



THE WTO'S FISHERIES SUBSIDIES NEGOTIATIONS

Executive Summary

Attempts are made to revitalise the fisheries subsidies negotiations at the WTO with the aim of achieving an outcome at the 11th WTO Ministerial Conference in December 2017.

This paper first reviews the problems of overcapacity, overfishing and illegal, unreported and unregulated (IUU) fishing and the growing role played by UN instruments aimed at making fishing more sustainable. It then provides an overview on fisheries subsidies provided today (how much, who provides them, the types of subsidies given), highlighting the particular case of EU fisheries subsidies. This is followed by an account of developments up to 2016, including Sustainable Development Goal 14 and the Transpacific Partnership Agreement. Finally, the recent fisheries subsidies proposals in the WTO are analysed, providing a basis for identification of key issues for consideration by developing countries in the on-going negotiations.

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CONTENTS

A. What is the problem.....	4
Importance of fish for developing countries	4
The problem of overcapacity and overfishing	5
The problem of IUU	7
<i>Definition of IUU</i>	7
<i>Impacts of IUU</i>	8
<i>Africa and IUU</i>	9
<i>Relationship between Flags of convenience (FoC) and IUU</i>	10
<i>Small scale fisherfolk and IUU</i>	11
B. UN Fisheries governance	12
C. Overview of Fisheries Subsidies	15
How Much?.....	15
Types of Subsidies.....	15
Who Provides Subsidies?	17
Who Provides Which Types of Subsidies?	17
How are Fisheries Subsidies a Problem? The Case of the EU	18
D. The WTO Negotiations and other developments until 2016.....	22
The WTO?.....	22
The WTO’s Doha mandate.....	22
2005 Hong Kong Ministerial, 2007 Chair’s text, 2011 Easter Package.....	23
10 th WTO Ministerial Conference (2015)	25
Sustainable Development Goal 14	26
TPP outcome on fisheries subsidies (Environment Chapter).....	27
E. Analysis of the recent WTO fisheries subsidies proposals	29
Recent WTO submissions	29
Scope	30
‘Specific subsidies’	30
<i>Focus on wild marine capture</i>	30
<i>Definition of fishing / fishing vessel</i>	31
<i>Differentiation between maritime zones</i>	33
<i>Exclusion of certain subsidies (‘Green Box’?)</i>	34
What types of subsidies to prohibit?	36
<i>Subsidies related to overcapacity</i>	36
<i>Subsidies related to overfishing</i>	40
<i>Subsidies related to IUU</i>	42
Special and Differential Treatment (S&D)	47
<i>S&D for artisanal/small-scale fisheries in developing countries</i>	47
<i>S&D linked to fisheries management?</i>	49
<i>Which subsidy prohibitions would be applied by all Members, including developing countries? (i.e. issue areas for which there would be no S&D)</i>	52
<i>TFA model?</i>	53
Standstill.....	54
Transparency	54
F. Conclusions and key issues for consideration in the fisheries subsidies negotiations	57



1)	Scope	57
2)	Which approach to prohibiting fisheries subsidies?	57
3)	Subsidies relating to overfishing.....	58
4)	Special & Differential Treatment.....	59
5)	Subsidies related to IUU	59
6)	Fuel subsidies	60
7)	Transparency	61
8)	Standstill.....	61
	Annex I: Findings on EU overfishing by European Commission Joint Research Centre (JRC)	62
	Annex II: Fish catches in African EEZs	63
	Annex III: Elements of the OECD Fisheries Support Estimate	65

A. WHAT IS THE PROBLEM**Importance of fish for developing countries**

Fish is important for developing countries in several ways:

- As a source of employment – more than 3.2 billion people live close to coastlines and rely on oceans and seas for their livelihoods.¹ 97 percent of the world’s fishermen and women live in developing countries. More than 90 percent are employed in small-scale activities.²
- About 60 million people are in artisanal and subsistence fishing activities worldwide, 15 percent are women.³
- In LDCs and Small Island Developing States (SIDS), fish consumption contributes to or exceeds 50 percent of daily protein intake.⁴
- Fishing license fees are also an important source of income. For instance, the revenue from fisheries licenses of Kiribati (in the Pacific) reached \$86 million – 43 percent of total government revenue.⁵
- More than half of fish exports by value (54%) as well as by weight (60%) originates from developing countries. In 2014, fishery exports from developing countries were valued at US\$80 billion, and their fishery net export revenues (exports minus imports) reached US\$42 billion, higher than other major agricultural commodities (such as meat, tobacco, rice and sugar) combined.⁶

Who fishes? According to FAO estimates, the top 25 ‘producers’ of fish caught in the wild (marine wild capture) account for 82 per cent of total global wild catch. These countries are China, Indonesia, the United States, Russian Federation, Japan, Peru, India, Vietnam, Myanmar, Norway, Chile, the Philippines, Republic of Korea, Thailand, Malaysia, Mexico, Morocco, Spain, Iceland, Taiwan, China, Canada, Argentina, the United Kingdom, Denmark and Ecuador.⁷

Where is the fish? Estimates made by FAO and an academic study⁸ converge on total catch outside the EEZs being about 11-13% (i.e. about 9.5-10.5 million tonnes per year) of the global total marine catch. Species caught outside the EEZs are mostly tunas (ranging between 33 and 49%), other oceanic species (e.g. squids, jack mackerel, etc; 19-37%), and deep-water species (30-32%).⁹

¹ Hinrichsen D 1999 ‘The Coastal Population Explosion: Trends, and future challenges of the US National Coastal policy and Coastal Policy’, Workshop outcomes, Mimeo.

² World Bank 2010 ‘The Hidden Harvests: the global contribution of capture fisheries’, <http://documents.worldbank.org/curated/en/515701468152718292/Hidden-harvest-the-global-contribution-of-capture-fisheries>

³ FAO 2014

⁴ FAO 2012 ‘The State of World Fisheries and Aquaculture’.

⁵ UNCTAD calculations based on Republic of Kiribati (2014), Fish Licensing revenue; IMF (2014), World Economic Outlook, IMF.

⁶ FAO 2016 ‘The State of World Fisheries and Aquaculture 2016’, page 7

⁷ FAO 2016 ‘The State of World Fisheries and Aquaculture 2016’, page 10

⁸ Sumaila, U.R., et al., 2015. Winners and losers in a world where the high seas is closed to fishing. Scientific Reports, 5: 8481, <https://www.nature.com/articles/srep08481>

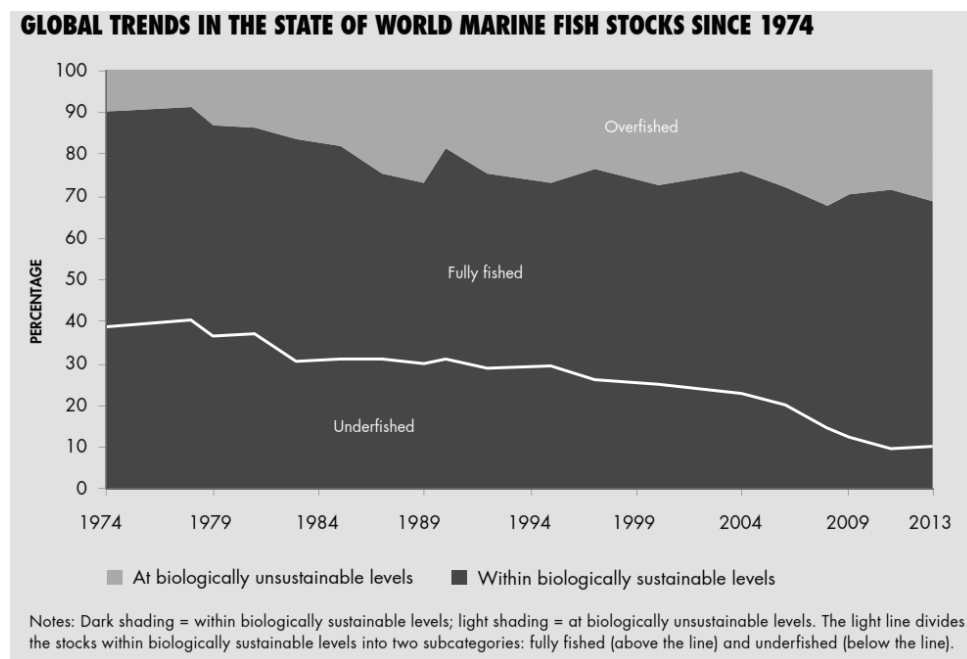
⁹ Garibaldi, L. and L. Limongelli, 2003. Trends in oceanic captures and clustering of large marine ecosystems: two studies based on the FAO capture database. FAO Fisheries Technical Paper, no. 435, Rome, FAO, 71 p. and “The State of World Fisheries and Aquaculture (SOFIA)” issues published in 2004, 2006 and 2008,



The problem of overcapacity and overfishing

Marine fisheries have declined rapidly in the recent decades. In the 1950s, Sumaila and Delagran note that most of the catches were taken from undeveloped fisheries. However, already by the 1990s, three-quarters of the catches were from fully exploited or overfished waters, and over 10 percent from collapsed fisheries.¹⁰ There are many reasons for this decline: poor management; globalisation of markets for fish; ineffective monitoring of open access to fisheries; overcapacity; technological innovation; and illegal fishing.

The UN Food and Agriculture Organisation reports in State of the World Fisheries and Aquaculture (SOFIA) 2016 that the share of fish stocks within biologically sustainable levels decreased from 90% in 1974 to 68.6% in 2013.¹¹ Between 2008 and 2013 the share of 'overfished' or 'overexploited' fish stocks has stood at around 1/3 of global fish stocks (see graph below).



Source: FAO State of the World Fisheries and Aquaculture (SOFIA) 2016, figure 13, page 39

The reference for determining whether a certain fish stock is 'overfished', 'fully fished' or 'underfished' is the Maximum Sustainable Yield (MSY), a biological concept. The MSY is 'the highest theoretical equilibrium yield that can be continuously taken (on average) from a stock under existing (average) environmental conditions without affecting significantly the reproduction process.'¹² Consequently, 'overfished stocks' are stocks with an abundance lower than the level that can produce the maximum sustainable yield (MSY) (i.e. such stocks are in a biologically unsustainable state).

¹⁰ Sumaila and Delagran 'Subsidising Fisheries,

https://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_22june10_e.htm

¹¹ FAO State of the World Fisheries and Aquaculture (SOFIA) 2016, <http://www.fao.org/3/a-i5555e.pdf>

¹² FAO Term Portal, 'maximum sustainable yield', <http://www.fao.org/faoterm/en/?defaultCollId=21>

Biologically sustainable stocks can be either 'fully fished' – stocks with an abundance at or above the level associated with MSY or 'underfished' – stocks with a biomass considerably above the MSY level where there is some potential to increase production.¹³

'Overfishing' in this context refers to 'a level of fishing effort or fishing mortality such that a reduction of this level would, in the medium term, lead to an increase in the total catch.' For long-lived species, overfishing (i.e. using excessive effort) starts well before the stock becomes overfished.¹⁴

Economic overfishing means harvesting more fish than necessary to have maximum profits for the fishery. This might overlap with the concept of biological overfishing but not necessarily. Scarcity of fish might increase landing values more than the costs involved, for instance.

Overcapacity has been identified as a main contributor to overfished stocks. There is no universal definition, but generally speaking, 'overcapacity' is a long run phenomenon that exists when the potential output that could exist under normal operating conditions is different from a given target level of production in fishery such as, the maximum economic yield, the maximum sustainable yield or applicable fishing quotas such as Total Allowable Catch (TAC).¹⁵

Essentially, the existence of overcapacity is a result of the widespread tendency to over invest and overfish under open access conditions. According to FAO, factors that contribute to overcapacity in world fisheries include the:

- Resilient profitability of fishing activities, whereby technical progress and relative price inelasticity of demand for fish have largely compensated for diminishing yields in overfished fisheries;
- Sizable national fishing subsidization programmes;
- Mobility of distant water fleets;
- Failure of fisheries management (in general) and of commonly used management methods (in particular) such as catch (total allowable catch or TAC), gear and spatial and temporal restrictions – which aim essentially at controlling fishing mortality indirectly through regulating the catching activities – rather than aiming to directly address the reasons why fishers are motivated to invest in excessive capital and capacity.¹⁶

The FAO International Plan of Action for the Management of Fishing Capacity (IPOA-Capacity) encourages States to address this problem through capacity management in order to align fishing capacity with the sustainable use of their fish stocks, but progress in the implementation of this Plan appears to be lagging.¹⁷

What is the impact on other countries? UNCTAD notes that subsidies which contribute to overfishing and overcapacity by richer nations lead to them harvesting a disproportionate share of the common

¹³ See FAO SOFIA 2016

¹⁴ FAO Term Portal, <http://www.fao.org/faoterm/en/>

¹⁵ FAO, Report of the Expert Consultation on Catalysing the Transition Away from Overcapacity in Marine Capture Fisheries, FAO Fisheries Report No. 691 (FIPP/R691) Rome, 15-18 October 2002. <http://www.fao.org/3/a-y8169e.pdf>

¹⁶ 'Measuring fish capacity', FAO Fisheries Technical Paper 445, <ftp://ftp.fao.org/docrep/fao/006/y4849e/y4849e00.pdf>

¹⁷ See 'Fisheries management – managing fish capacity', FAO Technical Guidelines for Responsible Fisheries 4 Suppl. 3, 2008, <http://www.fao.org/3/a-i0318e.pdf>

pool of resources. This hampers poorer or developing countries' capacity to harvest fish directly, add value and compete fairly in the global market.¹⁸

The problem of IUU

Definition of IUU

In 2001 the FAO adopted the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), a voluntary instrument within the framework of the 1995 Code of Conduct for Responsible Fisheries, establishes principles and standards for the conservation, management and development of fisheries in a non-mandatory manner.¹⁹

Besides the IPOA-IUU, three other International Action Plans have been adopted: on (1) reducing incidental catch of seabirds, (2) conservation and management of sharks, and (3) the management of fishing capacity.²⁰

The Code of Conduct for Responsible Fisheries as well as the Action Plans "provide guidance which may be used where appropriate in the formulation and implementation of international agreements and other legal instruments, both binding and voluntary" (Article 2(d) of the Code of Conduct for Responsible Fisheries).

Paragraph 3 of the IPOA-IUU defines Illegal, Unreported and Unregulated fishing:

Illegal fishing refers to activities:

- Conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
- Conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization (RFMO) but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or
- In violation of national laws or international obligations, including those undertaken by cooperating States to a relevant RFMO.

Unreported fishing refers to fishing activities:

- Which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
- Undertaken in the area of competence of a relevant RFMO which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

Unregulated fishing refers to fishing activities:

- In the area of application of a relevant RFMO that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

¹⁸ UNCTAD 2015 'Sustainable Fisheries: International Trade, Trade Policy and Regulatory Issues', p. 19, http://unctad.org/en/PublicationsLibrary/webditcted2015d5_en.pdf

¹⁹ More information about the FAO International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing can be retrieved from <http://www.fao.org/fishery/ipoa-iuu/en>

²⁰ The texts of these three International Plan of Actions can be retrieved from <ftp://ftp.fao.org/docrep/fao/006/x3170e/X3170E00.pdf>



- In areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

Impacts of IUU

IUU fishing has a major impact on fish populations and present a threat to global fisheries. Its occurrence is high. Conservative estimates of IUU fishing put the figure at 13 – 31 percent of the global catch, valued between \$10 billion to \$23.5 billion annually.²¹ This equates to about 18% of all fishing activities globally.²²

IUU fishing takes place in all oceans and threatens nearly all fisheries and species. According to WWF's analysis, 86 percent of global fish stocks are at risk of IUU fishing. 57 percent of the volume of global catch is at high risk of IUU fishing and 30 percent of the volume of the global catch is at moderate risk.²³

IUU fishing occurs both within exclusive economic zone (EEZs) and on the high seas, but the largest share of total IUU fishing activities are in developing countries' EEZs.²⁴

In practice, IUU fishing can include several illegal activities such as harvesting without a license or the violation of national laws or agreements by RFMOs. Illegal fishing activities may also include fishing out of season; harvesting banned species; the use of illegal gear; and catch over a prescribed quota without a license. Unreported fishing tends to include the provision of untrue data or misrepresentations regarding where, how and which amounts were caught. It can also mean the relevant required documentation and certification has not been provided or is incomplete. Unregulated fishing generally refers to fishing by vessels without nationality, harvesting in unregulated areas or fishing by vessels that are not members of particular RFMOs.²⁵

Illegal fishing often occurs because there is inadequate or ineffective monitoring, control, and surveillance (MCS) of fishing activities, due to capacity and resource constraints. Other factors include corruption and a lack of effective penalties or sanctions.²⁶

Why does it happen? IUU persists because the costs for IUU operators are much lower than the costs for legitimate fishermen. IUU vessels typically do not pay for observers, licenses, fees or data collection, nor do they comply with safety rules, bycatch rules or labour requirements.²⁷

The EU has taken steps to require that all fish imported into the Common Market provide catch documentation establishing the legal origin of the product. This is a pre-condition for market access. The US is also now in discussion over how to close its market to IUU fish products.²⁸

²¹ Agnew D, Pearce J, Pramod G, Peatman T, Watson R et al 2009 'Estimating the Worldwide Extent of Illegal Fishing', cited in WWF 2015 'Illegal Fishing: Which fish species are at highest risk from illegal and unreported fishing?', October; Global Oceans Commission, 2013, *Illegal, Unreported and Unregulated Fishing*.

²² Global Oceans Commission, *From Decline to Recovery* (2014), http://www.some.ox.ac.uk/wp-content/uploads/2016/03/GOC_report_2015.July_2.pdf

²³ WWF 2015 *ibid.*

²⁴ OECD document TAD/FI(2014)9 of 20 March 2014, *The challenge of combatting IUU Fishing*, page 3.

²⁵ For this paragraph on IUU, see UNCTAD (2015) (*supra*).

²⁶ WWF 2015 *ibid.*

²⁷ WWF 2015 *ibid.*

²⁸ WWF 2015 *ibid.*

Africa and IUU

Africa has some of the highest rates of illegal fishing in the world. Although some laws are in place, they are insufficient and lack enforcement, allowing unscrupulous fishing vessels to operate. It has been estimated for example that about half of the fish stocks off the West Coast of Africa are today overexploited due to the lack of fish management systems, continuous overfishing, and IUU fishing practices. Estimates indicate that West Africa loses more than USD 1.3 billion a year due to IUU fishing.²⁹ West African waters are estimated to have the one of the highest levels of IUU fishing in the world, representing a massive 37% of the region's total annual catch.³⁰ For all of Africa, IUU fishing is estimated to lead to losses of about US\$6-7 billion a year.³¹

Box: The Ways in Which Illegal and Unregulated Fishing Takes Place in Africa and Internationally

Illegal fishing activities take place in violation of the legal framework of a fishery, including, for example the law, regulations and license conditions. This can apply to fisheries that are under the jurisdiction of a coastal state or to high seas fisheries regulated by RFMOs. Offences include fishing out of season; fishing in closed areas; harvesting prohibited species; using banned fishing gear; catching more than the set quota; and, fishing without a license.

Forgery and fraud of documents or information is used in an attempt to hide illegal activities or to avoid obligations and costs. Forged documents of vessel registration certificates, fishing licenses or catch certificates are an essential feature of illegal fishing as operators either alter existing documents or create false documents. Fraudulent information such as details of vessel length or tonnage are often reported to avoid reporting or monitoring obligations.

Vessel identity issues can include one vessel illegally using several names or flags or several vessels using the same name. This enables operators to buy one fishing license or registration for a number of vessels, depriving the coastal state of revenue. Multiple use of one vessel name facilitates the laundering of fish caught illegally with legal catch.

Flag issues arise when flag States fail to fulfil their obligation to ensure that its vessels act according to national and international law wherever they are located. This can be through a lack of cooperation or interest by the flag State to investigate or to follow up on fisheries violations or interference by the flag State to prevent publicity or progression to a case. Flags of convenience also offer many advantages to illegal operators as they will flag fishing vessels without checking its history, if it is safe and seaworthy and if it is the vessel that it claims to be. Gaps in international regulations mean that it is not illegal to fish on the high seas even in an RFMO area, so a vessel can disregard management arrangements by flagging to a country that is not party to an agreement.

Illegal transshipment is one of the major missing links to understand where illegally caught fish finds its way to the market. Transshipment at sea enables illegal operators to avoid port controls and to maximize profits by e.g. whitewashing their catch by mixing illegally caught fish with legally caught fish.

Evasion of penalties is common practice; often the penalties for fishing violations are so low that to many illegal operators they are viewed as merely part of the operating costs.

²⁹ Africa Progress Report (2014)

³⁰ Adrian Tatum, World Fishing and Aquaculture, Are we winning the fight against IUU fishing? (April 11, 2013) <http://www.worldfishing.net/news101/regional-focus/are-we-winning-the-fight-against-iuu-fishing>

³¹ Boto I et al 2012 'Fighting Against Illegal, Unreported and Unregulated (IUU) Fishing : Impacts and Challenges for ACP Countries', <https://brusselsbriefings.files.wordpress.com/2012/10/reader-br-10-iuu-fisheries-eng.pdf>

Source: The material above comes from FISH-I Africa 2016 'Stop Illegal Fishing: Issues, Investigations and Impacts', https://stopillegalfishing.com/wp-content/uploads/2016/07/FISH-i-Africa-Issues-Investigations-and-Impacts_report_WEB.pdf

Relationship between Flags of convenience (FoC) and IUU

Flags of Convenience (FoC) is a business practice whereby a merchant ship is registered in a country other than that of the ship owner. For several countries this might be an additional source of income and part of a strategy to attract investment or offer additional services (large fish vessels are assets worth millions of US dollars). The largest number of foreign vessels are registered in Panama (over 5,000) and Liberia (around 2,500 vessels). Marshall Island, Cyprus, Malta, Antigua and Barbuda, Bahamas have more than 1,000 foreign-owned vessels in their national registers. Most international obligations relating to management of fisheries resources are borne by flag states. A ship's flag state exercises regulatory control over the vessel and is required to inspect it regularly, certify the ship's equipment and crew, and issue safety and pollution prevention documents. A ship operates under the laws of its flag state, and these laws are used if the ship is involved in an admiralty case.³²

A ship's owner may register the ship under a FoC to reduce operating costs, to avoid the regulations of the owner's country or to benefit from lower taxes.

