



Disciplines on Overcapacity and Overfishing:

Approaches and key steps in negotiations

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A word on where we are

The context of the overcapacity and overfishing negotiation, phase 2

The Fisheries Subsidies Agreement establishes framework for rules + deals with “red light” situations

- Cases of IUU fishing
- Fishing where stocks are declared to be overfished
- Fishing on high seas outside the competence of an RFMO

What is left? “orange light” situations:

- Subsidies to fishing in **domestic EEZs** when fish stocks are not overfished
- Subsidies to fishing in **foreign EEZs** when fish stocks are not overfished
- Subsidies to fishing within **the competence of RFMOs** when fish stocks are not overfished

Overview of Key Approaches on OCOF: Prohibitions



Things to remember

- The **burden of proof** matters: complainant proves rule applies, defendant proves exemption applies
 - Easier the prohibition is to prove, the more enforceable the rule (we assume this is an advantage)
 - Easier the exception is to prove, the less enforceable the rule (we assume this is a disadvantage)
- **Approaches can be combined**, and often were in proposals

List-based prohibition

Description: Prohibition of a list of **particular kinds of subsidies**

- Defined by the types of economic variables the subsidy targets, e.g. construction or renovation of vessels.
- Defined by the kind of fishing activities they benefit e.g. fishing in areas beyond national jurisdiction.

Advantages	Disadvantages
<ul style="list-style-type: none">• Easy to implement – based on the design of the subsidy• Easy to enforce – needs only information about the existence and basic design of the subsidy	<ul style="list-style-type: none">• Indiscriminate – does not account for circumstances (e.g. where listed subsidy is in fact not contributing to overcapacity or overfishing)

Effect-based prohibition

Description: Prohibition of subsidies if they have a **negative effect on fish stocks**.

- Can be part of, or combined with a list approach (e.g. subsidies that negatively affect fish stocks by reducing capital and operating costs are prohibited)

Advantages	Disadvantages
<ul style="list-style-type: none">• Tailored – addresses the impact (subsidies are contributing to depletion of fish stocks) that the rules seek to address	<ul style="list-style-type: none">• Implementation requires assessment of when/whether subsidies are likely to have a negative effect on a fish stock• Enforcement requires proof of causal link between subsidy and state of fish stock

Situational prohibition

Description: Prohibition of subsidies if there is overfishing or overcapacity in a fishery.

- Can be combined with a list approach, e.g. subsidies to capital and operating costs are prohibited in fisheries where there is overfishing or overcapacity.

Advantages	Disadvantages
<ul style="list-style-type: none">• Relatively tailored – addresses the situations (overcapacity and overfishing) that the rules seek to address, without requiring causal link between subsidy and overcapacity/overfishing or subsidy and fish stock	<ul style="list-style-type: none">• Implementation requires information about fishing effort and capacity in relevant fishery• Enforcement requires information about fishing effort and capacity in relevant fishery

Broad prohibition + management exemption

Description: Prohibition of all subsidies **unless fisheries management measures are in place.**

- Can be drafted to make exception more difficult to prove: «[subsidies prohibited] unless measures are in place that effectively ensure stocks are maintained at a biologically sustainable level»
- Can be drafted to make exception easier to prove: «[subsidies prohibited] unless measures are implemented to maintain stocks at a biologically sustainable level.»

Advantages	Disadvantages
<ul style="list-style-type: none">• Relatively tailored – addresses all situations except those where the risks associated with subsidies are/may be mitigated• If exception is difficult to prove: Enforcement easier	<ul style="list-style-type: none">• Implementation requires information about fisheries management measures• If exception is easy to prove: Enforcement harder

Broad prohibition + “green box” exemptions

Description: Prohibition of subsidies unless they are part of a **list of exempted (“green box”) subsidies**.

- Can be drafted to make exemption easy to prove (wide list, few requirements)
- Can be drafted to make exception more difficult to prove (narrow list, more safeguards)

Advantages	Disadvantages
<ul style="list-style-type: none">• Easy to implement – based on the design of the subsidy• If exception is difficult to prove: Enforcement easier	<ul style="list-style-type: none">• Indiscriminate – does not account for circumstances (e.g. where subsidies within the green box are in fact contributing to overcapacity and overfishing)• If exception is easy to prove: Enforcement harder

Capping approaches

Description: Establishment of a **quantitative limit** on the total level of subsidies that Members can provide

- Tiers based on share of global catch; cap and reduction to be negotiated for big fishing nations
- Tiers based on development level, catch level, importance of SSF; cap as % of landed value for each tier
- Members choose cap as a share of: (1) their subsidies in base period, (2) their landed value, or (3) global average subsidies x their number of fisherman.
- Cap based on common formula for each Member; higher reductions for bigger subsidisers

