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Roman Grynberg

University of the South Pacific

Ben M. Tsamenyi

University of Wollongong, tsamenyi@uow.edu.au

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Abstract

Focuses on fisheries trade, regulated under the "Agreement on Subsidies and Countervailing Measures" outside the World Trade Organization agreement. Suggests much stricter discipline is needed for the sector, led by the environmental interest, the USA and New Zealand. Relates fish stock depletion to subsidies, which are not quantifiable, in order to create a free market and efficient producers. Points out that technology and high incomes created the fish stock depletion, so subsidies are irrelevant; while all World Trade Organization members subsidize fisheries, none can be found to attack it. Proposes new World Trade Organization disciplines for licensing, training and compensating fishermen, reducing effort and increasing fees, and for discouraging overfishing by foreign fleets. Concludes that new agreements should protect Pacific islands wishing to gain from their tuna stocks while protecting fish stocks.

Keywords

fisheries, subsidies, wto, pacific, island, tuna

Disciplines

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Fisheries Subsidies, the WTO and the Pacific Island Tuna Fisheries

Roman GRYNBERG* and Martin TSAMENYI**

I. INTRODUCTION

One of the few sectors of international trade that has remained largely unaffected by the new disciplines created by the Uruguay Round negotiations and the creation of the World Trade Organization (WTO) has been the fisheries sector. This has been a sector of international trade of considerable importance, particularly for the island States of the Central and Western Pacific and it is from their perspective that the question of fisheries subsidies is analysed. Despite the existence of general obligations under Articles I and III of the General Agreement on Tariffs and Trade (GATT)¹ as well as regarding lesser WTO obligations there remains a lack of clarity as to which of the GATT/WTO disciplines in the area of subsidies apply to the fisheries. It is evident that it was not the intention of the Contracting Parties to subject the fisheries sector to the disciplines and subsidies reduction commitments of the *Agreement on Agriculture*.² It is the view of the WTO Secretariat and WTO members³ that the fisheries sector is subject to the much more rigorous disciplines on the *Agreement on Subsidies and Countervailing Measures*⁴ (ASCM). Prior to the very recent spate of research on the subject of fisheries subsidies WTO members were not aware of the magnitude of these subsidies and it is for this reason that they agreed to subject the fisheries sector to these stricter disciplines. The

* Associate Professor of Economics at the University of the South Pacific on secondment as Multilateral Trade Policy Adviser at the Forum Secretariat.

** Professor of Law, University of Wollongong, Australia on secondment as Fisheries Law Adviser to the Forum Fisheries Agency.

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¹ General Agreement on Tariffs and Trade Articles I and III are, respectively, the obligation to offer most-favoured-nation (MFN) treatment and national treatment. These two articles are the cornerstone of the GATT system.

² The Agreement on Agriculture specifically excludes fish and fish products see Annex 1 *Agreement on Agriculture* in GATT, *Results of the Uruguay Round of Multilateral Trade Negotiations—The Legal Texts*, Geneva, 1994, pp. 39-68.

³ See notifications listed in WTO Secretariat document *GATT/WTO Rules on Subsidies and Aids Granted in the Fishing Industry*, WT/CTE/W/80, 9 March 1998.

⁴ As note 3, above, pp. 264-315. During the Uruguay Round, negotiations were held by the Contracting Parties on the Natural Resource Based Products' (NRBP). These included such products as minerals and marine products. There was no agreement during the round on disciplines in this area but members did accept that the ASCM would apply to the fisheries sector. This was one of the few agreements that came from these negotiations which were generally seen as a failure. However, even this agreement was never included as part of the Final Act of the Uruguay Round. Despite this and despite the fact that some WTO members notify their fisheries subsidies under the terms of the ASCM there is no written agreement on this subject.

existence of very substantial subsidies offered by the major fishing nations will mean that the developing countries of the Pacific islands which are the source of 45 percent of the world's tuna,⁵ along with other developing coastal States, will need to pay particular attention to the emerging consensus at the WTO to bring the fisheries sector subsidies under much stricter discipline.

This article also considers the emerging synergy between the environmental movement and certain developed country fishing nations, in particular the United States and New Zealand that will put substantial pressures on Pacific island countries in the years to come. It will be argued that the emerging agreement between trade liberalisers and environmentalists may greatly impact upon the potential that Pacific island countries have to develop this one resource which the region has in relative abundance. The first section of this article considers the increasing pressure put on global fish stocks and its relation to subsidies. It is argued that while there is no dispute that the substantial subsidies offered by developed countries to their fishing fleets has contributed to increased effort, the question remains unanswered whether this pressure on fish stocks would be greatly diminished in the longer term in light of increasing populations, incomes and fish demand. It is argued here that an end to subsidies will only relieve pressure on fish stocks in the medium term as subsidies are largely symptomatic of the larger problem of diminishing returns in an open access fishery which is caused by rising global income and population operating on a fixed stock of marine resources.

The important question of whether there may be some conflict between the provisions of the UN Convention on the Law of the Sea (Law of the Sea Convention) regarding access arrangements and the ASCM is also addressed. It will be argued that while there does not exist an explicit conflict, the Law of the Sea Convention, which predates the Uruguay Round agreements, clearly permits financial provisions for fisheries access arrangements that could be construed as actionable subsidies.

Possible new disciplines or the rigorous application of existing subsidies disciplines in the fisheries sector could be negotiated in the up-coming "Millennium Round".⁶ These possible new disciplines will be considered and it will be argued that when applied to developed countries they could result in diminished fishing effort but could also have adverse implications for both the policy of domestication of fleets in coastal developing countries and on attempts to maximise returns from access fees available from catches of highly migratory species. In the context of the South Pacific where

⁵ This figure includes landings from the Exclusive Economic Zone and adjacent high seas of Forum Fisheries Agency member countries.

