WORLD TRADE ORGANIZATION

TN/RL/W/276/Add.1

11 May 2021

(21-4029)

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Negotiating Group on Rules

Original: English

FISHERIES SUBSIDIES

DRAFT CONSOLIDATED CHAIR TEXT

CHAIR'S EXPLANATORY NOTE ACCOMPANYING TN/RL/W/276

Addendum

The attached document is the Chair's explanatory note accompanying the new fisheries subsidies draft negotiating text circulated in TN/RL/W/276. The content of the explanatory note was delivered orally by the Chair when he presented the text at the 11 May 2021 meeting of the Negotiating Group on Rules at the level of Heads of Delegation.

INTRODUCTION

1. Good morning colleagues. First of all, thank you for joining me this morning. As I announced on 3 May in my statement to the Trade Negotiations Committee and in my e-mail to all delegations, the objective of today's meeting is for me to present a new draft text to serve as the basis for work toward a clean text to present to Ministers in July, for a meeting focused on fisheries subsidies. The new draft text was sent to all of you a few minutes ago, so that it will be easier for you to follow my detailed presentation of its contents. Before getting to the substance, let me remind you of how I intend to conduct the meeting. As I indicated to you by e-mail at the end of last week, I am simply presenting the text this morning. This is not a meeting for substantive discussion, and therefore I will not be opening the floor. Once I have presented the text and discussed some next steps, I will close the meeting.

2. Coming back now to the substance, as you know, the Ministerial meeting is now set for 15 July – the invitations went out last Friday. This leaves us just two months to finish. The shared sense of urgency is palpable, and we need to harness that sense to finally agree to the compromise landing zones that will represent the ambitious and balanced outcome that Ministers in Buenos Aires mandated us to find, to make a substantial and tangible contribution to the health of our shared oceans. The health of our very stressed planet is at stake – we cannot afford to let her down.

3. These are the imperatives that have been in my mind as I put the new text together. I now present this text to you as my most sincere and honest attempt, based on everything that I have heard from you in the nearly six months since circulating RD/TN/RL/126/Rev.2 ("126/Rev.2"), at an appropriate and workable balance between ambition and necessary flexibility. And to be clear, where the choice was between more ambition and less, I opted for more, given the mandate under which we are working and your recurring statements in the Negotiating Group, as well as in the TNC, on the need to deliver a meaningful outcome. I can only strongly urge all Members to approach the new text and this new phase of our work from the same place, and to resist the temptation of resorting to a lowest-common-denominator cop-out that makes no appreciable change to the status quo.

4. Of course I do not pretend that this text represents the final draft for Ministers. Rather it is intended as the crucial first step in getting there. So I ask for your careful attention this morning as I walk you through each provision of the text in detail, particularly where I am proposing compromise language on the areas where differences have persisted. I also ask all delegations, in reviewing the text in detail in Geneva and in capitals, to approach it with an open mind and with a view to using it as the basis for our engagement in this new and intensive phase of our negotiations.

5. Regarding the nature of this text, you will see that the title refers to it as a "Chair text", and this is because I have prepared it on my own responsibility. While many provisions are very familiar as they are transferred to the new text with little or no amendment from 126/Rev.2, other provisions are new, and represent my attempt at balanced compromise suggestions on issues where convergence has not yet emerged. And given the time pressure that we are under, I see such an arbitrated text, proposing specific compromise language where gaps remain, as the best basis for the focused further discussion that is needed for us to be able close the gaps in the time available.

6. In this regard, let me be clear that the new text is not a consolidation of proposals, and if we were to start treating it as such, with every new suggestion copy-pasted in, we would be taking a giant step backward. We already developed such a compilation text a couple of years ago, and our process moved beyond the point where that document provided a workable basis for discussion. Thus, we will need to be very disciplined as we move forward in our work in respect of amendments to the new text. We need to bear in mind at all times that we are creating a clean text for Ministerial consideration. The operating principle therefore must be that changes to the text are in the direction of reducing gaps and building more convergence on the points they address. This does not mean that new textual suggestions are not welcome. To the contrary. In fact, over the weekend I received two, and these have now been circulated as RD/TN/RL/135/Rev.1 and RD/TN/RL/139 at the request of their proponents. As our work moves forward between now and the July Ministerial meeting, we can expect these and other suggestions from Members to form part of our debates aimed at finding ever-greater convergence.

PRELIMINARY MATTERS

7. Before turning to the substance of the new text, I have few preliminary remarks for the whole text.

8. First, it goes without saying that everything in this text is without prejudice to any Member's positions or views. This means that the entire document is effectively in square brackets and nothing is agreed until everything is. This of course applies where square brackets have been removed. As I will elaborate further in the context of relevant changes, brackets can and do serve a number of different purposes in negotiating texts. Depending on the specific context, removal of a set of brackets does not necessarily convey that there was full agreement on the piece of text in question, recalling that the whole text remains in brackets. This also applies to textual proposals, suggestions or ideas that are not reflected in the text. Given that the whole text remains in brackets, it means that nothing outside of the text is rejected. In fact, one of the purposes of my explanations today is to reflect some of these ideas so that we can move forward with all these in mind.

9. Second, this text reflects the collective work of the Negotiating Group. The sources of the language used on the various issues are Members, whether reflected in a proposal, or facilitator's work, or expressed during our meetings and consultations. That said, a simple copy-paste of language from different sources is neither possible nor helpful at this point in moving us forward or closer to convergence. This is particularly important for this text which is meant to be the springboard for the complete and clean text that will be presented to Ministers, with at most only very few choices left for them to decide. This means that while this text needs to reflect our work, it also has to be coherent and consistent. To this end, some drafting adjustments were necessary when bringing together language and ideas from different sources. Likewise, as mentioned, in some areas where views have remained divergent, I have made an attempt at possible middle-ground language and/or clear choices.

10. Finally, as you all know, the eventual form of the new disciplines remains to be decided, whether an annex to the SCM Agreement or a stand-alone new agreement. This will have some implications on drafting, but is not an issue that prevents us from engaging on the substance. In areas where the drafting depends on the ultimate form of the disciplines, we nevertheless have been able to make progress on the understanding that the drafting could be changed depending on the final outcome. While the new text continues to more or less reflect the form of a standalone agreement, this is for convenience only, and is without prejudice to the final decision that will be taken on this issue.

ARTICLE 1: SCOPE

11. Turning now to the text, Article 1 sets out the scope of the fisheries subsidies disciplines. No changes have been made compared with the same provisions in 126/Rev.2. There are two paragraphs in this Article; in paragraph 1, the scope is defined as 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; and paragraph 2, states that the scope also extends to fuel subsidies that are not specific. Paragraph 2 remains in square brackets to indicate that it is an issue to be resolved at the political level.

12. There are also two footnotes to paragraph 1, neither of which has been changed from 126/Rev.2: 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.

13. To recall, the texts for both paragraphs, as well as footnote 1 to paragraph 1, reflect the work of the facilitator for this issue and have remained unchanged since they were consolidated in the original draft document last June, except for some minor editorial changes. Footnote 2 was added in 126/Rev.2 to reflect the broadly shared understanding that payments from one government to another government under access agreements would not constitute subsidies for the purpose of these disciplines.

ARTICLE 2: DEFINITIONS

14. Article 2 contains definitions for five terms that apply throughout the disciplines, and Members have generally supported these definitions as they appear in the text. The definitions for three terms in (b), (c) and (d) for "fishing", "fishing related activities", and "vessel" were based on the facilitator's work. The definition of "fish" in (a) was added in RD/TN/RL/126/Rev.1 ("126/Rev.1") after a dedicated discussion on this topic. All four terms and definitions were taken directly from the *Agreement on Port State Measures* (PSMA), with the exception that in 126/Rev.2, square brackets were placed around the phrase "as well as the provisioning of personnel, fuel, gear and other supplies at sea" in the definition of "fishing related activities" in subparagraph (c), although this language is part of the corresponding definition in the PSMA. Since 126/Rev.2 was circulated, views have converged that we should not alter terms and definitions taken from the PSMA, so as to avoid any inadvertent effects. On this basis the square brackets have been removed in this current version.

15. Concerning the general definition of the term "operator" in 2(e), while this was added to Article 2 in 126/Rev.1, it was not new language, as it had appeared in both facilitators' documents and in the first draft consolidated document, RD/TN/RL/126 ("126"). The only thing that changed in 126/Rev.1 was the placement of this general definition, as in 126 it appeared in a footnote in the IUU fishing pillar. The placement in Article 2 reflects the prevailing view that all definitions pertaining to the disciplines as a whole should be consolidated in Article 2. In this vein, only the definitional elements pertaining to operators in the specific context of the IUU fishing pillar remain in that pillar.

16. Thus, other than the removal of the square brackets around the last phrase of subparagraph (c), the text in Article 2 remains unchanged from that in 126/Rev.2.

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

Overall

17. Article 3 contains disciplines on subsidies to IUU fishing. The main source of the draft is the latest work of the facilitator for this pillar that was circulated on 10 April 2020 in document RD/TN/RL/113/Rev.2. That work was reflected fully in 126, apart from some minor changes for overall consistency. Since then, the Group has dedicated considerable time and efforts on almost all aspects of this pillar, and our progress has been captured in each revision of 126, and again in this new text.

Article 3.1

18. Article 3.1 sets forth the prohibition for subsidies to a vessel or operator (with the term "operator" in brackets) engaged in IUU fishing. Footnote 3 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.* In 126/Rev.2, the prohibition in paragraph 1 referred to "illegal, unreported *or* unregulated" fishing, which was changed to "illegal, unreported *and* unregulated" fishing in this new text. The change was made to keep consistency with the terminology of the Plan of Action.

19. Other than this, Article 3.1 and footnote 3 remain unchanged from 126/Rev.2. Footnote 4 to Article 3.1, which defines the term "operator" for the purpose of the IUU fishing discipline, also remains unchanged from 126/Rev.2, with one exception of adding the word "fishing" after "IUU", such that it now reads "IUU fishing infraction". This purely technical change – adding the term "fishing" wherever "IUU" appears without being followed by that term – was made throughout the document. In addition, the term "operator", as well as footnote 4 defining "operator", remain in square brackets throughout this Article, as Members' views continue to diverge on this issue.

