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UPDATE AND STATE OF PLAY ON THE WTO FISHERIES SUBSIDIES RULES NEGOTIATIONS

INTRODUCTION

In the post Nairobi (MC10) period, WTO Members in the Trade Negotiating Committee (TNC) and in the Negotiating Group on Rules (NGRL) have emphasized the importance of fishing to their economic development, social life and culture and have called for an outcome on fisheries subsidies rules in line with the DDA mandate and UN SDG 14.6 at the next ministerial conference to be held in Buenos Aires (MC11) in December 2017.

Seven textual proposals have now been submitted with proponents¹ representing a broad cross-section and the majority of the WTO membership including developed and developing countries, small island developing states, small vulnerable economies, and Least Developed Countries (LDCs). The proponents of the seven proposals are as follows.

The submissions and the discussions of each of the proposals were preceded and accompanied by two principles and elements papers from the ACP and the LDC Groups; a submission from the 6 Latin American Members on a framework for implementation of the disciplines; and a paper on the role of fisheries management and implications for fisheries subsidies rules from Japan. Members had also engaged in a technical briefing session on the role of regional fisheries management organisations (RFMOs) and fisheries management procedures and an phase of intensified thematic/issue specific discussions on all the elements of the fisheries subsidies rules negotiations.

Just before the summer break, at the request the proponents, the Chair with the assistance of the Secretariat, produced a compilation, in the form of a matrix, of all the textual proposals on the table. The Chair is now taking Members through a full reading of the matrix during which Members are engaged in exchange of positions, perspectives on each of the topics and elements contained in the proposals.

THE COMPILATION MATRIX OF TEXTUAL PROPOSALS RECEIVED TO DATE

In presenting the compilation, the Chair emphasized that the matrix of textual proposals is not a Chair text. It is simply a compilation, topic by topic, of the seven textual proposals now on the table. Nothing has been added to or subtracted from any of the proposals and no judgements are expressed or implied. It is meant to be a purely technical document and is without prejudice to and does not replace any of the proposals, all of which remain before the Group. It is intended as a tool, to serve a basis for topical discussions of the proposals when we reconvene in the fall.

At the first meeting of the NGRL on October 11-12, proponents reaffirmed their validation of the matrix and Members welcomes and accepted it as a useful tool for the next phase of

¹ The European Union (EU) – TN/RL/GEN/181/Rev.1; New Zealand, Iceland and Pakistan – TN/RL/GEN/186; Norway – TN/RL/GEN/191; Indonesia – TN/RL/GEN/189/Rev.1; six Latin American Countries, Argentina, Argentina, Colombia, Costa Rica, Panama, Peru, and Uruguay – TN/RL/GEN/187/Rev.2; the Least Developed Countries (LDCs) – TN/RL/GEN/193 and the African Caribbean and Pacific (ACP) Group of states – TN/RL/GEN/192.

work. In the discussions, Members identified commonality and convergence in a number of areas that leads to progress. They however also identified several areas of divergence and pointed to the amount of work that still remains to be done to bridge the gaps.

The first reading of the matrix will be completed on October 26 – 29. The possibility of engaging in a subsequent second reading of the matrix has been indicated by the chair depending on progress and consultations with the proponents and Members.

TOWARDS A SINGLE NEGOTIATING TEXT

Recognizing the limited time remaining before MC11, Members, particularly the proponents, see the need to work towards a single consolidated negotiating text as the basis for work towards a conclusion and an outcome. Some have hinted at a Chair's text. The Chair, however, has emphasized that the negotiating process must be member led and driven and he has sought to stick to that approach. He has expressed his reluctance to put forward any kind of chair's text at this stage. He has reiterated that the onus is on the proponents to advance their positions and convergence and consensus among themselves and with the rest of the Membership. In that regard the Chair has encouraged the proponents to engage to bridge gaps and build convergence and to lead the work towards that single consolidated negotiating text.

