



Preparing for MC 12: Agriculture Negotiations, Special and Differential Treatment, and Fisheries Negotiations

tralac Webinar Report

The Trade Law Centre (**tralac**) organised a webinar on 8 November 2021 focusing on specific developments related to negotiations at the World Trade Organisation (WTO) on Agriculture, Special and Differential Treatment, and Fisheries.¹ This webinar was organised in the context of increasing recognition of the important role of multilateral cooperation and governance in areas related to international trade and other global developments, such as climate change and the impact of COVID-19. The webinar provided a discussion and lessons from WTO experience which can be used in implementation of the ambitious African Continental Free Trade Area (AfCFTA) agenda. The webinar was moderated by **Trudi Hartzenberg**, Executive Director, tralac, and discussions were led by speakers from the Departments of Agriculture, Land Reform and Rural Development (DALRRD) and Trade, Industry and Competition (the dtic), South Africa; WTO; South Centre; CUTS International, Geneva; and the Commonwealth Secretariat.

Agriculture

In the first session, **Dr Edwini Kessie**, Director, Agriculture and Commodities, WTO, provided an extensive briefing on the state of play in the WTO agriculture negotiations, highlighting the priorities that have been identified by members and facilitated by the chair, Ambassador Gloria Abraham of Costa Rica.² He noted that the WTO Agreement on Agriculture (the Agreement)³, the only multilateral instrument governing global trade in agricultural products, has inherent

¹ On 26 November 2021, the WTO General Council announced that the 12th Ministerial Conference, due to take place from 30 November to 3 December 2021, has been postponed indefinitely following an outbreak of a particularly transmissible strain of the COVID-19 virus led several governments to impose travel restrictions that would have prevented many ministers from reaching Geneva. See https://www.wto.org/english/news_e/news21_e/mc12_26nov21_e.htm

² See the Report by Ambassador Gloria Abraham Peralta to the Committee on Agriculture in Special Session and Dedicated Sessions on PSH and SSM <https://www.tralac.org/documents/resources/external-relations/wto/4432-report-by-ambassador-gloria-abraham-peralta-committee-on-agriculture-psh-and-ssm-1-november-2021.html>

³ Current negotiations cover seven key topics: domestic support, market access, export competition, export restrictions, cotton, special safeguard mechanism (SSM), public stockholding for food security purposes. See https://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm

imbalances and is plagued by differences in opinion amongst WTO members on key issues critical to moving the negotiations forward. Domestic support and public stockholding for food security purposes have been given priority in the current round of negotiations. A proposal to reduce overall trade-distorting domestic support by 50% by 2030 has been met with significant pushback, and as a result, some members have called for the removal of any predetermined target provision. Several developing countries, particularly African, Caribbean and Pacific (ACP) members,⁴ have argued that in order to level the playing field, negotiations should begin by eliminating support beyond the *de minimis* ceiling of 10% of the value of total agricultural production in developing countries. A second proposal is that all forms of domestic support under Article 6 of the Agreement ('Domestic Support Commitments') should be considered concurrently rather than to specify the starting points in specific areas. The criteria for inclusion in the domestic support provisions therefore need to be clarified – amending the language used may help bridge this gap – so that the support provided actually benefits farmers in low-income countries. On PSH, Dr Kessie indicated that while a number of developing countries, particularly those belonging to the G33, are calling for a permanent solution, there is concern that this may result in an incentive for members to further negotiate on domestic support, which could be detrimental to achieving agreement in the agriculture negotiations as a whole.

PSH and market access are closely related, and views are also sharply divided here. Some countries, including South Africa, are of the view that the sequence of negotiations should begin with domestic support first, followed by negotiations on market access. A work programme on agricultural market access is being proposed by the Chair.⁵ Developing countries are also pushing for a special safeguard mechanism (SSM) to protect themselves from tariff increases on agricultural imports that negatively affect domestic farmers. Many developed countries are arguing that such agreement cannot be reached in the absence of new market access commitments. Tanzania is leading efforts to restrict purchases made by developed countries which impact food security in the countries from which the products are sold. The World Food Programme (WFP) itself has also indicated that it will not purchase food from countries at risk of food insecurity. Tanzania and other proponents have argued that using clearer language in any text would provide some peace of mind for developing country agriculture producers. A related issue concerns export restrictions, and the possibility of introducing an advanced notice system to improve transparency in the negotiations. Currently, transparency and the proper monitoring of the 2015 Nairobi Ministerial Decision on Export Competition⁶ is limited to elements on cotton. However, the big cotton traders have pushed back, arguing that a standalone decision on cotton in the absence of progress on domestic support more generally will prove difficult to reach. The only resolution would be to have a

⁴ Negotiating Group on Rules - Unofficial room document - Fisheries subsidies - Joint ACP Group and Africa Group proposal (document RD/TN/RL/146) of 26 September 2021

⁵ See the Report by Ambassador Gloria Abraham Peralt in footnote 2 above.

⁶ See the text of the Decision <https://www.tralac.org/documents/resources/external-relations/wto/1707-export-competition-ministerial-decision-of-19-december-2015-mc10-nairobi/file.html>

work programme on transparency, although developing countries have cautioned that given their capacity constraints, elaborate transparency decisions may prove determinantal.

