

WTO Fisheries Subsidies Negotiations

Main Issues and Interests of Least
Developed Countries

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Abbreviations

ACP	Africa, Caribbean and Pacific
DDA	Doha Development Agenda
FAO	Food and Agriculture Organization of the United Nations
LDC	Least Developed Countries
NGR	Negotiating Group on Rules - WTO
MTS	Multilateral Trading System
OECD	Organization for Economic Cooperation and Development
SCM	Agreement on Subsidies and Countervailing Measures
SIDS	Small Island Developing Countries
SVE	Small Vulnerable Economies
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization
WWF	World Wildlife Fund

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Introduction

Fish is important to every country for a number of reasons. It is critical to food security and nutritional intake for a large number of people globally. As of 2013, fish accounted for about 20 percent of the total animal protein consumed by humans and 6.7 percent of all the protein consumed worldwide. In Small Island and some Least Developed Countries (LDCs) including Bangladesh, it represents over 50 percent of animal protein intake.¹ It is established that even consumption of small quantities of fish can significantly impact on plant based diets, which are the staple for most LDCs as well as low income food deficient countries (LIFDs).² Importantly, fish supports livelihoods, both directly and indirectly, for about 10-12 percent of global population and critically important for the food security and development of the LDCs with sea zones and small island developing countries (SIDS).

However, over the years, the marine resources have been over-exploited, leading to pertinent questions about fish trade, ecological sustainability and consumption patterns. According to the Food and Agriculture Organization of the United Nations (FAO), about 87 percent of the world fish stocks have either been fully exploited, or over exploited.³ While a number of factors have contributed to the overexploitation of fish, the role of fisheries subsidies cannot be emphasised enough. Although data on subsidies is contested, it has been estimated that fisheries subsidies ranged between USD 15-35 billion in 2009, of which USD 20 billion were categorised as capacity enhancing, and therefore directly contributing to over fishing⁴

The global debate on fisheries subsidies was first prompted by the FAO in the early 1990s, leading to the Conference on Responsible Fishing in Mexico in 1992. The central argument was that subsidies are a major factor in the creation and promotion of excess

fishing capacity. Furthermore, economic theory demonstrates the market-distorting effect of subsidies and as such fisheries that do not receive subsidies, face a disadvantage in the world market. Developing and LDCs may be additionally disadvantaged as their governments may not have the financial capability to provide subsidies.⁵

In the light of these concerns, the members of the World Trade Organization (WTO) decided to find a solution within the framework of international trade rules to tackle fisheries subsidies. Consequently, the WTO Doha Ministerial Conference launched negotiations to improve disciplines on fisheries subsidies. The subsequent WTO Hong Kong Ministerial Conference of 2005 reaffirmed the need to strengthen such disciplines through prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over fishing. Since then, the Negotiating Group on Rules has been extensively discussing the scope of subsidies and ways to regulate them. However, there has not been a breakthrough at the WTO due to differences in opinion among member countries.

The WTO negotiations on fisheries disciplines have been quite challenging, the main issue being on how to balance important policy concerns of WTO Members, more especially developing countries and LDCs.⁶ There have also been concerns regarding the kind of harmful subsidies, the magnitude of such subsidies, and the development dimension of subsidies that support nutrition and local income, and the management system for the potential disciplines that may be imposed. At the same time, it is well recognised that the cost of inaction will be detrimental to the livelihoods of the coastal dwellers and countries dependent on fish for income generation and food security.

Since the adoption of the United Nations Sustainable Development Goals (SDGs), there has been a

¹ FAO: The State of World Fisheries and Aquaculture - 2016, at p. 4

² Ibid

³ Ibid, at p. 39

⁴ Sumaila, Lam and Le Manach (2013), Global Fisheries Subsidies, EU Parliament (Sourced from several UNCTAD publications 2015-16)

⁵ U. Rashid Sumaila & Ors, Global Fisheries Subsidies, IP/B/PECH/IC/2013-146 (for EU Parliament), 2013

⁶ WTO, Introduction to Fisheries Subsidies in the WTO, available at https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm (last accessed 27/11/2016)

renewed momentum at the multilateral level to address unsustainable practices in the fisheries sector. Goal 14.6 specifically aims to, “*by 2020 prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, 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 World Trade Organization fisheries subsidies negotiation.*”

From the foregoing, this study seeks to identify the main issues of importance with regard to WTO Fisheries Subsidies disciplines, specifically with regard to the LDCs. The aim is to make a contribution to development-friendly negotiations by highlighting concrete negotiations issues of importance to these countries.

1. Developments in WTO Fisheries Subsidies Negotiations

In order to understand the developments at the WTO, the importance of fish trade in the world provides a useful context. According to the FAO, fish represents about 10 percent of all agricultural export and 1 percent of all merchandise trade.⁷ Between 1995 and 2013 there was a 76 percent increase in trade (by value) due to increased demand, technical advancement in preservation and processing technology, better transport, and increase in demand by developing countries. By 2013, the total fish exports reached US\$136 billion and developing countries accounted for 56 percent of all fish exports, while the developed economies accounted for 42 percent, with transition economies contributing 2 percent.⁸ Furthermore, fish and fish products make up more than 7 percent of total SIDS exports and about 1.5 percent of LDCs.

⁷ FAO, *The State of World Fisheries and Aquaculture*, 2012.

⁸ *Supra* note 1, at pp. 9-10

Traditionally developed countries provide the major markets of fisheries exports of developing countries estimated to be approximately two-thirds of the latter’s exports. However recent trends indicate that a number of emerging markets are growing in importance. It is envisaged that with rising disposable incomes in emerging economies such as China, Brazil, Mexico, in addition to trade liberalisation and lowering of tariffs through the multilateral trading system, as well as regional and bilateral trade agreements; South-South trade is likely to grow.⁹ In light of these developments and given that developing countries are the leading exporters of fish, implies that they also have a significant role to play in ensuring sustainability of fish stocks and aquaculture production.¹⁰

1.1. Early developments at the WTO

With the rising importance of fish in trade, the broad debate on linkages between environment and trade and the effort by the United States to achieve ‘globalisation with a human face’ led to some discussions at the Seattle Ministerial Conference. Countries like, Iceland, Australia, New Zealand and Norway, Peru and the Philippines realised the negative effect of subsidies and submitted a position paper leading to the Seattle Ministerial Conference in 1999.¹¹ It is noteworthy that countries like Japan and the European Union (EU), two of the biggest providers of fisheries subsidies within their own constituencies, were reluctant to discuss fisheries subsidies at the WTO.

During that phase, the main argument of the EU was that its subsidies were aimed at adjusting fishing activities and as such it advocated for improving transparency and notification requirements within the WTO. According to the EU, the issue that needed to

⁹ U. Rashid Sumaila, Christophe Bellman and Alice Tipping, *Fishing for the Future: Trends and Issues in Global Fisheries Trade*, 2014.

