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A development perspective on WTO fish subsidies negotiations

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Abstract

Momentum for creating new disciplines on fisheries subsidies grew again since 2015, with the adoption of the 2030 Sustainable Development Agenda. Target 6 of SDG 14 calls on UN Members “to prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated (IUU) fishing, recognizing appropriate and effective special and differential treatment (SDT) for developing countries and LDCs within the WTO context by 2020”. Despite constructive engagement of Members since the launch of the negotiations, a comprehensive agreement is yet to be delivered. All efforts have focused now on implementing the Buenos Aires WTO Ministerial Decision mandate. The Chair of the Negotiating Group on Rules has undertaken a mixed and flexible line of work composed of cluster meetings, bilateral sessions, incubator groups made of selected delegations, and since early 2019 a process involving facilitators on four main areas of the disciplines namely: IUU fishing, overfished stocks, overfishing and overcapacity and cross-cutting issues. The key issues under negotiations relate to definitions, the scope of the disciplines, subsidies to fishing, subsidies for IUU fishing or on overfished stocks, subsidies that contribute to overfishing, possible approaches to prohibit or to reduce subsidies, SDT treatments, technical assistance and capacity building, notification, transparency and surveillance. While there are many complex technical challenges, several approaches can be identified to move forward. The components of a potential hybrid approach (prohibition plus a caps-based system) is identified as an interesting bridging option. Decisions on the most suitable approach will be needed by Member States in the short term if deadline by end of 2019 is to be respected.

Keywords: Fisheries subsidy, subsidies prohibitions, illegal, unreported and unregulated fishing, fishing vessels, IUU regulations, flag state, overfishing, overcapacity, economic exclusive zone, maximum sustainable yield, fisheries subsidy caps, special and differential treatment.

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1. Introduction

Global fisheries suffer from overfishing. According to the United Nations Food and Agriculture Organization, around 69 per cent of assessed fish stocks are within biologically sustainable levels and 31 per cent are fished at biologically unsustainable levels (FAO, 2018). The global fishing fleet is also severely over-capitalized. With fishing power continuously increasing and resources being slowly depleted, the productivity of global fishing has been falling significantly in recent years (ICTSD and WEF, 2014). There is strong evidence that subsidies that reduce the cost of fisheries operations and those that enhance revenues can contribute to the build-up of excessive fishing capacity and unsustainable levels of fishing, with significant consequences for poverty reduction, employment and nutrition security in developing countries. By recent estimates, subsidies to the fishing industry amounted to around \$35.4 billion per year, of which around \$22.2 billion were given in forms that tend to enhance fishing capacity (Sumaila et al., 2019). Public support by the Organisation for Economic Co-operation and Development (OECD) Members to the fisheries sector has reached an average of \$9.3 billion during the period 2010-2015 (UNCTAD, FAO and UN Environment (2019)). Since 2014, UNCTAD has been involved in supporting a successful outcome to World Trade Organization (WTO) negotiations with various contributions including the Oceans Forum, numerous research pieces and, more recently, with an Inter-Agency Plan of Action to accelerate the implementation of trade-related aspects of Sustainable Development Goal 14 (2020-2025)¹. In this context, this note seeks to provide an overview under a development perspective of the chronology, key issues on the table, as well as some options and approaches with a view to move forward in the last phase of negotiations.

2. Chronology of WTO fish subsidies negotiations

International discussions on the need to discipline fish subsidies have been on the multilateral stage for more than 20 years. The timeline below highlights some of the key milestones around this process.

2000: FAO International Plan of Action for the Management of Fishing Capacity (IPoA MFC). “States should reduce and progressively eliminate all factors, including subsidies and economic incentives and other factors which contribute, directly or indirectly, to the build-up of excessive fishing capacity thereby undermining the sustainability of marine living resources, giving due regard to the needs of artisanal fisheries” (Article 26 of the IPoA MFC). Only three countries and two regional fisheries management organizations (RFMOs) have presented plans to implement this IPoA.

2001: WTO Doha Development Agenda. The Doha Ministerial declaration calls on Members to “clarify and improve” WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries (Paragraph 28 of the Doha Ministerial Declaration).

2005: WTO Hong Kong Ministerial Conference. Ministers issue a call for prohibiting certain forms of fisheries subsidies that contribute to overcapacity and overfishing, taking into account appropriate SDT for developing and least developed Members as an integral element of the negotiations. (Annex D, paragraph 9 of the Hong Kong Ministerial Declaration).

2008: WTO draft consolidated text on anti-dumping, subsidies and countervailing measures including fisheries subsidies. The chair of the WTO Negotiating Group on Rules circulates a draft consolidated text (TN/RL/22) including possible disciplines on fisheries subsidies. The text is the first attempt at defining a list of prohibited subsidies, new rules for actionable fisheries subsidies, general exceptions and a sophisticated system of SDT including greater exceptions for small-scale fishing close to shore and narrower exceptions for larger-scale fishing. The Chair text is discussed by Members but never adopted as the basis for closing negotiations.

¹ See <https://unctad.org/meetings/en/SessionalDocuments/ditc-ted-14062019-oceans-JPoA-Pamphlet.pdf>.

2008-2015: Long reflection period. As a consequence of failure of the so-called 2008 July Package under the Doha Round negotiations, the 2008 Chair text stopped being a reference text and a long pause on text-based negotiations occurred. WTO Rules Chairs started a process of focusing on key questions instead of a consolidated text in order to find some common ground to move forward.

2015: Proposal by the Africa, Caribbean and Pacific (ACP) Group, followed by other WTO Members. The ACP Group is the first to propose that the post-Bali work programme prioritizes a set of core disciplines on fisheries subsidies for possible agreement by the 10th Ministerial Conference (JOB/TNC/46). The proposed core disciplines include, among others, a prohibition of subsidies for destructive fishing practices; subsidies to vessels engaged in IUU; and subsidies targeting overfished stocks. The proposal is followed shortly after by a submission from Argentina, Iceland, New Zealand, Norway, Peru, and Uruguay taking a similar approach (TN/RL/W/258). After several years of slow progress, these proposals create new momentum in the negotiations.

2015: Sustainable Development Goal 14. Heads of state adopt SDG 14 to “conserve and sustainably use the oceans, seas and marine resources for sustainable development”. Target 6 of SDG 14 calls on Members to prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and to eliminate subsidies that contribute to IUU fishing, recognizing appropriate and effective SDT for developing countries and Least Developed Countries (LDCs) within the WTO context by 2020.

2015: Trans-Pacific Partnership (TPP) disciplines on fisheries subsidies. The first disciplines ever agreed on fisheries subsidies in a regional trade agreement. The Environmental Chapter includes a binding prohibition of “subsidies for fishing that negatively affect fish stocks that are in an overfished condition” and “subsidies provided to any fishing vessel while listed by the flag State or a relevant Regional Fisheries Management Organization or Arrangement for IUU fishing (Article 20.16 (5) of the TPP).