Peter Lunenborg, Senior Programme Officer, The South Centre, reiterated many of the points highlighted by the previous speaker, reminding us of the importance of reaching agreement in the agriculture negotiations as developing and least developed countries (LDCs) work towards economic rebuilding, transformation and resilience building post-COVID.

Agreed at the Doha Ministerial Conference in 2001, the Agreement on Agriculture is only a partial agreement covering export competition, domestic support, market access and cotton – which Lunenborg refers to as a ‘ceasefire agreement’ given that large global players at the time were handing out significant subsidies – because it marked the first time that agriculture was included as part of the global trading system. The Agreement recognises that the long-term objective of substantial progressive reductions in domestic support will require a process of continuous reform (Article 20).

The text agreed at the Nairobi Ministerial Conference in 2010 included a major outcome on export competition and in particular, export subsidies. The latter, however, created an embedded imbalance given that a small group of countries had used their rights to subsidise their exports, whereas others had not. At the Ministerial Conference in Buenos Aires in 2017, no agreement on agriculture was reached. The Chair has therefore issued a series of draft Ministerial decisions for members to consider, but these have been criticised for failing to achieve a certain degree of convergence and appear rather to serve as a collation of proposals in many different areas. Mr Lunenborg concurred that the WTO is therefore heading for work programmes on key issues in the negotiations, including on domestic support, market access and export restrictions. The issue of transparency is now for the first time being viewed as a separate topic, although it is unclear what elements should be included here. The WTO is still looking at some exact language to use in the texts to cater for the interests and concerns of developing countries.

Many developing members want a concrete outcome, even if only applied on a temporary basis. There are two ideas being proposed by the African Group: Firstly, that an interim decision allow for special safeguards to be used for four years, after which the instruments will expire. Secondly, that reduction commitments on AMS (Aggregate Measurement of Support⁷) be subject to an interim standstill on anything beyond the *de minimis* levels. New Zealand has offered a counter proposal for a possible ‘lending zone’ in which members’ domestic support beyond the applicable level shall not be increased or new support measures introduced for a certain period.

⁷ This includes all product-specific domestic support and non-product-specific support in one single figure.

Special and differential treatment (S&DT)

Rashid Kaukab, Executive Director, CUTS International, Geneva, noted that traditionally, countries with lower levels of development require different levels of rights and obligations, hence the multilateral trading system should have special provisions allowing them to adopt different policies in line with their development levels and needs. The main constraint for developing countries is, however, their capacity. Hence the focus should be on building the capacity of developing and least developed countries (LDCs), which would mean longer transitional periods, some technical financial assistance, and flexibility of commitments contained in WTO trade rules and trade-related agreements. A second constraint concerns the language used in many provisions which has meant that they are not legally-binding. The 2001 Uruguay Round texts included a clear mandate to forward the development agenda and identified 88 specific proposals, with suggestions on how these specific provisions could be prioritised and made more precise and effective. Of these, developing countries identified only 10 relevant proposals. In 2018 and 2019, intense efforts were made by South Africa to study the 10 proposals and to engage the developed countries in the negotiations in a two-track process involving both developing and developed countries. Due to COVID, however, the 12th Ministerial Conference (MC12), which was originally scheduled to take place in Kazakhstan in June 2020, has now been postponed indefinitely. Meanwhile, work has continued on the agriculture negotiations and efforts have been made to revise, strengthen, and supplement the 10 identified proposals, linking them with the Sustainable Development Goals (SDGs) as well as taking into consideration the vulnerabilities of developing countries, particularly after COVID. Although an in-depth consultation process was initiated by the Chair of the Committee on Trade and Development in Special Session, in which developing countries presented new material in support of the S&DT proposals, the lack of response and engagement by developed countries has prevented the negotiations from moving forward.

Mr Kaukab suggested several reasons for this. Developed countries argue that they cannot give the same special and differential treatment to all developing countries, so the question begs itself: how does the WTO define a 'developing country' and what are their differing demands? Developed countries have argued that the proposals on the table in their current form need to be redrafted, but without suggesting any ways in which to do so. Various stances from these countries have been adopted, from the United States' argument that criteria to define a developing country may be futile because only a limited number of countries would fall into this category, to Norway who has indicated its willingness to discuss the provisions identified as relevant for the LDCs. The European Union, whose stance falls somewhere in between, has advocated for a case-by-case approach that would indicate which specific countries are in need of assistance. The stalemate in the S&DT negotiations has now become a political issue, and a two-track approach is needed: firstly, developed countries must be willing to come back to the negotiating table, and to indicate what it is they want and are able to offer; and secondly, the biggest developing countries, when differentiation among them is not possible, should

voluntarily opt out of the S&DT offered. Given that subsidies are a horizontal issue, they are critical for reaching agreement in the agriculture negotiations as a whole.

