



Note

Possible Special and Differential Treatment Provisions in the Fisheries Subsidies Negotiations at WTO

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Summary

This note examines the Special and Differential Treatment (SDT) proposals that have been made by WTO Members in the 2017 Matrix, with respect to flexibilities relating to subsidies; Illegal, Unreported and Unregulated (IUU) fishing; overfishing/overcapacity; implementation periods and capacity building/technical assistance. It also considers the SDT provisions in the Trade Facilitation Agreement (TFA) and how these might inspire provisions in a future Fisheries Subsidies Agreement.

Introduction

WTO Agreements have always contained provisions, which give flexibilities to developing countries/LDCs and allows them to be treated more favourably than other WTO Members. These unique/special provisions include, “longer time periods for implementing Agreements and commitments; measures to increase trading opportunities for developing countries; provisions requiring all WTO Members to safeguard the trade interests of developing countries; support to help developing countries build the capacity to carry out WTO work, handle disputes, and implement technical standards and provisions related to LDC Members”.¹

However, at the time of the launch of Doha Development Round in November 2001, it was the belief that negotiations under the Doha Development Agenda (DDA) should permit developing countries to benefit more from being Members of the WTO and in better harmonising WTO rules into their domestic policies. With this in mind, SDT was to be made more specific, effective and operational including through improved implementation, technical assistance and capacity building. Members also agreed to develop new ideas and solutions towards mitigating the unique

challenges faced by Least Developed Countries (LDCs) and small economies.²

On that account, the Doha Mandate Paragraph 44 accordingly states that “we reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442)³. We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns”.⁴

On 28 July 2017 and towards the run-up to the negotiations at the 11th WTO Ministerial Conference (MC11), which took place in Buenos Aires, Argentina, the then chair of the Negotiating Group on Rules (NGR), Ambassador Wayne McCook of Jamaica circulated a document in form a matrix⁵, which compiled seven fisheries subsidies proposals⁶

¹ Special and Differential Treatment Provisions https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm

² Doha Round Briefing Series - Special and Differential Treatment <https://www.iisd.org/library/doha-round-briefing-series-issue-13-13-special-and-differential-treatment>

³ WT/GC/W/442 https://www.wto.org/english/thewto_e/minist_e/min01_e/min01_proposals_e.htm

⁴ The Doha Mandate Paragraph 44 https://www.wto.org/english/thewto_e/minist_e/min01_e/min01_decl_e.htm

⁵ Compilation of Seven Fisheries Subsidies Proposals Circulated to WTO Members (TN/RL/W/273) https://www.wto.org/english/news_e/news17_e/fish_28jul17_e.htm

⁶ From New Zealand, Iceland and Pakistan; the European Union (EU); Indonesia; the African, Caribbean, Pacific (ACP) Group; Argentina, Colombia, Costa Rica, Panama, Peru and Uruguay; the LDC Group; and Norway.

that contained provisions on SDT and were to serve as the foundation for the fisheries subsidies negotiation at MC11, However, at MC11, there was no tangible decision on Fisheries Subsidies, but “Members agreed to continue to engage constructively in the fisheries subsidies negotiations with a view to adopting an Agreement by the next Ministerial Conference in 2019 [...]”.⁷ As a consequence, currently, at the WTO, Members are actively engaged in negotiations/discussions, in order to reach an Agreement on fisheries subsidies in 2019, as directed by Ministers at MC11.

The purpose of this note is, therefore, to examine the SDT proposals that have been made by Members⁸ in the 2017 Matrix, with respect to flexibilities relating to subsidies; Illegal, Unreported and Unregulated (IUU) fishing; overfishing/overcapacity; implementation periods and capacity building/technical assistance (contained in annex 1⁹), and how they relate to disciplines in the future fisheries

subsidies Agreement.¹⁰ In addition, the paper will also consider the SDT provisions in the Trade Facilitation Agreement (TFA) and how they can be applied/useful in a future Fisheries Subsidies Agreement.

SDT Flexibilities Relating to Subsidies, IUU Fishing, Overfishing and Overcapacity

Under this heading, whilst developed countries such as Norway give no provision, the EU proposed that “article 1¹¹ does not apply to subsidies granted or maintained by developing and least developed countries for fishing vessels which are used for subsistence fishing. Developing countries ranking among the world's [X] biggest in terms of marine capture production as determined by the FAO shall endeavour to refrain from making use of the flexibilities set out in Article 4.2¹².

⁷ Ministerial ended with decisions on fish subsidies, e-commerce duties; ongoing work continues https://www.wto.org/english/news_e/news17_e/mc11_13d_ec17_e.htm

⁸ Grouped according to developed Countries: EU/Norway; the ACP Group; the LDC Group; other developing countries: Indonesia/ Argentina, Colombia, Costa Rica, Panama, Peru, Uruguay and the mixed group of countries: New Zealand, Iceland and Pakistan.

