



Negotiating Group on Rules

**NEGOTIATING GROUP ON RULES
FISHERIES SUBSIDIES**

**REPORT BY THE CHAIR, H.E. MR SANTIAGO WILLS TO
THE TRADE NEGOTIATIONS COMMITTEE**

14 December 2020

INTRODUCTION

1. I would like to begin this report by expressing my hope that all are staying well and healthy in these difficult times.
2. As we are coming to the end of the year, I wish to provide a status report on, and to share a few thoughts and reflections about, the fisheries subsidies negotiations.
3. By way of introduction, I can only say that what I anticipated for 2020 when I became Chair of the Negotiating Group on Rules a year ago, and the 2020 we have just lived through, have almost nothing in common! In short, I had planned for a very intensive schedule of technical and HOD meetings, and a possible senior officials meeting or two, with substantial involvement of the DG along the way, all culminating in adoption by Ministers of a set of new fisheries subsidies disciplines, in June, in Nur Sultan. And I was confident that with the planned work programme, which would build on the very solid work of my predecessor and of the facilitators, a successful outcome in June was well within reach.
4. While an unfortunate confluence of events made that impossible, we nevertheless did our best to keep up a strong pace of work and indeed we made a tremendous amount of progress in spite of all of the challenges. And for this the credit goes to all the Members for maintaining, in very difficult circumstances, a high level of commitment and determination to bring the negotiations to a successful outcome this year. While unfortunately it is now clear that we simply cannot make up the time we lost to the pandemic and reach that goal, we are closer than ever and now need to capture the progress we have made, and focus with even greater attention on finding bridging, compromise solutions on the issues where divisions remain.
5. Here, I want to convey to all delegations how much I appreciate the constructive spirit in which you have been engaging, including in particular since the COVID-19 pandemic disrupted our lives. I admit that the intensive pace that we have maintained since June has been tiring, but the opposite would have been much worse, and all of you rose to the challenge.
6. This consistent positive engagement by delegations is what has allowed the real, substantive progress that we have made under these unprecedented circumstances. I am confident that this will continue, and will lead to the technical and political decisions necessary to bring this negotiation to a successful conclusion in line with our mandate.

WORK SINCE MY ELECTION AS CHAIR OF THE NEGOTIATING GROUP

November 2019 to March 2020

7. Members may remember that when I took this role in November last year, the negotiations had been inactive for several months. When the previous Chair left Geneva, the foundations had been

laid for a productive second semester of work, with the issuance of facilitators' reports capturing state of play of the negotiations, and a solid process in place.

8. Unexpectedly, it was only in November that Members agreed on a new Chair, and thus several months were lost that could have been spent in actual negotiations. During the interval, the facilitators and some Members convened and took part in a range of activities, and all of this was useful work, although necessarily limited in scope and potential to generate concrete progress.

9. Therefore, one of the first things I did upon assuming my new role in November was to ask the facilitators to update their June reports to reflect progress in their work since then. I also developed an intensive work programme from January to June 2020 with clusters of meetings and the promise of intersessional work, with the view of concluding the work for final decision by Ministers at MC12 in Nur Sultan.

10. With that objective in mind, work in 2020 resumed in January. A number of proposals were submitted by different delegations in the first few months that concentrated on overcapacity and overfishing, and on special and differential treatment. Based on suggestions from a number of meetings with Heads of Delegation, including a meeting that the Director-General and I held on 6 March, I began work on a single consolidated document to serve as a basis for further work. To start this process, I prepared and distributed on 9 March a suggested text, based on elements from Members' proposals and the facilitator's work, on the prohibition element of the disciplines on overfishing and overcapacity.

March to July 2020

11. However, just as the Director-General and I were ready to start an intensive series of HOD-level meetings for the final stretch before MC12, the measures needed to address the COVID-19 pandemic intervened. The restrictions on travel and public gatherings meant that meetings that were supposed to take place starting on 11 March had to be cancelled, and on 12 March it was announced that holding MC12 in June was no longer feasible. An attempt to hold a virtual meeting of the NGR on 20 March also was cancelled as there simply was not the time to sort out the logistical and technical issues involved.