⁶ At the first WTO Ministerial meeting Sir Leon Brittan formally proposed the calling of what he has termed the Millennium Round (WT/MIN(96)/ST/2, p. 3). However, Art. 20 of the *Agreement on Agriculture* prescribes that a new round of Multilateral trade negotiations must begin one year prior to the completion of the agreement, which is 1999. Given the multitude of new issues before the WTO including Competition Policy, Investment and Government Procurement, there is certainly adequate scope for new negotiations. Despite the resistance of some WTO members to calling a new round it is now apparent that one will commence at the Ministerial Conference planned for 1999.

there does not exist any obvious pressure on the marine resource,⁷ the justification for the global application of these subsidies disciplines for what are purported to be reasons of environmental sustainability and resource management is not apparent. It should not be assumed that the elimination of these subsidies is, *a priori*, in the interests of resource owners. Moreover, the elimination of the subsidy may result in the entry of new lower quality distant water fishing fleets which have far less concern with compliance and assuring sustainable fisheries practices than some of the existing fleets.

One of the ironies of the current fisheries subsidies debate is that the two countries which are most actively pursuing the question of WTO disciplines in the fisheries are New Zealand and the United States which are both signatories to the Multilateral Fisheries Treaty between the United States and Certain Pacific Island Countries which has a very substantial US government subsidy component. The possibility also arises that many of the existing access arrangements as well as aid agreements to the fisheries could be impaired if an overly stringent WTO policy were pursued that included disciplines for developing and least developed countries. Coastal and island States will have to carefully consider how they will structure their fisheries access agreements in future so as to assure compatibility with disciplines that may not yet exist. The various options for these disciplines will be discussed and recommendations offered for the structure of future access agreements.

II. FISH STOCK DEPLETION AND SUBSIDIES

Within the last two years several major international organisations including the United Nations Environment Programme (UNEP),⁸ the World Bank⁹ and the Food and Agriculture Organization (FAO)¹⁰ have taken a much more active interest in the question of subsidies in the fisheries. The Organisation for Economic Co-operation and Development (OECD) and Asia-Pacific Economic Co-operation Council (APEC) have also commissioned studies. This went hand in hand with heightened non-governmental organization (NGO) interests in this area and the recent publication by the World Wildlife Fund (WWF)¹¹ and Greenpeace¹² of a series of studies on subsidisation. If the question of subsidies had simply been brought to global attention by NGOs and international environmental organisations it would not have appeared as important or as

⁷ See South Pacific Commission, *Status of Tuna Stocks in the Western and Central Pacific Ocean* Oceanic Fisheries Programme, Noumea, New Caledonia, April 1997. In the case of the three main species, Skipjack (*Katsuwonus pelamis*), Yellowfin (*Thunnus albacurus*) and Albacore (*T. Alalunga*) there is no evidence of declining catches. Only in the case of Bigeye Tuna does there appear to be any evidence that there may be a need for curtailment of effort.

⁸ UNEP has recently convened an international symposium on Fisheries, Overfishing and Trade.

⁹ World Bank, *Subsidies in World Fisheries—A Reexamination*, World Bank Technical Paper No. 406, Washington, D.C., 1998.

¹⁰ FAO, *Overview of World Fisheries: Challenges and Prospects for Achieving Sustainable Resource Use*, FAO, Rome, April 1996.

¹¹ WWF, *Subsidies and Depletion of World Fisheries: Case Studies*, Endangered Seas Campaign, Washington, D.C., 1997.

¹² R.D. Downes & B. Van Dyke, *Fisheries Conservation and Trade Rules*, Centre for International Environmental Law, Greenpeace, Washington, D.C.

pressing as is presently the case. What has, at least from the perspective of developing countries, added a new sense of urgency to the issue of fisheries subsidies have been two recent papers by the United States¹³ and then two days later by New Zealand¹⁴ at the WTO's Committee on Trade and Environment. The arrival of the fisheries subsidies issue on the global trade agenda was reconfirmed implicitly by the acceptance in Vancouver in late 1997, by APEC Ministers of Fisheries as a sector that would be subject to early voluntary sectoral liberalisation.¹⁵ Within a very short period of time the subsidies issue has been brought to the forefront of the global environmental and trade agenda and will likely become a significant agenda item in the negotiations for a new agricultural agreement that is mandated to begin in 1999. While the interests of the FAO, UNEP and the NGOs stems from environmental concerns over sustainability, this is quite different, in motivation if not in consequence, from those WTO members who are pursuing this issue as a matter of strategic trade policy.

While there is little doubt that fisheries subsidies are substantial there still remains only limited and anecdotal evidence on their precise value. In a recent FAO publication there have been suggestions regarding the magnitude of the subsidies that are currently offered to fishing fleets:¹⁶

"Information about subsidies is poor, piece-meal and often confidential, and governments, if they are in a position to make such information available, are generally reluctant to do so. However, the FAO has estimated that in 1988 the global value of the industrial fishing fleet was US\$ 320 billion and the operating cost of the fleet for the year was US\$ 92 billion. With an assumed rate of return on capital of 10 percent (ie US\$ 32 billion) and the total revenue from the fishing of US\$ 70 billion, a deficit of US\$ 54 billion would have been sustained. The deficit represents 77 percent of the value of the fish harvested by the fleet in 1988. This figure indicates the magnitude of industrial subsidies paid world-wide to industrial fishing fleets."

There has been some questioning of the methodology that has been employed by the FAO in arriving at this estimate¹⁷ but there have also been a number of studies that have confirmed the importance of subsidies including those by the OECD¹⁸ and studies commissioned by New Zealand¹⁹ and the United States.²⁰ The original FAO estimates were made using data from the late 1980s when heavily subsidised Soviet fishing fleets were a significant part of the global fisheries. More recently the FAO has in effect

¹³ Environmental and Trade Benefits of Removing Subsidies in the Fisheries—Submission by the United States, Committee on Trade and Environment, WTO, 19 May 1997, WT/CTE/W/51.

¹⁴ The Fisheries Sector—Submission by New Zealand, Committee on Trade and Environment, WTO, 21 May 1997, WT/CTE/W/52.

¹⁵ APEC, Ninth Ministerial Meeting, 21–22 November 1997, Vancouver, Joint Statement, p. 11. This was followed by a study co-sponsored by New Zealand, on the nature and extent of subsidies in the fisheries which was agreed by the Senior Officials Meeting, 19 February 1998.

¹⁶ FAO, note 10 above, at p. 16.

¹⁷ WT/CTE/W/52, as note 14, above, at p. 3.

