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Negotiating Group on Rules

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FISHERIES SUBSIDIES

DRAFT CONSOLIDATED CHAIR TEXT

COMMUNICATION FROM THE CHAIR

The attached document is the new fisheries subsidies draft negotiating text which I announced at the 3 May meeting of the Trade Negotiations Committee would be circulated today.

I present this text on my own responsibility as Chair of the Negotiating Group on Rules, having listened to and carefully considered Members' comments and views in all of our discussions based on the previous consolidated draft documents (RD/TN/RL/126 and Revs. 1 & 2). This new text aims at capturing the progress that we have made since RD/TN/RL/126/Rev.2 was issued, and thus much of what is in the text is very familiar. The text also suggests compromise outcomes on outstanding issues, meaning that it also contains some new language. It goes without saying that this new text is without prejudice to the position of any Member in respect of any issue.

As you know, the Director-General in her capacity as Chair of the Trade Negotiations Committee has invited Ministers to a virtual meeting on fisheries subsidies on 15 July, for the purpose of considering and taking any necessary decisions on the final draft outcome of these negotiations. So we must make very quick progress to close the remaining gaps. I see an arbitrated text containing specific proposed compromise language for those gaps as the best way to do so, as it provides a concrete basis for the focused further discussion that we need.

In keeping with our mandate, as expressed in the Ministerial Decision from MC11 (WT/MIN(17)/64) which incorporates SDG target 14.6, we are charged with creating comprehensive and effective new disciplines to address fisheries subsidies that harm sustainability. Coupled with your recurring statements in the Negotiating Group and the TNC on the need to deliver a meaningful outcome, to me this means an ambitious outcome, and this has been my guiding principle in putting forth the compromise language contained in the new text. Where there was a choice to be made, I opted for ambition, and I believe that it is incumbent upon all of us to maintain a robust ambition level as we finalize the disciplines.

I thus call on Heads of Delegation, in the new phase of the negotiations that begins now, to engage intensively on the basis of this text in a compromise-seeking, convergence-oriented mode. I also would ask you to give these negotiations priority, and to be ready to meet at short notice and in different configurations – be it small-group consultations, confessionals, or plenary sessions, including with the engagement of the DG as appropriate – as well as bilateral consultations. I appreciate and count on your flexibility, as to substance and process, as we head into this very intensive, final, phase of our work.

Note: This document is without prejudice to any Members' positions or views, whether or not reflected herein.

ARTICLE 1: SCOPE

1.1 This [Instrument] applies to subsidies, within the meaning of Article 1.1 of 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.^{1, 2}

1.2 [Notwithstanding paragraph 1 of this Article, this [Instrument] also applies to fuel subsidies to fishing and fishing related activities at sea that are not specific within the meaning of Article 2 of the SCM Agreement.]

ARTICLE 2: DEFINITIONS

For the purpose of this [Instrument]:

- (a) "fish" means all species of living marine resources, whether processed or not;
- (b) "fishing" means searching for, attracting, locating, catching, taking or harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish;
- (c) "fishing related activities" means any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea;
- (d) "vessel" means any vessel, ship of another type or boat used for, equipped to be used for, or intended to be used for, fishing or fishing related activities;
- (e) "operator" means the owner of the vessel, or any person on board, who is in charge of or directs or controls the vessel.

¹ For greater certainty, aquaculture and inland fisheries are excluded from the scope of this [Instrument].

² For greater certainty, government-to-government payments under fisheries access agreements shall not be deemed to be subsidies within the meaning of this [Instrument].

**ARTICLE 3: PROHIBITION ON SUBSIDIES TO
ILLEGAL, UNREPORTED AND UNREGULATED FISHING³**

3.1 No Member shall grant or maintain any subsidy to a vessel [or operator]⁴ engaged in illegal, unreported and unregulated (IUU) fishing.

3.2 For purposes of Article 3.1, a vessel [or operator] shall be considered to be engaged in IUU fishing if an affirmative determination thereof is made by any of the following^{5, 6}:

- (a) a coastal Member, for activities in waters under its jurisdiction; or
- (b) a flag State Member, for activities by vessels flying its flag; or
- (c) a relevant Regional Fisheries Management Organization or Arrangement (RFMO/A), in accordance with the rules and procedures of the RFMO/A and relevant international law, in areas and for species under its competence.