The most common criticisms FoCs face are related to illegal fishing. The critics of the FoC system argue that many of the FoC flag states lack the resources or will to properly monitor and control those vessels. In fact, many, if not most of these vessels deliberately register with FoC countries to evade conservation and management regulations for high seas fisheries.

The IPOA-IUU lays a strong link between fishing vessel registration procedures and IUU. Relevant provisions include:

- States should ensure that fishing vessels entitled to fly their flag do not engage in or support IUU fishing (para 34)
- A flag State should ensure that, before it registers a fishing vessel, it can exercise its responsibility to ensure that the vessel does not engage in IUU fishing. (para 35)
- Flag States should avoid flagging vessels with a history of noncompliance (para 36)
- Flag States should deter vessels from reflagging for the purposes of non-compliance with conservation and management measures (para 38)
- States should take all practicable steps, including denial to a vessel of an authorization to fish and the entitlement to fly that State's flag, to prevent "flag hopping"; that is to say, the practice of repeated and rapid changes of a vessel's flag for the purposes of circumventing conservation and management (para 39).

There is clearly a need for the international community to address the problems associated with the FoCs. The UN Convention on Conditions for Registration of Ships would require that a flag state be linked to its ships either by having an economic stake in the ownership of its ship or by providing mariners to crew the ships. However, there are too few signatories and the Convention has not yet entered into force.³³

One way of addressing FoC in the WTO could be to prohibit subsidies to fishing vessels flying "flags of convenience" (i.e. a flag different from the subsidizing Member) or, alternatively, for WTO Members to ensure that, when they provide (certain) subsidies, it must be provided only to ships

³² B.A. Hamzah, *United Nations Institute for Training and Research, Ports and Sustainable Development: Initial Thoughts*, (July 7, 2004).

³³ United Nations Treaty Collection, *United Nations Convention on Conditions for Registration of Ships.*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-7&chapter=12&clang=en

flying the flag of the subsidizing WTO Member (i.e. registered in that Member). An additional measure could be a mandatory refund of subsidies that were provided by a subsidizing Member when a vessel is reflagged to another country.

For some developed countries (e.g. Cyprus or Malta) as well as developing countries (e.g. Liberia, Panama) this could result in a loss of income if such measures would lead to a reduction of the number of registered vessels. Nonetheless, such concerns could be addressed *inter alia* through a more strict definition of flag of convenience or an exception from the rule for vessels already registered under a flag of convenience of a developing country.

Small scale fisherfolk and IUU

If the IUU definitions under paragraph 3 of the IPOA-IUU are strictly applied, it might implicate many small scale fisherfolk from developing countries. They could be regarded as carrying out IUU fishing, in particular unregulated fishing. An OECD paper asserts that “IUU fishing in developing countries’ waters also includes smaller scale artisanal or subsistence fishing, typically by local fishers operating traditional fishing practices and harvesting small amounts. They often operate in the absence of any regulation or enforcement capacity. Their operations are also sometimes tolerated by authorities because fisher communities have little alternative livelihood means and no social safety net is on offer to ease adjustment.”³⁴

This issue is partially addressed in paragraph 3.4 of the IPOA-IUU: “Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged under the International Plan of Action (IPOA)”. Yet, this wording does not explicitly exclude small scale fisher folk from the definition of ‘unregulated’.

In the context of WTO fisheries subsidies negotiations, it is therefore imperative that any prohibition of subsidies to IUU fishing activities is designed in a manner that takes into account the fact that many small scale fisher folk might fall into the technical definition of conducting IUU fishing, as well as the capacity constraints of developing countries and LDCs generally.

³⁴ OECD document TAD/FI(2014)9 of 20 March 2014, The challenge of combatting IUU Fishing, <https://www.oecd.org/tad/events/Fishing-for-development-2014-Session-4-IUU.pdf>

B. UN FISHERIES GOVERNANCE

In the recent two decades, efforts have been undertaken to make fishing more sustainable, as reflected in several multilateral instruments. These include:

- United Nations Convention on the Law of the Sea (UNCLOS, 1982).³⁵ Among others, UNCLOS sets out rules about the establishment of Exclusive Economic Zones (EEZs) over which a state has special rights regarding the exploration and use of marine resources. Under UNCLOS, flag states have the primary responsibility for controlling the fishing activities of their vessels both within their EEZs and on the high seas. Flag and coastal States have the duty to cooperate so as to ensure fisheries sustainability and stocks conservation. Article 118 of UNCLOS states that they “shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end”.³⁶ UNCLOS has been ratified by 167 Parties, including the European Union.³⁷ The UN General Assembly annually reaffirms that UNCLOS provides the legal framework within which all activities in the oceans and seas must be carried out, akin to a “Constitution for the oceans”.
- UN Fish Stocks Agreement (UNFSA, 1995)³⁸, or the UN Agreement for the Implementation of the Provisions of UNCLOS relating to the Conservation and Management of Straddling Fish Stock’, sets out more detailed minimum international standards for the conservation and management of straddling fish stocks and highly migratory fish stocks. The UNFSA further strengthens the role of subregional or regional fisheries management organizations or arrangements, also called RFMOs or RFMAs (although the legal obligation to form such regional organisations or arrangements was not changed³⁹).

RFMOs have management responsibilities for fish stocks in various areas and provide the forum for countries to agree on conservation and management decisions, often including fishing allocations. They also adopt, implement and enforce measures to combat IUU fishing.⁴⁰ RFMOs have regulatory powers and may adopt conservation and management measures that are binding on their Members. A regional fisheries management arrangement (RFMA) is any form of arrangement through which States adopt conservation and management measures that does not provide for the establishment of an organization.⁴¹

³⁵ See for example UNGA document A/RES/71/123, Resolution adopted by the General Assembly on 7 December 2016 on sustainable fisheries, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/123

³⁶ http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

³⁷ Non-Parties include United States, Turkey, some Central Asian and Latin America countries (Peru, Colombia, Venezuela). African countries not party include Libya,

³⁸ The official name of UNFSA is the ‘United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks’

³⁹ Article 8.1 of UNFSA: “Coastal States and States fishing on the high seas shall, in accordance with the Convention (i.e. UNCLOS), pursue cooperation in relation to straddling fish stocks and highly migratory fish stocks either directly or through appropriate subregional or regional fisheries management organizations or arrangements, taking into account the specific characteristics of the subregion or region, to ensure effective conservation and management of such stocks.”

⁴⁰ United Nations Resumed Review Conference on the Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks - Making the Fish Stock Agreement Work, New York, 24-28 May 2010, http://www.un.org/depts/los/convention_agreements/reviewconf/FishStocks_EN_F.pdf

⁴¹ ‘Regional bodies involved in the management of deep-sea fisheries’, <http://www.fao.org/in-action/vulnerable-marine-ecosystems/background/regional-fishery-bodies/en/>

In Africa, relevant RFMOs include the Ministerial Conference on Fisheries Cooperation Among African States Bordering the Atlantic (ATLAFCO), headquartered in Morocco⁴²; the Sub Regional Fisheries Commission (SRFC) in West-Africa, headquartered in Senegal⁴³; the Regional Commission of Fisheries of Gulf of Guinea (COREP), headquartered in Gabon⁴⁴. (South-)Eastern Africa is less endowed with RFMOs. The largest ocean area is covered by the Southwest Indian Ocean Fisheries Commission (SWIOFC), served by the FAO Sub-Regional Office for Southern and Eastern Africa in Zimbabwe, but it is an advisory body with no regulatory power.⁴⁵

As of June 2017, the UNFSA had 86 Parties and membership is gradually expanding. In 2017, Ghana and Thailand were among the countries that ratified the UN Fish Stock Agreement.

- FAO Code of Conduct for Responsible Fisheries (1995) and the 4 International Action Plans (IPoAs) on (1) IUU, (2) reducing incidental catch of seabirds, (3) conservation and management of sharks, and (4) the management of fishing capacity. The IPoA for the Management of Fishing Capacity contains two provisions relating to subsidies:

Box - IPoA-Capacity on subsidies and economic incentives

Subsidies and economic incentives

25. When developing their national plans for the management of fishing capacity, States should assess the possible impact of all factors, including subsidies, contributing to overcapacity on the sustainable management of their fisheries, distinguishing between factors, including subsidies, which contribute to overcapacity and unsustainability and those which produce a positive effect or are neutral.

26. States should reduce and progressively eliminate all factors, including subsidies and economic incentives and other factors which contribute, directly or indirectly, to the build-up of excessive fishing capacity thereby undermining the sustainability of marine living resources, giving due regard to the needs of artisanal fisheries.

- FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement) was adopted in 1993 and entered into force on 24 April 2003. The Compliance Agreement strengthens 'flag-state responsibility' and makes binding some of the voluntary measures that are also included in the IPOA-IUU. Parties to the Agreement must ensure that they maintain an authorisation and recording system for high seas fishing vessels and that these vessels do not undermine international conservation and management measures. The Agreement aims to deter the practice of 're-flagging' vessels with the flags of States that are unable or unwilling to enforce such measures. Provisions are made for exchange of information of Parties' records of fishing vessels, particularly through the FAO.⁴⁶ A Party may exempt fishing vessels of less than 24 metres in length entitled to fly its flag from the application of this Agreement unless the Party determines that such an exemption would undermine the object and purpose of this Agreement (Article II.2 of the Compliance Agreement). Disputes regarding the implementation of the Compliance Agreement can be referred to the International Court of Justice, the International Tribunal for the Law of the Sea or to arbitration (Article IV - Settlement of Disputes).

⁴² <http://www.comhafat.org/en/presentation.php>

⁴³ <http://www.spcsrp.org/en>

⁴⁴ <http://www.corep-se.org/historique/>

⁴⁵ <http://www.fao.org/fishery/rfb/swiofc/en>. According to the latest performance review, SWIOFC has inadequate staffing and funding to implement its current mandate, see ftp://ftp.fao.org/fi/DOCUMENT/SWIOFC/PerformanceReview_Report.pdf

⁴⁶ See also <http://www.agriculture.gov.au/fisheries/legal-arrangements/fao>



- FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSA). Adopted in 2009 and entered into force on 5 June 2016. It is the first internationally binding instrument specifically targeting IUU fishing. It was partly based on the FAO Model Scheme on Port State Measures to Combat IUU Fishing adopted in 2005. Specific measures include advance notice and request permission for port entry, regular inspections by countries receiving vessels, denial of port use or certain port services for offending vessels, maintaining lists of vessels that have engaged in IUU fishing, and the creation of information sharing networks.⁴⁷

A range of other agreements not directly relating to fisheries, such as the 1992 Convention on Biological Diversity (CBD) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) are relevant for global fisheries governance. CITES for instance aims to regulate/prohibit the trade in wild plants and animals (including fish, sharks, and molluscs) and ensures that trade does not threaten the survival of listed species.

At the global level, the UN General Assembly (UNGA) and UN Informal Consultative Process on the Law of the Sea (ICP) address global fisheries issues among other responsibilities and the International Tribunal of the Law of the Sea (ITLOS) has the competence for resolving conflict between States. The Food and Agriculture Organization (FAO) is the UN specialized agency with a global mandate for fisheries policy through its Committee on Fisheries (COFI).

Under international law, flag and coastal States have the duty to cooperate so as to ensure fisheries sustainability and stocks conservation. Regional Fisheries Bodies (RFBs), also referred to as Regional Management Organisations or Arrangements (RFMO/As) is the main mechanism for organizing this cooperative management. UNCLOS as well as various annual UNGA resolutions invite States to create such organisations where they do not exist. Consequently, States have established new or enhanced their existing RFBs. The number of RFBs grew from 37 in 2001 (the start of Doha Round) to 48 in 2015.⁴⁸

This overview shows that UN fisheries governance has developed quite substantially. The WTO fisheries subsidies negotiations should not duplicate or undermine existing legal instruments, arrangements, processes, mechanisms or entities. Leaders also emphasized this in the UN Oceans Conference which took place in June 2017.⁴⁹

⁴⁷ See also <http://www.fao.org/fishery/psm/en>

⁴⁸ 'International Regulatory Framework for Fisheries Management and Implementation', Piero Mannini, Senior Liaison Officer, Fisheries and Aquaculture Department, FAO, Technical Briefing for Negotiating Group on Rules – Fisheries Subsidies, WTO, 27 March 2017

⁴⁹ UN document A/CONF.230/11, United Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development New York, 5-9 June 2017, Outcome of the Conference, paragraph 11, <https://undocs.org/A/CONF.230/11>

C. OVERVIEW OF FISHERIES SUBSIDIES

A case has been made that subsidies play a major role in contributing to overcapacity and overfishing.

Precise information about fisheries subsidies (quantities, types or trends) remains lacking. The concept of 'fisheries subsidy' is not defined in the WTO. There are no consistent definitions in other intergovernmental agencies, such as FAO and the OECD. According to an FAO Fisheries Technical Paper on fisheries subsidies, "subsidies are what each member nation (of OECD or FAO) considers them to be", and "studies of subsidies performed under the aegis of these agencies have inconsistencies among the definitions of subsidies used by different countries. Comparisons are therefore difficult."⁵⁰

Nonetheless, some general observations can be drawn from the available literature.

How Much?

Globally, fisheries subsidies are substantial. Government subsidies of fisheries amount to approximately US\$35 billion a year. This constitutes about 30-40% of the landed values generated by wild fisheries worldwide. Sumaila notes that 'capacity-enhancing' subsidies tend to motivate overcapacity and overfishing, and they make up the highest share of all fisheries subsidies – about US\$20 billion.⁵¹

Types of Subsidies

There are different ways to categorize subsidies. One way is as follows:

Type of subsidy	Good or service provided
Grants/loans/guarantees	<ul style="list-style-type: none"> • Building fishing vessels • Purchasing fishing gear • Repairing fishing gear • Vessel decommissioning programmes • Rural fisheries centres
Direct payments	<ul style="list-style-type: none"> • Price supports/guarantees • Wage supports for fishermen • Fishing access fees to foreign waters • Worker retraining programmes
Provision of goods at below-market rate	<ul style="list-style-type: none"> • Insurance • Fishing gear • Safety equipment (i.e. flares and lifejackets) • Ice
Tax free or import duty reductions	<ul style="list-style-type: none"> • Fuel • Fishing gear • Bait

Source: ICTSD (2006) Fisheries, International Trade and Sustainable Development: Policy Discussion Paper.

⁵⁰ FAO Fisheries Technical Paper 437, Introducing fisheries subsidies, page 3, <http://www.fao.org/3/a-y4647e.pdf>

⁵¹ Sumaila R 2016 'Trade Policy Options for Sustainable Oceans and Fisheries', the E15 Initiative, <http://e15initiative.org/publications/trade-policy-options-sustainable-oceans-fisheries/>

Another method is described by Sumaila et al. They provide three ways to classify subsidies based on their impact on sustainability- the 'Good', the 'Bad' and the 'Ambiguous':⁵²

- The Good or Beneficial subsidies, which as their name suggests are those subsidies that can be beneficial to the sustainability of fisheries, e.g., those for fisheries management programmes and services; and fishery research and development. Good subsidies can include supports for crew safety; support for processing by local populations; enable value addition; facilitate the establishment of fish stocks management systems; finance less harmful fishing methods; and the adoption of more sustainable technologies – hence providing for the restoration and rehabilitation of ecosystems.⁵³
- The Bad subsidies - capacity-enhancing or effort enhancing subsidies, could lead to overcapacity and overfishing. Capacity enhancing subsidies include all forms of capital inputs and infrastructure investments from public sources that reduce cost or enhance revenue⁵⁴ and include boat construction renewal and modernization programmes; fishing port construction and renovation programmes; fishery development projects and support services; and tax exemption programmes. Effort enhancing subsidies contribute to reducing operating/variable costs and include fuel subsidies; and subsidies for bait and refrigeration facilities on the vessel etc.⁵⁵
- The Ambiguous (or the Ugly) subsidies are those whose impact on the sustainability of fisheries is unclear as they include subsidies that can lead to positive impacts such as resource enhancement programmes; or to negative impacts such as resource overexploitation. Subsidies in this category include fisher assistance programmes, vessel buyback programmes and rural fisher community development programmes. They also include decommissioning fishing vessels, and facilitating a shift for fishers to other economic activities.⁵⁶

Most experts agree that the delineation between good and bad (or ugly) subsidies is not always clear-cut. For instance, subsidies provided to fisheries fleets that are fishing in underexploited waters or which follow all the applicable regulations of the Regional Fisheries Bodies are not necessarily harmful. Subsidies for building, refurbishing or repairing vessels are not bad *per se*. A newer engine with more capacity can imply more energy efficiency and less pollution. Conversely, subsidies for the decommissioning of fishing vessels may seem to be harmless at the outset, but could have a perverse effect on increasing fishing capacity: anticipation of buyback subsidies may encourage vessel owners to retain obsolete equipment and intensify fishing operations in order to maximize their benefits from the programme.

Fisher assistance programmes can also become capacity enhancing, for instance if such assistance is provided in the form of a grant or soft loan to help (young) fishers enter the sector. In such a scenario, this money is likely to be used to buy or lease a vessel as well as gear, possibly pooling funds with other people, leading to more fishing capacity. Subsidies that are considered 'Good' like assistance for the purchase of new fishing gear that reduces catch of non-targeted species might increase fishing capacity.

⁵² For further details regarding the basis for the classification of the subsidies into the following 3 categories namely beneficial, capacity enhancing and ambiguous subsidies respectively, please see Sumaila, Lam, Le Manach, Swartz and Pauly (2013) (infra)

⁵³ UNCTAD 2015 'Sustainable Fisheries: International Trade, Trade Policy and Regulatory Issues', p. 19.

⁵⁴ Sumaila, Lam, Le Manach, Swartz and Pauly (2013) (infra) p.24

⁵⁵ On subsidies to variable/operating costs, see UNEP: Analyzing the Resource Impact of Fisheries Subsidies: A Matrix Approach (2004) p. 10, <https://www.cbd.int/financial/fiscalenviron/g-subsidyfisheries-unep.pdf>

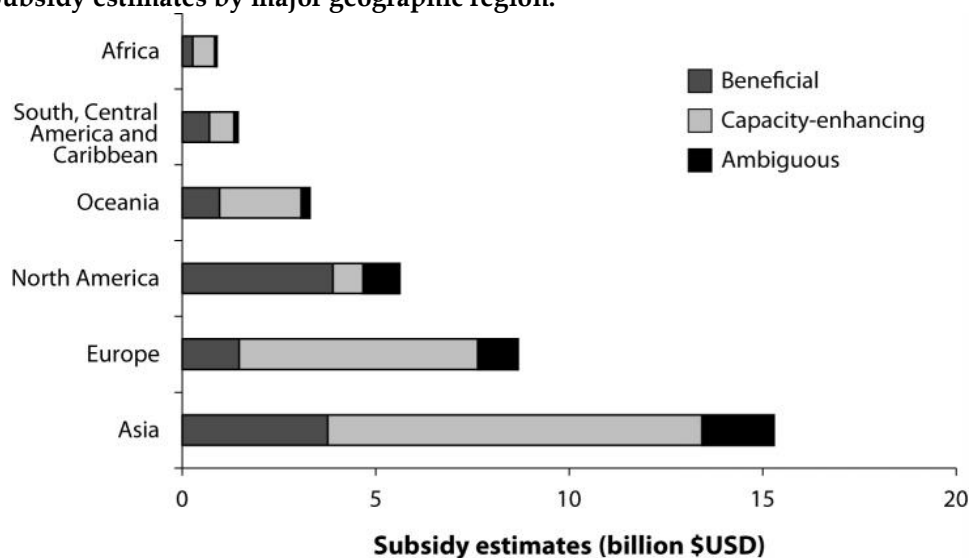
⁵⁶ UNCTAD 2015

Higher capacity (e.g. in terms of engine size) in itself does not necessarily mean that this capacity is being used to fish or used to fish (more) unsustainably. While there is a correlation between (over)capacity and overfishing it is not an absolute one. Nonetheless subsidies to support capacity when fishing fleets are already relying on overfished stocks should be considered by definition 'Bad' subsidies.

Who Provides Subsidies?

Subsidy estimates by major geographic region shows that Asia is by far the greatest subsidising region (43 % of total), followed by Europe (25 % of total) and North America (16 % of total). For all regions, the amount of capacity-enhancing and effort-enhancing (bad) subsidies is higher than other categories, except for North America and South, Central America and the Caribbean, which have a majority share of 'beneficial' or 'good' subsidies.⁵⁷

Graph - Subsidy estimates by major geographic region.