¹⁸ OECD, *Study on the Economic Aspects of Living Marine Resources*, Paris, 1996.

¹⁹ R. McLeod, *Seafood Trade Access Study*, New Zealand Fishing Industry Board, Wellington, 1996.

²⁰ National Marine Fisheries Service, *Analysis of the Potential Benefits of Rebuilding U.S. Fisheries*, Washington, D.C., April 1992.

substantially downgraded its estimates to US\$ 14 billion.²¹ The World Bank in its estimate of the value of fisheries subsidies concludes:²²

"... our estimate of environmentally harmful global fisheries sector subsidies are, to use round numbers, \$15 billion to \$20 billion, depending on the low and high estimates for the various subsidy categories. However, these estimates are so rough that they are better expressed as approximate shares of world capture fisheries first-sale revenues. Given global ex-vessel sales of about US\$ 80 billion, our estimated levels of subsidies amount to about 20 and 25 percent of world revenues."

The United States, in its submission to the WTO's Committee on Trade and Environment has argued that subventions to the fisheries sector are in effect the cause of virtually every conceivable ill that is currently plaguing that industry. The effects of fisheries subsidies suggested by the United States include:

- *Promotion of the misallocation of resources* because they hinder exit from the industry and encourage over-production by high cost producers.
- *Inducing a distorted market equilibrium* because they lower prices and stimulate demand. This pushes production over levels that are sustainable and results in depletion.
- *Promotion of structural overcapacity by delaying exit from the industry*. This promotes the perpetuation of chronically inefficient fleets which in turn remain as lobbies supporting further subsidies.
- *Shifting the burden of adjustment onto non-subsidised producers* which is achieved by eliminating market pressures and thus pushing the adjustment costs onto foreign producers.
- *Making it more difficult for developing countries to take full economic advantage of the fish resource of their exclusive economic zone (EEZ)*. By pushing Distant water fishing rights (DWFNs) into operating on the high seas where there are straddling stocks of highly migratory species this takes resources away from the fishing fleets of developing countries.

It is perhaps worth quoting verbatim the final portion of the US position on this matter because when seen in its commercial context it may well explain the US and New Zealand policy on fisheries subsidies:²³

"Generally, subsidies support marginal, often economically unviable coastal fleets. In addition when subsidized fleets harvest resources that are shared, transboundary, or on the high seas the more efficient producer is displaced from the market."

We would contend that it is this commercial issue rather than any environmental homilies in which it may be cloaked, which is the essence of the US and New Zealand

²¹ The results were based on an FAO survey on the extent of fisheries subsidies conducted in 1997 in 20 countries. Only 9 countries responded with a total declared subsidy of US\$ 7 billion which the FAO doubled on the assumption of 100 percent underreporting. See *Issues of International Trade, Environment and Sustainable Development: Fisheries Management, Subsidies and International Fish Trade*, Agenda Item 5, Provisional Agenda, FAO Committee on Fisheries, Sub-committee on Fisheries Trade, 6th Session, Bremen, 3–6 June 1998.

²² World Bank, as note 9, above, at p. 74.

²³ WT/CTE/W/51, as note 13, above, at p. 4.

position at the WTO. Subsidies are harming the US and New Zealand fisheries interests and their elimination would increase profitability by raising prices and increasing market share. If one considers the economic consequences of subsidies within the context of the existing commercial reality currently confronting the US Pacific *purse seiner* fishing fleets, for example, then the US position becomes less opaque. The US tuna *purse seine* fleet, in particular in the Western and Central Pacific tuna industry is highly capital intensive, recognised globally as very efficient and yet it seems unable to generate substantial and consistent profits in the Pacific.²⁴ The US fleet mainly supplies frozen skipjack and yellowfin to the canneries in Thailand and American Samoa.²⁵ The Japanese *purse seine* fleet, on the other hand, largely supplies the domestic Japanese *katsubushi* market which is not as volatile and is more profitable than the frozen skipjack tuna, i.e. canned tuna market supplied by the US fleet. The aging Korean fleet in the Pacific is largely tied to domestic Korean cannery supply and in the 1990s has not tended to be very profitable. It would appear that the principal reason for the apparent lack of profitability of the US fleet²⁶ stems from low cannery grade tuna prices which the US government sees as being a direct result of subsidies offered to distant water fishing nations. Thus the US government would be experiencing considerable domestic pressure from US fishing lobby interests to provide subsidies to their fleet similar to those offered by Asian, and to a much greater degree, by European fishing fleets in the Atlantic.²⁷ Whether the motivation for the US interest in subsidies stems from its concerns regarding the Atlantic or the Pacific fisheries is not known but a decrease in subsidies would have the same effect in both. If the United States is able to have the fisheries subsidies removed then it will save a potentially costly subsidies battle over fisheries as has occurred in the past over agricultural products such as edible oils and cereals.

The position of the New Zealand government stems from a similar motivation to that of the United States and is caused by the increase in efficiency of its own fishing fleet over the past decade. The New Zealand fishing fleet ranks among the more competitive and cost effective though its market interests are quite different from that of the US *purse seine* fleet. New Zealand has a considerable export interest in temperate water fish and an elimination of subsidies, especially in the highly subsidised EU market, would result in an increase in the profitability of the New Zealand marine products export sector. This would also be similar to the US interests in the North Atlantic

²⁴ In the last two years the Zaunich interests, one of the largest *purse seine* tuna companies in the United States has gone into receivership.

²⁵ The reported break-even price for the US *purse seine* fleet is US\$ 850. Throughout most of the 1990s tuna prices were below this level.

²⁶ It has been estimated that the break-even price for tuna for the US *purse seine* fleet is approximately US\$ 850 per tonne. Bangkok and Pago Pago prices for skipjack, which make up 75 percent of the US catch have tended to be below this break-even price throughout much of the 1990s. Yellowfin prices are at 20 percent premium to skipjack.

