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Analysis of the responses of the Pacific Island States to the fisheries provisions of the Law of the Sea Convention

Transform Aqorau
University of Wollongong

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**ANALYSIS OF THE RESPONSES OF THE
PACIFIC ISLAND STATES' TO THE
FISHERIES PROVISIONS
OF THE
LAW OF THE SEA CONVENTION**

**A thesis submitted in fulfilment of the requirements
for the award of the degree of
DOCTOR OF PHILOSOPHY**

UNIVERSITY OF WOLLONGONG

by

TRANSFORM AQORAU, LLB (UPNG), LLM (UBC)

**CENTRE FOR NATURAL RESOURCES LAW AND POLICY
FACULTY OF LAW, UNIVERSITY OF WOLLONGONG**

1998

ACKNOWLEDGMENT

The process of writing this thesis has been long and tiring. Although its production has been due to my own effort, its completion would not have been possible without the generous support of many friends and colleagues. It is only appropriate that I record my gratitude to them. At the University of Wollongong, I would like to thank the Research Office for making it possible for me to study at Wollongong. I would also like to thank my Supervisor and mentor, Professor Martin Tsamenyi for his guidance and critique of various drafts of this thesis. I would also like to express my gratitude to the Law Department of the University of Wollongong for the research facilities provided. In particular, I would like to thank the Secretarial Staff whom I found to be always helpful and kind.

Throughout my career in the South Pacific, I have worked with many fisheries and legal professionals. Some of my former colleagues were especially helpful and went out of their way to assist me in my studies. I would like to express my appreciation to two former Deputy Director's of the South Pacific Forum Fisheries Agency (FFA) who have helped me a lot: Dr David Doulman, now with the Food and Agriculture Organisation of the United Nations, and Andrew Wright who retired to the relative tranquillity of Kavieng in Papua New Guinea (perhaps to get away from it all). At the FFA, I would like to thank Ataban Kapule and Samao Nalei of the Information and Technology Division for providing me with materials and various information on the FFA and its programs, Andrew Richards of the Surveillance and Monitoring Division who read the Chapter on enforcement, Grant Boyes, Co-ordinator of the Maritime Delimitation Program for his comments on earlier drafts and my close friend Fred Amoa and his family for looking after me in Honiara. I am also grateful to the Solomon Islands Government for providing me with financial support during my study. I would also like to express my gratitude to Jannaline Oh of the Australian Department of Foreign Affairs for kindly editing my work. This was done voluntarily and I am therefore immensely indebted to her editorial skills. If I have forgotten to mention anyone, please note that I also thank you. Needless to say I am solely responsible for all the flaws in the thesis. They are mine and mine alone.

Finally, I cannot say how much I am grateful to my family for all the support they have provided me. To the trio of Annette Muiliko Laura-Aqorau, my beloved wife and son's, Lloyd Maepeza Colin Gina (Jnr) and Transform Kilikae Riabule Aqorau (Jnr), thank you very indeed for bearing with me. I am most grateful for their patience. Annette also helped in editing the thesis and for that I am most grateful. I would also like to thank my extended family for their support. *Leana Hola koa gamu doduru.*

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ACRONYMS

DWFNs	Distant Water Fishing Nations
EEZ	Exclusive Economic Zone
FAO	Food and Agriculture Organisation
FFA	South Pacific Forum Fisheries Agency
FFC	Forum Fisheries Committee
FMR	Fisheries Management Regimes
HMS	Highly Migratory Fish Stocks
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Convention for the Conservation of Atlantic Tunas
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
IUCN	International Union for the Conservation of Nature
LOS	1982 United Nations Convention on the Law of the Sea
MSY	Maximum Sustainable Yield
MTCs	Minimum Terms and Conditions
NFSC	National Fisheries Surveillance Centre
NMFS	National Marine Fisheries Service
NSCC	National Surveillance Co-ordination Centre
NSO	National Surveillance Organisation
OFP	Oceanic Fisheries Program
RFSC	Regional Fisheries Surveillance Centre
SPC	South Pacific Commission
SPOCC	South Pacific Organisations Co-ordinating Committee
SPREP	South Pacific Regional Environment Program
TAC	Total Allowable Catch
UNCED	United Nations Conference on Environment and Development
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNCSD	United Nations Commission on Sustainable Development
UNEP	United Nations Environment Program
UNGA	United Nations General Assembly
US	United States
VMS	Vessel Monitoring System

WCED	World Commission on Environment and Development
WCPO	Western Central Pacific Ocean

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INTRODUCTION

In 1982, the international community adopted the United Nations Convention on the Law of the Sea (LOSC).¹ One of the most significant outcomes of the 1982 LOSC is the creation of new international law of fisheries based on the concept of the exclusive economic zone (EEZ). Since the conclusion of the LOSC, many States throughout the world have been attempting to grapple with this new fisheries law. Like many other coastal States, the Pacific Island States in the Western Central Pacific Ocean (WCPO) region, have declared EEZs and are grappling with the application of the EEZ provisions relating to tuna.² The Pacific Island States are the independent and self-governing entities belonging to the South Pacific Forum Fisheries Agency. Excluding Australia and New Zealand, these include: Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa.

