# 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

# 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.*

# TABLE OF CONTENTS

# 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 |
| LOSC | 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 |

# TABLE OF FIGURES

# LIST OF TABLES

# 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 State[3], 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 aproach 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 Fishries between the Pacific Island States and the United Stateds. 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.

# 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.*

# TABLE OF CONTENTS

# 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 |
| LOSC | 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 |

# TABLE OF FIGURES

# LIST OF TABLES

# 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 State[3], 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 aproach 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 Fishries between the Pacific Island States and the United Stateds. 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.

# 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.*

# TABLE OF CONTENTS

# 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 |
| LOSC | 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 |

# TABLE OF FIGURES

# LIST OF TABLES

# 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 State[3], 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 aproach 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 Fishries between the Pacific Island States and the United Stateds. 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.

# 1

# THE PACIFIC ISLAND STATES

## I. INTRODUCTION

Chapter 1 provides a background to the Pacific Island States. The discussion analyses the constraints they face in fulfilling the obligations of the LOSC regarding tuna management. It will be shown that these constraints influence their tuna management and conservation policies.

## II. THE PACIFIC ISLAND STATES OF THE WESTERN CENTRAL PACIFIC OCEAN REGION

The Pacific Island States are small, poor and generally do not have the financial and technical resources needed to manage and conserve tuna in their exclusive economic zones (EEZs). Their biggest constraint in managing and conserving tuna is the sheer size of their EEZs.[1] Collectively, the Pacific Island States' EEZs cover some 30 million $km^2$ (see Figure 1.1 below) with a total population of only 5.1 million[2].

The total area of the Pacific Island States' EEZs is approximately the size of the African continent. In contrast, the area of land is only 500,00 $km^2$ of which Papua New

---

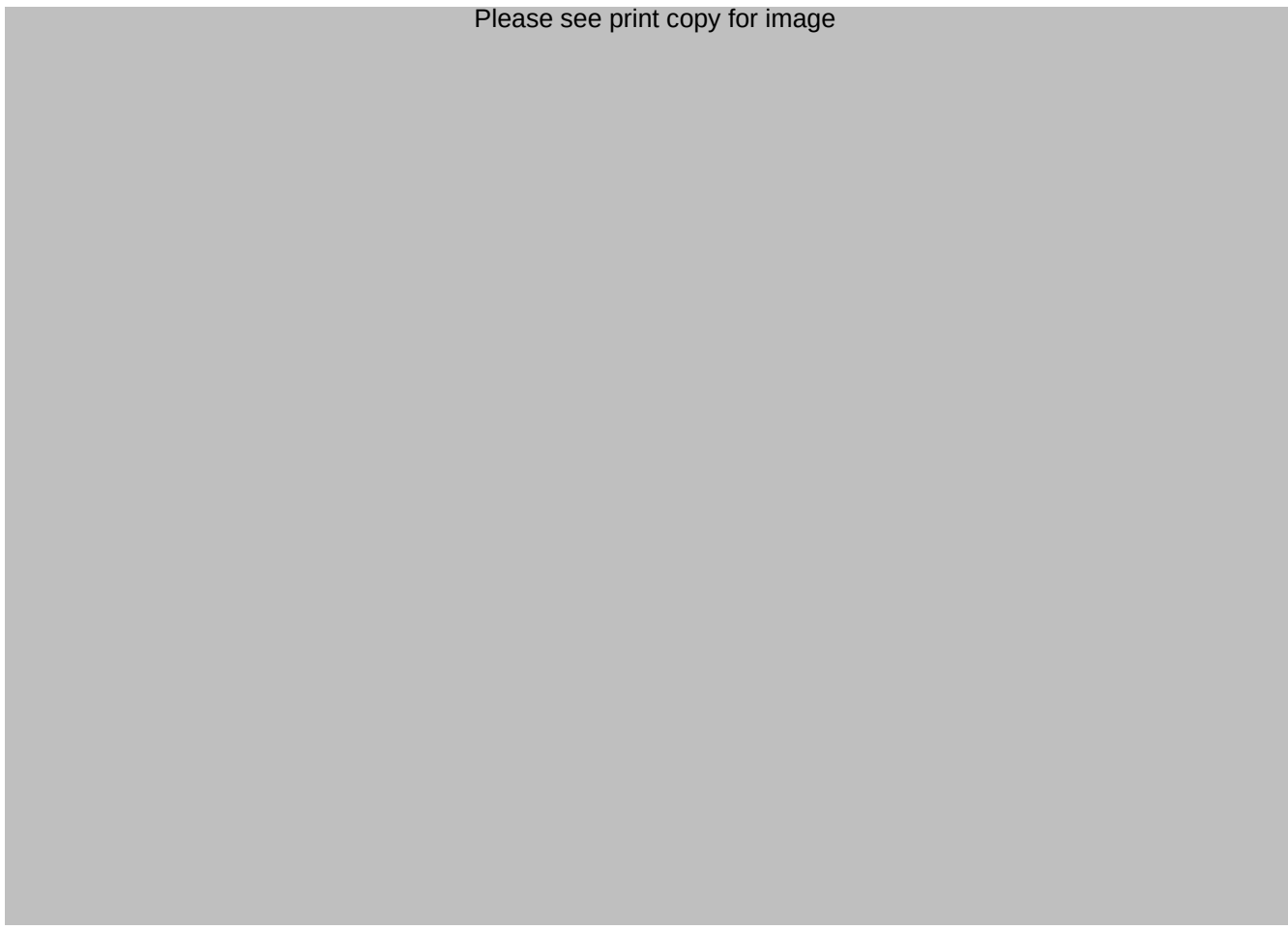
1 For a general discussion of the geographic characteristics of the Pacific island states see W.O. Freeman, (ed), *Geography of the Pacific*, (London: John Wiley & Sons Inc., 1966); F.P. King, *Oceania and Beyond: Essays on the Pacific since 1945*, (Conneticut: Greenwood Press, Westport, 1976); F.M. Bunge and C.W. Melinda, (eds), *Oceania: A Regional Study*, 2nd Edition, III (Washington DC: American University). Also see R. Crocombe, *The South Pacific: An Introduction*, (4th Edition), (Suva: Institute of Pacific Studies, 1987); Eric Waddell and Patrick D. Nunn, (eds), *The Margin Fades: Geographical Itineraries in World of Islands*, (Suva: Institute of Pacific Studies, 1993).

2 SPC, *Pacific Economies*, (Noumea: South Pacific Commission Demographic Unit, 1993).

Guinea accounts for 462,000 $km^2$ or 84 percent of the total land mass (see Figure 1.1 below). Among the smaller Pacific Island States, the Solomon Islands is the largest (28,500 $km^2$ or 5 percent), followed by Fiji (18,300 $km^2$ or 3 percent) while the smallest is Tuvalu (26$km^2$) (see Table 1.1 below). The large area of the Pacific Island States' EEZs presents problems for tuna management and conservation. They do not have the resources and capabilities to manage and conserve tuna effectively[3]. Because several are small and have limited land-based resources, they naturally rely on the sea for food, transport and economic development. For some of the Pacific Island States, especially the Federated States of Micronesia, Kiribati, Marshall Islands and Tuvalu, tuna is their most important resource endowment.

FIGURE 1.1

THE EEZS OF THE PACIFIC ISLAND STATES




Source; Forum Fisheries Agency, 1997

3 Teo I.J. Fairbairn, "Economic Forces: Constraints and Potentials", *Foreign Forces in Pacific Politics*, vol. 4, (Suva: Institute of Pacific Studies, 1983) at p. 230.

With the exception of Papua New Guinea and the Solomon Islands, most of the Pacific Island States do not have any area that is distant from the sea. Consequently, coastal resource planning is synonymous with resource planning and management. This results in a high ratio of EEZ to land mass and it follows that marine resources are more important than land-based resources especially in the Federated States of Micronesia, Kiribati, Marshall Islands and Tuvalu. An example is the Pacific island state of Kiribati which has an EEZ of 3.1 million $km^2$ and a land area of only 690 $km^2$ giving it a land to sea ratio of 1:6000.[4]

TABLE 1.1

SOUTH PACIFIC COUNTRIES PRINCIPAL PHYSICAL AND ECONOMIC FEATURES

| State | Land Area ('000 Sq.km) | Sea Area ('000 Sq. Km) | Populat. (1994) | Density Person/sq.km | Annual Growth % 1974-91 | Total GDP (A$'000) | Per Capita (US$) (1994) | Year |
|---|---|---|---|---|---|---|---|---|
| Cook Is. | 237 | 1,830 | 20,000 | 73 | 1.07 | 82,224 | 4,328 | 1994 |
| FSM | 701 | 2,978 | 110 | 159 | 4.02 | 181,000 | 1,554 | 1993 |
| Fiji | 18,272 | 1,290 | 784 | 41 | 1.91 | 1,715,652 | 2,051 | 1993 |
| Kiribati | 690 | 3,550 | 78.3 | 107 | 2.07 | 48,875 | 500 | 1994 |
| Marshalls | 181 | 2,131 | 54.1 | 265 | 4.21 | 52,682 | 1,610 | 1993 |
| Nauru | 21 | 320 | 10.6 | 457 | 2.28 | 206,250 | 4,640 | 1993 |
| Niue | 259 | 390 | 2.3 | 8 | -5.27 | 4,347 | 3,447 | 1992 |
| Palau | 488 | 629 | 15.6 | 32 | 1.80 | 48,831 | 3,564 | 1994 |
| PNG | 462,243 | 3,120 | 4,100 | 9 | 1.48 | 4,853,623 | 1,290 | 1994 |
| Samoa | 2,935 | 120 | 163.5 | 55 | 0.28 | 150,000 | 748 | 1993 |
| Sol. Is. | 27,5567 | 1,340 | 367.4 | 12 | 3.67 | 234,900 | 708 | 1993 |
| Tonga | 747 | 700 | 98.3 | 130 | 0.49 | 125,000 | 1,591 | 1993 |
| Tuvalu | 24 | 900 | 9.5 | 380 | 2.30 | 203,386 | 1,009 | 1990 |
| Vanuatu | 12,190 | 680 | 164.1 | 12 | 2.41 | 150,000 | 1,160 | 1993 |

Source: SPC, Economics Statistical Bulletin, 1993 and Foreign Investment Climate in South Pacific Forum Island Countries, Forum Secretariat, 1995.

The Pacific Island States have fragile natural ecosystems and are vulnerable to natural disasters such as cyclones and earthquakes[5], yet they depend on the marine environment for

---

4 See generally N. Douglas, (ed), *Pacific Islands Yearbook*, 17th Edition, (Suva: Fiji Times Ltd, 1994)

5 R. Thistlewait and J.W. Evans, *Environment and Development: A Pacific Island Perspective*, (Manila: Asian Development Bank, 1992): p. 147; A.L Dahl and I.L. Baumgart, 'The State of the Environment in the South Pacific', in *Report of the Conference on Human Environment in the South Pacific*, Rarotonga, Cook Islands, 8-11 March (1982): pp. 47-71; FAO, *Sustainable Management of Natural Resources in the South Pacific*, Technical Consultation of South Pacific Small Island Developing States on Sustainable Development in Agriculture, Forestry and Fisheries, Apia, Samoa, 6-9 May, 1996.

economic development.[6] The Pacific Island States' statement to the third meeting of the United Nations Conference on Environment and Development (UNCED) Preparatory Committee underscored the importance of the marine environment.[7] They called upon the international community to respect their dependency on the marine environment and recognise that the health of the marine environment and its resources were essential to their wellbeing.[8]

Another constraint to the management and conservation of tuna resources in the Pacific Island States is their isolation not only from each other, but also from the major metropolitan markets. The vast distances from the major markets hinders the establishment of shore based facilities and affects trade and migration. The distance between the various Pacific Island States with their closest metropolitan neighbours, New Zealand and Australia is approximately twice the distance separating the Caribbean islands from the Americas.[9] Papua New Guinea, the largest Pacific Island state and the most westerly of the group, is nearest to Australia; only 11 km from the nearest coastal point.[10] On the other hand, Western Samoa, the outermost Pacific island state, is roughly 4,320 km away.[11] This is almost the same distance between Marshall Islands, the northernmost Pacific Island State and the nearest point on the New Zealand coast.[12] In comparison, the proximity of developing States in other regions e.g the Caribbean Islands to the US, has led to a much higher economic growth rate and the development of tourism, small-scale manufacturing and offshore banking.[13]

---

6 Teo I.J. Fairbairn, *Island Economies: Studies from the South Pacific*, (Suva: Institute of Pacific Studies, 1985); World Bank, *Pacific Island Economies: Building a Resilient Economic Base for the Twenty-First Century*, (Washington DC: Country Department III, Report No. 13803-EAP, 1995).

7 SPREP, *Fourth Inter-governmental Meeting*, 3-9 July, Noumea, New Caledonia, 3-9 July (1991): p. 52.

8 Ibid.

9 Commonwealth Secretariat, "Vulnerability: Small States in the Global Society", *Report of a Commonwealth Consultative Group*, (London: Commonwealth Secretariat, Marlborough House, 1983): p. 12.

10 Ibid.

11 Ibid.

12 Ibid.

13 Gordon Bilney, "The Pacific Island States, Rich in Resources, Need to Do Better", *Int'l. Herald Trib.*, August 1, 1994 (Gordon Bilney was Australia's Minister for Pacific Island Affairs); Robert Keith-

The developmental problems that results from the Pacific Island States' isolation includes high infrastructure, transportation and communication costs. Their development problems have been described as follows:

> The Pacific communities are subject to the tyranny of distance in a way that is often forgotten and rarely appreciated elsewhere. Restrictions imposed by poor telephone services, infrequent transport services and slow mail are prosaic but very real. More tangible in economic terms is the effect of distance on trade. Rising transport costs, larger vessels and containerisation, fewer shipping services and ports of entry, and more stringent safety regulations have made it difficult, sometimes impossible, for Pacific Island countries to compete in the international market place. Similar problems of distance and economies of scale apply to air transport. Most of the South Pacific countries are at least 2000 kilometres from their nearest significant market, and half the world away from their major copra market. These constraints of transport and communications are far reaching in determining the most appropriate type and scale of economic development which would eventually lead to self-reliance.[14]

Another problem the Pacific Island States face is the high population growth rates. At 2.5 percent, the average population growth rates in the Pacific Island States is high by world standards.[15] A development problem that this presents is the pressure imposed on natural resources. More demands are being placed on the marine resources to meet the increasing social and economic needs of the Pacific Island States. Already the next generation of Pacific islanders' options are diminished by decreasing land areas and declining resources.[16] Efforts to reduce the population growth rates is hindered by a perception that over-population is not a problem. According to Gannicot:

---

Reid, "Putting Muscle on our growth: The Caribbean has a few lessons to teach the Pacific on the subject of economic wellbeing", *Island Business Pacific*, January (1996): pp. 26-29.

14 J. Carew-Reid, *Environment, Aid and Regionalism in the South Pacific*, Research Monograph No. 22, (Canberra: National Centre for Development Studies, Australian National University, 1989): p. 25.

15 K. Seniloli, "Family Planning: Determinants of Family Size" in *Populations and Development in the Asia-Pacific Region*, (Canberra: The Australian Academy of Science and the Academy of the Social Sciences, 1993): p. 37.

16 R.V. Cole (ed), *Pacific 2010: Challenging the Future*, (Canberra: National Centre for Development Studies, 1993).

> ...it is hardly surprising that population growth rate has received relatively little attention in the South Pacific. When Fiji, Kiribati, Papua New Guinea, Solomon Islands, Tonga, Vanuatu and Western Samoa together contain fewer than 4.5 million people, such small numbers have made population issues a minor component of the development debate in the South Pacific. The Malthusian concern that population growth will sooner or later come up against the limits of resource supply, nor the neo-Malthusian scare mongering of The Limits to Growth (Meadows et. al. 1972), nor even the optimistic claim from Julian Simon (1982) that people constitute the ultimate resource has seemed particularly relevant in the South Pacific.[17]

The Pacific Island States also face other development problems that result from their geographical isolation and colonisation. They have a narrow production base with very concentrated markets and products.[18] They also have small domestic markets and experience external and internal shocks that generate high fluctuations in exports. The Pacific Island States suffer from low literacy rates, low rates of domestic savings, economic dependence on foreign aid and lack of financial and technical expertise to develop what physical and human resources are available.[19] The development problems are compounded by severe shortages of skilled and professional labour resulting in low productivity. These problems make it difficult to attract large-scale investments.[20]

The absence of local skills is compounded by the inability of the Pacific Island States to match skills with jobs.[21] The public sector is the largest employer. In terms of

---

17 K. Gannicot, "Population, Development and Growth" in *Pacific 2010: Challenging the Future*, ibid., p. 17.

18 Rowan Callick, "Pacific Island: South Pacific Islands Out in the Cold - The International Economy", *Australian Financial Review*, Sept. 30, (1993): p. 67.

19 Savanaca Siwatibau, *The South Pacific Countries and Regionalism*, Paper presented at the Symposium on Co-operation in Asia and the Pacific, East-West Centre, Honolulu, 7-10 May, (1990). Robert Keith-Reid, "When the Money Runs Out: Micronesia plans for the day when the Americans will stop paying", *Islands Business*, August (1996): p. 68; Robert Keith-Reid, '"The Economy Stupid: Greenpeace and Company will predictably kick up a row over the Voyage of Pacific Teal. But barring disasters the real Pacific Story is the three Rs. The effort to Rescue, Repair and Restructure the failing economies of so many countries", *Islands Business*, January (1997): pp. 24-30.

20 Robert Keith-Reid, 'The Bad News Islands: A United Nations report paints a not-so-happy picture of the region', *Islands Business*, May (1996): pp. 18-19; Lisa Clausen, "Development: The Buck Stops; The island nations of the South Pacific meet economic reality", *Time*, September 16, (1996): pp. 36-37.

21 Peter Osborne, *Trade Issues and Development Prospects of Island Developing Countries of the Pacific*, Paper prepared for the Commission on Sustainable Development High-Level Panel Meeting on Island Developing Countries, 22-23 April, 1996, Geneva.

their economies, the Pacific Island States may be divided into three categories. In category A, are Papua New Guinea, Solomon Islands, Fiji and Vanuatu. These Island States have bigger populations, are made up of large volcanic islands, and are endowed with natural resources such as minerals, forestry, and fish.[22] All have significant industrial and manufacturing activities and given sound national economic management, political stability and capital, are capable of achieving economic independence and steady long term growth.[23]

In category B are Tonga, Western Samoa and the Federated States of Micronesia, Palau and Nauru. These Island States are heavily dependent on foreign external trade and finance. In these Island States, imports exceed exports by a substantial degree and in Tonga remittances are currently running at more than 300 percent of exports and 50 percent of imports.[24] Similar ratio of remittances and official aid to exports and imports are prevalent in Western Samoa.[25] The effect of remittances on GDP, employment, revenue, wages and salaries, the current account and foreign reserves are as significant as aid receipts.[26] These Island States have good soil, but natural resources are comparatively limited. Fishing is important but the prospects for finding minerals are limited, although the presence of minerals under the seabed is yet to be adequately determined. These Pacific Island States have prospects for agricultural diversification and for widening and deepening their subsistence sectors.[27] Nauru is an exception with significant but declining phosphate deposits.

---

22 See John Fallon, *The Papua New Guinea Economy: Prospects for Recovery, Reform and Sustained Growth*, (Canberra: AIDAB International Development Issues No. 27, 1992).

23 See AIDAB, *Australia and Vanuatu Development Cooperation: Country Strategy Paper*, Canberra; AIDAB; *Australia and Solomon Islands Development Cooperation: Country Strategy Paper*, (Canberra: Australian International Development Assistance Bureau). See Robert Keith-Reid, "How the Islands are Shaping Up", *Islands Business*, January (1997): pp. 26-30.

24 S. Siwatibau, *The South Pacific Region*, Keynote Address to the Seventeenth Meeting of the Forum Fisheries Committee, 25 September, 1989, Honiara, Solomon Islands.

25 R. Brown, and A. Walker, (1995), *Migrants and their Remittances: Results of Household Survey of Tongans and Western Samoans in Sydney*, (Sydney: Centre for Pacific Studies, UNSW, 1995).

26 Siwatibau, note 19 above at p. 12.

27 See AIDAB, *Australia and Tonga Development Cooperation*, (Canberra; Australian International Development Assistance Bureau); AIDAB, *The Tongan Economy: Setting the Stage for Accelerated Growth*, (Canberra: International Development Issues No. 22, 1991); Fairbairn Pacific Consultants Pty

The Pacific Island States in Category C, are the Cook Islands, Tuvalu, Niue and Marshall Islands, and Kiribati.[28] They are made up of atolls and are relatively resource poor with small land areas. The level of economic activity in their money sectors are determined by the external price of copra and other minor crops, the inflow of remittances and aid, rent from fishing rights within their EEZs and overseas investments by financial institutions.[29]

In recent times, one problem the Pacific Island States have faced is mismanagement of their economies and natural resources.[30] In a speech to the Eighth General Assembly of Pacific Islands Broadcasting Association, Australia's Minister for Pacific Islands Affairs said that the:

> ..challenge which all the countries of the region face is the continuing need to improve their resource management, so that precious forests and fisheries are not squandered for short-term gain. Some progress has been made in this area but there is still much further to go. In some countries, greedy and destructive resource harvesting still goes on, often by unscrupulous foreign firms with no commitment to the welfare of the people of the region.[31]

Some attempt has been made to tackle the economic problems. At the 26th meeting of the South Pacific Forum, the heads of government of the Pacific Island States issued a vision statement calling for resources, including tuna, forestry, minerals, water and land, to be

---

Ltd and Kolone Vaai and Associates, *The Western Samoan Economy: Paving the Way for Sustainable Growth and Stability*, (Canberra: AIDAB International Development Issues No. 35, 1994).

28 AIDAB, *Tuvalu: Economic Situation and Development Prospects*, International (Canberra: AIDAB Development Issues No. 29, 1993); AIDAB, *Australia and Tuvalu Development Cooperation: Country Strategy Paper*, (Canberra: Australian International Development Assistance Bureau); AIDAB, *Australia and Kiribati Development Cooperation: Country Strategy Paper*, (Canberra: Australian International Development Assistance Bureau).

29 U.F. Neemia, *Co-operation and Conflict: Costs, Benefits and National Interests in Pacific Regional Co-operation*, (Suva: Institute of Pacific Studies, 1986): p. 10.

30 Lisa K. Bostwick, "Empowering South Pacific Fishmongers: A New Framework for Preferential Access Agreements in the South Pacific Tuna Industry", *Law and Policy in International Business* 26(3) (1995): 900. Also see Tarcisius Tara, "Corruption: A Growing Industry", *Island Business*, January (1997): pp. 59-60.

31 G. Bilney, *New Directions in the South Pacific*, Speech to the Eighth General Assembly of Pacific Islands Broadcasting Association, Melbourne, 23 August, (1995), Australian Department of Foreign Affairs Media Release.

developed with proper regard for conservation.[32] They called for international co-operation through trade, investment and other exchanges, bearing in mind that strengthening subsistence and commercial agriculture, industrial development and competition would lead to growth with equity and capacity building for self reliance.[33]

These economic and geographic problems are enough to consume the energy of developed countries who have been dealing extensively with economic issues over the years. However, for the Pacific Island States, several factors provide additional overlay. Many of them only became independent in the 1970s and in most cases, were left with newly established bureaucracies and little expertise especially on fisheries matters. The administration inherited were invariably based on European models and emphasised agriculture rather than fisheries training.[34]

The historical development of the Pacific Island States has also been influenced by both the cultural backgrounds of the Melanesian, Micronesian and Polynesian peoples, and by the different institutions brought about by three major colonial traditions, British, United States, and French.[35] The present political map of the WCPO region is a product of the colonial divisions of the last and early part of the present centuries. Their historical development has not only impacted on political alliances but also impinged on trade, economic relations, culture and religion. As a result, "classical colonial models are still present, but even where the colonial mantle has been removed, significant vestiges remain as a legacy of the past."[36] This is exemplified by current trade and shipping patterns where

---

32 South Pacific Forum, "Record of Proceedings of Twenty Sixth South Pacific Forum, Forum Communiqué: Annex 2, Madang, Papua New Guinea, 13-15 September (1995)", (Suva: Forum Secretariat, 1995).

33 Ibid., Annex 2.

34 J. Swan, "Highly Migratory Species - The South Pacific Forum Fisheries Agency", Implementation of the Law of the Sea Convention Through International Institutions, 23rd Annual Conference of the Law of the Sea Institute, Honolulu: 1987; See A. Ali. and R. Crocombe (eds.), *Politics in Melanesia*, (Suva: Institute of Pacific Studies, 1982); A. Ali. and R. Crocombe (eds), *Politics in Micronesia*, (Suva: Institute of Pacific Studies, 1982); A. Ali., and R. Crocombe (eds.), *Politics in Polynesia*, (Suva: Institute of Pacific Studies, 1982).

35 Australian Department of Foreign Affairs, *Australian Foreign Affairs Review* (AFAR), 54 (1983): p. 379.

36 Fairbairn, note 6 above at p. 3.

strong links with the former colonial mother are evident in many cases.[37] Foreign aid is also still significantly influenced by historical factors and special arrangements between Island States and former colonial powers.[38]

The constitutional status of the Pacific Island States are as follows: nine are constitutionally independent States[39], two are self-governing States in association with New Zealand[40], and three are self-governing States in association with the United States.[41]

Differences in political form and constitutional status has no bearing on political ideology not only between the Pacific Island States, but also between them and metropolitan countries with dependencies in the region.[42] Irrespective of differences in policies and political status, they have shown an interest in regional co-operation through participation in a range of regional meetings and organisations including the South Pacific Forum, the University of the South Pacific (USP), South Pacific Commission (SPC), and the Forum Fisheries Agency (FFA).[43]

However, each Pacific island state is politically unique with its own set of national problems. For example, in Papua New Guinea the problem is to unify a profoundly heterogeneous society.[44] In Fiji, the major political issue is one of racial balance between indigenous Fijians and Indians and in Vanuatu, it is the colonial legacies of the Anglo-French Condominium.[45]

---

37 Ibid.

38 Ibid.

39 The nine constitutionally independenet States are: Fiji, Kiribati, Nauru, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa.

40 The two self-governing States in association with New Zealand are: Cook Islands and Niue.

41 The three self-governing States in association with the US are: Federated States of Micronesia, Marshall Islands and the Republic of Palau.

42 Neemia, note 29 above at p. 6.

43 AFAR, note 35 above at p. 379.

44 Neemia, ibid., p. 6.

45 Ibid.

## III. THE TUNA FISHERIES IN THE CENTRAL WESTERN PACIFIC OCEAN REGION

The creation of the 200 nautical mile EEZ has provided new economic opportunities for the Pacific Island States, enabling them to have strategic control of a major part of the WCPO region and its rich stock of tuna and other varieties of fish. The importance of tuna resources to the Pacific Island States cannot be overemphasised.[46] Over one million tonnes of skipjack (*Katsuwonus pelamis*), yellowfin (*Thunnus albacares*), albacore (*Thunnus alalunga*), and bigeye (*Thunnus obesus*) is harvested in their EEZs annually.[47] It is estimated that the WCPO region provides one quarter of the world's tuna catch in terms of weight and over one half of the world catch of skipjack.[48] Skipjack catches in the region between 1980 and 1995 accounted for an average of 64 percent of the world's annual catches, supplying half of the world's canned tuna.[49] In 1991, the total volume of tuna caught in the Pacific Island States' EEZ exceeded 1 million tonnes.[50] The value of the catch also exceeded US$1 billion for the first time in 1991.[51] Although the total tuna catch is valued at US$1.4 billion, the Pacific Island States receive only US$54 million in access fees.[52] This yields an aggregate rate of return of only 3.8 percent on the value of the landed

---

46 M. Shepard and L. Clerk, *South Pacific Fisheries Development Assistance Needs*, Consultancy Report prepared for the Food and Agriculture Organisation and United Nations Development Programme, (Suva: UNDP and FAO, 1984); Robert Keith-Reid, "Kiribati goes to sea to solve jobs and land problems", *Islands Business,* August (1996): p. 94.

47 South Pacific Commission, *Tuna Fishery Yearbook 1994*, (Noumea: Oceanic Fisheries Programme); Gordon Bilney, note 13 above.

48 See FAO, *FAO Yearbook of Fishery Statistics of Catches and Landings*, vol. 74, (Rome: Food and Agriculture Organisation, 1992).

49 See Generally, FAO, *The State of the World's Fisheries and Aquaculture*, (Rome: FAO Fisheries Department, 1995); SPC, *Tuna Fisheries Yearbook 1993*, (Noumea: Oceanic Fisheries Programme, 1994); G. Bilney, note 13 above.

50 South Pacific Commission,, *Tuna Fishery Yearbook 1992*, (Noumea: Oceanic Fisheries Programme, 1992).

51 Forum Fisheries Agency, (FFA), "Report of the Director to the 22nd Meeting of the Forum Fisheries Committee, Alofi, Niue, May 2-6, 1992", (Honiara: Forum Fisheries Agency).

52 Marine Science and Resource Investigations Pty Ltd, *A Study of the Economic and Social Costs of Underpricing of Resource Rent and Under Reporting of the Tuna Fish Catches in the South Pacific*, (Canberra: Paper prepared for the Australian Development Assistance Bureau, 1994); FFA, *Economic Overview of Tuna Industry Developments,* A Paper presented to the Eighth Standing Committee on Tuna and Billfish, Noumea, New Caledonia, 16-18 August 1995, (Honiara: Forum Fisheries Agency Report No. 95/48); H.G.J. Maxwell and A.D. Owen, *South Pacific Tuna Fisheries Study*, (Canberra: International Development Issues, No. 38, 1994).

catch.[53] Nevertheless, for many of them, the revenue from access fees represents a significant portion of gross domestic revenue.[54] The tuna industry also provides a primary export commodity, a substantial source of employment,[55] and the means for the exploitation of their main natural resource. Table 1.2 below gives a breakdown of catch by fishing nation and fishing gear, and the value of the catch in 1992. Table 1.3 below shows the annual catches of tuna by species between 1970 and 1993. One of the trends in the region's tuna fishery is the increase in skipjack catches from the 1980s. This has been attributed to the expansion of the purse seine fishery into the WCPO region.[56] Ninety percent of the tuna catch is taken by the DWFNs of Japan, USA, Taiwan and Korea.[57] As of March 1998, there were 1600 foreign fishing vessels registered on the Regional Register of Foreign Fishing Vessels.[58]

---

53 *The Australian*, Tuesday 2 August (1994): p. 12; Lisa K. Bostwick, note 30 above p. 902.

54 In 1989, access fees from fishing accounted for 59 percent of the Federated States of Micronesia's domestic revenue. See Office of Planning and Statistics, Federated States of Micronesia, *Trade Bulletin* No. 5 (1992): p. 2.

55 Fish (tuna) exports constitute 30 percent of the exports of Solomon Islands. *The Pacific Islands - Solomon Islands*, Barclays Bank Economics Department, Feb. 1994; See CBSI, *Annual Report of the Central Bank of Solomon Islands* , (Honiara: Central Bank of Solomon Islands). For a discussion of the structure of the world tuna industry see, H.F. Campbell, "Prospects for an International Tuna Resource Owners' Cartel", *Marine Policy* 20(5) (1996): pp. 419-427 at 420.

56 FFA, *Economic Overview of Tuna Industry Developments*, note 52 above.

57 H.J.G Maxwell and A.D. Owens, note 52 above.

58 FFA, *Report of the Director to the 29th Meeting of the Forum Fisheries Committee*, Vava'u, Tonga, May 13-17, 1996 (This figure has been up dated since March 1998). For a discussion of the Regional Register of Foreign Fishing Vessels, see chap. 8. See David J. Doulman, "Prospects and Directions in the Tuna Fishery", in D.J. Doulman (ed.), *Tuna Issues and Perspectives in the Pacific Islands Region*, (Honolulu: East-West Centre, 1987): pp. 299-312.

TABLE I.2

VALUE OF TUNA CATCHES IN THE SPC REGION, 1992

| GEAR | FISHING NATION | CATCH (Tonnes) | VALUE (US$'000) |
|---|---|---|---|
| Longline | | | |
| | Fiji | 886 | 4,652 |
| | French Polynesia | 128 | 265 |
| | FSM | 30 | 168 |
| | Japan (DWFN) | 49,600 | 262,015 |
| | Japan (Local) | 8,350 | 49,239 |
| | Korea (Republic) | 23,600 | 122,591 |
| | New Caledonia | 930 | 4,895 |
| | Taiwan (DWFN) | 9,500 | 21,435 |
| | Taiwan (Local) | 4,300 | 33,740 |
| | Tonga | 255 | 571 |
| | Sub-total | 97,579 | 499,570 |
| Pole-and-Line | | | |
| | Japan | 39,711 | 86,785 |
| | Solomon Islands | 22,250 | 14,248 |
| | Sub-total | 61,961 | 101,034 |
| Purse Seine | | | |
| | Japan | 184,105 | 173,979 |
| | Republic of Korea | 205,000 | 136,325 |
| | Philippines | 31,240 | 20,775 |
| | Taiwan | 220,000 | 146,300 |
| | United States | 195,000 | 129,675 |
| | Others | 13,196 | 8,775 |
| | Sub-total | 848,541 | 615,829 |
| Total | | 1,008,081 | 1,216,433 |

Source: Forum Fisheries Agency

TABLE 1.3

ANNUAL CATCHES OF TUNA BY SPECIES, SPC STATISTICAL AREA, 1970-93 ('000 TONNES)

| | ALBACORE | BIGEYE | YELLOWFIN | SKIPJACK | TOTAL |
|---|---|---|---|---|---|
| 1970 | 31.8 (34.3)a | 17.7 (19.1) | 32.6 (35.1) | 10.8 (11.6) | 92.8 |
| 1971 | 34.3 (28.6) | 21.9 (18.3) | 39.7 (33.1) | 24.3 (20.3) | 120.0 |
| 1972 | 37.6 (18.5) | 31.3 (15.4) | 49.7 (24.5) | 84.2 (41.5) | 202.8 |
| 1973 | 41.5 (15.3) | 26.2 (9.6) | 50.7 (18.6) | 153.8 (56.5) | 272.1 |
| 1974 | 30.8 (9.7) | 35.5 (11.1) | 50.5 (15.8) | 202.2 (63.4) | 319.0 |
| 1975 | 27.9 (11.7) | 34.0 (14.2) | 42.7 (17.9) | 134.3 (55.3) | 238.9 |
| 1976 | 30.0 (9.9) | 42.7 (14.1) | 62. 6 (20.7) | 167.3 (55.3) | 302.7 |
| 1977 | 35.8 (10.2) | 41.0 (11.7) | 73.9 (21.1) | 200.8 (57.2) | 350.9 |
| 1978 | 30.4 (8.1) | 28.0 (7.5) | 86.6 (23.2) | 228.8 (61.2) | 373.9 |
| 1979 | 25.4 (7.6) | 39.0 (11.7) | 83.3 (25.0) | 186.0 (55.7) | 333.7 |
| 1980 | 39.8 (10.0) | 41.6 (10.5) | 104.9 (26.4) | 211.7 (53.2) | 398.0 |
| 1981 | 32.9 (7.7) | 29.4 (6.9) | 112.0 (26.3) | 250.9 (59.0) | 425.2 |
| 1982 | 29.8 (6.6) | 30.8 (6.9) | 120.4 (26.8) | 268.4 (59.7) | 449.4 |
| 1983 | 20.3 (3.3) | 27.0 (4.5) | 144.4 (23.8) | 414.8 (68.4) | 606.6 |
| 1984 | 19.6 (3.1) | 32.2 (5.1) | 138.3 (21.9) | 437.7 (69.2) | 632.3 |
| 1985 | 27.5 (4.8) | 40.5 (7.1) | 219.4 (22.8) | 371.3 (65.3) | 568.6 |
| 1986 | 32.4 (5.1) | 34.0 (5.4) | 129.2 (20.4) | 436.7 (69.1) | 632.3 |
| 1987 | 23.5 (3.6) | 41.1 (6.2) | 187.7 (28.4) | 407.5 (61.8) | 659.9 |
| 1988 | 33.3 (4.5) | 35.4 (4.8) | 133.7 (17.9) | 542.6 (72.8) | 744.9 |
| 1989 | 47.6 (6.0) | 33.9 (4.3) | 184.3 (23.2) | 529.0 (66.6) | 794.8 |
| 1990 | 30.6 (3.5) | 53.8 (6.2) | 208.8 (23.9) | 579.7 (66.4) | 872.8 |
| 1991 | 24.9 (2.4) | 41.1 (3.9) | 231.1 (22.0) | 754.7 (71.8) | 1051.7 |
| 1992 | 41.8 (4.0) | 45.0 (4.3) | 272.4 (26.0) | 689.9 (65.8) | 1049.0 |
| 1993 | 40.9 (4.4) | 46.7 (5.0) | 291.7 (31.3) | 552.3 (59.3) | 931.7 |

**Note**: Figures in parenthesis are a percent of the total.
**Source**: South Pacific Commission, *Tuna Fishery Yearbook* 1993, Oceanic Fisheries Program, SPC, Noumea, 1993.

## A. Transboundary Nature of Tuna and the Tuna Industry

One of the difficulties in managing and conserving the major fisheries in the Pacific Island States' EEZ is the transboundary nature of the stock and industry. The effective sustainable development of tuna demands an understanding of its migratory nature, both as a resource and in the composition of the vertical nature of the tuna industry.[59] The major commercial

59 Lisa. K. Bostwick, note 30 above at p. 903; 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 25, (1989); J. Joseph and J.W. Greenough, 1979, *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.

species of tuna, albacore, bigeye, yellowfin and skipjack are all classified as highly migratory.[60] Because of its highly migratory nature, the Pacific Island States would face some difficulties managing tuna unilaterally. Schools of tuna cross international boundaries and also swim through areas of the high seas.[61] Tuna's migration patterns, areas of abundance, and commercial availability vary from year to year.[62] Often the availability of tuna is influenced by the ocean environment, temperature gradations, and the availability of food.[63] As a migratory resource, its management and conservation on a national or local basis will not guarantee its preservation at a sustainable level. Because tuna is highly migratory, the effects of its over-exploitation are borne on a regional or global level. For the Pacific Island States, this problem is compounded by an inability to carry out the necessary research.[64] In some of the countries, there is no staff dedicated to research.[65]

The tuna industry is also transboundary. The vertical structure of the tuna industry transcends various international boundaries from the location of the fishing operations, the registration of the vessel, transhipment, initial investment in the equipment, processing, packaging, marketing and end product markets.[66] Tuna fishing fleets are mobile, moving from one ocean to another as fishing areas get depleted. Although most of the tuna in the

---

60 See generally, Edwin S. Iversen, *Living Marine Resources: Their Utilisation and Management*, (New York: Chapman & Hall, 1996); G. Kent, *The Politics of Pacific island Fisheries*, (Colorado: Westview Press, 1980): p. 166.

61 Ibid.

62 Ibid.

63 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).

64 M.P. Shepard, *Fisheries Research Needs of Small Island Countries*, (Nova Scotia: International Centre for Ocean Development, 1986): p. 55.

65 Ibid.

66 Lisa K. Bostwick, note 30 above at p. 904. Greenpeace International, *In the Race for Tuna ... Dolphins Aren't The Only Sacrifice: The Impact of Commercial Tuna Fishing on Oceans, Marine Life and Human Communities*, 14 (1993). According to Greenpeace:

> a fishing ship carrying a flag from Cyprus is owned by a Spanish-Korean joint venture but its home port is Venezuela. It can land its catches in Colombian docks because fuel is cheaper there. Some of the catch is then sent to Asia for processing while the rest is sold to Bolivia to be processed into fillets (because in both places the work forces is cheaper). Part of this tuna, once it has been canned, is sent to an American Samoan facility to get ...[a] 'dolphin safe' label and then sold in the United States where the tuna is sold for more money than in other countries.

