



WTO Negotiations on Fisheries Subsidies:

What's the state of play?

GSI POLICY BRIEF



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Written by Alice Tipping and Tristan Irschlinger

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Head Office

111 Lombard Avenue, Suite 325
Winnipeg, Manitoba
Canada R3B 0T4

Tel: +1 (204) 958-7700

Website: www.iisd.org

Twitter: @IISD_news

Global Subsidies Initiative

International Environment House 2,
9 chemin de Balaxert
1219 Châtelaine
Geneva, Switzerland
Canada R3B 0T4

Tel: +1 (204) 958-7700

Website: www.iisd.org/gsi

Twitter: @globalsubsidies





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With only a few months left to conclude the WTO fisheries subsidies negotiations, this update provides an overview of the draft consolidated text circulated by the chair of the rules negotiating group (RNG), Ambassador Santiago Wills on June 25, 2020. It describes the main approaches proposed so far under the different disciplines and highlights key decisions Members will have to take in the final phase of the negotiations.

Background

Global fisheries suffer from overfishing. According to the Food and Agriculture Organization of the United Nations (FAO), almost 60% of assessed stocks are fully exploited, and 34% are fished at unsustainable levels (FAO, 2020). The significant overcapitalization of the global fishing fleet has resulted in continuous declines in the sector's productivity, threatening the sustainability of the resource, but also employment opportunities, livelihoods, and food security (World Bank & FAO, 2009). There is strong evidence that certain forms of subsidies contribute to the buildup of excessive fishing capacity and the depletion of fish stocks by reducing the cost of fishing operations or enhancing revenues. According to recent global estimates, subsidies to the fishery industry were estimated at USD 35.4 billion in 2018, of which around USD 22.2 billion was provided in a form that enhances capacity (Sumaila et al., 2019).

WTO negotiations aimed at disciplining fisheries subsidies are based on the 2001 Doha mandate, supplemented by a more detailed one agreed at the 2005 Hong Kong Ministerial Conference. These mandates call for WTO Members to “strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing.” Members also agreed that “appropriate and effective special and differential treatment [SDT] for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood, and food security concerns” (WTO, 2005, p. D-2).

In 2007, the chair at that time released a first draft text containing a set of prohibited subsidies, new disciplines for actionable subsidies, general exceptions and special and differential treatment (SDT) provisions (WTO, 2007). This text marked a first milestone in the negotiations but failed to gather consensus. In 2015, following several years of stalled talks, the momentum for new disciplines grew again as several delegations highlighted fisheries subsidies as a possible deliverable. The UN Sustainable Development Goal (SDGs) agreed in September 2015 provided additional impetus, with target 14.6 calling for the prohibition by 2020, of certain forms of fisheries subsidies that contribute to overcapacity and overfishing and the elimination of subsidies that contribute to illegal, unreported, and unregulated (IUU) fishing, recognizing that appropriate and effective SDT for developing and least developed countries should be an integral part of the WTO fisheries subsidies negotiation (UN General Assembly, 2015).



Throughout 2016 and 2017, new textual proposals were tabled by different proponents.¹ These were first collated into a matrix and subsequently into a single streamlined text highlighting areas of convergence and divergence through the use of brackets. In spite of intense negotiations, Members failed to reach an agreement at the 11th WTO Ministerial Conference in 2017. Instead, Ministers mandated continued negotiations based on emerging consolidated texts,² and set a deadline for the conclusion of the talks by the “next ministerial conference in 2019.”

In late 2018, several delegations suggested, however, that new approaches should be envisaged to test possible convergence and overcome the deadlock in aspects of the consolidated text.³ The chair also introduced a facilitators’ process covering four main areas of the disciplines, namely IUU fishing, overfished stocks, overcapacity and overfishing, and cross-cutting issues. The facilitators were not expected to arbitrate different points of view but rather to articulate differences in positions and capture emerging areas of consensus. Their consultations resulted in a series of working papers, circulated under their own responsibility, and reflecting the various levels of maturity among different topics. In parallel, Members continued to table textual proposals on the various aspects of the negotiations throughout 2019 and 2020.⁴ At the March 2020 cluster, a submission by India on SDT and a text proposal by the LDC Group were circulated before the COVID-19 pandemic interrupted the negotiations. At that time, the chair’s intention was to prepare a draft consolidated text and release it after Members had an opportunity to discuss these last two proposals. The consolidated text would be based on the facilitators’ work and the submissions tabled so far and would initiate a phase of text-based negotiations in the runup to the June 2020 WTO Ministerial Conference. With WTO premises closed, however, these proposals went through a written exchange of questions and answers. The COVID-19 crisis also forced Members to postpone the Ministerial Conference to 2021, creating further uncertainty on when the negotiations would conclude. In the absence of clarity on when normal negotiations could resume, the Chair, Amb. Wills from Colombia, ultimately decided to postpone the release of the consolidated text until June when WTO premises partially reopened. The draft consolidated text, circulated to Members on June 25, presents a streamlined compilation of the draft language under discussion in a series of articles covering the new instrument’s scope and definitions, the three substantive pillars of the rules (subsidies to IUU fishing, to overfished stocks, and subsidies that contribute to overcapacity and overfishing more broadly) and some cross-cutting issues. This note describes the approach taken in the draft consolidated text and the key decisions that the consolidation, as well as other remaining issues, present for Members.

¹ These included, for example, full textual proposals from the EU (TN/RL/GEN/181), the ACP Group (TN/RL/GEN/182/Rev.1), the LDC Group (TN/RL/GEN/193), Norway (TN/RL/GEN/191), 6 Latins- Argentina, Colombia, Costa Rica, Chile, Panama and Peru (TN/RL/GEN/187) – New Zealand with Iceland and Pakistan (TN/RL/GEN/186), or Indonesia (TN/RL/GEN/189). Many proposals in the negotiation, and the draft consolidated text of June 25, are not public documents. This brief is informed by the content of both public and non-public documents.

² TN/RL/W/274/Rev.2 and RD/TN/RL/29/Rev.3.

³ These resulted in new proposals circulated in 2019 including by Argentina, Australia, the United States and Uruguay (TN/RL/GEN/197/Rev.2), the Philippines (RN/TN/RL/81) and China (TN/RL/GEN/199) calling for a cap-based approach to reduce instead of prohibit subsidies that contribute to overfishing and overcapacity.

⁴ See for example proposals circulated in early 2020 by Canada (RD/TN/RL/121), the European Union, Japan, the Republic of Korea, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (RD/TN/RL/112/Rev.1), ACP (RD/TN/RL/122, RD/TN/RL/96/Rev.1, RD/TN/RL/89/Rev.2) or Brazil (RD/TN/RL/124).



Scope and Definitions

Issues covered under the two first articles of the draft consolidated text include the type of subsidies covered by the disciplines, the overall scope of a future instrument, and the definition of key terms such as fishing or fishing-related activities. The draft reflects the idea that disciplines should apply to subsidies as defined in Article 1 of the WTO Agreement on Subsidies and Countervailing Measures (ASCM) and which are specific within the meaning of Article 2 of the same agreement. It also specifies that disciplines should only apply to wild marine capture fishing and fishing-related activities at sea. In other words, the text would exclude subsidies to aquaculture or inland water fishing.

