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Page: 1/8

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NEGOTIATING GROUP ON RULES – FISHERIES SUBSIDIES

**PROVISIONS ON THE SCOPE FOR THE COMPREHENSIVE AGREEMENT ON FISHERIES
SUBSIDIES AND SUBSIDIES CONTRIBUTING TO
OVERCAPACITY AND OVERFISHING (OCOF)**

Communication from India

Groupe de négociation sur les règles

DOCUMENT DE SÉANCE NON OFFICIEL **

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* In Original language only/En langue originale seulement/En el idioma original solamente.

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**PROVISIONS ON THE SCOPE FOR THE COMPREHENSIVE AGREEMENT ON FISHERIES
SUBSIDIES AND SUBSIDIES CONTRIBUTING TO
OVERCAPACITY AND OVERFISHING (OCOF)**

Communication from India

The following communication, dated 18 September 2023, is being circulated at the request of the delegation of India.

The Context

1. The WTO Agreement on Fisheries Subsidies (AFS)¹, adopted at the 12th Ministerial Conference (MC12) on 17 June 2022, marks a major step forward for ocean sustainability by prohibiting harmful fisheries subsidies, which are a key factor in the widespread depletion of the world's fish stocks².
2. MC12 Ministerial Decision³ also gave the mandate to continue negotiations for additional provisions that would achieve a comprehensive agreement on fisheries subsidies, including through further disciplines on certain forms of fisheries subsidies that contribute to overcapacity and overfishing, recognizing that appropriate and effective special and differential treatment (S&DT) for developing country Members and least developed country Members should be an integral part of these negotiations.
3. In pursuance of the MC12 Ministerial Decision, India submits its proposal containing 'Provisions on the Scope for the Comprehensive Agreement on Fisheries Subsidies and Subsidies Contributing to Overcapacity And Overfishing (OCOF)'.

Structure of the Proposal

4. The note below is structured in the following sections:
 - A. HORIZONTAL ISSUES -PROVISIONS UNDER SCOPE
 - B. OCOF PILLAR- DISCIPLINES
 - C. OCOF PILLAR-CBDR-RC AND EXPLOITER (POLLUTER) PAY PRINCIPLES
 - D. OCOF PILLAR- S&DT ELEMENTS
 - E. NOTIFICATION AND TRANSPARENCY
 - F. PROPOSAL

¹ WT/MIN(22)/33, WT/L/1144.

² WTO website; https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm

³ WT/MIN(22)/33, WT/L/1144.

A. HORIZONTAL ISSUES - PROVISIONS UNDER SCOPE

I. Non-specific fuel subsidies

5. The AFS is a sustainability-linked agreement. Fuel subsidies, whether specific or non-specific have the same harmful impact on the marine environment and ocean sustainability.
6. The basic principle behind the principle of specificity in the Subsidies and Countervailing (SCM) Agreement is that a subsidy that distorts the allocation of resources within an economy, and further can distort international markets, should be subject to discipline. Where a subsidy is widely available within an economy, such a distortion in the allocation of resources is presumed not to occur. But when we are dealing with the sustainability of fish stocks based on an environmental perspective, the market distortion principle will not apply and the scope of prohibition cannot be limited to only specific fuel subsidies and leave out non-specific fuel subsidies.
7. In view of the above and in line with Article 1.2 under WT/MIN (21)/W/5, the inclusion of Non-specific fuel subsidies under the scope for the comprehensive agreement is proposed.

II. Non-collection from operators or vessels of government-to-government payments under fisheries access arrangements

In the AFS, the government-to-government payments under fisheries access agreements are not treated as subsidies. We recognise the fact that such access agreements/arrangements can help some Members generate revenues, especially in some developing countries including LDCs. However, further transfer, by a payer Member government, of access rights that it has acquired from another Member government to fish within the jurisdiction of such other Member should be treated as subsidies within the meaning of this Agreement. Excluding subsidies arising from the further transfer of access rights is like a blank cheque to distant water fishing nations that fish in other Member's EEZ /high seas. Such exclusion can easily circumvent the subsidy disciplines by entering into bilateral or circuitous agreements and avoid recovery of subsidy paid to commercial players. To address this loophole, an insertion in footnote 2 of the AFS is proposed. The footnote states that, non-collection/ partial-collection/ deferred-collection of payments from operators or vessels arising from further transfer, by a payer Member government, of access rights that it has acquired from another Member government to fish within the jurisdiction of such other Member are to be treated as subsidies within the meaning of this Agreement.

