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AGREEMENT ON FISHERIES SUBSIDIES

DRAFT TEXT

Addendum

The attached document from the Chair of the Negotiating Group on Rules is the explanatory note accompanying the draft Agreement on Fisheries Subsidies circulated in document WT/MIN(22)/W/20.

INTRODUCTION

Recalling the call by Ministers at the 15 July 2021 Virtual Meeting of the TNC at Ministerial Level on Fisheries Subsidies, the Negotiating Group on Rules (NGR) was asked to send to Ministers a clean, or as clean as possible, draft text of disciplines to fisheries subsidies in advance of the 12th Ministerial Conference (MC12). Recalling also that a draft Agreement on Fisheries Subsidies was sent to Ministers on 24 November 2021 when MC12 was scheduled to start on 30 November, in document WT/MIN(21)/W/5. A revised draft Agreement on Fisheries Subsidies has now been submitted for the attention of Ministers, in document WT/MIN(22)/W/20. The revised draft Agreement is based on the collective work of the Negotiating Group – that is, the work done by Members in meetings of the Group in different configurations, textual suggestions made by Members to the NGR, and all other Member-led work that has been undertaken. A compilation of Members' textual suggestions made on the two previous drafts – WT/MIN(21)/W/5 and TN/RL/W/276/Rev.2 – has been circulated in document RD/TN/RL/161.

This Addendum is a revision of the one that accompanied the draft Agreement sent to Ministers on 24 November in WT/MIN(21)/W/5, and is intended to assist them and their delegations in understanding the background and reasons for the provisions of the draft Agreement, including changes made in this version. It represents my best and objective assessment of the intention of proposals, textual suggestions, and comments made by Members, based on all the discussions at the NGR and in different configurations.

As with the previous drafts of disciplines on fisheries subsidies (in documents RD/TN/RL/126 of 25 June 2020, RD/TN/RL/126/Rev.1 of 2 November 2020, RD/TN/RL/126/Rev.2 of 18 December 2020, TN/RL/W/276 of 11 June 2021, TN/RL/W/276/Rev.1 of 30 June 2021, TN/RL/W/276/Rev.2 of 8 November 2021, and WT/MIN(21)/W/5), it is well understood that nothing in the most recent draft Agreement is agreed, and that it remains a draft until everything is agreed. While this text reflects my honest, best attempt to find a balance in a way that I consider most likely to build consensus, the final outcome remains in the hands of Members working together.

To assist the work at the Ministerial Conference, I have bracketed language in the draft Agreement to represent areas where views have not yet sufficiently converged for me to be in a position to present a clear suggested outcome, and on which I believe Ministers' attention will be particularly warranted. One of the principal areas for attention concerns the numbers associated with the special and differential treatment exemptions for developing country Members from the general prohibition

on subsidies contributing to overcapacity and overfishing. These numbers are: the share of global marine capture fishing above which a developing country Member would not be able to avail of the exemptions; the share of global volume of marine capture production below which developing country Members would be exempt from the discipline; the transition period during which developing country Members would be exempt from the discipline, which also is relevant to a provision for Members graduating from LDC status; and the geographic scope of the exemptions for subsidies to low income, resource-poor and livelihood fishing or fishing related activities. Another area for Ministers' attention concerns the transparency provision on the use of forced labour.

Work will not pause until MC12 begins. Indeed, Members are intensively engaged in different configurations in trying to narrow differences and eliminate as many brackets as possible in this last period before MC12. As such, supplementary reports may be circulated before and during MC12.

ARTICLE 1: SCOPE

1. Article 1 defines the scope of the fisheries subsidies disciplines as subsidies within the meaning of Article 1.1 of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) that are specific within the meaning of Article 2 of that Agreement, to marine wild capture fishing and fishing related activities at sea. Footnotes 1 and 2 have not been changed compared to the previous draft of the Agreement. Footnote 1 clarifies that aquaculture and inland fisheries are excluded from the scope of the disciplines, and footnote 2 clarifies that payments from one government to another government under fisheries access agreements are not within the scope, by indicating that those payments would not be deemed to be subsidies under the disciplines.

2. A new footnote 3 has been added, which was developed by delegations that worked together to resolve the differences between the two alternative texts that were in Article 5.3 of the previous draft, relating to subsidies to vessels not flying the flag of the subsidizing Member. According to Members, the language of the footnote is inspired by similar language found in previous texts in the negotiating process. This new footnote clarifies that a subsidy is attributable to the Member granting it, regardless of the flag or registry of the vessel involved or the nationality of the recipient. This footnote is one part of a new approach to address the issues previously addressed in two alternatives in the former Article 5.3. The other part of the new approach is in a new Article 5.4, which is described below.

3. Article 1.2 in the previous version of the text, which was in brackets, would have extended the scope of the Agreement to fuel subsidies that are not specific. The brackets indicated that no agreement had been reached on including this provision. The text of former Article 1.2 has been omitted from this draft because it is my assessment that, for both practical and systemic reasons, there is strong convergence among Members not to extend the scope of the disciplines to cover non-specific fuel subsidies. On the other hand, it should be acknowledged that some of those Members that had proposed or supported disciplining all fuel subsidies, specific or not, on the basis that these are particularly harmful subsidies, continue to hold the view that non-specific fuel subsidies should be covered by this Agreement.

4. There is a shared understanding, however, that fuel subsidies are relevant under SDG target 14.6 and the MC11 mandate from Ministers¹. In this regard, it has been noted that Article 1 already covers fuel subsidies that are specific, which is consistent with the current framework of the subsidies disciplines in the SCM Agreement. It also is commonly understood that non-specific fuel subsidies can contribute to excessive and illegal fishing, but the paucity of data and information on such subsidies makes it difficult to assess their extent and impact.

5. In this context, I would recall the very broad spectrum of views that have been expressed on the general issue of fuel, including but not limited to non-specific fuel subsidies, over the course of the negotiations. While some Members have consistently advocated including non-specific fuel subsidies, others have strongly opposed this, and neither side was moving from those diametrically opposing positions. As another facet of the fuel debate, there have been Members arguing that fuel detaxation schemes should be excluded entirely from the scope of the Agreement. However, this is strongly opposed by others, including those who seek to bring all fuel subsidies, whether specific or not, into the scope of the Agreement. In the view of these Members, fuel subsidies including in the form of detaxation schemes, were they to be found to be subsidies, are among the most harmful for fisheries sustainability, such that there is no justification to carve any such programmes out of the Agreement, given its sustainability focus.

6. Coming back to the treatment of non-specific fuel subsidies in the text, while the proposed Article 1.2 in the scope has appeared in the previous draft texts, it was clear that neither including this provision nor staying silent on non-specific fuel subsidies was attracting convergence. As an attempt to bridge this gulf in positions, some Members began to suggest that including transparency provisions in respect of non-specific fuel subsidies could be a possible compromise. Reflecting the interest in this sort of a solution, Article 8.1bis was introduced in the previous draft. At the time, it was recognized that both the content and the placement of such a provision would need further work and reflection by Members.

¹ WT/MIN(17)/64.

7. In our recent work in the Negotiating Group, I was happy to learn that a group of Members with different and somewhat opposed views on this issue had worked together to elaborate a text for transparency in respect of non-specific fuel subsidies around which all of them could converge. These Members made clear that for them, including this transparency provision in the Agreement would be a compromise alternative to including non-specific fuel subsidies within scope. The language developed by this representative group is reflected in new Article 8.2 in the draft Agreement. It has been noted in the discussions of a transparency provision that a major advantage of such a provision is that it would develop an information base about such subsidies that would be of great benefit in the review of the Agreement's operation and that might point the way toward developing future disciplines in this area. Weighing up all of these considerations that have been brought to the fuel debate, my assessment is that inclusion of the transparency provisions in Article 8.2 represents a compromise that everyone should be able to live with.

ARTICLE 2: DEFINITIONS

8. There has been no change to Article 2, which contains definitions for five terms that apply throughout the disciplines. The definitions of the first four terms, in (a) through (d), for "fish", "fishing", "fishing related activities" and "vessel", were taken from the Agreement on Port State Measures (PSMA).

9. Since the previous revision of the draft Agreement was distributed, some questions were raised as to the breadth of the definition of fish. It was recalled that this definition was taken from the PSMA and responds to Members' general desire not to create a new definition in the WTO.

10. Earlier discussions had also considered the placement of the term "at sea" in the definition of the term "fishing related activities" in (c) to clarify that onshore activities are not covered by the disciplines. However, it is clearly understood among Members that the term "at sea" in Article 2(c) covers all of the activities referred to in the definition, i.e., that the activities in question are those that take place at sea, and that the Agreement does not apply to such activities performed on land. Given this clear understanding, and to avoid modifying language taken as is from the PSMA, no change in the word order has been made.

