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AGREEMENT ON FISHERIES SUBSIDIES

DRAFT TEXT

Addendum

The attached document from the Chair of the Negotiating Group on Rules is the explanatory note accompanying the draft Agreement on Fisheries Subsidies circulated in document WT/MIN(21)/W/5.

INTRODUCTION

Recalling the call by Ministers at the 15 July 2021 Virtual Meeting of the TNC at Ministerial Level on Fisheries Subsidies, the Negotiating Group on Rules (NGR) was asked to send to Ministers a clean, or as clean as possible, draft text of disciplines to fisheries subsidies in advance of the 12th Ministerial Conference (MC12). As Chair of the NGR, I am submitting a draft Agreement on Fisheries Subsidies for the attention of Ministers, in document WT/MIN(21)/W/5. This draft Agreement is based on the collective work of the Negotiating Group – that is, the work done during meetings of the Group in different configurations, textual suggestions made to the NGR, and all other Member-led work that has been undertaken. Particularly intensive work has been undertaken on the basis of the previous version of the draft text, contained in document TN/RL/W/276/Rev.2. A compilation of Members' textual suggestions made on this draft has been circulated in document RD/TN/RL/153.

It is well understood that nothing in the draft Agreement is agreed, and that it and any revisions will remain a draft until everything is agreed. While this text reflects my honest, best attempt to find a balance in a way that I consider most likely to build consensus, all provisions remain open to discussion if Ministers wish to do so.

Nevertheless, the bracketed language in the draft Agreement represents areas where views continue to diverge, on which work is continuing, and on which I believe Ministers' attention will be warranted. These include: whether and, if so how, non-specific fuel subsidies should be treated in the Agreement, including fuel tax relief or detaxation; the provisions on special and differential treatment for developing country Members and LDC Members; and disclaimer language related to territorial claims and delimitation of maritime boundaries. In addition, there are some other issues which are particularly sensitive for specific Members that also are presented in brackets.

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

ARTICLE 1: SCOPE

1. Article 1 sets out the scope of the fisheries subsidies disciplines. 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 Agreement on Subsidies and Countervailing Measures (the SCM Agreement) that are specific within the meaning of Article 2 of that Agreement, to marine wild capture fishing and fishing related activities at sea. Footnote 1 to paragraph 1 clarifies that aquaculture and inland fisheries are excluded from the scope of the disciplines, while footnote 2 clarifies that payments from one government to another government under fisheries access agreements are not within the scope, by indicating that those payments would not be deemed to be subsidies under the disciplines.

2. Paragraph 2 states that the scope also extends to fuel subsidies that are not specific. This text remains in square brackets to indicate a pending decision as to whether to retain this language (i.e., by removing the square brackets) or not (i.e., by removing this text). This is a complex and sensitive issue to many Members, and there has been a long-standing divergence of views. Some Members support disciplining all fuel subsidies, specific or not, on the basis that these are the most harmful subsidies, but some other Members oppose it, raising systemic concerns given that specificity is a core element of the subsidies disciplines in the SCM Agreement.

3. That said, there is a shared understanding that fuel subsidies are indeed relevant under SDG target 14.6 and the MC11 mandate from Ministers¹. However, for those arguing for the deletion of Article 1.2, the current scope text in Article 1.1 already covers fuel subsidies that are specific, which is consistent with the current framework of the subsidies disciplines in the SCM Agreement and adequate for the purposes of this Agreement. Some Members have indicated that if non-specific fuel subsidies were to be addressed at all in this Agreement, only certain disciplines should apply to them. In this context, the disciplines on illegal, unreported and unregulated (IUU) fishing in Article 3.1 and on subsidies to fishing in the unregulated high seas in Article 5.2 have been identified as possibly relevant provisions.

4. The issue of non-specific fuel subsidies also is linked with, and therefore should be viewed in the light of, Article 8.1*bis*, which is new in this version of the draft text and is in square brackets. This provision requires notification of fuel subsidies, whether specific or not. For some Members who oppose including non-specific fuel subsidies in the scope of the disciplines, including such a notification requirement would be an acceptable compromise outcome in lieu of the current text in Article 1.2, recognizing the harmfulness of fuel subsidies and collecting information on them without subjecting them to the substantive disciplines in Articles 3, 4 and 5. For Members that support keeping Article 1.2, notification of such subsidies would be a required complement to the substantive disciplines, rather than a substitute for them. Some Members favouring the notification provision, regardless of their views on retaining or deleting Article 1.2, also have noted that it might be useful to take up the issue of non-specific fuel subsidies during the first in-depth review of the operation of the Agreement provided for in Article 9.4, and that the notified information on such subsidies would be very helpful in informing such a review.

5. Also related is the issue pertaining to fuel tax relief or detaxation schemes. Some Members are requesting that such schemes – including those that are specific within the meaning of Article 2 of the SCM Agreement – be excluded either from the scope of the Agreement entirely or from some of the disciplines. This is strongly opposed by others, including those who seek to bring all fuel subsidies, whether specific or not, into the scope of the Agreement. In the view of these Members, fuel subsidies including in the form of detaxation schemes are among the most harmful for fisheries sustainability, such that there is no justification to carve any such subsidies out of the Agreement, given its sustainability focus.

