



# A Draft World Trade Organization Agreement on Fisheries Subsidies:

What's on the table?

**GSI POLICY BRIEF**





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## A Draft World Trade Organization Agreement on Fisheries Subsidies: What's on the table?

May 2022

Photo: iStock

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This brief was produced with the support of The Pew Charitable Trusts.

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This update provides an overview of the draft agreement on fisheries subsidies circulated by the chair of the World Trade Organization (WTO) rules negotiating group, Ambassador Santiago Wills, on November 24, 2021. It describes the main rules and legal provisions that are proposed, explains how the draft agreement attempts to find balance among various priorities and considerations, and highlights the few outstanding key questions that members will have to address in the final phase of the negotiations. It is based on previous updates on these negotiations produced by IISD.<sup>1</sup>

## 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 types of subsidies can contribute to the buildup of excessive fishing capacity and the depletion of fish stocks by reducing the cost of fishing operations or enhancing revenues (Martini & Innes, 2018). 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).

WTO negotiations aimed at disciplining fisheries subsidies are based on the 2001 Doha mandate, supplemented by a more detailed one agreed upon 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” (WTO, 2005). Members also agreed that “appropriate and effective special and differential treatment (S&D) 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).

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 S&D for developing and least-developed countries should be an integral part of the WTO fisheries subsidies negotiations (UN General Assembly, 2015).

<sup>1</sup> See Tipping & Irschlinger, 2020, 2021.





Throughout 2016 and 2017, new textual proposals were tabled by different proponents.<sup>2</sup> 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” (WTO, 2017).

After MC11, 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 June 2020. The chair released a streamlined draft consolidated negotiating texts capturing the gradual progress made throughout 2019 and 2020.<sup>3</sup> The 12th WTO Ministerial Conference (MC12) was first postponed, due to the COVID-19 pandemic, to November 2021, and intensive work continued throughout the year. The chair of the negotiations released the first complete draft text for the agreement in May 2021 (WTO, 2021), and the new Director-General of the WTO, Ngozi Okonjo-Iweala, convened ministers to meet virtually to discuss the agreement on July 15, 2021.

In the lead-up to November 2021, the chair released updated draft texts (WTO, 2021c, 2021d) that reflected increasing convergence, achieved after many hours of negotiation, including over weekends and evenings, in Geneva. The draft agreement released on November 24, 2021 (WTO, 2021a), the week before ministers were due to land in Geneva, includes only very few brackets around unresolved issues to be decided by ministers. Four days before MC12 was scheduled to take place, travel restrictions linked to the outbreak of the Omicron variant of COVID-19 forced the further postponement of MC12, which is now scheduled to take place between June 12 and 15, 2022.

Progress in 2022 has been limited, as work at the WTO has been disrupted as a result of Russia's invasion of Ukraine in February 2022. The November 24, 2021, draft agreement is thus still the text on the table; it may be revised again before MC12, but likely not more than once. It thus reflects the launching point for the final stretch of discussions on the agreement.

This note describes the rules proposed in the draft agreement, explains how the text attempts to find a balance between various priorities and considerations that have been voiced by different WTO members, and highlights the few outstanding key questions members will need to answer in the last phase of negotiations. Following the structure of the draft agreement, this update starts by looking at the scope of the disciplines (briefly touching upon definitions) before addressing the three main substantive areas in which new rules and prohibitions are considered: (1) subsidies that contribute to IUU fishing; (2) subsidies for fishing and fishing-related activities regarding overfished stocks; and (3) subsidies that contribute to overcapacity

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<sup>2</sup> These included, for example, full textual proposals from the European Union (TN/RL/GEN/181), the African, Caribbean and Pacific 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 Latin American countries (Argentina, Colombia, Costa Rica, Chile, Panama, and Peru) (TN/RL/GEN/187), New Zealand with Iceland and Pakistan (TN/RL/GEN/186), and Indonesia (TN/RL/GEN/189). Many proposals in the negotiation, and most previous draft texts, are not public documents.

<sup>3</sup> Document RD/TN/RL/126 and its two revisions.



and overfishing more broadly. A number of crosscutting issues are then addressed, including horizontal S&D provisions, transparency and notification, institutional issues, and dispute settlement. In each section, a summary box is provided to outline the key elements of the draft agreement as well as the remaining key questions in front of WTO members, if any.

## Scope

Article 1 of the draft agreement sets out the type of subsidies covered by the disciplines and the overall scope of these rules. 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. It also specifies that disciplines should only apply to marine wild 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 agreement clarifies that subsidies to aquaculture and inland fisheries are excluded from the scope of the agreement and that payments made by governments to other governments under fisheries access agreements should not be considered to be subsidies.

The text includes bracketed language that would include non-specific fuel subsidies (i.e., those that are not restricted to a particular industry or enterprise, group of industries or enterprises, or geographical region) in the scope of the agreement. The rules in the WTO's ASCM apply only to specific subsidies; however, Article 3 of that agreement states that prohibited subsidies are automatically deemed to be specific. The members that have proposed the inclusion of non-specific fuel subsidies have emphasized that such subsidies also have environmental impacts. 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 of this idea argue that covering non-specific forms of support could introduce confusion regarding the scope of application of the new rules. An alternative approach, which is included in brackets in the transparency provisions of the draft agreement, would be to introduce an obligation to notify non-specific fuel subsidies to the WTO but without necessarily making these measures part of the scope of the agreement.<sup>4</sup>

In Article 2, the draft agreement defines a number of key terms. It includes definitions of fish, fishing, fishing-related activities, vessel, and operator, most of which are taken from the FAO's Port State Measure Agreement.

