Pacific Network on Globalisation[1]
Assessment of November Fisheries Chairs Text (276/Rev2)

Overview

The revised Chair's text[2] fails to address the imbalances of previous texts or target those subsidisers most responsible for the global state of fish stocks. The flexibilities for big subsidisers continue with a permanent carve-out offered under the exemption of Article 5.1.1. The text currently undermines other existing international agreements like the UN Convention on the Law of the Sea (UNCLOS) that enshrine the rights and responsibilities of Members in their exclusive economic zones. Developing countries and LDCs are most disadvantaged with the undermining of UNCLOS as it not only reduces their sovereignty but it places the burden on those countries who still retain the majority of fisheries resources to disproportionately carry the commitments of the agreement.

There is a critical need for greater Special and Differential Treatment (SDT) as it is currently failing the mandate of the SDG 14.6. Developing countries are being asked to make commitments which they may lack the technical capacity to implement as well as agree to flexibilities that a lack of capacity will also mean they aren't able to utilise. The commitments in this agreement must be conditional upon the provision of SDT by developed countries.

The agreement will also establish the WTO as a forum to challenge the fisheries conservation and management measures of other countries. This is highly problematic as the WTO has no expertise in fisheries management to be making such determinations and will again advantage the big developed countries with the most technical capacity.

Finally the notification requirements not only go beyond the existing requirements under the SCM Agreement but they are being used to access fisheries information that will advantage developed countries in their negotiations for fisheries access. This is inappropriate and should be removed.

The Chair's text presents many red flags for a final outcome. In its present form developing countries will be paying the price for the historical overfishing of developed countries.

Article 1: Scope

Article 1.1 The scope is the same as per the previous Chairs text of June 2021. The scope of the fisheries subsidies is aligned to the Subsidies and Countervailing Measures agreement of article 1 and 2 and is limited to marine capture fishing and fishing related activities at sea. It excludes the aquaculture and inland fisheries which is an improvement from previous 2017 scope. The scope must be read in conjunction with footnote 1 which states that for greater certainty, aquaculture and inland fisheries are excluded. It also has footnote 2 which excludes government-to-government payment under fisheries access agreements and not be deemed as subsidies, this is important for the notification requirements and will be addressed in Article 8.

Article 1.2 is important as it also covers the non-specific subsidies which in previous experience for example in the agriculture negotiations were excluded. However, it is important to ensure that there is an effective carve out for small fisher folks in the application of SDT.

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2 This analysis should be read against the Chair's text which can be found at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/TN/RL/W276R2.pdf&Open=True

Article 2: Definitions
The definitions are the same as the previous chairs text of June 2021. All the definitions are uplifted from the Port State Measures Agreement (PSMA) but not all countries are parties to PSMA so having such a formulation and having it legally binding on some members would have implications.

Under **Article 2(c)** the definition of "fishing related activities" captures onshore processing as it states that "fishing related activities means any operation, in support of, or in preparation for, fishing, including the landing, packaging, processing, transhipping or transporting of fish that have been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea". This is capturing the entire fisheries value chain. There is little change in these articles however the definition in 2(c) needs to be refined to make explicit that it is only for those activities carried out at sea. There is an argument that the scope overrides such a definition but it is important to ensure consistency and clarity of the bounds of this.

Recommendation – The definition in Article 2(c) is refined to make it explicit that "fishing related activities" in the context of this agreement only applies to those activities in the definition that are at-sea activities.

Article 3: Subsidies Contributing to IUU Fishing
There have only been minor changes from the chairs text formulation of June 2021. However, countries need to be cognisant about the implications as previously explained.

Article 3.1
The key change in the text is the inclusion of [or fishing related activities in support of IUU fishing] at the end of the prohibition on subsidies to IUU fishing. Given the problems mentioned above with the definition of "fishing related activities" including such language in this article will increase the capture of the fisheries value chain. The experience of Members from the imposition of unilateral measures on IUU fishing and the subsequent economic implications across processing, ports, and state responsibilities should be borne in mind when discussing the expansive nature of the changes to the text and their capture of the fisheries value chain.

Recommendation – The text [or fishing related activities in support of such fishing] should be removed to avoid any concerns.