Source: Sumaila, Lam, Le Manach, Swartz and Pauly

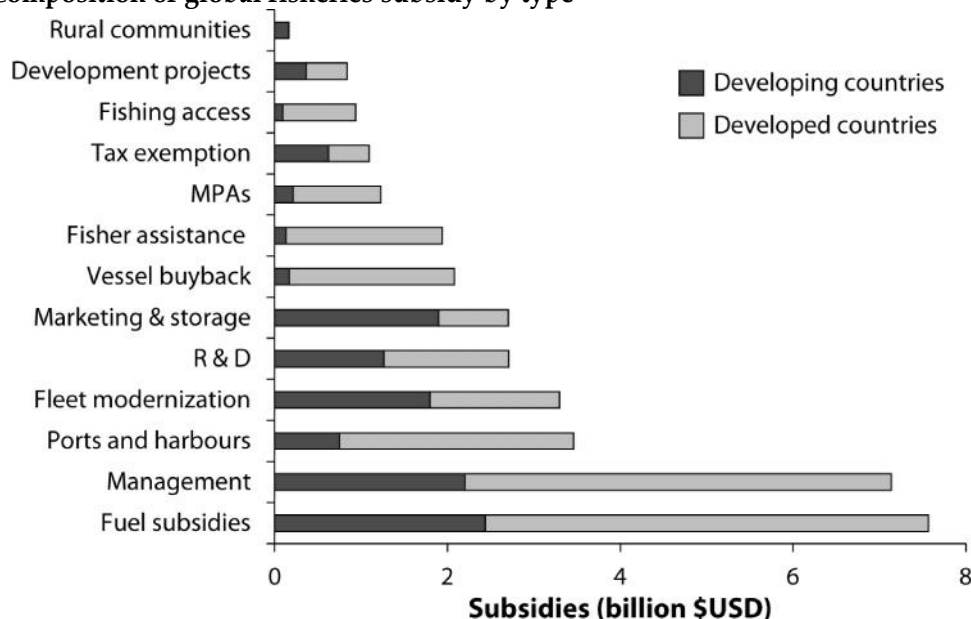
Who Provides Which Types of Subsidies?

Fuel subsidies contribute to the greatest part of the total subsidy (22% of the total), followed by subsidies for management (20%), ports and harbours (10%) and fleet modernization (close to 10%). Subsidies contributed by developed countries (65% of the total) are far greater than those contributed by developing countries (35% of the total).⁵⁸ These figures are based on the classification of China as a developed country by Sumaila et al..

⁵⁷ 'Global Fisheries Subsidies', Note for the EU Parliament, Directorate-General For Internal Policies, Policy Department B: Structural and Cohesion Policies, 2013, [http://www.europarl.europa.eu/RegData/etudes/note/join/2013/513978/IPOL-PECH_NT\(2013\)513978_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/513978/IPOL-PECH_NT(2013)513978_EN.pdf).

⁵⁸ Sumaila et al. 2013, *ibid*

Graph - Composition of global fisheries subsidy by type



Source: Sumaila, Lam, Le Manach, Swartz and Pauly.

How are Fisheries Subsidies a Problem? The Case of the EU

The EU provides support to its fisheries sector under different instruments:

- Subsidies provided under the European Maritime and Fisheries Fund (EMFF), for the years 2014-2020.⁵⁹ The EMFF supports the implementation of EU's Common Fisheries Policy⁶⁰ and succeeds the European Fisheries Fund (EFF) for the years 2007-2013. The total allocated amount under EMFF is EUR 6.4 billion during 2014-2020 which translates into EUR 800 million per year.⁶¹ The bulk of this support is managed/implemented by EU Member States (89% of the total). Four EU Member States manage half of this support: Spain (20.2%), France (10.2%), Italy (9.3%) and Poland (9.2%).⁶²
- Horizon 2020 is the EU Research and Innovation Programme for the period 2014-2020 with a total available funding of EUR 80 billion. Within the Horizon Work Programme 2016-2017, one focus area is 'Blue Growth - Demonstrating an ocean of opportunities' with the aim of creating more jobs and growth in the EU's fisheries sector. For 2016-2017, the 'Blue growth' programme under Horizon 2020 has a total budget of EUR 130.40 million (EUR 82 million for 2016 and EUR 42.40 million for 2017).⁶³

⁵⁹ Regulation (EU) 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund (EMFF),

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.149.01.0001.01.ENG

⁶⁰ Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R1380>

⁶¹ https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/2015-cfp-funding_en.pdf

⁶² Financial allocation per member state,

<https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/overall-table-2014-2020.xls>

⁶³ Small-scale fisheries and "Blue Growth" in the EU, study for the European Parliament's Committee on Fisheries, Section 2.3 - Support provided for Blue Growth, April 2017,

[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/573450/IPOL_STU\(2017\)573450_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/573450/IPOL_STU(2017)573450_EN.pdf)



- Fuel subsidies. According to Article 14 of Council Directive 2003/96/EC, “Member States shall exempt the following from taxation under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse: .. (c) energy products supplied for use as fuel for the purposes of navigation within Community waters (including fishing), other than private pleasure craft, and electricity produced on board a craft.”⁶⁴ Consequently, fuel subsidies for fishers within the EU mainly consist of nationally defined fuel tax exemptions with respect to the excise taxes directed at specific fuels. According to a study for the European Parliament, the overall annual foregone revenues as a consequence of the fuel tax reductions and exemptions for fishers during 2002-2011 are estimated at between EUR 1.05 and 1.3 billion.⁶⁵
- In the EU, State aid is covered under EU competition rules. EU Member States have more leeway in providing State aid to the fisheries and aquaculture sectors, in the form of grants, interest subsidies, loans, capital injections, risk finance measures or guarantees. EU member States do not need to notify the EU if such aid stays within *de minimis* levels. The maximum cumulative amount of *de minimis* aid to the fishery and aquaculture that may be granted by all EU Member States together during 2014-2010 is EUR 271 million per year (i.e. this amount can be provided by EU member states without informing the European Commission).⁶⁶

Thus far, for the fisheries subsidies that have been notified to the European Commission, few objections have been raised. Of the few cases that the European Commission investigated further, the result was a “negative decision without recovery” (i.e. the EU Member State does not have to recover the provided State aid from the beneficiary).⁶⁷ In other words, there has not been a single case where notified state aid in the fisheries sector has been sanctioned. During 2008-2010, public aid to fisheries was exempted from EU competition rules altogether, as a temporary specific action aiming to promote the restructuring of EU fishing fleets affected by the economic crisis.⁶⁸

Oceana estimates that EU subsidies to the fishing sector totalled EUR 3.3 billion in 2009. In 13 EU Member States, the amount of subsidies given were higher than the total value of their fish landings.⁶⁹ Finland’s fishing sector received subsidies 3 times more than the value of their landed catch; Germany’s fishing sector received 1.5 times more than the value of their landed catch:

‘The fisheries sector (in Europe), which often fails to generate profit, owes its life to generous subsidies schemes...The EU fishing industry’s addiction to European taxpayer funded subsidies has led to overfishing,

⁶⁴ Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity,

⁶⁵ Fuel subsidies in the EU fisheries sector, study for the European Parliament’s Committee on Fisheries, July 2013, [http://www.europarl.europa.eu/RegData/etudes/note/join/2013/513963/IPOL-PECH_NT\(2013\)513963_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/513963/IPOL-PECH_NT(2013)513963_EN.pdf). The draft version of this study calculated foregone revenue at EUR 1.3 billion

⁶⁶ Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the fishery and aquaculture sector, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.190.01.0045.01.ENG. This Regulation sets national caps (*de minimis* limits) which apply during a three-year period. The total of these national caps is EUR 813.5 million, with Spain (20%), France (14%) and UK (14%) taking the largest shares.

⁶⁷ EU database of competition cases, <http://ec.europa.eu/competition/elojade/isef/index.cfm>

⁶⁸ Council Regulation (EC) No 744/2008 of 24 July 2008 instituting a temporary specific action aiming to promote the restructuring of the European Community fishing fleets affected by the economic crisis, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008R0744>

⁶⁹ Oceana 2011 ‘New Oceana report reveals true amount of EU fishing sector subsidies to be 3.3 billion Euros : 13 Member States Receive More in Taxpayer Funded Subsidies than Total Value of Fish Landings’, Press Release September 13 2011, <http://eu.oceana.org/en/press-center/press-releases/new-oceana-report-reveals-true-amount-eu-fishing-sector-subsidies-be>

*fleet overcapitalisation, reduced economic efficiency in the sector and the failure to obtain the potential economic benefits from the resource’.*⁷⁰

Oceana sums that overfishing in European waters, the growing demand for fish in the EU and a large fish processing industry promoted the expansion of European fleets both in size and range. Combined with government supports, this has led to massive overcapacity in the European fishing fleet. In fact, what is fished is estimated to be 2-3 times greater than what should be fished sustainably. EU fleets are found in the Atlantic, Pacific and Indian Oceans.⁷¹

Under the EU’s Common Fisheries Policy, EU Member States should aim to balance the capacity of the fisheries fleet (in terms of gross tonnage and capacity of the engine) with available fishing opportunities. The EU provides guidelines for EU Member states to assess this balance. The idea behind these guidelines is that, through their use, Member States’ fisheries subsidies would become more sustainable. However these guidelines incentivize overcapacity in various ways. First, idleness of fishing vessels could result in loss of subsidies. This promotes more fishing. Further, the benchmark for economic performance seems to be set low which would enable Member States to continue providing subsidies despite dismal economic performance of their fishing fleets.

Despite the flexible rules that allow for overcapacity, EU’s overall fishing capacity appears to have been reduced in the period from 2001 to 2014 according to available OECD statistics, when measured in terms of the number of vessels (decline of 25%) and gross tonnage (decline of 28%).⁷² While this might seem to be claimed as a positive impact of the various multiannual EU fisheries policies, various observations need to be made:

- Other measurements of overcapacity might be more accurate. OECD does not have statistics on other measures of capacity, such as engine capacity, fish holding capacity of the vessel, and the availability of cold storage and processing facilities on boats – all of which might be better measurements of actual fishing capacity than number of vessels or gross tonnage.
- A large reduction in EU’s fleet capacity appears to be necessary to make EU fisheries sustainable. Based on Oceana estimates, EU fishing capacity should be reduced by 50%-66%. In other words, the EU fishing fleet continues to be woefully over-capacitated.
- The number of colossal fishing vessels (‘Sea Monsters’) has increased in the EU. According to Eurostat figures, EU had 84 fishing vessels with engine power of 3,000 kW or higher in 2004 and 93 of such vessels in 2015. One such vessel is the 145-meter long Annelies Ilena (currently registered in the Netherlands)⁷³, previously known as the Atlantic Dawn. The massive trawler was built by Irish businessman Kevin McHugh in 2000. When it was registered in Ireland, at one stage it accounted for one-third of the country’s fishing capacity. It was dubbed locally as the ‘Sea Monster’ because of concerns raised by local fishermen as well as by environmental experts over its large capacity. Consequently, the ship was only permitted to sail in Irish waters for a very short

⁷⁰ Oceana 2011 *ibid*.

⁷¹ ‘New Oceana report reveals true amount of EU fishing sector subsidies to be €3.3 billion’, 13 September 2011, <http://eu.oceana.org/en/press-center/press-releases/new-oceana-report-reveals-true-amount-eu-fishing-sector-subsidies-be>

⁷² OECD Statistics, Fishing Fleet, https://stats.oecd.org/Index.aspx?DataSetCode=FISH_FLEET

⁷³ The latest position of Annelies Ilena can be retrieved through marinetraffic.com: https://www.marinetraffic.com/en/ais/details/ships/shipid:231002/mmsi:244563000/imo:9204556/vessel:ANNELIES_ILENA



period of the year.⁷⁴ At present, the ship is mainly active outside Europe, including off the coasts of Mauritania and Chile.

- Most EU fisheries subsidies appear to be provided to unsustainable fisheries. The European Commission Joint Research Centre (JRC) found that in the year 2013, for 70% of fishing fleet segments no or no meaningful data on the sustainability of fish catches was available, i.e. it is not known for these fishing fleets whether they are fishing above or below Maximum Sustainable Yield. Such data is particularly sparse for the large EU fishing nations: France, Spain and Portugal.⁷⁵

Yet, for the 30% of fishing fleet segments with reliable data, it was found that three-quarters (73%) of all EU fisheries fleet segments are relying on overfished stocks.⁷⁶ (See Annex I for details). If this figure were to be representative of all EU fishing fleets, it would imply that most EU fisheries subsidies support fishing beyond the maximum sustainable yield, leading to (further) depletion of global fisheries resources.

- In May 2017, the European Court of Auditors (ECA) concluded that the EU's fisheries regime has certain weaknesses with regards to safeguarding the sustainability in the long-term of fish stocks and the fishing sector. Among others, they found weaknesses with the verification of the accuracy of the EU's fleets' capacity and the reliability of reported catch data. Moreover, not all EU Member States are as yet carrying out all the required controls.⁷⁷ In view of these findings, ECA has made recommendations for improvements with respect to the reliability of information on fishing fleets, the monitoring of fisheries management measures, the reliability of fisheries data and inspections and sanctions.

⁷⁴ 'The world's largest AND second largest supertrawlers are in Irish waters', Thejournal.ie, 17 January 2015, <http://www.thejournal.ie/annelies-ilena-atlantic-dawn-ireland-coast-1886452-jan2015/>

⁷⁵ Assessment of balance indicators for key fleet segments and review of national reports on Member States efforts to achieve balance between fleet capacity and fishing opportunities (STECF-15-15), Joint Research Commission (JRC) Scientific and Policy Reports, Scientific, Technical and Economic Committee for Fisheries (STECF), https://stecf.jrc.ec.europa.eu/documents/43805/1166222/2015-10_STECF+15-15+-+Balance+capacity_JRC97991.pdf

⁷⁶ Author's calculation based on data contained in the JRC report.

⁷⁷ Special Report No 08/2017: EU fisheries controls: more efforts needed, European Court of Auditors, <http://www.eca.europa.eu/en/Pages/DocItem.aspx?did=41459>

D. THE WTO NEGOTIATIONS AND OTHER DEVELOPMENTS UNTIL 2016

The WTO?

The WTO is not the most obvious forum to discuss the issue of fisheries. From its inception, fisheries subsidies negotiations was an agenda driven primarily by the 'Friends of Fish' coalition - Argentina, Australia, Chile, Colombia, New Zealand, Norway, Iceland, Pakistan, Peru and the United States. Amongst this group, New Zealand was at the forefront, solidly backed up by the US and Canada.

What is behind this push to include fisheries subsidies at the WTO? Whilst the stated intent is concern about the environment - the depleting fish stocks - it is not inaccurate to say that there have always been significant commercial interests driving these negotiations amongst the major proponents, including today, by the EU. Equally, there are also a few other countries with significant fishing capacity that are also wanting to protect their competing commercial interests, and are reluctant to have these disciplines.

The majority of developing countries with small-scale or artisanal fisheries, and which are in a state of 'undercapacity', are caught in the power play between the elephants.

The WTO's Doha mandate

The 2001 Doha mandate (in the WTO's Doha Ministerial Declaration) provides that:

*'28. In the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices that they seek to clarify and improve in the subsequent phase. **In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.** We note that fisheries subsidies are also referred to in paragraph 31.'* (Emphasis added).⁷⁸

The ambiguous language of this mandate, lacking detail regarding the nature of the required clarifications and improvements of the existing WTO disciplines (i.e. Agreement on Subsidies and Countervailing Measures, ASCM), meant that for the first few years after the launch of the Doha Round, the negotiations were dominated by discussions on the interpretation of the mandate.

Furthermore, under the Doha Round, fisheries subsidies negotiations have always been part of the 'Rules' negotiations that includes other areas, in particular clarifying and improving disciplines on antidumping (the Agreement on Implementation of Article VI of the GATT 1994, or the Antidumping Agreement) as well as clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements (paragraph 29 of the 2001 Doha Ministerial Declaration). These issues were given relatively more attention in the first few years.

The 'Friends of Fish' coalition, wanting a broad prohibition of fisheries subsidies, argued that the mandate covers both disciplining of trade-distorting subsidies and overcapacity/overfishing inducing subsidies. Others such as the EU, Japan, Republic of Korea and Taiwan argued that the ASCM mandate should be limited to strengthening the existing agreement in relation to the trade-distorting effects of fisheries subsidies.

⁷⁸ WT/MIN(01)/DEC/1, 14 November 2001



By 2003, as the EU's Common Fisheries Policy was reformed allowing the talks at the WTO to start moving. See the box below.

EU's Common Fisheries Policy Moves

According to the European Parliament's website: 'the measures that had been in place from 1992 – 2002 Regulation (EEC) No 3760/92 were not sufficiently effective to halt overfishing, and the depletion of many fish stocks continued at an even faster rate. The critical situation led to a reform consisting of three regulations that were adopted by the Council in December 2002 and entered into force on 1 January 2003:

- Framework Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources (repealing Regulations (EEC) No 3760/92 and (EEC) No 101/76);
- Regulation (EC) No 2369/2002 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector (amending Regulation (EC) No 2792/1999);
- Regulation (EC) No 2370/2002 establishing an emergency Community measure for scrapping fishing vessels.

'The primary objective of the 2002 reform was to ensure a sustainable future for the fisheries sector by guaranteeing stable incomes and jobs for fishermen, and supplying consumers, while preserving the fragile balance of marine ecosystems. It introduced a long-term approach to fisheries management, including the preparation of emergency measures, involving multiannual recovery plans for stocks outside safe biological limits and of multiannual management plans for other stocks.'

Source: European Parliament, http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuld=FTU_5.3.1.html

2005 Hong Kong Ministerial, 2007 Chair's text, 2011 Easter Package

EU's internal reform opened the way for broad agreement at the WTO's Hong Kong Ministerial Conference (2005) to prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing.

Hong Kong Ministerial Declaration Annex D (Rules), Para 9 states:

*'Recall our commitment at Doha to enhancing the mutual supportiveness of trade and environment, note that there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing, and call on Participants promptly to undertake further detailed work to, *inter alia*, establish the nature and extent of those disciplines, including transparency and enforceability. Appropriate and effective special and differential treatment for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns'.*⁷⁹ (note: the 'Group' is the Rules Negotiating Group)

The Hong Kong mandate fundamentally altered the dynamics of the fisheries subsidies negotiations. The focus of the negotiation shifted from arguing around the negotiation mandate to identifying the types of subsidies to be prohibited and the special and differential treatment for developing countries.

⁷⁹ Ministerial Declaration: Annexes Adopted on 18 December 2005, https://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm#annexd

In the midst of these discussions, the Chair in 2007 released his own text. It did not get the consensus of the Membership. As was later written (TN/RL/W/254, 21 April 2011), *'Although many delegations supported some elements of that text, it proved to be controversial and did not attract sufficient convergence even in respect of its approach and core concepts for the Chair to be able in late 2008...to table a revised text on fisheries subsidies.'* (Chairman of the Rules Committee, April 2011).

This 2007 WTO Chair's text broadly contained the following:

Subsidies that are Prohibited:

- Subsidies for vessels: acquisition, construction, repair etc. of fishing/ service vessels
- Subsidies on transfer of fishing/service vessels to third countries
- Subsidies on operating costs of fishing/service vessels – fuel, ice, bait, personnel, social charges etc., landing, handling, near-port processing activities etc.
- Subsidies for port infrastructure, port facilities (fish landing facilities, fish storage facilities, in – or near – port fish processing facilities)
- Income support for natural or legal persons engaged in fishing
- Price support for products of marine wild capture fishing
- Subsidies arising from the further transfer of access rights that a payer government has acquired from another Member government
- Subsidies to vessels engaged in illegal, unreported or unregulated fishing (IUU)

There were some **General Exceptions to the Prohibitions** (subject to implementation of fisheries management)

- Improving fishing vessel and crew safety
- Adoption of gear for selective fishing technique
- Personnel costs related to re-education, retraining or redeployment of fish workers
- Decommissioning or capacity reduction programmes

Special and Differential Treatment

'Bottom Tier' - Fishers would be exempted from the prohibited subsidies but they had to be/use

- non mechanised net-retrieval
- activities carried out on their own behalf - may include family members, organised associations
- catch consumed principally by them and families
- not go beyond a small profit trade

Fisheries management provisions would be indicative, not mandatory and could draw on indigenous institutions and measures.

Tier 1 -Fishers can be provided with the following subsidies: port infrastructure and facilities; Income Supports; and price supports.

Full range of very stringent fisheries management requirements would apply.

These rules were for all developing countries' fishers; no limit on boat size applied.

Tier 2 - Fishers can be provided with subsidies for port infrastructure and facilities; Income Supports; price supports; subsidies for fish vessels and operating costs.

Full range of very stringent fisheries management requirements would apply.

Boats have to be not greater than 10 meters in length overall, or otherwise undecked.

Tier 3 - Fishers can be provided with subsidies for port infrastructure and facilities; Income Supports; price supports; subsidies for fish vessels; and operating costs (i.e. including fuel subsidies)

Full range of very stringent fisheries management requirements would apply.

Fishing only within the Exclusive Economic Zone (EEZ); need prior scientific status assessment and peer review in the FAO.

LDCs are exempted from any fisheries subsidies disciplines.

Fisheries Management applied to all except 'subsistence' fishers.