¹⁰ UNCTAD, *Sustainable Fisheries: International Trade, Trade Policy and Regulatory Issues*. 2016

¹¹ UNEP, *Fisheries Subsidies, Sustainable Development and the WTO*, [2016] Chapter 4.

be addressed was fisheries management and not subsidies.¹² On the other hand, Japan argued that there was no established link between subsidies and depletion and that the WTO was the wrong choice of forum to discuss the issue of depletion. Japan insisted that all issues relating to fisheries and forest products should be discussed sectorally within any new WTO round and eventually argued that there was no basis to give fisheries sector any special treatment within the WTO subsidies rules.¹³

Against this backdrop, the Seattle Ministerial draft declaration called for clarification and strengthening of WTO subsidies disciplines with regard to fisheries subsidies and focussed on subsidies that contribute to overcapacity and overfishing. The draft declaration also mentioned the cooperative role of FAO.¹⁴ However, since the Seattle Ministerial collapsed, there was no final declaration and the issue of fisheries subsidies did not progress into any concrete next steps.

Between the Seattle Ministerial and the Doha Ministerial, a number of papers were tabled by Iceland, New Zealand and the United States that contributed to the groundwork for any eventual discussion on fisheries subsidies. At the same time, Japan and the Republic of Korea made active efforts to resist any new WTO fisheries subsidies rules. Simultaneously, during the early 2000s, there were discussions at major global forums outside the WTO regarding fisheries subsidies. The publications by the Organisation for Economic Co-operation and Development (OECD), World Wide Fund for Nature (WWF) and dialogues by WWF, United Nations Environment Programme (UNEP) and other organisations in Geneva kept the debate alive.

1.2. Developments at Doha and Hong Kong

The WTO's Doha Ministerial Declaration in 2001 which launched the Doha Round of negotiations

described the mandate on fisheries subsidies as follows:

*"...participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries."*¹⁵ (Paragraph 28)

It was the first official stand taken by the member countries at the WTO. It established in the clearest way a desire to move forward on WTO disciplines on fisheries subsidies and explicitly linked it with the discussions on trade and environment. The language of the Declaration took into cognisance the importance of the sector to developing countries. Furthermore, since the issue was linked to the WTO negotiations on 'rules', the fisheries issue was placed into the Negotiating Group on Rules (NGR) while the other trade and environment issues were placed within the mandate of the Committee on Trade and Environment (CTE). This helped in making the fisheries subsidies discussion a serious issue for consideration.

Given the vague and broadly worded language of the Doha mandate, the difference in approach of member countries continued and was reflected in the early submissions made to the NGR. The 'Friends of Fish' coalition¹⁶ sought a broad prohibition on fisheries subsidies covering both trade-distorting subsidies and overcapacity and overfishing issue. Japan, EU, Korea and Chinese Taipei continued to resist the negotiations from achieving any substantive results.¹⁷

However, by 2004, a consensus began to emerge towards an acceptance for the environmental mandate of the negotiations. The restructuring of EU's internal policies led to readjustment of its position at the WTO. Furthermore, Japan also changed its position from blanket opposition to a more 'balanced approach'. This change paved the way for the Hong Kong Ministerial in 2005 to declare:

¹⁵ WT/MIN(01)/DEC/1 (November 20, 2001)

¹⁶ Informal coalition seeking to significantly reduce fisheries subsidies. Members typically include Argentina, Australia, Chile, Colombia, Ecuador, Iceland, New Zealand, Norway, Pakistan, Peru, USA. However, from time to time other WTO members also identify themselves as "Friends of Fish".

¹⁷ Supra Note 8

¹² Ibid

¹³ Ibid

¹⁴ Ibid

“[We ministers] *recall our commitment at Doha to enhancing the mutual supportiveness of trade and environment, note that there is broad agreement that the Group should **strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing, and call on Participants promptly to undertake further detailed work to, inter alia, establish the nature and extent of those disciplines, including transparency and enforceability. Appropriate and effective special and differential treatment for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns.***”¹⁸ (Emphasis added)

The Hong Kong Declaration was a pivotal moment for the fisheries negotiations at the WTO. The declaration moved the focus from the scope of the negotiating mandate to specifically calling for prohibition of subsidies that contribute to overcapacity and overfishing. The difference of opinion among members was around having a ‘bottoms-up’ or a ‘top down’ approach. The Friends of Fish coalition sought a comprehensive list of prohibited subsidies with limited exceptions, as well as improved fisheries management programmes (top down). Whereas, the group led by Japan, Korea and Chinese Taipei supported a ‘bottoms-up’ approach with the prohibition limited to a narrow group of programmes.¹⁹ The Hong Kong Declaration opened up a period of intense negotiations on the language of the legal text of the eventual rules on fisheries subsidies leading to the Chair of the NGR to prepare a draft of the proposed rules.

1.3. Negotiating Group on Rules and Chair’s Drafts

The first draft was tabled by the Chair of the NGR on November 30, 2007. It had a broad set of prohibited subsidies and a list of general exceptions to go along.

The draft also had complementary rules regarding circumvention and ‘special and differential treatment’ for developing countries. Specifically, the draft prohibited the subsidies for vessel construction, modification or repair; support on operating costs (like fuel and license fees); transfer of vessels; port infrastructure exclusively or predominantly for fishing activities; income and price support; landing and ‘in or near’ port processing activities etc.²⁰ The Draft also prohibited subsidies for any vessels engaged in illegal, unreported or unregulated (IUU) fishing as well as subsidies affecting fish stocks that are in ‘unequivocally in overfished condition’.²¹

The 2007 Draft allowed subsidies programmes that were aimed at assisting adoptions of vessel safety and sustainable fishing practices as well as capacity-reducing programmes provided that these programmes did not contribute to new increase in fishing capacity. The Draft excluded subsidies to aquaculture from the scope of the rules. The Draft also had clearly recognised exceptions to the prohibited subsidies (positive subsidies) that included aid for natural disaster relief, improvements for crew safety, re-education of fishers towards alternate livelihoods, improvements for sustainable fishing techniques, environmental improvements etc. It also recognised certain exceptions as ‘special and differential treatment’ for developing countries, including complete exceptions for LDCs, artisanal fishing, subsidies for vessel acquisition and modification and operating costs for small-scale fisheries with vessels under 10 meters and exceptions for vessel modification on domestic fisheries operating within the exclusive economic zone provided that prior scientific stock assessments show that the fishing capacity does not exceed a sustainable level.²² All special and differential treatment was subject to fisheries management system that was applied to the general exceptions/ positive subsidies.

A series of meetings held from December 2007 to May 2008 brought out the sharp difference of opinions among the WTO member countries with regard to the Chair’s Draft. The Draft was welcomed and supported by the ‘friends of fish’ and other environmental stakeholders such as the WWF.