### Box 1. Scope

The agreement applies to "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 the scope?

<sup>4</sup> A summary of WTO members' fuel subsidies can be found in Moerenhout (2019).



## IUU Fishing

IUU fishing remains a pervasive problem in global fisheries. It undermines fisheries management regimes and affects fisheries' ability to deliver key socio-economic benefits sustainably, with estimates suggesting that associated economic losses could be as high as USD 50 billion each year (Sumaila et al., 2020). WTO members seem to agree that a vessel or operator that has been found to engage in IUU fishing, or any vessel that provides at-sea support to an IUU vessel (such as bunkering, replenishment, or other support activities), should not benefit from any form of subsidies.<sup>5</sup> This subsidy prohibition is included in Article 3 of the draft agreement, which now appears to be stabilized.

### How the Prohibition Is Triggered

Members have gradually converged on the question of whose determinations of IUU fishing would trigger the subsidy prohibition. Article 3.2 of the draft agreement provides that the subsidy prohibition could be triggered by an affirmative determination made by a WTO member acting either in its capacity as a coastal state, for activities occurring in the waters under its jurisdiction (i.e., in its Exclusive Economic Zone [EEZ], an area of sea out to 200 nautical miles from the baseline), or as a flag state for the activities of vessels flying its flag, which could occur on the high seas or in another member's EEZ. In both cases, the IUU determination could target either 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 Organization or Arrangement (RFMO/A) if the IUU fishing took place in the waters and for the species under its competence.<sup>6</sup>

Importantly, the draft agreement explicitly records in a footnote that there would be no obligation for members to make IUU determinations. Rather, if and when an affirmative IUU determination is made by one of the competent authorities, members would have an obligation not to subsidize the vessel or operator that is the subject of the determination or any support vessel. The draft agreement also includes an explicit obligation for members to have laws, regulations, and/or administrative procedures that ensure that no such prohibited subsidies are provided. In the draft agreement, this strict prohibition is balanced by specific provisions—addressed below—that set out the requirements that an IUU determination must fulfill in order to trigger the prohibition (Article 3.3) and that provide the subsidizing member with some level of control over how the prohibition is applied (Articles 3.4 and 3.5).

Separately, another obligation would require a subsidizing member to give due regard to information received from a port state member about a vessel's engagement in IUU fishing and to take appropriate action with regard to its subsidies to that vessel. As opposed to situations where an IUU determination is made by a coastal member, flag state member, or

<sup>5</sup> 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* to define IUU fishing.

<sup>6</sup> Public information about vessels that are the subject of IUU determinations by coastal or flag states is patchy, but a consolidation of all RFMO/A lists of IUU vessels included only around 328 vessels as of April 11, 2022 (see the Tryg Mat Tracking IUU Vessel List at [www.tm-tracking.org](http://www.tm-tracking.org)).



RFMO/A, there is no outright subsidy prohibition here. The subsidizing member would only need to take any action it deems appropriate.

## Requirements for IUU Determinations to Trigger the Prohibition

Key questions throughout the negotiation of this rule have 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. On this question, members have progressively converged on the approach that is now included in the draft agreement, which provides a first element of balance against a strict subsidy prohibition. Regarding determinations of IUU fishing made by coastal state members, Article 3.2(b) of the text provides that such determinations should rely on relevant factual information and follow a number of key procedural steps.<sup>7</sup> The flag state member and, if known, the subsidizing member should be (1) notified at the beginning of the determination process; (2) provided with an opportunity to provide information to be taken into account in the determination process; and (3) notified of the final determination and any sanction applied. The coastal state would also be obliged to notify the committee administering the agreement—and thus all other WTO members—of any affirmative determination it has made. Regarding determinations of IUU fishing made by RFMO/As, Article 3.2(c) specifies that such determinations should be made following the RFMO/As' own rules and procedures, in accordance with relevant international law, and must also include the provision of timely notification and relevant information, presumably to the flag state of the vessel involved, if they are to trigger the subsidy prohibition.

Importantly, the draft agreement includes a footnote that clarifies that nothing in the new rules would affect the validity and enforceability of IUU determinations themselves or delay determinations: the objective instead is to ensure certain procedural requirements are met before a determination triggers a subsidy obligation under this instrument. Another footnote also specifies that the new discipline should neither affect in any way the competence of coastal members, flag state members, and RFMO/As under other international instruments nor give them new rights to make IUU determinations.

## Flexibility for the Subsidizing Member in Applying the Prohibition

Another key element of the overall balance in Article 3 relates to the question of how much control the subsidizing member should have over the application of the subsidy prohibition once a determination is made. Under paragraph 3.4 of the draft agreement, the member subsidizing the vessel would decide for how long a vessel or operator would be prevented from receiving subsidies, taking into account “the nature, gravity, and repetition of IUU fishing committed” (WTO, 2021a). The approach in the draft agreement is that a relatively automatic triggering of the prohibition 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

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<sup>7</sup> The draft agreement does not include any particular requirement for IUU determinations made by flag state members to trigger the subsidy prohibition. As a result, in cases where the coastal member making an IUU determination is also the relevant flag state, such determination will not have to meet any particular requirement to trigger the subsidy prohibition.





subsidizing member, the text also suggests subsidies should be withdrawn for at least as long as the original sanction on the vessel remains in force or as long as the vessel or operator is listed as engaged in IUU fishing.