The following are only some of the very onerous measures:

- Shall be based on internationally-recognized best practices for fisheries management and conservation
- Compliance with provisions of international instruments aimed at ensuring the sustainable use and conservation of marine species
- Regular science-based stock assessment
- Member shall adopt and implement pertinent domestic legislation and administrative or judicial enforcement mechanisms
- Information as to the nature and operation of these systems, including the results of the stock assessments performed, shall be notified to the relevant body of the FAO, where it shall be subject to peer review prior to the granting of the subsidy
- Member to maintain an enquiry point to answer all reasonable enquiries concerning its fisheries management system

Source: TN/RL/W/213, https://www.wto.org/english/tratop_e/rulesneg_e/rules_chair_text_nov07_e.htm

In general, the text saw Members having many differences regarding the disciplines/ flexibilities for developing countries:

- The category of fishers (subsistence fishers) that did not have to undertake very stringent fish management requirements was too narrowly defined. They wanted a broader category of 'artisanal' or 'small-scale' fishers (see e.g. Brazil, China, India and Mexico, TN/RL/GEN/163; Ecuador and Peru TN/RL/GEN/179).
- The Small and Vulnerable Economies (SVEs) 'felt that the text unduly restricted small members who have very little impact on over-fishing and over-capacity.' They highlighted the importance of subsidies for operating costs (fuel subsidies) and asked for those flexibilities for Members with a share of world NAMA trade of not more than 0.1% (TN/RL/W/242).
- Developing countries also wanted to be able to exploit the resources which they felt they had a right to. They wanted to go beyond being small-scale fishers. They saw the subsidy disciplines standing in their way. The Chair in 2011 summed this thinking:

'All countries have the right to a share of fisheries resources in international waters, but the cost advantages of developed Members' fishing fleets are too great for them (developing countries) to overcome without subsidies. They consider that, including through the use of subsidization, developed countries are responsible for the overfishing of high seas stocks and now are denying developing countries the use of subsidies, and thus are attempting to impose a standstill on high seas fishing, which would be unfair to developing countries' (TN/RL/W/254, para 76).

Since 2011, various attempts have been made to achieve results to no avail.

10th WTO Ministerial Conference (2015)

There was no outcome on fisheries subsidies disciplines at MC10 as the following three issues proved to be contentious⁸⁰:

⁸⁰ See also 'WTO Members clinch Agriculture Export Competition Deal, Weigh Next Steps for Negotiating Future. Bridges daily update no. 5, 19 December', <http://www.ictsd.org/bridges-news/bridges/news/bridges-daily-update-5-overview-of-outcomes-of-wto%E2%80%99s-10th-ministerial-in>

- A proposal to complete negotiations on the prohibition of subsidies to IUU fishing and effort on overfished stocks within a specific timeframe.
- A provision that would have required Members to commit to a best endeavour standstill provision on new subsidies in prohibited areas, despite the inclusion of the standstill provision in the SDGs and the TPP.
- Specific fisheries subsidy programmes notification commitments under the ASCM, including details on format, and accounting for Members' resources and technical capacity.⁸¹

Nevertheless, there was a Ministerial Statement issued by 28 WTO members, in which these Members agreed "to seek to reinvigorate work in the WTO aimed at achieving ambitious and effective disciplines on fisheries subsidies, which should include, but not be limited to, prohibitions on subsidies: (a) for fishing that negatively affect overfished fish stocks; and (b) provided to vessels or operators engaged in illegal, unreported and unregulated fishing."⁸²

At the 2016 'Our Oceans' conference, the call for WTO negotiations on fisheries subsidies was repeated by 12 WTO Members who committed to launch negotiations on an international agreement under the WTO to prohibit harmful fisheries subsidies that contribute to overfishing and overcapacity, and subsidies linked to illegal, unreported, and unregulated (IUU) fishing.⁸³ None of the proponents were African countries although several of them were represented at the conference.⁸⁴

Sustainable Development Goal 14

The 2030 agenda adopted by Heads of State and Government in 2015 includes 17 Sustainable Development Goals (SDGs). Goal 14 addresses oceans, seas and marine resources: 'To conserve and sustainably use the oceans, seas and marine resources for sustainable development'. The sub-goals are listed in the box below. The most important one in relation to the WTO negotiations is sub-goal 14.6: to prohibit subsidies that contribute to overcapacity and overfishing. Sub-goal 14.b about providing market access and access to marine resources to small-scale artisanal fishers and sub-goal 14.4 about ending illegal, unreported and unregulated (IUU) fishing are also relevant.

Box - Sustainable Development Goals 14 (simplified)

- | |
|---|
| <p>14.1 By 2025, prevent and significantly reduce marine pollution of all kinds</p> <p>14.2 By 2020, sustainably manage and protect marine and coastal ecosystems, including by strengthening their resilience, and take action for their restoration</p> <p>14.3 Minimise and address the impacts of ocean acidification, including through enhanced scientific co-operation at all levels</p> <p>14.4 By 2020, effectively regulate harvesting, and end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices, and implement science-based management plans, to restore fish stocks in the shortest time feasible</p> <p>14.5 By 2020, conserve at least 10 per cent of coastal and marine areas, consistent with national and international law</p> |
|---|

⁸¹ UNCTAD, Trade and Environment Review 2016: Fish Trade, UNCTAD/DITC/TED2016/3, http://unctad.org/en/PublicationsLibrary/ditcted2016d3_en.pdf

⁸² 'Fisheries Subsidies' - Ministerial Statement on behalf of Argentina, Australia, Brunei Darussalam, Canada, Colombia, Costa Rica, Fiji, Haiti, Iceland, Mexico, New Zealand, Norway, Pakistan, Papua New Guinea, Paraguay, Peru, Senegal, Solomon Islands, Switzerland, United States, Uruguay, Vanuatu and OECS Economic Union WTO Members (Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, and St. Vincent and The Grenadines), WTO document WT/MIN(15)/37/Rev.1 of 7 January 2016

⁸³ https://ustr.gov/sites/default/files/09142016_STATEMENT_joint_statement_fisheries_partners_FINAL.pdf

⁸⁴ The Our Oceans conference is an annual high-level political event established by US Department of State in 2014. It has been held in US (2014, 2016) and Chile (2017). Future Our Ocean conferences will be hosted by EU (2017) and Indonesia (2018). See also <http://www.state.gov/e/oes/ocns/opa/ourocean/index.htm>



14.6 By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and refrain from introducing new such subsidies

14.7 Increase the economic benefits to small island developing states and least developed countries from the sustainable use of marine resources

14.a Increase scientific knowledge, develop research capacities and transfer marine technology to improve ocean health

14.b Provide access of small-scale artisanal fishers to marine resources and markets

14.c Enhance the conservation and sustainable use of oceans and their resources by implementing international law as reflected in UNCLOS.

Note: only SDG 14.6 specifically refers to the WTO.

At the UN Oceans Conference on SDG 14 which took place in June 2017, UN Member States agreed to “Act decisively to prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, including through accelerating work to complete negotiations at the World Trade Organization on this issue, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of those negotiations”.⁸⁵

TPP outcome on fisheries subsidies (Environment Chapter)

Even if the Transpacific Partnership Agreement (TPPA or TPP) under the new US Trump administration is buried for some time, nevertheless, the TPP text remains an important marker. It provides an indication of what can possibly be achieved amongst the countries that negotiated it.

The provisions of the Environment Chapter in the Transpacific Partnership Agreement (TPP) on fisheries subsidies might be used by some as the template for an outcome in the WTO negotiations. It was an outcome that was acceptable to the United States as well as other TPP parties such as New Zealand, Chile and Vietnam.⁸⁶ There is a high likelihood that the WTO outcomes on fisheries could be framed along similar lines.

The central fisheries subsidies elements in the TPP are the following:

- Prohibition of subsidies related to overfishing. “No Party shall grant or maintain subsidies for fishing that negatively affects fish stocks that are in an overfished condition.” (Article 20.16.5(a) TPP).
- Prohibition of subsidies to vessels engaged in IUU fishing. “No Party shall grant or maintain (..) subsidies provided to any fishing vessel while listed by the flag State or a relevant Regional Fisheries Management Organisation or Arrangement for IUU fishing in accordance with the rules and procedures of that organisation or arrangement and in conformity with international law.” (Article 20.16.5(b) TPP)
- Best endeavour standstill provision for non-prohibited subsidies: In relation to subsidies that are not prohibited by paragraph 5 (a) or (b), and taking into consideration a Party’s social and developmental priorities, including food security concerns, *each Party shall make best efforts to*

⁸⁵ A/CONF.230/11, ‘United Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development, New York, 5-9 June 2017’, paragraph 13(p), <http://undocs.org/en/A/CONF.230/11>

⁸⁶ Article 20.16 TPP, ‘Marine Capture Fisheries’, <https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf>



refrain from introducing new, or extending or enhancing existing, subsidies within the meaning of Article 1.1 of the SCM Agreement, to the extent they are specific within the meaning of Article 2 of the SCM Agreement, that contribute to overfishing or overcapacity. (Article 20.16.7 TPP).

- **Fisheries management systems.** “Parties shall seek to operate a fisheries management system that regulates marine wild capture fishing and that is designed to: (a) prevent overfishing and overcapacity; (b) reduce bycatch of non-target species and juveniles (..) and (c) promote the recovery of overfished stocks for all marine fisheries in which that Party’s persons conduct fishing activities.”. “Such a management system shall be based on the best scientific evidence available and on internationally recognised best practices for fisheries management and conservation as reflected in the relevant provisions of international instruments aimed at ensuring the sustainable use and conservation” which include, and as they may apply, UNCLOS, UN Fish Stock Agreement, FAO Compliance Agreement and the 2001 FAO IUU Fishing Plan of Action. (Article 20.16.3 TPP).
- **Transparency obligations.** Each Party shall notify the other Parties of ‘specific subsidies’ that the Party grants or maintains to persons engaged in fishing or fishing related activities. ‘To the extent possible’, the following information shall be included: (a) programme name; (b) legal authority for the programme; (c) catch data by species in the fishery for which the subsidy is provided; (d) status of the fish stocks in the fishery for which the subsidy is provided (for example, overexploited, depleted, fully exploited, recovering or underexploited); (e) fleet capacity in the fishery for which the subsidy is provided; (f) conservation and management measures in place for the relevant fish stock; and (g) total imports and exports per species. (Articles 20.16.9 and 10 TPP). Each Party shall also provide, to the extent possible, information in relation to other fisheries subsidies that are not prohibited in TPP, ‘in particular fuel subsidies.’ (Article 20.16.11 TPP).



E. ANALYSIS OF THE RECENT WTO FISHERIES SUBSIDIES PROPOSALS

Recent WTO submissions

Since the end of 2016, various textual proposals on fisheries subsidies have been submitted to the WTO Negotiating Group on Rules (NGR) as well revisions of original proposals. They include, *inter alia*, the following:⁸⁷

Textual proposals on WTO fisheries subsidies disciplines

Proponents	Title of submission	WTO reference and date of dissemination (latest revision)
Iceland, New Zealand, Pakistan (New Zealand et al.)	Proposed MC11 fisheries subsidies: implementing SDG target 14	TN/RL/GEN/186 of 27 April 2017
Indonesia	Proposed Disciplines on Prohibitions and Special and Differential Treatment for Fisheries Subsidies	TN/RL/GEN/189 of 6 June 2017
Norway	Discipline and prohibition on subsidies to IUU-fishing	TN/RL/GEN/191 of 26 June 2017
European Union	Advancing toward a multilateral outcome on fisheries subsidies in the WTO ⁸⁸	TN/RL/GEN/181/Rev.1 of 6 July 2017
ACP Group	ACP Group text proposal – Fisheries subsidies disciplines	TN/RL/GEN/192 of 14 July 2017
Argentina, Colombia, Costa Rica, Panama, Peru, and Uruguay (Argentina et al.)	Proposal for disciplines on fisheries subsidies	TN/RL/GEN/187/Rev.1 of 17 July 2017
LDC Group	LDC Group fisheries subsidies text proposal	TN/RL/GEN/193 of 17 July 2017

Several submissions fall short of a full-blown textual proposal, but contain a range of elements for the design of possible disciplines. These submissions have been effectively superseded by revised submissions with proposed negotiation text:

Submissions proposing elements for WTO fisheries subsidies disciplines

Proponents	Title of submission	WTO reference and date of dissemination
LDCs	Elements for WTO fisheries subsidies disciplines	TN/RL/GEN/184 of 22 December 2016
Argentina, Colombia, Costa Rica, Panama, Peru and Uruguay. (Argentina et al.)	Framework to guide the multilateral negotiations to eliminate harmful fisheries subsidies	TN/RL/GEN/183 of 29 November 2016
ACP Group	Principles and elements for concluding negotiations on fisheries subsidies in the WTO	TN/RL/GEN/182/ of 16 November 2016 and Rev.1 of 20 June 2017

⁸⁷ This overview covers submissions until mid-July 2017.

⁸⁸ EU made a submission titled 'Further considerations on fisheries subsidies in light of recent discussions on the EU proposal (WTO document JOB/RL/7 of 20 January 2017) subsequent to its initial proposal (WTO document TN/RL/GEN/181 of 20 October 2016).



In addition, several proponents made submissions on specific issues⁸⁹ or suggested issues for discussion, for instance for the sessions on fisheries subsidies which took place in May and June 2017.⁹⁰

An analysis of certain key aspects of the various submissions is provided below:

Scope

'Specific subsidies'

All textual proposals suggest that only specific subsidies would be covered by the fisheries subsidies disciplines. A 'subsidy' under ASCM requires (1) a financial contribution by (2) a government or any public body within the territory of a Member that (3) confers a benefit (see Article 1.1 ASCM). Article 2 of the SCM defines when a subsidy is considered 'specific' to a particular sector.

Focus on wild marine capture

The general direction is that inland fisheries and aquaculture would not be covered by fisheries subsidies disciplines. Marine capture would cover around 48% of annual fish production, measured in weight (based 2014 figures from FAO). Marine aquaculture is a growth market and currently accounts for around 25% of marine capture.

Table: Fish production in millions of Tons (2014)

	Inland	Marine	Total
Fish capture	11.9	81.5	93.4
Aquaculture	47.1	26.7	73.8
Total	59	108.2	167.2

Source: FAO State of World Fisheries and Aquaculture 2016, page 4

Aquaculture has benefits but has also been associated with certain sustainability concerns. The LDC Group (TN/RL/GEN/193) considers that aquaculture should fall under the fisheries subsidies disciplines if wild fish is used as feed.

Fishmeal, dried ground fish, is not only used in aquaculture. IFFO, an organisation that represents and promotes the fishmeal, fish oil and wider marine ingredients industry worldwide, estimates that in China, around 60% of fishmeal inputs are used for aquaculture whereas the other 40% for livestock.⁹¹

⁸⁹ E.g. JOB/RL/9 of 7 April 2017 (Colombia, Iceland, New Zealand, Norway, Panama, Peru, Singapore and Switzerland), 'Role of fisheries management systems in eventual fisheries subsidies disciplines' and JOB/RL/8 of 28 February 2017 (Japan), 'Roles of RFMOs and national fisheries management authorities in maintaining fisheries resources and their implications for developing disciplines in the WTO'.

⁹⁰ RD/TN/RL/10: Suggested issues for topical discussions (Argentina, Colombia, Costa Rica, Panama, Peru and Uruguay); RD/TN/RL/11: Discussion questions on fisheries subsidies for the meeting of 15-17 May 2017 (LDCs); RD/TN/RL/12: List of questions proposed by the EU with regard to scope, special and differential treatment/flexibilities, technical assistance and capacity building; RD/TN/RL/13: Discussion questions on scope, special and differential treatment/flexibilities, and technical assistance and capacity building (ACP).

⁹¹ IFFO response to the recent paper on China's aquaculture and the world's wild fisheries, 20 January 2015, <http://www.iffonet.net/node/720>

The ACP separately excludes 'Recreational fishing' from the scope of fisheries subsidies disciplines, a subsector that contributes to economic development of several developing countries, in particular SVEs. For instance, a recent study estimates that the recreational and sport fisheries contributes an estimated 500+ USD million annually to Bahama's economy through related expenditures by tourists, and provides employment for some 18,000 Bahamians.⁹²

Definition of fishing / fishing vessel

The definition of fishing/fishing vessel could partly determine the scope of the disciplines, depending on how the actual prohibition is formulated. In the EU textual proposal 'fishing' has been very broadly defined to include also 'searching for', 'processing fish on board', 'transshipping', 'transferring' or 'landing' fish - activities that are not covered by the Argentina et al. or New Zealand et al. definition of 'fishing' (New Zealand et al. consider such activities fishing-related rather than 'fishing'). Thus in the case of EU, subsidies to transshipment vessels for instance (which do not fish themselves) would be covered by the proposed prohibitions.

Table - What is fishing / fishing vessel?

Proposal	Definition of fishing (related activities)	Definition of (fishing) vessel
Argentina et al.	"Fishing" means searching for, attracting, locating, catching, taking or harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish.	"Vessels" refer to any vessel, ship or other type of boat used for, quipped to be used for, or intended to be used for fishing or fishing related activities.
LDC Group	No definition	"fishing vessel" refers to any vessel, ship or other type of boat used for, equipped to be used for, or intended to be used for <u>commercial</u> fishing or fishing related activities
ACP Group	"Fishing or fishing activity" means searching for, attracting, locating, catching, taking or harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish, including transshipping, and processing of fish <u>at sea</u>	"Fishing vessel" means any vessel, ship or other type of boat used for, equipped to be used for, or intended to be used for <u>commercial fishing or fishing activities and/or the definition for fishing vessel as applied in a Member's national laws.</u>
EU	"fishing" means <u>searching for</u> , attracting, locating, catching, taking and <u>processing fish on board</u> , <u>transshipping or transferring or landing</u> fish or any activity which can reasonably be expected to result in these activities.	"fishing vessel" refers to any vessel, ship or other type of boat used for, equipped to be used for, or intended to be used for <u>commercial fishing or fishing related activities.</u>
New Zealand et al.	"fishing" means searching for, attracting, locating, catching, taking or harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish. "fishing related activities" means any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish, as well as the provisioning of personnel, fuel, gear and other supplies.	Not defined

⁹²Improving the recognition of Caribbean recreational fisheries for data provision, FAO Regional Office for Latin America and the Caribbean, 22 June 2017, <http://www.fao.org/americas/noticias/ver/es/c/897436>

Definition of 'fishing' at the international level. 'Fishing' has not been defined under UNCLOS, the UN Fish Stock Agreement or the FAO Voluntary Guidelines for Catch Documentation Schemes. However, the latter (voluntary) instrument defines 'fishing vessel' as "any vessel of any size used for, equipped for use for, or intended for use for the purposes of fishing or fishing-related activities, including support vessels, fish-processing vessels, vessels engaged in transshipment and carrier vessels equipped for the transportation of fishery products, except container vessels."⁹³ Implicitly, this appears to suggest a broad definition of fishing.

Definitions of 'fishing' diverge across FAO instruments which contain such definitions. The Port State Measures Agreement (PSMA) differentiates between 'fishing' and 'fishing-related activities'. "Fishing" under the PSMA means "searching for, attracting, locating, catching, taking or harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish".⁹⁴ 'Fishing related activities' means "any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea."

The 1998 FAO Guidelines for the Routine Collection of Capture Fishery Data define fishing more restrictively as "Any activity, other than scientific research conducted by a scientific research vessel, that involves the catching, taking, or harvesting of fish; or any attempt to do so; or any activity that can reasonably be expected to result in the catching, taking, or harvesting of fish and any operations at sea in support of it."⁹⁵

Definition of 'fishing' at the national level. National laws maintain diverging definitions. US national law has a similar definition of 'fishing' as under the 1998 FAO Guidelines but widens it to also include 'any operations at sea in support of, or in preparation for activities that (attempt to or reasonably be expected to result in) catching, taking or harvesting fish': "Fishing, or to fish means any activity, other than scientific research conducted by a scientific research vessel, that involves:(1) The catching, taking, or harvesting of fish; (2) The attempted catching, taking, or harvesting of fish; (3) Any other activity that can reasonably be expected to result in the catching, taking, or harvesting of fish; or (4) Any operations at sea in support of, or in preparation for, any activity described in paragraphs (1), (2), or (3) of this definition."⁹⁶

In the case of Gambia's Fisheries Act 2007, 'fishing' is also a relatively broad concept which means "fishing for, searching for, catching, taking or harvesting fish by any method and includes the processing, storage, transshipment, refuelling or supplying of other fishing vessels or any other activity in support of fishing operations".⁹⁷

In contrast, the Fisheries and Marine Resources Act 2007 of Mauritius defines fishing as "catching; (ii) collecting; (iii) killing; or (iv) destroying; any fish by any method; and includes (i) searching for fish

⁹³ FAO document C 2017/LIM/14, 'Voluntary Guidelines for Catch Documentation Schemes', <http://www.fao.org/3/a-mt442e.pdf>

⁹⁴ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, http://www.fao.org/fileadmin/user_upload/legal/docs/037t-e.pdf

⁹⁵ Guidelines for the routine collection of capture fishery data, Annex 5 - Glossary, FAO Fisheries Technical Paper 382, <http://www.fao.org/docrep/003/x2465e/x2465e0h.htm>

⁹⁶ See 'Magnuson-Stevens Fishery Conservation and Management Act', U.S. Department of Commerce 2007, http://www.nmfs.noaa.gov/sfa/laws_policies/msa/documents/msa_amended_2007.pdf and 50 CFR 600.10 - Definitions, <https://www.law.cornell.edu/cfr/text/50/600.10>

⁹⁷ Gambia Fisheries Act 2007, <http://extwprlegs1.fao.org/docs/pdf/gam77403.pdf>

for the purpose of catching, collecting, killing or destroying the fish; (ii) placing, searching for or retrieving, a fish aggregating device;”⁹⁸

Differentiation between maritime zones

Several submissions suggest that the prohibition of subsidies should be differentiated by maritime zones, in particular a distinction is made between maritime zones under the national jurisdiction of Members (i.e. Exclusive Economic Zones, EEZs) and high seas. In some cases this is presented as an S&D element (e.g. if non-application of disciplines to certain maritime zones is only for developing countries i.e. developing countries should be allowed to continue subsidies if fishing takes place within their EEZs) and in some submissions this is presented as a general element.

