



## **PANG<sup>1</sup> analysis of the December 2020 Chair's Draft Consolidated Text on Fisheries Subsidies Negotiations at the World Trade Organization**

The revisions to the Chair's text (RD/TN/RL/126/Rev.2) fail to address the key outstanding concerns about developmental policy space and ensuring that disciplines on conservation and management measures (CMMs) are outside of the WTO discussion. Despite members recognizing the importance of CMMs, one should be mindful that the discussions on disciplines on CMMs are to be left to the Regional Fisheries Management Organizations (RFMOs) who have the remit and expertise. The CMMs in the context of the WTO fisheries negotiations are deemed as non-tariff measures and disguised restrictions to trade. Members therefore need to exercise caution and understand the implications of its inclusion into the legally binding text.

Further it is important to make explicit that the conservation and management measures of Members aren't included in the negotiations in a manner that could be challenged in the WTO. Currently there is a clear threat that this is the case which will advantage those industrialised nations with greater capacity for management and surveillance of their stocks. It must be made clear in the WTO that conservation and management measures are not up for dispute.

The continued framing of Special and Differential Treatment (SDT) provisions as merely a 'transitional measure' is problematic and undermines the SDG mandate of providing "appropriate and effective" SDT. These are internationally recognised frameworks for developing and least-developed countries and shouldn't be included in these negotiations as a time-limited manner. By doing so there is the threat that this sets precedence and will be the new approach to SDT used in all parts of the WTO and trade negotiations.

### **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

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Agreement, to marine wild capture fishing and fishing related activities at sea.<sup>2,3</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 on the previous experience of yellow and red card disciplines which were unilateral measures of the EU hampered the exports of fish for countries in Asia and Pacific should be learnt from.*

*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.*

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 an 'at sea' activity. Failing to contain it to 'at sea' will result in onshore activities being included in the prohibitions and 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.*

- (d) "vessel" means any vessel, ship of another type or boat used for, equipped

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<sup>2</sup> For greater certainty, aquaculture and inland fisheries are excluded from the scope of this [Instrument].

<sup>3</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 be used for, or intended to be used for, fishing or fishing related activities;

*This must exclude small boats that transfer fish from the mother ships to the shores. 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>4</sup>**

3.1 No Member shall grant or maintain any subsidy to a vessel [or operator]<sup>5</sup> engaged in illegal, unreported or 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. This explicitly outlines the definition in Annex 1, borrowing the language from the IPOA-IUU but removes the problem of turning a voluntary agreement into a binding one.*

3.2 For purposes of paragraph 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>6,7</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

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<sup>4</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* (IUU Fishing Plan of Action) 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 Organisation or Arrangement (RFMO/A) management and conservation rules and procedures].

<sup>5</sup> [For the purpose of Article 3, the term "operator" means the operator at the time of the IUU 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>6</sup> Nothing in this Article shall be interpreted to obligate Members to initiate IUU investigations or make IUU determinations.

<sup>7</sup> This Article shall have no legal implications regarding the competence under other international IUU determinations.

(RFMO/A), in accordance with the rules and procedures of the RFMO/A, in areas and for species under its competence<sup>8</sup>; or

(d) [a subsidizing Member for activities by vessels it subsidizes; or]

(e) [a port State Member for a vessel that is in one of its ports, provided it acted in cooperation with the flag State and, where appropriate, the coastal State, or acted in a situation where the flag State did not within a reasonable period of time inform the port State of action undertaken in response to alleged IUU fishing by vessels flying its flag when such allegations have been reported to the flag State by the port State concerned.]

*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 states technical assistance to develop 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 paragraph 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 paragraph 3.1 shall apply where the determination under subparagraphs 3.2[(a), 3.2(c), and 3.2(e)] is based on positive evidence and follows due process, [in accordance with relevant international law]].

*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) [If the flag State [or subsidizing Member] is known, a Member shall promptly notify the flag State [or subsidizing Member] of the initiation of an IUU investigation [, and provide an opportunity to the flag State [or subsidizing Member] to provide information to be taken into account in the determination.]]

*The square brackets pertaining to provisions for subsidizing Member's to be*

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<sup>8</sup> [In case of overlap between the area of jurisdiction of a coastal Member under subparagraph 3.2(a) and the area of competence of a RFMO/A under subparagraph 3.2(c), the determination made by the coastal Member shall prevail.]

<sup>9</sup> Nothing in this provision shall be interpreted to affect the validity and enforceability of an IUU determination.