The text includes language that would include non-specific fuel subsidies (i.e., those which are not restricted to a particular industry, enterprise, or geographical region) in the scope of the instrument. The treatment of fuel subsidies has been a contentious point. The rules in the WTO's ASCM only apply to specific subsidies; however, Article 3 of that agreement states that prohibited subsidies are automatically deemed to be specific. Some Members have proposed including non-specific fuel subsidies both on environmental grounds and because of their production and trade distorting effect. They argue that it would not be equitable to exclude non-specific fuel subsidies while at the same time disciplining specific ones. On the other hand, opponents fear that covering non-specific forms of support could introduce confusion regarding the scope of application of the new rules.

Other carve-outs proposed by several delegations would have excluded fuel de-taxation schemes (a common type of fuel subsidy to fishing)⁵ (Moerenhout, 2019); subsidies to artisanal and small-scale fishing; subsidies for fishing within the territorial sea (i.e., up to 12 nautical miles from the coast); natural or human-made disaster relief, or economic fluctuations. Although the text does not include any of these carve-outs in its article on scope, it does include special and differential treatment provisions for developing country Members in each of the articles on IUU fishing, overfished stocks, and overfishing and overcapacity. It also has a number of placeholders, some of which could be developed into exclusions from specific disciplines.

Finally, the draft consolidated text suggests definitions of vessels, fishing, and fishing-related activities provided under the Port State Measure Agreement (PSMA) as a basis for negotiations. Importantly, however, it limits the scope of the disciplines to fishing and fishing-related activities “at sea.” This would arguably include onboard processing and transshipping of catch, but would exclude, for example, subsidies to pre- and post-harvest activities such as packaging or processing if they happen onshore.

⁵ Some Members do not consider fuel de-taxation to be a subsidy on the grounds that there is no benefit to the fisher who can buy fuel duty free outside the territorial sea or in a duty-free zone in the port.



Scope and Definitions: Summary of main approaches envisaged and key decisions to make

Main approaches:

- “Subsidies” as defined in ASCM Article 1 that are specific under ASCM Article 2
- Scope of the instrument limited to marine wild capture fishing and fishing-related activities at sea
- PSMA definitions of vessels, fishing, and fishing-related activities used as a basis for negotiation

Key decision 1: Should non-specific fuel subsidies be explicitly included in scope?

Subsidies to IUU Fishing

Illegal, unreported, and unregulated (IUU) fishing remains a pervasive problem in global fisheries. It undermines management regimes and generates losses estimated at up to USD 23 billion annually (FAO, 2016). While most Members support the notion of a complete prohibition of subsidies to IUU fishing, the operationalization of such a prohibition has raised a number of questions (see Van Damme, 2020). Members seem to agree that a vessel and—possibly—an operator that has been found to engage in IUU fishing should not benefit from any form of support.⁶ Alternatively, some proposed that Members should have an *ex-ante* procedure in place to ensure no subsidies go to vessels or operators that have been found to have engaged in IUU fishing in the past. Both approaches are reflected in the draft consolidated text. The draft consolidated text also captures convergence around the idea to use the description in the 2001 International Plan of Action to Prevent, Deter, and Eliminate, Illegal, Unreported, and Unregulated Fishing (IPOA-IUU) adopted by the FAO in 2001 to define IUU fishing. This plan of action describes the activities considered as IUU but remains a set of voluntary guidelines. In practice, however, what constitutes IUU is defined by the relevant national laws and regulations that apply where the fishing is taking place or the rules and procedures established under relevant RFMO/A.

Besides these points of relative convergence, the key remaining questions can be summarized as follows: (a) whose determination of IUU fishing should trigger the subsidy discipline? (b) what procedure should be respected for such determination, given that the discipline would trigger an obligation for another Member to remove its subsidies? (c) whether, and if so, how, the instrument should clarify for what type of infraction and for how long should the disciplines be implemented? and (d) what type of SDT should be envisaged for developing country Members, including LDCs?

⁶ However, there is still no instrument on whether such a prohibition would also be extended to other vessels of the operator concerned. This explains why the term “operator” remains bracketed in the text.



Whose IUU Determinations Should Trigger the Subsidy Rules?

Overall, the chair's consolidated text recognizes Members' agreement that making an IUU determination is a right but not an obligation. In other words, no Member should be taken to the WTO dispute settlement mechanism for not making an IUU determination. The text envisages that the subsidy prohibition could be triggered by a determination made by a WTO Member acting either in its capacity as coastal Member, for violations in the waters under its national jurisdiction (i.e., an Exclusive Economic Zone (EEZ), an area of sea out to 200 nautical miles from baselines) or as a flag state Member, for a violation by a vessel flying its flag (e.g., in the high seas or in another Member's EEZ). In both cases, the IUU determination could target both a domestic vessel or a vessel owned, operated, or subsidized by another Member. Besides coastal and flag state Members, a third option would include a determination made by a Regional Fisheries Management Organisation or Arrangement (RFMO/A) if the IUU fishing took place in the waters and for the species under its competence. In this case, the determination would not be made by a WTO Member but by an international body. It should be noted that, in practice, RFMO/As' IUU lists include only a limited number of vessels. There appears to be most convergence around the ideas of coastal Member and RFMO determinations triggering the subsidy prohibition, as both of these entities have clear geographic jurisdiction over fishing activities. Flag state Member determinations would be an important addition to the list, as flag states are a key source of jurisdiction over fishing vessels, especially when they fish on the high seas outside coastal states' EEZs.

A fourth possible case could be a determination by the subsidizing Member itself. In this case, the government would agree that its own IUU determination would trigger a prohibition of its own subsidies. On the one hand, this would make the disciplines self-enforcing, but on the other, maintaining such an option could be seen as a way to enforce domestic policy coherence. In practice, this option would be relevant in cases where the subsidizing Member is not also the flag state or the coastal state and when neither of them has decided to make an IUU determination. Finally, some Members have proposed to accept determinations by the port state as envisaged under the FAO Port State Measures Agreement (PSMA) which allows a port state to prevent vessels engaged in IUU fishing from using its port facilities and landing their catches. This suggestion would add to the range of actors that could make determinations for the purpose of the subsidy rules, but has been opposed on the grounds that port states would act on the basis of evidence collected either by a flag state, the coastal state, or an RFMO and for violations of someone else's laws and jurisdiction.

What Procedure Should Be Followed to Trigger the Disciplines?

