



Trade Hot Topics

Special and Differential Treatment in Fisheries Subsidies Negotiations: Priorities for Pacific SIDS

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1. Background

The principle of Special and Differential Treatment (S&DT), legal provisions that accord special treatment to developing countries in international trade rules, has been a cornerstone of the multilateral trading system since the General Agreement on Tariffs and Trade (GATT 1947). The intent of this principle is to embody fairness in the form of both *equity* and *equitable opportunity*. Fairness is aimed at ensuring not only that trade rules equally benefit the 'progressive development of all contracting Parties' (GATT 1947) but also that the contemporary system creates a level-playing field where developing countries, and especially least developed countries (LDCs), undertake liberalisation commitments that are more commensurate with their different capacities and levels of development.

The negotiation of S&DT provisions in World Trade Organization (WTO) agreements can be understood through an analysis of the effectiveness of the six categories the WTO uses to classify these

provisions, namely (WTO Secretariat, 2001, para. 3, in WTO Secretariat, 2018, para. 1.5):

1. Provisions aimed at increasing the trade opportunities of developing country Members;
2. Provisions under which WTO Members should safeguard the interests of developing country Members;
3. Flexibility of commitments, of action and of use of policy instruments;
4. Transitional time periods;
5. Technical assistance;
6. Provisions relating to LDC Members.

Specific concerns have been identified with cross-cutting S&DT provisions. Provisions that relate to flexibility of commitments have been found to be limited, and do not allow sufficient policy space or 'room to grow' for developing countries, especially with respect to the WTO Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures (the SCM Agreement).

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For example, most of the provisions of Article 27 of the SCM Agreement relate to transition periods and not the granting of greater flexibility or policy space. Provisions relating to transition periods have been found to be arbitrary in design and not connected to any coherent development policy criteria (Oyejide, 2002), and unable to create sound differentiation between developing countries on account of their different levels of economic development, level of supporting institutions and legal and regulatory frameworks. Furthermore, the implementation of technical assistance provisions (totalling 25) tends to be overly complex and donor-driven, which could undermine national priorities and institutions, and they are often used to extract concessions when bargaining (Fritz, 2005). Such provisions, in the end, do not always improve participation of developing countries in trade or contribute to true capacity-building that reflects local priorities (ibid.).

This issue of *Commonwealth Trade Hot Topics* examines the need for S&DT in a potential fisheries agreement at the WTO from the point of view of the socio-economic needs of Small Island Developing States (SIDS) in the Pacific region and current proposals on S&DT in fisheries.

2. Significance of the fisheries sector for Pacific SIDS

According to the United Nations Food and Agricultural Organization's (FAO) officially reported statistics for 2016, on fish capture production in marine waters, SIDS-WTO members contribute only 1.3 per cent of total global capture production (see Table 1)¹ and approximately 0.1 per cent of global fish exports.² Given that capture fisheries are the main source of natural wealth in most SIDS and most SIDS are heavily dependent on their fisheries resources for economic development, food security and livelihoods, this is a very small share. Hence, there still appears to be a huge potential to develop the fisheries sector in SIDS and to harness its potential for economic development and poverty reduction in a sustainable way.

The potential of fish production to meet the food security needs of SIDS, relative to other nations, is

demonstrated by the fact that fish represents only 7.7 per cent of the total protein intake in the rich/developed world, whereas it represents 50 per cent or more of animal protein in SIDS and some other developing countries (UNEP, 2005). This further emphasises SIDS' vulnerability to food insecurity, against which effective S&DT provisions in a WTO agreement ought to provide adequate protection. Out of the 1.3 per cent of total global production by SIDS-WTO Members, the six WTO Members from the Pacific region – namely, Papua New Guinea, Fiji, Solomon Islands, Vanuatu, Tonga and Samoa – account for approximately 45 per cent. This, coupled with the fact that in the Pacific-SIDS capture fisheries can contribute as much as 10 per cent of gross domestic product (GDP), makes the fisheries negotiations at the WTO a critical development issue for the Pacific.

