Negotiating Group on Rules

UNOFFICIAL ROOM DOCUMENT*

NEGOTIATING GROUP ON RULES – FISHERIES SUBSIDIES
DRAFT DISCIPLINES ON SUBSIDIES CONTRIBUTING TO OVERCAPACITY AND OVERFISHING, AND RELATED ELEMENTS
Addendum

Chair's explanatory note accompanying RD/TN/RL/174

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INTRODUCTION

This addendum provides background, context, and explanations for the document "Draft disciplines on subsidies contributing to overcapacity and overfishing, and related elements", which I have circulated today in document RD/TN/RL/174. As indicated in its cover note, I suggest we use that document as the starting point for our text-based work this fall.

1. BACKGROUND AND CONTEXT

Members are aware that WTO Ministers, through their Decision in document WT/MIN(22)/33 adopting the Agreement on Fisheries Subsidies at the WTO 12th Ministerial Conference (MC12), mandated the Negotiating Group on Rules (NGR) to continue its work. In particular, Ministers instructed the NGR to negotiate on the issues in documents WT/MIN(22)/W/20 (W20) and WT/MIN(21)/W/5 (W5) that were left outstanding after MC12, with a view to making recommendations to the Thirteenth WTO Ministerial Conference (MC13) for additional provisions that would achieve a comprehensive agreement on fisheries subsidies. Members subsequently made clear in a variety of fora, starting with the retreat for Heads of Delegation held in Evian in October 2022, that the main focus of this "second wave" of negotiations should be to develop disciplines on subsidies contributing to overcapacity and overfishing.

Since taking up the Chair of the NGR in January this year, bearing in mind the MC12 mandate, I have been structuring the Group's work with a view to establishing as soon as possible an initial textual basis that we could use as the starting point for building a consensus text for adoption by Ministers next February at MC13. In this connection, I have consistently expressed the view that to be in a position to meet this deadline, we need to begin text-based negotiations as soon as we resume work after the summer break. During the last two Fish Weeks before the break, the Negotiating Group focused on discussing proposals of elements for that text-based work submitted by various Members and groups. My communication of 31 July foreshadowed the circulation of a starting point document before our resumption of work in the fall.

To aid all of our reflections on elements for such a starting point document, my 31 July communication to Members included an annex containing a so-called "menu of options". This annex was aimed at encouraging Members to explore commonalities and possible overlaps among the elements in the documents before us. To this end it groups together similar concepts from the different proposals that have been received and from other relevant documents, particularly W20 and W5. I hope that the annex is useful to your own reflections about all of those documents, as well as to your consideration of the starting point document I have circulated today.

In putting the starting point document together, I have reflected on the various elements and approaches before us which, based on the Negotiating Group's discussions, appear to enjoy substantial support. As indicated in my 31 July communication, my intention has not been to try to squeeze every proposal in its entirety into the document, but rather to establish a structured foundation for Members to adjust through your further inputs as we progress in the negotiating process. Thus, every textual element in the document should be very familiar to all of you, even if the drafting does not always simply replicate language contained in original proposals or other documents. You will note that in a few places the document either provides an alternative textual option or contains a simple placeholder in lieu of specific language.

I have circulated the document in the RD/TN/RL (room document) series. Using this series reflects my intended purpose of the document as a basic starting point for our text-based discussions, and not in any way as a suggested final outcome.
I would emphasize here (which in any event goes without saying) that nothing in the document is agreed. Furthermore, it is absolutely clear that the document is without prejudice to any Member's position on any issue, regardless of whether or how the document may reflect that issue. The document is meant only to serve as a starting point for a more focused phase of our work, and it is my hope that Members will amend it to progressively build consensus through that work.

The remainder of this addendum is intended to assist Members to understand the specific content of the document in RD/TN/RL/174. It thus provides explanations of each provision of the document, including in relation to corresponding provisions in W20 and W5, i.e., the immediately preceding versions of the draft disciplines on the outstanding issues.

2. DETAILED EXPLANATION OF THE PROVISIONS OF RD/TN/RL/174

ARTICLE A: SUBSIDIES CONTRIBUTING TO OVERCAPACITY AND OVERFISHING

Article A.1, Article A.1.1, Article A.1.2, and Article A.1.3

Article A.1 contains draft language for the core disciplines on subsidies contributing to overcapacity and overfishing. The drafting is based on a "hybrid approach" combining a statement of the prohibition and a list of presumptively prohibited fisheries subsidies, along with a qualification to the prohibition based on sustainability elements. The basic structure of the discipline is thus the same as in the hybrid approach in the corresponding provisions of W20 and W5. As was explained in the addendum to W20 (WT/MIN(22)/W/20/Add.1), the aim and operation of the hybrid approach 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. The subsidies and sustainability measures would be the subject of a demonstration that sustainability measures were in place for the fish stocks in respect of which the subsidies were provided. This demonstration process would begin with notifications to the Committee on Fisheries Subsidies.