Article 3.2

20. Article 3.2 provides that, for the purpose of triggering the subsidy prohibition in Article 3.1, a vessel or operator would be 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. While the basic structure of using the IUU fishing determination as a trigger for the subsidy prohibition in Article 3.1 has not changed from the

facilitator's work, the text has evolved in a number of important aspects based on the Group's work since then.

21. In particular, for this provision and throughout our work on Article 3 in general, concerns have been raised regarding the relationship of the fisheries subsidies disciplines in this pillar and Members' IUU fishing regimes. In respect of Article 3.2, two specific concerns were discussed: first, whether the list of entities under Article 3.2 implied any hierarchy among the entities and their respective IUU fishing determinations; and second, whether the list could inadvertently affect the operation of non-WTO instruments on IUU fishing, in particular in respect of the listed entities.

22. On the issue of hierarchy, discussion made clear that no Member intended the list to create or imply a hierarchy among the listed entities and their determinations. As such, an affirmative determination that a vessel or operator had engaged in IUU fishing by any of the listed entities serves as a trigger for the subsidy prohibition, whether or not another listed entity might disagree, or might make a contrary finding that IUU fishing had not taken place. This view is clarified in a number of places in the current text:

- The original text of Article 3.2 and Article 3.3 in 126 referred to a "determination", and this was changed to an "affirmative determination" in 126/Rev.2. As explained when this change was introduced, this was to clarify that the "determination" referred to in Article 3.2 means only the determination that a vessel or operator *has engaged* in IUU fishing.

- The chapeau of Article 3.2 also states that an affirmative determination may be made by "*any*" of the entities listed thereunder.

- And this is confirmed again in Article 3.3(a), which defines "affirmative determination" as the final finding that a vessel or operator *has engaged* in IUU fishing.

23. In this regard, during our recent discussions on the IUU fishing pillar, some Members raised a concern that a footnote to subparagraph (c) that appeared in 126/Rev.2 would, in spite of all of these other clarifying provisions, create a hierarchy among some of the listed entities. This footnote stated that where there are overlapping IUU fishing determinations by a coastal Member and a RFMO/A, the coastal Member determination should prevail. Some Members agreed, while others thought that RFMO/A's determination should prevail. But many Members, including those with views on the substance of the footnote, preferred to simply remove this footnote, on the basis that it creates a hierarchy among IUU fishing determinations, that such questions would need to be dealt with internally by the RFMO/A and the coastal Member in question, and that leaving this footnote in the text might well have inadvertent implications for the operation of international fisheries instruments. Accordingly, this footnote does not appear in the new text.

24. As to the competence of any entity as a determiner of IUU fishing under existing international law, our discussions have made clear that no Member intends the new disciplines to affect this, and in particular to endow new competences on any entity. In this regard, many Members supported footnotes 5 and 6 to the chapeau of Article 3.2. The first of these appeared in 126, and the second was added in 126/Rev,.2. Footnote 5 provides that Members are not obliged to initiate IUU fishing investigations or make IUU fishing determinations; and footnote 6 provides that Article 3.2 has no legal implications regarding the competence of any entity under other international instruments. Thus, this text remains unchanged from that in 126/Rev.2 except for the addition of "fishing" following the term "IUU" as I just discussed.

25. This discussion in turn has informed the Group's discussion of each of the entities listed in Article 3.2. Concerning the coastal Member and RFMO/A in subparagraphs (a) and (c), Members agree that these entities are competent authorities under international fisheries law to make IUU fishing determinations. Based on this discussion, these two entities are reflected in the new text as they were in 126/Rev.2.

26. However, one textual change was made to subparagraph (c), which now qualifies the determination by an RFMO/A as a determination made in accordance with "relevant international law". This qualification did not appear in the corresponding provision of 126/Rev.2, but instead was part of the positive evidence and due process requirements in Article 3.3(b). During our focused work on that provision, Members generally agreed that the "relevant international law" condition is pertinent to the RFMO/As, which are international organizations by definition, created and regulated

by specific international instruments. In fact, the "international law" language was proposed as a condition to determinations of RFMO/As in a number of proposals by Members. In order to clarify this link between the RFMO/As and the "relevant international law" standard, this language thus has been moved to Article 3.2(c).

27. On the flag State Member in subparagraph (b), I also did not hear any Member saying that a flag State Member is not competent to make an IUU fishing determination regarding vessels flying its flag. Rather, there was considerable discussion on the specific circumstances under which such competence would arise. This is an important question, but it is separate from the issue of whether a flag State Member has competence under any circumstance. As Members generally agreed during these debates that a flag State Member is competent under certain circumstances to make IUU fishing determinations, and concerns over the issue of hierarchy were addressed, the square brackets around subparagraph (b) were removed in 126/Rev.2 to reflect this broadly shared, if not fully agreed, understanding. Regarding whether more is needed here, my sense is that it is best to use generic language such as in footnote 6, as in the current and previous texts, rather than trying to capture specific nuances of different situations.

28. Let me here elaborate a bit on how square brackets are used in the new text, recalling that the entire text is in mental square brackets as we know that nothing is agreed until everything is. As I already explained last June, when introducing the first consolidated draft document, the square brackets within the text serve different purposes. Some of these are:

- Simply to highlight some terms that we need to change later based on more general discussions, like the terms "Instrument" and "Committee";

- To indicate where there are binary choices as to whether certain text should be kept or not;

- To provide clear choices between alternative texts; and

- For placeholders and to add some language as an elaborative form of a placeholder, with an expectation that the text will be added or revisited, or that the placeholder will be removed.

29. So these more specific brackets are used for various purposes and as in the previous texts, I have made some choices about when to remove or retain brackets, to convey a sense of how the discussions have been progressing. And of course unbracketed text is not carved in stone as if it were fully agreed. To the contrary, in the new text certain changes have been introduced to unbracketed language.

30. This brings me to two entities that appeared in brackets in the previous documents, namely the subsidizing Member and the port State Member. You will see that neither of these appears in the new text. Regarding the subsidizing Member, Members generally agreed that such Members would have competence to determine IUU fishing in their own waters and in respect of vessels flying their flag – that is, when acting in their capacity as a coastal State or a flag State. Of course, these situations already are covered by subparagraphs (a) and (b). This would leave the situation in which a subsidizing Member is providing subsidies to a vessel flying a flag other than its own. As there already is a draft provision in Article 5.4 – which I emphasize is in square brackets – that addresses this situation explicitly and would not allow this situation to arise, for the purposes of the new text there seemed to be no need also to deal with this issue in the IUU fishing pillar. Once we have completed the discussion of Article 5.4 we could return if necessary to the issue of "the subsidizing Member" in the context of the IUU fishing pillar.

31. Concerning the reason for not including port State Members in the list under Article 3.2 of the new text, I recall that there was considerable discussion of whether a port State Member acting as such - rather than as a coastal State Member or a flag State Member – has ***any*** competence to make IUU fishing determinations under ***any*** circumstances. In this regard, a number of Members were concerned that listing entities that may not have any competence to make IUU fishing determinations would undermine the principle, supported by all Members and reflected in footnote 6, that the disciplines should not have any implications for international fisheries law.

32. That said, Members generally recognize that port State Members do have an important potential role to play in eliminating subsidies to IUU fishing. New language, set forth in Article 3.5

of the new text, is intended to capture this. I will discuss that new language when we get there, but let me highlight for now that the importance of port State Members is addressed in the new text.

Article 3.3

33. Turning now to Article 3.3. The elements of this provision were taken from the facilitator's work and reflected in document 126, with some structural changes aimed at clarifying and narrowing down the issues. That drafting then was reformulated into three subparagraphs in 126/Rev.1, and that basic structure remains unchanged in the new text of Article 3.3, which:

- (a) defines what an "affirmative determination" is for the purpose of Article 3.2.
- (b) requires that an IUU fishing determination be based on positive evidence and follow due process for it to have the effect on the subsidizing Member of triggering the prohibition; and
- (c) clarifies (b), by requiring coastal Members to notify the initiation of an IUU fishing investigation to the flag State Member or, if known, the subsidizing Member, and to provide them with an opportunity to submit information in the investigation.

34. As you know, we have dedicated a lot of work to this set of provisions, and to subparagraph (b) in particular, including most recently during our April cluster at the HoD level, and during the HoDs meeting held in December last year. Thanks to your hard work, we have made important progress in this difficult area, which is reflected in the new text.

35. Subparagraph (a) has been, and continues to be, broadly acceptable to Members, including the addition of "affirmative" to qualify the term "determination" that was made in 126/Rev.2. As such, the text of Article 3.3(a) remains unchanged. Members also supported footnote 7 to subparagraph (a), which is intended to ensure that our work does not have any unintended impact on IUU fishing determinations as such. In this footnote, one change was made in the current text based on the textual suggestion aimed at preventing the discipline on subsidies to IUU fishing having the effect of delaying an IUU fishing determination. As it was clear during our discussions that Members agree that our work should not have any such impact, this is now clarified in the text. With this change, the footnote now reads "Nothing in this Article shall be interpreted to delay, or affect the validity or enforceability of, an IUU fishing determination."

36. Subparagraph (b) requires that IUU fishing determinations shall be based on positive evidence and follow due process in order to trigger the subsidy prohibition. In the facilitator's work these requirements applied to IUU fishing determinations made by a coastal State Member, an RFMO/A, and/or a port State Member, with all of these entities in brackets. As discussed earlier, the new text of Article 3.2 no longer lists the port State Member, and therefore the reference to it has been removed from Article 3.3(b).

37. As for RFMO/As, no Member has contested that these entities operate under relevant international law, or that the RFMO/A's own rules and procedures do not already incorporate procedural and evidentiary standards applicable for their IUU fishing determinations. All of these conditions are now reflected in the text of Article 3.2(c). In addition, some Members expressed concern that applying to RFMO/As independent standards such as positive evidence and due process could inadvertently affect international fisheries law and the role that RFMO/As play in it. Based on all of these views, I have removed the reference to RFMO/As in the current text of Article 3.3(b). But let me also highlight that this does not mean that there was full agreement on this point. I am aware that some Members do want the positive evidence and due process standard to apply to RFMO/As, and we will of course keep this in mind as we continue our work.

