



WTO Negotiations on Fisheries Subsidies Update:

What's the state of play?

GSI POLICY BRIEF



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Table of Contents

Background	1
Scope and Definitions	3
Subsidies to IUU Fishing	4
How Should Rules Ensure the Prohibition Can Be Effectively, but Also Fairly, Triggered?	4
How Should Rules Ensure the Prohibition Can Be Effectively, but Also Fairly, Applied?	5
Should the Prohibition Apply to Subsidies to Operators as well as Vessels?	5
What Special and Differential Treatment Would Be Appropriate and Effective?	6
Subsidies to Overfished Stocks	7
How Much Deference Should the Rules Provide to Governments' Stock Status Decisions? ..	7
Should There Be Exceptions for Subsidies Where a Stock Is Being Managed Back to Health?	8
What Special and Differential Treatment Would Be Appropriate and Effective?	8
Overfishing and Overcapacity (OFOC)	9
How Should Rules Prohibit Certain Subsidies While Allowing Others, Without Sacrificing Effectiveness?	9
What Special and Differential Treatment Would Be Appropriate and Effective?	10
Horizontal SDT Provisions	14
Institutional Issues	15
Transparency and Notification.....	15
The Legal Form of an Instrument	15
Mechanisms for Review and Implementation.....	16
Dispute Settlement.....	16
References	19



This update provides an overview of the third version of the draft consolidated text of an agreement on fisheries subsidies circulated by the chair of the WTO rules negotiating group, Ambassador Santiago Wills, on May 11, 2021. It describes the main rules under negotiation under the different disciplines and highlights questions Members will have to answer 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 fishing capacity (Sumaila et al., 2019).

World Trade Organization (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 overfishing.” 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 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 Goals agreed in September 2015 provided an 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 (see 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 (MC11). Instead, Ministers mandated continued negotiations based on emerging consolidated texts and set a deadline for the conclusion of the talks by the “next ministerial conference in 2019.”

After MC 11, Members continued to table textual proposals on the various aspects of the negotiations in the expectation that agreement could be reached at the Ministerial Conference scheduled to be held in Kazakhstan in 2020. The chair released streamlined draft consolidated negotiating texts capturing the gradual progress made throughout 2019 and 2020.² With the 12th WTO Ministerial (MC12) postponed to November 2021 due to the COVID-19 pandemic, negotiations have extended through 2020 and 2021 with the view to concluding them as soon as possible. To support the conclusion of the negotiations, the new Director-General of the WTO, Dr. Ngozi Okonjo-Iweala, has convened ministers to meet virtually on July 15, 2021.

The draft consolidated text published on May 11 (WTO, 2021a) presents streamlined draft language in a series of articles covering the new instrument’s scope and definitions, the three substantive pillars of the rules (subsidies to IUU fishing, subsidies to overfished stocks, and subsidies that contribute to overcapacity and overfishing more broadly) and some cross-cutting issues. This note describes the approaches taken in the draft consolidated text and the key questions remaining for Members’ consideration. It treats bracketed and non-bracketed text as equivalent because some non-bracketed text relates to key questions Members still need to resolve; as the chair pointed out in his commentary on the text (WTO, 2021b), not all non-bracketed text is agreed. The text does, however, use brackets strategically, likely to indicate points on which views are most divergent, so this note identifies in its discussion where text is bracketed.

¹ These included, for example, full textual proposals from the EU (TN/RL/GEN/181), the African, Caribbean and Pacific (ACP) Group of States (TN/RL/GEN/182/Rev.1), the least developed country (LDC) Group (TN/RL/GEN/193), Norway (TN/RL/GEN/191), six 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 most previous draft texts, are not public documents. This brief is informed by the content of both public and non-public documents, but cites directly only those proposals, and the latest text, which are publicly available.

² RD/TN/RL/126 and Revs 1 and 2.



Scope and Definitions

Articles 1 and 2 of the draft text set out 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 that are specific within the meaning of Article 2 of the same agreement. The draft text includes definitions of fish, fishing, and fishing-related activities and vessels, several of which are taken from the Port State Measure Agreement.

It also specifies that disciplines should only apply to wild marine capture 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. The draft text also clarifies that subsidies to aquaculture and inland fisheries are excluded from the scope of the agreement. The final provisions also clarify that subsidies for disaster relief are excluded from the application of the main prohibition on subsidies that contribute to overcapacity and overfishing.