As highlighted above, IUU determinations by coastal states and flag states may involve vessels or operators subsidized by another WTO Member, while RFMO/A IUU listings can involve vessels or operators subsidized by Members that are not parties to the RFMO. In these cases, the IUU determination made by one WTO Member may trigger a legal obligation for another to remove its subsidies. This raises the question of how much deference should be accorded to an IUU determination by another WTO Member. Would the prohibition be triggered automatically once an IUU determination is notified to the subsidizing Member and/or the WTO, or should it fulfill certain conditions to be recognized as valid for the purposes of the



subsidy rules? In the case of an RFMO/A, Members seem to be converging on the need to ensure that the determination is made according to the rules and procedures of the RFMO/A. In the draft consolidated text, this requirement appears to be subsumed into a general requirement that determinations by RFMOs, coastal, and port states be made in accordance with international law. These determinations would also need to be based on positive evidence as well as fair, transparent, and non-discriminatory procedures. Discussions have also focused on whether to make explicit certain obligations in the United Nations Convention on the Law of the Sea (UNCLOS) requiring the Member making a determination to inform the flag state of the vessel concerned and whether also to extend such an obligation to notification of the subsidizing Member and give them the opportunity to provide information.

Where exactly to put the cursor in this area remains debated, as illustrated by the fact that these different elements remain in brackets in the text. For some Members, it is essential to provide the subsidizing Member with an opportunity to present its arguments and feel confident that the determination has followed a fair and transparent procedure. Others argue that IUU determinations are made routinely, and that a WTO instrument should not put additional requirements on existing procedures as long as they respect national laws and international obligations. Under UNCLOS, when fishing in the EEZ of another country, a vessel or operator is under the jurisdiction of the coastal state, and must respect its fisheries rules, legal system, and domestic procedures. The draft consolidated text reflects convergence around the idea that nothing in the WTO rules will affect the validity and enforceability of the IUU determination itself: the question is whether procedural requirements need to be met before a determination triggers a subsidy obligation under this instrument.

For What Types of Infractions, and for How Long, Should the Disciplines Be Implemented?

Besides the issue of due process, several practical questions remain in case of an IUU determination-triggered subsidy rule. First, should any IUU infraction automatically trigger a subsidy prohibition? Second, for how long should the subsidy prohibition apply? And third, would the prohibition regarding an operator include subsidies to all its vessels or only subsidies to the vessel caught in IUU activities? On the first point, several Members have called for some proportionality between the severity of the IUU action and the triggering of the subsidy prohibition. More specifically, they have proposed excluding minor infractions from the application of the subsidy prohibition. The draft consolidated text suggests placing the decision with the subsidizing Member, which would be able to take into account the nature and gravity of the offence, or whether an infraction was “minor,” and therefore decide that subsidy withdrawal was not required. To limit this discretion given to the subsidizing Member, the text suggests listing infractions that should always be considered as serious violations based on the definition of that term in the UN Fish Stock Agreement (e.g., fishing without a licence, fishing in a closed area, or falsifying the identity or registration of a fishing vessel).

Regarding the duration of the subsidy prohibition, some of the proposals on the table envisaged that it should last as long as the sanction applied or as long as a vessel or operator is listed as engaged in IUU fishing, whichever is the longer, and with a minimum duration of [X] months, to be negotiated. A related question is when the prohibition should start. From



a practical perspective, the prohibition could probably start when an IUU determination is notified to the subsidizing Member and/or to the relevant WTO Committee. The draft consolidated text suggests possibilities for the duration of the prohibition (as long as the sanction is in place, with a minimum number of months to be negotiated) and reflects ideas requiring Members notify measures in place, but does not explicitly address the question of when the prohibition would begin to apply.

Regarding the issue of subsidies to operators and vessels, the main argument Members have advanced for limiting the prohibition to subsidies just to the vessel concerned, even if an operator has more than one vessel, is to not punish fishers on other vessels that have not been caught in IUU activities. The main counterargument other Members have advanced in favour of a stronger rule is that prohibiting all subsidies to an operator even if only one of their vessels is the subject of an IUU determination is that this stronger penalty would have a correspondingly stronger impact on operators and create a stronger incentive to ensure all of the vessels in their fleet fish legally. Including subsidies to operators would also allow the rule to apply to non-vessel-based subsidies, such as tax exemptions for fishing companies.

What Special and Differential Treatment Would Be Appropriate and Effective?

Generally speaking, Members have not requested a complete exemption from the implementation of IUU subsidy disciplines. As a result, the prohibition is expected to apply to all Members, including LDCs. That said, some Members have requested longer transition periods in the case of small-scale and artisanal fishing in domestic EEZ or RFMO waters with respect to determinations for unreported and unregulated fishing, arguing that they would need time to put in place enhanced monitoring mechanisms and regulations to comply with the instrument. This approach has been questioned by other Members on the grounds that making an IUU determination is a right, not an obligation. In other words, it would not seem appropriate to request a longer transition period to do something that is not an obligation under future disciplines. In a similar vein, some have proposed enabling developing country Members to exclude unreported and unregulated fishing by non-industrial fishing in territorial waters (i.e., within 12 nautical miles from the coast) from the rules, to ensure these disciplines would not apply to subsidies to small-scale artisanal fishing. Recognizing the large divergences of views persisting in this area, the draft consolidated text provides only a placeholder for a possible transition period for unreported and unregulated fishing. It nonetheless includes, in brackets, a carve-out from the prohibition in respect of subsidies for unreported and unregulated fishing and fishing-related activities by vessels other than large-scale industrial fishing vessels of developing countries and LDCs in their territorial sea (i.e., 12 nautical miles from the shore).



Subsidies to IUU: Summary of main approaches envisaged and key decisions to make

Main approach: Subsidies to vessels/operators prohibited when a final determination of IUU fishing is made

- Issuing determinations is a right, not an obligation. Definition of “IUU fishing” based on paragraph 3 of the IPOA-IUU.

Key decision 1: In addition to the coastal Member and a relevant RFMO/A, whose determination should trigger the subsidy obligation?

- Flag state Member
- Subsidizing Member
- Port state Member

Key decision 2: What due process should be required for determinations to trigger subsidy rules?

- Use of positive evidence
- Fair, transparent, and non-discriminatory procedures
- Notification of flag state, opportunity for flag and subsidizing state to provide information

Key decision 3: Whether/how to clarify how the obligation should be implemented?

- Subsidies could be prohibited for a certain (minimum) period of time
- Subsidies could be allowed for minor violations (but always prohibited for some serious violations).
- Subsidies could be prohibited only for the vessel concerned or also for the operator concerned.

Key decision 4: What, if any, SDT would be appropriate and effective for IUU fishing?

- Timeframes for implementation (for unreported and unregulated fishing)
- Geographical exceptions (territorial seas) for small-scale fishing (for unreported and unregulated fishing)

Subsidies to Overfished Stocks

With roughly a third of assessed global fish stocks being overexploited, Members are contemplating options to prohibit subsidies to the fishing of overfished stocks. While some proposals envisaged a complete prohibition applying to all overfished stocks, and some Members also would like rules on unassessed stocks, others considered that scope too broad and argued for a narrower discipline and for exceptions, particularly when measures are in place to improve the stock. Overall, the key questions to address in this area relate to (a)



the type of prohibition to be applied, (b) the definition of an overfished stock, (c) possible exemptions from the prohibition, (d) SDT provisions.