11. Concerning the general definition of the term "operator" in Article 2(e), as explained in the previous Addendum, this was taken from the facilitator's work. In an earlier draft, it was a footnote to one of the substantive disciplines on subsidies contributing to IUU fishing. Since then, given that the term "operator" is also used elsewhere, the general elements of that definition were moved to Article 2(e), whereas the specific part addressing IUU fishing aspects was retained in its original placement in that pillar. The text in Article 2(e) remained unchanged except for the deletion in the preceding version of the text of the qualifier "on board" that had appeared after "any person". This change reflects the general understanding that the term "operator" should not be too narrow or rigid as this could allow the disciplines to be circumvented through leasing, corporate structures or other arrangements, where someone who was not on board the vessel that had engaged in IUU fishing was directing and controlling its activities.

ARTICLE 3: SUBSIDIES CONTRIBUTING TO ILLEGAL, UNREPORTED AND UNREGULATED FISHING

Overview

12. Article 3 contains the discipline on subsidies contributing to IUU fishing. It has not been amended since the previous draft apart from the introduction of a reference to the Committee to be established under the Agreement, and the removal of the brackets from Article 3.8.

Footnote 4

13. Footnote 4 to the title of Article 3 defines the term "illegal, unreported and unregulated" fishing through a reference to paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA IUU).

Article 3.1

14. Article 3.1 contains the basic prohibition in respect of subsidies to IUU fishing, by stating that subsidies to a vessel or operator engaged in IUU fishing or fishing related activities in support of IUU fishing are prohibited. The phrase "fishing related activities in support of such fishing", which had been introduced in a previous draft text (TN/RL/W/276/Rev.2), is meant to ensure that the scope of Article 3.1 should be the same as that referred to in Article 1, as well as that of the other disciplines, all of which apply to both fishing and fishing related activities.

Footnote 5

15. Footnote 5 defines the term "operator" for the purpose of Article 3 and clarifies the prohibition on subsidies to operators. As explained above, the general elements of the definition of the term "operator" are found in Article 2(e), whereas the aspects specific to Article 3 appear in this Article.

16. Footnote 5 also clarifies that the prohibition on subsidies to operators engaged in IUU fishing applies to subsidies provided to fishing and fishing related activities at sea. While many Members were comfortable with this language, a few Members supported amending this text so that the prohibition on subsidies to operators would apply only to subsidies provided to fishing and fishing related activities at sea carried out by the vessel engaged in IUU fishing. Other Members took the opposite view, arguing that any affirmative IUU fishing determination regarding an operator, even involving a single vessel, should trigger the prohibition on all subsidies to the operator as a whole, and not only subsidies to the vessel or vessels involved in the specific incident of IUU fishing.

17. This is an important issue for many Members, as it is generally seen as being closely linked to the other provisions of Article 3. Some delegations sought to limit the subsidies prohibition on operators to the vessels engaged in IUU fishing as they saw this as being particularly linked to the conditions under which the subsidies prohibition is triggered by an IUU determination made by a foreign authority (provided for in Article 3.3). Thus, the drafting of the footnote on operators should not be seen in isolation. This and the related provisions are aimed at striking a delicate balance between an effective subsidy prohibition on the one hand, and an assurance that the subsidy prohibition would not be improperly triggered on the other hand.

18. The text of Article 3.1 represents a middle point between those who wanted the prohibition to apply to all vessels of an operator and those who wanted it to apply only to the vessels engaged in the particular IUU fishing incident. In particular, the current draft does not specify this one way or the other, and instead aims to ensure that the scope of the subsidy prohibition will be determined by the scope of the IUU fishing determination. As such, if an IUU fishing determination implicates a single vessel, the subsidies to that vessel are what would be prohibited. If, however, an IUU fishing determination implicates an operator as a whole, instead of or in addition to the vessel, the subsidies to that operator also or instead would be prohibited. This is consistent with the general understanding that the WTO does not, and should not, itself become involved in or prejudice the substantive nature and scope of any IUU fishing determinations. This understanding is critical for many Members.

Article 3.2

19. Article 3.2 defines what constitutes IUU fishing as referred to in Article 3.1; that is, it defines what constitutes IUU fishing for the purpose of triggering the subsidy prohibition in Article 3.1. In particular, a vessel or operator is considered to be engaged in IUU fishing when it has been found to be doing so by one of the entities listed in Article 3.2, namely a coastal Member, a flag State Member, or a relevant Regional Fisheries Management Organization or Arrangement (RFMO/A).

20. Once again, it should be emphasized that the listing of these entities is not meant to affect their competence to make IUU fishing determinations, nor to create a hierarchy among them. The current text contains certain clarifying language to this effect.

- Footnote 7 to the chapeau of Article 3.2 clearly states that "Nothing in this Article shall be interpreted as affecting the competence of the listed entities under relevant international instruments or granting new rights to the listed entities in making IUU fishing." The aim is simply to clarify explicitly what has always been intended. That is, that the fact of being

referred to in this provision of this Agreement does not change, and especially does not expand, the roles of these entities beyond those already existing under other relevant international instruments.

- The chapeau also states that a vessel or operator is considered to be engaged in IUU fishing only if there is an "affirmative" determination of such fishing. The qualifier "affirmative" clarifies that a qualifying affirmative determination by any listed entity is not nullified or negated by a negative determination by any other listed entity. This comports with the language in Article 3.3(a), defining an affirmative determination as a final finding that a vessel or operator "has engaged in IUU fishing", or a final listing of a vessel or operator by an RFMO/A.
- The chapeau of Article 3.2 also states that an affirmative determination may be made by "any" of the entities listed thereunder. The listed entities are connected by the conjunction "or", clarifying that there is no hierarchy among them.

21. The term "areas" is used in answer to a concern that had been raised by some Members to ensure that this clause covers all living marine resources of a coastal Member, including sedentary species in a coastal Member's continental shelf area.

22. In subparagraph (c), the condition "including through the provision of timely notification and relevant information" addresses a concern that IUU fishing determinations made by RFMO/As are not subject to the procedural requirements set out in Article 3.3(b). However, that language pertains specifically to IUU fishing determinations made by coastal Members and it does not squarely fit the situation of RFMO/As. In addition, subparagraph(c) already refers to the rules and procedures on the RFMO/A and relevant international law. To address more explicitly the procedural concerns over IUU fishing determinations made by RFMO/As the provision requires these entities to provide timely notifications and relevant information.

Article 3.3

23. Article 3.3 sets out the conditions for triggering the subsidies prohibition in Article 3.1. Subparagraph (a) provides that the "affirmative determination" referred to in Article 3.2 is the "final finding" of IUU fishing by a coastal Member or flag state Member in the case of an IUU fishing determination by a coastal Member of a flag State Member, and the "final listing" in the case of an RFMO/A.

24. Subparagraph (b) contains specific conditions applicable to IUU fishing determinations made by coastal Members. The approach in this subparagraph is based on the completion of specific required procedural steps, set forth in the chapeau of Article 3.3(b) and its subparagraphs (i) through (iii). The aim of these requirements is to provide clarity and certainty on what the coastal Member is obliged to do for its IUU fishing determination to trigger the subsidy prohibition as it applies to the subsidizing Member.

25. First, the chapeau of Article 3.3(b) requires that the determination be based on relevant factual evidence and, second, subparagraphs (i) through (iii) list what the coastal Member must provide to the flag state Member, and/or the subsidizing Member if known.

26. Concerning the factual evidence requirement in the chapeau, this is similar to a previously considered term "positive evidence". Many Members considered that to be a well-established and universal concept. As noted above, however, some Members were concerned that a positive evidence standard would invite WTO scrutiny of the quality of the evidentiary basis of domestic IUU fishing determinations, and argued for no reference to any supporting evidence or information. The term "relevant factual information" represents a compromise between these opposing views, by requiring that IUU fishing determinations be based on relevant factual information and, leaving no room for the quality of that information to be questioned or judged in the WTO. The first part of the text in (b) also contains the requirement that a coastal Member's IUU fishing determination must be "based on relevant factual information". This is intended to ensure that IUU fishing determinations are fact-based.

27. Subparagraph (i) requires timely notification to the flag state Member and/or the subsidizing Member if known of the commencement of the process that could potentially lead to an IUU fishing determination – namely either "that a vessel or operator had been temporarily detained pending further investigation for engagement in" IUU fishing or "that the coastal Member has initiated an investigation for" IUU fishing. Such a notification should be made through appropriate channels and include "reference to any relevant factual information, applicable laws, regulations, administrative procedures, or other relevant measures".

28. Subparagraph (ii) requires the coastal Member to provide the flag State Member and/or the subsidizing Member "an opportunity to exchange relevant information prior to a determination, so as to allow such information to be considered in the final determination". There is no prescriptive or rigid form as to how this exchange should take place, as clarified in footnote 9, which states that this exchange may include an opportunity to dialogue or for a written exchange if requested. To this end, the draft text provides that it is up to the coastal Member to specify how the information exchange should be carried out.