The text includes bracketed language that would include non-specific fuel subsidies (i.e., those that are not restricted to a particular industry, enterprise, or geographical region) in the scope of the instrument. The rules in the WTO's ASCM apply only to specific subsidies; however, Article 2.3 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 effects. 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. Some Members have proposed explicitly excluding fuel de-taxation schemes on the grounds that the de-taxation of fuel used outside the territorial sea is not a subsidy.³

Scope and Definitions

Overall approach

- **Scope of the instrument is “subsidies” as defined in ASCM Article 1 that are specific under ASCM Article 2, provided to marine wild capture fishing and fishing-related activities at sea.**

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

³ A summary of WTO Member's fuel subsidies can be found in Moerenhout (2019).



Subsidies to IUU Fishing

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). 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.⁴

A degree of convergence seems to have been reached on the question of whose determinations of IUU fishing would trigger the prohibition. Article 3 of the text envisages that the subsidy prohibition could be triggered by an affirmative determination made by a WTO Member acting either in its capacity as coastal state Member, for violations in the waters under its jurisdiction (i.e., in the 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. The subsidy prohibition could also be triggered by 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.⁵ Separately, a subsidizing Member would be required to give due regard to information received from port state Members about a vessel's engagement in IUU fishing and to take any action it deems appropriate with regard to its subsidies to that vessel. Importantly, the chair's consolidated text explicitly records, in footnote 5, 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.

Three key remaining questions about the operation of the rule are: (1) How to ensure that determinations are made fairly but can effectively trigger a subsidy prohibition; (2) how much control the subsidizing Member might have over the application of the rule; (3) whether such a prohibition would extend to subsidies provided to the operator of the vessel concerned. Members will need to strike a balance within each of these questions, as well as between them. The last key question is what type of SDT, if any, should be envisaged for developing country Members, including LDCs.

How Should Rules Ensure the Prohibition Can Be Effectively, but Also Fairly, Triggered?

A key question throughout the negotiation of this rule has been how much deference should be accorded to an IUU determination made by another WTO Member or RFMO/A, and what due process or other requirements, if any, would need to be fulfilled for a determination to trigger an obligation to withdraw subsidies. Article 3.2 (c) of the draft consolidated

⁴ The draft consolidated text uses the description of IUU fishing in the 2001 FAO International Plan of Action to Prevent, Deter, and Eliminate, Illegal, Unreported, and Unregulated Fishing (IPOA-IUU) (FAO, 2001) to define IUU fishing.

⁵ Public information about vessels that are the subject of IUU determinations by coastal or flag states is patchy, but a consolidation of all RFMO lists of IUU vessels includes only around 170 vessels (see the Tryg Mat Tracking IUU Vessel List at www.tm-tracking.org).



text provides that an RFMO/A determination should be made following its own rules and procedures and in accordance with relevant international law. For coastal state determinations, Article 3.3(b) states that the prohibition is triggered only by determinations based on positive evidence and that follow due process. What exactly is required to meet the “due process” condition is clarified somewhat in the following paragraph, which explains that the coastal state should notify the flag state and (if known) any governments subsidizing the vessel of the fact that the vessel is under investigation and allow these parties to provide information to be taken into account in the investigation. Importantly, 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 certain requirements need to be met before a determination triggers a subsidy obligation under this instrument.

How Should Rules Ensure the Prohibition Can Be Effectively, but Also Fairly, Applied?

A second topic of discussion is how much control the subsidizing Member should have over whether or how to apply the subsidy prohibition once a determination is made. Under paragraph 3.4 of the text, the Member subsidizing the vessel can decide the length of time that subsidies should be withdrawn, taking into account “the nature, gravity, and repetition of IUU fishing committed.” The chair’s proposal is that a relatively automatic triggering provision is balanced by giving the subsidizing Member some control over the impact of the prohibition on its vessels or operators. To limit this discretion given to the subsidizing Member, the text also suggests subsidies should be withdrawn for at least as long as the original sanction on the vessel remains or as long as the vessel or operator is listed as engaged in IUU fishing. According to this approach, however, in cases where the sanction is in the form of a fine, the subsidizing Member may not be obliged to continue applying the prohibition once the fine is paid. Importantly, WTO Members would also be obliged to notify the WTO—and thus all other WTO Members—of any IUU determinations when they were made.