The ACP Group (TN/RL/GEN/182/Rev.1) provides that ‘as a priority, disciplines should target subsidies provided to large-scale commercial or industrial fishing and subsidies to fishing activities outside of the Member’s maritime jurisdiction, (i.e. in the high seas or in the EEZ of another Member)’. Consequently, under the ACP textual proposal (TN/RL/GEN/192) the prohibition of subsidies to fishing vessels and fishing or fishing activity for capital and operating costs applies to a developing country Member’s large scale industrial fishing and fishing activity outside of their own EEZ. For developed countries this prohibition applies to fishing activity outside as well inside their EEZ.

The Argentina et al. proposal (TN/RL/GEN/187) suggests that disciplines related to overcapacity are ‘restraint’ (i.e. restricted) to areas beyond national jurisdiction’. Under the LDC Group proposal (TN/RL/GEN/193), no developing country Member shall be prevented to maintain or grant subsidies to ‘fishing activities which exclusively exploit fish stock within the EEZ of the Member granting the subsidy.’

This position finds support in Article 56.1(a) of UNCLOS which provides that a coastal State has ‘sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living (..) in its exclusive economic zone. The same principle has also been incorporated in the Port State Measures Agreement (PSMA). Article 3(2) of the PSMA provides that “A Party may, in its capacity as a port State, decide not to apply this Agreement to vessels chartered by its nationals exclusively for fishing in areas under its national jurisdiction and operating under its authority therein. Such vessels shall be subject to measures by the Party which are as effective as measures applied in relation to vessels entitled to fly its flag.”

According to some Members, basing S&D provisions on a broad general territorial exemption would render the disciplines an empty shell, and developing countries cannot obtain a carte blanche to subsidize.⁹⁹ In this line of argumentation, reference is often made to the fact that most fishing takes place in EEZs (around 85%, see also Section A above). However, the ACP proposal does not exempt fishing in EEZs altogether, but only exempts fishing by a Member in its own EEZ.

The Institute for the Oceans and Fisheries of the University of British Columbia launched the research initiative ‘Sea Around Us’, and has compiled the most comprehensive dataset on fish catches around the world that is publicly available, based on FAO data and other sources.¹⁰⁰ This dataset allows for an estimation of the amount of fish caught by foreigners in African EEZs.

⁹⁸ The Fisheries and Marine Resources Act 2007, Act No. 27 of 2007, Mauritius, https://www.ofdc.org.tw/components/Editor/webs/files/Mauritius_Fisheries_and_Marine_Resources_Act_2007.pdf

⁹⁹ EU statements in the Negotiating Group on Rules on Fisheries Subsidies (15-18 May 2017)

¹⁰⁰ <http://www.seaaroundus.org/data/#/search>

**Table - Catches of in African EEZs (2014): around 41% of fish is caught by foreign vessels¹⁰¹**

All African EEZ - total fish caught (Tonnes)	12,878,180
Fish caught by own vessel (Tonnes)	7,660,533
Fish caught by other countries (Tonnes)	5,217,647
% of fish caught by own vessel	59.5%
% of fish caught by foreign vessels	40.5%
Fish caught by African vessels (Tonnes)	8,595,434
Fish caught by non-African vessel (Tonnes)	4,282,747
% of fish caught by non-African vessels	33.3%
% of fish caught by other African vessels	7.3%

For all African EEZs combined, in 2014, 40.5% of fish caught was by vessels flying a flag other than their own. This represents the percentage of fish caught by foreign vessels in African EEZs. Countries where more than half of the (recorded) catches are by foreigners include countries in West Africa (Guinea-Bissau, Guinea, Liberia, Cote d'Ivoire, Togo, Mauritania, Sao Tome & Principe, Gambia), Central Africa (Equatorial Guinea, Gabon, Republic of Congo), south of Morocco, Eritrea, Somalia and Seychelles (see Annex II for a detailed overview).

If fisheries disciplines excluded fishing by developing countries in their respective EEZs, in the case of Africa, they would apply to more than 40% of fish caught in African EEZs - a substantial share.

Furthermore, under all proposals which advocate for a differentiation of obligations depending on where the fishing takes place (i.e. within or outside EEZ of the Member providing the subsidy), this distinction does not apply to the proposed prohibition of subsidies related to IUU or those related to fishing of overfished stocks.

In the negotiations, India has suggested a midway position – developing countries should be allowed to provide any fishery subsidies for fishing activities in their own territorial waters, i.e. those fishing activities taking place at most 12 nautical miles (22.2 kilometres) from the baseline of a coastal state. In its revised proposal, the EU also hints at such a differentiation, but only in the case of subsidies to fishing that targets overfished stocks.

Exclusion of certain subsidies ('Green Box'?)

Some submissions have proposed excluding certain subsidies (even if such subsidies could contribute to maintaining or increasing capacity, for instance). This is akin to creating a 'Green Box' featured in the Agreement on Agriculture for certain types of agricultural subsidies. There is a potential for such exceptions to cover subsidies that are used in large amounts by larger players (e.g. environmental subsidies, fuel subsidies), or to make eligibility for exceptions difficult in a way that only countries with capacity can make use of them (e.g. the case of decoupled payments in the area of agriculture).

The table below shows some examples from the submissions of WTO Members. Some of these exceptions are similar to those that are listed in the Chair's 2007 text (see above under Section D).

In addition to exemption of subsidies to fuel de-taxation schemes and subsidies compensating for natural disasters, the EU proposes an 'illustrative list of subsidies that do not negatively affect targeted fish stocks that are in an overfished condition' (Annex I of TN/RL/GEN/181/Rev.1). The practical effect of such a list appears to be similar to an exemption.

¹⁰¹ Source: Sea Around Us. Country-level data can be found in Annex II.



The natural disaster exemption as formulated by Argentina et al. (see table below) appears to be very onerous to implement for developing countries, especially for small island economies that regularly face natural disasters such as cyclones. In reality, reconstruction efforts may begin immediately and cannot wait for a ‘science-based assessment of the post-disaster state of fishery’.

Some of the exceptions proposed by EU could create loopholes or could be problematic. In particular, the EU suggests that subsidies aiming at improving the concerned Party’s capacity to fight against IUU fishing should not be challenged. Yet, trade-related measures for the stated purpose of combating IUU fishing might have elements that could constitute disguised trade barriers to fish.¹⁰² For instance, if one WTO Member institutes a very difficult to implement traceability scheme and this Member provides subsidies to its own fishers to comply with such measure, it could block out fish imports. Thus, if this exception would be approved it could create a (more) unequal playing field between domestic and foreign fishers.

Table - exclusion of certain subsidies from proposed fisheries subsidies disciplines

Indonesia	<ul style="list-style-type: none"> • Subsidies for the installation of equipment for safety or for control and enforcement purposes • Subsidies for equipment fitted for the purpose of reducing environmentally harmful emissions
Argentina et al.	<ul style="list-style-type: none"> • Except for disciplines for IUU fishing, subsidies limited to the relief of a particular natural disaster, provided that the subsidies are directly related to the effects of the disaster, are limited to the affected geographic area, are time-limited, and in the case of reconstruction subsidies, only restore the affected area, the affected fishery, and/or the affected fleet to its pre-disaster state, up to a sustainable level of fishing capacity as established through a science-based assessment of the post-disaster status of the fishery
EU	<ul style="list-style-type: none"> • Subsidies to fuel de-taxation schemes • Subsidies compensating for damage caused by natural disasters <p>Illustrative list of subsidies ‘that do not negatively impact targeted fish stocks that are in an overfished condition’:</p> <ul style="list-style-type: none"> • Subsidies that improve fishery management systems and thus promote sustainable fisheries including subsidies for research and development activities • Subsidies that improve hygiene, health, safety and working conditions for fishers • Subsidies aiming at improving the concerned Party’s capacity to fight against IUU fishing • Subsidies for permanent cessation of fishing activities provided that fishers concerned effectively cease all fishing activities within a reasonable timeframe after receiving the subsidy concerned
ACP Group	<ul style="list-style-type: none"> • Subsidies for disaster relief or safety • Subsidies for research and development • Subsidies for sustainability of stocks, • Subsidies for the acquisition and installation of equipment for vessel and crew safety, • Subsidies for the adoption of techniques or technology aimed at reducing the environmental impact of wild marine capture (such as by catch reduction or turtle excluder devices) or for improving compliance with fisheries management regimes aimed at sustainable use and conservation (such as devices for vessel monitoring

¹⁰² See e.g. ‘WTO-consistent trade-related measures to address IUU fishing – developing country issues’, Ruangrai Tokrisna, Faculty of Economics, Kasetsart University, Bangkok, Thailand, <http://www.fao.org/docrep/005/Y3274E/y3274e0j.htm>

	systems); and for increasing resilience or reducing vulnerability to climate change.
LDC Group	<ul style="list-style-type: none"> • Subsidies for installation of equipment for vessel and crew safety • Subsidies for adoption of techniques aimed at sustainable use and conservation such as devices for vessel monitoring systems

Source: WTO submissions (see overview table at the beginning of this Section for references)

What types of subsidies to prohibit?

From the 2005 Hong Kong Ministerial Declaration to SDG 14.6, the aim of the WTO fisheries negotiations has been to ‘prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing’. There has been a real challenge to come to any agreement on which type of subsidies should be prohibited. The issue of ‘illegal, unregulated and reported’ (IUU) fishing has gained prominence more recently.

As shown in Section C above, subsidies for fuel, fisheries management, ports and harbours, fleet modernization, R&D and marketing/storage, vessel buyback and fisher assistance are major subsidy categories (in order of global significance).

Subsidies to promote fishery resource conservation and management, for ports and harbours, R&D as well as marketing/storage do not (always) appear to be ‘fishing’ subsidies (see discussion on definition of ‘fishing’ above). However some of these subsidies might be considered subsidies in connection with fishing-related activities (New Zealand et al.).¹⁰³

Based on their relative importance and the definition of ‘fishing’, it would appear that subsidies for fuel, fleet modernization, vessel buyback and fisher assistance are the most relevant fisheries subsidies to address globally.

WTO Members are now discussing three groups of prohibitions, namely subsidies related to i) overcapacity, ii) overfishing and iii) IUU. These are discussed below.

Subsidies related to overcapacity

Some Members have proposed a general wide-ranging prohibition of ‘subsidies to capital and operating costs which contribute to overcapacity and overfishing’ (e.g ACP, LDCs). In its July 2017 submission (TN/RL/GEN/192) , the ACP Group clarified that ‘capital costs’ “may include payments for vessel construction and modernization, purchase of machines and equipment for fishing vessels (including fishing gear and engine, fish-processing machinery, fish-finding technology, refrigerators, or machine for sorting or cleaning fish), and tax exemptions”, and ‘operating costs’ ‘may include provision for fuel, ice, bait, personnel, social charges, insurance, gear, and at-sea support; or operating losses of such vessels or activities.

The EU has the most limited prohibition while the Indonesia and LDC Group’s proposals have the most expansive prohibitions. The ACP Group also proposes a relatively broad prohibition but requires that covered subsidies must ‘contribute to overfishing and overcapacity’.

¹⁰³ In the absence of a definition of ‘fishing’ in the submissions of LDCs, ACP and Indonesia, ‘subsidies to capital and operating costs which contribute to overcapacity and overfishing’ (LDCs, ACP and Indonesia), some of these subsidies might be considered fisheries subsidies (e.g. subsidies for ports and harbours).

Table - Proposed subsidy prohibition relating (mostly) to overcapacity

Proposed subsidy prohibition	Proponent
<ul style="list-style-type: none"> • Subsidies that increase the marine fishing capacity of a fishing vessel or support the acquisition of equipment that increases the ability of a fishing vessel <u>to find fish</u>; 	EU
<ul style="list-style-type: none"> • Subsidies that support the construction of fishing vessels or the importation of fishing vessels; 	
<ul style="list-style-type: none"> • Subsidies for the transfer of fishing vessels to other countries including through the creation of joint ventures with partners of those countries. 	
<ul style="list-style-type: none"> • Subsidies that increase <u>or allow to maintain</u> the marine fishing capacity of a fishing vessel <u>or a fishing fleet of vessels</u> or support the acquisition of equipment that increases <u>or maintains</u> the ability of a fishing vessel <u>or a fishing fleet of vessels</u> to find fish; 	Argentina et al.
<ul style="list-style-type: none"> • Subsidies that support the construction, <u>importation or transference</u> of fishing vessels or <u>any other form of increasing a fishing fleet of vessels</u>. 	
<ul style="list-style-type: none"> • Subsidies to fishing vessels and fishing or fishing activity for capital and operating costs, within the meaning of instruments elaborated under SCM Agreement Article 1.1, that contribute to overfishing and overcapacity 	ACP Group
<ul style="list-style-type: none"> • Subsidies for the purpose of modernization, renovation, repair or upgrading or existing fishing vessels (..) or any significant capital inputs to fishing 	Indonesia
<ul style="list-style-type: none"> • Subsidies for the purpose of fixed or variable operational costs of fishing vessels and fishing activities, including on-board processing 	
<ul style="list-style-type: none"> • Subsidies for any equipment that increases the ability of a fishing vessel <u>to fish and to find fish</u> 	LDC Group
<ul style="list-style-type: none"> • Subsidies for acquisition, construction, repair, renewal, renovation, modernization of fishing vessels 	
<ul style="list-style-type: none"> • Subsidies for operating costs including license fees or similar charges, fuel, ice, bait, personnel, social charges, insurance, at at-sea support; or operating losses of such vessels or activities 	

Source: WTO submissions (see overview table at the beginning of this Section for references)

In the case of EU, how much of subsidies would be covered? The EU's proposed prohibitions correspond largely with the OECD fisheries subsidy category of 'Transfers based on fixed capital formation'. This category is further subdivided into three subgroups: (1) support to vessel construction/purchase; (2) support to modernisation and (3) support to other fixed costs. According to OECD statistics, transfers based on fixed capital formation accounts for 1.4% (in the year 2014) to 1.8% (in the year 2015) of total OECD fisheries subsidies recorded by OECD. This implies that 98-99% of subsidies provided by OECD Members to their fisheries sector would in principle be tolerated.

Table - 'Transfers based on fixed capital formation' make up a very small share of total recorded fisheries subsidies in OECD Members

Type of subsidy recorded by OECD	Amount (USD mln)		Share of total recorded fish subsidies (%)	
	2014	2015	2014	2015
Support to vessel construction/purchase	3	2	0.05%	0.04%
Support to modernisation	70	44	1.35%	0.84%
Support to other fixed costs	22	27	0.42%	0.52%
Subtotal: Transfers based on fixed capital formation'	95	73	1.83%	1.40%
Other subsidies	5,101	4,788	98.17%	98.60%
All subsidies (As reported in OECD fisheries subsidies database)	5,196	4,861	100%	100%

Source: Calculations based on OECD Fisheries and Agriculture Statistics (Fisheries Support Estimate), https://stats.oecd.org/Index.aspx?DataSetCode=FISH_FSE#. Annex III contains a listing of the constitutive elements of the 'OECD Fisheries Support Estimate'.

Argentina et al. propose to expand on 2 prohibitions also proposed by EU. A main implication of Argentina et.al compared to EU would be a wider range of prohibited subsidies. For instance, under the European Maritime and Fisheries Fund (EMFF), start-up support for young fishermen is provided as a subsidy for up to 25% of the acquisition cost of the fishing vessel with a maximum of EUR 75,000 per fisherman.¹⁰⁴ Such support could be considered to maintain capacity and/or involve a transfer of a fishing vessel. This would not be covered by the EU's proposed subsidy disciplines, but they would be covered by Argentina et al.'s disciplines.

Another main difference could be fuel subsidies. In the case of EU, such subsidies are explicitly excluded through a footnote. In the case of Argentina et al., it can be argued that fuel subsidies are covered by the proposed subsidy prohibitions. Fuel subsidies allow fishing boats to go further afield, hence increasing potential output (i.e. capacity). Yet, Argentina et al. propose that WTO Members share information on the amount of fuel subsidies they provide to their fisheries (see section below on Transparency). This implies that fuel subsidies are in principle allowed under the Argentina et al. proposal, otherwise it would not make sense to have a notification obligation for subsidies that have already been prohibited.

The Indonesia and LDC Group proposals embody the most ambitious proposal in terms of prohibitions related to overcapacity. For instance, all subsidies that reduce the variable operational costs of fishing vessels are covered, which also covers fuel subsidies.

The EU's proposal dovetails with its Common Fisheries Policy 2014-2020.

The EU's European Maritime and Fisheries Fund (EMFF) is the main subsidy instrument under its Common Fisheries Policy for the years 2014-2020 (see section C above). The following types of subsidies are not eligible for EU funding:¹⁰⁵

¹⁰⁴ Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund (EMFF), Article 31, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.149.01.0001.01.ENG. Fisher assistance programmes could be considered a 'fishery' subsidy if such support can reasonably be expected to result in fishing (e.g. a subsidy for young fishers to buy a boat). Fisher assistance in the form of income that enables fishermen to reduce the number of fishing days i.e. so they stay on land more, is less likely to be a 'fishery' subsidy.

¹⁰⁵ Ibid., Article 11

- operations increasing the fishing capacity of a vessel or equipment increasing the ability of a vessel to find fish;
- the construction of new fishing vessels or the importation of fishing vessels;
- the temporary or permanent cessation of fishing activities, unless otherwise provided for in this Regulation;
- exploratory fishing;
- the transfer of ownership of a business;
- direct restocking, unless explicitly provided for as a conservation measure by a Union legal act or in the case of experimental restocking.

The underlined types of subsidies also feature in the EU fisheries subsidies proposal: Since the EU's fisheries fleet has a large overcapacity (see also Section C above), the EU already has unilaterally prohibited certain subsidies, and would like others to follow suit. This would make it more difficult for developing countries to develop their own commercial fisheries fleet. At the same time, the EU subjects developing countries to stringent fisheries management disciplines if they would like to provide subsidies to increase their fleet's capacity (see the section below on S&D).

Meanwhile the EU creates policy space to provide many other types of fisheries subsidies while NOT being subject to fisheries management disciplines. This might include subsidies for increasing the capacity of fishholds, temporary cessation of fishing activities, replacement or modernisation of main or ancillary engines, fishing gear, start-up support for young fishermen, or for fishing vessels retrofitted to vessels that support other fishing vessels (e.g. refuelling or transshipment ships).

There is an inequity in this that is problematic. The types of subsidies which the EU currently provides (in significant sums) can also increase fishing capacity. However, they would be legal under EU's proposed language. Other WTO Members' subsidies, especially developing countries attempting to increase fishing capacity could however run afoul of EU's proposed rules or have to be subjected to stringent fish management rules.

Subsidies related to overfishing

Most textual proposals, except Indonesia's, contain specific prohibitions for subsidies related to overfishing.¹⁰⁶

The TPP text prohibits 'subsidies for fishing that negatively affect fish stocks that are in an overfished condition' (Article 20.16.5a TPP). The WTO proposals use language along these lines, but there are variations across proposals:

Proposal	Formulation of subsidy prohibition related to overfishing
LDC Group	Subsidies to fishing vessels or fishing of fish stocks that are in an overfished condition
ACP Group	Subsidies to fishing vessels, fishing or fishing activity of targeted fish stocks that are in an overfished condition;
Argentina et al.	Subsidies for fishing that negatively affect fish stocks that are in an overfished condition 'Negatively affect' - the negative effect of such subsidies shall be determined based on the best scientific evidence available to that Member
EU	Subsidies for fishing outside the territorial sea that negatively affect targeted fish stocks that are in an overfished condition. ' Overfished condition' - As recognised as overfished by the national authorities of the Party or by the relevant Regional Fisheries Management Organisation or Arrangement. In the absence of sufficient data to make such a determination, the stock shall be presumed to be in an overfished condition.
New Zealand et al.	Subsidies in connection with fishing and fishing related activities involving fish stocks that have not been assessed or have been assessed to be in an overfished condition.

These variations raise some key questions:

Fish stocks that are in overfished condition. The general consensus appears to be that recognition of a fish stock situation is done by the national jurisdiction where the fishing is taking place or by a relevant Regional Fisheries Management Organization (RFMO), based on best scientific evidence available to them. (see e.g. LDC Group).

However, this leaves open the question of whether one Member could conduct a fish stock assessment that has to be relied upon by other Members and/or which can be used against other Members in a WTO dispute settlement case. For instance, under the current proposals it would be possible for any Member to make an assessment of the stock situation of fish species in the high seas. If such information would be public, this evidence would be available to any Member. The Argentina et. al clarifies that in the cases of straddling and highly migratory fish stocks shared among Members, the fish stock assessment shall be made pursuant to the cooperation of the Members involved.

Unassessed stocks presumed to be overfished? The EU and New Zealand et al. proposals suggest turning around the burden of proof – if a fish stock status is not known, i.e. has not been assessed, no subsidies must be provided. This would effectively reserve the right to provide fisheries subsidies to countries that have the capacity and resources to regularly implement fish stock assessments. As such this proposal would prejudice the development interests of developing countries. However, there could be merits also to this proposal if there is proper S&D including exclusion of this discipline from

¹⁰⁶ The Indonesian proposal (TN/RL/GEN/189) contains a general prohibition of 'subsidies to capital and operating costs which contribute to overcapacity and overfishing'.

fisheries active within their own EEZs. However, the EEZ differentiation has not (yet) been applied to subsidies related to overfishing (see also section above on 'differentiation between maritime zones').