¹⁸ WT/MIN(05)/DEC (December 22, 2005)

¹⁹ Supra note 4, at p. 14

²⁰ TN/RL/W/213 (November 30, 2007)

²¹ Ibid

²² Ibid

However, countries like the US, Japan and EU were still divided on the basic question of the scope and coverage of the proposed ban. Even the provision on 'special and differential' treatment was controversial. The developing countries sought a blanket approach without conditionalities for the fear that conditionalities may result in hidden 'green protection'. They feared the encroachment of their policy space and financial and institutional limitations to meet any conditionalities that may be imposed.²³

By the end of 2008, the NGR Chair released a second set of 'consolidated texts', revising the texts on anti-dumping and horizontal subsidy disciplines and countervailing measures that reflected a 'bottoms-up' approach to the issues at hand. The most controversial issues in the first Draft were replaced by brackets summarising the range of views expressed.²⁴ For fisheries subsidies the Chair tabled a 'roadmap for discussions' that set out in detail, a series of questions that were meant to guide the discussions going forward. The reason behind the roadmap document was that some of the division of opinions went to the very core of the discussions. After a year of discussions on the roadmap, the NGR began considering the substantive proposals put forward by member countries, which are further elaborated in the following section.

2. Fisheries subsidies and Impact on Trade flows: Analysis of WTO Members Submissions

2.1. Member Submissions: 2009-2011

Over the years the member countries submitted a number of proposals to express their positions and offer solutions to tackling the issue of fisheries subsidies. The 'Friends of Fish' submissions in 2009

asserted their objective of promoting sustainable fishing practices and eliminating harmful subsidies while providing appropriate special and differential treatment for developing countries.²⁵ They submitted that all countries share a common responsibility in respect of global resources and any such special treatment granted to developing countries should not undermine the overall objective. Therefore, the developing countries should have the necessary flexibility to support fishing through certain kinds of subsidies but subject to certain conditions. They also sought the application for IUU prohibition to apply to all countries, including LDCs and the exempted subsidy to remain actionable under Article 4 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

The United States sought to clarify some of the terms of the Chair's Draft, such as 'unequivocally overfished state' of fisheries resources and the evidence for 'harm' in case of overcapacity or overfishing.²⁶ It also elaborated upon the core elements for fisheries management system based on the FAO Code of Conduct for Responsible Fisheries.

The joint proposal by Brazil, China, Ecuador, Mexico and Venezuela emphasised that the special and differential treatment for developing countries should allow them to achieve their development priorities including poverty reduction, and addressing livelihood and food security concerns.²⁷ It recognised that small-scale and artisanal fishing are crucial for millions of the poorest in the world and as such there must be a balance in the rules.

Barbados submitted a proposal on behalf of the small, vulnerable economies (SVEs).²⁸ The SVEs' main concern regarding the Chair's draft was that the 'special and differential treatment' provisions did not adequately address their concerns and unduly restricted countries that had very little effect on fishing and overcapacity given their limited resources and small market share in global markets. Moreover, many of the SVEs heavily depend on fisheries and tourism and therefore were concerned about the sustainability of natural resources and consequently

²³ Supra Note 8

²⁴ Supra Note 5

²⁵ TN/RL/W/243 (October 7, 2009)

²⁶ TN/RL/GEN/165 (April 22, 2010)

²⁷ TN/RL/W/241/ Rev. 1 (October 16, 2009)

²⁸ TN/RL/W/242 (October 7, 2009)

sought to place a higher burden of responsibility on countries that have had a long history of overcapacity in fleets and subsidies. Specifically, the proposal called for exemptions from the rules for those developing countries that do not have more than 0.1 percent share in world ‘non-agricultural market access’ trade. In a subsequent submission, a few months later, the SVEs reiterated the concerns of small economies and the importance of domestic policy space.²⁹ They submitted that certain disciplines should not apply to developing countries. Furthermore, the updated proposal submitted that developing countries that do not have more than 0.1 percent share in world ‘non-agricultural market access’ trade and whose percentage share of global marine capture is not more than one percent should be exempt from the fisheries subsidies disciplines.

The Republic of Korea objected to the approach taken by the NGR. It submitted that instead of starting from a point where the concepts, principles and effectiveness of the SCM Agreement are used to clarify the rules regarding fisheries subsidies, the NGR focussed on compiling a list of prohibited subsidies afresh. It argued that subsidies that are sought to be prohibited must indisputably have negative impacts on fisheries stocks. New disciplines should be imposed only upon rigorous examination of the existence of a subsidy, its specificity and adverse impact.³⁰ Furthermore, it centred around the belief that effective fisheries management systems can minimise the negative impacts of fisheries subsidies.

A joint proposal submitted by Brazil, China, India and Mexico built upon the issue of ‘special and differential treatment’ and disciplines on fisheries subsidies.³¹ The proposal highlighted that any controls on subsidies should allow developing countries to achieve their development mandate, reduce poverty and address livelihood and food security concerns. They also proposed a definition based on socio-economic criteria on the issue of small and artisanal fisheries and argued for enough room within the final agreement for member countries to implement the rules according to their concerns and on a case by case basis. Their proposal objected to the fact that ‘special and differential treatment’ applied to fisheries

operating in the domestic exclusive economic zones and as late-comers to the high seas, they need to come at par with the capacity of the developed countries in the high seas. The cost advantages enjoyed by the developed countries due to their fleet size are difficult to overcome without subsidies. As such, the issue of subsidies for high seas fishing snow-balled into a contentious issue at the later stage of the negotiations.³²

In the end, the negotiations in 2011 saw minimal convergence with regard to key issues. The NGR Chair submitted a report concluding that there was no basis for submitting a revised legal text. Instead he submitted a summary of conclusions from the negotiations noting that the member countries should re-examine their approaches in order to make progress.³³ Any progress that will be made subsequently is most likely to follow a bottoms-up approach with the initiatives coming from the member countries and not from the NGR Chair.

The key takeaways from the negotiations of 2010-11 and the members’ submissions is that all countries realise the state of overexploited and overfished marine resources and agree that countries need to act collectively to address the situation. The crisis is imminent and can be particularly harsh for the poor who are dependent on fish for their livelihoods and nutrition. The major point of difference was not so much as to the fact of having a regime but rather the nature and scope of the rules and the disciplines for the developing countries.

