



Addressing the Development Dimension of an Overcapacity and Overfishing Subsidy Discipline in the WTO Fisheries Subsidies Negotiations:

A discussion paper by IISD



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Acronyms and Abbreviations

ASCM	Agreement on Subsidies and Countervailing Measures
EEZ	Exclusive Economic Zones
FAO	Food and Agriculture Organization of the United Nations
IUU	illegal, unreported and unregulated
LDC	least-developed countries
RFMO	regional fisheries management organization
S&D	special and differential treatment
WTO	World Trade Organization



1.0 Introduction

Members of the World Trade Organization (WTO) established a mandate in 2001, refined in 2005, for the negotiation of new rules on subsidies to the fishing industry. The refined mandate, agreed at the Hong Kong Ministerial, requires 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, and call on Participants promptly to undertake further detailed work to, inter alia, establish the nature and extent of those disciplines, including transparency and enforceability. Appropriate and effective special and differential treatment 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)

Many years of negotiation have helped to build an understanding of the concepts in play and some of the interests and options on the table but have not yet produced an agreement. Subsequently, the topic of new rules on fisheries subsidies was highlighted in the United Nations 2030 Agenda for Sustainable Development as target 14.6 within the Sustainable Development Goals. The target reads:

By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU fishing, and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the WTO fisheries subsidies negotiation. (United Nations, 2015)

The negotiations at the WTO were re-invigorated in 2017 in the lead-up to the Buenos Aires Ministerial meeting, at which ministers adopted a decision recording their agreement to:

continue to engage constructively in the fisheries subsidies negotiations, with a view to adopting, by the Ministerial Conference in 2019, an agreement on comprehensive and effective disciplines that prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU-fishing recognizing that appropriate and effective special and differential treatment for developing Members and least-developed country Members should be an integral part of these negotiations. (WTO, 2017)

In the same decision, Members recommitted to the “implementation of existing notification obligations under Article 25.3 of the Agreement on Subsidies and Countervailing Measures thus strengthening transparency with respect to fisheries subsidies” (WTO, 2017).

Since 2017, Members have made considerable progress refining options and alternatives around three main pillars of substantive disciplines: a prohibition of subsidies to illegal, unreported and unregulated (IUU) fishing; a prohibition of subsidies to the fishing of stocks that are already overfished; and a prohibition of subsidies that contribute to overcapacity and overfishing. Of these, the structure of the IUU and overfished stocks disciplines appears to be relatively stable, while the discussion of approaches to the overcapacity and overfishing disciplines is less so, with several ideas on the table.



Negotiators thus face the challenge of designing disciplines on overcapacity and overfishing that are comprehensive and effective, and that meet a mandate that appears to require a balance of three distinct policy priorities. The first priority is to support the sustainability of fish stocks themselves and the communities that depend on them. This underlying environmental imperative motivated the development of the original mandate and has arguably only become more important as the level of exploitation of fish stocks has progressively increased. Since the first mandate was agreed in 2001, the state of the world's fish stocks has deteriorated, with the proportion of assessed stocks considered as overfished climbing from 24 per cent in 2004 to 33 per cent in 2015 (Food and Agriculture Organization of the United Nations [FAO], 2018). The original mandate also identifies two key policy priorities that motivate the inclusion of special and differential treatment (S&D) for developing WTO Members in the negotiations:

- a) Poverty reduction, supporting livelihoods and food security
- b) Broader development priorities (which for many developing Members include building larger fleets to exploit national and high seas fisheries).

A key part of the challenge in balancing these objectives is that their interrelationship is dynamic: ongoing subsidization that encourages fishing that depletes stocks may ultimately undermine poverty reduction, food security and development objectives (Cisneros-Montemayor et al., 2019). Ensuring that fish stocks are exploited sustainably is thus crucial if policy-makers want to ensure that development priorities can continue to be achieved in the medium and longer terms.

S&D exists in WTO agreements in many different forms, summarized by the WTO Secretariat as follows:

- “1. Provisions aimed at increasing the trade opportunities of developing Members;
2. Provisions under which WTO Members should safeguard the interests of developing Members;
3. Flexibility of commitments, of action, and use of policy instruments;
4. Transitional time-periods;
5. Technical assistance;
6. Provisions relating to LDC Members.” (WTO, 2018)

In designing rules to meet the mandate for these negotiations, Members could include some or all of the mechanisms listed above or design new mechanisms to accord S&D to developing Members. Many of these mechanisms are reflected in the approaches on the table.

Finding a balance of rights and obligations between WTO Members at different stages of development is particularly challenging in the context of fisheries subsidies for two reasons: (i) because fisheries play an extremely important role in supporting livelihoods and food security for many developing Members and (ii) because developing Members' participation in global fisheries is extremely diverse. Some developing WTO Members have small and largely artisanal fishing sectors while others have very large industrial-scale fleets that operate both within and outside their Exclusive Economic Zones (EEZs). Developing WTO Members have some of the largest industrial fishing fleets in the world (Rousseau et al., 2019). They also make up 9 of the 15 largest marine capture fish producers (FAO, 2018). Allowing for considerable flexibility in the subsidy commitments that small developing WTO Members make might not have much of an impact on the overall effectiveness of



the agreement; however, considerable flexibility in subsidy commitments for WTO Members that are large fishing nations could have an impact on the overall effectiveness of the agreement. Other forms of S&D, like transitional time periods and technical assistance, could also be used to find a balance of obligations that is acceptable to all Members.

