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**Negotiating Group on Rules** Original: English/anglais/inglés

**UNOFFICIAL ROOM DOCUMENT****

**NEGOTIATING GROUP ON RULES – FISHERIES SUBSIDIES**

DRAFT CONSOLIDATED TEXT

*Chair's explanatory note accompanying RD/TN/RL/126/Rev.2*

*Addendum*

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**Groupe de négociation sur les règles**

**DOCUMENT DE SÉANCE NON OFFICIEL****

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**NEGOTIATING GROUP ON RULES – FISHERIES SUBSIDIES**

*Chair's explanatory note accompanying RD/TN/RL/126/Rev.2*

ADDENDUM TO RD/TN/RL/126/REV.2

*18 December 2020*

## INTRODUCTION

1. As I reported to the Trade Negotiations Committee (TNC) on 14 December, the period since we resumed work in September has been particularly intense, including the period after the first revised draft consolidated document, in RD/TN/RL/126/Rev.1 (Rev.1), was introduced on 2 November to a meeting of the Negotiating Group on Rules (NGR) at the Heads of Delegation (HoDs) level. Before and after the introduction of this draft document we had meetings almost every week in different configurations, at both technical and HoDs levels. Compared to where we were when I circulated the first version of the consolidated document we have made considerable progress; as is to be expected, this has meant that the issues that remain before us, and which we have been addressing in our discussions of Rev.1, are among the most complex and sensitive in these negotiations.

2. Despite this, and despite the difficulties imposed by the restrictions on movement and meetings necessary to deal with the ongoing COVID-19 pandemic, the intense work since the start of November on the basis of Rev.1 has continued to yield progress on a range of issues. In particular, the work has allowed Members to raise technical concerns in some areas of the document, with several suggestions from delegations to help clarify the intended meaning of some provisions. In other areas, concerns about substantive aspects of certain provisions have been raised and clarified.

3. The second revised draft consolidated document in RD/TN/RL/126/Rev.2 (Rev.2) is my attempt to capture the progress we have made so that we can continue from where we left off when we restart work early next year.

4. This introductory document is intended to explain the changes made to Rev.1, to take stock of where I think we are now in the negotiations, and to highlight some of the key areas which may help us focus our work going forward. In line with comments made at our meetings that a detailed explanation of my understanding of the current text is useful and helps delegations to present views and make suggestions for changes, this document also outlines the background for, and my understanding of the meaning of, each provision of the document. In keeping with the Member-driven nature of this process, this is not meant to be a defence of any provision, but simply an explanation.

## PRELIMINARY MATTERS

5. Before turning to the substance of Rev.2, there are few preliminary matters I would like to share.

6. First, the draft consolidated document and everything in it is the collective work of the Negotiating Group. The sources of the texts in the draft, including all the changes made in Rev.2, are from Members. These sources include: the facilitators' work; previous working documents (including document TN/RL/W/274/Rev/6 and the 2007 Chair's text in TN/RL/W/213); and suggestions and comments made during meetings. That said, a simple copy-paste of language from different sources is not always possible as words and phrases have to be adapted to the format and context of the draft consolidated document so that the whole text reads coherently and consistently. Also, in some instances the language in the draft consolidated document aims to reflect as simply and coherently as possible suggestions from more than one delegation or group on a given provision.

7. Second, it must be emphasised that everything in the draft consolidated document is without prejudice to any Member's positions or views. In other words, the entire document is effectively in square brackets and nothing in it can be considered agreed. Furthermore, I am fully aware that each

delegation's view on one issue depends on how other issues are addressed. Therefore, there is no agreement on any provision until there is agreement on all provisions, and everything in the draft consolidated document, whether in square brackets or not, is open for discussion. In addition, if a certain suggestion that has been made is not reflected in the text, this does not mean it has been rejected. To the contrary, as I explained in my report to the TNC, this simply reflects the need for more thorough discussion to mature those ideas, including in regard to their placement and in relation to other elements, before they can be included in the text.

8. Third, the eventual form of the new disciplines – the "Instrument" - remains to be decided. As you know, during our discussion at HoDs level on this issue on 29 September, there were different views on whether the new disciplines should be in the form of a standalone agreement or an annex to the SCM Agreement. This is an important issue for drafting purposes but not one that prevents us from engaging on the substance. In fact, we have made some progress in areas where the drafting depends on the eventual form of the disciplines, on the understanding that the drafting could be changed to reflect the final decision on annex vs standalone. Therefore, the drafting should not be construed as implying the adoption of either option, and I would draw your attention to the Secretariat background paper on this issue that was prepared at the request of some Members (RD/TN/RL/132).

**ARTICLE 1: SCOPE**

9. The first Article sets out the scope of the fisheries subsidies disciplines. There are two paragraphs in this Article: paragraph 1 defines the scope as specific subsidies within the meaning of Articles 1.1 and 2 of the SCM Agreement, to marine wild capture fishing and fishing related activities at sea; and paragraph 2 would add non-specific fuel subsidies to the scope of the Instrument.

10. The texts for both paragraphs, as well as footnote 1 to paragraph 1, are based on the work of the facilitator for this issue. Apart from some minor editorial changes for overall coherence and consistency, the facilitator's text is fully reflected. Thus far, Members have generally supported the scope language in paragraph 1. On paragraph 2, views still diverge, as is reflected by the brackets around this text.

11. In this article, what has changed in **Rev.2** is the addition of footnote 2 to Article 1.1. This footnote clarifies that payments from one government to another government under fisheries access agreements are not within the scope of the Instrument, by clarifying that those payments would not be deemed to be subsidies under this instrument.

12. As you know, issues relating to government-to-government access agreements have been discussed in a number of dedicated sessions during the past few months. These discussions have helped us narrow down where subsidies potentially could arise in the context of government-to-government access agreements. So far, three such possibilities have been raised and discussed:

- payments from one government to another government for the access to fisheries that is obtained under such agreements;
- the transfer, by the government acquiring access, of the acquired access rights to fishing fleets, operators, etc., through quota allocation, fishing licenses or by other means, depending on the terms of such onward transfer; and
- the use of the proceeds of access agreements by the government granting access, in particular to provide fisheries subsidies.

