

Fishing subsidies negotiations towards MC13: Some key issues

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Disciplines on fisheries subsidies have been discussed and mandated to be negotiated in the World Trade Organization (WTO) since 2001. In the earlier phase, the issue was pitched more towards trade distortion, similar to the approach on trade in agriculture. However, increasingly environmental sustainability became the central objective. This approach was reinvigorated by Sustainable Development Goal (SDG) 14.6 which was signed in 2015 and kickstarted the negotiations in 2016.

The Agreement on Fisheries Subsidies (AFS) was signed in 2022 at the 12th Ministerial Conference (MC12) of the WTO, but covered only illegal, unreported and unregulated (IUU) fishing and overfished stocks – consisting two out of the three pillars under consideration. Under the AFS, only a two-year special and differential treatment (S&D) exemption was made available for developing countries and least developed countries (LDCs). The AFS also includes very stringent notification requirements under its Article 8. In particular, Footnote 12 requires Member States to provide information under Article 8.1 “in addition to all the information required under Article 25 of the SCM [Subsidies and Countervailing Measures] Agreement and as stipulated in any questionnaire utilized by the SCM Committee, for example G/SCM/6/Rev.1”.

Overcapacity and overfishing (OCOF)

The third pillar of the fisheries subsidies negotiations, which concerns subsidies that contribute to overcapacity and overfishing, has continued to be negotiated since MC12 as Member States could not reach an agreement earlier. While significant compromises were already made by developing countries and LDCs in agreeing to Part 1 of the AFS, the lack of agreement on the OCOF pillar (or Article 5 under the complete agreement) points to the important role such subsidies play in most countries. These subsidies are not limited to relatively narrow categories such as IUU fishing or overfished stocks but are broader subsidies covering a range of fishing activities including capital costs and infrastructure costs. These are critical for developing countries as future development of the sector depends on such subsidies. The proof of the importance of OCOF subsidies lies in the long battle over the substance of the disciplines.

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The following provides a brief analysis and highlights key points on the basis of the text (WTO document TN/RL/W/277) provided by the Chair of the fisheries subsidies negotiations, Ambassador Einar Gunnarsson of Iceland, on 21 December 2023 and the revised text (WT/MIN(24)/W/10) released on 16 February 2024 for consideration at MC13. (The Article numbering below refers to the 16 February text.)

Part A: Disciplines

1. List-based approach (Article A.1): Article A.1 contains a non-exhaustive list of subsidies that purportedly contribute to OCOF and that are to be prohibited under the proposed disciplines. This list includes certain items sensitive for developing countries such as “subsidies to costs of personnel, social charges, or insurance”, or income support for workers. In spite of concerns expressed by many developing countries, these items continue to be in the list. At the same time, subsidies to distant-water fishing (DWF), which is the most unsustainable and industrial scale of fishing, have been taken out of the list.

2. Sustainability exemption (Article A.1.1.a) based on notification: *This implies that while all developed countries are technically under the purview of the disciplines under Article A.1, they can easily escape the obligations.*

This clause has been the biggest weakness of the suggested disciplines right from the first phase of the negotiations when it emerged as an escape clause for developed countries. It suggests that if a country can demonstrate that “measures are implemented that can reasonably be expected to ensure that the stock or stocks in the relevant fishery or fisheries are at a biologically sustainable level”, it can continue to subsidize. It is mainly the developed countries and advanced fishing nations (again, mainly developed countries) that have the mechanisms to monitor such stocks, often built up with years of subsidization. On the other hand, developing countries do not have such infrastructure and may not have the ability to build such capacities to monitor fish stocks in the next 20 years, and therefore cannot make use of the sustainability exemption. So while in principle all developed countries have obligations to cut subsidies unless they meet the sustainability exemption, they can in effect meet the exemption’s notification requirement quite easily. As a result, this so-called hybrid approach brings in the most powerful components of inequity and unfairness, resulting in what is referred to as reverse S&D for developed countries.

In spite of the fact that many developing countries have repeatedly objected to it, it seems to have become impossible to remove the sustainability exemption provision in the second phase of the negotiations. But it is clear that as long as this sustainability exemption remains, the AFS is likely to become a repeat of the WTO Agreement on Agriculture (AoA), where rich countries get to keep their subsidies while poorer countries are made to cut theirs.

