

Fisheries subsidies agreement at the WTO

A briefing note for fisher groups

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Disciplines to eliminate fisheries subsidies on marine catch have been discussed in the World Trade Organization (WTO) since 2001. In the earlier phase, the stated objective was to address trade distortions that are created because of subsidies, similar to the approach of the WTO Agreement on Agriculture. However, environmental and marine sustainability soon became the central objective. This approach got a boost from Sustainable Development Goal (SDG) 14.6, which was signed in 2015, and full negotiations to reach an agreement on fisheries subsidies were launched in 2016. This was also the first time a full agreement was being designed in the WTO mainly to meet sustainability, as opposed to the usual commercial or trade, objectives.

SDG 14.6 says “by 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to illegal, unreported and unregulated fishing, and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the WTO fisheries subsidies negotiation”. The objective of SDG 14.6 was clearly to ensure a sustainable global marine ecosystem by stopping the overexploitation of marine resources that had been going on for decades. The focus was on conservation of marine resources, both for a sustainable future and to ensure they are available for those who need them most, which is often the very small fishers who are dependent on fish catch for their own food security and livelihoods.

A. Fisheries subsidies agreement: Past and present

The WTO negotiations to discipline fisheries subsidies (marine) that lead to unsustainability cover three pillars – subsidies that contribute to: a) illegal, unreported and unregulated (IUU) fishing; b) overfished stocks (OS); and c) overfishing and overcapacity (OFOC).

The Agreement on Fisheries Subsidies (AFS) was signed in 2022 at the 12th Ministerial Conference (MC12) of the WTO but, due to wide differences in position among the Member states, covered only two out of the three pillars under consideration – IUU fishing and overfished stocks. A WTO agreement can come into force if two-thirds of the Members ratify the agreement. So far about 78¹ of the 110 Members required have ratified the AFS 2022.

The third pillar on subsidies contributing to overcapacity and overfishing has been the most complicated as it involves general subsidies including subsidies on infrastructure and investments. It is therefore critical for the future of fisheries sector development, especially across developing countries and least-developed countries

¹ https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_acceptances_e.htm. These include 52 Member states including the European Union, plus the EU Member states.

Third World Network (TWN) is an independent non-profit international research and advocacy organisation involved in bringing about a greater articulation of the needs, aspirations and rights of the peoples in the South and in promoting just, equitable and ecological development.

Published by Third World Network Berhad (198701004592 (163262-P))

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(LDCs). OCOF subsidies disciplines have been negotiated since 2022 but were not concluded in the recently held 13th WTO Ministerial Conference (MC13) in February 2024. There are some efforts to conclude the negotiations by July 2024 in the General Council of the WTO, but a lot of issues still remain unaddressed. All the disciplines, once agreed, are supposed to form one comprehensive agreement.

Each pillar or Article of the agreement is supposed to include two major sections. The first comprises the disciplines or the main rules to cut subsidies. The second is the special and differential treatment for developing countries and LDCs. These are then accompanied by sections on notification requirements (how and what countries will notify); technical and financial assistance; and other provisions.

B. Special and differential treatment (S&D)

In the WTO, developing countries and LDCs are allowed some concessions or flexibilities, in terms of either commitments or timelines for implementation. Such S&D is an integral principle of all WTO agreements based on the rationale that developing countries and LDCs are economically weaker and need some preferential treatment in order to catch up with their more developed counterparts, and that given their development status it may not be possible for them to take on full international competition and commit to fully liberalizing or cutting subsidies, especially where implications for poverty, income security, food or health security can be adverse.

The issue of S&D, even though highlighted in SDG 14.6, remains the most sensitive in the fisheries subsidies negotiations. Developing countries and LDCs have continually sought effective S&D for themselves as the fisheries sector is a major source of income, livelihood and food security in many of these countries. But this has faced major contestation from the developed countries. The presence of a large fishing and subsidizing country like China has also complicated the discussion on S&D during the negotiations.

C. The Agreement on Fisheries Subsidies 2022

The AFS, often referred to as Part 1 (as the third pillar is still being negotiated), included rules to eliminate all subsidies going to IUU fishing activities and where waters were determined to be overfished already. The main issues with this outcome were: the definition of IUU and how it may include small fishers in developing countries and therefore deny them access to subsidies; scope and definitions of the different concepts, including of small fishers; and the management role of the WTO.

In addition, only a two-year S&D exemption was made available for developing countries and LDCs up to their exclusive economic zone (EEZ). After this period, they have to fully cut these subsidies.

The AFS 2022 also includes stringent notification requirements under its Article 8. It is to be noted that Members are already supposed to notify fisheries subsidies under the WTO Agreement on Subsidies and Countervailing Measures (ASCM). However, to date most Members have lagged behind on making these notifications. It is particularly difficult for most developing countries and LDCs to make these notifications due to capacity constraints. Footnote 12 of the AFS 2022 requires Member states to provide more information than what is required for the ASCM. This is seen by many developing-country Members as challenging, with many not meeting the existing notification requirements.