## S&D

Some members do not see the need for any S&D for IUU-related disciplines, and, generally speaking, developing country members' demands for S&D have remained relatively limited with regard to the IUU-related disciplines, focusing mostly on artisanal fishing. The draft agreement reflects this. The still bracketed Article 3.8 of the text suggests a two-year grace period from WTO dispute settlement for breaches of the IUU subsidy prohibition when subsidies are provided by developing country members to low-income, resource-poor, and livelihood fishing or fishing-related activities that occur within 12 nautical miles measured from the baseline of the member in question—with the number of years and the geographical limit also in brackets. In other words, while the prohibition would still apply to all fleets from the entry into force of the agreement, WTO members would not be able to enforce this rule through dispute settlement for these specific activities during that period of time.

### Box 2. IUU fishing

#### SUBSIDY PROHIBITION:

Members agree not to provide subsidies to **vessels or operators** found to have engaged in IUU fishing or fishing-related activities **in support** of IUU fishing.

#### How the prohibition is triggered

It is triggered when a coastal member, a flag state member, or a relevant RFMO/A makes an affirmative determination that a vessel or operator has engaged in IUU fishing activity.

#### Requirements for determinations to trigger the prohibition

Determinations made by coastal members must be based on relevant factual information and follow a few key procedural steps, including notification of the flag state and (if known) the subsidizing member and the ability for both to provide information in the determination process.

Determinations by RFMO/As must be in accordance with the RFMO/As' procedures and relevant international law and involve the provision of timely notification and relevant information.

#### Flexibility for the subsidizing member in applying the prohibition

The subsidizing member sets the duration of the prohibition, taking into account the severity of the infraction. At a minimum, the prohibition shall apply as long as the IUU sanction remains in force or the vessel or operator is listed on an IUU list, whichever is the longer.



## S&D

Developing country members' subsidies for low-income, resource-poor, and livelihood fishing or fishing-related activities that are the subject of IUU determinations up to 12 nautical miles from the baselines cannot be challenged at the WTO during the first two years after entry into force.

*Note 1: Like most S&D provisions in the draft agreement, the grace period and the related time period and geographical limit are still in brackets, as discussions in this area are still ongoing.*

*Note 2: Members have no obligation to make IUU determinations; they must only refrain from providing subsidies to IUU (or IUU-supporting) vessels or operators when a determination is made.*

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## DUE REGARD AND APPROPRIATE ACTION OBLIGATION

A subsidizing member has an obligation to give due regard to a notification by a **port state member** that a vessel in one of its ports has engaged in IUU fishing and to take appropriate action with regards to its subsidies.

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## LEGISLATION AND MEASURES OBLIGATION

All members must have laws, regulations, and/or administrative procedures in place to ensure that no subsidies are granted to or maintained by any vessel or operator engaged in IUU fishing.

## Overfished Stocks

According to the FAO, more than a third of assessed marine fish stocks globally are overexploited, and this proportion has been steadily increasing over the last few decades (FAO, 2020). Article 4 of the draft agreement addresses situations in which stocks are overfished. It prohibits WTO members from providing subsidies for fishing and fishing-related activities regarding overfished stocks (Article 4.1). This relatively strict and automatic prohibition is balanced with specific provisions that provide subsidizing members some level of control over whether or not this rule would apply in particular situations, which are described below. Like the IUU subsidy prohibition, this discipline now appears to be relatively stable.

### How the Prohibition Is Triggered

A key point of discussion in this area has been around how the rules should establish, for the purposes of the subsidy prohibition, that a stock is overfished. The approach reflected in Article 4.2 of the draft agreement, which now enjoys wide support from members, is that the prohibition would apply when a coastal member (for fishing occurring under its jurisdiction) or a relevant RFMO/A (for fisheries under its competence) recognizes a stock as overfished. However, deference to RFMO/A and national decisions is not total. To limit the risk of arbitrariness, the text requires stock status decisions to be based on the “best scientific evidence available to the Member” (WTO, 2021a), which reflects similar language in Article



61 of the United Nations Convention on the Law of the Sea. While the balance here is tilted toward deference to national and RFMO/A decisions, thus providing subsidizing members with some control over when the prohibition is triggered, the text would require the entity making the stock status decisions to consider all the evidence available to it in deciding whether a stock is overfished.<sup>8</sup>

## Sustainability-Related Exemption for the Subsidizing Member

Another key question that members appear to have found convergence on is whether there should be any exemption from the prohibition in situations where policy efforts are made to rebuild overfished stocks back to healthy levels. In Article 4.3, the draft agreement includes a double exemption, which balances against the strictness of the basic prohibition. First, subsidies that are themselves implemented to help the stock recover toward “a biologically sustainable level” (WTO, 2021a) would be allowed to continue. Such subsidies could include support for the acquisition of more selective fishing gear or for improving fishers’ catch-monitoring capacities. Second, any other subsidies would also be exempted from the prohibition in situations where fisheries management measures are implemented to rebuild stocks to a biologically sustainable level. Importantly, the draft agreement does not explicitly require evidence that the subsidies or management measures are effective to be able to invoke this exemption. However, the use of this exemption is conditioned on the fulfillment of particular notification requirements by the subsidizing member, including information on the measures in place and general information on stock status (see Section 7 on notifications and transparency).