2016: UNCTAD XIV. At UNCTAD XIV in Nairobi, UNCTAD, FAO and UN Environment join forces to propose a roadmap to regulate and end harmful fish subsidies – a political statement which is supported by more than 90 member States, 4 international and regional organizations and more than 10 global NGOs. This joint statement calls on Member States to address certain subsidies that contribute to overcapacity, overfishing and IUU fishing through a roadmap that included four action points:

1. Require countries to provide information on what subsidies they are providing.
2. Prohibit those subsidies which contribute to overfishing and illegal fishing.
3. Introduce new policy tools to deter the introduction of new harmful subsidies.
4. Provide SDT to developing countries.

2016-2017: Textual proposals submitted by different coalitions. In late 2016 and throughout 2017, a wide range of text proposals are tabled by different proponents including the LDC Group and ACP Group, the European Union, Norway, 6 Latin countries - Argentina, Colombia, Costa Rica, Chile, Panama and Peru - and New Zealand, together with Iceland and Pakistan. These proposals are initially collated into a matrix in July 2017 and then into a compilation text by the proponents. Based on this compilation, negotiations focus on developing a single streamlined text (TN/RL/W/274/Rev.2 and RD/TN/RL/29/Rev.3) highlighting areas of convergence and differences through the use of brackets. Beyond the core proponents, other delegations - including Brazil, China, Ecuador, Guatemala, India, Philippines, the Russian Federation, Thailand, and the United States of America - also engaged on the so-called vertical text (comparative proposals text) inserting language to reflect their perspectives and interests.

2017: WTO MC11 Buenos Aires. The Buenos Aires Ministerial Decision on Fisheries Subsidies mandates continued negotiations on fisheries subsidies based on emerging consolidated non-attributable texts. The decision also sets a deadline for the conclusion of negotiations by 2019, which would ensure that an agreement would meet the SDG 14.6 deadline of 2020. Another significance of this decision is that for the first time, fisheries negotiations were delinked from the wider Doha Development Agenda rules negotiations.

2017 onwards: WTO Rules negotiating group. Post-Buenos Aires, the Chair of the Negotiating Group on Rules undertakes a mixed approach composed of cluster meetings, bilateral sessions, “incubator groups” made of selected delegations, and since 2019 a process involving facilitators on four main areas of the disciplines, namely

IUU, overfished stocks, overfishing and overcapacity and cross-cutting issues. The latest revision of the streamlined text at the time of the writing was TN/RL/W/274/Rev.6. In an attempt to bridge the positions, however, several new text proposals have emerged in recent months, particularly on IUU and overfished stocks but also on new approaches to overfishing and overcapacity originally floated during the incubator process which would establish a cap in the form of a limit on certain forms of support expressed in monetary terms. Based on these new proposals, the facilitators have suggested new language as a basis for future negotiations.

3. Key Areas for Consideration in the Proposed Texts

This section provides an overview of the main issues addressed under the current WTO negotiations based on the various proposals tabled so far by Members and draft negotiating text produced by the facilitators. It then provides some comments on possible ways to address the current challenges and move forward.

3.1 Definitions

Key issues

The current proposals refer to a series of key terms and concepts. These include for example subsidies, vessels and operators, fishing, fishing related activities, economic exclusive zones (EEZs), IUU fishing, overfished stocks, or subsistence, artisanal, small scale and large-scale fisheries, inland fisheries or aquaculture. As with any negotiations, definitions of key concepts are essential for clarity and for legal certainty in any future instrument. There seems to be some convergence on the notion that subsidies should be defined as per Article 1.1 the WTO Agreement on subsidies and countervailing measures (SCM Agreement)². Adopting the definition of subsidies under article 1.1. of the WTO SCM Agreement should not be controversial as it is quite wide and has been subject to multiple interpretations by WTO Panels and the Appellate Body over more than 25 years. The situation is more difficult with terms which are specific to the fishing industry and on which the WTO has no specific expertise.

Options to move forward

The WTO being not a fisheries organization, definitions should reflect -to the extent that they exist -internationally agreed ones, including those reflected in international instruments, such as the FAO's IPoA to Deter and Combat IUU fishing (IPoA IUU, 2000) and relevant United Nations agreements such as UNCLOS (1982) and the United Nations Fish Stocks Agreement (1995). As discussed further below, the definition of IUU and overfished stocks are particularly difficult, not least because no internationally agreed definition exist for these concepts. In this case, Members will have to rely on different national interpretations by national relevant authorities or Regional Fisheries Management Organizations (RFMOs). The definition of "operators" is also considered as important to extend potential obligations not only to "vessels" (vessels do not have legal personality) involved in the fishing operation, but also to those entities responsible for management and ownership of the vessels that apply for and receive public funds.

3.2 Scope

Key issues

The scope of the disciplines is still subject to intensive discussions. A question is whether the scope should be limited to "specific" subsidies as defined in Article 2 of the SCM Agreement or encompass all types of subsidies. Specificity can take several forms including industry-specific, sector-specific, or regional. However, in relation to

² The SCM Agreement defines subsidies as a financial contribution by or at the direction of a government or any public body within the territory of a Member (e.g. grants, loans, equity infusions, loan guarantees, fiscal incentives, coverage of operational costs, the provision of goods or services, etc.). Such financial contributions must confer a benefit to the recipient (e.g. by affecting conditions of competition).

prohibited subsidies, Article 2.3 of the SCM Agreement explicitly indicates that those subsidies falling into the prohibited category should be presumed to be specific. In terms of the activities covered, most proposals so far call for the disciplines to apply only to wild marine capture and to exclude inland fishing and aquaculture.³ There are also proposals to exclude certain forms of support such as:

- natural disaster relief;
- safety, R&D and sustainable management;
- purchasing of equipment for safety, control or enforcement purposes;
- access agreements to the EEZ by vessels of another party.

Other consider that these measures should not be excluded from the scope of the agreement but only from some of the prohibitions. For example, it may sound counter-intuitive to allow subsidies for IUU fishing in the case of access agreement or disaster relief. The most controversial aspect in this discussion is perhaps the proposals to exclude fuel subsidies and de-taxation schemes not least because of the contribution of fuel subsidies to overfishing.

Options to move forward

Regarding the specificity test, if a future fish subsidies agreement only covers prohibited subsidies, the reference to specificity may not be necessary. A reference to article 2.3 of the SCM Agreement should be enough. As discussed below, it would however be relevant if the disciplines also include the notion of a cap in the form of a monetary limit or define the scope of the notification requirements. It would also be relevant should Members decide to include the notion of actionable subsidies based on adverse effects (see section 3.3). Members also need to fine-tune what activities need to be outside the scope (e.g. subsidies to aquaculture or inland fisheries), what activities should be considered a general exceptions or part of a potential green box under a cap-based approach or subject to SDT (see sections 2.6 and 3.2 below) as there should not be overlap among them. Too broad exclusions under scope may create large loopholes that could hinder the effectiveness of a potential agreement.

