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SPECIAL AND DIFFERENTIAL TREATMENT TO LEAST DEVELOPING COUNTRIES UNDER THE FISHERIES SUBSIDIES AGREEMENT, 2022.

AUTHORED BY - SANKET DAS

INTRODUCTION

Sector of Fisheries is one of the important and significant sectors for Least Developing Countries in order to fulfill their food security. Subsidies on Fisheries should not be an impediment in achieving this objective. There lies a burden on these LDCs to ensure that there is no overburden on rights of the coastal state and other domestic regimes involved in fishing by this agreement. At the same time LDCs have an obligation that small scale global producers of fishes and those indulged in artisanal fishing is not hampered¹ and it has to be preserved intact with policy making.² Thus, special and differential treatment becomes important part of negotiations in fisheries subsidies agreement.³ Within its mandate, the contribution of WTO with minimum standards has to be undertaken by the LDCs from this fisheries agreement.

BRIEF BACKGROUND TO FISHERIES SUBSIDIES AGREEMENT

Need to regulate Fisheries Subsidies

In the year 1990, due to increased awareness a need was felt to regulate fisheries subsidies under international trade, not only as part of greater fairness but also as a matter of protecting the natural resources from degradation. Till the fisheries subsidies become the topic of discussion in WTO negotiations, many reports in the year 1992 and 1998 have been released which stated that effectiveness of fisheries management has been undermined by way of granting of subsidies that are provided to maintain the fisheries sector income. After WTO was established in the year 1995, impact and effects of fisheries subsidies on the environment has been debated upon by the

¹ Anna Schuhbaur, "The Global Fisheries Subsidies Divide Between Small- and Large-Scale Fisheries", The Frontiers, <<https://www.frontiersin.org/articles/10.3389/fmars.2020.539214/full>> as accessed on 3rd August, 2023.

² "Supporting Least Developed Countries in the Commonwealth ahead of WTO Ministerial Conference", <<https://supporting-least-developed-countries-ldcs-commonwealth-ahead-wto-ministerial-conference>>, dated 26th November 2021, as accessed on 4th August, 2023.

³ Elizabeth Fitt, "Fishing fail: WTO negotiators flunk deadline to end harmful fisheries subsidies by 2022", The Mongabay, <<https://news.mongabay.com/2020/12/fishing-fail-wto-negotiators-flunk-deadline-to-end-harmful-fisheries-subsidies-by-2020/>> as accessed on 4th August, 2023.

But many member countries to WTO were at outset and had differing opinions on overfishing being caused by fisheries subsidies. Ex. Japan believed lack of sustainable development as the main cause of overexploitation. New Zealand stressed upon the use of resources above economical rates of exploitation due to subsidies and thus, it lead to overfishing creating unfair competition for developing countries. EU didn't support the distortive effects of subsidies. This vague mandate among the member countries led to the need to decide and discuss on the scope of rules on fisheries subsidies.

Australia, Ecuador, Iceland, Peru and other 4 countries emphasized the need to address the harmful effects of fisheries subsidies and proposed the new disciplines to regulate the fisheries subsidies in international trade. Korea and Japan opposed this taking the stance that main cause of stock depletion is inadequacy in fisheries management and putting it on the State responsibility to maintain it. China asked for special and differential treatment for developing countries as the mandate to consider the importance of fisheries subsidies to these developing countries. In the year 2001, WTO members clarified the existing disciplines on fisheries subsidies. Additionally, WTO also negotiated and clarified the SCM Agreement (Agreement of Subsidies and Countervailing Measures).

Then UN World Summit on Sustainable Development in year 2002 called for preventing illegal, unreported and unregulated fishing and over capacity by eliminating subsidies which contribute to them. However, US dissents and asked to provide for strict disciplines which promotes over fishing and overcapacity and it can be done through Government programmes. Countries also differed on special and differential treatment scope and questioned its link with the Country's fisheries sector income.

Hong Kong Declaration – 06th Ministerial Conference

After 4 years of mandate, in the year 2005 in 06th ministerial conference of Hong Kong, the group negotiating on the disciplines was instructed to accelerate the process of preparing a detailed draft in the mandate specifying the regulation for fisheries subsidies. Annex D of the agreement proves that there were provisions for strengthening the disciplines for subsidies in fisheries sector. It also

includes elimination of subsidies which contributes to overstocking and overcapacity of fisheries.⁴ Also, it had contained the provisions for special and differential treatment for LDCs and developing countries.⁵ Countries provided narrowed down list of defined subsidies which has to be prohibited.