29. Subparagraph (iii) requires the coastal Member to notify the final determination and any sanctions applied, including their duration if applicable, to the flag State Member and/or the subsidizing Member. Thus, subparagraphs (i) through (iii) set forth in detail the bilateral obligations of the coastal Member vis-à-vis the flag state Member and/or the subsidizing Member from the beginning to the end of the proceedings that result in a final determination that triggers the subsidy prohibition.

30. A further, multilateral, notification obligation to the Committee on Fisheries Subsidies established by the Agreement, is contained in the chaussette to Article 3.3. This provision requires the coastal Member to notify its affirmative determinations of IUU fishing to the Committee. This notification requirement is aimed at providing transparency as to the IUU fishing determinations that are relevant under the Agreement, and at putting all Members on notice given that the Member subsidizing a given vessel or operator determined to have engaged in IUU fishing is not always known. The reference to the name of the Committee has been added since the previous draft. As this is the first time that the Committee is referred to in the draft Agreement text was added to make clear that "the Committee" referred to is the one to be established by Article 9.1.

31. Reading all of these provisions together, the draft text of Article 3.3 represents a very delicate balance among the long-held divergences of views on this provision. It retains meaningful checks on IUU fishing determinations made by coastal Members using objective procedural requirements and a fact-based standard. This, in turn, reinforces the effectiveness of the subsidies discipline by avoiding and minimizing subjective scrutiny of IUU fishing determinations made by competent authorities.

Article 3.4

32. Article 3.4 concerns the minimum duration of the subsidy prohibition on the basis of an affirmative IUU fishing determination. This article requires the subsidizing Member, in setting the duration of the prohibition resulting from an IUU fishing determination, to take into account the nature, gravity and repetition of the IUU fishing that was committed. This Article further provides that the prohibition is to apply for at least as long as the sanction on the vessel or operator resulting from the IUU fishing determination, or at least as long as the vessel or operator is listed by an RFMO/A, whichever is the longer.

33. While Members broadly agree that proportionality between the IUU fishing at issue and the subsidy prohibition is important, there were long-standing divergences on how this should be reflected in the disciplines. Some Members considered that proportionality is already taken into account by the competent entities in making the IUU fishing determinations, as well as in determining the sanctions or in listing a vessel or operator as having engaged in IUU fishing. In this view, an affirmative IUU fishing determination and the sanction or listing of a vessel or operator should be considered proportional to the offence, meaning that the minimum duration of the prohibition based on the duration of the sanction necessarily also would be proportional to the gravity of the violation.

34. Other Members were concerned that proportionality might not always be reflected in the sanction on or listing of a vessel or operator. Recalling that a subsidizing Member would have to remove its subsidies as a result of another Member's or entity's IUU fishing determinations, these Members considered that the subsidizing Member should be able or be required to take proportionality into account when determining the duration of the subsidy prohibition.

35. This issue was perceived to be intrinsically linked to Article 3.3 by many Members, as one of the core issues for them is whether and how proportionality should be taken into account by the entity making the IUU fishing determination and deciding on the sanction on or listing of a vessel or operator. Overall, in the context of the draft of Article 3.3, Members were generally comfortable with the structure of Article 3.4, which sets the minimum duration of the subsidy prohibition as that of the sanction or listing by an RFMO/A, while recognizing that proportionality is also to be taken into account by the subsidizing Member in setting the duration of the subsidy prohibition over and beyond the minimum.

36. That said, the draft contains certain clarifying language on a number of aspects:

- the text provides that the subsidizing Member "shall" consider proportionality, instead of the permissive "may" used in a previous text. This is to clarify that it is not only the subsidizing Member's right, but also its obligation, to take proportionality into account when determining the duration of the subsidy prohibition;
- the text also clarifies that the duration of the sanction on, or the listing by an RFMO/A of, a vessel or operator as having engaged in IUU fishing is the minimum duration for the subsidy prohibition, by stating that the subsidy prohibition shall apply "at least" as long as the sanction or the listing; and
- the text clarifies that sanctions are imposed by coastal Members, whereas listing of a vessel or operator as having engaged in IUU fishing is done by RFMO/As.

37. Importantly, the language of Article 3.4 reflects a delicate balance in the IUU fishing disciplines as a whole. In relation to Article 3.3, it is linked to Article 3.3(b)(iii), which requires direct notification by the coastal Member to the flag state Member and/or subsidizing Member, if known, of any sanctions it has applied and, if applicable, their duration. The coastal Member also is required to notify any affirmative determinations to the Committee. The subsidizing Member, in turn, is also accountable under Article 3.5 to notify to the Committee of the measures it has taken in applying the subsidy prohibition under Article 3.1. These are viewed as essential elements linked to and complementing Article 3.4, by ensuring that the coastal Member has put the subsidizing Member, if known, on notice of the final determination, and the sanction and its duration on the one hand; and on the other hand, by requiring the subsidizing Member to notify the implementation of the obligations on it arising under Article 3.4.

Article 3.5

38. As indicated above, Article 3.5 requires the subsidizing Member to notify to the Committee in accordance with Article 8.4 the measures it has taken pursuant to Article 3.1, that is the measures it has taken to implement the subsidy prohibition triggered by an IUU fishing determination. While Article 8.4 is a general provision requiring notification of measures taken to ensure the implementation and administration of the disciplines, more specific language is included in Article 3 via Article 3.5 to provide for transparency on the implementation of the prohibition in Article 3.1 in the particular cases where it is applied. Furthermore, as explained above, the drafting effectively provides for alignment of the scope of the prohibition to the scope of the IUU fishing determination, in particular as to whether the latter covered certain vessels only, or also or instead the operator.

Article 3.6

39. Article 3.6 sets out a role that port State Members could play in the disciplines on subsidies to IUU fishing. This provision reflects Members' recognition of the unique position of port State Members in combatting IUU fishing, including pursuant to the PSMA. In particular, Article 3.6 provides that when a port State Member has notified a subsidizing Member that it has clear grounds

to believe that a vessel in its port has engaged in IUU fishing, the subsidizing Member shall give due regard to this information and take such actions as it deems appropriate.

Article 3.7

40. 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 the evolution of this text, previous draft notification language for the instruments referred to in Article 3.7 was removed based on Members' view that this requirement is covered by Article 8.4.

Article 3.8

41. Article 3.8 provides for special and differential treatment (SDT) for the IUU fishing pillar, in the form of a "peace clause". The peace clause is for two years for developing Members, including least developed country (LDC) Members, in respect of subsidies for low income, resource-poor and livelihood fishing or fishing related activities, up to 12 nautical miles from the baseline. The effect of the peace clause is that the disciplines do apply but are not subject to the dispute settlement procedures during the specified duration. This is in line with the view shared by many Members, including many developing country Members, that subsidies to IUU fishing should be eliminated. At the same time, the unique and vulnerable circumstances of the artisanal fisheries sector have been raised as particularly challenging for developing country Members in implementing the disciplines. The peace clause in Article 3.8 is meant to address both of these concerns, while keeping with the mandate to eliminate subsidies to IUU fishing.

42. The brackets in the previous draft around the period of two years and the limit of 12 nautical miles have been removed to reflect an emerging convergence around this text. That said, some Members remain firmly of the opinion that there should be no special and differential treatment for subsidies contributing to IUU fishing. Other Members would prefer a peace clause of a longer duration.

43. Some questions about scope have been raised under the heading of subsidies that contribute to IUU fishing but may be more general in nature. This would concern livelihood support, which could take various forms such as monetary assistance or direct nutritional support, provided to assist families during closed fishing seasons. In a scenario where a fisher was found to have been fishing illegally the question arises whether this livelihood support would be prohibited on the grounds that it contributes to IUU fishing. It is difficult to see how such livelihood or nutritional support could be considered a subsidy "to marine wild capture fishing and fishing related activities at sea", given that at the time of receipt the recipient was not allowed to fish. Furthermore, even if for purposes of argument this were the case, the duration of any subsidy prohibition arising from an IUU fishing determination would be linked to the duration of the sanction for the illegal fishing via Article 3.4. Finally, the establishment of its IUU fishing regime, including any sanctions, is for each Member to determine.

ARTICLE 4: SUBSIDIES REGARDING OVERFISHED STOCKS

44. Article 4, which addresses subsidies to overfished stocks, is the second of the core disciplines in the Agreement and addresses those situations where subsidies are provided for fishing or fishing related activities regarding a stock recognized as overfished by a coastal Member or a relevant RFMO/A. This Article has not been changed compared to the previous draft, apart from the removal of brackets from around and inside Article 4.4.

Article 4.1

45. Article 4.1 is the prohibition for subsidies for fishing or fishing related activities regarding an overfished stock.