Three main approaches had been proposed by Members: (a) a simple prohibition triggered when a stock is overfished; (b) a prohibition triggered only if the subsidy negatively affects a particular stock; or (c) a prohibition based on a rebuttable presumption of negative effect—i.e., the subsidizing Member would have to demonstrate that a subsidy does not have a negative effect to continue subsidizing.

The approach considered in the draft consolidated text tries to reconcile those different views by proposing a ban on all subsidies for fishing an overfished stock but only when either of two conditions is present, namely that the stock is not recovering or that it continues to decline unless a Member can show it has measures in place that ensure the stock will recover. In other words, this limits the application of the disciplines to overfished stocks whose situation is not improving and is not being addressed.

How to Establish When a Stock Is Overfished for the Purpose of This Discipline?

A key unresolved question is what kind of rule should be used to establish that a stock is overfished and to trigger the subsidy disciplines. One option consists in using an objective definition of when a stock is overfished based on biological criteria. The challenge here is the absence of an internationally agreed definition of what constitutes an overfished stock. While in some cases, Members define this notion based on the concept of maximum sustainable yield (MSY), in others, they use different criteria (e.g., economic or social ones) (see Headley, 2020). In practice, the method often depends on the data available. Members also apply more or less conservative reference points to trigger a management response depending on the vulnerability of stocks. All this makes a very prescriptive objective definition difficult to agree, particularly given that the WTO is not a forum for fisheries management decisions. To address this concern, some Members have proposed an objective definition that refers both to MSY and “alternative reference points” to allow for variations in Members’ management methods.

At the other end of the spectrum, some Members propose giving full deference to the relevant national authorities or RFMO/A responsible for a particular stock. In other words, a stock would be overfished when considered as such by the relevant authorities. This carries the risk of turning the disciplines into a purely self-enforcing exercise—i.e., a Member would only be bound by the disciplines when it decides to declare a stock as overfished. As highlighted above, this may nonetheless enhance coherence among different national authorities, namely those managing the stocks and those granting subsidies.

The draft consolidated text includes these two options as possible alternatives and does not opt for one of them in particular. Under both approaches, a possible way to limit the risk of arbitrariness consists in requiring Members to base their assessment on the best scientific evidence available. Here discussions have focused on the standard of evidence that Members would be required to use. Some Members have proposed “best scientific evidence available to the Member” which reflects similar language in UNCLOS Art. 61. Others propose adding “recognized by them,” arguing that national authorities should not be obliged to use any evidence. Others refer simply to information “publicly available.” At the heart of the matter is



whether a Member's decision should be judged against the best evidence that the Member has, or chooses to have, or the best evidence anyone else has, about a stock. The more control the Member has over the evidence it is obliged to take into account, the more scope there is for Members to ignore evidence that a stock appears to be overfished. Here the draft consolidated text refers to the best scientific evidence available and recognized by the Member.

How to Deal With Unassessed Stocks

For some Members, unassessed stocks should automatically be considered as overfished, and subsidies should be prohibited following the logic of the precautionary principle. Others consider that unassessed stocks are not necessarily overfished. In practice, they tend to be less commercially meaningful and mostly targeted by small-scale subsistence or artisanal fisheries and hence not worth investing stock assessment resources. The draft consolidated text includes only a placeholder and refrains from suggesting specific language at this stage.

Should There Be Explicit Exceptions for Subsidies Where a Stock Is Being Managed Back to Health?

The option currently envisaged in the draft consolidated text would allow the subsidizing Member to show that, notwithstanding a stock's lack of recovery, its support is implemented in a manner that ensures rebuilding of the stock to a biologically sustainable level as determined by the coastal Member or the relevant RFMO/A. The measures cited would presumably need to be sufficient to ensure the future rebuilding of the stock.

What Special and Differential Treatment Would Be Appropriate and Effective?

Most proposals so far focus on the need to provide technical assistance and capacity building, for example, to undertake stock assessment. Other proposals argue that when fishing in their domestic EEZs, developing countries (including LDCs) shall be entitled to a transition period of two years to withdraw or modify any subsidy from the moment that a fish stock has been declared as overfished by the national authorities. There are also proposals for a total exception for developing countries and LDCs for fishing and fishing-related activities within the 12 nautical miles of their territorial sea. With technical assistance and capacity building now dealt with under a separate article, the draft consolidated text provides a bracketed placeholder for a possible transition period for developing country Members' implementation of the discipline and bracketed references to a general carve-out to allow subsidies to any fishing of overfished stocks within developing country and LDC Members' territorial seas.



Subsidies to Overfished Stocks: Summary of main approaches envisaged and key decisions to make

Main approach: Prohibition of subsidies when a stock is overfished and there is: 1) lack of recovery or 2) continuous reduction, except if measures are in place to ensure stock recovery, implicitly limiting the prohibition to overfished stocks that are getting worse.

Key decision 1: How to establish when a stock is overfished for the purposes of this discipline.

- Objective definition (overfished when at level $<MSY$ or alternative reference point)
- Deference (overfished when national authority or RFMO/A says so)
- Standard of evidence (best evidence available, “available to” or “recognized by” the Member)

Key decision 2: How should unassessed stocks be dealt with?

Key decision 3: What SDT, if any, would be appropriate and effective?

- Timeframes for implementation
- Geographical exceptions (territorial sea)

Overfishing and Overcapacity (OFOC)

While Members seem to agree broadly on the structure of IUU and overfished stocks disciplines, discussions on subsidies that contribute to overcapacity and overfishing haven't yet reached that stage of maturity. At the broadest level, Members still disagree on whether the disciplines should take the form of (a) a qualitative prohibition based on a list or triggered in situations where fishing capacity or effort are excessive, possibly with exceptions when fisheries management measures are in place, (b) an overall quantitative limit, by establishing a maximum entitlement for each Member and reducing it over time, or (c) a combination of both (see Tipping, 2020). Under all three scenarios, a supplementary question is whether and how exceptions should be designed, for example, through the introduction of a green box and/or SDT provisions. As described below, the current draft consolidated text opts for a combination of qualitative and quantitative restrictions supported by different carve-outs, but elaborates only possible disciplines on qualitative prohibitions, as there appears to be convergence on the idea that, at a minimum, the rule should contain some kind of qualitative prohibition of subsidies.

What Kinds of Qualitative Prohibitions Should Apply to Fisheries Subsidies?

Subsidies Contributing to Overfishing and Overcapacity

The negotiation's mandate explicitly refers to the prohibition of certain forms of fisheries subsidies that contribute to excessive fishing effort and capacity. Members have suggested different qualitative approaches to rules that would meet this mandate. A first approach consists in listing prohibited subsidies based on an *ex ante* acknowledgement that these forms



of support contribute to excessive fishing effort and capacity—e.g., subsidies to large scale industrial fishing which reduce capital or operational costs. A second approach consists in prohibiting all subsidies when the support targets a stock already fished at an unsustainable rate or by an oversized fleet. Finally, a third approach would establish a broad prohibition applying to all subsidies, unless a Member can demonstrate that it has a management system.