*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 [In applying the prohibition in paragraph 3.1, the subsidizing Member may take into account the [nature, gravity and repetition] [seriousness<sup>10</sup>] of IUU fishing committed by a vessel [or operator]].

3.5 [The prohibition in paragraph 3.1 shall apply as long as the sanction<sup>11</sup> resulting from a 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. In no case shall the duration of the prohibition be less than [X] months from the date on which it first took effect.]

*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.*

3.6 [Each Member shall ensure that this provision is effective in securing compliance, discouraging infractions and depriving offenders of benefits accruing from their IUU fishing activities.]

*Developing countries will need assistance for monitoring and surveillance to ensure compliance, this must be built into the SDT proposals on technical assistance and capacity building. The 2017 ACP text on Fisheries subsidies proposal had a list of areas to technical assistance which should be added to India's SDT proposals and expanded.*

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<sup>10</sup>[The following infractions [with reference to paragraph 3.2] shall always trigger the application of the prohibition under paragraph 3.1:

- (a) fishing without a valid licence, authorization or permit issued by the flag State in accordance with any applicable procedures agreed at the regional or global level;
- (b) failing to maintain accurate records of catch and catch-related data, as required by the relevant RFMO/A, or serious misreporting of catch, contrary to the catch reporting requirements of such RFMO/A;
- (c) fishing in a closed area, fishing during a closed season or fishing without, or after attainment of, a quota established by the relevant RFMO/A;
- (d) directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited;
- (e) using prohibited fishing gear;
- (f) falsifying or concealing the markings, identity or registration of a vessel;
- (g) concealing, tampering with or disposing of evidence relating to an investigation;
- (h) multiple infractions which together constitute a serious disregard of conservation and management measures; or
- (i) such other infractions as may be specified in procedures established by the relevant RFMO/A.]

<sup>11</sup> [Termination of sanctions is as provided for under the laws or procedures of the authority having made the determination referred to in paragraph 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, etc.]

3.7 Each Member shall have laws, regulations and/or administrative procedures in place to ensure that subsidies referred to in paragraph 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.*

3.8 Each Member shall notify to the WTO [PLACEHOLDER – RELEVANT BODY] its laws, regulations and/or administrative procedures referred to in paragraph 3.7. 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.*

3.9 [The prohibition under paragraph 3.1 in respect of unreported and unregulated fishing, shall not apply to:

(a) subsidies granted or maintained by developing country Members, including Least Developed Country (LDC) Members, for fishing or fishing related activities by vessels other than large scale industrial fishing vessels<sup>12</sup> within their territorial sea;<sup>13</sup>

(b) [PLACEHOLDER – TRANSITIONAL PERIOD SDT FOR UU]]

*The current proposal on SDT is an UNCLOS-minus outcome for developing countries and LDCs. Developing countries already have enshrined their sovereign right to manage their resources within their Exclusive Economic Zones 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. Some members may have pre-existing arrangements with RFMO's to monitor within their EEZs which may make them accept SDT only extending to their territorial waters however that is not the case for all developing countries.*

*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*

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<sup>12</sup> [PLACEHOLDER – LARGE SCALE INDUSTRIAL FISHING VESSELS]

<sup>13</sup> [Up to 12 nautical miles measured from baselines.]

*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 an as-yet-determined transitional period as per the placeholder in Art3.9(b) should be challenged.*

*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.*

*The definition of large-scale must ensure that small-scale and artisanal fishers are not captured by the prohibitions. This can be facilitated by ensuring a high threshold definition.*

*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 temporary 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 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 when any of the following situations related to that stock are present:

- (a) lack of recovery of the stock; or
- (b) continuous reduction in the level of the stock.

*There needs to be clarity on the practical implications of the subsidies "regarding an overfished stock". It is welcomed that the previous language which was more explicit on the subsidies targeting stocks, resulting in a hard to prove causality, has been removed however there needs to be a settled understanding of how it will be proven.*

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

*Also undertaking fish stock assessments is difficult for developing countries including PICs. If such commitments are to be taken then there needs to be strong SDT for technical assistance in the text for stock assessments. Also PICs should demand that if capacity building for stock assessment is not provided, then they should not be obliged to take such stringent requirements. This again is in the ambit of management measures.*

4.2 A fish stock is overfished if it is

[**ALT1** recognized as overfished by the Member under whose jurisdiction the fishing is taking place or by a relevant RFMO/A based on best scientific evidence available to and recognized by them.]