Article 4.2

46. The situation where a stock is considered overfished is described in Article 4.2, which is when it is recognized as such by a coastal Member with jurisdiction over the area where the fishing is taking place, or by a relevant RFMO/A for the area and species under its competence, based on the

best scientific evidence available to it. Clearly, the best scientific evidence available depends on many factors including the data available, the nature of the fisheries areas (for example multi-species tropical fisheries where data on individual stocks may be difficult to ascertain), and the resources available for data collection and assessment.

Article 4.3

47. As an exception to Article 4.1, Article 4.3 provides that a Member may grant or maintain subsidies for fishing or fishing related activities regarding an overfished stock where the subsidies are to rebuild the stock to a biologically sustainable level. A Member may also or alternatively provide subsidies for fishing or fishing related activities regarding an overfished stock where there are other measures implemented to rebuild the stock to a biologically sustainable level.

48. The term "biologically sustainable level" (BSL) is defined in footnote 11. The reference to this footnote is repeated in Article 5.1.1 where it has an identical meaning: the level determined by a coastal Member having jurisdiction over the area where the fishing or fishing related activity is taking place, using reference points such as maximum sustainable yield (MSY) or other reference points, commensurate with the data available for the fishery; or by a relevant RFMO/A in areas and for species under its competence.

49. The footnote refers to MSY as an example of a possible reference point that could be used to determine the BSL of a fish stock. Footnote 11 does not create any hierarchy or imply any preference for the choice of an appropriate reference point for establishing the BSL, as reference points could be based on different methodologies or indicators than, and could be independent of, the concept of MSY. It is left to each Member to determine appropriate indicators and methodology for calculating BSL in a manner best suited to the particular situation and commensurate with the data available for the fishery. For the areas and species under the competence of an RFMO/A, the BSL is that determined by the relevant RFMO/A.

50. One issue that had been raised pertains to subsidies for fishing and fishing related activities in multispecies fisheries where only some of the stocks are recognized as overfished. In these cases, Article 4 is not intended to create a presumption that subsidies for any fishing or fishing related activities on such stocks are prohibited. Instead, the same requirement of Article 4.3 would apply, namely that subsidies or measures are implemented to rebuild the overfished stock or stocks to a biologically sustainable level.

Article 4.4

51. Article 4.4 is identical to Article 3.8 and serves the same purpose, that is, for a period of two years, subsidies granted or maintained for low income, resource-poor or livelihood fishing up to 12 nautical miles from the baseline by developing country Members, including LDC Members, would be exempt from actions based on Articles 4.1 and 10 of this Agreement. In other words, this provision operates as a "peace clause" in respect of disputes being taken in respect of such subsidies. As is the case and for the same reasons that brackets around and inside Article 3.8 were removed, the brackets around and inside Article 4.4 have also been removed.

ARTICLE 5: SUBSIDIES CONTRIBUTING TO OVERCAPACITY AND OVERFISHING

52. Article 5 contains the disciplines on subsidies contributing to overcapacity and overfishing. This Article has been amended compared to the previous draft to incorporate several clarifications and changes of approach in different provisions.

Article 5.1 and Article 5.1.1

53. The core disciplines in this pillar are based on the compromise, "hybrid", approach based on a list of presumptively prohibited subsidies qualified by sustainability-based elements. Thus, the prohibition consists of the provisions of Article 5.1 and the qualifications in Article 5.1.1, read together.

54. Article 5.1 consists of a chapeau containing the main prohibition, followed by an illustrative list of subsidies in subparagraphs (a) through (h) that presumptively contribute to overcapacity or

overfishing. Article 5.1 then is qualified by Article 5.1.1, which provides that a subsidy is not inconsistent with Article 5.1 if the subsidizing Member demonstrates that measures are implemented to maintain the fish stocks at a biologically sustainable level. To recall, the biologically sustainable level in Article 5 is defined identically to the same term in Article 4, via a single footnote, footnote 11.

55. One important amendment has been made to Article 5.1 based on concerns raised by numerous Members since the two previous drafts were circulated. These concerns had to do with the placement of former Article 5.1(i), referring to subsidies contingent upon or tied to actual or anticipated fishing or fishing related activities in areas beyond the subsidizing Member's jurisdiction. In earlier versions of the draft disciplines, this had been a separate Article creating a straightforward prohibition on this category of subsidies, the explanation being that these were subsidies explicitly for fishing outside the subsidizer's jurisdiction and more likely to contribute to overcapacity and overfishing than, for example, the other subsidies listed in Article 5.1. However, it subsequently was moved into Article 5.1(i) to respond to the concerns of other Members that such subsidies did not necessarily contribute to overcapacity and overfishing, as a Member might be able to demonstrate that there were measures to maintain the stock or stocks were being fished at biologically sustainable levels.

56. The concerns over placement remained, and a significant preponderance of Members called strongly for re-establishing the content of former Article 5.1(i) as a standalone prohibition, as in former Article 5.2. This has been done in this draft for the reasons further elaborated in respect of new Article 5.2, to which the previous Article 5.1(i) was moved.

57. A new footnote, footnote 12, has been added to the start of Article 5.1. The footnote clarifies that Article 5.1 does not apply to subsidies to the extent that they regard stocks that are overfished. This footnote was added to address concerns raised by some Members that a subsidy for fishing a stock that was recognized as being overfished could be permitted under Article 4.3 but, because it is impossible to demonstrate that measures are in place to maintain an overfished stock at a biologically sustainable level, the same subsidy could be prohibited under Article 5.1. Although other Members did not share this concern over the interaction of Articles 4 and 5.1, they were open to this footnote because it ensures that such an interpretation would not arise. It should also be noted that, as set out in the previous Addendum, a fish stock recognized as overfished is in a particularly vulnerable state. Accordingly, the conditions of Article 4.3 are intended to be more stringent than those under Article 5.1.1, given that the object of Article 4.3 is to allow for subsidies or other measures to rebuild the stock to a biologically sustainable level, while that of Article 5.1.1 is to maintain the stock at such a level. At the same time, it was recognized that there could be a subsidy programme under which subsidies were provided both to fishing overfished stocks and to fishing stocks that are at biologically sustainable levels. Under such a programme, the subsidies to fishing overfished stocks would not be prohibited provided the requirements of Article 4.3 were met, and the subsidies to fishing stocks at biologically sustainable levels would not be prohibited provided the requirements of Article 5.1.1 were met. Some Members that had questioned the need for such a footnote indicated that they could accept it on the clear understanding that it did not change the operation of these provisions.

58. In our discussions of the provisions of Article 5.1 and 5.1.1, questions had been raised over the presumption that the listed subsidies contribute to overcapacity and overfishing. One particular concern was that this presumption would mean that no subsidies of the types referred to in Article 5.1 could be provided until after the demonstration referred to in Article 5.1.1 had been completed. Having carefully considered the various suggestions to address this concern by restructuring these provisions, my assessment is that the aim and effect of these suggestions is essentially the same as that of the provisions as they were drafted, albeit using different approaches. In particular, the provisions of Article 5.1.1 contain no requirement to make the referenced demonstration before a listed type of subsidy could be granted, nor any implicit requirement to stop all current subsidization until such a demonstration is made. Instead, the aim and operation of the text is to ensure that sustainability measures factor in as one important consideration in the granting and maintaining of subsidies, and that decisions on subsidization likewise should factor into sustainability considerations. It is this linked set of subsidies and sustainability measures – drafted and implemented as the Member sees fit – that would be the subject of the demonstration. As for the demonstration itself, it would naturally begin with the notifications as required in Article 8 and Committee review of those notifications as provided for in Article 9.

59. In particular, that review process would allow for other Members to pose questions and identify any issues of concern, and this in turn might lead to bilateral discussions. Ultimately, as a last phase, a dispute settlement proceeding could be initiated to address the issue. Thus, while the list in Article 5.1 refers to certain forms of subsidies that have been identified in many proposals and elsewhere as having the greatest potential to contribute to overcapacity and overfishing, the list does not constitute a blanket prohibition of such subsidies. Rather, the provisions of Article 5.1.1 make clear that because the issue is subsidies that contribute to overcapacity and overfishing – relative concepts that can only be understood in the context of a particular fishery – the question of whether a given subsidy is prohibited can only be determined in the context of the fishery in which it is provided. It is exactly that context that is the subject of the demonstration referred to in Article 5.1.1.

60. To elaborate a bit further, from my reading of the current draft text, I would expect that in the majority of cases, simply complying with the notification requirements would be sufficient to "demonstrate" to the satisfaction of other Members that the sustainability elements under Article 5.1.1 have been met. Most of the remaining cases would be clarified through the Committee work and dialogue among Members. A useful example is the experience under the SPS and TBT Agreements. In the more than 25 years of operation of those Agreements there have been tens of thousands of notifications. In respect of these, only several hundred specific trade concerns have been raised, and only a handful of disputes begun. Most of these were resolved before even getting to a ruling by a panel.