Based on our second wave discussions so far, this type of hybrid approach for the core discipline on subsidies contributing to overcapacity and overfishing appears to have the broadest support among the different proposals. That said, the provisions in Article A.1 and its subparagraphs contain various modifications to the approach in W20 and W5. These modifications, which draw on proposals and suggestions from Members, are aimed at addressing a broad-based call to tighten the core discipline relative to that previous drafting, particularly in respect of the largest subsidizers.

Similar to the approach in Article 5.1 of W20 and W5, the disciplines in Article A.1 combine a prohibition in the chapeau and an illustrative list of certain presumptively prohibited subsidies, with sustainability-based qualifications to the prohibition in Articles A.1.1 and A.1.2. These provisions would be operationalized, in part, through Article A.1.3 which elaborates certain aspects of the Committee review process.

In more detail, the main body of Article A.1, including sub-items (a) through (h), is identical to the counterpart provision in W20. This provision consists of a chapeau containing the statement of the prohibition on subsidies that contribute to overcapacity and overfishing, and an illustrative list of certain specific types of such subsidies. In our discussions to date, most Members continue to support the approach of stating the prohibition and then having an illustrative list of types of subsidies presumed to contribute to overcapacity and overfishing. While some Members have suggested amending in different ways the indicative list that appeared in W20, or splitting it into a closed list of most harmful subsidies and an indicative list of other subsidies that contribute to overcapacity and overfishing, these ideas have not yet been explored in detail and so are not included in the starting point document. Furthermore, some proposals call for a list-based approach as opposed to a hybrid approach. It will be for Members, in the forthcoming text-based discussions, to determine whether to maintain the overall approach reflected in Article A.1, and how to adjust the drafting.

Article A.1 is qualified by, and thus needs to be read together with, Articles A.1.1 and A.1.2. Between them, these latter provisions would establish a two-tiered sustainability-based qualification to the prohibition in Article A.1.
Article A.1.1, which creates the first tier of this mechanism, is of general application. This Article provides that a subsidy is not inconsistent with Article A.1 if the subsidizing Member demonstrates that measures are implemented to maintain the relevant fish stocks at a biologically sustainable level. This language is similar to that in the counterpart provision of Article 5.1.1 of W20 and W5. Article A.1.1 is further elaborated, however, by providing that the demonstration is to be made through the Member's regular subsidy notification under the Agreement on Subsidies and Countervailing Measures as well as Article 8 of the Agreement on Fisheries Subsidies, and by listing certain information that would have to be provided: catch data for the fish stock in question, status of the stock, and conservation and management measures in place for it.

The second tier of the mechanism for using the sustainability-based qualification to Article A.1 is found in Article A.1.2. This provision has been introduced on the basis of a widespread call, and several proposals, to apply to the largest subsidizers a stricter sustainability test than that in W20 and W5. In particular, Article A.1.2 aims to address the concern voiced by numerous Members that Article 5.1.1 in W20 and W5 would not have changed the status quo in terms of the total amount of fisheries subsidies being provided. Article A.1.2 is entirely new, with no counterpart in W20 or W5. However, the ideas and drafting draw from various Member proposals.

Under Article A.1.2 the largest providers of fisheries subsidies, identified on the basis of the annual aggregate value of their fisheries subsidies, would be deemed to provide subsidies that contribute to overcapacity and overfishing. The consequence of this deeming is that these Members would bear the burden of demonstrating, through a notification to be submitted immediately after a subsidy is designed and in effect, that measures are implemented to maintain at a biologically sustainable level the stocks in the relevant fishery or fisheries. Adding to the strictness of Article A.1.2, the content of the immediate "demonstration" notification that it provides for is more extensive than the periodic notification provided for in Article A.1.1. In addition, the notification under Article A.1.2 would need to contain all of the information referred to in Article A.1.1 plus information on the fleet capacity in the fishery for which the subsidy is provided.

An issue that arises in connection with Article A.1.2 is the methodology that would be used to identify the largest subsidizers. While as presented in the starting point document this would be done based on the annual aggregate value of each Member's subsidization, certain Members have proposed alternative approaches such as each Member's annual aggregate amount of fisheries subsidies calculated as a percentage of the total value of its marine catch.