⁹ It should be noted that the Annex1 has organised the SDT proposals into three categories of i) general SDT provisions; ii) flexibilities; and (iii) capacity building/technical assistance.

¹⁰ For the purposes of analysis, this paper divides the seven proposals into: i) those by developed countries (the EU and Norway); those by developing countries (ACP Group, LDC Group, Indonesia, and some Latin American countries); and (iii) those by a mixed group of countries (Iceland, New Zealand and Pakistan).

¹¹ EU - Article 1 - The Parties shall not grant or maintain any of the following subsidies: 1.1.(a) subsidies that increase the marine fishing capacity of a fishing vessel or support the acquisition of equipment that increases the ability of a fishing vessel to find fish; 1.1.(b) subsidies that support the construction of fishing vessels or the importation of fishing vessels; and 1.1.(c) subsidies for the transfer of fishing vessels to other countries including

through the creation of joint ventures with partners of those countries. 1bis.1. In addition to the subsidies prohibited under Article 1.1, the Parties shall not grant or maintain any subsidies for fishing outside the territorial sea that negatively affect targeted fish stocks that are in an overfished condition. 1bis.2. sets out an illustrative list of subsidies that do not negatively affect targeted fish stocks that are in an overfished condition: (a) subsidies that improve fishery management systems and thus promote sustainable fisheries including subsidies for research and development activities; (b) subsidies that improve hygiene, health, safety and working conditions for fishers; (c) subsidies aiming at improving the concerned Party's capacity to fight against IUU fishing; (d) subsidies for permanent cessation of fishing activities provided that the fishers concerned effectively cease all fishing activities within a reasonable timeframe after receiving the subsidy concerned.

¹² EU - Article 4.2 - Developing and least developed countries may grant or maintain subsidies referred to under Article 1 if the following conditions are met: (a) the vessel benefitting from the subsidy does not target fish stocks that are in an overfished condition; and as recognised as overfished by the national authorities of the Party or by the relevant Regional Fisheries Management Organisation or Arrangement. In the absence of sufficient data to make such a determination, the stock shall be presumed to be in an overfished condition. (b) the targeted

The EU goes further and states that developing and least developed countries may grant or maintain subsidies referred to under Article 1¹³ if the following conditions are met: (a) the vessel benefitting from the subsidy does not target fish stocks that are in an overfished condition. (b) the targeted stock is managed on the basis of the best available science at the disposal of the concerned Party, consistent with the conservation and cooperation obligations under the relevant international law as reflected in UNCLOS, conservation and management measures of competent RFMO(s)/A(s), and generally accepted standards for the conservation and management of fisheries resources; and (c) the subsidising Party has a management plan for the fleet segment it intends to subsidise.

On the other hand, the ACP Group proposed that the operationalization of disciplines on fisheries subsidies should not impede the ability of developing countries and LDCs to develop

and diversify their fisheries sector, and prohibitions other than those outlined in Article 2.1(a) and 2.1(b)¹⁴ shall not apply to LDCs. With respect to Article 2.1.b, in order to establish measures against unreported and unregulated fishing, after the period stipulated in Article 3.1 and 3.2¹⁵, developing countries not engaged in large scale industrial distant water fishing are entitled to apply [x] additional years and LDCs [x] additional years of transition period, except for illegal fishing. The prohibition under 2.1(c)¹⁶ (i) shall not apply to subsidies provided by a developing country supporting fishing outside of their Exclusive Economic Zone (EEZ), which exclusively exploits quotas or any other rights, established by a regional fisheries management organization (RFMO) or a regional fisheries management arrangement.

In correspondence, the LCD Group also proposed that the prohibition of Article 2.1 (d), (e) and (f)¹⁷ shall not apply to LDC Members. Specifically, noting that nothing in Article 2.1

stock is managed on the basis of the best available science at the disposal of the concerned Party, consistent with the conservation and cooperation obligations under the relevant international law, as reflected in UNCLOS, conservation and management measures of competent RFMO(s)/A(s), and generally accepted standards for the conservation and management of fisheries resources; and (c) the subsidising Party has a management plan for the fleet segment it intends to subsidise.

¹³ EU - Article 1 - Ibid.

¹⁴ ACP - 2.1.a. Subsidies to fishing vessels, fishing or fishing activity of targeted fish stocks that are in an overfished condition. 2.1.b. Subsidies provided to vessels or operators engaged in illegal, unreported and unregulated (IUU) fishing.

¹⁵ ACP - 3.1 No Member shall be obliged to apply Article 2 of this Agreement before the expiry of a period of one year after entry into force of this Agreement. 3.2 Developing countries are entitled to a further delay of [x] years, and LDCs are entitled to a further [x] years.