Socio-economic assessments of the small-scale fisheries in the South Pacific region³ have revealed a high reliance on this sector for livelihoods. Small-scale fisheries (including subsistence and artisanal) in Pacific SIDS are inextricably linked to domestic food security and the sustainable livelihoods of millions of people, yet face many challenges, including "ineffective management and weak governance; poverty and undernourishment in fishing communities; pressure from industrialisation and global changes, such as market shifts and climate change" (Schuhbauer et al., 2017). Since small-scale fisheries embody all aspects of sustainable development – economic, social and ecological – S&DT provisions in a potential WTO fisheries agreement that allow for effective support to under-developed small-scale fisheries have the potential to increase marine fisheries catch, for domestic production and export, and would contribute to both domestic food security and related income-generating opportunities.

In addition to small-scale fisheries, preserving policy space for support to the sustainable development of Pacific SIDS' own large-scale fleets (*vis-à-vis* the extensive presence of foreign fleets) is also a justified negotiating position for the region at the WTO. Levels of subsidies provided by SIDS in the Pacific region are too low

1 We should keep in mind that the artisanal and small-scale fisheries catch in SIDS is often under-reported owing to weak management and enforcement capacities. For example, Papua New Guinea's reconstructed data for domestic catches, calculated as part of the University of British Columbia's Working Paper Series (Kinch et al, 2014), excluding tuna, totalled 2.4 million tonnes in the period 1950-2010 – which was an estimate *at least four times* the total non-tuna marine landings of 590,000 tonnes, as reported to FAO for the country for the same period.

2 Calculated from FAO's Fisheries Commodities Global Production and Trade database (online query).

3 See those conducted by the FAO, available on its website.

Table 1: SIDS-WTO Members by marine capture production, tonnes (2016).

SIDS-WTO Members*	Marine capture production*
Papua New Guinea	295,744
Maldives	129,191
Belize	91,432
Solomon Islands	66,445
St Kitts and Nevis	65,734
Suriname	46,148
Vanuatu	44,002
Fiji	41,928
Guyana	41,442
St Vincent and the Grenadines	23,077
Cuba	21,857
Cabo Verde	19,900
Mauritius	18,062
Comoros	16,407
Jamaica	16,100
Haiti	15,910
Bahrain	15,000
Dominican Republic	13,602
Trinidad and Tobago	13,027
Samoa	8,800
Guinea-Bissau	6,550
Antigua and Barbuda	3,000
Grenada	2,550
Saint Lucia	2,097
Barbados	1,735
Tonga	1,650
Singapore	1,234
Dominica	770
Total (SIDS-WTO Members)	1,023,394
Total (Pacific Group only)	458,569
Pacific Group share of total SIDS production	44.81%
World total marine capture production	79,285,242
SIDS-WTO Members' share of global capture production	1.29%

Note: Out of 38 SIDS that are UN Members, 28 are Members of the WTO. 1 Tonne = 1000kg

* Excludes aquatic mammals, crocodiles, alligators and caimans, seaweeds and other aquatic plants.

Source: FAO Online Capture Production Database.

to have trade-distortive impacts, and the region places tremendous emphasis on the development of sound fisheries management plans, which would ensure that increased fishing capacities

do not target overfished stocks/areas or as such contribute to overfishing. In fact, SIDS generally are not the major subsidisers; the larger fishing nations provide the large chunk of distortive subsidies.

To put things in perspective, the six Pacific SIDS referred above provided 2 per cent⁴ of the total global fisheries subsidies of US\$35 billion estimated for 2009 (Sumaila et al., 2013). Additionally, these SIDS currently have such a low share of the harvesting and processing of fish in their own waters that they are unable to harness benefits from their resources for their own development. At the Third International Conference on SIDS in 2014, the Pacific Islands Forum Fisheries Agency reported that, “while their membership (composed largely of SIDS) contributes 40 per cent of the worldwide supply of tuna for canning, two-thirds of it is caught by foreign vessels and only about 10 per cent is processed onshore in the region (Pacific Islands Forum Fisheries Agency, 2014)”.

Table 2 demonstrates that the share of industrial marine catch of the Pacific exclusive economic zones (EEZs) is heavily skewed in favour of the Distant Water Fishing Nations (DWFNs). In Papua New Guinea, DWFNs are the largest marine catch producers, at 86.6 per cent, compared with only 13.4 per cent for Papua New Guinea. The dominance of the DWFNs is replicated in the other Pacific SIDS: Solomon Islands (90.5 per cent vs. 9.5 per cent), Fiji (87.6 per cent vs. 12.4 per cent), Tonga (97.2 per cent vs. 2.81 per cent), Samoa (99.8 per cent vs. 0. per cent) and Vanuatu (81.9 per cent vs. 18.1 per cent).⁵

The mandate for S&DT in the fisheries context stems from Paragraph 14.6 of the 2030 Agenda for Sustainable Development, which explicitly recognises that appropriate and effective S&DT for developing countries and LDCs should be an integral part of the WTO fisheries subsidies negotiations. In other words, any international rules crafted for the regulation of fisheries subsidies should not be incompatible with the implementation of development policies, especially for vulnerable groups such as SIDS. The economic development goals of SIDS from fisheries are also directly incorporated in SDGs 14.7 and 14.B as follows:

14.7 By 2030, increase the economic benefits to Small Island developing States and least developed countries from the sustainable use of marine resources, including through sustainable management of fisheries, aquaculture and tourism

14.B Provide access for small-scale artisanal fishers to marine resources and markets

Based on the 2030 Agenda for Sustainable Development, the WTO Membership adopted a Ministerial Decision on Fisheries Subsidies at the 11th Session of the WTO Ministerial Conference on 13 December 2017. This calls for Members to adopt by the Ministerial Conference in 2019 an agreement on 1) comprehensive and effective disciplines that prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing; 2) elimination of subsidies that contribute to illegal, unreported and unregulated fishing (IUU fishing); 3) recognition that appropriate and effective S&DT for developing country and LDC Members should be an integral part of these negotiations; and (4) recommitting to implementation of existing notification obligations under Article 25.3 of the SCM Agreement, thus strengthening transparency with respect to fisheries subsidies.

3. Designing effective S&DT provisions in fisheries subsidies

The high dependence of Pacific SIDS on the fisheries sector makes them exceptionally vulnerable to changes in the status of these resources. Therefore, effective regulation of harmful fisheries subsidies (the prohibition provisions in new WTO rules, even without their exceptions) is of direct development importance to these countries, especially in the long run. Trade-distorting subsidies, often provided by the larger players, not only typically reduce world fish prices but also give an “unfair trade advantage to subsidized fleets and multinational fish corporations, thereby distorting market access opportunities for developing countries” (UNEP, 2005). Hence, effective disciplines on fisheries subsidies will directly contribute to the objectives of safeguarding the trade interests of the smaller developing countries and increasing their trading opportunities. This is reaffirmed by Paragraph 58 (i) of the Samoa Pathway.

A review of the key S&DT proposals⁶ currently under consideration by WTO Members in the Negotiating Group on Rules reveals that these provisions contain greater ‘flexibility of commitments’/policy

4 Calculated using the fisheries support data available in the Sea Around Us database.

5 The percentage share of the domestic fleet may in some cases actually be even lower than reflected as the data from the Sea Around Us Database may not be able to differentiate between domestically owned vessels and foreign boats simply flying the domestic flags. This is evidently the case for Vanuatu, which currently does not have any domestic large-scale fishing vessels, even though the data suggests a 18.1 per cent share.

6 The proposed S&DT provisions of the following proposals have been analysed in this paper: ACP Group (TN/RL/GEN/192, July 2017), LDC Group (TN/RL/GEN/193, July 2017), Indonesia (TN/RL/GEN/189/Rev.1, July 2017), EU (TN/RL/GEN/181/Rev.1, July 2017), New Zealand, Pakistan, Iceland (TN/RL/GEN/186, April 2017), Argentina et al. (TN/RL/GEN/187/Rev.2, July 2017), China (TN/RL/GEN/195, November 2017), Argentina et al. (TN/RL/GEN/183, November 2016), Ecuador and Egypt (TN/RL/GEN/179, March 2011), ACP and SVEs (TN/RL/GEN/158, May 2008).

Table 2: Percentage share of industrial catch in EEZs of SIDS-WTO Members (2014).

