



Submission from the Pacific Network on Globalisation to the Joint Standing Committee on Treaties: Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization Agreement on Fisheries Subsidies

Introduction

The Pacific Network on Globalisation (PANG) would like to thank the Joint Standing Committee on Treaties for the opportunity to submit our views on this topic. PANG is a Pacific Islands based regional non-government organisation with a long history working on the issues of trade justice (and others) in the Pacific Islands.

PANG would like to provide some context for the contents below given that our primary focus is on the impacts that the WTO Agreement on Fisheries Subsidies (AFS) would have on Pacific Island Countries. Despite this, it is important for Australia to consider such impacts given the close relationship that Australia is seeking to maintain with the Pacific Islands.

The importance of fisheries in Pacific Island Countries cannot be overstated. Fisheries are a key source of sustenance for Pacific Islanders as well as a key economic lifeline for governments at the industrial level. The ability of Pacific Island Countries to be able to develop their own fisheries resources is an ongoing aspiration both for the economic benefits but also the enhanced sovereignty that would support.

As such, any agreement like the AFS discussed below will have significant ramifications across the Pacific Islands particularly for non WTO member countries. Further to this, the interests of Australia to ensure that those countries historically responsible for the overfishing and overcapacity of fleets are held accountable through an outcome at the WTO.

The current AFS fails to meet its mandate and address those most responsible for the current state of global fish stocks. As such PANG is wary of ratifying an incomplete agreement, negotiated in ways that are unfair on developing countries, that contains legal ambiguities and recommends that JSCOT proceed with any ratification with caution and understanding of the ramifications of ratification of an interim agreement.

The negotiations on fisheries subsidies have a long history in the WTO stretching back over 20 years from their initial entry. These negotiations were intensified in 2015 following the Sustainable Development Goals (SDG). Sustainable Development Goal 14.6 states:

By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation.

This mandate from Leaders gave added impetus to negotiations and after numerous delays due to COVID-19 the Twelfth Ministerial Conference (MC12) took place in Geneva, Switzerland on June 12 – 17, 2022. From MC12, Ministers agreed to an outcome of fisheries subsidies as well as committing to further negotiations for a comprehensive outcome. This submission examines the MC12 outcome and the WTO's Agreement on Fisheries Subsidies.

MC12

Prior to the Ministerial the Chair of negotiations, Colombian Ambassador Santiago Wills released a Chair's text (WT/MIN(22)/W/20). This text continued with the imbalanced approach to commitments and flexibilities and placed Developing Countries and in particular LDCs and SIDS in a difficult position heading into the Ministerial.

As the week progressed new proposals continued to retain the imbalances of previous texts, including limiting any flexibilities for small-scale fishers to a narrowly defined flexibility that would exclude many of those fishers.

The twice extended Ministerial would proceed to negotiate on Fisheries Subsidies throughout the final night resulting in an outcome in the early hours of the morning. There were reports that some members were not able to properly access the final text before it was gavelled in the closing ceremony.

The outcome on fisheries subsidies has been widely heralded by the WTO. In her closing statement on June 17, Director General Ngozi Okonjo-Iweala stated that “on fisheries subsidies, WTO members have for the first time concluded an agreement with environmental sustainability at its heart. This is also about the livelihoods of the 260 million people who depend directly or indirectly on marine fisheries.”¹

Going further Deputy Director General Angela Ellard, when addressing the annual conference of the WTO Chairs Programme commented on the significance of the WTO Fisheries Subsidies outcome by commenting that “...by prohibiting certain forms of fisheries subsidies, it delivers on UN Sustainable Development Goal Target 14.6 after more than 21 years of negotiations — the first SDG target fully met.”²

This claim that the mandate of SDG14.6 has been met contradicts the outcome, both the Agreement on Fisheries Subsidies (AFS) and the Ministerial Decision. The heart of the AFS were prohibitions of subsidies contributing to overfishing and overcapacity as well as appropriate and effective special and differential treatment. Both of these issues explicitly mentioned in SDG 14.6 are currently NOT in the AFS. The Ministerial Decision provide a mandate for further negotiations for a comprehensive outcome but it is uncertain whether this can be achieved by the next Ministerial Conference or any time soon.

