

# WTO Fisheries Subsidies Negotiations: Implications for Fisheries Access Arrangements and Sustainable Management

Roman Grynberg\*

## Abstract

*The paper considers the WTO negotiations on fisheries subsidies and the implications that envisaged disciplines will have on coastal developing countries. This is considered in relation to fisheries access agreements in the Central and Western Pacific where several least developed, but resource-rich, island states such as Kiribati and Tuvalu are highly exposed to the risks associated with new WTO fisheries subsidies disciplines that do not consider their particular vulnerabilities. The paper considers some of the issues that coastal developing countries should incorporate into their emerging negotiating positions at the WTO. State-to-state fisheries access agreements which are often highly subsidised, but where fishing vessel owners pay the equivalent of lump sum tax, are, paradoxically, the least distortionary and damaging to the environment. Strategies for managing the possible new disciplines are considered.*

## 1 Introduction

After almost five years of discussion at the Committee on Trade and Environment, WTO members have embarked upon negotiations on fisheries subsidies as a result of the decision reached by ministers at the fourth ministerial conference of the WTO at Doha. The ministerial decision was couched in language that explicitly recognised the importance of the sector to developing countries and clearly implied the development of appropriate special and differential treatment rules.<sup>1</sup> Yet, despite the language, in the principal submission<sup>2</sup> by the 'Friends of Fish', the majority of which are developing countries,<sup>3</sup> there has been no substantive call for special and differential treatment from developing countries.<sup>4</sup>

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\* The author is Deputy Director, Trade and Regional Integration, Commonwealth Secretariat. The views expressed in this paper are those of the author and not necessarily those of the Commonwealth Secretariat or any of its members. The author would like to thank Ms Christina Shroeder, WTO and Mr Len Rodwell, Forum Fisheries Agency, for their invaluable comments on earlier drafts. The contents are of course the sole responsibility of the author.

This paper begins by briefly considering both the economic case for fisheries subsidies disciplines and the evidence of the magnitude of those subsidies. The analysis proceeds to consider the existing subsidies rules in the WTO, perceived weaknesses that may exist in those rules and then reviews the negotiating positions of various WTO members in the negotiating group on rules which is considering the fisheries subsidies issue. The paper attempts to explain the need for special and differential treatment of developing coastal states in the current round of WTO negotiations in terms of the particular development needs of coastal states.

Particular reference is made to the situation in the Pacific Island states, which are the source of 45 per cent of the world's tuna landings and where the fisheries subsidies issue is of vital economic importance to some of the world's most vulnerable island states. It will be argued that two of world's smallest and most vulnerable LDCs, Kiribati and Tuvalu, neither of which are conducting an unsustainable fisheries policy, are exposed to the greatest risk from the current negotiations if they should result in new fisheries access fee disciplines. The last section of the paper deals with the implications of the proposed disciplines for ACP states in a number of areas and proposes several policy options that ACP governments may wish to pursue to minimise the possibility of new fisheries disciplines adversely affecting their development and fisheries policies.

## **2 Existing Economic Theory and Empirical Evidence on Subsidies**

The question of fisheries depletion in open access fisheries has been studied for many decades by natural resource economists. What is in large measure agreed is that in the absence of property rights fish stock depletion will occur in open access fisheries.<sup>5</sup> It is also widely accepted that this will occur whether there are subsidies or not.<sup>6</sup> The only role that subsidies play is that they will accelerate the rate of depletion. Only where there is some form of property rights arrangements can the natural tendency of depletion in the commons be arrested.<sup>7</sup> It is on this basis that economists have attempted to develop systems of tradable quotas as a mechanism of checking the tendency towards depletion in the open access fishery. However, where an effective and sustainable management regime exists<sup>8</sup> or where a system of tradable quotas is created,<sup>9</sup> then subsidies simply become rents that are transferred to either producers or consumers depending upon the particular market situation. This raises the key policy question of whether the current negotiations at WTO on enhanced fisheries subsidies disciplines constitutes a 'second best' approach to fisheries management where devising appropriate sustainable management policies in more appropriate fora, such as the FAO, has been more politically difficult than devising enforceable WTO rules.<sup>10</sup>

While there has been considerable discussion of subsidies in the marine products sector, there was no systematic attempt to quantify these subsidies until the late 1980s and 1990s when there was a flurry of research activity to attempt to determine the magnitude of the subsidies involved. The research results have indicated that these

subsidies have been of a significant order of magnitude. While the order of magnitude is in dispute, the fact they are substantial is not. The estimates originally made by the FAO suggested that in 1989 subsidies were US\$22 billion when measured in terms of operating costs only, and US\$54 billion when all investment costs were included.<sup>11</sup> This study was followed by research by APEC,<sup>12</sup> OECD<sup>13</sup> and World Bank,<sup>14</sup> all providing different estimates of the magnitude of subsidies. Present estimates suggest that subsidies are in the region of US\$10–US\$15 billion, possibly rising to as much as US\$20 billion. Regrettably, neither the WTO estimates stemming from notifications nor the research undertaken by international organisations has as yet provided sufficient and accurate time series on fisheries subsidies to allow economists to determine the statistical significance to the problem of fish stock depletion.

### 3 Existing WTO Rules on Subsidies

During the Uruguay Round, largely as a result of the position taken by a number of WTO members, some of whom are proponents of the current disciplines, fisheries was left out of the Agreement on Agriculture. This left fisheries subject to the disciplines of the Agreement on Subsidies and Countervailing Measures (ASCM). The ASCM provides for two types of subsidies relevant to the fisheries sector – prohibited and actionable subsidies.<sup>15</sup> In the definition of a prohibited subsidy,<sup>16</sup> 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’.<sup>17</sup> As the fisheries sector is bound by the disciplines of the ASCM, there are adequate provisions to deal with many, but by no means all, of the subsidies that are currently found in the sector. When defining the adverse effects of actionable subsidies the ASCM states:<sup>18</sup>

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

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. Governmental transfers by which a benefit is conferred, are defined as existing if:<sup>19</sup>

There is a financial contribution by a government or any Member public body within the territory of a Member;

A government practice involves a direct transfer of funds ( e.g. grants, loans and equity infusions) , potential direct transfers of funds or liabilities (e.g. loan guarantees); or

There is any form of income and price support in the sense of Article XVI of GATT 1994; and

a benefit is thereby conferred.

This definition may not include certain types of payments or subsidies for access by fishing fleets that may be 'flag-of-convenience' registered and hence defined as 'outside the territory' of the member offering the subsidy. In addition, 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;<sup>20</sup> hence one of the main forms of fisheries subsidies that are under attack by environmental NGOs (WWF and Greenpeace) would not be covered by the ASCM. It is precisely this potentially extra-territorial application of fisheries subsidies disciplines to distant water fishing nation (DWFN) development assistance that should necessarily be of principal concern to developing countries.

However, the definition may be 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 and direct payments such as income and price support schemes.