Regarding the need to cover fuel subsidies, a way to ensure that they are covered in a future agreement could be to introduce a legal presumption that could indicate that “for the purposes of this agreement fuel subsidies benefiting the fisheries sector are presumed to be specific and covered by the disciplines”.

3.3 Subsidies to Illegal Unreported and Unregulated (IUU) fishing

Key Issues

Illegal and unreported fishing is a multifaceted and pervasive problem in global fisheries and very much linked to enforcement capacity. IUU fishing across the world's oceans weighs in at around 11–26 million tonnes of fish each year or a value of \$26 to 35 billion (FAO, 2018). Prohibiting subsidies related to IUU fishing is perhaps the area where consensus might be the easiest in WTO fish subsidies negotiations.

According to the FAO's IPoA IUU (2000), “all States should cooperate to identify those nationals who are operators or beneficial owners of vessels involved in IUU fishing”. Indeed, it sounds illogical that States support IUU fishing activities. The reason is that sometimes governments provide subsidies to the entire fleet (e.g. fuel subsidies or port facilities to the maritime sector) and do not verify if the recipients have a clean record in relation to IUU fishing. While the notion of prohibiting subsidies to IUU is uncontroversial, applying such a prohibition in practice raises a number of practical challenges. These include, for example how to define IUU? Who determines when IUU fishing has occurred? Should determinations made by third parties be automatically recognized by the subsidizing country? Should the prohibition apply to specific vessels or operators as well?

³Subsidies to aquaculture are currently well covered by the SCM agreement as they are closer to traditional production schemes in land such as cattle ranching and there have already been several cases before the WTO Dispute Settlement Body (DSB) on addressing adequate subsidies given to the farming of certain species such as salmon.

Regarding the IUU definition, the FAO IPoA IUU provides a non-exhaustive list of what constitutes IUU⁴ fishing. It is not a definition per se. In practice, what constitutes an illegal activity can vary from one country to the other depending on domestic laws and regulations. Nevertheless, some activities are almost universally prohibited regardless of definition of the FAO IPoA IUU such as fishing without a license or above legal quotas previously set. By contrast, some countries are more flexible than others with regard to reporting obligation, transfers at sea or whether discards should be reported or not. Also, while many developing countries agree to a prohibition on illegal fishing, they consider that sometimes, lack of reporting and regulation, and underreporting are the consequence of lack of capacity, especially in responsible authorities or by small scale and subsistence fishers. This concern is reflected in the section on SDT below.

Regarding the determination, proposals tabled so far envisage different scenarios. First the determination can be made by the flag state or the subsidizing Member regarding a vessel flying its flag or an operator benefiting from the subsidy. A second option involves cases where a vessel or operator is listed as having engaged in IUU activities by a Regional Fisheries Management Organization or Arrangement (RFMO/A). This option would apply to IUU activities in the area and for the species under the area covered by relevant RFMO/A (areas of coverage may include both neighboring areas beyond national jurisdiction and Parties' EEZs). A third option would consist in having the coastal state making the determination for IUU activities in the waters under its jurisdiction. Importantly, none of the proposals tabled so far involve a legal obligation to make a determination. The disciplines would only force a Member to withdraw any subsidy if and when an IUU determination is made.

The main practical legal issue will be how a subsidizing Member recognizes a determination of IUU fishing activities by its vessels or operators, made by other Members or by a RFMO/A. In practice, this may occur if the subsidizing Member is not the same as the flag state, when the coastal states makes a determination regarding a foreign-flagged vessel engaged in IUU in the waters under its jurisdiction or when an RFMO/A includes a vessel in its IUU list. This raises the question of the level of deference that should be given to a determination made by a third party. In practice, a full and automatic recognition of a decision on IUU fishing by a third party, while potentially desirable, is quite unlikely. On the other hand, leaving too much leeway to the subsidizing Member to recognize or not a determination made by a third party could significantly weaken the disciplines. A final question relates to the extent to which there should be a distinction between each element of the IUU disciplines. This relates to the fact that some WTO Members and particularly LDCs, may have difficulties in establishing strong regulations and reporting systems, particularly in cases of small-scale fishing activities.

Options to move forward

Regarding the lack of a comprehensive IUU definition, we should not underestimate the value of illustrative lists as the one found in the FAO IPoA IUU. Once a soft law text makes it into a WTO agreement subject to dispute settlement, it becomes a benchmark and binding guidance to be used in WTO dispute settlement procedures. For example, there is no clear definition of what is an export subsidy in the SCM Agreement. Lack of definition was complemented by an illustrative list of export subsidies in Annex I to the SCM Agreement facilitating interpretation. The same could happen to the IUU illustrative list under the current or future revisions of the FAO IPoA IUU by making a direct reference (as already proposed by various proposals) or inserting it as well as future revisions as part of an annex to a potential subsidies agreement.

A second or complementary option, as envisaged for example in the TPP, is to rely exclusively on vessels that appear on IUU lists compiled by Members following an agreed procedure. There is indeed a combined IUU vessel list prepared by certain RFMOs and States. The total number of vessels in the combined list is about 310. If a future agreement focuses on listed vessels, its effect will be very limited, as the total number of motorized fishing vessels is estimated at 2.8 million. So, we may be regulating the listing of about 0.001 per cent of the global motorized fleet, while the number of vessels engaged in IUU fishing that have also received subsidies directly or indirectly is probably much larger.

⁴ See Article 3 of the FAO IPoA IUU (2000).

A third, option would consist in making explicit references to national laws and regulations to complement the broad orientations provided by the FAO IPoA IUU and to define parameters that an IUU determination has to comply with to be recognized by third parties. These could include both substantive requirements (e.g. the need to provide positive evidence of IUU fishing) and procedural requirements (e.g. the need to follow fair, transparent and non-discriminatory procedure, in conformity with international law). In such a case, if the subsidizing Member finds the process in place for making an IUU determination is consistent with international law and principles, it shall accept specific determinations. In the negative case, the subsidizing Member may reject the procedure and in consequence the specific determination.

All these options need to be complemented by an explicit due diligence obligation by subsidizing Members to verify *ex ante* if potential recipients of subsidies, whether operators or vessels, have engaged any IUU fishing activities whether in their own jurisdiction or aboard before granting any support.

3.4 Subsidies for fishing of fish stocks in an overfished condition

Key Issues

A second area of concern relates to subsidies for fishing and/or fishing related activities that affect stocks that are already overfished. In other words, a Member should not be allowed to provide subsidies to its fleet when the targeted stocks are already in an overfished condition. Here again while the general principle is not questioned, the devil is in the details.

In the absence of a universally agreed definition, a first question is how to define an overfished stock and who decides that a stock is overfished? Some Members have called for an objective definition based on the need to reduce the mortality from fishing to restore the stocks up to the level of maximum sustainable yield (MSY) or alternative reference points⁵ based on the best scientific evidence. The reference to best scientific evidence has been subject to debate, however, with some Members asking what constitutes best scientific evidence particularly in developing countries dealing with data poor fisheries. Should it be world class evidence or only the best evidence available to the Member making the assessment?⁶ A related question is whether the disciplines should only apply to the stocks targeted by the fishing activity as proposed by some members or any stock affected by such activity. Finally, some Members have raised the question of what to do with unassessed stocks.