WCPO region is caught in the EEZs of the Pacific Island States, the vast majority of the catch ends up in the developed markets of Europe, the United States and the lucrative sashimi markets of Japan.[67] The transboundary nature of tuna and the participation of many nations in the industry makes it difficult for the Pacific Island States to implement a co-ordinated fisheries management policy. The level of exploitation in the pockets of high seas adjacent to the EEZs of the Pacific Island States also need to be considered in catch statistics and fisheries management plans.

Agreements on conservation measures by the Pacific Island States and DWFNs is also affected by the transboundary nature of the resource. The conservation objectives of the Pacific Island States and DWFNs are not always consistent with each other.[68] For the DWFNs fleets, they have an incentive to cheat by overfishing, under-reporting, illegal fishing, and reaping the short-term benefits for themselves while allowing the long-term consequences to be shouldered across the WCPO region.[69] Among the Pacific Island States, different levels of dependency on tuna and the range of development opportunities in other industries often impede regional consensus with respect to the determination of the optimum or maximum sustainable yields.[70]

---

67 P.W. Philipson (ed), *The Marketing of Marine Products from the South Pacific*, (Suva: Institute of Pacific Studies, 1989); A.D. Owen and D.A. Toedson, "The United States Tuna Market", in *The Economics of Papua New Guinea's Tuna Fisheries*, Harry F. Campbell and Anthony D. Owen (eds), (Canberra: The Australian Centre for International Agricultural Research, 1994): pp. 242-250; A.D. Owen and D.A Troedson, "The Japanese Tuna Industry and Market", ibid: 231-238; A. D. Owen and D.A. Troedson, "The European Market for Tuna", ibid: pp. 251-262.

68 See FFA, "Fisheries Issues in the Pacific Islands", (Honiara: Forum Fisheries Agency Report No. 84/11, 1984). This may be true for individual vessel oweners and fleets but general Governments have a broader agenda and therefore it is important to distinguish between DWFNs and individual foreign fishing vessels (FFV). E.g., The Japanese Government has an incentive for sustainable management motivated by (1) their consumption of the product and demands of their market; and (2) the future of their numerically small but politically signifiant population.

69 See Lisa K. Bostwick, note 30 above at p. 905.

70 Ibid., See B.M. Tsamenyi and W.M. Sutherland, *Law and Politics in Regional Co-operation: A Case Study of Fisheries Co-operation in the South Pacific*, (Hobart: Pacific Law Press, 1992)

## B. Obstacles to the Sustainable Development of the Tuna Resource

The Pacific Island States' objective in managing and conserving tuna is to have their own domestic tuna industries.[71] However, in addition to the transboundary nature of tuna, a number of additional barriers impede their sustainable development. The over-capitalisation, sophisticated technological demands, and vertically international integrated nature of the modern fishing operations prevent the participation of the Pacific Island States in the world tuna market.[72] Overfishing threatens the viability of their future development plans. Furthermore, illegal fishing by DWFNs is a problem, especially the under-reporting of catch.[73] Without accurate catch and by-catch statistics, it is impossible to monitor the health of the stock or determine the maximum sustainable yield. Finally, the huge ocean space provides problems for surveillance and enforcement. Control and effective monitoring of the WCPO region is extremely difficult because it is expensive and requires support, equipment, and enforcement strength.[74] This is compounded by the lack of skills and expertise available. Many of the Pacific Island States do not have legal experts and have to rely on expatriate lawyers to staff their public offices and agencies. Most of these expatriate lawyers are engaged on two to three year contracts. Thus, a high degree of turnover prevents effective and consistent prosecution of fisheries cases.[75]

---

71 "The Food Catch: Tonga's got plenty of fish. But not enough are being caught to even feed the local market. Now a high-ranking noble with impressive international credentials is spearheading the drive to find answers", *Islands Business*, January (1997): p. 56. See Parties to the Nauru Agreement, *Declaration of the Parties to the Nauru Agreement*, "Record of Proceedings of the Special Ministerial Meeting of the Parties to the Nauru Agreement, April 15-16", 1996, (Honiara: Forum Fisheries Agency).

72 FFA, "Report of Proceedings Workshop of National Tuna Fishing Operations Tarawa, Kiribati, May 28 - June 2, 1984", (Honiara: Forum Fisheries Agency Report No. 84/7, 1984); FFA, "Tuna Industry Development Study: Regional Report", (Honiara: Forum Fisheries Agency Report No. 95/66, 1995): p. 13:

> The key constraints limiting investment in locally-based tuna industry must be considered against the nature of the tuna industry. The tuna industry is comparatively expensive to enter, it is capital intensive, high risk, and highly competitive. High skilled operations, careful timing, quality control, and commercial management are essential for successful operations.

73 See note 42 above. Also see "Tragedy of the Oceans", *Economist*, March 19, (1994): p. 22.

74 E. Miles, *The Management of Tuna Fisheries in the West Central and Southwest Pacific*, Paper prepared for the Expert Consultation on Monitoring, Control and Surveillance Systems for the Management of Fisheries, April 27-30, 1981, (Rome: Food and Agriculture Organisation).

75 Lisa K. Bostwick, note 25 above at p. 909.

The Pacific Island States are comparatively disadvantaged. They are small, relatively isolated and lack industrial fishing capacity.[76] These factors make them vulnerable to the sophisticated tactics of the DWFNs who opposed the concept of extended fisheries jurisdiction. This also makes them potentially susceptible to economic exploitation.

### C. Overcoming the Constraints to the Sustainable Development of the Tuna Resource

Because of the constraints outlined above, the Pacific Island States are not able to tackle tuna management and conservation problems individually. The obligations that are imposed by the LOSC are quite onerous. Although the establishment of the EEZ regime provides them with the opportunity to exploit the vast tuna resources in the EEZs, the LOSC also imposes new responsibilities. The utilisation of tuna requires a combination of technology, capital and manpower; three resources that are not readily available to the Pacific Island States.[77] Consequently, they have adopted a regionalist approach to tackle tuna management and conservation problems.[78]

The regionalist approach to tuna management was first suggested to the Pacific Island States at the Forum Meeting on the Law of the Sea in Suva in October, 1976.[79] The Forum Meeting was told that the WCPO region did not have an international or regional fisheries organisation accommodating the interests of all the developing countries and territories. The lack of a regional fisheries agency to compile regional fisheries statistics meant, that there was no way of knowing the magnitude of the tuna catch in the WCPO region. A regionalist approach to licensing and research was advocated.

---

76 D.J. Doulman, "In Pursuit of Fisheries Cooperation: The South Pacific Forum Fisheries Agency", *University of Hawaii Law Review*, 10(1) (1988): p. 139.

77 Commonwealth Secretariat, note 9 above at pp. 58-59.

78 SPEC, *Declaration by Members of the South Pacific Forum on the Law of the Sea Questions*, 13-14 October 1976, Suva, Fiji.

79 R.E. Kearney, *A Regional Approach to Fisheries Management in the South Pacific Commission Area*, Paper presented to the South Pacific Forum Meeting on the Law of the Sea, Suva, 13-14, October 1976, South Pacific Commission, Noumea, New Caledonia.

The Pacific Island States see regional co-operation as the means to overcome the constraints of resources, finance, expertise and technology. More significantly, the problems facing them are international in that they cannot be dealt with effectively within the national arena.[80] The large area of ocean space under national jurisdiction and the financial burden of managing the resources in the EEZs impose heavy responsibilities on the Pacific Island States. The large size of the Pacific Island States' EEZs places tremendous constraints on the management of tuna and limits the effective enforcement of management measures within the EEZ.

All the Pacific Island States are developing coastal States. To obtain maximum benefits from tuna, they need to protect their EEZs against foreign fishermen.[81] Consequently, they are compelled to formulate effective surveillance measures, consolidate enforcement mechanisms, and establish research facilities to enhance their capacity to manage the resources. These measures are expensive to establish and implement, and require highly trained and skilled manpower.

The regionalist approach is also supported by the LOSC. Article 63(1)[82] of the LOSC calls for co-operation among neighbouring coastal States over shared stocks.

---

80 A.J. Caporosa, "International Relations Theory and Multilateralism: The Search for Foundations", *International Organisations* 46(3) (1992): pp. 599-632 at 599.

81 B.M. Tsamenyi., "The South Pacific States and Sovereignty over Highly Migratory Species", *Marine Policy*, 10 (1986): 30; See also J. Van Dyke J. and S. Heftel, "Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency",*University of Hawaii Law Review*, 3(1) (1981): p. 6.

82 Article 63(1) of the LOSC states:

> Where the same stock or stocks of associated species occur within the EEZ of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organisations, to agree upon measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

There is a body of opinion that notwithstanding article 64(2) of the LOSC qualification that it applies in addition to other provisions of Part V of the LOSC, the spirit of article 64, and the elaboration of species in Annex I of the LOSC implies that tuna and other highly migratory species were not intended to be considered as either shared or straddling stocks and that therefore article 63 and 64 are mutually exclusive. The argument is that article 63 approach to conservation of highly migratory species cannot lead to sustainable measures unless the co-operation extends to all with a real interest in article 64 as elaborated and modified by the UN Fish Stocks Agreement. See Record of Proceedings of the 4th Meeting of the FFA Sub-Committee on Future Management Arrangements, April 10-12, 1996, Honiara, Solomon Islands. With respect, this view has been advanced to prevent the Pacific Islands States from consolidating the co-operation amongst themselves in order to approach DWFNs as a group.

## IV. CONCLUSION

The Pacific Island States face a number of problems in implementing provisions of the LOSC relevant to tuna fisheries. Although they are blessed with large EEZs, the responsibility for managing tuna is onerous and expensive. The prospects for sustainable development are threatened by their small size and fragile ecosystems. Rapid population growth rates have placed more pressure on fragile environments of the Pacific Island States as governments seek to increase financial revenue to pay for growing social services.[83] A heavy dependence on foreign aid has also weakened the Pacific Island States' ability to implement development programs. It was also shown that the transboundary nature of tuna and the industry prohibits the active participation of the Pacific Island States in the industry.

The Pacific Island States view regional co-operation as the means to tackle common problems. This is a sensible approach given that it will take time before they become self-reliant. The constraints flowing from their size, and limited financial and technical resources have various ramifications for tuna management in the region. Thus, regional co-operation is a conduit to improve tuna management and conservation.

---

83 R.V. Cole, note 16 above.

# 2

# INTERNATIONAL LAW FRAMEWORK FOR TUNA MANAGEMENT UNDER THE LAW OF THE SEA

## I. INTRODUCTION

Chapter 2 analyses the international law framework for tuna management. Part II discusses the relevant rules of international law pertaining to tuna management and conservation. It will be shown that the basis of the international law framework for tuna management has been transformed from one based on the principle of the freedom of the high seas, to one based on the EEZ regime. Part III analyses the weaknesses of the international law framework for tuna management. Chapter 2 concludes that the international law framework for tuna management provides a flexible regime based on the concept of the sovereign rights of coastal States over tuna in the EEZ. Although, there are weaknesses in this regime, efforts to rectify them do not undermine the fundamental principle of coastal States' sovereign rights over the living resources in the EEZ.

## II. RELEVANT RULES OF INTERNATIONAL LAW FOR TUNA MANAGEMENT

The LOSC generally sets out the basic framework for tuna management and conservation in the EEZ.[1] Article 311 of the LOSC provides that the LOSC prevails as between States Parties over the Geneva Conventions of 29 April 1958.[2] Although two or more States may modify the provisions of the LOSC, the modifications must not be incompatible with the LOSC.[3]

Until 1982, most tuna resources were located on the high seas.[4] The applicable international law was the 1958 *Convention on the High Seas*. There was no international management regime for tuna because of the high seas freedom of fishing.[5]

---

1 *United Nations Convention on the Law of the Sea*, UN. Doc. A/CONF. 62/122, *reprinted in* 21 I.L.M. (1982): p. 1261. General and applied studies of tuna management include J.A. Gulland, *The Management of Marine Fisheries*, (Bristol: Scientechnica (Publishers) Ltd, 1974); D. Cushing, *Fisheries Resources of the Sea and their Management*, (Oxford: Oxford University Press, 1975); J. Joseph and J.W. Greenough, *International Management of Tuna, Porpoise, and Billfish: Biological, Legal and Political Aspects*, (Seattle: University of Washington Press, 1979); W.T. Burke and F.T Christy (Jnr), *Options for the Management of Tuna Fisheries in the Indian Ocean*, (Rome: Food and Agriculture Organisation Fisheries Technical Paper 315, 1990); FAO, "Strategy for Fisheries Management and Development", *Report of the FAO World Conference on Fisheries Management and Development, Rome 27 June 6 July 1984*, (Rome: Food and Agriculture Organisation, 1984); Cyril De Klemm, "Migratory Species in International Law", *Natural Resources Law Journal*. 29 (1989): p. 935.

2 These Conventions are: *Convention on the High Seas* (entered into force 30 September 1962) [hereinafter "Geneva High Seas Convention]; *Convention on Fishing and Conservation of the Living Resources of the High Seas* (entered into force 20 March 1966); *Convention on the Territorial Sea and Contiguous Zone* (entered into force 10 September 1964); *Convention on the Continental Shelf* (entered into force 10 June 1964). All four Conventions appear in UN. Doc. A/CONF. 13/L. 52. Also *reprinted in* I. Brownlie, *Basic Documents in International Law*, (4th Edition), (Oxford: Clarendon Press, 1995): pp. 87-123. For an analysis of what was achieved by the conclusion of these four Conventions see, Arthur H. Dean, "Geneva Conference on the Law of the Sea: What was Accomplished", *American Journal of International Law* 52 (1958): p. 810.

3 LOSC, Art. 311.

4 Prior to the international expansion of States' jurisdiction, most of the waters were high seas. The high seas were regarded as *res communis* and open to fishing and exploitation by anyone. When most of the States had a twelve mile territorial limit, the majority of migratory fish were within the high seas. However, with the expansion of the EEZ to 200 miles, a very large number of fish stocks have been nationalised. See Cyril De Klemm, note 1 above: p. 946; William O. McLean & Sompong Sucharitkul, "Fisheries Management and Development in the EEZ: The North, South, and Southwest Pacific Experience", *Notre Dame L. Rev.* 63 (1988): p. 492.

5 See R.P. Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited*, (Dordrecht: Martinus Nijhoff Publishers, 1983); S. Oda, "International Control of Sea Resources" 127 *Recuéil des Cours*, Hague Academy of International Law (1969); S.M. McDougal and W.T. Burke, *Public Order of the Oceans*, (New Haven: Yale University Press, 1962).

## A. Management of Tuna under the Freedom of the High Seas Regime

The basic concept of the freedom of the high seas was embodied in the *Convention on the High Seas.*[6] Article 2 of the Geneva High Seas Convention provided that the high seas are open to all States, and that no State may legally purport to subject any part of the high seas to its sovereignty.[7] The principle of the freedom of fishing was based on the view that tuna is inexhaustible.[8] This had two implications for tuna management and conservation. First,

---

[6] For discussions on the concept of the freedom of the high seas see, H. Grotius, *The Freedom of the Seas, or the Right Which Belongs to the Dutch to Take Part in the Eastern Indian Trade*, (Translated by Magoffin, 1916, Carnegie Endowment for International Peace. The idea of the freedom of the high seas was espoused as a legal concept by maritime nations to advance their economic and trading interests. Anand has been critical of the concept as originating from the Western world. He argues that:

> ....freedom of the seas existed long before Grotius was ever heard of and before Europe emerged as a formidable force on the international stage. It was actually being practised in the sixteenth century by the Asian countries in the so-called East Indies. Thanks to the Asians' liberal traditions of freedoms of peaceful navigation and international maritime trade, and their willingness to allow foreign merchants to allow themselves and apply their own personal laws in their personal affairs, the Europeans obtained an easy foothold in Asia.

R.P. Anand, "Changing Concepts of Freedom of the Seas: A Historical Perspective", in Jon Van Dyke, Durwood Zaelke and Grant Hewison (eds.), *Freedom for the Seas in the 21st Century: Ocean Governance and Environmental Harmony*, (Washington DC: Island Press, 1993): pp. 72-86.

[7] The 1958 *Geneva Convention on the High Seas*, Art. 2 states:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these Articles and by other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:
>
> (1) Freedom of navigation;
> (2) Freedom of fishing;
> (3) Freedom to lay submarine cables and pipelines;
> (4) Freedom to fly over the high seas.
>
> These freedoms and others which are recognised by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

The 1958 Geneva Convention on the High Seas, Apr. 29, 1958, UN. Doc. A/CONF. 13/L. 52 *reprinted in* Selected Multilateral Treaties in the Field of the Environment 133, Alexandro Charles Kiss (ed.), 1983. For a discussion of international fisheries law prior to the 1958 Geneva Conventions on the Law of the sea, see L. Larry, *International Regulation of Fisheries*, (New York: Johnson Reprint Inc., 1944).

[8] See Lawrence Juda, *International Law and Ocean Use Management: The Evolution of Ocean Governance*, (London and New York: Routledge, 1996): p. 114.

coastal States did not have rights to tuna beyond the narrow limit of the territorial sea.[9] Second and more significantly, the system was inimical to good tuna management because it did not promote the effective conservation of the resource.[10] Fishing States, in particular DWFNs, refused to adopt effective conservation and management measures. Article 2 of the Geneva High Seas Convention requires States to exercise the freedom of the high seas with reasonable regard for the interests of other States. The principle of the freedom of fishing also had fundamental impact on the biological state of the resource. Because States were free to do as they wished, it resulted in overcapitalisation and economic waste.[11]

A half-hearted attempt to address this conservation issue was made with the conclusion of the *Convention on Fishing and Conservation of the Living Resources of the High Seas* (Geneva Convention on Fisheries).[12] This Convention articulates the concern about the increasing pressure on world fisheries, the danger of overexploitation and the "clear necessity" for measures to conserve the fisheries. The Geneva Convention on Fisheries, however, retained the right of all States for their nationals to engage in fishing on the high seas, subject to their treaty obligations, and to the rights and interest of coastal States[13] The

---

9 Grant J. Hewison, "High Seas Driftnet Fishing in the South Pacific and the Law of the Sea", *Geo. Int'l Envtl. L. Rev.* 5 (1993): pp. 313-336.

10 For a good discussion of the weaknesses of the 1958 Conventions see J. Gosselin, *The Development of the International Law of Marine Fisheries*, vols. 1& 2 (PhD Thesis, Australian National University, Canberra, 1988) chs. 7-9. See also M. Dahmani, *The Fisheries Regime of the Exclusive Economic Zone*, (Dordrecht: Martinus Nijhoff Publishers, 1987): p. 3. For a comprehensive treatment of the high seas fisheries regime see, Francis T. Christy and Anthony Scott, *The Common Wealth in Ocean Fisheries*, 2nd Edn., (Baltimore: John Hopkins Press, 1972); R.R. Churchill and A.V. Lowe, *The Law of the Sea*, (Manchester: Manchester University Press, 1983).

11 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): p. 21.

12 *Convention on Fishing and Conservation of the Living Resources on the High Seas*, 1958, UN. Doc. A/CONF. 13/L. 52. Also *reprinted in* I. Brownlie, BAsic Documents in International Law, (4th Edition), (Oxford: Clarendon Press, 1995) pp. 87-123 [Hereinafter "Geneva Convention on Fisheries"]

13 Geneva Convention on Fisheries, Art. 1.

Convention also imposed a weak obligation to co-operate for purposes of conservation.[14] Article 6 recognised coastal States' "special interest" in the maintenance of the productivity of the living resources in the high seas areas adjacent to their territorial sea. The words "special interest" was given legal meaning in article 7 which provided that any State may, with a view to the maintenance of productivity, adopt unilateral conservation measures for areas of high seas adjacent to the territorial sea.[15] These measures could only be valid where there is a need for urgent application of conservation measures in the light of existing knowledge of the fisheries and such measures must not discriminate against foreign fishermen[16] .

## B. Management of Tuna under the Exclusive Economic Zone Regime

The failure of the 1958 Geneva Conventions on the Law of the Sea was one of the factors which prompted the international community to negotiate a new international law framework for tuna management which resulted in the LOSC.[17] One of the most significant outcome of

---

14 Geneva Convention on Fisheries, Art. 2 defines "conservation" as the "aggregate of the measures rendering possible the optimum sustainable yield ... so as to ensure a maximum supply of food and other marine products."

15 See M. Dahmani, note 10 above at p. 3.

16 J. Gosselin, note 10 chs. 7-9. M. Dahmani, note 11 p. 4. See generally, D. Johnston, (1987), *The International Law of Fisheries: A Framework for Policy Oriented Inquiries*, (Dordrecht: Martinus Nijhoff Publishers, 1987). The Geneva Convention on Fisheries was also made unworkable because of "Conflicting political considerations, limited institutional authority, disagreements about catch allocations, and problems of enforcement", see, B.M. Tsamenyi and Kwame Mfodwo, "South Pacific Island States and the New Regime of Fisheries: Issues of Law, Economy and Diplomacy", in J. Crawford and D.R. Rothwell (eds.),*The Law of the Sea in the Asian Pacific Region*, (Dordrecht: Kluwer Academic Publishers, 1995): p. 125.

17 For a comprehensive discussion and analysis of the negotiations of the 1982 United Nations Convention on the Law of the Sea, see, M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II, (Dordrecht: Martinus Nijhoff Publishers, 1993); D.P. O'Connell, *The International Law of the Sea*, vols. 1 and II, (London: Oxford University Press, 1982); J.N. Moore, *International and United States Documents on Oceans Law and Policy*, vol. 3 and 4, (William S. Hein & Co Inc., 1986); M.H. Nordquist and K.R. Krueger, *New Directions in the Law of the Sea Documents*, vol. IX, (Oceania Publications Inc., 1980); R. Platzoder, *Third United Nations Conference on the Law of the Sea: Documents* (19 Volumes).

the LOSC is the EEZ regime in Part V of the LOSC.[18] Before the EEZ regime came into force[19], many coastal States were implementing the Fisheries Zone.[20] This raises questions about the status of the EEZ.

The EEZ is defined in the LOSC as an area extending beyond and adjacent to the territorial sea.[21] The EEZ is subject to the legal regime established under Part V of the LOSC. However, the rights of coastal States are also subject to other provisions of the LOSC reflecting the view that the management of tuna and other highly migratory species is not merely a jurisdictional issue, but one that needs to be considered as a whole.[22] The EEZ is an economic zone but for other purposes, the EEZ retains its high seas character. Article 58 of the LOSC provides that articles 88 to 115 which cover high seas matters, apply within the EEZ to the extent that these provisions are not incompatible with Part V.

Although the LOSC is in force, not all the Pacific Island States have ratified it.[23] The non-parties to the LOSC, however, could rely on the provisions of the EEZ as customary international law. This view is based on the consensus reached on the EEZ at the Third United Nations Conference on the Law of the Sea (UNCLOS III) negotiations and

---

18 For a comprehensive discussion of the establishment and status of the EEZ regime see, D.J. Attard, *The Exclusive Economic Zone in International Law*, (Oxford: Clarendon Press, 1987); S.N. Rembe, *Africa and the International Law of the Sea: A Study of the Contribution of the African States to the Third United Nations Conference on the Law of the Sea*, (The Hague: Sijthoff & Noordoff International Publishers, 1980); B. Kwiatkwoska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, (Dordrecht: Martinus Nijhoff, 1989); Orrega F. Vicuna, *The Exclusive Economic Zone: Regime and Nature under International Law*, (Cambridge: Cambridge University Press, 1989); R.B. Krueger and M.H. Nordquist, "The Evolution of the 200 Mile Exclusive Economic Zone: State Practice in the Pacific Basin", Virginia *Journal of International Law* 19 (1978): pp. 321-400; R.W. Smith, *Exclusive Economic Zone Claims: An Analysis and Primary Documents*, (Dordrect: Martinus Nijhoff, 1986) Ann L. Hollick, "The Origins of 200 Mile Offshore Zones", *American Journal of International Law*. 71(3) (1977): pp. 494-500.

19 The LOSC entered into force on 16 November 1994.

20 Ann L. Hollick, ibid.

21 LOSC, Art. 55.

22 Ibid.

23 The Pacific Island States who have ratified the LOSC are: Cook Islands, Fiji, Federated States of Micronesia, Marshall Islands, Palau, Papua New Guina, and Western Samoa.

widespread State practice.[24] In the *Continental Shelf (Tunisia/Libya) Case*, Judge Jiménez de Aréchaga noted that:

> The provisions of the negotiating text and of the draft convention and the consensus which emerged at the conference, have had in this respect a constitutive or generating legal effect, serving as the focal point for an as the authoritative guide to a consistent and uniform practice of States. The proclamation of 86 coastal States of economic zones, fishery zones or fishery conservation zones, made in conformity with the texts of the conference, constitutes a widespread practice of States which has hardened into customary rule, and irreversible part of today's law of the sea.[25]

In the *Gulf of Maine Case (US v Canada)*, the Chamber agreed noting:

> that the Convention adopted at the end of the Conference has not yet come into force and that a number of States do not appear inclined to ratify it. This, however, in no way detracts from the consensus reached on large portions of the instrument... In the Chamber's opinion, these provisions, even if in some respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law of the question[26] .

Although the basic concept of the EEZ has crystallised into customary international law, the detailed rules governing the EEZ regime have not transformed into customary international law.[27] This view is confirmed by studies of the conformity of State practice with the LOSC. For instance, a UN review found that several EEZ

---

24 C.A. Fleischer, "The Exclusive Economic Zone under the Convention Regime and State Practice", *Law of the Sea Institute Proceedings* 17 (Honolulu, Law of the Sea Institute, 1984); See also, C. Hudson, "Fishery and Economic Zones as Customary International Law", *San Diego Law Review* 17 (1979-80): pp. 661-690; L. Juda, "The EEZ: Compatibility of National Claims and the UN Convention on the Law of the Sea", *Ocean Development and International Law* 16 (1986): p. 44.

25 [1982] ICJ Rep. 18, 115.

26 [1986] ICJ Rep. 246, 294.

27 [1982] ICJ Rep. 18, 115 (Judge Jiménez de Aréchaga)

laws were not consistent with the LOSC provisions on the EEZ.[28] This appears to be the situation at present.[29]

The jurisdictional competence of coastal States in respect of tuna management are set out in article 56(1)(a) of the LOSC. Article 56(1)(a) provides that coastal States have sovereign rights for purposes of exploring and exploiting, conserving and managing the natural resources, whether living or non-living in the EEZ. It is instructive to note that the jurisdictional competence of coastal States in the EEZ is expressed in terms of "sovereign rights" rather than "sovereignty." Fleischer has noted that the term "sovereign rights"

> conveys the idea of a functional approach. The coastal State does not have full sovereignty as on its land territory or in the territorial sea but a right of jurisdiction that is related to certain purposes. Beyond the jurisdiction so defined, there is no special basis for coastal State rights, and the traditional rules developed for the high seas will continue to apply. On the other hand, in so far as the specific purposes are concerned, the coastal State is sovereign: it has the exclusive rights of decision in regard to the rules which are to apply within the extended zone, and the exclusive rights to enforce the measures on which it has decided.[30]

---

28 United Nations, "Introduction" in The Law of the Sea: *National Legislation on the Exclusive Economic Zone and the Exclusive Fishery Zone*, (New York: United Nations, 1986).

29 See further D. Johnston, "Is Coastal State Fishery Management Successful or Not?, Ocean *Development and International Law* 22 (1991): p. 199 at p. 203; FAO, *Coastal State Requirements for Foreign Fishing*, (Rome: Food and Agriculture Organisation Legislative Study 21, Rev. 3, 1993).

30 C.A. Fleischer, note 24 p. 253. The term "sovereign rights" was first used in article 2 of the 1958 *Geneva Convention on the Continental Shelf*. It was reviewed by the International Law Commission and therefore it would be useful to set out what the thinking was at the time. The International Law Commission (ILC) noted that it:

> desired to avoid language lending itself to interpretations alien to an object which the Convention considers to be of decisive importance, namely, the safeguarding of the principle of the full freedom of the superjacent sea and airspace above it. Hence it was unwilling to accept sovereignty of the coastal State over the seabed and subsoil of the continental shelf. On the other hand, the text as now Adopted leaves no doubt that the rights conferred upon the coastal State cover all the rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf. Such rights include jurisdiction in connection with the prevention and punishment of violations of the law.

Report of the International Commission covering the work of its eighth session (A/3159), Art. 68 *Commentary*, para. (2) II YB ILC, p. 253-297.

The question, however, arises whether article 56(1)(a) is an exclusive provision in regards to the sovereign rights of coastal States over tuna management matters. Juda argues that article 56(1)(a) sets a limit on coastal States while giving sufficient flexibility to carry out the duties in the provision.[31] According to Burke, the term "sovereign rights for the purpose of exploring and exploiting, conserving and managing" the tuna resources signifies that:

> ... with respect to the subject matter embraced by the sovereign rights, the decisions of the coastal State are plenary. The coastal State has final authority to choose one way or another regarding access to, and use of, fisheries resources of the zone, whether its obligations may be to consult with others or take account of specific considerations, factors, views or evidence. It is not inconsistent with the notion that the coastal State has duties and obligations in their exercise and nevertheless has the final right to exercise a claim.[32]

This coastal States generally have the power to do everything that is necessary to manage tuna within the EEZ. Unlike the management and conservation regime for the territorial sea, the LOSC imposes specific management and conservation responsibilities on coastal States in articles 61, 62 and 64.[33]

**Determination of Allowable Catch**

Article 61(1) of the LOSC obliges coastal States to determine the "allowable catch" of the tuna resources in the EEZ.[34] Coastal States have a duty to ensure through

---

31 L. Juda, note 24 above at p. 44.

32 W.T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond*, (Oxford: Clarendon Press, 1994), p 32.

33 For a discussion of the definition of "conservation" and "management", see W. Sutherland, "Management, Conservation and Co-operation in the EEZ Fishing: The Law of the Sea and the South Pacific Forum Fisheries Agency", *Ocean Development and International Law* 18 (1987): 613-640.

34 The Food and Agriculture Organisation (FAO) defines "allowable catch" as that catch which if taken in any one year will best enable the objectives of fisheries management (example, the optimum long-term

proper conservation and management measures that the living resources in the EEZ are not endangered by overexploitation.[35] The conservation and management measures for tuna must be enacted by coastal States taking into account the best scientific evidence available,[36] although it is not clear what is meant by "taking into account." Furthermore, the objectives of the coastal States' conservation and management measures are to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield (MSY).[37]

The LOSC gives coastal States the discretion to determine the factors to take into account in deciding on the conservation and management measures in the EEZ. Scientific evidence is only one of a range of issues which coastal States can consider. Thus, under article 62(3), conservation and management measures may be qualified by relevant environmental and economic factors, including the needs of coastal fishing communities and the special requirements of developing States.[38] Coastal States may only adopt conservation and management measures after taking into account fishing patterns, the interdependence of the stocks and any generally recommended international minimum standards.[39] Clearly, article 61 of the LOSC envisages that coastal States take into account social, economic, scientific, legal, political and environmental issues when determining conservation and management measures for the tuna.

---

yield) to be achieved. FAO Department of Fisheries mimeographed documents submitted to UNCLOS III, Geneva Session, Doc. GE 76.640.93.

35 LOSC, Art. 61(2).

36 Ibid.

37 LOSC, Art. 61(3).

38 For a more comprehensive analysis of article 61(3), see M. Dahmani, note 10. above. Also see W.T. Burke, "US Fishery Management and the Law of the Sea", *American Journal of International Law* 76 (1982): p. 34.

39 LOSC, Art. 61(3).

The interaction between harvested species and other species of marine resources is recognised by the LOSC. Article 61(4) imposes the duty on coastal States to establish conservation regulations for species associated or dependent on theharvested stock. Specifically coastal States should maintain or restore populations of such associated species above levels which threaten their sustainability.

Access to scientific information about the biology and spawning behaviour of tuna is fundamental to its conservation and management.[40] Coastal States have a duty to contribute and exchange data and other relevant information about tuna on a regular basis through competent international organisations.[41] To rectify shortcomings in the collection of information, all States including those States whose nationals fish for tuna in the EEZ can participate in exchanging information.[42]

The issue that arises is whether article 61 of the LOSC provides an adequate basis for the conservation of tuna. Burke argues that tuna management arrangement envisaged in article 61 is misleading.[43] "Allowable catch" as a definition is flawed because of the ambiguities in assessing tuna stocks and the impact of human activities. Burke also argues that coastal States are under no obligation to set an allowable catch above zero, if their interests are met by that determination.[44]

---

40 See Kevin McLoughlin, "How Many Fish in the Sea", *Mari time Studies*, November/December, 67 (1992): 13-15; Edwin S. Iversen, (1996), *Living Marine Resources: Their Utilisation and Management*, (New York: Chapman & Hall, 1996).

41 LOSC, Art. 61(5).

42 Ibid.

43 W.T Burke, note 32 above at p. 44.

44 Ibid.

In practice, it is difficult and expensive to determine the allowable catch. Gentle notes in relation to Australia that:

> There are few fisheries where scientific knowledge is currently adequate to determine sustainable total allowable catches (TACs). The abalone, Western Australia rock lobster and the Northern Prawn fisheries are notable examples. In most other fisheries, knowledge ranges from poor to nothing. For example the Bureau of Rural Resources has estimated that over $20 million of extra research will be required over the next five years to accurately set the TACs in the South East trawl, with recurrent annual stock monitoring costs at least $1 million.[45]

The practical value of determining the allowable catch has also been questioned by tuna experts. One major criticism is the assumption underlying the principle of article 61(1) that the determination of the allowable catch is the only means of conserving tuna whereas it is only one of a number of different measures which can be applied. According to Garcia, Gulland and Miles:

> The requirement in article 61(1) that the coastal State shall determine the allowable catch needs to be carefully considered. Those originally drafting this paragraph may have had hope that it would be possible to set some figure as the proper value for the allowable catch, on some objective scientific grounds (e.g. MSY), and that policy questions would be concerned solely with how this catch should be taken, including the question of the possible allocation of a surplus to foreign fleets. It is almost true to say that the reverse holds good. Important policy matters have to be settled first, which must include definitive and explicit recognition of the newly acquired right by all concerned, decisions on the relative importance of high total catch vis-à-vis high catch rates, or stability of the system, as well as where appropriate, on the rate at which depleted stocks should be rebuilt. Only then, and after collecting information about the current stock abundance, is it possible for scientists to calculate the magnitude of the allowable catch for the forthcoming season.[46]

---

45 G.D Gentle, "The price of Fish: the use of market mechanism in Australian fisheries management", *Issues in the Pricing and Management of Natural Resources*, EAPC Background Paper No. 16: 101. See OECD, "The Determination of Total Allowable Catch", in *Fisheries Issues: Trade and Access to Resources*, (Paris: OECD, 1989): pp. 199-219.

46 S Garcia, J.A Gulland and E. Miles, "The New Law of the Sea, and Access to Surplus Fish Resources: Bioeconomic Reality and Scientific Collaboration", *Marine Policy* 10 (1986): p. 197.

The difficulties of determining the allowable catch has raised the argument that there is no absolute duty on coastal States to determine the allowable catch or to accord the allowable catch priority in its tuna management plan. Thus, according to Oda, "it is not appropriate for the coastal State always to be required to determine the allowable catch of the tuna resources in the EEZ and ... it is extremely difficult to perform this obligation properly."[47] According to Burke, the LOSC "explicitly declares that the coastal State has discretion to establish the allowable catch. The catch may be set in accordance with the coastal State's judgement about both the level of abundance and the rate of replacement of tuna fishery stocks."[48] Kwiatkwoska also argues that the "total allowable catch, albeit very valuable, is only one of a number of possible conservation and management measures and cannot be viewed as being in general mandatory."[49] Further, according to Dahmani:

> Restricting fishing effort, however, is not a matter to be decided on the ground of biological parameters of the tuna stock only, but it is a decision involving economic, social, political as well as biological considerations.....In reality, to qualify the MSY by economic and environmental factors is only logical and necessary, for further adhering to any programme of conservation, States are expected to consider its economic and environmental consequences for their interests before any consideration of the need of the fisheries resources in question to the protection or restoration.[50]

These practical difficulties explain why the LOSC gives coastal States considerable management flexibility. The LOSC does not give much emphasis to the role of science in the determination of the allowable catch. Coastal States are not even required to search for

---

47 S. Oda, "Fisheries under the United Nations Convention on the Law of the Sea", *American Journal of International Law* 77 (1983): p. 743.

48 W.T. Burke, note 32 above at p. 44.

49 B. Kwiatkwoska, note 18 above at p. 49.

50 M. Dahmani, note 10 above at p. 43.

the best scientific evidence available. They are only required to take account of whatever scientific evidence is available to them.

Some commentators have argued that flexibility is necessary to "ensure adequate conservation and management."[51] However, given the tendency for coastal States to construe the EEZ purely in economic terms, too much flexibility would seem to be detrimental to the tuna stock in the long term.[52] It is not surprising, therefore, that overexploitation of tuna stocks continues to occur.

### Promotion of Optimum Utilisation

The second obligation imposed on coastal States is the duty to promote the optimum utilisation of the living resources in the EEZ. There appears to be a contradiction between article 61 of the LOSC which provides for conservation, and article 62(1) which imposes an obligation to promote the optimum utilisation of those resources. The promotion of the optimum utilisation of living resources, however, is "without prejudice" to article 61. Burke argues that the inclusion of the phrase "without prejudice" to article 61 means "that the coastal State's authority to set an allowable catch is not subject to any obligation to observe a particular level of utilisation above zero from a particular fisheries."[53] In practice, it means that the obligations in article 61 pertaining to the determination of the allowable catch, the obligation to prevent the overexploitation of the resources, the choice of what level of population abundance to maintain, and consideration of effects on associated or dependent species, are factors that need to be taken into consideration when promoting the optimum

---

51 S. Oda, ibid., p. 743.

52 Ibid.

53 W.T Burke, *Impacts of the UN Regulation on the Law of the Sea on Tuna Regulation*, (Rome: Food and Agriculture Organisation, 1982).

utilisation.[54] It must be said that the LOSC does not require coastal States to promote full utilisation.

In order to promote the optimum utilisation of the living resources in the EEZ, coastal States are required to determine the allowable catch within the EEZ and their capacity to harvest the allowable catch.[55] Coastal States may set the allowable catch at a level equal to their capacity to harvest, even if such level is below the level which would ensure the optimum utilisation of the stock, thus cutting off access of foreign fishing nations to any surplus which coastal States cannot harvest.[56] The legal exception is found in article 64 which obliges coastal States to "co-operate" with States whose nationals fish for tuna in the region. Although co-operation is not defined in the LOSC, Burke interprets it to mean that there is an obligation to negotiate and actively take into account other States' interests and respond to them.[57]

The word "shall" in article 62(1) suggest that the obligation to promote the optimum utilisation of the stock is mandatory. However, article 297(3)(a) of the LOSC suggests that the obligation is a discretionary one. Article 297(3) states:

> ...the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the fisheries resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of the surpluses to the States, and the terms and conditions established in its conservation and management laws and regulations.

---

54 M.H. Nordquist, note 17 above at p. 635.

55 LOSC, Art. 62(2).

56 W.T Burke, "The Law of the Sea Convention Provisions on Access of Fisheries Subject to National Jurisdiction", Oregon *Law Review* 63 (1984): 73-120 at 88.

57 W.T. Burke, note 53 above at p. 3.

**Determination of Harvesting Capacity, Surplus and Allocation**

Once coastal States have determined the allowable catch, they are required under article 62(2) of the LOSC to determine their harvesting capacity. It follows that coastal States can only determine their harvesting capacity if the allowable catch for the specific tuna stock is known. Where there is a surplus to the allowable catch which the coastal States are unable to harvest because of the lack of capacity, they are required to share the surplus with other States[58]. This is to be done through agreements or other arrangements[59]. In practice, coastal States can enter into bilateral or multilateral access agreements or joint venture arrangements with third States to harvest the resource.[60] Article 62(2), however, does not stipulate how coastal States are to determine their capacity to harvest the resource[61]. This provision raises some questions. For instance, how far will coastal States determine their actual capacity at some future time and limit the surplus that will be available to other States? While it may be argued that the coastal States' harvesting capacity must be what they are capable of utilising using their own resources, there does not seem to be any provision to prevent coastal States from acquiring this capacity by registering foreign vessels.