This paper aims to support discussions about the design of rules on subsidies that contribute to overcapacity and overfishing and integrate discussions about the S&D that might be appropriate and effective in that context. To do this, the paper explains what policies would be disciplined and what would fall outside the main approaches to rules that have been proposed in the overcapacity and overfishing pillar of the negotiations. Within the policies that would be disciplined, the paper identifies where S&D for policies for developing Members has been proposed.¹ The paper discusses the different approaches in the context of the priorities set out in the mandate and, where relevant, how additional considerations might be useful in balancing the priorities addressed by each approach. Section 3 of the paper looks more broadly at ways in which the different approaches, as currently reflected in proposals on the table, could be combined to balance the mandate's priorities, as well as what forms of S&D might be appropriate in these hypothetical examples.

It is worth underscoring here that the disciplines on overcapacity and overfishing are foreseen to work alongside other disciplines, on subsidies to IUU fishing and on subsidies to the fishing of overfished stocks. The disciplines in the new agreement on fisheries subsidies are also likely to be grounded in the WTO Agreement on Subsidies and Countervailing Measures (ASCM), which would continue to serve to discipline the trade effects of fisheries subsidies.

¹ This discussion paper takes into account the latest public compilation of proposals, which was circulated in November 2018 (TN/RL/274/Rev.6) (WTO, 2018b) and Members' proposals on overcapacity and overfishing tabled between November 2018 and the end of the July 2019 cluster of the WTO Rules Negotiating Group. The paper *references only* the proposals and negotiating texts in this area that are publicly available as at July 17, 2019. These are: negotiating text TN/RL/GEN/274/Rev.6 (WTO, 2018a); the proposal by Argentina, Australia, the United States and Uruguay TN/RL/GEN/197/Rev.2 (WTO, 2019a); the proposal by China TN/RL/GEN/199 (WTO, 2019b); and the proposal by India TN/RL/GEN/200 (WTO, 2019c).



2.0 Approaches to an Overcapacity and Overfishing Subsidies Discipline

There is a range of approaches to the design of rules on subsidies that contribute to overcapacity and overfishing, a key part of the negotiations' mandate that is reflected verbatim in SDG target 14.6 and the Buenos Aires Ministerial meeting decision. This section summarizes each of the main approaches, as reflected in proposals made and in records of the negotiations. It specifies, under each approach, what policies would and would not be covered by the discipline. For the policies that are covered by the discipline, it also highlights what S&D has been proposed for policies of developing Members.

2.1 List-Based Approaches

A list-based approach to these disciplines would prohibit certain kinds of subsidies, defined by the types of costs they target. Some recent proposals have adopted the list approach by specifying that the prohibition would apply to capital and operating costs of fishing vessels and related fishing activities. According to the Organisation for Economic Co-operation and Development (2017), these kinds of subsidies are most likely to increase fishing capacity and effort. The list approach implicitly excludes from the prohibition those subsidies that are not listed (e.g., those subsidies that are not provided to operating or capital costs of vessels, such as support to fishers' incomes, would not be subject to the discipline).

The most recent publicly available compilation text (WTO, 2018a) reflects proposals on subsidies contributing to overcapacity and overfishing tabled until toward the end of 2018. It includes a list of kinds of subsidies that would be prohibited, such as subsidies to the acquisition, construction or modernization of vessels; for the use of operating costs including fuel; and for fishing in areas beyond national jurisdiction unless the fishing is subject to management by a regional fisheries management organization (RMFO). Other elements of the possible list would prohibit any subsidies that contributed to building the capacity of a vessel or a fishing fleet. These two kinds of entries on a list clearly have different degrees of coverage: listing kinds of subsidies would exclude from the rule (and allow) any other kind of subsidy, while listing any subsidy that contributed to capacity could potentially cover all kinds of subsidies but exclude some or all of them from the discipline, depending on their actual effect on the capacity of a fishing vessel or fleet.

These various ideas are accompanied by a variety of proposals for S&D for developing Members (WTO, 2018a). These proposals include a complete exclusion for least-developed country (LDC) Members, as well as exclusions for subsidies to small-scale, artisanal or subsistence fishing, for fishing within developing Members' EEZs (in some cases only for underexploited resources) and for fishing of quotas provided under RFMOs. Some of these exceptions (such as for subsidies to artisanal fisheries) would also, per the proposals reflected in the compilation, be subject to conditions. Conditions might include that the fishery is subject to management and control mechanisms sufficient to ensure that overcapacity and overfishing do not occur or, more generally, that any subsidization undertaken is consistent with Members' obligations under the United Nations Convention on the Law of the Sea (UNCLOS) to preserve and protect marine resources. The compilation also reflects proposals that would provide developing and LDC Members with longer time frames to establish the status of stocks in subsidized fisheries.



One further recent proposal tabled since the compilation that also follows the list approach focuses on the idea that capital and operating cost subsidies should be prohibited for large-scale industrial fishing. Capital and operating cost subsidies provided by Members to small-scale fishing would not be covered by the discipline. Subsidies that do not reduce vessels' operating or capital costs would continue to be allowed. Under this proposal, all WTO Members could continue to provide subsidies to small-scale fishing. The focus of this discipline on large-scale fishing, separate from any S&D, speaks particularly to the priority of supporting fishing as a source of livelihoods and food security. Small-scale fishing tends to contribute significantly to employment in fisheries: an estimated 12.4 million fishers are employed in small-scale marine fisheries in developing countries (Pomeroy & Neil, 2011). However, excluding these subsidies from the discipline completely means that the approach, as proposed, does less to fulfill the environmental priority underpinning the mandate. The very fact that small-scale fishing is so important for some vulnerable coastal communities of developing Members suggests that subsidies to this sector should be subject to some limitations in order to ensure that support does not contribute to overcapacity, overfishing and the depletion of the stocks on which these communities depend.

