

Draft Fisheries Subsidies Agreement: some key issues to address for a sustainable catch

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Abstract

This Policy Brief reviews the draft Chair's text for a Fisheries Subsidies Agreement (WT/MIN(21)/W/5). Pursuant to Sustainable Development Goal 14.6, any agreement must effectively discipline fisheries subsidies especially of larger scale fisheries and distant water fishing fleets and must cater to the needs of developing countries including in the form of effective Special and Differential Treatment (S&DT).

This Brief highlights several provisions of the text which would need to be improved to reach its mandated objectives. These provisions include the fisheries management flexibilities in Article 4.3 and Article 5.1.1 which would result in the continuation of fisheries subsidies; provisions on subsidies to fishing in Areas Beyond National Jurisdiction (ABNJ), subsidies to vessels not flying the flag of the subsidizing Member and non-specific fuel subsidies; due process requirements for determinations of Illegal, Unreported and Unregulated (IUU) fishing by coastal Members; treatment of subsidies to finance companies; the proposal purported to address forced labour; treatment of Regional Fisheries Management Organisations/Arrangements (RFMO/As) in the text; the relationship between the future Agreement and the Agreement on Subsidies and Countervailing Measures (ASCM) including their Committees; and the Agreement's S&DT provisions.

Le présent rapport sur les politiques examine le projet de texte préparé par le président des négociations sur les subventions à la pêche (WT/MIN(21)/W/5). Conformément à l'objectif de développement durable 14.6, tout accord doit viser à discipliner les subventions à la pêche, en particulier la pêche industrielle à grande échelle en eaux lointaines, et répondre aux besoins des pays en développement, notamment sous la forme d'un traitement spécial et différencié efficace.

Il met en évidence plusieurs dispositions du texte qui devraient être améliorées pour atteindre les objectifs fixés. Parmi ces dispositions figurent celles concernant les flexibilités prévues aux articles 4.3 et 5.1.1 en ce qui concerne la gestion des stocks, qui auraient pour conséquence le maintien des subventions à la pêche; les dispositions relatives aux subventions à la pêche dans les zones situées au-delà de la juridiction nationale, les subventions aux navires ne battant pas le pavillon du membre qui accorde la subvention et les subventions non spécifiques au carburant; celles concernant les règles et procédures régissant les déterminations de pêche illicite, non déclarée et non réglementée (INN) par les membres côtiers; l'affectation des subventions au financement des opérateurs privés; la question du recours au travail forcé; le rôle des organisations/arrangements régionaux de gestion des pêches (ORGP/ARGP); les liens entre le futur accord et l'Accord sur les subventions et les mesures compensatoires (Accord SMC), y compris leurs comités respectifs; et celles relatives à l'octroi d'un traitement spécial et différencié.

En este informe sobre políticas se examina el proyecto de texto del Presidente de un Acuerdo sobre Subvenciones a la Pesca (WT/MIN(21)/W/5). De conformidad con el Objetivo de Desarrollo Sostenible 14.6, cualquier acuerdo debe disciplinar efectivamente las subvenciones a la pesca, especialmente a las pesquerías de gran escala y a las flotas de pesca en aguas distantes, y debe adaptarse a las necesidades de los países en desarrollo al incluir, entre otras medidas, un trato especial y diferenciado que sea efectivo.

En este informe se ponen de relieve varias disposiciones del texto que tendrían que mejorarse para lograr sus objetivos establecidos por mandato. Entre estas disposiciones figuran las flexibilidades en materia de ordenación pesquera previstas en el artículo 4.3 y el artículo 5.1.1, que darían lugar a la continuación de las subvenciones a la pesca; las disposiciones relativas a las subvenciones a la pesca en zonas situadas fuera de la jurisdicción nacional, a las subvenciones a los buques que enarbolen el pabellón del Miembro otorgante de la subvención y a las subvenciones no específicas a los combustibles; los requisitos de debido proceso para determinar la pesca ilegal, no declarada y no reglamentada por parte de los Miembros ribereños; el tratamiento de las subvenciones a entidades financieras; la propuesta de abordar el trabajo forzoso; el tratamiento de las organizaciones o los arreglos regionales de ordenación pesquera (OROP/AROP) en el texto; la relación entre el Acuerdo futuro y el Acuerdo sobre Subvenciones y Medidas Compensatorias (SMC), incluidos sus Comités; y las disposiciones en materia de trato especial y diferenciado previstas en el Acuerdo.

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Introduction

The Fisheries Subsidies negotiations are conducted in the World Trade Organization (WTO) Negotiating Group on Rules (NGR) which is part of the broader Rules agenda specified in paragraphs 28 and 29 of the 2001 Doha Ministerial Declaration. The Rules negotiation agenda concerns Regional Trade Agreements (RTAs)¹, anti-dumping (AD)², subsidies and counter-vailing measures (SCM)³.

In 2001, the mandate for fisheries subsidies was relatively generally worded: “In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.” “These negotiations’ refer to “clarifying and improving disciplines under the (...) Agreement on Subsidies and Countervailing Measures” (ASCM).

A more specific negotiating mandate was given by the Hong Kong Ministerial Conference in 2005 (Annex D, paragraph 9): “(...) 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.”