Article 62(2) speaks of a "surplus" to the harvesting capacity of coastal States which is determined by those States themselves, and not "surplus to the actual harvesting capacity of coastal States determined by reference to objective criteria. Dahmani argues that in order for coastal States to deny the existence of such surplus and consequently access by other

---

58 LOSC, Art. 62(3).

59 Ibid.

60 For State practice on this matter see, FAO, *Coastal State Requirements for Foreign Fishing*, (1993), note 29 above.

61 For a discussion of the history of this proposal at UNCLOS III see T.A Clingan, "Overview of the Second Committee Negotiations in the Law of the Sea Conference", *Oregon Law Review* 63 (1984): p. 57.

States, "it can subjectively equate its harvesting capacity with the entire allowable catch which it is able to set at levels which may best suit its own economic interests."[62]

**Access to the Surplus**

The requirement in article 62(2) that coastal States are to share the surplus through agreements or other arrangements suggests that this right is not automatic. It is conditional upon reaching agreement or other agreements, the terms of which may not be altogether satisfactory or acceptable to a third State seeking access to the surplus tuna stock of the EEZ.

The issue which arises is, what the words "shall seek through agreement or other arrangement" mean. According to Churchill and Lowe, the words do not seem to suggest that an obligation to enter into an agreement is imposed on coastal States, but represents only a requirement that coastal States should negotiate to their satisfaction "access agreements" with other States wishing to fish for the surplus.[63] Article 62 allows coastal States substantial flexibility. According to article 62(3) of the LOSC:

> In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, *inter alia*, the significance of the living resource of the area to the economy of the coastal State concerned and its national interests, the provisions of articles 69 and 70, the requirements of developing States in the region in harvesting part of the surplus and the need to minimise economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

The LOSC, however, is silent on the nature of these agreements or arrangements. In practice, many different solutions have been applied. These range from direct licensing, joint

---

62 M. Dahmani, note 10 above at p. 54.

63 R.R Churchill and A.V Lowe, note 10 above at p. 209.

ventures, co-operative agreements and international agreement between States to allocate the surplus amongst themselves.[64] Article 62(3) of the LOSC also requires coastal States to take into account articles 69[65] and 70[66] which reflect the objective in the preamble to the LOSC

---

64 FAO, *Coastal State Requirements for Foreign Fishing*, (1993), note 29 above pp. 1-10; J. Swan, "Tuna Management in the South Pacific", T.A. Clingan (ed), *The Law of the Sea: What lies Ahead?*, (Honolulu: Proceedings of the 20th Conference of the Law of the Sea Institute, 1989): p. 185.

65 Article 69 of the LOSC states:

> 1. Land-Locked States shall have the right to participate on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region, taking into account the relevant economic and geographical circumstances of all the States concerned an in conformity with the provisions of this article and of articles 61 and 62.
> 2. The terms and modalities of such participation shall be established by the States concerned through bilateral, subregional or regional agreements taking into account, *inter alia*:
>
> a. the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State;
>
> b. the extent to which the land-locked State, in accordance with the provisions of this article, is participating or is entitled to participate under existing bilateral, subregional or regional agreements in the exploitation of living resources of the exclusive economic zones of other coastal States;
>
> c. the extent to which other land-locked States and geographically disadvantaged States are participating in the exploitation of the living resources of the exclusive economic zone of the coastal State and the consequent need to avoid a particular burden for any single State or a part of it;
>
> d. the nutritional needs of the populations of the respective States.
>
> 3. When the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch of the living resources in its exclusive economic zone, the coastal State and other States concerned shall co-operate in theestablishment of equitable arrangements on a bilateral, subregional or regional basis to allow for participation of developing land-locked States of the same subregion or region in the exploitation of the living resources of the exclusive economic zones of coastal States of the subregion or region, as may be appropriate in the circumstances and on the terms satisfactory to all parties. In the implementation of this provision the factors mentioned in paragraph 2 shall also be taken into account.
> 4. Developed land-locked States shall, under the provisions of this article, be entitled to participate in the exploitation of living resources only in the exclusive economics of developed coastal States of the same subregion or region having regard to the extent to which the coastal State, in giving access to other States to the living resources of its exclusive economic zone, has taken into account the need to minimise detrimental effects on fishing communities and economic dislocation in States whose nationals have habitually fished in the zone.
> 5. The above provisions are without prejudice to arrangements agreed upon in subregionas or regions where the coastal States may grant to land-locked

States of the same subregion or region equal or preferential rights for the exploitation of the living resources in the exclusive economic zones.

[66] Article 70 of the LOSC states:

1. Geographically disadvantaged States shall have the right to participate on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region, taking into account the relevant economic and geographical circumstances of all the States concerned an in conformity with the provisions of this article and of articles 61 and 62.

2. For the purposes of this Part, "geographically disadvantaged States" means coastal States, including States bordering enclosed or semi-enclosed seass, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other States in the subregion or region for adequate supplies of fish for nutritional purposes of their populations or parts thereof, and coastal States which can claim no exclusive economic zones of their own.

3. The terms and modalities of such participation shall be established by the States concerned through bilateral, subregional or regional agreements taking into account, *inter alia*:

a. the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State;

b. the extent to which the geographically disadvantaged State, in accordance with the provisions of this article, is participating or is entitled to participate under existing bilateral, subregional or regional agreements in the exploitation of living resources of the exclusive economic zones of other coastal States;

c. the extent to which other geographically disadvantaged States and land-locked States are participating in the exploitation of the living resources of the exclusive economic zone of the coastal State and the consequent need to avoid a particular burden for any single State or a part of it;

d. the nutritional needs of the populations of the respective States.

4. When the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch of the living resources in its exclusive economic zone, the coastal State and other States concerned shall co-operate in theestablishment of equitable arrangements on a bilateral, subregional or regional basis to allow for participation of developing geographically disadvantaged States of the same subregion or region in the exploitation of the living resources of the exclusive economic zones of coastal States of the subregion or region, as may be appropriate in the circumstances and on the terms satisfactory to all parties. In the implementation of this provision the factors mentioned in paragraph 2 shall also be taken into account.

5. Developed geographically disadvantaged States shall, under the provisions of this article, be entitled to participate in the exploitation of living resources only in the exclusive economics of developed coastal States of the same subregion or region having regard to the extent to which the coastal State, in giving access to other States to the living resources of its exclusive economic zone, has taken into account the need to minimise detrimental effects on fishing communities and economic dislocation in States whose nationals have habitually fished in the zone.

6. The above provisions are without prejudice to arrangements agreed upon in subregionas or regions where the coastal States may grant to geographically disadvantaged States of the same subregion or region equal or preferential rights for the exploitation of the living resources in the exclusive economic zones.

of realising a just and equitable economic order which would take into account the interests and needs of humanity as a whole, and in particular the special interests and needs of developing countries, whether coastal or landlocked.[67]

**Conditions of Access to the Exclusive Economic Zone**

The LOSC requires nationals of States fishing in the EEZ to comply with the conservation measures and the laws and regulations of coastal States.[68] Under article 62(4), coastal States may enact laws and regulations which must be consistent with the LOSC to regulate the following activities:

- licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration which may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;
- determining the species which may be caught, fixing catch quotas in relation to particular stocks or group of stocks or catch per vessel over a period, or catch by nationals of any State during a specified period;
- regulating seasons and areas of fishing, the types, sizes and amount of gear, and types, sizes and number of fishing vessels that may be used;
- fixing the age and size of fish and other species that may be caught;
- specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;
- the conduct of specified research programs and regulating the conduct of such research, including sampling of catches, disposition of samples and reporting of associated scientific data;
- placing of observers or trainees on board such vessels;
- the landing of all or any part of the catch by such vessels in ports;
- terms and conditions relating to joint ventures or other co-operative arrangements;

---

67 See W.R Edeson, "Access by Foreign Fishing Vessels to Economic Zones, and Problems of Enforcement", *Prospects for a New Law of the Sea*, Papers read at a Seminar Conducted by the International Law Association in Sydney on 19 June 1982, Martin Place Papers, No. 2: 60-61.

68 LOSC, Art. 62(4).

- requirements for the training of personnel and the transfer of fishing technology, including enhancement of coastal States capability to undertake tuna research; and
- enforcement procedures.

This is a non-exhaustive list, and coastal States can enact other measures in addition to those listed in article 62(4) as long as they are consistent with the LOSC.

### C. Tuna as a Transboundary Stock

The separate treatment of transboundary stocks is in recognition of the factual situation that tunas are not confined by their movement or habitat within the limits of the EEZ. Many tuna species move through the EEZ to the high seas and can also move through two or more EEZs.[69] Fishing for such stock may occur within the EEZ of two or more States, or within the EEZ of a coastal State and the areas of high seas adjacent to the EEZ. In these circumstances, the tuna as a single unit of management does not fall within the jurisdiction of a single coastal State[70]. It requires additional arrangements to manage these conditions. Article 63 attempts to address this particular problem.

Under article 63(1) which deals with transboundary stocks, States are required to seek, either directly, or through appropriate sub-regional or regional organisations, to agree

---

69 J. Joseph, "The Management of Highly Migratory Species: Some Important Concepts", *Marine Policy* 1(4) (1977): pp. 275-288.

70 The problems of managing straddling stocks have been discussed extensively by scholars and experts. See G. Applebaum, (1990), "The Straddling Stock Problem: The Northwest Atlantic Situation, International Law, and Options for Coastal State Action" in A. H.A Soons (ed), *Implementation of the Law of the Sea Convention through International Institutions*, (Proceedings of the 23rd Annual Conference of the Law of the Sea Institute, 1989, Noordwijk an Zee: Honolulu): 282-317; E.L Miles and W.T Burke, "Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from the New Fisheries Conflicts: The Problem of Straddling Stocks", *Ocean Development and International Law* 20 (1989): 343-357; W.T Burke, "Fishing in the Bering Sea Donut: Straddling Stocks and the New International Law of Fisheries", *Ecology Law Quarterly* 16 (1989); K. Yonezawa, "Some thoughts on the Straddling Stocks Problem in the Pacific Ocean", in T. Kuribayashi and E.L. Miles (eds), *The Law of the Sea in the 1990s: A Framework for Further International Co-operation* (Proceedings of the 24th Annual Conference of the Law of the Sea Institute, 1990, Tokyo, Honolulu, 1992): pp. 127-135.

upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of Part V of the LOSC. This article contains three kinds of requirements. First, coastal States have a duty to "seek to ...agree" on the measures necessary to "co-ordinate and ensure the conservation and development" of the stocks in question.[71] Second, co-operation must be achieved without prejudice to the other provisions of the LOSC. Thirdly, co-operation must be undertaken either directly or through appropriate subregional or regional organisations.

This provision raises two issues. The first concerns the implications of the obligation to "seek to ...agree." Some writers have argued that this obligation requires States to reach agreement on the necessary conservation measures.[72] However, Hayashi argues that article 63(1) does not contain an obligation to conclude an agreement.[73] Hayashi's views are supported by the International Law Association (ILA) International Committee on the EEZ that article 63(1) contains a *pactum de negotiando*, which implies an obligation to enter into negotiations in good faith with a view to reaching agreement on necessary measures.[74]

The second issue relates to the obligation that the measures for conservation and development must be adopted without prejudice to the other provisions of Part V of the LOSC. Hayashi argues that:

> ..it implies, *inter alia*, that all the basic principles and rules regarding the rights and obligations of the coastal State over the living resource of its EEZ as well as their conservation

---

71 Moritaka Hayashi, "The Management of Transboundary Fish Stocks under the LOS Convention", *The International Journal of Marine and Coastal Law* 8(2) (1993): p.249.

72 See generally, E. Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources: The United Nations Law of the Sea Convention, Co-operation between States*, (Dordrecht: Martinus Nijhoff Publishers, 1989).

73 M. Hayashi, ibid., p. 249.

74 ILA Cairo Conference (1992), International Committee on the EEZ. Report of the Committee by Prof. Rainer Lagoni on "Principles applicable to living resources occurring both within and without the exclusive economic zone or in zones of overlapping claims", para. 12.

> and management - particularly those contained in articles 61 and 62 - apply unless specifically agreed otherwise by the States concerned.[75]

It follows that these obligations cannot be fulfilled by coastal States in isolation. The effective conservation of transboundary stocks can only be achieved by adopting appropriate measures as envisaged by the LOSC. Hence, while the LOSC does not oblige coastal States to reach agreement on appropriate measures, effective conservation and management of transboundary and straddling stocks cannot be achieved without some practical working arrangements. A United Nations study concerning high seas fisheries has noted that with regards to straddling stocks, "unrestrained fishing of a straddling stock in an area beyond 200 miles can render useless any measures taken within the exclusive economic zone."[76] The reverse situation is also true. The lack of controls within the EEZ could impact on the state of the resource on the high seas.

In recognition of this, paragraph 2 of article 63, provides that the objective, which is to be sought between co astal States and other States, is the conservation of these stocks "in an area beyond and adjacent to the zone." This obligation is developed further in article 116(b) of the LOSC.[77] Article 117 of the LOSC requires all States to co-operate in adopting measures for the conservation of the tuna resources of the high seas. This provision reflects the continuum of ocean space. The impact of high seas fishing on or affecting stocks in

---

75 M. Hayashi, ibid.

76 Division for Ocean Affairs and the Law of the Sea, UN Office of Legal Affairs, *The Regime for High-Seas Fisheries: Status and Prospects*, para. 62, at 21 (UN Sales No. E.92. V.12(1992)). See Kawasaki Tsuyoshi, "The 200 Mile Regime and the Management of Transboundary and High Seas Stock", *Ocean Management* 9 (1984): 7-20.

77 LOSC, Art. 116(b). All States have the right for their nationals to engage in fishing on the high seas subject to:

> (a)....
> (b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67; and ...

adjacent EEZs is also addressed in Part VII, section 2, pertaining to the conservation and management of the tuna resources of the high seas. It may be argued, therefore, that the effect of article 87(1)(e),[78] and article 116, subjugates the right to fishing transboundary stocks on the high seas, to the rights and duties, as well as the interests, of coastal States as provided for in article 63(2).

In 1978, the United Nations Environment Programme (UNEP), formulated guidelines and recommendations on the harmonious utilisation of natural resources shared by two or more States.[79] Principle 1 calls on States with shared resources to co-operate in the conservation and utilisation of such resources. To achieve this it will be necessary that "consistent with the concept of equitable utilisation of shared natural resources, States co-operate with a view to controlling, preventing, reducing, or eliminating adverse environmental effects which may result from the utilisation of such resources." Principle 2 envisages that States will give effect to the principles through bilateral or multilateral agreements. Accordingly, "States sharing such natural resources should endeavour to conclude bilateral or multilateral agreements between or among themselves in order to secure specific regulation of their conduct ... applying as necessary the present principles in a legally binding manner."

---

78 LOSC, Art. 87(1) reads:

> The high seas are open to all States, whether coastal or landlocked. Freedom of the high seas is exercise under the conditions land down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and landlocked States:
>
> (a) ...
>
> (e) freedom of fishing, subject to the conditions laid down in section 2;

79 UNEP Principles on Conservation and Harmonious Utilisation of Natural Resources Shared by Two or More States, 19 May 1978, *reproduced in* Patricia W. Birnie and Alan Boyle, *Basic Documents on International Law and the Environment*, (Oxford: Clarendon Press, 1995): pp. 21-30.

### D. Highly Migratory Species

These species, including tuna because of their ability to cross vast spans of ocean, require different management considerations. However, the distinction in the LOSC between highly migratory species (HMS) and other species of living marine resources is political rather than biological.[80] Some species which are not listed in Annex I have a far longer migratory range than those listed.[81] There is also little doubt that tuna can be regarded as straddling and transboundary stock since they can be found both inside and outside national jurisdiction.[82] According to Burke, the considerations affecting tuna differ only in degree from those involving other species.[83]

The LOSC recognises coastal States' sovereign rights over the tuna resources. In addition to their sovereign rights, coastal States are required under article 64(1) of the LOSC to co-operate with States whose nationals fish for tuna in the region with a view to ensuring conservation and promoting the objective of optimum utilisation. The legal obligations that this provision impose have been the subject of political dispute between the United States and the Pacific Island States.[84] However, since January 1992, the United States has recognised coastal States' sovereign rights over tuna in their EEZs.[85]

---

80 Gordon Munro, *Fishery Diplomacy in the 1990s: The Challenges and Constraints*, SEAPOL International Workshop on Challenges to Fishery Policy and Diplomacy in South-East Asia, Rayong, 6-9 December, 1992.

81 See R. Hilborn and J. Sibert, "Is International Management of Tuna Necessary?", *Marine Policy* 12 (1988): p. 31. Also see J. Gulland, "Tuna and International Institutions, *Marine Policy* 12 (1988): p. 408; J. Joseph, W. Klawe and P. Murphy, *Tuna and Billfish: Fish without a Country*, Inter-American Tropical Tuna Commission (1980); W.L. Klawe, "What is Tuna", *Marine Fisheries Review* 39(11) (1977): pp. 1-5.

82 W.T. Burke, note 32 above at p. 136.

83 Ibid.

84 See B.M. Tsamenyi, "The South Pacific States and Sovereignty over Highly Migratory Species", *Marine Policy* 10 (1986): pp. 29-41; C.R Kelly, "Law of the Sea: The Jurisdictional Dispute over Highly Migratory Species of Tuna", *Columbia Journal of Transnational Law* 23(3) 1988); W.T Burke, "Highly Migratory Species (HMS) in the Law of the Sea, *Ocean Development and International Law*

Article 64 clearly affirms the sovereign rights of coastal States over highly migratory species in the EEZ. Paragraph 2 states that it supplements the other provisions of Part V dealing with tuna resources. Under article 64, coastal States are required to co-operate with other States whose nationals fish for tuna in the region, in the management and conservation of highly migratory species in that region, both within and beyond the EEZ of States in that region. The objective of any co-operative arrangement entered into by the States concerned is to ensure the conservation of highly migratory species and to promote the objective of optimum utilisation of highly migratory species in that region. The aim therefore should be to apply the management measures throughout the entire range of the highly migratory species.

The duty to co-operate may be executed either directly or through appropriate international organisations. There is nothing in article 64 to suggest that these two options cannot be pursued at the same time. States can co-operate through using more than one mechanism even for the same tuna fisheries.[86] The phrase "with a view to ensuring conservation and promoting the objective of optimum utilisation" of tuna emphasise the goals stipulated in article 61(2) of sound management and conservation. The requirement that HMS be managed "both within and beyond the EEZ" links article 64 with articles 87 and article 116 of the LOSC. These linkages reflect the continuum of ocean space and the artificiality of jurisdictional boundaries. This was one of the reasons for the strong position taken by the United States. Its justification was that:

---

14 (1984-85): pp. 273-314; Peter N. Rasmussen, "The Tuna War: Fishery Jurisdiction in International Law", *University of Illinois Law Review* (1981): pp. 744-755.

85 See the statement of President Bush upon signing H.R 2061 (Fishery Conservation Amendments of 1990, Public Law 101-627); 4 *US Code: Congressional and Administrative News*, 101st Congress, Second Session 1990, 4436 (US. Code, title 16, sect. 1801) 26 *Weekly Compilation of Presidential Documents* 1932 (28 November 1990).

86 M.H Nordquist, note 18 above at p. 657.

> Tuna are not a resident resource of the EEZ. They are only found within any EEZ temporarily and may migrate far out into the ocean waters beyond. Therefore, the coastal State does not have the ability to manage and conserve tuna nor does it have a paramount interest in their development. Although many coastal States claim jurisdiction over tuna within 200 nautical miles, none exercises conservation and management authority through purely domestic measures. Only through international agreements have States actually managed effectively highly migratory tuna species....[87]

Article 118 of the LOSC requires States to co-operate in the conservation and management of the tuna resources of the high seas and, as appropriate, to establish sub-regional or regional organisations for that purpose.

### E. Management of High Seas Tuna

The foregoing discussion has highlighted the relationship between the provisions regulating stocks that move between the different jurisdictional boundaries. The high seas regime is set out in Part VII of the LOSC. Although article 87 preserves the freedom of fishing, article 116 which is the operational provision as far as tuna is concerned, clearly limits this freedom to treaty obligations the rights and duties as well as interests of coastal States as provided for in articles 63(2) and articles 64 and 67. The principle of freedom of fishing in article 116 cannot be interpreted as exclusive, but is subject to the fishing rights of other States. This view is supported by Burke who argues that "the qualification in article 116 that freedom of fishing is subject to coastal State rights strongly suggests that freedom to fish on the high seas is restricted by the fishing rights of other States, particularly coastal States."[88]

---

87 Statement from the US State Department quoted in W.T Burke, "Highly Migratory Species (HMS) in the Law of the Sea", *Ocean Development and International Law* 14 (1984): pp. 273-314.

88 W.T. Burke, note 32 above at pp. 82-150.

The LOSC imposes three main management and conservation obligations on States fishing on the high seas. The first is article 117 which requires States to take, either individually or collectively, conservation measures which must be complied with by their nationals. The second is article 118, which requires States to co-operate with each other in the conservation and management of the tuna resources of the high seas. This provision envisages the establishment of sub-regional or regional organisations which would have the objective of conserving the tuna resources. Thirdly, article 119 stipulates the parameters which are to be taken into account when determining the allowable catch and establishing the conservation measures. These include the special requirements of developing States[89] and the effects on species associated with or dependent upon harvested species.[90] The LOSC provisions on the management of high seas tuna stocks have come under increasing scrutiny because of the impact they have had on some tuna species.[91]

In 1992, the FAO convened a technical consultation on high seas fishing. The consultation agreed that the management of high seas tuna stocks should be conducted within the framework of the LOSC. A number of new concepts and techniques for high seas tuna management were adopted which included the principle that high seas tuna should be:

> ...conducted in accordance with the concept of responsible fishing that, as stated in the Declaration of Cancún, "encompasses the sustainable utilisation of tuna resources in harmony with the environment; the use of capture and aquaculture practices which are not harmful to the ecosystem, resources or their quality; the incorporation of added value to such products

---

89 LOSC, Art. 119(1)(a).

90 LOSC, Art. 119(1)(b).

91 E. Meltzer, "Global Overview of Straddling and Highly Migratory Fish Stocks: The Non-sustainable Nature of High Seas Fisheries, *Ocean Development and International Law* 25(3) (1994).

> through transformation processes meeting the required sanitary standards; the conduct of commercial practices so as to provide consumers access to good quality products.[92]

The consultation also agreed that for management and conservation measures to be effective, the tuna stocks should be managed throughout their entire range. The FAO Consultation stated that:

> ..tuna management should be concerned with the whole stock unit in its entire area of distribution, and take into account all sources of removals. In the case of tuna stocks that occur both within the EEZ of one or more States and the adjacent high seas, or tuna stocks entirely located in the high seas, management measures should be harmonised between the States involved, and also, where appropriate, through relevant regional and subregional tuna management bodies, within the framework of the LOSC.[93]

## III. EFFECTIVENESS OF THE EXISTING INTERNATIONAL LAW FRAMEWORK FOR TUNA MANAGEMENT

The pre-eminence of the LOSC as the major source of international law regulating tuna is duly acknowledged by the international community. This is evident in Chapter 17.1 of Agenda 21:

> The marine environment - including the oceans and all seas and adjacent coastal areas - forms an integrated whole that is an essential component of the global life support system and a positive asset that presents opportunities for sustainable development. International law as reflected in the provisions of the United Nations Convention on the Law of the Sea referred to in this Chapter of Agenda 21, sets forth rights and obligations of States and provides the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources. ...

---

92 FAO, *Report of the Technical Consultation on High Seas Fishing*, Rome, 7-15 *September, 1992*, (Rome: Food and Agriculture Organisation, 1992): para. 53.

93 Ibid.

The effectiveness of the international law framework for tuna management can be viewed from two perspective. First, can it prevent the over-exploitation of the tuna resources, and second, does it provide the basis for the sustainable development of the tuna resources. One view is that the LOSC is an effective legal framework for tuna management. The other view is that the LOSC is an ineffective legal framework for the management of the tuna resources.

### A. The LOSC is an Effective Legal Framework for Tuna Management

The LOSC is the most comprehensive international treaty governing the various uses of the ocean. The United Nations Conference on Environment and Development (UNCED) admits that the LOSC provides the international basis to pursue the protection and sustainable development of the marine and coastal environment and its resources.[94] However, what is needed is new approaches to marine and coastal area management and development at the national, subregional, regional and global levels. These approaches must be based on integration of marine and coastal area management into the development planning process and should be precautionary in nature. This is an acknowledgment that there is nothing intrinsically wrong with the substantive provisions of the LOSC. What is required is for States to adopt a new attitude towards the management and conservation of the tuna resources.

This proposition is generally consistent with the conclusions of the World Commission on Environment and Development (WCED).[95] The WCED noted that the LOSC has "provided an institutional setting that could lead to better management of these

---

94 Chapter 17.1 Agenda 21.

95 World Commission on Environment and Development, *Our Common Future*, (Australian Edition), (Melbourne: Oxford University Press, 1987): p. 309.

areas (EEZs), given that single governments may be expected to manage more rationally resources over which they have sole control."[96] However, the WCED warns that this expectation probably ignores the realities of short-sighted political and economic goals.

The WCED recommended that a number of actions are urgently needed to improve regimes for ocean management. These measures should:

- strengthen capacity for national action, especially in developing countries;
- improve fisheries management;
- reinforce co-operation in semi-enclosed and regional seas;
- strengthen control of ocean disposal of hazardous and nuclear wastes; and
- advance the Law of the Sea.[97]

The WCED argued that the LOSC represents the most ambitious attempt to provide an internationally agreed regime for the management of the oceans. The resulting Convention, it states, "represents a major step towards an integrated management regime for the oceans."[98]

The *Declaration of Cancún*, acknowledges that the LOSC contains relevant legal principles applying to fishing in areas under national jurisdiction and on the high seas.[99] Moreover, the report of the Secretary-General to the forty-fifth session of the UNGA, states:

> The comprehensive legal framework under the Convention provides the foundation for the use of the ocean and the development and management of its resources. It is fundamental to

---

96 Ibid.

97 Ibid.

98 Ibid.

99 "Declaration of Cancún", *International Conference on Responsible Fishing*, Mexico, 6-8 May, 1992, *reprinted in* Annex 2 of the Papers presented at the *Technical Consultation on High Seas Fishing*, FAO Fisheries Report No. 484, Suppl., (Rome: Food and Agriculture Organisation, 1992): p. 70. Para. 10 Preamble of the *Declaration of Cancún*, note 42. See FAO, *Conservation and Rational Utilisation of Living Marine Resources with Special Reference to Responsible Fishing*, Committee on Fisheries Twentieth Session, 15-19 March 1993, (Rome, FAO DOC. COFI/93/5, 1993): p. 8.

> rational development and management that there should be compliance with the internationally agreed legal framework and that the laws and regulations of States should conform with the Convention. To do otherwise would result in protests and repudiation from third States that could jeopardise peaceful uses and hinder resource development. A stable legal order is a prerequisite for proper management and for securing investment and international funding to support marine-related activities.[100]

It may be argued that the general deterioration in the state of world tuna stocks over the past twenty years has little to do with the LOSC.[101] A list of reasons why tuna stocks have continued to decline do not seem to be attributed to weaknesses in the LOSC.[102] Some of the reasons include:

- the reluctance of some governments to commit themselves to industry restrictions and restructuring programs necessary to achieve rationalisation;
- the continued subsidisation of the fishing industry directly, or indirectly, to associated industries;
- poor control of fleets by flag States, leading to high incidences of unauthorised fishing;
- lack of commitment to international co-operation;
- limited mandates for some fisheries bodies;
- reluctance by some countries to comply with scientific advice concerning conservation and management;
- decreased attention to local fishing by area managers and the fishing communities they serve;
- resistance to the introduction of limited entry and output restrictions particularly where tuna fishermen are well organised politically and where there is uncertainty in tuna policy and the effect of structural adjustment; and

---

100 Report of the Secretary-General, *Realisation of Benefits under the United Nations Convention on the Law of the Sea: Needs of States in regard to Development and Management of Ocean Resources*, (New York: UN. DOC. A/45/712, 16 November 1990): p. 10.

101 See FAO, *The State of World Fisheries and Aquaculture*, (Rome: Food and Agriculture Organisation, 1995).

102 David Doulman, *An Overview of World Fisheries: Challenges and Prospects for Achieving Sustainable Resource Use*, Paper presented at the 30th Annual Meeting of the Law of the Sea Institute, Al-Ain, United Arab Emirates, May 19-22 1996.

- lack of technical and financial capacity of developing countries to implement and monitor tuna conservation and management measures.[103]

The foregoing supports the view that the LOSC provides an effective legal framework for tuna management. The failures of the framework, however, are due to individual governments' political and economic goals that lead them to ignore the full potential the LOSC offers. Chapter 17.1 of Agenda 21 states that what is needed are new approaches to tuna management.

## B. The LOSC is an Ineffective Legal Framework for Tuna Management

The LOSC effectively transformed international law by transferring tuna management and conservation responsibilities to coastal States. In a penetrating analyses of the tuna provisions of the LOSC, Johnston argues that the:

> central role assigned to coastal States in ocean fisheries development, management, and conservation does, on the face of things, mean a less diffuse approach to decision-making than was possible in the age when regional tuna fisheries commissions were dominant. It might also seem that the reduced mobility of the world fishing industry is conducive to more effective management. But managing coastal States in general have failed so far, it is said, to develop a working formula designed to achieve socio-economic optimisation, and it is felt that few have made the hard political decisions necessary to deal with the domestic problem of allocation, perhaps because of the lack of supportive public opinion.[104]

---

103 Ibid.

104 Douglas M. Johnston, (1991), note 29 above at pp. 199-208.

The LOSC framework has also been criticised by a number of international law experts.[105] They argue that the LOSC is essentially a political document which reflects the lowest common denominator in the international community. Arvid Pardo has argued that:

> ...many of the legal rules established are sometimes based on nothing more than political deals designed to accommodate the interests of individual States. As a political document, the present Convention reflects - although to a different extent and in different ways - both the predominant interests of politically ascendant States and the general aspirations of the contemporary world community.[106]

Another problem is the present legal framework assumes that all coastal States are prepared to manage their living marine resources. This is a fundamental deficiency of the LOSC, that all coastal States are "both willing and capable" of effectively administering the living marine resources within their EEZs; an assumption that does not correspond to reality.[107] Even if all coastal States had the capability, rational management of the living marine resources would be impossible in the small marine areas allocated to the majority of coastal States.[108]

Although the LOSC provides a management and conservation framework under articles 61 and 62, it does not provide coastal States with any guidelines as to how they are to be implemented.[109] Unless coastal States can effectively implement their obligations under these two articles of the LOSC, the management system contemplated under the LOSC will

---

105 Arvid Pardo, "The Convention on the Law of the Sea: A Preliminary Appraisal", Frederick E. Synder and Surakiat Sathirathia (ed),*Third World Attitudes Toward International Law: An Introduction*, (Dordrecht: Martinus Nijhoff Publishers, 1987): pp. 737-749; Lawrence Juda, "The Exclusive Economic Zone and Ocean Management", *Ocean Development and International Law* 18(3) (1987): pp. 223-224; Martin B. Tsamenyi, "Legal Implications of Entry into Force of UNCLOS for Coastal and Maritime Zone Planning and Management - Resource Issues", *Coastal and Maritime Zone Planning and Management: Transnational and Legal Considerations*, (Wollongong: Centre for Maritime Policy, 1995): pp. 37-47.

106 A. Pardo, ibid., p. 743.

107 Ibid.

108 Ibid.

109 Ibid.

be rendered ineffective. If these provisions remain difficult, or near impossible to implement, the injunctions they contain could become a "dead letter."[110]

It has been argued that the LOSC does not provide a holistic approach in particular with regards to the marine environment. The LOSC divides the marine environment into different sectors but does not take account of the biological characteristics of the tuna resources which do not recognise jurisdictional boundaries. There is no linkage between the management of living marine resources within waters that fall under the sovereignty of coastal States and those that are found in the EEZ. Unless the same tuna management and conservation principles apply throughout the entire marine environment, it is inconceivable that proper management can be achieved by having different principles applying within the various jurisdictional zone. Suzuki[111] states that "these human bureaucratic subdivisions make no ecological sense, and they severely hamper any attempt to solve ecological problems." Furthermore, the "LOSC provides no comprehensive framework for co-ordination between different uses of the sea and the interaction of these activities with one another."[112] As explained by Juda:

> UNCLOS III focused its attention on issues of allocation, on matters of jurisdictional competence. Who was to have authority in which zones and for which purposes was the centre of diplomatic concern. In an effort to balance the varied needs of the multiplicity of States and interests, different jurisdictional zones, some already in existence and some new, were recognised. It may be that while these discrete zones, with their differing sets of legal rights and duties, serve important political and legal purposes, their existence may, in fact, clash with the needs of effective ocean management which, it increasingly appears, must be approached in an integrated fashion. A parting question which deserves careful and increasing attention is:

---

110 Ibid.

111 David Suzuki, *Time to Change*, (Sydney: Allen & Unwin Publishers, 1993): 8.

112 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): 31.

> how can integrated offshore management of the coastal belt be achieved without blurring the essential distinction inherent in the multiplicity of different jurisdictional zones stretching from the coastal zone to the high seas?[113]

The two most difficult tuna management and conservation problems are overfishing and over-capitalisation of tuna fleets.[114] It may be argued that the LOSC has failed to address these two problems. The FAO has said that the most important issue that needs to be dealt with involves the massive waste in fishing and controlling open access.[115] While the extension of national jurisdiction has been hailed as a success, it was a necessary but insufficient step in the process. Open access is still a problem within the zones of coastal States as well as the high seas.[116] Most fish stocks of commercial value have been over- fished or are under severe pressure.[117]

From a biological and conservation perspective, the list in Annex I of the LOSC is not complete because it omits some tuna species.[118] Furthermore, some species of fish which are known to be more highly migratory than some Annex I species are not included in the Annex.[119] These species include many of the mackerel species and bonito species. Marine mammals which are also highly migratory have also been excluded from Annex I and instead been afforded separate treatment.[120] Furthermore, separate management schemes are

---

113 L. Juda, (1987), ibid., pp. 223-224.

114 FAO, (1993), note 112 above.

115 Ibid.

116 Ibid.

117 Ibid.

118 Scientists state that there are eleven known species of "true" tuna. These are albacore (*Thunnus alalunga*), northern bluefin tuna (*Thunnus thynnus*), southern bluefin tuna (*Thunnus macoyii*), bigeye tuna (*Thunnus obesus*), blackfin tuna (*Thunnus atlanticus*), little tuna (*Euthynnus allotteratus*), Kawakawa (*Euthynnus affinis*), skipjack tuna (*Katsuwonus pelamis*), yellowfin tuna (*Thunnus albacares*), black skipjack (*Euthynnus lineatus*) and longtail tuna (*Thunnus tanggol*), see J. Joseph et. al., (1980), note 81 above at p. 43. The latter two species are excluded from Annex I of the LOSC.

119 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): p. 4.

120 LOSC, Art. 65.

provided for in the LOSC for anadromous[121] and catadromous[122] species which are clearly highly migratory species. However, in the context of the EEZ, the species selected under the LOSC as highly migratory are only those of economic importance.

### C. Neutral Perspective on the LOSC

The most common perception of the LOSC is that it provides the basis for international management of the tuna resources. Tuna catches throughout the world have continued to increase.[123] Although encouraging progress and adjustments have been made to the realities of the new ocean regime, a number of outstanding issues continue to confront world tuna fisheries. Some of these are longstanding while others are more recent. The FAO has called for better matching of supply and demand, and better management practices.[124] However, it cautions that changes will require making difficult political decisions. The FAO stated that, "while in general the 1980s might be considered an inevitable period of transition and adjustment to the realities of the new law of the sea and in the ownership of marine resources, many tasks still need to be completed before the potential benefits of extended national jurisdiction can be more completely attained."[125]

The LOSC, however, provides a framework within which coastal States can manage the tuna resources. The extent to which coastal States can utilise this framework will depend

---

121 LOSC, Art. 66.

122 LOSC, Art. 67.

123 FAO, *World Fisheries Ten Years after the adoption of the 1982 United Nations Convention on the Law of the Sea*, Paper prepared for the Twentieth Session of the FAO Committee on Fisheries, 15-19 March, 1993, Rome, COFI/93/4.

124 Ibid., p. 10.

125 Ibid., p. 15

on various factors. These could be political, economic, social or financial. An objective view of the LOSC is given up by Mensah:

> The Law of the Sea Convention, can be, and has been viewed from many different viewpoints. It may be regarded as a *legal document* which defines legal rights, obligations and responsibilities. Alternatively, it may be considered as a political statement outlining the ways in which the seas may be used and managed in the contemporary world. ..... I believe it is more helpful to view the Convention as a framework document which addresses a number of issues all of which relate to the same subject, but each of which is different in its scope and orientation.[126]

## IV. CONCLUSION

This chapter has analysed the international law framework for tuna management from a number of perspectives. It was seen that the traditional notion of management through freedom of fishing was not conducive to the management of the tuna resources. The major change to the management of the tuna resources brought about by the LOSC was shifting away from management through freedom of fishing on the high seas to coastal State control in the EEZ. The discussion attempted to show that the management regime established under the LOSC for the tuna resources in the EEZ is based on coastal States' sovereign rights over the tuna resources in the EEZ. The LOSC also imposes a responsibility on coastal States to manage and conserve the tuna resources. It is not enough for coastal States to simply claim an EEZ. Coastal States must demonstrate that they are capable of fulfilling the tuna management and conservation obligations under the LOSC.

---

126 Thomas Mensah, "Keynote Address", *The United Nations Convention on the Law of the Sea: What it means to Australia and Australia's Marine Industries*, Martin Tsamenyi et al, (ed), (Wollongong: Wollongong Papers on Maritime Policy No. 3, 1996): p. 11.

The Chapter that follows will show how the international community has dealt with the problems regarding the lack of specificity in the LOSC.

# 3

# POST-LAW OF THE SEA INITIATIVES

## I. INTRODUCTION

By the early 1990s, there was growing discontent with the LOSC, in particular, its effectiveness in preventing the overexploitation of tuna especially on the high seas.[1] This prompted the international community to negotiate several international instruments which supplement the LOSC in so far as tuna management is concerned.[2]

Chapter 3 analyses these post-Law of the Sea initiatives. These initiatives are the *Agenda 21 Programme of Action for Sustainable Development,*[3] 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 Conservation and Management of Straddling Fish*

---

1 See generally FAO, *Report of the World Conference on Fisheries Management and Development, Rome, 27 June - 6 July, 1984*, (Rome: Food and Agriculture Organisation, 1984); FAO, *Review of World Marine Fishery Resources*, (Rome: FAO Fisheries Technical Paper 335, 1994); "Tragedy of the Oceans", *Economist*, March 19, 1994; Elden V.C. Greenberg, "Overview of Ocean Fisheries and Law", *Entl. L. Inst.* (1993): 2; World Commission on Environment and Development, *Our Common Future*, (Oxford: Oxford University Press, 1987); John E. Bardach, "Sustainable Development of Fisheries", *Ocean Yearbook 9*, Elizabeth Mann Borgese et. al. (eds.), (London and Chicago: University of Chicago Press, 1991): pp. 57-72; UNGA Resolution 44/225 on large-scale Pelagic Driftnet Fishing *reproduced in* 29 I.L.M. (1990): p. 1555 and UNGA Resolution 45/197 of December 21, 1990 and UNGA Resolution 46/215 of December 20, 1991. The latter is *reproduced in* 31 I.L.M. (1992): p. 241.

2 See E. Hey, "Global Fisheries Regulations in the First Half of the 1990s", *The International Journal of Coastal and Marine Law* 11(4) (1996): pp. 459-490; Patricia W. Birnie, "The Law of the Sea and the United Nations Conference on Environment and Development", *Ocean Yearbook 10*, Elizabeth Mann Borgese et. al. (eds.), (London and Chicago: University of Chicago Press, 1993): pp. 13-39.

3 See United Nations, UNGA Resolution 47/190, *Report of the United Nations Conference on Environment and Development*, (New York: United Nations, 1992) [hereinafter "Agenda 21"].

*Stocks and Highly Migratory Fish Stocks* (Fish Stocks Agreement),[4] the FAO *Code of Conduct for Responsible Fishing* [5] and the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*. (Compliance Agreement).[6] Part II examines the main provisions of the Agenda 21 and the constraints to its implementation. It will be shown that Agenda 21 enhances the management and conservation of tuna by articulating the principles which should be applied by States in their management. Part III briefly discusses the Fish Stocks Agreement. Part IV examines the FAO Code of Conduct for Responsible Fishing and Part V discusses the Compliance Agreement. Chapter 3 concludes that these post-Law of the Sea initiatives could potentially enhance the management of tuna if implemented by all States.

## II. AGENDA 21: PROGRAMME OF ACTION FOR SUSTAINABLE DEVELOPMENT

One of the significant outcomes of the 1992 United Nations Conference on Environment and Development was the agreement on the *Agenda 21: Programme of Action for Sustainable Development*. Agenda 21 is a non-legally binding document which purports to provide a blueprint for sustainable development of the world's natural resources in the 21st century. However, it is said to have enormous political and moral value because of the length of time it took to negotiate and the large number of States that participated in its negotiation.[7]

---

4 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. Also *reproduced in* 34 *International Legal Materials* (1995): p. 1542 (hereinafter "Fish Stocks Agreement").

5 FAO, *Code of Conduct for Responsible Fishing*, Food And Agriculture, (Rome: Food and Agriculture Organisation, 1995).

6 FAO, *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, (Rome: Food and Agriculture Organisation, 1993). Also *reprinted in* 33 *International Legal Materials* (1993): p. 968 [hereinafter "Compliance Agreement"].

7 See Biliana Cicin-Sain and Robert W. Knecht, "Implications of the Earth Summit for Ocean and Coastal Governance", *Ocean Development and International Law* 24 (1993): pp. 232-353.

The unsustainable use of the world's natural resources, including tuna, prompted the United Nations General Assembly (UNGA) on 22 December, 1989, to adopt resolution 44/228[8] calling for a meeting at "the highest possible level of participation" in order to "elaborate strategies and measures to halt and reverse the effects of environmental degradation in the context of increased national and international efforts to promote sustainable and environmentally sound development in all countries."[9] This led to the convening of the United Nations Conference on Environment and Development (UNCED) attended by 178 heads of government from 3 to 14 June 1992 in Rio de Janeiro, Brazil. It committed the international community to 27 principles for sustainable development contained in the Declaration of Rio on Environment and Development (Rio Declaration) and the negotiated text of Agenda 21. The Rio Declaration was endorsed by the UNGA in resolution 47/190 of 22 December 1992.[10] To ensure that the programme of action established in Agenda 21 was implemented, UNCED requested the United Nations General Assembly to establish a United Nations Commission for Sustainable Development (UNCSD). This was established at the United Nations Headquarters in 1992 and consists of representatives of the United Nations. It serves as the principal "watch dog" to monitor progress on the implementation of the Rio Declaration and Agenda 21.

The most important part of Agenda 21, for the purposes of this discussion, is Chapter 17 which deals with "Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources."[11]

---

8 United Nations General Assembly, UNGA/RES/44/228, 22 December, 1989, (New York: United Nations, 1989). Several FAO Reports have highlighted the urgency of the need to manage the world's fish stocks in a sustainable manner; S.M. García & J. Majkowski, *State of High Seas Resources*, (Rome: Food and Agriculture Organisation: Fisheries Department, 1992); FAO, *World Fisheries after the adoption of the 1982 United Nations Convention on the Law of the Sea*, (Rome: FAO Committee on Fisheries Twentieth Session, 15-19 March 1993); FAO, "FAO Urges Increased Controls over Ocean Fishing", FAO/3592, 14 April, (1994); see also S.M. García and C. Newton, *Current Situation, Trends and Prospects in World Capture Fisheries*, Paper presented at the Conference on Fisheries Management, Seattle, Washington, 14-16 June (1994): p. 6.

9 Ibid.

10 United Nations General Assembly, 1992, UNGA/RES/47/190, n. 3 above at p. 1.

11 See FAO, *UNCED and its Implications for Fisheries*, Paper presented to the Twentieth Session of the FAO Committee on Fisheries, Rome, 15-19 March, (1993).

### A. Agenda 21 Programme for Resource Management and Conservation

Chapter 17 of Agenda 21 transforms the international law framework for tuna management by departing from the jurisdictional approach of the LOSC. It advocates an eco-system approach to ocean resources management.[12] Chapter 17 of Agenda 21 recognises that "the marine environment, including the oceans and all seas and adjacent coastal areas, forms an integrated whole that is an essential component of the global life support system and a positive asset that presents opportunities for sustainable development."[13] Furthermore, although it acknowledges that the LOSC reflects international law, and provides the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources, it states that new approaches are required to marine and coastal area management and development which are integrated in content and anticipatory in ambit.[14]

The concept of "sustainability" clearly underpins Chapter 17 of Agenda 21.[15] However, as Johnston argues, in spite of efforts to re-evaluate ocean development along

---

12 B.M. Tsamenyi, *Mechanisms for Integrated Resource Management*, Paper presented at the 29th Annual Conference of the Law of the Sea Institute, Denpasar, Bali, 19-22 June (1995): p. 12; Stella Vallejo, "The Integration of Coastal Management into National Development Planning", *Ocean and Coastal Management* 21 (1993): pp. 1-3 and 163-182.

13 Agenda 21, Chapter 17, at 17.1.

14 Ibid.

15 The term "sustainability" was first characterised by the Bruntlund Commission. See WCED (The World Commission on Environment and Development), *Our Common Future*, (Oxford: Oxford University Press, 1987). However, the International Union for the Conservation of Nature (IUCN) has used the term in combination with other terms such as "sustainable use", and "sustainable economy". In its document *Caring for the Earth: A Strategy for Sustainable Living*, (1991) IUCN, UNEP and WWF offers these comments on this matter of terminology:

> If an activity is sustainable, for all practical purposes it can continue forever. When people define an activity as sustainable, however, it is on the basis of what they know at the time. There can be no long term guarantee of sustainability, because many factors remain unknown or unpredictable. The moral we draw from this is: be conservative in actions that could affect the environment, study the effects of such actions carefully, and learn from your mistakes. The World Commission on Environment and Development (WCED) defined 'sustainable development' as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. The term has been criticised as ambiguous and open to a wide range of interpretations, many of which are contradictory. The confusion has been caused because 'sustainable development', 'sustainable growth' and 'sustainable use', have been used interchangeably, as if their meanings were the same. They are not. 'Sustainable growth' is a contradiction in terms: nothing physical can grow indefinitely. 'Sustainable use' is applicable only to

these lines, the "magnitude of this intellectual challenge is daunting, and the institutional implications are almost overwhelming."[16] Johnston suggests that the first response to Chapter 17 of Agenda 21 may have to be "a shared perception that present patterns of utilisation of the world's oceans are not sustainable, accompanied by a shared willingness on the part of national governments and other significant actors in the world community to provide the means for a truly integrated approach to sustainable ocean development and decision making beyond the confines of sectoral responsibilities."[17]

Some attempt, by prominent international and environmental lawyers, has been made to determine whether the principle of sustainable use resources is now a recognised rule of international law.[18] The conclusion of the group of experts indicate that States have a duty to ensure sustainable use of resources. The group of experts, *inter alia*, stated that:

> ... legal development has focused on State obligations with respect to the environment of other, mostly neighbouring States, as is clearly reflected in Principle 21 of the Stockholm Declaration. However, a distinct tendency can be discerned from UN resolutions and treaty law to impose duties on States with respect to the management of their natural wealth and resources so as to ensure sustainable production and consumption, in the interest of the peoples of their own and other States and of humankind including future generations. These obligations respond to environmental problems of international if not global concern, recognised under international law that natural resource management should no longer fall within the exclusive domestic jurisdiction of individual States.[19]

---

> renewable resources: it means using them at rates within their capacity for renewal. 'Sustainable development' is used in this Strategy [Caring for the Earth] to mean: improving the quality of human life while living within the carrying capacity of supporting ecosystems. A sustainable economy is the product of sustainable development...

Robinson and others, *Agenda 21 and the UNCED Proceedings*, vol. 1, at xv-xvi, n. 1 above.

16 Douglas M. Johnston, *Agenda 21: The Coastal and Ocean Challenges*, Paper prepared for the SEAPOL Singapore Conference on Sustainable Development of Coastal and Ocean Areas in Southeast Asia: Post Rio Perspectives, Singapore, May 26-28, (1994).

17 Ibid., p. 19.

18 UN Division for Sustainable Development, *Report of the Experts Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva, Switzerland, 26-28 September, 1995*, Paper prepared for the Forth Session of the Commission on Sustainable Development 18 April-3 May, 1996, (New York: United Nations, 1996).

19 Ibid., para. 63.

For the purpose of this Thesis, the most relevant parts of Agenda 21 Chapter 17 are Programmes C and D dealing with the sustainable use and conservation of marine resources. These Programmes are discussed below.

### Programme C: Sustainable Use and Conservation of Marine Living Resources of the High Seas

The enclosure of most fishing grounds under the EEZ regime prompted fishing States to relocate their vessels to the high seas. The expansion of the fishing activities on the high seas in the past decade subjected a number of high seas fisheries resources to overexploitation.[20] The activities of these fleets demonstrate the weakness of international fisheries Commissions effectively to conserve and manage high seas fish stocks.[21] The other major problems identified with high seas fishing include unregulated fishing, overcapitalisation, excessive fleet size, vessel reflagging to evade controls, unreliable databases, insufficiently selective gear and lack of sufficient co-operation between States.[22]

Program C enjoins States to take "effective action", including bilateral and multilateral co-operation to ensure that high seas fishery resources are managed in accordance with the LOSC.[23] The Program also calls upon States to give "full effect" to those provisions of the LOSC dealing with fishery populations whose range lie both within and beyond the EEZ (straddling stock) and highly migratory species.[24] It prescribes a range of measures which States must enact. These include deterring the reflagging of vessels by their nationals, minimising by-catch, prohibiting destructive fishing practices, fully implementing UNGA resolution 46/215 on large-scale pelagic driftnet fishing, reducing waste, post harvest losses and discards.[25] States are called upon to convene an

---

20 FAO, *State of the Worlds Fishery Resources Reports*, n. 1 above.

21 FAO, *Background to High Seas Fishing Issues*, Papers presented at the Technical Consultation on High Seas Fishing, Rome, 7-15 September 1992, (Rome: Food and Agriculture Organisation Fisheries Report No. 484 Supplement, 1992): pp. 1-12 at p. 7.

22 Agenda 21, Chapter 17.45.

23 Agenda 21, Chapter 17.49.

24 Agenda 21, Chapter 17.49(a) & (b).

25 Agenda 21, Chapter 17.50 to 55.

intergovernmental conference to "promote the effective implementation" of the provisions of the LOSC pertaining to straddling fish stocks and highly migratory species.[26]

Much of Programme C, however, reiterates the broad principles of the high seas provisions of the LOSC and therefore "maintains the status quo as far as high seas fisheries management is concerned."[27] The UNCSD has noted that significant fish stocks continue to be depleted and over exploited, and has called for urgent corrective action to rebuild depleted fish stocks and ensure the sustainable use of all fish stocks.[28]

### Programme D: Sustainable Use and Conservation of Marine Living Resources Under National Jurisdiction

Approximately 95 percent of the world's fisheries catch is taken from the EEZ.[29] However, fisheries in areas under national jurisdiction are facing increasing problems especially from local overfishing, unauthorised fishing by foreign fleets, ecosystem degradation, overcapitalisation and excessive fleet sizes, undervaluation of catch, and increasing competition between artisanal and large-scale fishing.[30]

Under this Programme, States commit themselves to a number of development and conservation objectives. These include the development of fisheries to meet human nutritional needs, taking into account traditional knowledge and small-scale fisheries; using selective fishing gear to minimise by-catch; and protecting endangered marine species and ecologically sensitive areas.[31] It also calls on States to develop fisheries and marine aquaculture, with a special emphasis on small-scale artisanal fisheries.[32] It calls for the strengthening of legal and regulatory framework for fisheries management; use of selective fishery gear to reduce wastage; post-harvest losses and discards; use of environmentally

---

26 Agenda 21, Chapter 17.49(e).

27 B.M. Tsamenyi, n. 12 above at p. 20.

28 United Nations, *Review of Sectoral Clusters: Protection of the Atmosphere and Protection of the Oceans and all Kinds of Seas*, Commission on Sustainable Development, Fourth Session, 18 April-3 May 1996, Agenda item 6(a), Draft Decision submitted by the Chairman, (New York: UNCSD Doc, E/CN. 17/1996/L.22, 2 May 1996): para. 1.

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

30 Agenda 21, Chapter 17.71.

31 Agenda 21, Chapter 17.75.

32 Agenda 21, Chapter 17. 79 & 82.

sound technology, including assessment of the environmental impact of major fishery practices,[33] encouragement of recreational and tourist activities based on marine living resources,[34] and protection of marine ecosystems exhibiting high levels of diversity and productivity, such as coral reefs, estuaries, wetlands, and seagrass beds.[35] It also calls for the transfer of environmentally sound technologies to develop fisheries and aquaculture, particularly to developing countries,[36] and a number of measures to increase the capacity for fisheries management such as support to local fishing communities.[37] The total cost of implementing this programme is estimated at $6 billion, including $60 million from the international community on grant or concessional terms.

The significance of Chapter 17 is that it gives those States that wish to develop new approaches to fisheries conservation and management a legitimate basis for formulating their policies. Chapter 17 of Agenda 21 must therefore be viewed as part of an evolving process and as an audit or review rather than an end in itself.[38]

### B. Constraints to the Implementation of Agenda 21 Chapter 17

Efforts to promote sustainable development of the oceans are being undertaken by many States. However, according to the Secretary General of the United Nations report to the fourth session of the UNCSD, a number of constraints continue to affect these endeavours.[39] The main constraints to the implementation of Chapter 17 of Agenda 21 are listed as follows:

---

33 Agenda 21, Chapter 17.79.

34 Agenda 21, Chapter 17.81.

35 Agenda 21, Chapter 17.86.

36 Agenda 21, Chapter 17.93.

37 Agenda 21, Chapter 17.95.

38 E. Hey, note 2 above ibid., p. 469. See Ninian Stephen, "The United Nations Conference on Environment and Development: Beyond Brazil, 1992", *Australian Institute of International Affairs Occasional Paper Number 7*, Victoria, (1991): 10. For a discussion of the implementation of *Agenda 21* see Biliana Cicin-Sain, (1996), "Earth Summit Implementation: Progress since Rio", *Marine Policy* 20(2) (1996): pp. 123-143; Anthony Bergin and Frances B. Michaelis, "Australia and the South Pacific: Implementing the UNCED Oceans Agenda", *Marine Policy* 20(1) (1996): pp. 47-62.

39 United Nations, *Report of the Secretary General on the Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources*, Commission on Sustainable Development (Fourth session), 18 April-3 May 1996, (New York: UN DOC E/CN. 17/1996/3, 1996).

- Oceans and coastal areas are a finite economic asset which is not yet fully understood by governments, as is also the need for their sustainable and rational exploitation and the need for them to be given priority in national development plans;[40]
- There is still a lack of coherence and integration in government policies. While the concerns of the member governments are based on the same scientific and socio-economic bases, they are often expressed by different government representatives and different intergovernmental forums in different ways, as a result there is no coherent policy within the United Nations system;[41]
- Most countries have not developed national co-ordination mechanisms that would enhance the implementation of Chapter 17 of Agenda 21;[42]
- Private sector concerns and those of poor communities are driven by short-term economic priorities which give low priority to resource conservation and the needs of future generations;[43]
- Constraints in resources, particularly in developing countries limit the ability of governments to allocate funds to scientific research and its application to national policy options;[44]
- There is insufficient awareness of the need to identify and reduce uncertainties in human knowledge and its consequences, including the consequences for the health of exposed populations, and thus the need for a precautionary approach to management and development decisions;[45] and
- The United Nations systems' efforts need to be more co-ordinated, embracing scientific, technological and socio-economic factors.[46]

The UN Secretary General warns that "without appropriate action by governments and the relevant economic sectors to improve information systems, research support and programs, institutions and legal frameworks, the present situation can only worsen."[47] The Agenda 21 contains principles which, if applied, could potentially enhance the international law

---

40 Ibid., para. 8(a).
41 Ibid., para. 8(b).
42 Ibid., para. 8(c).
43 Ibid., para. 8(d).
44 Ibid., para. 8(e).
45 Ibid., para. 8(f).
46 Ibid., para. 8(g).
47 Ibid., para. 8.

framework for tuna management under the LOSC. However, its main weakness is that it is not legally binding on States.

## III. THE FISH STOCKS AGREEMENT

One of the outcomes of the UNCED was the decision to convene an international Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (HMS) under the auspices of the United Nations.[48] The Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks negotiated 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*, (Fish Stocks Agreement) over six sessions from 1993 to 1995.[49]

Given the particular implications of the Fish Stocks Agreement for the Pacific Island States, this Chapter will not provide a detailed analysis of the Agreement.[50] For the purposes of this Chapter, it is sufficient to briefly summarise some of the essential aspects of the Agreement. The Fish Stocks Agreement was negotiated because the LOSC provisions on straddling and highly migratory fish stocks do not provide specific guidelines on how to deal with these valuable stocks of fish which occur both in the EEZ and on the

---

48 United Nations General Assembly, *Resolution 47/192 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks*, (New York: United Nations, 1993): The UNGA decided, *inter alia*:

> ... to convene in 1993, under the United Nations auspices and in accordance with the mandate agreed upon at the United Nations Conference on Environment and Development, an Intergovernmental Conference on straddling fish stocks and highly migratory fish stocks, which should complete its work before the forty-ninth Session of the General Assembly.

The terms of reference of the Intergovernmental Conference and the scope and nature of its work was defined by United Nations General Assembly resolution 47/192. The Conference was given the task of

> (i) identifying and assessing existing problems related to the conservation and management of straddling fish stocks and highly migratory fish stocks;
> (ii) considering means of improving fisheries co-operation among States, and
> (iii) formulating appropriate recommendations.

49 See FAO, *Structure and Process of the 1993-1995 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks,* Rome: Food and Agriculture Organisation, Fisheries Circular 898, 1995): pp. 5-26. Also see, David Doulman, "Perspectives on the Management of High Seas Fisheries: The UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: A View from Rome", *Reviews in Fish Biology and Fisheries* 5 (1995): pp. 103-119.

50 See discussions in Chapter 10.

high seas.[51] As a result, some States whose vessels fish on the high seas disregard calls for greater conservation of certain fish stocks that have become endangered through environmental degradation and overfishing. Some coastal States have attempted to extend their jurisdiction over fish beyond the 200 mile limits set by the LOSC consequently destabilising the "delicate balance on which the LOSC as a whole rests."[52]

The significance of the Fish Stocks Agreement is underlined by the closing statement of the Chairman of the Conference, Ambassador Satya Nandan of Fiji.

> The instrument you have adopted is far sighted, far reaching, bold and revolutionary. It addresses the problems facing the international community in relation to the fisheries for straddling stocks and highly migratory fish stocks. It takes into account the nature of the stocks and calls therefore for action not only at the national level, but also at sub-regional, regional and global levels.[53]

The Agreement was based on three essential pillars. First, it enunciates the principles on which conservation and management of the stocks had to be based, including the use of the precautionary approach and the best available scientific evidence. Secondly, it ensures that the conservation and management measures are adhered to and complied with and not undermined. This is because the Fish Stocks Agreement reaffirms the primary responsibility of the flag State and establishes a framework for action by States other than

---

51 See Chiyuki Mizukami, "Fisheries Problems in the South Pacific Region", *Marine Policy* 15(2) (1991): pp. 111-121; F. Orrega Vicuna, "Toward an Effective Management of High Seas Fisheries and the Settlement of the Pending Issues of the Law of the Sea", *Ocean Development and International Law* 24 (1993): pp. 81-87; B. Kwiatkwoska, "The High Seas Fisheries Regime: At a Point of No Return", *International Journal of Marine and Coastal Law* 8 (1993): pp. 340-41.

52 David A. Bolton, "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks", *Ocean Development and International Law* 27(1-2) (1996): pp. 125-51 at p. 126; E. Miles and W.T. Burke, "Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks", *Ocean Development and International Law* 20 (1989): p. 343; B. Kwiatkwoska, "200 Mile Exclusive Economic/Fishery Zone and the Continental Shelf' - An Inventory of Recent State Practice", *International Journal of Coastal and Marine Law* 9 (1994): p. 199 (Part 1) and p. 337 (Part 2) *International Journal of Coastal and Marine Law* 10 (1995): p. 53 (Part 3).

53 United Nations, *Statement of the Chairman, Ambassador Satya Nandan, on 4 August 1995, upon the adoption of the Agreement for the Implementation of 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*, United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, Sixth Session, New York, 24 July-4 August 1995, (New York: UN Doc. A/CONF. 164/35, 1995).

the flag State to clear safeguards against abuse. Third, it provides for the peaceful settlement of disputes. Although the Fish Stocks Agreement provides various possibilities for non-binding settlement, in the end every dispute could be referred to a court or tribunal for a binding settlement.[54] Whether these expectations will be fulfilled remains to be seen. However, the Agreement provides coastal and fishing States with the opportunity to forge a new co-operative relationship based on the solid framework of sound principles of fisheries management and conservation.

The Fish Stocks Agreement's objective is to maintain the long-term conservation and sustainable use of straddling and highly migratory fish stocks through the effective implementation of the relevant provisions of the LOSC.[55] The Fish Stocks Agreement defines "conservation and management measures" as measures to conserve and manage one or more species of living marine resources that are adopted and applied consistently with the pertinent rules of international law as reflected in the LOSC and the Agreement. The Fish Stocks Agreement is to be interpreted and applied in the context of, and consistent with, the LOSC. Significantly, the obligations arising from the Agreement are without prejudice to the rights, duties and jurisdiction of States under the LOSC.[56] The Fish Stocks Agreement generally applies to the conservation and management of straddling fish stocks and highly migratory fish stocks in the high seas.[57]

The international community' efforts to regulate the exploitation of the tuna resource in a sustainable manner have been complemented by the Food and Agriculture Organisation (FAO). The section below examines the arrangements developed under the auspices of the FAO.

---

54 United Nations, 1995, *Report on the Sixth Session of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks*, United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, Sixth Session, New York, 24 July-4 August 1995, (New York: UN Doc A/CONF. 164/36, 1995): para. 21.

55 Fish Stocks Agreement, Art. 2.

56 Ibid., Art. 4.

57 Ibid., Art. 3(1).

## IV. THE FAO CODE OF CONDUCT FOR RESPONSIBLE FISHING

The United Nations Food and Agriculture Organisation (FAO) has provided a forum where tuna management issues can be discussed.[58] The idea of responsible fishing was first raised by the FAO Committee on Fisheries (COFI) in April 1991.[59] In May 1992, the Government of Mexico in consultation with the FAO, organised the International Conference on Responsible Fishing that led to the adoption of the Declaration of Cancún.[60] The Code of Conduct for Responsible Fishing is a product of the Declaration of Cancún, which called on the FAO to draft in consultation with relevant international organisations an International Code of Conduct for Responsible Fishing. More specifically, the Declaration direct States to:

> ...take steps to improve management systems as part of the practice of responsible fishing. They recognise the principle of sustainable utilisation of marine living resources as the basis for sound fisheries management policies. In this regard, they consider as one of the most important objectives the application of policies and measures which result in a level of fishing effort commensurate with the sustainable utilisation of fisheries resources, taking into account the specific characteristics of particular fisheries.[61]

The FAO Code of Conduct is a voluntary code[62] which has global application[63] directed at States and governmental and non-governmental fisheries agencies at the national,

---

58 See, FAO, *Review of FAO's Programs in Fisheries (1991-1992) Field Programme*, Paper presented to the Twentieth Session of the Committee on Fisheries, Rome, 15-19 March 1993, (Rome: FAO Doc. COFI/93/3) for a description of various FAO programs relating to fisheries.

59 FAO, *Report of the Nineteenth Session of the Committee on Fisheries, Rome, Italy, 8-12 April 1991*, (Rome: Food and Agriculture Organisation Fisheries Report No. 459, 1991): paras. 83-84.

60 *Declaration of Cancún*, International Conference on Responsible Fishing, Cancún, Mexico, May 6-8, 1992. Also *reprinted in* FAO, *Papers presented at the Technical Consultation on High Seas Fishing, Rome, 7-15 September 1992*, (Rome: Food and Agriculture Organisation Fisheries Report No. 484 Supplement, 1992): 70-73. Also see FAO, "Supporting Document on the Drafting of the General Principles", *Technical Consultation on the Code of Conduct for Responsible Fishing, Rome, 26 September-5 October 1994*, (Rome: FAO Doc. FI:CCRF/94/Inf. 4., 1994).

61 Ibid., para. 2.

62 Code of Conduct, Art. 1.1. *See* FAO, "Background Information on the Code of Conduct for Responsible Fishing", *Technical Consultation on the Code of Conduct for Responsible Fishing, Rome, Italy, 26 September - 5 October 1994*, (Rome: FAO Doc. CCRF/TC/94/Inf. 3, 1994).

63 Code of Conduct., Art. 1.2.

subregional, regional and global levels, and at individuals concerned with the conservation and management of tuna stocks.[64] Although the Code's application is voluntary, articles 1 and 3 make it clear that certain parts of it are based on the relevant rules of international law especially as reflected in the LOSC.[65] In this regard, the Code is to be interpreted and applied consistently with the LOSC and the Fish Stocks Agreement.[66]

The Code establishes principles and international standards of behaviour for responsible fishing and fisheries activities and provides a bench mark to improve the legal and institutional framework for fisheries management and conservation.[67] The scope of the Code of Conduct is broad and encompasses the capture, processing and trade of fish and fishery products, fishing operations, aquaculture, fisheries research and the integration of fisheries into coastal area management.[68] Article 2 provide for the objectives of the Code which include the establishment of principles consistent with the relevant rules of international law, for responsible fishing and fisheries activities and the elaboration and implementation of national policies for conservation of the tuna resource and its management and development.

---

64 Ibid.

65 Ibid, Art. 3 states:

> 3.1 The Code is to be interpreted and applied in conformity with the relevant rules of international law, as reflected in the United Nations Convention on the Law of the Sea, 1982. Nothing in this Code prejudices the rights, jurisdiction and duties of States under international law as reflected in the Convention.
>
> 3.2 The Code is also to be interpreted and applied:
>
> (a) in a manner consistent with the relevant provisions of 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.

66 Code of Conduct, Art. 1.1 states:

> This Code is voluntary. However, certain parts of its are based on relevant rules of international law, including those reflected in the United Nations Convention on the Law of 10 December 1982. The Code also contains provisions that may be or have already been given binding effect by means of other obligatory legal instruments amongst the Parties, such as the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993, which according to FAO Conference 15/93, paragraph 3, forms an integral part of the Code.

67 Ibid., Art. 2.

68 Ibid., Art. 1.2.

The most significant part of the Code of Conduct is the article which sets out the general principles for fisheries management and conservation.[69] The Code enjoins States to adopt measures that ensure the level of fishing effort is commensurate with the productive capacity of fisheries resources. Article 5.2 introduces the concept of inter-generational equity:

> Fisheries management should promote the maintenance of the quality, diversity and availability of fishery resources in sufficient quantities for present and future generations in the context of food security, poverty alleviation and sustainable development. Management measures should not only ensure the conservation of targeted species but also species belonging to the same ecosystem or dependent on or associated with the target species.

The Code of Conduct emphasises the importance of the precautionary approach to conservation, management and exploitation of fisheries resources.[70] The Code takes a more holistic approach to fisheries management by clearly stating the importance of selective fishing gear and techniques and the need to avoid wastage and minimise catch of non-target species.[71] These provisions are also found in articles 5 and 6 of the Fish Stocks Agreement. The Code calls on States to establish effective mechanisms for compliance and enforcement and to control the activities of fishing vessels consistent with such agreements as the Compliance Agreement and Fish Stocks Agreement.[72]

---

69 Ibid., Art. 5.

70 Ibid., Art. 6.5.1:

> States should apply the precautionary approach widely to conservation, management and exploitation of living aquatic resources in order to protect them and preserve the aquatic environment. The absence of adequate scientific information should not be used as a reason for postponing or failing to take conservation and management measures.

For general and applied studies of the precautionary approach as applied to fisheries see, J. Cooke and M. Earle, "The Precautionary Approach to Fisheries and Reference Points for Fishery Management", *Review of European and International Environmental Law* 2 (1993): pp. 252-259; S. Garcia, "The Precautionary Principle: Its Implications in Capture Fisheries Management", *Ocean and Coastal Management* 22: 99, 106; FAO, "The Precautionary Approach to Fisheries with reference to Straddling Fish Stocks and Highly Migratory Fish Stocks", UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, (New York: UN Doc. A/CONF. 164/INF/8, 26 January 1994); Grant J. Hewison, "The Precautionary Approach to Fisheries Management: An Environmental Perspective", *International Journal of Marine and Coastal Law* 11(4) (1996): pp. 301-332.

71 Code of Conduct, Art. 5.6 & 5.7.

72 Ibid., Art. 7.2.

The Code also links fishery conservation and management to the broad economic framework within which fishing takes place. It refers, for example, to labour conditions;[73] artisanal and indigenous fishermen;[74] education, training, and participation;[75] the work of other relevant international organisations;[76] food security;[77] trade;[78] and the need to integrate fisheries into coastal zone management.[79]

The major advantage of the Code of Conduct is that it provides a useful guide for States to develop fisheries management strategies. It contains broad principles which can be used by States to support tuna management initiatives as well as by non-government organisations to support arguments against particular tuna management strategies or fishing technologies.[80] However, whether this expectation will be fulfilled remains unclear. Similar expectations greeted the Strategy for Fisheries Management and Development formulated by the FAO World Conference in 1984. The Code of Conduct clearly demonstrates the failure of the 1984 Strategy to fulfil its objectives. It is hoped that the Code will be more successful.

The Code of Conduct has been criticised for not setting any priorities which could have significant long-term effects.[81] According to Hey:

> Clearly the presumption underlying the Code is that priorities will be set through the monitoring and review process to be conducted within the FAO. However, this is unlikely to be the case as some rather crucial aspects of fisheries management, e.g., the relationship between fisheries conservation and management and trade measures are already being considered in other forums. While the Code provides that such measures shall be compatible, it is likely that whether they are indeed compatible will be determined through the dispute settlement mechanisms available within the

---

73 Ibid., Art. 5.17.

74 Ibid., Art. 5.18 & Art. 6.6.6.

75 Ibid., Art. 5.16 & Art. 11.1.8.

76 Ibid., Art. 7.4.1 & 7.10.1 refers to the work of the International Maritime Organisation and Art. 10.2 refers to the work of the World Trade Organisation.

77 Ibid., Art. 2(f) and Art. 6.2.

78 Ibid., Art. 5.14, Art. 10.2 and Art. 10.3.

79 Ibid., Art. 9.

80 M. W. Lodge, "FAO Code of Conduct for Responsible Fishing", (London: MacAllister Elliott & Partners Limited, 1995): p. 4.

81 E. Hey, n. 2 above at p. 466.

> World Trade Organisation. Such a development would mean the efficacy of fisheries conservation and management measures, at least to the extent that they might be backed up by trade measures, lies in the hands of the World Trade Organisation. This is despite the provision in the Code and in the Fish Stocks Agreement which determines that States seeking to take action through non-fishery organisations which may affect the work of fishery organisations should consult such forums and take account of the views expressed.[82]

## V. THE FAO COMPLIANCE AGREEMENT

The FAO Compliance Agreement was adopted in November 1993. It establishes minimum requirements which are to be applied by flag States. The objective of the Compliance Agreement is to prevent vessels from undermining the effectiveness of international conservation and management measures through reflagging.[83] No fishing vessel may be authorised to fish in the high seas unless it is authorised by the appropriate authorities of a party.[84] The Compliance Agreement also attempts to deal with the problem of reflagging by elaborating on the concept of a genuine link between the vessel and its flag State. It provides that no party can authorise any fishing vessel to fly its flag unless it is satisfied that it is able, taking into account the links that exist between it and the fishing vessel, to exercise its responsibility under the Agreement effectively.[85] Furthermore, it

---

82 Ibid., p. 26.

83 See M. W. Lodge, "An Analysis of the FAO Draft Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas", (Honiara: Forum Fisheries Agency Report 93/47, 1993); Patricia Birnie, "Reflagging of Fishing Vessels on the High Seas", *RECIEL* 2 (1993): 270-276; Patricia Birnie, *Aspects of International Law Concerning the Reflagging of Fishing Vessels*, Informal ad hoc Meeting of Experts, FAO Rome, February 1-5, 1993; Ichiro Nomura, *How Reflagging of Fishing Vessels should be Addressed and Prevented?*, Informal ad hoc Meeting of Experts, FAO Rome, February 1-5, 1993. Reflagging is described by Nomura in p. 2 as:

> an activity in which fishermen try to avoid conservation and management measures, which their own flag States would otherwise enforce, through transfer of the vessels registered in their own countries to other States which do not either participate in the implementation of international conservation and management measures or have no will or capability to control their fishing activities.

84 Compliance Agreement, Art. III(2).

85 Ibid., Art. III(4). The issue of genuine link is found in the 1958 Geneva Convention on the High Seas (Article 4) and the LOSC (Article 90) provide that every State has the right to sail ships under its flag on the high seas. Both also provide, in Articles 5 and 91 respectively, that:

> a. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the

prohibits a party from authorising a fishing vessel to fish on the high seas if that vessel, while previously registered in another State, undermined international management and conservation measures irrespective of whether that other State is or is not a party to the Agreement.[86] The parties are required to maintain a record of the fishing vessels entitled to fly their flags and authorised to fish on the high seas.[87] Moreover, the parties are required to submit t the FAO information relating to vessels on their registry and any changes made to the registry. This information is to be circulated by the FAO to other parties.[88] The Compliance Agreement also requires the parties to co-operate in exchanging information, including evidentiary material which will enable the flag State to identify fishing vessels flying its flag and have engaged in activities that undermine international and conservation measures.[89] Moreover, the Agreement also provides the basis for the development of a system of port State control[90] and other appropriate co-operative agreements or arrangements for mutual assistance to achieve the objectives of the Agreement.[91] In so far as port State control is concerned, the Agreement provides in article 5(2) that:

> ...where it [the port State] has reasonable grounds for believing that the fishing vessel has been used for an activity that undermines the effectiveness of international conservation and management measures, *shall* promptly notify the flag State accordingly.

According to Hey, this gives the port State a conditioned obligation, rather than a discretion to report to the flag State.[92] This outcome depends, however, on whether an arrangement to that effect is made between the flag State and the port State. Thus, the second sentence of article 5(2) of the Agreement provides that "parties may make

---

> nationality of the State whose flag they are entitled to fly. There must be a genuine link between the State and the ship.
> b. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

86 Compliance Agreement, Art. 3(5)(a) & (b).

87 Ibid., Art. 4.

88 Ibid., Art. 6.

89 Ibid., Art. 5(1).

90 Ibid., Art. 5(2).

91 Ibid., Art. 5(3).

92 E. Hey, n. 2 above at p. 465.

arrangements regarding the undertaking by port States of such investigatory measures as may be considered necessary to establish whether the fishing vessel has indeed been used contrary to the provisions of the Agreement".

The Compliance Agreement is not a derogation from international law as reflected in the LOSC. Indeed the pre-eminence of the LOSC as reflecting the relevant rules of international law relating to fishery management is acknowledged in the preamble of the Compliance Agreement. The Agreement provides that the parties recognise that all States have the right for their nationals to engage in fishing .... subject to the relevant rules of international law as reflected in the LOSC.[93] In addition, they further recognise that under international law, as reflected in the LOSC, all States have the duty to co-operate with other States in taking conservation measures for the fishery resources of the high seas.[94]

## VI. CONCLUSION

This Chapter has analysed the post-Law of the Sea developments. The discussion showed that the international law framework for tuna management has been enhanced by the Agenda 21, Fish Stocks Agreement, the Code of Conduct for Responsible Fishing and the Compliance Agreement. The success of these four international instruments, however, will depend on the extent to which States implement them. This will require careful planning and investment of resources. In this regard, Juda cautions against being overly optimistic about the prospects of the Code of Conduct and Compliance Agreement.

> Obviously, modifications in the international legal system take time, patience, and effort to achieve. The international legal system is ponderous, and different segments of the world community may not share the same sense of urgency for action. Further, the costs and benefits of such action must be apportioned among a variety of States which are often suspicious of the motives of others. Allocation of wealth as well as the conservation of resources and natural systems are at stake and each generation has had to come to terms with the many trade-offs implicit in any type of management scheme. Moreover, despite the availability of a greater amount of data

---

93 Compliance Agreement, Preamble, para. 1.

94 Ibid., para. 2.

> and increased understanding of natural systems, decisions today are perhaps more difficult, given the pressures on resources caused by the world's vast and still growing population. Working on new international management arrangements will not be easy but there does not seem to be much of an alternative if renewable resources and the marine environment are to be protected and conflict of use situations minimised.[95]

The Chapter that follows will show how the Pacific Island States have responded to the international law framework for tuna management.

---

95 L. Juda, *International Law and Ocean Use Management: The Evolution of Ocean Governance*, (London: Routledge Publishers, 1996): p. 318.

# 4

# THE PACIFIC ISLAND STATES' RESPONSE TO THE EXCLUSIVE ECONOMIC ZONE REGIME

## I. INTRODUCTION

At the time the LOSC was being negotiated at the Third United Nations Conference on the Law of the Sea (UNCLOS III), many of the Pacific Island States were just emerging as independent States. For them the concept of self-determination and extended maritime jurisdiction were intertwined virtually from the outset of nationhood.[1] Although the LOSC, especially the EEZ regime, offered enormous economic opportunities,[2] the LOSC imposed tremendous challenges for the new States.[3]

---

1 By the end of 1975, the only Pacific Islands who were independent were: Western Samoa, Nauru, Fiji, Tonga, Cook Islands, Niue, and Papua New Guinea. See Biliana Cicin-Sain and Robert W. Knecht, "The Emergence of a Regional Ocean Regime in the South Pacific", *Ecology Law Quarterly* 16(1) (1989): p. 179.

2 Camillus S.N. Narakobi, "The UN Convention on the Law of the Sea - Impact on the South Pacific Region", (Unpublished) (1989): p. 17.

3 See "South Pacific Regional Fisheries Organisation - Coastal State Jurisdiction with Regard to Highly Migratory Species in the 200-Mile Fishing Zone", Working Paper prepared by Papua New Guinea at the request of the meeting of SPEC Countries, Suva, May 9-11, 1976, South Pacific Bureau for Economic Co-operation Doc. (78) FA-INF.A. The PNG Discussion Paper states in para. 2 that:

> The question is what powers may be exercised by a coastal State with regard to the living resources of is 200-mile zone with confidence that its action will be consistent with the rights of States at international law. This is an area in which international law is passing through a phase of rapid development. The three main elements in this process are: first, the growing realisation that stocks of living resources are finite and must be carefully conserved and managed so as to avoid over-exploitation; secondly, the desire of coastal States, especially developing coastal States, to see the resources of their 200-mile zones, used by their own fishermen rather than by distant water fishermen; thirdly, the attempt being made at the 3rd UN Conference on the law of the sea to resolve the question of extended fisheries jurisdiction in a comprehensive law of the sea treaty, an attempt which is by no means certain of success, but which

Chapter 4 examines the Pacific Island States' response to the EEZ regime. It will be shown that they adopted a regional approach to the EEZ regime that has resulted in the establishment of the South Pacific Forum Fisheries Agency (FFA). It will also be shown that the FFA was established because the Pacific Island States were constrained by their extremely limited resources and the incapacity of their governments to exploit fully the benefits from the EEZ regime. Part II examines the status of the LOSC in the region. Part III analyses the FFA, and examines its strength and weaknesses. It also examines the extent to which the FFA conforms to the requirements of international law as laid down in the LOSC. Chapter 4 concludes that some changes will have to be made to the FFA in order for the Pacific Island States to fully discharge their obligations under the LOSC and other relevant treaties

## II. THE PACIFIC ISLAND STATES AND THE LAW OF THE SEA

An analysis of the response of the Pacific Island States to the LOSC must take into account their relatively short political history. All of the Pacific Island States are politically independent.[4] Eleven achieved independence in the 1970s or later.[5] Most, therefore, have been independent for 27 years or less.[6] Some commentators have argued, that

> with such a short history of statehood it is reasonable to expect a degree of caution and self-interest in policy formulation. Most nations, after all, display this attitude, and that it characterise the external posture of the newly independent Island States is understandable, particularly if their development objectives were to be realised.[7]

---

has already triggered action by many individual coastal States to legislate over fisheries within a 200-mile zone.