38. As a result of these changes, Article 3.3(b) now applies only to the determinations made by the coastal Member under subparagraph (a) of Article 3.2. That brings me to the bracketed reference to "in accordance with relevant international law" that appeared in the text of Article 3.3(b) in 126/Rev.2. In the new text, this language does not appear in this provision, but as I indicated it has been moved to Article 3.2(c), the listing of RFMO/As as entities making IUU fishing determinations. The reason for not also retaining this language in Article 3.3 (b) is precisely because while many Members viewed the "relevant international law" standard as clearly applicable to RFMO/As, there were concerns that also applying this standard to coastal Members would create uncertainty, including as to how it would interact with the concepts of positive evidence and due process that

also would apply in respect of those Members. It also was clear in the discussions that the advocates of Article 3.3(b) seek to ensure that all IUU fishing determinations, including those by coastal Members, be based on positive evidence and follow a certain minimum procedural standard before the subsidy prohibition is triggered. To reflect all of these views, Article 3.3(b) in the new text applies the positive evidence and due process standard to coastal Member determinations, and the "relevant international law" standard to determinations by RFMO/As, via Article 3.2(c).

39. We also have had considerable discussion on the specific term "due process" used in Article 3.3(b). In document 126, the first draft consolidated document, Article 3.3(b) contained a more prescriptive "fair, transparent and non-discriminatory" standard. In our subsequent discussions it became clear that some Members were concerned over one or more of the elements in this formulation. On the other hand, no Member said that they do not follow due process in making IUU fishing determinations, so the language - "due process" - was introduced in 126/Rev.1 to capture Members' basic common ground on this point. While since then the discussions have gone back and forth among a changing range of alternative formulations suggested by Members, in the April cluster many Members also indicated that they could accept the "due process" formulation if no agreement could be found on anything else. And to date there has been no convergence around any of the alternatives that have been put forward. In the new text, I thus have retained the unelaborated term "due process", as it still seems to capture the basic common ground.

40. Our work on "due process" also has been very useful for our understanding of subparagraph (c), which requires that an IUU fishing investigation or determination be notified to the flag State Member or, if known, to the subsidizing Member, and that such a Member should be given an opportunity to submit information. Specifically, many Members considered that the requirement in (c) is a part of the requirement in (b). In this regard, some textual suggestions were made for a requirement similar to that in (c) as a trigger for the subsidy prohibition. This showed that many Members consider the due process in (b) and the process of notification and submission of information in (c) to be closely related, and to work together in triggering the prohibition. This progress is now reflected in the current text of subparagraph (c), with the addition of "For the purpose of subparagraph (b)" in the beginning.

41. Another change from 126/Rev.2 is that the square brackets around the term "subsidizing Member" in subparagraph (c) have been removed. Our work so far has clarified that the concern here is that a subsidizing Member may not be known. No Member said that the subsidizing Member should not be notified where it is known. So, the concern has been addressed by clarifying that the requirement applies only where the subsidizing Member is known. In this regard, the text now refers to the flag State Member and, "if known", the subsidizing Member. With this change, the phrase in 126/Rev.2 "If the flag State [or subsidizing Member] is known" has become redundant, so it was removed. In addition, consistent with this, the last part of subparagraph (c) now provides that the flag State and the subsidizing Member should be notified and provided the opportunity to present information. Finally, a few other purely editorial changes to correct the grammar.

42. Before I conclude on Article 3.3, I would like to underscore that subparagraphs (b) and (c) remain in square brackets. As you are all aware, one long-standing position of certain Members is that the disciplines should contain no standard relating to coastal Members' IUU fishing determinations. The crux of this view is that the final findings of IUU fishing made by a competent national authority should be fully respected and taken at face value for triggering the subsidy prohibition, and that language such as positive evidence and due process should not be included as it could be used to second guess such findings. There is an equally strongly-held view that such procedural guarantees are required for subsidizing Members to accept such determinations as a trigger of the prohibition. Those taking this position have indicated that the aim of Article 3.3(b) and (c) is not to affect an IUU fishing determination as such, but only to qualify when such a determination would trigger the subsidy prohibition on another Member. Having said that, however, it is my reading that with the current language, WTO panels would not be reviewing the substance of an IUU fishing determination, but instead would focus only on the procedural requirements set forth in the disciplines.

43. Because this issue remains the subject of important differences of view, the provisions remain in the square brackets in the new text. In this regard, I would like to thank all Members for engaging in the discussions of these provisions on a without prejudice basis, which has helped us to clarify and narrow down the choices.

Article 3.4

44. Article 3.4 provides that the minimum duration of the subsidy prohibition is the duration of the sanction resulting from the relevant IUU fishing determination, or the duration that a vessel or operator remains listed as engaged in IUU fishing, whichever is the longer. Subject to this minimum duration, the subsidizing Member may take into account the nature, gravity and repetition of IUU fishing in setting the duration of the prohibition. This text is based on two separate provisions in 126/Rev.2: one on the nature, gravity and repetition, or seriousness of IUU fishing; and the other on the duration of the prohibition.

45. In 126/Rev.2, the first of these two provisions provided that the subsidizing Member could take into account the "nature, gravity and repetition", or as an alternative the "seriousness", of the IUU fishing incident in applying the prohibition. This has been referred to in the discussions as "proportionality". During the dedicated sessions on this text, Members broadly agreed that proportionality between the IUU fishing at issue and the subsidy prohibition is important, but they had different views on how it should be reflected in the disciplines. For some Members, proportionality is taken into account by the competent authorities in making the IUU fishing determinations, as well as in determining the appropriate sanctions or in the decision to list a vessel or operator as having engaged in IUU fishing. Thus, these Members were of the view that a sanction or listing of a vessel or operator resulting from an affirmative determination of IUU fishing should be considered proportional to the offense, because the minimum duration of the prohibition is a function of the duration of the sanction, which can be expected to reflect the seriousness of the violation as perceived by the determining entity.

46. Other Members, recalling that a subsidizing Member would have to remove certain subsidies as a result of another Member's or entity's IUU fishing determinations, considered that the subsidizing Member should be able to take proportionality into account when applying the subsidy prohibition. Many Members opposed this approach on the basis that it would amount to a *carte blanche* veto power for the subsidizing Member that would render the discipline ineffective. From this discussion, it was clarified that no Member intends to use proportionality to continue subsidizing IUU fishing.

47. Based on all these views, a possible compromise formulation emerged from our most recent meeting, which is the basis of the language reflected in the current text. This formulation would allow the subsidizing Member to take proportionality into account in setting the duration of the subsidy prohibition. This clarifies that subsidies to IUU fishing are to be prohibited, and that it is not up to the subsidizing Member to decide whether to apply the prohibition based on its own judgement of the seriousness of the infraction. Linking proportionality only to duration is consistent with our mandate to eliminate subsidies to IUU fishing, while leaving some room for the subsidizing Member to consider proportionality. In the meantime, proportionality also is factored into the IUU fishing determination by the entity that makes it, because the duration of the subsidy prohibition is at least the duration of the sanction or listing resulting from the IUU fishing determination.

48. To reflect this new formulation, some additional textual changes from the corresponding text in 126/Rev.2 also were necessary. First, the previous bracketed footnote listing IUU fishing infractions that should always trigger the application of the prohibition does not appear, as it is no longer necessary under the new formulation where an IUU fishing determination in every case triggers the subsidy prohibition. In addition, the minimum duration of "[X] months" does not appear, based on the clarification that duration is to be based on the duration of the listing or sanction resulting from IUU fishing determinations.

49. Before I conclude on this provision, there are two more changes that I would like to note. First, the new text refers to "nature, gravity and repetition" of IUU fishing, whereas 126/Rev.2 also contained the "seriousness" as an alternative. So far, Members seem to consider these two formulations to be equivalent and I heard no objection to "nature, gravity and repetition", which is more descriptive. Finally, the square brackets around footnote 8 on the termination of sanctions also have been removed, as no Member has raised any concern on this text during our dedicated sessions on these topics.

Article 3.5

50. As I indicated in the context of Article 3.2, Article 3.5 is a new provision aimed at setting out a role that port State Members could play in delivering on our mandate to eliminate subsidies to IUU fishing. As I mentioned, the port State Member does not appear in the list of entities that can make IUU fishing determinations under Article 3.2 for the purpose of the subsidy prohibition. Our discussions indicated that Members recognize the unique position of port State Members, and Article 3.5 captures this by providing 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 indeed engaged in IUU fishing, the subsidizing Member is required to give due regard to this information and take appropriate actions, in respect of its subsidies.

Articles 3.6 and 3.7

51. Article 3.6 is an obligation to implement relevant laws, regulations and/or administrative procedures to ensure that the prohibited subsidies are not granted or maintained. Article 3.7 requires notifications of such instruments. The texts of these provisions fully reflect the facilitator's work, with some minor adjustments and changes for coherence and consistency. In the new text, these provisions are identical to their counterparts in 126/Rev.2 other than a few technical changes, such as changing the references to "paragraphs" to "Articles" and simplifying the placeholder.

52. As some Members have pointed out, while other provisions discussed so far are about what happens after IUU fishing takes place, these provisions are about preventing subsidies to IUU fishing in the first place. In this sense, these provisions complement the rest of the other provisions and are essential for the completeness of the discipline. So far, I have heard no serious concerns about these provisions so I have retained them in the new text.

53. In 126/Rev.2, along with these two provisions, there was another provision that read "Each Member shall ensure that this provision is effective in securing compliance, discouraging infractions and depriving offenders of benefits accruing from their IUU fishing activities". This language does not appear in the new text because Members broadly agree that our work should focus on subsidies, not IUU fishing regimes as such. In addition, this provision was first introduced as a safeguard to previous proportionality formulations that would have allowed the subsidizing Member to opt not to apply the prohibition. Given that this option does not exist in the new text, this safeguard language has been removed as it no longer serves the intended purpose.

Article 3.8

54. Article 3.8 provides for special and differential treatment (SDT) for the IUU fishing pillar. It provides a timebound exemption from the prohibition under Article 3.1 for subsidies granted or maintained by developing country Members including LDC Members for low income, resource-poor or livelihood fishing and fishing-related activities within 12 nautical miles from the baseline. As a starting point for discussing this provision, I have used two years as the applicable time period.

55. As you know, we have devoted considerable time and efforts to the issue of SDT. With respect to the IUU fishing pillar, our work has clarified that no one intends to use SDT to continue subsidizing IUU fishing. Instead, the proponents have sought SDT in the IUU fishing pillar so that they could bring their subsidy programmes into compliance, and to provide the opportunity for subsistence, artisanal and small-scale fishers to comply with the relevant rules.