Article 3.3
The two alternatives presented in Article 3.3 outline the process for determinations being made by a Member or RFMO. The processes must be checked against any domestic or RFMO processes to ensure that they are not being undermined at the WTO. There are also critical challenges for developing countries in the capacity to make such determinations and as such there must be SDT allocation to support capacity.

Recommendation – While there is a concern that the term "due process" could leave it open to challenge in the WTO, of the two current alternative proposals ALT1[3] is the least prescriptive and would offer developing countries more flexibility in process. This would potentially avoid

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3Article 3.3:

(b) The prohibition under Article3.1 shall apply where the determination under Article 3.2(a) is based on positive evidence and follows due process.

(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.]

challenge or pressure to conduct IUU determinations in ways that aren't determined in a sovereign manner. Again this must be accompanied by SDT support for capacity building to make determinations.

Article 3.8

The square brackets around duration and geographic limits for the application of SDT can now be seen here: [For a period of [2] years from the date of entry into force of this [Instrument], subsidies granted or maintained by developing country Members, including least-developed country (LDC) Members, for low income, resource-poor and livelihood fishing or fishing related activities up to [12] nautical miles measured from the baselines shall be exempt from actions based on Articles 3.1 and 10 of this [Instrument].]

This is a welcome development and reflective of the concerns expressed by many members in the negotiations. The are many capacity issues as mentioned above for developing countries within Article 3 and the current formulation of flexibilities is quite insufficient.

The two year transition period is not enough for developing countries to develop the capacities needed to meet the requirements in Articles 3.5, 3.6, and 3.7. There are also many small-scale fishers who undertake unreported fishing that would be considered in breach of these agreement and it is unlikely that developing countries will be able to implement the necessary supports to prevent this (like ensuring capacity or local authorities etc).

The geographic limit must be expanded to the entire EEZ (200 nautical miles). This is not only on account of many small-scale fishers fishing beyond the 12nm area but also to ensure consistency with UNCLOS rights that currently exist.

Finally the cumulative criteria of "low income, resource-poor and livelihood fishing" needs greater clarity as to how that is to be determined. As it currently exists the criteria may be hard to exclusionary for many small-scale fishers who rely on subsidies.

Recommendation – Members' existing rights under UNCLOS should be maintained under commitments taken in this Article.

Recommendation – In relation to the IUU commitments as per Article 3, developed countries must provide capacity building and technical assistance in relation to the development on institutional capacity for proper reporting, proper regulating of IUU measures. The developed countries must also provide technical assistance and capacity building in transfer of technology for IUU determination and also assessment for developing countries and least developed countries. The developed countries must provide technical assistance and capacity building in proper monitoring, control and surveillance infrastructure and systems for developing and LDCs. The developed countries must provide technical assistance and capacity building in research and development to developing countries and least developed countries.

Article 4: Subsidies Regarding Overfished Stocks

Article 4.3

This provision allows the use of subsidies provided that they are aimed at rebuilding a stock to a biologically sustainable level. This provision opens up the Member to be challenged on the subsidies provided in this area as the Member has to prove that the management measures taking place meet the formulation for biologically sustainable stock based on the data available to it.

There are a number of concerns here, firstly is the need to ensure that Members are able to

determine the status of their stocks through a variety of metrics that are available to the Member and importantly recognised by them. This avoids other Members producing data and challenging the stock status based on other data that may not be relevant.

Secondly this also represents a capacity challenge for many developing country governments to meet. There must be dedicated capacity building and technical assistance components to such provisions to make them accessible to all Members.

Recommendation – There must be established Technical Assistance and Capacity Building (TA/CB) support for developing countries to be able to utilise this provision. This needs to be more than the establishment of a voluntary fund. Secondly the data must be recognised by the Member in considering the biologically sustainable stock assessments.

Recommendation: In relation to the fish stock in overfished condition, developed countries must provide technical assistance and capacity building as well as transfer knowledge and technology to developing countries and LDCs to enable them to undertake proper stock assessment in order for them to meet the complex conditions stipulated in footnote 9 on fish stock assessment. The developed countries must also provide the institutional infrastructure and institutional capacity building in relation to the fish stock assessment.

Article 4.4
The same concerns regarding the time and geographic based limits discussed in Article 3.8 apply here. Two years and 12nm are insufficient and undermine existing sovereign rights enshrined under UNCLOS.