Some other submissions were addressed to social security limits and conditions of special and differential treatment. Due to non-unanimous decisions or consensus on these provisions, scope of subsidies prohibited impeded Doha round of negotiation and slowed it down in year 2010-15. Momentum in negotiations was gained when UN Sustainable Development Goals were adopted in 2015 where it aims to “prohibit subsidies which contribute to overcapacity, over fishing and IUU fishing.” WTO members commit to conclude the negotiations by 2020.

Further Meetings and Developments on the Fisheries Subsidies Draft

In the year 2019, countries intensified the negotiations on the draft and discussed at length on several issues including special and differential treatment for LDCs and developing countries. During these negotiations, many contributions have been submitted where for example India suggested exemption of fishing activities in exclusive economic zones in developing countries from subsidies ban on overfishing and overcapacity of fisheries. This was proposed as part of special and differential treatment. The Colombian Ambassador, Santiago Wills, as a new chair concluded that countries will finalize the negotiations by 12th ministerial conference to be held in Geneva in year 2022.⁶ India, in March 2020, proposed withdrawal of special and differential treatment from countries whose gross capital income is more than \$5000 US, indulged in distant water fishing and agriculture share etc. which indirectly removes China specifically.

WTO chair issued revised negotiating draft text for further discussions. This includes prohibition on subsidies resulting to IUU fishing, overcapacity and overfished stock. It also delivers note upon the special and differential treatment for LDCs along with technical assistance, capacity building etc. It has been one of the key areas of discussion in the fisheries subsidies draft.

⁴ S Taylor, “*Measurement and implications of marine food security in the Ocean: an impending crisis?*”, The Springer Link, <<https://link.springer.com/article/10.1007/s12571-019-00971-6>> as accessed on 4th August, 2023.

⁵ “*World Trade Organisation Fisheries Subsidies Negotiations*”, <<https://crsreports.congress.gov/IF/IF11929>>, Congressional Research Service dated 16th September 2021, as accessed on 4th August, 2023.

⁶ “*WTO Negotiations on Fisheries: ‘Fundamental Differences’ Remain*”, <<https://sdg.iisd.org/news/wto-negotiations-on-fisheries-fundamental-differences-remain/>>, dated 01st March 2021, as accessed on 4th August, 2023.

AN OVERVIEW OF THE FISHERIES SUBSIDIES AGREEMENT, 2022.

The 12th Ministerial Conference (MC12), which ended on June 16, 2022, saw the World Trade Organization (WTO) maintain fisheries subsidies. However, several more amendments to the proposed agreement will have an effect on developing countries and favour the developed nations. The agreement compromises on preserving small fishermen because the subsidies that were eliminated allow blanket flexibility to both developing and rich countries. The proposed amendment extends the 12-mile limit for fishing to 200 nautical miles, as requested by developing nations. However, the subsidy is only available for two years to least developed nations before it is susceptible to modifications.

Article 1

Article 1 deals with the agreement's specific subsidies,⁷ such as those for marine wild trap fishing and allied sea activities.⁸ Non-specific fuel subsidies⁹ for fishing and fishing-related operations at sea are also covered, as stipulated by Article 2 of the SCM Agreement.¹⁰

Article 2

Article 2 of the proposed agreement contains definitions for the terms "*fish*," "*fishing*," and "*fishing-related activities*," "*vessel*," and "*operator*."¹¹ All alive marine resources are referred to as "*fish*." "*Fishing*" refers to any activity that can fairly be expected to occur in the catching, taking, or harvesting of fish. Any vessel, ship, or boat that is utilised, adapted to be used for, or intended to be used for fishing or fishing-related activities is referred to as a "*vessel*". The vessel's owner or any person on board who is in charge of, directs, or controls the vessel is referred to as the "*operator*."

Article 3

Article 3 of the draught agreement includes a "*prohibition on subsidies to illegal, unreported, and unregulated fishing*."¹² The vessel is deemed to be engaged in IUU fishing if a "*coastal*

⁷ Article 1.1 of the Subsidies and Countervailing Measures Agreement.

⁸ Article 1 of the Fisheries Subsidies Agreement, 2022.

⁹ Article 1.1 of the Fisheries Subsidies Agreement, 2022.

¹⁰ Article 2 of the Subsidies and Countervailing Measures Agreement.

¹¹ Article 2 of the Fisheries Subsidies Agreement, 2022.

¹² Article 3 of the Fisheries Subsidies Agreement, 2022.