4 See Table 1.1 in Chp. 1. With the exception of Cook Islands, Niue, Federated States of Micronesia, Marshall Islands, and Palau, all the Pacific Island countries are politically independent. Cook Islands and Niue are independent States in association with New Zealand, and the Federated States of Micronesia, Marshall Islands and Palau are independent in association with the US. See, Norman & Ngaire Douglas (eds.), *Pacific Islands Yearbook*, 17th Edition, (Suva: Fiji Times, 1994).

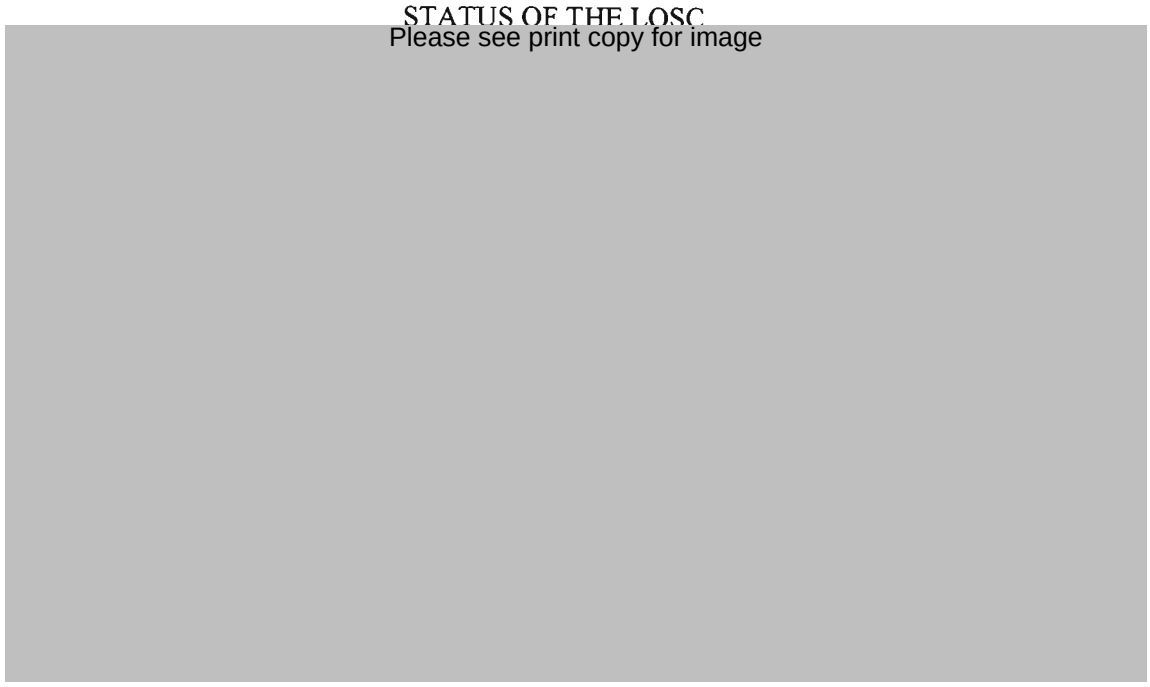
5 The Pacific Island States which became independent after the 1970s were: Cook Islands, Federated States of Micronesia Fiji, Kiribati, Marshall Islands, Niue, Palau, Papua New Guinea, Solomon Islands, Tuvalu, and Vanuatu.

6 Western Samoa was the first Pacific Island State to become independent in 1962 see *Pacific Islands Yearbook*, ibid., p. 731.

7 W. Sutherland and B.M. Tsamenyi, *Law and Politics in Regional Co-operation: A Case Study of Fisheries Co-operation in the South Pacific*, (Hobart: Pacific Law Press, 1992): p. 3.

Despite the importance of the ocean environment to the Pacific Island States, not all of them have ratified the LOSC. Table 4.1 below shows the status of the LOSC vis-à-vis the Pacific Island States.

TABLE 4.1:
STATUS OF THE LOSC




Source: United Nations Division for Oceans and Law of the Sea as at 30 June 1997

The Pacific Island States were slow to ratify the LOSC because of their lack of legal expertise and understanding of the implications of the LOSC[8] and they feared that the financial cost of being a party to the LOSC would be exorbitant. The pace of ratification has, however, increased since the LOSC entered into force (see Table 4.1 above).

---

8 Lisa K. Bostwick, "Empowering South Pacific Fishmongers: A New Framework for Preferential Access Agreements in the South Pacific Tuna Industry", *Law and Policy in International Business* 26(3) (1995): pp. 897-916, at 909. See R. Teiwaki, *Management of Marine Resources in Kiribati*, (Suva: Institute of Pacific Studies, 1988): at p. 61 states:

> The Kiribati government obtained the consultancy of Professor Shearer of Sydney University, Australia, to advise on the implications of the LOSC. Although he advised that Kiribati sign the Convention in December 1982 and defer ratification, it is doubtful whether that advice was put forward for Cabinet's consideration. Hitherto, no government official, let alone a Cabinet Minister, had taken a close interest in the LOSC. I remember taking up the issue in October 1981 with the appropriate authorities in government, as Minister for Natural Resources Development, but there was not much enthusiasm shown. The issue had always been avoided by local officials because of its apparent complexity and wider implications. It was assumed that accession to the Convention would be too costly for Kiribati.

The response of the Pacific Island States to the LOSC has been a regionalist one which has been determined by a number of factors. The obligations arising out of the tuna management provisions of the LOSC are difficult for individual Island States to discharge because they face enormous problems after claiming EEZs due to the lack of data and resources to give effect to the obligations under the LOSC.

A discussion paper prepared by Kearney for a meeting of senior government officials from the Pacific Island States highlighted the magnitude of the lack of data in the region[9]. Kearney argued that while interest in the tuna stocks of the WCPO region had increased the "lack of a regional fisheries agency responsible for the compilation of statistics on these fisheries means that the actual magnitude of the catches from the ocean surrounding the developing countries of the region must be estimated from statistics not specifically compiled for this purpose."[10] Furthermore, Kearney argued that:

> In addition to the paucity of the available catch statistics, the present state of knowledge on the stock structure, migration and biology of the most important resources is inadequate to enable the conservation and management of these resources to be approached with any confidence. In view of the impact universal acceptance of 200 mile zones of extended jurisdiction will have on the access and allocation of the total fisheries resources of the region, it is necessary to consider in depth the implications such extended jurisdiction may have on the total resource harvest from the region and the allocation of benefits or costs resulting from this harvest.[11]

Kearney advocated a regional approach to maintain optimum yields from the migratory resources and suggested that the Pacific Island States adopt a common licensing policy to cover the operation of foreign fleets.[12] Such an approach, in the short-term, would provide monetary returns to the Pacific Island States. In the long-term, it would increase local

---

9 R.E. Kearney, *A Regional Approach to Fisheries Management in the South Pacific Commission Area*, Paper presented to the South Pacific Forum Meetings on the Law of the Sea, Suva, 13-14 October, 1976.

10 Ibid., p. 1.

11 Ibid.

12 Ibid.

participation and involvement in the tuna industry without disrupting production from the WCPO region. It was against this background that the idea to establish a regional fisheries body was formed. In fact, the proposed functions of the regional fisheries body were quite expansive and would have given the body more management functions.[13] However, as it turned out, the Pacific Island States opted for a regional fisheries agency with limited management functions.[14]

### A. EEZ Claims

Eleven Pacific Island States have laid claims to EEZs.[15] These include the Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Niue, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa. Table 4.2 below sets out the years in which each claim was made and the pertinent legal basis for the claims.

---

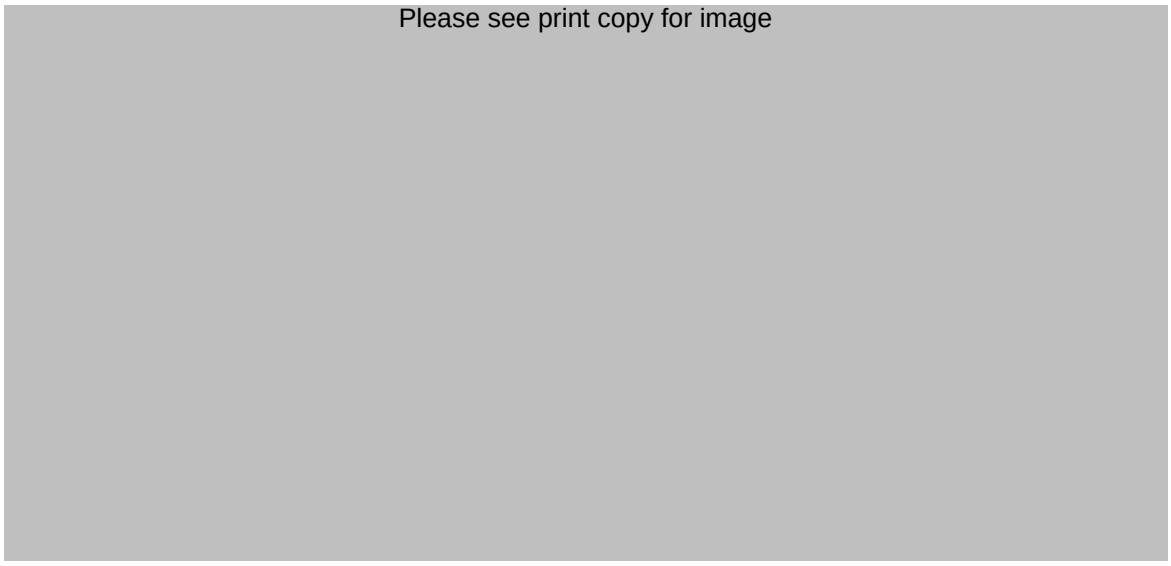
13 Ibid: 4; The proposed functions of the regional fisheries body were:
(1) The collection and compilation of catch statistics from all areas of occurrence of the common resources.
(2) The collation of all available biological data on all such resources.
(3) Scientific research in selected fields, particularly to facilitate stock assessment and the study of resource dynamics.
(4) Development of management proposals where management is indicated.
(5) Formulation of conservation measures where necessary.
(6) Consideration of socio-economic implications of all management measures.
(7) Evaluation of fishery development prospects throughout the region of responsibility.
(8) Evaluation of possible regional licensing policies.
(9) Consideration of optimising regional surveillance coverage when necessary.

14 For a discussion of the history of the formation of the FFA see Florian Gubon, "History and Role of the Forum Fisheries Agency", David Doulman (ed.), *Tuna Issues and Perspectives in the Pacific Islands Region*, (Honolulu: East-West Centre, 1987): pp. 245-256; William M Sutherland, "Coastal State Co-operation in Fisheries: Emergent Regional Custom in the South Pacific", *International Journal of Estuarine and Coastal Law* 1(1) (1986): pp. 15-28.

15 B. Campell and M. Lodge, *Regional Compendium of Fisheries Legislation*, vol. 1, FAO Fisheries Management and Law Advisory Programme, Field Report 93/31, (Rome: Food and Agriculture Organisation, 1993): p. 9.

TABLE 4.2.

EEZ CLAIMS BY PACIFIC ISLAND STATES




Source: B. Campell and M. Lodge, (1993), *Regional Compendium of Fisheries Legislation (Western Pacific Region)*, FAO, Rome.

In an analysis of the Pacific Island States' EEZs, Tsamenyi and Blay state that the EEZ claims conform to the LOSC, especially in terms of the maximum breadth of the EEZ.[16] Although they have not completed the delimitation of the EEZ boundaries, as required by the LOSC, the Delimitation Programme of the FFA is assisting them determine their co-ordinates in preparation for negotiations to delimit their EEZs with their neighbours.[17] It is also instructive to note that all legislation of the Pacific Island States dealing with the EEZ make provision for breadths less than the stipulated 200 nautical miles subject to delimitation by agreements.[18]

---

16 B.M. Tsamenyi and S.K.N. Blay, "Extended Zones of Jurisdiction over Marine Resources: State Practice in the South Pacific Region," H. Campbell, K. Menz and G. Waugh (eds.), Economics of Fishery Management in the Pacific Islands Region, (Canberra: ACIAR Proceedings No. 26, 1989): p. 44.

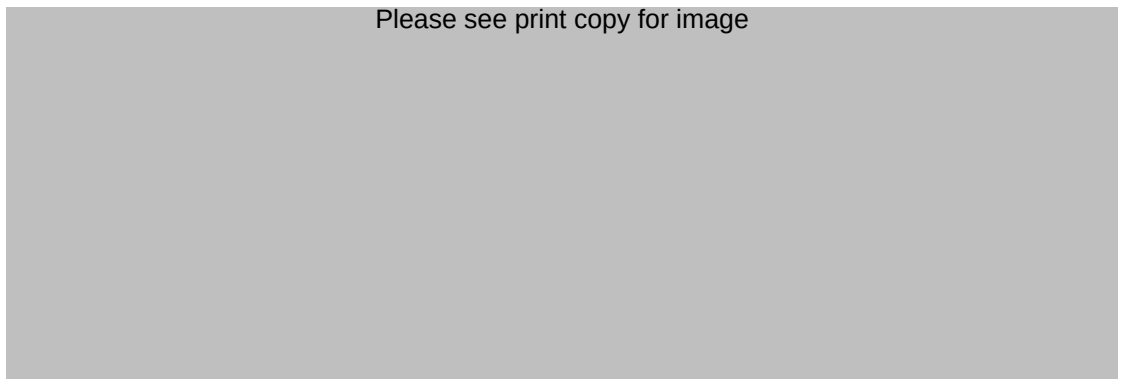
17 See FFA, "Draft Work Programme and Budget 1996 and 1997 of the Maritime Delimitation Division, Forum Fisheries Committee, 29th Meeting, Vava'u, Tonga, 13-17 May, 1996", (Forum Fisheries Agency FFC Doc. 29/14.1): pp. 56-65.

18 B.M. Tsamenyi and S.K.N. Blay, note 16 above at p. 45.

## B. Fisheries Zones

The countries that claim Fisheries Zones are Nauru, Palau and Papua New Guinea. Table 4.3 below sets out the year in which the claim was made and the relevant legislative basis for the claims.

TABLE 4.3:
FISHERIES ZONES CLAIMS BY PACIFIC ISLAND STATES




Source: B. Campell and M. Lodge, *Regional Compendium of Fisheries Legislation (Western Pacific Region),* (Rome: Food and Agriculture Organisation, 1993).

The LOSC does not provide a specific regime for a fisheries zone. It is therefore doubtful whether a State can use the LOSC as the basis for claiming a Fisheries Zone. However, according to Tsamenyi and Blay

> Since the EEZ gives States preferential fishing rights, it automatically incorporates the regime of a fisheries zone. Thus a State acquires a fisheries zone, but a State cannot acquire an EEZ by claiming a fisheries zone.[19]

A Fisheries Zone has limited jurisdictional scope compared to the EEZ. The EEZ regime gives coastal States rights over the living and non-living resources. A Fisheries Zone only provides jurisdiction over fisheries exploitation and does not cover the exploitation of non-living resources[20] nor does it provide for jurisdiction over the preservation and protection of the marine environment.

---

19 Ibid

20 In the Fisheries Jurisdiction Case [ICJ Reports 1974] at p. 24, the Court gave some support to the idea of a fisheries zone. However, the judgement must be qualified since it was made before the emergence

Because of the jurisdictional differences between the EEZ and Fisheries Zone, it is in the interest of those Pacific Island States which claim Fisheries Zones to claim EEZs. As discussed above, the Fisheries Zone has limited application. The specific rights of coastal States over tuna resources, and the enforcement powers they have over foreign fishing vessels are all based on the EEZ provisions of the LOSC.[21] Furthermore, since the EEZ regime covers all natural resources, it is in the interest of coastal States to claim EEZs.

## III. CHALLENGES FOR THE PACIFIC ISLAND STATES ARISING FROM THE EEZ REGIME

It is not sufficient for coastal States to simply claim EEZs. However, for the Pacific Island States, the challenge of fully utilising the benefits from the EEZ regime, was, and to a large extent still is, compounded by the lack of financial, legal and technical resources.[22]

When the Pacific Island States first claimed EEZs, they had very little information about the dynamics and status of the tuna stock; and the socio-economic aspects about how a particular fishery is organised and exploited.[23] This information is an essential foundation for rational tuna management.[24] They also needed to have some form of legislative framework asserting their rights and regulating their activities within the EEZ,[25]

---

of the EEZ Regime. Furthermore, the Court did not elaborate on the precise scope of State's rights in the fisheries zone. Hence it is doubtful that the Court intended to make the fisheries zone a general right in international law.

21 Ibid., p. 46.

22 FAO, *Fisheries Needs of Small Island Developing States*, Document prepared for the Committee on Fisheries, twenty-first Session, COFI/XXI/95/5 December 1994, Rome, 10-15 March 1995. The Food and Agriculture Organisation (FAO) has characterised the problems of small island developing States (SIDS). These include, amongst other things, disproportionately large ratios between land and EEZ areas and very high levels of dependence on fish for food.

23 Ibid: p. 6.

24 Les Clerk, "Economic Development and Management of Fisheries in EEZs of the Pacific Basin", (Honiara: Forum Fisheries Agency Report No. 84/19, 1984): p. 7:

> The declaration of EEZs by Pacific Island governments left them with rights and duties over resources in large areas of ocean which were fished by over 1000 vessels, carrying the flags of large powerful nations with whom Island governments have economic and political relationships. Initially, they were, with the important exception of the Japanese fleets subject to little control by flag State governments. And until recently at least flag authorities have, without putting too fine a point on it, been less than fully co-operative in their relationships with Island government fishing authorities and institutions.

25 FFA, "The Problems Facing Small Island Countries in the Management of their EEZs", (Honiara: Forum Fisheries Agency Report No. 84/20, 1984): p. 1.

reaching agreement on the delimitation of boundaries with neighbouring States where the their EEZs overlap, and honouring the duty to chart the EEZ limits.[26]

After claiming EEZs, the Pacific Island States had to generate benefits from the tuna resources. However, because of their limited capability, they have been licensing foreign fishing vessels. The large area of their EEZ created difficulties for surveillance and enforcement.[27] The Pacific Island States also lacked the financial capacity to purchase the necessary equipment to carry out surveillance of their EEZs.

The Pacific Island States' response to these problems was to establish a regional South Pacific Forum Fisheries Agency (FFA) to help deal with the problems of managing tuna in their EEZs.

## IV. THE SOUTH PACIFIC FORUM FISHERIES AGENCY

The FFA was established in 1979 to provide a forum to discuss tuna fisheries matters and formulate common tuna fisheries policies. Membership of the FFA is currently restricted to the Pacific Island States.[28] The FFA is mandated to help the Pacific Island States make tuna management and conservation decisions themselves. The FFA is established by an agreement and consists of a secretariat and governing council constituted by the Pacific Island States.[29]

The preamble to the FFA Convention expresses the Pacific Island States' "common interest" in the conservation and utilisation of the living marine resources, in particular,

---

26 Ibid. According to the FFA at p. 3:

> All member governments of the FFA have legislation defining national seas or EEZs, or in some cases the more limited notions of fishery limits. And most governments have in place regulations under these Acts at least governing fishing activity. There remains a steady workload in this area. Some of the legislation passed earlier has proved not to be completely appropriate. It was often a close copy of similar statutes in metropolitan countries such as New Zealand, Australia and UK and the US. Not surprisingly Island governments have developed a greater understanding over time of the types of legislative framework which more closely suit their needs, often drawing on shared experience with other governments in the region.

27 Ibid.

28 The members of the South Pacific Forum Fisheries Agency are: Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa. Australia and New Zealand are developed States and therefore the problems analysed in the discussion do not apply to them.

29 *The South Pacific Forum Fisheries Agency Convention*, 1979, UNTS (1979) p. 1224:

tuna. It also manifests the Pacific Island States' desire to "promote regional co-operation" and the co-ordination of fisheries policies to secure maximum benefits from tuna resources. Finally the preamble conveys the Pacific Island States' intention to "facilitate the collection, analysis, evaluation and dissemination of relevant statistical, scientific and economic information."

The FFA merely provides advisory services which would enable the Pacific Island States to discharge their LOSC obligations.[30] The Pacific Island States recognised that the conservation and rational utilisation of tuna was of paramount importance. They also recognised that to secure maximum benefits from the tuna stocks they needed to co-operate and co-ordinate their tuna fisheries which effectively meant increasing their participation in the fishery. Thus, Kearney argued that Pacific Island States should:

> increase their participation in the fisheries of the region so as to control the direction of the on-going development of those fisheries, otherwise not to take on these control functions would render the declaration of EEZs meaningless.[31]

It is not clear what is meant by the reference in the Preamble to securing "maximum benefits" from the tuna stocks. Munro has argued that it is not enough to say that the aim of resource management is to maximise benefits from the resource.[32] One needs to ask how these benefits are to be defined. For instance are they to be defined in terms of the benefits enjoyed by the domestic tuna industry, the fishing regions of the country, or the

---

30 The final draft of the FFA Convention appears to have deviated from the agreement in principle reached at the meeting of South Pacific Forum officials in Suva in October 1976 to establish a fisheries agency which would promote the conservation and rational utilisation of the fish stocks of the region. See *Declaration by Members of the South Pacific Forum on Law of the Sea Questions*, Suva, 13-14 October 1976, South Pacific Bureau for Economic Co-operation, Suva, Fiji. It has been argued that the FFA is a weak service agency rather than anything approaching a management agency, see G. Kent, *The Politics of Pacific Island Fisheries*, (Colorado: Westview Press/Boulder, 1980): p. 167. Kent's views are however misguided because as Sutherland demonstrates, the FFA is not intended to be a fisheries management body. See William M. Sutherland, " Management, Conservation and Co-operation in EEZ Fishing: The Law of the Sea and the South Pacific Forum Fisheries Agency", *Ocean Development and International Law* 18 (1987): pp. 613-640.

31 R.E. Kearney, "The Law of the Sea & Regional Fisheries Policy", *Ocean Development and International Law* 5 (1978): 249-286 at p. 280.

32 Gordon R. Munro, "Coastal States, Distant-Water Fleets and EFJ", *Marine Policy*, (January) (1985): pp. 2-15 at p. 4.

nation as a whole?[33] Some inferences regarding the meaning of "maximum benefit", can be made from the attitude of the Pacific Island States to the management of tuna in their EEZs. The Pacific Island States' priority has been to maximise economic benefits received through rents and to establish their own domestic fishing industries.[34] However, in spite of these goals, the FFA has noted that:

> few economic benefits, other than access fees, have been derived by Pacific Island States from foreign fishing in their waters. There is little employment of local people as crew members and the foreign operators have seldom used local ports for refuelling or provisioning their vessels or processing their catches. There has been little transfer of fishing, marketing or enterprise management skills or fishing technologies to Pacific Island nationals.[35]

The collective interest of the Pacific Island States in the optimum utilisation of tuna is based on the notion that it represents a new hope of achieving economic self-reliance.[36] Prior to the mid 1970s, all the tuna harvested in the WCPO region were taken by DWFNs in high seas areas.[37] When the Pacific Island States began claiming EEZs in the mid-1970s, DWFNs found themselves excluded from those areas they had traditionally fished.[38] In order to obtain access to the Pacific Island State's EEZs, DWFNs were required to negotiate fishing access agreements.[39] The Pacific Island States, however, were disadvantaged because they did not have enough data with which to negotiate effectively with the DWFNs. They needed to know the quantity and quality of the tuna resources;

---

33 Ibid.

34 See Michael P. Shepard and L.G. Clerk, *South Pacific Fisheries Development Assistance Needs*, A Consultancy Report prepared on behalf of the Food and Agriculture Organisation and UNDP, (Suva, UNDP and Food and Agriculture Organisation, 1984).

35 Gerry Geen, "Tuna Industry Development in the South Pacific: A Co-ordinated Approach", (Honiara: Forum Fisheries Agency Report No 94/19, 1994): p. 3.

36 R. Teiwaki, note 8 above at p. 71.

37 For a discussion of some of the problems created by the expansion of coastal State maritime jurisdiction see generally, René-Jean Dupuy, *The Law of the Sea: Current Problems*, (Leiden: Oceana Publications Ltd, 1974); Jeremiah J. Sullivan, *Pacific Basin Enterprise and the Changing Law of the Sea*, (Toronto: Lexington Books, 1977)

38 Norio Fujinami, "Development of Japan's Tuna Fisheries", D. Doulman (ed.),*Tuna Issues and Perspectives in the Pacific Islands Region*, (Honolulu: East-West Centre, 1987): pp. 57-70.

39 Ibid., p. 61. Also see August Felando, (1987), "US Tuna Fleet Ventures in the Pacific Islands", D. Doulman (ed), *Tuna Issues and Perspectives in the Pacific Islands Region*, ibid., pp. 93-104.

how much fishing could be permitted while sustaining the tuna stocks; who had traditionally fished in the region; and the market value of their tuna.[40] The LOSC requires that the Pacific Island States determine the allowable catch of the tuna in their EEZs.[41] They were also required to review their fisheries laws to provide for the licensing of foreign fishermen, fishing vessels and equipment and legislate for the payment of fees and other forms of remuneration.[42]

The Pacific Island States' size, geographic location, level of economic development and lack of experience militated against tackling these problems alone.[43] They resolved therefore that the formation of a regional organisation, such as the FFA, would assist them to obtain the necessary information and develop the necessary institutional arrangements to deal with the DWFNs.[44]

The objectives of the FFA, however, do not reflect the obligations of Art. 61 and 62 of the LOSC which are the basis for tuna management and conservation in the EEZ by coastal States. Article III of the FFA Convention, recognises the Pacific Island States' sovereign rights over tuna, but is silent on how those sovereign rights are to be exercised. Under the LOSC, the objectives of tuna management are to maintain the status of stocks and associated stocks at harvestable levels and prevent their overexploitation.[45] However, this principle is not reflected in the FFA Convention. Although the Pacific Island States recognise their common interest in the conservation and optimum utilisation of tuna, there is no mechanism under the FFA Convention to achieve this outcome. The emphasis on highly migratory species in the FFA Convention reflects the apprehensions surrounding the United States position[46] while the FFA Convention was being negotiated.[47]

---

40 Florian Gubon, note 14 above p. 249.

41 LOSC, Art. 61(1).

42 LOSC, Art. 62(4).

43 David J. Doulman, "In Pursuit of Fisheries Co-operation: The South Pacific Forum Fisheries Agency", *University of Hawaii Law Review* 10 (1988): pp. 144-145.

44 Florian Gubon, note 14 above at p. 249.

45 LOSC, Art. 61(2).

46 See discussions in Chp 2.

47 William M. Sutherland and B.M. Tsamenyi, note 7 above at p. 45.

Under the LOSC, stocks that associate with harvested species must also be managed.[48] Article 61(4) of the LOSC requires that in taking conservation and management measures coastal States shall "take into account the effects" on associated and dependent species "with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened."[49] According to Burke, this obligation comes from the theoretical and practical requirements for understanding the effects of tuna fishing on other species. To discharge the obligations in article 61(4) adequately would require a satisfactory understanding of the ecosystem as a whole and the effects of tuna fishing within the system.[50] It seems that the FFA Convention is only concerned with the commercially valuable tuna stock, but not other species associated with tuna. This is because there is no mention in the FFA Convention about the need to manage and conserve fish stocks that associate with tuna. This merely reflects the narrow interest of the Pacific Island States, which is, to obtain as much economic benefit from tuna as possible. However, in view of the need to conserve tuna, it would be useful to reconsider the stated objectives of the FFA Convention.

### A. The Forum Fisheries Committee (FFC)

Article I of the FFA Convention establishes the Forum Fisheries Committee. Although the FFA Convention does not stipulate the composition of the FFC, article IV(2) provides that "each party" shall have one vote where consensus is not possible, suggesting that the FFC is constituted by States parties. Article IV(5) enables the Forum Secretariat to participate in the work of the FFC. Other States, territories and international organisations could also participate in the FFC as observers in accordance with such criteria established by the FFC. It is unclear, however, what the term "participate" means. In the author's view,

---

48 LOSC, Art. 61(4).

49 In the Eastern Tropical Pacific, the purse seining fishing has led to high mortality rates of porpoise because of its association with the yellowfin tuna. As a result, the US Congress passed legislation requiring corrective measures by US tuna vessels. See, J. Joseph., "The Tuna-Dolphin Controversy in the Eastern Pacific Ocean: Biological, Economic, and Political Impacts", *Ocean Development and International Law* 25 (1994): pp. 1-30.

50 W.T. Burke, *The UN Convention on the Law of the Sea: Impacts on Tuna Regulation*, (Rome: Food and Agriculture Organisation Legislative Study No. 26, 1982): p. 14.

participation in the FFC could be interpreted to mean sharing in the discussions. The Forum Secretariat can participate in the work of the FFC, but others can only participate as observers. Sutherland and Tsamenyi state that the "strictly limited privilege accorded to observers is significant because it is suggestive of the way in which the Committee's work is informed with political sensitivities."[51]

Since its establishment, the number of regional and international organisations attending the meetings of the Committee has grown. All the member organisations of the South Pacific Organisations Co-ordination Committee (SPOCC) can participate in the work of the Committee.[52] Other organisations which participate as observers include the European Commission, Commonwealth Secretariat, Food and Agriculture Organisation, International Centre for Living Aquatic Marine Resources (ICLARM), United Nations Development Programme (UNDP), Overseas Fishery Co-operation Fund (OFCF), and representatives of parties to the Convention on the Conservation of Antarctic Living Marine Resources (CCAMLR).

The functions of the FFC are to be found in article V(1) of the FFA Convention. These are:

> (a) to provide detailed policy and administrative guidance and direction to the Agency;
>
> (b) to provide a forum for Parties to consult together on matters of common concern in the field of fisheries;
>
> (c) to carry out such other functions as may be necessary to give effect to this Convention

---

51 William M. Sutherland and B.M. Tsamenyi, note 7 above at p. 46.

52 The regional organisations of SPOCC are:
Forum Secretariat, South Pacific Commission (SPC),
South Pacific Regional Environment Programme (SPREP),
South Pacific Geosciences Commission (SOPAC),
University of the South Pacific (USP),
Forum Fisheries Agency (FFA).
The main functions of the SPOCC is to provide a forum where regional organisations can discuss programs and avoid duplication of functions and responsibilities.

The responsibilities involved in paragraph (a) include approving the Agency's annual budget and annual work programme.[53] The function in paragraph (a) suggests that the FFC provides the Agency with detailed policy and administrative guidance with regards to the overall work programs and functions of the FFA. In practice, however, the Secretariat prepares the background documents on policy matters requiring direction and seeks the views and endorsement of the FFC.[54]

Although the final decision about which policies should be adopted is vested in the FFC, its independence as the policy making body is generally confined to what it is requested to do by the Secretariat.[55] Although this may not have been the intention of paragraph (a), unfortunately, this is the way the obligation has been applied in practice.[56]

A legal issue that arises is the extent to which individual Pacific Island States are bound by the decisions of the FFC. Article II of the FFA Convention provides that the FFA consists of the Secretariat and the FFC. It follows that the decisions of the FFC which are made collectively by all the Pacific Island States are binding on all of them.[57]

The FFA Convention, however, leaves unresolved the issue of non-conformity with the FFC's decision. There is no dispute settlement mechanism and hence individual Pacific Island States who are not happy with the acts or omissions of other member States have no avenue in which to raise their grievances. It is, however, unlikely that an individual

---

53 Florian Gubon, note 14 above at p. 50.

54 For instance, at the 29th Meeting of the Forum Fisheries Committee, the Secretariat prepared a discussion paper to review FFA membership policy. The discussion paper was prepared as a result of inquiries received by the Secretariat from Guam about applying for membership of the Agency. After previewing the legal rules pertaining to membership, the Committee was asked to (a) consider the adequacy of the existing membership criteria; (b) identify the range of options available to FFA member countries to strengthen the existing relationships with the US and French Territories; and (c) make a decision on Guam's qualification for membership of FFA and develop a strategy for the clarification of any matters which appear to be outstanding. See FFA, "Review of FFA Membership Policy", Paper prepared for the 29th Meeting of the Forum Fisheries Committee, 13-17 May, 1996, Vava'u, Kingdom of Tonga, (Honiara: Forum Fisheries Committee Doc. 29/10, 1996).

55 There are exceptions where the member States raise issues of policy. However, most of the policy issues are raised by the Secretariat for the FFC to make a decision. See, David J. Doulman, "Fisheries Management in the South Pacific: The Role of the Forum Fisheries Agency", (Honiara: Forum Fisheries Agency Report No. 90/41, 1990).

56 See FFA documentation, note 54 above

57 See generally, D.W. Bowett, *The Law of International Institutions* (4th Edition), (London: Stephen & Sons Publishers, 1982); René-Jean Dupuy, (1988), *A Handbook on International Organisations*, (Dordrecht: Martinus Nijhoff Publishers, 1988).

member State will agree to a course of action and do the opposite because under article IX(d) of the FFA Convention, the parties are obliged to provide the FFA with information about the actions taken to implement the decisions of the FFC.

Overseeing the functions and responsibilities of the FFA is the Director whose appointment is provided for in the FFA Convention.[58] The Director is appointed by the Committee on such terms as it considers necessary. In practice, the Director is normally appointed for a three year term.[59] To assist the Director, there is provision for the appointment of a Deputy Director.[60] Article VI gives the FFC additional responsibilities as regards the running and administration of the FFA. The FFC is required to adopt financial regulations.[61] The FFC is also required to approve the annual report of the Agency and the work programme.[62]

Article VI(4) clarifies article V(1)(a) of the FFA Convention which requires the FFC to provide policy and administrative guidance to the FFA. However, article V(1)(a) does not prescribe the subject matters over which the FFC is to provide policy and administrative guidance. The question may be asked whether the FFC can provide policy guidance over tuna fisheries matters. In the author's view, article V(1)(a) gives the FFC authority to determine policies and administrative guidelines to assist in the organisation and administration of the FFA. At the same time, the FFC provides a forum for the Pacific Island States to consult on matters of common concern in the field of tuna fisheries.

Under article V(1)(a), the member States of the FFA may inform and advise each other of developments in the tuna fisheries. The fact that the FFA Convention requires the Pacific Island States to consult with each other does not necessarily give the FFC powers to adopt a particular course of action. Moreover, although the FFC is given wide discretionary powers to carry out such other functions to give effect to the Convention, [63]

---

58 FFA Convention, Art. VI(1).
59 See FFA Staff Regulations 1992.
60 FFA Convention, Art. VI(2).
61 Ibid., Art. VI(7).
62 Ibid., Art. VI(4).
63 Ibid., Art. V(1)(c).

the overall objective of the FFA Convention is centred on the management and conservation of tuna. However, article III(2) of the FFA Convention provides that:

> Without prejudice to paragraph (1) of this article the parties recognise that effective co-operation for the conservation and optimum utilisation of the highly migratory species of the region will require the establishment of additional international machinery to provide for co-operation between all coastal States in the region and all States involved in the harvesting of such resources.

The role of the FFC is simply to "promote" intra-regional co-operation and co-ordination.[64] It does not follow, however, that the FFC is required to achieve co-operation in the areas listed.[65] The FFC's role seems to be limited to providing the framework under which the Pacific Island States can co-ordinate their negotiating positions before approaching DWFNs. This is consistent with the Declaration on the Law of the Sea by the Pacific Island States.[66] In the Declaration, the Pacific Island States recognised the need "for coastal States in the South Pacific to work together in their relations with DWFNs to meet the stresses of the LOSC regime" and "agreed to harmonise their tuna fisheries policies, to co-ordinate their negotiating positions with regards to distant water fishing nations, and to consider co-operation in the surveillance and policing of their EEZs."[67]

### B. The Functions of the Forum Fisheries Agency

Under article VII of the FFA Convention, the functions of the Agency are to:

---

64 Ibid., Art. V(2).

65 Ibid., Art. V(2): In particular the Committee shall promote intra-regional co-ordination and co-operation in the following fields:
(a) harmonisation of policies with respect to fisheries management;
(b) co-operation in respect of relations with distant water fishing countries;
(c) co-operation in surveillance and enforcement;
(d) co-operation in respect of onshore fish processing;
(e) co-operation in marketing;
(f) co-operation in respect of access to the 200 mile zones of other Parties.

66 See Record of Proceedings of the Meeting of South Pacific Forum Officials to Discuss Law of the Sea Questions, Suva, Fiji, 14-14 October 1976, Appendix IV para. 4, reproduced in *Australian Foreign Affairs Review* (AFAR) 47 (1976): p. 55.

67 Ibid.

- collect, analyse, evaluate and disseminate relevant statistical and biological information with respect to the living marine resources of the region and in particular the highly migratory species;
- collect and disseminate relevant information concerning management procedures, legislation and agreements adopted by other countries both within and beyond the region;
- collect and disseminate relevant information on prices, shipping, processing and marketing of fish and fish products;
- provide on request, technical advice and information, assistance in the development of fisheries policies and negotiations, and assistance in the issue of licences, the collection of fees or in matters pertaining to surveillance and enforcement.

The Agency's role is to provide the Pacific Island States with the relevant information to enable them to discharge the tuna management obligations of the LOSC.

The strength of the FFA is its ability to recommend regional courses of action which the Pacific Island States can take. According to Doulman, "in comparison to other highly specialised international fisheries management bodies such as the Inter-American Tropical Tuna Commission (IATTC) and the International Commission for the Conservation of Atlantic Tunas (ICCAT), the FFA, with scientific advice provided by the South Pacific Commission (SPC), is able to evaluate management issues and recommend regional courses of action that might be taken by FFA member countries to deal with particular problems."[68] Doulman reviews the structure and operations of a number of international fisheries management organisations and argues that many of these bodies are failing because they cannot address equity questions relating to resource ownership, allocation of resource shares, and financial returns to resource owning States.[69] However, it may be argued that the FFA cannot be compared to these organisations because they are

---

68 Doulman, note 43 above at p. 145

69 Ibid. For a summary of the status of major international fisheries management bodies see, FFA, "Existing International Tuna Management Organisations: Background Information for Arrangements for South Pacific Albacore Fisheries Management", (Honiara: Forum Fisheries Agency Report No. 90/5, 1990): p. 20; See also G. Geen. and A. Wright, *Existing International Fisheries Management Arrangements: A General Review*, Paper prepared for the Workshop on Economic and Legal Aspects of Tuna Management, Manila, Philippines, 12-13 October 1992.

constituted differently. These organisations are involved in tuna management whereas the FFA is not. Furthermore, the FFA is not concerned with equity questions relating to resource ownership. If these issues are to be decided by the FFA, it could potentially result in the same divisive tendencies which have hampered other international fisheries organisations.

## V. UNRESOLVED LEGAL ISSUES UNDER THE FFA CONVENTION

The FFA is the only organisation in the WCPO region that is dedicated to assisting Pacific Island States fulfil the tuna management obligations of the LOSC. However, it has been criticised as being a "weak service agency" rather than "anything approaching a management agency."[70] Doulman says that the "agency "turned out to be a much weaker body than the one envisaged three years earlier."[71] These criticisms are misguided because the FFA was never intended to be a management body.[72]

Burke has argued that there is nothing to prevent coastal States from co-operating amongst themselves to manage tuna.[73] Although article 64 of the LOSC clearly requires coastal States and States whose nationals fish for highly migratory species in the region co-operate either directly or through appropriate international organisations, the precise goals of co-operation are for the States concerned to establish:

> total allowable catch (TAC), adopt proper conservation and management measures to ensure against over-exploitation; determine the appropriate yield; promote optimum utilisation; consider effects on associated and dependent species; and contribute and exchange data and information.[74]

s

The FFA Convention is silent on these matters because it is not designed to deal with the management of tuna. However, if the FFA was given broad tuna management

---

70 G. Kent, note 30 above at p. 170.

71 David J. Doulman, *The Performance and Prospects of Small Island Developing Countries*, ( The Hague: The Hague Institute of Social Studies Advisory Service, 1984): p. 28.