'Negatively impact'. Some proponents suggest that the fishing has to 'negatively impact' an overfished stock. This implies that fishing of overfished stocks could continue, unless there is proof that the subsidy somehow negatively impacts the overfished stock. I.e. the mere fact that a vessel is fishing an overfished stock and that the operator of the vessel receives subsidies would not be enough to trigger the prohibition. In practice, this could render the prohibition without potency as it would be difficult to prove such causality. Fisheries subsidies are usually not provided to specific fish species and/or fish area, i.e. eligibility is not linked to fishing of a certain stock in a certain area. Only in specific cases could there be a link, e.g. a subsidy to purchase gear that is used only in overfished areas, or equipment to locate exactly those species that are in an overfished condition.

'Targeted' fish stocks. The EU and the ACP Group use language about prohibition of subsidies affecting the 'targeted' overfished stock. Such a qualification appears to address the concern that by-catch or unintentional catch could trigger the prohibition. Yet, more thought should be given to how this is determined, as well as the burden of proof in dispute settlement. Larger-scale fisheries are usually given licenses to catch certain fish species. In WTO dispute settlement, Members could claim that the license conditions are evidence that any catches of fish of an overfished stock were not the 'target' of a fishing activity. WTO Members that provide licenses for multi-species fisheries or licenses that do not specify the fish species to be captured could not rely on such evidence.

Subsidies to vessels, fishing (activity) and/or fishing related activities. Some textual proposals suggest prohibiting subsidies to 'fishing vessels'. A fishing vessel' is an inanimate object, an asset like a piece of land or apartment complex. They do not have a bank account to which subsidies are transferred by governments.

Most proposals prohibit subsidies for 'fishing' or fishing (related) activity'. Depending on the definition of fishing (related) activity this could cover a wide range of actors. There might be a need to clarify which actors subsidies should not be provided to, possibly with reference to 'operators'. In the Agreement on Agriculture, 'support provided in favour of agricultural producers' is disciplined. With respect to fisheries subsidies, support provided in favour of operators fishing an overfished stock' is a possible formulation. This issue is related to the scope of the fisheries subsidies disciplines, in particular the definition of 'fishing' (see above).

Liability and national enforcement of subsidy prohibition. How can the prohibition of subsidies relating to overfishing be operationalised? For instance, if an operator with 20 vessels receives subsidies, of which 1 vessel fishes an overfished stock – should all subsidies to this operator be suspended by the subsidizing Member? Or should its subsidies be reduced 'pro rata', in relation to with the number of vessels (i.e. reduction of 5%). And what would be the duration of such elimination/reduction of subsidies?

Subsidies related to IUU

In the negotiations, the prohibition of subsidies relating to IUU fishing activities appears to have some level of acceptance. Despite this, the exact operationalisation of such a prohibition would determine its effectiveness and can entail possible risks for developing countries.

Definition of IUU. Most proposals⁷⁷ refer to the definition of IUU in paragraph 3 of the FAO IUU Fishing Plan of Action (see Section A above). This does not mean that the meaning of 'IUU' is the same across all domestic laws – what is illegal in one country might not be illegal in another country. Furthermore, international obligations might differ across WTO Members as not all WTO Members are parties to the relevant international treaties. Applicable treaties also provide space for divergent domestic application of these obligations.

Prohibition of subsidies (provided) to vessels or operators engaged in IUU fishing. Most submissions propose the prohibition of subsidies provided to vessels or operators engaged in IUU fishing (ACP, Argentina et al, LDCs, Indonesia, New Zealand et al.).

The EU proposes to only prohibit subsidies provided to operators engaged in IUU fishing (not vessels). An operator 'includes any person involved in the operation, management or ownership of a fishing vessel.' A 'person' can be a natural or legal person, or both. Yet, the EU further states that 'if an operator has more than one fishing vessel, this provision will only be applicable to that fishing vessel engaged in IUU activities.' This stance would imply that an operator which engaged in IUU fishing with 1 vessel will only be penalized for subsidies provided to that vessel. In other words, effectively this appears to be a prohibition of subsidies to a vessel (rather than to an operator). This raises questions as to the operationalization of this prohibition in practice (see also previous page).

Provided vs benefiting from. The Chair's 2007 text, prohibits *inter alia*, 'subsidies the benefits of which are conferred on any vessel engaged in illegal, unreported or unregulated fishing'¹⁰⁷ Most current textual proposals suggest that subsidies 'provided to' vessels engaged in IUU are to be prohibited. 'Provided to' is more restrictive than, 'benefiting from'. Even if one specific vessel benefited from a subsidy not provided specifically to a vessel (but, for instance, to a subsidy programme supporting crew expenditures or on-land facilities), it could escape the proposed disciplines. On the other hand, Indonesia's IUU proposal is much broader in scope than the Chair's 2007 text using the phrase 'relating to IUU fishing', i.e. Members are to prohibit 'subsidies granted, in law or in fact, whether solely or as one of several other conditions, relating to illegal, unreported, and unregulated fishing'.

IUU vessel lists. Which vessels/operators would be in practice covered by an IUU subsidy prohibition? This would require sufficient proof that a particular vessel has engaged in IUU fishing. Most proposals, except Indonesia's, suggest that Members would prohibit subsidies when a vessel is listed as an IUU vessel. All proposals suggest that Members should at least rely on IUU vessel lists maintained by Regional Fisheries Management Organisations (RFMOs).

Based on publicly available information, at present, nine RFMOs maintain or share lists of vessels that have been found to carry out or support IUU fishing. A combined IUU vessel list is published online.¹⁰⁸ As of June 2017, the combined list of 9 RFMOs counted 265 IUU vessels, of which 136 were active IUU vessels. (The remainder have been scuttled (sunk), scrapped or otherwise moved to 'non-IUU' status). The RFMOs with African members that maintain IUU vessel lists are the South East

¹⁰⁷ TN/RL/W/213 of 30 November 2007, 'Draft Consolidated Chair Texts of the AD and SCM Agreements', Annex VIII, Art I.1(h)

¹⁰⁸ See <http://iuu-vessels.org/iuu/iuu/search>

Atlantic Fisheries Organisation¹⁰⁹ and the Indian Ocean Tuna Commission¹¹⁰. At present, no RFMOs covering West and Central Africa appear to compile IUU vessel lists.¹¹¹

Most of the IUU vessels have been listed by the Indian Ocean Tuna Commission (IOTC). Its 2017 IUU vessels contains 69 vessels (i.e. around half of all known IUU vessel)¹¹². Out of these 69, 17 have a known operator (i.e. around 25% of known IOTC IUU vessels). Nine vessels are (or were) operated by nationals based in Taiwan Province of China and the other 8 by Indian fishers (caught fishing in the British Indian Ocean Territory). If these IOTC-listed vessels could be regarded as representative for all RFMO IUU vessel list, at present a discipline based on RFMO IUU vessel lists would concern only 30-40 vessels that can actually be traced back to an operator based in a WTO Member.

The number of IUU vessels identified by RFMOs is very small compared to the number of active vessels. In comparison, the total number of fishing vessels in the EU was 85,000 in 2015.¹¹³ In 2014, OECD economies and non-OECD European Union Member states together boasted more than 560,000 fishing vessels.¹¹⁴ Hence relying only on RFMO IUU vessel lists would clearly not be effective. Therefore, most proposals go beyond the RFMO IUU vessels lists:

Scope of prohibition to IUU fishing activities - who determines what is an IUU vessel?

EU	Subsidizing Member or a Regional Fisheries Management Organisation (RFMO) or Regional Fisheries Management Arrangement (RFMA)
Arg et al.	<ul style="list-style-type: none"> • Regional Fisheries Management Organization (RFMO), which the Member is Party to; in accordance with the rules and procedures of that organization and; in conformity with international and domestic law of the concerned Member • Each Member in accordance to its national legislation
New Zealand et al.	Flag State, the subsidizing Member, a Regional Fisheries Management Organization or Arrangement, or a relevant international organization
ACP Group	National and RFMO IUU lists, established in accordance with due process mechanisms, may be taken into account
LDC Group	<p>i. Included in an IUU list of a Regional Fisheries Management Organisation or Arrangement or a relevant international organisation in accordance with the rules and procedures of that organisation and in conformity with principles of due process</p> <p>ii. Identified by the flag State, the subsidising Member, or the coastal State in accordance with national regulations, laws and practices</p>
TPP	Flag State or a relevant Regional Fisheries Management Organisation or Arrangement for IUU fishing in accordance with the rules and procedures of that organisation or arrangement and in conformity with international law

Note: TPP has been included for comparison purposes only. It is not a WTO proposal.

¹⁰⁹ SEAFO has Angola, Namibia and South Africa as African members. The other Contracting Parties are the EU, Korea and Norway, see <http://www.seafo.org/About/Contracting-Parties>

¹¹⁰ IOTC has Guinea, Kenya, Madagascar, Mozambique, Sierra Leone, Seychelles, Somali, South Africa, Sudan, Tanzania as African members, <http://www.iotc.org/about-iotc/structure-commission>

¹¹¹ In 2012, the 7 Member States of the Subregional Fisheries Commission (SRFC) – Cabo Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal, Sierra Leone - concluded a Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the SRFC Member States (CMA Convention). It contains commitments to take all the necessary measures to prevent, deter and eliminate IUU fishing, including through carrying out joint surveillance operations, allocating a significant proportion of fines to strengthening fisheries management, and detaining vessels that has committed fishing offences in the maritime area under jurisdiction of another Member State.

¹¹² <http://www.iotc.org/vessels>

¹¹³ <http://ec.europa.eu/eurostat/web/fisheries/data/main-tables>

¹¹⁴ https://stats.oecd.org/Index.aspx?DataSetCode=FISH_FLEET

RFMA IUU vessel lists. The EU and New Zealand et. al proposals suggest that WTO Members are also to rely on RFMA IUU vessel lists. The dividing line between an RFMO and an RFMA is not clear-cut, and there does not appear to be a precise legal definition. For example, some consider the Sub Regional Fisheries Commission (SFRC) in West Africa an RFMO¹¹⁵, others consider it an RFMA.

Some consider that the authority to adopt conservation and management measures that are binding on Members is characteristic of an RFMO.¹¹⁶

RFMA appears to be a very broad concept. According to one definition, a regional fisheries management arrangement (RFMA) is 'any form of arrangement through which States adopt conservation and management measures that does not provide for the establishment of an organization.'¹¹⁷

The European Union is a WTO Member but also a grouping of States. Thus, any (future) unilateral EU regulation that would blacklist vessels from other (non-EU) WTO Members for reasons of IUU would be covered by the proposed subsidy prohibition.

WTO Members should consider whether RFMO and RFMA should be defined, whether RFMA IUU vessel lists should be relied upon and/or whether there is a need for procedural safeguards if RFMAs were to be considered part of the IUU disciplines.

National lists. Argentina et al. and the ACP Group propose that WTO Members could also rely on nationally developed lists of IUU vessels. Prima facie this seems like a good idea.

One example, reported by the Sub-Regional Fisheries Commission (SFRC), illustrates this:¹¹⁸

- In 2009, Guinea-Bissau in its EEZ boarded the tanker Virginia G, flying the flag of Panama, after Virginia G had refuelled the trawlers Amabal I and Amabal II without authorization by the competent national authorities. It was owned by the Spanish company Penn Lila Trading.

Amabal I and Amabal II have thus been engaged in IUU fishing, as identified by Guinea Bissau. But these vessels do not appear to have been identified as IUU vessels by either RFMOs, the EU (subsidizing Member) or Panama (flag state), or at least such information is not published on-line. For instance, Amabal I and Amabal II were not listed in the EU's IUU vessel for 2010¹¹⁹ or its latest IUU vessel list (2016)¹²⁰. Panama does not appear to have a published IUU vessel list.

¹¹⁵ Regional fisheries management organizations (RFMOs) -West African region, Expert group meeting entitled "Oceans, Seas and Sustainable Development: Implementation and follow-up to Rio+20, presentation by Camille Jean Pierre MANEL, Senegal, [https://sustainabledevelopment.un.org/content/documents/1758Regional%20fisheries%20management%20organizations%20\(RFMOs\)_cjpMANEL_Senegal.pdf](https://sustainabledevelopment.un.org/content/documents/1758Regional%20fisheries%20management%20organizations%20(RFMOs)_cjpMANEL_Senegal.pdf)

¹¹⁶ FAO document COFI/2014/Inf.11, 'Regional Fishery Bodies established within the FAO framework, Committee on Fisheries, 31th Session, Rome, 9-13 June 2014, <http://www.fao.org/3/a-mk346e.pdf>

¹¹⁷ 'Regional bodies involved in the management of deep-sea fisheries', <http://www.fao.org/in-action/vulnerable-marine-ecosystems/background/regional-fishery-bodies/en/>

¹¹⁸ Request for an advisory opinion to the International Tribunal for the Law of the Sea - ITLOS Written Statement Version 2, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round2/21_II-6_CSRP2.pdf

¹¹⁹ Commission Regulation (EU) No 468/2010 of 28 May 2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0468&from=EN>

¹²⁰ Commission Implementing Regulation (EU) 2016/1852 of 19 October 2016 amending Regulation (EU) No 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1852&from=EN>

However, national lists could also create challenges if a Member decides without due process or sufficient evidence to put another country's vessel on their own national list –which would imply that no (prohibited) subsidies could be provided to these vessels or to their operators.

According to Article 9.4 of the Port State Measures Agreement, in order to deny a vessel's entry into its ports, Parties are required to have 'sufficient proof that a vessel has engaged in IUU fishing or fishing related activities'. A similar test might be built into the IUU fisheries subsidies disciplines, in order to address these concerns while increasing the effectiveness of the IUU fisheries subsidies disciplines.

Broadening the scope of IUU fisheries subsidies disciplines. Several suggestions are made by Members to broaden the scope to activities considered by them as 'IUU' or related to 'IUU'.

(a) Prohibition of subsidies to fishing for fish stocks managed by an RFMO/RFMA where the subsidizing Member is not an RFMO/RFMA Member

As part of the IUU fisheries subsidy prohibition, New Zealand et al. also propose a broad prohibition for subsidies 'to fishing for fish stocks managed by a Regional Fisheries Management Organization or Arrangement where the subsidizing Member or vessel flag State is not a Member of the organization or arrangement.'

The activity of fishing in an area/species covered by an RFMO without being party to that RFMO in a manner that contravenes the conservation and management measures of that RFMO is already considered "Unregulated fishing" under paragraph 3 of the IPoA-IUU. The additional elements proposed by New Zealand et al would be (1) to include Regional Fisheries Management Arrangements and (2) to prohibit subsidies by non-parties to an RFMO/RFMA to fishing activities in that RFMO/RFMA area, even if this non-party does NOT contravene the applicable conservation and management measures of a relevant RFMO/RFMA. While not defined as IUU under paragraph 3 of the IPoA-IUU, New Zealand et al. appear to consider that there is a presumption of IUU if a non-party to an RFMO/ RFMA fishes in an RFMO/RFMA area.

This raises interesting questions if this were to apply to EEZs, in particular in the case of access agreements. For instance, the EU-Mauritania fisheries agreement allows the EU to fish in the EEZ of Mauritania under the terms of the access agreement which includes conservation and management measures. However, EU is not a Member of the SRFC, which covers 7 West-African EEZs including that of Mauritania. The suggestion by New Zealand et al. would imply a prohibition to ALL subsidies to fishing in Mauritania for the EU, unless EU would become a party to SRFC i.e. creating an incentive for EU to join SRFC. This might eventually lead to stronger bargaining power (the SRFC could set conditions for membership including on the type of subsidies that EU should or should not provide, and eventually the West African states might negotiate access agreements as a regional bloc). However, it might also lead to tensions in terms of sovereignty and West African countries' space to regulate in their own EEZs.

If this prohibition of subsidies would apply to the high seas only, the implications would depend on the composition of parties to an RFMO and the conditions for entry for late-comers, especially those that have an EEZ adjacent to the high seas covered by the RFMO. Take for instance the Southern Indian Ocean Fisheries Agreement (SIOFA)¹²¹ which entered into force on June 2012, roughly covering the high seas in the triangle between Mozambique, Somalia and Australia – an area of high interest to

¹²¹ <http://www.siofa.org/>



Southern and Eastern Africa. Parties to SIOFA include Australia, the Cook Islands, EU, France, Japan, Republic of Korea, Mauritius and the Seychelles. Comoros, Kenya, Madagascar, Mozambique and New Zealand are also signatories to this Agreement but have not yet ratified it. The New Zealand et al. proposal would effectively imply that SIOFA Parties' ability to subsidize in the SIOFA is safeguarded (including distant water nations such as Japan, Republic of Korea as well as New Zealand after ratification) while non-Parties to SIOFA would not be allowed to provide subsidies to fishing activities in the high seas. This would include Tanzania and Somalia which are adjacent to the SOFIA area (unless they would become Parties to this arrangement).

(b) Transshipments

Transshipping is the transfer of cargo, fuel, provisions, crew, gear or fish catch from one vessel to another, and can take place at the port or at sea. While transshipping is a common global practice and is often legal (depending on the EEZ, flag state or region), it can also hide IUU fishing. Transshipping often takes place between a fishing vessel and a refrigerated cargo vessel. A refrigerated cargo vessel can rendezvous with multiple fishing vessels, combining each vessel's catch in large refrigerated holds for storage before landing the accumulated catch in port. This practice can facilitate illegal fish laundering, where illegally caught fish is mixed with legally caught fish and then sold as such. Also catches contained in cargo containers are not necessarily inspected as closely as fish in holds of fisheries vessels, leading to unregulated fishing.¹²²

For this reason, LDCs have suggested that subsidies to illegal transshipment should be prohibited too – i.e. such a prohibition would include subsidies to refrigerated cargo vessels (which in themselves are not engaged in IUU fishing) but they assist vessels that engage in IUU fishing. In the same vein, subsidies to refuelling tankers could also be prohibited as they might support IUU fishing as well (see the example from Guinea Bissau discussed before).

'Illegal' transshipment could in principle be covered by a prohibition of subsidies to IUU. The EU has suggested that 'transshipment' should be part of the definition of 'fishing'. If so, subsidies to transshipment vessels would in principle be considered fisheries subsidies. However the subsidy prohibition would only be triggered if such vessels would end up on IUU vessel lists. Hence, the LDC Group has proposed a separate, self-standing prohibition of subsidies provided to vessels or operators engaged in illegal fish transshipment at sea.

(c) Flags of Convenience

Indonesia suggests the prohibition of subsidies to vessels flying Flags of Convenience, i.e. to vessels not flying the flag of the subsidizing Member. Flags of Convenience have strong links with IUU fishing (see Section A above).

For some developing countries (e.g. Liberia, Panama) this could result in a loss of income if such measures would lead to a reduction of the number of registered vessels. Nonetheless, such concerns could be addressed *inter alia* through a more strict definition of flag of convenience or an exception from the rule for vessels already registered under a flag of convenience of a developing country.

(d) Other Issues

¹²² 'No More Hiding at Sea: Transshipping Exposed', Oceana, 22 February 2017, https://usa.oceana.org/sites/default/files/oceana_transshipping_exposed_report_final_0.pdf

No discipline on subsidies which have already been provided to vessels engaged in IUU. None of the proposals contain provisions on what should be done with subsidies already received by operators or vessels before they were found to be engaged in IUU fishing. E.g. a subsidy may have been provided in the past (e.g. vessel construction) and there may not be on-going support. So if such a vessel engages in IUU fishing, the proposed IUU fisheries subsidies disciplines would have no effect whatsoever. A requirement for a refund would provide a disincentive for operators and vessels to engage in IUU fishing in the first place.

Destructive fishing practices. The UN Oceans Conference calls for an end to 'destructive fishing practices and illegal, unreported and unregulated fishing' (para 13d of the outcome document). While IUU has been discussed, the issue of 'destructive fishing practices' has been relatively left untouched so far in WTO fisheries negotiations, despite the fact that there are clear links between destructive fishing practices and overfishing and/or IUU. For instance, bottom trawling – dragging a fish net along the sea floor – is such a practice. Scientists and NGOs have called for a ban on bottom trawling.¹²³ There might be a need to explore disciplines for subsidies to vessels employing this fishing method as this contributes to overfishing/IUU.

Other measures to bolster the effectiveness of IUU subsidy disciplines could be a requirement to publish regularly IUU vessel lists in order to enable governments and traders to become acquainted with them, and/or to inform WTO Members where such lists are published. Another commitment could be (consideration of) inclusion of vessels identified by other WTO Members as IUU vessels in the IUU vessel lists maintained by the flag state (Panama in the example of Guinea-Bissau) as well as the Member where the operator resides (Spain or EU in the example of Guinea-Bissau), based on sufficient evidence.

Special and Differential Treatment (S&D)

Rationale for S&D. The main reasons for S&D are to protect the fishing activities by artisanal fisheries which are a major supplier of employment, income and food in many developing countries (see also Section A above), as well as to provide policy space for future development of the fisheries sector in developing countries.

Types of S&D. Special and differential treatment comes in various forms:

- Exclusion from disciplines, either unconditional or based on fulfilling certain requirements
- Technical assistance and capacity building
- Transitional arrangements, e.g. transitional period for implementation or
- Peace clause protecting countries from being brought to dispute settlement.

The strongest and most effective form of S&D is partial or complete exclusion from disciplines.