The two types of subsidies that are of principle concern in the ASCM, prohibited and actionable subsidies, are prevalent to varying degrees in the fisheries.<sup>21</sup> Prohibited subsidies are defined as those that are 'contingent in law or in fact ... upon export performance'.<sup>22</sup> Given the broad listing of prohibited export subsidies in the ASCM<sup>23</sup> and the broad interpretation normally given these subventions, there is no doubt that many of the provisions currently applied to the coastal fishing fleets of developed countries would be considered to fall into the category of prohibited export subsidies. The problem, as has been noted in the submissions during the current WTO negotiations by the 'Friends of Fish', is that the subsidies notifications are at a level of aggregation such that it is not possible to determine precisely which species of fish are being targeted. However, even where the existing range of subsidies are 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 where:<sup>24</sup>

- (a) There is injury to the domestic industry of another Member;
- (b) There is 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;
- (c) Serious prejudice is said to exist.

Until January 2000 there was a quantitative measure of serious prejudice which was deemed to exist, *inter alia*, when 'the total *ad valorem* subsidisation of a product exceeded 5 per cent'.<sup>25</sup> This definition of serious prejudice would have implied that, unless the FAO, World Bank and other estimates reviewed above were totally in error, there is *prima facie* evidence of the adverse effects of actionable subsidies. Redress for subsidies can be through the immediate application of countervailing duty measures.<sup>26</sup>

New Zealand has argued in a recent communication that the heterogeneity of fish stocks makes remedies including countervailing measures difficult to apply.<sup>27</sup> However, for fish exporting countries such as Iceland, New Zealand or Australia which do not import fish from fish-subsidising countries, countervailing duties are an ineffective form of redress. This has been raised by several countries but where countervailing duties are inappropriate the ASCM also permits resort to the WTO Dispute Settlement Mechanism. Should the DSM find in favour of a complainant experiencing injury to its domestic industry or nullification and impairment or serious prejudice it would allow redress through the imposition of duties in either the affected sector or in other sectors.

This raises the obvious question of why the subsidies issue is in need of new rules when 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. Clearly the now lapsed provisions of Article 6.1 provided an opportunity for litigation that was unambiguous. As argued by New Zealand, the heterogeneity of fish species makes proof of serious prejudice more difficult as any dispute may founder on appropriate definition of like products. Once again, the possibility of the use of nullification and impairment provisions in the ASCM would address the concerns of those WTO members unable to employ countervailing duties because of the structure of their fisheries sector. Second, as subsidies for fishing fleets are so pervasive among developed WTO members, negotiations are being chosen essentially for political and diplomatic reasons. In the litigious 'tit-for-tat' environment at the WTO it is difficult to find a developed WTO member with substantive trade interests in the sector that could not be accused of applying measures either in the marine products sector or in other sectors that could not be deemed as a GATT violation. Moreover, given the information requirements involved in successful litigation, a fisheries subsidies discipline based upon a methodology that forces countries to notify their subsidies in a precise manner, similar to the traffic light approach found in the Agreement on Agriculture, seems to be an architecture that would find support amongst many 'Friends of Fish'.

## **4 The Post-Doha Fisheries Negotiations and the Concerns of Small Developing Coastal States**

### ***The Negotiations***

What then should be the concerns of small developing coastal states with regard to the negotiation of possible new disciplines in the fisheries sector? For over 200 years developed countries have provided subsidies to their fisheries sector as part of a mercantilist policy of development of fisheries, maritime transport, food security and national defence.<sup>28</sup> Now these subsidies, correctly or otherwise, are seen as undermining fisheries sustainability and hence are about to be subjected to possibly entirely new disci-

plines. There remains considerable disagreement in the negotiating Group on Rules on the need for new disciplines and whether or not the provisions of the ASCM are adequate.<sup>29</sup> New Zealand has argued that, given the heterogeneous nature of fish stocks, it is not possible to use existing ASCM disciplines to challenge the actions of WTO members offering what are viewed as illegal subsidies.<sup>30</sup>

The question now arises as to precisely what type of architecture, if any, will evolve in order to accommodate the perceived shortcoming of the ASCM in the area of fisheries. This depends in large measure on political as well as technical considerations. With most WTO issues it is the commercial interests that counts when issues are being traded off at the end of the round. In the case of fisheries, the proponents are a mixed collection of countries with commercial interests and those that believe that fisheries subsidies disciplines will constitute an important step towards environmental sustainability. The only two developed countries in the Friends of Fish group where a substantial and clearly demonstrable commercial interest is at stake are Iceland and New Zealand, both nations with highly efficient and competitive fishing fleets but neither of which carry significant bargaining power.<sup>31</sup> Iceland's fisheries account for 75 per cent of its export earnings; hence the government simply cannot compete with other WTO members on subsidies, i.e. the Icelandic economy cannot subsidise fisheries. In the case of New Zealand, which has pursued a policy of aggressive unilateral liberalisation, there is also an ideological opposition to such subsidies which, according to OECD estimates, are virtually non-existent.<sup>32</sup> Both countries and their fishing industry would benefit substantially from the exit of less efficient suppliers that currently rely on subsidies.

The USA is one of the key players backing the current fisheries subsidies initiative.<sup>33</sup> It has tabled a paper on fisheries subsidies<sup>34</sup> which supports enhanced subsidies but, given the very wide diversity of its own fisheries interests (its New England, Gulf, Pacific west coast and distant water fleets all have quite different interests), its long-term support may depend not so much on direct commercial interests but upon how much the current US administration wishes to demonstrate that it has an environmental agenda in multilateral trade negotiations. Similarly, Australia appears to have strong political, as opposed to strictly commercial, interests in the subject. Those developing countries which are part of the 'Friends of Fish' group all have international fisheries trade interests but are also unlikely to be willing or able to 'pay' for fisheries disciplines when the crunch comes. The real powerhouses behind public support for the fisheries subsidies negotiations in the developed countries are the environmental NGOs, Greenpeace and WWF.

During the Uruguay Round, political opposition to the inclusion of fisheries under the reduction commitment disciplines of the Agreement on Agriculture came from the EU and those countries called 'the Friends of Fisheries'.<sup>35</sup> However, if recent proposed changes to the EU Common Fisheries Policy (CFP) actually succeed, then the

EU will be removed as an active obstacle to fisheries subsidies reform at the WTO.<sup>36</sup> Thus far in the Doha Round the EU has remained uncharacteristically silent and if the CFP reform is blocked by the 'Friends of Fisheries' then the EU will certainly become a more active protagonist. The most vocal political opposition to enhanced disciplines now comes from Japan. With the possible exception of Iceland and Norway, most OECD countries view fish as just one alternative to beef or lamb, but in Japan, with its long mercantilist tradition in the fisheries and where an older generation still vividly remembers the hunger at the end of World War II, food security issues for the nation's main source of animal protein remain a high priority. It is Japan's vital fisheries interests that will create the single largest barrier to a new architecture with enhanced disciplines.

WTO members in the Negotiating Group on Rules have not yet resolved or even openly discussed the technical issues pertaining to the possible architecture of enhanced disciplines. However, the environmental NGOs and UNEP have a much clearer picture and are well ahead of most WTO members in terms of enunciating architecture for future disciplines. If there is to be a new architecture, it will employ a methodology that would be related to the one employed in the Uruguay Round negotiations on agriculture, where countries disclose their support measures to fisheries and then make appropriate reduction commitments based upon some sort of traffic light system, i.e. red, green and amber.