Draft Consolidated Chair Texts of the AD and SCM Agreements were issued in 2007, including a proposed Annex VIII of the SCM Agreement on fisheries subsidies.⁴ This latter 7-page text listed subsidies to be prohibited and included general exceptions listing subsidies not to be prohibited, subject to implementation of specific fisheries management obligations. Special and differential treatment was available for developing countries other than least-developed countries (LDCs) for fishing within their entire maritime territory (Exclusive Economic Zone⁵) but subject to conditions including implementation of specific fisheries management obligations and prior stock assessments notified to and peer-reviewed by a relevant body of the Food and Agriculture Organization (FAO).

After 2007, fisheries subsidies negotiations were dormant as Members did not have much appetite to use the Chair’s text as a basis for further negotiations. Furthermore, an outcome on fisheries subsidies was contingent on other outcomes in the Rules agenda. It was also a relatively minor concern in the Doha Round; Members assigned more priority to other issues such as agriculture and non-agricultural market access. With the adoption of the Sustainable Development Goals

(SDGs) and in particular SDG 14.6 at the end of 2015, the fisheries subsidies negotiations were essentially restarted in earnest during 2016.

SDG 14.6 targets to “prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU 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 latter part of the 2005 Hong Kong Ministerial language referring to “the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns”, not explicitly included in SDG 14.6, continues to inform negotiation stances of developing countries.

At the 11th WTO Ministerial Conference in December 2017 which took place in Buenos Aires, Ministers agreed to continue to engage constructively in the fisheries subsidies negotiations, with a view to adopting, by the Ministerial Conference in 2019, an “agreement on comprehensive and effective disciplines...”⁶. This Ministerial Conference was originally postponed to June 2020 in Kazakhstan but further delayed due to the COVID-19 pandemic.

In November 2021, the Chair of the NGR submitted a draft text for a Fisheries Subsidies Agreement to the (now postponed) 12th Ministerial Conference (MC12) which was scheduled to be held in Geneva from 30 November to 2 December 2021. The Ministerial Conference has been rescheduled to take place in June 2022.

The draft Fisheries Subsidies Agreement is a revision of previous Chair’s texts. Table 1 lists the various published

Table 1 - Succession of published Chair’s fisheries subsidies texts

WTO document reference	Date of circulation
WT/MIN(21)/W/5	24 November 2021
TN/RL/W/276/Rev.2	8 November 2021
TN/RL/W/276/Rev.1	30 June 2021
TN/RL/W/276	11 May 2021
RD/TN/RL/126/Rev.2	18 December 2020
RD/TN/RL/126/Rev.1	2 November 2020
RD/TN/RL/126	25 June 2020
TN/RL/W/274/Rev.6	14 November 2018
TN/RL/W/274/Rev.5	26 July 2018
TN/RL/W/274/Rev.4	15 June 2018
TN/RL/W/274/Rev.3	18 May 2018
TN/RL/W/274/Rev.2, RD/TN/RL/29/Rev.3	5 December 2017, 4 December 2017

Note: During the course of 2019, negotiations were guided by 7 different Facilitators and various working documents have been published (RD/RL/113 to 119 and their revisions). Various working documents compiled by the NGR Chair and collections of language proposals made by WTO Members distributed among Members do not have a WTO document number.

Chair's fisheries subsidies texts since the Buenos Aires Ministerial Conference.

Stocktaking by the Fisheries Subsidies Ministerial of 15 July 2021

The latest stocktaking by Trade Ministers of progress made in the fisheries subsidies negotiations was on 15 July 2021, when a Trade Negotiations Committee (TNC) meeting at ministerial level on fisheries subsidies was held in virtual format (hereafter referred to as 'Fisheries Subsidies Ministerial').

From that meeting, WTO Members reaffirmed their strong commitment to achieve an outcome on fisheries subsidies. Nonetheless, many Members flagged their concerns and red lines and it emerged that the Chair's text (TN/RL/W/276/Rev.1) would need substantial further work for the negotiations to progress. Based on Members' statements, the Articles in need of further work included Art 1.2, Art 2, Art 3, Art 4.3, Art 5, Art 5.1.1, Art 5.2(b), Art 5.3, Art 5.4, Art 5.5, Art 8, Art 8.4, Art 10, Art 11.1 and Art 11.4.

At least eighty-one (81) developing countries stated that the Special and Differential Treatment (S&DT) provisions as represented by ALT2 in the Chair's text which covers artisanal fishing within territorial waters only was not sufficient. They disagreed that a key component of S&DT is for poor and vulnerable artisanal fishers in developing and least-developed countries only. Instead they stressed that S&DT should *inter alia* be permanent (as Art 5.1.1 is permanent), not be limited to a maritime zone of 12 nautical miles but also consider Members' rights over their Exclusive Economic Zones of 200 nautical miles.

Furthermore, it should cater for the future developmental needs of developing countries and LDCs, such as upgrading vessels with more modern and efficient technologies, experimental fishing of unexploited fisheries or fisheries with yet unknown potential and the construction of supporting infrastructure.

At the Fisheries Subsidies Ministerial, developing countries also highlighted that they have historically not provided most subsidies nor have the bulk of fishing capacity and that the principle of common but differentiated responsibility would be relevant in the context of the instrument under negotiation. In that respect, many developing countries considered that subsidies to large and/or distant water fishing should be the focus of the disciplines (estimated to receive around 85 per cent of subsidies). Removal of small scale/artisanal fisheries from the scope of the final outcome would not substitute for S&DT. The S&DT will need to be further expanded depending on the scope of the agreement and the commitment levels under the various pillars.