3.3 (a) An affirmative determination⁷ under Article 3.2 refers to the final finding by a Member and/or the final listing by an RFMO/A that a vessel [or operator] has engaged in IUU fishing.

(b) [The prohibition under Article 3.1 shall apply where the determination under Article 3.2(a) is based on positive evidence and follows due process.]

(c) [For the purpose of subparagraph (b), the coastal Member shall promptly notify the flag State Member and, if known, the subsidizing Member, of the initiation of an IUU fishing investigation [, and shall provide an opportunity to the flag State and subsidizing Member to submit information to be taken into account in the determination].]

3.4 The subsidizing Member may take into account the nature, gravity and repetition of IUU fishing committed by a vessel [or operator] when setting the duration of application of the prohibition in Article 3.1. In any case, the prohibition in Article 3.1 shall apply as long as the sanction⁸ resulting from a determination triggering the prohibition remains in force, or as long as the vessel [or operator] is listed as engaged in IUU fishing, whichever is the longer.

3.5 Where a port State Member notifies a subsidizing Member that it has clear grounds to believe that a vessel in one of its ports has engaged in IUU fishing, the subsidizing Member shall give due regard to the information received and take such actions in respect of its subsidies as it deems appropriate.

3.6 Each Member shall have laws, regulations and/or administrative procedures in place to ensure that subsidies referred to in Article 3.1, including such subsidies existing at the entry into force of this [Instrument], are not granted or maintained.

³ "Illegal, unreported and unregulated (IUU) fishing" refers to activities set out in paragraph 3 of the *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* adopted by the UN Food and Agriculture Organization (FAO) in 2001[, where applicable, as implemented under national fisheries laws and regulations, or under relevant Regional Fisheries Management Organization or Arrangement (RFMO/A) management and conservation rules and procedures].

⁴ [For the purpose of Article 3, the term "operator" means the operator at the time of the IUU fishing infraction. For greater certainty, the prohibition on granting or maintaining subsidies to operators engaged in IUU fishing applies to subsidies provided to fishing and fishing related activities at sea.]

⁵ Nothing in this Article shall be interpreted to obligate Members to initiate IUU fishing investigations or make IUU fishing determinations.

⁶ This Article shall have no legal implications regarding the competence under other international instruments of any of the listed entities to make an IUU fishing determination.

⁷ Nothing in this Article shall be interpreted to delay, or affect the validity or enforceability of, an IUU fishing determination.

⁸ Termination of sanctions is as provided for under the laws or procedures of the authority having made the determination referred to in Article 3.2, including by way of, for example: re-issuance of a suspended license; full prosecution of the matter; and delisting, forfeiture, sinking or scrapping of the vessel concerned.

3.7 Each Member shall notify to the [Committee] its laws, regulations and/or administrative procedures referred to in Article 3.6. This notification shall be made no later than the entry into force of this [Instrument]. Each Member shall promptly notify any subsequent amendments to its relevant laws, regulations and/or administrative procedures.

3.8 [The prohibition under Article 3.1 shall not apply to subsidies granted or maintained by developing country Members, including least-developed country (LDC) Members, for low income, resource-poor or livelihood fishing or fishing related activities within 12 nautical miles measured from the baselines for a period of [2] years from the date of entry into force of this [Instrument].]

ARTICLE 4: PROHIBITION ON SUBSIDIES CONCERNING OVERFISHED STOCKS

4.1 No Member shall grant or maintain subsidies for fishing or fishing related activities regarding an overfished stock.

4.2 For the purpose of this Article, a fish stock is overfished if it is recognized as overfished by the coastal Member under whose jurisdiction the fishing is taking place or by a relevant RFMO/A based on best scientific evidence available to it.

4.3 Notwithstanding Article 4.1, a Member may grant or maintain subsidies referred to in Article 4.1 if such subsidies are implemented to promote the rebuilding of the stock to a biologically sustainable level.⁹

4.4 [The prohibition under Article 4.1 shall not apply to subsidies granted or maintained by developing country Members, including LDC Members, for low income, resource-poor or livelihood fishing or fishing related activities within 12 nautical miles measured from the baselines for a period of [2] years from the date of entry into force of this [Instrument].]

