



## **PANG<sup>1</sup> analysis of the May 2021 Chair's Draft Consolidated Text on Fisheries Subsidies Negotiations at the World Trade Organization**

The new Chair's text (TN/RL/W/276) does not represent a progressive pathway towards conclusion at the July virtual Ministerial Meeting. The proposals that the Chair has unilaterally chosen to include, as well as the proposed articles not drawn from Member's proposals, have resulted in an unbalanced text that won't address those large and powerful subsidisers, like the EU, Japan and the US, with historical responsibilities for over one third of global fish stocks being overfished<sup>2</sup>.

Read as a whole, this text gives a 'reverse Special and Differential Treatment' (SDT) to those with established fishing fleets to continue subsidising unabated, fishing both in their and other Member state's waters. Further it enables those with the most capacity and existing global market dominance to dispute the management measures of other Members. In particular, those Members from developing and least developing countries attempting to challenge the market domination of big subsidisers by supporting the establishment of domestic fleets.

The current proposal on SDT is an UNCLOS-minus outcome for developing countries and LDCs. Developing countries already have the sovereign right to manage their resources within their Exclusive Economic Zones enshrined and should not accept an outcome that undermines that. These rights were negotiated for and secured in the United Nations and shouldn't be given up in the WTO. SDT is an integral part of this agreement and is acknowledged in the WTO as more than just longer timelines for commitments by developing countries. To ensure that the SDG mandate on SDT is met, these carve-outs must be made permanent in recognition of the asymmetry in development and resources between developed, developing and LDCs.

Summary of key concerns regarding the new Chair's text are:

- The updated chairs text doesn't address the many concerns regarding **Art5.1.1** (previously Art5.2) and the ongoing issues of the management-based flexibilities approach remain outstanding. This clause will effectively act as a permanent carve-out for those industrial fishing nations who have the capacity to subsidise their fleets. This does nothing to address the nations with the historic responsibility for overfishing but instead provides them with an opportunity to continue unabated. For Developing Countries this will make it harder to develop domestic fleets

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2 See United Nations Food and Agriculture Organisation "The State of World Fisheries and Aquaculture 2020", available <http://www.fao.org/state-of-fisheries-aquaculture>.

- to compete with foreign fleets, a key development feature for fisheries.
- The text (**Art4.3; Art5.1.1; Art8.1.b**) allows Members the avenue to challenge the management measures of another Member state (including measures set by Regional Fisheries Management Organisations) if it believes that they are not adequate enough. This advantages those Members with greater technical capacity to be better able to challenge another member's conservation measures undermining the national sovereignty of all Members.
- The Special and Differential Treatment (SDT) proposals (**Art3.8; Art4.3; Art5.5**) fail the mandate given to negotiators by SDG14.6. By only providing time-bound flexibilities that erode the existing sovereignty that Members already have under the UN Law of the Sea, developing countries lose the policy space to protect small-scale fishers as well as develop any future domestic fleet capacity to fish their own resources;
- The SDT provisions being contingent upon meeting burdensome notification obligations (**Art8.1b**) further undermines the mandate as well as the effectiveness of the agreement.

The new text, as it currently stands, will result in an agreement that fails the SDG 14.6 mandate by not capturing those responsible for depleted fish stocks as well as ensuring that developing countries including least developed and small island states retain the flexibilities and ability to develop.

**TN/RL/W 276** 11 May 2021

## **Negotiating Group on Rules**

### **FISHERIES SUBSIDIES DRAFT CONSOLIDATED TEXT**

#### *Revision*

*Note: This document is without prejudice to any Members' positions or views, whether or not reflected herein.*

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## **ARTICLE 1: SCOPE**

1.1 This [Instrument] applies to subsidies, within the meaning of Article 1.1 of the SCM Agreement that are specific within the meaning of Article 2 of that Agreement, to marine wild capture fishing and fishing related activities at sea.<sup>3</sup>

*It is welcome to see the scope only applying to fishing and fishing related activities "at sea". This is crucial to ensure that onshore facilities or activities like processing are not included in the prohibitions. The inclusion of the latter will derail the fisheries sector development of small states. Furthermore, the lessons should be learnt from the previous experience of yellow and red card disciplines which were unilateral measures of the EU that hampered the exports of fish for countries in Asia and the Pacific. The adoption of measures*

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<sup>3</sup> For greater certainty, aquaculture and inland fisheries are excluded from the scope of this [Instrument].

<sup>4</sup> For greater certainty, government-to-government payments under fisheries access agreements shall not be deemed to be subsidies within the meaning of this [Instrument].

*to rectify the yellow and red card disciplines required massive restructuring and had additional cost burdens.*

*The exclusion of government-to-government payments under footnote 2 is also a welcome clarification.*

*The scope should also explicitly state that Conservation and Management Measures (CMMs) should not be able to be challenged under any prohibitions taken in this agreement. The WTO is not the forum nor the expert body to discipline fisheries management measures.*

1.2 [Notwithstanding paragraph 1 of this Article, this [Instrument] also applies to fuel subsidies to fishing and fishing related activities at sea that are not specific within the meaning of Article 2 of the SCM Agreement.]