Member"¹³, a "flag State Member"¹⁴, or a "relevant Regional Fisheries Management Organization"¹⁵ or "Arrangement makes an affirmative determination in accordance with the Regional Fisheries Management Organization or Arrangement's rules" and procedures and relevant international law. "If a subsidising Member has clear grounds to think that a vessel in one of its ports has engaged in IUU fishing, the subsidising Member shall give due consideration to the information received and take such actions in relation to its subsidies as it deems appropriate,"¹⁶ according to Article 3.5. Article 3.6 requires "each Member to have laws, rules, and/or administrative procedures in place to prevent IUU fishing subsidies from being given or maintained".¹⁷ Members are required to notify their efforts under Article 3.7.¹⁸ On the other hand, Article 3.1 exempts subsidies provided or retained by developing country Members, including least-developed nations, for low-income, resource-poor, or livelihood fishing or fishing-related activities inside 12 nautical miles of the baselines for a period of two years.¹⁹

Article 4

Article 4 of the new agreement contains a prohibition on subsidies for overfished stocks. Overfished stocks are discussed in Article 4.²⁰ If the coastal Member under whose authority the fishing occurs or a relevant RFMO/A concludes that a fish stock is overfished based on the best scientific evidence available, the stock is considered to be overfished.²¹ Further, a Member may grant or retain subsidies if the revenues are used to assist or rebuild the stock to a biologically sustainable level.²²

Article 5

Prohibition on subsidies concerning overcapacity and overfishing is present under Article 5 of the draft agreement.²³ It includes "subsidies for the construction, acquisition and modernisation of vessels; subsidies for the purchase of machines and equipment for vessels; subsidies for the purchase/cost of fuel, ice, or bait; subsidies for costs of personnel, social charges, or insurance; income and price support and subsidies covering operating losses".²⁴ Moreover, a Member may

¹³ Article 3.2 (a) of the Fisheries Subsidies Agreement, 2022.

¹⁴ Article 3.2 (b) of the Fisheries Subsidies Agreement, 2022.

¹⁵ Article 3.2 (c) of the Fisheries Subsidies Agreement, 2022.

¹⁶ Article 3.5 of the Fisheries Subsidies Agreement, 2022.

¹⁷ Article 3.6 of the Fisheries Subsidies Agreement, 2022.

¹⁸ Article 3.7 of the Fisheries Subsidies Agreement, 2022.

¹⁹ Article 3.8 of the Fisheries Subsidies Agreement, 2022.

²⁰ Article 4 of the Fisheries Subsidies Agreement, 2022.

²¹ Article 4.2 of the Fisheries Subsidies Agreement, 2022.

²² Article 4.3 of the Fisheries Subsidies Agreement, 2022.

²³ Article 5 of the Fisheries Subsidies Agreement, 2022.

²⁴ Article 5.1 of the Fisheries Subsidies Agreement, 2022.

grant or retain subsidies if the revenues are used to assist or rebuild the stock to a biologically sustainable level and is not violative of Article 5.1.²⁵ Outside the territory of a coastal Member and the competence of a competent RFMO/A, a member may not give or retain subsidies for fishing or fishing-related activities.²⁶ A subsidising Member may not award or sustain subsidies for a vessel that does not fly the subsidising Member's flag.²⁷

Article 5.1 exempts LDC Members from providing or maintaining subsidies for fishing or fishing-related activities within their territorial waters,²⁸ but it really does apply to developing country Members, including LDC Members, providing or maintaining subsidies for fishing or fishing-related activities inside their EEZ and RFMO area. The criteria are that *“the Member's GNI per capita exceeds US\$5, 00012 for three consecutive years, the Member's share of annual global marine capture fish production exceeds 2%, the Member engages in distant water fishing, and the contribution of Agriculture, Forestry, and Fishing to the Member's annual national GDP is less than 10% for the most recent three years”*.

Article 5.1 exempts subsidies provided or retained by developing country Members, including least-developed nations inside 12 nautical miles of the baselines for a period of seven years. For a maximum of 5 years, a developing country Member may provide or maintain the subsidies referred to in Article 5.1 for *“fishing and fishing-related activities inside its EEZ and the jurisdiction of a relevant RFMO/A”*. An extension can be requested from the committee by a developing country Member with a share of *“annual global volume marine capture fish production of less than 0.7 percent,”*²⁹ according to the most recent FAO report, and *“annual subsidies to fishing or fishing-related activities at sea of less than US\$ 25 million.”*³⁰

Article 6 & 7

Specific Provision for Least Developing Countries Members is present under Article 6 of the draft agreement.³¹ LDC Members may continue to apply for a number of years after the UN General Assembly's resolution to remove them till the *“Least Developed Countries”* category takes effect. When presenting issues regarding an LDC Member, a Member must use caution, and any remedies

²⁵ Article 5.1.1 of the Fisheries Subsidies Agreement, 2022.