It is instructive to consider briefly the possible architectural arrangements for a WTO agreement on Fisheries Subsidies.<sup>37</sup> In 2000 three separate subsidies nomenclature were developed for categorising subsidies by the USA,<sup>38</sup> the OECD<sup>39</sup> and APEC,<sup>40</sup> all of which either directly or indirectly include government transfers such as access fees and tax and access fee exemptions that are of trade and commercial interest to coastal developing countries.<sup>41</sup> The architecture that emerges from the various proposals would almost certainly limit the capacity of developed countries to contribute to access fees and of developing countries to domesticate their fisheries. Such an architecture would require detailed notification of a variety of measures and also be likely to require commitments to reductions in support measures, as well commitments to the abolition of certain types of subsidies. If the normal type of special and differential approach provisions seen in the reduction commitments in the Agreement on Agriculture were to be extended to fisheries, then most developing coastal states would not be absolved from some level of bound reductions. Clearly, in such a case, least developed countries would be exempted from reduction commitments. It is precisely these measures that should be of concern to developing countries, as many of the measures that are discussed below are vital to the downstream processing of marine resources.

While a traffic light architecture seems to be the most likely type of framework to emerge, if fisheries management considerations are to have any influence on the disciplines then unless disciplines are imposed within the context of the fisheries manage-

ment regime and particular national context, it will make little environmental sense. To make reduction commitments where an appropriate fisheries management regime is in place would be environmentally futile and have no effect on sustainability; on the other hand, the acceptance of such an approach would imply something that WTO negotiators have long resisted, that criteria from other areas, for example environment or agriculture, can be a pre-condition for the application of disciplines. While an approach to the architecture which does not consider the fisheries management regime may be inappropriate from an environmental standpoint, it certainly does make sense from the standpoint of trade liberalisation. If negotiators ultimately agree on an architecture, it will be based solely on commercial criteria, i.e. whether a subsidy exists in a particular category, irrespective of whether or not the fisheries regime is sustainable.<sup>42</sup>

If WTO members are unable to agree on a new architecture, then what is likely to emerge is an annex to the ASCM which may have little commercial import and do little or nothing to protect fish stocks. Given the opposition to such an architecture from Japan and the relative weakness of its principle proponents, a new architecture is by no means a 'done deal' unless the environmental NGOs are able to successfully exert their considerable pressure on both the USA and the EU. A popular option in Geneva to increase bargaining leverage is to file a dispute, as has occurred in the case of the Australia/Brazil challenge to EU sugar subsidies and the Brazilian challenge to the US cotton regime. In the case of fisheries, such a challenge to the fisheries regimes of several larger WTO members is possible despite New Zealand protestations to the contrary.

### ***The Concerns of Small Vulnerable Coastal States***

The experience that developing countries have had with the WTO disciplines over the last eight years requires a highly precautionary approach to any new disciplines. Few small developing country missions in Geneva have had time to consider fisheries subsidies as they are widely seen by them as an issue that is peripheral to their principal trade interests. In the past, and often quite unintentionally, small developing countries have found themselves as 'by-catch' in trade disputes between larger WTO members. The experience with the *Banana* panels, the ensuing pressure on tuna margins of preference<sup>43</sup> and the current dispute over the EU sugar regime<sup>44</sup> have all resulted in developing countries experiencing the consequences of 'judicial activism' in the multi-lateral trading system between much larger players. It is precisely the past disciplines based on a single undertaking with MFN treatment which catch 'big fish' and 'small by-catch'. It is this, along with *ad hoc* judicial activism, that has created much of the discomfort that small developing states feel with further disciplines. The WTO's net has been cast without adequate consideration of the development, as opposed to adjustment, needs of its members.



Fisheries activities in small vulnerable coastal states fall into three separate categories:

- a) Revenue generation from access fees for distant water fleets;
- b) Domestic and foreign fishers operating for export in the EEZ and territorial sea to supply canneries, loining facilities and domestic processing facilities;
- c) Artisanal fisheries within the territorial sea for the domestic and export market.

In the fisheries sector of many small vulnerable coastal states, governments have been attempting to localise the distant water fisheries as well as develop linkages between in-shore fishery in the territorial sea and other sectors of their economies which include tourism, a substantial consumer of both domestic and imported marine products in coastal states. The section below considers the interests and concerns of small coastal states in each of these areas of fisheries activities as it pertains to the WTO negotiations.

#### **a. Revenue generation from access fees**

It is widely, though incorrectly, assumed that fish stocks are in decline in all marine environments. This is not the case and in those coastal states which have a substantial surplus fish stock in their exclusive economic zones and which have practised prudent fisheries management policies there are stocks in excess of the existing sustainable catch capacity of the domestic fleets. In these countries, many of which are least developed countries, significant government revenue has been generated from access fees from developed and developing country distant water fishing fleets.

The access fees that Pacific Island states negotiate are through state-to-state agreements and through commercial agreements between states and private companies. In the state-to-state agreements the distant water fishing nations also provide invaluable development assistance. A recent submission to the Negotiating Group on Rules (TN/RL/W/3, para 14) has served to heighten concerns amongst small vulnerable states that the intention of negotiations in this area may result, by design or default, in disciplines on fisheries access fees. The submission argues that:

*... the fisheries sector is distinctive in that, in addition to the standard market addressed in the SCM rules, fisheries sector subsidies can also distort access to productive resources, and can have negative effects from an environmental or developmental perspective.*

#### **b. Domestic and foreign fishers operating for export in the EEZ and territorial sea to supply canneries, loining facilities and domestic processing facilities**

Access fees, while significant to some marine resource-rich small vulnerable states, have generally only been significant to the least developed and most vulnerable. A far more common concern pertaining to the current negotiations on fisheries subsidies is

the potential impact that new disciplines may have upon fisheries activities geared towards domestic processing and subsequent export. This is a far more widespread concern, as many of the small vulnerable coastal states that do not offer access to distant water fishing nations have nevertheless sought to develop domestic capacity to use their own marine resource for development purposes. Many of these domestic facilities have formed strategic partnerships with fleets from distant water fishing nations to develop and land catches from the EEZ of small vulnerable coastal states.

In order to attract local and foreign investment in the fisheries, many developing and least developed small vulnerable states have offered incentives to both local and foreign fishers to supply domestic processing facilities. These incentives are vital if small vulnerable coastal states are to develop their fisheries sector. The right of coastal states to domesticate their fisheries sector is assured under UNCLOS and any possible WTO disciplines should not undermine the fundamental principles of the Law of the Sea.

Outside the context of the WTO there has been some early discussion of the methodology to be employed in any possible fisheries subsidies negotiations. While the ASCM has considerable weaknesses as it pertains to special and differential treatment for developing countries, the need for departure from its methodology is as yet to be demonstrated.