This proposal provides S&D in the form of an exception allowing developing WTO Members to continue to provide capital and operating cost subsidies to large-scale fishing within their EEZs. This S&D speaks to the broader development priorities of developing Members in that it would allow them to grow fleets to fish national, but not international, fisheries resources. However, it also sets up a tension between the environmental imperative that motivated the mandate and short- and long-term development interests: flexibility for continued subsidization of large-scale industrial fishing capacity and effort within EEZs could put national stocks at risk of overcapacity and overfishing in the medium term. If this subsidization led to the depletion of these stocks, there is a risk that this S&D could undermine developing Members' abilities to build profitable and sustainable fisheries in the long term. Members could consider whether a safeguard provision, designed to ensure that subsidies permitted under this approach do not actually contribute to overcapacity and overfishing, could help address this concern. A similar kind of provision might also help to address similar concerns regarding continued subsidization of small-scale fishing.

2.2 Effects-Based Approaches

The idea of an effects-based approach to a rule on subsidies contributing to overcapacity and overfishing surfaced in informal Incubator Group discussions among delegations in late 2018, and ideas referencing subsidy effects have been tabled in various proposals. They borrow from the idea of an actionable subsidy in the ASCM and would involve crafting a prohibition of subsidies that applies when a subsidy in fact contributes to fishing capacity and effort. The idea of a prohibition that only applies when a subsidy has a negative effect on a fish stock is also being discussed at length in the context of a separate prohibition on subsidies to the fishing of overfished stocks. The effects-based approach tailors the prohibition to exactly the circumstances (overcapacity and overfishing) that the mandate seeks to address. However, it is less clear how an assessment of the likely, or actual, effect of a subsidy should be made and therefore precisely the bounds of each Member's obligation.

No proposals under the overcapacity and overfishing part of the discipline have clearly adopted an effects-based approach, although some appear to have adopted a hybrid approach of combining a list of subsidies to be prohibited and effects-based rules.



2.3 Hybrid Approaches

Several ideas for combining the benefits of the list and effects approaches were raised during Incubator Group discussions in 2018. These include:

- **Mirroring the design of the ASCM:** Some subsidies are absolutely prohibited and all others made actionable under the new rules if they have a negative effect on fish stocks. Some “positive” subsidies would continue to be allowed under this approach, although they would still be actionable under the ASCM.
- **Geographic hybrid:** Disciplines on subsidies within EEZs could include effects-based rules, as governments have access to data that would allow them to assess the effects of subsidies and implement the rules. Disciplines on subsidies on the high seas and in other Members’ EEZs (where information on effects is less available to the subsidizing Member), however, might be more amenable to a listing approach.
- **Procedural hybrid:** Under this approach, WTO rules would be limited to requiring that a Member include due diligence procedures in subsidy policy-making to assess the potential impact of subsidies before they are provided. For example, subsidy policy could respond to changes in stock status with the aim of preventing subsidies from being provided to vessels and operators engaged in IUU fishing.

The clearest example of a hybrid approach to a prohibition is the “situational” approach proposed recently. This approach would prohibit subsidies to capital and operating costs in situations where subsidized enterprises target stocks that are being fished either at a capacity above the maximum sustainable level or with a level of effort that contributes to a decline in that stock’s biomass below the level that would produce its maximum sustainable yield. Under this approach, the prohibition would not apply to subsidies other than to capital and operating costs, and it would not apply to capital and operating cost subsidies unless they are provided to fishing that is taking place at unsustainable levels. It would therefore allow subsidized increases in capacity and effort in underexploited stocks, whether in EEZs or on the high seas (subject to other prohibitions on subsidies to fishing beyond areas of national jurisdiction). The proposal would also allow any WTO Member to continue to provide capital and operating cost subsidies if they could demonstrate that, notwithstanding the apparent risk of overcapacity and overfishing in a fishery, they had other policies in place to ensure that these negative consequences did not occur. These other policies could relate to fisheries management (e.g., limits on catch) or to the design of the subsidy.

In targeting subsidies when they appear to be contributing to overcapacity and overfishing, the situational approach speaks clearly to the environmental imperative underpinning the original mandate. Its very focused rule means that all WTO Members could continue to subsidize to meet poverty reduction and industrial development objectives unless and until the risk of excess capacity and overfishing presents itself. By prohibiting subsidies where they may in fact be leading to the depletion of stocks, this approach could help to keep fishing capacity and effort at sustainable limits and thus could help to ensure that the development priorities set out in the mandate can be achieved in the short and long terms.

The two parts of the situational proposal neatly raise two broader questions. The first part of the proposal requires information on capacity and effort and on the state of fish stocks to identify when subsidies risk creating overcapacity and overfishing. Members have very different quantities and



quality of data on these three points, which raises the question of how *disciplines* that rely on fisheries management data to establish when a subsidy is prohibited can be designed so that they can be applied by all WTO Members. The proposal answers part of this question in that it would, it appears, allow the rule to be applied based on stock status reference points (i.e., maximum sustainable yield or “alternative reference points”) that are appropriate in each Member’s fisheries management system. A similarly flexible approach to the data used to measure levels of capacity or effort could help the rule to be applied in the context of different management systems. Allowing a range of quality of data to be used in applying the discipline could make it more comprehensive and potentially more effective.