A second issues relates to the type of subsidies that should be covered in the prohibition. From a practical perspective, when a stock is declared as overfished, national authorities or relevant RFMO would usually take conservation measures aimed at reducing catches by adjusting quotas or restricting the period during which fishing is allowed. The question is whether Members should also remove all forms of subsidies on top of these management measures or whether certain forms of subsidies would still be allowed after action has been taken. In this respect, several proposals suggest limiting the prohibition to those subsidies that have a negative effect on the stocks.

Options to move forward

With different countries using different methodologies and reference points for the management of their stocks, it seems reasonable to defer to decisions made by national authorities or RFMOs when dealing with stocks under their respective jurisdiction instead of proposing a specific definition of overfished stocks. At most, some general principles or broad reference points such as MSY (as recognized under UNCLOS) could be considered as guidance.

⁵ MSY is one example of a threshold for resource management based on biological criteria including the spawning biomass and the fishing mortality levels. Other countries prefer to use thresholds expressed in technical terms (e.g. a certain level of fishing effort or capacity levels), or in economic ones (e.g. employment or revenues levels). Others still, use a biological approach but in order to account for uncertainties in the assessment of fish stock status, they adopt a precautionary approach by setting a more conservative threshold for triggering management actions to bring the stocks back to the target level.

⁶ Usually undertaking stock assessments involves collecting information regarding the weight or number of individuals in the catch as well as the size composition of the catch. Some Members are also using additional samples to determine the age of individuals being caught, their reproductive status, and other biological characteristics of interest. But such data intensive process might not be available in many developing countries.

Limiting the disciplines to overfished stocks that are targeted would exclude by-catches which in certain fisheries could constitute a significant share of total catches. With regard to unassessed stocks, it is important to recall that many developing countries do not have the capacity to assess all species within their jurisdiction with most assessment only focusing on the commercially more valuable species. The more prudent option will be the one of a due retrain clause under a precautionary approach in case of unassessed stocks combined with capacity building to overcome such limitations.

Regarding the adverse effect test proposed by some proposals, in practice, it could be addressed by establishing a list of subsidies that are not considered as negatively affecting stocks (e.g. public support for fish management or crew safety). Alternatively, the negative effect could be measured ex-post by looking at the evolution of the status of the stocks. This, however, may be challenging particularly for smaller developing countries which would have a hard time demonstrating that: 1) a subsidy is being granted to a vessel or operator; 2) there is a clear determination that a certain stock is in an overfished condition, 3) a vessel or an operator is or has targeted stocks in an overfished status; and 4) such activity is considered to generate an “adverse effect” on the stock. In this case a possible option might consist of reversing the burden of the proof and requesting the subsidizing Member to show positive evidence that the stocks are being rebuilt or within MSY. This could be done by establishing a rebuttable presumption that any subsidies to an overfished stock is considered as having a negative effect unless the subsidizing Member can prove otherwise.

3.5 Subsidies that contribute to overfishing and overcapacity

Key Issues

Several Members have proposed a prohibition of subsidies that contribute to overfishing and overcapacity of a fleet. However, reaching a consensus on which subsidy contributes or not to overfishing and overcapacity has proven difficult⁷. It is well accepted that subsidization of variable versus fixed inputs have different effects on fishing behavior. Support to variable inputs such as fuel, ice or bait is most likely to increase fishing effort. Support to fixed inputs like construction or modernization subsidies is most likely to increase fleet capacity but the benefits largely accrue to existing vessel owners, rather than new entrants to the sector. Support based on fishers’ incomes is, not surprisingly, the form of support that has the greatest benefit to them, and support to fisheries management, infrastructure and research and development are least likely to increase capacity or effort. Beyond those general considerations however, the effect of different forms of support depend very much on their design, implementation and other factors such as the status of the stocks or existing management measures.

A major question in this area is the degree to which subsidies provided by developing countries should be exempted from the disciplines (e.g. by defining exceptions for small-scale and subsistence fishing or for fishing taking place exclusively in the territorial sea or EEZ of developing countries). Nearly 85 per cent of total subsidies are provided to large scale industrial fleets as opposed to slightly more than 15 per cent going to artisanal fisheries (Schuhbauer, A., et al., 2017). Furthermore, nearly 60 per cent of the support provided to small scale fishing was for fisheries management or to protect vulnerable communities and promote development. By contrast, 60 per cent of subsidies to large scale fishing directly contributed to enhancing fishing capacity. A particular challenge in the negotiations is how to define the “small-scale” fishing that might be subject to the subsidy exception. One option could be to establish an objective global definition of subsistence, artisanal, or small-scale fishing, for example with reference to vessel length. Another and may be more realistic option would be to rely on national definitions.

A final proposal in this area is to prohibit subsidies to fishing in the high seas⁸ and in EEZs of other members. This would ensure that the disciplines target directly large-scale industrial fishing often competing with domestic artisanal fisheries of developing countries in their own EEZ. For example, LDCs fisheries resources are often

⁷ Although there is not an international definition of “overfishing”, some consider that it occurs when the fishing mortality in a stock is above sustainable levels and may ultimately drive a stock to reach an overfished status. Overcapacity refers more to the size of the fleet and is usually defined with respect to a stock.

⁸ Commonly known as those areas of the oceans for which no nation has the sole responsibility of management. It can make 64 percent of the surface of the oceans.

exploited by foreign vessels, either fishing illegally or under access agreements allowing them to catch fishes in LDCs' EEZs. On average, 45 per cent of total catches in the EEZ of LDCs are from foreign vessels⁹. While such agreements constitute an important source of income for the country, there are concerns that distant water fishing nations may contribute to the overexploitation of fish resources and that large-scale fishing by foreign fleets may compete unfairly with domestic artisanal fisheries.

Options to move forward

Establishing an exhaustive list of subsidies that contribute to overfishing and overcapacity and reaching consensus on this list is likely to be difficult. The broader the prohibition, the larger the pressure will be to include exceptions and carve outs or special and differential treatment. A possible way forward might consist in opting for a limited prohibition on the most perverse type of support combined with a limit on other subsidies contributing to overfishing and overcapacity (see Section 4 on the list vs cap-based approach). The prohibition could focus on 1) fishing in the high seas; 2) in the areas and for the species governed by RFMOs and 3) in the EEZs of third countries. Subsidies to fishing activities in the Members' own EEZ could simply be limited to a certain amount, leaving enough policy space for members to decide what type of support they would like to provide. This would largely deal with the negative spillover effects of those subsidies on third countries and leave the responsibility to Members to manage the fish resources in their own EEZ.