²⁷ There is presently a major restructuring of the European fleet that is occurring and will, just like the McSharry reforms of the Common Agricultural Policy did in the late 1980s, pre-empt much of the negotiations on reform of the EU fisheries sector that would be necessary if the matter of fisheries subsidies is to be brought under WTO discipline.

fisheries. However, in the case of New Zealand various governments since 1986 have taken a consistent ideological position that they will not offer subsidies to their exporters and hence a removal of the subsidies to other countries remains the sole option for relieving the cost and price pressures on its own fleet and fisheries interests. While New Zealand is not geo-politically significant it is a member of the influential Cairns Group²⁸ of countries and will almost certainly pursue this position through the group at the next round of trade negotiations. It has also taken a leading role in APEC over the early voluntary sectoral liberalisation of the fisheries.²⁹

While there can be no dispute that there is a significant global problem of depletion of fisheries resources in certain species³⁰ and that the current level of fishing effort is not sustainable, what can be disputed is the root cause of the current situation. That subsidisation is a problem in many regions of the world also cannot readily be disputed though the magnitude of the subsidy remains a point of contention, the question that has not been adequately addressed is whether the subsidisation is the root cause of the depletion or merely a symptom of a problem that stems from more fundamental factors. The evidence suggests that resource depletion in the fisheries is a result of increased populations and income together with vastly improved fishing technology on a fixed resource. Subsidisation is the obvious State response to the fundamental problem of diminishing returns in such a situation.

No doubt subsidies do serve to exacerbate the depletion problem but this fails to address the question of the motivation of the various protagonists. That trade policy makers are concerned with increasing the market share and profitability of their national fleets is only understandable—the WTO is after all a quintessentially mercantilist organisation that employs the language of free trade as it has always been throughout history, to strengthen the position of those who are already commercially competitive. What is more interesting than the commercially transparent interests of the United States and New Zealand is the sudden embracing of the issue by the “environmentalist establishment” which has focused on this particular aspect of over-fishing as the principal culprit when it is so clearly symptomatic of diminishing returns in an open access fisheries. Constantly improving fisheries technology and rising incomes and populations remain the fundamental causes of the problem of the open access capture fisheries. The elimination of the subsidies will decrease effort in the short-run much as economic theory predicts but will do nothing to tackle the fundamental problem of the fisheries that stem from human demographics and economic activity. What is peculiar

²⁸ The Cairns Group is a lobby group of agricultural exporting countries which includes Australia, Argentina, Brazil, Canada, Chile, Colombia, Fiji, Indonesia, Malaysia, New Zealand, Philippines, Thailand and Uruguay. It was established at the beginning of the Uruguay Round by Australia to pursue a policy of liberalisation in the agricultural sector. Recently Hungary, as part of its accession to the EU has signalled its intention to leave the Cairns Group and South Africa has indicated its intention to join.

²⁹ New Zealand and Japan are acting as “co-shepherds” for the fisheries subsidies issue in the APEC senior officials meeting responsible. The inclusion of Japan as co-shepherd of a proposal for early voluntary sectoral liberalisation is curious given the overt hostility that many Japanese fisheries officials have shown to Early Voluntary Sectoral Liberalisation (EVSL) in this sector.

³⁰ FAO, *The State of the World Fisheries*, Fisheries Department, Rome, 1995.

is that environmentalists, who for so long focused on economic and population growth as the cause of resource depletion should now enter into alliance with the free traders and focus on a symptom rather than what they have traditionally seen as the root cause of the problem. Depletion of fish stocks has occurred throughout history and results from the open access problem. Depletion began long before governments began subsidising their fishing fleets and will certainly continue after the subsidies end as long as the fundamental economic, demographic and technological pressures exist. The elimination of subsidies will not eliminate those pressures on the resource in the longer term.

In the past there have been accusations that environmentalists have formed "unholy alliances" with protectionists. This accusation was frequently levelled at environmental organizations during the first³¹ and second³² Tuna-Dolphin cases and has arisen again during the Prawn-Turtle case³³ which is presently before the WTO. What these cases have in common is that environmental organisations appear to have a coincidence of interests with local processing interests which support the use of US environmental standards against those who are endangering other species in the process of catching prawn or tuna. However, with the subsidies issue the environmentalists are once again supporting domestic US trade interests but this time they are clearly on-side with mainstream economics. This combination makes for a much more potent force than previous alliances. It is for this reason and the obvious consensus that is emerging on the issue in the global community that Pacific island countries and other developing coastal States need to consider their position when this rises to the head of the global trade agenda.

III. EXISTING WTO RULES AND POTENTIAL CONFLICTS WITH THE LAW OF THE SEA CONVENTION

1. *WTO Rules on Subsidies*

During the Uruguay Round, largely as a result of the European position, fisheries was left out of the *Agreement on Agriculture*. This leaves fisheries subject, at least in principle, to the more rigorous disciplines of the ASCM. That fisheries was covered by the ASCM was agreed during the Uruguay Round during the Negotiations on Resource Based Products but was not included as part of the Final Act of the Uruguay Round. The ASCM provides for two types of subsidies relevant to the fisheries sector—prohibited and actionable subsidies. However, there are certain sections of the agreement that imply that agricultural products should not be subject to the ASCM. In

³¹ BISD 39S/155–205.

³² GATT document DS29/R of June 1994.

³³ In April 1997 Malaysia, Thailand, India and Pakistan sought the creation of a panel complaining about US bans on the import of shrimp because the fishing techniques disturbed turtle populations in the Gulf of Thailand as well as in the Indian Ocean, WTO Newsletter, June–July, 1997.

the definition of a prohibited subsidy,³⁴ which is a subsidy "contingent in fact or in law" upon exports, the article is prefixed with the proviso that certain subsidies were prohibited "except as provided in the Agreement on Agriculture". However, it is important to note that there are clear exemptions from these provisions under the covered agreements which would allow least developed countries and those with a GNP per capita of less than US\$ 1,000 to be exempted from these disciplines.³⁵ When defining the adverse effects of actionable subsidies the ASCM states:³⁶

"This Article does not apply to subsidies maintained on agricultural products as provided in article 13 of the Agreement on Agriculture."