In light of this, proponents have initiated discussions among themselves. The aim will be to identify areas of commonality and convergence and work on single language where possible. Proponents will also need to discuss some of the more fundamental differences among them in terms of approach...

THE SUBSTANTIVE ISSUES

The Main Elements and the State of the Negotiations

Scope

Whether explicitly or implicitly, each proposal on the table contains language that establishes the contours of the proposed disciplines. There is near universal agreement that the disciplines should not cover inland fisheries or aquaculture but only marine capture fisheries. The ACP proposal further specifies that recreational fishing should be excluded. Indonesia however has included fresh water fisheries in its definition of capture fishing.

Several proposals also contain a list of subsidies to be excluded from the disciplines covering subsidies for natural disaster relief, crew and vessel safety, sustainable fisheries, fisheries management and environmental protection and climate change resilience.

Definitions

Definition of terms will be an important element of any agreement. Members in the discussions have generally agreed that the WTO Agreement should not unnecessarily create new definitions but instead rely on existing definitions drawn or referenced from the competent international/multilateral, regional and national authorities.

There seems to be emerging commonality on the definitions for fishing/fishing activity, fishing vessel, fishing operator, and IUU fishing. Reliance has been placed on definitions within FAO guidelines and instruments. Members do differ on the application of national approaches to the implementation of international definitions. The ACP in a number of its definitions gives recognition to the application in national laws and regulations.

Whether or not to define and how to define terms such as subsistence, artisanal and small scale fishing as well as large scale industrial and even semi- industrial fishing is an area of divergence and great sensitivity. Members recall the time consuming challenge of arriving at any agreed definition of these terms and are wary of repeating the experience.

Prohibitions

In line with the Doha and Hong Kong mandates and the SDG 14.6, all full proposals and Members generally agree that there would be prohibitions on subsidies to IUU fishing and on subsidies that contribute to overfishing and overcapacity.

- Subsidies to IUU Fishing

There is emerging consensus to prohibit subsidies to IUU fishing. Members mostly seem to agree that the basis of determining or identifying IUU fishing should include the listings of fishing vessels/operators caught engaged in IUU activity and promulgated by RFMOs and the incidents of and/or the national lists of IUU activity in taking place in the EEZs of coastal states. Several Members are concerned about the application of or reliance on lists from RFMOs of which they themselves are not Members. These Members are therefore seeking assurances of due process, transparency and appeal procedures.

How IUU is defined is also an area of some differences. While the FAO definition appears in all the proposals, some include elements such as flags of convenience and transshipment.

- Subsidies for Fishing of Overfished Stocks

The ACP, LDCs, EU, New Zealand et al and the Latin American Members proposals all contain specific disciplines to prohibit subsidies for the fishing of stocks that are in an overfished condition. The ACP and LDCs identify these subsidies together with IUU subsidies, as those to be prohibited with no or very limited flexibility or exemptions.

There is emerging consensus that the disciplines should rely on the recognition by national authorities and RFMOs as the basis of determining overfished status. Members are divided on whether the text should specify the requirement for using best scientific evidence available or available to Members. Members are also sharply divided on the application (proposed by the EU, New Zealand et al and the Latin American Members) of a precautionary principle that would stipulate that where no stock assessment has been done or where there is a lack of sufficient data, the concerned stocks should be treated as overfished and subsidies for their fishing prohibited.

- Subsidies Contributing to Overfishing and Overcapacity

Members have followed different approaches and argued different philosophies to the identification of subsidies that contribute to overfishing and overcapacity. The ACP, the LDCs, EU, Indonesia, and the Latin American Members have elements of a listing approach where specific types of subsidies are identified for prohibition on the understanding that these contribute either to overfishing or overcapacity.

Two or three of the proposals have elements of an effects based approach or circumstantial approach whereby subsidies will be prohibited based on their effect or circumstances. For instance there are proposed disciplines prohibiting: subsidies “negatively affecting” overfished stocks; subsidies for fishing outside one’s EEZ; fishing of unassessed stocks; or subsidies for fishing in waters managed by an RMFO of which the subsidising country is not a member.