ARTICLE 2: DEFINITIONS

6. Article 2 contains definitions for five terms that apply throughout the disciplines. The definitions of the first four terms, in (a) through (d), for "fish", "fishing", "fishing related activities" and "vessel", were taken from the *Agreement on Port State Measures* (PSMA). There were some suggestions to change the placement of the term "at sea" in the definition of the term "fishing related activities" in (c) to clarify that onshore activities are not covered by the disciplines. However, it is clearly understood among Members that the term "at sea" in Article 2(c) covers all of the activities

¹ WT/MIN(17)/64.

referred to in the definition, i.e., that the activities in question are those that take place at sea, and that the Agreement does not apply to such activities performed on land. Given this clear understanding, and to avoid modifying language taken as is from the PSMA, no change in the word order has been made.

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

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

Overview

8. Article 3 contains the discipline on subsidies contributing to IUU fishing. In the previous version of the draft text, there were two alternative formulations for Article 3.3, one of the core provisions of this pillar, and Members' views on this remained divergent. In order to bridge the gap and facilitate finding a landing zone, a group of Members representing the range of views on this issue held a series of dedicated sessions. A possible compromise text emerged from this work on Article 3.3, as well as on other, closely related provisions, including Articles 3.2, 3.4 and 3.5, as well as Article 8. This language was subsequently shared with and discussed by the whole NGR. The current text of Article 3 reflects this collective work towards striking a delicate balance among a number of related provisions on the basic issue of the procedural requirements for coastal Members' IUU determinations that would trigger the subsidy prohibition.

Footnote 3

9. 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* (IPOA IUU).

Article 3.1

10. Article 3.1 contains the basic prohibition in respect of subsidies to IUU fishing, by stating that subsidies to a vessel or operator engaged in IUU fishing or fishing related activities in support of IUU fishing are prohibited. The phrase "fishing related activities in support of such fishing", introduced in brackets in the previous draft text (TN/RL/W/276/Rev.2), is meant to reflect the issue raised that the scope of Article 3.1 should be the same as that referred to in Article 1.1, as well as that of the other disciplines, all of which apply to both fishing and fishing related activities. Although there were some questions about how the additional language would be implemented in practice, there was a general sense that consistency and coherence should be maintained across the substantive disciplines. In addition, one suggestion was to amend this language by changing the word 'such' with the term 'IUU'. In the view of Members, this provides greater clarity that the language refers to those fishing related activities in support of IUU fishing.

Footnote 4

11. Footnote 4 defines the term "operator" for the purpose of Article 3 and clarifies the prohibition on subsidies to operators. As explained above, the general elements of the definition of the term "operator" are found in Article 2(e), whereas the aspects specific to Article 3 appear in this Article.

12. Footnote 4 also clarifies that the prohibition on subsidies to operators engaged in IUU fishing applies to subsidies provided to fishing and fishing related activities at sea. While many Members

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

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

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

Article 3.2

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

16. The listing of these entities is not meant to affect their competence to make IUU fishing determinations, nor to create a hierarchy among them. The current text contains certain clarifying language to this effect.

- Footnote 6 to the chapeau of Article 3.2 clearly states that "Nothing in this Article shall be interpreted as affecting the competence of the listed entities under relevant international instruments or granting new rights to the listed entities in making IUU fishing." The aim is simply to clarify what has always been the purpose of this footnote. That is, that the fact of being referred to in this provision of this Agreement does not change, and especially does not expand, the roles of these entities beyond those already existing under other relevant international instruments. This is one of the changes that emerged from the focused work of the group of Members tasked with finding a possible landing zone on Article 3.3.
- The chapeau also states that a vessel or operator is considered to be engaged in IUU fishing only if there is an "affirmative" determination of such fishing. The qualifier "affirmative" clarifies that a qualifying affirmative determination by any listed entity is not nullified or negated by a negative determination by any other listed entity. This comports with the language in Article 3.3(a), defining an affirmative determination as a final finding that a vessel or operator "has engaged in IUU fishing", or a final listing of a vessel or operator by an RFMO/A.
- The chapeau of Article 3.2 also states that an affirmative determination may be made by "any" of the entities listed thereunder. The listed entities are connected by the conjunction "or", clarifying that there is no hierarchy among them.

17. Two changes were made to the current draft text compared to the previous version. First, the term "waters" in subparagraph (a) has been replaced with the term "areas". This is a technical change following the concerns raised by some Members during the recent discussion on the topic, that the term "waters" may be too narrow to cover all living marine resources of a coastal Member, such as sedentary species in a coastal Member's continental shelf area.

18. In subparagraph (c), the condition "including through the provision of timely notification and relevant information" has been added with respect to the IUU fishing determination by an RFMO/A. This is one of the changes that emerged from the focused work of the group of Members tasked with finding a possible landing zone on Article 3.3. One concern identified in that process was that the IUU fishing determinations made by RFMO/As are not subject to the procedural requirements set out in Article 3.3(b). Because that language pertains specifically to IUU fishing determinations made by coastal Members, it does not squarely fit the situation of RFMO/As, and in addition subparagraph(c) already refers to the rules and procedures on the RFMO/A and relevant international law. To address more explicitly the procedural concerns over IUU fishing determinations made by RFMO/As, language has been added requiring the provision by the RFMO/A of timely notification and relevant information.

