



Negotiating Group on Rules

FISHERIES SUBSIDIES

**DRAFT DISCIPLINES ON SUBSIDIES CONTRIBUTING TO OVERCAPACITY AND
OVERFISHING, AND RELATED ELEMENTS**

CHAIR'S EXPLANATORY NOTE ACCOMPANYING TN/RL/W/277

Addendum

INTRODUCTION

This addendum provides background, context, and explanations for the document "Draft disciplines on subsidies contributing to overcapacity and overfishing, and related elements", which I have circulated today in document TN/RL/W/277. Given that this text reflects the many discussions among Members during the latest Fish Week, I suggest we use this document as the new basis for our final push to conclude our negotiations in time for MC13.

Members will recall that on 4 September 2023, I circulated the draft text in RD/TN/RL/174 as the starting point for our text-based work this fall. The circulation of that text was followed by extensive deliberations on its provisions as well as on Members' textual suggestions regarding modifications to that text. While views often diverged, many Members also came forward with bridging text and ideas. Then, on 1 December, I circulated document RD/TN/RL/184 as an attempt at capturing some of your ideas on how to further develop Article A.1 and Article B, on the discipline and special and differential treatment, respectively.

In formulating the draft provisions contained in document TN/RL/W/277, I have drawn on your feedback on document RD/TN/RL/184 during the most recent fish week, as well as your submissions and our deliberations over the past several months. Many of the elements in this text will be familiar to you, as they have been a part of previous draft texts and deliberations.

This addendum is intended to assist Members understand the specific content of the draft provisions in TN/RL/W/277. Overall, the text contains a core discipline on subsidies contributing to overcapacity and overfishing based on a two-tier hybrid approach; a standalone discipline concerning subsidies contingent on fishing or fishing-related activities outside the subsidizing Member's jurisdiction; special and differential treatment provisions concerning the core discipline; notification and transparency provisions; and an open section with placeholders for any other provisions concerning overcapacity and overfishing. I have drafted these provisions recognizing their varying levels of maturity, and taking into account Members' calls for more clarity on the main disciplines with a view to subsequently deliberate on special and differential treatment and other related issues. Ideally, we should be able to find the landing zones on these issues during the rest of our work in Geneva so that Ministers will have a complete text in time for MC13.

As I have indicated before, the core discipline should lead to a meaningful reduction in subsidies contributing to overcapacity and overfishing not only through the statement of prohibition contained in the core discipline, but also through the rigorous Committee review procedure that is as central to the working of the discipline as the prohibition itself. The draft core discipline and the special and differential treatment provisions taken together essentially would allocate Members into three groups, with varying degrees of scrutiny applicable to the Members in each. A broad overview of these groups is as follows:

- The first tier of the disciplines, which comprises the 20 largest providers of subsidies. These Members would be subject to the strictest scrutiny – specifically, they would be required to demonstrate the fulfilment of the sustainability-based conditionality set out in Article A.1.1(a) soon after a new subsidy is in effect, in addition to in their regular notifications of fisheries subsidies.
- The second tier of the disciplines, which comprises all Members not falling under Article A.1.1(a), except those that would be covered by the special and differential treatment provisions concerning least developed country (LDC) Members and developing Members with a *de minimis* share of global catch. To grant or maintain fisheries subsidies, the Members in the second tier would have to demonstrate the fulfilment of the sustainability-based conditionality set out in Article A.1.1(b) in their regular notifications of fisheries subsidies.
- The third group, which comprises Members that would be excluded from the scope of the core prohibition by virtue of Articles B.1 and B.2. These are LDC Members and developing Members with a global share of marine catch not greater than 0.8%. Pursuant to footnote 13 of the Agreement on Fisheries Subsidies, these Members would only be required to provide certain information in their notifications of fisheries subsidies every four years and would not need to demonstrate fulfilment of a sustainability-based conditionality.

Notably, the allocation of Members between the first and the second tiers is based on the level of subsidization, and therefore can change over time. That is, Members might move between the first and second tiers depending on the levels of their subsidies *vis-à-vis* those of other Members. The relevant sections below provide more detail on how various aspects of the core discipline would operate.