### **c. Artisanal fisheries for export and domestic markets**

Any new fisheries subsidy disciplines on distant water and local fleets, as suggested by the proponents of such disciplines, would impact on large numbers of coastal small vulnerable states. However, heightened subsidies disciplines, if crafted without sufficient understanding or consideration of the particular circumstances of artisanal fishers, could effect the development efforts of all small vulnerable coastal states in the fisheries sector. The artisanal fisheries sector remains central to the subsistence and monetised livelihood of coastal populations throughout the developing world in general, and in particular in small vulnerable coastal states. Those involved in artisanal fisheries in the territorial sea normally fall into low-income groups. Moreover, in many coastal developing states women dominate the subsistence component of the artisanal sector.

In many small vulnerable states governments have specific programmes to assist these groups which often include direct assistance for the purchase of monetised inputs. This type of government assistance to low-income, low-technology fishers to raise income levels by expanding into monetised activities for the domestic and speciality export market are vital to the development efforts of small vulnerable coastal states and to raise the standard of living of what are often very low-income groups. As a result, any disciplines that may be developed on fisheries subsidies must be crafted so that they exempt government programmes to raise the income levels of artisanal fishers.

All these matters can conceivably be addressed if the size of the WTO's net is cast widely enough to provide for appropriate escape for the 'by-catch'. The judicious use of appropriate *de minimis* and special and differential provisions could provide a genuine development space. The question is whether, in the rush to write yet more disciplines, the genuine and legitimate concerns of the WTO's most vulnerable members will be overlooked.

## **5 Fisheries Subsidies Disciplines – the Case of Pacific ACP Fisheries Access Arrangements**

This section considers some of the implied disciplines that the current negotiations at the WTO appear to suggest. It will be argued that the disciplines implied by the negotiating positions suggest that possible future WTO disciplines that could endanger the position of the Pacific Island states and other coastal developing states that remain highly dependent upon revenues and development assistance stemming from access fees.<sup>45</sup> The analysis of possible WTO provisions will be reviewed in light of the various access provisions of the predominant regional fisheries access arrangements. These include treaty arrangements with the USA, emerging arrangements with the European Union and private bilateral access arrangements.

### ***Fisheries Access Arrangements with the USA***

The most significant access arrangement in the South Pacific is the multilateral arrangement between the Pacific Islands and the USA, the Treaty on Fisheries Between the governments of Certain Pacific Island states and the government of the United States of America (the US Treaty),<sup>46</sup> originally negotiated in 1987, revised in 1993 and with a further extension scheduled for June 2003. The US 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 (FFA).<sup>47</sup>

The financial terms of the revised US Treaty, which come into force in June 2003 (currently US\$18 million per annum), fall into three categories: (a) an annual industry payment representing licence fees for a maximum of 45 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 FFA.<sup>48</sup> Under current arrangements in the Multilateral Treaty, USAID pays approximately US\$14 million of the US\$18 million of annual returns to the beneficiaries.<sup>49</sup> This accounts for almost a third of total access fees derived by Pacific Island states, but less than 20 per cent of total DWFN catch in their EEZs.<sup>50</sup>

Studies by the World Bank<sup>51</sup> suggest that the current 4 per cent average access fee is only as high as it is because of the 10–11 per cent return received from the USA,

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 its traditional fishing ground. 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 free' 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. Finally, capacity constraints in the fisheries in the Eastern Pacific have meant that the US fleet will maintain its operations in the Central and Western Pacific region.

The second factor bringing the US fleet into the Central and Western Pacific have been the US Treaty itself, which not only provides substantial subsidies but allows purse seine operators to fish throughout the EEZs of the members of the FFA under one access agreement.<sup>52</sup> Should new fisheries subsidies disciplines be negotiated, then the US treaty in its present form would be likely to have to be revised. This would put further pressure on the US purse seiners to shift their operations to the Eastern Pacific. Without the US treaty the average access fee for Pacific Island countries would drop to 3 per cent.<sup>53</sup>

### ***EU Fisheries Partnership Agreements***

The EU has been a relatively new entrant into the resource-rich waters of the South Pacific. The first fisheries access agreement was signed between Kiribati and the EU in July 2002.<sup>54</sup> The three-year agreement is a bilateral access agreement which foresees six EU purse seine fishing vessels in the Kiribati EEZ in the first year along with 12 long-liners.<sup>55</sup> Receipts will be set at €546,000 per annum but in the second year of the agreement the benefits to Kiribati decrease to €416,000 when vessel levels will fall to four purse seine vessels, though this can increase to 11 purse seine vessels with an additional payment of €65,000 per purse seine vessel. The component paid by the industry is the highest of any previous EU access agreement and is set €35/tonne landed.<sup>56</sup> The method of calculating the licence fee in the EU agreement, it will be argued, compounds the fisheries management difficulties faced by policy-makers in the sector by providing a substantial and direct incentive to under-reporting. It should be noted that approximately 17 per cent of the total cost of fisheries access was met by ship owners with the balance coming from EU public funds.<sup>57</sup>

The relationship in fisheries between the EU and the ACP states in general has by and large been dominated by this type of 'cash for access' type arrangement with only some notable exceptions.<sup>58</sup> However, at the very end of 2002 the European commission launched a new policy initiative on fisheries that foresaw the development of

'fisheries partnership agreements'.<sup>59</sup> It is envisaged that the partnership agreements will result in the creation of a framework agreement with ACP countries in the area of fisheries. This fisheries agreement will have the overall objective of sustainability, good governance and poverty eradication<sup>60</sup> but have the specific objectives of protecting EU fisheries interests (including access) and fostering developing countries' capabilities to exploit their marine resource. The potential for policy conflict is apparent.

The current EU access arrangements involve substantial government transfers and because access fees are paid on the basis of reported catch, they result in incentive mechanisms that exacerbate unsustainable fisheries practices. The estimates of the extent of the government transfer in the current EU access arrangement are 83 per cent of total cost. This is very similar to that of the USA where the public contribution is 84 per cent of total payment.

### ***Japan, Korea and Taiwan***

While US, and to a lesser degree EU, fisheries access agreements are state-to-state and are largely transparent in nature, agreements with East Asian DWFN are highly opaque because they are a commercial agreements that are secret. In the case of Japan, there is a Head agreement with South Pacific nations but access is negotiated by industry associations, representing vessel operators, and individual governments. The access fee is negotiated in the subsidiary agreement which is calculated on per trip basis which decreases the incentive to under-reporting and is paid wholly by the Japanese companies.<sup>61</sup> Significantly, like the US arrangement, fisheries access is not dependent upon declared catch and hence is not as corrosive of good fisheries management practices as other arrangements. Japan has also successfully decoupled, in law if not entirely in fact, its access arrangements from its development assistance. where access is not subsidised but becomes, in the view of Pacific Island countries, a *conditio sine qua non* of Japanese development assistance to the fisheries sector.<sup>62</sup> Japan, like the USA, has a relatively good fisheries management record in the region.