The lead up to the WTO’s 10th Ministerial Conference in Nairobi in 2015 saw some interest to deal with fisheries subsidies but even the most active members called for a minimum agreement. The core issues of interest were (i) disciplines on subsidies to vessels fishing on overfished stocks or engaged in IUU fishing; (ii) transparency requirements; (iii) a standstill on introducing new subsidies, and; (iv) special and differential treatment.³⁴ Despite the narrowed scope, member countries failed to agree to any concrete solutions regarding fisheries subsidies at the Nairobi Conference. The main resistance emerged

²⁹ TN/RL/GEN/162 (January 8, 2010)

³⁰ TN/RL/W/245 (November 24, 2009)

³¹ TN/RL/GEN/163 (February 11, 2010)

³² Supra Note 4, at pp. 17-18

³³ TN/RL/W/254 (April 21, 2011)

³⁴ UNCTAD, Trade and Environment Review 2016: Fish Trade, UNCTAD/DITC/TED/2016/3 (2016), at pp. 73-74

on the prohibition on IUU fishing and fishing of overfished stock, provision on best-endeavour clause on new subsidies in the prohibited areas, and the specific notifications commitments.³⁵

2.2. Recent Developments and Member Submissions

With the declining interest of many countries in the Doha Round, the issue of fisheries subsidies somewhat had lost momentum in the period 2010-15. However, of recent, the interest of countries to come up with disciplines on fisheries subsidies has reignited in the build up to the WTO's 11th Ministerial Conference to be held in late 2017.

In light of the UN SDGs there is a renewed interest among WTO member countries to have binding rules on fisheries subsidies. SDG target 14.6 aims to “*by 2020 prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, 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 World Trade Organization fisheries subsidies negotiation.*” Since 2015 there has been some ambition on part of the world community to address a number of issues that concern the future of the planet and there was some interest among WTO member countries before the 10th Ministerial Conference.

Though the WTO's 10th Ministerial Conference in Nairobi in December 2015 did not make any official headway in fisheries negotiations, Colombia, Iceland, New Zealand, Norway, Pakistan and Uruguay sought to reignite the discussions acknowledging that in the last 15 years the interests of many countries had changed.³⁶ They submitted a paper that raised several questions to further the discussions before the

NGR in the light of the SDG 14.6. The questions revolved around the issue of key developments in the fisheries sector in each country, the primary objective of fisheries subsidies currently being granted, the main drivers for reforming and maintaining such subsidies, the areas of challenge in case of reforms, and the best way forward for the NGR in light of the SDGs.

Many members have expressed support for renewed negotiations so as to achieve a multilateral agreement soon, while some are hoping to have an agreement before the 11th Ministerial Conference. The focus should remain on a balanced regime, effective ‘special and differential treatment’, possible alternative fora for fisheries negotiations and possibility of drawing lessons from other multilateral agreements like the Trans-Pacific Partnership Agreement to reach consensus.³⁷

The African, Caribbean and Pacific Group of countries (ACP) in a paper discussed their comments on fisheries negotiations.³⁸ The paper supports disciplines for subsidies provided to large scale commercial fishing activities particularly those carried out outside of their domestic jurisdiction (i.e. in the high seas or in the exclusive economic zones of a third country) but maintains the right of developing countries and LDCs to support coastal fishing activities related to artisanal, small scale and subsistence fishing, fishing targeting stocks whose range are exclusively confined to the country's own economic zone, and fishing activities that exclusively exploit quotas established by regional fisheries management organisation.³⁹ Furthermore, the proposal called for prohibition on subsidies to fishing vessels or fishing activity that affect fishes in overfished condition and subsidies to vessels or operators engaged in IUU fishing. The ACP countries expressed support for developing countries and LDCs to receive technical assistance and capacity building to address the potential constraints to be faced by them in the light of disciplines and transparency and

³⁵ ICTSD, Bridges Daily Update no. 5, (December 19, 2015), available at <http://www.ictsd.org/bridges-news/bridges/news/bridges-daily-update-5-overview-of-outcomes-of-wto%E2%80%99s-10th-ministerial-in> (last accessed 8/12/16)

³⁶ TN/RL/W/272/Rev.1 (May 27, 2016)

³⁷ WTO News, https://www.wto.org/english/news_e/news16_e/rule_06jul16_e.htm (last accessed 30/11/2016)

³⁸ The Draft submissions refines and builds upon the earlier submissions by the ACP Group- JOB/TNC/46 and JOB/TNC/50
³⁹ TN/RL/GEN/176 (March 1, 2011) and JOB/TNC/46 (March 12, 2015)

notification requirement that is proportionate to their contribution to overfishing.

In a submission made prior to the 10th Ministerial Conference by Argentina, Iceland, New Zealand, Norway, Peru and Uruguay, the approach to ‘special and differential treatment’ is that the prohibition on subsidies for overfished stock and vessels engaged in IUU fishing should be applicable to all members including developing countries and LDCs.⁴⁰ Any meaningful rules framework should contain the following elements: prohibition for the most obvious subsidies, appropriate special and differential treatment, standstill provisions, transparency, monitoring and review provisions, and continuation of subsidy reforms.

Given the renewed vigour in fisheries subsidy negotiations, the European Union submitted a note to the NGR in October 2016 with a draft of the rules for a future multilateral agreement on fisheries subsidies.⁴¹ It calls for a prohibition on subsidies that increase the marine fishing capacity, that support the construction or importation of fishing vessels, subsidies for the transfer of fishing vessel to another country and subsidies that benefit an operator engaged in IUU fishing. Furthermore, the draft text supports some of the subsidies maintained by developing countries and LDCs with appropriate reporting requirements. There are however concerns that the EU approach may be too restrictive for LDCs not least because of the narrow definition it gives to artisanal fisheries and also because it excludes ex ante fuel subsidies provided through tax exemption.

The United States is leading a coalition of WTO members (originally 13 that signed on at the 3rd Our Ocean Conference in Washington held in September 2016, the number continues to increase) in an effort to eliminate harmful fisheries subsidies, especially subsidies that contribute to overfishing and overcapacity or are linked to illegal fishing. These countries are also pushing for a plurilateral negotiations at the WTO to achieve the mandate.⁴²

⁴⁰ Elements for Effective Disciplines on Fisheries Subsidies in the Post-Bali Work Programme, Communication by Argentina, Iceland, New Zealand, Norway, Peru and Uruguay.

⁴¹ TN/RL/GEN/181 (October 20, 2016)

⁴² USTR News, <https://geneva.usmission.gov/2016/09/15/obama-administration-undertaking-global-initiative-to-prohibit-harmful->

This approach is indeed unique since for the last 15 years the negotiations were aimed at arriving at a multilateral agreement. It will be interesting to watch the developments that lead up to the 11th Ministerial Conference.

3. LDCs Interests and Elements for Special and Differential Treatment

As discussed in the preceding sections, the issue of ‘special and differential’ treatment has been one of the most contested areas of negotiations at the WTO. Within the demand for differential treatments, the approach of all developing countries, LDCs and SVEs have not been the same. There are different visions as to how the ‘special and differential’ treatment provisions be structured, their coverage, their approach, the exceptions and overall implementation.