²⁶ Article 5.3 of the Fisheries Subsidies Agreement, 2022.

²⁷ Article 5.4 of the Fisheries Subsidies Agreement, 2022.

²⁸ Article 5.5 of the Fisheries Subsidies Agreement, 2022.

²⁹ Article 5.5 ALT-2 (d) (i) of the Fisheries Subsidies Agreement, 2022.

³⁰ Article 5.5 ALT-2 (d) (ii) of the Fisheries Subsidies Agreement, 2022.

³¹ Article 6 of the Fisheries Subsidies Agreement, 2022.

considered must take into account the LDC Member's situation. Further technical assistance and capacity building is present under Article 7 of the draft agreement.³²

Article 8

Members provide information as part of their notification of fisheries subsidies under the SCM Agreement,³³ such as "*type or kind of fishing activity for which the subsidy is provided*" and "*catch data by species in the fishery for which the subsidy is provided,*" in order to bolster and improve notifications of fisheries subsidies and facilitate more effective monitoring of the execution of fisheries subsidies agreements. Members provide information as part of their notification of fisheries subsidies under the SCM Agreement,³⁴ such as the "*status of the fish stocks in the fishery for which the subsidy is provided*"³⁵ and whether such stocks are shared, in order to bolster and improve notifications of fisheries subsidies and facilitate more effective monitoring of the execution of fisheries subsidies agreements. The vessels and operators that the Member has determined to be involved in IUU fishing, as well as a list of any fisheries access agreements, shall be given to the Committee annually in writing.³⁶ Members shall promptly and completely submit any additional information requested by other Members.³⁷ The notified Member must respond to the request in writing as soon as practicable and in a thorough way. Lastly if the member suspects that a notification or information has been suppressed, it may alert another Member of the situation.

Article 9

Institutional Arrangement is present under Article 9 of the draft agreement.³⁸ A committee is made up of officials from each of the Members.³⁹ The Committee will elect its own Chairperson and it will meet at least twice a year. The Committee is responsible for carrying out the tasks that have been given to it. The WTO Secretariat will serve as the Committee's secretariat. Within one year of their admission, each Member must inform the Committee of any precautions in place or adopted to ensure the Convention's implementation and administration, including any efforts undertaken to enforce the restrictions set forth in Articles 3, 4 and 5 of the draft agreement.⁴⁰ Any

³² Article 7 of the Fisheries Subsidies Agreement, 2022.

³³ Article 8.1. (a) of the Fisheries Subsidies Agreement, 2022.

³⁴ Article 8.1. (a) of the Fisheries Subsidies Agreement, 2022.

³⁵ Article 8.1. (b) of the Fisheries Subsidies Agreement, 2022.

³⁶ Article 8.2 of the Fisheries Subsidies Agreement, 2022.

³⁷ Article 8.3 of the Fisheries Subsidies Agreement, 2022.

³⁸ Article 9 of the Fisheries Subsidies Agreement, 2022.

³⁹ Article 9.1 of the Fisheries Subsidies Agreement, 2022.

⁴⁰ Article 9.2 of the Fisheries Subsidies Agreement, 2022.

modifications must be disclosed to the Committee as well. Every year, the Committee will assess the implementation and operation.⁴¹ On the other hand with the passage of every two years, the Committee will review all material given under Articles 3 and 8.⁴² The Committee will keep in constant communication with important international organisations in the field of fisheries management, particularly the FAO and relevant RFMO.⁴³ Further, the Committee will also conduct an evaluation of the operation in order to make any necessary improvements.⁴⁴

Article 10

Dispute Settlement is present under Article 10 of the draft agreement.⁴⁵ Articles of the GATT,⁴⁶ as expanded and enforced by the Dispute Settlement Understanding, and Article 4 of the ASCM⁴⁷ will govern consultations, dispute settlement, and remedies.

SPECIAL AND DIFFERENTIAL TREATMENT TO LEAST DEVELOPED COUNTRIES

Before we analyze the provisions of fisheries subsidies agreement for special and differential treatment for LDCs, we would be looking towards what does LDCs really mean, how they acquire this status, how they are being differentiated from developed nations and what yardsticks have been used by organizations of international importance like World Bank, IMF, UN, WTO etc. But under WTO there is self-determinative process for member countries to decide their status as either developing or developed countries and it is open for objection by other member countries of WTO.

However, countries generally go for developing countries status as several benefits are attached including longer transitional periods being given, technical assistance being provided by developed nations etc. Such special and differential treatments to LDCs become important when developed economies which are already in advantageous position of dominating the international trade market exploit such poorer nations. Developed economies are at better bargaining power with good sustainability and stability of economy.