The concept of a biologically sustainable level, also the subject of much debate, is explained in footnote 10. It can be determined by a coastal state using either reference points based on the widely recognized concept of maximum sustainable yield (MSY) 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 MSY, in others, they use different criteria (see Headley, 2020). In practice, the method often depends on the data available.

## S&D

Demands for S&D with regard to this prohibition have also been relatively limited and mostly focused on artisanal fishing. Like for the IUU subsidy prohibition, the draft agreement again suggests—in brackets—a 2-year grace period from WTO dispute settlement for developing country members regarding subsidies to low-income, resource-poor, and livelihood fishing or fishing-related activities on overfished stocks within 12 nautical miles measured from the baseline. That is, the prohibition would still apply to the activities that meet these characteristics, but the rule could not be enforced through dispute settlement for that period.

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<sup>8</sup> A separate issue is how the rules should apply to unassessed stocks. The draft agreement covers this question in the final provisions, which include an obligation for members to take special care when subsidizing fishing and fishing-related activities regarding stocks whose status is unknown.



### Box 3. Overfished stocks

#### SUBSIDY PROHIBITION:

Members agree not to provide subsidies for fishing or fishing-related activities regarding **stocks** that are **overfished**.

#### How the prohibition is triggered

It is triggered when a stock is recognized as overfished by a coastal member or a relevant RFMO/A, based on the best scientific evidence available.

#### Sustainability-related exemption for the subsidizing member

The prohibition does not apply if the subsidies themselves, or fisheries management measures, are implemented to rebuild the overfished stock(s) to a biologically sustainable level.

#### S&D

Developing countries' subsidies for low-income, resource-poor, and livelihood fishing or fishing-related activities on overfished stocks up to 12 nautical miles from the baselines cannot be challenged at the WTO during the first 2 years after entry into force.

*Note 1: Like most S&D provisions in the draft agreement, the grace period and the related time period and geographical limit are still in brackets, as discussions in this area are still ongoing.*

*Note 2: Members have no obligation to assess stocks; they must only refrain from providing subsidies when stocks are recognized as overfished by a relevant coastal member or RFMO/A.*

*Note 3: The possibility of providing subsidies when such subsidies or management measures are implemented to rebuild overfished stocks only applies if the subsidizing member has fulfilled specific notification obligations.*

## Overcapacity and Overfishing

On top of specific situations when an IUU determination is made or a fish stock is recognized as being overfished, the draft agreement also includes disciplines on subsidies that can contribute to overfishing and overcapacity more broadly. While a few key outstanding questions remain in this third substantive area, members have substantially narrowed the gaps between their positions regarding the structure and key elements of these rules. Proposed disciplines include a broad main prohibition, as well as two additional ones that would apply in more specific situations. The final provisions of the draft agreement also clarify that prohibitions in Article 5 would not apply to subsidies for disaster relief.

### Main Prohibition: Subsidies contributing to overcapacity and overfishing

The negotiation's mandate explicitly refers to the prohibition of certain forms of fisheries subsidies that contribute to excessive fishing effort and capacity. How exactly new WTO rules should respond to that mandate has been the subject of intense discussion among members, with different approaches being tabled over the course of the last few years. In this area, the





draft agreement reflects members' gradual convergence on an approach that borrows and balances elements from a number of proposals made by different groups of members.

Article 5 of the draft agreement 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 the most likely to incentivize overfishing and overcapacity (Article 5.1). 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; support to cover operating losses; and support targeting fishing beyond the subsidizing member's EEZ. Listed subsidy types are thus deemed to contribute to overfishing and overcapacity, but the list is not an exhaustive one, which means that other subsidies could also be prohibited under that rule if they are shown to contribute to excessive fishing effort or fishing capacity.

This broad prohibition is balanced by two key types of flexibility in the draft agreement, which are addressed below. A key outstanding question is whether the last subsidy type of the list in Article 5.1, which applies to the subsidies that target activities beyond the subsidizing member's waters (in the high seas or in foreign EEZs), should be part of this broad prohibition—and thus subject to the related flexibilities—or should be extracted from the list and be a stand-alone prohibition. Many members have expressed a strong preference for the latter.

## **Sustainability-Related Exemption for the Subsidizing Member**

In a separate subparagraph (Article 5.1.1.), the draft agreement includes an important qualifier to the main prohibition. This flexibility allows the provision of subsidies that would otherwise be prohibited 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 biologically sustainable level is defined here in the same way as in Article 4.3 and can be determined by a coastal member (based on MSY or other reference points) or by a relevant RFMO/A.

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 relevant stocks at healthy levels. There is a degree of constructive ambiguity being used here, and this requirement may be interpreted in different ways. The text does not explicitly require a subsidizing member to demonstrate that these measures are effective at maintaining a stock at a biologically sustainable level to be able to invoke this exemption. Nonetheless, members who would like to use this exemption would need to fulfill particular notification requirements, including by providing information on the status of relevant stocks and relevant conservation measures, which would be reviewed by other members (see Section 7 on notifications and transparency).