Other DWFN such as Korea and Taiwan negotiate bilateral commercial agreements between individual ministries and fishing companies; these are not agreements between sovereign states. Little or nothing is publicly known about these agreements except that the access fee is normally based on a percentage of the previous year's catch. It is entirely possible that governments offer subsidies for access to the DWFNs in the home country but no information on the existence of such transfers is available. In a recent publication, FFA officials described the access formula used by Pacific Island states:<sup>63</sup>

*In the FFA region, the access fees are largely determined using the previous year's catch and effort data as supplied by the DWFN, the market price and set percentage rate of return. The standard access fee formula is as follows:*

$$\text{Access} = \text{Average Price of Tuna} \times \text{Average Catch per Vessel} \times \text{Minimum Rate of Return}$$

This access fee formula or variants thereof have been used by Pacific Island countries as a method for calculating access fees for over a decade.<sup>64</sup> On the basis of current estimates US purse seine owners are paying US\$120,000 for access as compared with US\$250,000 paid for access by Japan, Korea and Taiwan.<sup>65</sup> EU purse seiners will pay an extra €65,000 (US\$70,000) for access. However, what the Pacific Island state receives is approximately five times more than what the US vessel owner pays because of the contributions of USAID.

This formula contrasts sharply with the access arrangement in the US Treaty which is highly subsidised but, more importantly, is not in any way related to catch levels or declared catch and hence creates no incentive for under-reporting or misreporting. In the formula above the more a fisherman reports, the more he will pay in access fees in the following year. Scientists and policy-makers are keenly aware that there are economic incentives to under-report or to report fish caught in the EEZ as being caught on the high seas. These policy-makers and scientists are confident that they are able to build into their own catch estimates margins of error which will take into account the magnitude of the misreporting and hence assure the sustainability of the region's fisheries. Whether this confidence is justifiable will only be tested in time as more pressure is put on the resource with the entry of new DWFNs into the Pacific and as the EU's desire for enhanced access into ACP waters brings effort levels close to estimated sustainable yields. However, suffice it to say that a system of access fees that provides financial incentives to misreport only further compounds fisheries management problems in the region because biological accuracy of recruitment is notoriously poor in the tuna fisheries.

It will be argued that the differences between the nature of the agreements bears heavily on the issue of sustainability of the fisheries but in an exactly opposite way to that predicted by the opponents of fisheries subsidies disciplines. The US agreement, with its extensive subsidies, is far more conducive to sustainability because it is multi-lateral in nature, transparent to all parties and in large measure respects the environmental and marine standards established in the Pacific Islands. The US treaty is widely regarded in fisheries circles as a model and the US Distant Water Fishing Fleet's behaviour is considered to be exemplary in terms of sustainability and monitoring. The USA is widely seen as the DWFN that is least involved in under-reporting and misreporting. The reason for this is that the treaty is based on access fees that are decoupled from fish catches. Thus, whether the US fleet reports catches on the high seas or within the EEZs of the Pacific Island countries does not affect the amount of the access fees it will pay in the current years. The US Treaty imposes an access fee regime that is the equivalent of a lump sum tax and so does not distort behaviour.

### **Revenue Estimates from Pacific ACP Access Arrangements**

For many years data on the economic importance and magnitude of access fees have not been publicly available in the Pacific Island states or indeed in many coastal states. National governments and regional fisheries organisations, operating under instruction from their members, have jealously guarded what they have seen as 'commercially sensitive' data on fisheries access fees and the revenues generated therefrom. Table 12.1 is the first country specific estimate of the significance of access fees to Pacific Island countries.

**Table 12.1: 1999 Access Fees and Gross Domestic Product**

	<b>Access Fees (US\$)</b>	<b>GDP (US\$)</b>	<b>Access Fees (% of GDP)</b>
Kiribati	20,600,000	48,123,871	42.81
Tuvalu	5,900,000	13,848,788	42.60
Federated States of Micronesia	15,400,000	229,869,864	6.70
Nauru	3,400,000	51,612,903	6.59
Marshall Islands	4,982,600	97,311,800	5.12
Niue	151,793	7,514,077	2.02
Palau	800,000	113,484,869	0.70
Cook Is	169,072	\$82,371,930	0.21
Papua New Guinea	5,840,000	3,415,590,478	0.17
Tonga	152,041	157,018,257	0.10
Solomon Islands	273,458	279,593,229	0.10
Vanuatu	218,448	226,280,313	0.09
Samoa	188,616	233,506,665	0.08
Fiji Islands	212,000	1,821,334,281	0.01

Source: R. Gillet and C. Lightfoot, *The Contribution of Fisheries to the Economies of the Pacific Island Countries*, Honiara: FFA, 2001

The most significant observation regarding these data is the importance of access fees to the economies of the region. One-quarter of total Pacific access fees come from payments made by USAID under the terms of the US Treaty. What is also significant is that access fees as a percentage of GDP tend to be greatest in those countries with the least developed fisheries sector and they are very often smallest as a portion of GDP in those countries with a relatively developed fisheries export sector. For the least developed and most vulnerable states, such as Kiribati and Tuvalu, fisheries access fees constitute an overwhelming proportion of GDP. Significantly, despite high dependence on access fees, there is no scientific evidence that either Kiribati or Tuvalu have allowed fishing in their EEZs beyond sustainable levels for the main target species of tuna. In some of the more developed and more resource-endowed states exemption

from access fees has been a standard incentive offered to facilitate localisation and down stream processing. The WTO compatibility of these arrangements should be of concern to Pacific Island countries that are members of the WTO.<sup>66</sup>

Table 12.2 covers estimates of access fees for two groups of countries, Pacific WTO members, i.e. Papua New Guinea, Fiji and Solomon Islands, and resource-rich non-WTO members who may nonetheless be effected by WTO disciplines. In the case of those countries where there are abundant marine resources, for example Kiribati, Marshall Islands, Nauru, Federated States of Micronesia and Tuvalu, almost no fish exports pass through their territories. However, where exports are developed and substantial in value, access fees are minimal because governments that have large marine product exporting sectors have used exemption from fisheries access fees as means of providing incentives to localisation.

**Table 12.2: Exports and Access Fees of Selected Pacific Countries (1999)**

Country	Estimated Exports (US\$)	Estimated Catch <sup>a</sup> (MT)	Estimated Value of Catch (US\$)	Access Fees (US\$)	Access Fees as % of Catch
Fiji Islands	23,000,000 <sup>b</sup>	15,600	40,000,000	212,000	0.053
Federated States of Micronesia	4,623,000 <sup>c</sup>	134,499	180,000,000	15,400,00	8.6
Kiribati	2,302,000 <sup>d</sup>	138,000	139,000,000	20,600,000	14.8
Marshall Islands	473,000	33,217	50,000,000	4,984,000	9.96
Nauru	0	41,000	37,000,000	3,400,00	9.2
Papua New Guinea	48,000,000	141,000 (85,000)	140,000,000 (75,000,000)	5,840,000	4.1 (7.3) <sup>e</sup>
Solomon Islands	5,000,000	74,000	70,600,000	273,000	0.3
Tuvalu	4,500	40,532	37,400,000	5,900,000	15.8

Source: R. Gillet R. and C. Lightfoot, *The Contribution of Fisheries to the Economies of the Pacific Island Countries*, Honiara: FFA, 2001

a Based on total commercial (non-subsistence) catch.

b These estimates are based on official figures of the Fiji Fisheries Division. The Reserve Bank of Fiji estimates that these figures are \$28,000,000. The EU estimates that these figures are closer to \$40,000,000.

c These are 1997 estimates for Federated States of Micronesia.

d Kiribati exports are dominated by live aquarium fish.

e The bracketed estimates for Papua New Guinea are based on the assumption that all access fees are paid only by offshore foreign based vessels.