⁴¹ Article 9.3 of the Fisheries Subsidies Agreement, 2022.

⁴² Article 9.4 of the Fisheries Subsidies Agreement, 2022.

⁴³ Article 9.5 of the Fisheries Subsidies Agreement, 2022.

⁴⁴ Article 9.6 of the Fisheries Subsidies Agreement, 2022.

⁴⁵ Article 10 of the Fisheries Subsidies Agreement, 2022.

⁴⁶ Articles XXII and XXIII of the GATT, 1994.

⁴⁷ Article 4 of the Subsidies and Countervailing Measures Agreement.

NEED FOR SPECIAL AND DIFFERENTIAL TREATMENT

Rationale for Special and Differential Treatment

Such special and differential treatment have been given and permitted to LDCs to make international market accessible and available to them without hampering or infringing upon their interests in international trade. At the same time it safeguards these LDCs from harsh policies which directly impact their economies and such treaties which favour the dominating developed nations and their governing organizations. Such nations also have ability to control and influence the policy decision making at international forums.⁴⁸ Any kind of incentives and benefits provided to these LDCs will help them to boost their economies and the Aid for Trade concept of WTO works on the similar lines where the developed nations help developing and LDCs to get their economies strengthened.

However, there have been several arguments for providing special and differential treatment to the LDCs. The major argument which was followed was it is not desirable for member countries which are developed to follow and adhere to such policies or treaties which are too sensible for other countries. On the other hand, it was argued that part of developmental policies is desirable but cost of implementing them is comparatively higher. It is such because cost of finances, human resources and other requisites is very high. But the cost of non-implementation in world trade system is trivial as LDCs don't have that stake there.

The idea of special and differential treatment is that most of the policies and treaties focus on the developed member countries which would cause ill-impact on the poorer or least developing countries. Due to different economical bases and infrastructure and availability of other resources, all policies cannot be expected to have same effect on all the member countries. It differs for developed nations, developing nations and least developed nations. But this treatment has been criticized also as it purports the unfair treatment to other nations which are not “developing”.⁴⁹

Problems and Challenges ahead with Special and Differential Treatment to LDCs

It is to be considered that, since the process of claiming the status in WTO is by self-determinative

⁴⁸ “WTO Negotiations on Fishery Subsidies”, <[https://www.europarl.europa.eu/EPRS_BRI\(2021\)698842_EN.pdf](https://www.europarl.europa.eu/EPRS_BRI(2021)698842_EN.pdf)>, European Parliamentary Research Services, dated December 2021, as accessed on 4th August, 2023.

⁴⁹ “Financing for Sustainable Development Report 2021”, The United Nation, <<https://www.un.org/sustainabledevelopment/wp-content/uploads/2022/03/2021-Report.pdf>> as accessed on 4th August, 2023.

process, the countries choosing to be developing, though developed, to get privileges get discriminatory advantage of these privileges which would not have been granted. Laws might have an element of anti-development or exploitation and they can be discarded at very moment and those which can be negotiated upon and are not binding need not be discarded. Weak economic power and capacities of developing countries is the major reason for providing special and differential treatment to the least developing countries.⁵⁰ These benefits and privileges has been provided to only those countries which have low levels of income and to whom these benefits by way of special treatment can help to get integrated into international trade system.

Special and differential treatment to developing countries was given to improve their economic growth and efforts have been made in this regard to streamline them and make them aligned with the national economic developmental strategies of developing countries and help them to meet their developmental needs.

But the focus has now been changed to helping LDCs to implement their trade commitments rather than supporting their economic needs. Experts contest for the degree of differentiation between the LDCs and criticized the “One Size Fits All” concept undertaken for special and differential treatment. Such special and differential treatment has been given to developing countries in very vague and ambiguous manner and there are no specific objectives and measures which are determinative factor or any yardstick which helps to identify the LDCs status of member countries in WTO.

MANDATE FOR SPECIAL AND DIFFERENTIAL TREATMENT UNDER WORLD TRADE ORGANIZATION

Establishment of Review Mechanism

WTO agreements do contain specific provisions developing countries giving them special rights and allow developed nations to favor these least developing countries. These special and differential treatment provisions are present in various ways like granting longer time periods for implementation of obligations under these agreements, support to these countries by way of capacity building, training assistances, safeguarding their trade interests over the developed economies and some pivotal measures to increase the opportunities for LDCs in international

⁵⁰ “*Special and Differential Treatment in WTO*”, <<http://www.legalservicesindia.com/article/201/Special-&-Differential-Treatment-in-WTO.html>>, as accessed on 4th August, 2023.

trading market. All special and differential treatment provisions were made integral part of WTO agreements in 4th WTO Ministerial Conference, Doha Declaration and review of such provisions was made for effective operations.