Fisheries negotiations

Ms Kedibone Machiu, Director, Department of Trade, Industry and Competition, South Africa, introduced the discussion by highlighting the policy concerns of WTO members in the fisheries negotiations, in particular which kind of harmful subsidies to address, the magnitude of such subsidies, and the development dimension of subsidies that support food security and local production and income. Renewed momentum at the multilateral level to address sustainable practices in fisheries (SDG 14), through discussions and submissions by WTO members, produced a consolidated draft text to use as a basis for these negotiations⁸.

Dr. Radika Kumar, Adviser, Infrastructure Policy, Trade, Oceans and Natural Resources Directorate, The Commonwealth Secretariat, shared some of what the fisheries subsidies negotiations actually entail. There are three key players: the first group of countries are holders of fisheries resources, i.e. these are countries – many of which are LDCs and small island developing states (SIDS) – generally have major fishing areas and large fishing capacity, as well as large exclusive economic zones. Some of these countries do not, however, have large fishing capacity, and are therefore not major contributors to issues in relation to depletion of stocks. Nevertheless, they are the ones who issue fishing licences. The second group of countries are those with large vessel holders and capacity in terms of tonnage and technology, but do not necessarily have large exclusive economic zones. Although these marine producers have some capacity to fish in the oceans, as a result of subsidies, they are able to compete with the larger vessel holders which have greater capacity. The third group consists of bigger countries such as China, the EU and New Zealand, with larger vessel capacity and are therefore large players in the market. These are the countries that actually process the fish for export, with the aim of developing global value chains and expanding the fisheries sector.

Dr Kumar posed the following questions: If fisheries subsidies are totally removed, who will benefit? And if fisheries subsidies are not removed, who would the beneficiaries be? What would happen when oligopolistic behaviour in the market is created? In terms of reducing or removing subsidies, it is likely that those countries who issue and set the prices of fishing licences will lose some market share, and large vessel holders who have already been giving non-specific subsidies would saturate the market. Although there may be fishing excess as a result, there will also likely be future opportunities of creating an oligopolistic market structure.

⁸ See the Revised Draft Consolidated Chair Text on Fisheries Subsidies (document TN/RL/W/276/Rev.1) of 30 June 2021 <https://www.tralac.org/documents/resources/external-relations/wto/4430-wto-negotiating-group-on-rules-fisheries-subsidies-revised-draft-consolidated-text-30-june-2021.html>. See also the Negotiating Group on Rules – Fisheries Subsidies Revised Draft Text (document TN/RL/W/276/Rev.2) of 8 November 2021 <https://www.tralac.org/documents/resources/external-relations/wto/4431-wto-negotiating-group-on-rules-fisheries-subsidies-revised-draft-text-8-november-2021/file.html>

Dr Kumar further provided a comprehensive overview of the fisheries subsidies negotiations at the WTO, which were officially launched at the Doha Ministerial Conference in 2001. At the Hong Kong Ministerial Conference in 2005, the mandate was elaborated when members committed to prohibiting certain forms of fisheries subsidies that contribute to overfishing and overcapacity. This was further expanded in 2016, in line with the introduction of the United Nations' 2030 sustainable development agenda the previous year, to include the elimination of subsidies that contribute to illegal, unreported and unregulated (IUU) fishing and to refrain from introducing new such subsidies. At the 2017 Buenos Aires Ministerial Conference (MC11), however, no outcome had been reached; instead, members agreed to a work programme.

There are two sides to the negotiations: trade issues, and the disciplines on subsidies. On trade, new proposals were introduced between 2017 and 2019, but there was a lot of cherry picking and some S&DT provisions were diluted. The Chair's text of June 2021⁹ included 11 articles addressing scope (definitions), coverage (what is included), and level of agreement (SEM). These include fishing or fishing related activities, prohibition of IUU fishing, fisheries capacity, fish stocks, overfishing, flagging of vessels, institutional dispute settlement, and transparency. The language used in the text will be important in specifying the needs of developing countries in terms of levels of commitments, S&DT provisions, and (de)linking of the management of subsidies from the fisheries subsidies negotiations as a whole. For countries at the very early stages of fisheries sector development, subsidies will depend on the issue of IUU determination to prove that their fish stock is growing legitimately and at a suitable pace before any subsidy can be provided. However, acquiring such data could prove very difficult for LDCs and SIDS who lack the human and technological capacity to do so. Specific provisions covering technical and capacity building assistance and how to expand on this; monitoring, regulation and reporting of data; and notification and transparency are also included in the draft text. The development dimension is also important; economic, environmental, and social implications need to be considered. A transition period of two years may not be sufficient for developing countries to build the necessary capacity and ensure that trading opportunities are increased. In his final summation, Dr Kumar therefore called for developing countries to be smart and specific in what they are asking for under S&DT, and to focus on the mandate as set out in the agriculture subsidies negotiations if an agreement is to be reached.

Conclusion

Speakers in this webinar reminded us of how important the multilateral trade governance agenda is, especially for developing countries and LDCs. Issues such as S&DT, definitions, differentiation among developing countries, as well as cross cutting issues are extremely important in reaching any agreement. The linkages, sequencing, and complexity of the challenges being faced should not be underestimated; the implications will be felt not only in terms of Africa's trade with global partners, but also trade within the continent itself.

⁹ Ibid.