Should the Prohibition Apply to Subsidies to Operators as well as 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 put forward in favour of a stricter rule that would prohibit 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 tougher impact on operators and create a greater incentive to ensure that 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. The text does not make any proposals on this point, and simply leaves the words “or operator” in brackets throughout.



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 transition periods or complete exemptions from the prohibition for subsidies provided to small-scale fishers found to have been engaged in unreported or unregulated fishing, on the grounds that livelihoods in the sector may be particularly dependent on subsidies and that authorities may require more time to implement measures to limit unreported and unregulated fishing. Other Members have objected to these ideas, arguing that governments can decide when to make (or not make) determinations of IUU fishing that would trigger the prohibition. They also considered that IUU fishing was a single concept and that unreported and unregulated fishing could not be treated separately. The draft consolidated text includes, in brackets, a possible compromise in which subsidies for low-income and resource-poor fishing within territorial seas that was the subject of a determination of either illegal, unreported, or unregulated fishing could continue for a period, perhaps of 2 years.

Subsidies to IUU Fishing

Overall approach:

- **Subsidies prohibited after a determination of IUU fishing by a coastal state, flag state, or relevant RFMO/A.**

Key question 1: How to ensure the prohibition is effectively, but fairly, triggered?

- Chair's proposal: Determinations by coastal and flag states to be based on positive evidence and follow due process (including notification of the flag state and subsidizer, and the ability for both to provide information). Determinations by RFMOs according to their own procedures.

Key question 2: How to ensure the prohibition is effectively, but fairly, applied?

- Chair's proposal: Subsidizer can decide the duration of the prohibition, depending on the severity of the infraction, with a safeguard on minimum duration.

Balance between provisions: Do proposals for questions 1 and 2 reflect the right balance of control between the Member making the IUU determination and the subsidizing Member?

Key question 3: Should the prohibition apply to operators as well as vessels?

Key question 4: What, if any, SDT would be appropriate and effective for this prohibition?

- Chair's proposal: Longer timeframe before obligations apply to subsidies to small-scale fishing subject to determinations for illegal, unreported, or unregulated fishing.



Subsidies to Overfished Stocks

According to the FAO, roughly a third of assessed global fish stocks are overexploited, and this proportion has been gradually increasing over the last few decades (FAO, 2020). Members have been discussing what rules should apply to subsidies when a stock is overfished. The draft consolidated text includes (in Article 4) a prohibition, coupled with two exceptions, on subsidies to stocks that are overfished. The text attempts to strike a balance between very divergent initial positions among Members on three key questions: (1) How much deference should the rules give to governments' stock status decisions? (2) Should there be exceptions for subsidies when a stock is being managed back to health? and (3) What, if any, SDT for developing country Members would be appropriate and effective? It is worth noting that a previous place-holder for a provision on subsidies to unassessed stocks has been removed, as the final provisions now contain an obligation on Members to exercise special care when subsidising the fishing of unassessed fish stocks.

How Much Deference Should the Rules Provide to Governments' Stock Status Decisions?

A key question in this pillar of the negotiations has been how the rules should establish that a stock is overfished for the purposes of the subsidy prohibition. Some Members advocated for an objective definition of when a stock is overfished based on biological criteria (e.g., requiring decisions to be based on the widely accepted concept of a fishery's Maximum Sustainable Yield). At the other end of the spectrum, some Members proposed 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 so by the relevant authorities. A key criticism of this approach is that complete deference to national decisions runs 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. The text suggests a stock should be considered overfished when a national or regional authority decides it is so; however, to limit the risk of arbitrariness, the text requires Members to base their assessment on the “best scientific evidence available to the Member” which reflects similar language in the United Nations Convention on the Law of the Sea Art. 61. While the balance here is tilted toward deference to national decisions, the text would require Members to consider all the evidence available to them in making a decision regarding whether a stock was overfished.⁶

⁶ A further issue is how the rules should apply to un-assessed stocks. For the moment, the draft negotiating text deals with them briefly in the final provisions, which include an obligation on Members to take special care when subsidizing fishing of stocks of unknown status.