3.6 Special and differential treatment

Key Issues

Most proposals recognise the need for disciplines on IUU and overfished stocks to apply to all Members, regardless of their level of development. In these areas, special and differential treatment (SDT) proposals essentially provide for longer transition period (e.g. with respect to unregulated and unreported fishing) as well as technical assistance, for example to monitor and assess stocks (see Section 3.7). Transitional arrangements are also envisaged before the agreement enters into force.

With respect to overfishing and overcapacity, some proposals suggest to exempt LDCs from any reduction commitments and envisage flexibilities in favour of other developing countries when subsidies are directed towards a) subsistence, artisanal and small-scale fishing; b) fishing activities within the EEZ of the subsidizing Member; c) fishing of underexploited resources within the EEZ, or d) to make use of quota rights under a RFMO/A. In the case of prohibitions for overcapacity, flexibilities are also proposed to developing countries and LDCs if certain conditions are met (such as not targeting overfished stocks and subjecting stocks and fleets to a management plan).

India has recently also proposed a more comprehensive set of SDT measures (TN/RL/GEN/199) designed to exclude, from future disciplines related to unreported and unregulated fishing, developing countries and LDCs when fishing within their territorial waters, within their EEZ and the high seas for a transition period of [X] years from the date of entry into force of future agreement. India also proposes that prohibitions to subsidies that support fishing on overfished stocks, shall not apply to those granted or maintained by developing countries, including LDCs, for fishing in their territorial waters and within their EEZ for X period. Similarly, as exception is also proposed to prohibitions on subsidies that contribute to overfishing and overcapacity granted/maintained by developing countries including LDCs for fishing within their territorial waters and their EEZ and for fishing by vessels in the high seas subject to the applicable fisheries conservation and management measures. The main effect of this proposal is to remind that SDT is not only applicable to LDCs but that developing countries may also need flexibilities, especially within their own EEZs, to improve management and use of their resources.

For some developed countries, due to the environmental sustainability considerations involved, SDT should be limited to transitional arrangements and capacity building support. According to this position, SDT should not be applicable to all developing countries as many of them are found among the largest marine catchers including

⁹ Authors' calculations based on data of the Sea Around Us database. See: <http://www.seaaroundus.org/data/#/eez>.

China, Indonesia, India, Viet Nam, Peru, Philippines, Malaysia, Chile, Morocco and the Republic of Korea. Efforts to try to differentiate based on levels of exports or catch and not levels of development can be clearly seen in the proposals made on cap-based approaches. According to UNCTAD's analysis based on OECD data (UNCTAD, FAO, UN Env, 2018 and OECD, 2019)¹⁰, developing countries such as China, Brazil, Malaysia, and the Republic of Korea are also found among the top ten subsidising nations, which makes claims for unconditional SDT by these later countries more difficult to sustain.

Options to move forward

SDT is explicitly mentioned in SDG 14.6 and the WTO Buenos Aires Decision on Fisheries Subsidies as a full part of any negotiated outcome. SDT in the case of fisheries subsidies is not only about levels of development, exports and catches but about actual levels of capacity to set and implement effective fish management systems and adequate measures to address IUU fishing, overfishing and destructive practices for fish stocks and marine ecosystems. While most developing countries have some form of fish stocks management plans, not all of them tend to have capacities to generate relevant scientific data for management and to deploy effective monitoring, control and surveillance (MCS) systems. In this regard, certain subsidies will be needed to undertake sustainable use and management of resources.

Also, in many cases, developing countries do not have a problem with overcapacity, but on the contrary, a problem of under capacity to benefit from the stocks found in their own EEZ and in the high seas. This later point is particularly relevant to land-lock countries, which also have rights under the freedoms of the seas to fish in Areas Beyond National Jurisdiction (ABNJ) and benefit from the "commons" under the UNCLOS. Perhaps, the most suitable form of SDT for developing countries seems to be the one related to the need of increasing capacities for sustainable stocks and ecosystems use and management, plus support to maintain livelihoods of subsistence, artisanal and small-scale fishers. Along this line of ideas, one option still feasible is to approach SDT in fish subsidies negotiations under the lens of the WTO Trade Facilitation Agreement, as already proposed by Peru and other countries, where implementation of commitments should be linked and be commensurate to support and capacity building effectively delivered and created, so developing countries are able to undertake effective stocks management in light of SDG 14.4. However, potential flexibilities should not give carte blanche to eschew obligations under the Agreement but rather provide robust impetus for developing countries to take responsibility for shifting from harmful and potentially prohibited subsidies to sustainable activities and stocks management that allow the resources to be available for future generations, considering the SDG 14.

3.7 Technical assistance and capacity building

Key Issues

Proposals currently on the table refer to a demand-driven process based on mutually agreed terms with developing countries, LDCs and Small and Vulnerable Economies (SVEs). The providers of such assistance should not only be developed countries but also for the first time, developing countries that are in a position to do so. The type of assistance is supposed to be managed by a cooperation scheme that includes bilateral and regional cooperation. Technical assistance needs listed so far go from institutional and financial difficulties to implement a future agreement to specific capacity constraints related to reporting mechanisms, compliance, stocks assessments, MCS, R&D and participation in RFMO/As processes. WTO has been explicitly called upon to cooperate with FAO and UNCTAD in the provision of technical assistance under the future agreement.

Options to move forward

Demand driven technical cooperation is not always provided in a coherent way. More active countries tend to get better cooperation. Without a mechanism, support for common cooperation schemes tends to decline or shift focus with time. It is quite positive to list willing developing countries as providers of technical assistance as many of them

¹⁰ See https://stats.oecd.org/Index.aspx?DataSetCode=FISH_FSE.

have developed useful fisheries management experience and infrastructure (e.g. research vessels) adapted to tropical and subtropical multispecies fisheries. It is essential that LDCs strengthen their fisheries management and data gathering/analysis capacity. Without effective and enforceable fisheries management plans, many of the obligations in future disciplines will not be implementable. There is a need to make a clear management capacity-implementation link to ensure success. UNCTAD, FAO and UNEP are preparing a response to this potential obligation with the development of an Inter-Agency Plan of Action to accelerate the implementation of trade-related aspects of SDG 14 (IAPOA 2020-2025).

3.8 Notification, transparency and surveillance

Key Issues

Submissions in this area propose that each Member shall provide or endeavour to provide under Article 25.3 (notifications and surveillance) of the WTO SCM Agreement the following information: subsidies programmes, legal basis, granting authority, amounts, level, type of support and trade effects. It should be noted that such notifications are already mandatory under the SCM Agreement. It is also explicitly mandated in the Buenos Aires Ministerial Decision on Fishery subsidies (2017). Several submissions however also suggest additional items to expand transparency requirements beyond the requirements of Article 25.3. These include aspects that would be relevant to implement a future WTO Fish Subsidies Agreement such as the type of marine activity supported, vessels to which the subsidy is granted, recipients, catch data, status of stocks, fleet capacity, conservation and management measures in place, non-specific subsidies for the provision of fuel or related to fuel that benefit the fisheries sector and the list of vessels as well as operators engaged in IUU fishing.