12. Nevertheless, despite these problems, work continued, on the basis of a written procedure to discuss new proposals, which at the time was the only means available for our work. While we did make progress, the procedures were both slow and cumbersome.

13. Furthermore, at that time many of us had problems using the wide range of virtual platforms that began to be used to host remote meetings. While we are now all veterans, at the time this felt completely alien, and the adaptation process was an additional element limiting our ability to meet, particularly in plenary meetings.

14. In addition, addressing the various crises provoked by the pandemic was by far the top priority of all governments, such that the possibility for engagement and consultations with capitals was just not there. Therefore, after a written exchange of views on two proposals I reluctantly suggested on 7 May that we take a short pause while waiting for restrictions to ease and for technical solutions to improve remote participation.

15. Then, that same month, on 14 May, the Director-General announced that he would be leaving at the end of August, which meant that we could no longer count on his availability for our process once the restrictions eased up.

16. In the meantime, I conducted extensive consultations with individual delegations and groups, using a variety of virtual platforms, and continued work on a first draft of a consolidated draft document. In June, the restrictions on movement and meetings were relaxed and meetings restarted again in the WTO, and we then resumed our negotiations in hybrid meetings with physical and remote presence and participation.

17. On 25 June I introduced a first draft consolidated document, in RD/TN/RL/126, at an NGR HoDs meeting. I need to stress that nothing in this draft was new as it was entirely based on the work by the facilitators, and on Members' proposals. On 21 July, at another NGR HoDs meeting, when

Members gave their preliminary comments on the first draft, they indicated that it should be the starting point for the Group's further work starting in September, and aiming for agreement by the end of this year.

September to November 2020

18. The NGR reconvened after the summer break and we continued our discussions on the basis of the draft consolidated document. By that point, we were making extensive use of virtual platforms for meetings and discussions, and hybrid meetings quickly became the norm. So did working in a truly continuous negotiating mode. While we held week-long clusters of meetings each month during the fall, there was no pause between clusters. In the intersessional periods, many topic-specific meetings in different configurations were held. In addition, I was very fortunate to find a good friend, Ambassador Chambovey of Switzerland, to assist me on moving forward on special and differential treatment which we all know is integral to the negotiations.

19. At the end of the October cluster, a number of Heads of Delegations suggested that it was time for a revision of the draft consolidated document. Based on this request and on the work post-July, I introduced such a revision on 2 November, in RD/TN/RL/126/Rev.1, at the start of a meeting cluster. As before, the revisions were entirely based on earlier work by facilitators, proposals from Members and the meetings I had held. I also circulated, in an addendum to 126/Rev.1, a detailed explanation on the rationale behind the revision.

20. This revised version of the draft consolidated document was an important step forward. Many of the changes were to fill in text in several important areas that were represented by placeholders in the first version. These areas included dispute settlement, notifications, and how a panel – and the WTO – would not address issues relating to overlapping claims of maritime jurisdiction.

21. Unfortunately, also on 2 November, COVID-19 intervened once again with renewed restrictions on meetings and movement imposed by the authorities in Switzerland and Geneva. The difficulties that this created for many Members for coordination between colleagues in Geneva and back home in capitals made it evident that the year-end deadline was going to be very difficult to meet. Nevertheless, I am very grateful to all delegations for maintaining their engagement as our meetings went fully virtual.

22. The most recent cluster of meetings this year was held in week of 30 November. The cluster was at the level of Heads of Delegation, with a particular focus on some key issues that need to be unlocked in the IUU and overcapacity and overfishing pillars. A summary of some of these issues is presented later in this report.