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

Members had also advocated for different approaches in answer to this question; some argued that all subsidies should be prohibited when a stock is overfished, others that subsidies should be able to continue if fisheries management measures were in place. The new text proposes a middle ground between these two positions: suggesting that some subsidies would be permitted even when a stock was overfished, but only those subsidies that are implemented to support a stock's recovery to a biologically sustainable level. In other words, subsidies that did not promote the stock's recovery would be prohibited.

What Special and Differential Treatment Would Be Appropriate and Effective?

Most proposals for SDT for this pillar focused on capacity building and on either time-limited or permanent exceptions for subsidies provided by developing country Members to small-scale fishing of overfished stocks within the 12 nautical miles of a coast's baseline. The draft consolidated text includes a provision in brackets that would provide a time-limited exception (with a further bracketed suggestion of 2 years) for subsidies to small-scale fishing of overfished stocks within the 12 nautical miles of the territorial sea.

Subsidies to Overfished Stocks

Overall approach: Most subsidies are prohibited when a stock is declared to be overfished

Key question 1: How much deference should there be to governmental stock status decisions?

Chair's proposal: Stocks are overfished when national authority or RFMO/A says so, based on the best evidence available to that authority.

Key question 2: Should there be exceptions for subsidies when a stock is being managed back to health?

Chair's proposal: Exception for those subsidies that promote the rebuilding of the overfished stock.

Balance between provisions: Do proposals for 1 and 2 strike the right balance in combining a relatively strict prohibition of subsidies with both a level of deference to national decision of when the prohibition applies and a narrow exception for subsidies that promote stock rebuilding?

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

Chair's proposal: Time-limited exception for subsidies to small-scale fishing of overfished stocks within the territorial sea.



Overfishing and Overcapacity (OFOC)

On top of specific situations when an IUU determination is made or a fish stock is assessed as being overfished, Members have been discussing disciplines on subsidies that contribute to overfishing and overcapacity more broadly. In the last few months, some convergence has emerged over the structure and key elements of these disciplines. While the previous version of the draft consolidated text included a placeholder for a possible quantitative limit on the total amount of subsidies Members are allowed to provide, the latest version exclusively focuses on a set of qualitative prohibitions.

How Should Rules Prohibit Certain Subsidies While Allowing Others, Without Sacrificing Effectiveness?

Main Prohibition: 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 approaches to rules that would meet this mandate. For a long time, three main approaches were proposed and advocated by Members: (1) listing prohibited subsidies based on an ex ante acknowledgement that these forms of support contribute to excessive fishing effort and capacity; (2) prohibiting all subsidies when the support targets a stock already fished at an unsustainable rate or by an oversized fleet; and (3) prohibiting certain subsidies unless a Member can demonstrate that it has a management system in place that to maintain the sustainability of stocks.

Like its previous versions, the latest draft consolidated text borrows elements from all these approaches and suggests a so-called “hybrid” approach for this main prohibition. The text in Article 5 starts with a simple and broad prohibition of all subsidies “that contribute to overcapacity and overfishing,” and immediately specifies that such subsidies include an illustrative list of particular subsidy types—which are generally considered as the most likely to incentivize overfishing and overcapacity. The list includes subsidies related to vessel construction, acquisition, and modernization; the purchase of machines and fishing equipment; the purchase of fuel, ice, and bait; the costs of personnel, social charges, or insurance; income support; price support of fish caught; at-sea support; and support to cover operating losses.

In a separate subparagraph (5.1.1.) the draft consolidated text includes an important qualifier to the main prohibition. Under this subparagraph, subsidies would not be inconsistent with this prohibition if the subsidizing Member can demonstrate that “measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level.” A footnote further indicates that this biologically sustainable level can be determined by a coastal state using either reference points based on the widely recognized concept of maximum sustainable yield or alternative reference points based on indicators commensurate with the data available in a given fishery or by an RFMO/A. The language in the footnote is important because while in some cases Members define the notion of a biologically sustainable level based on the concept of maximum sustainable yield, in others, they use



different criteria (see Headley, 2020). In practice, the method often depends on the data available.

A Member could thus use this exception to keep providing the subsidies listed in Article 5.1 but would have to prove that it has management measures in place to maintain a stock at healthy levels. It is not entirely clear, however, whether the text requires Members to demonstrate that these measures are effective at maintaining a stock at a biologically sustainable level, or only that they are implemented with this objective.