Options to move forward

Notification systems under the subsidies agreement are essential to ensure transparency and surveillance. Overall, however, transparency is not an end in itself. It should be specifically tailored to generate the type of information required to assess compliance without making implementation for Member States and specially developing country more burdensome than necessary. While the level and nature of government support may have been subject to under-reporting by countries, some intrinsic characteristics of the notification framework, such as disclosure requirements (Art. 25.3 of the SCM Agreement), may also play a role in determining notification outcomes (Formenti L., 2019). The level of detail of notifications may be too ambitious for many developing countries, especially SVEs and LDCs, and may not be commensurate with their contribution to the problem of overfishing and overcapacity. Some of the information requested may already be gathered under different international data platforms, in which case it may be better to use them and not unduly burden Members (e.g. on fleets, status of certain stocks, catch volumes per species and import-export data gathered by IMO, FAO, and UNCTAD depending on the case). Some of the required data may not be available in many developing countries. Specific technical assistance of WTO, FAO and UNCTAD may be needed. Regarding, IUU vessel listing notifications, it may be good to create an online notification platform under FAO that can compile such information in a more detail and accurate manner. Notifications of fuel subsidies may be necessary.

4. Explanation of Regulatory Approaches to Negotiations

Based on the proposals tabled so far, two main approaches to disciplining subsidies can be distinguished, namely a list approach and a cap-based approach. This section provides an overview of the main aspects of both approaches, how they could be applied and their main implications. Table 1 at the end of the section also summarizes the main advantages and disadvantages. Reference is also made to the adverse effect approach. As discussed in Section 5, these different approaches are not necessarily mutually exclusive and could indeed be combined in a final agreement.

4.1 A prohibition based on a list approach

A first approach also known as the “list approach” consists in prohibiting certain forms of support by identifying ex ante when subsidization may or may not be authorized. The prohibition can be based either on:

1. The type of fishing (e.g. small-scale vs large scale industrial fishing or IUU fishing);
2. Environmental factors (e.g. the status of the stocks);
3. Where the fishing activity is taking place (e.g. territorial waters, EEZs or the high seas); or
4. The type of subsidy granted (e.g. subsidies to operating costs, capital costs, general services, etc.).

The prohibition can take the form of a negative list (i.e. listing the prohibited subsidies), of a positive list (i.e. listing the type of support which is authorized) or a combination of both. Lists can also be a closed list (*numerus clausus*) or an illustrative list (*numerus apertus*) depending on the level of leverage to be given for interpretation by WTO panels. Under this approach, special and differential treatment essentially consists in exceptions for certain categories of countries (e.g. by exempting LDCs from certain prohibitions), longer transition periods or technical assistance.

In practice, this is the approach envisaged by most proposals, particularly for IUU and overfished stocks. Several submissions have also proposed a list a list of measures that are considered as contributing to overfishing and overcapacity and that should be prohibited under certain circumstances. These include so far mainly subsidies to capital goods such as construction, acquisition, purchase, modernization, repair and renovation of vessels, machinery and equipment and subsidies to operating costs such as license fees, fuel ice, bait, personnel, support in income or price, etc. Others have proposed to prohibit any public support to large-scale industrial fishing only in the high seas or in the EEZ of a third country. Carve outs are being envisaged for certain forms of support such as management, disaster relief or small scale artisanal or subsistence fishing.

From a sustainable development perspective, the inclusion of fuel subsidies in the list will be of particular importance. Private sector actors expressed in the United Nations Oceans Fora on Trade related aspects of SDG 14 (2017 and 2018) that fuel subsidies can represent up to 70-80 per cent of the cost in industrial fishing. Fuel subsidies contribute to GHG emissions without adding to the long-term competitiveness of fleets. Fuel subsidies, especially for large scale industrial fleets, represents the lion’s share in addressing the fish subsidies problem. This is however also what makes it difficult to prohibit them completely.

Overall, this approach tends to provide a high level of ambition and legal certainty, as long as the prohibitions and exceptions are defined clearly. Yet, the broader the prohibition, the more Members are likely to request specific exceptions and carve outs, resulting in a difficult trade-off between ambition and flexibility. Defining an exhaustive list of prohibited subsidies and well circumscribed exceptions is also conceptually challenging if one wants to avoid creating many loopholes. As a result, while difficult, it may be possible to achieve consensus under this approach beyond a set of very limited prohibitions (e.g. on IUU or overfished stocks), as illustrated by the experience of the 2008 chair text where too strict prohibitions ultimately failed to gather consensus.

4.2 A cap-based approach

A second approach, often referred to as the cap-based approach consists in establishing a maximum amount of support a particular member would be allowed to grant or maintain at any time. This ceiling would be reflected in Members’ schedules of commitment and be reduced over time. Any support provided on top of the Member’s limit would be prohibited. This type of system is somehow the same applied by the WTO Agreement on Agriculture to incrementally reduce public agricultural support with mixed results so far. The options proposed, so far, to establish the cap can be organized under three main categories:

1. A limit expressed as a percentage cut in the amount of support provided;
2. A limit expressed as a percentage of the landed value of wild marine capture;
3. A limit per fisherman based on the global average amount of subsidy received by fishermen.

Once established, the cap would be reduced over a certain period of time. Here again, several options have been suggested to reduce the cap. These include:

1. A tiered formula, applying certain reduction coefficient for different tiers. Under this approach, countries would fall under different tiers based on their development status or their share of wild marine capture;
2. A unique cap-based reduction formula applying equally to all WTO Members according to certain parameters (e.g. China with respect to a cap based on the number of fishermen);
3. A request and offer process resulting in individualized reduction commitments.

Several proposals also envisage to exclude some subsidies from the calculation of the new limit. These are sometimes referred to as “green box” subsidies and can include a more or less wide range of support measures not subject to any limitations. The green box would in principle apply to the calculation of caps by all countries.

Special and differential treatment can be reflected through the different tiers – e.g. with countries falling under the higher tiers being expected to undertake deeper reduction commitments – through exempting some categories of countries from scheduling a cap either based on their share of wild marine capture or their development status (e.g. LDCs) or through the request and offer approach by establishing individualized levels of commitments based on the specific circumstances applying to different countries.

The idea of a cap-based approach to fisheries has been developed in three recent submissions circulated among WTO Members. These include so far a proposal by the United States and Australia (TN/RL/GEN/197/Rev.1 and Rev.2)¹¹ by the Philippines (RN/TN/RL/81) and by China (TN/RL/GEN/199). The submission by United States and Australia has proposed a three-tier classification system relying on the percentage of global wild marine capture. Members in the different tier would then be required to negotiate individual subsidy caps through a request and offer approach with countries in the higher tiers undertaking more commitments than those under the lower tiers. Alternatively, Members may opt for a default cap of \$50 million annually. Members that account for less than 0.05 per cent of global wild marine capture would be exempt from a cap. The proposal does not differentiate between levels of development of Members, but between big and small fish producers. It also does not make a distinction between different types of subsidies or whether these are allocated to large scale industrial, artisanal or subsistence fisheries.