The statements of Ministers and Heads of Delegations, the NGR Chairman as well as WTO Director-General made during the Fisheries Subsidies Ministeri-

al were distributed to the WTO Membership on 30 July 2021.⁷ In her closing address, the WTO Director-General concluded that there were many gaps. She also noted that many Members made specific references to Articles in their statements and she felt "as if we had actually started the text-based negotiations".

Assessment of the draft Fisheries Subsidies Agreement

The Chair's proposed text for MC12 (WT/MIN(21)/W/5) has 11 Articles spread out over 9 pages and counts 26 portions of bracketed text. However, this does not necessarily imply that Members would reach an outcome by only addressing these portions.

The current text does not have preambular language which would, at the minimum, refer to negotiation mandates and objectives of the final Agreement.

The fisheries subsidies text is now termed an 'Agreement' rather than an 'Instrument'. Whether and how the agreement will be integrated into the WTO Agreement is not clear but this terminology suggests that the amendment procedure under Article X of the WTO Agreement would be followed, as was the case with the Trade Facilitation Agreement.

Some of the key issues and concerns with the draft Fisheries Subsidies Agreement include the following:

- **The fisheries management flexibilities in Article 4.3 and Article 5.1.1 are problematic and will result in the continuation of fisheries subsidies especially by Members with the capacity to conduct fish stock assessments**

Articles 4.3 and 5.1.1 contain the so-called fisheries management or sustainability flexibilities. Article 4.3 allows continuation of subsidies in the case of overfished stocks and Article 5.1.1 allows continuation of subsidies contributing to overfishing and overcapacity:

- Article 4.3: "Notwithstanding Article 4.1, a Member may grant or maintain subsidies referred to in Article 4.1 if such subsidies or other measures are implemented to rebuild the stock to a biologically sustainable level.¹⁰"

- Article 5.1.1: "A subsidy is not inconsistent with Article 5.1 if the subsidizing Member demonstrates that measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level.¹⁰"

- Footnote 10: "For the purpose of this paragraph, a biologically sustainable level is the level determined by a coastal Member having jurisdiction over the area where the fishing or fishing related activity is taking place, using reference points such as maximum sustainable yield (MSY) or other reference points, commensurate with the data available for the fishery; or by a relevant RFMO/A in areas and for species under its competence."

Pursuant to Article 5.1.1, a Member would have to demonstrate that 1) the relevant fish stock(s) are at a biologically sustainable level (BSL) and 2) “measures are implemented” to maintain it. These measures could be measures taken by a subsidizing Member, but also measures taken by the Regional Fisheries Management Organization/Arrangement (RFMO/A), another Member or a non-Member.

Sustainability would only have to be demonstrated with respect to ‘a relevant fish stock’. The word ‘fish stock’ is not defined in the text. This seems to provide flexibility to the Member invoking Article 5.1.1. The sustainability of species belonging to the same ecosystem or associated with or dependent upon the target stocks is not considered. Nonetheless, the ecosystem approach is considered best environmental practice and has been embedded in various national regulations such as the 1996 New Zealand Fisheries Act, amongst others.⁸

If the stock is under the competence of a Regional Fisheries Management Organization/Arrangement (RFMO/A), no reference points for determining biological sustainability are needed. The RFMO/A make such determinations in accordance with its own procedures. In order to prevent that RFMO/A decisions on sustainability reflect political influence instead of science, it is recommended that the WTO fisheries subsidies disciplines require the use of science for determinations by RFMO/As and allow WTO Members to eventually challenge them on scientific grounds.

The terms ‘RFMO’ and ‘RFMA’ are not defined in the text. Generally, RFMOs are international organisations underpinned by a treaty which has the authority to issue binding decisions for parties. RFMAs often do not have such authority and have less institutional machinery. For instance, the European Union Common Fisheries Policy might be considered as an RFMA, or certain bilateral agreements on fisheries between neighbouring countries.

Article 4.3 on overfished stocks is even more lenient than Article 5.1.1 as the subsidies or other measures would need to be implemented to ‘rebuild’ the stock without defining a time frame for the transition towards non-overfished status. Having a ‘less’ overfished stock does not necessarily mean a biologically sustainable stock; it would still be an overfished stock. In other words, Members may be able to avail of Article 4.3 even if a relevant fish stock remains overfished. For instance, a Member could commit to a 25 year plan to rebuild a certain stock and provide subsidies under such plan.

These flexibilities under Article 4.3 and 5.1.1 are subject to the following notification requirements under Article 8.6(a) and (b):

- 1) An up-to-date biennial notification of all industrial subsidies under Article 25 ASCM.

This requirement implies that the flexibility to provide (certain) fisheries subsidies is made contingent upon notification of all industrial subsidies. A similar linkage has also been made in the interim solution for the issue of public stockholding programmes for food security purposes (‘peace clause’), under which a developing country Member would need to submit its Domestic Support notification covering all agricultural subsidies (DS:1 notification) in order to benefit from a specific flexibility.⁹ Such contingency is among the contentious issues in the interim solution.