56. To this end, the proposal in TN/RL/GEN/200/Rev.1 provided for an exemption in respect of unreported and unregulated fishing, for fishing within 12 nautical miles other than fishing by large scale industrial fishing vessels. This proposal was the most complete and comprehensive proposal on SDT at the time the draft consolidated document in 126 was circulated last June, and this text continued to be reflected in 126/Rev.2. In our work based on this language, a number of concerns have been raised:

- First, some Members consider that IUU fishing is a single concept, and that unreported and unregulated fishing cannot be treated separately from the whole.

- Many Members also have recalled that in spite of many discussions, Members have not agreed on any definition of "large scale industrial" fishing. Here, the discussion we have had on subsistence, artisanal and small-scale fishing has been informative, where the idea of using certain criteria to distinguish large-scale and small-scale fishing has emerged.

- Finally, while a number of Members consider that there should be no SDT whatsoever in the IUU fishing pillar, other Members consider that a timebound exemption would be appropriate for the reasons explained by the SDT proponents, namely to facilitate compliance of the small-scale sectors. Permanent exemptions, on the other hand, were opposed by many Members on the grounds that this would be inconsistent with the mandate and would undermine sustainability.

57. Based on these views, the new text of Article 3.8 is formulated as a timebound exemption that applies to IUU fishing. This covers UU fishing as requested by proponents, while keeping IUU fishing as a single concept intact. The new language also replaces the term "large scale industrial fishing" with the criteria that emerged during our discussion on subsistence, artisanal or small-scale fishing, which are low income, resource-poor and livelihood fishing. Another criterion that has emerged from that discussion was the geographic limit of 12 nautical miles, which had been reflected in a footnote in 126/Rev.2. As such, the text in the footnote remains unchanged, and has been moved to the main text of Article 3.8 for clarity. Finally, with this provision for a timebound exemption, there is no placeholder for a transition period such as appeared since 126 was circulated.

58. Note also that this Article remains in square brackets given, as noted, that some Members continue to question whether any SDT flexibility is necessary or warranted in the IUU fishing pillar.

ARTICLE 4: OVERFISHED STOCKS (OFS)

Overall

59. Article 4 contains disciplines on subsidies regarding overfished stocks. Up until now, the drafting of this Article had remained essentially the same since it was first introduced in document 126. The reason was that many Members had pointed out that the work on overfished stocks would be more focused and productive once there was more clarity on the disciplines in the overcapacity and overfishing pillar. As our work on the overcapacity and overfishing discipline had significantly evolved, we revisited the overfished stocks pillar in April.

60. In that discussion, the common thread regarding the general structure of Article 4, was consistency and coherence. A number of Members pointed to the need to review the drafting in Article 4 in the light of what we now have in Article 5, to ensure that the two provisions use any common terminology in a consistent way and do not work at cross purposes. A number of Members also pointed to the need to avoid redundancy as much as possible in how the disciplines treat subsidies related to overfished stocks and subsidies contributing to overcapacity and overfishing, given their conceptual links.

61. In relation to this, I heard different views concerning the merits of this prohibition. Some delegations consider that Article 5 already sufficiently covers the overfished stocks issue; some consider that Article 5 should be adjusted to explicitly address overfished stocks; while others see merit in maintaining Article 4 as a separate pillar on overfished stocks. Nevertheless, our discussions showed that, wherever such disciplines are placed, many delegations see the issue of overfished stocks as qualitatively different from that of overcapacity and overfishing, and in need of stricter disciplines given that the stocks are in an already-overfished condition. In the new text, Article 4 is maintained as a separate provision.

Article 4.1

62. Article 4.1 contains the main discipline of the overfished stocks pillar. It is a straightforward prohibition without conditionalities, in a single sentence. This is a departure from the text in 126/Rev.2, which in turn was taken from the facilitator's work. In that previous version, the prohibition would be triggered only when certain situations related to an overfished stock were

present: i) lack of recovery of the overfished stock, or ii) continuous reduction in the level of that overfished stock.

63. I recall that Members had a robust discussion on whether these additional conditions were needed. Overall I heard three main views opposing the inclusion of these parameters:

- First, many Members noted that it is difficult to measure the parameters "continuous reduction" and "lack of recovery". They considered that simply using the existence of an "overfished" condition as the trigger for disciplines would create a consistent, verifiable and predictable framework of implementation because the term "overfished" is scientifically defined and widely used in fisheries science. These Members noted that the difficulty of measuring the parameters "continuous reduction" and "lack of recovery", which are not scientifically defined, would make it difficult to ensure predictable implementation of overfished disciplines based on these parameters.

- Second, some Members pointed out that the notion of being able to provide subsides that promote the rebuilding of an already overfished stock is already captured in Article 4.3, which arguably was the intention behind including the parameters "continuous reduction" and "lack of recovery".

- Third, some Members noted that a simple prohibition in this Article is important as a signal that the disciplines concerning overfished stocks are more stringent than, and address a distinct situation from, the disciplines on overcapacity and overfishing.

Article 4.2

64. Turning to Article 4.2. This provision defines that a fish stock is considered overfished if 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, based on the best scientific evidence available to it.

65. This is an important revision to the previous language in 126/Rev.2 which contained two alternatives: one where a fish stock is overfished if it is recognized as such by a Member with jurisdiction for the area or a relevant RFMO/A; and the other where a fish stock is overfished when it is at such a low level that mortality from fishing needs to be restricted to allow the stock to rebuild to a level that produces maximum sustainable yield (MSY) or an alternative reference point (ARP). In both alternatives, the overfished status would be based on the best scientific evidence available to and recognized by the Member in question, or by a relevant RMO/A in the first alternative.

66. I recall that Members expressed different views and concerns on the concepts in both alternatives:

- Regarding the second alternative (the "ALT2" text), some were concerned that this provision could be used to call Members' stock assessments into question before a WTO panel. They thus preferred the first alternative (the "ALT1" text), based on competent authorities' stock assessments and determinations of overfished status;

- Regarding the ALT1 text, some were concerned that this approach would make the determination of overfished stocks a self-judging standard for the purpose of the subsidy prohibition. Concerned that this would make the discipline ineffective, they preferred the ALT2 text, as setting out an objective standard for what overfished condition means;

- Some Members saw merits in both of these views and thought that they could be combined to strike an appropriate balance between the need for an effective discipline and the need to avoid undue intrusion into competent authorities' stock assessments.

67. Another important consideration was our discussion of unassessed stocks last year. Members generally did not see the need to address unassessed stocks under the overfished stocks pillar, given the progress we had made on the overcapacity and overfishing discipline. As a result, there was broad support for limiting the overfished stocks discipline to the stocks that ***are*** assessed and that have been found to be overfished. This progress had been reflected in 126/Rev.2, as the placeholder for unassessed stocks was removed from Article 4.

68. In considering all of these views, I have noted that discussions of the ALT 2 text raised a number of questions that remain unaddressed. First, this text contains a freestanding definition of what an overfished stock is, which means that the WTO, whether by a dispute panel or in a Committee, would be put to the task of determining *de novo* whether the stock is overfished. The only limit is "based on the best scientific evidence available to and recognized by the Member". However, except for the parameters in the discipline on the evidence that could be examined, it would be up to the WTO to substitute its own judgement for that of the competent fishing authority in respect of whether the stock in question was overfished – including its own analysis of the evidence, making substantive judgements based on the evidence, and ultimately deciding whether the stock is overfished. This does not seem compatible with the widely shared view that our work, and the WTO's involvement, should be focused on fisheries subsidies, not on fisheries management.

69. In addition, the ALT 2 text would allow the examination of subsidies to unassessed stocks. In particular, under ALT 2 the WTO would be required to make *de novo* judgements of whether a stock is overfished. This would mean that subsidies to unassessed stocks could be challenged under this provision, and the WTO could be asked to make the stock assessments. This does not seem compatible with Members' views that unassessed stocks should not be covered under the overfished stocks pillar.

70. Given these considerations, the approach in the ALT 2 text does not square with the overall approach in the disciplines to the role of the WTO in respect of fisheries management issues. For these reasons it is not included in the new text, and Article 4.2 incorporates the approach in the ALT1 text. .

71. Before I conclude, I also note two other changes reflected in the current text. First, the qualification that the best scientific evidence available to competent authorities also needs to be "recognized by them" has been removed. Many Members said that such additional narrowing of the best scientific evidence available would give too much deference to the competent authorities and thus would be a major loophole in our disciplines. Also, several Members noted that this language would be inconsistent with the terminology used in international fisheries instruments, such as UNCLOS and the UN Fish Stocks Agreement. Finally, "For the purpose of this Article" has been added at the start of Article 4.2 so as to clarify that the definition of overfished stocks in this provision has no bearing on anything else.

Article 4.3

72. Article 4.3 permits subsidies that otherwise would be prohibited under Article 4.1, if such subsidies are implemented in a manner that promotes rebuilding of the stock to a biologically sustainable level.

73. Many delegations pointed out that as formulated in 126/Rev.2, the flexibilities in Article 4.3 were similar to those in the overcapacity and overfishing pillar, and questioned how their respective operation would differ. In the view of these Members, keeping the same sort of flexibility in respect of overfished stocks as would apply in the overcapacity and overfishing pillar would risk undermining the disciplines in respect of the stocks that are in the worst condition – the overfished ones. Members taking this view consider that any flexibility in the overfished stock pillar should be narrower than that in the overcapacity and overfishing pillar, and there should be a direct link between any allowed subsidy and its effects on rebuilding the stock, regardless of other fisheries management policies in place.

74. In the new text the Article 4.3 language reflects these points, such that it contains a distinct approach from that in respect of overcapacity and overfishing. In particular, certain flexibility is provided in Article 4.3 only for subsidies that themselves are implemented to promote rebuilding of the stock to a biologically sustainable level. This is distinct from the flexibility in the overcapacity and overfishing pillar, where a Member could provide a capacity- or effort-enhancing subsidy if it can show that other (non-subsidy) measures are being implemented to maintain the stock or stocks at a biologically sustainable level.

75. Apart from some minor editorial changes for overall coherence and consistency, this narrowing of the flexibility has been achieved by substituting the phrase "other appropriate measures are implemented in a manner that ensures rebuilding of the stock to a biologically sustainable level" with the phrase "subsidies implemented to promote the rebuilding of the stock to a biologically

sustainable level". This phrase was suggested by one delegation and supported by many during the April meeting on overfished stocks.