13. From these discussions, it is clear that more work is needed on some aspects of government-to-government access agreements, most notably with respect to the distribution of fishing rights acquired under such agreements. There was progress regarding payments from one government to another government under access agreements, as the general view appears to be that such payments should not be subject to the disciplines. In this regard, some Members specifically referred to footnote 80 of the 2007 Chair's text, which was used as the basis of the text in footnote 2 in this revision of the draft consolidated document.

**ARTICLE 2: DEFINITIONS**

14. Article 2 contains definitions for five terms that apply to the entire Instrument. The definitions in (b) to (d) for "fishing", "fishing related activities", and "vessel" were taken from the facilitator's work with only minor changes for consistency, and these in turn were taken from the *Agreement on Port State Measures* (PSMA).

15. The definition of "fish" in (a) was added in Rev.1 after a dedicated discussion on this topic on 6 October. In that discussion, there was considerable support for including such a definition, with those in favour noting that the term "fish" is used in the definition of "fishing" that was already in the original version of the draft consolidated document, such that adding this definition would improve clarity. In the discussion the view also was expressed that because the definition of "fishing" in the draft was taken from the PSMA, for coherence it would be appropriate to use the definition of "fish" from the same Agreement. The definition of "fish" that was added in Rev.1 was taken from the PSMA.

16. When it was introduced in Rev.1, the definition of "fish" was in brackets. Since Rev.1 was circulated, generally delegations appear to be willing to accept this definition from the PSMA, so in **Rev.2** the brackets have been removed. That said, if inclusion of this definition is confirmed, we may need to revisit this definition at some point as some delegations expressed some reservations about this definition, including over the term "whether processed or not".

17. A definition of the term "operator" in (e) also had been added in Rev.1. In the original version of the draft consolidated document, this term was used in various places, and defined in a footnote in the illegal, unreported and unregulated ("IUU") fishing pillar. That footnote contained both a general definition of the term "operator" and more specific language relating to the context of IUU. As such, in Rev.1 the general definition was added to the definitions section and deleted from the IUU section. No changes have been made in this respect in Rev.2.

**ARTICLE 3: ILLEGAL, UNREPORTED AND UNREGULATED FISHING (IUU)**

**Overall**

18. Article 3 contains disciplines on subsidies to IUU fishing. The main source of the draft was the latest work of the facilitator for this pillar that was circulated on 10 April in document RD/TN/RL/113/Rev.2.

**Articles 3.1 and 3.2**

19. Article 3.1 is the prohibition for subsidies to a vessel or operator ("operator" being in brackets) engaged in IUU fishing. Under Article 3.2 the prohibition in Article 3.1 would be triggered when a vessel or operator has been found by one of the entities listed in Article 3.2(a) to (e) to have engaged in IUU activities. As now drafted in **Rev.2**, a vessel or operator would be considered to have engaged in IUU fishing where there is an "affirmative determination" to this effect by any of the entities listed under Article 3.2. Article 3.3(a) then provides that an "affirmative determination" is the final finding by a Member and/or the final listing by an RFMO/A that a vessel or operator has engaged in IUU fishing. Two main issues emerged in the discussions of these provisions in Rev.1, namely the effect on the subsidy prohibition of conflicting IUU determinations by different listed entities, and the extent to which each of the different types of listed entities has "competence" to make IUU determinations.

20. Regarding the first issue, in my view, in Rev.1 the text and structure of Article 3.2 (which did not contain the qualifier "affirmative"), together with the definition of "determination" in Article 3.3(a), already made it clear that what would trigger the prohibition would be a determination by "any" of the listed entities that IUU *had* taken place. Thus, a contrary determination by any other listed entity that IUU fishing *had not* taken place, or the absence of an IUU determination by any other listed entity, could not nullify the subsidy prohibition triggered by the determination that IUU *had* taken place. In this sense, no hierarchy was implied or intended among the IUU determinations by the different kinds of listed entities. Nevertheless, in our discussions of Rev.1, a number of Members expressed concerns that conflicting IUU determinations by different entities could nullify the subsidy prohibition. With a view to addressing those concerns, the word "affirmative" has been introduced in **Rev.2** as a qualifier to the term "IUU determination", to make explicit the absence of any such hierarchy or possibility of such nullifying effects.

21. Regarding the second issue ("competence"), in the discussions of Rev.1 some delegations objected to the inclusion in Article 3.2 of entities other than coastal Members and RFMO/As, on the basis that international fisheries instruments relating to IUU fishing refer only to these two types of entities as making IUU findings, and thus of having "competence" to do so. It was clarified in the discussions that the purpose of this provision is limited to what would trigger the subsidy prohibition in Article 3.1, exclusively in the context of the WTO fisheries subsidies disciplines. This is reflected in the chapeau of Article 3.2, which begins "[f]or purposes of paragraph 3.1". That is, the provision has never been intended to address or affect the substance of IUU regulation, including the entities identified under international fisheries instruments in other fora as having responsibility in this area.

22. The text of Article 3.2 in Rev.2 reflects a number of changes aimed at clarifying this reading of the provision, based on the NGR's work on this topic, most recently on 1 December at the HoDs level. The issue discussed in these meetings was whether we could remove the brackets around one or more of three of the listed entities, namely flag State Members in (b), subsidizing Members in (d), and port State Members in (e). Members who read this provision as set out above generally supported removing the brackets around (b) for flag State Members, on the basis that under international law, flag States are responsible for the conduct, in all waters, of vessels flying their flag, and that including flag State determinations of IUU fishing by vessels flying their flag as a trigger for the prohibition would tighten the prohibition on subsidies to IUU fishing. Members taking the opposite view considered that if flag State Members were to be included as entities whose IUU determinations would trigger the subsidy prohibition, this might be used in other fora to argue that flag States have competence under international fisheries instruments that do not currently refer to them.

23. These discussions showed, in essence, that no Member thinks that there should be a hierarchy of IUU determinations by different listed entities, such that one could cancel out another. As noted above, the qualifier "affirmative" has been added to Article 3.2 to make this explicit. The discussions also showed that no Member thinks that the fisheries subsidies disciplines should affect the competence, under existing international law, of any entity in relation to actions and measures related IUU fishing. To try to make this clear, I have added footnote 6. This footnote states that "[t]his Article shall have no legal implications regarding the competence under other international instruments of any of the listed entities to make an IUU determination". With these clarifications, I hope to have allayed the concerns raised by Members about removing the brackets around (b) for a flag State Member.