Cross-country comparisons of percentage access fees are always fraught with difficulty for at least two reasons. The effective rates reflect two distinct forces. First, they may reflect differences in the nominal negotiated or target rate, i.e. rates may be different from one country to another. This could be because where catch levels are below



sustainable levels, as they are in the Pacific, some coastal states will prefer to attract some possibly low level of access from a marginal DWFN than to gain nothing at all. Second, the effective rates may be different even where two countries pay the same nominal rates because the declared catch per vessel is higher for one DWFN than for another. This, in turn, could be the result of genuine differences in actual catch per vessel, stemming from differences in productivity or from differences in misreporting and under-reporting, i.e. differences in the rate of malfeasance. Differences are also a matter of development policy. as has been mentioned above. where the relatively advanced marine product-exporting countries such as Fiji, Solomon Islands and Papua New Guinea have, as a matter of development policy, developed a diversified and 'domestic' fisheries sector where no or almost no access fees are paid by local and locally-based fishers. Nevertheless, the differences in rates are so large as to require some explanation.

The estimates above are determined by dividing the known access fees paid by the DWFN by the estimated value of the catch. The numerator, i.e. the access fees, forms part of government revenue and is relatively accurate as the amount received in fees is presented to parliament in government budget estimates. It is the denominator, the volume and unit value of fish, which is the most difficult to verify as it comes from reported catch levels multiplied by estimated price. The catch estimates of the distant water fishing fleets are inaccurate if for no other reason than that the access fee formula used in bilateral agreements gives them considerable economic incentive to under-report and misreport.

It is worth considering three groups of countries from the above sample. The first group is made up of Kiribati and Tuvalu, two of the poorest and most vulnerable LDCs in the Pacific, but islands which are resource rich and overwhelmingly dependent upon access fees paid under the US Treaty. Over the last few years, the US fleet has become increasingly dependent upon the EEZs of Kiribati and Tuvalu as these countries are nearest to their traditional fishing grounds in the Eastern Pacific. In 1999, approximately 40 per cent of the tuna caught in the Kiribati EEZ was caught by US purse seiners (56,000 tonnes) and 90 per cent in Tuvalu (36,000 tonnes). The very high estimates of return to both Kiribati and Tuvalu reflect not only low reported volumes but also the predominance of the US fleet and the way in which access fees are paid under the US Treaty. Three factors help explain the high reported *ad valorem* rates which are much higher than what is known to be paid internationally. First, the US Treaty decouples access from price; second, most of the US fleet was operating in the EEZs of these countries; and third, 1999 was a low tuna price year. However, according to Pacific fisheries officials the US fleet has the best fisheries management record of all the DWFN operating in the region. Because access fees are decoupled from declared catch they also have no incentive to misreport and under-report. Furthermore, the US fleet operates a monitoring and surveillance framework which contributes to good management.

The second group of countries includes Nauru, Federated States of Micronesia (FSM) and Marshall Islands which appear to generate access fees of around 8.6–9.9 per cent of estimated catch. In this case it is not possible to easily explain such estimates. From the data available in 1999 these apparently high rates of return cannot be explained by the presence of the US tuna fleet as it was not operating in the EEZs of FSM or Marshall Islands and was only a minor player in the EEZ of Nauru (accounting for 15 per cent of total Nauru catch in 1999).

The third group of countries, the WTO members – Papua New Guinea, Solomon Islands and Fiji – have, as stated above, pursued a development policy based on the domestication of the fisheries sector and have used access fees, along with a host of other measures, to subsidise domestication of their industry. As a result, revenues from access fees have been negligible. This constitutes a significant investment in the development of a commercial advantage in marine resource exports. Papua New Guinea has earned access fees from agreements with Taipei and, to a lesser degree, USA.<sup>67</sup> In Fiji, the absence of government earnings from access fees is compounded by the loss of tax revenues stemming from tax incentives to the export sector. Thus a very high rent sector, such as the export of sashimi grade tuna, operates in Fiji in an almost tax free environment.<sup>68</sup> Moreover, there is evidence that operators in this sector are involved in the massive and systematic under-reporting of exports, as has been highlighted by the EU as well as the Reserve Bank. This absence of access fees for local fishers accounts for the relatively low percentage access fees found for Fiji and Papua New Guinea.<sup>69</sup> In the Fiji and Papua New Guinea canned tuna sectors no access fee is paid for tuna used in the cannery which is processed domestically; in the demersal export fisheries in Papua New Guinea, where there are only domestic fishers, there is an exemption from access fees. It should, however, be noted that since the publication of this data there have been changes in policy in both Papua New Guinea and Fiji which will assure higher access fees even for domestic fishers as the Fisheries Departments become ever more self-reliant in financing their operations.

## **6 Implications of WTO Disciplines on Fisheries Subsidies**

The clamour for fisheries subsidies disciplines at the WTO has been strenuously supported by the NGOs and the intergovernmental organisations (IGOs), such as UNEP, FAO, APEC and the World Bank. The nexus between fisheries subsidies and stock depletion is now accepted wisdom, so that policy-makers no longer even consider the internal dynamics of the global capture fisheries. However, even if by some *deus ex machina* effective subsidies disciplines are negotiated at the WTO, the dynamics of rising global population, rapid economic growth, which has increased income and demand for fish, and the application of sophisticated technology to the last primitive hunter-gatherer activity will mean that global fisheries will not survive unless global

disciplines to limit access to sustainable levels are negotiated in the appropriate forum, i.e. the FAO or the UN. To discuss this dynamic of fisheries depletion is today profoundly unfashionable because it is to lay the blame for fish stock depletion on what are, in effect, the very pillars of our modern society – the application of advanced technology and rapid population and economic growth. Instead, the NGOs and IGOs prefer to pretend to address the issue of fish stock depletion by supporting WTO negotiations that will ultimately result in weak disciplines at the WTO. In the Pacific, the coastal states together with the DWFNs have virtually completed the negotiation of a new legal instrument<sup>70</sup> which will set in place a management regime that will provide genuine multilateral guarantees for sustainability. In such a fisheries management context, fisheries subsidies rules at the WTO will only serve to undermine the economies of the region and make the fisheries sector of less value to governments.

Disputing the logical veracity and factual foundations of an argument made by those who are large, rich and powerful by those who are small, poor and vulnerable may prove personally satisfying to the proponent, but it normally overlooks the inevitable outcome. It is best for coastal states to consider policy responses to the threats posed by those changes in policy. The challenges posed by these disciplines include:

- The potential loss of a substantial portion of the GDP of Kiribati and Tuvalu, two of the smallest and most environmentally and economically vulnerable LDCs in the ACP group;
- Losses of revenue by a large number of other ACP countries dependent upon revenues from subsidised access agreements;
- dismantling of economic incentives to domestication through elimination of subsidies to local fishers.