It is also important to note that a notification requirement alone does not amount to stricter conditions on the use of the sustainability exemption. Currently the conditions are simply based on additional notification and not any real disciplines. Ideally, the developed countries should not have recourse to the sustainability exemption at all. At a minimum, the top 10 subsidizers and those significantly engaged in DWF should not have recourse to the sustainability exemption clause.

3. Flexibility for developing countries (Article A.1.1.b): The new proposed text for MC13 (WT/MIN(24)/W/10) suggests that developing countries which are not among the top 10 subsidizers and do not “significantly” engage in distant-water fishing may have more flexible notification requirements regarding the use of the sustainability exemption.

The following points may be noted in this regard:

- **The top 10 subsidizers** will likely include a few developing countries, e.g., China, Chinese Taipei, Thailand and Malaysia. There may be some questions on how the top 10 will be determined and disciplines operationalized. Data related to subsidies is not of the required quality, and it is difficult to determine the top 10 subsidizers if the full data is not known and not consistent across datasets. The list may also change from year to year. The question also is whether this criterion can account for historical subsidization and pin responsibility, say, on the top subsidizers for the last 30 years. This exemption is however a clear improvement on the stricter disciplines for the top 20 subsidizers proposed in the 21 December text, especially since the top few among the top 20 give much higher subsidies compared with the rest, therefore giving grounds for the argument that the same rules cannot apply to all of them.
- The Article A.1.1.b flexibility for developing countries is not allowed for **countries which are significantly engaged in DWF**. Footnote 6 suggests that a country is considered to be “significantly engaged in the fishing or fishing related activities referred to in this subparagraph if the combined volume of marine capture production of its vessels or operators in the relevant FAO Major Fishing area(s) exceeds 2 per cent of the total volume of marine capture production of that Member”. Currently most developing countries will likely not be under this category but if their DWF catch does exceed 2% of their total catch, they will then have to comply with the notification requirements under Article A.1.1.a.

DWF-based disciplines seem to be the most rational and fair approach to disciplining subsidies as such fishing definitely requires large-scale vessels with high capacity. Historically, large-scale fishing in distant waters has been the most responsible for the current state of global waters and the depletion of marine resources at an alarming scale. In spite of this, the disciplines on DWF are still weak (see also point 4 below). In fact, it may be suggested that countries significantly engaged in DWF should not be able to use the sustainability exemption (as a counterpart to Article B.5 – see point 8 below).

- It is also to be noted that developing countries which are eligible for the flexibility under Article A.1.1.b will still have to meet the **general notification requirements** under Article A.1.1.a in order to use the sustainability exemption. They will have to demonstrate through their “regular notifications of fisheries subsidies under Article 25 of the SCM Agreement and Article 8.1 of the AFS” that “measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level”. Whether they will be able to comply with the notification requirements already agreed under Article 8 of Part 1 of the AFS remains to be seen. The fact that most developing countries are currently not able to notify under Article 25 of the SCM Agreement indicates that they may not be able to make such notifications and will therefore not be able to exempt their subsidies from cuts. Further, they may be asked for clarifications (Article A.1.2), to which they “shall respond ... as quickly as possible in writing and in a comprehensive manner”.

4. Subsidies to distant-water fishing (Article A.2) are apparently banned but the proposed provision is designed to offer a loophole and allow such subsidies to continue. Under Article A.2.a, Members cannot give subsidies “contingent upon or tied to” DWF. But in reality, DWF may receive subsidies classified under any other heads. Further, traditional arrangements are exempt under Footnote 16, which may be another escape clause. Finally, access agreements such as those used by the European Union (EU) have been kept outside the purview of the AFS, allowing the EU to continue with its subsidized distant-water fishing.

- Article A.2.b, added to the 16 February text, allows an exemption from the already weak A.2.a, for “the non-collection from the operators or vessels of government to government payments under agreements and other arrangements with coastal Members or coastal non-Members for access to the surplus of the total allowable catch of the living resources in waters”. Government to government

payments under access agreements, used by the EU for example, are already exempt under Footnote 2 of the AFS (Part 1). India had suggested that non-collection from operators or vessels that benefit from such government payments should be brought under the ambit of the disciplines as these are in effect a subsidy to such fishing fleets if they do not have to pay for using these waters. But it seems the EU may have included this provision to ensure protection for its distant-water fishing activities.