The WTO committee on Trade and Development was established in 2013 in Bali Conference and was asked to identify those provisions of special and differential treatment which has to be made mandatory and also analyse their legal implications when such non-binding provisions were given mandatory application. Also, it is the function of the committee to make recommendation which either focus on improving the implementation part of the reviewed provisions or re-negotiate on the provisions itself to improve them.

Paragraph 44 of Doha Declaration 2001 reaffirmed the provisions of special and differential treatment and made it an integral part of WTO agreements. Also, the concerns of LDCs have been taken into account to be addressed and emphasis has been laid down on the operation part of the provisions relating to special and differential treatment.

Fisheries Subsidies and Special and Differential Treatment

Negotiations on fisheries subsidies agreement has been one of the significant discussions under WTO and major key areas of disagreements have been there among the member countries. One of them is the provisions of special and differential treatment to LDCs and nations have debated long to the extent of flexibilities given under this treatment. WTO members do support the idea and rationale to provide flexibilities to developing economies for implementation of obligations and commitments under WTO agreements but at the same time they oppose to the extent these flexibilities have been given.⁵¹

They believe such flexibilities under special and differential treatment has to be limited to certain extent and focus must be more on the specific needs of the LDCs. It should not be a permanent exceptions to LDCs rather an optional privilege given on case to case basis. But contradictorily China, developing nation, supported the broader and wider provisions for special and differential treatment as such relaxations are necessary for countries with low income and resources and are having poorer fishing industries.

⁵¹ K Fukasuku, “*Special and Differential Treatment for Developing Countries: Does It Help Those Who Help Themselves*”, The United Nation, < <https://www.wider.unu.edu/sites/default/files/wp197.pdf>> as accessed on 4th August, 2023.

SPECIAL AND DIFFERENTIAL TREATMENT TO LDCS UNDER ARTICLE 6 OF THE FISHERIES SUBSIDIES AGREEMENT, 2022.

So far the discussion was concerned about the fisheries subsidies agreement and the provisions for special and differential treatment for LDCs. This treatment to LDCs has been one of the major areas which have been contested by the member countries of WTO. But there have been very different approaches as to how this provision for special and differential treatment has to be covered, implemented and what all are the exceptions created therein. LDC's interests in these fisheries subsidies have been considered to be by different ways and for different reasons. Some of them are creation of job opportunities, fisheries livelihood, economic development, poverty alleviation, revenue generation through fisheries licenses, increasing their catch in global share, exploit viable stock in international waters which are for commercial purposes etc.⁵²

The main bone of contention here is as to why each and every LDC should be given same special and differential treatment when they have unequal or very little share of trade in fish products or global trade. There should be stricter rules or disciplines for those LDCs which do have significant share in the total fish capture in the global market. Those developing countries which are not covered in the given threshold or are having insignificant share in the fisheries trade can be allowed to give subsidies to vessel operating costs and all types fishing activities.

Another significant issue was regarding the subsidies given to fishing activities which are in nature of artisanal, small scale or subsistence. There should be flexible rules with regards to these fishing activities as they cause less damage to the environment as compared to large scale commercial fishing activities. These activities have the tendency to affect income, livelihood and food security.⁵³ Last issue is with regards to the scope of prohibitions on subsidy and the exemptions, the transparency, assistance in capacity building and trainings requirements for LDCs.⁵⁴

⁵² Murray Gibbs, "*Special and Differential Treatment in the Context of Globalization*", UNCTAD, as accessed on 4th August, 2023.

⁵³ "*Special and Differential Treatment Provisions*", <https://www.wto.org/special_differential_provisions_e.htm>, Trade and Development Committee of World Trade Organisation, as accessed on 4th August, 2023.

⁵⁴ U Sumaila, "*Small-scale Fisheries and Subsidies Disciplines: Definitions, Catches, Revenues, and Subsidies*", The ICTSD, <<https://www.greengrowthknowledge.org/sites/default/files/downloads/resource/Small-scale/pdf.>> as accessed on 4th August, 2023.

FISHERIES SUBSIDIES AND ROLE OF LEAST DEVELOPING COUNTRIES

When we talk about countries contribution to the global marine capture, it amounts to more than 70% by LDCs and developing nations and hence this become the major reason for demanding special and differential treatment to LDCs. Also, since developed nations provide heavy subsidies to fisheries production in their nations, LDCs do face some disadvantage as they do not have sufficient financial resources or other forms of institutional support to validly apply heavy subsidies to its producers. This difference leads to unfair competition in the market and thus, demand for adequate policy for countries to choose their own subsidy regime as per their level of commitments is justified.