*The inclusion of fuel subsidies horizontally needs to be accompanied by an exception for developing countries and LDCs to ensure that their small-scale fisherfolk are still able to receive this much needed support.*

## **ARTICLE 2: DEFINITIONS**

For the purpose of this [Instrument]:

- (a)** "fish" means all species of living marine resources, whether processed or not;
- (b)** "fishing" means searching for, attracting, locating, catching, taking or harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish;
- (c)** "fishing related activities" means any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea;

*The definition needs to ensure that the landing, packaging, processing and transshipping of fish is 'at sea' activity as currently proposed. Failing to contain it to 'at sea' will result in onshore activities being included in the prohibitions and this can undermine canneries and other processing facilities that value-add to developing countries industries. Being addressed in Article 1 is helpful but this would reinforce the point in Article 2 (c)*

- (d)** "vessel" means any vessel, ship of another type or boat used for, equipped to be used for, or intended to be used for, fishing or fishing related activities;

*The emphasis on ensuring that the activities are confined to those "at sea" is to ensure that small boats that transfer fish from the mother ships to the shores are excluded from the prohibitions. In many small island states, this is income generating activity for large boats to offload fish into small boats that then land the catch into the ports.*

- (e)** "operator" means the owner of the vessel, or any person on board, who is in charge of or directs or controls the vessel.

## **ARTICLE 3: PROHIBITION ON SUBSIDIES TO ILLEGAL, UNREPORTED AND UNREGULATED FISHING<sup>5</sup>**

3.1 No Member shall grant or maintain any subsidy to a vessel [or operator]<sup>6</sup> engaged in illegal, unreported and unregulated (IUU) fishing.

*Applying it to the operator as well as the vessel provides greater capacity to capture subsidies for IUU as the subsidy may not be provided directly to a vessel.*

*Looking at the footnote 3 definition of IUU there are a number of issues to consider. The FAO 'International Plan of Action' is an evolving document so countries should not be agreeing to be bound by it. The square brackets starting with [where applicable...] should be added to this and retained. In addition it must apply only to 'at sea' fishing and fishing related activities to ensure that any prohibitions don't become a barrier to onshore processing.*

*A better formulation would be to revert to the ACP proposals regarding definition of IUU as included in document TN/RL/GEN/192. While this may be essentially the same language as referred to in footnote 6, by explicitly outlining the definition in an Annex like the ACP proposed, it borrows the language from the IPOA-IUU but removes the problem of turning a voluntary agreement into a legally binding one.*

3.2 For purposes of Article 3.1, a vessel [or operator] shall be considered to be engaged in IUU fishing if an affirmative determination thereof is made by any of the following<sup>7 8</sup>:

- (a) a coastal Member, for activities in waters under its jurisdiction; or
- (b) a flag State Member, for activities by vessels flying its flag; or
- (c) a relevant Regional Fisheries Management Organization or Arrangement (RFMO/A), in accordance with the rules and procedures of the RFMO/A and relevant international law, in areas and for species under its competence.

*This IUU determination is important to ensure that there is a process. This is inspired from the International Guidelines from Coastal States, Flag States and Port States responsibilities and cooperation among these three stakeholders are important. However, for small island states technical assistance to develop*

<sup>5</sup> "Illegal, unreported and unregulated (IUU) fishing" refers to activities set out in paragraph 3 of the *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* adopted by the UN Food and Agriculture Organization (FAO) in 2001[, where applicable, as implemented under national fisheries laws and regulations, or under relevant Regional Fisheries Management Organization or Arrangement (RFMO/A) management and conservation rules and procedures].

<sup>6</sup> [For the purpose of Article 3, the term "operator" means the operator at the time of the IUU fishing infraction. For greater certainty, the prohibition on granting or maintaining subsidies to operators engaged in IUU fishing applies to subsidies provided to fishing and fishing related activities at sea.]

<sup>7</sup> Nothing in this Article shall be interpreted to obligate Members to initiate IUU fishing investigations or make IUU fishing determinations.

<sup>8</sup> This Article shall have no legal implications regarding the competence under other international instruments of any of the listed entities to make an IUU fishing determination.

*capacities for IUU determination needs to be considered.*

*The inclusion of the word 'affirmative' is aimed to counter a situation where there are conflicting determinations being made. It is important to ensure that the determinations cannot be challenged to ensure that Coastal States and RFMO/As are not being undermined. Such a clarification however must also be accompanied by not allowing port states Members, subsidizing Members or flag state Members to be able to make determinations. While there should be cooperation among all such members there is no benefit to giving others the power to make such determinations. This maintains consistency with other international agreements such as the International Guideline on Port State Measures and recognition of competence.*

### 3.3

- (a)** An affirmative determination<sup>9</sup> under Article 3.2 refers to the final finding by a Member and/or the final listing by an RFMO/A that a vessel [or operator] has engaged in IUU fishing.
- (b)** [The prohibition under Article 3.1 shall apply where the determination under Article 3.2(a) is based on positive evidence and follows due process.]