D. Disciplines on subsidies contributing to overcapacity and overfishing

The negotiations on the third pillar, which concerns subsidies that contribute to overcapacity and overfishing, have been the most contested and have continued since MC12. This section provides a brief analysis and highlights key points on the basis of the latest draft text tabled by the Chair of the negotiations on 12 April 2024.

Part A: Disciplines

1. List-based approach (Article A.1):

Article A.1 contains a non-exhaustive list of subsidies² that purportedly contribute to OCOF and that are to be prohibited under the proposed disciplines. This list includes certain sensitive items, especially for developing countries, such as “subsidies to costs of personnel, social charges, or insurance”, or income support for workers. In spite of concerns

² The list includes: (a) subsidies to construction, acquisition, modernization, renovation or upgrading of vessels; (b) subsidies to the purchase of machines and equipment for vessels (including fishing gear and engine, fish-processing machinery, fish-finding technology, refrigerators, or machinery for sorting or cleaning fish); (c) subsidies to the purchase/costs of fuel, ice, or bait; (d) subsidies to costs of personnel, social charges, or insurance; (e) income support of vessels or operators or the workers they employ (except for such subsidies implemented for subsistence purposes during seasonal closures); (f) price support of fish caught; (g) subsidies to at-sea support; and (h) subsidies covering operating losses of vessels or fishing or fishing-related activities.

expressed by many developing countries, these items continue to be on the list. At the same time, subsidies to distant-water fishing (DWF), which is the most unsustainable, industrial-scale form of fishing, have been taken off the list.

2. *Sustainability exemption (Article A.1.1) based on notification:*

This clause suggests that if a country can demonstrate (through a notification) that “measures are implemented that can reasonably be expected to ensure that the stock or stocks in the relevant fishery or fisheries are at a biologically sustainable level”, it can continue to subsidize. It is mainly the developed countries and advanced fishing nations that have the mechanisms to monitor such stocks, often built up with years of subsidization, and make the necessary notifications. In contrast, most developing countries do not have such infrastructure and may not have the ability to build such capacities to monitor fish stocks in the next 20 years, and therefore cannot make use of the sustainability exemption. Under the current proposed text, the 10 countries with the highest subsidies have to notify slightly more early and frequently. Rather than actual disciplines, this clause hinges on the ability to notify. So while in principle all countries have obligations to cut subsidies unless they meet the sustainability exemption, richer countries can in effect meet the exemption’s notification requirement quite easily. Consequently, this so-called hybrid approach brings in the most powerful components of inequity and unfairness, resulting in what is referred to as reverse S&D for developed countries.

3. *Flexibility for subsidies to distant-water fishing (Article A.2):*

DWF-based disciplines seem to be the most rational and fair approach to disciplining subsidies as such fishing definitely requires large-scale vessels with high capacity. Historically, large-scale fishing in distant waters has been the most responsible for the current state of global waters and the depletion of marine resources at an alarming scale. In spite of this, the current proposed disciplines on DWF in the latest Chair’s text (which saw significant changes based on proposals from DWF nations during MC13) are extremely weak. First of all, they allow countries to “try to do their best” to cut such subsidies rather than impose strict disciplines. This is known as a “best endeavour” discipline and is a more lenient treatment than what countries enjoy for their domestic fisheries subsidies. Secondly, DWF subsidies get access to the sustainability exemption clause provided the notifications can be made. Thirdly, government-to-government payments (e.g., the European Union paying Mauritania for DWF in the latter’s waters) for access agreements are outside the purview of the AFS. But when operators (e.g., in the EU) using such distant waters are given free access to these waters, this in effect constitutes a subsidy by the government to the operator. But in spite of proposals to include such waivers, they are not currently included.

Part B: Special and differential treatment (exemptions for developing countries and LDCs)

4. *LDCs and those developing countries with <0.8% share in global marine catch (Article B.1 and B.2) are exempted:*

These countries can give subsidies as long as they satisfy these conditions. The important point to remember, however, is that in order to be exempted under these provisions, a country has to remain an LDC or remain a low-catch country. If the fishing sector in a developing country grows to secure a global share bigger than 0.8% – which is a real possibility especially for those already with shares close to 0.8% (e.g., Brazil, Angola, South Africa, Senegal) – or if a country graduates from LDC status with a global share above 0.8% (e.g., Bangladesh), they will no longer get this exemption. It is also important to remember that a country’s marine catch share is volatile and is also dependent on other countries’ shares.

5. *General S&D for developing countries is limited by time (Article B.3):*

The general S&D for developing countries whose share of global marine catch is above 0.8% is only for a limited period; the exact duration of this period is still bracketed in the text, denoting lack of agreement. Whatever the eventual outcome, it is clear that the exemption is unlikely to be permanent even up to the EEZ. This is contrary to the rights given under the United Nations Convention on the Law of the Sea (UNCLOS) to countries up to areas under their national jurisdiction. This exemption period should be long enough to allow these developing countries to rebuild fish stocks, develop monitoring mechanisms and develop basic infrastructure. There is a proposal for an “opt out” clause for advanced developing countries which do not need S&D (targeted at China).