DETAILED EXPLANATION OF THE PROVISIONS OF TN/RL/W/277

1 ARTICLE A: SUBSIDIES CONTRIBUTING TO OVERCAPACITY AND OVERFISHING

Article A.1, Article A.1.1, Article A.1.2, and Article A.1.3

Article A.1 contains draft language for the core discipline on subsidies contributing to overcapacity and overfishing. The core discipline continues to be based on the "hybrid approach" combining a statement of the prohibition and a list of presumptively prohibited fisheries subsidies, with a qualification to the prohibition based on sustainability elements. It is well known that the aim and operation of the hybrid approach is to ensure that sustainability measures factor in as one important consideration when Members grant or maintain fisheries subsidies, and that decisions on subsidization likewise should factor into sustainability considerations. In general terms, under the hybrid approach, the subsidies and sustainability measures would be the subject of a demonstration that sustainability measures were in place for the fish stocks in respect of which the subsidies were provided. This demonstration process would begin with notifications to the Committee on Fisheries Subsidies. As explained below, the current text builds on the foundations of the hybrid approach contained in documents WT/MIN(21)/W/5 ("W5") and WT/MIN(22)/W/20 ("W20"), along with the concept of a two-tiered sustainability-based conditionality as reflected in documents RD/TN/RL/174 and RD/TN/RL/184.

Like the core discipline in the previous draft texts, Article A.1 combines a prohibition in the chapeau and an illustrative list of certain presumptively prohibited subsidies. In the discussions following the circulation of RD/TN/RL/174, the vast majority of Members supported the approach of stating the prohibition and then having an illustrative list of types of subsidies presumed to contribute to overcapacity and overfishing. Several Members did, however, propose various modifications to the list of subsidies contained in Article A.1. Some proposed deletion of certain items in the list, while some proposed the addition of items to the list. Almost all Members that called for modifications to the list commented on the item concerning income support, which is item (e) in the draft.

Speaking on this item, numerous Members raised the concern that a prohibition of such subsidies could pose limitations on providing assistance to the livelihood of low-income fishing communities, notably income support during closed fishing seasons. Given the degree of support that this concern received among Members, the current draft retains a qualification to item (e) in square brackets from document RD/TN/TL/184. This qualification would exclude income support from the scope of

the prohibition if such support were provided for subsistence purposes during closed seasons. The qualification is bracketed given that some Members proposed alternative ways of addressing the underlying concern, e.g., through the deletion of this item from the list, or through the operation of Article B.4. Furthermore, some Members opposed the inclusion of the additional language, pointing to the illustrative nature of the list.

The current text also includes an additional sentence in Article A.1 following the list of presumptively prohibited subsidies. This sentence makes explicit that Members would have to consider the consequence of a subsidy on overcapacity and overfishing. This sentence is an affirmation of the well-known implicit objective of the hybrid approach to ensure that sustainability measures factor in as one important consideration in the granting and maintaining of subsidies.

The next element of the core discipline is Article A.1.1, which sets out the two-tiered sustainability conditionality as well as certain notification requirements through which the conditionality would be operationalized. While the text on RD/TN/RL/174 had the two-tiered sustainability-based conditionality in two different provisions, i.e., Articles A.1.1 and A.1.2, the current draft restructures the two tiers into different subparagraphs of the same provision, i.e., Article A.1.1.

The basis for determining the two tiers is the same as that used in RD/TN/RL/174, namely the annual aggregate value of fisheries subsidies. Following the circulation of RD/TN/RL/174, Members explored the merits and practicalities of a few other criteria for determining the two tiers, including subsidy intensity based on catch value, distant water fishing defined using FAO major fishing areas, and large-scale industrial fishing. Document RD/TN/RL/184 provided two options to determine the two tiers, which were discussed in detail during the December fish week. While several Members indicated that they saw potential in each of these bases for the determination of the two tiers, practical challenges associated with each were also identified. Overall, most Members appeared to prefer the aggregate value of subsidies as the basis for determining the two tiers given that it would be more practicable to implement. Hence, the current text would subject the largest subsidizers identified based on the annual aggregate level of subsidies to the stricter tier of the sustainability-based conditionality.

The text in RD/TN/RL/174 did not indicate the source of subsidy data that would be used for this purpose and included a placeholder for the source, pending further discussions. In subsequent discussions, it became clear that Members see WTO notifications as the most reliable source of information on subsidy amounts. Thus, the current text indicates that the amount of annual aggregate subsidies provided by each Member will be determined based on its own WTO notifications. The current text also substitutes the placeholder for the number of largest subsidizers in the first, stricter tier, to refer to the top 20 subsidizers. Given Members' concerns that at present, the data contained in the fisheries subsidies notifications submitted by Members to the Committee on Subsidies and Countervailing Measures (SCM Committee) are neither comprehensive nor standardized, Article C.4 has been included in the draft text. This provision, as explained below, is intended to provide the basis for creating a robust database on Members' annual aggregate subsidy amounts, which in turn would facilitate giving effect to the two tiers in Article A.1.1.