*This alternative is better for PICs as it allows the existing authorities to work within their jurisdictions and competencies to make determinations based on existing processes. The inclusion of "best scientific evidence available to and recognised by them" is important to ensure that countries maintain sovereignty over their proceedings.*

*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.*

[**ALT2** at such a low level that mortality from fishing needs to be restricted to allow the stock to rebuild to a level that produces maximum sustainable yield (MSY) or alternative reference points based on the best scientific evidence available to and recognized by the Member.]

*This alternative is too prescriptive in its approach for determining stock levels. Members and RFMOs already have procedures in place to undertake stock assessments and any changes to those methods should be determined in the relevant fora. Binding the method within the WTO undermines the work of competent authorities by removing the decision making process for assessments from those bodies. There is also no explicit reference to it being the evidence recognised by the Member under whose jurisdiction the fishing is taking place.*

4.3 A Member may grant or maintain the subsidies set out in Article 4.1 if the subsidies and/or other appropriate measures are implemented in a manner that ensures rebuilding of the stock to a biologically sustainable level as determined by the coastal Member under whose jurisdiction the fishing is taking place or a relevant RFMO/A in areas and for species under its

competence.

*There needs to be clarity as to whether it is solely the "biologically sustainable level" that is determined by the coastal Member or RFMO/A or whether this extends to the determination of what measures and manners of implementation are appropriate. If it does not extend to the latter then it invites the WTO into a position where the "appropriate measures" are open to challenge by another member, something the WTO does not have the appropriate expertise to determine. Also the technical aspect of such determination will be burdensome on member countries which will require resources. Developing countries that are not major contributors to overfishing will be required to take such burdensome measures which would hinder their fisheries sector development.*

*The text should be strengthened for developing countries by including a footnote to further clarify that the management measures of countries are not open to challenge or dispute under the WTO.*

*Article 4.3 also provides consistency and coherence with the ALT1 language in Article 4.1.*

4.4 [For the purposes of [paragraphs 2 and 3 of this Article], in case of overlap between the area of jurisdiction of a coastal Member and the area of competence of a RFMO/A, the determination made by the coastal Member shall prevail.]

4.5 (a) [The prohibition under paragraph 4.1 shall not apply to subsidies granted or maintained by developing country Members, including LDC Members, for fishing or fishing related activities within their territorial sea.

*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.*

(b) [PLACEHOLDER – TRANSITIONAL PERIOD SDT FOR OFS]]

*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 text should be expanded on and integrated into the 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.

5.1.1 For the purpose of paragraph 5.1, 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.

*The subsidies listed above are important to discipline but it is also crucial to ensure that there is a comprehensive SDT for developing countries. The above subsidies are important for any developing country member wanting to domesticate their fishing industry, including fishing within their EEZ and not just their territorial waters. Without a sufficient carve-out of a Member's EEZ this will hamper the ability of governments to support and nurture these industries and build their ability to compete with the previously supported foreign fleets.*

5.2 Notwithstanding paragraph 5.1, a Member may grant or maintain subsidies referred to in paragraph 5.1 if it demonstrates that measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level.<sup>14</sup>

*There are a number of issues with the approach proposed in 5.2. 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 the 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*

<sup>14</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 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.

*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 the change in language for Members "if it can demonstrate" to "if it demonstrates" implies that the onus is on the Member to submit its management plans to the WTO prior to any dispute being initiated. This is inappropriate and a burden 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.*

### 5.3 No Member shall grant or maintain subsidies:

1. (a) contingent upon, or tied to actual or anticipated fishing or fishing related activities at sea 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;
2. (b) provided to fishing or fishing related activities outside of the jurisdiction of a coastal Member and outside the competence of a relevant RFMO/A.

5.3.1 With respect to subparagraph 5.3(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 subparagraph 5.3(a).

#### 5.3.2 [PLACEHOLDER – NON RECOVERY OF PAYMENTS UNDER GOVERNMENT-TO-GOVERNMENT ACCESS AGREEMENTS]

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

*This article needs more clarity as it is unclear what happens when a flag state provides its flag to a subsidising member vessel and the vessel then becomes the nationality of the flag state. The subsidizing member is granting the subsidy but the vessel nationality has changed to that of the flag state and the flag state is not providing the subsidy.*

*Further this is going beyond the flag state and coastal state responsibility. Most developed countries have national vessels with national flags which raises the question as to whether or not these vessels will be carved out. If so it will provide an advantage to developed nations fishing vessels.*