## S&D

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” (WTO, 2005). In practice, discussions on S&D have been controversial, and most proposed provisions in this area are all still bracketed, indicating that more work will be needed to find a consensus. In the context of Article 5, demands for S&D from developing countries have been more substantial than under the disciplines related to IUU fishing and overfished stocks. Several delegations have highlighted the need not only to protect the livelihoods and employment of poor fishing communities but also to develop their fishing fleets and ensure a fairer distribution of shared resources among fishing nations. Meanwhile, other members have insisted that broad exemptions from the rules would undermine the effectiveness of an agreement from a sustainability perspective. Despite strong initial divergences in this area, members have managed to achieve wide convergence, although not yet a full consensus, on the structure of a set of detailed and tailored S&D provisions in the context of Article 5. There is currently less convergence, however, regarding the particular figures for the thresholds and time periods referred to in those provisions.

The approach suggested in Article 5.4 and Article 6.1 of the text includes three different exemptions from the main prohibition of subsidies that contribute to overcapacity and overfishing. First, it includes a temporary exemption (a transition period) for subsidies provided by developing country members for fishing and fishing-related activities occurring in their domestic EEZ or under the competence of a relevant RFMO/A. The text does not suggest a particular number of years for this transition period, though, and only includes a bracketed placeholder. Second, the draft agreement would permanently exempt the subsidies provided by developing country members for low-income, resource-poor, and livelihood fishing or fishing-related activities up to a limit of 12 nautical miles from the baselines—a number that is still bracketed. Third, the draft agreement includes a permanent exemption for two groups of members: (1) least-developed country (LDC) members, and (2) developing country members accounting for less than 0.7% of global marine capture production (the so-called “de minimis” exemption)—a number that is also in brackets. This exemption would apply to all of their fishing and fishing-related activities. The exemption would also apply to former LDC members that have recently—no particular time period suggested—graduated out of the LDC category, but only for activities occurring in the domestic EEZ or under an RFMO/A. It is also important to note that the draft agreement contains a footnote, in brackets, that would prevent developing country members with a share of 10% or more of global marine capture production from using these S&D provisions. Based on the latest catch data from the FAO, the only developing country member this would appear to cover is China (FAO, n.d.).

To access any of these exemptions, developing country members would need to notify relevant subsidies and certain fisheries-related information (see Section 7 on notifications and transparency). Importantly, the draft agreement also introduces a soft sustainability obligation for members using these flexibilities, requiring them to undertake efforts to ensure that their subsidies do not contribute to overcapacity and overfishing.



A key question for members will be determining the right combination of numbers for the elements of Article 5.4 that are still in brackets, which are (1) the duration of the transition period for activities in the domestic EEZ and under RFMO/As; (2) the geographical limit for the exemption for low-income, resource-poor, and livelihood activities; and (3) the exact threshold in terms of percentage of global marine capture production below which a developing country member would be exempted entirely from the prohibition. As they address this question, members will need to strike a balance that both provides for what they consider to be appropriate and effective S&D and preserves the effectiveness of the new disciplines.

Since any member's subsidies may be exempted from the prohibition in Article 5.1 if appropriate management measures are in place, these S&D provisions would essentially exempt developing country members from the need to show that they have fisheries management measures in place if they would like to continue providing the subsidies covered by the prohibition. Table 1 provides a sense of the possible scale of these exemptions, understood as the proportion of global fishing catch, fishing effort, or fisheries subsidies that these provisions would exempt from the application of the prohibition in Article 5.1. The percentages presented in the table assume that members that account for more than 10% of global marine capture production (currently only China) cannot use these S&D provisions, as provided for in the still-bracketed footnote 12. Table 1 shows that while the temporary exemption for developing country members' subsidies to activities in their EEZ or under an RFMO/A would cover a large share of global fishing catch and effort, the scale of the permanent exemptions is more limited. As mentioned above, these exemptions would only apply to the main subsidy prohibition in Article 5.1, which means some subsidies in the table below could still be covered by the prohibitions in Articles 5.2 and 5.3.

**Table 1. Possible scale of suggested S&D exemptions<sup>9</sup>**

Exemption	% of global catch (tonnage)	% of global effort (kW day)	% of WTO-relevant subsidies
<b>Temporary</b> EEZ of developing country members <sup>10</sup>	42	58	n/a <sup>11</sup>
<b>Permanent</b> Artisanal fleets of developing country members <sup>12</sup>	13 (inshore: ~9%) <sup>13</sup>	34–45 (includes China)	5
<b>Permanent</b> Fleets of LDCs	7	5	1.7
<b>Permanent</b> Fleets of developing country members <0.7% global catch	11	16 (EEZ only) <sup>14</sup>	6

<sup>9</sup> This table was compiled using data extracted and adapted from presentations made by experts at two webinars for WTO negotiators organized by the International Institute for Sustainable Development (in January and September 2021) (see: <https://www.iisd.org/events/fisheries-subsidies-chairs-text-balances>). Catch data was presented by Deng Palomares from the University of British Columbia, based on Sea Around Us, n.d. Effort data was presented by Yannick Rousseau from the University of Tasmania. Subsidies data was presented by Anna Schuhbauer, independent fisheries scientist, based on Schuhbauer et al., 2020. Some of these data points were then adapted or added by authors to reflect the content of the draft agreement using the above-mentioned sources, as well as FAO, n.d. (for catch) and Sumaila et al., 2019 (for subsidies).