-Article 2: For purposes of this Agreement, the following subsidies shall be prohibited: 2.1.a. Subsidies to fishing vessels, fishing or fishing activity of targeted fish stocks that are in an overfished condition. 2.1.b. Subsidies provided to vessels or operators engaged in illegal, unreported and unregulated (IUU) fishing. 2.1.c Subsidies to fishing vessels and fishing or fishing activity for capital and operating costs, within the meaning of instruments elaborated under SCM Agreement Article 1.1, that

contribute to overfishing and overcapacity, provided i. to a developing country Member's large-scale industrial fishing and fishing activity outside of their own EEZ ii. by developed country Members. 2.1. (c) (i.) to a developing country Member's large-scale industrial fishing and fishing activity outside of their own EEZ.

¹⁶ ACP - 2.1.c Subsidies to fishing vessels and fishing or fishing activity for capital and operating costs, within the meaning of instruments elaborated under SCM Agreement Article 1.1, that contribute to overfishing and overcapacity, provided: i. to a developing country Member's large-scale industrial fishing and fishing activity outside of their own EEZ and ii. by developed country Members.

-SCM Agreement Article 1.1 (The Definition of a Subsidy) https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm

¹⁷ LDC - 2.1.d - Capacity enhancing subsidies supporting large scale industrial fishing activities outside of the subsidizing Member's maritime jurisdiction. 2.1.e - Subsidies for acquisition, construction, repair, renewal, renovation, modernization of fishing vessels, or any equipment that increases the ability of a fishing vessel to fish and to find fish. 2.1.f - Subsidies for operating costs including licence fees or similar charges, fuel, ice, bait, personnel, social charges, insurance, and at-sea support; or operating losses of such vessels or activities.

(d), (e) and (f) ¹⁸ shall prevent a developing country Member from maintaining or granting subsidies to the following activities conducted in accordance with the principle of protection and preservation of fisheries resources defined under Article 61 and 62 of the United Nations Conference on the Law of the Sea Treaty (UNCLOS) ¹⁹: (a) Fishing activities related exclusively to artisanal and small-scale fisheries. (b) Fishing activities, which exclusively exploit fish stocks within the economic exclusive zone (EEZ). (c) Fishing activities, which exclusively exploit quotas or any other rights, established by a regional fisheries management organization (RFMO) or a regional fisheries management arrangement.

Whilst other Developing countries such as (Argentina, Colombia, Costa Rica, Panama, Peru, Uruguay) proposed that in order to bring any subsidy programs into conformity with the obligations provided in this provision, developing and least-developed country Members, that at [the time of entry into force/adoption] of this instrument, have not completed; or, need to update the information

related to the status of the fish stocks in the fishery for which the subsidy is provided, shall be granted with a period of time of [X] and [Y] years, respectively, after entry into force, subject to comply with the transparency section provided in paragraph 3.4.²⁰

Members shall make this notification [under 3.1]²¹, for the first time, within one year after [the entry into force/adoption] of this instrument. In the case of developing and least-developed country Members, the information requested in paragraph 3.1²² shall be submitted to the Committee on Subsidies and Countervailing Measures (SCM Committee) within [the entry into force/adoption] of this instrument, 2 years and 4 years, respectively.

Indonesia proposed that notwithstanding the provisions of the ASCM²³ and Article 2.1²⁴ of this proposal, a developing country Member shall be allowed to grant or maintain fisheries subsidies to its artisanal fisheries activities. Notwithstanding the provisions of the ASCM and Article 2.1 of this proposal, a developing country Member shall be allowed to grant or

¹⁸ LDC - Ibid.

¹⁹ Article 61 and 62 of the United Nations Conference on the Law of the Sea Treaty (UNCLOS)
<https://www.jus.uio.no/english/services/library/treaties/08/8-01/unclos.xml>

²⁰ Argentina et al - 3.4 - Within the six months after [the entry into force/adoption] of this instrument, Members that have not completed; or, need to update the information related to the status of the fish stocks in the fishery for which the subsidy is provided, shall inform the SCM Committee.

²¹ Argentina et al - 3.1 - In order to enable effective surveillance of subsidies elimination, Members shall notify as part of their regular notifications under Article 25.3 of the Agreement on Subsidies and Countervailing Measures the following information: a. fleet capacity in the fishery for which the subsidy is provided; b. vessels and operators fishing in areas beyond national jurisdiction, for which the subsidy is provided; c. kind of subsidies provided and amounts granted; d. programme name; e. legal authority for the programme; f. catch data, to the extent possible by species, in the fishery for which the subsidy is provided; g. Status of the fishery for which the subsidy is provided (for example, overexploited, depleted, fully exploited,

recovering or underexploited); h. conservation and management measures in place for the relevant fish stock. i. Total imports/exports, to the extent possible per species.

-Article 25.3 (Notification and Surveillance) of the Agreement on Subsidies and Countervailing Measures
https://www.wto.org/english/tratop_e/scm_e/scm_e.htm

²² Argentina et al - Ibid.