61. Seen in this light, demonstration of sustainability under Article 5.1.1 is neither an impossible standard nor a meaningless procedural step. It is rather a step that would begin with and take account of the available data and other information about the subsidy, the fishery or fisheries in question, and specific management measures. And it also would include the various types of multilateral review and other scrutiny provided for in the disciplines.

Article 5.2

62. As noted above, this new draft of the Agreement once again contains a standalone prohibition of subsidies contingent on fishing outside a Member's jurisdiction, in Article 5.2. As I mentioned above, there was a significant preponderance of Members sharing the view that this provision should be moved back to a standalone prohibition to ensure its effectiveness. Some Members preference was to retain the provision as Article 5.1(i), but indicated that they could accept the move back to Article 5.2 so long as the prohibition was accompanied by former Article 5.2(b). That provision exempted from this prohibition the non-collection from operators or vessels of government-to-government payments, subject to the sustainability elements in Article 5.1.1. That provision has been restored. Thus, new Article 5.2 has the same structure as and is very similar to former Article 5.2 found, for example, in the draft in TN/RL/W/276/Rev.1.

63. The footnote to Article 5.2(a), now footnote 13, has been amended compared to the previous draft by adding clarifying language regarding fishing in a nearby Member's exclusive economic zone pursuant to traditional or historical practices or arrangements, including relating to migratory stocks, an issue of relevance to some Members.

Article 5.3

64. As just noted, Article 5.3 is intended to complement the main prohibition in Article 5.1 on subsidies that contribute to overcapacity and overfishing. It provides for a prohibition of all subsidies to fishing or fishing related activities in the high seas – that is, outside of any coastal Member's or coastal non-Member's jurisdiction and outside the competence of any RFMO/A.

65. Although it has been stated that the sustainability conditionality under 5.1.1 to grant otherwise prohibited subsidies under Article 5.1 *de facto* prohibits subsidies in areas where such demonstration cannot occur, including the high seas, Article 5.2 reinforces this prohibition by providing clarity that subsidies to fishing or fishing related activities in the unregulated high seas are prohibited not only in fact, but also in law.

Article 5.4

66. Along with footnote 3, Article 5.4 is part of a new approach to address the differences among Members concerning the two alternatives to this provision that appeared in the previous draft concerning subsidies to vessels not flying the flag of the subsidizing Member. As I stated above, footnote 3 clarifies that a subsidy is attributable to the Member conferring it, regardless of the flag or registry of any vessel involved or the nationality of the recipient. In addition, Article 5.3 requires the subsidizing Member to take special care and exercise due restraint when granting subsidies to vessels not flying its flag. This text is the result of compromise among the Members holding views on the opposite sides of the spectrum.

Article 5.5

67. Article 5.5 concerns special and differential treatment for subsidies contributing to overcapacity and overfishing, which has been an issue of particular concern for many Members in these negotiations. This is not surprising as this is a key element in the overall discussion on balance and ambition in the Agreement on Fisheries Subsidies.

68. For a long time, Members held diverging views on both the structure and content of SDT provisions in this pillar of the disciplines. For this reason, I, as the Chair of the negotiations, was asked to try my hand at putting together different elements in the form of a new clean text on SDT for Article 5. This first try was circulated in an earlier version of this text in TN/RL/W/276/Rev.2 on 8 November 2021.

69. On the basis of the discussions in the NGR, proposals, and textual suggestions from Members, I drafted Article 5.4 of TN/RL/W/276/Rev.2 as my best and honest attempt to reflect where I considered a landing zone could lie among different views at that time. The whole of the Article was in brackets in that draft, to reflect that the provisions remained under discussion. Three weeks later, on 24 November 2021, when I circulated the first Draft Agreement on Fisheries Subsidies in WT/MIN(21)/W/5, the structure of Article 5.4, including the language in it and brackets around it remained virtually unchanged. One addition was a footnote at the start of the Article, which provided that it would not apply to Members whose annual share of the global volume of marine capture production is at or above 10 per cent as per the most recent published FAO data. This was in response to a widespread call during discussions on the previous versions of the text that developing country Members with a relatively large share of global fishing should not be in the position to avail of the SDT provisions.

70. Over the past few weeks, intensive and useful discussions with and among Members have given me the impression that views on SDT in Article 5 may not be as far apart as they had appeared. First, many delegations indicated that they could work on the basis of the approach that was in Article 5.4 of WT/MIN(21)/W/5, subject to some restructuring and rewording to make it more clear that the three elements of SDT in that provision are separate; and second, many Members showed some flexibility in respect of the length of the transition period, the *de minimis* threshold, and the geographical exemption for artisanal fishing.

71. On the basis of this work, I have made certain changes to the previous formulations on SDT in the overcapacity and overfishing pillar, with the aim of making these provisions more broadly acceptable to Members. One important change was to separate and renumber the subparagraphs of the Article to make it more clear that the three elements of SDT are separate although they work in parallel during the transition period. This restructuring has been well-received by delegations, allowing us to focus on the specific elements themselves.

Footnote 14

72. Footnote 14, which was footnote 12 in the previous draft, has been revised, and the figure of 10 per cent has been replaced with an "X". The entire footnote is in brackets to indicate that some Members are concerned that this is not the appropriate way to indicate that any developing country Member should not avail from SDT. Others consider, however, that those developing country Members with a large share of global marine capture should not be able to avail of SDT for subsidies contributing to overcapacity and overfishing.

73. The other amendment concerns the reference to the most recent published FAO and adds the phrase "as circulated by the WTO Secretariat". The intention of this amendment is to account for potential differences in nomenclature between the UN system and the WTO.

Article 5.5 (a)

74. Article 5.5(a) provides for a transition period available to all developing country Members not falling under the scope of footnote 14 and that choose to use this provision. During this period a developing country Member would be exempt from the prohibition in Article 5.1. That is, it could grant or maintain the subsidies in Article 5.1 without having to meet the sustainability requirements in Article 5.1.1, in its EEZ and in the area of competence of an RFMO.

75. Members' views on the duration of this transition period continue to range from no, or at best a very short transition period, to the proposal for a transition period of 25 years. However, these represent views at the opposite ends of the spectrum, while it appears that most Members now see the likely outcome within a narrower range. I have incorporated two alternative formulations of the transition period, based on Members' discussions on this issue. The first alternative is 7 years, which represent a mid-point among the gradually narrowing range of numbers that Members have been discussing. The second alternative is based on the suggestion from numerous Members to refer to a specific end-date for the transition period, namely year 2030. This is the target date for implementation of the Sustainable Development Goals and Target 14.6 which, along with the MC11 Ministerial Decision on Fisheries Subsidies, is our mandate for negotiating this Agreement.

76. The numbers associated with the transition period, 7 years or up to the year 2030, have been included in brackets, because this is an area where views have not converged enough for me to present a single suggested outcome.

77. Another new element to the transition period is some further period of flexibility through a two-year peace clause, which would apply after the transition period ended. During this two-year period, a developing country Member using Article 5.1 would still have the obligation to implement that provision but would be exempt from dispute settlement under Articles 5.1 and 10 of this Agreement. A proposal with a similar objective has also been distributed, which would give developing country Members a set number of years after the transition period when they would not have to notify information about stock status.

78. Finally, questions have been raised about the appropriateness and practicability of the final clause of Article 5.4(b) in the previous draft, that Members intending to invoke this provision should inform the Committee in writing before the date of entry into force of the Agreement. To address this concern, the drafting has been changed to mirror that in Articles 8.4 and 8.5, by referring to "within one year of the date of entry into force".

Article 5.5 (b)(i)

79. Article 5.5(b)(i) is intended to provide flexibility for developing country Members with relatively small individual shares of marine global capture production. This provision would apply separately and in parallel to Article 5.5(a), that is during and after the transition period. Under Article 5.5(b)(i), a Member with no more than the specified *de minimis* share of global marine capture would be exempt from Article 5.1, including Article 5.1.1, for as long as its share of catch was below the *de minimis* limit for three consecutive years.

80. The previous draft of the Agreement had proposed a 0.7 per cent share of global marine capture as the threshold. The number was in brackets to indicate that views varied on the threshold percentage, ranging from 0.3 up to 5 per cent. Once again, however, these represented the far ends of the spectrum. Some Members that had indicated a willingness to accept 0.7 per cent stated that this was their compromise position, noting that a Member with 1 per cent share of global catch would be among the top 20 fishing nations in the world with over 800,000 tonnes of fish caught a year. It also was noted that the vast majority of Members currently below a 0.7 per cent share of global catch well below this figure, giving them considerable policy space to increase catch before reaching this threshold. Others pointed out that some developing country Members might reach 0.7 per cent relatively soon, and therefore sought additional policy space.

81. As a compromise solution, and based on discussion and negotiations among Members, in this new draft, I am suggesting that the *de minimis* threshold for the exemption from Article 5.1 be set at 0.8 per cent share of global volume of marine capture production as per the most recent published FAO data. This number is in square brackets since this is an area where views have not fully converged. In this provision the phrase "as circulated by the WTO Secretariat" has been added for the same reasons as I outlined for footnote 14.