24. Regarding the other elements in Article 3.2, in Rev.2 the brackets have been retained around (d) for a subsidizing Member and (e) for a port State Member, as the concerns raised about these types of entities have not yet been fully addressed. Members views continue to differ over whether it is appropriate to refer to subsidizing Members and/or port State Members as entities that might make IUU determinations that would trigger the subsidy prohibition.

25. In respect of (d), the subsidizing Member, although views remain divided, the discussion did clarify that the intention of those wishing to include (d) in the list is that any IUU determination by such a Member would only trigger the prohibition in respect of the subsidies provided by that Member. In other words, if a given vessel received subsidies from more than one Member, if any one of those Members made an IUU determination in respect of that vessel, this would trigger the subsidy prohibition only in respect of the determining Member's subsidies.

26. Regarding (e), port State Member, the view of a number of Members is that while port States have a clear role and responsibility in respect of IUU fishing pursuant to the PSMA, port States themselves do not make IUU determinations. In the discussions, some suggestions were made to this effect, whereby port State Members would not be included in the list in Article 3.2, but would be referred to elsewhere in the text. I will bear these views and suggestions in mind as we continue our work on the remaining brackets and issues under this provision.

27. Finally, as a purely technical drafting change, to harmonize terminology, the word "provision" has been replaced with "Article" in footnote 5.

**Article 3.3**

28. Article 3.3 has three subparagraphs:

- (a) defines what an "affirmative determination" is for the purpose of Article 3.2. As discussed above, this text has changed in Rev.2 by adding the qualifier "affirmative" in front of "determination";
- (b) requires that an IUU determination be based on positive evidence and follow due process in accordance with relevant international law for it to have an effect of triggering the prohibition; and
- (c) requires notification of the initiation of an IUU investigation to the flag State or subsidizing Member ("subsidizing Member" being in brackets), and an opportunity for them to participate in an IUU investigation. The elements of this text were taken from the facilitator's work, and in Rev.1, these elements were reorganized and structured into these three subparagraphs following our discussions on this provision.

29. Subparagraph (a) has been, and continues to be, broadly acceptable to Members. I also hope that the addition of "affirmative" would be uncontroversial given that it is meant to clarify what the provision already states, i.e. that the "determination" means a finding or listing that a vessel or operator *has* engaged in IUU fishing.

30. However, subparagraphs (b) and (c), which have not been amended in Rev.2, continue to be in brackets as differences remain and I felt that any change to these provisions would be premature despite our extensive discussions. Nevertheless, our work has helped to narrow down our focus to the fundamental issue of whether a Member's domestic IUU determinations should be subject to the "positive evidence", "due process", and/or "relevant international law" standards. Related to this, Members also differ on whether the notification and participation requirements in (c) should form part of the standard required for an IUU determination, or be left as a standalone requirement.

31. In this regard, some Members do not want WTO disciplines that they believe could question substantive domestic law and processes on IUU. Other Members, however, consider that some form of due process requirements is an essential part of the disciplines relating to IUU determinations. However, among these Members there are differences over: the entities to which the standard should apply; whether the term "due process" is sufficient or more specific elements of due process should be spelled out; and whether the standard "in accordance with relevant international law" is appropriate.

32. In our next discussions on this issue in the new year, I would suggest that Members bear in mind that the standards in Article 3.3 are not about IUU determinations, but about the subsidy prohibition. That is, they are not about invalidating an IUU determination or making it unenforceable – as set out in footnote 8. They are about triggering a subsidy prohibition. In addition, as will be discussed below, Articles 3.4 and 3.5 relate to implementing the subsidy prohibition. Thus, it may be helpful to consider 3.3, 3.4 and 3.5 together as some see them as being tightly interlinked.

33. As a final, purely technical point, to harmonize terminology the word "provision" has been replaced with "Article" in footnote 8.

**Articles 3.4 and 3.5**

34. Articles 3.4 and 3.5 are about implementation of the subsidy prohibition by a subsidizing Member. Article 3.4 allows a subsidizing Member to take proportionality into account in applying the prohibition and Article 3.5 sets out the duration of the prohibition. These texts reflect the facilitator's work as well as some changes made in Rev.1. Of note, one substantive change that was made in Rev.1 was the deletion of the sentence in Article 3.4 that would have allowed a subsidizing Member not to implement the prohibition in cases of minor IUU infractions.

35. In Rev.2, no change has been made to these provisions. However, both are in brackets and we have continued to work on them, including during the plenary sessions on Article 3.4 (20 October) and Article 3.5 (3 November). During these discussions, it was noted that the purpose of Article 3.4

is to allow a certain flexibility, depending on the seriousness of the infraction, for subsidizing Members when they are required to prohibit their subsidies as a result of an IUU determination by another Member. In turn, the purpose of Article 3.5 is to limit this flexibility under Article 3.4 by establishing a minimum duration of the prohibition. Some Members consider that Articles 3.4 and 3.5 operate together to give a limited safeguard to a subsidizing Member when an IUU determination made by another Member triggers the subsidy prohibition. In this respect, the view was expressed that the purpose of Articles 3.4 and 3.5 and that of the due process requirements in Article 3.3 are similar, as the requirements in Article 3.3 could be seen as limiting the subsidy prohibition by imposing certain conditionalities on IUU determinations.

36. A range of views also has been expressed regarding footnote 9 to Article 3.4, which provides a list of the IUU infractions that should always trigger the prohibition. A number of Members consider that because this footnote was taken from the part of the *Fish Stocks Agreement* (FSA) that deals with fishing in areas of competence of an RFMO/A, it cannot necessarily simply be transposed into Article 3.4 which relates to all areas including Members' EEZs. Some Members made textual suggestions to better fit this footnote to its context, but mindful of the fact that we have yet to resolve the more fundamental issues related to Article 3.4, I have not yet made any change to this footnote. That said, I will bear these and other views in mind as we continue engaging on these provisions.

**Articles 3.6, 3.7 and 3.8**

37. Article 3.6 requires Members to ensure effective compliance, discourage infractions and deprive offenders of benefits accruing from IUU fishing. Article 3.7 is an obligation to implement relevant laws, regulations and/or administrative procedures to ensure that the prohibited subsidies are not granted or maintained. In turn, Article 3.8 requires notifications of such instruments. The texts of these provisions fully reflect the facilitator's work, with some minor adjustments and changes for coherence and consistency.