The second part of the proposal provides further flexibility by allowing subsidies to continue in the circumstances identified if other policies are in place to mitigate their impacts. WTO Members’ fisheries management systems differ in design and in effectiveness, which raises the question of how *flexibilities* that depend on the existence of fisheries management for their application could be made fairly accessible to all WTO Members while also incentivizing improvements in the coherence between subsidies and fisheries management policy. In this case, of course, allowing a range of data quality to be used to establish that mitigation measures are in place could make the disciplines less comprehensive and potentially less effective.

The proposal answers this second question implicitly: should its subsidies be challenged, the burden is on the subsidizing Member to prove that its measures do actually ensure that stocks are maintained at healthy levels. Under this approach, flexibility is accessible to any WTO Member that is confident that its measures are effective in keeping fisheries resources at sustainable levels.

An ongoing concern in the negotiations, however, has been the perceived risk that the effectiveness of Members’ fisheries management systems might be challenged in a WTO dispute and found to be inadequate in some way. One way to address this concern could be to clarify what elements or results of fisheries management measures would be considered “sufficient” to allow Members to access a management-dependent flexibility. This “minimum standards” approach might be conceptually attractive, but it requires WTO Members to agree on a minimum level of fisheries management, which Members do not want to do.

Another approach could focus on a Member review of the implementation of the new subsidy rules in the WTO committee responsible for the new agreement. Either the Subsidies and Countervailing Measures Committee or a new committee could monitor and review the new agreement. Members could be required to notify their subsidies, the reform measures taken to comply with a prohibition and relevant measures in place (related to fisheries management or subsidy design) that, in their estimation, were sufficient to ensure that stocks were kept at healthy levels (part of this idea is already present in one of the proposals around transparency obligations). The committee’s review could be guided by a commitment to give “due consideration” to relevant factors that might affect a developing Member’s management of the subsidized fishery, including the Member’s capacity, technical assistance provided and the economic importance of the fishery. The committee would not necessarily approve the measures in place (and this work could be without prejudice to any positions taken in dispute settlement proceedings), but could help to give subsidizing Members a sense of whether their measures raised any concerns among the Membership and a chance to explain the objectives sought and balances struck in designing their subsidy policy. It could also be an opportunity for Members to request technical assistance to help reform their subsidy measures to ensure that they avoid contributing to overcapacity and overfishing.



2.4 Capping and “*De Minimis*” Approaches

There are three versions of a capping approach on the table: one proposed by Argentina, Australia, the United States and Uruguay (WTO, 2019a); one proposed by China (WTO, 2019b); and a *de minimis* (i.e., minimal) approach that is discussed here because it is functionally similar to the capping ideas. Each reflects a different balance of the mandate’s priorities.

The proposal by Argentina et al. (WTO, 2019a) would allocate WTO Members into one of three tiers based on their average marine capture production for 2015–2017. Each tier would be subject to different subsidy cap and reduction commitments as follows:

Tier 1: Members that account for 0.7% or more of global marine capture production would be required to negotiate with other Members, on a request-offer basis, individual “subsidy caps” in monetary terms to be reflected in a Schedule to the agreement. However, Tier 1 Members that have historically low or no subsidies, may wish to accept the “Default Subsidy Cap” value of \$50 million annually. Members in Tier 1 that opt for the Default Cap would not be required to reduce their subsidy programs over time.

Tier 2: Members that account for more than 0.05% of global marine capture production (but less than 0.7%, per above) would also have the option to negotiate a cap, based on the recent subsidy information provided, or to accept the same “Default Subsidy Cap” value of \$50 million annually.

Tier 3: Members that account for less than 0.05% of global marine capture production would not be required to schedule a cap. (WTO, 2019a, p. 2)

Capped subsidy amounts would exclude expenditures for fisheries management and enforcement.

Members in Tier 1 with negotiated caps would be required to reduce their total amount of subsidies “over a negotiated period of time at a rate commensurate with [their] overall level of subsidization” (WTO, 2019a, p. 2). These Members could therefore continue to provide subsidies up to an agreed capped amount per year. Members in Tier 1 that chose the default cap would be allowed to subsidize up to USD 50 million per year, every year. Members in Tier 2 could choose either to subsidize up to an agreed amount or up to USD 50 million per year. For Members in any of these groups, only subsidies above a Member’s individual capped amount would be prohibited. Members in Tier 3 would not be required to schedule a cap or to undertake any reduction commitments; they would have notification obligations, but there would be no quantitative limits on their subsidies.

Under Argentina et al.’s proposal (WTO, 2019a), Members with the largest caps would be expected to undertake the largest cuts. Members in Tiers 2 and 3 would not be required to undertake any subsidy reductions, but Tier 2 Members might receive priority technical assistance to enable them to reduce their subsidy levels voluntarily. The nature of this technical assistance is not specified in the proposal, but it could include advice on better targeting of subsidies to enable continued support to vulnerable groups while reducing support to large commercial operators and reducing total amounts overall.

The Argentina et al. (WTO, 2019a) proposal imposes stricter limits on the subsidies provided by Members with more engagement in capture fishing and fewer restrictions on WTO Members with



smaller engagement in capture fishing. Subsidies for Members in Tier 3, for example, would not be subject to any quantitative limits at all.

China also proposes a system of caps on subsidy levels based on three options for variables that Members would choose from to fix their subsidy levels (WTO, 2019b):

1. A proportion of the average amount of subsidies provided during a base period of time
2. A percentage of the average landed value of a Member's total wild marine capture
3. A percentage of the average subsidy provided per fisher on a global level, multiplied by a Member's number of fishers.