Article 5: Subsidies Contributing to Overcapacity and Overfishing
Article 5.1
The list of subsidies considered to contribute to overfishing and overcapacity apply to most subsidises used to build domestic fishing capacity. This will derail the fisheries sector development of countries that aim to domesticate their fisheries sector or are in the process of doing so. Moreover, it will affect the future economic development of countries depending on the fisheries sector. Currently many developing countries rely on Distant Water Fishing Nations (DWFN) to fish their resources, limiting the gains that can be retained. **Article 5.1(i)** is an existing paragraph that has been moved into this article and addresses subsidies for fishing in another Members jurisdiction. While this is now subject to the exemptions to Art5.1 there are still questions about how this advantages DWFN who have the capacity to subsidise access to fisheries over domestic fleets who rely on discounted access prices in domestic waters (like currently exists under the Parties to the Nauru Agreement Members).

The comprehensive nature of this list is important as they may only be accessed through the exemptions that may apply.

One exemption **Article 5.1.1** offers an exemption on the condition that Members can demonstrate that measures are in place to maintain stocks at biologically sustainable levels. This article maintains the same approach in determining this as in Art4.3 and with it the same issues regarding the capacity of developing countries to be able to meet those requirements. This is also a problematic approach as the method for "demonstrating" isn't defined and opens up Members to being challenged on their management measures in the WTO, a body that has no expertise on these matters.

The Chair, in his comments to the new text presented the notion that just by meeting the notification requirements would in most cases be considered as having been 'demonstrated' and that the

approach factors in the subsidies and the management issues (again turning the WTO into an adjudicator on management measures). While the onerous nature of the notification requirements will be mentioned below this is not enough to make legally binding decisions upon. The text opens up the possibility for other members to challenge the management measures of a Member and this will advantage those developed country members who have the capacity to manage their stocks, meet the notification requirements as well as potentially challenge the measures being presented by others.

There have already been many experiences of developed countries (like the EU) implementing unilaterally measures against a country based on their fisheries management measures (for example the EU's the yellow and red card approach). The has also been pressure from New Zealand on some Pacific Island Countries over their use of the Vessel Day Scheme, despite being regarded as a high quality standard in sustainability. This highlights the existing experiences of developed countries having the capacity to challenge the management measures or other countries and the current text will allow these challenges to be multilateralised. This does little to address the institutional capacity and infrastructure needs that many developing countries have.

This article enshrines the existing asymmetries in fisheries sector and industrial fishing capacity and offers in effect a permanent carve-out for those who can subsidise to not only continue to do so in their own waters but the waters of other Members. The text fails to address the issues from a point of common but differentiated responsibility and ignores the decades of subsidisation and overfishing by developed country fleets that are a major contributor for the state of global fish stocks. Instead developing countries are being asked to shoulder the burden.

Recommendation – Similarly to Article 4.3 there are a number of changes that need to be made to best protect developing countries from having their management measures challenged as well as the TA/CB support needed to allow them the ability to be able to access any exemptions.

Recommendation – In relation to the fish stock in overfished condition, developed countries must provide technical assistance and capacity building as well as transfer knowledge and technology to developing countries and LDCs to enable them to undertake proper stock assessment in order for them to meet the complex conditions stipulated in footnote 9 on fish stock assessment. The developed countries must also provide the institutional infrastructure and institutional capacity building in relation to the fish stock assessment.

Article 5.3[4]
ALT2 in this article is most clear about the interplay between a subsidising member and its jurisdiction over it. The option presented in ALT1 lacks clarity.

Article 5.4
There have been a number of changes to the SDT approach in this article. **Article 5.4(a)** should provide a carve-out for developing countries as per their existing rights under UNCLOS and not undermine that treaty. This is an existing, legally binding right that Members have and as a red-line should not be undermined in this text.

The proposal to include SDT on this issue as a discussion of time and geographic barriers should be refused. Even a proposed transition period of 25 years as has been proposed by India must be

4 [**ALT 1** No Member shall grant or maintain subsidies for a vessel not flying the flag of the subsidizing Member.]

[**ALT 2** No Member shall grant or maintain subsidies under Article 5.1 for a vessel over which it cannot exercise jurisdiction or control or cannot otherwise ensure that the vessel to which the subsidy is granted is not engaging in activities which contribute to overfishing or overcapacity.]

weighed up against the undermining of UNCLOS and national sovereignty. This must also be contrasted with the permanent exemption being given in Article 5.1.1, an exemption that favours the most developed countries and those with the historical responsibility of overfishing.