Article 3.3

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

20. Subparagraph (b) contains specific conditions applicable to IUU fishing determinations made by coastal Members. As noted above, this provision was developed through the work of a group of Members with divergent views, and the current draft marks a significant change from the earlier draft which contained two alternative formulations that reflected the divergence of views. One formulation reflected a qualitative approach, which required the IUU fishing determination be based on "positive evidence" and follow "due process". Many Members strongly supported this approach, with some suggesting different, but still qualitative, language such as "fair, transparent and non-discriminatory processes".

21. On the other side there were equally strong concerns over such a qualitative approach, which was seen as opening a door for the WTO, including its dispute settlement system, to pass judgement on the substance of domestic IUU fishing determinations and related domestic judicial and quasi-judicial processes. Initially, some of the Members with these concerns opposed any sort of requirements pertaining to IUU fishing determinations that they would make as coastal Members, and preferred instead the automatic triggering of the subsidies prohibition once a coastal Member made an IUU fishing determination.

22. The approach set forth in Article 3.3(b) of this text does not contain language for a qualitative standard such as "due process". Instead, the approach is based on completion of specific required procedural steps, set forth in the chapeau of Article 3.3(b) and its subparagraphs (i) through (iii) of Article 3.3(b). The aim of these requirements is to provide clarity and certainty on what the coastal Member is obliged to do for its IUU fishing determination to trigger the subsidy prohibition as it applies to the subsidizing Member.

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

24. Concerning the factual evidence requirement in the chapeau, this is similar to the previously considered term "positive evidence". Many Members considered this to be a well-established and universal concept. As noted above, however, some Members were concerned that such a standard would invite WTO scrutiny of the quality of the evidentiary basis of domestic IUU fishing determinations, and argued for no reference to any supporting evidence or information. The term "relevant factual information" represents a compromise between these opposing views, by requiring

that IUU fishing determinations are based on relevant factual information and, leaving no room for the quality of that information to be questioned or judged in the WTO.

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

26. Subparagraph (ii) requires the coastal Member to provide the flag State Member and/or the subsidizing Member "an opportunity to exchange relevant information prior to a determination, so as to allow such information to be considered in the final determination". There is no prescriptive or rigid form as to how this exchange should take place, as clarified in footnote 8, which states that this exchange may include an opportunity to dialogue or for a written exchange if requested. To this end, the draft text provides that it is up to the coastal Member to specify how the information exchange should be carried out.

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

28. A further, multilateral, notification obligation to the Committee established by the Agreement, is contained in the chaussette to Article 3.3. This provision requires the coastal Member to notify its affirmative determinations of IUU fishing to the Committee. This notification requirement is aimed at providing transparency as to the IUU fishing determinations that are relevant under the Agreement, and at putting all Members on notice given that the Member subsidizing a given vessel or operator determined to have engaged in IUU fishing is not always known.

29. There is one additional condition in the first part of the text in (b), which contains the requirement that the coastal Member IUU fishing determination be "based on relevant factual information". This is intended to ensure that IUU fishing determinations are fact-based.

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

Article 3.4

31. Article 3.4 concerns the minimum duration of the subsidy prohibition on the basis of an affirmative IUU fishing determination. This article, which also was the product of the work of the group that developed the drafting for Article 3.3, requires the subsidizing Member, in setting the duration of the prohibition resulting from an IUU fishing determination, to take into account the nature, gravity and repetition of the IUU fishing that was committed. This Article further provides that the prohibition is to apply for at least as long as the sanction on the vessel or operator resulting from the IUU fishing determination, or at least as long as the vessel or operator is listed by an RFMO/A, whichever is the longer.

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

should be considered proportional to the offense, meaning that the minimum duration of the prohibition based on the duration of the sanction necessarily also would be proportional to the gravity of the violation.

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

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

35. That said, the current drafting contains certain clarifying language on a number of aspects:

- the current text provides that the subsidizing Member "shall" consider proportionality, instead of the permissive "may" used in the previous text. This was aimed at clarifying that it is not only the subsidizing Member's right, but also its obligation, to take proportionality into account when determining the duration of the subsidy prohibition;
- the current text also clarifies that the duration of the sanction on, or the listing by an RFMO/A of, a vessel or operator as having engaged in IUU fishing is the minimum duration for the subsidy prohibition, by adding that the subsidy prohibition shall apply "at least" as long as the sanction or the listing;
- footnote 9 has been clarified by removing the illustrative list of terminations of sanctions, as it was generally considered unnecessary; and
- the current text clarifies that sanctions are imposed by coastal Members, whereas listing of a vessel or operator as having engaged in IUU fishing is done by RFMO/As.

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

37. In addition, and as noted above, some Members also consider the definition of the term "operator" in footnote 4 to be part of the overall balance of this pillar, and to be particularly linked to Article 3.4. To these Members, if there is no limitation of the scope of the subsidy prohibition to the particular vessel or vessels engaged in IUU fishing, additional flexibility in Article 3.4 would be warranted. As noted above, other Members consider that proportionality is taken into account by the competent authorities in such situations, as it is in any other IUU fishing determinations.