76. The 126/Rev.2 text also contained the phrase "as determined by the coastal Member under whose jurisdiction the fishing is taking place or a relevant RFMO/A in areas and for species under its competence" after the term biologically sustainable level. This phrase now appears in new footnote 9. This footnote defines the term "biologically sustainable level" and is essentially the same as the footnote defining the same term in the overcapacity and overfishing pillar. As many Members pointed out, these are, and are meant to be, the same, and so they should be defined consistently.

77. Finally, the beginning of this paragraph has been revised to start with "Notwithstanding Article 4.1". This was added to clarify that this provision is an exception, given that Members recognized overfished stocks as the most vulnerable stocks. In this view, Members generally agreed that any flexibility from this pillar should be narrow and exceptional.

Article 4.4

78. Article 4.4 sets forth SDT for the overfished stocks pillar. This text is essentially identical to the SDT for the IUU fishing pillar in Article 3.8. It provides a timebound exemption from the prohibition under Article 4.1 for subsidies granted or maintained by developing country Members including LDC Members for low income, resource-poor or livelihood fishing and fishing-related activities within 12 nautical miles. As in Article 3.8, a period of 2 years has been proposed for the applicable time as a conversation starter.

79. The reason why the same text has been used here as in the IUU fishing pillar is because similar concerns were raised in both pillars. As with the IUU fishing pillar, no Member has said that they intend to use SDT to continue subsidizing fishing on overfished stocks. Instead, some proponents clarified that they were seeking SDT under the overfished stocks pillar due to the implementation challenges, especially in coastal waters where tropical and multi-species stocks are prevalent. With a view to addressing these concerns, the text that was reflected in 126/Rev.2 was based on the proposal in TN/RL/GEN/200/Rev.1 for this pillar. This text provided for an exemption for developing Members, including LDCs, limited to fishing within 12 nautical miles, on the basis that subsistence, artisanal and small-scale fishing is prevalent in this area. During our work based on this text, many Members objected to providing a permanent SDT exemption due to its possible undermining of the discipline.

80. Based on these views, the current text provides a timebound exemption, to provide for addressing the implementational challenges faced by developing country Members. The geographical limit of 12 nautical miles has been complemented with certain other criteria. For the proponents of the original language that was used as the source, the 12 nautical miles limit was used as a proxy to distinguish subsistence, artisanal and small-scale fishing. Based on discussions since then, a more elaborate set of criteria for subsistence, artisanal and small-scale fishing has emerged, which uses low-income, resource poor and livelihood fishing in addition to the geographical limit. As such, these criteria were used, as was done in Article 3.8. Also, since this is a timebound exemption now, the placeholder for a transition period has been removed.

81. Again, the entirety of Article 4.4 remains in square brackets, to reflect some Members' view that SDT exemptions are not warranted in the overfished stocks pillar. In the view of these Members, overfished stocks are the most vulnerable and therefore the disciplines should apply in full to all Members.

Overlapping jurisdiction

82. Finally, in 126/Rev.2 there was a provision that stated that where there are overlapping stock assessments by a coastal Member and an RFMO/A, the coastal Member's assessment should prevail. For the reasons discussed with respect to the similar language that existed in Article 3.2 of 126/Rev.2, this language is not included in the new text.

ARTICLE 5: SUBSIDIES CONTRIBUTING TO OVERCAPACITY AND OVERFISHING

Overall

83. Article 5 of the new text contains disciplines on subsidies contributing to overcapacity and overfishing. As we have said many times in our discussions, the approach to overcapacity and overfishing is at the heart of our negotiations. The provisions on this issue in the new text are based on the compromise, "hybrid", approach that we have been discussing for some time now as an alternative to the two main approaches that have been discussed for years without resolution: a prohibition based on a list of prohibited subsidies; and a prohibition only when subsidies are shown to have caused negative effects on fisheries resources. The "hybrid" approach aims to strike a balance between these two. It contains a list of presumptively prohibited types of fisheries subsidies, modulated by a provision that would permit such subsidies to be provided where measures are in place to maintain fish stocks at a biologically sustainable level. The main prohibition is coupled with some additional prohibitions: first, prohibitions on certain subsidies for fishing beyond a coastal Member's jurisdiction; and second, the draft prohibition that I referred to earlier on subsidies for a vessel not flying the flag of the subsidizing Member. Finally, there are two alternative formulations of SDT provisions for this pillar. The first alternative is the same text that was initially introduced in 126 and has remained unchanged in the revisions to that document. The second is a set of provisions that I have put together after reflecting on the many consultations that I and Ambassador Chambovey as former Friend of Chair have held.

84. While we all recognized that Article 5 in 126/Rev.2 was not perfect, it served its intended purpose of providing a good basis to continue advancing our work on how to address the overcapacity and overfishing pillar, which has been the most difficult to progress of the basic pillars in the disciplines. Since the beginning of the year, on the basis of the text in 126/Rev.2, we held numerous meetings on this pillar in different configurations, including the recent HoDs discussions on 15 and 16 of April which were held in three separate small-group meetings. I was encouraged by the wide engagement from many delegations during these meetings and overall, I detected a sincere effort to find compromise by many Members. Most importantly, I am very happy that instead of only pointing to perceived shortfalls in the current text or in the views of other Members, some constructive suggestions for bridging the gaps were made. Based on all of our discussions, it appeared to me that all Members were willing to keep working on the basis of the hybrid approach. In the new text I thus have introduced some reformulation of that approach in Article 5, taking into account the following considerations:

- First, Members have certain differences of view concerning the list of prohibited subsidies, in terms of its content and whether it should be an open or closed list, although lately most Members are of the view that it should remain illustrative;

- Second, many delegations have expressed the view that the main prohibition in this Article should contain the objective sustainability criteria, rather than putting them in a separate provision;

- Third, some delegations consider that the requirement of a "demonstration" that measures are in place to maintain stocks at a sustainable level needs further clarification;

- Fourth, there are different views on disciplines for subsidies to fishing in areas beyond anyone's jurisdiction and/or subsidies that are contingent on fishing outside the subsidizing Member's EEZ.

- Fifth, given the significant progress that we have made based on the hybrid approach, the new text contains no placeholders for alternative approaches.

- Sixth, there is an ongoing debate about whether the sustainability-based flexibility incorporated in the discipline is beyond the reach of most developing Members, and if so, how it can be modified so as to be practicable for all WTO Members to use.

85. With that introduction, I now will explain the provisions of Article 5 in detail, starting with Article 5.1.

Article 5.1

86. Article 5.1 contains the main prohibition in this pillar, including the prohibition language itself, an illustrative list of prohibited subsidies, and some flexibility based on sustainability.

Chapeau of Article 5.1 and list of prohibited subsidies

87. The chapeau of Article 5.1 contains a simple, straightforward prohibition of all subsides contributing to overcapacity or overfishing. For clarity and conciseness, the list of subsidies that presumptively contribute to overcapacity or overfishing is no longer a separate subparagraph, but is moved under the chapeau of Article 5.1.

88. In the new text, the word "include" at the end of the second sentence of the chapeau paragraph is unbracketed. You will recall that the brackets around this word in 126/Revs. 1 and 2 indicated Members' different views on whether the list should be open or closed. As I noted in my April aide memoire, as time passed it seemed that this difference has narrowed, with most Members seeming to prefer that the list be illustrative to prevent circumvention of the prohibition.

89. Different views also have been expressed on the content of the list in our various discussions. Some Members have argued that the subsidies referred to in subparagraphs (a), (b) and (c) are the most harmful, while other Members countered that even some of these subsidies could be beneficial depending on the specifics. For example, one view was that item (b), subsidies for the purchase of machines and equipment for vessels, could be non-harmful if the equipment were to improve the sustainability of the fishing. In addition to views about what types of subsidies should be listed, some specific suggestions were made for refining and clarifying the contents. I did not detect convergence on any of the suggested modifications. The individual elements in the list thus are unchanged from the previous versions of the list.

Flexibility provision

90. Second, the provision on flexibility now appears as subparagraph 1 under Article 5.1. This was to respond to the calls from many Members to put objective sustainability criteria in the main prohibition rather than in a separate provision. And Members seem broadly to agree that the sustainability standard should be referred to only once in this pillar, and not be duplicated in the main prohibition and the flexibility provision. In changing the placement of the flexibility provision, the burden of proof has not changed – it remains, as was the case in 126/Rev.2, with the subsidizing Member.

91. I now will highlight the main aspects of the flexibility provision in Article 5.1.1:

- First, to reflect that this is not an exemption from the main prohibition but instead is a sustainability-based flexibility in the prohibition itself, and to make a clear distinction from a similar but different provision in Article 4.3, a drafting suggestion made by delegations in our discussions has been reflected by including the phrase "A subsidy is not inconsistent with Article 5.1" instead of "Notwithstanding Article 5.1";

- Second, footnote 10 which defines a biologically sustainable level now includes the phrase "based on indicators" before the examples of "level of depletion, or level of or trend in time series data on catch per unit effort (…)", which appear as they did in 126/Rev.2. This is a simple technical edit to clarify that the "level of depletion" etc. are not themselves alternative reference points, but rather indicators on the basis of which alternative reference points can be established. The indicators in question remain in brackets because some Members were wary of listing certain indicators, even as examples, while leaving others out. I would recall here that the introduction of those indicators into this footnote was based on a suggestion from certain Members aimed at making the flexibility provided for in Article 5.1.1 accessible to and usable by all Members, including developing Members.

- Another technical edit made for consistency is clarification that determinations by relevant RFMO/As are only valid in areas and for species under their competence. The exact same reference to an RFMO/A's area of competence is contained in Article 3.2 (c).

92. Concerning the issue of clarifying the demonstration requirement, which would be the basis for using the flexibility in Article 5.1.1, some Members suggested that the demonstration requirements should be linked to the notification requirements in Article 8 of the text. That is, when a Member provides subsidies referred to in Article 5.1, it should notify the information called for under Article 8. Related to this, some Members suggested that the substantive requirements for the demonstration could be addressed in Article 5, and the procedural requirements in Article 8 on notification and transparency.