²³ The ASCM Agreement
https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm

²⁴ Indonesia - Article 2.1 - Members shall not grant the following types of subsidies: 2.1.a subsidies granted or maintained, in law or in fact, whether solely or as one of several other conditions, for the purpose of, construction, modernization, renovation, repair or upgrading of existing fishing vessels, including engine or gear acquisition, any technical or electronic equipment on-board the vessel. 2.1.b. subsidies granted or maintained, in law or in fact, whether solely or as one of several other conditions, for the purpose of fixed or variable operational costs of fishing vessels and fishing related activities, including on-board processing.

maintain fisheries subsidies to its small-scale fisheries activities, which are not covered in Article 3.1²⁵. Notwithstanding the provisions of the ASCM and Article 2.1 of this proposal, a developing country Member shall be allowed to grant or maintain fisheries subsidies to other fisheries activities which are not covered in Article 3.1 and Article 3.2²⁶, provided that the purpose is to exploit a. underexploited resources in the Member's own Economic Exclusive Zone; or b. rights held by the Member in high seas fishing quotas or any other rights established by a RFMO or a regional fisheries management arrangement.

However, the mixed group of countries (New Zealand, Iceland, Pakistan) take a general route and propose that appropriate S&DT for developing and least developed Members that does not undermine the effectiveness of the disciplines would be an integral part of these negotiations²⁷.

SDT Flexibilities Relating to Implementation Periods

Here, with respect to article 2.1 b, the proposals by the ACP and LDC group are similar. Thus, according to the ACP group on Article 2.1b²⁸, “in order to establish measures against unreported and unregulated fishing, after the period stipulated in Article 3.1 and 3.2²⁹, developing countries not engaged in large scale industrial distant water fishing are entitled to apply [x] additional years and LDCs [x] additional years of transition period, except for illegal fishing.

Whilst according to the LDC group on Article 2.1.b³⁰, in order to establish measures against unreported and unregulated fishing, after the period stipulated in Article 6.2³¹, developing countries not engaged in large scale industrial distant water fishing are entitled to apply [x] additional year and LDCs [x] additional years transition period to enable them to establish reporting mechanism and regulations through implementing Article 3³². Developing countries

²⁵ Indonesia - Article 3.1 - Notwithstanding the provisions of the ASCM and Article 2.1 of this proposal, a developing country Member shall be allowed to grant or maintain fisheries subsidies to its artisanal fisheries activities.

²⁶ Indonesia - Article 3.1 – Ibid. Article 3.2 – Notwithstanding the provisions of the ASCM and Article 2.1 of this proposal, a developing country Member shall be allowed to grant or maintain fisheries subsidies to its small-scale fisheries activities, which are not covered in Article 3.1.

²⁷ Annex 1

²⁸ ACP - Ibid.

²⁹ ACP - Ibid.

³⁰ LDC - 2.1(b) Subsidies provided to any vessel or operator engaged in illegal, unreported and unregulated (IUU) fishing.

³¹ LDC - 6.2 - Developing countries are entitled to a delay of [x]years, and LDCs are entitled to a delay of [x] years after entry into force of this Agreement.

³² LDC - Article 3.1- The prohibition of Article 2.1 (d), (e) and (f) shall not apply to least developed countries (LDC) Members. 3.2 -Nothing in Article 2.1 (d), (e) and (f) shall

prevent a developing country Member from maintaining or granting subsidies to the following activities conducted in accordance with the principle of protection and preservation of fisheries resources defined under Article 61 and 62 of the United Nations Conference on the Law of the Sea Treaty (UNCLOS): (a) Fishing activities related exclusively to artisanal and small scale fisheries or the subsistence and livelihood of the fishermen and their families; (b) Fishing activities, which exclusively exploit fish stocks within the economic exclusive zone (EEZ) of the Member granting the subsidy; and (c) Fishing activities, which exclusively exploit quotas or any other rights, established by a regional fisheries management organization (RFMO) or a regional fisheries management arrangement.

3.3 - With respect to Article 2.1.b, in order to establish measures against unreported and unregulated fishing, after the period stipulated in Article 6.2, developing countries not engaged in large scale industrial distant water fishing are entitled to apply [x] additional year and LDCs [x] additional years transition period to enable them to establish reporting mechanism and regulations through implementing Article 3.4. 3.4 – [partial] Upon request of a developing country or LDC Member, developed country Members shall provide targeted technical assistance and capacity building

are entitled to a delay of [x] years, and LDCs are entitled to a delay of [x] years after entry into force of this Agreement”³³

On the other hand, no other proposal by any other country or group of countries give any SDT provisions under this heading.