Interest of LDCs in Fisheries Subsidies Negotiations

Most of the LDCs and small island countries are dependent on fisheries sector for their livelihood, food security and other reasons of protein intake.⁵⁵ These LDCs have large exclusive economic zones and hence have better interest in fisheries subsidies as well. They are a vital source of earnings as well for LDCs as their contribution through exports is large and effective too as a source of national income. Major issues for LDCs was the need to prohibit such subsidies which lead to illegal, unregulated and unreported fishing activities, over capacity, and facilitates such activities. There is need for technical assistance to LDCs to ensure that there are no eventualities of IUU vessels entering into the territorial limits of the nation and such monitoring mechanism has to be there in place with LDCs.

Apart from this, LDCs also need to have the monitoring mechanism for fish stocks in order to overcome the lack of capacity and hence improving their sustainability. Approach of LDCs to these subsidies is both offensive and defensive. In defence, the LDCs stated that any discipline under the subsidies should not hinder their fisheries sector especially at the smallscale commercial level or subsistence level.⁵⁶ Such policies need to be adopted which permits LDCs a good developmental growth of the fisheries sector. Such hindrance should also not be extended to

⁵⁵ K Charlton, "Fish, food security and health in Pacific Island countries and territories: a systematic literature review", The Springer Nature, < <https://bmcpublihealth.biomedcentral.com/articles/10.1186/s12889-016-2953>> as accessed on 4th August, 2023.

⁵⁶ Aniekan Ukpe and Sangeeta Khorana, "Special and Differential Treatment in the WTO: Framing Differential Treatment to achieve (real) Development", <<https://www.emerald.com/insight/content/doi/10.1108/JITLP-08-2020-0052/full/pdf?title=special-and-differential-treatment-in-the-wto-framing-differential-treatment-to-achieve-real-development>>, *Journal of International Trade Law and Policy*, dated 07th March 2021, as accessed on 4th August, 2023.

transforming ability of the LDCs i.e from one form to other.

Also, they emphasized on maintaining their trade and export preferences and protect them from tariff escalation.⁵⁷ It thereby can be done through policy for processing, marketing and regulating fisheries subsidies at international market. Lastly, though they are small in numbers, they have to be given flexibilities in order to provide them sustainable levels of growth by subsidies and at the same time curtail the heavy subsidies by developed nations which lead to overcapacity of fisheries globally.

But on the other side, LDCs want disciplines of WTO to address the issues of distant fishing activities by EU, Japan, Russia, Korea which have large capacity to fish including the exclusive economic zones of LDCs.⁵⁸ However, there were many instances of IUUs in LDCs zones as there was lack of monitoring mechanism with the LDCs to regulate their zones. The main root cause of distant water fishing is the subsidies which is not the viable solution with LDCs given high costs of vessels and capacity equipments.⁵⁹ Some countries do counter the said argument by providing access fees to LDCs in whose territories they have entered and exploited the fishing activities but this is not sustainable seeing the current trends of depletion of fisheries resources by overexploitation. LDCs having huge access to oceans do often lack capacity to completely exploit their fisheries resources from both high seas and their exclusive economic zones.⁶⁰ Hence, the need to improve LDCs capacity in order to ensure sustainability and help LDCs to harness fisheries resources fully is significant.

Another issue is with the capacity of LDCs to analyse whether the over fished species are endangered species or not and therefore there is need for possible remedies and policy in this regard. They do lack in capacity to evaluate whether the vessels indulged in IUUs is licensed or not and such vessels sometimes are involved in under declaring the catches to suspected authorities or Trans boarding of over stocked fishes.

⁵⁷ “Trade impact on the least Developing Countries”, The WTO, <https://www.wto.org/english/res_e/booksp_e/trade_impacts_of_ldc_graduation.pdf> as accessed on 4th August, 2023.

⁵⁸ K Schorr, “Building Capacity in the Least Developed Countries to Fully Harness the Potential of Fisheries and Aquaculture”, The UNCTAD, <https://unctad.org/system/files/official-document/aldcmisc2020d4_en.pdf> as accessed on 4th August, 2023.

⁵⁹ Xin Zhao, “Towards sustainable small-scale fisheries”, The Science Direct, <<https://www.sciencedirect.com/science/article/pii/S0308597X19305998>> as accessed on 4th August, 2023.