6. *Small-scale fishing and fishers are still fighting to get exemption though they are not responsible for OCOF (Article B.4):*

It is clearly established by now that small-scale fishing (SSF), especially in developing countries and LDCs, is not the source of unsustainability in fishing operations, rather the opposite.³ In fact, the intention of SDG 14.6 and even 14.b was to protect fish resources for small-scale fishers and allow them access to markets. Small-scale fishing provides both the means as well as the need to achieve sustainability in global marine resources.

³ Nicole Franz, Simon Smith, Nicolas Gutierrez, Stefania Vannuccini, Lena Westlund, Xavier Basurto, John W. Virdin, David Mills (2023), “Illuminating Hidden Harvests: The contributions of small-scale fisheries to sustainable development”, Rome: Food and Agriculture Organization of the United Nations (FAO). <https://worldfishcenter.org/publication/illuminating-hidden-harvests-contributions-small-scale-fisheries-sustainable>

The current formulation of Article B.4 provides, for the first time, an exemption to subsidies given to SSF in developing countries without any geographical limit.⁴ Under the Chair's text of 12 April, the beneficiary category can be nationally defined, but a footnote (No. 23) imposes a host of vague and irrational conditionalities, severely limiting national governments' policy space to determine SSF based on local contexts and realities. Footnote 23 says "*the activities described in this paragraph do not include significantly commercial fishing or fishing related activities*". The term "significantly commercial" implies small fishers can get subsidies only if they sell a very small proportion of their catch, which will limit them from pursuing their livelihoods and will in fact threaten their very survival. What constitutes "significance" is not even defined and may be interpreted by the dispute settlement body in any manner. Therefore, rather than supporting SSF, this footnote may actually eliminate SSF as a livelihood option. This itself challenges both the economic and social pillars of sustainability.

Moreover, this clause is the only S&D provision with strict notification requirements. These include not only regular notifications under the ASCM and AFS 2022, but also additional notifications on subsidies provided under this category, as well as the operational definition(s). If developing-country governments do not have the capacity to notify, they cannot subsidize this category of fishing at all. It is also not clear if national definitions of SSF can be challenged in the WTO.

It is to be noted that the United Nations Food and Agriculture Organization (FAO)'s approach to sustainability hinges very much on a balance between environmental, economic and social dimensions and incorporates an equitable and inclusive approach to fishing, especially through its SSF guidelines. But the current design of Article B.4 seems to challenge that very premise.

E. Some important points to keep in mind

- The agreement, if concluded, will cover only subsidies (marine, not inland). The WTO Membership can at best ask Members to cut subsidies but does not have the mandate or the capacity to directly discipline illegal fishing or address other fisheries management issues. It may be more prudent to strengthen other international instruments and agreements to discipline such illegal fishing or other management issues.
- While WTO agreements are enforceable, the dispute mechanism under the proposed agreement is not triggered or facilitated by any overall WTO body (though there will be a Committee to monitor). Countries have to file their own cases and fight these cases using critical financial resources. In the history of the WTO, only one LDC (Bangladesh) has filed a case as the primary complainant and has not pursued it at the panel level.⁵ Only in six other cases have LDCs been third parties. So even if the WTO had a functioning dispute settlement system, it is not easy for poorer countries to use it.
- Environmental issues are not the core mandate of the WTO, which is primarily a forum for addressing trade/commercial interests. The history of the WTO has shown that economic interests have tended to overshadow and dominate environmental or social objectives, and North-South divisions on economic lines have continued to determine the political dynamics within the institution.
- While the agreement in principle may address sustainability issues as mandated by SDG 14.6, the current text remains unbalanced and is weak on disciplining those responsible. The sustainability exemption clause and DWF disciplines provide massive loopholes for big players while exemptions for SSF remain fragile and are sought to be over-prescribed and over-conditioned.
- The current framing fails to account for historical responsibility and historical subsidization that has created massive fleets and industrial capacities. Attempts by developing countries to bring in the principle of "common but differentiated responsibilities" (CBDR) have failed to be clearly incorporated.
- In sum, the current content, unless challenged, will maintain current dominance patterns over the oceans and marine resources. Small fishing nations will be forced to stay small and a country which is developing from a very poor status will be punished for it, while the currently dominant players can escape without facing much actual disciplines.
- SSF groups can engage with the process through tracking and sharing of information and analysis; engaging with their national governments and the WTO Membership through meetings, letters and physical presence during public events; and setting up networks and organizing themselves to articulate and advocate their positions.

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⁴ Throughout the negotiations, subsidies given to SSF operating only within 12 or 24 nautical miles (NTM) were allowed exemption.

⁵ https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm