122 Research Paper
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Analysis of the Overcapacity and Overfishing Pillar of the WTO Fisheries Subsidies Negotiations

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SOUTH CENTRE

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122

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ABSTRACT

Sustainable Development Goal (SDG) 14.6 asks World Trade Organization (WTO) Members to "prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing". Hence, the pillar on overcapacity and overfishing (O&O) is the most important pillar of the fisheries subsidies negotiations. However, WTO Members have not yet agreed on the approach to prohibition. This research paper distinguishes three types of approaches: the fisheries management linked approach (sometimes referred to as effects-based approach), capping and list-based approach.

This paper argues that the core of the prohibition in the Overfishing and Overcapacity pillar should be list-based and be applicable to large scale fisheries who receive the bulk of global fisheries subsidies especially those that are capacity-enhancing. For subsidies which are not prohibited an effects-based test might be considered. A supplementary subsidy prohibition covering areas beyond national jurisdiction (ABNJ) could be considered, or the vessels or operations targeted by proponents of the ABNJ proposals could be deemed 'large scale'. If capping remains on the table, capping subsidies per fisher could be explored. Special and Differential Treatment should be an integral element of the outcome as developing countries whose fisheries sector are less developed should not take on the same commitments.

L'objectif de développement durable (ODD) 14.6 demande aux membres de l'Organisation mondiale du commerce (OMC) « d'interdire les subventions à la pêche qui contribuent à la surcapacité et à la surpêche ». Les discussions relatives à la surcapacité et la surpêche constituent le principal pilier des négociations sur les subventions à la pêche. Cependant, les membres de l'OMC ne se sont pas encore mis d'accord sur l'approche à adopter. Le présent document distingue trois types d'approches : l'approche fondée sur une gestion de la pêche (parfois dénommée approche fondée sur les effets), le plafonnement des subventions et l'approche fondée sur les listes.

Il soutient que l'approche qui doit être retenue concernant l'interdiction des subventions contribuant à la surcapacité et à la surpêche doit être celle fondée sur les listes et viser en priorité les pêcheries à grande échelle, qui reçoivent la majeure partie des subventions mondiales, en particulier celles favorisant le renforcement des capacités. Pour les subventions qui ne sont pas interdites, un test basé sur les effets pourrait être envisagé. Une interdiction supplémentaire couvrant les zones situées au-delà de la juridiction nationale (ABNJ) pourrait également être privilégiée. Une autre option serait de considérer les navires ou opérations ciblés par les promoteurs de cette interdiction supplémentaire comme étant « à grande échelle ». Si l'approche fondée sur le plafonnement des subventions reste sur la table, elle pourrait s'orienter vers un plafonnement par pêcheur. Dans tous les cas, un traitement spécial et différencié doit être considéré pour les pays en développement, dont le secteur de la pêche est moins développé et qui ne peuvent dès lors prendre les mêmes engagements.

En la meta 14.6 de los Objetivos de Desarrollo Sostenible (ODS) se pide a los Miembros de la Organización Mundial del Comercio (OMC) "prohibir ciertas formas de subvenciones a la pesca que contribuyen a la sobrecapacidad y la pesca excesiva". Por consiguiente, el pilar de la sobrecapacidad y la pesca excesiva es el más importante de las negociaciones sobre las subvenciones a la pesca. Sin embargo, los Miembros de la OMC aún no se han puesto de acuerdo sobre el enfoque de la prohibición. En este documento de investigación se distinguen tres tipos de enfoques: el enfoque vinculado a la ordenación pesquera (a veces

denominado enfoque basado en los efectos), el enfoque de limitación y el enfoque de listas.

En este documento se sostiene que el planteamiento fundamental de la prohibición del pilar de la sobrecapacidad y la pesca excesiva debería estar basado en listas y ser aplicable a las pesquerías de gran escala que reciban el grueso de las subvenciones mundiales a la pesca, especialmente aquellas destinadas a la mejora de capacidades. En el caso de las subvenciones que no estén prohibidas, se podría plantear una prueba basada en los efectos. Se podría considerar una prohibición de subvenciones complementaria que abarque las zonas situadas fuera de los límites de la jurisdicción nacional, o bien los buques o las operaciones objetivo de los promotores de las propuestas de zonas situadas fuera de los límites de la jurisdicción nacional podrían considerarse de "gran escala". Si la posibilidad de la limitación permanece sobre la mesa, podrían estudiarse subvenciones a la limitación por pescador. El trato especial y diferenciado deberá ser un elemento integral del resultado, dado que los países en desarrollo cuyos sectores pesqueros están menos desarrollados no deberían contraer los mismos compromisos.

TABLE OF CONTENTS

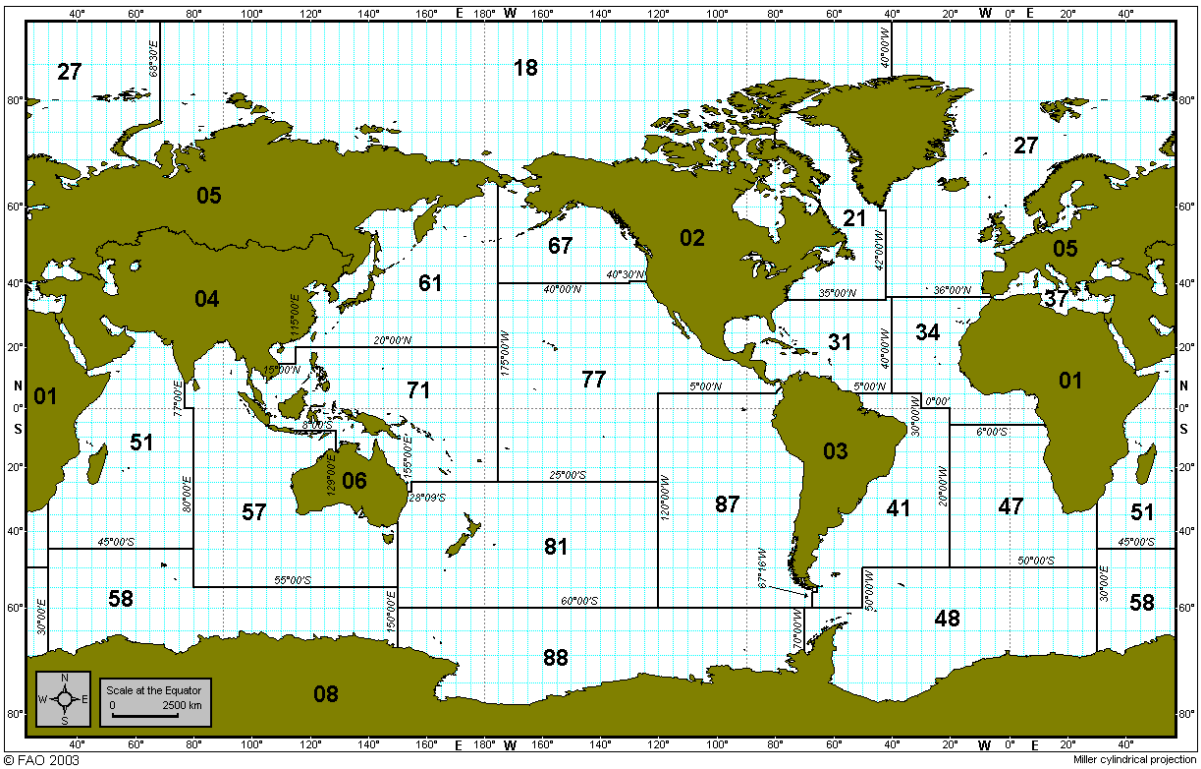
SECTION I: INTRODUCTION – BASIC FISHERIES DATA

This Section reviews some of the basic data relating to fisheries. First, fisheries sustainability trends are discussed. Subsequently, this section examines which countries and what type of fisheries are involved in catching fish.

Fisheries sustainability trends

The biennial Food and Agricultural Organization (FAO) State of World Fisheries and Aquaculture (SOFIA) report provides a longitudinal view of global marine fisheries sustainability. Based on around 500 species (groups), it makes assessments of fisheries sustainability at FAO major fishing area level. FAO has divided up the world into fishing areas which also encompass the Exclusive Economic Zones (EEZs) of countries covered by a particular fishing area (see Figure 1), of which 19 are marine fishing areas. Tuna stocks are singled out as a self-standing category on account of their largely migratory and straddling nature and as such move between FAO fishing areas.

Figure 1: FAO Major Fishing Areas



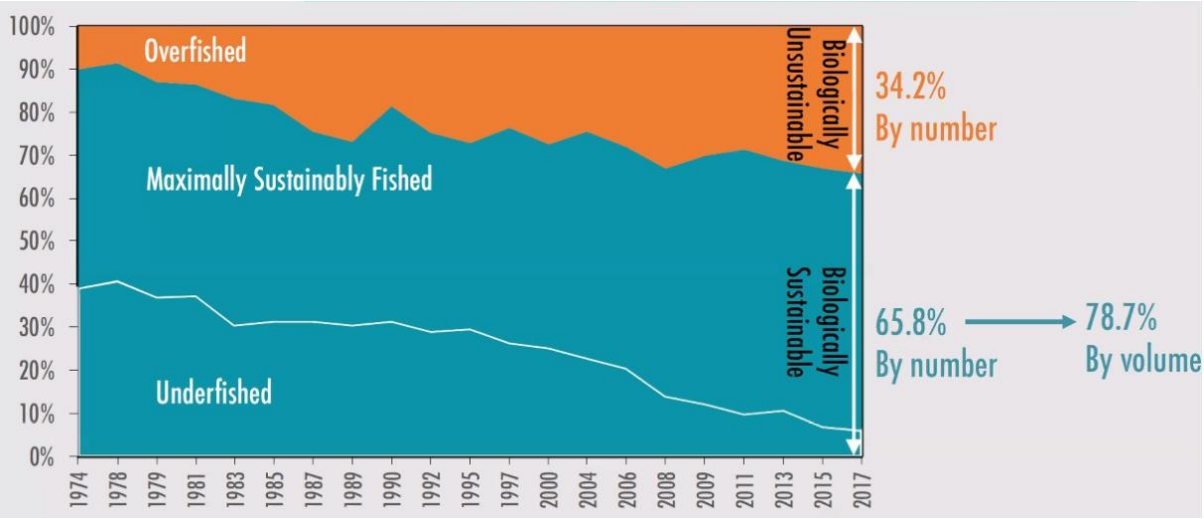
Source: FAO (2003)[3]

The SOFIA 2020[4] reports that as of 2017 there was practically no underfished stock and most fish stocks were "Maximally Sustainably Fished", while 34.2% of stocks were overfished (see Figure 2).

[3] Image retrieved from http://www.fao.org/fishery/static/cwp/handbook/annex/maps/world_2003.gif.
[4] FAO, *The State of World Fisheries and Aquaculture 2020*: *Sustainability in action* (Rome). Available from http://www.fao.org/3/ca9229en/ca9229en.pdf.

The highest percentage of unsustainable stocks are found in the Mediterranean and Black Seas, FAO fishing area 37 (62.5% unsustainable stocks) and in the FAO areas bordering South America, namely the Pacific Southeast, FAO fishing area 87 (54.5% unsustainable) and the Atlantic Southwest, FAO fishing area 41 (53.3% unsustainable). The lowest percentage of unsustainable stocks, hovering around 13-16% of total fish stocks assessed, are found in the FAO fishing areas bordering the west side of North and Central America as well as the FAO fishing area which includes New Zealand (FAO fishing areas 67, 77 and 81).

Figure 2: FAO assessment of fisheries sustainability



Source: FAO (2020)

At first glance, it appears that the global situation has been more or less stabilized. Since 2008 the share of overfished fish stocks has been around a third of the total. Nonetheless, Figure 2 does not tell a complete picture, such as the basis for making the assessment (e.g. reliance on expert opinion or which surrogate indicators have been used for data poor fish stocks), the catch involved and uncertainty relating to assessments. More detailed data would be informative to make such an assessment.

At any rate, it is safe to say that the situation is not improving and that the number of unexploited or underfished stocks is trending towards zero, currently at around 9%, down from around 40% in 1974. Also, it is likely that FAO classifies a fish stock as 'overfished' only when there is overwhelming evidence in that respect, which means that part of 'maximally sustainably fished' is in reality 'overfished'. Some of the indicators used for fish stock assessment rely on catch data meaning that unobservable catches from illegal, unreported and unregulated (IUU) fishing are not always taken into account.

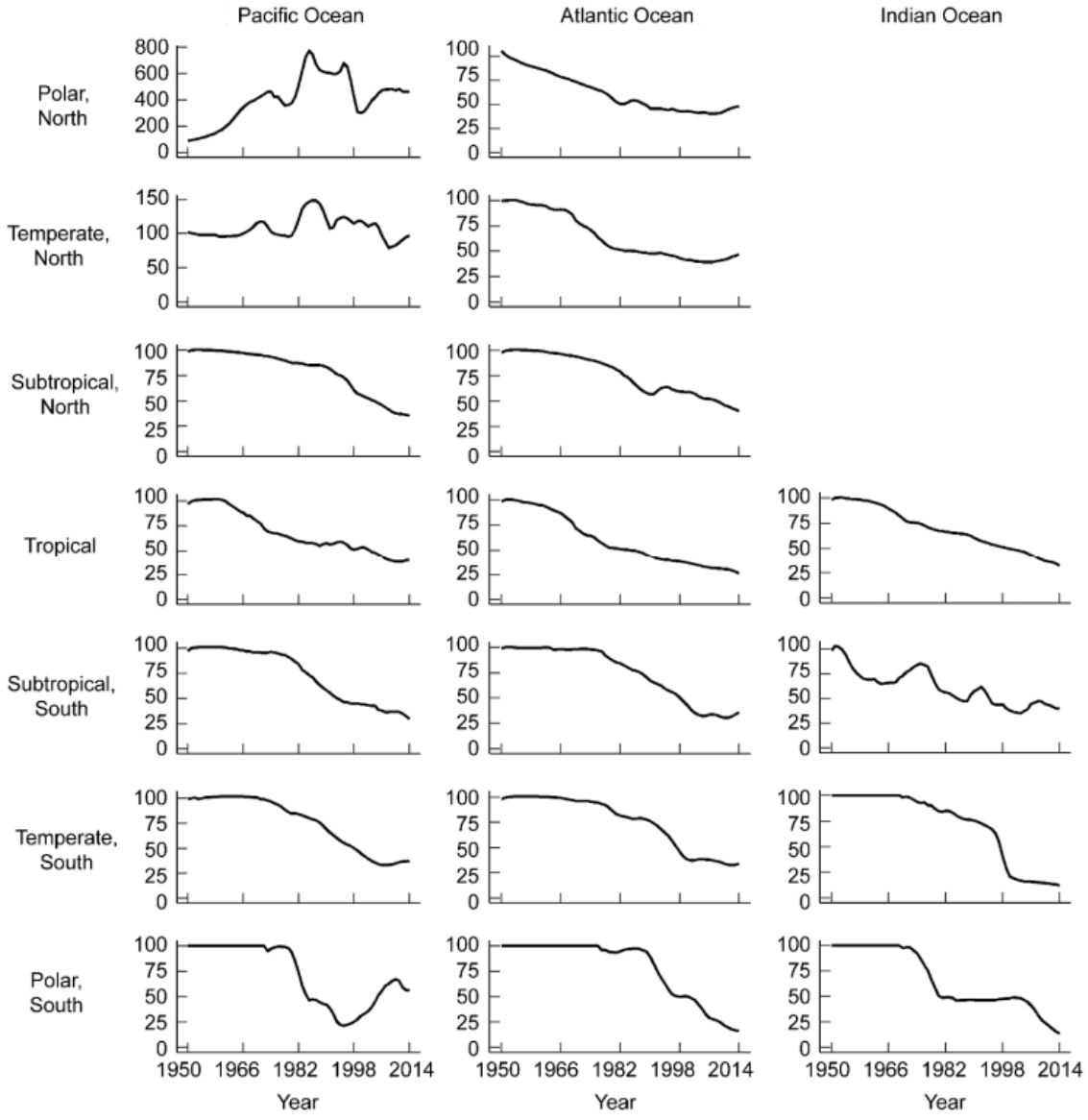
A recent paper by Palomares *et al*. (2020)[5] provides a starker picture of global fisheries sustainability. They find that biomass plummeted essentially to around 25%, or lower, of 1950 levels in all oceans except in the North Pole, Pacific South Pole and Temperate North.[6] The paper posits that a level below 50% of initial biomass can be considered below Maximum Sustainable Yield (MSY), implying that most fish stocks in the ocean are overfished. Such a conclusion depends on whether certain assumptions are holding, such as

[5] M.L.D. Palomares *et al.*, "Fishery biomass trends of exploited fish populations in marine ecoregions, climatic zones and ocean basins", *Estuarine, Coastal and Shelf Science,* vol. 243 (30 September 2020). Available from https://doi.org/10.1016/j.ecss.2020.106896.

[6] The general state of fish stocks in the temperate North, which remains below 50% of 1950 levels, might be overstated as it is driven by a large fish stock, namely Alaska Pollock which is climate sensitive, and arguably large-scale fishing started earlier in this region compared to other regions.

their modelling assumptions, whether 1950 can be considered the 'initial' stage, whether biomass is concentrated around the poles and whether the results on 'biomass' in general apply to specific commercially caught fish species.

Figure 3: Relative changes in population biomass of analyzed populations over time expressed as a percentage of the average biomass at the start of the time series (1950-1954), grouped by climatic zone and ocean basin



Source: Palomares *et al.* (2020), Figure 4

Who is doing most of the fishing?

Catches by WTO Member

According to FAO SOFIA 2020, in 2017, the most active country marine fishers in terms of the absolute weight of catches were China, Indonesia, the United States of America (USA), the European Union (EU) and Russia.[7]

For several countries there is a notable difference between the official figures reported by FAO and the estimates by Sea Around Us (SAU) which are based on but add to FAO data.[8] In absolute terms, the differences are most pronounced for Thailand, the Russian Federation, China, USA and EU27. This would make Russia nr.2 (Sea Around Us) in the world rather than nr. 5 (FAO), for instance.[9]

Table 1: Marine catches in Tonnes according to FAO and Sea Around Us

WTO Member	Catches in Tonnes (FAO, 2017)	Share of total	Catches in Tonnes (SAU, 2016)	Share of total	Difference of more than 10% between SAU 2016 and FAO 2017 figures
Total	81,705,830	100%	104,494,420	100%	
China	13,390,357	16.4%	16,023,066	15.3%	Yes
Indonesia	6,268,749	7.7%	6,251,881	6.0%	No
USA	5,023,887	6.1%	6,411,092	6.1%	Yes
EU27	4,782,208	5.9%	6,125,240	5.9%	Yes
Russian Federation	4,603,322	5.6%	7,785,665	7.5%	Yes
Peru	4,156,539	5.1%	4,409,823	4.2%	No
India	3,857,213	4.7%	3,833,531	3.7%	No
Japan	3,248,925	4.0%	4,072,853	3.9%	Yes
Viet Nam	3,118,696	3.8%	3,741,589	3.6%	Yes
Norway	2,532,834	3.1%	2,091,368	2.0%	No
Chile	2,334,421	2.9%	1,628,355	1.6%	No
Philippines	1,727,447	2.1%	2,137,582	2.0%	Yes
Mexico	1,469,309	1.8%	2,400,378	2.3%	Yes
Malaysia	1,469,172	1.8%	2,496,572	2.4%	Yes
Morocco	1,368,865	1.7%	1,694,490	1.6%	Yes
Korea, Republic of	1,360,241	1.7%	1,930,832	1.8%	Yes
Thailand	1,288,857	1.6%	4,955,651	4.7%	Yes
Myanmar	1,263,080	1.5%	1,365,984	1.3%	No
Iceland	1,184,479	1.4%	1,106,563	1.1%	No
Canada	818,540	1.0%	967,550	0.9%	Yes

[7] FAO, The State of World Fisheries and Aquaculture 2020: Sustainability in action (Rome). Available from http://www.fao.org/3/ca9229en/ca9229en.pdf.
[8] The Sea Around Us is a research initiative at The University of British Columbia that assesses the impact of fisheries on the marine ecosystems of the world (see http://www.seaaroundus.org/).
[9] The Sea Around Us figures are indicative, relate here to a different year (2016 vs 2017) and there are questions surrounding the reliability and accuracy of the estimation methodology employed by Sea Around Us but large differences might hint at a certain level of underreporting.

Top 20 WTO Member total catches (weight)	**65,267,139**	**79.9%**	**81,430,067**	**77.9%**	

In any case, it is clear from the data that 75 to 80% of fishing is done by 20 World Trade Organization (WTO) Members, with the remaining 144 WTO Members as well as a number of non-WTO Members, some which have a significant EEZ (e.g. Kiribati, Federated States of Micronesia), accounting for 20-25% of global marine fish capture.

It should be taken into account that catch figures give a glimpse of reality. Often catches are allocated to the country of the flag of a fishing vessel catching the fish. If a foreign vessel is incorporated in a smaller country it would appear that such a country might catch a lot of fish, but the beneficial owners of that vessel (and the catch) are often not from that country. One example would be Vanuatu. Also, figures often reflect the place of landing rather than the place of capture but there is a difference between the two. For instance, a lot of fish are caught by Spanish(-owned) fishing vessels that landed in Mauritania; as a result Mauritania appears relatively high on the list (although in 2017, it just did not make it to the Top 20).

Moreover, it is only logical that larger countries would be higher on the list than smaller countries. Therefore, for a better comparison, catch data would have to normalized, for instance at a per capita basis, per fisher basis or per square kilometer of (own) EEZ.

Catches by type of fisheries sector

According to the literature, most fish is caught by large scale fishing vessels. The WTO (2019)[10] quoting Sumaila (2017) reports that, globally, large scale accounts for 75.5% of global fish capture. Regionally, this percentage ranges from 59.5% in Africa to 89% in Europe. In terms of value, the share for the large-scale fishing sector is a bit lower (68.9%) which suggests that the unit value of fish caught by small scale fishers is higher, on average.

Table 2: Global and regional data on catch and landed value

Region	Catch (million tonnes)		Landed value (billion USD)	
	Large-scale	Small-scale	Large-scale	Small-scale
Globally	85.5(75.5%)	27.5 (24.5%)	113 (68.9&)	51 (31.1%)
Africa	4.9 (59.5%)	3.2 (53.5%)	6.7 (46.5%)	5.7 (40.5%)
Asia	39.1 (70.5%)	16.0 (29.5%)	54.8 (67%)	26.2 (33%)
Europe	17.5 (89%)	2.0 (11%)	25.9 (86%)	4.4 (14%)
Central & South America, Caribbean	15.2 (78.5%)	4.2 (21.5%)	9.9 (55%)	8.1 (45%)
North America	6.0 (79.5%)	1.6 (20.5%)	12.9 (70%)	5.5 (30%)
Oceania	0.9 (71.2%)	0.4 (28.8%)	1.9 (59.2%)	1.3 (40.8%)

Source: WTO (2019), Table 3

The United Nations Special Envoy for the Ocean estimated that small scale fisheries account for 30% of the catch in marine fisheries.[11] In other words, fisheries that are not small scale catch 70% of global marine catch.

[10] WTO secretariat paper RD/TN/RL/111, 5 November 2019, summarizing Sumaila (2017).
[11]: "90% of fish stocks are used up – fisheries subsidies must stop", by Mukhisa Kituyi, Secretary-General of the United Nations Conference on Trade and Development (UNCTAD), and Peter Thomson, United Nations Special Envoy for the Ocean, United Nations, July 2018, available at https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1812.

SECTION II: FISHERIES SUBSIDIES

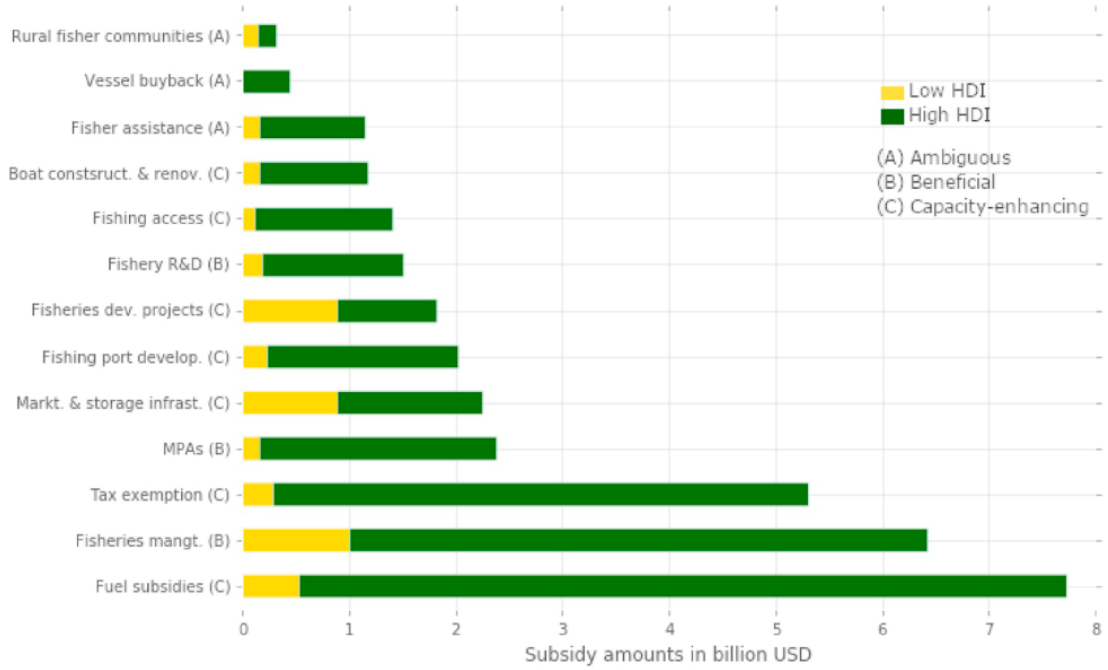
Amount and categories of fisheries subsidies

The concepts of "supports", "subsidies", "transfers" or "payments" do not necessarily have the same meaning between authors or organizations. The WTO maintains a very particular definition of subsidy. The Agreement on Subsidies and Countervailing Measures (ASCM or SCM Agreement) defines a "subsidy" as follows: (i) a financial contribution, (ii) by a government or any public body and iii) a benefit is thereby conferred.[12] All three of these elements must be satisfied in order for a subsidy to exist. In addition, for a subsidy to be contestable under the ASCM by other WTO Members, they should be 'specific', that is they should be specifically provided to an enterprise or industry or group of enterprises or industries. Prohibited subsidies currently listed in Article 3 of the ASCM - export subsidies and subsidies predicated upon domestic content - are deemed specific.

With the above in mind, what does the current research tell us?

Sumaila *et al.* (2019)[13] estimate global fisheries subsidies at USD 35.4 billion in 2018, of which capacity-enhancing subsidies are USD 22.2 billion. The top five subsidizing political entities are China, the European Union, the United States, the Republic of Korea and Japan which contribute 58% (USD 20.5 billion) of the total estimated subsidies. Furthermore, within the category of capacity-enhancing ('bad') subsidies amounting to USD 22.2 billion, 86% is on account of countries with a High Development Index (HDI), high being defined as an HDI of 0.7 or higher.

Figure 4: Categories of subsidies and their relative amounts



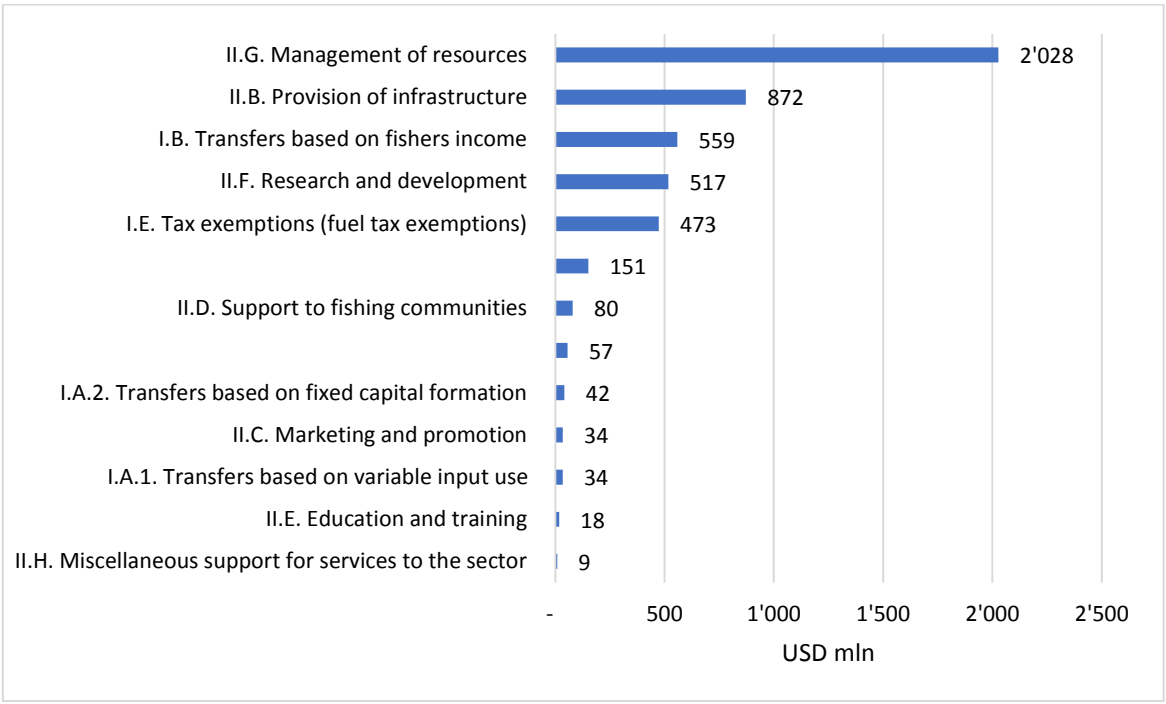
Source: Sumaila *et al.* (2019)

[12] For further reading, see e.g WTO Analytical Index, entry on the SCM Agreement – Article 1 (Jurisprudence), https://www.wto.org/english/res_e/publications_e/ai17_e/subsidies_art1_jur.pdf.
[13] Sumaila *et al*., "Updated estimates and analysis of global fisheries subsidies", *Marine Policy* 109 (2019) 103695. Available from https://doi.org/10.1016/j.marpol.2019.103695.

Fuel subsidies is by far the largest category of subsidies ('bad'), followed by fisheries management ('beneficial'). Fisheries development projects, marketing and storage infrastructure are relatively important for countries with a low HDI (see Figure 4).

The Organisation for Economic Co-operation and Development (OECD) keeps track of fisheries subsidies for OECD members. It also compiles unofficial estimates of fisheries subsidies provided by non-OECD economies. According to the latest available estimates for 2018, management of resources which includes fisheries management expenditures, stock enhancement programs and enforcement expenditures is by far the largest category, for OECD Members. Other significant categories are provision of infrastructure, transfers based on fisher's income, research and development and fuel tax exemptions.[14]

Figure 5: OECD government support to fisheries in 2018, by OECD Fisheries Support Estimate (FSE) category



Finally, what do WTO subsidy notifications reveal?

The WTO notifications provide a very sketchy picture of actually provided subsidies. Rogers (2020) compiled data from all notifications made to WTO in 2019, for the years 2017 or later. He found that boat construction and renovation, fisheries development projects and fuel subsidies are the largest subsidy categories:

[14] OECD Fisheries Support Estimate Database, available at https://stats.oecd.org/Index.aspx?DataSetCode=FISH_FSE.

Table 3: Subsidies reported to the WTO, by category

Category	Amount reported (USD)	Amount reported (%)
Boat construction and renovation	2,722,547,689	46.1%
Fisheries development projects	1,274,882,653	21.6%
Fuel subsidies	546,725,301	9.2%
Fisheries management	440,940,437	7.5%
Fishery research and development	225,654,864	3.8%
Tax exemption	198,604,066	3.4%
Fisher assistance	169,743,071	2.9%
Fishing port development	166,322,137	2.8%
Market support and processing/storage infrastructure	69,487,607	1.2%
Vessel buyback	64,279,366	1.1%
Rural fisher communities	32,018,941	0.5%
Grand Total	**5,911,206,131**	**100.0%**

Note: includes data from all notifications made to WTO in 2019, for the years 2017 or later. Excludes subsidies to aquaculture and inland/freshwater
Source: Anthony Rogers, Sea Change Economics, presentation made on 27 February 2020

The amount of fuel subsidies is currently underreported in the WTO. First, at present, subsidy notifications only need to include specific subsidies. Fuel subsidies provided to all vessels or different groups of vessels are not likely to fall within the scope of ASCM's notification obligations. This is the case for instance in the EU. Second, even if reported the monetary amount is not always provided. For instance, in the US notifications, none of the programmes provided by States such as fuel tax or sales tax exemptions on fuel have an estimated subsidy amount. Research by the South Centre reveals that US federal and state subsidies for fuel alone amount to around USD 200 million annually.[15]

Which fisheries subsidies contribute the most to overfishing or overcapacity?

Sumaila *et al.* classify subsidies into three categories: beneficial ('good'), harmful ('bad') and ambiguous ('ugly'). Beneficial subsidies include fisheries management and services, fishery research and development and maintenance of Marine Protected Areas (MPAs). Ambiguous subsidies include fisher assistance, vessel buyback and rural fisheries community development. Finally, harmful subsidies are subsidies to boat construction, renewal and modernization, fishery development and support services, fishing port construction and renovation, marketing support and storage infrastructure, tax exemption, foreign access agreements, and fuel subsidies. [16]

An OECD publication from 2018 investigates the impact of six categories of support using a bioeconomic model of the global fishery, taking into account the effects of different support policies subject to many external factors, and provides estimates for two fleet segments: a

[15] South Centre informal note, "US notification of fisheries subsidies – an initial estimate of fuel subsidies", 8 November 2019.
[16] See also Sea Around Us database, Global Fisheries Economics, http://www.seaaroundus.org/data/#/feru

larger, more technically efficient fishing segment, and a smaller one with less flexible production technology. The results show that all have the potential to provoke overfishing, to lead to fish stocks being overfished, to encourage illegal, unreported or unregulated (IUU) fishing and to increase fleet capacity, but that their effects can vary significantly both in scale and how they are distributed at the fleet level. The fisheries management system can mitigate, though not entirely eliminate, these impacts.[17]

Supports based on reducing the cost of inputs purchased by fishers provoke the greatest increase in fishing effort, with associated risks of overfishing. This includes fuel subsidies, which are also shown to deliver less than 10% of their value in actual benefits to fishers in some cases, making them the least effective means of transferring income to fishers of those evaluated. [18]

Amount of subsidies to small scale and large scale fisheries

Schuhbauer *et al.* (2017) found that globally, around 15.9% of global fisheries subsidies go to small-scale fisheries.[19]

According to Schuhbauer *et al.*, the disparity between small-scale and large-scale is greater for capacity enhancing subsidies (90% of the nearly USD 20 billion in such subsidies was estimated to go to large-scale fisheries), and for fuel (over 90% was estimated to be given to large-scale fisheries through marine diesel subsidies, which were mostly outside the reach of small-scale fishers because of the high cost of purchasing and maintaining diesel motors). The World Wide Fund for Nature (WWF, 2019) found that in Mexico industrial fleets receive 70% of the budget for modernization, and of this amount government programs allocate half for updating engines, repairing or renovating vessels, installing modern navigation systems, and improving fishing gear. The rest of the budget is allocated to the artisanal fleet, mostly for engine replacements. [20]

Another study, by Islam *et al.* (2016), also found that fuel subsidies disproportionately benefitted larger commercial vessels.[21] Further, it was estimated that subsidies for port development and for boat construction, renewal and modernisation were likely to be concentrated on large-scale fisheries.

Non-specific or 'horizontal' fuel subsidies

It appears that any outcome on fisheries subsidies would have to deal with fuel subsidies benefitting fishing vessels, especially those that fish in high seas or distant waters. This would require the prohibition or disciplining of horizontal or non-specific fuel subsidies. Fuel subsidies are an important element in trade and sustainability, see for instance proposals by

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[17] Roger Martini and James Innes, "Relative effects of fisheries support policies", OECD Food, Agriculture and Fisheries Papers, No. 115 (Paris, OECD Publishing, 2018). Available from https://doi.org/10.1787/18156797.
[18] *Ibid.*
[19] A. Schuhbauer, R. Chuenpagdee, W.W.L. Cheung, K. Greer, and U.R. Sumaila, "How subsidies affect the economic viability of small scale fisheries", Marine Policy 82 (August 2017), pp. 114-121. Available from https://doi.org/10.1016/j.marpol.2017.05.013.
[20] WWF, *Reforming Harmful Fisheries Subsidies: Making the Case for Mexico* (2019). Available from http://awsassets.panda.org/downloads/reforming_harmful_fisheries_subsidies__mexico_april_2019.pdf.
[21] G. M. N. Islam, J. Ali, S. Zamhuri, K. Kuperan Viswanathan & H. Abdullah, "Impact of Subsidies on the Economic and Environmental Conditions of Small Scale Fisheries in Malaysia", *International Journal of Economics and Financial Issues*, vol. 6, no. 7S (2016). Available from https://www.econjournals.com/index.php/ijefi/article/view/3563.

New Zealand, together with Costa Rica, Fiji, Iceland, Norway, and Switzerland on fossil fuel subsidies in the envisaged Agreement on Climate Change, Trade and Sustainability.[22]

Many developing countries are in favour of including non-specific fuel subsidies within the scope of the fisheries subsidies disciplines.

Nonetheless, this could be politically difficult for some countries as fuel subsidies are a type of policy instrument wielded by them and in some instances fuel subsidy reform has resulted in domestic disturbances. For oil producers this might be a relatively easy subsidy to provide as well. However, in this case we are not talking about changing incentives for the entire economy but only for fisheries in particular. Reform should be focused on large scale fishing vessels and those fishing vessels which fish in the high seas.

In the EU, fuel subsidies for fisheries mainly consist of fuel tax reductions/exemptions. One study estimates the average annual forgone revenue during the period 2002-2011 at around EUR1.05 billion. Italy (EUR362mln), France (EUR241mln) and the Netherlands (EUR 103.2mln) were the Top 3 EU Member States. These figures are likely to be higher in present times, as fuel excise duties have increased.

As part of the European Green Deal, the EU has the intention to evaluate its fisheries fuel subsidies as it does not meet sustainability criteria: "The price of transport must reflect the impact it has on the environment and on health. Fossil-fuel subsidies should end and, in the context of the revision of the Energy Taxation Directive, the Commission will look closely at the current tax exemptions including for aviation and maritime fuels and at how best to close any loopholes."[23] Be that as it may, the EU, in its proposal with Japan, Korea and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (TPKM), assumes that only specific subsidies in the meaning of the ASCM will be covered by the disciplines (RD/TN/RL/112/Rev.1). As such, it seems to miss an important opportunity to drive multilateral change which would also be in line with the policy intentions as expressed in the European Green Deal policy paper.

[22] "Agreement on Climate Change, Trade and Sustainability (ACCTS) negotiations" - What is the envisaged scope?, available at https://www.mfat.govt.nz/en/trade/free-trade-agreements/climate/agreement-on-climate-change-trade-and-sustainability-accts-negotiations/#scope.
[23] The European Green Deal, available at https://ec.europa.eu/info/sites/info/files/european-green-deal-communication_en.pdf.

SECTION III: MAJOR ISSUES IN THE OVERFISHING AND OVERCAPACITY PILLAR

State of progress

Initially the negotiations on fisheries subsidies was only one of the many items in the Doha Round negotiations which were launched in 2001. Even within the Doha Round it was part of the so-called 'Rules' negotiations which included negotiations on anti-dumping rules and regional trade agreements (Article XXIV of the General Agreement on Tariffs and Trade (GATT)). Until today, fisheries subsidies are negotiated in the Negotiation Group on Rules (NGR) under the supervision of the Trade Negotiations Committee (TNC), organs established for the purposes of reaching outcomes on the Doha Round.[24]

The mandate for fisheries subsidies negotiations specifically were agreed at the 2005 Hong Kong Ministerial. The Declaration states 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".[25]

This mandate was carried over into Sustainable Development Goal (SDG) 14.6 in 2015. By then, Members had agreed to treat fisheries subsidies as a self-standing issue. Notably, this meant that progress on anti-dumping was not linked anymore with progress on fisheries subsidies. This was a major concession by larger developing countries especially China which are most subject to anti-dumping measures.

In 2017 at the 11th WTO Ministerial Conference in Buenos Aires (MC11), Ministers agreed to continue negotiations on the basis of two draft texts.[26] Between MC11 and September 2020 around 30 unique proposals have been submitted (see Annex I). Various proposals which have been integrated in some form into the Chair's text might not have been provided as a standalone proposal and were introduced during the discussions. For pre-MC11 proposals refer to the 2017 South Centre Analytical Note on Fisheries Subsidies.[27]

Active participants which have added their name to post-MC11 proposals include developing country groups such as the African, Caribbean and Pacific countries (ACP) and least-developed countries (LDC) Groups and WTO Members including Argentina, Australia, Brazil, Canada, Chile, China, Chinese Taipei, Ecuador, Egypt, EU, Iceland, India, Japan, the Republic of Korea, Morocco, New Zealand, Philippines, US and Uruguay. Korea has submitted a joint proposal with EU, Japan and Chinese Taipei.[28]

The work has been organized around three main prohibitions, something also referred to as 'pillars':

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[24] As such, the endorsed Principles and Practices for the negotiations apply (see WTO document TN/C/1, dated 4 February 2002).
[25] Hong Kong Ministerial Declaration, Annex D: Rules. Available from https://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm#annexd.
[26] WTO document WT/MIN17/64, https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm
[27] South Centre Analytical Note SC/AN/TDP/2017/5, "The WTO's Fisheries Subsidies Negotiations", July 2017. Available from https://www.southcentre.int/analytical-note-july-2017-2/.
[28] WTO document RD/TN/RL/112/Rev.1, 5 February 2020

- Elimination of subsidies that contribute to Illegal, Unreported and Unregulated (IUU) fishing
- Overfished stock
- Overfishing and Overcapacity (O & O)

During 2019 and 2020, the Chair was assisted by Facilitators, experts from delegations, who organized open-ended meetings and consultations around the three main prohibitions as well as a range of other topics, resulting in Facilitator texts produced under their own responsibility and without prejudice to Members' positions and to any other text. Table 4 lists the latest revisions of these Facilitator Texts.

Table 4: Facilitator texts

Topic	WTO reference	Date
IUU	RD/TN/RL/113/Rev.2	10 April 2020
Overfished stocks	RD/TN/RL/119/Rev.1	9 December 2019
O & O	RD/TN/RL/114/Rev.2	10 April 2020
Definitions, scope, notifications and transparency	RD/TN/RL/115/Rev.1	9 December 2019
Dispute settlement, remedies and territoriality	RD/TN/RL/116/Rev.1	9 December 2019
Institutional arrangements	RD/TN/RL/117/Rev.1	9 December 2019
Special and differential treatment	RD/TN/RL/118/Rev.1	9 December 2019

In June 2020, the Chair produced a draft consolidated text (DCT) which tried to capture the state of play in a single document.[29] This is expected to be a reference for negotiations for the remainder of 2020. Nonetheless, Facilitator Texts as well as the proposals by Members continue to inform the negotiations.

The Overfishing and Overcapacity pillar

SDG 14.6 asks WTO Members to "prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing". Hence, the pillar on overcapacity and overfishing (O&O) is the most important pillar of the fisheries subsidies negotiations. At the same time, it has been the least mature area within the negotiations.

WTO Members have advocated several approaches to prohibition. There have been three main approaches advocated by different WTO Members:

i) Fisheries management linked approach
ii) Capping
iii) List-based approach

These approaches will be discussed in turn.

[29] WTO document RD/TN/RL/126, 25 June 2020

i) Fisheries management linked approach

Under fisheries management-linked approaches, subsidy prohibition is predicated on implied or explicit implementation of fisheries management systems which aim to make fisheries sustainable. Sometimes these approaches are referred to as "effects-based" approach, linking subsidies directly or indirectly to sustainability of fish stocks.

New Zealand and Iceland proposal

Under the New Zealand and Iceland proposal[30], enterprises are not allowed to receive subsidies when they target fish stocks which are

- being fished with a measure of fishing capacity that is greater than would be required to maintain the stock or stocks at a level that [would maintain MSY*]; or
- being fished at a rate that is contributing to a decline in that stock or stocks below a level that would equate to a level that [would maintain MSY*].

Such a subsidy prohibition raises several concerns and in practice seems to be difficult to implement or assess compliance thereof, even for the subsidizing Member. It would also imply the introduction of fisheries management disciplines into the WTO.

First, it would require enormous amount of data, including about fish stocks, current fishing efforts by all fishers as well as enterprise-level data on catches by species. Such data is generally not publicly available, at least not all elements to confirm that the subsidy prohibition is implemented.

Second, the question is how other WTO Members could effectively question the "rate of fishing" or "measure of fishing capacity" established by another WTO Member and whether this should be left to WTO dispute settlement to decide. A WTO Member could set "the measure of fishing capacity" to maintain adequate fish stock levels at 10,000 vessels or 1 million kwh or 500,000 vessel days and unless such a threshold is breached, all subsidies would in principle be OK. Similarly, "rate of fishing" could be established at a certain level of catches. How could another WTO Member know whether a certain "measure of fishing" or "rate of fishing" is sustainable or not? A WTO dispute settlement proceeding would thus have to double check or assess whether a WTO Member implements adequate fisheries management, and go through the documentation and methodologies which underly decisions to maintain a certain "rate of fishing" or "measure of fishing capacity". This would mean that jurisprudence would gradually be built up on how Members should set a "rate of fishing" or "measure of fishing capacity" in order to ensure sustainability of stocks. However, this is not the mandate of the WTO and many WTO Members; developing and developed countries alike, have expressed the sentiment that WTO is not a 'fisheries management organization'.

Related to the above, if the maximum rate of fishing which would maintain MSY or a certain fish stock level could be established, the subsidy prohibition could be avoided by setting a quota for all operators. While quotas could be necessary a policy tool to avoid collapse of a stock, the track record of quotas in ensuring sustainability is mixed. It would also be very difficult to argue that the level of quota in a certain year is inadequate.

Moreover, in many cases the "rate of fishing" in a given period to reach the stock corresponding to the Maximum Sustainable Yield in the fastest possible way would be to fish

[30] "Draft Language for an Overfishing and Overcapacity Prohibition", WTO document RD/TN/RL/79/Rev.1, 18 April 2019.

nothing during that period, i.e. ban fishing altogether. Would it be appropriate to outsource a decision to ban fishing to WTO dispute settlement?

Third, subsidies which do not have an impact on sustainability in the same year as when it is granted seem to be off the hook. Incidentally, these are among the subsidies which can increase capacity the most, including subsidies for the construction of vessels. An unfinished ship is not fishing at sea and does not contribute to a "rate of fishing".

Fourth, the "rate of fishing" (and "measure of fishing capacity") would take into account the fishing (and capacity) of all WTO Members. This means that if a neighbouring Member or a Member that engages in distant water fishing fishes in high seas or fishes or affects a stock in an EEZ of a Member with a less developed fishing sector/fleet, subsidies for the less developed Member would be prohibited.

Fifth, more generally, the concept of "measure of fishing capacity" has not been defined. Ambiguity in a legal text implies policy flexibility which would reduce the effectiveness of a prohibition. A 2018 WTO Secretariat paper looked at the measurement of fishing capacity and reported that "number of vessels" is a frequently used measure of capacity (see Annex III). Yet, it is generally accepted that fishing capacity should be normalized in order to be added up and compared at a fair basis between fleets and countries. A fleet of 10 super huge trawlers can have a higher capacity than 20,000 small scale fishing vessels, for instance. Examples frequently used in the literature include combined power of engines or Gross (Registered) Tonnage of vessels.

Paragraph 5.1.1 (as well as 5.1.3) of the Chair's Draft Consolidated Text of 25 June 2020 largely takes from the New Zealand and Iceland proposal. As such, the same concerns apply.

EU/Japan/Korea/TPKM proposal

On the O&O pillar, the Republic of Korea submitted a proposal together with EU, Japan and Chinese Taipei.[31] They propose that only subsidies which meet certain conditions would be allowed ("deemed not to be prohibited"). A subsidy shall be allowed if two conditions are met:

1. The subsidizing Member can demonstrate that "The stocks targeted by the subsidy recipient are managed on the basis of the best publicly available scientific evidence consistent with conservation, management and cooperation obligations under the relevant international law including, where relevant, with conservation and management measures of competent RFMO(s)/A(s);", and
2. "On the basis of the best publicly available evidence the subsidy will not create an imbalance between fishing capacity and available fishing opportunities."

The above essentially implies that if a Member complies with applicable international law or regional fisheries management organization (RFMO) obligations it can continue to provide subsidies. Assessing compliance with such obligation would require a high level of knowledge in fisheries management as well as a skill to determine the applicable laws (this would differ depending on a specific WTO Member). As a consequence, a WTO panel or arbitrator would have to pronounce itself on such issues. The question is whether this is desirable. As stated before, the general sentiment among WTO Members is that WTO should not become a "fisheries management organization".

[31] "Proposed Draft Text on A Prohibition of Subsidies Contributing to Overcapacity and Overfishing", WTO document RD/TN/RL/112/Rev.1, 5 February 2020.

Also, compliance with applicable international law or RFMO obligations does not always guarantee sustainability of resources or absence of overcapacity. Fisheries resources have been on decline even with the concurrence of RFMOs and (new) international instruments, some of which might not apply to all WTO Members. In the literature it is acknowledged that while RFMOs are often a good step in the right direction, they are not perfect. Allocation of fishing effort or quota within an RFMO is often fraught with challenges, especially if resources are dwindling.[32]

The second condition implicitly speaks to the latter concern but does not assuage it. First, who defines and decides what is an "imbalance between fishing capacity and available fishing opportunities"? The EU, for instance, has issued guidelines on this issue since 2014.[33] It contains biological indicators, economic indicators and vessel use indicators to assess the imbalance between fishing capacity and available fishing opportunities. For a given situation, these indicators could be used to either indicate a balance or imbalance. For instance, with respect to the vessel use indicator, if there are too many vessels not fully utilized it could indicate a technical inefficiency that may reveal the existence of an imbalance. However, 'inefficient' use of vessels might have a bearing on catches resulting in exploitation of fish corresponding to or below the Maximum Sustainable Yield (MSY) – which is one of the biological indicators in the EU guidelines.

Furthermore, as reported in a previous South Centre Analytical Note, not all EU Member States have been in a position to provide the necessary information to enable the assessment of (im)balance, for instance with respect to the biological indicators. This happens to be the case for some of the largest fishers within the EU, which might indicate that some available information is not made public. Thus, in the case when there is no "publicly available evidence", there cannot be a finding of imbalance.

The EU Guidelines cannot represent the definitive interpretation of what constitutes an "imbalance between fishing capacity and available fishing opportunities." It is just a policy document by 1 WTO Member which is subject to revisions. In the absence of further guidance, this would need to be addressed in a WTO dispute settlement proceeding, which again delves into how WTO Members should manage their fisheries resources.

Overall, the approach to subsidy prohibition taken in the Korea *et al.* proposal does not seem to be effective and would introduce fisheries management obligations into the WTO.

ii) Capping

Several WTO Members have advocated various variations of capping, namely US (together with Argentina, Australia, Uruguay), Brazil, China and Philippines. The main idea of capping is to prohibit subsidies only if they exceed a certain monetary amount.

Some have depicted capping as a 'complementary' modality besides 'hard' subsidy prohibitions (which would not be subject to capping); mostly these would be found in other pillars such as those related to IUU fishing or overfished stocks although some might be found within the O&O pillar (see below section on distant water/high seas fishing).

Examples of current subsidy prohibitions within the WTO include Article 3 of the Agreement on Subsidies and Countervailing Measures (export subsidies and local content subsidies)

[32] See e.g. Rosemary Rayfuse, "Regional Allocation Issues or Zen and the Art of Pie Cutting", UNSWLRS 10 (2007). Available from http://www5.austlii.edu.au/au/journals/UNSWLRS/2007/10.html.

[33] "Guidelines for the analysis of the balance between fishing capacity and fishing opportunities according to Art 22 of Regulation (EU) No 1380/2013 of the European Parliament and the Council on the Common Fisheries Policy", Communication from the Commission to European Parliament and the Council, COM(2014) 545 final. Available from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0545.

and the Nairobi Decision on Export Competition which *inter alia* prohibits export subsidies for agricultural products and certain forms of export finance.

Capping as a concept does not seem to be in line with the SDG 14.6 mandate to prohibit certain forms of fisheries subsidies which contribute to overfishing and overcapacity: *de minimis* subsidies or subsidies not exceeding a certain cap are of the same form as subsidies beyond de minimis or exceeding a certain cap.

However, the idea of capping is contained in the Agreement on Agriculture (AoA). Pursuant to the AoA, the amount of subsidies which are considered most trade-distorting (AMS, shorthand for Aggregate Measure of Support) are capped at a *de minimis* expressed as a percentage of annual value of agricultural production for a given year. This *de minimis* is set at 5% for developed countries, 10% for developing countries, and 8.5% for China and Kazakhstan as part of their respective WTO accession commitments. Only a select few countries, those that already subsidized agriculture in the late 1980s to a high degree (in particular EU, Japan, US), can go beyond this *de minimis* as they have been allotted AMS entitlements, i.e. additional legal rights to subsidize their farmers.

Relative cap

A non-paper by the Philippines advocated the idea of a relative cap, limiting subsidies relative to value of fish capture during a given year, an approach similar to that contained in the AoA. This seems to be a logical extension of the concept of *de minimis* in the AoA. In the fisheries subsidies context, however, such an approach appears more difficult to operationalize.

First, there is no publicly available data on the value of captured fish. Value is the product of price and quantity (value = price x quantity). FAO's FishStat database only provides data on quantities, i.e. the weight in tonnes of fish caught, but not the price of captured fish.

Second, price data might also be commercially sensitive and subject to confidentiality. Even in the agricultural context this has been an issue of concern for some WTO Members. Canada, for instance, has remained reluctant to share information on the value of sugar in its WTO notifications. The price of fish is also a sensitive issue in the context of negotiations on fisheries access agreements.

Third, the question is what is exactly the 'price' of fish? In the agricultural context, price usually refers to farmgate prices, i.e. the first point of sale by the farmer/primary producer. In the fisheries context, this could be the price when captured at sea. But other possible prices could be the price at transhipment at sea (if applicable), the price after initial processing at sea (if applicable), the price at landing or the price after initial processing of the captured fish on-land. In other words, for the same quantity of fish even if the same species we could have divergent values depending on the approach. Furthermore, it appears that if the extent of subsidization would depend on the value of fish caught in a given year, countries that capture or land fish from large scale industrial fisheries would be able to subsidize more as more value addition happens at sea rather than onshore.