Furthermore, in order to operationalize this, Members might consider adding either to the discipline in Article A.1.1 or in a footnote, a description of how the list of the 20 largest providers of fisheries subsidies would be established. One solution could be to circulate a document based on the notified information under Article C.4 within a specified timeframe. Members may also wish to consider how to ensure that non-notification by some Members would not disadvantage Members that provide this information in terms of establishing the list of 20 largest providers of fisheries subsidies.

The stricter of the two tiers is contained in Article A.1.1(a). This provision stipulates that a subsidy would not be inconsistent with Article A.1 if the subsidizing Member demonstrated that measures were implemented that could reasonably be expected to ensure that the relevant fish stocks were at a biologically sustainable level. The provision also would require Members falling in this tier to make this demonstration no later than three months after a new subsidy programme came into effect, and thereafter in its regular notifications of fisheries subsidies.

Article A.1.1(b) sets out the second tier of the discipline, which would be of general application and would apply in respect of Members not among the top 20 largest subsidizers. This provision stipulates that a subsidy would not be inconsistent with Article A.1 if the subsidizing Member demonstrates

through its regular notifications of fisheries subsidies that measures are implemented to maintain the relevant fish stocks at a biologically sustainable level. The requirements of Article A.1.1(b) differ from those of the stricter tier contained in Article A.1.1(a) in two ways.

The first difference is in the sustainability-based conditionality contained in the two provisions. The sustainability-based conditionality in Article A.1.1(b) is the same as that contained in Article 5.1.1 of W20. On the other hand, the sustainability-based conditionality in the stricter tier, i.e., Article A.1.1(a), responds to the call by several Members that the sustainability-based conditionality applicable to the largest subsidizers should be tightened further to discipline the largest subsidizers effectively. To this end, the phrase "to maintain" that appeared in W20 has been replaced in Article A.1.1 (a) with "that can reasonably be expected to ensure" the relevant fish stocks at a biologically sustainable level. This language reflects ideas emanating from the discussion of suggestions to replace the language "to maintain" with "which maintain". In the discussion, several Members expressed the view that "which maintain" would be an impossible standard to meet, and as an alternative some Members suggested the language "can reasonably be expected to ensure" as a stricter standard than "to maintain".

The second difference between the two tiers is in the periodicity of notifications that Members would have to follow to fulfil the sustainability-based conditionality. The 20 largest subsidizers would be obliged to submit the notifications referred to in Article A.1.1(a) no later than three months after a new subsidy program came into effect as well as in their regular notifications of fisheries subsidies. The other Members, pursuant to Article A.1.1(b), would have to submit the notifications referred to in that provision only in their regular notifications of fisheries subsidies.

Article A.1.1(c) contains additional requirements concerning the notifications through which Members would invoke the sustainability-based conditionality. The notifications referred to in Article A.1.1 would form the basis for evaluating the consistency of subsidies with the sustainability-based conditionalities in Articles A.1.1(a) and A.1.1(b). Accordingly, Article A.1.1(c) would require such notifications to be sufficiently precise to enable that evaluation to be made. This requirement is intended to place Members' notifications at the centre of the demonstration of their compliance with the disciplines. Article A.1.1(c) also specifies certain information to be included in the notifications referred to in Articles A.1.1(a) and A.1.1(b). Notably, Article A.1.1(c) applies to Articles A.1.1(a) and A.1.1(b) alike.

Article A.1.2 of the draft operationalizes certain aspects of the Committee review process of Members' compliance with the sustainability-based conditionality. In particular, this provision allows other Members to pose questions and seek clarifications about the information referred to in Article A.1.1 and establishes rules for the subsidizing Members' responses. This provision is materially the same as Article A.1.3 of RD/TN/RL/174, with certain adjustments intended to replicate more closely the language in Article 8.5 of the Agreement on Fisheries Subsidies.

Article A.1.3 reinforces the core discipline by stipulating that non-notification or a notification manifestly inconsistent with Article A.1.1 would lead to the application of the prohibition in Article A.1 to the subsidy in question. The word "manifestly" has been added to this provision to ensure that it does not capture inadvertent errors or omissions in the relevant notifications.

Article A.1 retains certain other elements contained in footnotes to the Agreement on Fisheries Subsidies and reflected in previous draft texts. First is footnote 1 to Article A.1, which clarifies that this Article (the core disciplines on subsidies contributing to overcapacity) would not apply to subsidies to the extent they regard stocks that are overfished. This provision was contained in W20 to indicate that such subsidies are dealt with under Article 4.3 of the Agreement on Fisheries Subsidies. Second is footnote 2 and 3, which are identical to footnote 11 of the Agreement on Fisheries Subsidies defining "biologically sustainable level". Third is footnote 4, which is identical to footnote 14 of the Agreement on Fisheries Subsidies defining shared stocks.