A related key practical issue that Members would need to resolve to make Article A.1.2 operational, regardless of the specific methodology for identifying the top subsidizers, is to identify and agree on the source of information to use in that methodology. The draft reflects this through the bracketed phrase "according to [...]".

A further issue that would need to be negotiated is the specific number of top subsidizers to which Article A.1.2 would apply. This is reflected by the reference to "the [X] largest providers of fisheries subsidies".

The Committee's review of the notifications referred to in Articles A.1.1 and A.1.2 would form part of the "demonstration" process by allowing other Members to pose questions and seek clarifications about the notifications. Article A.1.3, does not have a counterpart in Article 5 of W20 or W5, but draws from recent proposals. It reinforces this Committee review process by explicitly providing for concerned Members to seek relevant information from subsidizing Members and establishing rules for the subsidizing Members' responses.

Article A.1 retains certain other elements contained in footnotes to the Agreement on Fisheries Subsidies and reflected in W20. First is footnote 'a' to Article A.1 of the starting point document, which replicates footnote 12 of W20. This footnote clarifies that this article (the core disciplines on subsidies contributing to overcapacity) does not apply to subsidies to the extent they regard stocks that are overfished. It is aimed at addressing a concern raised by some Members that a subsidy for fishing a stock that was recognized as being overfished could be permitted under Article 4.3 of the Agreement on Fisheries Subsidies but, because in such circumstances it would be 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 A.1. Second is footnote "b", which is identical to footnote 11 of the Agreement on Fisheries Subsidies, and which defines "biologically sustainable level". Third is footnote "c", which is identical to footnote 15 of the Agreement on...
Fisheries Subsidies, concerning catch data for multispecies fisheries. Fourth is footnote "d", which is identical to footnote 14 of the Agreement on Fisheries Subsidies, which defines shared stocks.

**Article A.2**

Article A.2 contains a prohibition on subsidies contingent on fishing outside the subsidizing Member's jurisdiction. This provision is a standalone discipline, as was the case for the counterpart provision of W20.

Article A.2(a) contains the statement of the prohibition. The language of this provision, including footnote "e" attached thereto, is identical to that of the corresponding provision in W20.

Article A.2(b) takes the form of a bracketed placeholder for possible flexibility in respect of the prohibition in Article A.2(a). The use of a placeholder here reflects the fact that Members hold different views as to whether and what kind of flexibility from such a prohibition might be appropriate, and how any such flexibility should operate. Some Members consider that flexibility from the prohibition in A.2(a) should be provided for non-collection from operators or vessels of government-to-government access fees, subject to sustainability requirements (as was the case in W20). Other Members consider that such a prohibition should not be free-standing, but instead should be treated the same as any other subsidies listed in Article A.1, including (as was the case in W5) being eligible for the sustainability-based qualifications to the prohibition. Some Members consider that there should be no flexibility in respect of this prohibition.

**ARTICLE B: SPECIAL AND DIFFERENTIAL TREATMENT**

Article B contains provisions on special and differential treatment (SDT) for developing country Members in relation to the draft disciplines on subsidies concerning overcapacity and overfishing. These SDT provisions include certain elements from the corresponding provisions in W20 and W5, as well as additional elements on SDT reflected in some of the recent proposals from Members.

**Article B.1**

Article B.1 provides three types of SDT that would be available to developing country Members. The provisions of Articles B.1(a) and B.1(b), taken together, are similar to Article 5.5(a) in W20. Article B.1(a) provides for a transition period for a maximum number of 7 years available to all developing country Members. During the transition period, certain subsidies maintained by such Members to fishing and fishing related activities in their EEZ or in the area and for species under the competence of a relevant RFMO/A would be exempt from the prohibition in Article A.1 (and thus not subject to the sustainability qualifications in Article A.1.1 and Article A.1.2). The brackets around the duration of the transition period reflects that Members' views on this point have not yet been fully developed and explored. The applicability of this transition period would be conditioned on whether the Member intending to invoke this provision informs the Committee of such intention in writing within one year of the entry into force of the new disciplines. This condition also appeared in Article 5.5(a) of W20.

Article B.1(b) creates a further period of flexibility through a two-year peace clause that would be available after the transition period to all developing Members that had notified their intention to avail themselves of the transition period pursuant to Article B.1(a). During the period of the peace clause, a developing country Member would be obliged to implement Article A.1 but would be exempt from dispute settlement in respect of obligations under that provision. As noted, the drafting of this peace clause is similar to language in Article 5.5(a) of W20.