S&D for artisanal/small-scale fisheries in developing countries

Various proposals suggest exemption from the disciplines for artisanal / small-scale scale/subsistence fisheries. A challenge has been to define 'artisanal' or small-scale' fisheries. The table below provides an overview:

¹²³ 'Scientists call for destructive seabed trawling to be banned', Independent, 21 January 2015, <http://www.independent.co.uk/environment/scientists-call-for-destructive-seabed-trawling-to-be-banned-9993788.html>. 'Trawling: destructive fishing method is turning seafloors to 'deserts'', Mongabay, 28 May 2014, <https://news.mongabay.com/2014/05/trawling-destructive-fishing-method-is-turning-seafloors-to-deserts/>



Proposed definition of artisanal/small-scale fisheries in recent submissions

Member(s)	Definition
Indonesia	<ul style="list-style-type: none"> Boat length below 24 meters Operating within the Member's EEZ (S&D is conditional on other conditions)
Argentina et al.	<ul style="list-style-type: none"> Domestic fisheries in waters under national jurisdiction of a Member Small-scale artisanal fishers should be interpreted and applied in accordance with national legal systems of the Member concerned, taking into account the "Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication" of the FAO (the SSF Guidelines).
EU	<ul style="list-style-type: none"> Subsidies granted or maintained by developing and LDCs which are used for subsistence fishing <p>The term "subsistence fishing" refers to fishing activities undertaken by an individual household for consumption by the members of that household and kin of the fishers as opposed to fishing activities undertaken for commercial purposes. Nevertheless, part of the fish caught can be sold or exchanged for other goods or services.</p> <p>(S&D is conditional on other conditions)</p>

Subsistence fishing

The EU has a very limited definition of what is 'small' – it only contemplates S&D for subsistence fishing. Effectively this definition excludes most fishing activities even in LDCs. For instance, according to Gambia's Diagnostic Trade Integration Study (DTIS), 'artisanal fishing for pelagics (such as shad, sardinella, anchovies) in coastal waters and the river is thriving. Most of the catch is destined for the home and regional markets in dried or smoked form'.¹²⁴ I.e. in reality subsistence fishers undertake fishing activity for commercial purposes and actually sell beyond their own kin.

Vessel length

During the course of the negotiations, vessel length featured as an indicator of the small-scale fisheries sector. EU's original proposal suggested a boat length of 10 meters as a yardstick to differentiate between small(er) scale fisheries (which need S&D) and those that are not. Indonesia put it at 24 meters, the vessel length used by the Indian Ocean Tuna Commission to differentiate commitments. The 24 meter-bench mark is also used in the FAO Compliance Agreement (see Section B above).

Boat length appears to be a bit arbitrary. Fish engine capacity, tonnage, fishhold capacity could be other variables. In any case, a globally harmonized vessel length cannot be determinative of the definition of 'artisanal' or 'small-scale' fisheries. First, vessel lengths of artisanal fishermen can be longer than the 10 meters proposed by the EU. Hence the EU proposal by limiting the boat size to 10 metres is effectively excluding the majority of small scale fisheries from the carve out, thus defeating the very purpose of such a provision.¹²⁵

¹²⁴ The Gambia - From Entrepôt to Exporter and Eco-tourism, Diagnostic Trade Integration Study for the Integrated Framework for Trade-related Technical Assistance to Least Developed Countries, July, 2007, para 55, http://www.enhancedif.org/en/system/files/uploads/gambia_dtis_final_july07.pdf

¹²⁵ Based on prior submissions such as the one made jointly by India, Indonesia and China (TN/RL/GEN/155/Rev.1) dated 19 May, 2008, it is clear that most of the small and traditional vessels in the aforesaid countries are either up to or about 20 metres in length.

Secondly, the EU itself has used different measures to differentiate between ‘small’ and ‘big’ fisheries. In its own Common Fisheries Policy, it uses a combination of tonnage and engine capacity which might be better indicators than only the length of a fishing vessel. But in cases where it has used vessel length, it has used 24 meters as a benchmark. For instance, under the European Fisheries Fund 2007-2013, subsidies for the replacement of the engine of a vessel could only be provided to vessels longer than 24 meters if the new engine had at least 20% less power than the old one, and the vessel was subject to a rescue and restructuring plan. Vessels up to 24 meters did not have these conditions.¹²⁶ Thus if a choice would need to be made between a boat length of 10 or 24 meters as the determining factor between ‘small’ and ‘big’, 24 meters appears to have some merit.

Small-scale to be determined by national legislation

Argentina et al. propose that ‘small-scale’ should be determined on the basis of national legislation, taking into account the FAO Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication.¹²⁷ Paragraph 2.4 states that ‘These Guidelines recognize the great diversity of small-scale fisheries and that there is no single, agreed definition of the subsector. Accordingly, the Guidelines do not prescribe a standard definition of small-scale fisheries nor do they prescribe how the Guidelines should be applied in a national context.’ The LDC Group advocates a similar approach.

Article 6.2 of the Agreement on Agriculture follows a similar approach to that taken by Argentina et al. in the fisheries negotiations. In the area of agriculture, developing countries can provide input subsidies to ‘low income or resource poor farmers’, a concept that is not defined by the Agreement on Agriculture but which has been interpreted by WTO Members themselves.

Carve out of small-scale fisheries: enough policy space for future development of fisheries sector?

Yet, even if there would be eventually some consensus about what is ‘small-scale’, it does not provide policy space for the future development of the fisheries sector. This is problematic especially for countries that have no commercial fleets or when they have underfished stocks.

Hence, the ACP in its 2016 submission takes a country-level approach – S&D in the form of exemption from disciplines is based on country-status, namely LDCs or SVEs. This approach is in consonance with the 2011 proposal by SVEs to carve out WTO Members with a share world NAMA trade of less than 0.1% and whose percentage share of global marine wild capture is not more than 1 %.¹²⁸

S&D linked to fisheries management?

EU and Indonesia have proposed several conditions for developing countries to use prohibited subsidies (for their ‘small-scale’ fisheries only as defined under their respective proposals), mostly related to fisheries management.

In the case of EU, a developing country has to fulfil the following requirements:

¹²⁶ Council Regulation (EC) No 1198/2006 of 27 July 2006 on the European Fisheries Fund (EFF), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006R1198>

¹²⁷ FAO Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication, 2015, <http://www.fao.org/3/a-i4356e.pdf>

¹²⁸ TN/RL/GEN/162/Rev.1 of 20 April 2011

- The vessel benefitting from the subsidy does not target fish stocks that are in an overfished condition; and unassessed stocks are presumed to be overfished.
- Targeted fish stock is managed on the basis of the best available science to the Member, consistent with relevant international laws, and generally accepted standards.
- Fishing capacity management plan applied to the fleet to which the vessels benefitting from the subsidy belong.

These cumulative conditions are onerous for developing countries:

(1) Fish stock assessments of the various fish species would need to have been undertaken by the relevant national authorities or RFMOs, prior to the provision of the subsidies. It may be impossible to meet this requirement from a practical perspective given that stock assessment of fish species can take up to 10 years and is further complicated by capacity-related constraints in light of factors such as the number of fish species found in different geographical regions (i.e. greater number of species inhabit tropical waters).

(2) Members would have to comply with 'relevant international law' and 'generally acceptable standards'. 'Relevant international law' includes, amongst others, the UNCLOS, UN Fish Stock Agreement, FAO Compliance Agreement, the FAO Port State Measures Agreement, and the FAO Code of Conduct for Responsible Fisheries. Many of these instruments are voluntary in nature, and with respect to binding instruments, not all developing countries are Parties to (all of) these. 'Generally acceptable standards' are not defined by the EU's submission. Bringing these instruments into the ambit of the WTO dispute settlement could have unintended consequences.

Indonesia's proposal puts additional conditions for developing countries to make use of subsidies for purposes of modernization, renovation, repair or upgrading or existing fishing vessels or any significant capital inputs to fishing. In addition to the EU's proposal on a fishery management plan that does not contribute to overfishing, developing countries would have to show that their subsidies to artisanal fisheries do not cause adverse effect on the fishery resources of other Members. They also require members to establish 'a control mechanism' (which is not defined) on fisheries subsidies to avoid overfishing and overcapacity. Indonesia's proposal does not incorporate references to 'relevant international law' or 'generally acceptable practices' however.

The logic behind this link between subsidies and fisheries management for developing countries seems to imply that developing countries cannot be trusted to have good fisheries management and should prove themselves 'innocent' before they can provide certain fisheries subsidies. However, commitments to fish sustainably and have good fisheries management practices should in the first instance apply to Members that contributed most to global fisheries overcapacity and overfishing, and/or to those that take out most of the fish from the oceans.



Prohibited subsidies and conditions for developing countries to use prohibited subsidies: EU and Indonesia proposal.

EU

Type of subsidies	S&D for developing countries	Conditions to make use of S&D
<ul style="list-style-type: none"> Subsidies that increase the marine fishing capacity of a fishing vessel or support the acquisition of equipment that increases the ability of a fishing vessel to find fish; Subsidies that support the construction of fishing vessels or the importation of fishing vessels; and Subsidies for the transfer of fishing vessels to other countries including through the creation of joint ventures with partners of those countries. 	Subsidies for fishing vessels which are used for subsistence fishing.	<ul style="list-style-type: none"> Stock(s) targeted for fishing is not overfished as recognized by Member or relevant RFMO (Unassessed stocks are presumed to be in an overfished condition) Targeted fish stock is managed on the basis of the best available science to the Member, consistent with relevant international law, <u>and</u> generally accepted standards Fishing capacity management plan

Indonesia

Type of subsidies	S&D for developing countries	Conditions to make use of S&D
Subsidies for the purpose of fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel, or bait, or ice.	Subsidies for small scale fisheries (defined as boat length below 24 meters) that operate within the Member's EEZ	<ul style="list-style-type: none"> Fishery management plan that is effectively monitored and adequately enforced; No adverse effect on fishery resources governed by the fisheries management plan; No adverse effect on fishery resources of other members ; and Control mechanism on fisheries subsidies to avoid overfishing and overcapacity.
	Fisheries in the Member's own EEZ or rights held by Members in high seas fishing quota or any other right established by a RFMO or RFMA	<ul style="list-style-type: none"> Underexploited resources in Member's EEZ, or Right to high seas fishing quotas or extra quota in RFMO

In fact, most of EU's fisheries fleet rely on overfished stocks according to data from the European Commission Joint Research Centre (JRC). Furthermore, the European Court of Auditors (ECA) concluded that the EU's fisheries regime has certain weaknesses to safeguard the sustainability in the long-term of fish stocks and the fishing sector (see Section C above). These proposals run the risk of having higher standards for developing countries even as EU's fisheries subsidy regime is contributing to maintaining the current situation.

What would be a proper role of fisheries management in WTO fisheries disciplines? This is a very difficult question that Members have been trying to grapple with.

It would be difficult to agree to common fisheries management rules in the WTO. In any case, the WTO is not a fisheries management organisation. Applicable fisheries management rules are guided by multilateral UN instruments, and implemented regionally in RFMOs as well as bilaterally in fisheries access agreements.

A couple of observations:

- i) developing countries should not favour linking S&D to fisheries management (e.g. EU; Indonesia proposals). This would mean only developing countries are subjected to fisheries management oversight, not developed countries. This would not be fair. As noted above, even the EU does not live up to its own fisheries management objectives.
- ii) developing countries in their own EEZs should not be subjected to fisheries management rules at the WTO. WTO Members should in principle be free to exploit their own EEZs. Compliance with national management plans and/or the relevant instruments to which they are Parties should be a domestic concern. Foreign vessels can be subjected to these disciplines.

Which subsidy prohibitions would be applied by all Members, including developing countries? (i.e. issue areas for which there would be no S&D)

Several submissions make pronouncements of areas where S&D should NOT apply, or do this implicitly by leaving out certain prohibited subsidies from the scope of the proposed S&D provision.

The New Zealand et al. and ACP elements paper are at opposite ends of the spectrum. New Zealand et al. does not consider any exception from subsidy prohibitions. ACP considers that S&D is necessary for all subsidy prohibitions, except for non-LDCs for subsidies related to overfishing.

Table - issue areas with no S&D

Submission	No exceptions for the following disciplines:
New Zealand et al.	All prohibitions should apply equally to all subsidies from all Members (no exceptions)
Indonesia	Subsidies related to IUU, subsidies to fishing vessels flying flags of convenience, other prohibited subsidies not listed under the S&D provision ¹²⁹
LDC Group	Subsidies related to overfishing, IUU and subsidies to vessels or operators engaged in illegal fish transshipment at sea
EU	Subsidies related to IUU, transparency obligations
Argentina et al.	Subsidies related to IUU, transparency obligations (transitional implementation period for developing countries and LDCs)
ACP Group	Non-LDCs: Subsidies related to overfishing

While Indonesia proposes S&D provisions (subject to either stringent fisheries management disciplines or proof that its resources in its EEZ are underexploited, see above), certain prohibition of subsidies would have to be applied by all WTO Members. These include subsidies related to IUU and subsidies to fishing vessels flying flags of convenience. In addition, certain types of subsidies are not covered by the proposed S&D provision and would fall under the scope of Indonesia's proposed broad prohibitions *inter alia* subsidies to any significant capital inputs to fishing; subsidies for the

¹²⁹ S&D for subsidies for the purpose of fishing vessel construction, repair, or modernization, or gear acquisition or improvement, or fuel, or bait, or ice. Other subsidies would be covered under Indonesia's proposed broad prohibitions

purpose of fixed or variable operational costs of fishing vessels and fishing activities; and subsidies which contribute to overcapacity and overfishing. Examples would include subsidies for engines or subsidies to equipment on-board (e.g. processing facilities).

A common dominator appears to be the prohibition of subsidies related to IUU. The ACP Group proposal only contemplates an additional transition period in the case of prohibiting subsidies related to IUU – this may not be adequate. The right to have effective S&D including exceptions should be reserved for all areas.

TFA model?

In 2016, Argentina et al. suggested a Trade Facilitation Agreement (TFA) type approach to the multilateral disciplines on fisheries subsidies, in which commitments would be categorized by each Member as follows:

- Category A: To be implemented by the time the Agreement enters into force
- Category B: To be implemented after a transitional period following the entry into force of the Agreement
- Category C: Capacity building and capacity is attained before implementation.

It is unclear how a TFA type approach would work in the area of fisheries subsidies. In the case of the TFA, there is a range of positive obligations (e.g. establish a single window). If a commitment is put in Category C the idea is that this commitment would be binding if implementation capacity is reached (e.g. the establishment of a single window) through technical assistance and capacity building. While not always easy in practice, it is possible to determine when implementation capacity is reached for certain TFA commitments.

In the case of fisheries subsidies, the core of the disciplines would be negative obligations (e.g. do not provide fisheries subsidies to IUU vessels). There would have to be many aspects to this before this obligation can be achieved over the long-term. This includes reliable on-going assessment of fish stocks, good fisheries management of national waters, good enforcement mechanisms (e.g. surveillance vessels to collect evidence on IUU fishing activities in waters under national jurisdiction), good catch data including of small fisheries. All of this should be undertaken. If this were a Category C commitment, such support could go on indefinitely as it is very difficult to attain implementation capacity (especially for countries with large coastal areas), and also to ascertain when implementation capacity has been achieved.

Nonetheless, the Argentina et al. proposal itself suggest that all commitments would be essentially transitional periods, including those put in Category C: “ To benefit from SDT, a member must categorize each provision of the Agreement (Categories A, B and C), and notify other WTO members of these categorizations in accordance with specific timelines outlined in the Agreement.”¹³⁰

In their 2017 textual proposal, Argentina et al. did not further develop the idea of the TFA model, and proposed an S&D for small-scale artisanal fisheries. This is likely to mean that they themselves have seen the lack of feasibility of the TFA model.

¹³⁰ TN/RL/GEN/183 of 29 November 2016, paragraph 2.3

Standstill

Some submissions propose a standstill.

The idea of a standstill is problematic for developing countries. From a conceptual viewpoint this implies that countries that currently are large subsidizers can continue to provide large subsidies and those that do not currently subsidize, cannot subsidize in the future.

The LDC Group proposal (TN/RL/GEN/193) posits that “No Member shall extend the scope of a programme inconsistent with this Agreement, nor shall such a programme be renewed upon its expiry”. Since the LDC Group proposed rather broad prohibitions, the impact of this provision might be significant. Furthermore, LDCs might be impacted themselves as the relationship between this provision and the exemption from the prohibition to provide certain subsidies (despite being prohibited for non-LDCs) is not clear.

Transparency

Most proposals touch upon transparency (except Indonesia’s).

Which fisheries subsidies should be notified? Argentina et al. do not enlarge the scope of subsidies that should be notified to the WTO. In the event a fisheries subsidy has to be notified in accordance with current rules, they propose that Members provide more information about these subsidies (compared with other subsidies that have to be notified).

New Zealand et al. suggest the same, but in addition they propose that Members also notify other fisheries subsidies, in particular fuel subsidies. Depending on the design of the subsidy programme, fuel subsidies could be considered ‘non-specific’ subsidies (i.e. the subsidies are not specifically targeted to the fisheries sector) and are currently not disciplined by the Agreement on Subsidies and Countervailing Measures.

The EU suggests a notification obligation for ‘all subsidies that support, directly or indirectly, marine fishing activity’. Yet notification should be ‘in accordance with Article XVI:1 of GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures (ASCM)’ – it is not exactly clear to what extent this suggestion constitutes an additional obligation compared with the current ASCM.

Which information should be notified? Under the current rules, Article 25 of the Agreement on Subsidies and Countervailing Measures (ASCM) on notifications requires that the following information is provided by Members:¹³¹

- Title of the subsidy programme, if relevant, or brief description or identification of the subsidy
- Period covered by the notification
- Policy objective and/or purpose of the subsidy
- Background and authority for the subsidy
- Form of the subsidy (i.e., grant, loan, tax concession, etc.)
- To whom and how the subsidy is provided (e.g. to producers, to exporters, or others)
- Subsidy per unit, or total amount or the annual amount budgeted for that subsidy
- Duration of the subsidy, including date of inception/commencement
- Statistical data permitting an assessment of the trade effects of the subsidy. The specific nature and scope of such statistics is left to the judgement of the notifying Member.

¹³¹ G/SCM/6/Rev.1 of 11 November 2003, ‘Questionnaire Format for Subsidy Notifications under Article 25 of the Agreement on Subsidies and Countervailing Measures And Under Article XVI of GATT 1994’ (Revision).



Table - Proposed information elements for notifications of fisheries subsidies

Information element (mentioned in fisheries subsidies proposal)	Arg et al.	NZ et al.	TPP	LDC	EU
<i>Programme name</i>	✓	✓	✓	✓	✓
<i>Legal authority for the programme/ legal basis for the programme</i>	✓	✓	✓	✓	✓
Kind of subsidies provided / type or kind of marine fishing activity supported by the programme	✓			✓	✓
<i>Amounts granted / level of support provided</i>	✓			✓	✓
<i>Status of the fish stock for which the subsidy is provided / status of fish stock targeted by the vessel benefitting from the subsidy</i>	✓	✓	✓		✓
<i>Conservation & management measures in place for relevant fish stock</i>	✓	✓	✓	✓	✓
Fuel subsidies	✓	✓	✓		
Fleet capacity in the fishery for which the subsidy is provided	✓	✓	✓	✓	
Fishing capacity management plan					✓
Vessels and operators fishing in areas beyond national jurisdiction, for which the subsidy is provided;	✓				
Catch data by species in the fishery for which the subsidy is provided	✓	✓	✓		
Total imports/export per species		✓	✓		

The additional elements suggested by Argentina et al. and New Zealand et al. are similar to those mentioned in TPP. Argentina et. al do not propose mandatory submission of trade data (something that is currently left to the judgment of the WTO Member).

The original EU proposal contained relatively few elements, and appeared to have taken a cue from the current notification format for agricultural subsidies classified as Green Box. However in its revised proposal (TN/RL/GEN/181/Rev.1), it has added, "Parties shall also endeavour to include the following in the notification: (a) the status of the fish stock targeted by the vessel benefitting from the subsidy (..), (b) any conservation and management measures applied to the fish stock targeted by the vessel benefitting from the subsidy; and (c) any fishing capacity management plan applied to the fleet to which the vessels benefitting from the subsidy belong."

Eligibility to receive fisheries subsidies is not necessarily linked to species or type of vessel (capacity). Therefore linking information on fleet capacity, catch data, fish stock status and conservation/management measures to notifications of specific subsidy programmes appears to be an indirect way of obtaining information on the level of a WTO Member's entire fleet capacity, all its catches by species, and the situation of all fish stocks where the Member operates.

Some of the information to be included into WTO notifications according to the proposals, has to be shared already among UN Members in accordance with Article 61.5 of UNCLOS: "Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations (..)". FAO is the organization that receives and compiles this information at international level, and RFMOs at the regional level.



“Catch and fishing effort¹³² statistics, and other data relevant to the conservation of fish stocks” would cover catch data, fish stock status, applicable conservation and management measures and fleet capacity management plans. WTO does not appear to be the primary competent organization to receive this information.

Exchange of information on fleet capacity is dealt with in the FAO Compliance Agreement. Paragraph 2 of Article VI (Exchange of Information): “Each Party shall, to the extent practicable, make available to FAO the following additional information with respect to each fishing vessel entered in the record required to be maintained under Article IV: (a) name and address of operator (manager) or operators (managers) (if any); (b) type of fishing method or methods; (c) moulded depth; (d) beam; (e) gross register tonnage; (f) power of main engine or engines”¹³³ This obligation primarily applies for ships measuring 24 meters or more in length.

With 40 Parties, the FAO Compliance Agreement is less universal than the UNCLOS¹³⁴. In general, data on global fleet capacity is sketchier than, for example, on global fish catches. FAO does not appear to have a comprehensive global database on fleet capacity, like it has on global fish catches.