The draft consolidated text draws on proposals that suggest qualitative restrictions would take the form of a prohibition targeting subsidies that reduce capital and operational costs but only in situations where a stock is fished “at a rate of fishing or with a measure of fishing capacity that is greater than would allow the stock to be maintained at a sustainable level” as defined by a relevant RFMO/A or the coastal Member based on MSY or alternative reference points. According to the text, capital costs would include, for example, acquisition, construction, renovation, or modernization of fishing vessels, while operational costs would cover fuel, licence fees, ice, bait, personnel, insurance, or operating losses, to list just a few. In doing so, the text focuses on prohibiting the most problematic kinds of subsidies in situations where fishing capacity (or fishing effort) is already excessive and where the risk of overexploiting fish stocks is greatest.

The draft consolidated text suggests an exception in an additional paragraph that states that a subsidy shall be deemed not to be prohibited if the subsidizing Member can demonstrate that it has other policies in place that effectively ensure the stock is maintained at a sustainable level. This could apply, for example, in cases where excessive capacity exists but at the same time measures are in place that limit actual fishing and so keep stocks at a sustainable level. In this case, as with similar provisions in the overfished stocks rule, a subsidizing Member could use this exception to keep subsidizing, but would have to prove that its management measures in place were effective in maintaining a stock's health.

Subsidies for Fishing in Areas Beyond National Jurisdiction (ABNJ) and Reflagging

In addition to subsidies contributing to overfishing and overcapacity, the draft consolidated text envisages two supplementary prohibitions. The first targets fishing in all areas beyond national jurisdiction (ABNJ)—i.e., fishing in the high seas or in the EEZ of another WTO Member—but would cover only subsidies contingent upon or tied to fishing in ABNJ, following the model of export subsidies in the ASCM and the Agreement on Agriculture. This would cover those subsidy programs specifically designed for distant-water fishing or which, in practice, provide the bulk of their benefit to distant-water fishing. The second provision would cover all subsidies, not just those that target distant-water fishing, but would focus solely on fishing on some parts of the high seas, excluding fishing in foreign EEZs and waters under the competence of RFMO/A. Some Members have proposed a carve-out for subsidies to fishing within areas under the competence of RFMO/A adjacent to the EEZ of the subsidizing Member.

Finally, a last possible prohibition included in the draft consolidated text, although in brackets, targets vessels subsidized by one Member but flying the flag of another. According to the proponents, prohibiting subsidies for a vessel not flying the flag of the subsidizing Member would contribute to fighting the use of flags of convenience, particularly in the high seas,



which are often associated with IUU fishing.⁷ In practical terms, if accepted, this prohibition might make the need to include IUU determination by a subsidizing Member superfluous because governments could not subsidize vessels not flying their flag, so the “subsidizing Member” would also always be the “flag state.” Without this prohibition, though, Members could continue to subsidize vessels not flying their flag.

Should the Instrument Include Quantitative Restrictions or an Overall Cap to Fisheries Subsidies? If so, What Types?

Beyond—or in addition to—possible subsidy prohibitions, proposals for quantitative restrictions have taken the form of a “cap-based approach,” setting a maximum limit or ceiling to the total amount of subsidies Members would be allowed to grant.⁸ It would require Members to first notify their current level of support and establish their respective baseline from which reductions would be applied. The key question for this approach is how caps and reductions would be determined for each Member. The draft consolidated text does not elaborate on the options for this prohibition, but the main proposals are set out here for reference.

Some proposals envisage a tiered approach under which Members would fall into different categories based on their contribution to world marine captures. Countries accounting for larger shares of global catches would be expected to reduce their support more. Reduction commitments from the baseline would be applied following a “request and offer” approach. Those falling in lower tiers and unwilling to negotiate an individual cap could alternatively apply a uniform default cap expressed in monetary terms. Finally, countries falling in the lowest tier would not be required to schedule a cap or reduce their subsidies. An alternative approach consists in allowing Members to choose between different options in defining their cap to reflect their specific sensitivities. Such options could be either based on (a) a percentage cut from the baseline level of support, (b) a defined percentage of the total landed value of catches, or (c) a specific amount allocated per fisher.

A third approach consists in establishing different categories of Members based on their development status and/or their share of world marine capture and to apply a tiered formula to define for each of them an overall limit calculated as a percentage of the value of production—with countries in the higher tier undertaking deeper cuts and those in the lowest ones (including LDCs) being exempt. Finally, some delegations have proposed to simply use a progressive formula with higher reduction coefficients corresponding to higher portions of a given amount of support and applied cumulatively to the total subsidy.

Overall, a cap-based approach would allow Members to decide where to initiate cuts in their different programs and reflect their respective sensitivities, while at the same time reducing the

⁷ Some Members have expressed concerns, though, that this may affect legitimate temporary reflagging arrangements under access instruments and have proposed to exempt those cases from the prohibition.

⁸ It should be noted, however, that some of the proponents of capping have put such an approach forward as a practical way to get around disagreements relating to prohibitions based on lists or based on effects tests or combinations of these two approaches. With the draft text focusing on prohibiting subsidies for capital and operating costs when stocks are going in a bad direction, the need for capping all fishing subsidies may no longer be required. Similarly, a green box may no longer be needed because non-harmful subsidies would not presumably include subsidies for capital and operating costs.



total amount of support. From that perspective, it mirrors the approach adopted for the amber box in the WTO Agreement on Agriculture (AoA) to reduce subsidies. Critics nonetheless point to the fact that the AoA resulted in providing significant entitlements for some of the largest subsidizers, which have subsequently proven difficult to reduce, as illustrated by the stalled WTO negotiations on domestic support. It would also require Members to accurately notify their fisheries subsidies when most of them already struggle to comply with their existing ASCM notification obligations. As noted above, in light of the wide divergences of views in this area, the draft consolidated text provides only a placeholder for capping in the text but so far does not suggest any specific way forward.

Should the Discipline Include a “Green Box” of Allowable Subsidies, and if so, What Should These Be?

Regardless of the approach taken—i.e., prohibition, capping or a combination of both—the extent to which certain forms of support should be excluded from the disciplines has been hotly debated. In practical terms, the need (if any) for a green box is likely to be proportionate to the scope of the disciplines. On the one hand, if these are limited and clearly circumscribed, the need to spell out exceptions will be smaller, as all measures not covered by the disciplines would by default continue to be allowed. If, on the other hand, the disciplines cover a very wide range of subsidies, the need to list specific carve-outs is likely to become more pressing.

One key question in the decision around a green box is whether it should exempt subsidies from qualitative or quantitative rules, or both. If applied to a possible qualitative prohibition, the green box would certainly exempt a set of subsidies from the application of the disciplines. If applied to a quantitative or cap-based approach, green box measures would most probably be excluded from the calculation of existing support, which would have to comply with the new cap.⁹

In practical terms, possible candidates for a green box include subsidies for fisheries management, R&D, health and safety on board, support to coastal communities, vessel decommissioning, or disaster relief. From a sustainable development perspective, envisaging safe harbour provisions may provide incentives for Members to reform their subsidy regime toward less harmful forms of support. However, if not designed carefully, a broad green box may create loopholes and enable circumvention of the disciplines. A further key question is, therefore, whether the green box might be conditional or restricted in some way, such as requiring that any green box subsidies not increase the overall fishing capacity of the subsidizing Members. In the absence of a clear direction to follow, the draft consolidated text at this stage provides only a placeholder to list non-harmful subsidies.