This thesis focuses specifically on the responses of these States to the challenges posed by the EEZ provisions of the LOSC regarding the management and conservation of tuna. It will be shown that the responses of the Pacific Island States have taken two forms. At first, the Pacific Island States responded collectively by co-operating with each other. This collective response was dictated by a number of internal and external factors. Internally, these States are all small and developing and therefore lack the necessary expertise, finance and technology to implement the EEZ provisions of the LOSC to their advantage. Externally, they are confronted with powerful distant water fishing nations

¹ The 1982 United Nations Convention on The Law of the Sea, *reprinted in* 21 I.L.M (1982): p. 1261

² For the purposes of this thesis, reference to tuna shall be taken to include all tuna species listed in Annex I of the LOSC, in particular, the four main species of commercial significance in the Western Central Pacific Ocean (WCPO): skipjack (*Katsuwonus pelamis*), yellowfin (*Thunnus albacares*), bigeye (*Thunnus obesus*) and southern albacore (*Thunnus alalunga*).

(DWFNs) such as Japan and the United States. Individually, the Pacific Island States cannot match the negotiation skills and resources of these powerful DWFNs. The Pacific Island States have also responded individually to the EEZ regime by adjusting their laws and administrative structures as appropriate. The thesis describes and analyses the adequacy of these responses in terms of the requirements of the EEZ regime of the LOSC. In the context of the WCPO region, from a regional and international perspective, tuna has significant political and economic overtones and is the most lucrative fisheries resource in the WCPO region. Moreover, because it is highly migratory, crossing the political maritime boundaries of more than one coastal State³, its management and conservation involve co-operation between States.⁴

The LOSC provisions on the management of highly migratory species has been supplemented by the 1995 *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 Straddling Fish Stocks and Highly Migratory Fish Stocks*.⁵

This thesis examines developments leading to the conclusion of the Fish Stocks Agreement and assesses its implications for the internal and external tuna management and conservation arrangements adopted by the Pacific Island States at a time when the world's marine fisheries are facing a crisis arising from over-exploitation. According to the United Nations Food and Agriculture Organisation (FAO), the crisis in the world's marine fisheries stems from unsustainable fishing practices and unregulated fishing by non-parties

³ Cyril De Klemm, "Migratory Species in International Law, *Natural Resources Law Journal*, 29 (1989): p. 935; Florian Gubon, *Treatment and Management of Some Tuna Species as Highly Migratory Species under the 1982 United Nations Convention on the Law of the Sea*, (Seattle: University of Washington School of Law, 1987).

⁴ See J. Joseph, *Some Observations on Fisheries Management in the South Pacific Ocean*, Paper presented to the Seventeenth Meeting of the Forum Fisheries Committee, Honiara, Solomon Islands, September 17, 1989; J. Joseph and J.W. Greenough, *International Management of Tuna, Porpoise, and Billfish: Legal and Political Aspects*, (Seattle: University of Washington Press 1979); J. Joseph, "The Management of Highly Migratory Species: Some Important Concepts", *Marine Policy*, 1(4) (1977): pp. 275-288.

⁵ United Nations, *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, UN. Doc. A/CONF. 164/33, 1995. Also reprinted in 34 I.L.M. (1995): p. 1542. (Hereinafter referred to as "Fish Stocks Agreement")

in management areas.⁶ The massive waste in fisheries emanates from unregulated access within the EEZ and the high seas areas. This has led to the depletion of stocks, dissipation of economic rents and increased conflict among users.⁷ One of the problems associated with unregulated fishing is over-capitalisation of fleets competing for the same resource. The tonnage and number of the world's decked vessels doubled between 1970 and 1992.⁸ Most of the world's fishing fleets are operating at a net loss estimated at US\$54 billion. A major proportion of the loss is offset by government subsidies.⁹ As a result, 70 percent of the world's marine fisheries has been classified as either fully or over-exploited.¹⁰ Experts argue that the world's fishing fleet would need to be reduced by up to 50 percent before sustainable levels can be reached.¹¹

The Pacific Island States provide a unique case study of tuna management and conservation in the WCPO region because they are small, isolated, lack financial and technological resources and are surrounded essentially by large ocean space.¹² Many of them, especially the Federated States of Micronesia, Kiribati, Marshall Islands, and Tuvalu lack any natural resources apart from tuna. Their development is inextricably intertwined

⁶ FAO, *Marine Fisheries and the Law of the Sea: A Decade of Change - Special Chapter (revised) of the State of Food and Agriculture 1992*, (Rome: Food and Agriculture Organisation Fisheries Circular No. 853, 1993); FAO, *The State of World Fisheries and Aquaculture*, (Rome: Food and Agriculture Organisation, 1995).