Based on current compliance with notification of industrial subsidies under Article 25 ASCM, around 55 WTO Members (EU counted as one) would comply with the first requirement to avail of Article 4.3/5.1.1. However, around 80 developing countries did not make a notification under Article 25 ASCM by the beginning of 2021 for the biennial notification due on 30 June 2019. If a similar notification pattern continues, most developing countries could not benefit from Article 4.3/5.1.1¹⁰.

2) Provision of the following additional information:

- i. type or kind of fishing activity for which the subsidy is provided with respect to relevant fish stock(s) for which subsidies are provided (Art 8.1(a)(i)); and
- ii. catch data by species or group of species in the fishery for which the subsidy is provided (Art 8.1(a)(ii)); and
- iii. status of the fish stocks and the reference points used, and whether such stocks are shared with any other Member or are managed by an RFMO/A (Article 8.1(b)(i)); and
- iv. conservation and management measures in place for the relevant fish stock (Article 8.1(b)(ii)).

Fleet capacity and the name and identification number of vessels benefitting from subsidy are not strictly necessary for the invocation of Article 4.3 or 5.1.1. This information is to be submitted ‘to the extent possible’ under Article 8.1(b)(iii) and (iv).

Even if a developing country would be able to make a notification under Article 25 ASCM it would need to provide this additional data in 2-year intervals, or if the text under footnote 15 would be unbracketed in 4-year intervals, for LDCs and developing countries with a share below 0.7 percent of global marine fish capture.

However, such information might not be easily available or come at a price, in particular data regarding fish stock status and catch data by species. Fish stock assessments are more costly for developing countries which have a high variety of fish species and/or multi-species fisheries. In the United States, based on estimates made for 2011-2015, the total budget for fish stock assessment was close to USD 215 million in total, accounting for up to 4 percent of commercial fishery ex-vessel value. The average cost of an individual fish stock assessment is around USD 1.6 million which can range considerably at a region-

al level; from USD 675,000 in Alaska to USD 5.7 million in Pacific Islands where stock assessment is more complex due to existence of multi-species fisheries and highly migratory fish stocks.¹¹ This would imply that developing countries with waters more akin to the Pacific Islands could face very high costs for fish stock assessment amounting to 14 percent of the value of the captured fish (USD 5.7mln / USD 1.6mln x 4%).

- **Subsidies to fishing in areas beyond national jurisdiction (ABNJ) are not disciplined adequately**

In previous Chair's texts two prohibitions related to fishing in areas beyond national jurisdiction (ABNJ) were included. Article 5.1.1 (the sustainability flexibility) would not apply to the prohibitions:

- The first was a modest prohibition of subsidies 'tied' or 'contingent' to fishing in the high seas or in jurisdictions of other Members. Fuel subsidies are likely covered under this prohibition as this allows vessels to reduce costs to operate in distant waters. It is not a blanket prohibition of subsidies to all ABNJ fishing as subsidies not 'contingent' or 'tied' to fishing in such areas would be outside the scope of this prohibition (Article 5.1(i) in the draft Agreement).

- The second prohibition, now reflected as Article 5.2 in the draft Agreement, concerned subsidies to fishing in high seas which are not under the competence of an RFMO/A, regardless of whether such subsidies are 'contingent' or 'tied' to fishing in such areas. However, the area of application of Article 5.2 seems marginal as only a very minor part of the high seas is not covered by at least one RFMO/A. Furthermore, not all fish species under the "competence" of an RFMO/A are necessarily actively managed – competence does not substitute for effective fisheries management.

In the draft Fisheries Subsidies Agreement, the first ABNJ prohibition has been inserted into the list under Article 5.1 (Art 5.1(i)). One implication is that the flexibility of Article 5.1.1 would be available to Members for contingent/tied ABNJ subsidies. Footnote 10 suggests that for the high seas outside the competence of RFMO/As, no biologically sustainable level could exist and thus Article 5.1.1 could not be invoked. However, subsidizing Members could still invoke Article 5.1.1 in various situations, for example if the relevant stock also occurs in waters of the subsidizing Member (e.g. highly migratory stocks) or in waters under competence of a relevant RFMO/A (regardless whether the subsidizing Member is a party to such RFMO/A). It might also create pressure on host nations for distant water fleets to declare fish stocks as biologically sustainable.

For this change which benefits Members engaged in distant water fishing, no trade-off has been made.

- **Treatment of subsidies to finance companies unclear**

Subsidies to finance companies are used in some distant water fishing nations to provide support to their fisheries sectors; they *inter alia* provide purchase guarantees to shipyards reducing their uncertainty eventually leading to a greater supply of fishing vessels. Finance companies might be subsidized to keep them in business and/or offer attractive leasing terms to fishers, which contributes to overfishing and overcapacity.

In the draft Fisheries Subsidies Agreement, "operator" means the owner of a vessel, or any person, who is in charge of or directs or controls the vessel. Owners who are not in charge or do not direct or control the vessels are not covered by the phrase 'operator'. This would not encompass finance companies under a financial lease (lessor) as they are the owner but do not control the vessel.¹²

Nonetheless, subsidies to finance companies might be covered under Article 5.1(g): "subsidies covering operating losses of vessels or fishing or fishing related activities". This subparagraph does not specify who should be bearing the operating losses (i.e., not necessarily an operator). Therefore, it could be argued that subsidies to finance companies cover operating losses of vessels (for the finance company). Yet, what type of subsidies would fall under Article 5.1(g) is not entirely clear, as the word "operating loss" is not defined and what exactly would constitute an "operating loss" for a vessel, for fishing, or for fishing-related activities, respectively.