*As mentioned above the determinations should only be made by Coastal state Members and RFMO/As. It should also only be done in accordance with the relevant international law that Members are party to.*

- (c)** [For the purpose of subparagraph (b), the coastal Member shall promptly notify the flag State Member and, if known, the subsidizing Member, of the initiation of an IUU fishing investigation [, and shall provide an opportunity to the flag State and subsidizing Member to submit information to be taken into account in the determination].]

*The square brackets pertaining to provisions for subsidizing Member's to be able to provide information to be taken into account in the determination as well as being in accordance with relevant international law are important to ensure that unilateral actions like the EU's red and yellow carding of other countries is avoided.*

*Further to this there is a need for the cooperation and provision of information to be in line with the Member's level of development and capacity to provide the information. The Member should not be required to provide information which it deems commercially sensitive and confidential.*

3.4 The subsidizing Member may take into account the nature, gravity and repetition of IUU fishing committed by a vessel [or operator] when setting the duration of application of the prohibition in Article 3.1. In any case, the prohibition in Article 3.1 shall apply as long as the sanction<sup>10</sup> resulting from a

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<sup>9</sup> Nothing in this Article shall be interpreted to delay, or affect the validity or enforceability of, an IUU fishing determination.

<sup>10</sup> Termination of sanctions is as provided for under the laws or procedures of the authority having made the determination referred to in Article 3.2, including by way of, for example: re-issuance of a suspended license; full prosecution of the matter; and delisting, forfeiture, sinking or scrapping of the vessel concerned.

determination triggering the prohibition remains in force, or as long as the vessel [or operator] is listed as engaged in IUU fishing, whichever is the longer.

*These prohibitions must be compatible with the existing mechanisms and procedures in relevant RFMO/As. If they are not compatible then there will be pressure to bend the procedures in RFMO/As to the binding commitments in the WTO.*

3.5 Where a port State Member notifies a subsidizing Member that it has clear grounds to believe that a vessel in one of its ports has engaged in IUU fishing, the subsidizing Member shall give due regard to the information received and take such actions in respect of its subsidies as it deems appropriate.

3.6 Each Member shall have laws, regulations and/or administrative procedures in place to ensure that subsidies referred to in Article 3.1, including such subsidies existing at the entry into force of this [Instrument], are not granted or maintained.

*The requirement that "Each Member shall" must be replaced with "Each Member should" to ease the burden for developing countries and be done so based on those Members capacity. There should be the option of providing SDT support for developing countries in order to ensure that this can be undertaken.*

3.7 Each Member shall notify to the [Committee] its laws, regulations and/or administrative procedures referred to in Article 3.6. This notification shall be made no later than the entry into force of this [Instrument]. Each Member shall promptly notify any subsequent amendments to its relevant laws, regulations and/or administrative procedures.

*Members should be encouraged to notify, or Members shall notify, based on accessible information. The transparency requirements should also state that the provision of confidential commercial information should be kept out of the requirements. This was previously in a footnote and should be reinserted. Further the notifications should be the equivalent of the ASCM notification requirements as per the ACP 2017 text.*

*Likewise there is also a need for support and capacity assistance to provide notifications as such activities are burdensome and we are already seeing many developing countries struggle to meet all their notification requirements. This should include transition periods for which to prepare.*

3.8 [The 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 [2] years from the date of entry into force of this [Instrument].]

*The current proposal on SDT is an UNCLOS-minus outcome for developing countries and LDCs. Developing countries already have the sovereign right to manage their resources within their Exclusive Economic Zones enshrined and should not accept an outcome that undermines that. These rights were*



*negotiated for and secured in the United Nations and shouldn't be given up in the WTO.*

*The current proposed text contains a carve-out based on the limits of the territorial sea however it won't be sufficient to ensure that small-scale and artisanal fisherfolk aren't caught up in the prohibitions and potentially lose much needed government support. Small-scale fishers do not uniformly fish within the territorial waters, variety in geographic realities like the extension of the continental shelf and the adoption of new technologies means that some small-scale fishers can easily exceed the 12 nautical miles of the Territorial Waters. This further undermines the sovereign rights of developing country and LDC members as per UNCLOS.*

*The proposal that SDT will only be applied for a 2 year transitional period is grossly inadequate to the realities of developing countries. Primarily the inclusion of SDT on a limited-time basis fails the SDG mandate. Two years is an insufficient time to allow for countries to get their internal procedures in place to adjust to the extensive commitments in this Article. The experience of Pacific Island Countries whom have already had to comply with unilateral demands for compliance from the European Union highlights just how long and arduous these changes can be.*

