

G2 HACKATHON CHALLENGE

How to Make the WTO
Fit for Future Trade



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Geneva Trade
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2021 Hackathon Submission

Precautionary Approach To Determine
“Harmful Subsidies” In The Fisheries
Subsidies Negotiation

Trade Her Way

Indumugi C.

Gayathri Devi P.

Watch the Video



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Question #1

Define the substantive issue that your team is addressing, why it's a problem, and why your team believes the WTO is the right forum to address it.

The fisheries subsidies negotiations at the WTO have been split between two approaches - 1) a broad prohibition centric approach that argues for outlawing harmful subsidies which contribute to IUU fishing and 2) a special and differential approach that accounts for the "polluters pay principle". The latter stems from the understanding that the majority of harmful subsidies have been given by developed countries to enhance the capacity of their domestic industries. Developed countries are structurally advantaged with their fleets engaging in large-scale industrial fishing activities having received extensive subsidies over the years. In developing countries, fishing is inextricably linked to food security, economic development, and sustaining livelihoods of many subsistence and artisanal fishing communities. While a total prohibition on harmful subsidies can help lessen IUU fishing, it may also tie the hands of developing countries that intend to support their domestic industries, be it in mere sustenance or modernization.

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Currently, to incorporate a sustainable approach, subsidies are grouped as “harmful” if it “contributes to overcapacity and overfishing”. The clause that contains the general prohibition on harmful subsidies simply assumes a threshold beyond which rate of fishing and fishing capacity clearly contribute to overcapacity and overfishing. However, this will expansively cover all subsidies of a particular kind to be harmful, ignoring the unique nature of fishing industries in developing and LDCs. India has proposed that the ‘polluters pay’ principle must be made applicable taking the negotiations forward. It argued that members responsible for providing harmful subsidies must be held responsible first, without unnecessarily burdening developing countries and LDCs that provide miniscule subsidies for the sustenance of the livelihood of fisherfolk. India’s assertion to adopt “polluters pay” is in the form of a relaxation in the commitments to prohibit harmful subsidies. The possibility of affording an S&DT that relaxes commitments for some countries in relation to a shared resource is counter-intuitive to the goals that both SDG 14.6 and the fisheries subsidies negotiations are trying to achieve.

Therefore, we think there is not only a need to include an appropriate and effective S&DT clause, but also have the general prohibition clause itself to incorporate a mechanism that can articulate a precise statement of the “covered” activities that may show clear indication of a subsidy being harmful. This could take the form of enumeration of activities that show a clear case of harm arising out of excessive subsidies or a generic clause referring to the targeted harmful effect. We think incorporation of a precautionary approach not just as a principle but with precise articulation in the general prohibition clause, can help identify harmful subsidies when they are really contributing to overcapacity and overfishing within the jurisdictional scope of invocation, and leave aside subsidies that only help domestic industries within specific countries to meet basic needs and do not showcase irreversible damage.

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Question #2

Propose a specific treaty text, or more informal commitment/declaration text, that addresses either the concern or a particular, detailed aspect of it.

The parties should take a precautionary approach to prevent, or minimize subsidies contributing to illegal, unreported and unregulated fishing. Where there are threats of serious or irreversible damage to the fish stock, lack of full scientific certainty shall not be used as a reason for continuing subsidization. When determining the effects of a subsidy, factors to consider include whether -

1 The subsidy has directly caused overcapacity, overfishing or IUU fishing; or

2 There exists reasonable scientific certainty that a specific fish species in a given geographical area is facing the risk of stock depletion; or

3 A member country violates the Agreement on Port-State Measures, or a relevant Regional Fisheries Management Organization has identified a port of non-compliance within the member country that is acting inconsistently with the Agreement on Port-State Measures; or

4 A vessel associated with a member country uses flags of convenience to circumvent management and conservation measures, and avoid penalties for illegal fishing; or

5 A member country violates flag state obligations regarding monitoring, controlling and surveillance provided in the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, by allowing unauthorized vessels beyond the scheme provided for authorization of vessels in its domestic regulations.

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Question #3

Suggest a legal/technical or institutional way to implement your textual proposal within the broader WTO framework (500 words)

Our text proposes a modification to the 'general prohibition on harmful subsidies' clause that is already being negotiated. We argue that for member countries to reach consensus, the general prohibition clause should, in and of itself, contain a precautionary approach only invocable when a precise threshold has been crossed. The threshold mentioned not only looks at whether a subsidy "contributes to overcapacity and overfishing" but also includes specific metrics that show clear liability of excessive subsidization causing overfishing.

The proposed text works effectively only if it is multilaterally adopted, as plurilateral agreements would frustrate the object of clarifying rules regarding the use of a common good. This text creates obligations to prevent or minimize harmful subsidies and would bind all WTO members (MFN Basis). Its legally binding quality would be reinforced by the fact that disputes arising against a state for violation of the obligations could be referred to the dispute settlement body.

The articulations of the precautionary principle in various multilateral environmental agreements have generally been hortatory in nature albeit to varying extents vague and non-binding. The proposed text is a more precise version of the principle and it creates a duty for the members to take preventive measures even in cases of uncertainty when the enumerated conditions reveal active support for IUU fishing from the state. Although the question of whether precautionary principle is part of customary international law has been moot, inclusion of such an approach as the primary optic would allow for equitable responses to developmental and environmental issues.

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The issue of the DSB dealing with questions of substantive International Environmental Law won't arise because in case of disputes, the fundamental question that the DSB decides is whether a subsidy is harmful according to objective criteria. The criteria is contained in an enumerated list with the first one being subsidies "directly causing overcapacity and IUU fishing" along with a chapeau criteria of such a subsidy causing "serious or irreversible damage to the fish stock". It is only to this extent that the DSB has to look at environmental effects, and not substantive environmental law.

Politically, whether countries will commit to strong articulations of precautionary approaches to control IUU fishing might be a hurdle. The growing impatience in concluding the long-winded fisheries subsidies negotiations along with a clear text containing an appropriate common denominator for all countries, can potentially make countries look at a different basis for prohibition than a blunt prohibition.

Finally, the WTO should engage and actively collaborate with RFMOs to identify non-compliant states based on positive evidence and due process. Transparency and non-discriminatory functioning of the RFMOs will address some members' concerns regarding compliance with RFMOs' conservation measures. The Committee on Trade and Environment can engage in research with specialized organizations working in these areas such as the FAO on fisheries and fishing areas statistics, and desk or empirical research from Friends of Ocean Action, Pew Charitable Trusts, etc.