72 W. M. Sutherland and B.M. Tsamenyi, note 7 above at p. 35.

73 See W.T. Burke, note 50 above.

74 W.T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond*, (Oxford: Clarendon Press, 1994): p. 218.

responsibilities, the FFA Convention would need to be reviewed to enable it to perform those functions.

A penetrating analysis of the FFA Convention has been undertaken by Van Dyke.[75] Van Dyke argues that the FFA Convention fails to fulfil the requirements of article 64 of the LOSC because it limits membership to coastal States, and excludes DWFNs.[76] He goes on to state that from a management and conservation perspective, the FFA should be open to all nations not only those situated within the WCPO region, but also those that fish and those with dependencies in the region.[77] Van Dyke's views are, however, flawed because the FFA was not intended to be an article 64 of the LOSC type organisation.[78]

Van Dyke's concerns are baseds on the grounds that if the FFA does not control the pockets of high seas outside the Pacific Island States' EEZs, then the DWFNs could fish in those pockets and escape regulation. These views reflect a misunderstanding of the FFA's functions and the intentions behind its formation.[79] However, Van Dyke's views warrant some consideration by the Pacific Island States. Article 64(1) of the LOSC recognises that because of the migratory nature of tuna, some form of co-operation between those coastal States in whose EEZ the tuna swims through and those States whose nationals fish for the tuna will be required to manage it effectively. Furthermore, if the tuna stocks are not managed properly on the high seas, it would also impact on the stocks on the EEZ because the stock also migrates through the high seas.[80] It follows that if tuna are not managed

---

75 Jon Van Dyke and Susan Heftel, "Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency", *University of Hawaii Law Review* 3 (1981): pp. 1-65.

76 Ibid., p. 38.

77 Ibid. The FFA Convention, however, does not exclude the possibility of other States or territories from becoming members of the FFA. Under article II of the FFA Convention, other States or territories may become members on the recommendation of the Committee and with the approval of the South Pacific Forum. Whether other States, in particular DWFNs, will be allowed to become members is not known.

78 W. M. Sutherland and B.M. Tsamenyi, note 14 above at p. 36 argue that even if it can be demonstrated that the type of co-operation which the Pacific Island States intended should have complied with article 64 of the LOSC, it still remains the case that such co-operation does not necessarily have to be implemented though a broad-based organisation.

79 See comments by Judith Swan at the panel on the Pacific Islands region in *The International Implications of Extended Maritime Jurisdiction in the Pacific*, John P. Craven et.al. (eds.), Proceedings of the 21st Annual Conference on the Law of the Sea Institute, (Honolulu: University of Hawaii, 1989): p. 163.

80 See Parcival Copes, "Tuna Fisheries Management in the Pacific Islands Region", David J. Doulman (ed), *Tuna Issues and Perspectives in the Pacific Islands Region*, (Honolulu: East-West Centre, 1987):

properly in the EEZ, it could adversely affect management efforts on the high seas. On the high seas, States enjoy the freedom of fishing subject to their treaty obligations and articles 63 and 64 of the LOSC.[81] Furthermore, States have a duty to adopt conservation measures on the high seas which their nationals must observe.[82] States also have a duty to co-operate with other States to conserve and manage tuna on the high seas[83] and to determine the allowable catch and establish other conservation measures for the tuna stocks.[84] The obligations in articles 64, 86, 87, 116, 118 and 119 of the LOSC cannot be implemented unless there is a regional management and conservation body with broad membership that has the right to establish measures throughout the entire migratory range of highly migratory fish stocks.

Van Dyke's analysis of the FFA Convention supports a broad-based regional tuna management body which would have responsibility for prescribing regulations in areas including the high seas. It is based on the assumption that the FFA Convention gives the FFA legal authority to prescribe management and conservation measures in the Pacific Island States' EEZs. As argued above the FFA Convention does not apply to high seas areas and the FFA is not given any management responsibility under the FFA Convention.

Another lingering issue is whether a broad-based organisation is necessary for the WCPO region.[85] Hilborn has argued that there is no need for international management of tuna because not all tuna species are as highly migratory as originally thought.[86] Burke supports Hilborn's views:

---

pp. 3-25. At p. 3 Copes states that managing a highly migratory stock such as tuna requires consistent control over the fishery on that stock throughout its whole migratory range.

81 LOSC, Art. 87(e) & 116.

82 Ibid., Art. 117.

83 Ibid., Art. 118.

84 Ibid., Art. 119.

85 J. Joseph, *Some Observations on Fisheries Management in the South Pacific Ocean*, Paper presented to the Seventeenth Meeting of the Forum Fisheries Committee, September 17-21, 1989, (Honiara: FFC17/TM3/3.17, 1989). Joseph advances the standard argument that because of the migratory nature of the tuna resources, it is necessary to have a broad-based international body to manage it.

86 See R. Hilborn and J. Sibert, "Is International Management of Tuna Necessary?", *Marine Policy* 12 (1988): p. 31; R. Hilborn, letter to the editor on international management of tuna, *Marine Policy* 13 (1989): p. 166. Also see J. Gulland, "Tuna and International Institutions, *Marine Policy* 12 (1988): p. 408. Hilborn argues that "there is no real international management of skipjack and yellowfin tuna, and yet the stocks of these species are not thought to be seriously over-exploited anywhere in the

> ... if regulation were indicated, any requirement for internationally agreed measures appears to be dependent on the range of movement of these animals in relation to the size of the areas of national jurisdiction of coastal States where these species are found, as well as on the economic demands of the industry. It may be that in some instances, the species listed as highly migratory can be managed successfully by individual coastal States, without regard to the actions of other States or of vessels fishing beyond national jurisdiction. In such cases, management measures could be taken, if needed, by the coastal State concerned, since most of the stock is caught within its jurisdiction and outside fishing has no effect on the inside stock.[87]

One of the arguments advanced to justify a broad-based tuna management organisation for the WCPO region is that ninety percent of the tuna catch is taken by DWFNs.[88] In the author's opinion, this is not based on any legal justification. Under the LOSC, coastal States have the discretion to establish the conservation and management measures for the living resources in the EEZ regardless of the nationality of vessels that harvest the stock. DWFNs are not entitled to make management and conservation decisions inside the EEZs. For this reason, the argument that a broad-based tuna organisation is needed because of the ratio of catch taken by DWFNs must fail. However, there may be some support for a broad-based organisation involving other coastal States in the WCPO region.[89]

The LOSC does not prevent coastal States from co-operating amongst themselves to manage tuna. According to Burke:

---

world to my knowledge". However, he adds that "I do believe, however, if prices increase significantly so that bioeconomic equilibrium is at a highly overexploited stock size, then in regions where national EEZs are small compared with adjacent international waters (Eastern Pacific and Eastern Atlantic) there will be a need for international co-operation in harvest regulation". Note that international co-operation is needed only to regulate harvesting, and not for purposes of management and conservation.

87 W.T. Burke, note 74 above at p. 203.

88 J. Van Dyke, note 75 above. See SPC, *Tuna Fishery Yearbook 1993*, (Noumea: Oceanic Fisheries Programme, 1993); APEC, *Survey of Species Requiring International Co-operation in Resources Management and Existing Management and/or Scientific Supporting Arrangements*, Paper presented to the APEC Working Group on Fisheries, Wellington, October (1993).

89 In particular Indonesia, Philippines, the French Territories of New Caledonia, French Polynesia, and Wallis and Futuna and the American associated States and territories of American Samoa, Guam, and the Commonwealth of the Northern Marianas.

> It seems unlikely that "co-operation" could be achieved if any State takes unilateral action that is not preceded by communications designed to lead to *agreed* measures to be implemented by coastal States within an EEZ and by fishing States beyond. To take regulatory action prior to a full and timely exchange of views would not be consistent with the Treaty. Co-operation signifies that the parties not only communicate data, but also exchange concrete suggestions for specific issues.[90]

Burke's views is consistent with the attitude of the Pacific Island States when they negotiated the FFA Convention.[91] They recognised that simply co-operating amongst themselves may not be enough to manage tuna. However, Nandan argues that the structure of the FFA does not respond to the obligations of States under the LOSC.[92] He argues that article 3(II) of the FFA Convention recognises the limitation of the FFA to manage tuna by providing that additional machinery is required for its effective management. Nandan argues further that given that the cohesion and co-ordination among the coastal States of the WCPO region in their relations with DWFNs has been substantially achieved, the time has now come for the Pacific Island States to fulfil the second stage in regional co-operation for tuna conservation and management, namely, the "establishment of additional international machinery to provide for co-operation between all coastal States in the region and all States involved in the harvesting of the such resources in the region."[93]

---

90 W.T. Burke, note 74 above at p. 218.

91 According to the proposal submitted by the Director of SPEC, "Proposals for the Establishment and Operation of a South Pacific Fisheries Agency", (Document SPEC (77)13) to the South Pacific Forum Meeting in Port Moresby in 1977 reproduced in *Australian Foreign Affairs Review* 48 (1977): p. 632, it was noted that:

> Taking into account of Arts. 50, 51 and 53 (of the Revised Single Negotiating Text) and applying them to the South Pacific region, it will be seen that there is a need for an international body for the management and conservation of highly migratory species, whose membership includes all the coastal States of the South Pacific region, and foreign nations fishing in the region, and whose geographical boundaries in the West should be defined with respect to the Indo-Pacific Fisheries Commission, with which the Indian Ocean Fisheries Commission has established a Joint Tuna Management Committee for Indo-Pacific tunas, and the Inter-American Tropical Tuna Commission in the East.

92 S. Nandan, "Report of the United Nations Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and its Implications for the South Pacific Region", (Honiara: Forum Fisheries Agency, 1995): p. 8.

93 Ibid.

Tuna stocks are also found in the EEZ of two or more States thus bringing article 63(1) of the LOSC into play.[94] This article requires coastal States to "seek to agree upon the measures necessary to co-ordinate and ensure the conservation and development" of the tuna fishery. These measures are to be reached by agreement either directly or through appropriate sub-regional or regional organisations. According to Slayter, the framework provided under the FFA Convention fulfils these obligations.[96] Slayter argues that the FFA provides a forum where the Pacific Island States can consult on tuna fisheries matters. The same conclusions, however, cannot be reached in respect of article 63(2) of the LOSC which also has some implications for the Pacific Island States. Under this article, the States in whose EEZ the stock is found and those fishing States whose nationals harvest the stocks in the adjacent high seas areas are required to "seek to agree upon the measures necessary for the conservation of these stocks in the adjacent high seas areas." This obligation affects the operations of fishing States who are required to seek the views of adjacent coastal States on whether conservation measures are necessary.[97]

The FFA is an effective co-operative arrangement for co-ordinating the positions of the Pacific Island States in their relationship with DWFNs. The crucial issue is whether the FFA is an effective body to manage and conserve tuna in the WCPO region.

---

94 According to W.T. Burke, note 74 above at p. 136:

> while tuna species are dealt with as a discrete problem in Art. 64, there can be little doubt that they can be regarded as a straddling stock since they are available both inside and outside national jurisdiction. Harvesting in each area has effects on stock abundance and availability in the other. The considerations affecting this problem differ only in degree from those involving other species.

For a comprehensive analysis of article 63(1) of the LOSC, see, M. Hayashi, "The Management of Transboundary Fish Stocks under the LOS Convention", *The International Journal of Marine and Coastal Law* 8(2) (1993): p. 249; E. Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources: The United Nations Law of the Sea Convention, Co-operation between States*, (Dordrecht: Martinus Nijhoff Publishers, 1989).

96 T. Slayter, "Tuna and the Impact of the Law of the Sea", D. Doulman (ed.), *Tuna Issues and Perspectives in the Pacific Islands Region*, (Honolulu: East-West Centre, 1987): pp. 27-37 at p. 31.

97 Ibid.

## VI. STRENGTHS AND WEAKNESSES OF THE FORUM FISHERIES AGENCY

Some attempt has been made to evaluate the economic benefits of the FFA to the Pacific Island States. One report posed the question whether it is worthwhile for the Pacific Island States to participate in the FFA.[98] The scope of the study, however, was limited because it only examined the costs and benefits of participation in the FFA. The costs and benefits were divided between those that are tangible and those that are not. It identified the tangible costs as the cost of participation. Benefits were measured in terms of the extra-budgetary funding received by the FFA from which the Pacific Island States indirectly benefit. According to the study, "by participating in the FFA, Pacific Island States have access to extra-budgetary funds that would not normally be available."[99] The other tangible benefit identified by the study was the conclusion of the *Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America* (Treaty on Fisheries).[100] The negotiation of the Treaty on Fisheries was co-ordinated by the FFA. Under the Treaty on Fisheries all the Pacific Island States receive a portion of the monies paid by the United States.

The study, however, fails to ascertain how these benefits have affected tuna management in the Pacific Island States. For instance, the study does not establish whether extra-budgetary funding has benefited all the Pacific Island States, or only those who utilise the programs funded from extra-budgetary sources. Furthermore, the study does not define the scope of the benefits. It also fails to identify whether the Pacific Island States receive value in return for their contribution to the FFA. It may be argued, for instance, that if the value of services a member State receives from the FFA is less than its contribution, it actually costs more to be a member of the FFA.

---

98 FFA, "Economic Benefits of the Forum Fisheries Agency", (Honiara: Forum Fisheries Agency Report No. 89/30, 1989).

99 Ibid., p. 2.

100 Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America, *opened for signature* Apr. 2, 1987, *reprinted in* 26 I.L.M. 1048 (1987). [hereinafter Treaty on Fisheries]. See Chp. 8.

The study also identifies a number of intangible benefits. These are classified as; training opportunities provided by the FFA; assistance in access negotiations; and access to professional staff.[101] The study concludes that:

> There appears to be a significant net benefit derived by member countries in participating in the FFA. These are both at the tangible and intangible level. Tangible costs to participate are minimal. They are limited to the cost of participation in the FFA. Tangible benefits appear to more than off-set these costs. The same situation holds for intangible costs and benefits. There are little, if any, tangible costs to participation in the FFA, intangible benefits are many.[102]

The study, however, cautions that a more detailed analysis of the FFA would require a comprehensive academic study. The failure of the study to be critical of the FFA has to be seen in context. It was prepared by the Secretariat, and therefore it contains material that would only justify its existence.

A second study essentially follows the same pattern.[103] It also identifies the same kinds of issues and concludes that the most significant benefits are "the provision of quality consultancy services ... to assist the member countries to derive reasonable economic returns from the exploitation of their fisheries resources."[104] This conclusion, however, is debatable. According to Kaufman, "while existing regional arrangements have benefited the FFA member States, it is unlikely that benefits from tuna resources have been maximised, due to, amongst other things, significant non-compliance by individual countries" with regional initiatives.[105] This is a problem that the Pacific Island States will need to redress.

---

101 However, these are all areas in which assistance could be obtained from existing international organisations such as the FAO, United Nations Industrial Development Organisation (UNIDO) and the Commonwealth Fund for Technical Co-operation (CFTC).

102 See FFA Report No. 89/30, note 98 above at p. 3

103 FFA, "Economic Benefits to member Countries from Forum Fisheries Agency Membership", (Honiara: Forum Fisheries Agency Report No. 92/84, 1992)

104 Ibid.

105 B. Kaufman, "A Strategic Framework for the Effective Management and Conservation of the Tuna Resources of the FFA Member Countries", (Honiara: Forum Fisheries Agency Report No. 94/37, 1994): pp. 6-7.

One of the strengths of the FFA is its role in providing the Pacific Island States with a united front to negotiate with DWFNs. This was amply demonstrated during the negotiations of the Treaty on Fisheries and the *Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific.*[106] It is unlikely that the Pacific Island States would have succeeded in obtaining international support to ban driftnet fishing without the supporting role of the FFA.[107]

### A. Weaknesses of the FFA

One major weakness of the FFA is that it does not respond to the tuna management obligations of the LOSC. Although the FFA provides a framework under which the Pacific Island States may discuss issues of common concern regarding tuna, it does not allow wider participation of all States both coastal and fishing States to participate. This has exposed the FFA to international criticism.[108] The United States has argued that:

> The primary concern for the management of Pacific tropical tunas is the lack of consensus on a comprehensive plan for gathering and reporting statistics and for setting up a conservation and management group to represent all interests. The lack of data is critical and prevents conducting accurate stock assessment, developing informal management options, and preparing pragmatic advice for rational exploitation of the resource.[109]

Another major weakness of the FFA is the imbalance between funding of the FFA from Pacific Island States and extra-budgetary sources. In 1993 the ratio of member country contributions to extra-budgetary sources was 1:3.12. By 1995, it had decreased only slightly to 1:2.09, which is still an insignificant decrease.[110] While the Pacific Island

---

106 Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, *reprinted in* 29 I.L.M 1454 (1990); ATS (1992) No. 30, SD37: 206. Entered into force 17 May 1991.

107 W. M. Sutherland and B.M. Tsamenyi, note 14 above at pp. 90-91.

108 See FFA, "Draft Summary Record of Discussion of Sub-Committee on Future Management Arrangements, 8-9 March, 1995, Nadi, Republic of Fiji", (Honiara: Forum Fisheries Agency, 1995): Attachment D.

109 National Marine Fisheries Service (NMFS), (1996), http:/kingfish.ssp.nmfs.gov/olo/unit 18.html.

110 FFA, "Forum Fisheries Agency Sub-Committee on Review of Member Country Contribution Schedule, 30 January-3 February, 1995", (Honiara: Forum Fisheries Agency, 1995): Attachment D at p. 2.

States' contributions account for only 54 percent of the FFA's general fund, 74 percent of this is contributed by Australia and New Zealand. This leaves the FFA vulnerable and exposes it to the whims of aid donors. It also raises the argument that without the support Australia and New Zealand, the FFA would be largely unsustainable, thus rendering the sovereign rights of the Pacific Island States in their EEZs meaningless.[111] This can also impact on the ability of the FFA to service the needs of its member States.[112]

Finally, the present structure of the FFA does not allow for transparency in decision-making. There is no prospect for non-governmental organisations (NGOs) and representatives from industry to contribute to the decision-making processes of the FFA.

### B. Strengths of the FFA

The strength of the FFA is its low cost to the Pacific Island States since most of its programs are externally funded. Furthermore, because the FFA is restricted to coastal States there is generally uniformity in the regional objectives of its member States. Unlike other international fisheries bodies, the FFA's emphasis is on economic and legal issues.[113] It is not preoccupied solely with the biological aspects of management. As it is presently constituted, the FFA provides a sound platform for the Pacific Island States to co-ordinate

---

111 See R.E. Kearney, note 9 above; Roniti Teiwaki, "Commentary", John P. Craven et.al. (eds.), *The International Implications of Extended Maritime Jurisdiction in the Pacific*, Proceedings of the 21st Annual Conference on the Law of the Sea Institute, (Honolulu: University of Hawaii, 1987): 150-152. Teiwaki states that the LOSC was perceived as a panacea for economic problems. However, the problem now is the expectation has not been very realistic which he describes as a mirage.

112 See FFA, "Submission to the Parliament of the Commonwealth of Australia Joint Committee on Foreign Affairs, Defence and Trade Inquiry into Australia's Relations with the Pacific Island States of the South Pacific", (Honiara: Forum Fisheries Agency Report No. 88/11, 1988); FFA, "Submission to the New Zealand Foreign Affairs and Defence Committee Inquiry into Official Development Assistance to the FFA", (Honiara: Forum Fisheries Agency Report No. 88/12, 1988); See "Report of the Director to the 29th Meeting of the Forum Fisheries Committee, May 13-17, 1996", (Honiara: Forum Fisheries Committee DOC. 29/2, 1996). According to the Director's Report, the Agency's total 1995 budget was $4,191,000 (unaudited). Of this total 67 percent (77 percent in 1994) came from extra-budgetary contributions to the Trust Fund. The balance came from the General Fund Account, of which member countries contributed 47 percent in 1995. The major providers of extra-budgetary support in 1995 were; Australia (AusAid), Canada (CIDA), Commonwealth Secretariat, European Union, Japan (OFCF), New Zealand, United Kingdom, Asian Development Bank (ADB), United Nations Development Programme (UNDP), United States of America. Funding for discrete projects have been provided by Taiwan and the Australian Centre of International Agricultural Research (ACIAR). See Peniasi Kunatuba, "Regional Organisation and International Assistance", (Honiara: Forum Fisheries Agency Report No. 88/67, 1988).

113 D. Doulman, note 55 above at p. 4.

and co-operate amongst themselves to negotiate as a united group with DWFNs.[114] This is its major strength. Attempts to undermine the cohesion of the FFA will be detrimental to the Pacific Island States. They would not have the economic and political force to counter the influence of DWFNs in an organisation where all States are represented in their own right.

## VII. CONCLUSION

This chapter has shown that the Pacific Island States regionalist response to the LOSC is dictated by geographic and economic conditions. This led to the establishment of the FFA. The FFA was established to assist the Pacific Island States implement the tuna management and conservation provisions of the LOSC. In this way, the burden on individual Island States would not be so great. The Chapter also discussed the strengths and weaknesses of the FFA. The major weakness of the FFA is its dependency on external financial support. The strength of the FFA is the cohesion that it has brought to the Pacific Island States.

Chapter 5 will examine the major accomplishments of the FFA.

---

114 According to Doulman ibid., p. 3:

> As a fisheries organisation, the FFA is unique. Its uniqueness results from it having only coastal States as members. This means that the entire membership has a common purpose and compromises do not have to be reached among members to accommodate those members that have incongruent interests. The common thrust of the agency's activities and its singular focus has greatly contributed to FFA's success as a regional fisheries body. Moreover, the FFA has demonstrated that small and economically vulnerable countries that take a united and co-ordinated stand on fisheries issues can effectively countervail pressures and demands from large and economically powerful DWFNs. This demonstration of strength and achievement by the FFA has encouraged regional groupings of countries elsewhere in the world (most notably the island countries in the Indian Ocean) to consider the adoption of a similar regional approach to fisheries development and management.

# 5

# SUBREGIONAL TUNA MANAGEMENT ARRANGEMENTS

## I. INTRODUCTION

The FFA Convention has, over the years, fostered the development of subregional groupings whose activities complement the objectives of the FFA. It has come to symbolise the organisation and achievements of the subregional arrangements.

This Chapter analyses these arrangements in terms of the management and conservation of the tuna stock in the WCPO region. Part II examines the *Nauru Agreement concerning Co-operation in the Management of Fisheries of Common Interest*[1] and its implementing arrangements. Part III discusses the *Palau Arrangement for the Management of the Western Pacific Purse Seine Fishery*[2] and Part IV examines the *Federated States of Micronesia Arrangement for Regional Access* [3].

It will be shown that the subregional arrangements complement the objectives of the FFA Convention. In chapter 5 the conclusion is reached that the subregional

---

1 Nauru Agreement concerning Co-operation in the Management of Fisheries of Common Interest 1982, *reprinted in* David J. Doulman (ed), *Tuna Issues and Perspectives in the Pacific Islands Region*, (Honolulu: East-West Centre, 1987): pp. 268-271 [hereinafter referred to as the "Nauru Agreement"].

2 The Arrangements for the Management of the Western Pacific Purse Seine Fishery, *opened for signature* Oct. 28 1992 *reprinted in* Forum Fisheries Agency Report No. 92/114 [hereinafter Palau Arrangement]. The Parties to the Palau Arrangements are: Federated States of Micronesia, Kiribati, Marshall Islands, Nauru, and Papua New Guinea.

3 The Federated States of Micronesia Arrangement for Regional Access *opened for signature* Nov. 30, 1994, *reprinted in* Forum Fisheries Agency Report No. 95/1 [hereinafter "FSM Arrangement"]. The parties to the FSM Arrangement are: Federated States of Micronesia, Kiribati, Papua New Guinea, Solomon Islands and Nauru.

arrangements are part of the regional attempts to respond to the challenges arising from the EEZ regime.

## II. THE NAURU AGREEMENT CONCERNING CO-OPERATION IN THE MANAGEMENT OF FISHERIES OF COMMON INTEREST, 1982

The Nauru Agreement provides a framework for the harmonisation and co-ordination of tuna management in the parties EEZs.[4] The Preamble recognises that the exploitation of the common tuna stock in the parties EEZs is carried out largely by foreign fishing fleets. The Agreement also reiterates the parties' dependence on the rational development and optimum utilisation of the resource and recognises the importance of regional co-operation. Under article I of the Nauru Agreement, parties have a duty to "..seek, without derogation of their respective sovereign rights, to co-ordinate and harmonise the management of fisheries with regard to common stocks within the Fisheries Zones, for the benefit of their peoples."

The parties also have a duty to promote the objectives of the FFA Convention, in particular, the promotion of regional co-operation and co-ordination of tuna fisheries policies.[5] Moreover, the parties are to "establish a co-ordinated approach" to the development of uniform terms and conditions for foreign fishing vessels that wish to obtain access to their EEZs.[6] These include the requirement that foreign fishing vessels possess a licence or permit to fish in their EEZs and keep a daily log book to record their activities within the EEZ. In addition, the parties have a duty to establish terms and conditions

---

4 The Parties to the Nauru Agreement are; Federated States of Micronesia, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Solomon Islands, and Tuvalu.

5 Nauru Agreement, Preamble para. 4. See David Doulman, (1987), "Fisheries Co-operation: The Case of the Nauru Group", David J. Doulman (ed), *Tuna Issues and Perspectives in the Pacific Islands Region*, (Honolulu: East-West Centre, 1987): pp. 257-271. For a comprehensive analysis of the Nauru Agreement see T. Aqorau and P. Lili, "The Nauru Agreement - the First Decade, 1982-1992: A Review of the Aims and Achievements of the Parties to the Nauru Agreement Concerning Co-operation in the Management of Fisheries of Common Interest", (Honiara: Forum Fisheries Agency Report No. 93/11, 1993); F. Amoa and M. Lodge, "The Implementation of the Minimum Terms and Conditions of Access through Legislation by Parties to the Nauru Agreement", (Honiara: Forum Fisheries Agency Report No. 93/50, 1993).

6 Nauru Agreement, Art. II.

pertaining to the payment of access fees, and the imposition of the flag State's responsibility for all foreign fishing vessels licensed to operate in the parties' EEZs.[7]

Article III imposes a duty on the parties to "seek" to establish uniform licensing procedures and explore the possibility of establishing a centralised licensing system for foreign fishing vessels. Furthermore, the parties are obliged to establish procedures and administrative arrangements to exchange statistical data pertaining to catch and effort, and vessel specifications and fleet composition.[8] Surveillance and enforcement of fisheries legislation is vital to the management of tuna. In this regard, the parties are obliged to co-operate and co-ordinate the monitoring and surveillance of foreign fishing vessels by exchanging information[9] and. developing procedures to facilitate the enforcement of their fisheries laws. In particular, the parties are required to examine the means by which a regime for reciprocal enforcement may be established.

The Nauru Agreement is generally consistent with the LOSC. Article 63(1) of the LOSC allows coastal States to co-operate to ensure the conservation and development of common fish stocks. The Nauru Agreement discharges the obligation found in article 63(1). The provisions regarding the establishment of procedures to exchange statistical data and various other data is consistent with article 62(4) of the LOSC which requires nationals of other States to comply with the laws and regulations of coastal States regarding, *inter alia*, the provision of catch and effort statistics.

The implementation of the Nauru Agreement is effected by the conclusion of implementing arrangements.[10] Two implementing agreements have so far been concluded. These are discussed below.

---

7 Ibid.
8 Ibid., Art. IV(a) & (b).
9 Ibid., Art. VI(a).
10 Ibid., Art. IX.

### A. An Arrangement Implementing the Nauru Agreement Setting Forth Minimum Terms and Conditions of Access to the Fisheries Zones of the Parties

Article I of the Arrangement Implementing the Nauru Agreement Setting Forth Minimum Terms and Conditions of Access to the Fisheries Zones of the Parties (First Implementing Arrangement)[11] provides for the establishment of a regional register of foreign fishing vessels to be maintained by the FFA.[12] More specifically, the parties have a duty not to licence a foreign fishing vessel unless that vessel is on good standing on the regional register.[13] To maintain good standing status, the foreign fishing vessel must comply with the fisheries laws of the parties.

The parties have a duty to impose minimum terms and conditions of access for foreign fishing vessels.[14] Specific conditions include the requirements that foreign fishing vessels must be individually licensed [15] and that no foreign fishing vessels be licensed unless the licence fees are paid or at least guaranteed.[16] The transfer of licences is prohibited and licensed vessels are to carry the licence at all times.[17]

Article II(2) requires the parties to compel the owner, charterer, operator, master or any other person responsible for a licensed vessel to permit authorised officers to board the vessel for inspection.[18] Authorised officers are to be allowed to gather catch and effort data. To facilitate enforcement, authorised officers are to have access to facilities and equipment including satellite navigators, radios and other navigational aids.[19] Authorised

---

11 An Arrangement Implementing the Nauru Agreement Setting Forth Minimum Terms and Conditions of Access to the Fisheries Zones of the Parties 1982 *reprinted in* B. Campell and M. Lodge, *Regional Compendium of Fisheries Legislation (Western Pacific Region),* vol. III, (Rome: Food and Agriculture Organisation, 1993): pp. 1704-1705 [hereinafter First Implementing Agreement]. The First Implementing Agreement was concluded in 1982.

12 A more detailed examination of the Regional Register is given in Chp. 9.

13 First Implementing Arrangement, Art. I(3).

14 Ibid., Art. II(1)(c).

15 Ibid., Art. II(1).

16 Ibid., Art. II(1)(c).

17 Ibid., Art. II(1)(d) & (e).

18 Ibid., Art. II(2)(a).

19 Ibid., Art. II(2)(b) & (d).

Officers must also be provided with reasonable accommodation, including food and medical care.[20]

Article II(3) requires foreign fishing vessel operators to keep daily catch and effort records and submit them to the licensing authority of the parties within 45 days of the completion of a fishing trip. In addition, article II(4) requires all vessels to give notice of entry into, and exit from, the EEZ, and furnish licensing authorities with a weekly report of position and catch on board while within the exclusive economic zone. When the vessel leaves the EEZ, it should report its position and the amount of fish on board.

Vessel identification is an important enforcement device to assist surveillance officials to be able to discriminate between those vessels which are licensed from those that are not. Thus, article II(5) requires all licensed vessels to display standard identification marks. Specifically, the radio call sign must be displayed in a prominent position on the vessel where it can be identified. If a vessel does not have a radio call sign, its registration number must be displayed in a prominent position.[21] The letters and numbers must be at least one metre high, written in clearly and distinctly and coloured in black on white, white on black or similar contrasting colours.[22] The vessel's name must be painted clearly in English in large letters on the bow and stern of the vessel.[23] To ensure that the terms and conditions are applied to all fishing fleets, article III imposes a duty on the parties to ensure that all foreign fishing vessels comply with the terms and conditions of access. The parties are also required, if necessary, to enact legislation to implement their obligations.

---

20 Ibid., Art. II(2)(c) & (e).
21 Ibid., Art. II(5)(a) & (b).
22 Ibid., Art. II(5)(c).
23 Ibid., Art. II(5)(d).

## B. Second Arrangement Implementing the Nauru Agreement Setting Forth Additional Terms and Conditions of Access to the Fisheries Zones of the Parties

The Second Implementing Arrangement the Nauru Agreement Setting Forth Additional Terms and Conditions of Access to the Fisheries Zones of the Parties (Second Implementing Arrangement)[24] incorporates additional terms and conditions for foreign fishing vessels. Article I(1) prohibits transhipment at sea, irrespective of whether it is carried out within the EEZ or the high seas. Transhipment can only be done in designated ports. In addition, foreign fishing vessels licensed to fish in one or more EEZ and high seas area are obliged to maintain a record of their daily catch and effort data of their high seas catch.[25] The record is to be kept up to date and furnished to the licensing State within 45 days of the completion of the fishing trip.[26] The Second Implementing Arrangement supplements the obligation of vessel operators to provide reasonable accommodation for authorised officers by requiring them to meet the travel cost of the officer from the licensing State to the vessel.[27] Furthermore, the vessel operator is obliged to meet the salary of the officer and provide full insurance coverage.[28] In anticipation of developments in communications technology, the fishermen's association and flag State are to ensure that appropriate electronic position, monitoring and data transfer device are installed on the vessel at the request of the licensing State.[29]

Any legal analysis of the First and Second Implementing Arrangements must begin with the LOSC, in particular, Part V of the LOSC which creates the EEZ regime and imposes important obligations on coastal States to institute conservation and management measures for the tuna stock.[30] Under the LOSC, coastal States are vested with the power to

---

24 Second Implementing Arrangement Implementing the Nauru Agreement Setting Forth Additional Terms and Conditions of Access to the Fisheries Zones of the Parties 1990, *reprinted in* B. Campell and M. Lodge, ibid., pp. 1707-1708 [hereinafter "Second Implementing Arrangement"].

25 Ibid., Art. I(2).

26 Ibid., Art. I(2)(a) &(b) & (c).

27 Ibid., Art. I(3).

28 Ibid.

29 Ibid., Art. II.

30 See discussions in Chp. 2.

make management decisions with regard to tuna in the EEZ. Even where the LOSC requires coastal States to co-operate with other States, this management decision is not taken away. The LOSC only requires co-operation with DWFNs in respect of conservation. The LOSC does not specify any structure for such co-operative arrangements at the subregional or regional level. The important issue is whether the particular structure adopted ensures the conservation and development of such stock.

The First and Second Implementing Arrangements enable its parties to discharge their conservation and utilisation obligations under article 61 and 62 of the LOSC. It may also be argued that the Implementing Arrangements satisfy the requirements of article 63(1) of the LOSC. The efforts of the Parties to the First and Second Implementing Arrangements to harmonise and co-ordinate the management of the tuna stocks in the EEZ is consistent with the obligations under article 61 of the LOSC to enact measures to conserve the tuna stock in the EEZ; to promote the objective of optimum utilisation in article 62 and to co-operate to develop management measures necessary to conserve stock that occur in the EEZs of two or more States. The LOSC does not stipulate any specific procedures or structures to be pursued by coastal States to discharge their management obligations in the EEZ. Significantly, the LOSC does not prohibit co-operation between coastal States to harmonise their tuna management regimes in the EEZ. Taken as a whole, the Nauru Agreement and the First and Second Implementing Agreement in so far as they purport to provide a framework for the parties to harmonise their tuna management obligations, is consistent with both the spirit and letter of the LOSC.

## III. THE ARRANGEMENT FOR THE MANAGEMENT OF THE WESTERN PACIFIC PURSE SEINE FISHERY

The Arrangement for the Management of the Western Pacific Purse Seine Fishery (Palau Arrangement)[31] is the only tuna management-oriented instrument geared towards

---

31 See note 2 pp. 1697-1703. Also *reprinted in* Forum Fisheries Agency Report No. 92/114, [hereinafter "Palau Arrangement"]. The Palau Arrangement entered into force on 1 November, 1995.

controlling fishing effort in the WCPO region.[32] Underpinning the Palau Arrangement's conclusion were the concerns about the state of the yellowfin and bigeye tuna stock and the rapid expansion of the purse seine fishery in the WCPO region.[33] It was argued that reducing the purse seine effort for skipjack tuna would alleviate pressure on the yellowfin and bigeye tuna.[34] The parties' objective was to prevent a likely economic disaster to the tuna industry and mitigate threats to the yellowfin and bigeye stock.[35] It was envisaged that this would be achieved by reducing the supply of raw material for canning below demand levels. The assumption underpinning the development of the Palau Arrangement was that cutting effort would improve catch rates in the medium and long terms. With increased prices, foreign fishing vessels would be able to meet higher fees.[36] Initially, the development of the Palau Arrangement was motivated by biological and economic concerns. However, the text of the Palau Arrangement does not reflect those concerns. Even if the Palau Arrangement did reflect those concerns, it is not clear how they would be achieved.

The Palau Arrangement is linked with the FFA Convention and the Nauru Agreement by "having regard" to their objectives especially the promotion of regional co-operation and co-ordination of tuna fisheries policies. Furthermore, the Palau Arrangement recognises the responsibility of coastal States and fishing States to co-operate in the

---

32 For discussion of the development of the Palau Arrangements see Michael Lodge, *A Review of the Development of the Palau Arrangement for the Western Pacific Purse Seine Fishery*. Thesis submitted to the London School of Economics (LSE) in partial fulfilment of the MSc Degree, August 1996, (copy with author). The rapid expansion of the Western Pacific purse seine fishery in the late 1980s caused concern for the status of the tuna stocks in the region. The parties to the Palau Arrangement are; Federated States of Micronesia, Kiribati, Nauru, Marshall Islands, Papua New Guina and Tuvalu.

33 See FFA, "The Western Pacific Purse Seine Fishery: A Summary of Concerns", (Honiara: Forum Fisheries Agency Report No. 90/27, 1990).

34 Ibid., p. 4. It was argued at the time that the adoption of measures to limit purse seining in the WCPO region would elicit an immediate response from Japan and would thus further the Parties to the Nauru Agreement's ambitions to achieve multilateral access with Japan. PNA, "Record of Proceedings, Ninth Annual Meeting of Parties to the Nauru Agreement, Nauru, 19-21 April, 1990", (Honiara: Forum Fisheries Agency, 1990).

35 FFA, note 32. See FFA, "Some Legal Observations on Mechanisms for Controlled Licensing of the Western Pacific Purse Seine Fishery", (Honiara: Forum Fisheries Agency Doc. FFC18/MTC/1 Suppl. 1)(mimeo).

36 Ibid.

conservation and management of tuna in the high seas, and takes into account the special interest of coastal States in the tuna stocks outside the EEZ.

The Palau Arrangement applies within the "Purse Seine Fisheries Management Area" defined as the EEZ or fisheries zones of the parties including the adjacent high seas in the Western Pacific where purse seine vessels operate.[37] The Palau Arrangement's regulatory ambit covers all species of tuna and tuna-like species (including billfish and other incidental by-catch) taken by purse seine vessels in the Management Area.[38] The operative provisions, so far as the cap on purse seine vessels is concerned, are articles 5 and 6.

Article 5.1 requires purse seine vessels to have good standing on the Regional Register before they can be licensed by the parties.[39] However, article 5.1 is inconsistent with the Regional Register. Under the Palau Arrangement, domestic vessels must have good standing on the Regional Register before they can be licensed. The Regional Register, however, does not require domestic vessels to have good standing.

The concept of good standing is a creation of the Regional Register. The drafters of the Palau Arrangement clearly envisaged that there is only one Register as evidenced by the definition of "Regional Register."[40] It is arguable that the Palau Arrangement cannot be construed to impose obligations that impinge on matters for which the Regional Register does not provide.

The vessel limits are provided for in article 6 of the Palau Arrangements which States that no licences would be issued in excess of the cap set out in Annex I.[41] If the parties wish to licence beyond the agreed limit, a 20 percent premium is applied to the applicable fees.[42] It is not clear, however, whether the premium is to be paid to the FFA, the parties or the licensing State. Individual purse seine vessels can be licensed by the parties provided

---

37 Palau Arrangement, Art. 1.1(a) [hereinafter the "Management Area"].

38 Ibid., Art. 2.

39 Domestic vessels are to be given priority over other vessels. See Chp. 9 for a discussion of the Regional Register.

40 Palau Arrangement, Art. 1.1(e) defines the "Regional Register" as the Regional Register maintained by the South Pacific Forum Fisheries Agency.