38. So far, we have focused our work more on the earlier provisions under this pillar, Articles 3.1-3.5, and we have spent relatively less time on Articles 3.6-3.8. Thus, no changes have been made to these provisions in Rev.2.

39. Having said that, I assure you that I am fully aware of the importance of Articles 3.6-3.8. As some Members have pointed out, these provisions are about ensuring compliance, or preventing non-compliance, in the first place. From what I understand, this is why some Members refer to these provisions as the "due diligence" approach. In this way, the "due diligence" approach is different from the prohibition based on IUU determinations, which takes place after IUU fishing has occurred. On this basis, the view has been expressed that the "due diligence" approach could be an alternative to the subsidy prohibition based on IUU determinations; that said, other Members see this approach as a complement to such prohibition. These are important issues that should be addressed, which also will benefit from our work on IUU determinations to clarify how these provisions relate to one another.

**Article 3.9**

40. Article 3.9 on special and differential treatment (SDT) for the IUU pillar has remained unchanged since the first version of the draft consolidated document. As I explained when introducing that document, the drafting of SDT provisions was based on the proposal in TN/RL/GEN/200/Rev.1. This was not because that proposal had gained consensus. Indeed, the written exchange of views and our subsequent work shows clearly that views remain far apart on all of the SDT provisions, including in Article 3.9. However, at the time when the draft consolidated document was being prepared, only the SDT proposal TN/RL/GEN/200/Rev.1 covered elements of other SDT proposals that had been made for the different pillars.

41. Although we have devoted considerable effort to the issue of SDT overall, this remains a difficult and complex area where views are still far apart, including in respect of Article 3.9. Some Members consider any SDT under the IUU pillar to be inappropriate. Others support some form of SDT in line with the current text in Article 3.9. In between, some Members could consider a transitional period but not an exemption. More specific issues also have been raised regarding certain elements in Article 3.9, such as the idea reflected in the placeholder in Article 3.9(b) to separate

illegal fishing from unreported and unregulated fishing for the purposes of SDT, and whether "vessels other than large industrial scale fishing vessels" could be used as a basis for an exemption.

**ARTICLE 4: OVERFISHED STOCKS (OFS)**

**Overall**

42. Article 4 of Rev.2 on the prohibition of subsidies concerning overfished stocks (OFS) remains essentially the same as when it was first introduced, in the first version of the consolidated draft document. As explained at that time, this text largely reflects the work of the facilitator on this pillar, in RD/TN/RL/119/Rev.1. There are three main reasons why there have not been as many changes in this pillar as in other pillars:

- First, many Members have pointed to a potential overlap between the disciplines in this pillar and the disciplines on overcapacity and overfishing (OCOF). Thus, they preferred to continue the work to clarify the OCOF pillar before engaging substantively in the OFS pillar;

- Second, the text as it currently stands is relatively clean, with relatively few brackets and clear choices in the form of alternative texts; and

- Third, key substantive issues under this pillar overlap with issues in other pillars that we have been discussing. For the best use of our time, I think that we can better address those issues in the OFS pillar later with the benefit of discussions on similar issues in other pillars.

43. That said, there is one change that was made in **Rev.2**, which is the deletion of the placeholder for unassessed stocks. As such, I will go through this Article with an emphasis on this change and refer you to my introductory remarks in RD/TN/RL/126/Add.1 for more details on other provisions.

**Article 4.1 to 4.5**

44. Article 4.1 contains the main prohibition for the OFS pillar. It prohibits subsidies when either of two conditions are met. The first condition is that the subsidies are for fishing or fishing related activities regarding an overfished stock. The second condition is that there is either lack of recovery of the stock or continuous reduction in the level of the stock.

45. Article 4.2 defines what "overfished" stocks means for the purpose of one of the conditions in Article 4.1. Based on the facilitator's work, there are two alternatives: in ALT1, a fish stock is overfished if it is recognized as such by a Member with jurisdiction for the area or an RFMO/A; and in ALT2, a fish stock is overfished when fishing needs to be restricted to allow the stock to rebuild to its maximum sustainable yield (MSY) or an alternative reference point (ARP). In both alternatives, the overfished status would be based on the best scientific evidence available to and recognized by the Member in question.

46. Article 4.3 permits subsidies that otherwise would be prohibited under Article 4.1, if the subsidies and/or other appropriate measures are implemented in a manner that ensures rebuilding of the stock to a biologically sustainable level. Article 4.4 is a provision for resolving potential conflicts between the stock assessments by national authorities and RFMO/As under either Articles 4.2 or 4.3.

47. In addition, while more work is needed on Articles 4.3 and 4.4, a number of Members have pointed out substantive overlaps in these provisions with Article 5.2, and in respect of the question of RFMO/A and coastal state determinations between Article 4.4, and Article 3.2 and footnote 7, respectively. From this perspective, work we undertake on Article 5.2 and 3.2 may help us in our further consideration of Articles 4.3 and 4.4.

48. Finally, Article 4.5 is an SDT provision for the OFS pillar. For the reasons set forth above in respect of Article 3.9, the text here is based on the text in the proposal in TN/RL/GEN/200/Rev.1. The text of Article 3.9 remains unchanged since its introduction in the original version of the consolidated draft document, also for the reasons discussed above.

**Unassessed stocks**

49. The latest text of the facilitator for OFS contained a placeholder for unassessed stocks, which was reflected in Article 4 (OFS) in the first draft consolidated document and which remained unchanged in Rev.1. Since then, we have held a number of dedicated sessions on this placeholder, most recently on 3 November in a plenary session and 17 November in a small-group configuration.

50. These were our first opportunities to discuss this placeholder in the context of the entire document. The discussion made clear that many Members consider that a possible provision on unassessed stocks would be better located under the OCOF pillar. To these Members, the main rationale for including in the disciplines a provision on unassessed stocks was to address fishing in high seas, where no entity is responsible for stock assessments. Some delegations consider that this concern is now addressed in Article 5.3(b) in the OCOF pillar, which would prohibit subsidies to fishing in high seas and outside the competence of a RFMO/As. On this basis, there appeared to be general support for the idea that the placeholder for unassessed stocks could be removed from the OFS pillar. This is reflected in **Rev.2**.