⁶⁰ Alexander Keck and Patrick Low, “Special and Differential Treatment in the WTO: Why, When and How?”, Economic Research and Statistics Division, dated May 2004, as accessed on 4th August, 2023.

Analysis of the Article 6 of Fisheries Subsidies Agreement

Article 6 to 11 of the Fisheries Subsidies Agreement do cover specific provisions for LDCs and includes technical assistance, capacity building, transparency, other institutional arrangements and mechanisms for developing countries. We would be analyzing Article 6 only for the purpose of our discussion.

Article 6 talks about special and differential treatment to LDCs where Para 1 of Article 6 directly exempt LDCs from the prohibition imposed under Article 5. Para 2 of Article 6 specifically talks about transition period further when LDC graduates from the acquired status. It is similar to Article 5.4(a) and the time period has not been decided yet as it is up for discussions and negotiations by member countries of WTO. The only difference from Article 5.4(a) is that such transition period will not start from date of entry into the force of the aforesaid judgment but only when such LDCs graduate.

Article 6 Para 3 do put an obligation on member countries to exercise due care while raising or reporting any matter which includes LDCs and also while taking and exploring the solutions to the problem at hand, they should take into consideration the specific situation of LDCs. At the same time, this paragraph puts an obligation on LDC members to ensure that such exemption from Article 5.1 and subsidies do not add to overfishing or over capacity. Article 5.1.1 qualifies Article 5.1 which does talk about permissible subsidies by member countries if such measure has been taken to maintain stocks and for sustainable levels of biology.

Article 3.8 of the fisheries draft also exempts LDCs and other developing countries from prohibition under Article 3.1 and it states “prohibition under Article 3.1 shall not apply to subsidies granted or maintained by developing country members, including least developed country (LDC) Members, for low income, resource-poor or livelihood fishing or fishing related activities within 12 nautical miles measured from the baselines for a period of two years from the date of entry into force of the proposed instrument”. This was also contested by many member countries that such special and differential treatment should not be given to LDCs and such exemptions would be disadvantageous for developed nations.⁶¹

⁶¹ Smriti Bahety and Julian Mukiibi, “World Trade Organisation Fisheries Subsidies Negotiations: Main Issues and Interests of Least Developed Countries”, <<https://unctad.org/system/files/non-official-document/ditc-ted-21032017-OceansForum-CUTS.pdf>>, as accessed on 4th August, 2023.

However, discussions were also on the lines that how LDCs members can be identified and suggestions were there as to upholding the sustainability objectives of special and differential treatment by listing out such LDCs or opt out clauses in the agreement. Some suggested to include individual commitments as inserted in Trade Facilitation Agreement where assistance can be given periodically and some call for legal guarantee where major and dominating nations cannot take advantage of these exemptions.

CONCLUSION AND SUGGESTIONS

Since 2015, Fisheries Subsidies Agreement is the first multilateral trade deal which would be successfully completed under WTO and is the topmost priority of LDCs. The discussions for next ministerial conference should focus on the areas which were mutually agreed upon by the parties and then the issues of subsidies leading to IUUs and overcapacity can be discussed thoroughly. However, the provisions on special and differential treatment to LDCs under Article 6 and Article 3, exempting the countries from obligations is problematic as there are many big subsidies providers who disagree on such blanket exemptions. Countries like China and India are also not on board with this draft and had asked for a balance policy space for all the issues and negotiating on such lines might end up de-linking the fisheries with other deliberations.

This draft would impact countries like China which have distant fishing vessels in large numbers and this plurilateral agreement would help countries reach the negotiated policies, especially those who have schemes operating to support such water fishing in distant form. LDCs while deliberating on the draft text should clearly intend their concerns regarding the developmental goals of the nations and issues of food security, livelihood, poverty eradication and most importantly the employment generation.

In the 11th Ministerial conference, several recommendations were made and some of them were inclined towards LDCs making them lead the discussions on enhancing the subsidies for capacity building as trade is distorted majorly by these subsidies and it threatens the small economies and food security concerns. Also, funds could be created for LDCs to support them in technical assistance. Specific provisions for this have been there in the fisheries subsidies agreement. There has to be amendment and revision of SCM Agreement to exclude and prevent subsidies resulting into overcapacity.

Lastly, member countries can negotiate and shift to beneficial subsidies from harmful subsidies

which would help in contribution to sustainability commitments, including but not limited to, creating marine protected areas, marine conservation and the overall resources. Hence, the deliberations in the upcoming 12th Ministerial conference are of utmost importance as to provisions for special and differential treatment to LDCs and balancing out their interest with those of developed nations.