What Special and Differential Treatment Would Be Appropriate and Effective?

The 2005 Hong Kong mandate explicitly recognizes that “appropriate and effective special and differential treatment [...] should be an integral part of the negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and

⁹ A question remains, however, as to whether green box measures should be included in the calculation of the baseline for setting the cap in the first place.



livelihood and food security concerns.” In practice, discussions on SDT have remained particularly controversial, and proposed provisions in this area are all bracketed. This is partly because the rationale for SDT is much more limited under rules on subsidies to IUU fishing and for fishing of overfished stocks. Also, because subsidies contribute to overfishing and overcapacity, the problem is not simply a question of eliminating subsidies that encourage particularly egregious fishing practices—it is also a question of how far governments should be allowed to support fleets, including when they compete against each other for shared resources. Besides the need to protect the livelihood and employment of poor fishing communities, several Members have also insisted on the need to develop their fishing fleet and ensure a fairer distribution of shared resources among fishing nations.

Besides technical assistance and capacity-building needs that are covered in the draft consolidated text in a dedicated article, SDT provisions discussed by Members largely consist of specific flexibilities under the different commitments envisaged in the instrument. Under the capping approach, for example, developing countries could benefit from smaller reduction coefficients or flexibilities in the definition of the different tiers. Under a more qualitative approach, SDT could take the form of exceptions or specific carve-outs from the different prohibitions.

Conceptually, possible flexibilities can be organized under four broad categories. A first approach consists in basing them on the development status or the national per capita income of Members. LDCs, for example, have requested to be fully exempted from any prohibition applying to overfishing and overcapacity and/or any obligations under a cap-based approach. A second approach would apply different commitments in different geographical areas. For example, ACP countries have sought a carve-out for fishing activities in their own EEZs. Others have proposed excluding fishing within the 12 nautical miles of the territorial waters. A third category of proposals envisages exempting certain forms of fishing, such as small-scale and artisanal fisheries, and applying the disciplines only to distant-water fishing vessels. Finally, a fourth approach consists in differentiating Members based on their share of wild marine captures. For example, some proposals would exempt developing countries Members accounting for less than 2% of global marine capture from the prohibition.

The draft consolidated text combines these different approaches. It exempts LDCs from any commitment on subsidies that contribute to overcapacity and overfishing. Second, it exempts other developing countries from these disciplines for fishing and fishing-related activities within their territorial sea. Finally, a third carve-out would apply to developing country Members for subsidies to fishing and fishing-related activities in their EEZ and the areas of competence of RFMO/A as long as a Member met any of the following criteria: (a) has gross national income (GNI) per capita lower than USD 5,000 (based on constant 2010 USD), (b) accounts for less than 2% of global marine capture; (c) does not engage in distant-water fishing and (d) relies on agriculture, fisheries, and forestry for more than 10% of their GDP.

The draft consolidated text also contains a placeholder for a possible list of subsidies considered not to be harmful to fish stocks that would continue to be allowed.



Overcapacity and Overfishing: Summary of main approaches envisaged and key decisions to make

Key decision 1: Which prohibition or qualitative restrictions should apply to fisheries subsidies?

- Prohibition of subsidies that contribute to overcapacity and overfishing

What subsidies?	Under what circumstances?
Subsidies for operational and capital costs	When the rate of fishing or the capacity of the fleet is beyond sustainable levels as determined by the coastal state or RFMO using MSY or alternative reference points
	Except when effective management in place

- Prohibition for subsidies to fishing in ABNJ
 - Subsidies “contingent or tied to” fishing in all ABNJ
 - All subsidies to fishing in high seas outside area of competence of RFMOs
- Prohibition of subsidies to reflagged vessels

Key decision 2: Should the instrument include quantitative as well as qualitative restrictions on subsidies? If so, how should these be designed and what subsidies would be included?

- Tiers of Members by level of capture, with different rules for each tier:
 - Tier 1: Negotiated individual caps and reduction commitments (default cap in specific cases)
 - Tier 2: Default cap or negotiated cap. No reduction commitment
 - Tier 3: No cap or reduction commitment
- Caps according to % of (a) the total level of subsidization, or (b) level of capture, or (c) global average x number of fishers.
- Caps (and resulting reductions) according to % of value of marine capture, across four tiers of Members.
- Caps (and resulting reductions) according to a common formula, with higher reduction percentages for higher portions of a total subsidy amount.



Key decision 3: Should the discipline contain a “Green Box” of allowable subsidies? If so, what should its contours be?

- Should it exempt subsidies from qualitative or quantitative rules, or both?
- Which elements should it cover?
 - Fisheries management, R&D
 - Reduction of fishing capacity
 - Subsidies to small-scale fishing
 - Health and safety
- Should it be conditional or restricted in some way?

Key decision 4: What SDT would be appropriate and effective?

- LDC carve-out for subsidies contributing to overfishing and overcapacity
- Exceptions for subsidies from developing country Members for fishing in their territorial sea
- Exceptions for subsidies for fishing in domestic EEZ and RFMO/A for developing country Members that meet all of a set of criteria (GNI per capita, share of marine capture, distant water fishing and the role of agriculture, forestry, and fisheries in their GDP).

Horizontal SDT Provisions

Beyond the flexibilities relating to specific subsidy disciplines, the draft consolidated text also envisages a number of cross-cutting or horizontal SDT provisions. These essentially relate to technical assistance and capacity building (TACB) and a set of LDC-specific measures. Here again, in light of the lack of consensus, all provisions are between brackets. Regarding TACB, proposals tabled so far envisage a commitment by developed countries and developing countries declaring themselves in a position to do so, to provide technical assistance and capacity building for the implementations of the instrument.¹⁰ Besides implementation, some Members have also requested support for fisheries management aspects such as monitoring and surveillance or stock assessment, by involving other international organizations and specialized agencies such as the FAO. The draft consolidated text, however, limits the provision of TACB to the implementation of the instrument. Other provisions involve extending LDC flexibilities to Members graduating from the LDC category for a certain transition period as well as a due restraint clause in raising matters involving LDCs under this instrument. Contrary to what was envisaged in some proposals tabled so far, the draft consolidated text does not incorporate any transitional arrangements and transition period in favour of developing countries for the implementation of the instrument. Instead, it envisages specific transition periods under the different disciplines.

¹⁰ For a discussion of potential implementation steps of a WTO agreement on fisheries subsidies, see Redding and Macfadyen (2020).



Horizontal SDT Provisions

Key decision 1: What type of TACB should be provided?

- Limited to the implementation of the instrument
- Covering other elements of fisheries management (e.g., stock assessment, monitoring)

Key decision 2: What additional SDT would be appropriate and effective?