51. That said, some Members continue to hold the view that the special case of unassessed stocks should be addressed explicitly somewhere in the text. To this end, textual suggestions raised by Members used a formulation of an obligation to exercise "special care" or "due restraint" when dealing with unassessed stocks, and language to this effect has been introduced in Rev.2. However, given that Members have different views whether this should be placed under the OCOF pillar or elsewhere, this text has been added as Article 11.2 in the final provisions in **Rev.2**.

**ARTICLE 5: OVERCAPACITY AND OVERFISHING (OCOF)**

**Overall**

52. Article 5 contains disciplines on subsidies concerning overcapacity and overfishing. This pillar has been one of the most difficult areas of our negotiations because there remain divergent views on how to approach these disciplines, ranging from a list of prohibited subsidies, to capping, to a list of non-harmful subsidies, and so on. Against this backdrop, you will recall that the Director-General and I convened a meeting at HoDs level back in March to seek Members' views on how to make progress in this pillar. In this meeting, there was general support for focusing first on the prohibition element of the pillar based on the idea that this could help to clarify our discussions on other elements. On this basis, I reviewed the then-latest work of the facilitator, in document RD/TN/RL/114/Rev.1, and prepared a draft by focusing on the prohibition element. This document was circulated on 9 March and it formed the basis of the drafting of this Article in the first version of the draft consolidated document.

**Articles 5.1 and 5.2**

53. Some of the more important revisions since then were made to what are now Articles 5.1 and 5.2. Together, these two provisions form the main discipline of this pillar, by prohibiting subsidies that contribute to OCOF in Article 5.1 while keeping some flexibility based on sustainability in Article 5.2.

54. The current structure of the discipline reflects the long-standing divergence on the basic approach to the disciplines on OCOF. Specifically, some Members prefer a list of subsidies that would simply be prohibited. Other Members oppose such an approach on the basis that not all of the listed subsidies would contribute in every instance to OCOF. These Members prefer a prohibition based on the contribution of a subsidy to overfishing or overcapacity in a particular fishery, taking into account policies and measures implemented to maintain fish stocks at a sustainable level. In my attempt to find a compromise, in each version of the draft consolidated document I have put together elements from both approaches.

55. Thus, this basic "hybrid" structure has been maintained since the introduction of the first draft document. However, there were some notable textual changes in Rev.1. In the initial version of the document, a subsidy was considered to be contributing to OCOF if it reduced certain costs for fishing on a stock that was being fished at a rate of fishing or with a measure of fishing capacity greater than would allow the stock to stay at a sustainable level (Article 5.1.1 of RD/TN/RL/126). This provision was followed by a list of the costs in question, and an elaboration of what was meant by a

sustainable level, with reference to MSY and ARP, in a footnote (Article 5.1.2 and footnote 11 of RD/TN/RL/126). Then, following the prohibition provisions, there was a provision for flexibility where the sustainable level could be ensured through other policies (Article 5.1.3 of RD/TN/RL/126).

56. Based on our discussions before Rev.1, it was clear that the condition requiring reduction of costs was not gaining traction. That condition therefore was removed in Rev.1. This change meant that the list of costs was no longer relevant, and this was changed to the list of subsidies that was introduced in Rev.1. Finally, a number of Members considered that in the original version of the draft document there was a redundancy which reduced the effectiveness of the prohibition between the sustainability element in the prohibition provision – based on the rate of fishing, the measure of fishing capacity, and the sustainable stock level – and that in the flexibility provision – also based on the sustainable stock level. To address this issue and to simplify the drafting, in Rev.1 the sustainability element was omitted from the prohibition provision, with the idea of first focusing on the substantive aspects of a sustainability element in this pillar of the disciplines, and then considering where such an element would best be placed, including whether and why sustainability would need to be addressed in more than one place. As a result of these changes, the structure was simplified in Rev.1 to two paragraphs, in Articles 5.1 and 5.2.

57. The structure and text of Articles 5.1 and 5.2 remain unchanged in Rev.2, not because we agree, but precisely because we have not yet converged on the best way forward for this pillar of the disciplines. Thus, in Rev. 2, as in Rev.1, the chapeau in Article 5.1 provides for the prohibition of subsidies that contribute to OCOF, followed by an illustrative list of such subsidies in Article 5.1.1. Article 5.2 then sets for a provision under which a Member could use otherwise prohibited subsidies (including the ones listed in Article 5.1.1) if it can show that measures are being implemented to maintain the stock or stocks at a biologically sustainable level. Together, this "hybrid" approach prohibits subsidies when the subsidizing Member cannot demonstrate that measures are implemented to ensure the subsidized fishing is sustainable. Conversely, the discipline allows a Member to grant subsidies if it can show that there are measures in place that maintain the stocks in question at a biologically sustainable level.

58. Linked to this, an element that did change in **Rev.2** is footnote 13 (previously, footnote 11 of RD/TN/RL/126 and Rev.1). This footnote provides parameters for the term "biologically sustainable level". In a number of dedicated sessions on the OCOF pillar of Rev.1, most recently on 2 December at the HoDs level, some Members expressed the concern that the footnote's reference to MSY could render the flexibility in Article 5.2 unusable for them because their systems simply do not operate in a way that would meet the standards implied by the MSY. They did not consider that the footnote's additional reference to ARP was sufficient to address this concern, as they see ARP as more or less equivalent to MSY. While other Members do consider the reference to ARP as sufficient to provide the desired degree of flexibility, I did not hear any objection to the idea that, if we were to accept a hybrid approach, the footnote should be drafted in a way that makes it clear that MSY or similar reference points are not the only measures of biological sustainability.

59. To reflect the concerns over the drafting of the footnote in Rev.1, the drafting change to the footnote introduced in Rev.2 was based on a textual suggestion put forward during our meeting on 2 December, adding specific examples of non-MSY based reference points. These examples, based on "level of depletion, or level of or trend in time series data on catch per unit effort, commensurate with the data available for the fishery", are reflected in square brackets in footnote 13 of Rev.2.

60. Of course, there are other important and difficult issues that remain outstanding in respect of the prohibition in the OCOF pillar. At a fundamental level, I am aware that some of those who support the list approach consider that the flexibility based on sustainability is not needed. In their view, the subsidies to be listed do, inherently, contribute to OCOF and should be prohibited. Other Members, however, do not think that the subsidies currently listed in Article 5.1.1 always contribute to OCOF, and that coming up to a list of types of subsidies that are always harmful regardless of the specific context in which they are provided would be difficult, and/or would lead to complex discussions on a list of non-harmful subsidies.