*SDT is an integral part of this agreement and acknowledged in the WTO as more than just longer timelines for commitments by developing countries. To ensure that the outcome meets the SDG mandate on SDT these carve-outs must be made permanent in recognition of the asymmetry in development and resources between developed, developing and LDCs. Accepting a weakened interpretation of SDT will allow other negotiations to accept such an interpretation.*

*Further, as has been mentioned above there is greater need for specified assistance for surveillance, compliance, notifications, implementation of laws etc in the SDT component. Limiting SDT to a two-year carve-out does not address the other issues that developing countries face in this sector. Many developing countries already struggle to meet the notification requirements in the WTO and unless support is given this will be exacerbated, not to mention diverting resources that could be used to develop domestic industries.*

Finally the special requirements of developing countries in international fisheries agreements including the UNCLOS provides existing lists of technical assistance required, the failure to include similar commitments may result in the already existing rights and flexibilities of developing countries being overridden by the WTO's binding commitments.

#### **ARTICLE 4: PROHIBITION ON SUBSIDIES CONCERNING OVERFISHED STOCKS**

4.1 No Member shall grant or maintain subsidies for fishing or fishing related activities regarding an overfished stock.

*There needs to be clarity on the practical implications of the subsidies*

*"regarding an overfished stock". Further, differences in fishing practice/ techniques? means there is a variety of ways to fish that can result in numerous stocks being caught at the same time, take purse-seine fishing compared to long-line fishing for example. There needs to be clarity as to how the term "regarding" will be implemented in these cases.*

4.2 For the purpose of this Article, a fish stock is overfished if it is recognized as overfished by the coastal Member under whose jurisdiction the fishing is taking place or by a relevant RFMO/A based on best scientific evidence available to it.

*It is important to ensure that the determinations are based on both the "best scientific evidence available to and recognised by them" to ensure that countries maintain sovereignty over their proceedings. The removal of "recognised by them" in the new chairs text is a regression for the sovereignty of members. The argument that this is in accordance with other international instruments like UNCLOS and the UN Fish Stocks Agreement is a dangerous misrepresentation. UNCLOS states that the coastal state can determine the allowable catch levels within its EEZ "taking into account the best scientific evidence available to it", taking into account still provides the coastal state with the authority to determine the value of the information. The UN Fish Stocks Agreement then becomes enforceable within this framework of UNCLOS and Members taking into account the best scientific evidence available to it. Not providing members with an ability to assess the information presented to it may result in other Members with greater capacity using their evidence to challenge a Member's assessments.*

*It is also worth noting that some developing countries face capacity challenges with being able to make such determinations. As such technical assistance should be provided and contingent upon the undertaking of these obligations. It is important that any technical assistance is specific and not left open ended as that can result in meaningless assistance. The ACP proposal on this in TN/RL/GEN/192 articulates a solid list of the types of technical assistance and capacity building that would be of use and these should be included in the final outcome.*

4.3 Notwithstanding Article 4.1, a Member may grant or maintain subsidies referred to in Article 4.1 if such subsidies are implemented to promote the rebuilding of the stock to a biologically sustainable level.<sup>11</sup>

*This Article has undergone significant change between the previous and current chair's texts. The previous text Art4.3 left the determination of the status to the Coastal Member State whose jurisdiction the fishing was taking place or the relevant RFMO/A in areas and species under its competence. This more simplified approach left greater sovereignty with the coastal members however the current changes to the chairs text are more prescriptive.*

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<sup>11</sup> For the purpose of this paragraph, a biologically sustainable level is the level determined by a coastal Member having jurisdiction over the area where the fishing or fishing related activity is taking place, using maximum sustainable yield (MSY), or alternative reference points based on indicators such as [level of depletion, or level of or trend in time series data on catch per unit effort, commensurate with the data available for the fishery]; or by a relevant RFMO/A in areas and for species under its competence.



*The footnote detailing the parameters for determining biological sustainability presents challenges for developing and small island states who rely on the work of RFMOs to support making such decisions. The lack of national capacity presents an asymmetry between those developed nations who have extensive capacity to capture and utilise fisheries data and those who don't, making it easier for developed nations to provide subsidies based on national data points. Further the inclusion of examples for alternative reference points may present limitations in what alternative reference points can be used by Members.*

4.4 [The prohibition under Article 4.1 shall not apply to subsidies granted or maintained by developing country Members, including 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 [2] years from the date of entry into force of this [Instrument].]