- **Prohibition of subsidies to vessels not flying the flag of subsidizing Member remains in the balance (Article 5.3)**

The use of flag(s) of convenience contributes to overfishing and overcapacity and/or facilitate Illegal, Unreported and Unregulated (IUU) fishing. The new ALT2 is formulated in an unclear way and would seem to make it difficult to operationalize – it will be difficult for Members to verify implementation of this provision. There is broad support for this prohibition although there is opposition of inclusion of this provision by some (developing) countries which operate open ship registries. It may be considered an option to make this Article applicable only to future vessels. Such an approach is sometimes taken in legal instruments negotiated at the International Maritime Organization (IMO).

Furthermore, to ensure monitoring of Article 5.3, subsidizing Members should notify the flag of vessels they are subsidizing (under Article 8.1(b)(iii) and 8.2(c)(vi)). Such provision would reinforce existing IUU fishing regulation that some developed country Members maintain. For instance, under EU's IUU fishing regulation, EU Member States shall encourage nationals to notify any information pertaining to legal, beneficial or financial interests in, or control of, fishing vessels flagged to a third country which they hold and the names of the vessels concerned.¹³

- **Non-specific fuel subsidies are not dealt with adequately**

Article 1.2 to also include non-specific fuel subsidies within the scope of the Agreement remains bracketed. Fuel subsidies are the single most important form of subsidies

in fisheries. Sumaila *et al.* (2019) found that fuel subsidies is the largest subsidy type at 22 percent of the total global subsidy followed by subsidies for fisheries management accounting for 19 percent of the total. As many fisheries management subsidies do not fall within the definition of 'subsidy' under the Agreement on Subsidies and Countervailing Measures, the actual share of fuel subsidies in total fisheries subsidies is higher than 22 per cent.¹⁴

Fuel subsidies allow vessels to fish further away than otherwise would be the case and such subsidies could significantly reduce their operating costs, thereby keeping otherwise unprofitable ships in business. In various economies, fuel subsidies are provided not to fishing vessels only but to a wider group of vessels or other vehicles and could not be considered 'specific' to fisheries and, as a result, escape any of the proposed subsidy prohibitions.

Inclusion of Article 1.2 would particularly strengthen the IUU fishing discipline under Article 3. It would be less pertinent for the subsidy prohibitions under Article 4 (overfished stocks) and Article 5 (overfishing and overcapacity) as flexibilities and/or S&DT are available under which non-specific fuel subsidies could go ahead.

At the same time, inclusion of Article 1.2 would not automatically increase transparency as Article 8 stipulates that Members are to notify fisheries subsidies in their regular notification under Article 25 of the SCM Agreement (ASCM) whose scope is specific subsidies only. It is recommended to add a clause in Article 8 requiring Members to also provide information on non-specific fuel subsidies, possibly on best endeavour basis. As a possible reference, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) has already a provision along such lines: "Each Party shall also provide, to the extent possible, information in relation to other fisheries subsidies that the Party grants or maintains that are not covered by paragraph 5, in particular fuel subsidies" (Article 20.16.11).

- **The due process requirements for IUU fishing determinations would limit subsidy prohibitions even if IUU fishing would take place**

The due process requirements for IUU fishing determinations would make it difficult for a determination by a coastal Member to result in a subsidy prohibition for another Member. The text in Article 3.3 (ALT2) has improved in clarity compared to the previous text (ALT1). However, the requirements would still pose challenges in terms of automaticity of subsidy prohibition following an IUU fishing determination, in particular by a coastal Member:

- Proposed due process requirements go beyond usual requirements applicable under RFMO IUU vessel list procedures. This means that subsidy prohibition following IUU fishing determination

would be less automatic than it would be under RFMOs.

- Notifications and interaction should be mainly with the flag State Members, as is the case with RFMOs. However, according to the draft text, the subsidizing Member "if known" should also be involved. This knowability might be subjective and can be contested. It would give a subsidizing Member a justification to continue subsidies if certain procedures were not followed, even if IUU fishing took place. With respect to a coastal Member's IUU fishing determination of a certain vessel, there appears to be a logical link between an obligation of a coastal Member to interact with a subsidizing Member and its notification of vessels subject to subsidy under Article 8, a link that currently is not expressed in the text.
- Notifications, if any, regarding IUU fishing determinations by a Member to the WTO or another Member should not affect the validity of such determination. Obligations relating to notification of a final determination should principally be located in Article 8, not in Article 3.
- Ensuring that the capacity deficits of developing countries and LDCs are taken into account is fundamental to the disciplines because determinations will be more difficult for developing countries. Developed countries are likely to have better access to real-time data from satellites, vessel monitoring systems and other equipment and better capacity to board ships suspected to conduct IUU fishing such as helicopters, fast moving patrol ships. In many developing countries, fisheries agencies might not have enough fuel to go out far out the coast and end up patrolling small scale fisheries.
- **US forced labour proposal is not targeting forced labour practices per se and raises systemic issues**