<sup>10</sup> The temporary exemption included in the draft agreement would also apply to activities that occur under the competence of an RFMO/A, but data on the relevant amount of catch, effort, and subsidies for this specific fishing is not available. As a result, the numbers presented likely underestimate the possible scale of this exemption. Also, note that these numbers do not include China (as a result of footnote 12 of the draft agreement). They would increase to 50% (catch) and 61% (effort) if China was included.

<sup>11</sup> No percentage is provided here, as no data is available on the amount of subsidies provided by geographic area. Overall, subsidies provided by developing country members except China are estimated at 28% of the global total, most—but not all—of which would be covered by this temporary exemption. Adding China, the figure increases to 61% of the global total.

<sup>12</sup> The way “artisanal” is defined varies between studies. Also, note that the numbers on catch and subsidies do not include China (as a result of footnote 12 of the draft agreement). The percentages for catch would increase to 15% and 10% (inshore) if China was included. The percentage for subsidies would not change.

<sup>13</sup> Inshore waters extend up to 50 km from shore, which corresponds to approximately 27 nautical miles, or up to the 200-metre depth contour, whichever comes first. This area is thus larger than the area that would correspond to the 12 nautical mile limit suggested in the draft agreement, meaning that this number is likely an overestimate. No data was available regarding catch in the area that would be covered by 12 nautical miles limit.

<sup>14</sup> This particular value does not include fishing outside of the domestic EEZ by the fleets of the relevant countries, but the amount of such fishing is likely small.





## Box 4. Overcapacity and overfishing (1)

*Preliminary note: Subsidies for disaster relief are not affected by these rules.*

### MAIN SUBSIDY PROHIBITION:

Members agree not to provide subsidies that contribute to overcapacity or overfishing, including subsidies for the following items:

- vessel construction, acquisition, modernization, renovation, or upgrading
- purchase of machines and equipment
- purchase of fuel, ice, or bait
- costs of personnel, social charges, or insurance
- income support
- price support of fish caught
- at-sea support
- coverage for operating losses
- support targeting fishing beyond the subsidizing member's waters

### Sustainability-related exemption for the subsidizing member

The prohibition does not apply if fisheries management measures are implemented to maintain the relevant fish stock(s) at a biologically sustainable level.

*Note 1: The possibility of providing subsidies when management measures are implemented to maintain stocks at a sustainable level only applies if the subsidizing member has fulfilled specific notification obligations.*

### S&D

The prohibition does not apply to subsidies provided by:

- Developing country members for fishing and fishing-related activities in their EEZ or under a relevant RFMO/A for a maximum of [X] years after the entry into force of the agreement
- Developing country members for low-income, resource-poor, and livelihood fishing or fishing-related activities, up to [12] nautical miles from the baseline
- Developing country members that account for less than [0.7%] of global marine capture
- LDCs or recently graduated LDCs for fishing in the domestic EEZ or under an RFMO/A.

Members using S&D provisions must endeavour to ensure that their subsidies do not contribute to overcapacity and overfishing and comply with certain notification obligations.

A still-bracketed footnote would prevent developing countries that account for more than 10% of global marine capture production from benefiting from these S&D provisions.



**Key question 1:** Should Article 5.1(i) remain in the main prohibition and thus be subject to the sustainability-related flexibility and S&D provisions, or should it be a separate prohibition?

**Key question 2:** Regarding the three bracketed elements in S&D, what combination of numbers would provide for appropriate and effective S&D?

## Additional Subsidy Prohibitions: Unregulated high seas and reflagged or uncontrolled vessels

In addition to the main prohibition of subsidies contributing to overfishing and overcapacity, Article 5 of the draft agreement includes two additional prohibitions that would apply in more specific circumstances. The first prohibition (Article 5.2) would apply to all subsidies that are provided to fishing or fishing-related activities occurring on the high seas when such activities are not regulated by a competent RFMO/A. The second prohibition (Article 5.3) would focus on a situation where the subsidizing member is not able to exercise control over the subsidized vessels. The draft agreement includes two alternatives. The first alternative would prohibit the subsidization of vessels that do not fly the subsidizing member's flag. The second one is framed in a broader way and would prohibit subsidies to vessels over which the subsidizing member has no jurisdiction or control unless it can ensure in another way that such subsidies do not contribute to overfishing and overcapacity. No particular S&D provisions are associated with either of these prohibitions.

### Box 5. Overcapacity and overfishing (2)

*Preliminary note: Subsidies for disaster relief are not affected by these rules.*

#### UNREGULATED HIGH SEAS SUBSIDY PROHIBITION:

Members agree not to provide subsidies to fishing and fishing-related activities that occur on the **high seas** if such activities are **not regulated** by a relevant RFMO/A.