Of the metrics China proposes, the choice of percentage of subsidies for a baseline period allows higher subsidy caps to be set by Members with recently high levels of subsidies. A cap based on the percentage of landed value could allow higher subsidy caps for those with relatively low subsidy intensity in their fishing fleets. Setting a capped amount of subsidies based on a multiple of global per capita subsidies provides greater flexibility for those Members whose level of subsidies per fisher is relatively low and whose populations include a large proportion of the world's fishers. China's proposal also refers to reductions in subsidy levels, but it is not clear how these would be established.

China proposes to exclude expenditure for programs related to fisheries management from all Members' capped amounts, including capacity and effort reduction, as well as programs that would be rebuttably presumed not to contribute to overcapacity and overfishing. LDC Members would not have to cap or reduce their subsidies, and the proposal notes that further S&D is envisaged for developing WTO Members, although the details have yet to be set out in further formal text.

These two variants of the capping approach speak differently to the various policy priorities in the mandate. The Argentina et al. approach of establishing stricter requirements to cap and reduce subsidies on Members responsible for the highest levels of global catch is designed to apply greater restrictions to subsidizing Members whose fishing operations have the largest global impact, and so would speak to the environmental imperative of tackling subsidies that contribute to overcapacity and overfishing. For Members with subsidy levels far above the default cap of USD 50 million, the impact of the rules depends on what they negotiate. For Members in Tiers 1 or 2 that have annual subsidies around or less than USD 50 million, choosing the default cap means that future expenditure would need to be structured so that it did not breach the annual threshold. This constraint could also be loosened under the Argentina et al. proposal (WTO, 2019a) if a subsidizing Member requested an adjustment to its capped level following a change in circumstances. The proposal notes that harmful subsidies should be prioritized for reduction, which is important, but the flexibility of the approach means that some Members with large levels of harmful subsidies may still end up with relatively large levels of subsidies at the end of the reduction period. Some Members that currently have only low levels of subsidies but choose the default cap may end up with space to actually increase their subsidies. The approach proposed by Argentina et al. (WTO, 2019a) could therefore result in flexibility, allowing a significant amount of subsidies to be provided annually by any Member in order to meet policy priorities, including supporting fishing communities to reduce poverty and building fleets to fish national or international resources.

Some Members have raised the concern that setting subsidy caps and reduction schedules in request–offer negotiations among WTO Members with large levels of subsidies (and thus with greater



defensive interests) might lead to them agreeing to higher caps and fewer reduction commitments among themselves. Transparency in the request–offer negotiating process could help to address this concern to a degree. So would the effective use of the review mechanism outlined in Argentina et al.’s proposal (WTO, 2019a). Others are concerned that bilateral request–offer negotiations might exacerbate unequal negotiating positions between larger and smaller Members that choose to negotiate caps and reductions. Transparency in the negotiating process might also help smaller Members to exercise greater leverage through coordination.

Leaving Members a choice of variables with which to establish a subsidy cap, as China proposes (WTO, 2019b), would give each Member, developed or developing, the ability to establish a cap that maximizes the amount of subsidies that are allowed, with a corresponding risk that the rules would do less to limit subsidies that contribute to overcapacity and overfishing. Ambitious reduction commitments for the subsidy caps that are set could, however, help to ensure that the approach achieves meaningful changes to subsidy patterns and addresses the environmental imperative of the mandate. Excluding many different kinds of subsidies from capped amounts also carries a risk that these “green box” subsidies, set outside any numerical limits, could contribute to overcapacity and overfishing. If Members decide to exclude some subsidies from the disciplines, they would need to be carefully drafted to ensure they did not allow circumvention of the disciplines, as discussed further below.

The degree to which the capping approach addresses subsidies that contribute to overfishing and overcapacity and the environmental imperative underpinning the mandate depends in large part on whether the request–offer negotiations (or an alternative method) leads to meaningful caps and reduction commitments. Even if it leads to meaningful reductions in total subsidy levels, the capping approach might not, without additional disciplines, ensure that the subsidies that remain permitted do not contribute to overcapacity and overfishing. As noted at the beginning, ensuring that harmful subsidies are reduced and that fish stocks are exploited sustainably is crucial if policy-makers want to ensure that development priorities can continue to be achieved in the medium and longer terms. This rationale applies to any subsidy that is allowed under an approach, whether because it is exempted under S&D or it is simply not prohibited (e.g., is part of a capped amount). Safeguards in the form of additional rules on how permitted subsidies should be provided could help to address this remaining challenge. Possible options in this regard are discussed in Section 2 in the combining of different approaches.

2.4.1 *De Minimis*

A further variant on the capping approach would establish an overall prohibition of subsidies and *de minimis* levels of permitted subsidies. Members would be required to draw down their subsidies in equal increments over a period of years until they reached their *de minimis* level, calculated as a percentage of the total landed value of a Member’s marine fisheries catch (similar to China’s proposal). The proposal includes a sophisticated system of S&D for developing WTO Members, so they set permitted subsidy levels and schedule subsidy reductions to those *de minimis* levels. Developing and LDC WTO Members would be allowed greater *de minimis* levels of allowable subsidies and, in addition, would also be allowed to provide subsidies to fishers within their territorial waters (or 12 nautical miles from the coast or baseline). Developing and LDC Members would have a longer time period in which to phase down subsidies to *de minimis* levels, allowing (proportionately) higher levels of subsidies to continue for longer. This combination of lower levels



of commitment and longer time periods to reach committed levels reflect two common forms of S&D provided in WTO agreements.