MC12 Ministerial Decision

The Ministerial Decision³ evokes the mandate given to Ministers from the previous Ministerial (MC11) which calls to adopt an agreement on “comprehensive and effective disciplines” on fisheries subsidies while recognising appropriate and effective special and differential treatment. It is clear that the outcome from MC12 has failed to meet the 'comprehensive and effective' mandate set from MC11.

¹ https://www.wto.org/english/news_e/spno_e/spno27_e.htm

² https://www.wto.org/english/news_e/news22_e/ddgae_26jul22_e.htm

³ <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/33.pdf&Open=True>

The Decision also references the attached Protocol to establish the WTO Agreement on Fisheries Subsidies, opening it for acceptance by Members.

The Ministerial Decision also states:

Notwithstanding Article 9.4 of the Agreement on Fisheries Subsidies, the Negotiating Group on Rules shall continue negotiations based on the outstanding issues in documents WT/MIN(21)/W/5 and WT/MIN(22)/W/20 with a view to making recommendations to the Thirteenth WTO Ministerial Conference 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 for developing country Members and least developed country Members should be an integral part of these negotiations.

This decision commits Members to continued negotiations on fisheries subsidies prohibitions, including on subsidies contributing to overfishing and overcapacity based on the texts W/20⁴ and W/5⁵. The word ‘including’ signifies that the negotiations may not be necessarily limited to disciplines on subsidies contributing to overfishing and capacity but might encompass any other disciplines which would achieve a ‘comprehensive agreement’, for instance further prohibitions on subsidized distant water fishing.

It is worth noting the shift in language from the Mandate given from Ministers at MC11 for “comprehensive and effective” prohibitions while MC12 is only calling for a “comprehensive” outcome. It is unclear why the language of an effective outcome has been dropped.

Further the decision places the next Ministerial (MC13) as the next deadline for recommendations for an outcome. While deadlines often come and go in trade negotiations it allows MC13 to again be a pressure point with which to press developing countries to agree to another outcome. The experience of MC12 should be borne in mind for how the pressure from the WTO, developed countries and others to deliver an outcome, any outcome regardless of the value, can trump the mandate set.

Assessment of the AFS Outcome

The Agreement on Fisheries Subsidies (AFS) contains a number of concerning elements that will be explained and discussed in turn in this section.

Article 1: Scope

The scope of the AFS is aligned to the Subsidies and Countervailing Measures Agreement of Article 1 and 2 and is limited to specific subsidies for marine capture fishing and fishing related activities at sea. It excludes the aquaculture and inland fisheries. Specific subsidies are generally subsidies that are directed to particular companies, this narrows the scope of subsidies included in the AFS, narrowing its ability to meet the SDG14.6 mandate.

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 meaning they will not be deemed as subsidies, this is important for the notification requirements and will be addressed in Article 8.

Article 2: Definitions

⁴ <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W20.pdf&Open=True>

⁵ <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN21/W5.pdf&Open=True>

All the definitions for “fish”, “fishing”, “fishing related activities”, “vessel” and “operator” are uplifted from the United Nations Port State Measures Agreement (PSMA). However not all WTO Members are parties to PSMA which means that having such a formulation and having it legally binding may be hard for some members to accept.

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, 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”. This is capturing the entire fisheries value chain. There is little change in these articles however the definition in 2(c) fails to make explicit that it is only for those activities carried out at sea. Previously the Chair of negotiations had stated in his accompanying remarks that “it is clearly understood among Members” that it only applies to the activities at sea in the definition however there is little reason as to why this couldn't be explicit in the text to ensure consistency and clarity of the bounds of this. The reservations about altering text taken from the PSMA isn't a sufficient reason.

Article 3: Subsidies Contributing to Illegal, Unreported and Unregulated Fishing

Article 3.1 prohibits the granting or maintain of subsidies to a vessel or operator engaged in IUU fishing or fishing related activities in support of IUU fishing. This prohibition needs to be read in conjunction with the issues raised above regarding the scope of the agreement especially for 'fishing related activities'. 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 making decisions on ratification.