Article 3.5

38. As indicated above, Article 3.5 is new language in the current text, requiring the subsidizing Member to notify to the Committee in accordance with Article 8.3 the measures it has taken pursuant to Article 3.1, that is the measures it has taken to implement the subsidy prohibition triggered by

an IUU fishing determination. While Article 8.3 is a general provision requiring measures taken to ensure the implementation and administration of the disciplines, a more specific language in Article 3 was considered warranted to provide for transparency on the implementation of the prohibition in Article 3.1 in the particular cases where it is applied. Furthermore, as explained above, the current drafting effectively provides for alignment of the scope of the prohibition to the scope of the IUU fishing determination, in particular as to whether the latter covered certain vessels only, or also or instead the operator.

Article 3.6

39. Article 3.6 sets out a role that port State Members could play in the disciplines on subsidies to IUU fishing. This provision reflects Members' recognition of the unique position of port State Members in combatting IUU fishing, including pursuant to the PSMA. In particular, Article 3.6 provides that when a port State Member has notified a subsidizing Member that it has clear grounds to believe that a vessel in its port has engaged in IUU fishing, the subsidizing Member shall give due regard to this information and take such actions as it deems appropriate.

Article 3.7

40. Article 3.7 is an obligation to implement relevant laws, regulations and/or administrative procedures to ensure that the prohibited subsidies are not granted or maintained. While this text has not been changed from that in the previous draft, the notification requirement for the instruments referred to in Article 3.7 has been removed based on Members' view that this requirement is redundant to the requirement in Article 8.3.

Article 3.8

41. Article 3.8 provides for special and differential treatment (SDT) for the IUU fishing pillar, in the form of a "peace clause". The peace clause is for two years for developing Members, including the least developed country Members, in respect of subsidies for low income, resource-poor and livelihood fishing or fishing related activities, up to 12 nautical miles from the baseline. As a peace clause, it means that the disciplines do apply but would not be subject to the dispute settlement procedures. This is in line with the view shared by many Members, including many developing Members, that subsidies to IUU fishing should be eliminated. At the same time, the unique and vulnerable circumstances of the artisanal fisheries sector have been raised as particularly challenging for developing Members in implementing the disciplines. The peace clause in Article 3.8 is meant to address both of these concerns, while keeping with the mandate to eliminate subsidies to IUU fishing. It should be noted that the period of two years and the limit of 12 nautical miles remain in brackets, as does the provision in its entirety, reflecting that discussions on all of the special and differential treatment provisions remain ongoing.

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

ARTICLE 4: SUBSIDIES REGARDING OVERFISHED STOCKS

43. Article 4, which addresses subsidies to overfished stocks, is the second of the core disciplines in the Agreement and addresses those situations where subsidies are provided for fishing or fishing related activities regarding a stock recognized as overfished by a coastal Member or a relevant RFMO/A.

Article 4.1

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

Article 4.2

45. The situation where a stock is considered overfished is described in Article 4.2, which is when it is recognized as such by a coastal Member with jurisdiction over the area where the fishing is taking place, or by a relevant RFMO/A for the area and species under its competence, based on the best scientific evidence available to it. Clearly, the best scientific evidence available depends on many factors including the data available, the nature of the fisheries areas (for example multi-species tropical fisheries where data on individual stocks may be difficult to ascertain), and the resources available for data collection and assessment.

Article 4.3

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

47. The term "biologically sustainable level" (BSL) is defined in footnote 10. The reference to this footnote is repeated in Article 5.1.1 where it has an identical meaning: the level determined by a coastal Member having jurisdiction over the area where the fishing or fishing related activity is taking place, using reference points such as maximum sustainable yield (MSY) or other reference points, commensurate with the data available for the fishery; or by a relevant RFMO/A in areas and for species under its competence.

48. The footnote refers to MSY as an example of a possible reference point that could be used to determine the BSL of a fish stock. Footnote 10 does not create any hierarchy or imply any preference for the choice of an appropriate reference point for establishing the BSL, as reference points could be based on different methodologies or indicators than, and could be independent of, the concept of MSY. It is left to each Member to determine appropriate indicators and methodology for calculating BSL in a manner best suited to the particular situation and commensurate with the data available for the fishery. For the areas and species under the competence of an RFMO/A, the BSL is that determined by the relevant RFMO/A.

49. Some concerns have been raised about the possibility that a subsidy provided in respect of a particular fishery might meet the conditions of Article 4.3 (that it or other measures are provided to rebuild the stock) and at the same time would fail to meet the conditions of Article 5.1.1. The concern is that under Article 5.1.1, a Member would be required to demonstrate that measures are being implemented to maintain the stock at a biologically sustainable level, while such a demonstration would be impossible if the stock were recognized as overfished. Here, Article 4 addresses and provides a specific set of rules for the distinct situation where the stock has been recognized as being overfished by the coastal Member or RFMO/A. Indeed, a fish stock recognized as overfished is in a particularly vulnerable state and the conditions of Article 4.3 are intended to be more stringent than those under Article 5.1.1, as the object of Article 4.3 is to allow for subsidies or other measures to rebuild the stock to a biologically sustainable level, while that under Article 5.1.1 is to maintain the stock at such a level.