The sophisticated system of S&D in this approach speaks very clearly to the livelihood, food security and industrial development priorities that motivate S&D in the mandate. A key question, however, is the degree to which the proposal would reduce subsidy levels and the extent to which the subsidies allowed within *de minimis* levels would still contribute to overcapacity and overfishing. Setting *de minimis* levels of subsidies based on the landed value of a Member's catch could lead to higher levels of allowable subsidies for Members with higher levels of catch. The proposal also includes a commitment under which Members would ensure: (i) that capacity and effort in the subsidized fishery do not exceed that required to fish at maximum sustainable yield and (ii) that fisheries management is in place. If implemented effectively, these additional conditions could serve to ensure that remaining subsidies do not contribute to overcapacity and overfishing, therefore helping to ensure that stocks are exploited sustainably and that development priorities can be achieved in the short and longer terms.

2.5 Subsidies to Fishing in Areas Beyond National Jurisdiction

Two recent proposals have suggested an additional prohibition on subsidies to fishing in areas beyond national jurisdictions, in the high seas or foreign EEZs.

Under the first proposal, the prohibition would apply to any subsidy contingent upon or tied to actual or anticipated fishing or fishing-related activities in these areas. This prohibition would presumably capture only those subsidy programs that are, in law or in fact, targeted at high seas and foreign EEZ operations. The proposal clarifies that the rule would exclude subsidies that happen to benefit high seas and foreign EEZ fishing, but that are not targeted at that fishing. Under this proposal, in other words, only subsidies that target distant-water fishing activities would be prohibited; the proposal has no impact on subsidies other than these. This proposal does not include S&D, presumably because its scope is very focused on subsidies with a particular design, and the rationale for this prohibition (to tackle subsidies likely to have a particularly large international impact on shared stocks) applies whether subsidies are provided by developed or developing Members. Of the most important distant water fishing fleets identified in recent academic literature, several are from developing Members (Tickler et al., 2018).

Under the second proposal, the prohibition would apply to subsidies to vessels fishing on the high seas or EEZs of Members other than the subsidizing Member, when those vessels operate for extended periods of time under a flag other than that of the subsidizing Member or that of another Member taken on under an access agreement. In other words, this rule would only prohibit subsidies to distant water fishing vessels if those vessels use a flag that is not that of their home base or the country in whose EEZ they are fishing under an access agreement. This prohibition does not affect any other subsidies. The proposal refers to S&D generally, without specifying how it would apply to the discipline proposed, although it does note that S&D for fishing on the high seas should be more limited than that provided for subsidies to fishing within EEZs.



2.6 Additional Elements Of Approaches to a Discipline on Subsidies to Overcapacity and Overfishing

At least two additional elements have been proposed for inclusion in a discipline on subsidies to overcapacity and overfishing: a proposal for geographical exclusions of some subsidies (whatever the approach to the discipline) and the idea of explicit exclusions from the disciplines of certain allowable subsidies.

2.6.1 General Approaches to S&D

India has proposed that, whatever the approach taken to the overcapacity and overfishing disciplines, subsidies should be exempted when they are provided by developing Members to fishing within territorial waters and EEZs and for fishing in the high seas, subject to any conservation and management measures that may apply (see WTO, 2019c). These geography-based flexibilities have been proposed specifically in the context of the list approach to disciplines, and obviously speak clearly to the livelihood and food security priorities and to the broader development policy priorities of the mandate, at least in the short term. The breadth of the flexibilities, however, has also raised questions about the extent to which continued subsidization in these areas might lead to stock depletion, which economic theory and case studies suggest is likely to happen when fisheries management is not effectively enforced. Where ongoing subsidization leads to the depletion of stocks within territorial waters and EEZs, it could potentially undermine the achievement of poverty reduction and industrial development priorities in the long term.

India has also proposed that technical assistance and capacity building be provided to developing Members to help support the implementation of these disciplines. Technical assistance and capacity building—along with lesser degrees of commitment proposed under the list and *de minimis* approaches, extended time frames for reaching levels of commitment under the *de minimis* approach and exceptions for LDCs proposed under several approaches—mean that many of the key forms of S&D identified at the beginning of this paper have been put forward as possible elements of a discipline on subsidies that contribute to overcapacity and overfishing.

2.6.2 “Green Box” Lists of Allowable Subsidies

Both variants of the capping approach, as well as several proposals under other approaches, would exclude government expenditure for the management of marine resources, including enforcement of regulations. Some proposals exclude these expenditures on the basis that they are not subsidies at all, while others consider that, whether or not they meet the ASCM definition of a subsidy, they should be explicitly carved out of any prohibition because they support the sustainability of fish stocks and should be allowed to continue. Some proposals widen the list of allowable expenditures to include funds for the recovery of the fishing sector after natural disasters, as well as support for expenditures related to crew safety and for technology that reduces the environmental impact of fishing. China’s capping proposal includes several more possible exceptions, including support to fishermen (covering training, insurance, and income support not linked to production) as well as programs that would be rebuttably presumed not to contribute to overcapacity (like the renovation of fishing vessels) or overfishing (like support to fishing in other EEZs) (WTO, 2019b).

Leaving management and enforcement aside, different kinds of subsidies carry a greater or lesser risk of contributing to overcapacity and overfishing in different circumstances (von Moltke, 2011).



