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Page: 1/9

Negotiating Group on Rules

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UNOFFICIAL ROOM DOCUMENT**

NEGOTIATING GROUP ON RULES – FISHERIES SUBSIDIES

DRAFT CONSOLIDATED TEXT

Revision

Groupe de négociation sur les règles

DOCUMENT DE SÉANCE NON OFFICIEL**

NEGOTIATING GROUP ON RULES – FISHERIES SUBSIDIES

DRAFT CONSOLIDATED TEXT

Révision

Grupo de Negociación sobre las Normas

DOCUMENTO DE SALA NO OFICIAL**

NEGOTIATING GROUP ON RULES – FISHERIES SUBSIDIES

DRAFT CONSOLIDATED TEXT

Revisión

* In Original language only/En langue originale seulement/En el idioma original solamente.

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DRAFT CONSOLIDATED TEXT

Revision

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

ARTICLE 1: SCOPE

1.1 This [Instrument] applies to subsidies, within the meaning of Article 1.1 of the SCM Agreement that are specific within the meaning of Article 2 of that Agreement, to marine wild capture fishing and fishing related activities at sea.^{1, 2}

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

ARTICLE 2: DEFINITIONS

For the purpose of this [Instrument]:

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

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

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

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

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

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

- (a) a coastal Member, for activities in waters under its jurisdiction; or
- (b) a flag State Member, for activities by vessels flying its flag; or
- (c) a relevant Regional Fisheries Management Organization or Arrangement (RFMO/A), in accordance with the rules and procedures of the RFMO/A, in areas and for species under its competence⁷; or
- (d) [a subsidizing Member for activities by vessels it subsidizes; or]
- (e) [a port State Member for a vessel that is in one of its ports, provided it acted in cooperation with the flag State and, where appropriate, the coastal State, or acted in a situation where the flag State did not within a reasonable period of time inform the port State of action undertaken in response to alleged IUU fishing by vessels flying its flag when such allegations have been reported to the flag State by the port State concerned.]

- 3.3
- (a) An affirmative determination⁸ under paragraph 3.2 refers to the final finding by a Member and/or the final listing by an RFMO/A that a vessel [or operator] has engaged in IUU fishing.
 - (b) [The prohibition under paragraph 3.1 shall apply where the determination under subparagraphs 3.2[(a), 3.2(c), and 3.2(e)] is based on positive evidence and follows due process, [in accordance with relevant international law]].
 - (c) [If the flag State [or subsidizing Member] is known, a Member shall promptly notify the flag State [or subsidizing Member] of the initiation of an IUU investigation [, and provide an opportunity to the flag State [or subsidizing Member] to provide information to be taken into account in the determination.]]

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

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

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

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

⁷ [In case of overlap between the area of jurisdiction of a coastal Member under subparagraph 3.2(a) and the area of competence of a RFMO/A under subparagraph 3.2(c), the determination made by the coastal Member shall prevail.]

⁸ Nothing in this Article shall be interpreted to affect the validity and enforceability of an IUU determination.

3.4 [In applying the prohibition in paragraph 3.1, the subsidizing Member may take into account the [nature, gravity and repetition] [seriousness⁹] of IUU fishing committed by a vessel [or operator]].

3.5 [The prohibition in paragraph 3.1 shall apply as long as the sanction¹⁰ resulting from a determination triggering the prohibition remains in force, or as long as the vessel [or operator] is listed as engaged in IUU fishing, whichever is the longer. In no case shall the duration of the prohibition be less than [X] months from the date on which it first took effect.]

3.6 [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.]

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

3.8 Each Member shall notify to the WTO [PLACEHOLDER – RELEVANT BODY] its laws, regulations and/or administrative procedures referred to in paragraph 3.7. This notification shall be made no later than the entry into force of this [Instrument]. Each Member shall promptly notify any subsequent amendments to its relevant laws, regulations and/or administrative procedures.