ARTICLE 5: PROHIBITION ON SUBSIDIES CONCERNING OVERCAPACITY AND OVERFISHING

5.1 No Member shall grant or maintain subsidies to fishing or fishing related activities that contribute to overcapacity or overfishing. For the purpose of this paragraph, subsidies that contribute to overcapacity or overfishing include:

- (a) subsidies to construction, acquisition, modernisation, renovation or upgrading of vessels;
- (b) subsidies to the purchase of machines and equipment for vessels (including fishing gear and engine, fish-processing machinery, fish-finding technology, refrigerators, or machinery for sorting or cleaning fish);
- (c) subsidies to the purchase/costs of fuel, ice, or bait;
- (d) subsidies to costs of personnel, social charges, or insurance;
- (e) income support of vessels or operators or the workers they employ;
- (f) price support of fish caught;
- (g) subsidies to at-sea support; and
- (h) subsidies covering operating losses of vessels or fishing or fishing related activities.

⁹ For the purpose of this paragraph, a biologically sustainable level is the level determined by a coastal Member having jurisdiction over the area where the fishing or fishing related activity is taking place, using maximum sustainable yield (MSY), or alternative reference points based on indicators such as [level of depletion, or level of or trend in time series data on catch per unit effort, commensurate with the data available for the fishery]; or by a relevant RFMO/A in areas and for species under its competence.

5.1.1 A subsidy is not inconsistent with Article 5.1 if the subsidizing Member demonstrates that measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level.¹⁰

- 5.2 (a) No Member shall grant or maintain subsidies contingent upon, or tied to, actual or anticipated fishing or fishing related activities in areas beyond the subsidizing Member's jurisdiction (whether solely or as one of several other conditions), including subsidies provided to support at-sea fish-processing operations or facilities, such as for refrigerator fish cargo vessels, and subsidies to support tankers that refuel fishing vessels at sea.¹¹
- (b) Subparagraph (a) shall not apply to the non-collection from operators or vessels of government-to-government payments under agreements and other arrangements with coastal Members for access to the surplus of the total allowable catch of the living resources in waters under their jurisdiction, provided that the requirements under Article 5.1.1 are met.

5.3 No Member shall grant or maintain subsidies provided to fishing or fishing related activities outside of the jurisdiction of a coastal Member and outside the competence of a relevant RFMO/A.

5.4 [No Member shall grant or maintain subsidies for a vessel not flying the flag of the subsidizing Member.]

[ALT 1

- 5.5 (a) The prohibition under Article 5.1 shall not apply to subsidies granted or maintained by LDC Members for fishing or fishing related activities.
- (b) The prohibition under Article 5.1 shall not apply to subsidies granted or maintained by developing country Members for fishing or fishing related activities within their territorial sea.
- (c) The prohibition under Article 5.1 shall apply to subsidies granted or maintained by developing country Members, including LDC Members, for fishing or fishing related activities within their EEZ and the area of competence of RFMO/A if all the following criteria are met:
- i. the Member's GNI per capita exceeds US\$5,000¹² (based on constant 2010 US dollars) for three consecutive years;
 - ii. the Member's share of the annual global marine capture fish production exceeds 2% as per the most recent published FAO data;
 - iii. the Member engages in distant water fishing¹³; and
 - iv. the contribution from Agriculture, Forestry and Fishing to the Member's annual national GDP¹⁴ is less than 10% for the most recent three consecutive years.]

¹⁰ For the purpose of this paragraph, a biologically sustainable level is the level determined by a coastal Member having jurisdiction over the area where the fishing or fishing related activity is taking place, using MSY, or alternative reference points based on indicators such as [level of depletion, or level of or trend in time series data on catch per unit effort, commensurate with the data available for the fishery]; or by a relevant RFMO/A in areas and for species under its competence.

¹¹ With respect to Article 5.2(a), the mere fact that a subsidy is granted or maintained to vessels or operators that may be engaged in fishing or fishing related activities in areas beyond the subsidizing Member's jurisdiction shall not for that reason alone be considered a prohibited subsidy within the meaning of Article 5.2(a).

¹² US\$5,000 (based on constant 2010 US dollars) as per published data of the World Bank.