The more widely drafted the list of exceptions, the greater the risk that it might include support that contributes to the depletion of stocks and the undermining of the achievement of the livelihood and food security objectives in the mandate in the longer term. Different safeguards could be used to reduce this risk. The first is to focus a list of exceptions on the kinds of subsidies generally considered not to contribute to overcapacity and overfishing. Another safeguard is to introduce conditions specific to the kind of support proposed for exception. In the case of natural disaster recovery support, for example, the text in the latest public compilation of proposals (WTO, 2018) explicitly records some delegations' desire to limit this exception to restoring a fishery to its pre-disaster state, to limit the likelihood that it contributed to overcapacity. A more general, perhaps complementary, approach could be to include a safeguard clause similar to the “chapeau” of General Agreement on Tariffs and Trade Article XX, requiring the subsidizing Member to prove that the use of the exception did not in fact contribute to overcapacity and overfishing.



3.0 Food for Thought: Combining approaches to balance the mandate’s priorities

The range of proposals on the table in this area of the negotiations, and the message from at least some proponents that their proposals are intended to be complementary to other approaches, opens the door to thinking about how the proposals could conceivably be combined to find new ways of balancing the mandate’s three priorities. Some possible combinations of discrete pairs of proposals are explored below, at a conceptual level. The discussion does not explore the mechanics of how the combinations would work, but what might be achieved by combining approaches that serve different functions.

Table 1. Possible combinations of approaches to an overcapacity and overfishing subsidy discipline

	List	Situational	Cap or <i>de minimis</i>	Distant water
List		1.	2.	4.
Situational			3.	5.
Cap or <i>de minimis</i>				6.
Distant water				

In combining approaches to achieve different balances of rights and obligations, Members also have the option of designing S&D that would be appropriate and effective in each context. In considering this, Members can use as reference the kinds of S&D introduced at the beginning of this paper:

- “1. Provisions aimed at increasing the trade opportunities of developing Members;
2. Provisions under which WTO Members should safeguard the interests of developing Members;
3. Flexibility of commitments, of action, and use of policy instruments;
4. Transitional time-periods;
5. Technical assistance;
6. Provisions relating to LDC Members.” (WTO, 2018)

Different forms of S&D might be appropriate in different contexts. For approaches that already include built-in flexibility in the design of levels of commitment to subsidy reductions, for example, S&D for developing Members could conceivably take the form of longer transitional time periods to achieve agreed levels of commitments. Where levels of commitment are defined by development status, special exceptions for LDC Members might be appropriate. Where levels of commitment are consciously defined by variables other than development status, however, exceptions for commitments for groups of Members defined by their development status, including LDCs, might not fit as neatly. Technical assistance to support the gathering of information about fleet capacity and the status of stocks might be useful to support the implementation of disciplines under approaches that require this information. Members could consider whether a specific reference in the agreement to international organizations that could provide this assistance, such as the FAO, might be helpful. Technical assistance to support the reform of subsidies more broadly might be appropriately included across any of the approaches to disciplines.



3.1 Situational Prohibition + Prohibition of Listed Subsidies

The situational approach could play a useful role if it were combined with a list approach prohibition along the lines of the recent proposal discussed above, that is to say, focused on subsidies to capital and operating costs to large-scale industrial fishing (with or without exception for subsidies to fishing within developing Members' EEZs). If these approaches were combined, subsidies to small-scale fishing (or industrial fishing within EEZs) could still be subject to the requirement that they did not contribute to overcapacity and overfishing. A situational prohibition combined with other versions of the list approach, for instance, those that allowed for S&D in the form of exceptions for subsidies to the fishing of RFMO quotas, could, in principle, also help to ensure that those subsidies did not contribute to overcapacity and overfishing. This combination thus approximates some of the same effects as the conditions for exceptions to listed prohibitions that were included in the compilation of earlier proposals. This combination of approaches could potentially help to resolve one of the challenges in the list approach identified above by helping to ensure that poverty reduction and industrial development priorities could be achieved for small-scale and domestic fishing in the short term and maintained through the long term.

S&D in this context could take the form of technical assistance to help developing Members with capacity-building needs to evaluate fleet capacity, effort and stock status, and to develop the mechanisms to link this information to subsidy decisions. This assistance, where required, could help Members apply the situational approach in different circumstances. This combination could include exceptions for subsidies to large-scale fishing within developing Members' EEZs, as currently proposed in the list approach, as additional S&D.

3.2 Cap or *De Minimis* + Prohibition of Listed Subsidies

Combining a cap (or *de minimis*) level of subsidies and a discipline based on the list approach as reflected in the most recent list-based proposal (with a focus on capital and operating cost subsidies to large-scale fishing) might result in the subsidies allowed under a cap approach or as *de minimis* being subject to considerable additional restrictions. In practice, the capped amount could only consist of subsidies to capital and operating costs provided to small-scale fishing and to large-scale fishing within developing Members' EEZs and other kinds of subsidies (under other list approaches, this might include developing Members' subsidies for fishing under RFMO quotas). While this combination would significantly reduce the scope of what subsidies within a cap could be paid, it would not necessarily help to resolve the underlying challenge of both of these approaches, which is to ensure that the subsidies allowed (to small-scale or domestic fishing or allowed within a cap) did not in fact contribute to overcapacity and overfishing.

More generally, though, there may be other ways in which elements of the two approaches could be combined: Members' reduction schedules within a cap could prioritize reductions in the subsidies most likely to increase capacity and fishing effort, for example. As noted above, if the cap approach includes considerable flexibility in the level of commitments taken on by different Members, S&D for developing Members with capacity-building needs could more usefully take the form of longer transition periods for the achievement of those levels of commitment.