Article 5.5(b)(ii)

82. Article 5.5(b) now contains two subparagraphs because footnote 13 of the previous draft has been moved into Article 5.5(b) as subparagraph (ii). Apart from editorial changes, the text of this provision remains the same. That is, it provides that a developing country Member would remain exempt from Article 5.1 until its share of global marine capture production exceeded the *de minimis* threshold for three consecutive years. Conversely, Article 5.5(b)(i) would apply again to a Member whose share of global marine capture production fell back below this threshold for three consecutive years.

Article 5.5 (c)

83. Article 5.5(c) is often referred to as the exemption for subsidies to artisanal fishing. This provision also works separately and in parallel to the transition period in Article 5.4(a). Article 5.5(c) would exempt from Article 5.1, including Article 5.1.1, for all developing country Members not falling under the scope of footnote 14, subsidies to low income, resource-poor and livelihood fishing within a geographic limit. Again, this is a stand-alone provision that operates in parallel with the transition period in Article 5.5(a), and would be relevant after the transition period for those Members with a greater than *de minimis* share of world catch.

84. The previous draft Agreement set a geographic limit of 12 nautical miles (in brackets). Similar to the discussions on the length of the transition period and the *de minimis* threshold, Members' views on what the limit should be are diverse. Some have noted that they see even having such an exemption as a compromise from their earlier opposition to an artisanal fishing exemption, or their view that it should be limited to *de minimis* Members. These Members generally oppose any expansion of the 12 nautical mile limit because it is a permanent exemption. On the other hand, some developing country Members argue that this exemption should apply to the entire EEZ or 200 nautical miles. From recent discussions among Members, I sense that the preponderance of Members are considering numbers in the 12 to 24 nautical mile range. This is the reason that these two figures appear in the text, as alternatives, and in brackets.

85. Those in favour of 12 nautical miles have noted that this is the limit of the territorial sea in UNCLOS where the coastal Member has full sovereignty. Some Members in favour of a limit of more than 12 nautical miles argue, however, that artisanal fishers may fish somewhat beyond 12 miles and that such fishers should not be subject to any conditions or artificial boundaries for any subsidies they may receive. Some Members have suggested 24 nautical miles as an alternative, noting that this is the limit of the contiguous zone as set out in UNCLOS.

86. One technical clarification has been introduced at the end of this provision, to reflect that the baselines from which the geographic scope of the exemptions is measured includes archipelagic baselines, as referred to in Article 47 of UNCLOS, that is from the outermost points of the outermost islands and drying reefs of the archipelago. This means in practice that the exemption for artisanal fishing would apply to all of the waters inside the archipelagic baselines.

Article 5.5 (d)

87. From our extensive discussions on this issue to date, it has been suggested that Members availing themselves of the SDT provisions nevertheless should aim to provide subsidies in a sustainable manner, with a view to avoiding contributing to overcapacity and overfishing. This has been a shared view of both developed and developing country Members. This is reflected in Article 5.5(d), which was Article 5.4(c) in the previous draft text. Some Members consider that the mandatory "shall" in this best endeavours clause is too strong and have suggested "should" or "may" instead. I have not changed the drafting here, noting the views of many Members that "shall

endeavour" merely implies a need to be cognizant of potential impacts of subsidies when granting them rather than requiring any specific action.

88. As stated earlier, while the drafting of Article 5.5 is my best and honest attempt at presenting a possible landing zone, divergences remain with regard to specific figures, and I believe Ministers' attention will be particularly warranted in resolving these issues. It must be noted, additionally, that the numbers in brackets are suggested as a compromise between long held positions on this issue.

ARTICLE 6: SPECIFIC PROVISIONS FOR LEAST-DEVELOPED COUNTRY MEMBERS

89. Article 6 contains specific provisions for Least Developed Country (LDC) Members. Articles 6.1 and 6.2 provide for special and differential treatment under Article 5. Article 6.1 is a straightforward exemption for LDC Members from the prohibition in Article 5.1.

90. Article 6.2 provides for a further transition period once an LDC Member has graduated from LDC status. The operational language of this provision is identical to that in Article 5.5(a), and the duration of the transition period is reflected as "X" in square brackets. It has been understood in the discussions of this provision that the number to be filled in here should correspond to the length of the transition period in Article 5.5(a). For LDCs, this transition period would begin when they graduate, rather than at entry into force of the Agreement.

91. Article 6.3 calls for Members to exercise due restraint in raising matters involving an LDC Member, and to explore solutions taking into consideration the specific situation of the LDC Member involved, if any. Furthermore, this provision adds that LDC Members shall endeavour to ensure that the subsidies provided do not contribute to overcapacity and overfishing. This is intended to mirror in the LDC Member-specific provisions the same "best endeavour" language that appears in Article 5.5 (d) pertaining to developing country Members.

92. As part of the overall SDT provisions, brackets around Articles 6.2 and 6.3 have been removed to reflect the removal of brackets around Article 5.5.

ARTICLE 7: TECHNICAL ASSISTANCE AND CAPACITY BUILDING

93. Article 7 has not been amended but the brackets have been removed. It concerns technical assistance and capacity building for developing country Members, including LDCs, for the purpose of implementing these disciplines.

94. It also refers to the establishment of a voluntary WTO funding mechanism and clarifies that contributions of WTO Members to such mechanism shall be exclusively on a voluntary basis and shall not utilize regular budget resources. A concept note on the funding mechanism has been circulated to Members.

ARTICLE 8: NOTIFICATION AND TRANSPARENCY

95. Article 8 sets forth the provisions on notifications and transparency, which Members view as critical for the implementation of the Agreement.

Article 8.1 chapeau

96. As a general principle, the notification and transparency requirements for the Agreement on Fisheries Subsidies are intended to be in addition to the existing rules of the SCM Agreement. In this regard, the chapeau to Article 8.1 provides that the information requirements under Articles 8.1(a) and 8.1(b) are without prejudice to Article 25 of the SCM Agreement; that is they are in addition to and not in lieu of that provision.

Article 8.1 (a)

97. Article 8.1(a) requires the provision of information on the kind of fishing activity for which a notified subsidy is provided, and relevant catch data, with footnote 15 providing that this information is in addition to that provided pursuant to Article 25 of the SCM Agreement.

98. Footnote 16 to Article 8.1(a), which was in brackets in the previous draft, is part of the overall SDT provisions in the disciplines. The aim of the footnote is to address concerns that the transparency and notification requirements in Article 8 should not be overly burdensome for developing country Members, including LDC Members. In this regard, the footnote provides for a four-year periodicity for the notification of the information referred to in Article 8.1(a) for Members falling within the *de minimis* threshold provided for in Article 5.5(b)(i). As the specific number for the *de minimis* threshold in Article 5.5(b)(i) is in brackets, the specific number for the *de minimis* threshold in footnote 16 also is in brackets.

99. Article 8.1(a)(ii) requires the provision of certain catch data for the fishery for which the subsidy is provided. To provide for the situation of multispecies fisheries, where catch data by species may be difficult to report, the provision allows for reporting by species or group of species. In addition, footnote 17 provides that for multispecies fisheries a Member may provide other relevant and available catch data.

Article 8.1 (b)

100. Article 8.1(b) requires notification "to the extent possible" of certain information pertaining to the fisheries, stocks and vessels in respect of which subsidies are provided.

101. The first item under Article 8.1(b) requires notification of the status of the fish stocks in the fishery for which the subsidy is provided, along with whether such stocks are shared or managed by an RFMO/A. This subparagraph also includes, within parentheses, examples of the stock status to be notified. The terms in question, "overfished", "maximally sustainably fished", and "underfished" are the terms used by the FAO, for example in its SOFIA report. In addition, the reference points used to establish the status are to be notified.

Article 8.2

102. Article 8.2 requires annual notification "to the extent possible" of fuel subsidies to fishing and fishing related activities that are not specific. As noted above, the language was developed by a group of interested Members with different and somewhat opposed views on this issue as a formulation around which all of them could converge.

103. Article 8.2 has some changes compared to the previous formulation of the same provision, Article 8.1bis in the previous draft (WT/MIN(21)/W/5). First, concerning the placement, the discussion of new proposed Article 8.2 led to the conclusion that this separate provision should not be mixed with what is covered by Article 8.1, which refers to the SCM Agreement, given that non-specific subsidies are outside the scope of the SCM Agreement. The suggestion was that, logically, this provision should immediately follow Article 8.1. Second, the old footnote 18 to Article 8.1bis in the Draft Agreement (WT/MIN(21)/W/5) clarified that this provision is without prejudice to Article 25 of the SCM Agreement. However, with the inclusion of the new Article 8.9, which is more general and clarifies that notifying a measure does not prejudice its legal status under the SCM Agreement, its effects or its nature, in Members' view the old footnote 18 became redundant and it was deleted.