Additional Prohibitions: Subsidies for fishing in areas beyond national jurisdiction and reflagging

In addition to subsidies contributing to overfishing and overcapacity, the draft consolidated text includes two supplementary prohibitions that would apply to fishing beyond a subsidizing Members' domestic EEZ. The first (Article 5.2) would prohibit subsidies to 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 (Article 5.3) would cover all subsidies, not just those that target distant-water fishing, but would focus solely on fishing on the high seas that does not fall under the competence of an RFMO/A. The text states that the first prohibition in 5.2 would not apply to situations where a government purchases access rights to fish in another Members' EEZ and transfers those rights to its national fleet without fully recovering the costs (which could be considered a subsidy), provided that measures are implemented to maintain the stocks fished at sustainable levels, as for the main prohibition described above.

Finally, a further prohibition included in the draft consolidated text (although in brackets) as provision 5.4 would prohibit subsidies provided by one Member to vessels flying the flag of another Member. In practice, this rule would thus require that a Member have flag state jurisdiction (and therefore more control) over the fishing it subsidizes. 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. Some Members have expressed concerns, though, that this may affect legitimate temporary reflagging arrangements under access agreements and open registry arrangements more generally.

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 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 the 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. In addition to technical assistance and capacity-building needs covered in the draft consolidated text in a dedicated article, SDT provisions discussed by Members largely consist of specific flexibilities in the form of time-bound or permanent exemptions 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. A second approach would apply different commitments in different geographical areas. For example, ACP countries have sought a carveout for fishing activities in developing country Members' EEZs. Others have proposed excluding subsidies to fishing by developing Members' fleets within the 12 nautical miles of their territorial waters. A third category of proposals envisages exempting certain forms of fishing, such as small-scale and artisanal fisheries. Finally, a fourth approach consists of differentiating Members based on specific criteria, such as their share of wild marine captures. For example, one option could be to exempt—temporarily or permanently—developing countries Members accounting for a certain share of global marine capture from the prohibition.

The draft consolidated suggests two separate alternatives for exemptions from the main prohibition of subsidies that contribute to overfishing and overcapacity, both of which combine elements from these different approaches. Both of these alternatives remain in square brackets. The first alternative would grant a permanent exemption from this prohibition for (1) subsidies provided by LDC Members, (2) subsidies for fishing by developing Members' fleets within their own domestic territorial waters; and (3) subsidies for fishing by developing Members' fleets within their domestic EEZ or under the competence of an RFMO/A, provided a Member meets 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. Based on these criteria, this last exemption would likely apply to all developing country Members (except for China) and possibly one or two other Members.

In the second alternative, there would be several different exemptions. First, a permanent exemption for subsidies that are provided by LDC Members. Second, an exemption for subsidies to low-income, resource-poor, or livelihood fishing or fishing-related activities in developing Members within 12 nautical miles of their shore. The draft includes, in further square brackets, the idea that this exemption could be time limited, and proposes a period of 7 years. The third exemption would be for subsidies to developing Members' fleets fishing within their own EEZ, and would apply for a limited period of time. The text does not include



square brackets around the idea that this provision would be time limited, and suggests the time period could last for 5 years. Small developing country Members whose share of global marine capture does not exceed 0.7% and whose fisheries subsidies do not exceed USD 25 million would also have the opportunity to ask for extensions of these time-limited exemptions. Such extensions would need to be approved and renewed every year by the committee in charge of administering the new instrument. If the extension is not renewed, the developing country Member would have 2 years to phase out prohibited subsidies.

Overcapacity and Overfishing

Key question 1: How should the rules prohibit certain subsidies while allowing others, without sacrificing effectiveness?

Chair's proposal: Prohibition of subsidies that contribute to overcapacity and overfishing, including subsidies for:

- Vessel construction, acquisition, and modernization
- Purchase of machines and fishing equipment
- Purchase of fuel, ice, and bait
- Costs of personnel, social charges, or insurance
- Income support
- Price support of fish caught
- At-sea support
- To cover operating losses.

Unless a Member can show it implements measures to maintain stocks at a biologically sustainable level, with flexibility on how such a level can be determined.