The responses by ACP countries to the challenges posed should be based upon:

- Seeking special and differential treatment in fisheries negotiations that recognise the need of developing coastal states to maintain revenues from sustainable access arrangements, and subventions to domestic and artisanal fishers;
- Developing access agreements that decouple development assistance from fisheries access arrangements, such as is found in the Japanese agreements with the Pacific ACP. In the case of the fisheries partnership agreements, development assistance to the fisheries sector should not be linked to EU access;
- Where possible, replacing access fees with income withholding taxes for DWFNs. This will permit differential rates for local and foreign fishers and avoid issues pertaining to GATT Article I and III.

There is much irony in a situation where Kiribati and Tuvalu,<sup>71</sup> two of the world's

smallest and most environmentally vulnerable states threatened by unsustainability and eventual physical extinction caused by global warming, are first threatened with economic collapse as a result of negotiations in the WTO, an international trade body which is being used by some of its members to protect the environment. This is even more ironic when one considers that the most powerful proponent of these fisheries subsidies disciplines, the USA, is the most important provider of government support to fisheries access in the region and at the same time has destroyed the best, albeit flawed, hope for saving these low-lying atolls from global warming through its refusal to sign the Kyoto Convention. All this may be palatable to some if it could be defended on the grounds of fisheries management, but there is no evidence of unsustainable fisheries in Kiribati and Tuvalu; the first victim of the negotiations would probably be the very access agreement that has become most closely associated with good fisheries management practice in the region, i.e. the US Treaty. The outcome becomes demonstrably inequitable and unjust when one considers that these disciplines are being negotiated in the WTO, a forum in which both Kiribati and Tuvalu were *de facto* members, a status which they lost at the end of the Uruguay Round.<sup>72</sup>

## Notes

- 1 WTO Ministerial Declaration WT/MIN(01)/DEC/1, 20 November 2001, Para. 28. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.
- 2 Negotiating Group on Rules, TN/RL/W/3, 24 April 2002.
- 3 The principle proponents of enhanced fisheries subsidies rules at the WTO include Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines and the USA
- 4 China has called for Special and Differential Treatment Provisions in very broad terms without specifying the content of such provisions. Negotiating Group on Rules TN/RL/W/9, 20 June 2002.
- 5 Gordon, H. S., 'The Economic Theory of a Common Property Resource: The Fishery', *Journal of Political Economy*, Vol. LXII, 1954, pp. 124–42.
- 6 See Arnason, R., 'Ocean Fisheries management: recent international developments', *Marine Policy*, September 1993; Porter, G., 'Fisheries Subsidies and Overfishing: Towards a Structured Discussion', UNEP, Geneva, 2002, p. 11.
- 7 Scott, A. D., 'The Fishery: The Objectives of Sole Ownership', *Journal of Political Economy*, Vol. LXIII, 1955, pp. 116–24.
- 8 Flaaten, O. and Wallis, P., 'Government Financial Transfers to Fishing Industries in OECD Countries', OECD, 2000. <http://oecd.org/agr/fish/publication.htm>
- 9 Arnason, R., 'Fisheries subsidies, overcapitalization and economic losses' in *Overcapacity, Overcapitalisation, and Subsidies in European Fisheries*, *Proceedings of the First Workshop of the EU Concerted Action and the Common Fisheries Policy*, ed. Hatcher, A. and Robinson, C., University of Portsmouth, UK, October 1998.
- 10 Japan has asserted that any possible adverse effect of fisheries subsidies on stock depletion could be addressed with an appropriate management regime, WT/CTE/W/173.
- 11 FAO, 'Marine Fisheries and the Law of the Sea: a Decade of Change', 1992, Rome.
- 12 Asia-Pacific Economic Cooperation (APEC), Fisheries Working Group, *Study into the Nature and Extent of Subsidies in the Fisheries Sector in APEC Member Countries*, 2000.
- 13 See *Transition to Responsible Fisheries: Economic and Policy Implications*, Paris, 2000; also 'Transition to Responsible Fisheries, Government Financial Transfers and Resource Sustainability: Case Studies', (AGRI/FI), Paris 2000. It is worthy of note that the OECD does not refer to subsidies which may be construed as having WTO implications but 'government transfers'.
- 14 Milazzo, M., 'Subsidies in World Fisheries: A Re-examination', Washington, World Bank, 2000.
- 15 For a full and complete analysis of the application of existing WTO fisheries subsidies rules see Stone, C. D., 'Too Many Fishing Boats, Too Few Fish: Can Trade Laws Trim Subsidies and Restore the Balance in Global Fisheries', *Ecology Law Quarterly*, Vol. 24, 1997, pp. 505–43.
- 16 Article 3, ASCM.
- 17 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. See Annex VII, ASCM.
- 18 Article 5, ASCM.
- 19 Article 1, ASCM.
- 20 It is generally understood that development assistance is normally not covered under the subsidies code. However, there is no legal precedent on the matter and the specific case of development assistance being used to lower access fees for DWFNs is central to the advocates of greater subsidies disciplines.
- 21 Non-actionable subsidies ceased to exist from January 2000.
- 22 Footnote 4, 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.
- 23 See Annex 1, ASCM.
- 24 Article 5, ASCM.
- 25 Article 6(a) ASCM. Under the provisions of ASCM, Article 31.
- 26 ASCM, Articles 17 and 19.
- 27 TN/RL/W/3 and TN/RL/W/12. While there is no doubt that fish stocks are heterogeneous in nature and this creates difficulties in the definition of 'like products' for the purpose of the application of countervailing measures, this is not unique to fish. More significantly, heterogeneity does not preclude the determination of injury or serious prejudice as there is no obligation in footnote 46 ASCM for the like products to be identical.

28 Indeed Adam Smith, in *The Wealth of Nations*, criticised bounties provided by Britain to its own whaling fleet but in the end recognised the key role the subsidies played in the national defence. Japan and France used subsidies in the nineteenth century to develop their own distant water fleets.

29 Japan has argued that the current rules are adequate (Negotiating Group on Rules, TN/RL/W/11, 2 July 2002) and that the matter should be addressed at the FAO which possess the fisheries expertise to address such a complex issue.

30 Negotiating Group on Rules, TN/RL/W/12, 4 July 2002.

31 Norway, which is not formally part of the group but is supportive of enhanced disciplines in the sector, does possess some bargaining power, but whether it is willing to use this on fisheries issues remains to be seen.

32 OECD, 'Transition to Responsible Fisheries – Economic and Policy Implications', Paris, 2000. New Zealand government transfers to the national fisheries are approximately 1.5 per cent of the estimated value of the New Zealand catch in 1996 (p. 145). In the case of Iceland, the comparable figure is 4.6 per cent of the value of the catch. While no comparable figures were provided by Japan, the EU, reputedly among the largest provider of subsidies, granted 639 million Euros, equal to approximately 7 per cent of the value of 1997 landings. If one includes the cost of general services under the CFP, this figure rises to 14 per cent of the value of the catch (p. 140).

33 On the basis of OECD data, *op. cit.* p. 148, the USA is by far the most prolific provider of transfers to the fisheries sector. In 1997, the last year for which comparable OECD data were available, the USA provided transfers of \$724 million in constant 1990 dollars from a catch of \$3 billion, i.e. 24 per cent of the value of the catch. This makes the USA the largest user of transfers of any OECD country for which comparable data were available. (Data from Japan were not available.)

34 Negotiating Group on Rules, TN/RL/W/21, 15 October 2002.

35 This is a group of EC members who have substantial fisheries interests and includes, among others, France and Spain.

36 At the Johannesburg Earth Summit, the European Union took an active role as protagonist for the agreement to limit fish catches to sustainable levels.

37 The architectural options come from G. Porter, 'Fisheries Subsidies and Overfishing: Towards a Structured Approach', UNEP, Geneva, 2001.

38 WT/CTE/W/154.

39 OECD, 'Transition to Responsible Fisheries: Economics and Policy Implications', Paris, 2000.

40 APEC, Fisheries Working Group, 'Study into the Nature and Extent of Subsidies in the Fisheries Sector of APEC Member Economies'.

41 Access fee exemption provisions for local fishers may well constitute a *prima facie* violation of GATT 1947 National Treatment obligations.

42 Porter, G., *op. cit.* UNEP, 2000, pp. 34–35 The architecture proposed by Porter, which foresees a matrix that would include evaluation of whether a particular fisheries management regime imposes weak or strong output controls, would require an evaluation from experts in fisheries as a pre-condition to imposing trade rules. Irrespective of the economic or environmental virtues of such a methodology, it would certainly prove extremely unpalatable to trade negotiators.

43 Thailand and Philippines placed considerable pressure on the EU at the Doha ministerial conference to agree to lower their MFN tariff on canned tuna in response to demands from the ACP group for a waiver for the trade provisions of the Cotonou Agreement. The waiver was made necessary by the results of the various Banana disputes. Thailand and Philippines have sought mediation at the WTO over EU MFN canned tuna tariffs.

44 Australia Request for Consultation, European Communities – Export Subsidies on Sugar, WT/DS265/1, 1 October 2002; Brazil Request for Consultation, European Communities – Export Subsidies on Sugar, WT/DS266/1, 1 October 2002.

45 Kingston, T., 'The Current Status and Benefits of the Pacific Island Fisheries Industry', in Zachary, D. 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 per cent of government revenue from fisheries access fees in 1992/3. The equivalent figure for other island states was Kiribati – 45 per cent in 1991; Federated States of Micronesia 25 per cent in 1993; Tuvalu 11 per cent in 1990; and Solomon islands 5 per cent in 1993.

46 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.

47 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.

48 See Schedule 3, Multilateral Treaty, *op. cit.*

- 49 S. Tarte, 'The European Union and the Western Pacific Tuna Fishery', October, 2002, Strasbourg, France.
- 50 Needs source from Forum Fisheries Agency.
- 51 World Bank, *Pacific Island Economies: Building a Resilient Economic base for the Twenty First Century*, Report No 13803-EAP, Washington February, 1995, p. viii.
- 52 If the US purse seiners paid the US government the equivalent of the USAID contribution in licence fees then this would not be a subsidy.
- 53 This estimate is based on tuna prices existing in 1997. Given that the US estimates
- 54 The agreement grants access to French, Spanish and Portuguese vessels.
- 55 Even this initially modest agreement between the EU and Kiribati has proven to be quite controversial as there was considerable debate as to whether Kiribati provision of access for EU purse seiners violated their obligation to limit access under the Palau arrangement. (Arrangement for the Management of the Western Pacific Purse Seine Fishery, 1995). See [www.spc.org.nc/OceanFish/Hmtl/SCTB/SCTB14/FT5\\_Opnai\\_Clark.pdf](http://www.spc.org.nc/OceanFish/Hmtl/SCTB/SCTB14/FT5_Opnai_Clark.pdf) For a complete analysis of the Palau arrangement see T. Aquorau and A. Bergin, 'Ocean Governance in the Western Pacific purse seine fishery – the Palau Arrangement', *Marine Policy*, Vol. 21, No. 2, 1997, pp. 173–86.
- 56 In earlier tuna access agreements, such as the Seychelles-EU arrangement, the amount paid by the industry was set at €25/tonne
- 57 IFREMER, CEMARE, CEP,199. 'Evaluation of Fishing Agreements Concluded by the European Community', European Contract No. 97/S 240-152919.10.12.1197, IFREMER/CEMARE/CEP, Ref. APC02, quoted in B. Gorez and B. O'Roidan, 'A report on the Future of European Union-ACP Fisheries Relations', Commonwealth Secretariat, February 2002, p. 17.
- 58 This type of 'first generation agreement' was followed by 'second generation agreements', e.g. that between the EU and Argentina which saw the creation of joint ventures. In Mozambique the EU has also pursued fisheries joint ventures.
- 59 'Communication from the Commission on an Integrated Framework for Fisheries Partnership Agreements with Third Countries', Brussels, 23 December 2002, COM (2002)637 final.
- 60 Ibid p. 5.
- 61 Japan has fisheries agreements with FSM, Kiribati, Marshall Islands, Nauru, Palau, Solomon Islands and Tuvalu. There is also a fisheries agreement with Fiji but Japanese fishing vessels do not fish in Fiji waters
- 62 The government of Japan normally denies that there is any link between its fisheries technical assistance and access agreements. The US government also denies that the Multilateral Treaty has any subsidy component.
- 63 Tamate, J. and Joseph, G., 'The Experience in the Pacific on Negotiating Fishing Agreements' in Lankester, K., Diouf, P. and Khandy, S.(eds), 'Proceedings of two Workshops held in Senegal and Mauritania on Fisheries Access in West Africa', WWF, 2002, p. 94.
- 64 See Grynberg, R. and Powell, M., 'Taxation in the Island Nations of the South Pacific', Australian National University, NCDS, Canberra, 1994, Vol. I.
- 65 See Tarte supra, p. 6.
- 66 The differences in access fees can be seen as a possible GATT Article I (MFN) and III(National treatment) violation as well as a possible violation of existing subsidies rules. These concerns, especially possibly Articles I and III violations, should be considered by developing countries irrespective of the outcome of the Fisheries subsidies negotiations.
- 67 It is reported that PNG tuna caught by Philippino and PNG vessels bound for the Madang tuna cannery and export to the EU have been free of access fees. This accounts for approximately 50 per cent of PNG exports in 1999.
- 68 Fiji has a long tradition of offering tax-free status to marginal garment factories as well as high rent earning sectors such as gold mining and sashimi grade tuna.
- 69 This exemption from access fees in Fiji has in the past extended to foreign fishers operating under licence to domestic fishers.
- 70 Pursuant of the UN Fish Stocks Agreement (the agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and management of Straddling Fish Stocks and Highly Migratory Fish Stocks) has negotiated a multilateral agreement for management of fish stocks the Central and Western Pacific region.
- 71 Kiribati and Tuvalu are small atolls with their highest points approximately two meters above sea level.
- 72 Kiribati and Tuvalu were GATT *de facto* members until the end of the Uruguay Round. As they did not seek accession prior to the creation of the WTO they would now have to accede like all other countries. Countries such as Solomon Islands, which were also GATT *de facto* members, obtained WTO membership easily at the end of the Uruguay Round because they submitted their offers within the stipulated period.