104. In the discussion of this provision, it has been noted that the information that would be collected could be informative in the reviews of the substantive operation of the Agreement under Article 9.4. This element of discussion was an important consideration to many Members in finding the transparency elements in 8.2 to be a compromise approach to the overall treatment of non-specific fuel subsidies in this Agreement.

105. This provision is related to Article 1 and deletion of the former Article 1.2 on non-specific fuel subsidies. As a reminder, Members' views on how to deal with this sensitive issue covered a spectrum from the simple deletion of the brackets around Article 1.2 at one end, to the deletion of Article 1.2 itself and any transparency provision on these subsidies at the other end.

106. As mentioned above, the compromise solution arising from the long process we had on this issue that most Members could live with was to add language on transparency in respect of non-specific fuel subsidies, currently reflected in Article 8.2, and to delete Article 1.2.

107. Adding this new provision has caused the remaining paragraphs of Article 8 to be renumbered. Similarly, new Article 8.9 caused the further renumbering of former Article 8.8 to Article 8.10.

Article 8.3

108. Article 8.3 contains specific notification and transparency requirements, to be notified on an annual basis, relating to: (a) lists of vessels and operators that have been affirmatively determined as having been engaged in IUU fishing; (b) information indicating the use of forced labour by vessels or operators; and (c) information about government-to-government fisheries access agreements or arrangements. Subparagraph (b) is in square brackets, reflecting that discussions on this provision are continuing.

109. Article 8.3(c) requires transparency in respect of government-to-government access agreements. Namely, the notification of (i) the titles of the agreements or arrangements; (ii) a list of their parties; and (iii) to the extent possible, the full text of the agreement or arrangement.

110. Article 8.3(c) has evolved considerably since it was first included in TN/RL/W/276/Rev.1 when only the titles of and parties to the agreements or arrangements were to be notified. In line with suggestions that there should be greater transparency for access agreements, additional information to be included in the notification was listed in TN/RL/W/276/Rev.2. As some Members were concerned that these additional transparency requirements were excessive and unnecessarily burdensome and might involve confidential information, the text in Article 8.3(c) reflects a middle ground, with the retention of some but not all items from the version in TN/RL/W/276/Rev.2, and item (iii) put in terms of "to the extent possible" due to concerns over confidential or otherwise non-disclosable information.

Articles 8.4 and 8.5

111. Articles 8.4 and 8.5 refer, respectively, to notification of measures in existence or taken to ensure the implementation and administration of this Agreement, and a description of a Member's fisheries regime with references to its laws, regulations and administrative procedures relevant to this Agreement.

112. Under Article 8.4, the information to be notified pertains to a Member's specific measures and steps for implementing and administering the obligations under the Agreement. These include steps to implement the prohibitions in Articles 3, 4 and 5 generally, as well as new measures to implement the prohibitions in Article 3. This latter is linked to the notification obligation in Article 3.5.

113. The scope of Article 8.5 is broader and more general. It requires the provision of a description of a Member's fishing regime, including references to the Member's relevant legal instruments. It is thus meant as an overview, and an index to where the relevant legal instruments can be found. This notification would only need to be updated when any changes were introduced, and could be made by providing a link to an official website.

Article 8.6

114. Article 8.6 provides for a mechanism whereby Members can seek additional information from another notifying Member. It is similar to the mechanism under Articles 25.8 and 25.9 of the SCM Agreement.

Article 8.7

115. Article 8.7 links using the flexibilities or the sustainability qualifications to prohibitions in the different pillars of the disciplines to certain notification requirements, both those in Article 4.3 and Article 5.1.1 available to all Members, and those in the various provisions containing special and differential treatment for developing and LDC Members.

116. Subparagraph (a) indicates the information that must be provided to use the flexibilities or sustainability qualifications to prohibitions found in Article 4.3, Article 5.1.1., Article 5.4, and Article 6. This is the information notified under Article 25 of the SCM Agreement and Article 8.1 of this Agreement. All of the notification requirements referenced in subparagraph (a) of Article 8.7

already apply or are meant to apply to all Members pursuant to Article 8.1(a), so this text does not impose additional notification requirements in respect of the SDT provisions beyond those that generally apply to all Members.

117. To invoke Article 4.3 or Article 5.1.1, subparagraph (b) of Article 8.7 requires notification of the specific information called for in Article 8.1(b)(i) and Article 8.1(b)(ii). This reflects Members' view that these types of information would become relevant and important for assessing whether the requirements for using the provisions in question have been met.

118. New footnote 19 has been added to Article 8.7 to clarify that there is no requirement to notify subsidy programmes before they are implemented, or prior to what is required under the regular notification process. This is a broadly shared understanding among Members, which is reflected in this footnote for clarity and does not change the substance of Article 8.7. This footnote also contains a cross-reference to footnote 16, pertaining to the periodicity of notifications by developing country Members below the *de minimis* threshold in Article 5.5(b)(i).

Article 8.8

119. Article 8.8 addresses the call by many Members for transparency in respect of the operation, decisions and measures of RFMO/As. The information to be provided includes the instrument establishing the RFMO/A, its areas and species of competence, stock status, conservation and management measures, and information regarding IUU determinations and listings.

Article 8.9

120. Article 8.9 is a new provision which repeats verbatim the text of Article 25.7 of the SCM Agreement. In particular, it provides that notifying a measure under the Agreement does not prejudice its legal status, effects or nature.

Article 8.10

121. Article 8.10 provides that there is no requirement to notify confidential information. This responds to concerns of some Members that some of the information relevant to items listed in this Article might be impossible to provide due to its confidentiality.

ARTICLE 9: INSTITUTIONAL ARRANGEMENTS

122. Article 9 contains provisions relating to institutional arrangements. These provisions reflect among other things convergence around the idea that the disciplines on fisheries subsidies should be a standalone agreement rather than an annex to the SCM Agreement, the other option that has been under discussion.

123. Article 9.1 establishes a Committee on Fisheries Subsidies, to carry out the responsibilities assigned to it under the Agreement. As elaborated in the subsequent paragraphs, these responsibilities include monitoring the implementation of the Agreement.

124. Article 9.2 provides that the Committee shall examine the information notified under the Agreement not less than every two years. Because the notification requirements are found in Article 8 and Articles 3.3 and 3.5, this provision refers to these two Articles generally.

125. Article 9.3 provides for an annual review of the operation of the instrument, similar to that found in other WTO Agreements. These reviews would be straightforward reports to the Council for Trade in Goods with information on the Committee's activities such as meetings, review of notifications, and so forth. This is analogous to the annual reviews conducted by the SCM Committee pursuant to Article 32.7 of the SCM Agreement, and indeed the drafting of this provision is identical to that of SCM Article 32.7.

126. Article 9.4 provides for a periodic review of the substantive operation of this Agreement. During the discussions on this provision, there was a general understanding that this review is distinctly different from the annual review under Article 9.3. Its purpose is to assess the effectiveness of the Agreement against its overall objective and to identify possible modifications to improve its

operation, which it has the possibility to submit to the Council for Trade in Goods. Members generally considered that the first of these reviews should be undertaken after a sufficiently long period of operation to allow for the development of experience in applying the disciplines and to evaluate their effects on the sustainability of fisheries. The text reflects the widely held view that five years after entry into force, and every three years thereafter, would be appropriate intervals for these reviews.

127. Article 9.5 requires the Committee to maintain close contact with the FAO and other relevant international organizations in the field of fisheries management, including relevant RFMO/As.

ARTICLE 10: DISPUTE SETTLEMENT

128. Article 10 sets forth the provisions related to dispute settlement, in two paragraphs. Paragraph 1 provides that Articles XXII and XXIII of the GATT 1994, as elaborated and applied by the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), apply to the entire Agreement. Paragraph 2 provides that the dispute settlement rules for prohibited subsidies in Article 4 of the SCM Agreement apply to Articles 3, 4 and 5 of this Agreement on Fisheries Subsidies.

129. The intention of this structure is to clarify that Article 4 of the SCM Agreement would be applicable to disputes concerning those Articles of the Agreement on Fisheries Subsidies while the DSU would apply to the rest of its provisions. First, the general rules for dispute settlement in Article XXII and XXIII of GATT 1994 and the DSU apply to the Agreement on Fisheries Subsidies as a whole (Article 10.1). Second, Article 4 of the SCM Agreement would apply to consultations and the settlement of disputes under Article 3, 4 and 5 of Agreement on the Fisheries Subsidies (Article 10.2). To ensure that the relationship between these two provisions is clear, paragraph 10.2 begins with the phrase "without prejudice to paragraph 1".