SDT Provisions Relating to Capacity Building and Technical Assistance

Whilst the proposals by the developed country group of the EU and Norway have no SDT provisions regarding capacity building/technical assistance, the proposal by the mixed group of countries (New Zealand, Iceland and Pakistan) call for general provisions where “appropriate SDT that does not undermine the effectiveness of the disciplines may be considered, including capacity building to bring programmes into conformity with the prohibitions.

In a similar manner, the group of other developing countries (Argentina, Colombia, Costa Rica, Panama, Peru, Uruguay) propose that Members agree to implement an effective scheme of cooperation to help developing and least developed country Members to acquire capacity building in the form of technical assistance, in order to fulfil their commitments. This scheme could include bilateral and regional cooperation as well as technical assistance from

relevant international organizations.

However, the ACP group, LDC group and Indonesia have proposed mandatory provision under this heading, where the ACP group submits that developed countries, and developing countries in a position to do so shall provide, and relevant agencies are invited to provide, targeted technical assistance and capacity building to developing countries, in particular LDCs and small, vulnerable economies (SVEs) to: a) address institutional and financial difficulties faced by LDCs and developing countries with constraints to implement this Agreement; b) establish reporting mechanisms and regulations to prevent unreported and unregulated fishing; c) conduct stock assessments d) conduct monitoring, control and surveillance of fish stocks; and e) research and development.

Whilst the LDC group submits that upon request of a developing country or LDC Member, developed country Members shall provide targeted technical assistance and capacity building assistance to address institutional and financial constraints faced by LDCs and developing countries in the implementation of this Agreement. And for establishing reporting mechanisms and regulations to prevent unreported and unregulated fishing, conducting stock assessments, and monitoring fish stocks.

assistance to address institutional and financial constraints faced by LDCs and developing countries in the implementation of this Agreement. [partial] and for establishing reporting mechanisms and regulations to prevent unreported and unregulated fishing, conducting stock assessments, and monitoring fish stocks.

-Article 61 and 62 of the United Nations Conference on the Law of the Sea Treaty (UNCLOS)
<https://www.ius.uio.no/english/services/library/treaties/08/8-01/unclos.xml>

- Article 2.1.b - Subsidies provided to any vessel or operator engaged in illegal, unreported and unregulated (IUU) fishing.

- Article 6.2 - Developed Members shall not be obliged to apply Article 2 of this Agreement before the expiry of a period of [x] year[s] after entry into force of this Agreement.

³³ Annex 1

Indonesia proposed that upon the request of developing country Members, developed country Members shall provide technical assistance to developing country Members on mutually agreed terms and conditions to develop the capacity to initiate, implement, and enforce compliance with a fishery management plan in keeping with the FAO Code of Conduct on Responsible Fisheries³⁴ and adequate to provide the showing required by Articles 3.2 and 3.3³⁵ of this proposal.

Also, upon the request of developing country Members, and with reference to guidance provided by the UN Fish Stocks Agreement³⁶, developed country Members shall provide technical assistance on mutually agreed terms and conditions to developing country Members to allow them to participate fully in any RFMO adjacent to their exclusive economic zone or archipelagic waters³⁷.

How Can the SDT

³⁴ The FAO Code of Conduct on Responsible Fisheries <http://www.fao.org/3/a-v9878e.htm>

³⁵ Indonesia - 3.2 Notwithstanding the provisions of the ASCM and Article 2.1 of this proposal, a developing country Member shall be allowed to grant or maintain fisheries subsidies to its small-scale fisheries activities which are not covered in Article 3.1. 3.3 -Notwithstanding the provisions of the ASCM and Article 2.1 of this proposal, a developing country Member shall be allowed to grant or maintain fisheries subsidies to other fisheries activities which are not covered in Article 3.1 and Article 3.2, provided that the purpose is to exploit: a. underexploited resources in the Member's own Economic Exclusive Zone; or b. rights held by the Member in high seas fishing quotas or any other rights established by a RFMO or a regional fisheries management arrangement.

-Article 2.1 - Members shall not grant the following types of subsidies: 2. 1.a subsidies granted or maintained, in law or in fact, whether solely or as one of several other conditions, for the purpose of, construction, modernization, renovation, repair or upgrading of existing fishing vessels,

Provisions in the TFA be Applied to the Future Fisheries Subsidies Agreement?

The Trade Facilitation Agreement (TFA) entered into force on 22 February 2017 and has three sections. Section one contains 12 articles on publication and the availability of information; procedures for appeal or review; release and the clearance of goods etc. Section two contains 10 articles on SDT provisions for developing and LDC Members, which allows them to determine their timing and need for technical /capacity support in the implementation of provisions, whilst section three has two articles referring to institutional arrangements and final provisions.

To benefit from the TFA, each Member of the WTO must classify each provision of the Agreement under categorisation A, B and C (explained below) and then must inform other WTO Members of these categorizations in accordance with specific timelines, which have

including engine or gear acquisition, any technical or electronic equipment on-board the vessel. 2.1.b. subsidies granted or maintained, in law or in fact, whether solely or as one of several other conditions, for the purpose of fixed or variable operational costs of fishing vessels and fishing related activities, including on-board processing.