The interests of LDCs in ‘special and differential treatment’ are coloured by many different considerations, including⁴³:

- Fisheries support livelihood and help in poverty alleviation, creation of job opportunities and support economic development.
- Revenue from fishing licenses granted to other countries comprise an essential revenue component for many small island nations.
- Desire of LDCs and developing countries to increase their share in global catch.
- Enhanced policy space and lesser disciplines as the present state of overfishing and overexploitation is largely by the industrialised nations.
- Desire to exploit commercially viable fish stock in international waters.

One of the first issues of importance is around the question whether all developing countries should be subject to the same disciplines or should there be

[fishing-subsidies/](#), September 14, 2016 (last accessed 07/12/2016)

⁴³ Supra Note 30

some differentiated treatment. This is because some of the developing countries have very little share in total marine capture and total global trade in fish and fish products. As such there could be greater disciplines for developing countries that have a not so insignificant share in global capture. Members below the defined threshold could be allowed to subsidise vessel capital costs, vessel operating costs for all types of fishing activities and subject to certain fisheries resource management rules.⁴⁴

The second issue is what kind of disciplines would apply to 'subsistence', 'artisanal' and 'small-scale' fishing activities, if any. These categories of fishing are likely to be less damaging to the environment than large-scale commercial fishing and therefore the rules should be flexible. These activities also tend to directly impact income, livelihood, and food security concerns.

The third issue is what the scope of exemptions from subsidy prohibition rules is, what transparency and notification requirement would apply to LDCs and developing countries, and the supporting mechanism within the rules for capacity-building and technical support.

3.1. Importance of fisheries and the subsidies debate

In order to understand the needs of the countries better, it is useful to understand the contribution to world marine capture. Developing countries collectively account for 70 percent of the total global capture production and therefore there is significant opposition to allow the developing countries a blanket exception to any rules regime.⁴⁵ At the same time, because of heavy subsidies by the developed and some developing countries, SIDS and LDCs face a disadvantage as they do not have the financial and institutional resources to support large subsidies. Therefore, the produce from such countries are unable to compete with the fish which are supported by subsidies. Consequently, one of the main demands under the 'special and differential' treatment

negotiations has been for adequate policy space for the countries to choose their own level of commitments and compliance to an international subsidy regime.

3.2. Source of Livelihood

According to FAO estimates, millions of people around the world rely on fisheries and aquaculture for income and livelihood. The most recent estimates indicate that 56.6 million people were engaged in the primary sector of capture fisheries and aquaculture in 2014 with the largest group in Asia. Of this total, 36 percent were engaged full time, 23 percent part time, and the others were either occasional fishers or of unspecified status.⁴⁶ It is estimated that 95 percent people of this total estimate reside in developing countries. Furthermore, if the number of people who are indirectly dependent on fishing, whether marine, inland or aquaculture, for their livelihood is included, the numbers would go much higher. According to UNCTAD's estimate, around 350 million jobs are directly or indirectly created by the oceans economy.⁴⁷ Given that a large population of developing countries, LDCs, coastal economies and small island nations directly depend on fisheries, the issue of subsidies is particularly sensitive for small and poor nations.

Fisheries are also crucial for gender relations. Women are heavily engaged in many activities associated with fishing including preparatory work, making and mending nets, and in processing activities like sorting, cleaning and basic processing. In artisanal and small-scale fishing, women become integral part of the economic unit. As such, women contribute to household income and help in improving the socio-economic conditions of their families, communities and regions. The contribution of fisheries to employment, gender and livelihood goes a long way in removing hunger and reducing poverty in some of the most impoverished regions of the world.

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ Supra Note 2, at pp. 32-34

⁴⁷ Supra Note 31

3.3. Food Security

Fish is an important source of nutrition and a cheap source of animal protein. As such, it forms an important part of human diet in many regions across the world. In fact, the growth in the global supply of fish for human consumption has outpaced population growth in the past five decades, increasing at an average annual rate of 3.2 percent in the period 1961 to 2013, double that of population growth. World per capita apparent fish consumption increased 14.4 kg in the 1990s and 19.7 kg in 2013 from an average of 9.9 kg in the 1960s.⁴⁸ Therefore, the sustainability and long-term viability of global fish stock is of extreme importance to developed, developing and least developed countries alike.

The consumption patterns of fish vary widely from region to region. For example, fish represents only 7.7 percent of total protein intake in industrialised countries whereas it represents over 50 percent of animal protein intake in small and island developing countries including Bangladesh, Sri Lanka, Indonesia, Sierra Leone, Gambia, Ghana, Congo etc.⁴⁹ Similarly, fish is increasing in importance to the staple food in China. Since fish is a cheap source of good protein, it is of critical importance to the fight against food insecurity and hunger. LDCs and developing countries therefore have a keen interest in sustainability of fish stock in the years to come.

3.4. Export Earnings

Fisheries are also an important source of export earnings and foreign exchange for a large number of LDCs and developing countries. According to estimates, developing countries contribute a little more than half of the world's total fish production and account for about 38 percent of the production that enters international markets. Net receipts of fisheries foreign exchange in developing countries are worth more than US\$17.4 billion and fish is the single

most valuable agricultural export by developing countries.⁵⁰

Furthermore, some of the small island developing nations and SVEs depend disproportionately on earnings from fish exports including Maldives, Seychelles, Angola, Tuvalu etc., making them extremely vulnerable to the effects of change in subsidies regime or depletion of fish stock. Due to their total export potential, fish exports also contribute heavily to the gross domestic product of some of these countries and therefore are an important source for the overall development of the nations.

Earnings are also significant from licenses granted to third country vessels and access fees. Several nations in Africa and the Pacific have earnings from access agreement with developed countries. Coastal countries with dense populations are susceptible to even the slightest of changes in the ecological environment and therefore the significance of the debate around fisheries subsidies and sustainability. For certain countries like the Maldives, protection of the ecosystem and management of fish stock is important as tourism and fishing comprise of the two vital sources of national income. Since most LDCs and developing countries lack the institutional and financial capability to implement proper resource management and monitoring schemes, these discussions are an important part of the 'special and differential' treatment negotiations.

4. Alternative Subsidies focusing on Sustainability of Fish Stocks

One of the reasons why the fisheries subsidies negotiations have been complex at the WTO is because there is no agreed definition or classification of fisheries subsidies. The OECD, UNEP and literature on the subject have proposed different approaches. The understanding of what is a 'subsidy' and how it can be measured is crucial. Broadly speaking, subsidies, income support, financial

⁴⁸ Supra Note 2, at p. 2

⁴⁹ Supra Note 8, Ch. 5

⁵⁰ Ibid

support, government transfers and other economic assistance are the different types of payments by a government to the fisheries sector. The purpose for which a subsidy is given (irrespective of the type) is useful in determining whether the subsidy is beneficial and supports sustainability of fish stocks or encourages overfishing and thereby are harmful.