The Philippines proposal also envisages an approach based on tiers based on landed values and levels of development. In this case however, the tiers would be mostly defined by the development status of a Member with all developed countries and developing countries among the top [10] producers falling in the highest tier, other developing countries in the middle tier and LDCs in the lowest tier. Reductions would then be applied through a tiered formula based on the share of the landed value (with countries in higher tier being required to reduce their support more proportionally than those situated in the lower tiers). While landed value tends to be a good indicator, it is not always readily available and tends to exclude discards.

Under the Chinese proposal all forms of fish subsidies and certain fish support measures are to be included in the base for capping, including non-specific subsidies. It then proposes three approaches for capping and reduction based either on (a) a percentage of the current amount of support provided (b) a share of the landed value as envisaged by the Philippines or (c) based on the number of fishermen with countries with large number of fishermen being allowed to subsidize more. The first two options envisaged by China would require further negotiations to define the reduction commitments and at this stage, it is unclear whether these will be done through a formula or a request and offer process as envisaged under the United States and Australia proposal. Under the third option, the new cap would be established through a unique formula based on the number of fishermen. In practice, such an approach would imply deep cuts in most OECD countries but significant leeway for emerging economies such as China or Indonesia to increase their current level of support.

¹¹ The Rev 2 version was also sponsored by Argentina and Uruguay.

One novelty of the Chinese proposal is the inclusion of a green box within the cap-based approach designed to allow for Sustainable Development Goals implementation, as well as to keep a certain level of policy space. This green box will allow for the exclusion of certain forms of subsidies. The content of the green box, as proposed by China, points to exemption for those subsidies directed toward government services and management; programmes dedicated to protecting or rebuild stocks; support to reduce fishing efforts or fishing capacity and programmes that are presumed to not contribute to overfishing and over capacity. The list of exceptions is particularly long and covers a wide range of support measures including fairly controversial ones such as support to distant water fishing nations fishing in the EEZ of a third country under access agreements. Finally, the Chinese proposal indicates that all LDCs shall be excluded from capping and reduction commitments.

The main advantage of the cap-based system that it could be potentially agreed in a faster manner than a more complex “prohibition” systems that require significant political and legal concessions. Also, a cap-based system can address politically sensitive and non-specific subsidies such those granted to fuels. The main disadvantage of cap-based systems is that Members need to notify current level of subsidization per country, agree on per country ceilings (or caps), as well as potential tiers, modalities, or formulas for reduction commitments. This would require Members that have not yet done so in a consistent manner to notify their current volume of subsidies under Article 25.3 of the WTO SCM Agreement. It would also require collecting data such as the landed value of wild marine capture or employment figures (e.g. under the China approach) which are not collected systematically by the FAO or the OECD.

Also, a cap-based approach may not immediately reduce most harmful subsidies as it deals with volumes and not specific forms of subsidies whether harmful or not. While some approaches would cut drastically the support provided by OECD countries, they would at the same time leave significant leeway to large emerging economies and the other way around. This reflects the very heterogeneous nature and composition of support among WTO members, a reality which makes it difficult for any single reduction formula to achieve the desired result. The more flexible request and offer approach suggested by the United States may help address this problem. Yet, from a developing country perspective, the request-offer process to set caps implies much more uncertainty about the outcome of the negotiations compared to a strictly formula-based approach as proposed by the Philippines. It also puts individual countries in a weaker position compared to a situation where they can negotiate as a group and give stronger position to countries with a strong bargaining capacity.

4.3 Redefining the notion of adverse effect

A third approach, which was included in the 2008 chair text but has not attracted a lot of attention in this phase of the negotiations, would consist in defining a set of actionable subsidies, based on their effect on fish stocks. This option was further elaborated at the First United Nations Oceans Forum (2017) by UNCTAD's experts and would consist target any non-prohibited subsidy that has an adverse or harmful effect on stocks in which another Member has identifiable fishing rights or interests. The notion of actionable subsidies already exists in the WTO SCM Agreement for subsidies that cause adverse effects in the form of an injury to the domestic industry of a third country. Here, the adverse effect would not be defined in terms of trade distortion but rather in terms of their effect on shared resources. The interesting aspect of this proposal is that it would put the focus on Members' rights over straddling and highly migratory species or stocks located in the high seas.

Table 1. Advantages and disadvantages of the list and cap-based approaches

		List-based approach		Cap-based approach	
		Advantages	Disadvantages	Advantages	Disadvantages
Overall		Tends to increase the level of ambition and provides more legal certainty. It will be in line with SDG 14.6.	Limits the scope for flexibility and therefore makes reaching consensus more difficult.	Provides more flexibility to deal with members' specificities and policy space and therefore is more conducive to achieving a consensus.	May result in high entitlements for large subsidizers and reduce the level of ambition. Once entitlements have been granted, they are difficult to reduce in practice.
Subsidies covered		A list of prohibited subsidies provides a predictable approach and legal certainty in terms of prohibited and allowed public support.	Defining an exhaustive list of prohibition is challenging and difficult to agree on. However, this can be mitigated with illustrative lists.	Eliminates/minimizes the need to agree on an exhaustive list of prohibition. It focuses on volume more than the type and effect of the subsidy.	Provides less certainty on the type of subsidies, which will be reduced or removed.
Exceptions		Defining a positive list of non-prohibited subsidies may be easier than identifying an exhaustive list of prohibited ones and can provide incentives for reform.	The risk of creating loopholes in the prohibitions by providing too wide exceptions.	A "green box" type of approach can provide incentives to move subsidies towards less harmful forms of support.	Defining the list of subsidies falling in the green box raises the same challenges as those associated with a list approach.
Reduction commitments	Request & offer	A list-based prohibition eliminates/minimizes the need to agree on ceilings or reduction modalities.	Reductions are often easier to accept politically than prohibitions. Therefore, a list-based approach may be more difficult to agree on.	Allows to address different situations and specificities as opposed to a one-size-fits-all approach.	Puts smaller countries in a weaker position and large subsidizers in a stronger one.
	Formula based			Limits the risk of ending up with large entitlements for large subsidizers.	
SDT		Provides clarity on the scope of flexibilities.	Limits the type of possible exceptions (i.e. either a subsidy is removed or not).	Can be addressed through a tiered approach combined with a request & offer process.	Provides less predictability regarding the outcome of the negotiations.
Notification		Requires lower levels of transparency and therefore limits the burden on notifications.	Does not provide incentives to increase transparency.	Requires comprehensive levels of transparency covering all forms of support.	May be too burdensome for smaller delegations. It will imply technical cooperation.

5. Conclusions and way forward

WTO negotiations on fish subsidies have been on the table for almost 20 years. Since then, the effects of fish subsidies continue to impact levels of stocks and capacities among fishing nations. SDG 14.6 is an early harvest target to be achieved by 2020. The WTO Ministerial Decision on Fisheries subsidies provided new impetus to seek a comprehensive outcome by the end of 2019.