Article 3.2 states that a vessel or operator shall be considered to be engaged in IUU fishing if there is an affirmative decision made by either a Coastal Member in areas of its jurisdiction, Flag State Members for vessels flying its flag, or a Regional Fisheries Management Organisation or Agreement (RFMO/A).

Article 3.3 outlines what is required for a Coastal Member to have the affirmative determination apply to Article 3.1. The onus of the Coastal Member to provide a list of information to the flag state and if known, the subsidizing member raises a number of concerns about the capacity of developing and least developed country Members to be able to meet the requirement to make such determinations. The failure to include an explicit SDT allocation to support capacity in this area undermines the ability to prohibit IUU subsidies. This article also includes a hanging paragraph (a non-numbered paragraph) at the end, this raises a number of legal interpretation questions about exactly how it is to be included and applied to in regards to the commitments in Article 3.3.

Article 3.7 requires all Members to have “laws, regulations and/or administrative procedures” in place to ensure that subsidies referred to in Article 3.1, including those existing at the entry into force of the agreement, aren't granted or maintained. The requirement poses significant policy and implementation capacity issues for developing countries as this is to be met upon entry into force and there are no flexibilities offered in this regard.

With some developing countries having many small-scale fishers undertaking unreported fishing, often due to a lack of administrative capacity, there will be significant challenges for countries to ensure they remain consistent with the commitments in this article. Ensuring that there are legislative requirements to guarantee that IUU fishing receives no subsidies, even if only considered

as that through an affirmative determination (as per Article 3.2), there is still considerable uncertainty as to how this impacts small-scale fishers.

Article 3.8 provides a 2-year 'peace clause' for the prohibition of subsidies in Article 3.1 for developing countries and least-developed countries within their Exclusive Economic Zones. As part of this peace clause is the exemption from the dispute settlement processes. The extension of this carve-out to the entire EEZ of a developing country member is a welcome development as previous iterations of the text had only offered 12 nautical miles. While this outcome is consistent with the existing rights Members may have under UNCLOS, it does so only temporarily.

The lack of inclusion of Article 3.7 within the flexibilities provided for in Article 3.8 will provide a major barrier to any effectiveness of these flexibilities. The requirement to have the legislative and policy pieces in place to ensure no IUU subsidies are provided will render the peace-clause ineffective.

Article 4: Subsidies Regarding Overfished Stocks

Article 4.1 states that subsidies aren't permitted for fishing or fishing related activities regarding an overfished stock. **Article 4.2** outlines that a stock is overfished stock if it is recognised as such by a Coastal Member with jurisdiction for where the fishing is taking place or a relevant RFMO/A, based on the best scientific evidence available to it.

Article 4.3 allows Members to grant/maintain subsidies if the subsidies or other measures are aimed at rebuilding the stock to a biologically sustainable level. This exemption is very open-ended as it allows continued subsidisation of fishing overfished stocks provided there are "other measures" in place to rebuild the stock. This is complicated further by multi-stock fisheries and the fishing of them.

This provision also 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 is a 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.

Further 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 relating to stock assessments to make them accessible to all Members.

Article 4.4 offers the same 'peace clause' as Article 3.8 with the same concerns applying.

Article 5: Other Subsidies

Previously Article 5 was targeting subsidies contributing to overfishing and overcapacity however during MC12 these proved too difficult to find agreement on. Instead many of those proposals have been pushed to future negotiations leaving some aspects to remain in the AFS.

Article 5.1 prohibits subsidies provided to fishing or fishing related activities outside the jurisdiction of a coastal member or coastal non-member and the competence of a relevant RFMO/A. There is some uncertainty about how this Article will be interpreted as there is only a small percentage of the high seas that isn't under the competence of an RFMO/A, undermining its

effectiveness and claims of impact. This uncertainty in its application will be detrimental to its effectiveness.