*The same concerns regarding SDT in IUU apply to 'Overfished Stocks'. Any outcome on SDT for developing and least developed countries must ensure that their existing rights under UNCLOS are maintained and that any technical assistance and capacity building is adequate and easily accessible. The current proposal is UNCLOS-minus in its scope and the temporary nature of the carve-out will only exacerbate this.*

*Also one must exercise caution as giving up their UNCLOS EEZ rights to management measures will not only capture fisheries resources but also other marine biodiversity too.*

*SDT must include more than transitional periods as mentioned in the SDT in Article 3. As mentioned above, the need for assistance for notifications as well as stock assessments is very real and any commitments made by developing countries should be linked to binding commitments and the actual provision of such support.*

*Further in the assessment of stocks, different bio-economic models are applied and undertaking such assessment will be burdensome. This requires greater capacity and support and relying on a transitional period is insufficient. The SDT from the ACP 2017<sup>12</sup> text should be expanded on and integrated into the*

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<sup>12</sup>ACP proposal on Special and Differential Treatment

4.1 Prohibitions other than those outlined in Article 2.1(a) and 2.1(b) above shall not apply to LDCs.

4.2 With respect to Article 2.1.b, in order to establish measures against unreported and unregulated fishing, after the period stipulated in Article 3.1 and 3.2, developing countries not engaged in large scale industrial distant water fishing are entitled to apply [x] additional years and LDCs [x] additional years of transition period, except for illegal fishing.

4.3 The prohibition under 2.1(c) (i) shall not apply to subsidies provided by a developing country supporting fishing outside of their EEZ, which exclusively exploits quotas or any other rights, established by a regional fisheries management organisation (RFMO) or a regional fisheries management arrangement.

4.4 Developed countries, and developing countries in a position to do so shall provide, and relevant agencies are invited to provide, targeted technical assistance and capacity building to developing countries, in particular LDCs and small, vulnerable economies (SVEs) to:

*text from the Indian proposal.*

## **ARTICLE 5: PROHIBITION ON SUBSIDIES CONCERNING OVERCAPACITY AND OVERFISHING**

5.1 No Member shall grant or maintain subsidies to fishing or fishing related activities that contribute to overcapacity or overfishing. For the purpose of this paragraph, subsidies that contribute to overcapacity or overfishing include:

- (a) subsidies to construction, acquisition, modernisation, renovation or upgrading of vessels;
- (b) subsidies to the purchase of machines and equipment for vessels (including fishing gear and engine, fish-processing machinery, fish-finding technology, refrigerators, or machinery for sorting or cleaning fish);
- (c) subsidies to the purchase/costs of fuel, ice, or bait;
- (d) subsidies to costs of personnel, social charges, or insurance;
- (e) income support of vessels or operators or the workers they employ;
- (f) price support of fish caught;
- (g) subsidies to at-sea support; and
- (h) subsidies covering operating losses of vessels or fishing or fishing related activities.

5.1.1 A subsidy is not inconsistent with Article 5.1 if the subsidizing Member demonstrates that measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level.<sup>13</sup>

*This article uses fisheries management as a condition of accessing flexibilities. This approach advantages those with existing fishing vessels and fleets and fisheries management capacity while disproportionately disadvantaging those without such capacity. This effectively locks in the existing market dominance of the current major fishers by giving them the opportunity to continue to subsidise their fleets while having recourse to challenge members who may also want to support domestic fleet capacity.*

*The updated chairs text doesn't address the many concerns regarding the article above (previously Art5.2) and the ongoing issues with this approach*

1. a) address institutional and financial difficulties faced by LDCs and developing countries with constraints to implement this Agreement;
2. b) establish reporting mechanisms and regulations to prevent unreported and unregulated fishing;
3. c) conduct stock assessments;
4. d) conduct monitoring, control and surveillance of fish stocks; and
5. e) research and development

4.5 The operationalization of disciplines on fisheries subsidies should not impede the ability developing countries and LDCs to develop and diversify their fisheries sector.

<sup>13</sup> For the purpose of this paragraph, a biologically sustainable level is the level determined by a coastal Member having jurisdiction over the area where the fishing or fishing related activity is taking place, using MSY, or alternative reference points based on indicators such as [level of depletion, or level of or trend in time series data on catch per unit effort, commensurate with the data available for the fishery]; or by a relevant RFMO/A in areas and for species under its competence.

*remain outstanding. Firstly this clause will effectively act as a permanent carve-out for those industrial fishing nations who have the capacity to subsidise their fleets. This does nothing to address those nations with the historic responsibility for overfishing but instead provides them with an opportunity to continue unabated.*

*Secondly this approach would turn the WTO into a body that would determine whether or not the policies of Members are effective at ensuring sustainable stock levels. The WTO is not the body that is best suited to make such determinations and such language invites it into that area of expertise. While some management plans may operate in the manner described above it is not the remit of the WTO to be making a determination as to whether or not those systems and fisheries are managed well enough to be able to have subsidised vessels fishing those waters. Developing Countries should be wary of bodies without expertise making such determinations and support India's proposal that states "a panel shall not review claims regarding a coastal member's determination made concerning IUU fishing, overfished stocks, and overfishing and overcapacity in respect of fishing and fishing activities conducted by its own fishing vessels in its territorial sea and exclusive economic zone".*

*Thirdly conservation and management measures are negotiated in the RFMOs. There is the concern that the inclusion of CMMs in the WTO will see non-WTO members also having to comply with any internationalised standards, thus undermining the other foras that have the expertise to make decisions on the matters. We do not want to offset the negotiating rights of members in RFMOs on CMMs by agreeing a blanket provision in the fisheries text.*