⁷ Pamela Mace, "Halve World's Fishing Fleet, Scientist Warns", *The Australian*, Tuesday, July 30, 1996: p. 5.

⁸ Ibid.

⁹ Ibid.

¹⁰ FAO, *Review of the State of World Fishery Resource*, (Rome: FAO Committee on Fisheries Twentieth Session, Rome, 15-19 March, 1993).

¹¹ See Pamela Mace, note 7 above.

¹² For a study of the special needs of the Pacific island states see, M. Shepard and L. Clerk, *South Pacific Fisheries Development Assistance Needs*, Consultancy Report prepared for the Food and Agriculture Organisation and United Nations Development Program, (Suva: UNDP and FAO, 1984) at p. 5 state:

Clearly, tuna represents the region's most valuable renewable resource, and, in the long term, probably its most valuable asset overall. At present, the very substantial benefits flowing from resource accrue mainly to distant water fishing nations. The harnessing of this resource for the benefit of the island countries represents perhaps their greatest opportunity to achieve economic self-sufficiency. For some, it may represent the only hope of ever achieving this goal. The recent changes in the Law of the Sea, granting coastal States sovereign rights for the exploitation of the resources within 200 mile zones, and the fact that the interlocking zones of the island nations cover the great majority of the South Pacific's ocean surface, provide excellent opportunities for the island States to gain substantial increased benefits from the tuna resources off their shores in the future.

with the sea and the resources in the sea. The proportion of the world tuna catch taken in the WCPO region contrasts sharply with the size of the Pacific Island States. Approximately, 60 percent of the world tuna catch is taken from the WCPO region.¹³ In terms of catch by tuna species, 71 percent of the world skipjack (*Katsuwonus pelamis*) catches, 66 percent of the yellowfin (*Thunnus albacares*), 58 percent of the of the bigeye (*Thunnus obesus*) and 53 percent of the albacore (*Thunnus alalunga*) is taken from the WCPO region.¹⁴ The international oceans regime is therefore important to the Pacific Island States because their economies are closely linked to the oceans.

Underpinning the strategies of the Pacific Island States to comply with the fisheries provisions of the LOSC are the geo-political, historical and cultural circumstances that characterise the WCPO region. Therefore, Chapter 1 provides some background to the Pacific Island States. The discussion centres on the physical features of the WCPO region and the economic factors that compel the Pacific Island States to address common problems on a regional, rather than a national, basis. Chapter 1 also examines tuna fisheries in the WCPO region and analyses the constraints to the sustainable development of tuna species.

To appreciate the responses of the Pacific Island States, it is necessary to examine the issues arising from the implementation of the LOSC. Chapter 2 gives an overview of the obligations imposed by the provisions of the LOSC relevant to tuna fisheries. The discussion focuses on the key imperatives for tuna management and conservation. These imperatives are the need for States to collect scientific, biological and economic data to determine the allowable catch and promote the optimum utilisation of tuna and the obligation to co-operate with other States to ensure compliance on the high seas. Chapter 2 concludes that the LOSC is flexible and gives States considerable discretion over these matters which they are to take into account when managing and conserving tuna resources.

¹³ FAO, (1995) note 6 above at p. 40.

¹⁴ FAO, *World Review of Highly Migratory Species and Straddling Stocks*, (Rome: FAO Fisheries Technical Paper, Fisheries Department, 1994): p. 24.

Chapter 3 analyses post-Law of the Sea initiatives, in particular, those developments that impact on the regulation of tuna. The discussion analyses the key imperatives for the management of tuna arising from the Fish Stocks Agreement, the FAO Code of Conduct for Responsible Fishing, Agenda 21 and the FAO Agreement to Promote Compliance with International Conservation and Management Measures for the High Seas. The relationship between the post-Law of the Sea initiatives and the LOSC is also examined. Chapter 3 concludes that the post-Law of the Sea initiatives supplement the LOSC and provide more detailed content to the tuna management obligations in the LOSC.

Chapter 4 analyses the Pacific Island States' response to the EEZ regime. It examines the EEZ claims established in the WCPO region and discusses the establishment of the South Pacific Forum Fisheries Agency (FFA) and its role in facilitating tuna management in the WCPO region. Chapter 4 discusses the weaknesses and strengths of the FFA and analyses some of the unresolved legal issues arising from the FFA Convention and its effectiveness in facilitating the management of tuna resources in the WCPO region. Chapter 4 concludes that the FFA serves a useful, but limited objective, and in order to manage tuna throughout its entire range, the Pacific Island States must pursue the second stage of regional co-operation which is to co-operate more effectively with DWFNs.