At a late stage of the negotiations, in May 2021, US made a proposal which purports to address forced labour on fishing vessels.¹⁵ At face value, it could be regarded as an implementation of a more worker-centered trade policy advanced by the current Biden Administration¹⁶. Also, in June 2021, Group of Seven (G-7) countries committed themselves to "continue to work together including through our own available domestic means and multilateral institutions to protect individuals from forced labour and to ensure that global supply chains are free from the use of forced labour."¹⁷

Forced labour is an issue within the fisheries supply chain. For instance, a well-known investigation by the Associated Press in 2015 exposed forced labour in operations of Pusaka Benjina Resources and found, amongst others, trafficked Burmese men locked in cages in the company's island compound.¹⁸

The draft Fisheries Subsidies Agreement includes two (bracketed) provisions taken from the US proposal:

- i. An additional subsidy prohibition: Members are to prohibit subsidies to fishing related activities in support of IUU fishing besides subsidies to IUU fishing (under Article 3.1)
- ii. Members shall notify annually ‘any vessels and operators for which the Member has information that reasonably indicates the use of forced labour’ (...) (under Article 8.2(b)).

The US proposal raises various concerns. First, the proposed additional subsidy prohibition by the US does not address forced labour directly, but any ‘activity in support of IUU fishing’ which is a different issue. The phrase ‘in support of’ IUU fishing is quite ambiguous and might extend only to activities prior or during such fishing. Yet, the prohibition is likely to have a larger scope. In most jurisdictions around the world, receiving and handling stolen goods are criminal offences as these activities are considered to be “in support” of stealing. Applying this analogy to this proposal, a fish processing establishment onshore (a fishing related activity) using non-forced labour might procure fish from different sources some of which might be caught in violation of applicable fishing regulations. A fish processor could therefore be ‘in support of IUU fishing’, regardless of whether it made use of forced labour. Thus, the implication of this proposal could be that activities performed with non-forced or legal labour would also be covered by the proposed subsidy prohibition.

Second, this proposal seems to be driven by US commercial interests. As it is simpler to manage the inputs of a single ship compared to a land-based operation, the proposal appears to make it easier to provide subsidies to massive factory ships compared to fish processing establishments onshore. This view could find support in US disputes on processed fish against several Members including Viet Nam, Thailand and China.

Third, the applicable domestic law for “activities in support of IUU fishing” for the application of the subsidy prohibition is not defined. Thus, it seems possible that a Member can demand from another Member enforcement of subsidy prohibition when a fishing activity is IUU fishing in its own jurisdiction (e.g. a rule relating to mesh size or bycatch) regardless of applicable rules in other jurisdictions.

Fourth, there is no due process for determination of “activities in support of IUU fishing”. In the case of “IUU fishing”, Articles 3.2 and 3.3 spell out who could determine IUU fishing with respect to which waters and accompanying conditions; currently such rules would not apply to “activities in support of IUU fishing”.

One way of solving some of the concerns would be to change the wording in Article 3.1 to read: “No Member shall grant or maintain any subsidy to a vessel or operator engaged in illegal, unreported and unregulated (IUU) fishing or fishing related activities in support

of a vessel or operator engaged in IUU fishing” (underlined text would be added into the text).

On the second issue (Article 8.2(b)), the proposed language would mean that WTO would be turned into a forum to discuss and arbitrate allegations of labour rights violations. First, the WTO does not appear to be the appropriate or competent forum; the International Labour Organization (ILO) would be better and competently equipped to host these discussions. It is recommended that the ILO address this matter in a holistic manner. Furthermore, the proposed notification obligation does not have a logical basis in the body of the text as Article 3.1 does not mention ‘forced labour’.

• Questions relating to RFMO/As

Fisheries which (also) occur in high seas and/or in jurisdictions of two or more States could be managed through Regional Fisheries Management Organizations or Arrangements (RFMO/As).

The terms “RFMO” or “RFMA” have not been defined in the draft Fisheries Subsidies Agreement. A major reference for definitions would be the 1995 United Nations (UN) Fish Stock Agreement¹⁹, even though not in force for all WTO Members (90 States). It mentions ‘subregional or regional fisheries management organization’ at least 37 times in relation to straddling fish stocks and highly migratory fish stocks but does not provide a definition. However, it does provide a broad definition of “arrangement”: “a cooperative mechanism established in accordance with the Convention and this Agreement by two or more States for the purpose, *inter alia*, of establishing conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks.” (Article 1.1(d)).

The absence of definitions in the WTO fisheries text raises various issues:

- Should WTO Members which have not ratified or acceded to the UN Fish Stock Agreement be bound by definitions contained therein?
- What kind of arrangements would be considered an RFMA? For instance, the EU Common Fisheries Policy is a cooperative mechanism for its EU Member States for the management of fish. This implies that the EU could make IUU fishing determinations as an RFMA in accordance with its own EU IUU regulation and would not be bound by the additional due process conditionalities applicable to a coastal Member under Article 3.3 such as notification of an affirmative determination to the coastal Member, subsidizing Member and/or the WTO or provision of opportunity to exchange relevant information. For developing countries, this question (in the specific case of EU) might also be relevant for IUU fishing determinations in EU overseas territories in their vicinity including in the Caribbean, the Pacific or off the coast of Morocco.
- Would the disciplines fully apply to RFMO/As with

fish stocks not ‘straddling’ or ‘highly migratory’ under their competence? For instance, the competence of the North East Atlantic Fisheries Commission (NEAFC) extends to all fishery resources in the Convention Area.²⁰ This is relevant for the application of Article 5.2 for instance, whether fisheries subsidies granted for fishing of non-highly migratory fish stocks in the North East Atlantic would be prohibited (current drafting suggests it is not prohibited).