Chair's proposal: Prohibition for subsidies to fishing in ABNJ

- Subsidies "contingent or tied to" fishing in all ABNJ, with an exemption for subsidized access rights if measures are implemented to maintain stocks at a sustainable level.
- All subsidies to fishing in high seas outside the area of competence of RFMO/As

Chair's proposal: Prohibition of subsidies to reflagged vessels

Key question 2: What SDT would be appropriate and effective?



Chair's proposals:

Alternative 1	Alternative 2
<p>Permanent exemption from the main prohibition for subsidies provided:</p> <ul style="list-style-type: none"> • By LDC Members • By developing Members for fishing in the domestic territorial sea • For fishing in the domestic EEZ or RFMO/A for developing country Members who meet any of a set of criteria (GNI per capita; share of global catch; distant-water fishing; and share of agriculture, forestry, and fisheries in GDP) 	<ul style="list-style-type: none"> • Permanent exemption from the main prohibition for subsidies provided by LDCs • Exemption (perhaps time limited) for subsidies by developing Members to small-scale fishing within 12 nautical miles of the coast • Exemption (time limited) for subsidies by developing countries to fishing in domestic EEZs <p>Possible extension of the time-limited exemptions for some developing country Members (share of global catch less than 0.7%, and subsidies below USD 25 million)</p>

Balance between provisions: Do proposals for question 1 and elements of the alternative proposals for question 2 strike the right balance of obligations between developed and developing countries, providing appropriate and effective SDT while ensuring that the agreement has a meaningful impact on subsidy patterns?



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. Draft Article 6, in brackets, contains suggestions for specific provisions for LDC Members. One paragraph, in a second set of brackets, would extend LDC flexibilities to Members graduating from the LDC category for a certain transition period. A further paragraph, in unbracketed text, sets out an obligation to exercise restraint in raising matters involving LDCs under this instrument. Article 7 of the draft text covers TACB. It includes, in brackets, a commitment by developed countries and developing countries declaring themselves in a position to do so to provide TACB for the implementations of the instrument.

Horizontal SDT Provisions

Key question 1: What, if any, specific provisions for LDCs would be appropriate and effective?

Chair's proposals:

- Extend LDC flexibilities to graduating Members over a certain transition period
- Commitment to “due restraint” in raising matters involving LDC Members

Key question 2: What type of TACB would be appropriate and effective?

Chair's proposal: TACB for implementation of the agreement



Institutional Issues

Beyond the substantive disciplines described above, the draft consolidated text addresses a number of institutional matters. These include questions related to (a) transparency and notifications, (b) the legal form of the instrument, (c) a mechanism for review and implementation, and (d) dispute settlement.

Transparency and Notification

Article 25 of the ASCM already requires Members 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. Discussions on transparency and notification in the context of a new instrument on fisheries subsidies have focused on what additional information Members should be required to provide on top of existing ASCM requirements, keeping in mind the need to ensure information is available to monitor the agreement, but also that what is required is practicable for everyone.

The draft consolidated text opts, in Article 8, for a combination of mandatory and less strict notification requirements. For each fisheries subsidy program, Members would have an obligation to notify the kind of fishing activity for which it is provided, as well as catch data for the fishery where subsidized fishing is taking place. Other information, the text suggests (but with brackets), would have to be provided “to the extent possible,” including on stock status, conservation and management measures, number and identification of subsidized vessels, and fleet capacity in the relevant fishery.

Independently of subsidies, Members would also need to notify vessels or operators that have been subject to an IUU fishing determination domestically, and fisheries access agreements in force with another government, if any. Finally, the draft consolidated text suggests that Members would only be able to benefit from the proposed flexibilities under the different disciplines for subsidies that have been duly notified. To invoke the sustainability-related flexibilities in the disciplines on overfished stocks and overfishing and overcapacity, Members would also have to have notified two key pieces of fisheries-related information whose provision would otherwise not be mandatory—i.e., on stock status and conservation measures for stocks fished with subsidies.

The Legal Form of an Instrument

Discussions on the legal form of a final instrument have focused on 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 ASCM. The draft consolidated text does not take a final position on this aspect and therefore refers only to “[this instrument]” throughout the text.



Mechanisms for Review and Implementation

With respect to review and implementation, options that have been proposed by Members include 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. The draft consolidated text does not propose one or other of these options, leaving the paragraph describing where the Committee would sit in the WTO architecture—and even the word “Committee”—in brackets.