The role of fisheries management has been a controversial and debated issue in the discussions. Major fishing nations such as Japan, Korea, the Philippines and proponents such as the EU and Indonesia have stressed the role of fisheries management arguing that with good fisheries management in place, subsidies thought to contribute would be disarmed and thus need not be prohibited. This has been linked also to SDT provisions as indicated below.

- Development and Special and Differentia Treatment (SDT)

No Member denies that the WTO rules on fisheries subsidies disciplines should contain provisions on development and SDT. This is clearly spelt out in the WTO and the UN SDG mandates. The ACP, African Group and LDCs and several other developing countries including the major players have emphasised their need for policy space and flexibility to develop their fledgling and growing fishing sectors and the concern for their small scale, artisanal and subsistence fisher folk.

Different approaches have been taken to address these concerns. The ACP and the LDCs have identified the EEZ as the area to provide flexibility and policy space through exemptions for developing countries. The other developing country proposals and the EU identify the lower scale of fishing (subsistence, artisanal and small scale) for flexibility and exemptions.

Some high ambition seeking demandeurs caution against SDT provisions undermining the goal of the disciplines and the mandate if major developing fishing nations get to benefit from SDT. Others have established conditions to accessing SDT through fisheries management provisions.

The provision of technical assistance and capacity building is also emphasised and found in developing country proposals including the ACP.

- Transparency

Five of the six full proposals have language on transparency and notification requirements. There is consensus that new rules on fisheries subsidies disciplines will have some new transparency and notification requirements. Members differ on the breadth and depth of information that should be required.

The ACP is particularly concerned about the capacity constraints of developing countries and its Members specifically and the burden of new transparency disciplines. The ACP is also concerned about the provision of confidential information, including confidential business information.

- Transitional Provisions and Standstill

Five of the 6 full proposals have some form of transitional provisions. The EU makes reference to 2020 found in the UN SDG 14.6. Some delay the application of the agreement for a limited time after entry into force for all WTO Members. Others like the ACP and LDCs provide an additional amount of time for developing countries and yet more for LDCs.

Pointing to the UN SDG 14.6 the EU proposal includes a standstill element. The ACP along with several other developing countries has expressed concerns about a hard standstill provision.

THE ROAD AHEAD

In the 12 weeks remaining before MC11, Members will need to work with determination and intensity to resolve differences and build convergence. Some of the issues are highly technical and there are different underlying perspectives and philosophies that will need to be reconciled. Having a clear roadmap and process and the lack of time will be the main challenges.

There are also other elements on which there are no proposals, but which will need to be discussed for the final outcome. This includes the nature of the outcome (an amendment to the SCM Agreement or something else); and dispute settlement provisions.

The wider negotiating context will have a critical role to play. Very little progress is being made on other areas identified as priority or mandated for MC11 particularly in agriculture. This could have a dampening effect on progress in the fisheries subsidies rules negotiations. There is also a latent though recently subdued threat of linkages within the rules pillar. Key proponents continue to advocate some deliverable on trade remedies.

Another factor is the US engagement. While the US has demonstrated some engagement in the fisheries subsidies rules discussions, it has consistently indicated that it is preliminary. Finally the plurilateral process continues to run in parallel though its impact on the multilateral process so far has not been manifestly discernible.

A group of Ministers will be convening in Marrakech on October 9 – 10 to discuss the road to MC11. It is expected that Ministers there will in their outcome document provide some guidance and indications on what is or is not possible for MC11.

CONCLUSION

The ACP Group should continue its constructive engagement in the discussions to advance and secure its interests and concerns in any outcome on fisheries subsidies rules. The ACP should maintain its position that there must be a negotiated outcome on fisheries subsidies rules at MC11 alongside any and other negotiated outcome and if possible as a standalone.

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