-Article 3.1 -Notwithstanding the provisions of the ASCM and Article 2.1 of this proposal, a developing country Member shall be allowed to grant or maintain fisheries subsidies to its artisanal fisheries activities.

- Article 3.2 - Notwithstanding the provisions of the ASCM and Article 2.1 of this proposal, a developing country Member shall be allowed to grant or maintain fisheries subsidies to its small-scale fisheries activities, which are not covered in Article 3.1.

³⁶ The UN Fish Stocks Agreement http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm

³⁷ Annex 1

been outlined in the Agreement. Hence,

- Category A: For provisions that a member will implement by the time the Agreement enters into force (or in the case of a least-developed country within one year after entry into force).
- Category B: For provisions that the member will implement after a transitional period following the entry into force of the Agreement.
- Category C: For provisions that the member will implement on a date after a transitional period following the entry into force of the Agreement and requiring the acquisition of assistance and support for capacity building.

In addition, the TFA also provides extra protections/flexibilities for developing countries and LDC Members, which relate to early warning mechanisms, expert group; shifting between categories and grace period.³⁸

One can then argue that the TFA could be used as a basis for future negotiations on SDT as not only is SDT very much ingrained into the Agreement, it is also the first WTO Agreement, which gives complete control to Members in determining their own own implementation schedules and where progress is linked to technical assistance and support for capacity building.³⁹ With this, the Agreement acknowledges the need for Members to increase their assistance outputs and requires “donor

members,” such as the United States, to provide needed capacity building and support.⁴⁰

For LDCs, the Agreement provides even greater flexibilities as they are permitted to determine individual implementation schedules for the provisions in Articles one – 12, and to request technical assistance and capacity building support, which can be in the form of technical, financial, or other agreed forms of assistance.⁴¹

In 2016, Six Latin American countries (Argentina, Colombia, Costa Rica, Panama, Peru and Uruguay) were then of the view that the TFA approach could serve as a useful basis for the fisheries subsidies negotiations as it has been accepted by all WTO Members and the structures stated above could be those adapted. They also suggested that commitments should be categorised by each Member as Category A: to be implemented by the time the Agreement enters into force. Category B: to be implemented after a transitional period following the entry into force of the Agreement and Category C: capacity building and capacity should be attained before implementation.⁴²

In this respect, some of the core disciplines in the fisheries subsidies negotiations for example, the assessment of fish stock mechanisms, good enforcement mechanisms (i.e surveillance vessels to collect evidence on IUU fishing activities, good catch data etc.,) could be those categorized in category A, B, and especially C for the need of capacity/technical assistance.

³⁸ The Trade Facilitation Agreement: An overview https://www.wto.org/english/tratop_e/tradfa_e/tradfatheagr eement_e.htm

³⁹ Special and Differential Treatment as an Incompletely Theorised Agreement. <https://strathprints.strath.ac.uk/62476/>

⁴⁰ World Trade Organization: Overview and Future Direction <https://www.hsdl.org/?abstract&did=819289>

⁴¹ Ibid.

⁴² TN/RL/GEN/183.

Also, in 2017, in the fisheries subsidies matrix,⁴³ the ACP, LDC and Argentina et al group recommended transitional periods such as those in the TFA as these will provide Members with flexibilities, which are needed to implement all provisions of the Agreement, as well as the affirmation that they will have the time and assistance to do so.⁴⁴

Nonetheless, it is unclear how a TFA type approach would act as the full basis for a future fisheries subsidies Agreement as under the TFA, it is possible to determine when the implementation capacity is reached for certain commitments i.e in the establishment of a single window. On the other hand, in the fisheries subsidies negotiations, as most of the disciplines would be negative for example, prohibit fisheries subsidies to IUU vessels, this then poses a problem as such obligations need on-going assessments of fish stocks, the surveillance of vessels etc., which can be time-consuming and achieved over a long period.

In addition, in their 2017 proposal, Argentina et al⁴⁵ also did not reinforce further the idea that the TFA Agreement could serve as a useful basis for the fisheries subsidies negotiations and this could depict that after much thought, they themselves did not see the feasibility of the TFA model in directing the fisheries subsidies negotiations.⁴⁶

However, it cannot be denied that the negotiations, which led to the TFA Agreement showed an inclusive manner of carrying out

trade negotiations where the needs of developing countries and LDCs are very much captured in SDT; are at the forefront of the concluding Agreement and also recognises the necessity in providing developing countries and LDCs with mandated and uniquely structured support.⁴⁷

Conclusion

At MC11, “Members 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 that prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU-fishing recognizing that appropriate and effective special and differential treatment for developing country Members and least developed country Members should be an integral part of these negotiations”⁴⁸

In addition, SDG 14.6, states that “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

⁴³ Matrix
https://www.wto.org/english/news_e/news17_e/fish_28jul17_e.htm

⁴⁴ Ibid.