Advantages	Disadvantages
<ul style="list-style-type: none">• Certainty – the bounds of each Member’s obligation are very clear• Adaptable – the level of commitment of Members can be adapted to their situation• Enforcement of subsidy reductions possible	<ul style="list-style-type: none">• Most approaches require data on current levels of subsidization• Indiscriminate – limits do not reflect impact of subsidies in specific circumstances

Prohibition modulated by type of fleet

Description: Additional language that would limit the prohibition to subsidies to **large-scale fishing fleets**

- Described with adjectives e.g. large-scale industrial fishing
- Described with characteristics e.g. vessel length, tonnage, motorised gear, engine power, freezing equipment

Advantages	Disadvantages
<ul style="list-style-type: none">• Relatively tailored – focuses prohibition on fleets that receive proportionately more subsidies.	<ul style="list-style-type: none">• If defined by characteristics: Difficult to reach agreement on single set of characteristics appropriate to all Members' large-scale fleets• If defined by adjectives: Members have wide discretion to decide what segment of the fleet is covered

Overview of Key Approaches on OCOF: SDT



SDT: By established country groups

Description: Exceptions from the prohibition(s) for specific groups of Members

- Developing country Members
- Least developed country Members

Advantages	Disadvantages
<ul style="list-style-type: none">• Certainty – Membership of groups relatively clear• Some adaptability: Members of the groups can, if they wish, declare they will not avail themselves of SDT	<ul style="list-style-type: none">• Indiscriminate: Fishing and subsidising capacity varies widely within country groups

SDT: By threshold-defined country groups

Description: Exceptions from the prohibition(s) for groups of Members that meet a specific threshold

- Threshold based on contribution to global fishing catch (e.g. more than, or less than, x% of global catch)
- Threshold based on subsidies provided (e.g. more than, or less than, x amount of subsidies)
- Threshold based on fishing activities (e.g. countries with, or without, distant water fishing activities)
- Threshold based on national economic statistics (GNI per capita, contribution of fisheries to GDP)

Advantages	Disadvantages
<ul style="list-style-type: none">• Implementation – Thresholds can be based on existing, agreed set of international data (or notifications)• Adaptability – Once a country no longer meets the threshold, prohibition applies	<ul style="list-style-type: none">• Indiscriminate – Thresholds are all imperfect proxies for degree of contribution to global problem of subsidised overcapacity and overfishing.• Thresholds focus on the global problem, rather than local overcapacity and overfishing.

SDT: By geographical area

Description: Exceptions from the prohibition(s) for subsidies by developing country Members to fishing in specific geographical areas

- Territorial sea (12 nautical miles from the baseline)
- Contiguous zone (24 nautical miles)
- Exclusive Economic Zone (200 nautical miles)
- In areas and for species under the competence of RFMOs

Advantages	Disadvantages
<ul style="list-style-type: none">• Clarity – areas considered are all fisheries governance areas.	<ul style="list-style-type: none">• Indiscriminate – Area-based rules may not reflect well the diversity of fisheries realities• Together, these areas cover most global fishing

SDT: By scale of fishing activity

Description: Exceptions from the prohibition(s) for subsidies by developing country Members to different scales of fishing activity

- Often described with socio-economic criteria e.g. low-income, resource poor, livelihood fishing

Advantages	Disadvantages
<ul style="list-style-type: none">• Tailored: can be drafted to focus on particular parts of the fishing fleet or particular socio-economic groups.	<ul style="list-style-type: none">• Difficult to develop single set of criteria to tailor exception adequately in different circumstances.

SDT: Exceptions modulated by time

Description: Exceptions from the prohibition(s) for subsidies by developing country Members for different time periods

- Can be permanent or temporary
- Time periods often applied to exceptions developed on the basis of other approaches (e.g. different transition periods for subsidies to large-scale vs small-scale fishing, or permanent exceptions for either or both)

Advantages	Disadvantages
<ul style="list-style-type: none">• Clarity: Objective standard delimits the exception from obligations.• Can combine flexibility with pressure for reform	<ul style="list-style-type: none">• Difficult to agree on single transition period to apply to diverse fishing fleets between Members

What else needs to be considered?

(what did we miss??)

Are there other approaches?

Are there other advantages and disadvantages to the approaches listed?