93. The new text of Article 5 contains no elaboration of the demonstration requirement for two reasons. First, as I will explain later, Article 8 on notification and transparency now contains a specific link to the flexibility in Article 5.1.1. Second, my sense was that any substantive clarification concerning the demonstration requirement might be more detailed than appropriate for the text itself, and arguably would be better dealt with by the Committee or other body charged with overseeing the implementation of the disciplines established under this Instrument.

94. Finally, I recall that some Members suggested including the term "rebuild" in this provision to capture subsidies where measures are implemented not only to maintain, but also to rebuild, stocks to a biologically sustainable level. This term does not appear in the new text of Article 5, as this provision deals with the situation of subsidization that contributes to overcapacity and overfishing. This is a different situation from the one where the stock is already in an overfished condition, and, as mentioned by those Members, certain subsidies might contribute positively to rebuilding the stock to a sustainable level. This latter situation already is captured in Article 4.3 as I have explained.

Articles 5.2 and 5.3

95. The new text maintains the two provisions in 126/Rev.2 addressing subsidies to fishing beyond a Member's jurisdiction. In the new text, these provisions are contained in Articles 5.2 and 5.3. Article 5.2(a) sets forth a prohibition on subsidies contingent upon or tied to actual or anticipated fishing or fishing related activities at sea, in areas beyond the subsidizing Member's jurisdiction. This is accompanied by a new subparagraph (b) which clarifies that the non-recovery of payments under government-to-government access agreements are not captured by this provision. Article 5.3 contains a prohibition on subsidies to fishing or fishing related activities in areas beyond a subsidizing Member's jurisdiction and outside the competence of a relevant RFMO/A.

96. Reformulations and revisions pertaining to the substance in Articles 5.2 and 5.3 compared to the counterpart provisions of 126/Rev.2 are mostly structural, not substantive. You will note that the previous Article 5.3 in 126/Rev.2 is now contained in two separate provisions, Articles 5.2 and 5.3. Article 5.3.1 from 126/Rev.2 which explains the contingency appears as footnote 11 attached to Article 5.2 (a) in the new text. The placeholder in 126/Rev.2 for non-recovery of payments under access agreements has been developed into a text which appears as subparagraph (b) under Article 5.2.

97. Thus, the only substantive change in Article 5.2 is the new language in Article 5.2(b) concerning non-recovery of payments under government-to-government access agreements. We held a number of dedicated sessions on government-to-government access agreements and one of the topics discussed was the terms on which the fishing rights acquired under access agreements are distributed, i.e., whether and how much money is recovered from fishers for the rights distributed to them. One specific concern by some Members was in respect of access agreements under which a vessel or operator of one Member engages in fishing in another Member's waters, and the government acquiring the access contributes to conservation and management measures in the fishery in question. These Members acknowledge that the distribution of fishing rights under these agreements without the payer government recovering the amounts it paid for the access could be construed as a prohibited subsidy under subparagraph (a), and they support limited flexibility from the prohibition where the government acquiring the access takes on conservation and management obligations under the access agreement.

98. The textual proposal on this specific issue made by one delegation at the meeting of 21 October 2020 was distributed to the Negotiating Group on 25 January 2021. This proposal was discussed, and it seemed to raise no objection from Members to exclude non-recovery of payments under government-to-government access agreements from disciplines on subsidies to fishing in areas beyond national jurisdiction. Hence, the first part of that textual suggestion has been included in Article 5.2(b) with some editorial changes for consistency. The second part of that textual

suggestion, which focuses on public disclosure requirements in relation to access agreements, is not reflected in Article 5, but is essentially covered by Article 8.2(b) of the new text.

99. Naturally, this language is only relevant in relation to Article 5.2(a), as the fishing under access agreements by definition takes place in the EEZ of another (coastal) Member.

100. As a general matter concerning the draft disciplines on subsidies to fishing beyond national jurisdiction, I note the view of some Members that, regardless of the merits of such disciplines, as a practical matter explicit provisions to address such subsidies may be unnecessary because the subsidies prohibited under Articles 5.2 and 5.3 are already prohibited under the main prohibition in Article 5.1. To this point, as I read it, Article 5.1 is not geographically limited to any particular area or areas. Given this, it will be important in our work ahead to review the new draft to ensure coherence in the geographic coverage of the various disciplines in Article 5.

101. Also, I note the strongly-held view opposing the presumption that all subsidies in the high seas are harmful, and linking any subsidy prohibition here to including all fuel subsides, whether specific or not, within its scope. I would simply note that this is tied to the more general discussion of whether non-specific fuel subsidies should be covered by the disciplines.

Article 5.4

102. Article 5.4 sets forth a prohibition on subsidies for vessels not flying the flag of the subsidizing Member. This text, in square brackets, remains unchanged since its introduction in 126. It appears in the new text as some Members consider such a prohibition to be necessary, while others reject its underlying presumption. On this issue, it appears that the dichotomy of views involves a limited number of Members. I can only encourage those Members to reach out to one another to see if they can find a way to move forward on this issue. So, the current text reflects the choices before Members on this issue.

Article 5.5

103. Article 5.5 contains SDT provisions for this pillar. Beginning in October 2020, Ambassador Didier Chambovey in his capacity as Friend of the Chair held a number of consultations and open-ended meetings with a view to finding convergence in this area. In his last report to HoDs as Friend of the Chair, on 19 February 2021, Ambassador Chambovey noted that the main challenge in reaching convergence was the fact that Members still had fundamental differences over the objectives of SDT in the fisheries subsidies negotiations. He reported, and I agree, that some Members view SDT as a means to support implementation of the new disciplines, and thus favour forms such as transitional periods and technical assistance and capacity building. Others consider that the purpose of SDT is to provide policy space to develop fishing capacity, sustainably. Ambassador Chambovey reported that, given these diverging views, he did not see convergence around the formulation of SDT in this pillar of the disciplines that is set forth in the new draft as ALT1 of Article 5.5 (c).

104. The proponents and adherents of ALT1 Article 5.5 (c) describe it as a transitional mechanism given that Members initially falling below the thresholds could eventually exceed them and then would graduate from this SDT provision. Other Members, however, consider some of the criteria in the provision as non-germane to fisheries, and see the cumulative effect of the criteria and thresholds in the provision as operating to exclude from the disciplines, long term, virtually all developing Members, as most developing Members in fact would never graduate and become subject to the disciplines. Furthermore, some Members that generally support a criteria-based approach such as in ALT1 object to certain specific criteria in that provision, particularly income-related criteria such as GNI per capita, which they consider inappropriate in these negotiations.

105. In 126/Rev.2 I added a placeholder (ALT2) for an alternative approach simply described as "other forms of transitional mechanisms", to capture in shorthand form the main lines of the discussions regarding (c) at that time. In doing so, one question I posed in the addendum to 126/Rev.2 was whether a criteria-based approach could be accepted as a transitional mechanism in the first instance. And if so, what criteria, thresholds or mechanisms - whether those in (c) or others – could be acceptable to all Members. Ensuing discussions revealed that despite existing divergences, the differences did not seem to be unbridgeable. As such, Ambassador Chambovey identified some key principles that could guide our work towards bridging language:

- No Member suggested that SDT should enable subsidies to be given for unsustainable fishing in the long term;

- Whether it is called "needs-based" or "subject to criteria" the objective is similar, which is to provide the concerned Members with cover from the general rules based on their situations;

- Whatever the transitional process is called, the concept seems to be similar, that is, at some point in the future, the SDT to which a Member may be entitled would come to an end; and

- The common elements of the proposals that have been made could provide a basis on which to build convergence.

106. Ambassador Chambovey concluded that Members were also of the view that clarity in the overcapacity and overfishing disciplines could give clarity to the SDT for this pillar. As the discipline has evolved, it has been evident that the sustainability-based flexibility in Article 5.1.1 would have an impact on SDT. Similarly, there seems to be an inherent link between SDT in this pillar and calls for flexibility for subsidies to subsistence, artisanal and small-scale fishing.

107. In light of the above, Article 5.5 in the new text contains two alternatives. ALT1 remains unchanged from the corresponding provision in 126/Rev.2. Work to date has shown wide differences in respect of this draft language, and thus has not produced convergence that could be reflected in amendments to this language. That said, the proponents of the ALT1 language have indicated that they are working with Members to make adjustments that could build toward convergence.

108. In the new text, ALT2 contains elaborated language developed on the basis of the various approaches, proposals and discussions over the last few months.

- Subparagraph (a) of ALT2 is identical to subparagraph (a) of ALT1, providing for an exemption for LDC Members. Similar language can be found in various proposals including the LDC proposal (RD/TN/RL/125), the ACP proposal (RD/TN/RL/96) and India's proposal (TN/RL/GEN/100/Rev.1).

- Subparagraph (b) of ALT2 sets forth an exemption for subsidies to subsistence, artisanal and small-scale fishing. The text combines elements from the proposals from India (TN/RL/GEN/200/Rev.1), Cameroon (RD/TN/RL/135) and the proposal from Argentina, Chile and Ecuador (RD/TN/RL/136). A transition period has been added in brackets to reflect the position of many Members that any exemption for this type of fishing should be time-bound. As a conversation starter, seven years after entry into force of the disciplines is suggested. It should be noted that the idea here is that any transition period for subsidies to this type of fishing should be longer than one applicable to subsidies to other types of fishing.

- Subparagraph (c) provides for a time-bound exemption for developing Members' subsidies other than those to subsistence, artisanal and small-scale fishing. Developing Members that so choose would be allowed to grant or maintain prohibited subsidies to such other fishing and fishing-related activities for a certain period, provided that they invoked the provision prior to entry into force of the new disciplines. As a starting point for discussion, five years is suggested as that period, that is, a shorter period than for subsidies to subsistence, artisanal and small-scale fishing.

- Subparagraph (d) provides for an extension mechanism for the subsidies covered by subparagraphs (b) and (c), for developing Members with a limited share of global fish catch and limited total amount of fisheries subsidies. These Members could seek an extension through a Committee process beyond the initial periods provided for their subsidies to their subsistence, artisanal and small-scale fisheries, and for their subsidies to other kinds of fisheries. The language in this provision is modeled on that in Article 27.4 of the SCM Agreement.