3.3 Cap or *De Minimis* + Situational Prohibition

At a conceptual level, a situational prohibition could serve as a useful complement to a capping or *de minimis* approach to the disciplines in that, if the two kinds of rules were applied together, subsidies would be subject to both a numerical cap and to the requirement that they did not contribute to overcapacity or to overfishing. This combination could be a useful way of reducing the risk that subsidies contribute to overcapacity and overfishing, prohibiting them when, notwithstanding the quantitative limit, fisheries find themselves in that situation. The *de minimis* proposal already reflects this thinking to some extent.

Given that both the cap and situational prohibition proposals provide for considerable flexibility in setting the levels of commitments for different Members, if these two proposals were combined, Members could consider whether S&D treatment might most appropriately be found in setting longer time frames for developing Members to reach the agreed levels of commitment.

3.4 Distant Water Fishing Subsidy Prohibition + Prohibition Of Listed Subsidies

Both of these approaches, in the form of the list approach most recently proposed, focus on prohibiting subsidies to fishing outside EEZs. The impact of either version of the distant water fishing prohibition is likely to be on large-scale fishing on the high seas and in other Members' EEZs (including if subsidies are targeted at this kind of fishing). The impact of the prohibition following the list approach, per the proposal discussed above, is likely to be similar. It may in fact be more definite, as it imposes a prohibition on operating and capital cost subsidies provided to large-scale industrial fishing outside an EEZ, not just a prohibition on subsidies that target fishing outside the subsidizing Member's EEZ. Versions of the list approach that allow developing Members to subsidize fishing of RFMO quotas, of course, might reduce the relative impact of a list-based approach as compared to a distant water fishing prohibition. The combined effect of the two proposals may not be very significant. The main difference this combination of approaches would appear to make is to restrict Members' ability to provide subsidies for small-scale fishing that are conditional on small-scale fishing occurring outside a Member's EEZ. This may require changes to the design of some Members' subsidies, but perhaps not many.

3.5 Distant Water Fishing Subsidy Prohibition + Situational Prohibition

These two proposals could serve as useful complements: a distant water fishing subsidy prohibition would focus on subsidies tied to fishing outside a Member's jurisdiction, while a situational approach ensures that, wherever subsidies are allowed (for fishing within EEZs or on the high seas), they do not contribute to overcapacity and overfishing. Combining these two rules would allow all Members the space to provide subsidies for fishing of healthy national fish stocks (these subsidies would not be caught by the two prohibitions, as drafted) but would ensure that, where subsidies are provided, they do not undermine the sustainability of fish stocks and so help to ensure that development priorities can be met in the short and longer terms.

As above, a combination that included the situational prohibition could be accompanied by S&D in the form of technical assistance to help developing Members with capacity-building needs to develop



systems to link fisheries information with subsidy decisions. This technical assistance could also help Members to redesign subsidies that targeted distant water fishing so that they were provided in ways that were compliant with the new disciplines. S&D could also take the form of longer time frames for the implementation of the new rules, to give Members time to redesign subsidies to be consistent with the new rules.

3.6 Distant Water Fishing Subsidy Prohibition + Cap or *De Minimis*

The Argentina et al. (WTO, 2019a) proposal explicitly notes that subsidies to fishing in areas beyond national jurisdictions would be prohibited, notwithstanding a Member's subsidy cap. This combination of a cap with a prohibition of subsidies to fishing beyond areas of national jurisdiction would serve to impose a qualitative limit on subsidies that are capped or that are within a *de minimis* amount. Whatever the quantitative amount, they could not be targeted at distant water fishing.

This combination of disciplines could, similar to the options above, be accompanied by S&D that provides developing Members with capacity-building needs with longer time frames to redesign subsidies to distant water fishing, and perhaps to reduce subsidies so they complied with new quantitative limits.



4.0 Conclusion

This paper described the main approaches under discussion for the construction of a discipline on subsidies contributing to overcapacity and overfishing in the WTO's negotiations on fisheries subsidies. It discussed the ways they balance the environmental priority underpinning the mandate (prohibiting certain subsidies that contribute to overcapacity and overfishing) and the two kinds of policy priorities that motivate S&D for subsidies by developing Members: supporting food security and fishers' livelihoods and supporting fisheries to achieve broader industrial development objectives.

As noted at the beginning of this paper, a key part of the challenge in balancing these priorities is that their interrelationship is dynamic. Ongoing subsidization that encourages fishing that depletes stocks may ultimately undermine both poverty reduction and food security objectives and development interests. Ensuring that fish stocks are exploited sustainably is thus crucial if policy-makers want to ensure that development priorities can continue to be achieved in the medium and longer terms. Effective fisheries management measures will help to ensure exploitation levels are sustainable, but it is probably inappropriate (and not politically feasible) to establish rules about fisheries management in the context of the WTO.

The last part of this paper explored, at a conceptual level, how different approaches could be combined to build a complementary set of disciplines aimed at ensuring that subsidies do not contribute to overcapacity and overfishing and has suggested where Members could consider a role for S&D in those hypothetical contexts. This balance is particularly relevant in considering the development dimension of the disciplines. Some combinations (e.g., a distant water fishing approach and a list approach with geographical exceptions, as currently proposed) appear not to deliver much added value in the search for balance. Other combinations of different versions of approaches (e.g., a situational approach combined with either a listing approach or a quantitative cap) could be more useful avenues for further discussion among Members.

The aim of this analysis of the proposals on the table, and the food for thought around combinations of approaches, is to help WTO Members to design a system of rules that ensures that subsidies that continue are subject to safeguards to ensure that they do not contribute to overcapacity and overfishing. This logic could apply to subsidies excluded from the disciplines for all Members. The same logic could apply to S&D for developing Members to help ensure that development priorities can be achieved in the long term as well as in the short term.



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