Besides that, RFMO/As appear to have a privileged position in certain provisions. As mentioned before, they do not need to use reference points/science for fish stock assessment. Lighter process requirements apply for ‘valid’ IUU fishing determinations for the purposes of subsidy prohibition, compared to coastal Members (Article 3.2(c) vs 3.3).

Furthermore, they are bound to have some influence on the implementation of the Agreement, as the Committee shall ‘maintain close contact’ with relevant RFMO/As (Article 9.5). The operationalization of this provision would need to be discussed in the Committee, such as which RFMO/As would be ‘relevant’ and their level of participation such as whether they can make presentations at certain Committee meetings or their observership.

- **Relationship between Fisheries Subsidies Agreement and the ASCM Agreement including their Committees**

The text appears to be ambiguous about the future WTO Committee to be notified of the additional information under Article 8.1. It requires Members to provide information “as part of its regular notification of fisheries subsidies under Article 25 of the SCM Agreement.” The notification under Article 25 ASCM is submitted to the ASCM Committee. If the additional information is “part of” this regular biennial notification, this would imply that the additional information would need to be submitted to the ASCM Committee as well, at the same time of the Article 25 ASCM submission.

On the other hand, footnote 14 stipulates that “Members shall provide this information in addition to all the information required under Article 25 of the SCM Agreement”. In that case, this may mean that submission of additional information under Articles 8.1(a) and 8.1(b) would be notified to the future Fisheries Subsidies Committee, and would not necessarily be timed with the Article 25 ASCM notification. This latter view seems to be the drafters’ intention as Article 9.2 mandates the future (Fisheries Subsidies) Committee to “examine all information provided pursuant to Articles 3 and 8”. Notification of the additional information under Article 8.1 to the ASCM Committee is inconsistent with this mandate.

Yet this view is not reflected in the body of the text. It is therefore suggested to change the relevant wording

of Articles 8.1(a) and 8.1(b) to read as follows: “provide the following information ~~as part of~~ **in addition to** its regular notification of fisheries subsidies under Article 25 of the SCM Agreement”.

Article 11.6 of the draft Fisheries Subsidies Agreement also states that “this Agreement does not modify or nullify the rights and obligations as provided by the SCM Agreement”. This appears to be a very absolute provision which could render the entire Fisheries Subsidies Agreement ineffective. It could mean that a fisheries subsidy not prohibited under the ASCM should not be prohibited under the Fisheries Subsidies Agreement: an additional prohibition would modify a right under the SCM Agreement. It is suggested to add the qualifier “subject to the provisions of this Agreement”, adopting similar language used in Article 21.1 of the Agreement on Agriculture.

- **S&DT provisions should be strengthened**

The most consequential S&DT provision is found in Article 5 on overfishing and overcapacity. It exempts developing country Members from the subsidy prohibition under Article 5.1 if it is classified as a Least Developed Country (LDC) (Article 6.1) or if its annual share of the global volume of marine capture production does not exceed [0.7 per cent] as per the most recent published FAO data (Article 5.4(a)). This has been referred to as a ‘de minimis’ in the negotiations. In addition, for low income, resource-poor and livelihood fishing or fishing related activities, up to [12] nautical miles measured from the baselines (Article 5.4(b)). This S&DT is subject to the same conditionalities applicable to Article 5.1.1, namely the submission of a notification of all industrial subsidies under Article 25 ASCM and provision of additional information. In reality, a few developing countries currently comply with these notification requirements (see above) so the question is whether this S&DT is operational in practice.

The ‘artisanal fishing’ exemption under Article 5.4(b) seems to target a very narrow range of fisheries. First, fisheries would need to be “low-income” **and** “resource-poor” **and** be for “livelihood”. In previous Chair’s texts the word “or” was used in line with a similar concept used in Article 6.2 of the Agreement on Agriculture (“low-income **or** resource-poor producers”), but it was changed to “and”. Second, in many countries artisanal fisheries go beyond the territorial sea (12 nautical miles). In some countries this is reflected in domestic laws which specify maritime zones where industrial fishing is prohibited. For instance, Mauritania prohibits industrial fisheries in a zone of 20 nautical miles, implying that the first 20 nautical miles is reserved for artisanal fisheries. It is recommended to broaden up Article 5.4(b) to encompass the Exclusive Economic Zone or the contiguous zone (24 nautical miles from baselines, as defined in UNCLOS) and to use similar language from the Agreement on Agriculture, i.e., “low income” **or** “resource poor”.

Developing countries not falling within the minimis of 0.7 percent (if unbracketed) can avail of a transition period of [X] years. The provision of fixed transition periods is

wholly insufficient and might not correspond to the actual development needs of a developing country Member.

Overall, the S&DT provisions in the text are inadequate and it is recommended that developing countries and LDCs provide additional language for S&DT.