Part B: Special and differential treatment

5. The exemption for LDCs and those developing countries with <0.8% share in global marine catch (Article B.1 and B.2): This seems to be agreed. Developing countries can push to get this limit extended to 1.2% as some have already proposed. However, the important point to remember is that to be exempted under these provisions, a country has to remain an LDC or remain a low-catch country. If the fishing sector in countries in the latter category grows, they can no longer avail of S&D. It is also important to remember that a country's share of catch may increase, even beyond 0.8%, if the share of another country goes down for some reason; this may happen even if the first country does not catch more fish in absolute terms. Moreover, graduating LDCs will join the ranks of developing countries, and if their share is above 0.8% of global marine catch, they will be expected to take on full commitments after availing of the limited S&D available under Article B.3 (see point 6). Therefore, it is in the interest of LDCs, graduating LDCs and those developing countries with lower than 0.8% share to still join the fight for a broad and permanent S&D exemption under Article B.3.

6. General S&D for developing countries is limited by time (Article B.3): The general S&D for developing countries whose share of global marine catch is above 0.8% is only for a limited period; the exact duration of this period is still bracketed in the text, denoting lack of agreement. Whatever the eventual outcome, it is clear that the exemption is unlikely to be permanent even up to the exclusive economic zone (EEZ). This is contrary to the rights given under the United Nations Convention on the Law of the Sea (UNCLOS) to countries up to areas under their national jurisdiction. There is still merit in developing countries fighting to make this permanent to ensure policy space for future growth. At a minimum, the exemption period should be 20 years; anything less will not allow developing countries to develop the wherewithal to meet their commitments.

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

- The 16 February text suggests an exemption for small-scale fishing up to 12 or 200 nautical miles (NTM), with the exact geographical limit still in square brackets (not yet decided). This geographical limit was earlier 12 or 24 NTM, which effectively amounts to a punishment for those who are not responsible for unsustainable fishing and whose subsidies should have been completely exempt up to the EEZ. The current formulation offers a ray of hope but developing countries have to fight to ensure it is up to 200 NTM. However, they need to add reference to the EEZ or the area of national jurisdiction (which is generally 200 NTM but not always) over which UNCLOS ensures their rights. This should be a red line for all developing countries and graduating LDCs.
- The exemption for what was earlier limited only to “low-income, resource-poor, livelihood fishing or fishing related activities” has now been expanded to “small scale and artisanal fishing or fishing related activities that are primarily low income, resource poor or livelihood in nature” in the 16 February text. This is a significant improvement. The provision also says that this category may be “operationally defined by a Member”, which recognizes national sovereign policy space on this matter. In the 21 December text, the definition of the target group was narrow and hazy. There were attempts to pin it down rather than allow developing-country governments to define it in their national contexts. In that respect, the 16 February text offers significant improvement. However, whether such definitions, which have to be notified by Member States (Article B.4.b), can be contested is not yet clear.

8. S&D is not available to a country with significant engagement in DWF (Article B.5): The Chair's text of 16 February implies that S&D under Article B.3 or B.4 will not be available to a developing country if more than 2% of its marine catch comes from DWF (Footnote 23). The definition of "significantly engaged" is the same as under Article A.1.1.b. This is an improvement over the 21 December text which suggested that even if one fleet engages in DWF in a developing country, they will not have recourse to any S&D. Currently DWF in most developing countries will likely be under the 2% limit, though the data is not really clear as yet. But if they do cross that limit in the future, they will lose access to S&D.

Two further points are to be noted:

- In the earlier text, exemption for LDCs and those countries with a share below 0.8% of global marine catch was also included under this clause. While the provision has improved in this regard, exemption for small-scale fishers will still be barred if conditions under this paragraph are met.
- While this limits exemption for developing countries if DWF accounts for more than 2% of their catch, the proposed agreement still allows some developed countries to continue and also sometimes subsidize their DWF. The EU, for example, can carry on subsidizing under its access agreements through Article A.2.b and Footnote 2 of AFS Part 1. This means the inequality in the global fisheries economy will be perpetuated.

9. Moreover, under the notification requirements proposed under Article C.6, a developing country can avail of provisions under Article B.2–B.4 "only in respect of subsidies which it has notified to the Committee under Article 25 of the SCM Agreement and Article 8.1 of the AFS". This provision is currently in square brackets. If agreed, it will place undue restrictions on developing countries' ability to use S&D.