⁴⁵ TN/RL/GEN/187/Rev.21 - Argentina et al

⁴⁶ SC/AN/TDP/2017/5 South Centre - The WTO's Fisheries Subsidies Negotiations.

⁴⁷ Ibid.

⁴⁸ MC11 decision
https://www.wto.org/english/news_e/news17_e/mc11_13dec17_e.htm

Organization fisheries subsidies negotiation”.⁴⁹

With this, there now exists a push to move faster in concluding the negotiations on fisheries subsidies at the WTO, and as they did in the negotiations for the TFA, Members should strive to agree on definitions, disciplines, timelines and most importantly, the future fisheries subsidies Agreement should be aimed at “ensuring the appropriate enforcement of disciplines; exploring the cooperation between competent authorities; and identifying cases in which flexibilities (S&DT) should be given to fulfil the commitments included in the Agreement”.⁵⁰

⁴⁹ Sustainable Development Goal 14
<https://sustainabledevelopment.un.org/sdg14>

⁵⁰ TN/RL/GEN/183.

Annex 1: Members' Proposals on SDT in Fisheries Subsidies Negotiations

GENERAL SDT PROVISIONS							
	New Zealand, Iceland, Pakistan TN/RL/GEN/186	EU TN/RL/GEN/ 181/Rev.1	Indonesia TN/RL/GEN/189/Rev.1	ACP Group TN/RL/GEN/192	Argentina, Colombia, Costa Rica, Panama, Peru, Uruguay TN/RL/GEN/187/Rev.2	LDC Group TN/RL/GEN/193	Norway TN/RL/GEN/191
GENERAL SDT	<p>[...] Appropriate S&DT for developing and least developed Members that does not undermine the effectiveness of the disciplines would be an integral part of these negotiations.</p> <p>Appropriate S&DT that does not undermine the effectiveness of the disciplines may be considered, including capacity building to bring programmes into conformity with the prohibitions.</p>			<p>The operationalization of disciplines on fisheries subsidies should not impede the ability of developing countries and LDCs to develop and diversify their fisheries sector.</p>			

FLEXIBILITIES

<p>NZ, Iceland, Pakistan TN/RL/GEN/186</p>	<p>EU TN/RL/GEN/181/Rev.1</p>	<p>Indonesia TN/RL/GEN/189/Rev.1</p>	<p>ACP Group TN/RL/GEN/192</p>	<p>Argentina, Colombia, Costa Rica, Panama, Peru, Uruguay TN/RL/GEN/187/Rev.2</p>	<p>LDC Group TN/RL/GEN/193</p>	<p>Norway TN/RL/G EN/191</p>
<p>Article 1 does not apply to subsidies granted or maintained by developing and least developed countries for fishing vessels which are used for subsistence fishing.</p> <p>Developing and least developed countries may grant or maintain subsidies referred to under Article 1 if the following conditions are met:</p> <p>(a) the vessel benefitting from the subsidy does not target fish stocks that are in an overfished condition.</p> <p>(b) the targeted stock is managed on the basis of the best available science at the disposal of the concerned Party, consistent with the conservation and cooperation obligations under the relevant international law, as reflected in UNCLOS, conservation and management measures of competent RFMO(s)/A(s), and generally accepted standards for the conservation and management of fisheries resources; and</p> <p>(c) the subsidising Party has a management plan for the fleet segment it intends to subsidise.</p> <p>Developing countries ranking among the world's [X] biggest in terms of marine capture production as determined by the FAO shall endeavour to refrain from making use of the flexibilities set out in Article 4.2.</p>	<p>Notwithstanding the provisions of the ASCM and Article 2.1 of this proposal, a developing country Member shall be allowed to grant or maintain fisheries subsidies to its artisanal fisheries activities.</p> <p>Notwithstanding the provisions of the ASCM and Article 2.1 of this proposal, a developing country Member shall be allowed to grant or maintain fisheries subsidies to other fisheries activities which are not covered in Article 3.1 and Article 3.2, provided that the purpose is to exploit:</p> <p>a. underexploited resources in the Member's own Economic Exclusive Zone; or</p> <p>b. rights held by the Member in high seas fishing quotas or any other rights established by a RFMO or a regional fisheries management arrangement.</p>	<p>Prohibitions other than those outlined in Article 2.1(a) and 2.1(b) shall not apply to LDCs.</p> <p>With respect to Article 2.1.b, in order to establish measures against unreported and unregulated fishing, after the period stipulated in Article 3.1 and 3.2, developing countries not engaged in large scale industrial distant water fishing are entitled to apply [x] additional years and LDCs [x] additional years of transition period, except for illegal fishing.</p> <p>The prohibition under 2.1(c) (i) shall not apply to subsidies provided by a developing country supporting fishing outside of their EEZ, which exclusively exploits quotas or any other rights, established by a regional fisheries management organization (RFMO) or a regional fisheries management arrangement.</p>	<p>In order to bring any subsidy programs into conformity with the obligations provided in this provision, developing and least-developed country Members, that at [the time of entry into force/adoption] of this instrument, have not completed; or, need to update the information related to the status of the fish stocks in the fishery for which the subsidy is provided, shall be granted with a period of time of [X] and [Y] years, respectively, after entry into force, subject to comply with the transparency section provided in paragraph 3.4.</p> <p>Members shall make this notification [under 3.1], for the first time, within one year after [the entry into force/adoption] of this instrument. In the case of developing and least-developed country Members the information requested in paragraph 3.1 shall be submitted to the Committee on Subsidies and Countervailing Measures (SCM Committee) within [the entry into force/adoption] of this instrument, 2 years and 4 years, respectively.</p>	<p>The prohibition of Article 2.1 (d), (e) and (f) shall not apply to least developed countries (LDC) Members.</p> <p>With respect to Article 2.1.b, in order to establish measures against unreported and unregulated fishing, after the period stipulated in Article 6.2, developing countries not engaged in large scale industrial distant water fishing are entitled to apply [x] additional year and LDCs [x] additional years transition period to enable them to establish reporting mechanism and regulations through implementing Article 3.4.</p> <p>Nothing in Article 2.1 (d), (e) and (f) shall prevent a developing country Member from maintaining or granting subsidies to the following activities conducted in accordance with the principle of protection and preservation of fisheries resources defined under Article 61 and 62 of the United Nations Conference on the Law of the Sea Treaty (UNCLOS):</p> <p>(a) Fishing activities related exclusively to artisanal and small-scale fisheries.</p> <p>(b) Fishing activities, which exclusively exploit fish stocks within the economic exclusive zone (EEZ) of the Member granting the subsidy; and</p> <p>(c) Fishing activities, which exclusively exploit quotas or any other rights, established by a regional fisheries management organization (RFMO) or a regional fisheries management arrangement.</p> <p>Developing countries are entitled to a delay of [x] years, and LDCs are entitled to a delay of [x] years after entry into force of this Agreement.</p>		