Article A.2

Article A.2 contains a prohibition on subsidies contingent on fishing or fishing-related activities outside the subsidizing Member's jurisdiction. This provision is a standalone discipline, and its drafting remains unchanged from the counterpart provision of RD/TN/RL/174 except for an additional footnote, footnote 6. The purpose of this footnote is to address a concern of some

Members that their subsidies could be prohibited solely because the maritime zones under their jurisdiction do not have a definitively determined EEZ.

The draft retains the placeholder for Article A.2(b) as our discussions show that Members continue to hold different views as to whether and what kind of flexibility from such a prohibition might be appropriate, and how any such flexibility would operate. Some Members consider that flexibility from the prohibition in A.2(a) should be provided for non-collection from operators or vessels of government-to-government access fees, subject to sustainability requirements (as was the case in W20). Other Members consider that such a prohibition should not be free-standing, but instead should be treated the same as any other subsidies listed in Article A.1, including (as was the case in W5) being eligible for the sustainability-based qualifications to the prohibition. During recent discussions, proposals were submitted to provide flexibility for developing Members and to provide for more transparency. Some Members consider that there should be no flexibility in respect of this prohibition.

2 ARTICLE B: SPECIAL AND DIFFERENTIAL TREATMENT

Article B contains provisions on special and differential treatment (SDT) for developing Members and LDC Members in relation to the draft disciplines on subsidies concerning overcapacity and overfishing. Given Members' overall positive reactions to the rearrangement of the provisions in this pillar as presented in document RD/TN/RL/184, the SDT provisions in the present text reflect the same order. These SDT provisions largely reflect the corresponding provisions in documents RD/TN/RL/174 and RD/TN/RL/184, given that many Members called for more clarity on the main disciplines in order to inform additional discussions on SDT. As such, the only significant amendments made to the SDT provisions in Article B are those related to operationalizing the two-tier sustainability-based conditionality in Articles A.1.1 (a) and A.1.1 (b).

Article B.1

Article B.1 provides for SDT for LDC Members and graduating LDC Members, and it largely reflects the counterpart provisions in documents RD/TN/RL/174 and RD/TN/RL/184. The language "under the competence of a relevant RFMO/A" has been replaced with "under the competence of an RFMO/A through which the Member has fishing rights" to provide more clarity.

Article B.2

Article B.2 mirrors the language of the corresponding provisions in documents RD/TN/RL/174 and RD/TN/RL/184, exempting from the disciplines in Article A.1 developing Members that fall below a *de minimis* threshold based on their share of global marine capture production. A footnote has been added to clarify that this provision also applies to graduated LDC Members that fall below this *de minimis* threshold after the expiry of the transition period referred to in Article B.1. The brackets around [0.8] have been retained given the existing divergences among Members regarding the appropriate share of global marine capture production to use as the threshold.

Article B.3

The transition period in Article B.3 has been modified to reflect the new structure of the two-tier sustainability-based conditionality. As before, Article B.3 would apply only to developing Members that are neither LDCs nor below the *de minimis* level of capture production. In addition, the article would not apply to developing Members falling under Article B.6. Furthermore, as was done in Article B.1, the phrase "under the competence of a relevant RFMO/A" has been replaced with "under the competence of an RFMO/A through which the Member has fishing rights".

Keeping in mind that some developing Members could fall within the first tier, Article B.3 (a) provides two transition periods. First, a developing Member falling under this provision would, without having to meet the sustainability-based conditionality, have a maximum of [X] years after entry into force of the disciplines to grant or maintain the subsidies referred to in Article A.1 within its exclusive economic zone and in the area and for species under the competence of an RFMO/A through which the Member has fishing rights. Second, a developing Member falling under this provision that would be amongst the top 20 subsidizers would have an additional maximum of [Y] years after the

[X] years, during which it could apply Article A.1.1 (b) instead of Article A.1.1 (a). Sub-paragraphs (b) and (c) remain largely unchanged from RD/TN/RL/184.

Article B.4

Although Article B.4 has been the subject of numerous discussions, including in dedicated sessions, Members' views still diverge on how best to identify the vulnerable fishing communities that the provision seeks to safeguard. During the latest discussions, Members noted that providing more clarity on the main disciplines could subsequently provide more clarity on the discussions regarding Article B.4. As such, the drafting of this provision remains largely unchanged from its counterpart in document RD/TN/RL/184. However, I draw your attention to the bracketed [and][or] which reflect the latest discussion on this issue. Similar to Article B.3, this provision would apply only to developing Members that are neither LDCs nor below the *de minimis* level of capture production. In addition, it would not apply to developing Members falling under Article B.6.