50. Thus, although it is not possible for the Agreement to anticipate every situation that might arise, Article 4 is intended to be the specific provision to address subsidies provided where a stock is already below a biologically sustainable level, and Article 5.1.1 is intended to be the specific provision where a stock remains above such a level. While it is not impossible that there could be some situations where both Article 4 and Article 5 might apply, in most cases, if the stock or stocks in question are recognized as overfished, then any subsidies for fishing or fishing related activities would need to meet the requirements of Article 4.3.

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

Article 4.4

52. Article 4.4 is identical to Article 3.8 and serves the same purpose, that is, for a period of two years, subsidies granted or maintained for low income, resource-poor or livelihood fishing up to 12 nautical miles from the baseline by developing country Members, including LDC Members, would be exempt from actions based on Articles 4.1 and 10 of this Agreement. In other words, this provision operates as a "peace clause" in respect of disputes being taken in respect of such subsidies. It should be noted that the period of two years and the limit of 12 nautical miles remain in brackets, as does the provision in its entirety, reflecting that discussions on all of the special and differential treatment provisions remain ongoing.

ARTICLE 5: SUBSIDIES CONTRIBUTING TO OVERCAPACITY AND OVERFISHING

Article 5.1 and Article 5.1.1

53. Article 5 contains the disciplines on subsidies contributing to overcapacity and overfishing. The core disciplines in this pillar are based on the compromise, "hybrid", approach based on a list of presumptively prohibited subsidies qualified by sustainability-based elements. Thus, the discipline consists of the prohibition in Article 5.1 and the qualifications in Article 5.1.1, read together.

54. Article 5.1 consists of a chapeau containing the main prohibition, followed by an illustrative list of subsidies in subparagraphs (a) through (i) that presumptively contribute to overcapacity or overfishing. Article 5.1 then is qualified by Article 5.1.1, which provides that a subsidy is not inconsistent with Article 5.1 if the subsidizing Member demonstrates that measures are implemented to maintain the fish stocks at a biologically sustainable level. To recall, the biologically sustainable level in Article 5 is defined identically to the same term in Article 4, via a single footnote, footnote 10.

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

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

it is provided. It is exactly that context that is the subject of the demonstration referred to in Article 5.1.1.

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

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

Articles 5.2

59. Article 5.2 is intended to complement the main prohibition in Article 5.1 on subsidies that contribute to overcapacity and overfishing. It provides for a prohibition of all subsidies to fishing or fishing related activities in the high seas – that is, outside of any coastal Member's or coastal non-Member's jurisdiction and outside the competence of any RFMO/A.

60. Questions have been raised about the relationship of the prohibition in Article 5.2 and the prohibition of subsidies contingent upon, or tied to, fishing outside the subsidizing Member's jurisdiction contained in item (i) of the list of subsidies in Article 5.1. One particular question is whether the subsidies referred to in item (i), which can be provided subject to the demonstration in Article 5.1.1, could be provided in the unregulated high seas, and if so, whether Article 5.2 would be deprived of its effect. In my reading, the answer is clearly no. First, footnote 10 clearly provides that the demonstration referred to in Article 5.1.1 can only be made in respect of areas under the jurisdiction of a coastal Member and for areas and species under the competence of a relevant RFMO/A. In other words, Article 5.1.1 including its footnote is limited to these areas. In conjunction with this, Article 5.2 provides for a straightforward prohibition of all subsidies in other areas, namely the unregulated high seas outside the jurisdiction or competence of any coastal Member or non-Member or any RFMO/A. In other words, the sustainability conditionality under 5.1.1 to grant otherwise prohibited subsidies under Article 5.1 *de facto* prohibits subsidies in areas where such demonstration cannot occur, including the high seas. Article 5.2 reinforces this prohibition by providing clarity that subsidies to fishing or fishing related activities in the unregulated high seas are prohibited not only in fact, but also in law.

Article 5.3

61. Article 5.3 on subsidies for a vessel not flying the flag of the subsidizing Member contains two alternatives.

62. Alternative 1 contains language reflecting the views of those Members who consider this provision to be necessary.

63. Some Members reject the presumption underlying the prohibition proposed in Alternative 1 and have been pressing for its deletion. Alternative drafting was suggested to address this concern, and this is included in the text as Alternative 2 in Article 5.3.

64. Both alternatives are in square brackets and more discussion and engagement among concerned delegations are needed on this issue.

Article 5.4

65. Article 5.4 concerns special and differential treatment for subsidies regarding overcapacity and overfishing. SDT has been an issue of particular concern for many Members. Like Articles 3.8 and 4.4, Article 5.4 remains an outstanding issue to be addressed in a broader discussion regarding the overall approach to SDT in this Agreement.

66. Given the diverging views on this topic, before I circulated the previous version of this text (in TN/RL/W/276/Rev.2), Members called on me as Chair to try my hand at putting together different elements in the form of a new clean text on SDT for Article 5, reflecting where I considered a landing zone could lie among different views. On the basis of all the discussions in the NGR, proposals, and textual suggestions from Members, I drafted Article 5.4 with the aim of increasing convergence among Members in this area of the text. Discussions on SDT as a whole are continuing and therefore the structure and language of Article 5.4 are the same as those in TN/RL/W/276/Rev.2. The whole of Article 5.4 is in brackets to reflect that the provisions remain under discussion.