SIDS-WTO Member (host EEZ)	Total industrial catch (thousand tonnes)	SIDS (host EEZ) (%)	Distant Water Fishing Nation (%)
Bahrain	N/A*		
Guinea-Bissau	886.7	0.00%	100%
Cabo Verde	29.27	62.28%	37.72%
Maldives	6.51	96.77%	2.92%
Comoros	n/a		
Mauritius	6.5	83.08%	16.92%
Singapore	n/a		
Antigua and Barbuda	n/a		
Belize	0.88	100%	0.00%
Dominican Republic	1.43	100%	0.00%
Haiti	1.65	0.00%	100%
Saint Lucia	0.33	100%	0.00%
Trinidad and Tobago	10.17	62.83%	37.17%
Cuba	0.86	100%	0.00%
Grenada	0.14	100%	0.00%
Jamaica	n/a		
St Vincent and the Grenadines	0.35	14.29%	85.71%
Barbados	2.82	100%	0.00%
Dominica	0.22	100%	0.00%
Guyana	31.25	100%	0.00%
St Kitts and Nevis	n/a		
Suriname	17.71	74.70%	25.30%
Fiji	16.9	12.43%	87.57%
Papua New Guinea	325.4	13.43%	86.57%
Vanuatu	8.3	18.07%	81.93%
Samoa	8.42	0.24%	99.76%
Tonga	9.26	2.81%	97.19%
Solomon Islands	80	9.50%	90.50%

Note: * N/A refers to the situation where there is no industrial catch in the EEZ of the particular SIDS, where fishing is characterised by subsistence and artisanal only.

Source: Generated using the Sea Around Us database of the University of British Columbia, online at <http://www.searoundus.org/data/#/eez>

space provisions. Unlike with other negotiations, the proposed fisheries subsidies agreement is a sector-specific agreement. It is easier to achieve 'policy space' objectives when targeting a specific sector where issue-based needs can be identified at the outset, making the policy space granted less arbitrary.

Another reason for these proposals containing more acceptable 'policy space' provisions is that

they have been able to create sub-sectoral level differentiation within fisheries, finding solutions to different issue-based problems/needs confronting different sectors. Specifically, most proposals considered have a different level of derogation for the artisanal, small-scale and industrial sectors, keeping in mind their different contributions to the problem and their different level of socio-economic needs and development. Developed countries would be more amenable to agreeing

to the S&DT provisions where they know they are targeted towards sectors with the strongest need for development and that tend to be more in-competitive.

For example, almost all proposals call for full exceptions from the proposed prohibitions for support to fishing activities related exclusively to artisanal and small-scale fisheries or the subsistence and livelihood of the fishers and their families. This is based on the understanding that this sector contributes less to overcapacity and overfishing than the larger industrial sector, and its development is vital to the food security and sustainable livelihoods of vulnerable coastal and island communities. Consequently, greater obligations and fewer exceptions are proposed in most proposals for the large-scale industrial sector, capable of fishing in the high seas as well, where the evidential link to overcapacity and overfishing and IUU fishing is much higher.

Most of the proposals have structured their prohibition under the pillars of the 2030 Sustainable Development Agenda: prohibition of 1) subsidies for IUU fishing and 2) subsidies contributing to overcapacity and overfishing. Therefore, the corresponding S&DT exemptions in these proposals are automatically tied to the new rules only, the focus of which is to capture the production distortion effect or the effect of a subsidy on the level of fish stocks. This leaves open the question: could the subsidies exempted under the new rules still be actionable under the SCM Agreement for its trade-distorting effects? The answer is yes, unless there is policy flexibility under Article 27 of the SCM Agreement, which is very limited in scope and mostly addresses transition periods; or unless there are specific provisions for S&DT that make the SCM Agreement non-applicable in as far as the derogation goes. This option is captured by Indonesia's proposal (TN/RL/189 Rev.1, July 2017), which structures its S&DT provisions by stating 'Notwithstanding the SCM Agreement..., developing countries will be allowed to...'

In summary, any agreement should give consideration to:

- **Transition periods:** Most proposals call for a cascading approach to transitional arrangements, with the shortest period of delay offered to developed countries for the implementation of commitments; a longer implementation period for developing countries; and the longest to LDCs. Most subsidy programmes are reviewed

and renewed in annual budgets. A transition period of no more than one year should apply to developed countries, with a slightly longer implementation period for developing and least developed countries given their low level of institutional and regulatory capacity to comply with international laws/regulations.