The WTO Secretariat is of the view that the ASCM was intended to cover all products not covered by the Agreement on Agriculture.³⁷ If this was the intention of the Contracting Parties at the end of the Uruguay Round then the fisheries sector is subject to very strict disciplines but even the proponents of this position certainly consider the matter to be in need of clarification.³⁸ If the fisheries sector is bound by the disciplines of the ASCM then there exist adequate provisions to deal with many but by no means all of the subsidies that are currently found in the fisheries sector. The two principal forms of subsidies discussed above, prohibited and actionable subsidies, cover various subventions that are offered by coastal States to their fisheries sector. Subsidies have a very specific definition which includes, *inter alia*:³⁹

"There is a financial contribution by a government or any Member public body within the territory of a Member or there is any form of income and price support in the sense of Article XVI of GATT 1994 and a benefit if thereby conferred."

This definition may not include certain types of payments or subsidies to fishing fleets that may be "Flag-of-Convenience" registered and hence defined as "outside the territory" of the member offering the subsidy. Also subsidies that may be offered in the form of foreign aid in lieu of access may not be covered under the current definition of subsidy and hence one of the main forms of fisheries subsidies that are under attack by environmental NGOs would not be covered by the ASCM. However, the definition is adequate to cover many of the domestic subsidies that are currently available from distant water fishing nations. These subsidies include low interest loans, tax exemptions, vessel buy-back schemes, direct payments as income and price support schemes.

The two types of subsidies that are of principal concern in the ASCM, prohibited

³⁴ Art. 3, ASCM.

³⁵ Annex VII, ASCM.

³⁶ Art. 5, ASCM.

³⁷ The New Zealand position (WT/CTE/W/52 p. 4) is that the ASCM does apply to the fisheries as the *Agreement on Agriculture* does not. However, as New Zealand has argued, whether the ASCM applies to fisheries is in need of clarification.

³⁸ New Zealand Statement to CTE, as note 37, above, at p. 6.

³⁹ Art. 1, ASCM.

and actionable subsidies, are prevalent to varying degrees in the fisheries.⁴⁰ Prohibited subsidies are defined as those that are "contingent in law or in fact ... upon export performance."⁴¹ Given the broad listing of prohibited export subsidies in the ASCM⁴² and the extremely broad interpretation normally given these subventions there is no doubt that many of the provisions currently applied to coastal fishing fleets of developed countries would be considered to be in the category of prohibited export subsidies. However, even where the existing range of subsidies is not covered under the broad definition of prohibited subsidies there remain actionable subsidies that have "adverse effects" upon the domestic industry of a WTO member. Adverse effects are defined to exist when there is:⁴³

- injury to the domestic industry of another member; or
- nullification or impairment of benefits accruing directly or indirectly to other members under GATT 1994, in particular the benefits of concessions bound under Article II of GATT 1994; or
- serious prejudice."

It is the third provision that is of particular interest in the fisheries sector because the ASCM offers a quantitative measure of serious prejudice which is deemed to exist, *inter alia*, when "the total *ad valorem* subsidization of a product exceeds 5 percent".⁴⁴ This definition of serious prejudice would imply that, unless the FAO and World Bank estimates are totally in error there is *prima facie* evidence of the adverse effects of actionable subsidies. Thus if the ASCM is, as New Zealand has argued, applicable to the fisheries sector then there is probably a strong basis for action.

However, this raises the obvious question of why a subsidies issue is being addressed circuitously through the Committee on Trade and Environment when other, more forceful avenues, such as the WTO's dispute settlement mechanism could readily be employed as a means of dealing with WTO members that are employing prohibited or actionable subsidies. The first reason would appear to be that until recently there was, and even in 1998 remains, inadequate evidence to demonstrate serious prejudice. Second, as subsidies for fishing fleets are so pervasive among developed WTO members this route is being chosen essentially for political and diplomatic reasons as it is difficult to find a developed WTO member with substantive trade interests in the sector that could not be accused of subsidy. That using the Committee on Trade and Environment appears to be the preferred route suggests that separate and possibly new disciplines are

⁴⁰ Part IV provisions of the ASCM allow for what are normally referred to as Green Box measures, i.e. non-actionable subsidies such as research, assistance to disadvantaged regions and environmental measures. The exceptions for disadvantaged areas, when applied to the fisheries constitute a very significant weakening of any disciplines on fisheries subsidies given the coincidence of fisheries with disadvantaged areas both in Europe and North America.

⁴¹ Art. 3, ASCM defines this standard as being met "when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to *actual or anticipated* export earnings." (Emphasis added.)

⁴² See Annex 1, ASCM.

⁴³ Art. 5, ASCM.

⁴⁴ Art. 6(a) ASCM. Other situations that can be deemed to be serious prejudice and are of relevance to the fisheries include subsidies to cover the operating losses of an enterprise or an industry and the forgiveness of debt.

envisaged by not only the United States and New Zealand but also by the environmental NGOs.

2. *Law of the Sea Convention Rules on Fisheries Access*

Access to fisheries in the EEZ and the financial terms governing such access are regulated principally by the Law of the Sea Convention. The relevant provisions of the Law of the Sea Convention are flexible, permitting coastal States and distant water fishing nations to enter into all types of financial and technical arrangements on access into the EEZ. It is, therefore, important that debate on fisheries subsidies within the WTO framework is informed by the Law of the Sea Convention.

The Law of the Sea Convention allows coastal States to declare EEZs which must not extend beyond 200 nautical miles measured from the baseline from which the breadth of the territorial sea is measured.⁴⁵ Within the EEZ, coastal States have sovereign rights for the purpose of exploring, exploiting, conserving and managing the fisheries resources.⁴⁶

As part of their sovereign rights, the Law of the Sea Convention gives to coastal States almost unlimited rights of access to the fisheries resources in the EEZ. The provisions of the Law of the Sea Convention on access are specified in Articles 61 and 62. The coastal State is also required to "determine the allowable catch of the living resources in its exclusive economic zone".⁴⁷ The coastal State is also required to promote the objective of optimum utilization of the living resources in EEZ.⁴⁸ To this end, the coastal State is required to determine its capacity to harvest the living resources in the EEZ. Where the coastal State does not have the capacity to harvest the entire allowable catch, it is required to give other States access to the surplus.⁴⁹

One implication of the sovereign rights of the coastal State in the EEZ is that it is permitted to discriminate between its nationals and foreign nationals in the allocation of rights to the fisheries resources in its EEZ. As a start, foreign nationals would only have access to the surplus of the living resources as determined by the coastal State; and the coastal State is perfectly entitled to allocate all the fisheries resources in its EEZ to its nationals under any policies it deems appropriate in its national interest. As Burke notes:

"It is now well recognized that a coastal State may have sound reasons for affirmatively deciding that its interests are best served by determining that the allowable catch is equal to, or less than its harvesting capacity, and thus deciding not to allow any foreign fishing."