Conclusions

This Policy Brief discussed the draft Chair's text for a Fisheries Subsidies Agreement (WT/MIN(21)/W/5). Pursuant to Sustainable Development Goal 14.6, any agreement must effectively discipline fisheries subsidies especially of larger scale fisheries and distant water fishing fleets. Many developing countries have raised concerns about the fisheries subsidies negotiations during the Fisheries Subsidies Ministerial of 15 July 2021. Minutes and/or statements are yet to be released.

This Brief highlights several provisions of the text with recommendations to improve the language to reach its mandated objectives, including the fisheries management flexibilities in Article 4.3 and Article 5.1.1 which would result in the continuation of fisheries subsidies; provisions on subsidies to fishing in ABNJ, subsidies to vessels not flying the flag of the subsidizing Member and non-specific fuel subsidies; due process requirements for IUU fishing determinations by coastal Members, treatment of subsidies to finance companies; the US forced labour proposal; treatment of RFMO/A in the text, the relationship between the Fisheries Subsidies Agreement and the ASCM including their Committees; and the Agreement's S&DT provisions.

Endnotes:

¹ In the Doha Round, a partial result has been achieved on RTAs in 2006 with the RTA Transparency Mechanism currently applied on a provisional basis. See World Trade Organization, document WT/L/671.

² On anti-dumping, no outcome has been achieved in the Doha Round. However, in response to paragraph 12 of the Doha Ministerial Declaration (Implementation-related issues and concerns) some recommendations in the area of anti-dumping have been adopted by the General Council, namely Recommendation Regarding Annual Reviews of the Anti-Dumping Agreement (G/ADP/9) and Recommendation Concerning the Time-Period to be Considered In Making a Determination of Negligible Import Volumes for Purposes of Article 5.8 of the Agreement (G/ADP/10).

³ Paragraphs 28 and 29 of the 2001 Doha Ministerial Declaration contained in World Trade Organization document WT/MIN(01)/DEC/1.

⁴ World Trade Organization, document TN/RL/W/213.

⁵ Exclusive Economic Zone, defined by the UN Convention on the Law of the Seas (UNCLOS), is the first 200 nautical miles of sea measured from a State's baselines. Base lines are drawn straight based on characteristics of a State's coast, such as reefs and bays. Waters behind baselines are called 'internal waters'.

⁶ World Trade Organization, Ministerial Decision on Fisheries Subsidies, document WT/MIN(17)/64; WT/L/1031.

⁷ World Trade Organization, document TN/C/M/41, 30 July 2021.

⁸ New Zealand Fisheries Act 1996. Available from <https://www.legislation.govt.nz/act/public/1996/0088/latest/whole.html#DLM395397>.

⁹ World Trade Organization, Public Stockholding for Food Security Purposes, Ministerial Decision, document WT/MIN(13)/38 or WT/L/913.

¹⁰ See the table starting on page 30 in World Trade Organization, document G/L/223/Rev.28, Updating of the Listing of Notification Obligations and the Compliance Therewith as set out in Annex III of the Report of the Working Group on Notification Obligations and Procedures.

¹¹ "NOAA's Cost of Fish Stock Assessments", presentation by the National Oceanic and Atmospheric Administration, 11 October 2016, available at https://www.npfmc.org/wp-content/PDFdocuments/CM/2016/102016/NOAA_FisheriesCostofStockAssessments.pdf.

¹² A possible definition of operator could be: "any person who is in charge of or directs or controls a vessel, or for whose direct economic or financial benefit the vessel is being used, including the master, owner, and charterer", used in Western and Central Pacific Fisheries Commission (CPFC) Conservation and Management Measure 2004-03, available at <https://www.wcpfc.int/doc/cmm-2004-03/specifications-marking-and-identification-fishing-vessels>.

¹³ European Union, establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, Council Regulation (EC) No 1005/2008, Article 40.1. Available from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R1005&from=EN>.

¹⁴ Sumaila *et al.*, "Updated estimates and analysis of global fisheries subsidies", *Marine Policy*, Volume 109 (2019). Available from <https://www.sciencedirect.com/science/article/pii/S0308597X19303677>.

¹⁵ World Trade Organization, The use of forced labor on fishing vessels - submission of the United States, document TN/RL/GEN/205.

¹⁶ The Office of the United States Trade Representative, The 2022 Trade Policy Agenda and 2021 Annual Report of the President of the United States on the Trade Agreements Program. Available from <https://ustr.gov/sites/default/files/2022%20Trade%20Policy%20Agenda%20and%202021%20Annual%20Report.pdf>.

¹⁷ Carbis Bay G7 Summit Communique, 13 June 2021. Available from <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/13/carbis-bay-g7-summit-communique/>. This statement pointed out the agricultural, solar, and garment sectors but did not specifically mention fisheries.

¹⁸ Robin McDowell, Margie Mason and Martha Mendoza, "AP Investigation: Slaves may have caught the fish you bought", *Associated Press*, 25 March 2015. Available from <https://www.ap.org/explore/seafood-from-slaves/ap-investigation-slaves-may-have-caught-the-fish-you-bought.html>.

¹⁹ United Nations Agreement for the implementation of the provisions of UNCLOS relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. Available from

https://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm

²⁰ Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries. Available from <https://www.neafc.org/system/files/Text-of-NEAFC-Convention-04.pdf>.



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