- **Technical assistance and capacity-building:** Most proposals call for a mandatory obligation and a wide spectrum of activities that this assistance ought to cover. Particularly noteworthy here is the African, Caribbean and Pacific (ACP) group of countries proposal (TN/RL/GEN/192, July 2017), which calls for mandatory technical assistance by developed countries, developing countries and relevant agencies (in a position to do so) in: addressing institutional and financial difficulties faced by LDCs and developing countries with constraints to implement this Agreement; establishing reporting mechanisms and regulations to prevent unreported and unregulated fishing; conducting stock assessments; conducting monitoring, control and surveillance of fish stocks; and research and development.
- **Special 'flexibility of commitment' and policy space provisions:** S&DT provisions should accommodate the legitimate subsidy programmes of Pacific SIDS, particularly for promoting the development of artisanal and small-scale fisheries that would help them derive value from their own resources (through both capture and processing activities) and obtain a larger share of global fish exports. The current level of subsidies by Pacific SIDS demonstrates that such provisions would have a relatively low influence on world market prices or trading patterns.

4. Flexibilities for fishing subsidies with socio-economic benefits for Pacific SIDS

Subsidies specifically targeted at improving the economic viability of small-scale fisheries (SSF) in SIDS, especially in the Pacific region, should be at heart of the exceptions negotiated at the WTO. According to Schuhbauer et al., 2017, there is a "major imbalance in subsidy distribution, with small-scale fisheries receiving only 16% of the total global fisheries subsidies amount of \$35 billion in 2009. To bring this in perspective, a person engaged in large-scale fishing received around 4 times of the subsidies amount received by their SSF counterparts". The developmental, economic and social consequences of this inequity are huge and impair the economic viability of the

already vulnerable small-scale fishing sector.’ The allocation of subsidies to the small-scale fisheries sector is found to be the lowest in the Oceania region (only 4 per cent of its total allocation) (Table 2 in the ACP proposal).

From the point of view of the socio-economic needs of Pacific SIDS, the types of subsidies for which there should be enough ‘policy space’ in the design of S&DT include those that enhance market access opportunities, both domestic and export; those for investment in infrastructure (refrigeration, smoking, canning, packaging), transport, market research and distribution; and those for transport and electric power infrastructure as well as cold storage facilities that can enhance the export competitiveness of Pacific SIDS. In general, subsidies focused on value-added activities ought to have very positive spill-over socio-economic effects.

Provisions for strong prohibition must ensure they do not inadvertently target ‘positive’ subsidies provided in the SIDS – that is, those specifically designed to promote fisheries management and environmental sustainability. These could include subsidies to improve fisheries management system/plans for better conservation of resources, research and development activities related to conservation and stock replenishment and subsidies to combat IUU fishing. The latter is also important bearing in mind that losses from IUU fishing can be significantly high for some SIDS. Examples include the estimation that, in the mid-2000s, IUU fishing losses represented at least a quarter of the total value of Papua New Guinea’s fishery (MRAG, 2005, in Teh et al., 2014).

It is also important to mention here that access fees obtained as part of bilateral fishery partnership arrangements are a very important source of development revenue for Pacific SIDS. In some cases, where a subsidy element may arise from the onward transfer of access rights from the foreign government to its private fishing companies/fleets, Pacific SIDS are of the view that these would not be problematic as such access agreements contain strong conservation measures (are tied to effective management plans). These ensure that fishing under these arrangements takes place under sustainable fishing quotas and there is no overfishing as a result of activities under such arrangements.

5. Conclusion

S&DT provisions in any future agreement on fisheries subsidies should be broad enough to provide sufficient policy space for the sustainable

development of the fisheries sector in Pacific SIDS. Policy space should be provided for clear and specific programmes targeted at meeting the unique needs and priorities of these countries. The structure of the S&DT disciplines could adopt a cascading approach, whereby greater flexibilities (with lesser conditions) could be provided for artisanal and small-scale sectors that contribute less to overfishing and are more intrinsically tied to poverty reduction and food security than the large-scale fishing sector.

Where policy space is legitimate and imperative for the development of large-scale domestic fleets in the Pacific region, provisions could contain the necessary built-in environmental conditionalities that help ensure the sustainability of the resources. A positive-list approach to enlisting S&DT exceptions aimed at being ‘exhaustive’ may be difficult to formulate as it is hard to encompass all the different programmes of all the different developing countries, and it may also not have adequate policy flexibility for new programmes in the future. Therefore, a broader, cascading and sectoral approach may be the best way forward.

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International Trade Policy Section at the Commonwealth Secretariat

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10 October 2019: Commonwealth Trade Ministers Meeting held at Marlborough House, London, United Kingdom.

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