The 1982 Convention makes it clear that in practical terms the coastal State cannot be compelled to allow foreign access, even if it fails to determine an allowable catch or its harvesting capacity. Nor can the coastal State be compelled to provide access, after

⁴⁵ Art. 57.

⁴⁶ Art. 56(1)(a).

⁴⁷ Art. 61(1).

⁴⁸ Art. 62.

⁴⁹ For a thorough discussion of this issue, see W. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond*, Clarendon Press, Oxford, 1994, pp. 43–69.

declaring a surplus, if it fails to allocate the whole, or a part of, the surplus to any other State.⁵⁰

The Law of the Sea Convention also allows the coastal State considerable discretion in dealing with foreign fishing vessels that are permitted to harvest the surplus of the living resources in its EEZs. The Convention also permits discrimination among different coastal States:⁵¹

“In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests ... and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.”

The coastal State also has considerable flexibility in the choice of the financial and related terms of an access agreement with foreign States and their nationals. Nationals of other States fishing in the EEZ of the coastal State have an obligation to comply with the terms and conditions established in the coastal State's laws and regulations.⁵² The range of issues which may be regulated under the laws and regulations of the coastal State, and for that matter, an access agreement, includes:

- licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;
- terms and conditions relating to joint ventures or other co-operative arrangements; and
- requirements for the training of personnel and the transfer of fisheries technology etc.

These provisions would seem to allow the coastal State to seek and obtain forms of remuneration which may appear to be subsidies. However, within the terms of the Law of the Sea Convention, it is legitimate for the terms of a fisheries joint venture agreement to provide tax exemptions or relief to the foreign venturer. It is equally lawful for the coastal State to receive payment in respect of foreign access to its EEZ in various forms, such as a lump sum payment and development assistance. What is also clear from the Law of the Sea Convention is that the determination of levels and forms of remuneration depend on a number of variables, thus making direct comparisons between various access agreements unhelpful.

IV. FISHERIES SUBSIDIES DISCIPLINES AND PACIFIC ISLAND FISHERIES ACCESS ARRANGEMENTS

This section considers some of the implied disciplines that the environmental

⁵⁰ As note 49, above, at p. 63.

⁵¹ Art. 62(3).

⁵² Art. 62(4).

organisations appear to suggest in their analyses. It will be argued that the disciplines implied in many of the studies suggest possible future WTO disciplines that could endanger the position of the Pacific island States and other coastal developing States that remain dependent upon revenues generated from access fees.⁵³ The analysis of possible WTO provisions will be reviewed in the light of the various access provisions of the predominant regional fisheries access treaty, the *Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America* (the Multilateral Treaty),⁵⁴ originally negotiated in 1987 and revised in 1993. The Multilateral Treaty creates a multilateral framework to regulate access of US *purse seine* vessels in the EEZs of the South Pacific Island States which are members of the Forum Fisheries Agency.⁵⁵

However, as we shall see, the new implied WTO disciplines have potentially even more serious and far reaching implications for developing countries as they would result in development assistance to the commercial as well as infrastructure sectors of developing countries being brought under the disciplines of the WTO subsidies code. This could seriously retard the development effort of many coastal states as they attempt to domesticate their fisheries sector and increase down-stream processing.

The central thrust of the argument presented by those advocating either the application of existing WTO disciplines or the creation of new ones in the area of fisheries subsidies is that these disciplines would assist in lowering effort levels. Several authors have attached development assistance as well as the terms of fisheries access agreements to the EEZ of developing countries. In particular the Euro-African fishing agreements have been held up as precisely the sort of agreements that have seen the EU subsidise access for its vessels into the EEZ of African countries. These agreements have given African countries extremely low rates of return and one of the principal recommendations of those critical of those arrangements has been the creation of new disciplines at the WTO. As Porter has stated:⁵⁶

“The negotiation of an international agreement on subsidies, including provisions prohibiting the payment by governments of any part of the costs of access to fishery resource, would alter the economic and environmental dynamics of Euro-African co-operation on fishing. If the EU vessel owners had to pay the full cost of access, some would find it no longer profitable to fish there. The number of EU fishing vessels in African fishing

⁵³ T. Kingston, *The Current Status and Benefits of the Pacific Island Fisheries Industry*, in D. Zachary et al., *Towards a Prosperous Pacific: Building a Sustainable Tuna Industry in the Pacific Islands*, Maui Pacific Centre, Hawaii, 1997, pp. 73–81. The Marshall Islands obtained 25 percent of government revenue from fisheries access fees in 1992/93. The equivalent figure for other island States was Kiribati 45 percent in 1991; Federated States of Micronesia 25 percent in 1993; Tuvalu 11 percent in 1990 and Solomon Islands 5 percent in 1993.

⁵⁴ Forum Fisheries Agency, *The Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America* (the Multilateral Treaty on Fisheries), Honiara, 1994.

⁵⁵ The parties to the Multilateral Treaty include Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

⁵⁶ G. Porter, *Euro-African Fishing Agreements: Subsidizing Overfishing in African Waters* in WWF, *Subsidies and Depletion of World Fisheries-Case Studies*, Washington, D.C., April 1997. A host of articles have recently been written on the Euro-African agreements. See V.M. Kaczynski, *Foreign Fishing Fleets in the Sub-Saharan West African EEZ*, Marine Policy, January 1989. See also O.C. Ihedru *Political Economy of Euro-Africa Fishing Agreements*, Journal of Development Areas 30, 1995.

zones would presumably decline, and the pressure on the resources would be reduced. Much of the income lost from the reduction in the EU fleet could be recovered, however, simply by increasing fishing fees to a more reasonable level.”