- The two criteria for seeking an extension that appear in the text were selected based on their direct connection to fisheries subsidies. These are, specifically:

- The Member's share of annual global volume of marine capture. The threshold maximum share suggested as a starting point for discussion is 0.7%, as it is contained in the proposal by Argentina, Australia, the United States and Uruguay (TN/RL/GEN/197/Rev.2), and also has been noted by Members during consultations as a good starting point.

- The total amount of the Member's subsidies to fishing and fishing related activities at sea. As a starting point for discussion, the threshold maximum figure suggested is USD25 million. This was drawn from the proposal from Brazil (RD/TN/RL/124/Rev.1).

In terms of the extension mechanism itself, this would be similar to that provided for in Article 27.4 of the SCM Agreement. Developing Members meeting the two criteria that sought an extension would need to enter into consultations with the relevant WTO body no less than one year before the expiry of the transition period, and justify the need for such extension. If the Committee agrees to the extension, the Member then would hold annual consultations to determine the necessity of maintaining the subsidies. Should the body in question not grant an extension, that Member would need to phase out the prohibited subsidies within two years.

109. Members must recall that because the discipline itself, set forth in Articles 5.1 and 5.1.1, does not strictly prohibit all fisheries subsidies, but is designed to allow those that are not harmful in the context of the particular fishery in respect of which they are provided, the SDT provisions, by definition, would apply in a way to allow for harmful subsidization. Overall, ALT2 would allow:

- LDCs to provide subsidies indefinitely, without the need to demonstrate any sustainability criteria if providing harmful subsidies;

- Developing Members to provide, with no sustainability criteria demonstration, potentially harmful subsidies to subsistence, artisanal and small-scale fishing, for a period of seven years with possible extensions if eligibility criteria are met; and

- Developing Members to provide, with no sustainability criteria demonstration, potentially harmful subsidies to other kinds of fishing for a period of five years, with possible extensions if eligibility criteria are met.

110. In my view, the combination of these SDT provisions and the built-in flexibility in the discipline itself provides the kind of policy space that developing Members have demanded – that is, the space to develop their own fisheries in a sustainable manner. The initial exemption periods and any extensions would allow the gradual introduction of the necessary structures and measures that would eventually enable the Member in question to use the built-in flexibilities themselves, to develop and exploit fisheries in a sustainable way over the long term. In considering this, it is also important to bear in mind the technical assistance and capacity building that would aid Members into successfully transitioning to the built-in sustainability flexibility embedded in Article 5.1.1. Indeed, the very purpose of technical assistance and capacity building is to assist Members in implementing WTO disciplines – obligations and flexibilities.

111. As a final point on SDT in this pillar, as set forth in Article 8, the new text provides that a Member could invoke the SDT provisions in respect of subsidies which it has notified under Article 25 of the SCM Agreement and Article 8 of these disciplines.

ARTICLE 6: SPECIFIC PROVISIONS FOR LDC MEMBERS

112. Article 6 contains two paragraphs specific to LDC Members, dealing with graduating LDC Members in the first paragraph, and requiring the exercise of due restraint in raising matters involving LDC Members in the second. These provisions, which remain unchanged since they were introduced in 126, were drawn directly from the LDC Group's proposal in RD/TN/RL/125.

113. Article 6.1 is bracketed, as some Members are of the view that this provision should not be included in the text; particularly, given that such discussion is being held simultaneously in the work of other Committees and Councils.

114. Article 6.2 on due restraint is unbracketed, given that similar language exists under Article 26 of the Dispute Settlement Understanding.

ARTICLE 7: TECHNICAL ASSISTANCE AND CAPACITY BUILDING

115. Article 7 deals with technical assistance and capacity building. This text has been unchanged since its introduction in 126. It is based on India's textual proposal in TN/RL/GEN/200/Rev.1, with the term "land-locked developing country Members" (LLDC Members) added based on the proposal made by Afghanistan, Mongolia, Nepal and Paraguay (the LLDC proponents) in document RD/TL/RL/130.

116. Given the substantive progress made in the disciplines, a discussion on technical assistance and capacity building during this new phase of the negotiations would be timely.

ARTICLES 8-10: OTHER CROSS-CUTTING ISSUES

Overall

117. Texts for Articles 8, 9 and 10 were added in 126/Rev.1, as these were empty placeholders in 126. These provisions concern cross-cutting issues of notification and transparency, institutional arrangements, and dispute settlement, respectively.

118. Details of how each text has been drafted have already been provided in RD/TN/RL/126/Rev.1/Add.1 when I introduced 126/Rev.1. Generally speaking, these texts were drawn from the proposal in RD/TN/RL/90/Rev.2 that was introduced during the plenary session on 17 September 2020; earlier work that was referred to by Members during our discussions such as certain language in TN/RL/W/274/Rev.6 and the 2007 Chair's text in TN/RL/W/213; and specific textual suggestions and comments made by Members during our meetings. Our work on some of these provisions is relatively more advanced than on others, so in addition to summarizing the key issues for going forward, I will focus on the changes made in the new text compared with the corresponding provisions of 126/Rev.2.

Article 8: Notification and transparency

119. During our work on notification and transparency, as well as on core disciplines, Members have highlighted the critical importance of transparency for the fisheries subsidies disciplines. Members generally support the idea that the notification and transparency requirements for the fisheries subsidies disciplines should be in addition to the existing rules under the SCM Agreement. That is, the notification and transparency rules in the fisheries subsidies disciplines should not undermine or replace the corresponding rules in the SCM Agreement. In this regard, I heard no objection to the current approach to Article 8.1, which requires notification of certain information in addition to the notification requirements under the SCM Agreement.

120. Divergent views have been expressed, however, on what specific information should be subject to notification under the fisheries subsidies disciplines. As such, this was left as a placeholder in 126/Rev.2. Since then, I have heard Members' views in various consultations, including during the small-group meeting held in the March cluster. In addition, the issue of notification and transparency was raised in our discussions on the core disciplines. All of these views were very helpful in putting together the notification provisions in the new text, which establish two categories of information: (a) information that Members are required to provide; and (b) information that Members are required to provide to the extent possible.

121. Listed under (a) are the type or kind of fishing activity for which the subsidy is provided, and the relevant catch data. Both of these items were identified as relevant information in TN/RL/W/274/Rev.6 and more recently in the proposal in RD/TN/RL/90/Rev.2. So far, Members generally have considered them to be directly relevant to the fisheries subsidies.

122. However, Members' views varied on the information listed under (b) for different reasons.

- For the status of the fish stocks, some Members pointed out that not all fish stocks for which a subsidy is provided are assessed.

- On conservation and management measures, some Members found the relevance of this information to be limited for our purposes as in their view we should be focused on fisheries subsidies, not on management measures.

- With respect to the details regarding fishing vessels, some Members considered that obtaining such information would be too burdensome, or even in some cases impossible for reasons such as confidentiality.

123. With these concerns in mind, these types of information have been listed under (b), which requires provision of the information to the extent possible. However, the phrase "to the extent possible" is in square brackets, as Members have expressed varying degrees of comfort with that language.

124. Article 8.2 contains specific notification and transparency requirements relating to IUU fishing determinations and to government-to-government fisheries access agreements. Article 8.3 is an information exchange mechanism among Members, similar to the mechanism under Articles 25.8 and 25.9 of the SCM Agreement. The texts for both of these provisions remain unchanged from 126/Rev.2, except for some editorial changes for clarity.

125. Article 8.4 is new language, which links using the flexibilities in the different pillars of the disciplines to certain notification requirements. Members have called for such a link in various meetings, in particular during our discussions on a possible exemption for subsidies to subsistence, artisanal, and small-scale fishing, on the sustainability-based flexibility in the overcapacity and overfishing pillar, and in the sustainability exception in the overfished stocks disciplines. To reflect these views, first, subparagraph (a) now provides that the notification requirements under Article 25 of the SCM Agreement and Article 8.1 of the fisheries subsidies disciplines must be fulfilled in order to invoke SDT flexibilities. All of the notification requirements referenced in subparagraph (a) of Article 8.4 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. Second, and by contrast, for the sustainability-based exception or flexibilities under the overfished stocks, and overcapacity and overfishing pillars, subparagraph (b) of Article 8.4 requires notification of the fish stock status, and the conservation and management measures, set forth in Article 8.1(b). This reflects Members' views that these types of information would become relevant and important for assessing whether the requirements for using the exception or the flexibility in question have been met.

Article 9: Institutional arrangements

126. The need for specific institutional arrangements depends on whether the disciplines will be a standalone agreement or an annex to the SCM Agreement. Given that this issue remains outstanding, our work on this provision is not as advanced as on other issues. In the meantime, the text had been developed on the working basis of the disciplines taking the form of a standalone agreement, only for the reason of enabling us to move quickly once the decision is made. This means that the whole Article should be read as in square brackets, and this is also the reason why there were no significant changes to these provisions in the new text.

127. Article 9.1 is a provision establishing a new fisheries subsidies Committee, which would be needed in the event that the disciplines take the form of a standalone agreement, and which Members might decide to do even if the disciplines are annexed to the SCM Agreement. Subsequent paragraphs elaborate on the responsibilities and functions of the body that would be responsible for monitoring the implementation of the new disciplines. Article 9.2 contains a requirement for each Member to inform that body of, and for the body to review, its measures taken to implement the fisheries subsidies disciplines; Article 9.3 is a requirement for Members to inform the body of their fisheries regime; Article 9.4 requires the body to examine the notifications made pursuant to the disciplines; Article 9.5 requires the body to maintain close contact with certain other international organizations; and Article 9.6 requires the body to review the operation of the fisheries subsidies disciplines.

128. The new text incorporates a few minor drafting changes from the corresponding provisions in 126/Rev.2. In Article 9.2, the reference to Articles 3, 4 and 5 at the end of the first sentence was in square brackets, due to uncertainty – which is now reduced - as to the placement of the referenced provisions. In Article 9.3, "URL" was an alternative text to the "electronic link" as an acceptable

means to make the necessary notification, indicated with square brackets around both terms. So far, our discussions have shown that there is no strong objection to either, so given that "electronic link" appeared to be a broader term, I have removed the alternative and the square brackets. In Article 9.4, the frequency of the Committee examination of the information notified under the fisheries subsidies discipline has been added, as not less than every two years. The frequency of this examination was an empty placeholder in 126/Rev.2, but given that the notification requirements include the requirements under the SCM Agreement, the practice on the frequency of notifications that is followed under the SCM Agreement is now reflected as the starting point.