The FFA has fostered the development of legal arrangements which attempt to regulate different aspects of the WCPO region's tuna fisheries. Chapter 5 discusses subregional arrangements which have been developed. The discussion analyses the wordings of the arrangements and tests them against the LOSC imperatives for tuna management. Chapter 5 concludes that the subregional arrangements generally reflect the obligations in the LOSC, however, they do not go far enough to discharge the fisheries obligations under the LOSC.

Chapter 6 analyses the regional strategies of the Pacific Island States to deal with the conservation and management of tuna. Three initiatives are discussed namely the Harmonised Minimum Terms and Conditions of Access for Foreign Fishing Vessels, the South Pacific Driftnet Fishing Convention and the attempts to develop a management

arrangement for southern albacore tuna. Chapter 6 concludes that a regional approach is necessary to manage and conserve tuna in the WCPO region.

Chapter 7 focuses on multilateral access agreements which have been developed to deal with DWFNs. In particular, the Chapter analyses the Treaty on Fisheries between the Pacific Island States and the United States. The discussions also examines efforts to negotiate multilateral access agreements with other DWFNs. The analysis also seeks to ascertain whether the regional strategies comply with the LOSC. Chapter 7 concludes that although the regional arrangements generally reflect the LOSC obligations for tuna management, they do not discharge all the obligations that coastal States are required to fulfil under the LOSC.

Chapter 8 analyses the Pacific Island States national strategies to deal with DWFNs. It examines the general framework of the LOSC for bilateral access agreements and discusses the general characteristics of the bilateral access agreements concluded between the Pacific Island States and DWFN. Chapter 6 also explores the issue whether the principles of tuna management and conservation in the LOSC are reflected in the bilateral access agreements. Chapter 8 concludes that the national strategies of the Pacific Island States reflect the need to control and regulate the activities of foreign fishing vessels. These responses do not go far enough to discharge the LOSC obligations to manage and conserve tuna in the EEZ. Furthermore, Chapter 8 also concludes that while the LOSC generally provides a guide as to the contents of the bilateral access agreements, not all the access agreements reflect the obligations in the LOSC.

The enforcement of tuna management and conservation measures within EEZs by the Pacific Island States is essential to the efficacy of the management and conservation arrangements for tuna in the WCPO region. Therefore, chapter 9 analyses the Pacific Island States' response to the enforcement of the fisheries provisions of the LOSC. Chapter 9 also highlights the limitations, especially the lack of financial and technical resources for surveillance and enforcement facing the Pacific Island States. The analysis looks at how the Pacific Island States have addressed these limitations. Chapter 9 concludes that the

Pacific Island States' responses are generally consistent with the LOSC, although certain aspects of their strategy are questionable under international law.

Chapter 10 firstly discusses the implications of the post-Law of the Sea initiatives for the future management arrangements of tuna in the WCPO region and then focuses on strategies that would promote responsible fishing for tuna in the WCPO region. Chapter 10 concludes that the principles of responsible tuna management should be reflected in all the tuna management and conservation arrangements in the WCPO. Chapter 10 also concludes that the Pacific Island States will need to develop co-operative tuna management arrangements with DWFNs.

The thesis shows that there are three phases to the responses of the Pacific Island States to tuna management obligations in the LOSC. The first phase, from 1979 to 1989 involved strengthening the organisation of the Pacific Island States to co-ordinate their relationship. The second phase, from 1990 to 1996, was characterised by efforts to improve the regulation of foreign fishing vessels' activities in the region. The third phase, from 1997 onwards will involve reviewing the present tuna management and conservation arrangements to reflect principles of responsible tuna management and conservation. The review should take into account the new international instruments developed by the international community.

The overall conclusion the thesis draws are as follows:

- That the LOSC gives coastal States the authority to manage and conserve tuna in their EEZ. This authority carries with it the responsibility to ensure that tuna resources are not over-exploited. The obligation to conserve and manage may be implemented individually or it may be exercised co-operatively between the coastal States and also between the coastal States and DWFNs;
- That the responses of the Pacific Island States in general to the tuna provisions of the LOSC have complied with the LOSC imperatives for

the management and conservation of tuna. However, the responses do not go far enough to discharge all the fisheries obligations of the LOSC; and;

- That the challenge for future tuna management arrangements is to ensure that co-operative arrangements are made with DWFNs to ensure that tuna is managed throughout its entire range and that conservation obligations are clearly reflected in the responses of the Pacific islands to the challenges arising from the EEZ regime.