Grants and direct payments are usually one-time payment given either for a specific investment or to support research or allied activities. They could also be linked to production or sales. Tax exemptions, tax credit or tax deferrals are some of the 'tax expenditures' borne by the exchequer. The general criticism with tax policies are that they are rigid, non-transparent and difficult to change. Some subsidies could also be in-kind subsidy which is privileged access to a government-owned or controlled natural resource. Access to foreign seas (through access agreements) for fishing for free or at a below-market price is an example of in-kind subsidy. Subsidies could also be given in the form of preferential government procurement or through price support mechanisms.

Studies have found certain types of subsidies to be beneficial subsidies.⁵¹ They include subsidies for fisheries management programmes and services and fisheries research and development. They lead to investment in natural resources leading to growth of fish stock through conservation and monitoring of catch rates through control and surveillance measures. The aim of the beneficial subsidies is to achieve maximum social, economic and biological good for all.⁵² In fact, it is estimated that out of the total global fisheries subsidy of US\$35 billion⁵³, the capacity enhancing subsidy is about US\$20 billion. Some subsidies serve important policy purposes including supporting artisanal and small-scale fisheries, crew safety, processing by local communities, and rehabilitation of eco-systems.

The subsidies for fisheries management include subsidies for strengthening monitoring, control and other surveillance programmes; fish stock assessment and resource surveys; fishery habitat enhancement;

implementation and management of marine protected areas and stock enhancement programmes.⁵⁴ Fisheries management programmes includes the establishment and administration of management systems (including allocating and monitoring fishing licences, permits, quota, vessel numbers and catch returns); adjusting management settings within an existing management system; and developing amendments or additions to the existing management system.⁵⁵ Government support for such programmes can help in monitoring the stock and ensuring that the fish stock is maintained at sustainable levels.

The other type of beneficial subsidy includes subsidies for research and development. Such subsidy programmes are aimed at improving the methods for fish catching and processing and other strategies that enhance the fisheries stock through the advancement in technology. As such, the subsidy would support the research activities that can lead to break-through development in technology that improves efficiency and minimises the damage to the natural environment. These subsidies can be further categorised as fishery frame surveys, oceanographic studies, socio-economic studies, fishery planning and implementation, information systems, database and statistical bulletin to support fisheries, and setting up of marine protected areas and reserves.⁵⁶

However, there can be certain types of subsidies which fall into the 'ambiguous' category, meaning they can lead to either investment or divestment in the fishery resource. The ambiguous subsidies can either lead to a positive impact (i.e. stock enhancement or sustainability) or negative impact (i.e. overexploitation). Some of the ambiguous subsidies include fisher assistance programmes, vessel buy-back, and community development initiatives. They fall into this category as their effectiveness is questionable. Fisher assistance programmes include payments to fishers to stop fishing or as income insurance during bad times or due to lack of alternate employment opportunities. Vessel buy-back schemes are aimed at reducing fishing capacity. Whereas, community development

⁵¹ Supra Note 4, at pp. 21- 22

⁵² Ibid

⁵³ Supra Note 5, According to some estimates the total global fisheries subsidies is between US\$ 15 to US\$ 30 billion.

⁵⁴ Ibid

⁵⁵ USTR, Fisheries Subsidies: Proposed New Disciplines, <https://ustr.gov/sites/default/files/fisherie-subsidie.pdf> (last accessed 07/12/2016)

⁵⁶ Supra note 4, at p. 22

programmes may include schemes for enhancing productivity which may lead to overcapacity.⁵⁷

Therefore, as the world is negotiating a rules framework for fisheries subsidies, it is important to demarcate subsidies that enhance production from subsidies that help in sustainable development. Only those subsidies which are capacity enhancing or further IUU fishing should be prohibited.

5. Stakeholders' Perspectives on LDCs Considerations towards Fisheries Subsidies Disciplines

Stakeholders that included WTO negotiators, fisheries experts, organizations working on fisheries issues, as well as capital based government officials working on fisheries issues related to ongoing WTO negotiations were approached to share perspectives on the critical considerations of LDCs with regard to fisheries subsidies negotiations in the WTO.

Views were sought on possible reasons for a delayed outcome on fisheries subsidies disciplines in the WTO and how these could be overcome so as to redress this critical issue, especially considering its significance to a number of LDCs for their economic development, livelihoods and food security.

Stakeholders views also covered the following issues: LDCs interests in the fisheries subsidies negotiations; main elements of special and differential treatment for LDCs; ideal approach in ensuring transparency, monitoring and evaluation of any agreed disciplines; and the way forward for a possible outcome at the forthcoming 11th WTO Ministerial Meeting. Highlights from stakeholders' viewpoints in this regard are discussed hereunder.

On the whole, delayed conclusion of the fisheries negotiations like in the other aspects of the Doha

Development Agenda (DDA) is attributed to a wide variance of WTO Members positions over time. Currently, while some members view it as a DDA issue that needs to be balanced with outcomes in other negotiations such as on anti-dumping; others disagree with such an approach, and insist on outcomes on fisheries independent of other considerations given its global significance.

By 2008 substantive progress had been achieved but with the single undertaking approach, some members insisted on tying a fisheries subsidies agreement to other issues. By the time of the 10th WTO Ministerial Conference it had been realised that certain WTO members were unwilling to proceed with negotiations under the DDA modus, and that an opportunity to ensure fisheries remained on the negotiating agenda could not be missed. The African, Caribbean and Pacific (ACP) group to which many LDCs are members brought the issue to the negotiating table highlighting their economic concerns on the continued depletion of fish stocks and the need for multilaterally agreed disciplines to curtail this trend. These efforts have contributed to the continued engagement on the issue.

5.1. Issues of Critical Interest to LDCs in WTO Fisheries Negotiations

The fisheries sector is very important for many LDCs as well as small island countries with large exclusive economic zones, which derive livelihood from the sector and are dependent on it for food security and protein intake. Fisheries also contribute significantly to export earnings of many LDCs and therefore a vital source of income for national development efforts.

The critical issues for LDCs include the need to prohibit: fisheries subsidies that facilitate overcapacity; subsidies that facilitate illegal, unreported and unregulated (IUU) fishing practices. The LDC Group in the WTO has emphasised these issues in a recent submission to the NGR⁵⁸, wherein they call for

⁵⁷ Supra Note 4, at p. 25

⁵⁸ TN/RL/GEN/184 LDC Group Submission on Elements for WTO Fisheries Subsidies Disciplines December 2016

disciplines to target primarily industrial fishing on a large scale.