CAPACITY BUILDING/ TECHNICAL ASSISTANCE

NZ, Iceland, Pakistan TN/RL/GEN/186	EU TN/RL/GEN/181 /Rev.1	Indonesia TN/RL/GEN/189/Rev.1	ACP Group TN/RL/GEN/192	Argentina, Colombia, Costa Rica, Panama, Peru, Uruguay TN/RL/GEN/187/Rev.2	LDC Group TN/RL/GEN/193	Norway TN/RL/G EN/191
<p>Appropriate SDT that does not undermine the effectiveness of the disciplines may be considered, including capacity building to bring programmes into conformity with the prohibitions</p>		<p>Upon the request of developing country Members, developed country Members shall provide technical assistance to developing country Members on mutually agreed terms and conditions to develop the capacity to initiate, implement, and enforce compliance with a fishery management plan in keeping with the FAO Code of Conduct on Responsible Fisheries and adequate to provide the showing required by Articles 3.2 and 3.3 of this proposal.</p> <p>Upon the request of developing country Members, and with reference to guidance provided by the UN Fish Stocks Agreement, developed country Members shall provide technical assistance on mutually agreed terms and conditions to developing country Members to allow them to participate fully in any RFMO adjacent to their exclusive economic zone or archipelagic waters.</p>	<p>Developed countries, and developing countries in a position to do so shall provide, and relevant agencies are invited to provide, targeted technical assistance and capacity building to developing countries, in particular LDCs and small, vulnerable economies (SVEs) to: a) address institutional and financial difficulties faced by LDCs and developing countries with constraints to implement this Agreement; b) establish reporting mechanisms and regulations to prevent unreported and unregulated fishing; c) conduct stock assessments d) conduct monitoring, control and surveillance of fish stocks; and e) research and development.</p>	<p>Members agree to implement an effective scheme of cooperation to help developing and least developed country Members to acquire capacity building in the form of technical assistance in order to fulfill their commitments. This scheme could include bilateral and regional cooperation as well as technical assistance from relevant international organizations.</p>	<p>Upon request of a developing country or LDC Member, developed country Members shall provide targeted technical assistance and capacity building assistance to address institutional and financial constraints faced by LDCs and developing countries in the implementation of this Agreement and for establishing reporting mechanisms and regulations to prevent unreported and unregulated fishing, conducting stock assessments, and monitoring fish stocks".⁵¹</p>	

⁵¹ Fisheries Subsidies Compilation Matrix (TN/RL/W/273) https://www.wto.org/english/news_e/news17_e/fish_28jul17_e.htm



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