The text sets out, in Article 9, what the work of a Committee overseeing the new rules would be. On top of the notification requirements described above, Members would need to provide to the committee a description of their implementation measures, as well a description of their fisheries management regime, in particular their laws, regulations, and procedures relevant for the new instrument. On the basis of these descriptions and Members’ regular notifications, the committee would be tasked with examining all information submitted to it by Members every 2 years. Finally, the text suggests that the committee should undertake periodic reviews of the operation of the new instrument and make modifications to improve the way it operates, without specifying the frequency of such reviews.

Dispute Settlement

The draft text reflects the idea that existing rules under the WTO’s dispute settlement mechanism should apply to this new instrument, including the rules specifically envisaged for subsidies disputes under Article 4 of the ASCM. In past discussions on this issue, Members have considered whether other specific rules might need to be developed for this agreement, including: whether non-violation claims would be covered under the new disciplines, whether Members should set a particular standard of review for future dispute settlement panels, and whether unilateral remedies for non-compliance with the new agreement might also be needed. A final important question, which is addressed explicitly in the text, is how the WTO panel decision would relate to situations where jurisdiction over maritime areas is disputed.

As the text stands, Members could bring claims under this agreement in the same way that they can under other WTO agreements (on the basis of a violation of the agreement or on the basis that an expected benefit is otherwise nullified or impaired, i.e., including “non-violation” complaints). Once a panel was established, its standard of review might become relevant. As a general point, 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. 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. In its current version, the draft consolidated text does not suggest any general articulation of the standard of review, which means that dispute settlement panels would be guided by the requirements of each specific discipline in deciding what type of review they need to undertake.



With respect to remedies, the starting point is that the ASCM allows Members to pursue multilateral resolution of a dispute through a panel process, but it also allows them 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 inclusion of a unilateral remedy track in the fisheries subsidies instrument based on the ASCM model would require Members to make some adaptations 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 rather to protect fish stocks from subsidies that contribute to IUU fishing or overfishing and overcapacity. The current text would enable only multilateral dispute settlement to be used to resolve disputes under the agreement.

A final question, which the text addresses explicitly, 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 jurisdiction. A question that has arisen in the negotiations is what to do if an IUU determination, or a determination that a stock is overfished, is made in disputed waters, and how would the dispute settlement mechanism apply in those circumstances? In its final provisions, the draft consolidated text provides in Article 11 that the new instrument and the legal proceedings involved in its application will have no legal implications with regards to the questions of territoriality or delimitation of maritime jurisdiction. The text also suggests that dispute settlement panels "shall not entertain any claim" that would require them to address issues of disputed jurisdiction. This suggests that while the agreement and its obligations would still apply to subsidies to fishing in areas where jurisdiction is disputed, these obligations may not be enforceable in the same way as those that apply to fishing in other areas.



Institutional Issues

TRANSPARENCY AND NOTIFICATION

Key question 1: What elements beyond those listed in Art. 25 of the ASCM should Members be required to notify?

Chair's proposals:

- For each notified subsidy, Members must provide information on the type of fishing activity and the catch data of fisheries that are subsidized, and to the extent possible, further information, e.g., stock status.
- Members must notify IUU determinations and any fishing access agreements in force.

Key question 2: Should the proposed flexibilities and exceptions be conditioned on having notified existing subsidies?

Chair's proposal: Members may invoke exceptions only with respect to notified subsidies and management-based exceptions only when it has notified the stock status and management measures in place.

LEGAL FORM OF THE INSTRUMENT

Key question 3: Should the instrument be structured as an Annex to the ASCM or to the Marrakesh Agreement?

MONITORING AND REVIEW

Key question 4: What institutional structure should administer the new instrument, and what should be its role and responsibilities?

Chair's proposal: Establishment of a new Committee, which should review notifications and implementation-related information submitted by Members every 2 years and undertake periodical reviews of the operation of the new instrument.

DISPUTE SETTLEMENT

Key question 5: How should the instrument address situations of disputed jurisdiction over maritime areas?

Chair's proposals:

- The instrument and the results of any findings under it have no legal implications regarding maritime jurisdiction.
- A dispute settlement panel shall not entertain any claim under this instrument that requires it to address issues of contested jurisdiction.



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