61. Another important remaining question regarding the prohibition in the OCOF pillar, which has been the focus of considerable attention in the discussions of Rev.1 is the placement and content of Article 5.2. It has occurred to me, based on the discussions, that those supporting a sustainability test for the application of the subsidy prohibition (i.e., those that consider the provision in Article 5.2

in the current draft insufficient and/or wrongly placed) are addressing two linked but different situations:

- The first, where the fish stock in question is not being fished at a rate that would lead to depletion to below a biologically sustainable level, or where fishing capacity is too small to allow this situation to develop; and

- The second, where the fish stock in question is being fished at a rate that is heading toward depletion to below the biologically sustainable level, or where fishing capacity could allow this situation to develop, but measures are implemented to maintain stocks at a biologically sustainable level. In addition, it has been suggested that if measures are in place to rebuild a stock to its biologically sustainable level then the exemption from the prohibition should also apply.

62. The need to further discuss the different combinations and permutations of these situations, and the need for further clarification of the drafting through negotiation, were additional reasons why I did not change Articles 5.1 or 5.2 apart from footnote 13.

63. All of this is to state the obvious, that this text is not perfect. But I would like to emphasize that, in our discussions so far, no Member has said that they intend to use subsidies to develop their fisheries sector in an *unsustainable* manner. In this sense, the clarification that we have achieved, that the flexibility in Article 5.2 is meant to prevent subsidies for unsustainable fishing, represents a certain degree of progress in our discussions. That said, we clearly need more work to find the language that will ensure that this objective is met, in a way that is accessible and acceptable to all Members.

**Article 5.3**

64. Article 5.3 contains two prohibitions on subsidies for fishing beyond a Member's jurisdiction:

- Subparagraph (a), would prohibit subsidies contingent upon or tied to actual or anticipated fishing or fishing related activities at sea in areas beyond the subsidizing Member's jurisdiction. The meaning of "contingent upon" and "tied to" is elaborated in Article 5.3.1; and

- Subparagraph (b) would prohibit subsidies to fishing or fishing related activities in areas beyond a subsidizing Member's jurisdiction and outside the competence of a relevant RFMO/A, which is a subset of the high seas.

65. The text of these provisions has remained unchanged since its introduction in the first version of the consolidated draft document, as I felt that textual changes to either subparagraph would be premature. That said, we have made some progress in our understanding during the dedicated sessions on this topic.

66. A number of delegations emphasize the importance of specific disciplines for subsidies to fishing in areas where there is no control of fishing activities and/or subsidies that are contingent on fishing outside the subsidizing Member's EEZ. Other delegations question whether such fishing necessarily contributes to OCOF on the basis of where it takes place. This view opposes Article 5.3 or considers that it should be limited to certain types of subsidies that are seen as particularly harmful. A further issue in these discussions is the relationship between Article 5.1 and Article 5.3. Some Members hold the view that, regardless of the merits of Article 5.3, as a practical matter it is unnecessary because the subsidies prohibited under Article 5.3 already would be prohibited under Article 5.1.

67. Another, issue relates to the placement of Article 5.3.1. Given that this is seen as an elaboration of subparagraph (a), some delegations have suggested moving it to that subparagraph, either to the body of the text or to a footnote.

68. Finally, in **Rev.2**, a placeholder Article 5.3.2 was added for non-recovery of payments under government-to-government access agreements. This placeholder appears in Article 5.3 as the fishing under such agreements by definition takes place outside the jurisdiction of the Member

obtaining the access. As explained below the placeholder is intended to mark this issue for further work.

69. As mentioned above in respect of footnote 2, we have held a number of dedicated sessions on government-to-government access agreements and one of the topics discussed was the terms on which the fishing rights acquired under access agreements are distributed, i.e., whether and how much money is recovered from fishers for the rights distributed to them. In this regard, some Members consider that subsidies would arise from the distribution on below-market terms of fishing rights obtained under access agreements, and that such subsidies should be subject to the disciplines. Other Members disagree, considering either that no subsidies would arise in these circumstances, or that any subsidies that do so arise should be excluded from the scope of the disciplines. At least two related, but distinct issues were identified in this connection.

70. First, some Members hold the view that any distribution of fishing rights, such as through quota allocation or fishing licenses, whether in domestic waters or in foreign waters under access agreements, and regardless of the terms on which the rights are distributed, should not be subject to the disciplines. I have understood from these discussions that the underlying concern for the Members holding this view is about how a Member's system of distributing fishing rights should be treated under the disciplines. In other words, for these Members this issue relates to the distribution of fishing rights in general, with access agreements being only one specific instance where it could arise. Their concern is that treating any distribution of fishing rights as a subsidy could undermine their fisheries management regimes. While we had some discussions on this, it is clear that more work is needed, so no textual changes have been introduced in this regard

71. Second, some Members have a more specific concern, in respect of access agreements under which a vessel or operator of one Member engages in fishing in another Member's waters, and the government acquiring the access contributes to conservation and management measures in the fishery in question. These Members acknowledge that the distribution of fishing rights under these agreements without the government recovering the amounts it paid for the access could be construed as a prohibited subsidy under Article 5.3(a). They support limited flexibility from the prohibition where the government acquiring the access takes on conservation and management obligations under the access agreement. Here again, we have not had sufficient discussion to warrant introduction of text into the consolidated draft document to address this issue.

72. The placeholder introduced in Article 5.3.2 is intended as the starting point for a focused discussion of these issues.

**Articles 5.4 to 5.6**

73. Articles 5.4 to 5.6 remain unchanged from when they were introduced in the initial version of the draft consolidated document. Article 5.4 sets forth a prohibition on subsidies for vessels not flying the flag of the subsidizing Member. This text, in square brackets, remains in place as some Members consider such a prohibition to be necessary, and others reject its underlying presumption. While certainly requiring more discussion, the current text reflects the choices before Members on this issue.

74. Articles 5.5 and 5.6 are placeholders for capping and non-harmful subsidies. These remain unchanged given that our work so far has been focused on the prohibitions text in this pillar, which is the approach endorsed by HoDs early this year. I wish to note that we cannot postpone discussing these placeholders for too long. Soon, we will need to take stock of the progress we have made so far on the main prohibitions and seriously assess how we proceed on Articles 5.5 and 5.6. From this standpoint, I would like to thank the proponents of these two placeholders for their patience, and for engaging actively in our work on the main prohibitions.