Absolute cap

Other capping proponents have been proposing absolute caps. To make this work, several elements would need to be considered, including:

i. Base for establishing the monetary cap
ii. Methodology for cutting (who and how)
iii. Which subsidies would be covered within the cap

iv. Monitoring implementation of the cap

i. Base for establishing the monetary cap

Most capping proponents have argued that the basis for establishing cap should be centred around Members' notifications. In the case of US *et al.*, the basis for negotiations would be a 'baseline subsidy notification' with up-to-date information about recent fisheries subsidies.

Members' notifications essentially equate current level of subsidization. This would appear to imply that Members with larger subsidy programmes would retain more policy space compared to Members with a lower level of current expenditures on their fisheries sectors. Such a situation is similar to how AMS entitlements were established during the Uruguay Round, which were based on historical levels of subsidization during 1986 to 1988. In other words, this could create a historical inequity, something which many developing countries believe should have been avoided in the area of agriculture.[34]

Table 5: Base for Capping

Proponent(s)	**Base for capping**
US *et al.* TN/RL/GEN/197/Rev.2, 11 July 2019	Members' notifications (e.g. last 2 years)
Brazil RD/TN/RL/124, 27 February 2020	Members' notifications covering the last three years.
China TN/RL/GEN/199, 4 June 2019	• the average base for capping provided by a Member during the base period; or • average landed value of a Member's total wild marine capture during the base period; or • the amount of global average base for capping per fisherman multiplied by the number of fishermen of a Member during the base period.

The China paper takes this into account and has proposed that WTO Members could, besides their current or historical level of subsidization, also base a cap on the landed value of wild marine capture or the global average subsidy per fisher multiplied by the number of fishers (TN/RL/GEN/199, 4 June 2019). The latter would increase the starting point for negotiations on a cap especially for developing countries, including those that currently provide no or few subsidies.

However, in a presentation on 4 March 2020, China argues that the basis for establishing a cap would be a Member's notification plus any unnotified fuel tax exemptions[35], either because a monetary estimate is not provided or because it falls outside the scope of the ASCM due to the requirement of specificity. Average subsidy per fisher would then be one of the dimensions to evaluate the meaningfulness of a cap rather than the base for establishing a cap. This implies that developing countries with a large number of (small scale) fishers should not be required to make cuts from the established base cap, i.e. current notified amounts plus any currently unnotified fuel tax exemptions.

[34] See for example para 5.2, "Reversed S&DT" of a WTO submission by Bolivia, Central African Republic, China, Cuba, India, Kenya, Lao People's Democratic Republic, WT/GC/W/765/Rev.2, 4 March 2019.
[35] Presentation by China, "Meaningful Reductions to Global Fisheries Subsidies through the Capping Approach ——Preliminary Findings based on some simulations", 14 March 2020.

ii. Methodology for cutting (who and how to cut from base)

With respect to methodology, US and some other proponents (TN/RL/GEN/197/Rev.2) try to get around establishing a complex methodology by giving countries whose global marine capture is below 0.7% of the world a fixed amount of USD 50 million and to propose request-offer negotiations between 26 WTO Members, or less if any of those 26 agree to be capped at USD 50 million.

Request-offer negotiations on subsidies are not a tried and tested method in the WTO to cap subsidies. In such cases subsidy cuts are usually based on negotiated formula. The prime example is AMS entitlements which are based on historical level of such support during the years 1986 to 1988 with a 30% reduction from that base level.

In the Doha Round, formula-based modalities were carefully negotiated for different types of agricultural subsidies, usually with higher reductions for countries with higher subsidy entitlements or levels ('tiered formula cuts'). The idea of 'tiered cuts' emerged in the Doha Round to deal with the historical inequities. Brazil's proposal also proposes tiered formula cuts which reduces inequity marginally but it does not do away with it.

According to China, it is very difficult to agree on a single formula which would apply to all Members as "Members fisheries situations differ greatly" and that meaningful reductions to fisheries subsidies should be evaluated in light of the following three dimensions: overall reductions, subsidy intensity and equality of fishers' economic rights. This implies that negotiating a cap is not straightforward and that it would be difficult to agree on caps which score high on all three dimensions.

iii. Subsidies (not) covered within the cap

With respect to coverage, the US proposal stipulates that government agencies' expenditures for fisheries management and enforcement would be outside Members' caps. In other words, all other fisheries subsidies would be within the cap. However, in subsequent statements, the US has indicated a greater range of subsidies which should be excluded from the cap, including subsidies for disaster relief. Thus, the range of exemptions envisaged by US *et al.* is not yet entirely clear.

Brazil proposes that 4 groups of subsidies fall outside the cap, namely subsidies contingent on the temporary or permanent cessation of fishing activities, subsidies provided for the protection of fish stocks or for fish stock rebuilding, subsidies that benefit low income, resource poor or livelihood fishing activities, provided that these activities are performed by fish workers on an individual or family basis within 12 nautical miles, and subsidies for disaster relief, subject to certain conditions.

In China's submission the list of subsidies not subject to cap seems to be the largest. It includes fisheries management, programmes to protect fisheries resources or rebuild stocks, programmes to reduce fishing efforts or fishing capacity, and programmes that are rebuttably presumed not to contribute to overcapacity or overfishing (TN/RL/GEN/199).

In its 4 March presentation, China suggested that subsidies in the latter category would include subsidies for fishery communities (community development, infrastructure, disaster relief), subsidies for research and development (R&D) and training (e.g. best practice promotion), subsidies for subsistence fishers (e.g. poor traditional fishers), subsidies for environmental protection and health and sanitary conditions, subsidies for safety (e.g. life-saving equipment, insurance) and subsidies for control and monitoring (e.g. vessel monitoring system (VMS)).

In fact, it could be inferred that the cap proposed by China intends to cover four different types of subsidies which it considered "likely to contribute to fishing capacity/efforts":

- Subsidies for fishing activities (e.g. fuel, gear, bait)
- Subsidies for fishing vessels (e.g. vessel, engine)
- Subsidies for ancillary fishing activities (e.g. ice, processing, sales, marketing)
- Subsidies to develop fisheries (e.g. income tax incentives, property tax incentives, comprehensive programs for fisheries development)

These types of subsidies are generally considered the most harmful, which is also substantiated among others by OECD research (see above).

A commonality between the Brazil and China proposals is that both consider that subsidies provided to certain small-scale fisheries should not be limited.

iv. Monitoring the implementation of a cap

Agreement and implementation of capping is a relatively time and resource-intensive process. Agreeing on the capping amount and coverage will be less straightforward than agreement on prohibition – which would mainly require agreement on coverage.

Establishing a cap would require prior submission and validation of (expanded) subsidy notifications as well as periodic notification afterwards in order to monitor Members' compliance with an agreed capping amount. Many developing countries have voiced concerns that WTO's current transparency obligations are already difficult to comply with and require a lot of resources.[36]

In the area of agriculture, one of the main jobs of the Committee on Agriculture is perusal of annual notifications of agricultural subsidies. With capping for fisheries subsidies, a similar Committee process would have to be replicated. This would require additional resources as well.

With a view to efficiency and use of resources within WTO, applying notification / transparency obligations to a smaller subset of WTO Members, for instance those that currently have the highest amount of subsidies or which are distant water fishing nations could be explored.

A cap on fisheries subsidies as envisaged by proponents seems relatively flexible. In the case of agriculture, the limiting cap is the product-specific *de minimis*, so if too much AMS is provided to a certain product, compliance would mean reducing support for a particular product (e.g. wheat). In the case of cap on fisheries subsidies, all different types of subsidies within the scope of the cap would be interchangeable. Members could comply by decreasing and increasing certain harmful subsidies at the same time, and in fact subsidies for fishing a certain fish species could increase, provided that the total granted subsidies stays within the cap. This could lead to 'box shifting' and could allow the continued provision of a large amount of subsidies to fisheries catching specific species such as tuna or squid (which often are large scale fisheries).

[36] See e.g. Section 5 "Transparency and notification" of WTO submission by Bolivia, Cuba, Ecuador, India, Malawi, South Africa, Tunisia, Uganda and Zimbabwe, WT/GC/W/778, 11 July 2019.

Other possible variation of capping – capping per fisher

Other variations of capping are possible. One of them is to cap (certain) fisheries subsidies per fisher.

In the EU, *de minimis* aid, being aid granted to a single undertaking over a given period of time that does not exceed a certain fixed amount, is deemed not to meet all the criteria laid down in Article 107(1) of the Treaty[37] and is therefore not subject to the notification procedure.[38] In the fishery and aquaculture sector, the *de minimis* amount has been set at EUR 30,000 (over USD 35,000) over any period of three fiscal years, subject to a EU Member State specific cap which is EUR 165.84 million for Spain and EUR 112.55 million for France, for instance.

This essentially means that such *de minimis* subsidies are considered to be in conformity with EU subsidy rules and do not need to be reported by EU Member States to the European Commission. As a consequence, *de minimis* subsidies are not reported in WTO notifications submitted by the EU on behalf of its Member States; nonetheless such subsidies should be reported by EU Member States (who are WTO Members as well) to the WTO, if they fall within scope of the notification obligation.

In response to COVID-19[39], the EU has introduced more flexibility in the provision of fisheries subsidies by its Member States and considers most fisheries subsidies "compatible with the internal market on the basis of Article 107(3)(b) TFEU (..)" if "the aid does not exceed EUR 120, 000 per undertaking active in the fishery and aquaculture sector (..)", if "the aid is granted no later than 31 December 2020". An exemption is made for aid granted in form of tax advantages, where the aid is considered granted when the 2020 tax declaration is due (which could be later than the deadline of 31 December 2020).

The EU excludes subsidies listed in Article 1.1a-1k of Commission Regulation (EU) No 717/2014 from the *de minimis* (or cap), that is subsidies:

- the amount of which is fixed on the basis of price or quantity of products purchased or put on the market; (1a)
- linked to exports or domestic content; (1b and 1c)
- directly linked to capacity, i.e. subsidies for the purchase, construction or importation of fishing vessels, subsidies for the modernisation or replacement of main or ancillary engines of fishing vessels, subsidies to operations increasing the fishing capacity of a vessel or equipment increasing the ability of a vessel to find, subsidies to the temporary or permanent cessation of fishing activities unless specifically provided for in the Regulation (1d, 1e, 1f, 1g, 1h)
- to exploratory fishing; (1i)
- to the transfer of ownership of a business; (1j)
- to direct restocking, unless explicitly provided for as a conservation measure by a Union legal act or in the case of experimental restocking. (1k)

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[37] Article 107.1 reads: "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market." (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2008:115:TOC).

[38] 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, available at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32014R0717.

[39] "Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak", Communication from the Commission, 19 March 2020, available at https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf.

In the WTO negotiations, if capping remains on the table, a *de minimis* per operator could be explored borrowing from the EU example. This would *de facto* shield a large share of small-scale fishers from the disciplines.

iii) List-based approach

Taking into account the challenges with the proposals linked with fisheries management and capping, many developing countries have argued the case for a list-based approach. Under this approach a subset of subsidies which are known to be most harmful should be outlawed. WTO dispute settlement proceeding would not have to go into fisheries management matters but simply examine whether a prohibited subsidy is provided or not.

Many developing countries have argued that a 'list approach' would be more operational and provide predictability. It would also be clear what subsidies would be prohibited and when. Furthermore, the SDG 14.6 mandate refers to prohibiting "certain forms" of subsidies; the form of a subsidy (e.g. a fuel excise exemption) does not depend on its impact on sustainability.

This approach has been advocated by the ACP and LDC Groups. They propose that a subset of subsidies (those considered most harmful) provided to large-scale industrial fishing shall be prohibited. Besides that, the US together with Argentina, Australia, Chile, New Zealand and Uruguay proposes a prohibition of subsidies contingent upon fishing in areas beyond national jurisdiction (ABNJ).[40] Similarly, Canada proposed a prohibition on subsidies for fishing outside the jurisdiction of coastal Members and Regional Fisheries Management Organizations/Arrangements (RFMO/As).[41] While the US and Canada proposals have been integrated in the Draft Consolidated Text of 25 June 2020, the ACP and LDC Group proposals were not.[42]

Capital and operating costs subsidies to large scale industrial fishing

The Africa, Caribbean and Pacific (ACP) Group proposes that "Capital and operating cost subsidies to fishing vessels and fishing or fishing activity, provided to large-scale industrial fishing shall be prohibited". Subsequently a list of subsidies spelt out which subsidies are included.[43] The Least Developed Country (LDC) Group similarly proposes that certain subsidies provided to large scale industrial fishing shall be prohibited, using a list very similar to that of the ACP Group.

The subsidies targeted in the proposals by ACP and LDC Groups are largely in line with the body of research which has identified the most harmful subsidies (see also Section II above). The subsidies targeted by the ACP and LDC Groups also largely overlap with the subsidies described by the OECD Fisheries Support Estimate (FSE) database as being "direct transfers to fishers" (see Annex IV). Subsidies which are not listed are not prohibited.

What is large scale?

[40] "Proposed text on fisheries subsidies for fishing in areas beyond national jurisdictions", WTO document RD/TN/RL/91/Rev.1, dated 1 July 2019.
[41] WTO document RD/TN/RL/121, dated 14 January 2020
[42] The proposal for prohibiting subsidies to vessels not flying the flag of the subsidizing Member is not discussed here. Even though it might be possible supplementary prohibition (or rather an obligation to provide subsidies to own-flagged vessels), support for it appears limited. The 2017 South Centre Analytical Note of Fisheries Subsidies raised this idea as well, but noted that it would be difficult to garner support for it across the WTO Membership.
[43] WTO document RD/TN/RL/96/Rev.1, 3 February 2020

One of the elements of this proposed prohibition centres around the concept of "large-scale industrial fishing". This idea seems to make common sense. Large scale accounts for 75.5% of global fish capture and 84.1% of global fisheries subsidies, according to some estimates (see Section I). In developing countries, almost 32 million fishers work in small scale fisheries and a multiple of that is directly dependent on the small scale fisheries value chains for their livelihoods.[44]

Large scale fishing has lower socio-economic impact, and is also environmentally less sustainable in terms of CO2 emissions, fuel consumption, discards, by-catch or the destruction of marine habitats. All Members, developing and developed countries alike, recognize that there is a large difference between small scale and large scale fisheries and that differential treatment is justified. This has also been anchored in the FAO since 2015 with the promulgation of the FAO Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries (SSF Guidelines), and more recent FAO Guidelines also incorporate the concept of SSF. The focus on large scale would also facilitate implementation of agreed prohibitions and monitoring thereof – there are millions of small scale fishing vessels while there are thousands of large scale vessels.