The criteria proposed under **Article 5.4 (b)** again challenges the existing UNCLOS rights that Members have and should be rejected on such grounds. The threshold mentioned in Art5.4(b)(i) currently would exclude many developing countries but not those like India, Indonesia, South Africa, Bangladesh and Mauritania. Special and Differential Treatment can't be considered appropriate if it is excluding so many developing countries. The criteria in (b)(ii) again is currently limited to territorial waters which is insufficient as some small-scale fishers go beyond this distance, disqualifying them from essential assistance.

Recommendation – That the carve-out should be based upon a Members EEZ in line with the sovereign legal rights that exist under UNCLOS. This would see the prohibitions in Article 5.1 not apply to a Member subsidising fishing in areas under its jurisdiction.

Article 6: Specific Provisions for LDC Members

The carve-out for LDC Members under **Article 6.1** is welcomed. However given that a number of LDCs are graduating soon the issue remains how to adequately deal with the transition. This will require sufficient timelines and TA/CB to ensure that they are not overburdened. LDCs need to be strategic and ensure that the provisions of developing countries also benefit them as even after graduation they would not be able to implement such burdensome commitments.

Article 7: Technical Assistance and Capacity Building

The establishment of a fund with only voluntary contributions creates an imbalance between the extensive commitments being undertaken by developing countries and the capacity support needed to be able to meet them. The existing asymmetries will be further exacerbated as developing countries will be unable to meet the requirements to access flexibilities.

Article 24 of the UN Fish Stock Agreement on Special Requirements of Developing Countries[5] text offers a precedent that is binding and appropriate for the WTO negotiations. To ensure consistency across global agreements (like has been used with definitions under PSMA etc) these should be imported into this agreement.

The article states:

Article 24 Recognition of the special requirements of developing States

1. States shall give full recognition to the special requirements of developing States in relation to conservation and management of straddling fish stocks and highly migratory fish stocks and development of fisheries for such stocks. To this end, States shall, either directly or through the United Nations Development Programme, the Food and Agriculture Organization of the United Nations and other specialized agencies, the Global Environment Facility, the Commission on Sustainable Development and other appropriate international and regional organizations and bodies, provide assistance to developing States.
2. In giving effect to the duty to cooperate in the establishment of conservation and management measures for straddling fish stocks and highly migratory fish stocks, States shall take into account the special requirements of developing States, in particular:
   (a) the vulnerability of developing States which are dependent on the exploitation of living marine resources, including for meeting the nutritional requirements of their populations or parts thereof;
   (b) the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers and women fish workers, as well as indigenous people

5 https://www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm

in developing States, particularly small island developing States; and

(c) the need to ensure that such measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action onto developing States.

It is also important to ensure that the commitments being undertaken by Developing Countries are conditional upon SDT being provided. This will ensure that developing countries aren't caught out by insufficient transition periods.

Recommendation – There must be equivalent commitments by developed countries in TA/CB to those taken elsewhere by developing countries. This should be seen used as a metric to determine the level of genuine interest that there is in improving and promoting sustainable fisheries. Commitments by developing countries must be contingent upon the provision of TA/CB. In addition, the SDT must be specific and expanded to avoid the need to negotiate for funds at a later stage after other concessions have been made.

Article 8: Notification and Transparency

Article 8.1 sets out an extensive set of notifications for Members. The requirements to meet the existing commitments under Article 25 of the SCM Agreement is expected for coherence across WTO agreements (however Article 8.1(a)(ii) goes beyond).

There are two main concerns about this article. The first is the extensive amount of notifications required on top of what is already expected from Members under the SCM Agreement, something that many developing countries currently struggle to comply with. These are burdensome obligations for developing countries and despite the best endeavour language in Article 8.1(b) this will be an issue for Members to meet if they want to access any flexibilities in the Agreement.

Secondly the information required in 8.1(a)(ii) and 8.1(b) are fisheries management information that should not be required as a notification for the WTO. The information may be present in other forums where such information is given under different circumstances (without the ability of other Members to challenge the management measures).

Footnote 13 needs to be reassessed. Using a global marine capture de minimis approach to notification is not an appropriate approach to assessing a Member's ability to notify. Based on 2019 FAO data a country like Papua New Guinea has a higher percentage of global marine capture than Australia and New Zealand yet has much lower capacity to meet notifications. The key issue is capacity for notification and that should be supported and addressed as opposed to creating new criteria to differentiate between developing countries.