Article 6: Specific Provisions for LDC Members

This article only states Members “shall exercise due restraint” in raising matters involving an LDC member and that solutions explored shall take into consideration the specific situation of the LDC member involved. This appears to be a rephrasing of existing commitments in the Dispute Settlement Understanding (Art 24.1⁶),

This is the only article that specifically offers LDC Members any greater consideration for flexibility within this agreement. The peace clauses in Articles 3 and 4 offer no longer timeframes or differential treatment and the language in Article 6 offers little concrete outcomes for LDCs. Special and Differential Treatment is a key part of the SDG14.6 mandate and the current text for LDCs fails that mandate.

Article 7: Technical Assistance and Capacity Building

Article 7 establishes that targeted technical assistance and capacity building shall be provided for the purpose of implementation of the agreement. This is to be done through the creation of a voluntary WTO funding mechanism.

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.

When the Fund was launched in November 2022, the starting pledges amounted to US\$10million with the aim for US\$20million to be targeted over the course of the fund's operations. This amount is inadequate to meet the extensive needs of the many developing countries in the WTO's membership.

Australia's pledge of AUD\$2 million⁷ is a welcome contribution to supporting developing countries to deal with the significant burden that will come with the AFS implementation. It is crucial that the fund actually delivers for developing countries.

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.

There are a number of 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 even with the 4 year timeline for reporting offered under Footnote 13. While it is an improvement from previous proposals there are still issues with the

⁶Article 24 Special Procedures Involving Least-Developed Country Members 1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures

⁷As reported by the WTO Secretariat, “Australia Pledges AUD 2 million to WTO Fisheries Funding Mechanism”, https://www.wto.org/english/news_e/pres22_e/pr913_e.htm

capacity of countries to meet these requirements.

Despite a flexibility being included in Footnote 13 it fails to reflect the capacity needs of developing countries. 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.

Secondly the information required in 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).

It is also important to highlight the inclusion of "fishing vessel" in Article 8.1(b)(iv). This Article calls for the provision of information on "name and identification of the fishing vessel or vessels benefitting from the subsidy". While Article 2 defines 'vessel' there is no definition of 'fishing vessel' creating legal uncertainty about what this applies to.

It is important to also bear in mind that previous texts ensured that a number of SDT flexibilities were contingent upon meeting the notification requirements if they want to access any flexibilities in the Agreement. The extensive notifications required in Article 8.1 may result in any future agreement as being a barrier to SDT flexibilities.

Article 8.3 is the requirement within one year from the entry into force of the Agreement for a Member to inform the committee of its measures taken to implement the Agreement. This sets out a burdensome obligation for developing countries to meet. **Article 8.4** is similar to Art8.3 but in regards to the fisheries regime that a Member has including the laws, regulations and administrative procedures.

Article 8.5 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 relating to conservation and management measures, not trade issues. This will most likely advantage those developed countries who have the capacity and resources to investigate such things.

Article 9: Institutional Provisions

Article 9.1 establishes a Committee on Fisheries Subsidies to carry out the responsibilities assigned to it under this agreement. **Article 9.2** mandates the Committee to examine all the information provided pursuant to Articles 3 and 8. However it is worth noting that the notifications under Article 8.1 are per the regular notifications under the ASCM, meaning they are deposited with the relevant existing committee on subsidies. There is no clear explanation however as to how the Committee on Fisheries Subsidies will access and utilise the notifications given to the ASCM Committee.

Article 10: Dispute Settlement

Article 10.1 applies the Dispute Settlement Understanding to the Agreement, allowing the WTO's dispute process to apply to commitments undertaken by Members. This also opens up the possibility for the challenge of a Member's conservation measures under Article 4.3, potentially resulting in the WTO overriding the national processes of fishing management.

Article 11: Final Provisions

Article 11.1(d) applies to reconstruction subsidies after a natural disaster. The commitments allows reconstruction subsidies however limits then ti restoring the affected fishery and/or fleet back to its pre-disaster level. In order for developing countries to be able to do this it is contingent upon pre-existing scientific assessments of stocks. This 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.