A definition of "large scale" might not be required for the implementation of this fisheries subsidies prohibition. In the outcome document of Kobe III, a joint meeting of tuna RFMOs which took place in 2011, the words 'large scale purse seine capacity' were mentioned without an explicit definition.[45] Moreover, since 2006, the annual United Nations (UN) General Assembly resolution on Sustainable Fisheries calls for Member States to require a Vessel Motoring System (VMS) for 'vessels fishing on the high seas' and 'large-scale fishing vessels'.[46] Implementation of VMS for large scale fishing vessels has been ongoing in RFMOs as well as at Member State-level. This shows there is precedence for the use of the phrase 'large-scale fishing vessels' in international instruments, as well as its effectiveness, without a precise definition.

Nonetheless, some guidance with respect to a minimum standard could be useful, i.e. what could be considered 'large scale' for all WTO Members. Morocco made a submission in this regard (see Box 1 below).[47]

Box 1: Fishing vessels to be exclusively or mainly targeted in the context of overcapacity and overfishing disciplines (proposal by Morocco)

1.	Fishing vessels having, at least, three of the following characteristics:
a.	Length overall more than 24 meters;
b.	Tonnage higher than 100 gross tonnage or equivalent;
c.	Fishing gear towed or hauled by a motor driven equipment;
d.	Propulsion engine power higher than 130 kW or equivalent;
e.	Freezing equipment on board for storage of fish capture;
f.	Owned or operated by a multinational enterprise, a public limited company or a joint venture.

[44] See e.g. FAO Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries - Fact and Figures, http://www.fao.org/voluntary-guidelines-small-scale-fisheries/ihh/en/.

[45] "Kobe III participants recommended that developed fishing members freeze large scale purse seine capacity under their flag", Chair's Report of the Third Joint Meeting of the tuna Regional Fisheries Management Organizations (KOBE III), page 6. Available from http://www.tuna-org.org/Documents/TRFMO3/REP-KOBE3-ENG.pdf.

[46] See e.g. paragraph 13 of the 2019 United Nations General Assembly (UNGA) Resolution on Sustainable Fisheries, https://undocs.org/en/A/RES/74/18.

[47] "Fishing vessels to be exclusively or mainly targeted in the context of overcapacity and overfishing disciplines", WTO document RD/TN/RL/103, dated 7 August 2019.

2. Not later than the end of the 5th year from the date of adoption of the fisheries subsidies instrument and at the end of each 5-year period thereafter, Committee XX shall review the characteristics of the fishing vessels aforementioned.

In Morocco's view meeting a single indicator (e.g. length more than 24 meters or towed fishing gear) does not necessarily mean that a fishing vessel is 'large scale'. As such, it proposes a multi-criteria approach based on indicators referred to in research or other international instruments.

For instance, vessel length of more than 24 meters is referred to in the FAO Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels, the International Convention on Tonnage Measurement of Ships, 1969, the Indian Ocean Tuna Commission (IOTC) resolution 15/04 concerning the establishment of an IOTC record of vessels authorised to operate in the IOTC and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.

The engine power threshold of 130Kw, equivalent to around 174-175 horsepower, is derived from Regulation 13 of Revised International Convention for the Prevention of Pollution from Ships (MARPOL) Annex VI on nitrogen oxides (NOx) which stipulates that it shall apply to "each marine diesel engine with a power output of more than 130 kW installed on a ship" .[48] In other words, the NOx emission requirements only apply to ships with 'large' engines.

Across legal instruments of the International Maritime Organization (IMO), Gross Tonnage (GT) is often used as an indicator for application of a certain rule. For instance the Ballast Water Management Convention[49], the Regulations on Energy Efficiency for Ships[50], and the International Convention on the Control of Harmful Anti-fouling Systems on Ships apply to ships of 400 gross tonnage and above.

The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships maintains a gross tonnage threshold as well a territorial exemption. This Convention shall not apply to "ships of less than 500 GT or to ships operating throughout their life only in waters subject to the sovereignty or jurisdiction of the State whose flag the ship is entitled to fly. However, each Party shall ensure, by the adoption of appropriate measures, that such ships act in a manner consistent with this Convention, so far as is reasonable and practicable."

The International Regulations for the Safety of Fishing Vessels[51] combine length and GT: Regulations do not apply to vessels with a length less than 24 meters, where a gross tonnage of 300 shall be considered equivalent to a length of 24 meters.

What is the distribution of large-scale fisheries across the WTO Membership?

[48] Resolution Mepc.176(58) Adopted on 10 October 2008 - Amendments to the Annex of The Protocol Of 1997 to Amend the International Convention for The Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Relating Thereto, http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Marine-Environment-Protection-Committee-(MEPC)/Documents/MEPC.176(58).pdf

[49] International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004, http://library.arcticportal.org/1913/1/International%20Convention%20for%20the%20Control%20and%20Management%20of%20Ships%27%20Ballast%20Water%20and%20Sediments.pdf

[50] See http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Marine-Environment-Protection-Committee-(MEPC)/Documents/MEPC.203(62).pdf.

[51] Regulations annexed to the Torremolinos Protocol of 1993 relating to the Torremolinos International Convention for the Safety of Fishing Vessels, 1977, as modified by the Cape Town Agreement of 2012 on the Implementation of the Provisions of the Torremolinos Protocol of 1993 relating to the Torremolinos International Convention for the Safety of Fishing Vessels, 1977

The first four characteristics in Morocco generally figure in national vessel registers, namely length, tonnage, gear type and engine power. Various FAO and other regional instruments, including the FAO Deep Sea Guidelines and FAO Compliance Agreement, call upon Member States to record such information in a register.

Harmonized data on capacity parameters of the global fishing fleet and their distribution across countries has been lacking, in particular those relating to the engine power and Gross Tonnage (as these are numbers which can be added up). The FAO is also working to progressively increase global transparency on vessel capacity, through the Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels (Global Record). However, the scope of this initiative currently focuses on fishing vessels which are 100 gross tonnage, or of 24 meters in length, or above (i.e. fishing vessels which can be considered 'large scale') and the data contained in the Global Record is not easily accessible for further analysis.

Academia have also made efforts in this area, and recently, the seminal work of Rousseau *et al.* [52] provides a unique insight into global vessel capacity.

According to this dataset, the global fishing fleet consist of 2.49 million motorized vessels with a combined power of 139.8 million Kwh and 33 million Gross Tonnage.

The highest numbers of motorized vessels are found in Indonesia (439,338), Philippines (317,235), Japan (234,526), China (187,051) and India (146,229). However, the order changes if sorted on engine power, with China leading (14.52 million Kwh) followed by Japan (12.56 million), Indonesia (12.44 million), Korea (10.69 million) and United States (8.7 million). The fishing vessels in the fleets of Russia, Argentina, Norway, Chinese Taipei, Australia and United States, i.e. mostly developed countries with the exception of Argentina, have the highest average engine power.

The database of Rousseau *et al*. contains data on the first 4 characteristics (as these are generally recorded in vessel registers) and this allows to model Morocco's proposal on this database. We assume that a fishing vessel is large scale when 2 out of the first 4 characteristics in Morocco's proposal) are met. This implies that a fishing vessel may be considered 'large scale' under the following six combinations:

- Length overall > 24 meters and gross tonnage > 100 tonnes; or
- Length overall > 24 meters and fishing gear towed or hauled by a motor driven equipment; or
- Length overall > 24 meters and propulsion engine power > 130 kW or equivalent; or
- Gross tonnage > 100 tonnes and fishing gear towed or hauled by a motor driven equipment; or
- Gross tonnage > 100 tonnes and propulsion engine power > 130 kW or equivalent; or
- Fishing gear towed or hauled by a motor driven equipment and propulsion engine power > 130 kW or equivalent.

The results show that 163,686 vessels globally could be regarded as large scale, i.e. 6.6% of the global motorized fishing fleet. Together these vessels account for 37.6% of global engine power and 53% of global tonnage. In otheer words, it can be argued that less than 200,000 vessels worldwide account for close to or around half of global vessel capacity (see Table 6 below).

[52] Yannick Rousseau, Reg A. Watson, Julia L. Blanchard, and Elizabeth A. Fulton , "Evolution of global marine fishing fleets and the response of fished resources", PNAS June 18, 2019. Available from https://doi.org/10.1073/pnas.1820344116.

Seven WTO Members appear to account for around 63.5% of all large scale vessels, namely China, Japan, India, Viet Nam, Indonesia, European Union and United States. But even in these countries the number of non large scale vessels would exceed 75% or more of all motorized vessels. For instance, in the case of Korea, only 5% of vessels would be covered by Morocco's large scale criteria accounting for 51.7% of Gross Tonnage.

Table 6: Large scale fishing vessels

	All motorized fishing vessels			Large scale fishing vessels			Large scale fishing vessels (% of total fleet)		
WTO Member (ISO3 code)	**Number of Vessels**	**Power**	**Gross Tonnage**	**Number of Vessels**	**Power**	**Gross Tonnage**	**Number of Vessels**	**Power**	**Gross Tonnage**
World	2,485,611	139,748,077	33,029,683	163,686	52,490,231	17,495,643	6.6%	37.6%	53.0%
CHN	187,051	14,521,595	7,365,355	43,887	10,853,198	5,590,091	23.5%	74.7%	75.9%
EU-27	71,350	5,085,796	1,698,662	7,567	2,630,830	1,346,300	10.6%	51.7%	79.3%
RUS	2,569	1,861,520	1,207,239	1,980	1,771,194	1,186,812	77.1%	95.1%	98.3%
USA	42,004	8,714,135	959,425	7,135	3,225,522	641,010	17.0%	37.0%	66.8%
IDN	439,338	12,442,170	2,176,054	9,112	2,703,986	609,762	2.1%	21.7%	28.0%
TWN	12,256	2,984,166	595,609	3,897	2,112,802	550,174	31.8%	70.8%	92.4%
JPN	234,526	12,563,020	953,575	15,732	3,359,594	514,546	6.7%	26.7%	54.0%
AUS	8,748	2,000,775	634,327	2,343	1,425,667	503,950	26.8%	71.3%	79.4%
NOR	5,927	1,666,062	506,153	1,088	1,149,191	443,732	18.4%	69.0%	87.7%
IND	146,229	5,890,553	1,779,896	10,421	1,623,993	442,381	7.1%	27.6%	24.9%
VNM	114,997	7,072,002	866,909	10,120	2,648,805	433,393	8.8%	37.5%	50.0%
BRA	35,092	3,547,709	647,640	4,180	1,759,997	416,503	11.9%	49.6%	64.3%
WTO LDC	120,012	3,957,723	844,086	2,934	1,187,908	354,973	2.4%	30.0%	42.1%
KOR	66,234	10,694,838	527,324	3,311	2,011,672	272,411	5.0%	18.8%	51.7%
MAR	19,379	1,569,138	332,662	2,069	931,021	271,880	10.7%	59.3%	81.7%
MYS	52,230	3,087,431	412,540	5,746	1,428,002	265,071	11.0%	46.3%	64.3%
THA	49,916	2,919,822	402,756	5,287	1,095,831	242,213	10.6%	37.5%	60.1%
GBR	6,475	851,759	259,081	1,068	530,093	230,245	16.5%	62.2%	88.9%
PHL	317,235	2,776,776	712,645	1,763	562,375	196,109	0.6%	20.3%	27.5%
ARG	1,591	561,842	180,446	1,168	519,049	177,487	73.4%	92.4%	98.4%
ZAF	10,325	1,126,711	238,403	1,800	476,156	164,301	17.4%	42.3%	68.9%

Note: the Morocco proposal (2 out of the first 4 criteria) was applied using Rousseau *et al.* dataset (see text). In the absence of a global database on vessel fleet capacity, these numbers are estimates based on information from national vessel registries. They may be incomplete or inaccurate in some cases.

Subsidies to fishing in areas beyond national jurisdiction

Besides the large scale approach, several WTO Members also propose a prohibition of subsidies to fishing in areas beyond national jurisdiction (ABNJ). ABNJ include the high seas as well as the Exclusive Economic Zones (EEZs) of third parties.

The LDC Group proposes, as a complementary prohibition to the subsidy prohibition applying to large scale industrial fishing, that any subsidy to vessels and operators fishing in areas beyond national jurisdiction shall be prohibited.[53]

US, together with Argentina, Australia, Chile, New Zealand, and Uruguay also proposed a text on fisheries subsidies for fishing in areas beyond national jurisdictions. US *et al.* propose the prohibition of "Subsidies contingent upon, or tied to actual or anticipated, fishing or fishing-related activities in areas beyond its national jurisdiction (whether solely or as one of several other conditions or criteria), including subsidies provided to support at-sea fish-processing operations [or facilities], such as for refrigerator fish cargo vessels, and subsidies to support tankers that refuel fishing vessels at sea." In contrast to the LDC proposal which does not condition or limit the prohibition it contains the proviso "The mere fact that a subsidy is granted to operators or vessels that may be engaged in fishing or fishing-related activities in areas beyond its national jurisdiction shall not for that reason alone be considered a prohibited subsidy within the meaning of this article." [54] The US et al. proposal is reflected in paragraph 5.2(a) and 5.2.1 of the Chair's Draft Consolidated Text of 25 June 2020.

As worded, it is not directly clear when the proposed prohibition would apply. The second sentence appears to subtract much from the prohibition formulated in the first sentence. There are also interpretative issues around the words "contingent upon", "tied" and "anticipated". More generally, this prohibition might run the risk that the WTO could become another forum where territorial claims could be contested.