Several comments regarding the substance of this proposal are possible. First, such a multilateral trade agreement on subsidies in the fisheries sector as proposed by Porter would in effect rule out the type of financial arrangements found in the Multilateral Treaty. The financial terms of the Multilateral Treaty, (currently US\$ 18 million per annum) fall into three categories: (a) annual industry payment representing licence fees for a maximum of 55 *purse seine* vessels and technical assistance; (b) observer programme costs paid by industry; and (c) economic development assistance provided by the US government pursuant to a related agreement between the US government and the Forum Fisheries Agency.⁵⁷ Under current arrangements in the Multilateral Treaty, the US Agency for International Development (USAID) pays approximately US\$ 14 million of the US\$ 18 million of annual returns to the beneficiaries. It is ironic that one of the first victims of what is essentially a US-New Zealand proposal at the WTO should be a treaty arrangement between the United States and, *inter alia*, New Zealand. Given many of the changes in US fisheries interests that have occurred in the Central and Western Pacific tuna fishery industry since the initial promulgation of the treaty this may not be as ironic as it initially appears.

Second, as Porter correctly argues, the number of EU vessels in African waters would probably decrease should fisheries subsidies disciplines be introduced that prohibited State payment of fisheries access fees. However, such a discipline does not mean that effort in the EEZ of the West African States would decrease. It could result in the replacement of the EU with the fleets of other distant water fishing nations or national fleets which are less mindful of fisheries conservation practices than the EU fleet.

The third comment is that if, as Porter claims, its revenue could be increased “simply by raising access fees to a more reasonable level” then why has it not been done already? This position reflects an extraordinary naivety regarding the political economy of fisheries access arrangements between least developed and highly vulnerable coastal States and developed country distant water fishing nations. The Forum Fisheries Agency (FFA) member countries, for example, have had the most serious difficulty raising their access fees to an average of 4 percent of the landed value of the catch.⁵⁸ Of an estimated catch valued at US\$ 1.7 billion in the EEZ and adjacent waters of the FFA nations only US\$ 74 million was paid in access fees.⁵⁹ For some of the small island States of the Western Pacific these access fees constitute upwards of 30 percent of total government domestic revenue.

⁵⁷ See Sched. 3, Multilateral Treaty, note 54, above.

⁵⁸ J.G.H. Maxwell & A.D. Owen *South Pacific Tuna Fisheries Study*, International Development Issues No. 38, AIDAB (now AUSAID), Canberra, 1994.

⁵⁹ T. Aquorau & A. Bergin, *Ocean Governance in the Western Pacific purse seine fishery—the Palau Arrangement*, Marine Policy, Vol. 21, No. 2, pp. 173–186, 1997.

Recent studies by the World Bank⁶⁰ suggest that the 4 percent average access fee is only as high as it is because of the 10–11 percent return received from the United States, which is subsidising the agreement through USAID. In the past two decades two factors, both now related to events at the WTO, have pushed the US fleet into the Central and Western Pacific and away from the Eastern Pacific, which was the traditional fishing ground of the US fleet. The first is that in the Western Pacific tuna and dolphin do not school together and hence canneries using fish caught by US *purse seiners* could continue to use the “dolphin friendly” label and continue to use the profitable *purse seine* fishing technique. However with recent amendments to the US Mammal Protection Act made necessary as a result of the Second Tuna-dolphin case there has been a redefinition of “dolphin friendly” which will increase the permissible dolphin by-catch and may well help to pull the US fleet back to the Eastern Pacific closer to previous bases of Pago Pago and San Diego.

The second factor bringing the US fleet into the Central and Western Pacific has been the Multilateral Treaty itself which not only provides substantial subsidies but allows *purse seine* operators to fish throughout the EEZ of the members of the FFA under one access agreement.⁶¹ Should new subsidies disciplines now proposed be negotiated at the next round of multilateral trade negotiations then the Multilateral Treaty in its present form would have to be abandoned. This would put further pressure on the US *purse seiners* to shift operations to the eastern Pacific. Without the Multilateral Treaty the average access fee for Pacific Island countries would drop to 3 percent. The table below illustrates the access fee estimates provided by the World Bank of various distant water fishing nations. The point worth noting is that Korea and Taiwan and certainly the Peoples Republic of China have tended to pay access fees that are well below that of Japan and the United States.

AD VALOREM ACCESS FOR VARIOUS DISTANT WATER FISHING NATIONS

Fishing Nation	Access Fee (percentage value of catch)
United States	10 percent
Japan	5 percent
Taiwan	3.7 percent
Korea	2.2 percent
Average	4.4 percent

Source: World Bank (1997).

The impact of an Agreement on Fisheries at the WTO could have far more serious implications for Pacific island countries than just the impact upon the Multilateral Treaty arrangements. The difficulty that is currently found in the Multilateral Treaty can be resolved by decoupling fisheries access from development assistance. This is the type of arrangement that is found with the bilateral Japanese agreements where access is not

⁶⁰ World Bank, *Pacific Island Economies: Building a Resilient Economic Base for the Twenty First Century*, Report No. 13803-EAP, Washington, D.C., February 1995, p. viii.

⁶¹ If the US *purse seiners* paid the US government the equivalent of the USAID contribution in license fees then this would not be a subsidy.

subsidised but becomes, in the view of Pacific Island countries, a *conditio sine qua non* of Japanese development assistance to the fisheries sector.⁶² Another approach to dealing with the issue would be to exclude the disciplines on access fees for developing and least developed coastal States in those circumstances where specialized agencies such as the FAO cannot show that there is pressure on the sustainable development of the resource. Such an approach, which applies special and differential treatment in an environmentally sensitive manner could well be the basis for a negotiating position on the subsidies issue for coastal and island States in the Millennium Round.

A WTO agreement in the fisheries sector providing for the application of normal disciplines of MFN and national treatment, which are the legal foundations of WTO agreements, would also have very serious implications because it could also limit the possibility of domestication and down-stream processing of tuna products. A strict application of Article III provisions would in effect mean that the current practice found in most Pacific island countries and most coastal developing States of exempting national fleets from access fees would be inconsistent with existing WTO obligations.⁶³ Moreover, if the ASCM is applicable to the fisheries sector or becomes so in future this also constitutes what could in effect be a prohibited subsidy to domestic producers.⁶⁴

It is the intention of the environmental NGOs to put pressure on the global community to introduce measures at the WTO that would prohibit the use of direct assistance to the payment of access fees. There is, however, a more profound issue of economic development here rather than just the quasi-rents derived from access fees. Increasingly, the WWF and other environmental organisations are arguing that any development assistance to the fisheries,⁶⁵ and by extension to other sectors including infrastructure,⁶⁶ can be construed as a subsidy to environmentally unsustainable activities. This is also a position that in broad principle would be accepted by many of the developed countries of the WTO. Increasingly the Quad⁶⁷ countries are arguing that the special and differential treatment that has for 20 years been the foundation of the WTO treatment of developing countries was only ever intended to be a transitional

⁶² The Government of Japan normally denies that there exists any link between its fisheries technical assistance and access agreements.