Article 12: Termination of Agreement if Comprehensive Disciplines are not Adopted

Article 12 states that if comprehensive disciplines are not adopted within four years of this agreement entering into force the agreement will be terminated unless otherwise decided by the WTO General Council. This sunset-clause places a timeline on the ongoing negotiations however from a political perspective it is highly unlikely that the WTO Members would let an agreement be terminated. Despite this the sunset-clause will most be used to pressure developing country members to the negotiating table.

Ratification

With the Agreement passed at the Ministerial, each Member now must decide upon whether or not to ratify. Before Members make such a decision it is important to consider a number of issues as to whether or not ratifying this agreement is in their best interests.

Need for a legal scrubbing

As has been mentioned above, there are a number of outstanding legal uncertainties with the Agreement that need to be resolved. Members domestic ratification processes may highlight these legal ambiguities as a concern for proceeding with ratification. It is most efficient and best-practice to ensure that the AFS is legally scrubbed within the WTO before Members ratify as correcting any issues later, even in future negotiations, is a poor approach to fixing such issues. The acceptance by Switzerland of the AFS now makes a WTO legal scrub even more unlikely however for other Members the issues of ratifying a treaty that contains legal ambiguities remain and must be seriously considered before any decision is made.

Ratifying an incomplete agreement

As the above analysis has shown, the AFS contains a number of burdensome obligations for developing countries with inadequate support. The agreement also fails to fulfil the mandate set by Leaders under SDG14.6, despite the comments by the WTO Deputy Director General that it does, which is why further negotiations are being planned. The failure of the outcome to target and hold accountable those most responsible for the historical overfishing of global fish stocks limits the impact that the Agreement will actually have.

Implications for Comprehensive Negotiations

Some of the potential issues in the comprehensive negotiations will be mentioned below but one consideration within those negotiations is whether or not ratifying this agreement will undermine any negotiating positions in future negotiations. Previous texts had proposed that the flexibilities for developing countries and least developed countries are conditional upon meeting the notification requirements, while that isn't the case in the AFS, if the proposals comes up again it will be hard to lower the level of notification obligation as it has already been accepted by members whom have ratified the AFS.

Further to this, the ratification and entry into force of the agreement will lower the need for the conclusion of the comprehensive negotiations. If it is acknowledged how politically unlikely it is for the AFS to be terminated as per the sunset clause in Article 12, there will be little willingness for

the big subsidising nations to accept any outcome that will limit their subsidy programs. The watered down outcome of the AFS doesn't hold the big subsidisers accountable yet gives the WTO the publicity of delivering on sustainability. The lack of conclusion of comprehensive negotiations will still see the WTO retain its public framing as having a sustainability agreement while doing little to actually reign in the big subsidisers.

Finally the ratifications of the AFS by a number of countries will make it more difficult to address any of the legal issues that have been highlighted above. The proposal to address them in ongoing negotiations not only is an admission of their existence but it is poor practice to ratify a treaty with legal inconsistencies while negotiating a new agreement that aims to fix them. There is potential that many of these legal issues might be able to be resolved through an interpretation by WTO Members of the existing text of the AFS, or as interpretations by a WTO Member when its domesticates the AFS. While that may assist in clearing up some legal issues it still doesn't resolve the poor process that is adopting a text in this state.

Conclusion

The outcome from MC12 – the WTO's Agreement on Fisheries Subsidies – has resulted in few gains in terms of addressing IUU fishing subsidies while committing developing countries to significant burdens. This, coupled with the legal ambiguities within the agreement should give countries pause to consider the decision to ratify.

The proposed comprehensive negotiations also provide serious concerns about their ability to target those most responsible while offering heavily conditioned flexibilities for developing countries. On this trajectory they will fail to meet the mandate set by leaders under SDG14.6.

Ahead of MC13 there will be extensive pressure on countries to ratify the AFS and continue to negotiate for a comprehensive outcome. This submission has highlighted some key areas that will need to be resolved in order to ensure that developing countries, least-developed countries and small island developing states can have a future where they are able to manage their fish stocks and fish their own resources without relying on external fleets.