*Note: There are no S&D provisions related to that obligation in the text.*

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#### CONTROL-RELATED SUBSIDY PROHIBITION:

##### Alternative 1

Members agree not to provide subsidies to vessels that **do not fly the flag** of the subsidizing member

##### Alternative 2

Members agree not to provide subsidies to vessels over which the subsidizing member has **no control or jurisdiction, unless** that member has a way to ensure that such subsidies do not contribute to overfishing or overcapacity.



**Key question:** Could a third alternative accommodate the concerns of all members?

*Note: There are no particular S&D provisions related to that obligation.*

## Horizontal S&D Provisions

Beyond the flexibilities relating to specific subsidy disciplines, the draft consolidated text also envisages a number of crosscutting or horizontal S&D provisions. These essentially relate to an LDC-specific due restraint clause and to provisions regarding technical assistance and capacity building (TACB). Article 6.3 of the draft agreement, which is still bracketed, would introduce an obligation for members to exercise due restraint in raising matters involving LDCs under the draft agreement. Article 7 of the draft agreement covers TACB. It includes, in brackets, a commitment by developed country members and developing country members declaring themselves in a position to provide TACB for the implementation of the instrument.<sup>15</sup> This article also envisages the creation of a specific voluntary funding mechanism under the WTO in cooperation with the FAO and the International Fund for Agricultural Development to support the implementation of the disciplines.

### Box 6. Horizontal S&D provisions

Members shall exercise “**due restraint**” in raising matters involving **LDC members**.

**Technical assistance** shall be provided to developing countries to implement the disciplines of the agreement, and a voluntary WTO funding mechanism shall be established for that purpose.

## Notifications, Institutional Issues, and Dispute Settlement

Beyond the substantive disciplines described above, the draft consolidated text addresses a number of issues related to (a) transparency and notifications, (b) institutions charged with monitoring and review of the implementation of the new agreement, and (c) dispute settlement.

### Transparency and Notifications

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 agreement

<sup>15</sup> For a discussion of potential implementation steps of a WTO agreement on fisheries subsidies, see Redding & Macfadyen (2020) and Global Subsidies Initiative (2020).



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 that information is available to monitor the agreement and also that what is required is practicable for everyone.

Article 8 of the draft text sets out 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, with more flexible requirements for information about multispecies fisheries. Other information would have to be provided “to the extent possible,” including stock status, conservation and management measures, number and identification of subsidized vessels, and fleet capacity in the relevant fishery. A bracketed footnote would allow LDC members and developing country members accounting for less than 0.7% of global marine capture production to provide such information every 4 years instead of every 2 years.

Crucially, the agreement links the use of exemptions to the provision of information in notifications. Members would only be able to claim the use of the sustainability-related exemptions from the overfished stock prohibition (Article 4.3), the main prohibition in Article 5 (Article 5.1.1), and the S&D exceptions in Article 5.4 and Article 6, if they had included the mandatory elements of Article 8 in their notification. Additionally, they would only be able to use the exemptions that rely on fisheries management being in place (the exemptions in Article 4.3 and Article 5.1.1.) if they had also included information on stock status and on conservation and management measures in their notification.

Independently of subsidies, members would also need to notify the committee about the vessels or operators that have been subject to an IUU fishing determination domestically with any information pointing to the use of forced labour on fishing vessels (text in brackets) and any fisheries access agreements or RFMO/As they are party to. Importantly, there is specific language clarifying that nothing in the article requires the release of confidential information.

## Institutional Issues

The new agreement on fisheries subsidies would be a stand-alone agreement under Annex 1 of the Marrakesh Agreement (the same structure as was adopted for the Trade Facilitation Agreement).

Article 9 of the text establishes a committee to oversee the new rules and sets out what its work 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 as a description of their fisheries management regime, in particular their laws, regulations, and procedures relevant to the new instrument. On the basis of these descriptions and members' regular notifications, the committee would examine all information submitted to it by members every 2 years. It would review the operation of the new instrument annually. Five years after the agreement enters into force and every 3 years thereafter, the committee would review the operation of the whole agreement and make recommendations to improve the way it operates.





## Dispute Settlement

Article 10 of the draft agreement establishes that, broadly, the existing rules under the WTO's dispute settlement mechanism would apply to this new instrument. One variation from the existing rules on the settlement of disputes is that, under this agreement, members would not be able to bring “non-violation” complaints (these are complaints that an expected benefit under the agreement has been otherwise nullified or impaired, even if this is not caused by an actual violation of the agreement). The text also applies the specific procedures applicable to subsidy disputes under Article 4 of the ASCM to disputes under the main substantive articles of this agreement. Members will not be able to use unilateral trade policy remedies (like those allowed under the ASCM agreement, such as anti-dumping or countervailing duties) with respect to the obligations under the new fisheries subsidies agreement. Rather, they must use the multilateral dispute settlement process and be authorized to take action in response to subsidies covered by the new agreement. If ever there were a finding by a dispute settlement panel that a member had not brought measures into conformity with the new agreement, another member could take retaliatory action in the form of “appropriate countermeasures.”

A final but very important issue relates to situations where the jurisdiction over maritime areas is disputed: for example, if an IUU determination, or a determination that a stock is overfished, is made in disputed waters. Article 11 clarifies that the new agreement, and the legal proceedings involved in its application, would have no legal implications with regard to the questions of territoriality or delimitation of maritime jurisdiction and that nothing in the agreement should be interpreted to prejudice the rights and obligations of members under other sources of international law.