There is also need for technical assistance for LDCs to ensure IUU's vessels do not cross into their territories – or similar preventive monitoring mechanism to prevent such eventualities. Additionally LDCs would also need assistance to overcome the lack of capacity to monitor fish stocks towards improving sustainability in their territories. LDCs approach to the negotiations on fisheries subsidies are therefore both defensive and offensive. The defensive interests are around the following:

- LDCs would like to ensure that any disciplines agreed do not hinder their ability to develop the fisheries sector especially given that fisheries are undertaken at subsistence or small commercial level in their jurisdictions. This would require provision of policy space for LDCs allowing for development of the sector.
- Disciplines should also not hinder LDCs ability to transform the sector by among others improving processing of fish beyond simply freezing, to other forms and products that are more lucrative in export markets; further, trade preferences for LDCs should be maintained in order to protect their products from tariff escalation, which in sum requires policy space that would enable development of landing, processing, and marketing facilities through provision of subsidies.
- Given that LDCs fishing fleets are still small, there is need for flexibility to allow for development of their fleets within sustainable levels through subsidies, while curtailing harmful subsidies in general that have led to overcapacity and depletion of fisheries resources globally

Offensively, the main interest of LDCs is for the disciplines to address and regulate distant water fishing nations with large fleets such as the EU, Japan, Republic of Korea, Taiwan, Russia, which have huge capacity and ability to fish close to, or in some cases within exclusive economic zones of LDCs. These fleets exploit fish stocks on which LDCs rely, as has been manifested in Senegal and Liberia. Although access agreements would be required in

such instances, there are many cases of IUUs especially because LDCs lack the required capacity to effectively monitor their zones.

Subsidies are the root cause of distant water fishing which would not be economically viable given the high costs of vessels and equipment with capacity for long distance fishing. This is amongst the main issues of concern for LDCs since it has resulted in raids on their fish stocks and depleted them significantly. Although there are arguments that besides IUUs, access fees are paid to LDCs in whose territories distant vessels exploit, this is unsustainable in the long term given current trends of over exploitation of fisheries resources.

LDCs that have territories in oceans often lack the capacity to fully exploit fisheries resources within their exclusive economic zones as well as from the high seas. Building such capacity would boost their development efforts. Moreover, with the increasing depletion and/or over exploitation of fish stocks the need for disciplines to ensure sustainability, while improving LDCs capacity to optimally harness fisheries resources is significant.

Another critical issue is that mapping of seas within LDCs territories indicate that fishing vessels are mostly from Europe and countries such as the Republic of Korea and China, which have made technological advancement in this area; moreover some of such vessels are involved in IUU, and yet the LDCs do not have the capacity to either monitor whether they are licensed to operate in their territory (through license or similar authorisation).

A further critical aspect is that LDCs in most cases do not have capacity to evaluate whether endangered species are over-fished or not and therefore put in place requisite remedies through policy and other means. This aspect needs to be taken into consideration in an agreement on fisheries disciplines.

There is also a critical lack of capacity to effectively monitor and deter over-capacity with regard to licensed foreign fishing vessels, which in some cases are involved in activities such as disposing of stocks above limit onto other vessels on the high seas (trans

boarding), and later under-declaring their catch to unsuspecting authorities.

It is with regard to the above issues that the LDC Group at WTO submitted a proposal for consideration in the WTO fisheries subsidies negotiations⁵⁹. The proposal lays out the groups position on the scope of the disciplines, those that should be prohibited, transparency and notification considerations as well as special and differential treatment for LDCs. It also calls for capacity building to help LDCs develop their fishing capacity in a sustainable manner, as well as the ability to assess and monitor stocks, and control fishing activities⁶⁰.

5.2. Special and Differential Treatment for LDCs

The issue of special and differential treatment for fisheries subsidies disciplines remains divisive in the negotiations, although it is generally agreed that LDCs deserve special consideration. The view from experts is that their demand in this respect would have to be specific, indicating the disciplines from which they should be exempted and clearly highlighting the parameters. Best practices such as the ocean islands model could be used as a basis.

Another view is that special and differential treatment should not prohibit LDCs from the policy space to subsidise the fixed and variable costs of their vessels as a means of sustaining survival of traditional fisheries and local markets. Such assistance could extend to facilitating optimal harnessing of fisheries resources within their exclusive economic zones and also in the event of country allocation of fishing quotas, the ability to exploit fisheries resources in the high seas.

Special and differential treatment for artisanal fisheries is critical for LDCs. Moreover any disciplines such as those that have been included in the EU's recent proposal on commercial fishing, should take into account the livelihoods of people in LDCs dependent on fisheries.

⁵⁹ Ibid

⁶⁰ Ibid

Some experts are of the view that effective special and differential treatment for LDCs can only be determined after an agreement is reached so as to determine its nature and application in light of the fisheries subsidies disciplines agreed, otherwise specificity may elude negotiations and hence deter possibilities towards an outcome.

In the submission to the NRG⁶¹, LDCs propose that disciplines prohibiting subsidies negatively impacting fish stocks that are over fished, and those provided to vessels or operators engaged in IUU fishing should apply to all Members without exception. Further that technical assistance and transition periods should be granted to LDCs in light of the institutional and financial constraints likely to affect implementation of the disciplines and the fight against IUU.

5.3. Transparency and Enforcement of Outcomes

With regard to transparency as well as monitoring and evaluation of agreed disciplines, it is suggested that countries owning vessels involved in IUU activities should be obliged to sanction, and penalise them and that steps taken in this regard should be regularly reported to WTO.

Also, in addition to a requirement of self-notification of actions taken in the implementation of an agreement on fisheries subsidies disciplines, LDCs should be provided with capacity to monitor and implement obligations in their territorial waters, especially in light of advanced technology that enables vessels to fish in their territory without detection or beyond the capacity licensed; further, disciplines in this relation should extend to the high seas where illegal activities such as trans boarding take place.

With regard to implementation of outcomes, WTO disciplines could borrow from the FAO Port State Measures Agreement that address elimination of IUUs. Regional surveillance bodies could be mandated to provide an oversight role and

⁶¹ Ibid

periodically report to the relevant WTO body dealing with fisheries issues.

In order to ensure effective monitoring and evaluation of outcomes, members should be required to have internal processes that feed into the WTO periodic reporting on conformity with any disciplines put in place; however LDCs should be exempted from this requirement until they have obtained or been provided with assistance to do so. In this respect, developed countries and developing countries in a position to do so, should be required to undertake surveillance on the seas including in EEZs of LDCs so as to prevent harmful practices such as IUU's.

In the submission to the NRG, LDCs acknowledge the advantages of enhanced transparency, however they propose that any additional requirements in transparency and notification should remain proportional to global objectives and should not be burdensome for LDCs.⁶²

6. Conclusions and Recommendations

It is not disputed that oceans contribute to food security, nutrition and to ending hunger, fostering culture and identity, supporting agriculture, and mitigating the effects of climate change. The protection and conservation of oceans and marine resources is essential to the future of the planet and human well-being, particularly in the coastal communities. In furtherance of this concern, the UN SDG Goal 14 elaborates upon conservation of marine resources. There is also universal recognition now that fisheries subsidies result in overfishing and overexploitation of resources, thereby threatening the ecological balance.