41 As of March 1997 the cap on purse seine vessels stood at 206 vessels.

42 Palau Arrangement, Art. 6.2.

the vessels have a good record of compliance with the parties' national laws. Individual vessels applying to be licensed under the Palau Arrangement will be considered on a first come, first served basis.[43] Vessels with poor compliance records receive low priority.[44]

The Palau Arrangement establishes the Management Meetings which would oversee its implementation. The parties are required to meet once a year to review the status of the tuna stock and to establish necessary measures for its management and conservation. Decisions of the Management Meetings are binding on the parties. More specifically, the Management Meetings consider available information pertaining to the catch and effort data of purse seine fishing vessels operating in the region, and economic and socio-economic data pertaining to the impact of the fishery in the WCPO region.[45] There is a range of management options which the parties could adopt. These include the regulation of fishing effort, regulation of vessel numbers, and the establishment of closed areas and seasons.[46] In addition, the Management Meetings have to develop surveillance and enforcement procedures consistent with the regionally agreed initiatives.[47] In order to advance the objectives of the Palau Arrangement, the parties may establish Special Working Groups to assist the Management Meetings.[48] The functions of the Special Working Groups are to examine issues arising from the implementation of the Palau Arrangement. However, the recommendations of the Special Working Groups are not binding.

Secretarial services are provided to the parties by the Director of the FFA. More importantly, however, the Director is responsible for assisting the parties to implement and co-ordinate the provisions of the Arrangements.[49] Specifically, the Director evaluates the level of compliance by purse seine vessels of catch report requirements, and also analyses reports received with regards to compliance with national laws and regulations. The

---

43 Ibid., Art. 6.4

44 Ibid., Art. 6.5.

45 Ibid., Art. 3.2(a).

46 Ibid., Art. 3.2(b).

47 Ibid., See discussions on the Niue Treaty and enforcement and surveillance in Chp. 9.

48 Palau Arrangement, Art. 7.

49 Ibid., Art. 9.1.

parties have a duty to comply with the Regional Register of Foreign Fishing Vessels. In addition the parties are required to inform the Director of the details of licensed vessels.[50]

The parties to the Palau Arrangement recognise the need to co-operate with DWFNs and international organisations who have an interest in tuna in the WCPO region.[51] However, such co-operation can only take place through informal consultations between the parties, DWFNs or international organisations.[52] It has been suggested that this provision violates article 64 of the LOSC and the Fish Stocks Agreement.[53] However, the Fish Stocks Agreement sheds light on the correct interpretation of article 64 and provides for co-operation between coastal States and DWFNs either directly or through subregional or regional fisheries management organisations or arrangements.[54] Such organisations or arrangements should be open to participation by all States having a real interest in the fisheries concerned.[55] It is argued that the Palau Arrangement, as presently structured, could not comply with the requirements of the Implementing Agreement.[56] However, this view misconstrues the objective of the Palau Arrangement and assumes that the Palau Arrangement applies to the high seas areas. It also misinterprets the application of the Fish Stocks Agreement by suggesting that it requires coastal States and DWFNs to make joint decisions regarding the tuna fishery in the WCPO region. In the author's view the Fish Stocks Agreement merely requires coastal States and DWFNs to ensure that the measures they respectively adopt for the EEZ areas and high seas areas are compatible.[57] Insofar as the Palau Arrangement applies to the EEZ, the parties have the right to conserve and manage tuna within their EEZs.[58]

---

50 Ibid., Art. 9.4.

51 Ibid., Art. 8.1

52 Ibid., Art. 8.2.

53 M. Lodge, note 32 above at p. 12.

54 Ibid., p. 32.

55 Ibid.

56 Ibid.

57 Fish Stocks Agreement, Art. 7. See discussions on the implications of the Fish Stocks Agreement in Chp. 10.

58 W.T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond*, (Oxford: Clarendon Press, 1994): 218. For a comprehensive analysis of the Palau Arrangements see, T. Aqorau and A. Bergin, "Ocean Governance in the Western Pacific Purse Seine Fishery - the Palau Arrangement", *Marine Policy* 27(2) (1997): pp. 173-186.

The implementation of the Palau Arrangement, however, has some international law implications. The Palau Arrangement purports to apply to high seas areas adjacent to the EEZs of the parties. It also claims that the parties have a *special interest* in the tuna in the high seas. It is not clear what is meant by *special interest*; neither is it clear whether this refers to the conservation or management of tuna or to the exploitation of the resource.

One interpretation is that special interest refers to coastal States interest in managing, conserving, exploiting and exploring tuna. In other words, the sovereign rights over tuna in the EEZ may be extended to the high seas. It is hard however to justify this interpretation since tuna is clearly subject to the limitations in article 64 of the LOSC. Under article 64, coastal States and fishing States who fish for highly migratory species are required to co-operate with a view to conserving the resource.

It has been argued that if coastal and fishing States that fish on the high seas fail to reach agreement, the LOSC "clearly provides that coastal States have the superior rights."[59] This conclusion is based on an analysis of article 63(2) of the LOSC. It follows that if negotiations fail, article 116 of the LOSC which provides that States which fish on the high seas have obligations to the coastal States may be construed to "authorise the coastal State to secure its superior rights by prescribing conservation measures with which high seas fishing States are obliged to comply."[60] Whether the parties can rely on this argument to justify the claim to special interest is not clear. There have been no direct negotiations conducted pursuant to article 63 or article 64 of the LOSC in the WCPO region. Consequently, the parties may not claim a special interest.

The parties to the Palau Arrangement could argue that high seas fishing is jeopardising the state of the resource inside the EEZ. An argument could be based on the grounds of dependency on the resource.[61] Under customary international law, coastal

---

59 W.T Burke and E.L. Miles, (1988), *Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problems of Straddling Stock*, Moscow Symposium on the Law of the Sea, Law of the Sea Institute (1988): pp. 217-243.

60 Ibid., p. 242.

61 W.T. Burke, *Fisheries Regulations Under Extended Jurisdiction and International Law*, (Rome: FAO Fisheries Technical Paper 233, 1992): pp. 16-18.

States may not extend management authority beyond the EEZ to high seas areas and enforce it there without the agreement of the flag State.[62] However, coastal States can impose restrictions as a precondition for access to their EEZs but these conditions cannot be enforced outside the EEZ.

The purpose of applying the Palau Arrangement to the adjacent high seas is to give effect to article I of the Second Implementing Arrangement. Article I requires fishing vessels licensed by the parties to report high seas catch where these are caught during the same fishing trip. In light of the foregoing analysis, it would seem that while the parties to the Arrangement may prescribe conditions for high seas fishing as a precondition for access to their EEZs, they may not enforce them outside the EEZ.

This situation will change, however, once the Fish Stocks Agreement comes into force and is ratified by parties to the Palau Arrangement. The Fish Stocks Agreement breaks new ground in international law by providing that a State which is a party to a regional conservation and management agreement may board and inspect a vessel of another party to the Agreement fishing on the high seas areas covered by the regional agreement. If a violation is found, the inspecting State will notify the flag State and the flag State is required to investigate the violation and take enforcement action, if appropriate. The flag State must, within three days, take action by itself or authorise the inspecting State to act on its behalf. If the flag State fails or refuses to exercise either of the two options, the inspecting State may investigate the vessel further and in case of a serious violation, may require the vessel to go to the nearest port. Such enforcement action by a non-flag State in respect of a fishing vessel is an important development in international law and is a significant departure from the traditional regime whereby it is the State whose flag the vessel flies that has the exclusive enforcement responsibility in respect of the high seas fishing.[63]

---

62 W.T. Burke, note 59 above.

63 For a detailed discussion of this point see Moritaka Hayashi, "Enforcement by Non-flag States on the High Seas under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks", *Georgetown International Environmental Law Review* IX(1) (1996): pp. 1-36.

The desire to control high seas fishing is, in part, driven by the political problems the Pacific Island States have faced in managing tuna within their EEZs.[64] It also reflects their desire to manage tuna throughout its entire range. However, because of their suspicions of the DWFNs' motives, they have not been willing to enter into direct negotiations with DWFNs with respect to international co-operation on tuna management.

Under article 62(2) of the LOSC, coastal States are required to determine their capacity to harvest the living resources within the EEZs. Where they do not have the capacity to harvest the entire allowable catch, they are required to share the surplus with other States through agreement or other arrangements. It may be argued that the Palau Arrangement is in violation of the spirit of the LOSC. In other words, where there is no threat to tuna stocks, and where the coastal States do not have the capacity to catch the surplus, they cannot curtail the efforts to catch the surplus. It may be counter argued, however, that the number of vessels which can be licensed is the prerogative of coastal States. Whether they permit one or one hundred foreign fishing vessels to fish in their waters is their discretion.

Not surprisingly, the DWFNs have not accepted the Palau Arrangement. In October 1992, a high level government and industry delegation from Japan visited the Pacific Island States to discuss the Palau Arrangement. The Japanese Delegation criticised the Palau Arrangement as discriminating against DWFNs. They argued that while the preamble mentioned "co-operation between coastal States and fishing States" there is no reference to article 64 of the LOSC which is the basis for co-operation between coastal States and DWFNs.[65] They also argued that countries who are not involved in making decisions on such important management issues will not be obliged to comply with those decisions.

---

64 In the Central and Western Pacific, there is a lack of effective management arrangements across all sectors of the tuna fisheries. There is a clear need for effective management institutions and controls within zones. See PNA, *General Fisheries Management Issues in the Western and Central Pacific*, Paper prepared for the Parties to the Nauru Agreement Twelfth Special Session, Honiara, Solomon Islands, 21-22 November, 1996.

65 FFA, "Record of Meeting: FFA member Countries and Secretariat regarding Western Pacific Purse Seine Management Arrangements, 1 October, 1992", (Honiara: Forum Fisheries Agency Report No. 92/93, 1992).

They saw very clear discrimination in article 5 and 11.4, arguing that while Australia and New Zealand were potential members, they were both outside the region. Japan argued:

> If Australia and New Zealand are to be placed in privileged positions and Japan is not, discrimination here is very clear. Such unfairness is certainly inconsistent with international legal standard and may result in adverse effects on bilateral relations between Japan and individual member countries.[66]

As it turned out, the Palau Arrangement has not led to a deterioration in relations between Japan and the Pacific Island States. The Japanese delegation offered a number of suggestions to deal with the situation. They recommended that (a) there should be more consultations among all the States concerned, both coastal and fishing States before the Pacific Island States enforce any new arrangements affecting the high seas; (b) any new arrangements affecting fishing on the high seas should be open to all States in the region; (c) any such arrangements should have a consultative mechanism that can reflect the views of all States; (d) decisions on scientific assessments should involve scientists from all States; and(e) any regulatory measures should be agreed to by all States.

The concerns of DWFNs are genuine and can also be construed as strategic, but perhaps should be taken into account by the Pacific Island States. However, the Palau Arrangement is essentially a mechanism that applies in the EEZ. It is within the discretionary powers of the Pacific Island States to determine the measures that are to be applied within their EEZs. There are, at present, two factors which mitigate against the formation of a broad-based tuna management body. The first is that there is at present no mechanism that provides a fair balance between the aspirations of the coastal States and DWFNs due to the fact that there continue to be fundamentally different objectives between the DWFNs and coastal States with respect to tuna fisheries management in the WCPO region.[67] Several Pacific Island States have few alternative natural resources on

---

66 Ibid.

67 G. Geen and A. Wright, *Options for Tropical Tuna Management: Considerations for the South Pacific*, Paper presented at the WPFCC/TPFCC Workshop on Economic and Legal Aspects of Tuna Management, Manila, Philippines, 12-13 October 1992, (Honiara: Forum Fisheries Agency Report No. 92/88, 1992): p. 7.

which to base their economic development and they do not have the luxury enjoyed by DWFNs who are able to relocate to other fishing grounds if the tuna stocks are depleted. The second is the present level of catches taken within the zones of the Pacific Island States. It is uncertain whether the purse seine fishery can be viable if DWFNs fish exclusively in the high seas areas. It can be argued therefore that control of the surface fishery as a whole in the WCPO region is well within the capabilities of coastal States acting in concert.[68] With the expansion of the domestic tuna industry in the region, it is likely that coastal States' control would increase.

## IV. THE FEDERATED STATES OF MICRONESIA ARRANGEMENT FOR REGIONAL ACCESS

The Federated States of Micronesia Arrangement for Regional Access[69] provides the legal framework for the parties to give favourable access to purse seine vessels that are listed on the Register of Eligible Vessels.[70] The objective of the FSM Arrangement is to facilitate participation by the parties in the exploitation of tuna and secure maximum sustainable economic benefits from it. The FSM Arrangement establishes a framework under which purse seine vessels that provide long-term sustainable and quantifiable economic benefits may be granted preferential access. Article 2 lists five objectives which the FSM Arrangement sets out to achieve. The first is to provide a framework for co-operation between the parties to secure mutual maximum sustainable benefits from the exploitation of tuna.[71] The second is to promote the participation of nationals in the exploitation of tuna.[72] The third is to establish a licensing arrangement for national vessels to be given preferential access to the EEZs of the parties on terms no less favourable than those applied to foreign fishing vessels.[73] The fourth is to establish criteria to ensure that only genuine

---

68 Ibid., p. 5.

69 See note 3 above for a list of the parties to the FSM Arrangement.

70 For a comprehensive analysis of the FSM Arrangement see T. Aqorau and A. Bergin, "The Federated States of Micronesia Arrangement for Regional Fisheries Access", *International Journal of Marine and Coastal Law* 12(1) (1997): pp. 37-80.

71 FSM Arrangement, Art. 2(a).

72 Ibid., Art. 2(b).

73 Ibid., Art. 2(c).

investors are given preferential treatment;[74] and, finally, it is to provide a framework under which purse seine vessels may be given access in accordance with the Nauru Agreement and Palau Arrangement.[75]

### Access to the FSM Arrangement Area

The FSM Arrangement establishes an "Arrangement Area" which encompasses the EEZ or fisheries zones of the parties, except those waters closed in accordance with Schedule 2 of Annex V.[76] To be eligible to fish within the Arrangement Area, a vessel must first be registered on the Register of Eligible Vessels. This is a register maintained by the Director of FFA and is essentially a bank of information containing the name of the vessel, its international radio call sign, country of registration, regional registration number, name and address of owner or owners, name and address of operator, and the name of the home party of the vessel.[77] The "home party" means the party in whose waters the vessel is based and is licensed to fish.

The home party must first satisfy itself as to the eligibility of the vessel. Details of the eligibility criteria are set out in Table 5.1 below. Annex III provides for a points system to evaluate whether a vessel is based in the region. A vessel must score at least 25 points to be eligible for a licence. Article 3(4) provides that a pre-condition of entry into the Register is that the applicant must agree that the vessel will provide regular reports of its catch while it is within the Arrangement Area or on the high seas. These must be provided within 14 days following completion of a fishing trip. Once the vessel is registered on the Register of Eligible Vessels, it may apply through its home party for a regional access licence.[78]

---

74 Ibid., Art. 2(d).
75 Ibid., Art. 2(e).
76 Ibid., Art. 1(c).
77 Ibid., Art. 3.
78 Ibid., Art. 6(3).

TABLE 5.1: POINTS EVALUATION SYSTEM

| Points | Equity[a] | Vessel Flag | Nationals employed[b] | Local purchases (US$)[c] | Onshore investment (US$)[d] |
|---|---|---|---|---|---|
| 10 | 100% | Party | >50 | >700,000 | >5,000,000 |
| 8 | >50% | | 31–50 | 500,000–700,000 | 2,000,000–5,000,000 |
| 5 | 30–49% | State eligible to accede to this Arrangement | 16–30 | 250,000–500,000 | 500,000–2,000,000 |
| 2 | 10-29% | | 5–15 | 50,000–250,000 | 100,000–500,000 |

a 'equity' means the percentage of the total capital invested by the Government or nationals of a Party in the enterprise and the vessel. In cases where the vessel is owned by the enterprise, the measure is simply the percentage of equity in the enterprise. 'The enterprise' means the operation the subject of the application for a regional access licence, and includes the operator of a vessel, a corporation, a joint venture operation and any other form of corporate entity.

b 'nationals employed' means the average number of nationals of Parties employed annually by the enterprise in purse seine related activities, apportioned across the number of eligible fishing vessels operated by the enterprise.

c 'local purchases' means the annual value in US dollars of the purse seine related purchases made by the enterprise in the territory of Parties, apportioned across the number of eligible fishing vessels operated by the enterprise.

d 'onshore investment' means the value in US dollars of purse seine industry related investments by the enterprise in the territory of Parties, apportioned across the number of eligible fishing vessels operated by the enterprise.

The performance of the vessel in terms of meeting the criteria is subject to further review by the parties at their annual meeting.[79] If, at the annual meeting the parties consider that a particular vessel, or a fishing enterprise under which the vessel operates, has not met the eligibility criteria or has not fulfilled the objectives of the FSM Arrangements, or has not made sufficient information available to enable an evaluation to be made, that vessel may be deleted from the register of eligible vessels. If that occurs any regional access licence issued to that vessel will be cancelled.

79 At least two months prior to the annual meeting of the parties, the Director of the FFA may request the assistance of the home country, the vessel owner and/or the fishing enterprise to provide information relating to the vessels performance in terms of meeting the eligibility criteria. This information might include details of equity holdings; number of nationals trained; number and proportion of nationals employed and the payroll of national employees; details of onshore investments; details of local purchases; and any further information as may be considered necessary. The annual meeting shall use this information to assess the extent to which vessels, or fishing enterprises, have satisfied the eligibility criteria and fulfilled the objectives of the Arrangement. An independent evaluation of the operations of the vessels may be requested if considered necessary.

Any party may apply to the Director of the FFA for a vessel to be added to the Register of Eligible Vessels, but the vessel must first be licensed to fish in the home party (the country in which the fishing vessel is based).[80] The home party must also be satisfied that the vessel fulfils the eligibility criteria. Details of the vessel entered on the Register is circulated to all the parties.

The Administrator may withhold issuing a licence if the proper procedures have not been complied with by the vessel.[81] Moreover, a regional access licence may be denied if the vessel does not have good standing on the Regional Register or where it has failed to satisfy a judgement for breach of the FSM Arrangement.[82] The regional access licence is valid for up to twelve months.

**Access Fees**

Access fees are set at five percent of the value of the catch calculated on the basis of the vessels' performances, and the average price of tuna in the preceding year.[83] The fees are to be paid to the party in whose waters the vessel has a regional access licence to fish. The level of fees also varies according to the size of the vessels.

The FSM Arrangement makes provision for three different classes of fishing vessels according to their size. In the first category are vessels less than 700 gross registered tonnes (GRT). Fees for such levels are set at US$73,000 for an annual licence or US$18,300 for a quarterly licence. In the second category are vessels that range between 700-1000 GRT. Annual fees for these vessels are set at US$86,000 and US$21,500 for a quarterly licence. The final category includes vessels greater than 1000 GRT which are required to pay US$107,500 for an annual licence and US$26,900 for a quarterly licence.[84] The FSM Arrangement requires that the licence fees be paid in two equal instalments. The

---

80 There is no registration charge for the Register of Eligible Vessels.

81 FSM Arrangement, Annex IV(4)(a).

82 Ibid., Annex IV(4)(c) & Annex IV(4)(d).

83 Ibid., Annex IV Schedule 1(2).

84 See FFA, "The Federated States of Micronesia Arrangement for Regional Access: Procedures Manual for FFA Member Countries", 2nd Edition, (Honiara: Forum Fisheries Agency, 1995): 7.

first instalment must be paid when the application for a regional access licence is submitted, and the second instalment is due when the licence expires.[85]

To ensure there is adequate provision to meet the cost of monitoring and observation, the FSM Arrangement imposes an "observer levy" presently set at US$2,400 per vessel. This is to be paid at the time when the vessel applies for a regional access licence.[86] The relevant provision governing the distribution of fees to all the parties is set out in Annex VI. The basic principle is that the fees will be apportioned according to where the tuna is caught. The formula for distributing the fees is based on the calculation of the regional price of tuna per tonne. This is the aggregate of the licence fees divided by the aggregate of the regional catch of the parties.[87] The fees are then distributed by the Administrator by dividing the fees. The fee is arrived at by calculating the total catch in a party's waters multiplied by the regional price of tuna per tonne. The calculations are made after the Administrator has deducted its administrative costs.[88]

**Flag State Responsibility**

The concept of "flag State responsibility" is incorporated in article 12 of the FSM Arrangement. The parties have a duty to ensure that their flag vessels do not engage in fishing in the EEZ of another party unless that vessel is licensed under the FSM Arrangement. The parties also have an obligation to prosecute nationals and fishing vessels who violate other parties' laws. In a departure from previous arrangements in the region, a party may prosecute a vessel for violating another parties' fisheries laws.[89] Furthermore, the parties have a duty to assist each other in the investigation of breaches of the Arrangement. The parties are obliged to investigate an alleged breach if requested by another party. If the vessel has left its jurisdiction, the parties may ask the home party to launch an investigation. The home party is required to furnish a report of its investigations

---

85 FSM Arrangement, Annex IV Schedule 1(7).
86 Ibid.
87 Ibid., Annex VI(1)(d).
88 Ibid., Annex VI(5).
89 Ibid., Art. 12(2).

within two months. If the home party establishes that a breach has been committed and the vessel is one that flies its flag, it must take all practical steps to ensure that the vessel submits to the jurisdiction of the party in whose EEZ the violation occurred.[90] Alternatively, the home party may take appropriate remedial and punitive action on behalf of the other party to the extent to which it is permitted by its national laws. If the vessel concerned flies the flag of a third State, the home party can only use its "best effort" to ensure the operator submits to the jurisdiction of the party in whose waters the alleged violations took place. The home party may also request the flag State of the vessel to take appropriate action against the vessel.[91]

**Enforcement**

The Administration of the FSM Arrangement is delegated to the Director of the FFA under article 7. To ensure that the FSM Arrangement is implemented smoothly, provision is made for an annual meeting of the parties to review the operation of vessels on the Register of Eligible Vessels and review the efficacy of the observer program.[92] The parties are required to provide the Administrator with the catch data received by licensed vessels.[93]

The parties have a duty to co-operate to enforce the provisions of the FSM Arrangement and their fisheries laws and regulations.[94] Furthermore, the parties are

---

90 Ibid., Art. 13(2) states that where a party has probable cause to believe that a fishing vessel has committed any of the following offences, it may request the home party of the fishing vessel to assist in its investigations. The offences are listed in Art. 13(2) as follows:

(a) did not have a licence to fish;
(b) was involved in any infringement of an applicable national law;
(c) was involved in any incident in which an authorised officer or observer was allegedly assaulted with resultant bodily harm, physically threatened, forcefully resisted, refused boarding or subjected to physical intimidation or physical interference in the performance of his or her duties as authorised pursuant to this Arrangement;
(d) transhipped or off-loaded catch otherwise than in accordance with Annex V;
(e) was used for fishing in waters closed to fishing pursuant to Annex V;
(f) was used for fishing in any Limited Area as described in Annex V, except as authorised in accordance with that Annex;
(g) was used for fishing for any kinds of fish other than tunas, except that other kinds of fish may be caught as an incidental by-catch.

91 Ibid., Art. 13(3).

92 Ibid., Art. 8(1).

93 Ibid., Art. 9.

94 Ibid., Art. 13.

required to develop procedures for the conduct of fisheries surveillance and law enforcement.[95] If a vessel is arrested by one party for breach of the FSM Arrangement, the home party must be notified immediately. Where the home party is not the flag State, the arresting party is also required to inform the flag State.

The FSM Arrangement provides for port State enforcement. This is the first time such powers have been incorporated in a regional treaty.[96] A party may exercise port State powers if there are grounds to believe that a vessel has violated the FSM Arrangement. The powers of the port State may include detaining the vessel for a reasonable period of time until the home party or the flag State assumes responsibility over the vessel.[97] The FSM Arrangement also creates an observer program which will ensure that it is implemented properly.[98] It is hoped that the FSM Arrangement will stimulate the growth of the domestic tuna industry in the WCPO region which is one of the major challenges facing the Pacific Island States. Whether the FSM Arrangement will achieve its objectives,

---

95 Ibid., Art. 15.
96 Ibid., Art. 16.
97 Ibid.
98 Ibid., Art. 17.

however, remains to be seen.[99] Since the FSM Arrangement came into force, only four purse seine vessels have been licensed to operate in the FSM Arrangement Area.[100]

The FSM Arrangement goes beyond simply providing a regulatory framework for eligible vessels to be given preferential access to the FSM Arrangement Area. The FSM Arrangement contains management and conservation provisions which are based on the LOSC.[101] For instance article 3(4) and 6(3) both operate to preclude a vessel from being licensed unless it agrees to provide various reports of its fishing activities. This is consistent with article 62(4)(e) of the LOSC which allows coastal States to require foreign fishing vessels to provide regular reports of their activities in the EEZ. The FSM Arrangement is also consistent with the LOSC obligations in article 63(1) for coastal States to co-operate to develop and conserve tuna.

## V. CONCLUSION

The subregional arrangements are an extension of the regionalist approach adopted by the Pacific Island States. A significant feature of the subregional arrangements discussed

---

99 A. Wright, "Tuna and Pacific Island States: Some Considerations for Local Industry Development", (Honiara: Forum Fisheries Agency Report No. 95/47, 1995) at p. 8 said the parties to the FSM Arrangement expect that it provides:

> .... a multilateral licensing arrangement for purse seine vessels that satisfy criteria establishing them as vessels making a genuine commitment to the development of the domestic tuna industry in the region. Vessels that meet the agreed licensing criteria can with a single licence, gain access to the EEZs that are parties to the Arrangement. With easier access to the principal fishing grounds, at a cheaper price than would be paid should the same access be sought under a series of bilateral arrangements, and with greater long-term security, the Arrangement provides foreign vessel owners with real incentive to change the nature of their fishing operations.

However, the optimism must be viewed against the failure of many of the domestic tuna industries which have been established in the WCPO region. According to an FFA Report:

> few, if any .... have met the expectations of their Pacific island partners in terms of generating profits and employment, or providing the level of training required for nations to allow them to play a larger role in the fishing operations or the management of the company. Of the purse seine ventures currently operational in the region, most are heavily in debt and hard pressed to cover their day to day operating costs

Quoted in J.H.G Maxwell and A.D Owen, *South Pacific Tuna Fisheries Study*, (Canberra: International Development issues No. 38, AusAid, 1994): p. 20.

100 See "Report of the Administrator to the First Special Meeting of the Parties to the Federated States of Micronesia Arrangement for Fisheries Access, 21-22 November 1996", (Honiara, Forum Fisheries Agency, 1996).

101 T. Aqorau and A. Bergin, note 70 above at p. 52.

above is their close linkage with the FFA Convention, in particular, the objective of having a co-ordinated approach to the management and conservation of the tuna fisheries. For example the Preamble to the Nauru Agreement, pays "regard to the objectives of the South Pacific Forum Fisheries Agency and in particular the promotion of regional co-operation and co-ordination of fisheries policies and the need for urgent implementation of these objectives through regional or subregional arrangements". Further, article VII states that, "nothing contained in this Agreement shall be construed as a derogation of any of the rights and obligations undertaken by any of the parties under the South Pacific Forum Fisheries Agency Convention or any other international agreement in effect on the date on which this Agreement enters into force." Article 9 of the Palau Arrangement calls on the Director of the FFA to assist the parties to implement the Arrangement. In recognition of the significance of the wider membership of the FFA, the Palau Arrangement is open to accession by other member States of the FFA.[102]

The subregional arrangements are responses to specific challenges arising from the EEZ regime. The Nauru Agreement was concluded to establish a framework for its States parties to adopt a co-ordinated approach to the licensing of foreign fishing vessels.[103] The Palau Arrangement is an effort control mechanism which addresses the rapid growth of the purse seine fishery in the WCPO region since the 1980s. Finally, the FSM Arrangement is an attempt by its States parties to stimulate the growth of the domestic tuna industry by giving vessels that relocate their operations to the WCPO region favourable access to the parties EEZ. Each of these subregional responses have attempted to address specific challenges at the subregional level. However, the arrangements all maintain strong linkages with the FFA in particular the need to co-operate with each other underpinning the regionalist strategy to the challenges arising from the EEZ regime.

---

102 Palau Arrangement, Art. 11.4.

103 David J. Doulman, note 5 above at pp. 259-260.

# 6

# REGIONAL STRATEGIES TO DEAL WITH THE CONSERVATION AND MANAGEMENT OF TUNA

## I. INTRODUCTION

This Chapter discusses the major regional initiatives adopted by the Pacific Island States to conserve and manage tuna in the WCPO region. Part II will examine the conservation and management aspects of the Harmonised Minimum Terms and Conditions of Access for Foreign Fishing Vessels. Part III will discuss the *Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific Region* (Driftnet Fishing Convention)[1] and Part IV examines the attempts to develop a conservation and management regime for southern albacore tuna. The Chapter concludes that a regional strategy is necessary to conserve and manage tuna.

## II. THE HARMONISED MINIMUM TERMS AND CONDITIONS OF ACCESS FOR FOREIGN FISHING VESSELS

The Harmonised Minimum Terms and Conditions of Access for Foreign Fishing Vessels (MTCs) essentially establish a code to regulate the conduct of foreign fishing vessels operating in the EEZs of the Pacific Island States.[2] For the purpose of conservation and

---

1 The Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific Region 1989, *opened for signature* Nov. 29, 1989 *reprinted in* Forum Fisheries Agency Report No. 93/1, Honiara, Solomon Islands [hereinafter "Driftnet Fishing Convention"]. Entered into force on May 4, 1990. Appended as Appendix VII. The parties to the Driftnet Fishing Convention are: Australia, Cook Islands, Federated States of Micronesia, Fiji, Nauru, New Zealand, Niue, Tuvalu, Western Samoa.

2 For a comprehensive discussion of the MTCs see M. Lodge, "Minimum Terms and Conditions of Access: Responsible Fisheries Management Measures in the South Pacific Region", *Marine Policy*

management of tuna, the MTCs requires all foreign fishing vessels licensed by a Pacific Island State to report their entry into and departure from the EEZ.[3] Foreign fishing vessels also have a duty to provide regular reports of their catch and position to the licensing State.[4] The catch reports must include the catch on board by weight and species, the international radio call sign of the vessel, licence number, and the vessel's name. The information is used by the Pacific Island States to determine how much fish is caught in their EEZs.[5] The MTCs prohibit transhipment at sea except at designated ports.[6] Furthermore foreign fishing vessels licensed by Pacific Island States must provide reports of high seas catch.[7] However, the duty to provide high seas catch data is a qualified obligation. Foreign fishing vessels are only required to provide high seas catch data if they are licensed by one or more Pacific Island State, and the vessels' fishes on the high seas during the same fishing trip in which they fish in the EEZ of the Licensing States.

The MTCs are generally consistent with article 62(4) of the LOSC. However, certain provisions of the MTCs raise some difficulties under international law. The first is the prohibition of transhipment at sea. The MTCs do not define the term "at sea" and therefore it has been argued that the MTCs encroaches on the fundamental principle of the freedom of the high seas.[8] However, the artificial distinction in the LOSC between the

---

16(4) (1992): pp. 277-305. Also see *Report of the Workshop on Harmonisation and Co-ordination of Fisheries Regimes and Access Agreements, SPEC Headquarters, Suva, Fiji, 22 February - 5 March 1982*, (Honiara: FFA DOC/FFC - VII/3/2); G. Coulter, "Harmonisation of Fisheries Regimes: The Pacific Islands Experience", (Honiara: Forum Fisheries Agency Report No. 83/7).

3 Minimum Terms and Conditions, s. 2.

4 For an analysis of the implementation of the MTCs see M. Lodge and F. Amoa, "The Implementation of the Minimum Terms and Conditions of Access through Legislation by Parties to the Nauru Agreement", (Honiara: Forum Fisheries Agency Report No. 93/50).

5 See FFA, "Minimum Terms and Conditions of Fisheries Access in the South Pacific", (Honiara: Forum Fisheries Agency Report No. 88/90).

6 Minimum Terms and Conditions, s.5.

7 Ibid., s.6.

8 This comment was made by Tatsuo Saito, Special Adviser to the Japan's Minister for Agriculture and Fisheries during bilateral discussions between representatives of the Government of Japan, Japanese Tuna Industry and Solomon Islands Government Officials, October 2, 1992. See "Record of Discussions between Officials from the Solomon Islands Government and Officials from the Government of Japan on Fisheries Relations, Government of Solomon Islands." Honiara, Solomon Islands. For a discussion of the freedom of the high seas see, R.R. Churchill and A.V. Lowe, *The Law of the Sea*, (Manchester: Manchester University Press, 1983). The Pacific Island States have acknowledged that the ban on "transhipments at sea" may be contrary to international law. See FFA,

EEZ and high seas does not necessarily create different rights and duties for the same stocks and associated stocks once these stocks move from the EEZ to the high seas and *vice versa*. Most tuna are now wholly in or partly beyond the EEZ, and subject to the rights, duties and interests of coastal States.

Furthermore, the basis to have joint responsibility between coastal States and fishing States to conserve and utilise fish stocks beyond the EEZ, originates from the sovereign rights granted to and exercised by coastal States over those species within the EEZ. In this regard, reference can be made to the 1989 *UN General Assembly Resolution 44/225 on Large Scale Pelagic Driftnet Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas* which recognises that "[w]hen living marine resources are over-exploited in the high seas adjacent to the exclusive economic zones of coastal States, this is likely to have adverse impacts on the same resources within such zones."[9]

There must be consistency between measures applied within the EEZ and the adjacent high seas.[10] The compelling argument which lends support to the Pacific Island States' position is the limitation under article 116 of the LOSC that articles 61 and 62 could apply to the high seas on the grounds that high seas fishing practices cannot be allowed to undermine the conservation and management practices of coastal States.[11] However, it is unlikely that Pacific Island States could enforce the prohibition of transhipment at sea on the high seas without the consent of the DWFNs.[12]

---

"Review of the Minimum Terms and Conditions for Fisheries Access by DWFNs", (Honiara: Forum Fisheries Agency Report No. 89/63, 1989): p. 5 stated:

> Such a general prohibition cannot be supported by law and it has been suggested that to attempt to support it, or even to be perceived as supporting it, would seriously undermine the credibility of FFA member States. There is an arguable case in international law for some form of restriction on transhipment in areas of high seas adjacent to the EEZs, but even this has to be weighed against the practicability of enforcing such a regime.

9 B. Kwiatkwoska, "Creeping Jurisdiction beyond the 200 miles in the light of the 1982 United Nations Convention and State Practice", Ocean *Development and International Law* 22 (1991): p. 168.

10 Ibid.

11 See E.L. Miles and W.T Burke, "Pressures on the United Nations Convention on the Law of the Sea of 1982 arising from New Fisheries Conflicts: The Problem of Straddling Stocks", *Ocean Development and International Law* 20 (1989): pp. 343-357.

12 Ibid.

If the Pacific Island States were to rely on the arguments above, they would have to demonstrate that high seas transhipment poses a threat to the management and conservation measures taken in the EEZ. It is debatable whether the distortion of catch levels because of transhipment could undermine conservation and management measures in the EEZ. Given that a fishing trip ends once all or part of the fish is unloaded, it could be argued that transhipment actually increases the number of trips. For those Pacific Island States who have access agreements based on the trip per vessel system, it could potentially increase the total amount of the access fees.

The implementation of the MTCs have largely been affected by three issues.[13] These are: The MTCs' status under international law, that is, whether it is a treaty; the compatibility of some of its provisions with international law; and its application to third States.

First, it would be useful to discuss the general difficulties the Pacific Island States have faced in the implementation of the MTCs. A major challenge has been to convince the DWFNs, in particular Japan to accept the MTCs, especially the provisions prohibiting transhipment at sea, the provision of high seas catch data and meeting observer costs.[14]

The DWFNs' position is based on legal and political grounds. Japan's view is that tuna should be managed according to an article 64 of the LOSC type organisation.[15] The management measures should be decided under a mechanism where all States participate on an equal basis.[16] Although Japan's views have been politically unacceptable, they nevertheless are legally valid since Japan is not a party to the agreement establishing the MTCs and therefore are not be bound by them.

The difficulties confronted by the Pacific Islands to convince DWFNs to accept the MTCs can be interpreted as an unwillingness on the part of DWFNs to co-operate to

---

13 See M. Lodge, note 1 above at p. 280.

14 Ibid.

15 See Tatsuo Saito, *Coastal State - Distant Water Fishing State Relations Focusing on Management of Central and Western Pacific Tuna,* Paper presented to the PECC Fisheries Task Force 6th Workshop, Mexico City, 24-25 February, 1992.

16 Ibid.

manage tuna in the WCPO region. Alternatively, the problem in getting the MTCs accepted by DWFNs may be attributed to the failure of the Pacific Island States to incorporate the MTCs into domestic legislation.

A Working Group established by the FFA to investigate mechanisms to enhance the effectiveness of the MTCs noted large disparities in their application of the MTCs by the Pacific Island States.[17] Because of differences in natural resource endowment and economic well-being, some Pacific Island States depend more on tuna than others. The Working Group found that the Pacific Island States more dependent on tuna were less likely to enforce the MTCs in access agreements.[18] The Working Group also found that the incorporation of the MTCs into the access agreements was subject to acceptance by the DWFNs.[19] Some access agreements have "roll over" provisions which makes it easy to set the issue aside.[20] The Working Group found that Pacific Island States fail to assert their sovereign rights in their EEZs. The LOSC clearly gives the Pacific Island States' sovereign rights to establish such terms and conditions to regulate the operation of foreign fishing vessels in their EEZs.[21] This right is the unfettered discretion of coastal States.[22] DWFNs have no right to determine the conditions under which their vessels fish in the EEZs of other States.

The problems confronting the Pacific Island States in the implementation of the MTCs reflect the inequalities in the political and economic powers of the Pacific Island

---

17 FFA, "Record of Proceedings of the Small Working Group Meeting on the Minimum Terms and Conditions of Access and their Implementation, Honiara, 17-21 February, 1992", (Honiara: Forum Fisheries Agency Report No. 92/15, 1992).

18 Ibid.

19 Ibid.

20 See for example s.15 of the Arrangement between the Government of Solomon Islands and the Kaohsiung Fishermen's Association concerning Longline Fishing by Association Vessels within the Fishery Limits of Solomon Islands, 1990 which states: This Arrangement shall enter into force upon signature by the second party and shall remain in force for a period of one year and shall continue in force thereafter until:

> (a) the expiration of three months from the date on which either party shall give notice to the other of its intentions to terminate this Arrangement; or
> (b) in the event of fees not being paid promptly, or the terms and conditions are not complied with, the Arrangement may be terminated forthwith.

21 LOSC, Art. 62(4).

22 W.T. Burke, "Highly Migratory Species (HMS) in the Law of the Sea", *Ocean Development and International Law* 14 (1984): pp. 273-314.

States on the one hand and the DWFNs on the other. The Pacific Island States are amongst the smallest and poorest States in the world. The DWFNs on the other hand are some of the wealthiest and most powerful. Some of the DWFNs are major providers of development assistance to the Pacific Island States and invariably link aid to fisheries access.[23] Under these circumstances it is often politically difficult for the Pacific Island States to bite the hand that feeds them.

## III. THE CONVENTION FOR THE PROHIBITION OF FISHING WITH LONG DRIFTNETS IN THE SOUTH PACIFIC REGION

The negotiation and implementation of the Driftnet Fishing Convention is one of the most successful co-operative efforts by the Pacific Island States to prohibit the use of non-selective and non-discriminatory fishing gear.[24] The conclusion of the Driftnet Fishing Convention was preceded by intensive political and diplomatic lobbying by the Pacific Island States which resulted in unprecedented international support culminating in a United Nations General Assembly (UNGA) resolution banning the use of large scale pelagic driftnets.[25] The Pacific Island States were also active in obtaining international support for UNGA resolution 46/215 of December 20, 1991, which established a moratorium on driftnet fishing in the North Pacific by 30 June 1992 and called for cessation of driftnet activities in the South Pacific by 1 July 1991. Taking the issue to UNGA was unprecedented because for the first time UNGA was used to resolve a specific tuna fisheries problem.

---

23 Sandra Tarte, "Japan's Fisheries Aid to the Pacific Island Countries: An Overview of Japan's Fisheries Aid Policy to the Region with Reference to the Proposed Multilateral Fisheries Agreement", (Honiara: Forum Fisheries Agency Report No. 94/7, 1994): p. 7.