*Fourthly this will be tied to how Member's "demonstrate" the measures, placing an ongoing burden on developing countries. As will be raised in Article 8 below, there must be greater support for capacity within developing countries and the level of capacity should match the level of commitments undertaken. This is inappropriate and a capacity-based issue for developing countries.*

*Finally, the footnote detailing the parameters for determining biological sustainability presents challenges for developing and small island states who rely on the work of RFMOs to support making such decisions. The lack of national capacity presents an asymmetry between those developed nations who have extensive capacity to capture and utilise fisheries data and those who don't, making it easier for developed nations to provide subsidies based on national data points. Further the inclusion of examples for alternative reference points may present limitations in what alternative reference points can be used by Members.*

## 5.2

- (a)** No Member shall grant or maintain subsidies contingent upon, or tied to, actual or anticipated fishing or fishing related activities in areas beyond the subsidizing Member's jurisdiction (whether solely or as one of several other conditions), including subsidies provided to support at-sea

fish-processing operations or facilities, such as for refrigerator fish cargo vessels, and subsidies to support tankers that refuel fishing vessels at sea.<sup>14</sup>

- (b)** Subparagraph (a) shall not apply to the non-collection from operators or vessels of government-to-government payments under agreements and other arrangements with coastal Members for access to the surplus of the total allowable catch of the living resources in waters under their jurisdiction, provided that the requirements under Article 5.1.1 are met.

5.3 No Member shall grant or maintain subsidies provided to fishing or fishing related activities outside of the jurisdiction of a coastal Member and outside the competence of a relevant RFMO/A.

5.4 [No Member shall grant or maintain subsidies for a vessel not flying the flag of the subsidizing Member.]

**[ALT 1**

5.5

- (a) The prohibition under Article 5.1 shall not apply to subsidies granted or maintained by LDC Members for fishing or fishing related activities.
- (b) The prohibition under Article 5.1 shall not apply to subsidies granted or maintained by developing country Members for fishing or fishing related activities within their territorial sea.
- (c) The prohibition under Article 5.1 shall apply to subsidies granted or maintained by developing country Members, including LDC Members, for fishing or fishing related activities within their EEZ and the area of competence of RFMO/A if all the following criteria are met:
- i. the Member's GNI per capita exceeds US\$5,000<sup>15</sup> (based on constant 2010 US dollars) for three consecutive years;
  - ii. the Member's share of the annual global marine capture fish production exceeds 2% as per the most recent published FAO data;
  - iii. the Member engages in distant water fishing<sup>16</sup>; and
  - iv. the contribution from Agriculture, Forestry and Fishing to the Member's annual national GDP<sup>17</sup> is less than 10% for the most recent three consecutive years.]

*As mentioned previously, SDT should include the carve-out of a Members entire EEZ to ensure that UNCLOS is not undermined and neither are management measures or development policy space. If a fall-back position is taken that includes a criteria for extending out to a Member's EEZ it should be*

<sup>14</sup> With respect to Article 5.2(a), the mere fact that a subsidy is granted or maintained to vessels or operators that may be engaged in fishing or fishing related activities in areas beyond the subsidizing Member's jurisdiction shall not for that reason alone be considered a prohibited subsidy within the meaning of Article 5.2(a).

<sup>15</sup> US\$5,000 (based on constant 2010 US dollars) as per published data of the World Bank.

<sup>16</sup> A Member is deemed not to be engaged in distant water fishing if its operators or vessels normally fish in FAO Major Fishing Area(s) that is(are) adjacent to the natural coastline of the flag State.

<sup>17</sup> Based on the latest published data of the World Bank.

*as inclusive as possible to ensure that developing country members are all able to access their rights under UNCLOS. If there is concern about the use of some metrics to determine SDT then others should be explored to support wide-scale application of SDT to all developing countries.*

**[ALT 2**

**5.5**

- (a) The prohibition under Article 5.1 shall not apply to subsidies granted or maintained by LDC Members for fishing or fishing related activities.
- (b) The prohibition under Article 5.1 shall not apply to subsidies granted or maintained by developing country 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 [7] years from the date of entry into force of this [Instrument]].
- (c) For subsidies other than those referred to in subparagraph (b), a developing country Member may grant or maintain the subsidies referred to in Article 5.1 for fishing and fishing related activities within its EEZ and the area of competence of a relevant RFMO/A for a maximum of [5] years after the entry into force of this [Instrument]. A developing country Member intending to invoke this provision shall inform the [Committee] in writing before the date of entry into force of this [Instrument].
- (d) If a developing country Member whose:
  - i. share of the annual global volume marine capture fish production does not exceed [0.7%] as per the most recent published FAO data; and
  - ii. subsidies to fishing or fishing related activities at sea do not exceed US\$[25 million] annually

deems it necessary to apply subsidies referred to in subparagraphs (b) and (c) beyond the [7 or 5] years provided for, respectively, in those subparagraphs, it shall not later than one year before the expiry of the applicable period enter into consultation with the [Committee], which will determine whether an extension of this period is justified, after examining all the relevant needs of the developing country Member in question. If the [Committee] determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the [Committee] to determine the necessity of maintaining the subsidies. If no such determination is made by the [Committee], the developing country Member shall phase out the remaining subsidies prohibited under Article 5.1 within two years from the end of the last authorized period.]