Key steps in recent negotiations



25 June 2020 text (RD/TN/RL/126)

Main prohibition	<u>Broad list of costs/subsidies + situational prohibition</u> : capital and operating costs subsidies (with examples), only when rate of fishing or fishing capacity is too high.	
Management exemption	<u>Situational exemption</u> : If Member can show "other policies" that [effectively ensure] stocks are maintained at a sustainable level Sustainable level: MSY or alternative	
SDT	<u>[Exemptions for:</u>	<ul style="list-style-type: none">- LDCs- Activities in territorial sea- EEZ and RFMO fishing for Members not fulfilling a list of cumulative socio-economic criteria]
Distant water	<u>Double prohibition</u> :	<ul style="list-style-type: none">- DWF-contingent subsidies- All subsidies for activities in unregulated high seas
Capping and green box	Bracketed placeholders	

2 November 2020 text (RD/TN/RL/126/Rev.1)

Main prohibition	<p><u>Detailed list prohibition</u>: List of 8 subsidy types (vessels; machines and equipment; fuel, ice and bait; personnel, social charges and insurance; income support; price support; at sea support; operating losses).</p> <p>No decision on open/close list ([include])</p>	
Management exemption	<p><u>Situational exemption</u>: If Member can show that measures are implemented to maintain the stock at a biologically sustainable level. BSL: MSY or alternative</p>	
SDT	<p><u>[Exemptions for:</u></p>	<ul style="list-style-type: none">- LDCs- Activities in territorial sea- EEZ and RFMO fishing for Members not fulfilling a list of cumulative socio-economic criteria]
Distant water	<p><u>Double prohibition:</u></p>	<ul style="list-style-type: none">- DWF-contingent subsidies- All subsidies for activities in unregulated high seas
Capping and green box	<p>Bracketed placeholders</p>	

18 December 2020 text (RD/TN/RL/126/Rev.2)

Main prohibition	<p><u>Detailed list prohibition</u>: List of 8 subsidy types (vessels; machines and equipment; fuel, ice and bait; personnel, social charges and insurance; income support; price support; at sea support; operating losses).</p> <p>No decision on open/close list ([include])</p>	
Management exemption	<p><u>Situational exemption</u>: If Member can show that measures are implemented to maintain the stock at a biologically sustainable level. BSL: MSY or alternative (reference points can be "commensurate" with available data)</p>	
SDT	<p><u>[Exemptions for:</u></p>	<ul style="list-style-type: none">- [LDCs]- [Activities in territorial sea]- [EEZ and RFMO fishing for Members not fulfilling a list of cumulative socio-economic criteria; or other form of transitory mechanism]]
Distant water	<p><u>Double prohibition:</u></p>	<ul style="list-style-type: none">- DWF-contingent subsidies- All subsidies for activities in unregulated high seas <p>Placeholder for exemption of access subsidies</p>
Capping and green box	<p>Bracketed placeholders</p>	

11 May 2021 text (TN/RL/W/276)

Main prohibition	Detailed open list prohibition : List of 8 subsidy types (vessels; machines and equipment; fuel, ice and bait; personnel, social charges and insurance; income support; price support; at sea support; operating losses).
Management exemption	<u>Situational exemption</u> : If Member can show that measures are implemented to maintain the stock at a biologically sustainable level, and has fulfilled transparency requirements . BSL: MSY or alternative (reference points can be "commensurate" with available data)
SDT	Bracketed alternatives. <u>Exemptions for:</u> <ul style="list-style-type: none">LDCsActivities in territorial seaEEZ and RFMO fishing for Members not fulfilling criteriaLDCsArtisanal within 12 nm [for 7] yearsEEZ and RFMO fishing for 5] years+ possible extensions for Members below catch and subsidy thresholds
	Exemptions can be used only if subsidies have been notified
Distant water	<u>Double prohibition</u> : <ul style="list-style-type: none">DWF-contingent subsidies; exemption for access subsidies if management measures are in placeAll subsidies for activities in unregulated high seas
Capping and green box	Nothing

30 June 2021 text (TN/RL/W/276/Rev.1)

<p>Main prohibition</p>	<p><u>Detailed open list prohibition</u>: List of 8 subsidy types (vessels; machines and equipment; fuel, ice and bait; personnel, social charges and insurance; income support; price support; at sea support; operating losses).</p>		
<p>Management exemption</p>	<p><u>Situational exemption</u>: If Member can show that measures are implemented to maintain the stock at a biologically sustainable level, and has fulfilled transparency requirements. BSL: MSY or other (reference points can be "commensurate" with available data)</p>		
<p>SDT</p>	<p>Bracketed alternatives. <u>Exemptions for</u>:</p> <table border="0" style="width: 100%;"> <tr> <td style="vertical-align: top; width: 50%;"> <ul style="list-style-type: none"> • LDCs • Activities in territorial sea • EEZ and RFMO fishing for Members not fulfilling criteria </td> <td style="vertical-align: top; width: 50%;"> <ul style="list-style-type: none"> • LDCs • Artisanal within 12 nm (permanent) • EEZ and RFMO fishing for [5] years <p>+ possible extensions for Members below catch and subsidy thresholds</p> </td> </tr> </table> <p>Exemptions can be used only if subsidies have been notified</p>	<ul style="list-style-type: none"> • LDCs • Activities in territorial sea • EEZ and RFMO fishing for Members not fulfilling criteria 	<ul style="list-style-type: none"> • LDCs • Artisanal within 12 nm (permanent) • EEZ and RFMO fishing for [5] years <p>+ possible extensions for Members below catch and subsidy thresholds</p>
<ul style="list-style-type: none"> • LDCs • Activities in territorial sea • EEZ and RFMO fishing for Members not fulfilling criteria 	<ul style="list-style-type: none"> • LDCs • Artisanal within 12 nm (permanent) • EEZ and RFMO fishing for [5] years <p>+ possible extensions for Members below catch and subsidy thresholds</p>		
<p>Distant water</p>	<p><u>Double prohibition</u>:</p> <ul style="list-style-type: none"> • DWF-contingent subsidies; bracketed exemption for access subsidies if management measures are in place • All subsidies for activities in unregulated high seas 		