- Extending LDC flexibilities to graduating Members over a certain transition period
- Due restraint clause in cases involving LDCs

Institutional Issues

Beyond the substantive disciplines described above and set out in the draft consolidated text, Members will have to address a number of institutional matters. These include questions related to (a) transparency and notifications (b) the legal form of the instrument, (c) mechanism for review and implementation, and (d) remedies. Discussions on those issues are still at an early stage and may have to wait until some of the key questions highlighted in previous sections are resolved. Indeed, as explained below, the answers to many of these questions will largely depend on what is ultimately agreed under the general disciplines themselves. For this reason, the draft consolidated text provides only specific placeholders, without proposing any language for Members to consider.

Transparency and Notification

Article 25 of the ASCM already requires Member to notify all their subsidies as defined in paragraph 1 of Article 1 that are specific within the meaning of Article 2. Notifications must include the form of the subsidy, the amount provided, the policy objectives, the duration of the program, and statistical data permitting an assessment of the trade effect of a measure. On top of existing requirements, proposals tabled so far call for information on the type of marine fishing activity, the vessels and operators fishing in ABNJ, catch data by species targeted by a subsidy program, the status of stocks for which the subsidy is provided, the fleet capacity in the relevant fishery that the program supports, conservation and management measures, etc.

As highlighted above, the purpose of notification is, at least in part, to help Members monitor each other's compliance with the WTO agreements, which means the content of these transparency provisions will largely depend on the scope of the disciplines. For example, notifying the vessels and operators fishing in ABNJ will only be relevant if specific prohibitions are included in this area. Assuming a possible prohibition on IUU, based on determinations by the coastal or flag state, transparency provisions will probably have to include requirements for Members to notify their respective IUU legislation and any determination they make. It may also be relevant to include mechanisms for notification by a Member or report by the Secretariat on RFMO/A and national IUU lists. Besides the content of transparency provisions, several developing country Members and LDCs have highlighted



the need to ensure that disciplines in this area are not more burdensome than necessary and commensurate not only with the commitments undertaken by those Members but also with their contribution to the problem of global overfishing. More generally, given the current poor records on notifications, it would be important to ensure that what is ultimately agreed is practicable for everyone.

The Legal Form of an Instrument

Discussions on the legal form of a final instrument seem to converge around two main options for the incorporation of a future instrument into WTO law. First, a stand-alone agreement under Annex 1 of the Marrakesh Agreement (e.g., like the Trade Facilitation Agreement) or second, an Annex to the Agreement on Subsidies and Countervailing Measures (ASCM). The draft consolidated text does not suggest any particular approach and therefore refers only to [this instrument] throughout the text. One consideration in choosing between the two options is the extent to which Members want to incorporate concepts from the ASCM Agreement and follow its broad structure. Annexing the new instrument to the ASCM could allow Members to adopt most of the ASCM approach, including not only basic elements (such as the definition of a subsidy and the notion of specificity) but also details such as the rule that prohibited subsidies are automatically deemed to be specific. If the instrument borrows only some elements of the ASCM but is otherwise quite different, a stand-alone deal might make more sense.

Mechanisms for Review and Implementation

With respect to review and implementation, proposals so far have envisaged three main institutional options (a) a new committee on fisheries subsidies; (b) using the existing Committee on Subsidies and Countervailing Measures by expanding its scope; or (c) creating a subsidiary body under the Committee on SCM as provided under Art. 24.2. Beyond the form, however, Members will also have to define the scope of the committee and the responsibilities assigned to it. Proposals so far have mainly focused on notifications, compliance, and a review of commitments. But the committee could also conceivably serve as a forum to raise specific concerns, for example, if a Member believes another is subsidizing the fishing of an overfished stock following the approach of specific trade concerns under the SPS and TBT Agreements. In a similar vein, it could serve as a forum to review technical assistance and capacity-building needs of developing Members.

Remedies

Another question relates to possible remedies to offset the negative effects of a subsidy. In practice, this question would arise in the event that a Member proves that another Member's subsidy is prohibited and that other Member does not remove it or change it. Under the ASCM, Members have two options to do so: a multilateral one, through the dispute settlement mechanism, and a unilateral one through the use of countervailing measures. Under the multilateral track, a question that arises is whether a special consultation procedure should be envisaged given the environmental nature of the disciplines. According to some Members, this procedure would operate in addition to what is already provided under the ASCM, allowing Members to exchange information on fisheries subsidies and voluntarily rectify any harmful effect, thus minimizing reliance on litigation processes.



Under the unilateral track, the ASCM allows Members to impose additional duties on imports, pursuant to an investigation showing that their domestic industry suffered material injury caused by the importation of goods benefiting from a prohibited or actionable subsidy program. The question that arises is whether a similar unilateral track should be envisaged in a future fisheries subsidy instrument for Members whose fishing industry (or fish stocks) is affected by a subsidy program from another WTO Member. In such a case, the challenge would consist of defining how the material injury would be calculated. The ASCM already covers cases where subsidies generate trade distortions. If a unilateral remedy track was included in the fisheries subsidies instrument based on the ASCM model, it would have to take account of the object and purpose of the fisheries subsidies agreement, which is not to protect one Member's industry from injury caused by another Member's subsidies but to protect fish stocks from subsidies that contribute to IUU fishing or overfishing and overcapacity. Therefore, the calculation of the remedy would probably be very different to that set out in the ASCM.

Dispute Settlement

Several proposals envisage that future WTO disciplines would require that subsidies be changed on the basis of decisions taken in the context of fisheries management. For example, under IUU disciplines, a determination by a coastal state Member may trigger an obligation for another WTO Member to remove its subsidies to the offending vessel or operator. Similarly, under overfished stocks, the subsidy prohibition could be triggered by the findings of a stock assessment. Knowing that the WTO is not a fisheries organization, this raises questions about the extent to which WTO dispute settlement panels should examine decisions taken about subsidies in compliance with the new instrument, and the extent to which they should also examine decisions taken in the context of fisheries management that would trigger the subsidy obligations that are the focus of the instrument.

Broadly, the depth to which a dispute settlement panel examines a Member's compliance with the instrument will depend on the nature of the provision being challenged, and what exactly it requires. Members are also considering if, and if so, how, to ensure it is clear which elements of the fisheries management-related decisions that trigger subsidy obligations can be reviewed. Most Members seem to converge on the idea that a panel should not engage in *de novo* review or have full discretion to assess substantive elements of an IUU determination or stock assessment decision made by a national authority or an RFMO/A. Several options have been suggested that could guide the drafting of different obligations in the instrument. These include (a) an automatic recognition of assessment or determination by relevant authorities; (b) a procedural review defining if a decision is objective, unbiased, and based on facts;¹¹ or (c) a review limited to the scientific basis for a Member's assessment (e.g., in case of a fish stock assessment).¹² Precedents for all three options exist in current WTO law. These include International Monetary Fund findings under General Agreement on Tariffs and Trade (GATT) Art. XV as an example of full deference; the SPS Agreement approach for a review

¹¹ In this case, the panel will be limited to assessing minimum due process guarantees and whether evidence was appropriate and correctly relied upon in a determination.