#### 5.5 [PLACEHOLDER – CAPPING]

*The previous proposals on capping were incredibly problematic for locking in the advantage that the previous large subsidisers had gained. Following a capping mechanism risks repeating the mistakes of the past as is currently experienced in the Agreement on Agriculture and the manner in which the large subsidisers have locked in their benefits.*

#### 5.6 [PLACEHOLDER - LIST OF NON-HARMFUL SUBSIDIES]

*The use of a 'green box' can be difficult to get right. Whilst there is a need to ensure that any subsidies that support conservation and management measures must be allowed there are also proposals on this that would advantage the big industrial fishing nations.*

*There is currently a 'Green box' proposal from the EU, Japan, South Korea and Taiwan (RN/TN/RL/112) which is expansive in what it is proposing and already allows many of the types of subsidies that are currently given by the EU as opposed to the capacity enhancing ones of the past. The scope of the excepted subsidies offers many options for abuse of such subsidies. For small states, the addition of technology transfer in fisheries and also subsidies for socioeconomic development in relation to food security and livelihood should also be included in the list.*

5.7 (a) [The prohibition under paragraph 5.1 shall not apply to subsidies granted or maintained by LDC Members for fishing or fishing related activities.

(b) [The prohibition under paragraph 5.1 shall not apply to subsidies granted or maintained by developing country Members for fishing or fishing related activities within their territorial sea.]

*Similarly to the previous pillars, the carve-out for SDT must be for the EEZ of developing country members without being contingent upon a set criteria as that right is already in existence. As mentioned above, the subsidies being*

*targeted in this Article will be crucial to allowing developing countries to be able to develop domestic fleets to harvest their sovereign resources.*

*There should also be no differentiation between LDCs and Developing countries in this as it grants existing rights to one category whilst denying it to the other. This type of differentiation, especially in regards to the implications of national sovereignty that it deals with, creates a problematic approach to dealing with SDT that places LDCs and developing countries in contestation with each other.*

(c) [**ALT 1** The prohibition under paragraph 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 Member's 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 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** OTHER FORMS OF TRANSITIONAL MECHANISM]

*The adoption of such a criteria in Art5.7(c) is ostensibly a 'transitional measure' which is problematic as such SDT should apply to developing countries for as long as they are developing countries. That said, if such an approach is to be followed ensuring a high threshold criteria must be supported including the metrics that also provide a more rounded assessment of a developing country's level of development, so including metrics like GNI per capita etc.*

*The inclusion of a placeholder for ALT 2 opens up the challenge and opportunity to better address SDT under this Article. While others will aim to*

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<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.

*counter propose fewer flexibilities, developing countries have the space to propose stronger flexibilities like an entire EEZ carve-out.*

## **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 have been raised and these 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**

[The developed country Members, and the developing country Members declaring themselves in a position to do so, shall provide targeted technical assistance and capacity building assistance to other 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 [, to the extent possible,] provide the following information as part of its regular notification of fisheries subsidies under Article 25 of the SCM Agreement<sup>18</sup>:

(a) [PLACEHOLDER – LIST OF SPECIFIC INFORMATION TO BE NOTIFIED]

*Developing Countries should ensure that these commitments are "to the extent possible" so as not to over-burden themselves.*

8.2 Each Member shall notify [the relevant SCM body/the Committee established under paragraph 9.1] in writing on an annual basis of:

1. (a) any list of vessels and operators that it has determined as having been engaged in IUU fishing; and
2. (b) where applicable, a list of its fisheries access agreements in force with another government or governmental authority, and such

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<sup>18</sup> 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.

notification shall consist of the titles of the agreements and a list of their parties.

8.3 A Member may request additional information from the notifying Member 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].

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

[9.1 There is hereby established a [COMMITTEE NAME] 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 [URL][electronic link] to the Member's or other appropriate official web page that sets out this information.

[9.4 The Committee shall examine [frequency] all information provided pursuant to Articles 3 and 8 and this Article.]

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 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 [should][shall [take special care][exercise due restraint] when granting subsidies to fishing or fishing related activities regarding [commercially valuable] 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 [natural] disaster relief, provided that the subsidy is:

- (a) limited to the relief of a particular [natural] 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.

*The reconstruction must be back to its pre-disaster level and not to a level as described in the square brackets. The unagreed text provides no detail as to who makes such an assessment, how they do so, and whether or not it is accepted and recognised by the Member under whose jurisdiction the fishery falls.*

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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\* *Editorial note: This provision which copies the language of Article 24.1 of the SCM Agreement would be directly relevant to disciplines in the form of a standalone agreement. A similar provision may be useful to disciplines in the form of an Annex to the SCM Agreement.*