Article B.5

Article B.5 is identical to the counterpart provision in document RD/TN/RL/184. It reflects the view that Members availing themselves of SDT provisions should nevertheless aim to provide subsidies in a sustainable manner, with a view to avoiding contributing to overcapacity and overfishing.

Article B.6

Article B.6 excludes certain developing Members from applying the SDT provisions, namely, Articles B.1, B.2, B.3, and B.4.

While different criteria have been discussed in this regard, the present text reflects an idea that has been recently explored – that is, identifying Members based on how far offshore their vessels conduct fishing or fishing-related activities. During those discussions, Members sought to articulate what they describe as far "distant water fishing", while also seeking to avoid defining this term at the WTO. However, some Members continued to argue the merits of using FAO Major Fishing Areas as an indicator. Previously, some Members had proposed fishing or fishing-related activities beyond the FAO Major Fishing Area adjacent to the natural coastline. For some Members, that would have meant that fishing and fishing-related activities very close to their jurisdiction would be captured. By proposing to go one FAO Major Fishing Area further out, this can be avoided. This provision thus refers to Members that conduct fishing or fishing-related activities "in any area further than one FAO Major Fishing Area beyond the one(s) adjacent to its natural coastline" and would exclude those Members from the scope of Articles B.1, B.2, B.3, and B.4. Overall, this would mean that developing Members falling under Article B.6 would apply Article A.1.1 from the entry into force of these disciplines.

3 ARTICLE C: NOTIFICATION AND TRANSPARENCY

Article C sets forth notification and transparency provisions.

Article C.1 clarifies that in addition to the specific notification obligations set out in these disciplines, Members are required to comply with their notification obligations under Article 25 of the SCM Agreement and Article 8 of the Agreement on Fisheries Subsidies. This provision is identical to its counterpart in document RD/TN/RL/174. It should be noted that Article C.1 would not affect the operation of footnote 13 in the Agreement on Fisheries Subsidies, which provides that LDCs and developing Members with an annual share of the global volume of marine capture production not exceeding 0.8 per cent can notify certain specified information every four years, rather than every two years as is the case for other Members.

Article C.2(a) pertains to the notification of information indicating the use of forced labour by vessels or operators. This provision is identical to its counterpart in RD/TN/RL/174. Many Members consider that this issue should be dealt with outside the WTO, while other Members advocate strongly to retain this provision.

Article C.2(b) pertains to information about government-to-government fisheries access agreements or arrangements. This provision is identical to its counterpart in RD/TN/RL/174. Although some

Members consider that sub-item (iii) should be deleted, other Members note that in addition to the obligation being "to the extent possible", this provision should be read together with Article 8.8 of the Agreement on Fisheries Subsidies.

Article C.3 provides for the notification of information concerning non-specific fuel subsidies. This provision is identical to its counterpart in RD/TN/RL/174. Most Members having expressed views on this provision feel strongly that it should not be retained, while some Members continue to support its inclusion.

Article C.4 responds to the recent call from several Members that all Members should submit comprehensive information regarding their aggregate fisheries subsidies. This provision would be key to operationalizing the two tiers in Article A.1.1. It sets out two timelines for Members to submit information concerning the aggregate levels of their fisheries subsidies. The first is for Members to submit this information no later than 90 days from the entry into force of these disciplines. The idea behind this requirement is to ensure the operationalization of Article A.1.1 soon after the entry into force of the disciplines. The second is that thereafter, Members would include this information in their regular notification of fisheries subsidies. This would ensure that the allocation of Members in the two tiers is based on the latest data and would dynamically take into account any changes in the amount of subsidies provided by different Members.

As requested by many Members, this provision could be further reinforced by a Ministerial decision at MC13 instructing Members to promptly provide information concerning the aggregate amount of their fisheries subsidies to the WTO Secretariat.

4 ARTICLE D: OTHER OVERCAPACITY AND OVERFISHING PROVISIONS

Article D provides space for insertion of other issues concerning subsidies contributing to overcapacity and overfishing that are not addressed elsewhere.

The one specific issue referred to in the placeholder in Article D.1 is non-specific fuel subsidies. While some Members continue to advocate strongly for a substantive provision on non-specific fuel subsidies, the majority of Members strongly disagree.

Article D.2 provides space for other possible provisions that Members may wish to include. Proposals that have been made include disclaimer language about references to the United Nations Convention on the Law of the Sea; a proposed title for these disciplines; amending footnote 2 of the Agreement on Fisheries Subsidies; and including a new footnote in that Agreement.