3.9 [The prohibition under paragraph 3.1 in respect of unreported and unregulated fishing, shall not apply to:

- (a) subsidies granted or maintained by developing country Members, including Least Developed Country (LDC) Members, for fishing or fishing related activities by vessels other than large scale industrial fishing vessels¹¹ within their territorial sea¹²;
- (b) [PLACEHOLDER – TRANSITIONAL PERIOD SDT FOR UU]]

ARTICLE 4: PROHIBITION ON SUBSIDIES CONCERNING OVERFISHED STOCKS

4.1 No Member shall grant or maintain subsidies for fishing or fishing related activities regarding an overfished stock when any of the following situations related to that stock are present:

- (a) lack of recovery of the stock; or
- (b) continuous reduction in the level of the stock.

⁹ [The following infractions [with reference to paragraph 3.2] shall always trigger the application of the prohibition under paragraph 3.1:

- (a) fishing without a valid licence, authorization or permit issued by the flag State in accordance with any applicable procedures agreed at the regional or global level;
- (b) failing to maintain accurate records of catch and catch-related data, as required by the relevant RFMO/A, or serious misreporting of catch, contrary to the catch reporting requirements of such RFMO/A;
- (c) fishing in a closed area, fishing during a closed season or fishing without, or after attainment of, a quota established by the relevant RFMO/A;
- (d) directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited;
- (e) using prohibited fishing gear;
- (f) falsifying or concealing the markings, identity or registration of a vessel;
- (g) concealing, tampering with or disposing of evidence relating to an investigation;
- (h) multiple infractions which together constitute a serious disregard of conservation and management measures; or
- (i) such other infractions as may be specified in procedures established by the relevant RFMO/A.]

¹⁰ [Termination of sanctions is as provided for under the laws or procedures of the authority having made the determination referred to in paragraph 3.2, including by way of, for example: re-issuance of a suspended license; full prosecution of the matter; and delisting, forfeiture, sinking or scrapping of the vessel concerned, etc.]

¹¹ [PLACEHOLDER – LARGE SCALE INDUSTRIAL FISHING VESSELS]

¹² [Up to 12 nautical miles measured from baselines.]

4.2 A fish stock is overfished if it is:

[**ALT1** recognized as overfished by the Member under whose jurisdiction the fishing is taking place or by a relevant RFMO/A based on best scientific evidence available to and recognized by them.]

[**ALT2** 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 alternative reference points based on the best scientific evidence available to and recognized by the Member.]

4.3 A Member may grant or maintain the subsidies set out in Article 4.1 if the subsidies and/or other appropriate measures are implemented in a manner that ensures rebuilding of the stock to a biologically sustainable level 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.

4.4 [For the purposes of [paragraphs 2 and 3 of this Article], in case of overlap between the area of jurisdiction of a coastal Member and the area of competence of a RFMO/A, the determination made by the coastal Member shall prevail.]

4.5 (a) [The prohibition under paragraph 4.1 shall not apply to subsidies granted or maintained by developing country Members, including LDC Members, for fishing or fishing related activities within their territorial sea.

(b) [PLACEHOLDER – TRANSITIONAL PERIOD SDT FOR OFS]]

ARTICLE 5: PROHIBITION ON SUBSIDIES CONCERNING OVERCAPACITY AND OVERFISHING

5.1 No Member shall grant or maintain subsidies to fishing or fishing related activities that contribute to overcapacity or overfishing.

5.1.1 For the purpose of paragraph 5.1, subsidies that contribute to overcapacity or overfishing [include]:

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

5.2 Notwithstanding paragraph 5.1, a Member may grant or maintain subsidies referred to in paragraph 5.1 if it demonstrates that measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level.¹³

5.3 No Member shall grant or maintain subsidies:

- (a) contingent upon, or tied to actual or anticipated fishing or fishing related activities at sea in areas beyond the subsidizing Member's jurisdiction (whether solely or as one of several other conditions), including subsidies provided to support at-sea fish-processing operations or facilities, such as for refrigerator fish cargo vessels, and subsidies to support tankers that refuel fishing vessels at sea;
- (b) provided to fishing or fishing related activities outside of the jurisdiction of a coastal Member and outside the competence of a relevant RFMO/A.

5.3.1 With respect to subparagraph 5.3(a), the mere fact that a subsidy is granted or maintained to vessels or operators that may be engaged in fishing or fishing-related activities in areas beyond the subsidizing Member's jurisdiction shall not for that reason alone be considered a prohibited subsidy within the meaning of subparagraph 5.3(a).