67. Footnote 12, which is new, provides that Article 5.4, that is, the special and differential treatment provisions for subsidies regarding overcapacity and overfishing, shall not apply to Members whose annual share of the global volume of marine capture production is at or above 10 per cent as per the most recent published FAO data. This is in response to a widespread call during discussions on the previous versions of the text that developing country Members with a relatively large share of global fishing should not be in the position to avail of the SDT provisions.

68. Article 5.4 (a) is a transition period allowing developing country Members to grant or maintain the subsidies referred to in Article 5.1. The duration of this transition period is indicated with a placeholder of "X" years in square brackets to reflect the ongoing discussions on this text, ranging from the view that there should be no, or at best a very short, transition period to the demand for a transition period as long as 25 years. This provision also states that developing country Members intending to use this transition period shall inform the Committee in writing before the date of entry into force of the Agreement.

69. Article 5.4 (b) provides for certain flexibilities that would apply beyond the transition period under Article 5.4 (a). Namely, in subparagraph (i) for developing Members with small individual shares of marine global capture production; and (ii) for all developing Members in respect of subsidies to subsistence, artisanal and small-scale fisheries.

70. Article 5.4 (b) (i) provides for SDT in the form of an exemption from Article 5.1 based on a developing Member's annual share of global marine capture production, known as the 'de minimis' approach. Concerning the "*de minimis*" level itself, I note that the figure of a 0.7 per cent share has been suggested, and this has been used as a starting point for discussions. The figure remains in brackets, as it needs further discussion. The provision provides that a Member's share of marine global capture production is to be calculated on the basis of the most recent data published by the UN Food and Agriculture Organization (FAO). The statistics in question are those for wild marine capture production with the same product scope as the definition of fish in Article 2 (a), and excluding aquaculture and inland fishing.

71. Article 5.4 (b) (ii) provides for SDT for artisanal and small-scale fisheries, defined as low-income, resource poor and livelihood fishing and fishing related activities within 12 nautical miles from the baseline. Several Members have indicated that in some cases artisanal fishing may go beyond 12 nautical miles, and some thus have suggested extending the geographical limit up to the limit of a developing country Member's EEZ. Other Members, however, believe that no vessel navigating beyond 12 nautical miles should be considered as artisanal fishing, and thus oppose extending this limit in the provision. To reflect the need to further discuss this issue, the number 12 in "12 nautical miles" is in square brackets.

72. From our extensive discussions on this issue to date, it has been suggested that Members availing themselves of the SDT provisions nevertheless should aim to provide subsidies in a sustainable manner, with a view to avoiding contributing to overcapacity and overfishing. This has been a shared view of both developed and developing country Members. To reflect this discussion, Article 5.4(c) was included in this Article in the previous text (in TN/RL/W/276/Rev.2), and it still remains.

73. As stated earlier, while the drafting of Article 5.4 is my best and honest attempt at presenting a possible landing zone, divergences remain with regard to specific figures, as well as the overall structure. A broader discussion regarding the overall approach to SDT in this Agreement is ongoing.

ARTICLE 6: SPECIFIC PROVISIONS FOR LEAST-DEVELOPED COUNTRY MEMBERS

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

75. Article 6.2 provides for a further transition period once an LDC Member has graduated from LDC status. The operational language of this provision is identical to that in Article 5.4(a), and the duration of the transition period is reflected as "X" in square brackets, reflecting the need for further discussion. The difference from Article 5.4(a) is, as noted, that for LDCs this transition period would begin when they graduate, rather than at entry into force of the Agreement.

76. Article 6.3 calls for Members to exercise due restraint in raising matters involving an LDC Member, and to explore solutions taking into consideration the specific situation of the LDC Member involved, if any. Furthermore, this provision adds that LDC Members shall endeavour to ensure that the subsidies provided do not contribute to overcapacity and overfishing. This is intended to mirror in the LDC Member-specific provisions the same "best endeavour" language that has been added to SDT in Article 5.4 (c) pertaining to developing country Members.

77. Articles 6.2 and 6.3 are in brackets to reflect that discussions on all of the SDT provisions of the Agreement are ongoing.

ARTICLE 7: TECHNICAL ASSISTANCE AND CAPACITY BUILDING

78. Article 7 concerns technical assistance and capacity building for developing country Members, including LDCs, for the purpose of implementing these disciplines.

79. It also refers to the establishment of a voluntary WTO funding mechanism and clarifies that contributions of WTO Members to such mechanism shall be exclusively on a voluntary basis and shall not utilize regular budget resources.

80. Article 7 is in brackets to reflect that discussions on all of the SDT provisions of the Agreement are ongoing.

ARTICLE 8: NOTIFICATION AND TRANSPARENCY

81. Article 8 sets forth the provisions on notifications and transparency.

Article 8.1 chapeau

82. As a general principle, the notification and transparency requirements for the Agreement on Fisheries Subsidies are intended to be in addition to the existing rules of the SCM Agreement. In this regard, the chapeau to Article 8.1 provides that the information requirements under Articles 8.1(a) and 8.1(b) are without prejudice to Article 25 of the SCM Agreement.