III. Multi-species fishing and fishing-related activities using non-selective fishing gear

8. There can be practical challenges in the implementation of disciplines and prohibitions of subsidies in the scenario of non-target fishing practices undertaken by the fishers in tropical waters operating with non-selective gears. Given these practical challenges, it is proposed that the disciplines on overfished stocks (Article 4) under this Agreement shall not apply to multi-species fishing and fishing related activities within the EEZ of coastal states by fishers using such non-selective fishing gears.

B. OCOF PILLAR – DISCIPLINES

9. The disciplines proposed below follow the effects-based approach and are being proposed as an alternative to the list-based approach of the W/5, W/20 and other submissions.

IV. Disciplines upon affirmative determination; sustainability carve-out

10. Prohibition of subsidies should be based on an affirmative determination by the coastal member or a Regional Fisheries Management Organisation/ Agreement (RFMO/A) concerned i.e., there should be a determination concerning the existence of subsidies contributing to overfishing and overcapacity, subject to the outcome of such determination, the subsidies should be disciplined. This is similar to the approach under the IUU and Overfished Pillar of the AFS.

11. Further, the presumption of listed subsidies (i.e. list of subsidies as mentioned in Article 5.1 in W/5 and W/20 documents) contributing to OCOF is against the mandate of the negotiations. The mandate *inter-alia* is to prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing, while the text of Article 5.1 of W/5 and W/20 documents presumes a priori existence of overcapacity and overfishing. Further, the depletion of fish stocks could be because of other reasons as well. Such listed subsidies alone cannot be the sole reason for the depletion of stocks. Therefore, a determination is essential.
12. In the presumptive harmful subsidies approach of W/5 and W/20 texts and the recent proposals, we presume two aspects, both of which are not contained in the mandate – first, we presume, that there exists overfishing and overcapacity everywhere and second, we presume that the listed subsidies lead to overfishing and overcapacity. However, both these presumptions are incorrect.
13. The presumption of overfishing and overcapacity cannot be the case in all scenarios, especially in tropical waters where there are multi-species of fish stocks. As tropical waters have faster biological regeneration capacities, the same yardstick of temperate waters fisheries conservation and management measures cannot be imposed.
14. The list under Article 5.1 of W/5 and W/20 and other recent submissions is based on the presumption that all subsidies mentioned in Article 5.1 contribute to overfishing and overcapacity. But that is certainly not the case as subsidies like income and livelihood support during the seasonal fish ban period, social security and insurance cannot contribute to OCOF. Similarly, a change of fishing gear/vessel may also contribute to more sustainable fishing. In the recent proposals, some Members have recognised this issue and therefore have either excluded a few beneficial subsidies from the prohibited list or proposed a more nuanced approach to the treatment of such subsidies.
15. In view of the above, an affirmative determination approach, which take into account the effects before the disciplines are imposed, is advocated.
16. However, notwithstanding the affirmative determination discipline, a Member may grant or maintain subsidies if it implements measures to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level (as defined below in the section on Proposal).

C. OCOF PILLAR - CBDR-RC AND EXPLOITER (POLLUTER) PAY PRINCIPLES

V. Moratorium on subsidy provided by DWFN

17. The Agreement pertains to sustainability of fish stocks which is an environmental concept that relates to the management and conservation of fish populations and ecosystems. Hence India seeks to incorporate the principles of 'Exploiter (Polluter) Pays' and 'Common but Differentiated Responsibilities - Respective Capabilities' and aims to bring balance to the text by placing higher responsibilities on distant water fishing nations (DWFN) who have heavily contributed to the current situation of overexploitation of fisheries resources, by imposing a moratorium on subsidies provided by them for 25 years.
18. The definition of DWFN is based on the concept of FAO major fishing areas. A cut-off date of 17 June 2022 is proposed for identifying the list of such nations engaged in DWF, this date being the date of the landmark Agreement on Fisheries Subsidies.

VI. Reduction of fishing capacities by DWFN (I) upon determination of OCOF (II) in high seas not governed by RFMO/As

19. To address the issue of overcapacity and overfishing, it is but natural to address the root cause of the problem through the reduction of capacities. Accordingly, it is proposed that DWFN reduce their capacities in a calibrated manner.