5.3.2 [PLACEHOLDER – NON-RECOVERY OF PAYMENTS UNDER GOVERNMENT-TO-GOVERNMENT ACCESS AGREEMENTS]

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

5.5 [PLACEHOLDER – CAPPING]

5.6 [PLACEHOLDER – LIST OF NON-HARMFUL SUBSIDIES]

- 5.7
- (a) [[The prohibition under paragraph 5.1 shall not apply to subsidies granted or maintained by LDC Members for fishing or fishing related activities.]
 - (b) [The prohibition under paragraph 5.1 shall not apply to subsidies granted or maintained by developing country Members for fishing or fishing related activities within their territorial sea.]
 - (c) **[ALT 1]** The prohibition under paragraph 5.1 shall apply to subsidies granted or maintained by developing country Members including LDC Members, for fishing or fishing related activities within their EEZ and the area of competence of RFMO/A if all the following criteria are met:
 - i. the Member's GNI per capita exceeds US\$5,000¹⁴ (based on constant 2010 US dollars) for three consecutive years;
 - ii. the Member's share of the annual global marine capture fish production exceeds 2% as per the most recent published FAO data;
 - iii. the Member engages in distant water fishing¹⁵; and

¹³ For the purpose of this paragraph, a biologically sustainable level is the level determined by a coastal Member having jurisdiction over the area where the fishing or fishing related activity is taking place, using maximum sustainable yield (MSY), or alternative reference points such as [level of depletion, or level of or trend in time series data on catch per unit effort, commensurate with the data available for the fishery]; or by a relevant RFMO/A.

¹⁴ US\$5,000 (based on constant 2010 US dollars) as per published data of the World Bank.

¹⁵ A Member is deemed not to be engaged in distant water fishing if its operators or vessels normally fish in FAO Major Fishing Area(s) that is(are) adjacent to the natural coastline of the flag State.

- iv. the contribution from Agriculture, Forestry and Fishing to the Member's annual national GDP¹⁶ is less than 10% for the most recent three consecutive years.]

[**ALT 2 OTHER FORMS OF TRANSITIONAL MECHANISM**]]

ARTICLE 6: [SPECIFIC PROVISIONS FOR LDC MEMBERS]

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

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

ARTICLE 7: TECHNICAL ASSISTANCE AND CAPACITY BUILDING

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

ARTICLE 8: NOTIFICATION AND TRANSPARENCY

8.1 In order to strengthen and enhance notifications of fisheries subsidies, and to enable more effective surveillance of the implementation of fisheries subsidies commitments, each Member shall [, to the extent possible,] provide the following information as part of its regular notification of fisheries subsidies under Article 25 of the SCM Agreement¹⁷:

(a) [PLACEHOLDER – LIST OF SPECIFIC INFORMATION TO BE NOTIFIED]

8.2 Each Member shall notify [the relevant SCM body/the Committee established under paragraph 9.1] in writing on an annual basis of:

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

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

ARTICLE 9: [INSTITUTIONAL ARRANGEMENTS]

[9.1 There is hereby established a [COMMITTEE NAME] composed of representatives from each of the Members. The Committee shall elect its own Chair and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this [Instrument] at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this [Instrument] or by the

¹⁶ Based on the latest published data of the World Bank.

¹⁷ Members shall provide this information in addition to all the information required under Article 25 of the SCM Agreement and as stipulated in any questionnaire utilized by the SCM Committee, for example G/SCM/6/Rev.1.

* *Editorial note: This provision which copies the language of Article 24.1 of the SCM Agreement would be directly relevant to disciplines in the form of a standalone agreement. A similar provision may be useful to disciplines in the form of an Annex to the SCM Agreement.*

Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of this [Instrument] or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.]*

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

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

[9.4 The Committee shall examine [frequency] all information provided pursuant to Articles 3 and 8 and this Article.]

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

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

ARTICLE 10: DISPUTE SETTLEMENT

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

ARTICLE 11: FINAL PROVISIONS

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

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

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

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

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