¹³ A Member is deemed not to be engaged in distant water fishing if its operators or vessels normally fish in FAO Major Fishing Area(s) that is(are) adjacent to the natural coastline of the flag State.

¹⁴ Based on the latest published data of the World Bank.

[ALT 2

- 5.5 (a) The prohibition under Article 5.1 shall not apply to subsidies granted or maintained by LDC Members for fishing or fishing related activities.
- (b) The prohibition under Article 5.1 shall not apply to subsidies granted or maintained by developing country Members for low income, resource-poor or livelihood fishing or fishing related activities within 12 nautical miles measured from the baselines [for a period of [7] years from the date of entry into force of this [Instrument]].
- (c) For subsidies other than those referred to in subparagraph (b), a developing country Member may grant or maintain the subsidies referred to in Article 5.1 for fishing and fishing related activities within its EEZ and the area of competence of a relevant RFMO/A for a maximum of [5] years after the entry into force of this [Instrument]. A developing country Member intending to invoke this provision shall inform the [Committee] in writing before the date of entry into force of this [Instrument].
- (d) If a developing country Member whose:
- i. share of the annual global volume marine capture fish production does not exceed [0.7%] as per the most recent published FAO data; and
 - ii. subsidies to fishing or fishing related activities at sea do not exceed US\$[25 million] annually

deems it necessary to apply subsidies referred to in subparagraphs (b) and (c) beyond the [7 or 5] years provided for, respectively, in those subparagraphs, it shall not later than one year before the expiry of the applicable period enter into consultation with the [Committee], which will determine whether an extension of this period is justified, after examining all the relevant needs of the developing country Member in question. If the [Committee] determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the [Committee] to determine the necessity of maintaining the subsidies. If no such determination is made by the [Committee], the developing country Member shall phase out the remaining subsidies prohibited under Article 5.1 within two years from the end of the last authorized period.]

ARTICLE 6: [SPECIFIC PROVISIONS FOR LDC MEMBERS]

6.1 [Provisions relating to LDC Members shall continue to apply for a transitional period of [X] years after the entry into force of a decision of the UN General Assembly to exclude a Member from the "Least Developed Countries" category.]

6.2 A Member shall exercise due restraint in raising matters involving an LDC Member and solutions explored shall take into consideration the specific situation of the LDC Member involved, if any.

ARTICLE 7: TECHNICAL ASSISTANCE AND CAPACITY BUILDING

[Developed country Members, and developing country Members declaring themselves in a position to do so, shall provide targeted technical assistance and capacity building assistance to developing country Members, including LDC Members and land-locked developing country Members, for the purpose of implementation of the disciplines under this [Instrument].]

ARTICLE 8: NOTIFICATION AND TRANSPARENCY

8.1 In order to strengthen and enhance notifications of fisheries subsidies, and to enable more effective surveillance of the implementation of fisheries subsidies commitments, each Member shall

- (a) provide the following information as part of its regular notification of fisheries subsidies under Article 25 of the SCM Agreement¹⁵:
 - i. type or kind of fishing activity for which the subsidy is provided; and
 - ii. catch data by species in the fishery for which the subsidy is provided; and
- (b) [to the extent possible,] provide the following information as part of its regular notification of fisheries subsidies under Article 25 of the SCM Agreement:
 - i. status of the fish stocks in the fishery for which the subsidy is provided (e.g. overfished, maximally sustainably fished, or underfished) and whether such stocks are shared with any other Member¹⁶ or are managed by an RFMO/A;
 - ii. conservation and management measures in place for the relevant fish stock;
 - iii. name and identification number of the fishing vessel or vessels benefitting from the subsidy; and
 - iv. fleet capacity in the fishery for which the subsidy is provided.

8.2 Each Member shall notify the [Committee] in writing on an annual basis of:

- (a) any list of vessels and operators that it has determined as having been engaged in IUU fishing; and
- (b) a list of any fisheries access agreements in force with another government or governmental authority, and such notification shall consist of the titles of the agreements and a list of their parties.

8.3 A Member may request additional information from the notifying Member regarding the notifications and information provided under paragraphs 1 and 2. The notifying Member shall respond to that request as quickly as possible in writing and in a comprehensive manner. If a Member considers that a notification or information under paragraphs 1 and 2 has not been provided, the Member may bring the matter to the attention of such other Member or to the [Committee].