Notification and other issues

10. This briefing does not cover notification issues in detail. It is important to note that the notification requirements under Part C of the proposed agreement are particularly onerous for developing countries and LDCs. Article C.4 asks developing countries to file the initial notifications within 120 days of entry into force of the OCOF provisions, which may be quite difficult for them to do. There is no clarity on how this timeframe of 120 days was decided on. There is also no clarity about the data to be filed. Further, since this notification is supposed to be done in 120 days from the entry into force of these provisions, it is not clear what the relevant time period is for those countries that ratify late. Meanwhile, Article C.5 allows the WTO Secretariat to seek clarifications from Members on their notifications. It is not clear whether Members are expected to change their notifications if their clarifications are not deemed satisfactory by the Secretariat.

It seems that detailed negotiations are still needed on notifications. But it has apparently been suggested that there will not be negotiations on most of the major notification provisions.

11. Further, several other issues remain unresolved and need further intervention. For example, non-specific fuel subsidies are currently covered only by notification requirements under Article C.3 but no disciplines are included. This issue could be tackled while integrating S&D. The weak technical assistance (under Part 1 of the AFS) may also be taken up by developing countries.

Some points for further consideration

- **Alliance and mutual support among developing countries** remain key to addressing some of the critical points described above. Given the challenges they are facing not only under the AFS but also in almost all other areas of the WTO negotiations, this alliance and solidarity will be critical even for the future.

- **“No agreement is better than a bad agreement.”** There is no rush to conclude the fisheries subsidies negotiations in MC13. Most other issues of interest to developing countries and LDCs, for example in agriculture, are not getting any outcome in MC13. A bad outcome can forever jeopardize the future growth potential of their fisheries sector and the possibility of generating livelihoods therefrom.
- **The future of S&D** in other WTO agreements/negotiations will be influenced by what happens to S&D in this agreement. If some countries use an opt-out clause, that may itself challenge the principle of general self-determination. But more importantly, the broad trend towards limiting S&D would lay down a problematic precedent. Developing countries can argue that limiting S&D violates the SDG 14.6 mandate of “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 impact of the current AFS and ratification thereof:** As of 14 February 2024, the current agreement (Part 1) has been ratified by 60 Members (including the 27 under the EU), which is 55 per cent of what is needed for the agreement to come into effect (two-thirds of the WTO membership).

However, the rules on ratification are not very clear at the moment. It seems like those who have already ratified Part 1 of the AFS will have to separately ratify Part 2 (the additional provisions on OCOF) or will have to ratify the comprehensive agreement as a whole. This means that ratifying Part 1 at this point does not serve any purpose. There may be attempts also to ensure that those who have ratified Part 1 are automatically assumed to have ratified Part 2 even if they are not satisfied with it. Therefore, for those who have not ratified yet, it may be prudent to wait to see the outcome of Part 2 (OCOF subsidies) before committing.

Those who have not ratified until the conclusion of Part 2 will presumably ratify the comprehensive agreement. It is clear that the impact on the fishing sector will be determined by the comprehensive effect of the commitments under the full agreement. In fact, adverse provisions in Part 2 may compromise governments’ ability to meet commitments under Part 1. For example, governments may have thought they could make sure their small fishers shift from the IUU category to registered categories and can therefore be protected. But if they cannot even be protected through Article B.4 under the OCOF S&D provisions, it may not be possible for them to meet the Part 1 commitments.

Therefore, governments must weigh their options before they complete the process of ratification.

In sum, the following are must-haves for developing countries and LDCs:

1. Either get the sustainability exemption removed completely, or do not allow access to the sustainability exemption for developed countries. At a minimum, the top 10 subsidizers and those significantly engaged in DWF should not have recourse to the sustainability exemption clause.
2. Under Article A.2, any subsidies to DWF must be prohibited, including those given under other headings (not just subsidies contingent upon or tied to DWF). Non-collection of payments from the operators or vessels of government to government payments under agreements must be considered a subsidy and brought under the disciplines.
3. Under S&D, a permanent exemption for developing countries, or at least 20 years’ exemption, must be agreed.
4. Exemption for subsidies for artisanal and small-scale fishing up to the EEZ or area of national jurisdiction or 200 NTM, as relevant for each developing-country and LDC Member, must be ensured, and the coverage and sovereign national determination of coverage under this category should be protected.

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