*The proposals contained within Alt2 will limit the ability of developing country members to support their small-scale fishers or aspirations for domestic vessel capacity.*

The inclusion of time-bound SDT in this alternative proposal raises many of the issues that currently exist in this text. Limiting the ability of a developing country member to subsidise their domestic capacity undermines the possibility that such domestic capacity will ever be achieved, leaving many developing countries reliant on foreign fleet capacity.

The additional proposal for any extension to be decided by the committee initially and then on an annual basis places the burden on the developing country member to prove annually that they need to provide such subsidies. There is no stated criteria to provide clarity on how the committee would determine that an extension is "justified" leaving such a clause completely open ended while accepting other commitments elsewhere in the text.

Alt2 represents a step backwards in regards to the application of SDT both in this text and in any future application for SDT in other WTO negotiations.

## **ARTICLE 6: [SPECIFIC PROVISIONS FOR LDC MEMBERS]**

6.1 [Provisions relating to LDC Members shall continue to apply for a transitional period of [X] years after the entry into force of a decision of the UN General Assembly to exclude a Member from the "Least Developed Countries" category.]

*This article needs to be expanded beyond the transitional timelines approach and ensure that LDCs especially get access to technical assistance and capacity to ensure they are better placed to meet their commitments. As has been mentioned above the issues of SDT also apply here.*

6.2 A Member shall exercise due restraint in raising matters involving an LDC Member and solutions explored shall take into consideration the specific situation of the LDC Member involved, if any.

## **ARTICLE 7: TECHNICAL ASSISTANCE AND CAPACITY BUILDING**

[Developed country Members, and developing country Members declaring themselves in a position to do so, shall provide targeted technical assistance and capacity building assistance to developing country Members, including LDC Members and land-locked developing country Members, for the purpose of implementation of the disciplines under this [Instrument].]

*It is welcomed that this a binding commitment for developed countries as previous texts provided more optional language. For developing countries their adherence to their commitments should be contingent upon the provision of adequate technical and capacity building assistance.*

## **ARTICLE 8: NOTIFICATION AND TRANSPARENCY**

8.1 In order to strengthen and enhance notifications of fisheries subsidies, and to enable more effective surveillance of the implementation of fisheries subsidies commitments, each Member shall

1. (a) provide the following information as part of its regular notification of fisheries subsidies under Article 25 of the SCM Agreement<sup>18</sup>:

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<sup>18</sup> For the purpose of Article 8.1, Members shall provide this information in addition to all the information required under Article 25 of the SCM Agreement and as stipulated in any questionnaire utilized by the SCM Committee, for example G/SCM/6/Rev.1.



1. type or kind of fishing activity for which the subsidy is provided; and
  2. catch data by species in the fishery for which the subsidy is provided; and
2. (b) [to the extent possible,] provide the following information as part of its regular notification of fisheries subsidies under Article 25 of the SCM Agreement:
1. status of the fish stocks in the fishery for which the subsidy is provided (e.g. overfished, maximally sustainably fished, or under fished) and whether such stocks are shared with any other Member<sup>19</sup> or are managed by an RFMO/A;
  2. conservation and management measures in place for the relevant fish stock;
  3. name and identification number of the fishing vessel or vessels benefitting from the subsidy; and
  4. fleet capacity in the fishery for which the subsidy is provided.

The notification commitments listed in 8.1.2 are asking for SCM 'Plus' levels of notifications. Developing countries will already provide this information to any relevant RFMOs in a non-binding manner plus it is not linked to subsidisation of fleets/fishers. The provision of this data to RFMOs means that it can be accessed through the RFMO if and when necessary. The manner of inclusion for this information in this instrument brings the burden of legal enforceability with it. Providing such information officially to the WTO will also allow it to be used for any counter-claims against a member that their fisheries stocks or subsidies program is in breach of their commitments under this instrument. This changes the original nature with which such information is being shared in different forums, as such this should be removed from the text.

Furthermore any notifications should be based on the capacity of Members to provide such notifications. Ensuring up-to-date notifications is an ongoing capacity issue for many developing countries and this will be exacerbated by such extensive requirements under this instrument.

8.2 Each Member shall notify the [Committee] in writing on an annual basis of:

- (a) any list of vessels and operators that it has determined as having been engaged in IUU fishing; and
- (b) a list of any fisheries access agreements in force with another government or governmental authority, and such notification shall consist of the titles of the agreements and a list of their parties.