⁶³ Even without a fisheries agreement at the WTO the current arrangements would appear to be inconsistent with national treatment obligations.

⁶⁴ Depending upon whether the tuna is exported or not it may constitute an actionable subsidy that is not consistent with the definition of severe prejudice as it is in most cases below the 5 percent *ad valorem* thresholds. Domestic fleets in the Pacific islands are normally offered this exemption when they supply tuna to domestic processing facilities. Under WTO rules there is no obligation to offer subsidies to foreign firms. However, if the access fee is considered to be a tax or fee then there is an obligation to treat foreign and domestic producers the same. WTO disciplines apply in this area to both imports and exports.

⁶⁵ See M.L. Weber, *Effects of Japanese Government Subsidies of Distant Water Fleets in WWF, Subsidies and Depletion of World Fisheries: Case Studies*, Washington, D.C., 1997. While there can be no doubt that the aid provided by the government of Japan to the government of the Solomon islands was self-interested and assisted its fisheries effort, the allegation that it is in effect a subsidy would mean that all commercial development assistance that is self-interested could be construed as such. The implied position puts the WWF in direct opposition to development assistance to commercial sectors.

⁶⁶ A. de Moor & P. Calamai, *Subsidizing Unsustainable Development: Undermining the Earth with Public Funds*, Earth Watch, 1998. This study attacks subsidies in numerous sectors including agriculture, water, energy and road transport.

⁶⁷ The Quad refers to the four main players in the WTO—The United States, the EU, Japan and Canada.

arrangement and that the greatest benefit to members is when they accept the full disciplines of the WTO. Given the emerging consensus on subsidies by environmentalists and free traders, not just in the fisheries sector but in all sectors, developing countries can legitimately expect disciplines in the up-coming round that severely limit the capacity of developing countries to subsidise the economic transformation that OECD countries undertook well before the existence of such disciplines. Special and differential treatment will in fact be the one defence that least developed countries (LLDCs) and highly vulnerable economies will have against these disciplines.

What is also commonly argued in the Pacific about the island countries is that despite having approximately 60 percent of the world's skipjack tuna, they have no comparative advantage in its production and processing.⁶⁸ This is because of the combined effect of high costs of operation, low levels of development and isolation from principal sources of supply as well as the main markets which in turn means that it is more efficient to have the processing occur in Thailand or Philippines. If the Pacific islands region is ever to develop a commercial advantage in the processing of the one resource available in abundance in the region then there can be no doubt that some form of subsidy to domestic fleets and processing facilities will be necessary as transitional measures in assuring the profitability of these ventures. To deny development assistance and State subsidy to these sectors at this early stage of development would in effect deny the Pacific island countries the single greatest opportunity available for the development of manufacturing capacity. While there are provisions of the GATT 1994 that would permit these departures from WTO rules⁶⁹ these provisions are by no means universally acceptable and must be negotiated with other members.

V. CONCLUSION

There are several conclusions of importance to Pacific island countries and all developing coastal States from the emerging debate on fisheries subsidies. The first is that the present Multilateral Treaty, as it is currently structured could be construed as inconsistent with the existing WTO provisions on subsidies if those disciplines are extended beyond "the territory of a Member". In future, fisheries access agreements will have to decouple aid from access as is the case with Japanese fisheries access arrangements. With the EU fleets showing increased interest in the region, negotiators at the bilateral or multilateral level will have to be mindful of the provisions in any new arrangement to assure its WTO compatibility. In any future round of negotiations new subsidies disciplines or the application of existing ones could well result in the "grandfathering" of any existing access arrangements for a specified period. However,

⁶⁸ Asian Development Bank, Office of Pacific Operations, *The Pacific's Tuna: The Challenges on Investing in Growth*, Manila, 1997, pp. 23–24.

⁶⁹ Art. XVIII Section A & C permits developing countries to deviate temporarily from the normal disciplines when they are trying to develop a new industry.

prudence dictates that it would be better for Pacific island countries to treat fisheries subsidies as though they were subject to the terms of the ASCM.

The debate on WTO disciplines on fisheries subsidies, concerning depletion in particular and fisheries sector in general, does however threaten a whole host of measures that are currently in place in various Pacific island countries including differential access fees for national and foreign fleets, as well as compulsory transshipment through national ports. It is crucial that Pacific island countries engage in this debate actively as it will almost certainly over the next few years involve issues that will affect the development of the one resource that the Pacific island countries have in abundance.

There is of course a more profound issue, and that is whether the termination of subsidies will, in the longer term, have any significant impact on effort in the fisheries. It has been argued that subsidies to the fisheries sector certainly increase short term effort but that subsidies are a result of diminishing returns induced by rising global incomes and population working together with vastly improved fisheries technology. The apparent synergy between the commercial interests of the United States and New Zealand and the environmental movement may at first appear only superficial. But in the past few years the WTO Secretariat has engaged in an important strategic dialogue with the NGO community and it would appear from the fisheries subsidy debate that the process of constructive engagement has led to some immediate returns. The environmental NGO community appears to have accepted the logic of liberalisation as a vehicle to achieving environmental objectives. However, in the final analysis those who are concerned with fisheries conservation will have to address the fundamental issues of population and income growth and the application of advanced and at times inappropriate technology for what remains a hunter-gatherer activity. Eventually those who seek a genuinely sustainable approach to the development of the global fisheries sector shall have to deal with the real issues in the sector. This return to the fundamental issues that the environmental movement has traditionally advocated since the 1970s will induce a most rapid evaporation of this temporary liaison between free traders and environmentalists.

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