- 8.4
- (a) A Member may only invoke Article 3.8, Article 4.3, Article 4.4, Article 5.1.1, or Article 5.5 in respect of subsidies which it has notified to the [Committee] under Article 25 of the SCM Agreement and Article 8.1 of this [Instrument].
 - (b) In addition, a Member may only invoke Article 4.3 or Article 5.1.1 if the Member has provided information called for in Articles 8.1(b)(i) and 8.1(b)(ii).

¹⁵ For the purpose of Article 8.1, Members shall provide this information in addition to all the information required under Article 25 of the SCM Agreement and as stipulated in any questionnaire utilized by the SCM Committee, for example G/SCM/6/Rev.1.

¹⁶ The term "shared stocks" refers to stocks that occur within the exclusive economic zones (EEZ) of two or more coastal Members, or both within the EEZ and in an area beyond and adjacent to it.

ARTICLE 9: [INSTITUTIONAL ARRANGEMENTS]

[9.1 There is hereby established a [Committee] composed of representatives from each of the Members. The Committee shall elect its own Chair and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this [Instrument] at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this [Instrument] or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of this [Instrument] or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.]

9.2 Each Member shall, within one year of the date of entry into force of this [Instrument], inform the [Committee] of measures in existence or taken to ensure the implementation and administration of this [Instrument], including the steps taken to implement prohibitions set out in Articles 3, 4 and 5. Each Member shall also inform the [Committee] of any changes to such measures thereafter. The [Committee] shall review annually the implementation and operation of this [Instrument], taking into account the objectives thereof.

9.3 Each Member shall, within one year of the date of entry into force of this [Instrument], provide to the [Committee] a description of its fisheries regime with references to its laws, regulations and administrative procedures relevant to this [Instrument], and promptly inform the [Committee] of any modifications thereafter. A Member may meet this obligation by providing to the [Committee] an up-to-date electronic link to the Member's or other appropriate official web page that sets out this information.

9.4 The [Committee] shall examine all information provided pursuant to Articles 3 and 8 and this Article not less than every two years.

9.5 The [Committee] shall maintain close contact with the relevant international organizations in the field of fisheries management, especially with the Food and Agriculture Organization of the United Nations (FAO) and relevant RFMO/As.

9.6 Not later than [X] after the date of entry into force of this [Instrument] and periodically thereafter, the [Committee] shall review the operation of this [Instrument] with a view to making all necessary modifications to improve the operation of this [Instrument], taking into account the objectives thereof.

ARTICLE 10: DISPUTE SETTLEMENT

The provisions of Articles XXII and XXIII of the GATT 1994 as elaborated and applied by the Dispute Settlement Understanding, and Article 4 of the *Agreement on Subsidies and Countervailing Measures* shall apply to consultations, the settlement of disputes, and remedies under this [Instrument], except as otherwise specifically provided herein.

ARTICLE 11: FINAL PROVISIONS

11.1 Nothing in this [Instrument] shall be construed or applied in a manner which will affect the rights of land-locked country Members under public international law.

11.2 Members shall take special care and exercise due restraint when granting subsidies to fishing or fishing related activities regarding stocks the status of which is unknown.

11.3 Except as provided in Articles 3 and 4, nothing in this [Instrument] shall prevent a Member from granting a subsidy for disaster relief, provided that the subsidy is:

- (a) limited to the relief of a particular disaster;
- (b) limited to the affected geographic area;
- (c) time-limited; and
- (d) in the case of reconstruction subsidies, limited to restoring the affected area, the affected fishery, and/or the affected fleet up to [a sustainable level of fishing and/or fishing capacity as established through a scientific-based assessment of the status of the fishery and in no case beyond] its pre-disaster level.

- 11.4
- (a) This [Instrument], including any findings, recommendations, and awards with respect to this [Instrument], shall have no legal implications regarding territoriality or delimitation of maritime jurisdiction.
 - (b) A panel established pursuant to [Article 10 of this Instrument] shall not entertain any claim that would require it to address any issues of territoriality or delimitation of maritime jurisdiction that is contested by a party or a third party.
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