More explicitly, the text also suggests that dispute settlement panels “shall not entertain any claim” that would require them to address issues of disputed jurisdiction if such an issue is raised by a party or a third party to the dispute. The special provisions that would apply in WTO disputes if issues of territorial jurisdiction emerge are still being hotly debated and remain in bolded square brackets in the draft agreement. What follows is a summary of the main issues and options, but there are variations and nuances in members' positions on each point.

Some members consider that the most appropriate way to address this set of issues is by saying nothing about it in this agreement. In their view, existing horizontal WTO principles and rules already make clear that the WTO has no mandate to consider such issues. To the extent that text on this issue is included in the final agreement, the key decisions seem to be a) whether third parties to disputes should be allowed to raise territorial issues in a WTO dispute and b) once a territorial issue is raised, what the dispute settlement panel should be required to do.

On the first issue, some members prefer to allow only parties to the dispute (the complaining and responding parties) to raise territorial issues and trigger this rule. This is, at least in part, because they prefer not to expand the range of members who would have the right to limit, potentially significantly, the operation of a WTO dispute panel enforcing rights and obligations between two members. Other members argue that the right to raise a territorial



issue should be extended to third parties,<sup>16</sup> essentially because these members want the ability to limit any panel's consideration of a claim that touches on territorial issues that are important to them. Some members are concerned about the political consequences of a WTO panel decision being seen to validate claims of jurisdiction over waters they consider contested, even if findings under the agreement have no legal implications regarding those claims, and there are also options under discussion to address these more systemic concerns. Article 11.3 of the draft text takes the wider approach: it enables both parties involved in and third parties to a dispute to raise a territorial issue.

On the second issue, members are discussing what exactly should trigger the operation of this rule. Some members would prefer that a simple assertion that territory is disputed would trigger the rule; others would allow the dispute settlement panel to assess whether the assertion is valid and the rule should apply. Members are also discussing what the panel should be instructed to do once the rule is triggered. Some members would prefer to allow a dispute settlement panel to decide how far it could consider a claim without touching on the territorial issue and where to stop. Other members prefer to give a panel very strict instructions and would require a panel to stop any consideration of a claim with respect to which a territorial issue has been raised and simply note, with respect to that claim, that the territorial issue has been raised and not consider the claim further.

## Box 7. Notification, institutional issues, and dispute settlement

### Transparency and notification

Members must notify the WTO regarding subsidies, fishing activity subsidized, and catch from the subsidized fishery. They must notify this information in order to use the exceptions in Articles 4.3 and 5.1.1., and to use the S&D provisions in Articles 5.4 and 6.

Members must notify, to the extent possible, regarding the status of the fish stock subsidized, and conservation and management measures in place for that stock. They must notify this information in order to use the exception in Articles 4.3 and 5.1.1.

Members must also notify the committee, to the extent possible, of the name and identification number of subsidized vessels and fleet capacity in the subsidized fishery.

Members must also notify regarding IUU vessel lists, vessels, or operators that information suggests use forced labour, access agreements and RFMOs they are party to, information about fisheries management regimes, and implementation of the agreement.

**Key question 1:** How frequently should different members be required to notify regarding the additional elements beyond those listed in Article 25 of the ASCM?

**Key question 2:** Should the use of exemptions from prohibitions, including S&D, be conditioned on notification of particular information?

<sup>16</sup> Third parties are WTO members who are allowed to “join” a dispute between two or more other members to provide their views on the arguments raised, although the outcome of the dispute does not create any new rights or obligations for them.



### **Institutional issues**

The agreement would be a stand-alone agreement annexed to the Marrakesh Agreement.

A committee would meet at least twice a year to review the implementation and operation of the agreement annually, review notifications at least every 2 years, and after 5 years, review the operation of the agreement and recommend any modifications to improve it.

### **Dispute settlement**

Nothing in the agreement should be interpreted to prejudice jurisdiction or rights, or obligations of members arising under international law.

The agreement, and findings related to it, has no legal implications for territorial claims or the delimitation of maritime boundaries.

WTO panels established to settle disputes about the agreement shall not entertain claims that would require them to address issues of contested maritime jurisdiction raised by parties or third parties to the dispute.

**Key question 3:** Who should be able to raise territorial issues within a dispute under this agreement?

**Key question 4:** When a territorial issue is raised in a dispute, what should the WTO dispute settlement panel be instructed to do?

Article 11.3 of the draft agreement chooses from among these options to try to strike a balance. The current drafting would require a panel not to entertain any claim under a dispute that would require the panel to address a territorial issue (raised by a party or third party to the dispute). This current drafting means an assertion of a territorial issue automatically triggers the operation of the rule. However, this relatively automatic trigger is balanced by a degree of deference to the panel: the language allows the panel to decide whether it can resolve the claim without addressing the territoriality question.

These issues are extremely sensitive for many members, as they touch on questions of territorial sovereignty and national security. Members do seem to agree on two main objectives, though: the need to ensure the agreement is effectively enforceable and the need to ensure that no findings under the agreement disrupt the already delicate political and legal situation in disputed waters. Members therefore implicitly agree 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. With these two shared objectives, the path to a solution would seem to be one of finding a balance between perceived legal risks that is satisfactory for all members.



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Published by the International Institute for Sustainable Development.

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