23. During these meetings, I noted a high level of engagement, both from Geneva and from senior capital-based officials. The delegations put forward many interesting ideas and, in some areas, there was a willingness to compromise, while in other areas the discussion clarified the main concerns of delegations.

PROGRESS MADE, CURRENT STATUS, AND CERTAIN OUTSTANDING ISSUES

24. Unfortunately, despite all of our efforts, our work is still not complete. As all of us are well aware, the challenges we faced in the past year are real and have not yet disappeared. The platforms for virtual meetings have worked well and they have allowed capital-based officials to participate but they have many disadvantages as well. The absence of a Director-General also has left us without that important instance on which we were hoping to draw to help us cross the finish line.

25. As a result, we will not be able to deliver an agreement on disciplines to fisheries subsidies by the end of this year. This is a serious setback for the Negotiating Group, for the WTO, for the SDGs set by our Heads of Government, and for sustainable fishing. But let's not forget that our mandate remains unchanged – even if we are going to make a late delivery.

26. Although we should not underestimate this serious setback, the truth is we did make lot of progress this year. Major differences remain but, in some areas where we have spent many hours working on specific texts, delegations are not that far apart. This is less true for some other topics but with the right will and proper engagement I am convinced we can finish these negotiations in

the near future. And indeed, it is normal that as differences narrow down and come into sharp focus, the final steps to bridge the gaps become more difficult.

27. And the NGR has made some progress since the first revision of the draft consolidated text until today, particularly on the topics on which we focused in our recent discussions. I would now like to summarize some of the key issues that have been addressed.

IUU Fishing

28. In the pillar on subsidies to illegal, unreported and unregulated (IUU) fishing, a lot of the discussion was focused on the entities that can make an IUU determination that would trigger the subsidy prohibition.

29. The discussion showed that there are some differences of view on whether the list in Article 3 implied a hierarchy and the possibility that a determination of IUU fishing by one listed entity could be cancelled by another that came to the opposite conclusion. I wish to emphasize, as I did in the discussions, that that was never the intention of the provision. There was some discussion of possible textual changes aimed at making this absolutely clear.

30. A more substantive issue that was extensively discussed is the degree to which the various entities listed have the competence to make IUU findings and, if so, under what circumstances. In this context, some Members focused on certain provisions in international fisheries instruments in emphasizing the competence of coastal Members in waters under their jurisdiction, and of RFMOs/As in areas and for species under their competence. Some Members raised questions over the competence under such instruments of flag State Members and subsidizing Members to make IUU findings. Others considered that the disciplines are only addressing findings that would trigger a subsidy prohibition, and that in this context flag State and subsidizing Members have particular responsibility in respect of vessels that they flag or subsidize. Another area of discussion was the role of port State Members and whether or not they have competence to make IUU findings that would trigger a subsidy prohibition.

31. Other issues that were discussed in the context of the IUU pillar included whether and what due process requirements should apply to IUU determinations by the various entities, how to address minor offences, and what provisions there should be on the duration of the subsidy prohibition. A number of references also were made to a due diligence provision in the draft, with issues raised including whether this could be a possible alternative to due process.

32. Regarding the treatment of developing Members in the IUU pillar, some Members advocate SDT in the form of a transition period to allow for the development or reinforcement of legal and administrative systems to address unregulated and unreported fishing. Others oppose any SDT in this pillar, taking the view that no Member should provide any such subsidies.

Overfished stocks

33. Concerning subsidies for fishing of stocks that are already overfished, some delegations questioned whether such a provision is needed given that there will be a provision on subsidies that contribute to overfishing and overcapacity. Others continue to consider a separate provision to be important, given the poor condition of the fisheries in question.

34. Most recently, the focus of our discussions related not to this question or the substantive drafting, but instead a placeholder in the draft regarding how to address subsidization to fishing on unassessed stocks. Here the discussions helped to clarify that there are many unassessed stocks in the world and that many Members oppose a simple assumption that unassessed stocks could be equated with overfished stocks, such that the placement of this provision in this pillar was questioned. At the same time, there also were delegations emphasizing the need for care in granting subsidies to fishing on unassessed stocks which they felt should be recognized in the disciplines.