20. In pursuance of the CBDR-RC and Polluter Pays principles, DWFN as on 17 June 2022 need to take a proportionate burden since such nations have historically allowed their fishers to exploit not only their jurisdictional waters but also beyond it.
21. Accordingly, it is proposed that DWFN as on 17 June 2022, (a) based on an affirmative determination made by the relevant RFMO/A, reduce its distant water fishing capacity by [X] per cent every year till overcapacity and/or overfishing persists; and (b) reduce its fishing capacity in the High Seas, in areas not governed by an RFMO/A, by [X] per cent every year.
22. In the Agreement on Fisheries Subsidies, we have referred to the implementation of the International Plan of Action (IPOA) on IUU but we totally ignored the other International Plan of Action for the Management of Fishing Capacity (IPOA-CAPACITY) agreed upon under FAO. This IPOA requires to achieve worldwide preferably by 2003, but not later than 2005, an efficient, equitable and transparent management of fishing capacities. Further, this IPOA also requires that coastal states and regional fisheries organizations confronted with an overcapacity problem, where capacity is undermining the achievement of long-term sustainability outcomes, should endeavour initially to limit at the present level and progressively reduce the fishing capacity applied to affected fisheries.

D. OCOF PILLAR - S&DT PROVISIONS

VII. Carve-out for low income or resource-poor or livelihood fishing or fishing related activities

23. India believes that appropriate and effective special and differential treatment (S&DT) are needed *inter-alia* to protect the livelihoods of poor fishermen and address food security concerns.
24. To protect the livelihoods of poor fishers and address food security concerns, a permanent carve-out for the category of low-income or resource-poor or livelihood fishing and fishing related activities is proposed. Such a carve-out will be irrespective of any geographical limitation or the type of activity engaged by such fishers.
25. It is also clarified that the determination of what would constitute low-income or resource-poor or livelihood fishing and fishing related activities should be decided by the national authorities.

VIII. Transition period for 25 years for developing country

26. Appropriate and effective SDT is required to ensure policy space to those Members who do not have the fiscal space or administrative or technical capacity to have their own fleet at present, even though they have a good catchment area. Such countries face competing demands on their limited financial, technical and administrative resources and in the process, never get to develop their fishing sector.
27. Therefore, India proposes that the prohibition under Article 5.1 shall not apply to subsidies granted to maintained by developing country Members that are not engaged in distant water fishing as on 17 June 2022 for fishing or fishing-related activities in the area and for species under the competence of a relevant RFMO/A for a maximum period of twenty-five years after the entry into force of this Agreement.

IX. Carve-out for EEZ

28. Fishing activities, which predominantly exploit domestic fish stocks in developing country Members' EEZ should be exempted from future disciplines. The sovereign Member should exercise its rights up to its EEZ. The sovereign rights of the coastal states up to their EEZs have been emphasised in some of the recent proposals.

E. NOTIFICATION AND TRANSPARENCY

X. Notification requirement for DWFN

29. For enhancing transparency, it is proposed that Members engaged in DWFN shall declare details of (i) fishing vessels engaged in fishing or fishing related activities in the distant waters (ii) the RFMO/A where it is a member/contracting party and has engaged in distant water fishing and the names and details of the High Seas where it has engaged in distant water fishing.

F. PROPOSAL

30. The legal draft for the provisions proposed is given in boxes below.

A. HORIZONTAL ISSUES - PROVISIONS UNDER SCOPE

i. Non-specific fuel subsidies

Article 1.2: Notwithstanding paragraph 1 of this Article, this Agreement 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.

ii. Non-collection from operators or vessels of government-to-government payments under fisheries access arrangements

Footnote 2 of AFS: The following amendment to Footnote 2 of the Agreement on Fisheries Subsidies (AFS) (proposed amendment in *italic red font*):

Footnote 2 of AFS: For greater certainty, government-to-government payments under fisheries access agreements shall not be deemed to be subsidies within the meaning of this Agreement. *However, non-collection/ partial-collection/ deferred-collection of payments from operators or vessels arising from further transfer, by a payer Member government, of access rights that it has acquired from another Member government to fish within the jurisdiction of such other Member shall be treated as subsidies within the meaning of this Agreement.*

iii. Multi-species fishing and fishing-related activities using non-selective fishing gear

Footnote 4 (new) to Article 1 (to be renumbered now as 1.1) (proposed amendment in *italic red font*):

1.1 This Agreement applies to subsidies, within the meaning of Article 1.1 of the Agreement on Subsidies and Countervailing Measures (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.^{1, 2, 3, 4}

Footnote 4: For greater certainty, the disciplines on overfished stocks (Article 4) under this Agreement shall not apply to multi-species fishing and fishing related activities within the Exclusive Economic Zone (EEZ) of coastal states undertaken by fishers using non-selective fishing gears.