Marine resources are of particular importance to coastal nations, especially LDCs and SIDS. The concerns of LDCs, SVEs, SIDS and other developing countries must be considered at any international discussion on disciplining fisheries subsidies. It is well known that trade demands and trade regulations

affect marine resources and thus international trade initiatives are part of the solution to sustainable oceans and fisheries development. This is one of the main reasons why the negotiations on fisheries subsidies have been on-going at the WTO for the last 15 years.

Over the years, some of the initial positions taken by member countries have changed and views have converged on certain issues. But some radical differences of opinions remain. The WTO members failed to agree on the road ahead for the fisheries negotiations at the 10th Ministerial Conference, even though the UN Sustainable Development Agenda had been agreed upon in New York a few months prior to the Ministerial. Developed and developing country demandeurs at the Nairobi Ministerial should have made a stronger push for consensus mirroring the lowest common denominator rules in the SDGs and the Trans-Pacific Partnership Agreement (TPP), which did not happen.

With the finalisation of the TPP, the world saw a substantive legal text on fisheries subsidies. The 12 member TPP is yet to come into effect, but it has placed the disciplines on fisheries subsidies in the dispute settlement rules, making them enforceable, as and when the agreement comes into force. The environment chapter in the TPP is unique among trade agreements for its breadth and coverage. The TPP emphasises on fisheries management based on scientific evidence and best practices, and explicitly prohibits certain kinds of fisheries subsidies. It also incorporates a best-effort 'stand-still' provision, in relation to new or extending existing fisheries subsidies that contribute to overfishing or overcapacity.⁶³ However, it is worth noting that the TPP does not provide for any cross-cutting 'special and differential treatment' for developing economies, with the exception of technical cooperation and an extension granted to Vietnam for the transition period to remove inconsistent subsidies.⁶⁴

During the same period, the UNCTAD-FAO-UNEP Joint Declaration for regulating fisheries subsidies has garnered support from many countries and independent organisations. Other initiatives include, FAO's Port State Measures Agreement that came into

⁶² Ibid

⁶³ The TPP Agreement, Chapter 20

⁶⁴ Supra Note 31, at p. 17

force in June 2016, to which so far 35 countries are parties and the United States' push for a plurilateral with like-minded countries for fisheries subsidies rules. The Port State Measures Agreement seeks to prevent, deter and eliminate IUU fishing through implementation of port state measures. These developments have ensured that fisheries subsidies remain on the international agenda. However, there is fear that due to the progress made outside the WTO, there could be a reduced urgency to further the negotiations at the WTO.

Yet, in terms of development implications, many economically smaller coastal developing countries, such as the SIDS countries, ACP States, SVEs, and LDCs have an offensive interest in focusing attention on fisheries subsidies and carrying the proposed rules through to agreement in the multilateral and legally binding WTO context. They seek to limit subsidies by developed and large developing countries to fleets that fish on overfished stocks, in order to improve the chances of their domestic producers, and potentially benefit long-term sustainability and food security in all countries.

Many in the developed countries have echoed an interest in multilateral rules but the problems persist due to incomplete data on subsidy programmes, definition of key terms, costs associated with monitoring and enforcement of rules, among other issues. From a least developed country perspective, the major defensive interest of the low-ambition WTO agenda is the disproportionate reporting burden for small subsidy programs. There the discussions around 'special and differential' treatment become important.

6.1. Way Forward

An outcome on fisheries subsidies disciplines is a priority for LDCs and is being actively pursued both within the group, and bilaterally with the main players with the objective of success by the next WTO Ministerial Conference.

As a first step focus could be on the areas where there is general consensus, these being the need to address IUUs as well as subsidies for overcapacity.

Special and differential treatment remains a problem given that among the developing countries, there are big providers of subsidies making it difficult to agree on blanket exemptions in this regard.

In the build up towards the 11th Ministerial Conference, some important players such as China and India are not yet on board insisting on counter balancing with other issues. Reaching an agreement may require de-linking fisheries from other negotiation issues, since some members are unwilling to continue deliberations under the DDA setting that provided for single undertaking. In this respect initiatives such as Peru's proposal premised on SDGs commitments could be a means of de-linking fisheries negotiations from other DDA issues.

The key to a breakthrough on the fisheries issue lies in bringing on board the emerging economies like China that has a large fleet of distant water fishing vessels. This may require a carve out of concessions that would for instance allow them to maintain support of their small fleets, since they also have a sizeable population still faced with similar challenges to those in smaller developing countries and LDCs.

The MTS remains the ideal forum for an agreement on fisheries that would address LDCs interests and challenges. The proposed plurilateral agreement on fisheries subsidies would require a critical mass of members especially those operating schemes that support distant water fishing, so as to have real impact in redressing the fisheries issue. Given the divergence in the WTO, this is unlikely; moreover there may be no incentive for members within the plurilateral to come to an agreement that would benefit free riders, who would not have contributed to commitments agreed.

As a foreseeable solution, minimum disciplines on fisheries subsidies could be agreed in the WTO, and more ambitious disciplines pursued in the plurilateral as a stepping stone towards their eventual inclusion in the WTO as well.

LDCs in their approach to the negotiations on fisheries subsidies should clearly express their development concerns given that the sector is critical for food security, employment and poverty eradication efforts. Away from political and tactical

considerations, there is general consensus amongst WTO members to assist LDCs in overcoming such challenges.

As we head towards the 11th Ministerial Conference, the following recommendations are made that member countries should explore when considering alternatives for the future:

- LDCs, SIDS, ACP and SVE groups, together with like-minded developing nations could lead the discussion for elimination of IUU and capacity enhancing subsidies. Such subsidies are the most trade-distorting, create an uneven playing field for small economies and threaten food security.
- The WTO remains the ideal forum for an agreement on fisheries that would include LDCs interests; member countries could consider the plurilateral proposal by the United States as an alternative to pursue more ambitious disciplines while ensuring outcomes on the critical aspects within the WTO. Both the WTO and proposed plurilateral could draw insights and lessons from the TPP Agreement.
- At the minimum, there should be a strong call for notification by WTO member countries on the exact extent and type of subsidies given by them. A fund could be created for LDCs and SVEs for technical support.
- NGR should propose a road-map for negotiations leading up to the 11th Ministerial Conference in December 2017. This is particularly important if the 2020 target of SDG 14.6 is to be realised.
- The SCM Agreement could be revised to insert specific provisions prohibiting subsidies that result in overcapacity.
- Member countries should call on each other to shift from giving 'harmful' subsidies to beneficial subsidies that contribute to the sustainability commitments, including marine conservation, research and creation of marine protected areas.

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