Two main - and not necessarily mutually exclusive - approaches have been put on the table to address fish subsidies in the last phase of negotiations: A prohibitions or list-based approach following the WTO SCM Agreement and a cap-based approach following the WTO Agreement on Agriculture (AoA) model. Both options have pros and cons for developing countries depending on each specific situation. It must, however, be noticed that a cap-based approach alone may not be considered as enough to comply with SDG 14.6. For this reason, a possible way forward may consist in taking a hybrid approach, as suggested by some recent proposals, combining elements of both approaches. A list-based set of prohibitions might be more appropriate to deal with IUU fishing and subsidies for the fishing of fish stocks which are already in an overfished condition. Given the significant negative spillover effect on third countries, one could also envisage a prohibition of subsidies for fishing in the high seas and in the EEZ of third countries.

When dealing with those prohibitions, there will be a need to concede a certain level of sovereignty if Members want such prohibitions to be effective. IUU listing as well as determinations on IUU fishing activities and fishing on overfished stocks by Members and/or RFMOs need to be recognized, whether a source of “positive evidence” in a national determination or investigation as it already happens to some extent under the FAO Port State Measures Agreement (2010) or as an element to be checked in due diligence procedures that could be established before granting subsidies. The case for SDT is also limited in these areas and could be limited to longer transition periods, exceptions for unregulated and unreported fishing when caused by a lack of government capacities and enhanced technical assistance.

These prohibitions could be combined with a cap-based approach for subsidies contributing to overfishing and overcapacity. Such an approach could be potentially agreed in a faster manner than more complex “prohibition” systems that require significant political and legal concessions. Cap-based systems can also address politically sensitive and non-specific subsidies such those granted to fuels.

For a cap-based system to work, Members need to notify current level of subsidization per country, agree on per country ceilings (or caps), as well as potential tiers, modalities, or formulas for reduction commitments. Developing countries will require technical support to prepare their notifications particularly in terms of collecting the required historical data. UNCTAD, FAO and UN Environment may provide support through their IPoA 2020-2025, which includes elements to support countries in preparing notifications *ex ante* (for cap-based systems) or *ex post* (for prohibitions) once a WTO fisheries subsidies agreement enters into force. It would also be most beneficial for them that the notification system uses data that is already collected at the international level (for example FAO data on fish capture, and UNCTAD export/import data), with complementary country-level data where needed, to minimize the extra data collection burden and ensure that countries continue to report only to one point.

One concern to be addressed with the cap-based approach is that it may not immediately reduce most harmful subsidies as it deals with volumes and not specific forms of subsidies whether harmful or not. To address this concern, an option that would result in more equitable reduction commitments would consist in applying a reduction method such as Swiss type formula as proposed in the past for non-agricultural market access tariff reduction. A Swiss type of formula for countries in the highest tier with an agreed coefficient would allow for greater convergence by imposing deeper cuts on those giving more subsidies. This approach could reduce many of the current asymmetries in fisheries subsidies among main subsidizers which in many cases are also the main catchers and exporters such as China, the United States, Japan and the European Union among others.

Finally, under this hybrid approach, a green box and explicit SDT will be needed to preclude reduction commitments on subsidies that may have a potential positive impact on stocks, fishers and sustainable development. SDT is explicitly mentioned in SDG 14.6 and the WTO Buenos Aires Decision on Fisheries Subsidies as a full part of any negotiated outcome.

A green box will allow a focus of reduction commitments on potentially harmful subsidies, while excluding positive ones. In addition to the proposed measures to be included in a possible green box, Members may want to consider some forms of support for small scale and artisanal fisheries given the importance of the sector for employment and livelihood and the limited amount of subsidies provided to small-scale fishing. Similarly, some flexibilities for developing countries with under-developed fishing fleet to build domestic capacities in their own EEZ up to sustainable limit would be welcomed. In this respect, and given their specific handicaps and vulnerabilities, excluding LDCs, and potentially Small Island Development States, from any capping commitments may significantly facilitate consensus.

In concluding, SDT should not only be envisaged in terms of additional flexibilities but also in terms of support measures to enhance developing countries' capacity to set and implement effective fish management systems and adequate measures to address IUU fishing, overfishing and destructive practices for fish stocks and marine ecosystems. There is a need to significantly enhance management capacities in developing countries to implement any future WTO Fish Subsidies Agreement and achieve SDG 14.4 and 6 implementations. Shifting support to address and overcome non-tariffs measures and comply with sustainability voluntary (IAPOA 2020-2025; Fugazza M. and Ok T., 2019) by small scale and artisanal fishermen in line with SDG 14.b would also be coherent. UNCTAD, FAO and UN Environment have prepared a realistic response to accelerate the implementation of trade-related aspects of SDG 14 under the IAPOA (2020-2025). They remain available and willing to support countries in the implementation phase of a future WTO fish subsidies Agreement, especially in relation to subsidies reform, notification and in setting adequate internal systems to ensure that subsidies contribute to and do not hinder SDG 14 implementation by 2030.

References

- ICTSD and WEF (2014). Fishing for the Future: Trends and Issues in Global Fisheries Trade.
- FAO (2000). International Plan of Action for the Management of Fishing Capacity.
- FAO (2000). International Plan of Action to Deter and Combat Illegal, Unreported and Unregulated fishing.
- UNCTAD, FAO, UN Environment (2019). Inter-Agency Plan of Action to accelerate the implementation of trade-related aspects of SDG 14 (2020-2025), pamphlet. Full proposal only available to Member States.
- FAO (2018). State of World Fisheries and Aquaculture.
- FAO (2010). Port State Measures Agreement.
- Ababouch, Vivas and Formenti (forthcoming, 2019). Advancing Sustainable Development Goal 14: sustainable fish and seafood value chains, trade and climate. United Nations: New York/Geneva.
- Formenti, L. (2019). Transparency in Fisheries Subsidies: Notification-driven analytics of country performance and disclosure requirements (provisional title), UNCTAD Research Paper Series: N.36 2019. United Nations: New York/Geneva.
- Fugazza, M. and Ok T. (2019). Fish and Fisheries Products: from subsidies to non-tariff measures. UNCTAD Research Paper Series N.34 . United Nations. OECS (2019). Fisheries support estimates.
- Schuhbauer, A., and others (2017). How subsidies affect the economic viability of small-scale fisheries. Marine Policy. Volume 48. Pp 114 – 121.
- Sumaila, R., and others (2019). Updated estimates and analysis of global fisheries subsidies. Marine Policy, 109, (2019) 103695.
- Sumaila, R., and others (2013). Global Fisheries Subsidies. European Parliament.
- United Nations (1995). Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.
- United Nations (1982). Convention on the Law of the Sea.
- UNCTAD, FAO and UNEnv (2018). Achieving the targets of Sustainable Development Goal 14: Sustainable fish and seafood value chains and trade. Background note to the 2nd Oceans Forum on trade related aspects of SDG 14.
-