B. OCOF PILLAR – DISCIPLINES

iv. Disciplines upon affirmative determination; sustainability carve-out

5.1 (a) No Member shall grant or maintain subsidies to fishing or fishing related activities if an affirmative determination is made that such subsidies contribute to overcapacity and/or overfishing.

(b) For the purpose of Article 5.1, an affirmative determination shall be made by the following:

(i) the coastal Member within its jurisdiction; or

(ii) the relevant Regional Fisheries Management Organisation/Agreement (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.

5.2 Notwithstanding Article 5.1, a Member may grant or maintain subsidies if it implements measures to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level ^{X1}.

Footnote X1: 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, based on best scientific evidence available to it, using reference points such as maximum sustainable yield (MSY), or other reference points; or by a relevant RFMO/A in areas and for species under its competence.

C. OCOF PILLAR CBDR-RC AND EXPLOITER (POLLUTER) PAY PRINCIPLES

v. Moratorium on subsidy provided by DWFN

5.3 Notwithstanding Article 4.3 (of the Agreement on Fisheries Subsidies), no Member engaged in distant water fishing^{X2} as on 17 June 2022, shall grant or maintain subsidies to fishing or fishing related activities beyond its Exclusive Economic Zone for a period of [twenty-five years] from the date of entry into force of this Agreement.

Footnote X2: A Member shall be deemed to be engaged in distant water fishing if its operators or vessels engage in fishing or fishing related activities beyond the FAO Major Fishing Area(s) that is(are) adjacent to the natural coastline of the flag State.

vi. Reduction of fishing capacities by DWFN (I) upon determination of OCOF (II) in high seas not governed by RFMO/As

5.4 A Member engaged in distant water fishing ^{X3} as on 17 June 2022 shall:

(a) based on the determination in Article 5.1(b) in respect of distant water fishing made by the relevant RFMO/A, reduce its distant water fishing capacity by [X] percent every year till overcapacity and/or overfishing persists; and

(b) reduce its fishing capacity in the High Seas, in areas not governed by an RFMO/A, by [X] percent every year.

Footnote X3: The term "distant water fishing" shall have the same meaning as set forth in Footnote X2.

D. OCOF PILLAR - S&DT PROVISIONS

- vii. **Carve-out for low income or resource-poor or livelihood fishing or fishing related activities**
- viii. **Transition period for 25 years for developing country**
- ix. **Carve-out for EEZ**

5.5 The prohibition under Article 5.1 shall not apply to subsidies granted or maintained under the following provisions:

- (a) by developing country Member to fishing or fishing-related activities within its **own EEZ**;
- (b) by developing country Member that are not engaged in distant water fishing as on 17 June 2022 for fishing or fishing-related activities in the area and for species under the competence of **a relevant RFMO/A** for a **maximum period of twenty-five years** after the entry into force of this Agreement;
- (c) by developing country Members for **low income or resource-poor or livelihood fishing or fishing related activities**.

Footnote X4: For the purpose of this Agreement, the determination of what constitutes low income or resource-poor or livelihood fishing and fishing related activities shall be decided by the national authorities.

x. De-minimis

5.6 The disciplines under Article 5.1, Article 5.3 and Article 5.4 shall not apply to any developing country Member whose share of annual marine capture fish production is less than [one percent] of the Global annual marine capture fish production.

E. NOTIFICATION AND TRANSPARENCY

xi. Notification and Transparency

Article 8: NOTIFICATION AND TRANSPARENCY (ARTICLE 8) – provisions to be inserted are highlighted in *italic red font*)

8.x. Every Member engaged in distant water fishing^{X5} shall within [ninety] days from the date of entry into force of this Instrument, and every year thereafter, declare the details of:

- (a) its fishing vessels engaged in fishing or fishing related activities in the distant waters (whether part of an RFMO/A or the High Seas); and*
- (b) the RFMO/A where it is a member/ contracting party and has engaged in distant water fishing and the names and details of the High Seas where it has engaged in distant water fishing.*

Footnote X5: The term "distant water fishing" shall have the same meaning as set forth in Footnote X2.