Unlike Articles B.1(a) and B.1(b), Article B.1(c) has no counterpart in W20 but draws from recent proposals. This provision would establish a mechanism by which a developing country Member would be able to request the Committee to grant an extension of the peace clause. In considering such a request, the Committee would take into account the specific circumstances of the Member in question, and would give sympathetic consideration to developing country Members that demonstrate concrete progress toward implementing Article A.1. Subparagraph (c) is included to address proposals suggesting that transition periods should be linked to helping developing country Members transition to sustainable fishing.
Article B.2

Article B.2 addresses the call from numerous Members to exempt from the disciplines developing country Members' subsidies to artisanal and small-scale fishing.

This provision is identical to the counterpart provision in W20, containing language describing the fishing in question as "low income, resource poor and livelihood fishing", and including the same bracketed options (12 or 24 nautical miles from the baselines) for the precise geographical limit within which this exemption would apply.

It has been evident in recent discussions that Members' views remain divergent on how best to define and provide SDT for artisanal and small-scale fishing. Proposals seeking to provide some guidance in terms of characteristics of such fishing could be further explored.

Article B.3

Article B.3, which is identical in substance to the counterpart provision of W20, would exempt from the disciplines in Article A.1 developing country Members with no more than a specified (de minimis) share of the annual global volume of marine capture production. This provision retains the bracketed figure in W20 of no more than 0.8% of annual global marine capture production as the de minimis threshold.

Article B.3 ALT is a new, alternative de minimis formulation. This formulation addresses proposals to exclude from the disciplines in Article A.1 developing country Members whose absolute level of subsidies provided to fishing or fishing related activities is below a specified amount. The proponents of this type of approach have signalled openness to discussing the precise amount of such a de minimis subsidization threshold. To reflect this, the text contains a placeholder for this subsidization amount. A central practical issue that Members would need to resolve under this formulation, as is the case for Article A.1.2, would be to identify and agree on the source of information to use in calculating each relevant Member's absolute amount of the subsidization. This is indicated in the phrase "as per [...]" in this provision.

Article B.4

Article B.4 provides for special and differential treatment specifically for LDC Members. This provision is essentially the same as the counterpart provisions in W20 and W5, although the format differs slightly.

Article B.5

Article B.5 is identical to the counterpart provision in W20. It reflects a widely-held view that Members availing themselves of SDT provisions should nevertheless aim to provide subsidies in a sustainable manner, with a view to avoiding contributing to overcapacity and overfishing.

Article B.6

Article B.6 is a placeholder for a provision that would exclude certain developing country Members from the scope of special and differential treatment. Three options have been proposed as a basis for identifying such Members, should such a provision be included: (a) a Member's share of global marine capture production; (b) the geographic area in which a Member conducts fishing activities; and (c) a voluntary opt-out by developing country Members not intending to avail themselves of SDT. Views also diverge regarding whether such a provision should be included in the disciplines at all.

Furthermore, Members would need to consider the relationship between developing country Members falling under Article A.1.2 and the various SDT provisions.

Given the multiplicity of views on this issue, further discussion will be required. The placeholder in Article B.6 is intended to invite such discussion.
ARTICLE C: NOTIFICATION AND TRANSPARENCY

Article C sets forth notification and transparency provisions.

Article C.1 clarifies that in addition to the specific notification obligations set out in these disciplines, Members are required to comply with their notification obligations under Article 25 of the SCM Agreement and Article 8 of the Agreement on Fisheries Subsidies, as consistent with the approach in W20 and W5.

Article C.2(a) pertains to information indicating the use of forced labour by vessels or operators. This provision is identical to its counterpart in W20 and W5.

Article C.2(b) pertains to information about government-to-government fisheries access agreements or arrangements. This provision is identical to its counterpart in W20.

Article C.3 covers information about non-specific fuel subsidies. This provision is identical to its counterpart in W20 and W5.

ARTICLE D: OTHER OVERCAPACITY AND OVERFISHING PROVISIONS

Article D provides space for insertion of other issues concerning subsidies contributing to overcapacity and overfishing that are not addressed elsewhere.

The one issue referred to in the placeholder in Article D.1 is non-specific fuel subsidies. This issue was extensively debated and was dealt with differently in W5 and W20.

Article D.2 provides space for other possible provisions Members may wish to include. For instance, in the second wave of negotiations, some Members have also proposed specific disclaimer language regarding their rights under UNCLOS. Reference to UNCLOS remains a sensitive issue for certain Members, however, and so this issue is not referred to in Article D. In this connection, Members are invited to consider the disclaimer language in Article 11.3 of the Agreement on Fisheries Subsidies, the scope of which appears to be relatively broad.