130. Footnote 22 is purely for clarity. This footnote states that for purposes of this Agreement on Fisheries Subsidies, the term "prohibited subsidy" in Article 4 of the SCM Agreement refers to the subsidies subject to the prohibitions in Articles 3, 4 and 5 of the Agreement on Fisheries Subsidies. The reason is to avoid any possibility that subsidies covered by Article 3 of the SCM Agreement could be considered relevant under or somehow covered by the prohibitions in Articles 3, 4 and 5 of the Agreement on fisheries subsidies, responding to a concern that had been raised.

131. Footnote 21 to Article 10.1 is substantive, as it excludes non-violation claims and situation claims under Article XXIII of the GATT 1994 and Article 26 of the DSU. The discussion of this issue centered on the sustainability objective underpinning the Agreement on Fisheries Subsidies, which sets it apart from the GATT 1994 and other WTO Agreements that address trade and trade-related matters. In this view, there were concerns that non-violation claims and situations claims would bring uncertainty and unpredictability in applying the disciplines. In addition, it was noted that these types of claims have rarely been made and even more rarely have succeeded. Thus, footnote 21 states that subparagraphs 1(b) and 1(c) of Article XXIII of the GATT 1994 and Article 26 of the DSU shall not apply to the settlement of disputes under the Agreement on fisheries subsidies.

132. Another issue that has been raised is that of the standard of review for panels addressing certain claims under the Agreement on Fisheries Subsidies. In particular, Members agree that the WTO is not a fisheries management organization, and that thus WTO dispute settlement should not conduct *de novo* reviews of fisheries specific matters such as stock assessments or IUU determinations. To this end, over the course of the negotiations some Members have suggested adding various separate standard of review provisions to address such matters. Other Members have considered that this is not necessary, as the drafting of the disciplines themselves should make clear the applicable standard of review for each provision. For example, the procedural steps in Article 3.3 are what would be reviewable in a dispute regarding an IUU determination, rather than the substantive foundation of that determination. The balance of the different views appeared to be in the latter sense, and therefore there is no provision in Article 10 or elsewhere for any specific standard(s) of review.

ARTICLE 11: FINAL PROVISIONS

Overview

133. During the negotiations, it was clear that some draft provisions that had gained a level of support did not belong readily to one of the existing provisions. Article 11 "Final Provisions" contains six paragraphs that do not fit readily into the other ten Articles, or that apply to some, but not all, of them.

Article 11.1

134. Article 11.1 addresses the issue of subsidizing where the status of the stocks being fished is unknown. The provision requires Members to take special care and to exercise due restraint when granting subsidies to fishing or fishing related activities regarding such stocks. This can be viewed as an application of a precautionary approach to fisheries management.

135. As for the requirement of both due restraint and special care, this is to reflect that these are complementary rather than alternative concepts, as the former covers something that a Member shall do and the latter something that a Member shall refrain from doing.

Article 11.2

136. Article 11.2 provides for an exception applicable to all Members for disaster relief.

137. The drafting reflects the fact that disasters can be caused by many factors, some natural, such as hurricanes and tsunamis, and some man-made, such as oil spills and similar events, all with a direct impact on the marine environment and the lives and livelihoods of those that depend on fishing. Footnote 23 clarifies that this provision does not apply to economic or financial crises, to respond to concerns that an unmodified reference to "disasters" could open a wide loophole in the disciplines.

138. The chapeau to this provision states that this exception does not apply to subsidies contributing to IUU fishing (Article 3) or to subsidies regarding overfished stocks (Article 4).

139. Subparagraphs (a) through (d) set forth the conditions for the subsidies that can be provided pursuant to this provision in respect to a given disaster. These are that the subsidy must be limited to the relief of that disaster, in the affected geographic area and for a limited period, and for reconstruction subsidies, limited to restoring the affected fishery and/or fleet to its pre-disaster level. Previous references to sustainability criteria have been deleted based on discussions among Members, including that these could make the provision redundant with Article 5.1.1.

Article 11.3

140. Article 11.3 sets forth in two paragraphs disclaimer language aiming to ensure the common view of Members that this Agreement and its operation shall not affect in any way issues of territorial claims or delimitation of maritime boundaries, including in the context of WTO dispute settlement.

141. The first paragraph is intended to ensure that nothing in the Agreement or arising from the Agreement has any implications for territorial claims or claims relating to the delimitation of maritime boundaries. The second is intended to ensure that a WTO panel established under the Agreement shall not make findings that would imply that one territorial claim prevailed over another such claim.

142. Even though Members share this objective for this provision, they have had opposing views on how it should be addressed in the text, particularly concerning the issues relating to dispute settlement. Some Members preferred to have no text on this issue, some had a strong preference for the language in Article 11.3(b) of the Draft Agreement in WT/MIN(21)/W/5, and some wanted a text but did not support that version. One point made to me on several occasions is that it is extremely unlikely that a WTO Member would go to WTO dispute settlement with a subsidies claim under this Agreement that would require a panel to decide which Member had jurisdiction over an area of sea claimed by two or more Members. Based on common practice in other areas of work of the WTO, first there would probably be informal consultations between Members, then the

Committee process where the subsidy concern would be raised, then there would be the notification of consultations under the DSU, and then there would be a request for the establishment of a panel in the DSB. At each stage, it would be clear to the complaining party that the territoriality issues were present in the matter, making it very unlikely that a subsidy dispute would be pursued.

143. Some Members nevertheless considered it important to provide explicit guidance to a panel, should such an issue arise in a dispute under this Agreement, however remote the chance.

144. The differences as to any text on territoriality could be summarized as follows:

- First, whether it is only the party complained against in a dispute under this Agreement that could make a statement or assertion regarding a territorial claim that would trigger the panel to act in a particular way, or whether such a statement by a third party to the dispute under this Agreement also could do so;
- Second, what the panel could do if such a situation arose – would it be able to make its own assessment of whether the territoriality assertion was relevant to the particular issue about WTO compliance, or should it accept the assertion without any assessment; and
- Third, how the panel would handle this situation in its report – would it explain why it found the assertion about territoriality relevant or not relevant to the WTO dispute claim, or would it restrict its report on this particular subsidies claim to a simple statement that an assertion had been made.

A further concern that I heard from several delegations is that we must ensure that any provisions in the Fisheries Subsidies Agreement referring to territoriality would not have implications under other WTO agreements that have no such provisions.

145. Article 11.3 (b) in this new draft of the Agreement reflects a compromise that was identified through a very constructive and collaborative process of discussion among interested delegations, and a desire to find a solution that all could accept, even though it is the preferred outcome of no delegation. The language is different in some ways compared to the earlier formulation of the same provision in WT/MIN(21)/W/5. First, it uses the phrase "shall make no findings", compared to the former language "shall not entertain any claim". Second, it uses the phrase "base its findings" compared to the former language "address any issues". The third change of terminology is the new term "asserted" compared with the former term "contested". In addition to these changes of specific language, a further change is to make no reference to either a party or a third party to a WTO dispute. The delegations participating in the discussion felt that these changes, including the constructive ambiguity regarding parties and third parties, achieved a level of comfort that they could live with.

146. Footnote 24 clarifies that the same limitation as in Article 11.3(b) would apply to any Article 25 arbitration that might take place instead of a panel. This footnote was suggested to cover the possibility that arbitration under Article 25 of the DSU could be used to resolve a dispute, in lieu of a dispute settlement panel by the DSB.

Article 11.4

147. Article 11.4 contains a disclaimer to clarify that nothing in this Agreement shall prejudice the jurisdiction, rights and obligations of Members under international law, including the law of the sea.

148. This provision draws on and reflects extensive discussions aiming to ensure that existing rights and obligations under other international instruments, and more generally under international law, are not affected by this new Agreement. The specific reference to the law of the sea in this provision is strongly supported given the close intersection of the subject matter of this new Agreement and existing international fisheries instruments. While concern has been raised that this reference is a synonym for the UN Convention on the Law of the Sea (UNCLOS) to which not all WTO Members are parties, in fact it is a broader term encompassing everything that can be considered the international law of the sea, which in turn applies in an individual way to each individual Member depending on what it has accepted.

149. Finally, on Article 11.4, footnote 25 clarifies that the law of the sea includes the rules and procedures of RFMO/As as applicable. This is to ensure that the WTO does not become involved, through the operation of this Agreement and dispute settlement, in internal matters of RFMO/As.

Article 11.5

150. Article 11.5 is intended to address a concern raised over possible implications of the reliance in certain provisions of this Agreement on actions of RFMO/As. In particular, this provision states that other than as provided in the Agreement, there is no implication that a Member is bound by measures or decisions of, or recognizes, any RFMO/A of which it is not a party or cooperating non-party. This is intended to reflect the general understanding that the references in the Agreement to RFMO/A decisions and measures are exclusively for the purpose of the fisheries subsidies disciplines and are not meant to have any implications beyond those disciplines.

Article 11.6

151. Article 11.6 is a further disclaimer to clarify the relationship of this Agreement with the SCM Agreement. In particular, the provision states that this Agreement does not modify or nullify any rights and obligations of Members under that Agreement.