**Article 5.7**

75. Article 5.7 is for SDT in the OCOF pillar. As discussed above in respect of Article 3.9, the text here is based on the text in the proposal in TN/RL/GEN/200/Rev.1 and the substantive portions of the text remain unchanged due to significant differences in views. To recall, while the proposal was initially reflected in the draft for being the most comprehensive proposal on SDT, work to date has shown wide differences and thus has not produced convergence that could be reflected as textual changes.

76. We have had a number of discussions in the NGR dedicated to Article 5.7, in addition to the work undertaken by Ambassador Chambovey in his capacity as Friend of Chair in this area. This work warrants some elaboration. First to note is that there is no convergence on any of the three subparagraphs of Article 5.7. Subparagraph (a) is an exemption for LDC Members; (b) is an exemption for developing country Members within their territorial seas; and (c) is an exemption for developing country Members within their EEZs and in areas of competence of RFMO/As, except for those exceeding thresholds for all of four listed criteria. On (a) and (b), some Members consider these exemptions to be contrary to the mandate, while being open to transition periods and technical assistance and capacity building for least-developed country Members and some developing country Members. Other Members, however, consider that exemptions or flexibilities, in one form or another, would be appropriate and effective to address development needs.

77. On subparagraph (c), Members also hold divergent views. The proponents and their supporters describe (c) as a transitional mechanism as Members initially falling below the thresholds could eventually exceed them and then graduate from this SDT provision. Some other Members oppose the text, considering that some or all of the criteria are non-germane to fisheries subsidies, and that the cumulative effect of the thresholds essentially would be a permanent carve-out from the disciplines for all but a very few developing country Members. Furthermore, some Members that generally support the approach object to certain criteria, particularly income-related criteria such as GNI per capita, as inappropriate for our negotiations

78. From these discussions, I have detected that there are related, but distinct issues relating to subparagraphs (a) and (b) on the one hand, and subparagraph (c) on the other. For (a) and (b), the issues are relatively straight forward, whether exemptions should be used as SDT in respect of either or both of the situations covered by these paragraphs. For (c), the issues are more complicated. For one, there is the question of whether a criteria-based approach could be accepted as a transitional mechanism in the first instance. If so, the further question is what criteria, thresholds or mechanisms - whether those in (c) or others – could be acceptable to all Members.

79. I consider this progress in our SDT discussions to be an important step towards finding solutions, which as such should be marked in **Rev.2**. To that end, I first have added brackets around (a) and (b), considering that each is now being discussed separately. In respect of (c) I have added a placeholder for an alternative simply described as "other forms of transitional mechanisms" to capture in shorthand form the main lines of the current discussions of (c).

**ARTICLE 6: SPECIFIC PROVISIONS FOR LDC MEMBERS**

80. Article 6 contains two paragraphs specific to LDC Members, dealing with graduating LDC Members in the first paragraph, and requiring the exercise of due restraint in raising matters involving LDC Members in the second. These provisions, which remain unchanged since they were introduced in the initial version of the draft consolidated document, were drawn directly from the LDC Group's proposal in RD/TN/RL/125. As we have not yet had focused discussions on these provisions, they remain in brackets.

**ARTICLE 7: TECHNICAL ASSISTANCE AND CAPACITY BUILDING**

81. Article 7 deals with technical assistance and capacity building. As discussed in respect of Article 3.9, the text here is based on the text in the proposal in TN/RL/GEN/200/Rev.1 and remains unchanged since it was introduced in the initial version of the draft consolidated document with one exception. This is the insertion in **Rev.2** of the term "land-locked developing country Members" (LLDC Members) based on the proposal made by Afghanistan, Mongolia, Nepal and Paraguay (the LLDC proponents) in document RD/TL/RL/130, which was introduced on 4 November. In introducing this proposal, the LLDC proponents explained that this addition was not meant to change anything of substance in Article 7. Rather, it was to make explicit what is already implicit in the existing text, that technical assistance and capacity building applies to LLDC Members as it applies to all developing country Members. We held a discussion on this on 24 November and I detected no strong objection to this idea.

## ARTICLES 8 TO 10: OTHER CROSS-CUTTING ISSUES

### Overall

82. Texts for Articles 8, 9 and 10 were added in Rev.1, as these were empty placeholders when the draft consolidated document was first introduced. These provisions concern cross-cutting issues of notification and transparency, institutional arrangements, and dispute settlement, respectively.

83. Details of how each text has been drafted have already been provided in RD/TN/RL/126/Rev.1/Add.1 when I introduced Rev.1. Generally speaking, these texts were drawn from the proposal in RD/TN/RL/90/Rev.2 that was introduced during the plenary session on 17 September, our earlier work that was referred to by Members during our discussions such as that in TN/RL/W/274/Rev.6 and the 2007 Chair's text in TN/RL/W/213, as well as specific textual suggestions and comments made by Members during our meetings. To avoid repetition, I will focus on briefly summarizing Articles 8-10 and key issues arising from the discussions of these provisions to set the course of our future work.

### Article 8: Notification and transparency

84. Our work on notification and transparency has shown that Members view this as critical for the fisheries subsidies disciplines and consider that the notification and transparency requirements for the fisheries subsidies disciplines should be in addition to the existing rules under the SCM Agreement. That is, the notification and transparency rules in the fisheries subsidies disciplines should not undermine the corresponding rules in the SCM Agreement. However, there remain divergences on what specific information should be required to be notified. To reflect this, Article 8.1 has a chapeau for notification and transparency requirements building on the requirements under the SCM Agreement, followed by a placeholder for that specific information to be subject to this chapeau.

85. Article 8.2 contains specific notification and transparency requirements relating to IUU determinations and to government-to-government fisheries access agreements. However, whether and what information relating to these two items needs to be notified depends on the main disciplines, so we will need to revisit them later.

86. Article 8.3 is an information exchange mechanism among Members. There are corresponding provisions in the SCM Agreement (Article 25.8 and 25.9, in particular), meaning that whether we need a similar mechanism in the fisheries subsidies disciplines and how it should be drafted will be affected by the eventual decision on whether the new disciplines should take the form of a standalone agreement or an annex to the SCM Agreement.