Overfishing and overcapacity

35. In the pillar on subsidies contributing to overcapacity and overfishing, the revision of the consolidated draft document made some substantive changes to the provisions setting forth the

prohibition. The aim of the changes was to try to clarify how the hybrid approach used in the consolidated draft document would operate such that certain forms of subsidies would be prohibited if they contributed to overfishing and overcapacity but would not be prohibited if they did not. There were extensive discussions of these provisions and positions remain divided on whether the draft achieves this effect. ,

36. Despite these differences in respect of what many consider to be the central pillar of the disciplines, the discussions did help clarify positions. Some delegations continue to advocate a list of subsidies that would be prohibited. Others consider that the prohibition should operate on the basis of sustainability indicators, with subsidies prohibited when the rate of fishing and/or the level of fishing capacity are more than would keep the stock at a biologically sustainable level, and an exception from that prohibition where measures are implemented to maintain the stock at a biologically sustainable level. While a number of Members continue to have concerns over this approach, the meeting generated a useful discussion over how the sustainability indicators are expressed in the draft, and whether those indicators could be modified to accommodate a broader range of the sustainability measures in question.

37. Considerable differences remain, especially as regards concerns that the approach as drafted could provide a loophole for Members with more advanced management systems. To bridge the gaps and develop a compromise that all can accept, we will need to continue to focus intensively on this area as we move forward in our work.

38. There also were useful discussions on draft provisions that would prohibit certain subsidies to fishing beyond national jurisdictions. While some see these provisions as a very important part of the final outcome, ensuring the coverage of the disciplines of unregulated areas of the ocean, others take the view that some subsidies for fishing beyond national jurisdiction may be neutral or even beneficial for fish stocks, and that one cannot assume that all such subsidies contribute to overfishing and overcapacity. One view was that, if there is to be such a provision, it should focus on fuel subsidies as these are considered by some fisheries experts to be the most harmful kinds of subsidy.

39. In the context of subsidies to fishing beyond national jurisdiction, we also had some discussion on government-to-government access agreements. While it seems to be the common view that government-to-government payments pursuant to such agreements are not subsidies and thus are outside of the scope of the disciplines, views differ on how the disciplines should treat any subsidies that might arise from the provision of the acquired fishing rights to the fleets in question. This too is an area that requires considerable additional work.

40. Other draft disciplines and placeholders in the overcapacity and overfishing pillar have not been extensively discussed in recent meetings. I am aware that there are strong views in respect of some of them and that there is increasing interest in pursuing many of these issues further.

41. Lastly under overfishing and overcapacity, the discussion on special and differential treatment has been the subject of intensive discussion. As Ambassador Chambovey stated at a number of meetings, positions remain far apart. However, there are some interesting ideas that are beginning to emerge and there are some signs that it may be possible to begin to build on these ideas. Most important have been the repeated statements by all delegations that they do not want to use subsidies that would lead to unsustainable fishing.

42. To summarize the debate in broad terms, one view is that special and differential treatment should take the form of transition periods for the implementation of and adaptation to the new disciplines. Another view is that SDT should be more structural, providing flexibility for developing Members with underdeveloped fishing capacity to create that capacity using subsidies. There also is the view that least developed Members should be exempted completely from this pillar of the disciplines. As I mentioned, some ideas are beginning to emerge for possible compromise solutions. Again, this is an area that will continue to require intensive work.

Other

43. In other areas we have made significant progress during the year, including on notifications and transparency, dispute settlement, and exemption of subsidies for disaster relief, as well as on the highly sensitive issue of territoriality. These provisions are reflected in the current draft. There also

are ideas that have received considerable interest that would need to be refined and discussed further, such as, for instance, a possible exemption from some disciplines for artisanal or subsistence fishing.