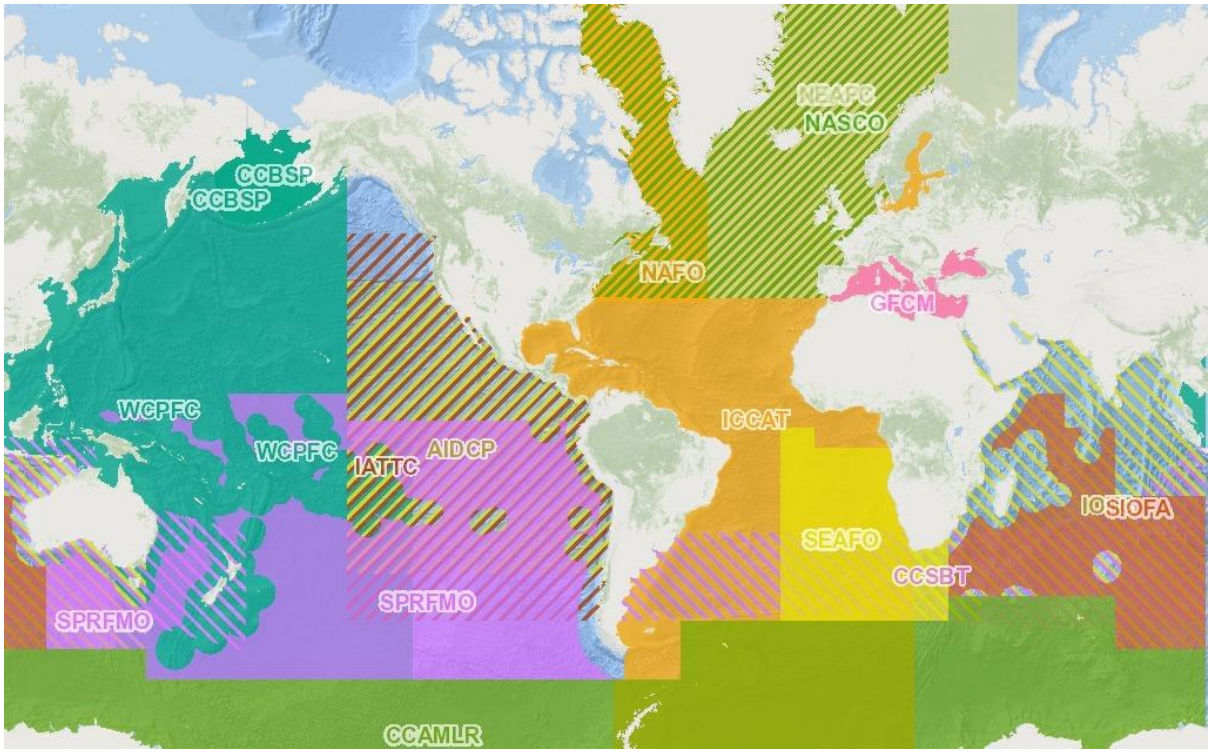
Effectively, this proposal addresses a subset of what the ACP targets. Largely, vessels that fish in high seas or other EEZs can be considered large scale industrial vessels. In fact, the US *et al.* proposal indirectly complements the Morocco proposal as it indicates what type of vessels could be considered "large scale", i.e. those that fish outside the national jurisdiction as well fish processing vessels and vessels which support such vessels, such as refrigerator fish cargo vessels and tankers that refuel fishing vessels at sea might be considered large scale (industrial) vessels.

Canada made another ABNJ submission, according to which subsidies provided to fishing or fishing related activities outside of the jurisdiction of a coastal Member and outside the area of competence of a relevant RFMO/A are prohibited. This proposal is reflected in Article 5.2(b) of the Chair's Draft Consolidated Text of 25 June 2020.

This prohibition appears limited, as there are two parts in the world which are outside Members' jurisdictions (EEZs) AND outside an area under the competence of an RFMO: a small area off the coast of Alaska and Canada and the Arctic Ocean – where at present commercial fishing is principally forbidden (see Figure 6 below).

[53] WTO document RD/TN/RL/125, 6 March 2020
[54] WTO document RD/TN/RL/91, 27 June 2019

Figure 6: RFMOs and their areas of competence



Source: European atlas of the seas[55]

Special and Differential Treatment (S&D)

In the Chair's Draft Consolidated Text of 25 June 2020 (DCT), Special and Differential Treatment for developing countries is proposed as follows:[56]

First, a complete carve-out is proposed for LDCs. Secondly, a territorial carve-out for developing countries, namely subsidies granted or maintained for fishing or fishing related activities at sea within their territorial sea. The territorial sea is the stretch of water beyond 12 nautical miles (22 kilometres) measured from the baseline. Waters behind the baseline are considered 'internal waters'. For archipelagos, the base line is drawn around the islands, and the waters in between are 'archipelagic waters' which have a status similar to 'internal waters'.

This territorial sea S&D is based on the idea that many artisanal fishers are only or mostly fishing close to shore. A carve out would protect any subsidies provided to such fishers. Furthermore the United Nations Convention on the Law of the Sea (UNCLOS) allots a special status to the territorial sea, as States have sovereignty over it, whereas they maintain a sovereign 'right' to their Exclusive Economic Zone. This exemption is not yet universally accepted by the WTO Membership for several reasons. Small scale fishers do not necessarily fish in the first 22 kilometres of water from shore; it also depends on the depth of water and where the fisheries resources happen to be. Some of them might also fish at sea in internal waters, as baselines do not always start directly from the coast. Also, the principle of sovereignty applies to all WTO Members, whether developing or developed. As such, it

[55] See https://ec.europa.eu/maritimeaffairs/atlas/maritime_atlas/#lang=EN;p=w;bkgd=5;theme=112:0.75,111:0.75Transparency;c=-3618535.713421492,8574282.708475756;z=4.

[56] It should be noted that S&D only applies to the core prohibition in paragraph 5.1 and not to the ABNJ prohibitions in paragraph 5.2 of the Draft Consolidated Text.

would be difficult to claim it as a special and differential treatment for developing countries only. Perhaps not coincidentally, the EU has proposed an exemption for territorial sea as well (in the Overfished discipline, but same could apply to Overfishing and Overcapacity). Also others think that exclusion of small-scale fishers from the scope of prohibition would be a better way to approach this, or to apply (part of) the disciplines only to large scale fisheries (see also above). As such, there is a connection between the large-scale approach and S&D for developing countries with respect to territorial sea or small-scale fishers.

Finally, , it is proposed that developing countries can continue subsidies for fishing or fishing related activities at sea within their EEZ and the area of competence of RFMO/A, unless they cumulatively meet 4 criteria, namely:

- Member's gross national income (GNI) per capita exceeds USD 5,000 (based on constant 2010 US dollars) for three consecutive years;
- Member's share of the annual global marine capture fish production exceeds 2% as per the most recent published FAO data;
- Member engages in distant water fishing; and
- Contribution from Agriculture, Forestry and Fishing to the Member's annual national gross domestic product (GDP) is less than 10% for the most recent three consecutive years.

In other words, subsidy prohibition would kick in for developing countries if all of the 4 criteria would be met.

This S&D is in the form of a carve-out for fishing in EEZ and RFMO/As. It would only apply to those developing countries meeting all these 4 criteria. As currently worded, very few developing countries would meet all criteria. Developed countries and some developing countries have therefore argued that this special and differential treatment is problematic, to the extent that large subsidizers in developing countries could circumvent the discipline.

Looking at currently provided subsidies however, this does not seem to be the case. Developed countries, developing countries that do not fall within the scope of this proposed S&D provision (e.g. China), as well developing countries that have disavowed to make use of new special and differential treatment provisions in the WTO (e.g. Brazil, Korea) are responsible for the lion's share of global fisheries subsidies especially capacity-enhancing subsidies which are to be targeted in the Overfishing and Overcapacity pillar – around 90% or so (see Section II above). In other words, it would exempt 10% of such subsidies. Furthermore, this S&D does not apply to high seas fishing not within the purview of an RFMO/A S&D. In the bigger picture, this S&D does not seem to be overly maximalist when looking at currently provided subsidies. But in theory unlimited policy space in providing subsidies could increase this share.

Some have also argued that the indicators are not necessarily valid measurements of the development of a country's fisheries sector. For instance, there might be a weak correlation between level of fisheries development and GNI per capita. A counterargument is that the proposed S&D is not predicated on a single indicator but a set of indicators which have to be examined as a whole. Furthermore, GNI per capita is currently used in the Agreement on Subsidies and Countervailing Measures as an indicator, permitting those with a low GNI per capita, below USD 1000 in 1990 constant prices, to continue otherwise prohibited export subsidies.

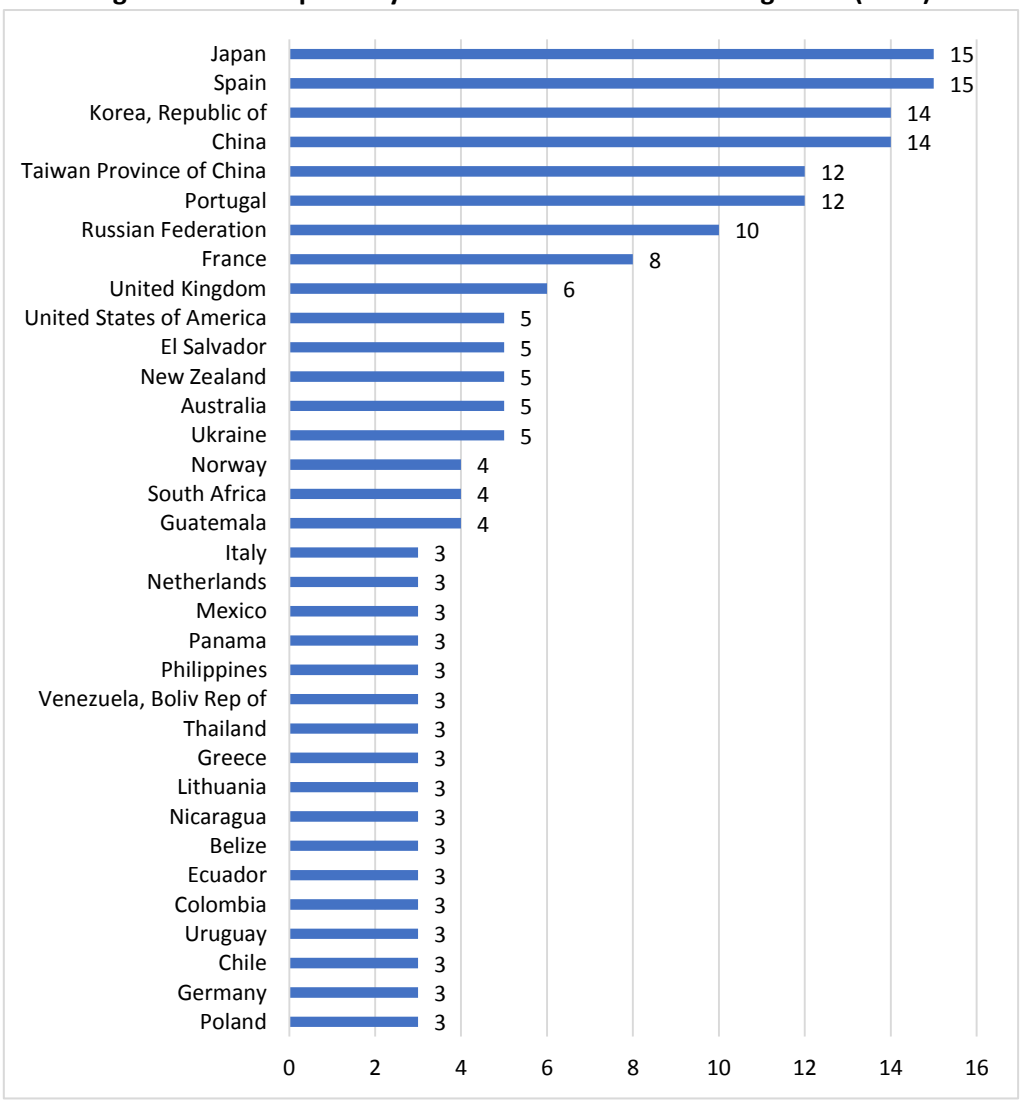
The share in global marine fish capture was an indicator taken from a proposal by the ACP Group. This indicator could be questioned as well. Higher share might not be necessarily be associated with high level of development (e.g Mauritania). Also global share is not a normalized indicator corrected for the size of a country.

The criterion “Member engages in distant water fishing”, also referred to as distant water fishing nation (DWFN) in the fisheries literature, is an interesting one as this is closely related to capacity to fish in distant waters. Under the DCT, “a Member is deemed not to be engaged in distant water fishing if its operators or vessels normally fish in FAO Major Fishing Area(s) that is(are) adjacent to the natural coastline of the flag state.”

This definition means that if fishes are caught in WTO Members’ ‘own’ FAO major fishing areas, it is deemed not to be a DWFN. Several WTO Members are bordering more than 1 fishing area, examples include the United States (4 FAO marine fishing areas), Australia (3), South Africa (3), India (2) or France or UK by virtue of their overseas territories.

Most WTO Members fish within the FAO fishing area(s) covering their EEZ. However, there are several WTO Members which fish beyond that. For instance, in 2017, Japanese vessels caught fish from 15 different FAO marine fishing areas and can therefore be assumed to be very active in distant water fishing. The same applies for EU, Korea, China, Russia, UK, US, amongst others (see Figure 7 below).

Figure 7 – Fish capture by number of FAO marine fishing areas (2017)



Source: FAO FishStatJ

Note: All other fishing entities derive fish from 2 or less FAO marine fishing areas.

Recommendations

SDG 14.6 asks WTO Members to "prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing". Hence, the pillar on overcapacity and overfishing (O&O) is the most important pillar of the fisheries subsidies negotiations. However, WTO Members have not yet agreed on the approach to prohibition. This research paper distinguishes 3 types of approaches: the fisheries management linked approach (sometimes referred to as effects-based approach), capping and list-based approach.