The suggestion to notify fleet capacity has been made by multiple Members. There is a rationale for enhanced transparency on fleet capacities for fisheries subsidies disciplines related to overcapacity. Information on fleet capacity is not mentioned in Article 61 of UNCLOS. Such information should be already available domestically (although even the EU has challenges with obtaining and verifying such data from its Member States, according to the European Court of Auditors), but globally there is no unified way of reporting on it (e.g. vessel tonnages, engine power). It would be economical to have such an obligation for the largest fishing nations. Yet, the question remains whether WTO is the right body to act as the repository of this information.

Who should give additional information? The LDCs (TN/RL/GEN/184) note that “any additional requirements on transparency and notification should remain proportional to the global objective and should not be burdensome for LDCs.” Likewise, ACP states argue that notification requirements shall not be burdensome on developing countries with capacity constraints.

Enhanced notification and transparency obligations should in principle apply to the major fishing powers, as they are the main cause of overcapacity and overfishing. Such obligations should not apply developing countries with a small share in global fish captures.

¹³² Fishing effort refers to ‘The amount of fishing gear of a specific type used on the fishing grounds over a given unit of time e.g. hours trawled per day, number of hooks set per day or number of hauls of a beach seine per day’, see <http://www.fao.org/fishery/cwp/handbook/N/en>

¹³³ Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas, http://www.fao.org/fileadmin/user_upload/legal/docs/012t-e.pdf

¹³⁴ <https://treaties.un.org/pages/showDetails.aspx?objid=080000028007be1a>

F. CONCLUSIONS AND KEY ISSUES FOR CONSIDERATION IN THE FISHERIES SUBSIDIES NEGOTIATIONS

The issue of sustainable fisheries and how to deal with overfishing, over exploitation, IUU fishing is very complex. There are many policy areas that are interlinked, and most of these issues are dealt with in the UN system, outside the WTO.

There is a push by a number of countries to have an outcome on fisheries subsidies by MC11. The question is whether and to what extent the proposed disciplines would contribute to solving the problem of overfishing.

A problem with a uniform set of multilateral rules is that they are likely to be too weak to truly discipline those Members with industrial fishing capacities and who largely aim to continue the status quo, and too strong for Members with small fishing capacities. Care must be taken to have a different outcome than what has happened in the Agriculture domestic supports situation – where subsidisers continue to subsidise under different programmes (albeit still trade-distorting), but those who did not are locked into being able to provide still small amounts of subsidies (at a per farmer level). If we are to have these fisheries subsidies rules and they are to be supportive of developing countries with small fishing capacities compared to the big players, effective Special and Differential Treatment must be an integral part of the deliverable.

If no outcome materialises, it may not also be so negative. This does not mean that efforts in relation to fish stock depletion should slack. There are already a multiplicity of governance mechanisms for fish, and international resources and political will should be directed at, inter alia,

- improving and having coherence in this web of governance instruments
- closing the gaps (e.g. forming RFMOs where they do not exist or strengthening those that do exist)
- improving equity to developing countries (e.g. treatment in RFMOs for example in terms of allocation of quotas) and
- improving developing countries' capacities to enforce their own rights (e.g. to have resources on the ground to police their own EEZs against IUU by foreign vessels, including those with access rights).

If there is to be an outcome to these negotiations, the following issues would need to be resolved:

1) Scope

According to international law, coastal States have 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living (..)' in their Exclusive Economic Zones (Article 56.1(a) of UNCLOS). Accordingly, developing countries should be able to provide subsidies to fishing activities inside their maritime jurisdiction, and disciplines should primarily apply to fishing in the high seas and in the EEZs of other Members.

If fisheries disciplines would not apply to fishing by developing countries in their own EEZs, in the case of Africa, they would apply to more than 40% of fish caught – a substantial share.

2) Which approach to prohibiting fisheries subsidies?

Two main approaches to the prohibition of fisheries subsidies can be distinguished: the 'listing type' and the 'effects type'. In the 'listing type' approach, mainly proposed by the EU, certain defined subsidy programmes are prohibited. In the 'effects type' approach, fisheries subsidies are prohibited

in so far as they have a negative impact on stocks already in an overfished condition or if they cause or contribute to overcapacity or overfishing.

Each approach has its pros and cons. The 'effects type' approach potentially covers more subsidy programmes and could be preferable from an environmental viewpoint. However, under this approach the prohibited subsidies would usually be more difficult to litigate than under the 'listing type' approach. It would be particularly difficult to prove a causal link between certain fisheries subsidies and overfishing and to a lesser extent, between fisheries subsidies and overcapacity.

A challenge with the 'listing type' approach is that the major subsidy providers would be able to determine the line between prohibited and permissible subsidies. As the example of the EU shows, the subsidies proposed for elimination are exactly those not provided by the EU (anymore). Yet, the EU continues to provide billions of Euros through other subsidy programmes. A parallel could be drawn with the agricultural subsidy negotiations where subsidies used by major subsidizers are either made permissible (e.g. direct payments under the Green Box) or subsidies not used anymore by major subsidizers are prohibited by WTO rules (e.g. export subsidies).

Yet, a listing type approach would enable all Members to know what subsidies they have to prohibit. Clearly defining prohibited subsidies *ex ante* would enhance predictability and avoid unnecessary ambiguity at the implementation stage. For disciplines to have some effect, there would be a need to move away from a general prohibition of subsidies that contribute to overcapacity and overfishing to more specific prohibitions. The Argentina et al. proposal defines certain subsidies related to overcapacity, going beyond the EU proposed listing, representing a step in the right direction.

3) Subsidies relating to overfishing

The formulation used by several Members is 'subsidies for fishing (Argentina et al.)/fishing vessels or activity (ACP, LDCs) that negatively affect fish stocks that are in an overfished condition'.

The main operational problem is the interpretation of the phrase 'negatively impact'. It implies that not all fisheries subsidies are prohibited, but only those that negatively impact an overfished stock. How should this be determined, and who should determine that? Fisheries subsidies are usually not fish area-specific, i.e. eligibility is not linked to fishing in a certain area. Only in specific cases could there be a link, e.g. a subsidy to purchase gear that is used only in overfished areas, or equipment to locate exactly those species that are in an overfished condition. This discipline would leave the dispute settlement to decide which subsidies are to be prohibited and which subsidies are not.

According to some Members, such a prohibition risks rendering the WTO rule declaratory and difficult to implement in practice.

Argentina et al. coined the idea to prohibit subsidies to vessels or operators fishing in areas beyond national jurisdiction, which are not aimed to fulfil a quota or a right established by an RFMO. Subsidies allowed under this provision include subsidies for vessels fishing beyond their national jurisdiction if these vessels return to their national jurisdiction within [x days] after the day of departure.

This Argentinian et al prohibition is relatively simpler to implement – it does not require a finding of overfished status, or establishment of (negative) causal link between subsidies and fish stocks. In principle, it seems an interesting idea.

4) Special & Differential Treatment

Whatever approach or combination of approaches to prohibiting fisheries subsidies is taken, developing countries should be able to provide subsidies to develop their artisanal fisheries sectors. Millions of people are dependent on ocean resources for their livelihoods and developing countries should not be curtailed in their policy space to achieve food and livelihood security especially with regards to fish from their own waters. The majority of developing countries also have 'under-capacity' in their fisheries. Their aspiration to increase capacity and have a larger share of the ocean's resources to support their development goals is a valid one.

A globally harmonized vessel length cannot be determinative of the definition of 'artisanal' or 'small-scale' fisheries. First, vessel lengths of artisanal fishermen can be longer than 10 meters, which is what has been proposed by the EU. In fact, the EU proposal of limiting the boat size to 10 metres is effectively excluding the majority of artisanal fishers' vessels from the carve-out, thus defeating the very purpose of such a provision.

The relationship between S&D and fisheries management is a complex and controversial one. If a link is established, might this mean that the WTO Dispute Settlement Mechanism inadvertently has a role in assessing a developing country's compliance with the fisheries management measures which have been made binding through the WTO fisheries subsidies disciplines? This could raise three main problems:

- First, WTO fisheries subsidies disciplines might set higher standards than those established domestically, in bilateral access agreements or by RFMOs. In principle, fisheries management in a country's EEZ is a sovereign matter. Where fish species moves across different Exclusive Economic Zones, relevant fisheries management measures are to be agreed upon by regional fisheries bodies, or Regional Fisheries Management Organisations (RFMOs).
- Second, it might imply the imposition of binding rules through the backdoor. Not all WTO Members are party to all the relevant UN instruments.¹³⁵ Some of the UN instruments are 'soft' law which can become binding through WTO disciplines or future rules may be developed within the UN system, which may render them automatically binding.
- Third, and this is a major concern of Members, dispute settlement panels might lack the necessary expertise and experience to judge a country's compliance with fisheries management measures.

Of course, it has been argued that WTO panels and the Appellate Body (AB) will not make these assessments. They do not have the competence. Those assessments would be drawn from the appropriate experts/ bodies. Nevertheless, there is a fine line to tread for panels or the AB to come up with final judgements particularly when circumstances may not be so clear-cut.

This brings us back to reinforce the point that subsidies provided by developing countries for fishing in their own EEZs should not be subjected to WTO disciplines. Furthermore, in relation to S&D for developing countries, the rules of RFMOs, as well as the respective commitments of Members under the UN fisheries governance regime, should have pre-eminence over WTO fisheries subsidies disciplines.

5) Subsidies related to IUU

¹³⁵ For instance, African countries such as Burundi, Central African Republic and Rwanda are not Parties to UNCLOS

Prohibiting subsidies to IUU fishing activities appears to have general support. Despite this, the exact operationalisation of such a prohibition would determine its effectiveness and can entail possible risks for developing countries.

It would be important to give weight to how IUU is defined under national laws and regulations, as artisanal fishers might be regarded as 'Unregulated' or 'Unreported' fishers.

In the operationalization of the IUU fisheries subsidies disciplines, Members would have to rely on so-called IUU vessel lists. Relying only on IUU vessel lists maintained by relevant Regional Fisheries Management Organizations (RMFOs) would clearly not be effective, mainly due to the small number of vessels listed. Therefore, most proposals go beyond the RFMO IUU vessels lists.

Argentina et al. propose that WTO Members could also rely on nationally developed lists of IUU vessels. Prima facie this seems like a good idea. However, this could also create challenges if a Member decides without due process or sufficient evidence to put another country's vessels on their own national list – would which imply that no (prohibited) subsidies could be provided to these vessels or their operators.

In Article 9.4 of the Port State Measures Agreement, in order to deny a vessel's entry into its ports, Parties are required to have 'sufficient proof that a vessel has engaged in IUU fishing or fishing related activities'. A similar test might be built into the IUU fisheries subsidies disciplines, in order to address these concerns while increasing the effectiveness of the IUU fisheries subsidies disciplines.

Other measures to bolster the effectiveness of IUU subsidy disciplines could be a requirement to publish regularly IUU vessel lists in order to enable governments and traders to become acquainted with them, and/or to inform WTO Members where such lists are published. Another commitment could be (consideration of) inclusion of vessels identified by other WTO Members as IUU vessels in the IUU vessel lists maintained by the flag state as well as the Member where the operator resides, based on sufficient evidence.

6) Fuel subsidies

Fuel subsidies are the largest component of total fisheries subsidies globally. The EU carves out fuel subsidies from its proposal. Both developed and developing countries provide fuel subsidies. On one hand, carving out fuel subsidies from future disciplines would provide also leeway for developing countries to provide fuel subsidies and hence increase their fishing capacity. On the other hand, leaving out the largest share of fisheries subsidies might render fisheries subsidies disciplines less significant. Whether or not to include fuel subsidies, would primarily depend on whether there are appropriate and effective S&D provisions.

Some proposals consider a transparency obligation for fuel subsidies (e.g. Latin American proposal TN/RL/GEN/187). This obligation should not apply to developing countries with a small share in global fish captures.



7) Transparency

Most submissions appear to agree that transparency and notification requirements relating to fisheries subsidies could be enhanced.

The ACP/LDC approaches would be the best for African countries as they require transparency/notification requirements to be proportionate to developing countries' capacity and contribution towards overfishing and overcapacity so as to ensure that such obligations are not unduly burdensome.

The FAO is the most competent authority to collect and receive catch data and 'fish effort' statistics (see Article 61 UNCLOS). Providing similar information to WTO would duplicate existing processes. Yet, the WTO could receive information from the largest fishing nations on their fleet capacity using harmonized statistics (e.g. vessel tonnages, engine power). This information element is not mentioned in Article 61 UNCLOS. In the event of fisheries subsidies disciplines related to overcapacity, there is a rationale to have some level of transparency on capacity (or what the EU calls 'nominal fishing power'). Such information is already available domestically, but there are no harmonized statistics at the global level. The suggestion to notify fleet capacity has been made by multiple Members. The obligation to provide (additional) information should be mainly done by the larger fishing nations.

8) Standstill

The idea of a standstill is problematic for developing countries. From a conceptual viewpoint this implies that countries that currently are large subsidizers can continue to provide large subsidies and those that do not currently subsidize, cannot subsidize in the future.

ANNEX I: FINDINGS ON EU OVERFISHING BY EUROPEAN COMMISSION JOINT RESEARCH CENTRE (JRC)

Note: The Sustainable Harvest Indicator (SHI) measures whether a fleet segment (on average for all species caught) depends on overfished stocks, i.e. the stock fished is above the fishing mortality corresponding to maximum sustainable yield (MSY).

EU Member State	Number of fleet segments	SHI indicator data available and meaningful	Imbalance between capacity and fishing opportunities (number)	% of fleet segments where data on MSY is unavailable or not meaningful	% of fish segments relying on overfished stocks (where data is available and meaningful)	Coverage of SHI indicator (% of value of landings)
	A	B	C	(A-B) / A	C / B	F
EU	586	177	130	<u>70%</u>	<u>73%</u>	
France	103	22	15	79%	68%	<u>30%</u>
Spain	84	13	10	85%	77%	<u>14%</u>
Portugal	57	3	3	95%	100%	<u>15%</u>
UK	43	15	10	65%	67%	70%
Croatia	34	6	6	82%	100%	68%
Ireland	32	11	4	66%	36%	86%
Netherlands	27	8	7	70%	88%	77%
Sweden	25	22	10	12%	45%	94%
Italy	23	10	9	57%	90%	58%
Malta	23	1	1	96%	100%	19%
Bulgaria	22	17	16	23%	94%	40%
Denmark	19	15	13	21%	87%	73%
Poland	18	2	2	89%	100%	50%
Germany	14	9	8	36%	89%	57%
Slovenia	13	2	2	85%	100%	47%
Belgium	10	4	4	60%	100%	93%
Cyprus	9	0	n/a	100%	n/a	0%
Lithuania	8	2	2	75%	100%	13%
Estonia	7	5	3	29%	60%	78%
Romania	6	3	3	50%	100%	50%
Finland	5	4	1	20%	25%	78%
Latvia	4	3	1	25%	33%	95%

Source: Joint Research Centre of the European Commission¹³⁶

¹³⁶ Assessment of balance indicators for key fleet segments and review of national reports on Member States efforts to achieve balance between fleet capacity and fishing opportunities (STECF-15-15), Joint Research Commission (JRC) Scientific and Policy Reports, Scientific, Technical and Economic Committee for Fisheries (STECF), https://stecf.jrc.ec.europa.eu/documents/43805/1166222/2015-10_STECF+15-15+-+Balance+capacity_JRC97991.pdf

ANNEX II: FISH CATCHES IN AFRICAN EEZS¹³⁷

Note: table is sorted by share of fish caught by foreign vessels in descending order (high to low)

Country / EEZ	Total fish caught (Tonnes)	Fish caught by African vessel (Tonnes)	Fish caught by non-African vessel (Tonnes)	% of fish caught by non-African vessels	Fish caught by own vessel (Tonnes)	Fish caught by other countries (Tonnes)	% of fish caught by foreign vessels	% of fish caught by other African vessels
Guinea-Bissau	921,040	383,053	537,987	58%	34,332	886,708	96.3%	37.9%
Guinea	894,020	346,106	547,914	61%	227,490	666,530	74.6%	13.3%
Liberia	87,630	32,978	54,651	62%	27,908	59,722	68.2%	5.8%
Equatorial Guinea	34,498	24,610	9,888	29%	11,989	22,509	65.2%	36.6%
Cote d'Ivoire	171,285	60,867	110,418	64%	60,867	110,418	64.5%	0.0%
Togo	57,934	29,782	28,152	49%	20,720	37,214	64.2%	15.6%
Gabon	147,474	59,027	88,447	60%	55,762	91,712	62.2%	2.2%
Eritrea	10,060	9,925	135	1%	3,814	6,245	62.1%	60.7%
Mauritania	1,600,450	873,304	727,146	45%	607,079	993,371	62.1%	16.6%
Seychelles	11,587	4,814	6,773	58%	4,812	6,775	58.5%	0.0%
Somalia	141,386	79,327	62,059	44%	62,735	78,651	55.6%	11.7%
Morocco (South)	2,159,422	981,963	1,177,459	55%	980,732	1,178,690	54.6%	0.1%
Gambia	226,557	209,091	17,465	8%	106,544	120,013	53.0%	45.3%
Sao Tome & Principe	19,776	9,448	10,329	52%	9,448	10,329	52.2%	0.0%
Congo, R. of	96,747	46,507	50,240	52%	46,297	50,450	52.1%	0.2%
Congo (ex-Zaire)	24,873	12,629	12,244	49%	12,629	12,244	49.2%	0.0%
<i>All African EEZs combined</i>	<i>12,878,180</i>	<i>8,595,434</i>	<i>4,282,747</i>	<i>33%</i>	<i>7,660,533</i>	<i>5,217,647</i>	<i>40.5%</i>	<i>7.3%</i>
Morocco (Central)	1,077,874	740,962	336,912	31%	740,429	337,445	31.3%	0.0%
Namibia	717,226	512,339	204,886	29%	512,339	204,886	28.6%	0.0%

¹³⁷ Data from 'Sea Around Us', a research initiative at The University of British Columbia, <http://www.seararoundus.org/data/#/search>

Country / EEZ	Total fish caught (Tonnes)	Fish caught by African vessel (Tonnes)	Fish caught by non-African vessel (Tonnes)	% of fish caught by non-African vessels	Fish caught by own vessel (Tonnes)	Fish caught by other countries (Tonnes)	% of fish caught by foreign vessels	% of fish caught by other African vessels
Angola	743,874	539,197	204,677	28%	539,197	204,677	27.5%	0.0%
Djibouti	4,046	3,333	713	18%	2,957	1,089	26.9%	9.3%
Cape Verde	33,879	28,000	5,878	17%	26,917	6,962	20.5%	3.2%
Mauritius	13,198	10,598	2,601	20%	10,598	2,601	19.7%	0.0%
Algeria	187,669	164,584	23,085	12%	164,584	23,085	12.3%	0.0%
Senegal	519,876	505,482	14,394	3%	469,449	50,427	9.7%	6.9%
Benin	75,380	70,830	4,549	6%	68,275	7,104	9.4%	3.4%
Kenya	16,245	16,180	65	0%	14,766	1,479	9.1%	8.7%
Madagascar	126,436	115,207	11,228	9%	115,207	11,228	8.9%	0.0%
Cameroon	165,949	154,160	11,789	7%	154,156	11,793	7.1%	0.0%
South Africa (Ind. Ocean)	9,155	8,844	311	3%	8,844	311	3.4%	0.0%
Sierra Leone	355,630	345,875	9,755	3%	345,332	10,298	2.9%	0.2%
Morocco (Med.)	75,938	73,948	1,990	3%	73,948	1,990	2.6%	0.0%
Ghana	398,787	391,969	6,818	2%	390,565	8,222	2.1%	0.4%
Libya	69,895	69,550	344	0%	68,869	1,025	1.5%	1.0%
Egypt (Med.)	117,893	117,615	278	0%	117,615	278	0.2%	0.0%
Mozambique	189,201	188,768	433	0%	188,768	433	0.2%	0.0%
Nigeria	455,045	454,530	514	0%	454,530	514	0.1%	0.0%
Tanzania	135,413	135,352	61	0%	135,352	61	0.0%	0.0%
Comoros	38,070	38,057	13	0%	38,057	13	0.0%	0.0%
South Africa (Atl/Cape)	650,945	650,800	144	0%	650,800	144	0.0%	0.0%
Egypt (Red Sea)	93,945	93,945	-	0%	93,945	-	0.0%	0.0%
Sudan	1,873	1,873	-	0%	1,873	-	0.0%	0.0%



ANNEX III: ELEMENTS OF THE OECD FISHERIES SUPPORT ESTIMATE

FISHERIES SUPPORT ESTIMATE - Non Budgetary		
<i>Transfers to individual fishers</i>	Market price support	
	Fuel tax concessions	
FISHERIES SUPPORT ESTIMATE - Budgetary		
<i>Transfers to individual fishers</i>	Transfers based on input use	Transfers based on variable input use
		Transfers based on fixed capital formation: -Support to vessel construction/purchase -Support to modernisation -Support to other fixed costs
	Transfers based on fishers income	Income support
		Special insurance system for fishers
	Transfers based on the reduction of productive capacity	
Miscellaneous transfers to fishers		
<i>General Service Support Estimate</i>	Access to other countries' waters	
	Provision of infrastructure	
	Provision of infrastructure	Capital expenditures
		Subsidized access to infrastructure
	Marketing and promotion	
	Support to fishing communities	
	Education and training	
	Research and development	
	Management of resources	
	Management of resources	Management expenditures
Stock enhancement programs		
Enforcement expenditures		
Miscellaneous transfers to general services		
<i>Cost recovery charges (negative subsidies)</i>	Cost Recovery Charges, for resource access rights	
	Cost Recovery Charges, for management, research and enforcement	
	Cost Recovery Charges, Other	

Source: OECD, https://stats.oecd.org/Index.aspx?DataSetCode=FISH_FSE