¹² In this case, a panel would review whether evidence was appropriate and correctly relied upon in a determination, and whether explanations are reasoned and adequate.



limited to the scientific basis of a Member's assessment; or Art. 17.6 of the Anti-Dumping Agreement as an example of a review limited to procedural aspects only. As these issues are further discussed, several Members have argued that different standards of review may be required for non-scientific determinations (e.g., IUU) and scientific determinations (e.g., overfished stocks).

A final question relates to situations where the jurisdiction over maritime areas is disputed. The issue comes up particularly, but not exclusively, in the context of IUU determinations. As highlighted above, several IUU provisions make reference to activities in the waters under a Member's "national jurisdiction." A question that arises in the negotiations is what to do if an IUU determination is made in disputed waters, and how would the dispute settlement mechanism apply in those circumstances? A first option proposed consists in simply excluding disputed waters-related issues from the scope of the dispute settlement process including through a mandatory termination procedure should such issues arise. Others have opposed excluding cases involving disputed waters from the scope of the dispute settlement mechanism and instead suggest that the instrument should state that it shall not affect the claims of Members concerning disputed waters. In this case, the panel's review of the procedures followed in an IUU determination itself or the existence of a subsidy would explicitly have no legal implications regarding territoriality or delimitation of maritime jurisdiction. This, however, has been questioned by others to the extent that making an IUU determination would necessarily imply defining who the competent coastal state is. In practice, this remains a highly sensitive political matter for some Members.

The draft consolidated text does address a different potential issue of disputed jurisdiction, which is where an RFMO's decision regarding an IUU determination, or decision regarding the status of a stock, is different from the IUU determination or stock status decision taken by a coastal state. This could occur where an RFMO has been given the authority to make IUU determinations or stock status decisions covering a coastal Member's EEZ, but the coastal state does not want the determinations or decisions to apply for the purposes of this WTO instrument on subsidies. The draft consolidated text suggests that in these cases, a coastal state Member's IUU determination or stock status decision would prevail over that of an RFMO, presumably at least for the purposes of this instrument.



Institutional Issues: Summary of main approaches envisaged and key decisions to make

TRANSPARENCY AND NOTIFICATION

Key decision 1: Should the instrument require notification of elements beyond those listed in Art. 25 of the ASCM? What should these elements be?

- Fishing capacity of fleets receiving subsidies
- Status of stocks fished by fleets receiving subsidies
- Vessels and operators fishing in ABNJ
- IUU legislation and any determinations (national, perhaps RFMOs)

LEGAL FORM OF THE INSTRUMENT

Key decision 2: Should the instrument be structured as an Annex to the ASCM or to the Marrakesh Instrument?

MONITORING AND REVIEW

Key decision 3: What institutional structure should administer the new instrument?

- SCM Committee
- SCM Subcommittee for Fisheries Subsidies
- New Committee for Fisheries Subsidies

Key decision 4: What should be the role and responsibilities of the administering institution?

- Reviewing notifications and compliance
- Reviewing commitments according to agreed timeframes

REMEDIES

Key decisions 5: Should the instrument allow for unilateral remedies or only multilateral remedies?

Key decision 6: If the instrument allows for multilateral remedies, should these be preceded by a special consultations mechanism? If so, how should it be designed?

- Exchange of information preceding formal multilateral dispute settlement
- Opportunity to voluntarily rectify harmful effect of subsidies

Key decision 7: If the instrument allows for unilateral remedies, how should these be calculated?

- Develop different methodology for calculating “material injury”?
- Develop different type of countervailing measure that offsets a subsidy's impact on fish stocks?



DISPUTE SETTLEMENT

Key decision 8: How, if at all, should the instrument articulate the standard of review that should apply for different obligations?

- An automatic recognition of assessment or determination by relevant authorities?
- A procedural review? or
- A review limited to the scientific basis for a Member's assessment (e.g., in case of a fish stock assessment)?

Key decision 9: How, if at all, should the instrument address situations of disputed jurisdiction over maritime areas?



References

- Food and Agriculture Organization of the United Nations (FAO). (2016). *Illegal, unreported and unregulated fishing*. <http://www.fao.org/3/a-i6069e.pdf>
- Food and Agriculture Organization of the United Nations. (2020). *The state of world fisheries and aquaculture 2020. Sustainability in action*. Rome. <https://doi.org/10.4060/ca9229en>
- Headley, M. (2020). *Determining the status of fish stocks in data-poor environments and multispecies fisheries*. International Institute for Sustainable Development. <https://www.iisd.org/library/status-fish-stocks-data-poor-multispecies-fisheries>
- Moerenhout, T. (2019). *Support to fuel consumption for fisheries*. International Institute for Sustainable Development. <https://www.iisd.org/library/support-fuel-consumption-fisheries>.
- Redding, T. & Macfadyen G. (2020). *Potential implementation steps of a WTO agreement on fisheries subsidies*. International Institute for Sustainable Development. <https://www.iisd.org/library/steps-wto-agreement-fisheries-subsidies>
- Sumaila, U. R., Skerritt, D., Schuhbauer, A., Ebrahim, N., Li, Y., Kim, H.S., Mallory, T.G., Lam, V.W.L., & Pauly, D. (2019). A global dataset on subsidies to the fisheries sector. *Data in Brief* 27. <https://www.sciencedirect.com/science/article/pii/S2352340919310613>
- Tipping, A. (2020). *Addressing the development dimension of an overcapacity and overfishing subsidy discipline in the WTO fisheries subsidies negotiations*. International Institute for Sustainable Development. <https://www.iisd.org/library/overfishing-discipline-wto-fisheries-subsidies>
- United Nations General Assembly. (2015). *UN General Assembly Resolution A/RES/70/1 of 21 October 2015*. https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf
- Van Damme, I. (2020). *Reflections on the WTO negotiations on prohibiting IUU fishing subsidies*. International Institute for Sustainable Development. <https://www.iisd.org/library/reflections-wto-negotiations-iuu-fishing-subsidies>
- World Bank and Food and Agriculture Organization of the United Nations. (2009). *The sunken billions: The economic justification for fisheries reform*. World Bank. <https://openknowledge.worldbank.org/handle/10986/2596?locale-attribute=en>
- World Trade Organization (WTO). (2005, December 22). *Ministerial Decision 2005 WT/MIN(05)/DEC. 22 WTO*. https://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm
- World Trade Organization. (2007). *Draft consolidated chair texts of the AD and SCM agreements (TN/RL/W/213 of 30 November 2007)*. https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-Html.aspx?Id=70293&BoxNumber=3&DocumentPartNumber=1&Language=E&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True&Window=L&PreviewContext=DP&FullTextHash=371857150#

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IISD Head Office

111 Lombard Avenue, Suite 325
Winnipeg, Manitoba
Canada R3B 0T4

Tel: +1 (204) 958-7700

Website: www.iisd.org

Twitter: [@IISD_news](https://twitter.com/IISD_news)

Global Subsidies Initiative

International Environment House 2
9 chemin de Balaxert, 1219 Châtelaine
Geneva, Switzerland

Tel: +41 22 917-8683

Website: www.iisd.org/gsi

Twitter: [@globalsubsidies](https://twitter.com/globalsubsidies)