Recommendation – The inclusion of management measures and stock information should not be included in as required notifications. Failing this, the best endeavour language should be moved to a separate article to avoid capture in the requirement for accessing flexibilities.

Recommendation – Removal of the differentiation in footnote 13 for developing country reporting requirements.

Article 8.2(b) on forced labour is an issue that should be addressed in the relevant forum like the International Labour Organization. This is a binding commitment to inform on an annual basis with only additional relevant information being “to the extent possible” for a Member.

Recommendation – Article 8.2(b) be removed from the text.

Article 8.2(c) commits Members to notify the details of access agreements between Members, this

should be removed. Access agreements are negotiated by countries and based on certain conditions the access rights are granted. The price which are the access fees is always confidential and it gives the bargaining power to small states. By divulging such a level of information, the developed countries which are the vessel holders are trying to create a market for themselves to compete and also set the revenue parameters for the small states. While there is a caveat in **Article 8.6** that says there is no requirement to provide confidential information, it should remove the requirement to report on access agreements.

In addition, the exclusion of Access agreements from the scope of the agreement raises the question as to why there is a need to report on them under transparency provisions. The should be treated as a red line as it will greatly benefit those fishing nations who already have vessel capacity.

Recommendation – Article 8.2 should be removed from the text as it applies to activities outside the scope of the agreement and is not necessary. Further it would undermine the ability of developing countries with fisheries resources to leverage their position in negotiations regarding fisheries access, this has further implications for governments who use access fees for government revenue.

Article 8.3 offers other Members extensive opportunities to request information from members included in Art8.1 and 8.2. This is problematic as it allows Members to police the notifications of other Members. This will most likely advantage those developed countries who have the capacity and resources to investigate such things.

The requirements under **Article 8.4** link the flexibilities in Articles 4.3, 5.1.1, and 5.4 to the ability to meet the notification requirements. The linking of the flexibilities advantages those with the capacity to notify (developed countries) and disadvantages those who don't (many developing countries). It is also an inappropriate way to provide flexibilities under the Special and Differential Treatment mandate.

The text in Article 8.4 (a) requires the notifications in Article 8.1 to be met in order to allow the flexibilities to be accessed. This would include those mentioned in Article 8.1(b) to the extend possible. This is problematic as it is expected (as per the Chair's comments) that developing countries would provide such notification every four years. This undermines the best endeavour language of the article and could be used to force developing countries to meet those notification requirements in order to access the flexibilities. Article 8.4(b) is more direct and commits countries to meeting the requirements of Article 8.1(b) in order to access to flexibilities in Article 4.3 and 5.1.1. Again those countries with capacity would be most able to benefit from this.

Recommendation – Remove Article 8.3. Article 8.4 should be de-linked from the flexibilities as it disadvantages those (developing countries) who currently lack capacity to notify.

Recommendation – That information on management measures that may be provided to other bodies should be accessed through them to prevent duplicating resources as well as respecting the different nature of the organisations that information is being provided to.

Recommendation – There must be extensive commitments on TA/CB to support developing countries in meeting the notification requirements, this is especially the case if the onerous requirements in the article are included in the final outcome.

Recommendation – The transparency and notification requirements must not be ASCM plus and onerous.

Article 11: Final Provisions

Article 11.1 should apply to all Members not just the rights of land-locked Members under international law. This could be used to ensure that the rights of Members under UNCLOS are not undermined.

Article 11.3(d) applies to reconstruction subsidies after a natural disaster. There is proposed language that makes such subsidies contingent upon pre-existing scientific assessments of stocks. This again represents a capacity issue for many developing countries as this assessment may not exist prior to a natural disaster and as such may prevent them from utilising this article.

Recommendation – If the article is basing reconstruction subsidies on pre-existing stock assessments then there must be support for developing countries to make such assessments. In relation to the fish stock assessments, developed countries must provide technical assistance and capacity building as well as transfer knowledge and technology to developing countries and LDCs to enable them to undertake proper stock assessment in order for them to meet the complex conditions stipulated in footnote 9 on fish stock assessment. The developed countries must also provide the institutional infrastructure and institutional capacity building in relation to the fish stock assessment.