SECOND REVISION OF THE CONSOLIDATED DRAFT DOCUMENT

44. To mark the current state of progress, I intend to issue a second revision of the consolidated draft document by the end of this week. The changes relative to the current version will be modest and will aim to reflect where I think we are at this stage. As before, the revision will be accompanied by an addendum outlining the background for and intention of each change. As always, this document will be without prejudice to Members' positions and the entire text will remain in brackets.

45. I should note here that although we have had rich discussions in recent weeks, with a range of important new ideas put forward by Members, these ideas will not necessarily be reflected in the revised text. This in no way is intended as a judgement on the substance of those ideas, and to the contrary I welcome all constructive suggestions that might help us find a way forward. Rather this simply reflects the need for more thorough discussion to mature those ideas, including in regard to their placement and in relation to other elements, before they can be included in the text.

NEXT STEPS

46. A number of delegations have said that we need to reach an agreement as soon as possible. Others have said that we should not sacrifice quality for a rushed agreement, particularly given the problems that many are still having in their coordination between Geneva and capitals.

47. I believe that I speak for all of us in saying that our negotiations have a particular urgency, not only because of the SDG 14.6 and MC11 mandates but because while we talk, fish stocks continue to decline due to overfishing, and the research by international organizations such as the FAO and OECD detailing the nature of the links between harmful subsidies and unsustainable fishing has been growing steadily. To continue without multilateral disciplines on harmful subsidies essentially means that governments can continue to spend in unsustainable fishing, with no immediate consequences – except that eventually there will be no fish left to find.

48. New disciplines on harmful fisheries subsidies are like a debt that we owe to the global community. We were supposed to pay this debt at the end of the year. The fact that we are not managing to pay on time does not mean the debt has gone away. To the contrary, the debt increases with each day that goes by – so the urgency, far from disappearing or diminishing, is growing.

49. Although it is evident that the COVID-19 pandemic is a major cause for not meeting the deadline, it is not the only one. Members' positions remain divided on some very important issues, and it is clear that we need more flexibility and compromise from Members in order to successfully conclude the negotiations. If we have learned something from the past two decades of negotiating it is that, pandemic or not, we will get nowhere without a willingness to find solutions we can all live with rather than remaining in positions others cannot agree to.

50. Given that there is thus no time to waste, and given that we are still bound by the mandates agreed by Heads of Government in SDG 14.6 and trade ministers in MC11 to deliver effective disciplines on fisheries subsidies, I intend to schedule the first cluster of meetings after the Christmas break in the week of 18 January, and to be available for consultations with delegations scheduled the week prior. Details of issues for discussion and the structure for the work in the cluster will be sent to you as soon as possible.

51. I plan to hold the second cluster in the week beginning 15 February. I cannot give you more details about the work programme because it depends on other developments, including the measures taken here in Switzerland and back home in capitals to deal with the ongoing COVID-19 pandemic, and how this pandemic evolves. But I can tell you that the intensity will not diminish until we conclude our negotiations and deliver on our mandate, and that work will be continuous with intersessional meetings in various formats. We must also keep in mind convening opportunities for Ministers in 2021, as well as scheduled meetings of our leaders to review our work in light of the SDG mandate. It will be intense.

52. Believe me, Didier and I are not doing this because there is nothing else to do. We believe in the importance of these negotiations for our Oceans' sustainability and for the WTO; we are doing this to help Members deliver a meaningful outcome as soon as possible.

53. In closing, let me say that although we should not underestimate the setback of missing this deadline, we should not be discouraged. To the contrary, we should be encouraged by the progress made, by the momentum that has been built, and by the real and unique opportunity we have to conclude this process in the near future, fulfilling the responsibility that has been tasked upon us.

54. Dear colleagues, it's time to step up.

55. I wish you an excellent, safe and restful holiday period.