### Article 9: Institutional arrangements

87. The need for specific institutional arrangements also will depend on whether the disciplines will be a standalone agreement or an annex to the SCM Agreement. Thus, the entirety of Article 9.1, providing for the establishment of a new fisheries subsidies Committee, is in brackets.

88. Subsequent paragraphs under Article 9 elaborate on the responsibilities and functions of the Committee that would be established under the first paragraph: Article 9.2 contains a requirement for each Member to inform the Committee of, and for the Committee to review, its measures taken to implement the fisheries subsidies disciplines; Article 9.3 is a requirement for Members to inform the Committee of their fisheries regime; Article 9.4 requires the Committee to examine the notifications made pursuant to the disciplines; Article 9.5 requires the Committee to maintain close contact with certain other international organizations; and Article 9.6 requires the Committee to review the operation of the fisheries subsidies disciplines. While each of these provisions remains to be discussed, our work on the main disciplines and the issue of the form that disciplines will take will help to sharpen our focus in this area.

**Article 10: Dispute settlement**

89. Dispute settlement, covered in Article 10, also depends on whether the disciplines becomes an annex to the SCM Agreement. This is because Article 30 of the SCM Agreement already provides for application of the *Understanding on Rules and Procedures Governing the Settlement* (DSU) and special and additional rules for prohibited subsidies in Article 4 of the SCM Agreement. If the fisheries subsidies disciplines are annexed to the SCM Agreement, these existing rules of the Agreement, unless we specifically decided to depart from them, would apply to the disciplines. The current text in Article 10 was added in Rev.1 to reflect this default position.

90. While no change has been made to this provision in Rev.2, we have made significant progress on this topic, which warrants some elaboration. In particular, there appears to be a general acceptance that the DSU and Article 4 of the SCM Agreement should be the starting point in the sense that we should not try to reinvent the dispute settlement rules for the fisheries subsidies disciplines. That said, many Members also pointed out certain aspects of the DSU and Article 4 of the SCM Agreement that they consider inadequate for the fisheries subsidies disciplines. My understanding from these discussions is that we can narrow down the areas that require further work, which include:

- Remedies, for which Members broadly agree that the withdrawal of a prohibited subsidy without delay provided for in Article 4.7 of the SCM Agreement is appropriate. Views diverge, however, on whether and what additional remedies should be established;

- Countermeasures, for which Members hold divergent views as to whether the "appropriate" countermeasures provided for in Article 4.10 of the SCM Agreement are suitable. In addition, views diverge on whether an alternative or additional and fisheries-specific countermeasure would be needed;

- Non-violation claims, which are incorporated in the current text of Article 10 through its reference to Article XXIII of the GATT 1994. Some Members consider that non-violation claims should not be allowed under the fisheries subsidies disciplines; and

- Standard of review, and specifically whether and to what extent Members' IUU determinations and stock assessments should be subject to the WTO dispute settlement mechanism.

**ARTICLE 11: FINAL PROVISIONS**

**Overview**

91. Article 11 contains certain final provisions. This Article was added in Rev.1 as some of the provisions in question do not belong readily to one of the existing provisions or apply to some, but not all, substantive pillars. In Rev.1, there were two paragraphs under this provision, one for disaster relief (currently in Article 11.3 of Rev.2) and another for territoriality (currently in Article 11.4 of Rev.2). Texts of these paragraphs remain unchanged in Rev.2, although their placement shifted as a result of insertion of two new paragraphs, Articles 11.1 and 11.2, in Rev.2.

**Article 11.1**

92. Article 11.1, which is introduced in **Rev.2**, clarifies that nothing in the disciplines shall be construed or applied in a manner which will affect the rights of LLDC Members. This text is based on the proposal by the LLDC proponents RD/TL/RL/130. When this proposal was discussed on 24 November, there was no strong objection to this part of the text.

**Article 11.2**

93. Article 11.2 also is a new provision introduced in **Rev.2** regarding unassessed stocks, as explained above in the context of the OFS pillar. To recall, this provision is based on textual suggestions that were made in the topic-specific meeting held on this issue for a "special care" or "due restraint" requirement when granting subsidies to fishing regarding unassessed stocks. This

new draft provision replaces the empty placeholder for unassessed stocks that previously was in Article 4.

**Articles 11.3 and 11.4**

94. Articles 11.3 and 11.4 remain unchanged, as explained above. On Article 11.3, which is an exception for disaster relief, Members have generally supported the idea that there should be an exemption of some sort for subsidies for the relief of disasters. Divergences nevertheless remain on specific aspects of this exception, including whether the exception should be limited to cases of "natural" disasters, whether it should apply to the IUU and OFS pillar, and whether and what other conditions could be attached to the exception.

95. Finally, Article 11.4 reflects many Members' views that our work here at the WTO, and anything that flows from our work, should not have any impact on issues of territoriality and delimitation of maritime jurisdiction. Based on our work and textual suggestions, this idea has been translated into two subparagraphs now under Article 11.4: subparagraph (a) ensuring that the fisheries subsidies disciplines in the WTO, including results of dispute settlement, could not be used outside in other international fora; and subparagraph (b) ensuring that WTO panels not address any issues of territoriality or delimitation of maritime jurisdiction.

96. I would like to emphasize that divergences of view remain in respect of Article 11.4. During our discussions, some Members expressed the concern that the current text could weaken the disciplines or be used as a veto to any dispute under the disciplines that was brought before a WTO panel. In addition, new proposals addressing this issue were submitted, in documents TN/RL/GEN/204 and Add.1, and RD/TN/RL/129. To me these discussions and proposals have reflected a fundamental difference in views, rather than a more technical divergence. I will bear this in mind as we move forward in seeking a solution in this area that all Members can accept. On a more technical level, that the suggestion also was made that, for consistency, some of the words and phrases might be changed to the terminology used in other international instruments.

**CONCLUSION**

97. This completes my walk-through of Rev.2. I would like to thank all of the delegates who participated in the NGR this year for their hard work, especially during the last few months which have brought both Rev.1 and Rev.2. As my colleagues know well, changes in Rev.2 reflect our work on some of the most difficult, complex and sensitive issues. Obviously, as we enter into the final stages of these negotiations, most of the outstanding issues are equally difficult, complex and sensitive. So, I count on you to engage with the same zeal and spirit when we reconvene.

98. With this, thank you all once again and I wish you all a safe and relaxing holiday season and all the best for 2021.

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