129. Before concluding my remarks on this provision, I would like to highlight one critical institutional issue that has not been discussed in full, which is entry into force. As you know, it could take many months if not years for a new WTO instrument to enter into force. This gap – as well as anything that Members may decide to do during this period, such as a provisional application of this instrument – could affect how we see certain issues. Now that we are in the endgame mode, I would urge you to turn your minds to this issue.

Article 10: Dispute settlement

130. Dispute settlement, covered in Article 10, also depends on whether the disciplines become an annex to the SCM Agreement or a standalone agreement. This is because Article 30 of the SCM Agreement already provides for application of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and special and additional rules for prohibited subsidies in Article 4 of the SCM Agreement. If the fisheries subsidies disciplines are annexed to the SCM Agreement, these existing rules of the Agreement would apply to the disciplines, unless we specifically decided to depart from them. The current text in Article 10 was added in 126/Rev.1 to reflect this default position.

131. This text has remained unchanged since then, but this does not mean that we have not been discussing this. In fact, so far in 2021 alone, we have held dedicated sessions on various aspects of dispute settlement, such as non-violation claims and standard of review. And the views exchanged in those meetings were very helpful. In particular, there appears to be a general acceptance that the DSU and Article 4 of the SCM Agreement should be the starting point, and that we should not be inventing new dispute settlement rules for the fisheries subsidies disciplines. Reflecting this understanding, this Article is unbracketed in the new text.

132. This is not meant to imply that there was full convergence on this provision, or that no more work is needed on it. In fact, during our recent meetings on dispute settlement, some Members wanted to specifically exclude non-violation claims or set a separate standard of review. In addition, I am well aware of the views that fisheries-subsidies-specific remedies and/or countermeasures could be crafted. Removing the square brackets here only means that Article 4 of the SCM Agreement and the DSU are a starting point, on which we can build as needed.

ARTICLE 11: FINAL PROVISIONS

Overview

133. Article 11 contains "Final Provisions". This Article contains four paragraphs that do not belong readily to one of the existing provisions, or that apply to some, but not all, substantive pillars. The text of this Article remains largely unchanged from that in 126/Rev.2, with some exceptions.

Article 11.1

134. Article 11.1 clarifies that nothing in the disciplines shall be construed or applied in a manner which will affect the rights of LLDC Members. This text was introduced in 126/Rev.2 based on the proposal by the LLDC proponents in RD/TL/RL/130, and it remains unchanged in the new text.

Article 11.2

135. Article 11.2 is a provision for a "special care" and "due restraint" requirement when granting subsidies to fishing where the stocks in question are unassessed. This text was introduced in 126/Rev.2 based on the textual suggestions that were discussed during the meeting dedicated on

the issue of unassessed stocks. A few changes were made in the new text compared with that in 126/Rev.2:

- In 126/Rev.2, the term "shall" was in square brackets, along with an alternative "should" also in square brackets. However, what needs to be done – namely taking special care and exercising due restraint – already leaves ample flexibility for the Member concerned. The proponents of this language also confirmed this intention during the dedicated meeting we held on this topic. For this reason, the purpose of the alternative term "should" seems to be served by the current formulation using "shall".

- In 126/Rev.2, the phrase "take special care" was in square brackets, along with the phrase "exercise due restraint" also in square brackets. These two formulations were suggested as alternatives. But upon review, they seem to complement each other covering both something that a Member shall do and something that a Member shall refrain from doing. As such, the new text contains both elements, rephrased as "take special care *and* exercise due restraint" as unbracketed text.

- In 126/Rev.2, there was a qualifier "commercially valuable" in square brackets before "stocks", such that this text would apply only to commercially valuable stocks if it were to be accepted. As noted, upon review it seemed clear that this text already leaves ample space for the Member concerned, such that further limiting the text with qualifiers like "commercial valuable" seemed unnecessary. The new text thus does not contain this qualifier.

Article 11.3

136. Article 11.3 is an exception for disaster relief. This text was introduced in 126/Rev.1 based on the dedicated plenary meeting on this topic held during the October cluster last year, and it remained unchanged in 126/Rev.2. Two changes were made in the new text. First, the qualifier "natural" in square brackets for "natural disaster" is omitted. This is because no one has yet to provide a clear rationale for limiting this exception to natural disasters, while we heard clear need for such an exception for other disaster scenarios, such as oil spills. In addition, the language "except as provided in Articles 3 and 4" is unbracketed in the new text. Regarding Article 3, this reflects the view that Members broadly shared that such an exception should not apply in respect of subsidies to IUU fishing. As for Article 4 on overfished stocks, treating the reference as unbracketed reflects the significant progress we have made on that pillar since our discussion on disaster relief. As explained earlier, this discipline is now triggered only if a stock is recognized as overfished by the competent authority and it no longer has a placeholder for unassessed stocks. Subsidies that promote stock rebuilding are also allowed.

Article 11.4

137. Finally, Article 11.4 reflects many Members' firm views that our fisheries subsidies work here at the WTO, and anything that flows from that work, should not have any impact on issues of territoriality and delimitation of maritime jurisdiction. This text was developed based on the textual suggestions and discussions that were made in a number of sessions dedicated to this topic. Specifically, subparagraph (a) is aimed at ensuring that the fisheries subsidies disciplines in the WTO, including results of dispute settlement, could not be used outside in other international fora. In addition, subparagraph (b) is aimed at ensuring that WTO panels addressing claims under the fisheries subsidies disciplines not address any issues of territoriality or delimitation of maritime jurisdiction.

138. Of course, the fact that this text has not changed since it was introduced in 126/Rev.2 does not mean that it reflects convergence. Understandably, the issue of territoriality is one of the most sensitive issues for all Members. So far, some but not all Members have expressed a level of comfort with the current drafting. As an example, some Members think that the panels should not even be allowed to consider whether a claim requires a panel to address any issues of territoriality or delimitation of maritime jurisdiction. These Members want an automatic suspension or termination of a claim once territoriality is raised. On the other hand, some Members think that the current text is already too strong, such that it amounts to a *carte blanche* veto. We will thus need to continue discussing this issue and the drafting to address it.

NEXT STEPS

139. So, that brings me to the end of the text. I know that was a lot of information, but I wanted to make sure that it was a thorough explanation. As I mentioned earlier, the addendum to the new text, containing this full explanation, will be circulated right away, with the French and Spanish translations following in short order.

140. To sum up, the whole text is up for discussion and it will ultimately be up to Members to resolve the issues that remain open. There is still a lot of work ahead of us. First and foremost, I would request that you read the text and addendum carefully, take it all in and consider what you can and cannot live with. You have all said on numerous occasions that you want a meaningful outcome. In drafting this text, this is the one message I kept in mind; a text which delivers on our mandate in light of various positions. So, I hope that after carefully reading the text and addendum, you can conclude that I delivered on that promise.

141. After carefully considering the text, we all have to come back together to prepare for Ministerial engagement. This brings me to the next steps. I already indicated that I would not open the floor today for comments given that you have just received this text. Instead, I will make some suggestions on how I think we could best engage on the text in the coming weeks. You all would have received the invitation from the DG inviting your Ministers to a session of the TNC dedicated to fisheries subsidies on July 15. That is about 8 weeks from now. This is not a lot of time, and we have a lot to do.

142. As I said during the last TNC meetings, I will be calling on all of you to engage intensively, in a compromise-seeking, convergence-oriented mode, aimed at quickly finding acceptable landing zones. I also ask you to give these negotiations priority, and to be ready to meet at short notice and in a range of different configurations - be it bilateral meetings, small-group consultations, confessionals, or plenary sessions, including with the engagement of the DG as appropriate – as well as bilateral consultations. If needed, we also need to be ready to work nights and weekends to get this done.

143. I appreciate and count on your flexibility on the substance and process, as we head into this very intensive phase of our work. Though we should remain flexible, I understand from many of you that a calendar of activities would be useful for your preparation, especially if you require input from capitals. Therefore, I intend to organize thematic weeks starting the week of 24 May as follows:

- Each week will be dedicated to a specific pillar or pillars from the text.
- The first two days of each week would be for consultations. This would be an opportunity for Members to reach out to me, and for me to reach out to Members, in respect of particular issues regarding that week's theme.
- The rest of each week would be dedicated to meetings in various configurations. This is where flexibility would be required given that the form of meetings would depend on each topic.
- I can assure you that the principles of transparency and inclusiveness will be respected. And in this regard, I plan to give transparency briefings each week.

144. An outline of this structure, including the themes for each week, will be circulated shortly. I hope that you will find this calendar of activities useful in terms of your planning.

145. To help my thinking in structuring specific topics of discussion, I would like to start by first touching base with each of you before we start work during the thematic weeks. Therefore, on 20 and 21 May I intend to hold brief HoDs plus one, in-person, 10-minute confessional style meetings with interested delegations. The idea is for you to identify up to three issues in the text that are the toughest for your delegation. These meetings will be short and to the point; all you have to do is come with your list of those three tough issues and share it with me. Further details, including how to schedule a slot, will be communicated shortly.

146. I look forward to engaging with all of you during this final stage of these negotiations. I know it will not be easy. Nothing is easy when 164 Members need to reach consensus, but it is doable. The good thing is that we have a complete text in front of us on which we can engage. I am sure no delegation will be entirely happy with the text - you will all find something you don't like, in addition to things that you do like. Let us now figure out those key issues that require further teasing out in Geneva so that we can present something to Ministers that provides them with clean and straightforward options in July. As I said at the last TNC, the Negotiating Group on Rules has come a long way. Your leadership and willingness to engage over the last year has led us to this point. Now it's time to sprint for the finish line.

147. This brings me to the end of my report. To recap, expect the following in your inboxes soon:

- You will receive the final English version of the text incorporating minor corrections compared with the version sent before the meeting, (i.e., two typos are fixed) and the addendum containing my explanation of the text;

- So will the French and Spanish versions of the text and addendum;

- You also will receive a schedule of work based on thematic weeks, including details for the short confessionals to be held on 20 and 21 May.

148. Before closing, I would like to thank the Secretariat team for their formidable work in fully supporting me and the whole NGR in this negotiating process. This Negotiating Group should feel privileged to have such a dedicated Secretariat team supporting our work. Thank you.

149. With this, I hope you all have a good long weekend. Thanking the interpreters for their hard work today, I would now like to close this meeting. The meeting is now closed.

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