8 November 2021 text (TN/RL/W/276/Rev.2)

Main prohibition

Detailed open list prohibition: List of 9 **subsidy types** (vessels; machines and equipment; fuel, ice and bait; personnel, social charges and insurance; income support; price support; at sea support; operating losses; **DWF-contingent in brackets**).

Management exemption

Situational exemption: If Member can show that measures are implemented to maintain the stock at a biologically sustainable level, and has fulfilled transparency requirements. BSL: MSY or other (reference points can be "commensurate" with available data)

SDT

Exemptions for **(no alternatives)**:

- **[[EEZ and RFMO] fishing for [X] years]**
- **[Members below [0.7%] of global capture]**
- Artisanal within **[12] nm**
- LDCs

+ best endeavor sustainability obligation

Exemptions can be used only if subsidies have been notified

Distant water

Prohibition: All subsidies for activities in unregulated high seas (**DFW-contingent rule moved to main prohibition**)

24 November 2021 text (WT/MIN(21)/W/5)

Main prohibition

Detailed open list prohibition: List of 9 subsidy types (vessels; machines and equipment; fuel, ice and bait; personnel, social charges and insurance; income support; price support; at sea support; operating losses; DWF-contingent [unbracketed](#)).

Management exemption

Situational exemption: If Member can show that measures are implemented to maintain the stock at a biologically sustainable level, and has fulfilled transparency requirements. BSL: MSY or other (reference points can be "commensurate" with available data)

SDT

Exemptions for:

- [[EEZ and RFMO] fishing for [X] years]
- [Members below [0.7%] of global capture]
- Artisanal within [12] nm
- LDCs

+ best endeavor sustainability obligation

Exemptions can be used only if subsidies have been notified

[No S&D for Members above 10% of global capture]


Distant water

Prohibition: All subsidies for activities in unregulated high seas

10 June 2022 text (WT/MIN(22)/W/20)

<p>Main prohibition</p>	<p><u>Detailed open list prohibition:</u> List of 8 subsidy types (vessels; machines and equipment; fuel, ice and bait; personnel, social charges and insurance; income support; price support; at sea support; operating losses).</p>	
<p>Management exemption</p>	<p><u>Situational exemption:</u> If Member can show that measures are implemented to maintain the stock at a biologically sustainable level, and has fulfilled transparency requirements. BSL: MSY or other (reference points can be "commensurate" with available data)</p>	
<p>SDT</p>	<p><u>Exemptions</u> for:</p> <ul style="list-style-type: none"> • EEZ and RFMO fishing for [7 years]/[until 2030] + 2 years peace clause • Members below [0.8%] of global capture • Artisanal within [12]/[24] nm • LDCs 	<p>+ best endeavor sustainability obligation</p> <p>Exemptions can be used only if subsidies have been notified</p> <p>[No S&D for Members above [X%] of global capture]</p>
<p>Distant water</p>	<p><u>Double prohibition:</u></p>	<ul style="list-style-type: none"> • DWF-contingent subsidies, with exemption for access subsidies if management measures are in place • All subsidies for activities on unregulated high seas

Summary of key steps

	2020	2021-2022
Main prohibition	Broad list (operational and capital costs) + situation  Detailed list of subsidy types	Stable (+/- DWF-contingent-subsidies)
Management exemption	Situational exemption made wider: “implemented to maintain”, “commensurate” reference points	Link with transparency requirements
SDT	Stable, some discussion but no movement	<ul style="list-style-type: none"> • Proposed approach to find common ground • Gradual widening and adjustments
Distant water fishing	Stable, double prohibition	Debate on what exemptions should apply to the rule on DWF-contingent subsidies (access subsidies, or all subsidies if management)
Capping, green box	Placeholders	Nothing