*This version of the chairs text has lost "where applicable" in Article 8.2(b) and this should be reinstated. Providing the lists of fisheries access agreements should be where deemed appropriate from the Members involved and this should be reflected in the text.*

8.3 A Member may request additional information from the notifying Member

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<sup>19</sup> The term "shared stocks" refers to stocks that occur within the exclusive economic zones (EEZ) of two or more coastal Members, or both within the EEZ and in an area beyond and adjacent to it.

regarding the notifications and information provided under paragraphs 1 and 2. The notifying Member shall respond to that request as quickly as possible in writing and in a comprehensive manner. If a Member considers that a notification or information under paragraphs 1 and 2 has not been provided, the Member may bring the matter to the attention of such other Member or to the [Committee].

#### 8.4

- (a)** A Member may only invoke Article 3.8, Article 4.3, Article 4.4, Article 5.1.1, or Article 5.5 in respect of subsidies which it has notified to the [Committee] under Article 25 of the SCM Agreement and Article 8.1 of this [Instrument].

There is a requirement for clarity for the reference to Article 8.1 in this article. As it currently is worded it includes all of the components of Article 8.1 not just 8.1.(a) even though the second part of Art8.4 refers to 8.1(b).

- (b)** In addition, a Member may only invoke Article 4.3 or Article 5.1.1 if the Member has provided information called for in Articles 8.1(b)(i) and 8.1(b)(ii).

These provisions tie the burden of notifications to being able to access any flexibilities or SDT in the instrument. As mentioned above notifications are burdensome obligations for many developing countries and by tying the access to SDT to notifications we will see the repeat of the mistakes made in the agricultural stockholding programmes. These provisions will undermine the already weak SDT for developing countries and risk making what is proposed unworkable. This again enhances the position of those developed countries with existing large fleets that have the existing capacity to meet the notification requirements, placing them at an advantage over those who are aren't responsible for current overfishing of stocks nor have notification capacity.

### **ARTICLE 9: [INSTITUTIONAL ARRANGEMENTS]**

[9.1 There is hereby established a [Committee] composed of representatives from each of the Members. The Committee shall elect its own Chair and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this [Instrument] at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this [Instrument] or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of this [Instrument] or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.]

9.2 Each Member shall, within one year of the date of entry into force of this [Instrument], inform the [Committee] of measures in existence or taken to ensure the implementation and administration of this [Instrument], including the steps taken to implement prohibitions set out in Articles 3, 4 and 5. Each Member shall also inform the [Committee] of any changes to such measures thereafter. The [Committee] shall review annually the implementation and operation of this [Instrument], taking into account the objectives thereof.

9.3 Each Member shall, within one year of the date of entry into force of this [Instrument], provide to the [Committee] a description of its fisheries regime with references to its laws, regulations and administrative procedures relevant to this [Instrument], and promptly inform the [Committee] of any modifications thereafter. A Member may meet this obligation by providing to the [Committee] an up-to-date electronic link to the Member's or other appropriate official web page that sets out this information.

9.4 The [Committee] shall examine all information provided pursuant to Articles 3 and 8 and this Article not less than every two years.

9.5 The [Committee] shall maintain close contact with the relevant international organizations in the field of fisheries management, especially with the Food and Agriculture Organization of the United Nations (FAO) and relevant RFMO/As.

9.6 Not later than [X] after the date of entry into force of this [Instrument] and periodically thereafter, the [Committee] shall review the operation of this [Instrument] with a view to making all necessary modifications to improve the operation of this [Instrument], taking into account the objectives thereof.

#### **ARTICLE 10: DISPUTE SETTLEMENT**

The provisions of Articles XXII and XXIII of the GATT 1994 as elaborated and applied by the Dispute Settlement Understanding, and Article 4 of the *Agreement on Subsidies and Countervailing Measures* shall apply to consultations, the settlement of disputes, and remedies under this [Instrument], except as otherwise specifically provided herein.

#### **ARTICLE 11: FINAL PROVISIONS**

11.1 Nothing in this [Instrument] shall be construed or applied in a manner which will affect the rights of land-locked country Members under public international law.

11.2 Members shall take special care and exercise due restraint when granting subsidies to fishing or fishing related activities regarding stocks the status of which is unknown.

11.3 Except as provided in Articles 3 and 4, nothing in this [Instrument] shall prevent a Member from granting a subsidy for disaster relief, provided that the subsidy is:

- (a) limited to the relief of a particular disaster;
- (b) limited to the affected geographic area;
- (c) time-limited; and
- (d) In the case of reconstruction subsidies, limited to restoring the affected area, the affected fishery, and/or the affected fleet up to [a sustainable level of fishing and/or fishing capacity as established through a scientific-based assessment of the status of the fishery and in no case beyond] its pre-disaster level.

11.4

- (a) This [Instrument], including any findings, recommendations, and

awards with respect to this [Instrument], shall have no legal implications regarding territoriality or delimitation of maritime jurisdiction.

- (b)** A panel established pursuant to [Article 10 of this Instrument] shall not entertain any claim that would require it to address any issues of territoriality or delimitation of maritime jurisdiction that is contested by a party or a third party.
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