This paper argues that the core of the prohibition in the Overfishing and Overcapacity pillar should be list-based. As such, WTO Members should look into streamlining the list of prohibited subsidies along the lines of ACP & LDC proposals, and take into account research from the OECD and the categorization of subsidies in its Fisheries Support Estimate (FSE) database.

Such a list of prohibited subsidies should only apply to large scale fisheries. A definition of "large scale", might not be required for an outcome, as this could be discussed as an implementation issue in a WTO Committee. Nonetheless, some guidance with respect to a minimum standard could be useful, i.e. what could be considered 'large scale' for all WTO Members. Such guidance could take cue from precedents set by IMO regulations, the criteria used for inclusion of vessels into the FAO Global Record and/or Morocco's proposal on large scale, for instance. Such minimum standard could start at a relatively low level of ambition and could be evaluated and gradually be tightened up, while inviting WTO Members to go beyond the minimum standard so as to create a 'race to the top'.

For subsidies which are not prohibited an effect test might be considered. Such an approach would assuage proponents of a fisheries management linked approach, including New Zealand/Iceland and EU/Japan/TPKM/Korea. Such a combined approach would effectively model the approach taken by the ASCM to subsidy prohibition: define a relatively limited list of prohibited subsidies (Article 3 ASCM) whereas other subsidies which are found to cause injury would be actionable (Article 7 ASCM).

A supplementary subsidy prohibition covering ABNJ could be considered, but as currently worded is either very ambiguous or only seems to cover fishing in a limited space of ocean. It is essentially a lower ambition version of the proposal to prohibit certain subsidies to large scale industrial fishing, which most fishing in the high seas or in other EEZs is. One option to take the ABNJ type of proposals on board is to deem certain vessels as 'large scale'. For instance, vessels which are authorized to fish, capture fish or anticipated to fish, in areas beyond national jurisdiction of the subsidizing Member can be deemed as large scale, and could also include fish processing vessels and vessels that support at-sea fish-processing operations or facilities, such as refrigerator fish cargo vessels and tankers that refuel fishing vessels at sea. The latter vessels are listed in the US *et al.* ABNJ proposal (and reflected in para 5.2(a) in the Chair's Draft Consolidated Text of 25 June 2020).

Capping is not a preferred method to discipline subsidies. However, if capping remains on the table, capping subsidies per fisher could be explored, borrowing this idea from the EU *de minimis* aid thresholds and China's proposal to use subsidy per fisher as an element to establish a cap.

On S&D, developing countries whose fisheries sector are less developed should not take on the same commitments. The capacity to be engaged in distant water fishing is one valid indicator which could be explored. At the same time, there also appears to be a strong correlation between being engaged in distant water fishing and level of subsidies.

ANNEX I: OVERVIEW OF TEXTUAL PROPOSALS FROM MC11 TO AUGUST 2020

Submissions by WTO Members in the WTO document series RD/TN/RL/ and TN/RL/GEN/
Note: in case of revisions, the latest revision is being shown

Proponent	Title	WTO document reference	Date
LDC Group	LDC Group fisheries subsidies text proposal	RD/TN/RL/125	6 March 2020
India	Article [X] : special and differential treatment	TN/RL/GEN/200/Rev.1[57]	6 March 2020
Brazil	Mechanism for reductions and limits of fisheries subsidies	RD/TN/RL/124	28 February 2020
Australia	"Green box"?	RD/TN/RL/123	26 February 2020
EU, Japan, Korea, TPKM	Proposed Draft Text on a Prohibition of Subsidies Contributing to Overcapacity and Overfishing	RD/TN/RL/112/Rev.1	5 February 2020
ACP	IUU Fishing	RD/TN/RL/89/Rev.2	4 February 2020
ACP	Overcapacity and Overfishing	RD/TN/RL/96/Rev.1	4 February 2020
ACP	Scope	RD/TN/RL/122	4 February 2020
Canada	Proposed prohibition on subsidies contributing to overcapacity and overfishing	RD/TN/RL/121	14 January 2020
EU	EU proposal on port state determination - Background and adjustments	RD/TN/RL/120	5 December 2019
Argentina, Australia, Indonesia, Japan, New Zealand, US and Uruguay	Prohibiting subsidies to fishing vessels not flying the Member's flag	TN/RL/GEN/201/Rev.1	2 December 2019
China	Adjusting the WTO dispute settlement mechanism when applied to the fisheries subsidies disciplines	RD/TN/RL/107/Rev.1	4 November 2019
Argentina, Australia, US and Uruguay	Initial text to incorporate the cap approach to address certain fisheries subsidies	TN/RL/GEN/203	4 November 2019
Philippines	Proposed solution to concerns on disputed waters	TN/RL/GEN/202	21 October 2019
Japan	Proposed text of the elements of the instrument on fisheries subsidies	RD/TN/RL/108	7 October 2019
Argentina, Australia, US and Uruguay	Template and guidance for preparing offers under the cap mechanism for fisheries subsidies for Tier 1 members and Tier 2 members	RD/TN/RL/105	10 September 2019
EU	Possible consolidated vertical negotiating text	RD/TN/RL/104	10 September 2019

[57] Previous version in RD/TN/RL/82 (8 April 2019)

Proponent	Title	WTO document reference	Date
Morocco	Fishing vessels to be exclusively or mainly targeted in the context of overcapacity and overfishing disciplines	RD/TN/RL/103	7 August 2019
Brazil, Ecuador and Egypt	Proposed draft text on a possible consultations mechanism	RD/TN/RL/100	7 August 2019
Argentina, Australia, US and Uruguay	A cap-based approach to addressing certain fisheries subsidies	TN/RL/GEN/197/Rev.2	11 July 2019
Japan	Concept notes and proposals on the disciplines of fisheries subsidies	RD/TN/RL/99	5 July 2019
ACP	Overfished discipline	RD/TN/RL/95	2 July 2019
Argentina, Australia, Canada, Chile, New Zealand, US and Uruguay	Proposed text on notification and transparency	RD/TN/RL/90/Rev.1	1 July 2019
Argentina, Australia, Chile, New Zealand, US and Uruguay	Proposed text on fisheries subsidies for fishing in areas beyond national jurisdictions	RD/TN/RL/91/Rev.1	1 July 2019
China	Cap-based approach to address certain fisheries subsidies that contribute to overcapacity and overfishing	RD/TN/RL/88; TN/RL/GEN/199	18 June 2019; 4 June 2019
Argentina, Colombia, Costa Rica, Panama, Peru, Uruguay, Canada, Iceland, New Zealand and US	Draft text on IUU fisheries subsidies	RD/TN/RL/87	12 June 2019
Australia	Australian draft text on overfished stock	RD/TN/RL/77/Rev.2	5 June 2019
Canada	Dispute settlement in a WTO fisheries subsidies agreement: discussion paper	TN/RL/GEN/198; RD/TN/RL/85)	21 May 2019; 10 May 2019
New Zealand and Iceland	Draft Text on Overfishing and overcapacity	RD/TN/RL/79/Rev.1	18 April 2019
Philippines	Draft text: Philippines non-paper	RD/TN/RL/81	20 March 2019

ANNEX II: FACTUAL PAPERS BY WTO SECRETARIAT SINCE MC11

Factual papers by the WTO Secretariat

Title	WTO reference	Date
Amount of Subsidization Going to Small-Scale, Artisanal, And Industrial Fishing	RD/TN/RL/111	5 November 2019
Compilation of Provisions apparently relating to the Special and Differential Treatment from Selected International Instruments on Fisheries Regulation	RD/TN/RL/106	20 September 2019
Government Support for The Acquisition and Construction of Vessels, Including Fleet Renewal Programmes	RD/TN/RL/86/Rev.3	3 July 2019
Compilation of references in WTO Agreement relating to laws, regulations, guidelines, and similar	RD/TN/RL/84	6 May 2019
Statistics on marine fish catch by area, by country, by sector; contribution to employment and to food security	RD/TN/RL/74/Rev.1	25 April 2019
Fuel subsidies to the fisheries sector	RD/TN/RL/78/Rev.1	25 April 2019
Factual paper on RFBs, including RFMOs; IUU vessel lists of RFMOs	RD/TN/RL/62	21 September 2018
Compilation of information on notified subsidies pertaining to fisheries extracted from Members' notifications in the G/SCM/N/284/… and G/SCM/N/315/… series	RD/TN/RL/49/Rev.3	11 September 2018
Compilation of Material from International Instruments and Domestic Legislation (and other Domestic Sources) relating to the Definitions in RD/TN/RL/29/Rev.3	RD/TN/RL/47	25 May 2018
Compilation of provisions in Free Trade Agreements relating to Fisheries subsidies specifically, as well as fisheries sustainability more generally	RD/TN/RL/43	7 May 2018
Compilation of data on definition and measurement of fishing capacity	RD/TN/RL/44	7 May 2018

ANNEX III: MEASUREMENT OF FISHING CAPACITY ACCORDING TO 2018 WTO FACTUAL PAPER

Organisation	**Measure of fishing capacity**
FAO	Number of fishing vessels Number of fishers Gross Tonnage Gross Registered Tonnage
OECD	Gross Tonnage Number of vessels
Inter-American Tropical Tuna Commission (IATTC)	Number of vessels (purse seine and pole-and-line) Well volume, in cubic meters (m3)
International Commission For The Conservation Of Atlantic Tunas (ICCAT)	Number of vessels
North Pacific Fisheries Commission	Number of vessels (trawl, longline, gillnet, crab pot) Number of fishing days
Northwest Atlantic Fisheries Organization (NAFO)	Fishing effort (measured in days) Number of fishing vessels (squid jigging, drift-net, bottom trawl, mid-water trawl)
South Indian Ocean Fisheries Agreement (SIOFA)	Number of vessels (trawl, bottom longline and gillnet)
Western and Central Pacific Fisheries Commission (WCPFC)	Number of vessels (authorized to fish beyond national jurisdiction within the Convention Area)

Source: WTO document RD/TN/RL/44, 7 May 2018

ANNEX IV: LINKAGES BETWEEN OECD FISHERIES SUPPORT ESTIMATE (FSE) DATABASE CATEGORIES AND WTO FISHERIES SUBSIDIES PROPOSALS

OECD FSE – direct transfers to fishers

OECD FSE category	**Draft Consolidated Text of 25 June 2020 (para 5.1.2)**
Direct transfers to fishers:	
I.A. Transfers based on input use	Subsidies to/that reduce "operating costs" (partially)
I.A.1. Transfers based on variable input use	Subsidies to costs of fuel, ice, bait, personnel, social charges, insurance, and gear, subsidies for at-sea support, and subsidies to cover operating losses of vessels or fishing or fishing related activities.
I.A.2. Transfers based on fixed capital formation	Subsidies to "capital costs"
I.A.2.1.Support to vessel construction/purchase I.A.2.2.Support to modernisation I.A.2.3.Support to other fixed costs	Subsidies to costs of construction, acquisition, modernisation, renovation or upgrading of vessels Subsidies to 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)
I.B. Transfers based on fishers income	
I.B.1. Income support	income support of vessels or operators or the workers they employ (as part of "operating cost")
I.B.2. Special insurance system for fishers	Depending on the programme, subsidies to the costs of personnel, social charges or insurance could fall within this OECD FSE category
I.C. Transfers based on the reduction of productive capacity	
I.D. Miscellaneous direct support to individuals and companies	payments based on the price of fish caught
I.E. Tax exemptions	
I.E.1. Fuel tax	Subsidies to costs of fuel (fuel tax exemption is one way to provide subsidies, the other main way is refund)
I.E.2. Other tax exemptions	

OECD FSE categories (support for services to the sector) and WTO Member proposals for exemptions

OECD FSE category	WTO Member proposals for exemptions
II.A. Access to other countries' waters	X.2 This instrument shall not apply to the following: (b) government to government access agreements (ACP)
II.B. Provision of infrastructure	
II.C. Marketing and promotion	
II.D. Support to fishing communities	programs to ensure social welfare of fishers and sustainable development of local communities dependent on fisheries (ACP)
II.E. Education and training	programmes aiming to promote human capital, including training, advisory services, and cooperation between fishers and scientists (ACP, and EU/Japan/Korea/TPKM proposal)
II.F. Research and development	research, development and innovation subsidies (EU/Japan/Korea/TPKM proposal)
II.G. Management of resources	• programmes for the design, research, development, implementation and enforcement (including monitoring control and surveillance) of fisheries management measures, including to protect and improve/ restore marine biodiversity conservation and eco-systems, rebuild stocks, and reduce effort (ACP) • subsidies to protect marine environment and to restore fish stocks and maintain them above levels which produce maximum sustainable yield, such as subsidies to reduce fishing effort and fishing capacity, subsidies for the creation and management of marine protected areas and subsidies for fisheries management, data collection, monitoring, control and enforcement (EU/Japan/Korea/TPKM proposal) • support to the implementation of and compliance with international agreements and other arrangements on conservation and sustainable management of fisheries resources (ACP) / subsidies to implement international agreements and other arrangements that promote sustainable resource management (EU/Japan/Korea/TPKM proposal)
II.H. Miscellaneous support for services to the sector	• subsidies to improve health and safety on board (ACP, EU/Japan/Korea/TPKM proposal) • measures to prepare for, relieve, or recover from damage caused by man-made or natural disasters, including adverse weather and climatic events (ACP) / subsidies to react to adverse climatic events and environmental incidents (EU/Japan/Korea/TPKM proposal)

Provision of infrastructure (Capital expenditures or Subsidized access to infrastructure) and Marketing and Promotion have not been explicitly mentioned as a subsidy to be exempted from the disciplines. This might be as many developing countries assume that such subsidies do not fall within the scope of the fisheries subsidies instrument, as it would be limited to "marine wild capture fishing and fishing related activities at sea". However, construction of a fisheries port or subsidized access to it would affect costs of fishing at sea as well. In the absence of a list approach which would set out very specifically which subsidies are prohibited these categories of subsidies would potentially be prohibited.

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