Article 8.1 (a)

83. Article 8.1(a) requires the provision of information on the kind of fishing activity for which a notified subsidy is provided, and relevant catch data, with footnote 14 providing that this information is in addition to that provided pursuant to Article 25 of the SCM Agreement.

84. Footnote 15 to Article 8.1(a), which is in brackets, is part of the overall SDT provisions in the disciplines. The aim of the footnote is to address concerns that the transparency and notification requirements in Article 8 should not be overly burdensome for developing country Members, including LDC Members. In this regard, the footnote provides for a four-year periodicity for the notification of the information referred to in Article 8.1(a) for Members falling within the *de minimis* threshold provided for in Article 5.4(b)(i). That provision, as well as the specific number for the *de*

minimis threshold, are in brackets, and as a consequence footnote 15 and the specific number for the *de minimis* threshold also are in brackets.

85. Article 8.1(a)(ii) requires the provision of certain catch data for the fishery for which the subsidy is provided. To provide for the situation of multispecies fisheries, where catch data by species may be difficult to report, the provision allows for reporting by species or group of species. In addition, footnote 16 provides that for multispecies fisheries a Member may provide other relevant and available catch data.

Article 8.1 (b)

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

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

Article 8.1bis

88. Article 8.1bis is a provision for the notification of information pertaining to non-specific fuel subsidies to fishing and fishing related activities. This issue is related to Article 1.2, in the section on Scope, which also is in square brackets. Footnote 18 clarifies that this provision is without prejudice to Article 25 of the SCM Agreement. The numbering of this item as Article 8.1"bis" simply reflects that there are several possible places where this provision, if agreed, could be placed. For example it could be under Article 8.1(a), Article 8.1(b), or as a separate provision under Article 8.

89. In the discussion of this provision, it has been noted that the information that would be collected could be informative in the reviews of the substantive operation of the Agreement under Article 9.4.

90. This provision remains in brackets, as it would be part of the discussion and decision to be made on the overall approach to non-specific fuel subsidies and fuel tax relief or detaxation schemes.

Article 8.2

91. Article 8.2 contains specific notification and transparency requirements, to be notified on an annual basis relating to: (a) lists of vessels and operators that have been affirmatively determined as having been engaged in IUU fishing; (b) information indicating the use of forced labour by vessels or operators; and (c) information about government-to-government fisheries access agreements or arrangements. Subparagraph (b) is in square brackets, reflecting that discussions on this provision are continuing.

92. Article 8.2(c) requires transparency in respect of government-to-government access agreements. Namely, the notification of i) the titles of the agreements or arrangements; ii) a list of their parties; and iii) to the extent possible, the full text of the agreement or arrangement.

93. This provision has evolved considerably since it was first included in TN/RL/W/276/Rev.1 when only the titles of and parties to the agreements or arrangements were to be notified. In line with suggestions that there should be greater transparency for access agreements, additional information to be included in the notification was listed in TN/RL/W/276/Rev.2, including the titles, parties, full text and other details of access agreements or arrangements, and how such access is subsequently used. However, some Members were concerned that these additional transparency requirements were excessive and unnecessarily burdensome.

94. The changes in this draft are an attempt to find a middle ground by deleting items (iv), (v) and (vi) from the list in Rev.2, with item (iii) in the list, the full text of the agreement or arrangement,

to be notified "to the extent possible" as parts of these agreements or arrangements may include confidential or otherwise non-disclosable information.

Articles 8.3 and 8.4

95. Articles 8.3 and 8.4 refer, respectively, to notification of measures in existence or taken to ensure the implementation and administration of this Agreement, and a description of a Member's fisheries regime with references to its laws, regulations and administrative procedures relevant to this Agreement.

96. Under Article 8.3, the information to be notified pertains to a Member's specific measures and steps for implementing and administering the obligations under the Agreement. These include steps to implement the prohibitions in Articles 3, 4 and 5 generally, as well as new measures to implement the prohibitions in Article 3. This latter is linked to the notification obligation in Article 3.5.

97. The scope of Article 8.4 is broader and more general. It requires the provision of a description of a Member's fishing regime, including references to the Member's relevant legal instruments. It is thus meant as an overview, and an index to where the relevant legal instruments can be found. This notification would only need to be updated when any changes were introduced, and could be made by providing a link to an official website.

Article 8.5

98. Article 8.5 provides for a mechanism whereby Members can seek additional information from another notifying Member. It is similar to the mechanism under Articles 25.8 and 25.9 of the SCM Agreement.

Article 8.6

99. Article 8.6 links using the flexibilities or the sustainability qualifications to prohibitions in the different pillars of the disciplines to certain notification requirements, both those in 4.3 and Article 5.1.1 available to all Members, and those in the various provisions containing special and differential treatment for developing and LDC Members.

100. Subparagraph (a) indicates the information that must be provided to use the flexibilities or sustainability qualifications to prohibitions found in Article 4.3, Article 5.1.1., Article 5.4 and Article 6. This is the information notified under Article 25 of the SCM Agreement and Article 8.1 of this Agreement. All of the notification requirements referenced in subparagraph (a) of Article 8.6 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.

101. To invoke Article 4.3 or Article 5.1.1, subparagraph (b) of Article 8.6 requires notification of the specific information called for in Article 8.1(b)(i) and Article 8.1(b)(ii). This reflects Members' view that these types of information would become relevant and important for assessing whether the requirements for using the provisions in question have been met.

Article 8.7

102. Article 8.7 addresses the call by many Members for transparency in respect of the operation, decisions and measures of RFMO/As. The information to be provided includes the instrument establishing the RFMO/A, its areas and species of competence, stock status, conservation and management measures, and information regarding IUU determinations and listings.

Article 8.8

103. Article 8.8 provides that there is no requirement to notify confidential information. This responds to concerns of some Members that some of the information relevant to items listed in this Article might be impossible to provide due to its confidentiality.

ARTICLE 9: INSTITUTIONAL ARRANGEMENTS

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

105. Article 9.1 establishes a fisheries subsidies Committee, to carry out the responsibilities assigned to it under the Agreement. As elaborated in the subsequent paragraphs, these responsibilities include monitoring the implementation of the Agreement.

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

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

108. Article 9.4 provides for a periodic review of the substantive operation of this Agreement. During the discussions on this provision, there was a general understanding that this review is distinctly different from the annual review under Article 9.3. Its purpose is to assess the effectiveness of the Agreement against its overall objective and to identify possible modifications to improve its operation, which it has the possibility to submit to the Council for Trade in Goods. Members generally considered that the first of these reviews should be undertaken after a sufficiently long period of operation to allow for the development of experience in applying the disciplines and to evaluate their effects on the sustainability of fisheries. The text reflects the widely held view that five years after entry into force, and every three years thereafter, would be appropriate intervals for these reviews.

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

ARTICLE 10: DISPUTE SETTLEMENT

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

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

112. Footnote 21 also has been added, purely for clarity. This footnote states that for purposes of this Agreement on Fisheries Subsidies, the term "prohibited subsidy" in Article 4 of the SCM Agreement refers to the subsidies subject to the prohibitions in Articles 3, 4 and 5 of the Agreement on Fisheries Subsidies. The reason was to address a concern, to avoid any possibility that subsidies covered by Article 3 of the SCM Agreement could be considered relevant under or somehow covered by the prohibitions in Articles 3, 4 and 5 of the Agreement on fisheries subsidies.

113. Footnote 20 to Article 10.1 is substantive, as it excludes non-violation claims and situation claims under Article XXIII of the GATT 1994 and Article 26 of the DSU. The discussion of this issue centered on the sustainability objective underpinning the Agreement on Fisheries Subsidies, which sets it apart from the GATT 1994 and other WTO Agreements that address trade and trade-related matters. In this view, there were concerns that non-violation claims and situations claims would bring uncertainty and unpredictability in applying the disciplines. In addition, it was noted that these types of claims have rarely been made and even more rarely have succeeded. Thus, footnote 20 states that subparagraphs 1(b) and 1(c) of Article XXIII of the GATT 1994 and Article 26 of the DSU shall not apply to the settlement of disputes under the Agreement on fisheries subsidies.

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

ARTICLE 11: FINAL PROVISIONS

Overview

115. Article 11 contains the "Final Provisions" of the draft Agreement. This Article contains six paragraphs that do not fit readily into the other ten provisions, or that apply to some, but not all, of them. This Article has been simplified and rearranged to improve clarity.

Article 11.1

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

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

Article 11.2

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

119. The drafting reflects the fact that disasters can be caused by many factors, some natural, such as hurricanes and tsunamis, and some man-made, such as oil spills and similar events, all with a direct impact on the marine environment and the lives and livelihoods of those that depend on fishing. Footnote 22 clarifies that this provision does not apply to economic or financial crises, to respond to concerns that an unmodified reference to "disasters" could open a wide loophole in the disciplines.

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

121. Subparagraphs (a) through (d) set forth the conditions for the subsidies that can be provided pursuant to this provision in respect to a given disaster. These are that the subsidy must be limited to the relief of that disaster, in the affected geographic area and for a limited period, and for reconstruction subsidies, limited to restoring the affected fishery and/or fleet to its pre-disaster level.

Previous references to sustainability criteria have been deleted based on discussions among Members, including that these could make the provision redundant with Article 5.1.1.

Article 11.3

122. Article 11.3 sets forth in two paragraphs disclaimer language aiming to ensure the common view of Members that this Agreement and its operation shall not affect in any way issues of territorial claims or delimitation of maritime boundaries, including in the context of WTO dispute settlement. Heavy brackets have been put around this Article to indicate that intensive work is ongoing on this very sensitive set of issues at the time this document is being finalized. It is expected that the final version of the Agreement will contain revised text in this regard.

Article 11.4

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

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

125. Finally, on Article 11.4, footnote 23 clarifies that the law of the sea includes the rules and procedures of RFMO/As. This is to ensure that the WTO does not become involved, through the operation of this Agreement and dispute settlement, in internal matters of RFMO/As.

Article 11.5

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

Article 11.6

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