24 Robert Eisenbud, "Problems and Prospects for the Pelagic Driftnet", *Boston College Environmental Affairs Law Review* 12(3-4) (1985):p. 473. The pelagic driftnet is a type of gillnet which consists of a plastic webbing that is suspended vertically in the water by floats at the top of the panel and weights at the bottom. As a passive fishing device it entangles the gill plates and other body parts of the fish and other creatures that swim into it. By adjusting the buoyancy of the net with floats and weights, the net can be suspended like a curtain at any depth in the deep water column and can either be anchored like a curtain to fish in one place or drift with wind and current.

25 United Nations General Assembly Resolution 44/225 of 22 December, 1989 on Large-scale Pelagic Driftnet Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas *reproduced* in E.D. Brown, *The International Law of the Sea: Volume II Documents, Cases and Tables*, (London: Dartmouth Publishing, 1994): pp. 241-243.

International attention on the driftnet problem, however, was preceded by regional action taken by the South Pacific Forum. In July 1989, the South Pacific Forum adopted the Tarawa Declaration which emphasised the grave concerns that the Pacific Island States held about the adverse impact of large scale driftnet fishing.[26] The South Pacific Forum resolved to develop a convention banning driftnet fishing in the region, and seek the establishment of a management regime for South Pacific albacore tuna. The conclusion of the Driftnet Fishing Convention therefore represents a watershed in regional co-operative efforts.[27]

### A. The Main Provisions of the Driftnet Fishing Convention

The objective of the Driftnet Fishing Convention is to prohibit the use of long driftnets in the Convention Area.[28] The Driftnet Fishing Convention creates a Convention Area which includes areas of the high seas in which the parties agree to prohibit their nationals and vessels from engaging in driftnet fishing.[29] The Convention Area includes areas of the EEZ and high seas encompassing the geographical region lying within 10 degrees North latitude and 50 degrees South latitude and 130 degrees East longitude and 120 degrees West longitude and includes the EEZs of the parties.[30]

The Drifting Fishing Convention defines "driftnet fishing" broadly to include attempted fishing, support operations, transhipment and the use of aircraft.[31] Driftnets less than 2.5 kilometres fall outside the ambit of the Driftnet Fishing Convention. Although the

---

26 Tarawa Declaration on Driftnet Fishing 1989, *reproduced* in E.D. Brown, ibid., pp. 235-236. For a comprehensive analysis and description of the Pacific Island countries efforts to ban long driftnets see Andrew Wright and David Doulman, "Driftnet Fishing in the South Pacific: from controversy to management", *Marine Policy* (September) (1991): pp. 303-338.

27 For further discussions see Douglas M. Johnston, "The Driftnetting Problem in the Pacific Ocean: Legal Considerations and Diplomatic Options, *Ocean Development and International Law* 21 (1990): pp. 5-39; M. Rafiqul Islam, "Coastal States' Control over Driftnet Fishing in the South Pacific and the Freedom of Fishing on the High Seas", *Melanesian Law Review* (1989): pp. 81-91; Judith Swan, *International Regulation of Driftnet Fishing Activities*, (Nova Scotia: Oceans Institute of Canada, 1991).

28 Driftnet Fishing Convention, Art. 3.

29 Ibid., Art. 2.

30 Ibid., Art. 1(a)(i).

31 Ibid., Art. 1(c).

Convention Area includes pockets of high seas and substantial expanses of high seas, article 1 provides that the obligations imposed by the Convention do not extend throughout the entire Convention Area in the case of those parties which are non-regional States signing the Convention for any Territory within the Convention Area for which it is internationally responsible, or of a non-sovereign Territory which has been authorised to sign by the State for whose international obligations it is responsible. In those circumstances the obligations are assumed only in respect of waters under the fisheries jurisdiction of that party adjacent to the relevant Territory.[32]

The obligations arising from the Driftnet Fishing Convention only apply to the parties. As such, the parties can only prevent their own nationals from using long driftnets in the high seas. This is generally consistent with international customary law in which only the flag State can take enforcement measures against its vessels on the high seas.[33] Arguably this is one of the weaknesses of the Driftnet Fishing Convention because the parties do not use long driftnets in their EEZs and in the high seas. Moreover, the inability of the Driftnet Fishing Convention to bind third States reflects the limitations of international law to address such issues. If article 2 of the Driftnet Fishing Convention had been drafted to bind third States as well, it would have been inconsistent with international law and contravened the principle of the freedom of the seas.

### Measures against Driftnet Fishing

The Driftnet Fishing Convention requires parties to prohibit their nationals from using driftnets within the Convention Area.[34] Furthermore the parties have a duty to discourage the use of driftnets, prohibit their use within their EEZs and prohibit transhipment of driftnet catches within their EEZs.[35] The parties also have a duty to take action to stop

---

32 Ibid, Art. 1(a)(ii). This qualification applies to American Samoa, Federated States of Micronesia, France, Marshall Islands, Niue, Palau, Pitcairn, and Tokelau.

33 See J. Van Dyke, "Regulation of Fishing on the High Seas under the 1982 Law of the Sea Convention", Paper prepared for the Maui Pacific Centre's Conference on Sustainable Living in the Aquatic Continent: Creating Sustainable Jobs, Aug. 17, 1994.

34 Driftnet Fishing Convention, Art. 2.

35 Ibid., Art. 3(1)(a).

their territory being used by driftnet vessels.[36] These measures may include prohibiting the landing of driftnet catches, processing of catches within their EEZs.[37] and imposing restrictions on the importation of driftnet caught fish and restricting port access.[38] The parties may also legislate to prohibit the possession of driftnets on board any fishing vessel within the EEZ.[39] The Driftnet Fishing Convention permits the parties to take more stringent actions than those specified as long as they are consistent with international law.[40]

**Enforcement of the Driftnet Fishing Convention**

With respect to enforcement, the Driftnet Fishing Convention obliges the parties to take appropriate measures to ensure the provisions of the Convention are enforced and applied.[41] Furthermore, the parties have a duty to collaborate to facilitate surveillance and enforcement of measures they adopt pursuant to the Convention.[42] The parties also undertake to invoke the Regional Register procedures if a vessel is found to have engaged in driftnet fishing activities.[43]

The FFA is given responsibility to collect, prepare and disseminate information on driftnet fishing activities within the Convention Area.[44] The FFA is also required to provide an annual report of any driftnet fishing activities and the measures which are taken to implement the Driftnet Fishing Convention and its associated Protocols. In order to assist the FFA perform its task, the parties have a duty to provide the FFA with information regarding measures they have taken and any scientific analysis on the effects of driftnet fishing.[45]

---

36 Ibid., Art. 3(2)(a).
37 Ibid., Art. 3(2)(b).
38 Ibid., Art. 3(2)(c) & (d).
39 Ibid., Art. 3(2)(e).
40 Ibid., Art. 3(3).
41 Ibid., Art. 4(1).
42 Ibid., Art. 4(2).
43 Ibid., Art. 4(3). See Chp. 9 for a discussion of the Regional Register.
44 Ibid., Art. 6(1)(a).
45 Ibid., Art. 6(1)(c).

### Development of Conservation and Management Measures

The Driftnet Fishing Convention also has a conservation objective beyond merely prohibiting the use of long driftnets within the Convention Area. The Driftnet Fishing Convention attempts to achieve international co-operation in fisheries and conservation as required by the LOSC.[46] Thus, the Driftnet Fishing Convention imposes a duty on the parties to co-operate with each other and with DWFNs to develop conservation and management measures for the southern albacore tuna within the Convention Area.[47]

## B. Protocols I and II

One of the major difficulties with the prohibitive provisions of the Driftnet Fishing Convention is that their implementation requires the co-operation of those States whose interests are affected.[48] Burke has said in relation to the Driftnet Fishing Convention that "it is obvious that continuation of such driftnet fishing would be in the hands of its opponents."[49] The strategy adopted by the Pacific Island States was to conclude two additional Protocols to provide a legally binding mechanism for non-parties situated outside the Convention Area.[50] Both Protocols require the parties to take a number of actions to facilitate the implementation of the Driftnet Fishing Convention. In particular, the parties are:

- to prohibit their nationals and fishing vessels registered under their laws from using driftnets within the Convention Area;
- to convey to the FFA information on the measures they have adopted to implement the Protocol and information on scientific analysis on the effects of driftnet fishing activities in the Convention Area;

---

46 W.M. Sutherland and B.M. Tsamenyi, *Law and Politics in Regional Co-operation: A Case Study of Fisheries Co-operation in the South Pacific*, (Hobart: Pacific Law Press, 1992): p. 83.

47 Driftnet Fishing Convention, Art. 8.

48 W.M. Sutherland and B.M. Tsamenyi, note 47 above at p. 84.

49 W.T. Burke, "Driftnets and Nodules: Where goes the United States?", *Ocean Development and International Law* 20 (1990): p. 237.

50 Protocol I and II *adopted in* Noumea, Oct. 20, 1990, reproduced in B. Campell and M. Lodge,

- to co-operate with the parties to the Driftnet Fishing Convention in the development of conservation and management measures for southern albacore tuna in the Convention Area;
- to take appropriate measures to ensure the application of the Provisions of the Protocol.

In addition, Protocol II requires the parties to take measures consistent with international law:

- to prohibit the use of driftnets within areas under their fisheries jurisdiction;
- to prohibit the transhipment of driftnet catches within areas under their national jurisdiction;
- to prohibit the landing of driftnet catches within their territory;
- to prohibit the processing of driftnet catches in facilities under their jurisdiction;
- to prohibit the importation of any fish or fish product which was caught using a driftnet;
- to restrict port access and port servicing facilities for driftnet fishing vessels; and
- to prohibit the possession of driftnets on board any fishing vessels within areas under their fisheries jurisdiction.

### C. Analysis of the Driftnet Fishing Convention and Protocols

Some general criticisms need to be made about the Driftnet Fishing Convention. The obligation of the parties to legislate with regards to their nationals and vessels is well established in international law on the nationality principle of jurisdiction.[51] It is also the basis of article 117 of the LOSC which obliges States to legislate measures to conserve the living resources of the high seas and apply them to their nationals. Some questions, however are raised by the obligation to prohibit driftnets and transhipment of driftnet catches, by persons or vessels of any nationality within the jurisdiction of the parties since both obligations are stated to be subject to international law. So far as the prohibition of driftnets within the EEZ is concerned, there would be no problems because Part V of the LOSC and customary international law principles in relation to the EEZ regime recognise

---

51 I. Shearer, *High Seas: Drift Gillnets, Highly Migratory Species, and Marine Mammals*, Paper presented to the Annual Law of the Sea Institute Conference, Tokyo, (1990): p. 17.

the right of coastal States to make regulations for the conservation and management of the tuna resources in the EEZ. These include the right to specify the types, size and amounts of gear that may be used.[52]

The prohibition of transhipment can also be found in national legislation.[53] However, the prohibition of transhipment of catches within areas under national jurisdiction may be a problematic prohibition. The reason being the Driftnet Fishing Convention uses the term "jurisdiction" as opposed to "fisheries jurisdiction" in the first prohibition. A State could prohibit transhipment of goods within its territorial sea or contiguous zone in accordance with international law; in the territorial sea stopping a vessel would deprive the voyage of its character as innocent passage; and in the contiguous zone it could be related to a coastal State's customs jurisdiction. The State could also legislate to prohibit such activities in its ports. However, it is argued that in the EEZ, there seems to be no basis for such prohibitions in international law.[54] Transhipment is not mentioned in article 64(2) of the LOSC as coming within the regulatory power of coastal States, although it may be counter-argued that the list is not exhaustive. However, the provision should be interpreted restrictively so that no legal challenges can be instigated. So far as customary international law is concerned, derogations from the freedoms of the high seas should not lightly be implied, although it is not unusual to read article 58(2) of the LOSC as giving rise to a strong presumption of residual high seas freedom in the EEZ.[55]

Another legal issue which arises is the optional prohibition against the "possession of driftnets on board any fishing vessel under a party's fisheries jurisdiction."[56] The same argument could also apply to this prohibition at least in so far as it might be applied in the enforcing State's EEZ. It may be argued that, while article 62(4) of the LOSC empowers coastal States to regulate the types of gear that can be used in their EEZs, it is not clear whether the mere possession of certain types of gear, properly stowed, could be

---

52 LOSC, Art. 62(4)(c).

53 E.g., Cook Islands, s. 15 *Marine Resources Act* 1989.

54 I. Shearer, note 51 above at p. 17.

55 Ibid.

56 Driftnet Fishing Convention, Art. 3(2)(d).

prohibited.[57] These doubts deepen where a State may seek to enforce such a prohibition against a foreign fishing vessel exercising its right of archipelagic sea lanes passage or transit passage through straits.[58] This observation has led to the argument that "one can only assume, or at least hope, that in applying the measures indicated by the Convention 'consistent with international law' the parties would not attempt to apply them to vessels exercising the rights of archipelagic sea lanes passage or transit passage through straits, which seem completely contrary to both the Law of the Sea Convention and customary international law."[59]

Insofar as restriction of port access and port servicing facilities for driftnet vessels are concerned, the Driftnet Fishing Convention is consistent with international law. Indeed, Lowe has argued that there is no right of access to ports in modern customary international law.[60] The exception of course, are vessels in distress which involve different considerations.

There are also some doubts as to whether the prohibition on the importation of any fish or fish products, whether processed or not, which are caught by driftnets is consistent with international law. However, it may be argued that the use of measures to prohibit the importation of products caught illegally is a familiar legislative device. Reference may be made to the Magnuson Act, 1976 of the United States, which allows the Secretary to the Treasury to declare an embargo on fish products from countries whose laws conflict with US tuna policies.[61] According to Shearer:

> It is not necessary in international law for the undoubted prescriptive legislative power of States in respect of their own domestic commerce and customs concerns extend to the high seas in order to characterise the nature of the prohibition; the fact that the prohibited catch originated from the high seas is no more than a fact, not different in essence from prohibiting the importation of products in green-coloured

---

57 I. Shearer, note 51 above at p. 18.

58 LOSC, Arts. 42, 53, 54.

59 I. Shearer, note 51 above at p. 18.

60 A.V. Lowe, "Right of Entry into Ports", *San Diego Law Review* 14 (1976-77): p. 597.

61 Fishery Conservation and Management Act, 1976, 16 U.S.C .{s} 1825 (1982).

> wrapping. It is not per se an assertion of prescriptive jurisdiction over the high seas. Enforcement on the high seas, however, would be an entirely different matter.[62]

However valid these views are, they must be reassessed in the light of the decision of the GATT Panel on US restrictions on imports of tuna.[63] This case arose from the US imposing an embargo on Mexican tuna into the US under the Marine Mammal Protection Act 1972 (MMPA), as revised.[64] Mexico argued that section 101(a)(2) of the MMPA, the relevant provisions of the corresponding regulations and the US prohibition on imports of yellowfin tuna and yellowfin tuna products from Mexico were contrary to Article XI of the General Agreement.[65] The Panel held that the US actions were contrary to article XI of the GATT and the prohibition of importation from "intermediary nations" was also in contravention of GATT. In view of the GATT ruling it may be argued that the prohibition on the importation of tuna and tuna products caught by driftnets violates the GATT. However, in view of the universal support for the ban on driftnets, it remains to be seen whether a GATT panel would adopt the same conclusions.

The conclusion of the Driftnet Fishing Convention and the concerted regional and international efforts to exert political pressure on those countries which engaged in driftnet fishing reflected the lack of substantive rules to deal with the issues. Until then, there were no substantive rules of international law to prohibit driftnet fishing on the high seas. The conclusion of the Fish Stocks Agreement will probably lead to the development of specific principles banning the use of driftnets on the high seas.[66] The Driftnet Fishing Convention, however, represents an important step in this direction. After the conclusion of the Driftnet Fishing Convention, there was a dramatic decrease in the number of vessels driftnetting in

---

62 I. Shearer, note 51 above at p. 18.

63 GATT Panel Report on "United States restrictions on imports of Tuna 1991. See T.L. McDorman, "The 1991 US-Mexico GATT Panel and Report on Tuna and Dolphin: Implications for Trade and Environment Conflicts", *N.C. Journal of International Law and Comparative Reg.*, 17 (1992): pp. 461-88.

64 Marine Mammal Protection Act 1972 (as revised) P.L 95-522, 86 Stat. 1027 (1972), as amended, notably by P.L. 100-711, 102 Stat. 4755 (1988) and most recently by P.L 101-627 at 184 Stat. 4467 91990); codified in part at 16 U.S.C 1361ff.

65 GATT Panel, note 63 above at para. 3.10.

66 See Chp. 10 for a discussion on the implications of the Fish Stocks Agreement.

the WCPO region.[67] The United Nations continues to monitor the use of driftnets throughout the world. Since 1989, the UNGA has passed 8 resolutions on large-scale pelagic driftnet fishing and its impact on living marine resources of the world's ocean and seas.[68] In resolution 50/25 of January 4, 1996, the UNGA expressed its deep concern that there were continuing reports of driftnet fishing activities. The UNGA reaffirmed the importance of the full implementation for the global moratorium on all large-scale pelagic driftnets on the high seas and, importantly for the Pacific Island States, called upon international development assistance organisations to give priority to supporting small island developing States (SIDS) to improve the monitoring and control of fishing activities and the enforcement of fishing regulations.[69] This indicates that there are still strong international feelings against large-scale driftnet fishing.

Throughout the debate over driftnet fishing, both at the regional and international levels, there was a notable absence of any scientific evidence that overwhelmingly supported the view that driftnet fishing endangered the tuna stocks.[70] Not surprisingly, this was the line taken by the Government of Japan. In a letter to the PNG Embassy in Tokyo, the Japanese Government said that it was not possible for the albacore stock to be depleted

---

67 See SPC, "Status of Stocks Reports", (Noumea: South Pacific Commission, 1992).

68 See UNGA Resolutions 44/225 of 22 December, 1989, 45/197 of 21 December, 1990 and 46/215 of 20 December 1991; Resolutions 47/443 of 22 December, 1992, 48/445 of 21 December, 1993 and 49/436 of 19 December, 1994; Resolution 49/116 of 19 December on unauthorised fishing in zones of national jurisdiction and resolution 49/118 of 19 December, 1994 on fisheries by-catch and discards and their impact on the sustainable use of the world's living marine resources.

69 United Nations, UNGA Resolution 50/25 of 4 January, 1996, (New York: UN Doc. A/RES/50/25)

70 There are conflicting views about the impact of driftnetting. One view is that there are no technological or management solutions which might reduce the impact and the scale which driftnets affect non-target species. The converse view is that driftnets when properly regulated and monitored do not create any real environmental problems. As a type of fishing gear, it need not be any more destructive than longlining, troll or purse seining if used selectively and moderately. According to Eisenbud, its adverse environmental impact can be minimised by imposing effective regulatory measures governing mesh size, the overall length of the nets, as well as monitoring the sea space and area of use. Moreover, the impact could also be mitigated if there were more regular and frequent monitoring of the fishery to determine its impact on the marine environment. Another problem with driftnets is that they are not biodegradable and are acoustically and visually invisible to fish and other animals. Most driftnets are almost unbreakable. The Japanese government refuted these claims and argued that the driftnet is a passive gear which catches only certain sized fish which swim towards the nets in specified surface waters at night. See R. Eisenbud, note 24 above at p. 473; Yoshiaki Matsuda, "Technological Aspects", Paper presented at the 1990 *Annual Meeting of the Law of the Sea Institute Conference*, Tokyo.

on the basis of the 1988/89 catch levels.[71] The Japanese cited that no scientific data indicating a depletion of the albacore resources had been given to the South Pacific Albacore Research (SPAR) Group. Furthermore, the Japanese stated that in its view, whether or not a certain fishery will be depleted is not a matter of which fishing gear is used, but a matter of managing the level of fishing effort, such as vessel numbers. The Pacific Island States took a precautionary approach to the issue and argued that the lack of scientific evidence should not prevent the resources being managed.[72] In fact, the SPAR concluded in spite of the lack of data, that "..surface fishery effort and catches have increased rapidly to an alarming level; any further increases would worsen the situation..."[73] Japan's position may have been correct they had data not available to the Pacific Island States. However, the Pacific Islands adopted a precautionary approach. They argued that the lack of data did not mean that the stock is not threatened. Moreover, most of the data was in the hands of the DWFNs which they would not share for their own reasons.[74]

The driftnet issue raised a number of legal issues for the Pacific Island States. Essentially it was a high seas tuna fisheries problem occurring mainly in the southern tropical convergence zone (STCZ), that is, on the high seas areas between New Zealand, Australia, Fiji and the Cook Islands. The first problem was establishing whether driftnetting on the high seas was compatible with the LOSC. The second issue was whether the practice was consistent with international legal requirements relating to the rights and obligations of high seas tuna fisheries conservation and management principles.

---

71 Government of Japan, *The view of the Government of Japan on the conservation and rational utilisation of albacore resources in the South Pacific and its additional voluntary measures for 1988/89 season*, dated 14 September, 1989. The letter is appended as Attachment A to FFA, "Commentary on Japanese View on Driftnet Fishing in the South Pacific", (Honiara: Forum Fisheries Agency Report No. 89/90, 1989).

72 A. Richards, "Problems of Driftnet Fisheries in the South Pacific", (Honiara: Forum Fisheries Agency Report No. 93/66, 1993):p. 3.

73 Ibid., FFA Commentary on Japanese Views, p. 2.

74 See FFA, "Report by the FFA to the Secretary General of the United Nations pursuant to UNGA Resolution 44/225: Large-scale pelagic driftnet fishing and its impact on the living marine resources of the world's ocean and seas", (Honiara: Forum Fisheries Agency Report No. 90/33, 1990).

The third issue was what measures could the Pacific Island States take within their powers that would be effective in stopping driftnet fishing, and not violate international law.

To address these issues in detail, a Legal Consultation was convened by the FFA to examine the legal principles relating to driftnet fishing as a high seas activity. The Legal Consultation concluded that high seas driftnet fishing was not consistent with international legal requirements with regards to rights and obligations of high seas tuna fisheries.[75] However, the Legal Consultation could not recommend measures that would entail enforcement on the high seas in spite of advocating the creation of a driftnet free area. Instead, the Legal Consultation recommended unilateral action within the purview of coastal States' rights in the EEZ. These included the denial of port access to driftnet vessels, prohibition of transhipment and supply to driftnet vessels in the EEZ and prohibiting the possession of driftnets on all vessels in the EEZ. These issues formed the basis of the Driftnet Fishing Convention.

The Driftnet Fishing Convention is an extension of the regionalist approach under the FFA Convention. It is unlikely that the problems posed by driftnet fishing activities could have been resolved unilaterally by the Pacific Island States.

## IV. DEVELOPMENT OF MULTILATERAL ARRANGEMENTS FOR SOUTHERN ALBACORE TUNA

Some attempt has also been made to establish multilateral arrangements to manage and conserve a specific species of tuna. Negotiations were started with DWFNs with a view to concluding a framework for the management and conservation of southern albacore tuna. The impetus for the negotiations stemmed from the large number of southern albacore tuna caught by driftnet fishing vessels on the high seas. Furthermore, the Driftnet Fishing Convention required the parties to co-operate with the DWFNs to develop management and conservation measures for southern albacore tuna.[76] After four sessions of

---

75 FFA, "Record of Proceedings of the Legal Consultation on the High Seas Albacore Driftnet Fishery, 29-31 May, 1989, Solomon Islands", (Honiara: Forum Fisheries Agency Report No. 89/38, 1989).

76 Driftnet Fishing Convention, Art. 8.

consultations between the Pacific Island States and DWFNs, it became apparent that no agreement could be reached on management arrangements for southern albacore tuna.

The issues which proved intractable were the geographic scope, species to be covered by the proposed arrangements and its structure. The Pacific Island States wanted the scope of the arrangement to be restricted to the high seas areas and albacore tuna. The DWFNs, in particular Taiwan, Korea and Japan, wanted it to include the EEZs and high seas and all species of tuna. Furthermore, the Pacific Island States wanted a non-formal arrangement while the DWFNs wanted a legally binding article 64 of the LOSC type arrangement. It was obvious from the outset that there could be no agreement on these issues over which the two parties took fundamentally opposing views.

The Pacific Island States wanted four objectives achieved from the negotiations. These were the preservation of their sovereign rights over the resources within the EEZ; maximisation of benefits from the exploitation of the resource; ensuring the conservation of the resource, and control over the management regime on the high seas.[77] These objectives reflect the apprehensions of the Pacific Island States that the DWFNs were attempting to create an article 64 type organisation.

It was envisaged that the arrangement would include a scientific body whose functions would be to receive and analyse all relevant information and data; to carry out research and scientific investigations, report to the management body; and to give advice on such matters as harvest levels, gear, effort and area of application. It was also agreed that, as far as possible, existing organisations in the WCPO region should be used. In this regard the Pacific Island States were thinking about the South Pacific Commission (SPC) and the South Pacific Albacore Research (SPAR) Group. In particular the SPAR would be formalised as an autonomous body to deal with all the scientific questions. FFA's role would be to distribute all the information as it is required to do under the Driftnet

---

77 FFA, "Albacore Management Regime: Consultation Strategy," (Honiara: Forum Fisheries Agency Report 89/99, 1989): p. 1.

Convention. The SPC would be integrated into this arrangement by being responsible for collecting, analysing and disseminating information.[78]

There were three issues with respect to the management of southern albacore tuna. These were the constitution of the management body, the geographical scope of the arrangements and the powers of the body on the high seas and within EEZs. The Pacific Island States agreed that the proposed body should be open to all coastal States and DWFNs fishing in the WCPO region. The FFA would retain an advisory and secretarial role while the management body would have broad powers to take decisions based on the recommendations of the scientific body. These could also include decisions pertaining to reporting requirements, surveillance, enforcement, registration and revenue generating activities.

The Pacific Island States have consistently advocated that any decision-making procedures should ensure that sovereignty is maintained over the living resources in the EEZs. A two-tiered decision-making procedure was therefore proposed. With respect to the high seas, all management decisions would be made collectively with DWFNs. However, with respect to the EEZ, the decisions of the management body would be non-binding, require the concurrence of coastal States and take into account a separate management group consisting only of coastal States.[79] The geographical scope of the proposed body would include areas of high seas.[80] It was proposed that the functions of the management body could include licensing of vessels,[81] developing a data base for fisheries information[82] and the development of surveillance and enforcement mechanisms.

---

78 FFA, "South Pacific Albacore Fisheries Management principles for a Management Regime," (Honiara: Forum Fisheries Agency Report No. 89/97, 1989): pp. 1-2.

79 Ibid., p. 2.

80 See FFA, "Record of Proceedings of the Third Consultation on Arrangements for South Pacific Albacore Fisheries Management, Noumea, October 17-23, 1990", (Honiara: Forum Fisheries Agency Report No. 90/114).

81 See FFA, "Driftnets in the South Pacific: Japan and Taiwan Perspectives Commentary", (Honiara: Forum Fisheries Agency Report No. 89/58).

82 FFA, "Fourth Consultation on Arrangements for South Pacific Albacore Fisheries Management, Suva, Fiji, 18 December, 1991", (Honiara: Forum Fisheries Agency Report No. 91/79): Attachment k.

The negotiations, however, failed[83] and consequently no management arrangement for the southern albacore tun has been developed.[84]

## V. CONCLUSION

The discussion has shown that the challenges to the EEZ regime to conserve and manage tuna can best be tackled by the Pacific Island States by adopting a regionalist approach. However, the regional initiatives discussed above do not restrain fishing effort. Moreover, they do not contain measures that would ensure that tuna are not over-exploited as required under the LOSC.[85]

Although the regional initiatives have helped to improve tuna management, the arrangements need to be reviewed to incorporate precautionary management principles. The arrangements would also need to be integrated so that limited resources are not duplicated. The tide of international opinion is in favour of more responsible resource management. This should persuade the Pacific Island States to review the regional arrangements.

---

83 David J. Doulman, "Management of South Pacific Albacore Tuna and the Purse Seine Fishery in the Western Pacific", (Honiara: Forum Fisheries Agency Report No. 91/54): p. 16.

84 See Andy Richards, "Historical Perspectives and Trends of South Pacific Albacore Fleets", (Honiara: Forum Fisheries Agency Report No. 93/18, 1993).

85 LOSC, Art. 61(2).

# 7

# MULTILATERAL ACCESS AGREEMENTS

## I. INTRODUCTION

Fundamentally, tuna fishing in the WCPO region is about the regulation of foreign fishing vessels. Ninety percent of tuna caught in the Pacific Island States' EEZs and the adjacent high seas is taken by foreign fishing vessels.[1] Furthermore, the traditional markets for tuna are controlled by DWFNs.[2] They control the harvesting, processing and fundamentally the markets for tuna. The Pacific Island States have claimed EEZs. However, until the late 1980s some of the DWFNs refused to recognise the sovereign rights of the Pacific Island States over tuna.[3] The Pacific Island States also suffered because of their weaker bargaining position in access negotiations with DWFNs and limited surveillance capacity.[4] The difficulties faced by the Pacific Island States was compounded by the failure of DWFNs to comply with the conditions of fisheries access agreements.[5]

---

1 See SPC, *Tuna Fishery Yearbook 1994*, (Noumea: Oceanic Fisheries Program, South Pacific Commission, 1994)

2 See G. Geen, T. Maeda and P. Tauriki, "Overview of Tuna Markets," (Honiara: Forum Fisheries Agency Report 93/32, 1993); G. Waugh, "The Politics and Economics of Fisheries in the South Pacific", Stephen Henningham & R.J. May (eds.), *Resources, Development and Politics in the Pacific Islands*, (Bathurst: Crawford House Press, 1992): pp. 170-178; G. Munro, "The Pacific Islands, the Law of the Sea and Pacific Tropical Tuna", H.F. Campbell et. al (eds.), *Economics of Fishery Management in the Pacific Islands Region*, (Canberra: ACIAR Proceedings No. 26, 1989): pp. 18-28.

3 FFA, "Some Problems of Tuna Management in the South Pacific", (Honiara: Forum Fisheries Agency Report No. 87/48, 1987): p. 2.

4 Ibid., p. 2.

5 Ibid. Indeed, the FFA reported at p. 2 that:

> Data submitted as a requirement under access agreements is not always correct and misreporting is common. DWFNs have provided little assistance to prevent this practice. Without reliable data, Pacific Island countries will not be able to implement effective management regimes, including perhaps quota allocations at some future

To address this problem, the Pacific Island States' response was to adopt a regionalist approach to the licensing of foreign fishing vessels. Part II discusses some of the initiatives of the Pacific Island States in dealing with the challenges in the relationship between the Pacific Island States and DWFNs. The analysis will attempt to show the success which has been achieved through the multilateral framework for the licensing of foreign fishing vessels. Chapter 7 concludes that the regionalist approach to the licensing of foreign fishing vessels is the right strategy because of the Pacific Island States' paucity of resources.

## II. MULTILATERAL FRAMEWORK FOR LICENSING OF FOREIGN FISHING VESSELS

### A. Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States

One of the problems faced by the Pacific Island States after they claimed EEZs was the failure of some DWFNs, in particular the US, to recognise their sovereign rights over tuna.[6] The legal and political differences between the Pacific Island States and the US led to open conflict which resulted in the imposition by the US of a trade embargo against Solomon Islands' tuna products.[7] The Pacific Island States' response to this challenge was to take a regionalist approach by way of negotiating a multilateral framework for the licensing of US purse seine vessels.

The result of these negotiations was the conclusion of the *Treaty on Fisheries between the Governments of certain Pacific Island States and the Government of the United States* (Treaty on Fisheries).[8] The Treaty on Fisheries establishes a broad

---

time. Failure to provide accurate and complete data inhibits closer fisheries co-operation between Island countries and DWFNs.

6 See B.M. Tsamenyi, "The South Pacific States, the USA and Sovereignty over Highly Migratory Species", Marine *Policy*. 10 (186): pp. 29-41.

7 B.M. Tsamenyi, "The Jeanette Diana Dispute", *Ocean Development and International Law* 16 (1986): pp 353-368.

8 Treaty on Fisheries between the Governments of certain Pacific Island States and the Government of the United States *opened for signature* Apr. 2, 1987, *reprinted in* 26 I.L.M. p. 1048 (1987) [hereinafter "Treaty on Fisheries"]. For a comprehensive analysis of the Treaty on Fisheries see B.M. Tsamenyi, "The Treaty on Fisheries between the Government of Certain Pacific Island States and the Government of the United States: The Final Chapter in United States Tuna Policy", *Brooklyn Journal*

multilateral framework for the licensing of US purse seine vessels to operate in the EEZs of the Pacific Island States. To understand the significance of the Treaty on Fisheries, it is necessary to appreciate the wider context of the political and legal dispute which led to the negotiation of the Treaty on Fisheries. Before turning to a discussion of the main provisions of the Treaty on Fisheries, therefore, the political and legal dispute is first examined.

The US had been involved in several tuna disputes over the years. These disputes have centred around the refusal by the US to recognise the sovereign rights of coastal States over tuna in the EEZ.[9] The US tuna policy was based on the premise that because tuna migrate widely through the open ocean and waters of many coastal States, no single coastal State could effectively manage the stocks.[10] The Pacific Island States on the other hand recognise coastal States' sovereign rights over tuna; a position explicitly reflected in article III(1) of the FFA Convention.[11]

The US tuna policy was enforced through the *Fishery Conservation and Management Act* (FCMA) of 1976.[12] The FCMA defined highly migratory species as species of tuna which, in the course of their life cycle, spawn and migrate over great distances in waters of the ocean.[13] Accordingly, the FCMA excluded tuna from the jurisdiction of the Fishing Management Authority which was established under the FCMA.[14] By restricting the definition of highly migratory species and also by excluding

---

*of International Law* XV(2) 1989): pp. 183-221; Florian Gubon, "The Southwest Pacific Multilateral Fisheries Treaty: Some Passible Implications for Fisheries Development, Management and Conservation in the Pacific Islands Region", *Melanesian Law Journal* 22 (1994): pp. 1-22.

9 Christopher R. Kelly, "The Jurisdictional Dispute over Highly Migratory Species of Tuna", *Columbia Journal of Transnational Law* 26(3) (1988): pp. 475-513.

10 See Edward Wolfe, *The International Implications of Extended Maritime Jurisdiction in the Pacific*, Address to the 21st Annual Conference of the Law of the Sea Institute, August 4, 1987.

11 Article III(1) of the FFA Convention states:

> The Parties to this Convention recognise that the coastal State has sovereign rights, for the purpose of exploring and exploiting, conserving and managing the living marine resources, including, highly migratory species, within its exclusive economic zones of fishing zone which may extend 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

12 Fishery Conservation and Management Act (FCMA) of 1976 [16 USC 180 - Public Law 94-265] Also referred to as the "Magnuson Act".

13 See s.3(14) FCMA.

14 See s. 1813 FCMA which stated:

US coastal jurisdiction over tuna, the US effectively used a domestic device (legislation) not to recognise other coastal States' jurisdiction over tuna.[15] The position of the US was based on political expediency rather than a principle or considered policy.[16]

The dispute over rights to tuna led to open conflict in the WCPO region. The first open conflict occurred in 1982 when Papua New Guinea authorities arrested the *Danica*, a US tuna fishing vessels for fishing without a licence within Papua New Guinea's EEZ.[17] The captain of the *Danica* was fined and convicted under the Papua New Guinea Fisheries Act which makes it an offence for a foreign fishing vessel to fish in Papua New Guinea's EEZ without a licence. The Danica was forfeited to the State by the Papua New Guinea court. In response, the US invoked the pertinent sections of the FCMA and imposed an embargo on the importation of fish products from Papua New Guinea. The embargo was lifted after Papua New Guinea released the *Danica* for a nominal fee.[18] In accordance with the FCMA, Papua New Guinea agreed to conclude an interim access agreement with the American Tuna Boat Association which gave members of the association unlimited access to Papua New Guinea's EEZ.[19]

The second dispute was more protracted than the first. This time the conflict was between the US and the Solomon Islands. The dispute arose as a result of the arrest of another US purse seine vessel, the *Jeanette Diana* by the Solomon Islands authorities on June 24, 1984.[20] The captain and owner of the *Jeanette Diana* were charged on two counts

---

> The exclusive fishery management authority of the United States shall not include, nor shall it be construed to extend to, highly migratory species of fish.

15 President Ronald Reagan's statement of 10 March, 1983 proclaiming a 200 nautical mile EEZ also excluded tuna from US jurisdiction. President Reagan's statement is reproduced in *Virginia Journal of International Law* 23(4) (1983):pp. 598-601.

16 See W.T. Burke, "Highly Migratory Species (HMS) in the Law of the Sea," *Ocean Development and International Law* 14 (1984): p. 306. See also C. Healy, "United States Tuna Management Policy", V *ASILS International Law Journal* (1981): p. 67. Healy argued:

> ... by not claiming jurisdiction over tuna, the United States could justify its refusal to recognise claims by other coastal States of 200 mile jurisdiction over tuna. This so-called jurisdictional position is titled somewhat in favour of the US because most of the world's tuna is caught outside the US's 200 mile zone.

17 See B.M. Tsamenyi, note 6 above at pp. 29-41.

18 Ibid.

19 Ibid

20 See B.M. Tsamenyi, note 7 above at p. 360.

under the Solomon Islands Fisheries Act.[21] The defendants were found guilty and were fined by the Solomon Islands High Court. The High Court also ordered the forfeiture to the State of the *Jeanette Diana*, its fishing gear, the illegal catch, and the helicopter on board the vessel.

In retaliation, the US imposed an embargo on the importation of fish products from the Solomon Islands under the FCMA. The embargo was lifted in April 1985 after the Solomon Islands agreed to sell the Jeanette Diana back to its owners.[22]

The political tensions which resulted from these incidents prompted the negotiations of the Treaty on Fisheries.[23] The US also feared growing Soviet influence in the WCPO region following the signing of fishing agreements between the Soviet Union and Kiribati.[24]

### Main Provisions of the Treaty on Fisheries

The main provisions of the Treaty on Fisheries are discussed below under the headings of access to the EEZs of the Pacific Island States; conditions of access; enforcement of the Treaty on Fisheries by Pacific Island States and the responsibilities of the US as a flag State. An assessment of the Treaty on Fisheries is then made.

---

21 *Regina v. Jose Silva Finete and C & F Fishing Ltd*, Criminal Case No. 4 of 1984, Honiara, Solomon Islands.

22 See D. Doulman, *Fishing for Tuna: The Operation of Distant Water Fleets in the Pacific Islands Region*, (Honolulu: Pacific Islands Development Programme, 1986).

23 The feelings of the Pacific Islands leaders that a treaty was needed to regulate US access to the region were supported by US Congressman Paul McCloskey (Jr) of California who stated in 1982:

> The United States .... should convene and host a meeting of the Pacific Islands nations involved. Our goal would be to create a regional treaty following the pattern for regional co-operation in the management of highly migratory species recently set up by the Nauru Fisheries Agreement.

Such an initiative, he added would:

> Demonstrate the willingness of the United States to co-operate fairly and justly in the conservation and management of international fisheries stocks and to encourage the rational use of such resources by [United States] fishermen while still helping the small developing countries ... to make use of, and prosper from the use of, their own natural resources.

*Congress Records* 3948 (daily ed. March 1982) p 1 & 5. Quoted in W.M. Sutherland and B.M. Tsamenyi, *Law and Politics in Regional Co-operation: A Case Study of Fisheries Co-operation in the South Pacific*, (Hobart: Pacific Law Press, 1992): p. 67.

24 Ibid., pp. 68-69.

**Access to the Treaty Area**

The Treaty on Fisheries creates four zones within the EEZs, namely, Treaty Area, Licensing Area; Closed Area; and Limited Area. The "Treaty Area" which encompasses high seas areas is defined as "all waters north of 60 degrees South latitude and east of 90 degrees East Longitude, subject to the fisheries jurisdiction of Pacific Island parties .....except for waters subjected in accordance with international law of a State which is not a party to this Treaty."[25] The Licensing Area includes all waters in the Treaty Area except waters subject to the jurisdiction of the US under international law and waters closed to US fishing vessels under the treaty.[26] The closed areas include the internal waters, territorial sea and archipelagic waters (where applicable) of the Pacific Island States. In general, coastal States do not allow foreign fishing vessels access to these waters in order to protect the domestic commercial industry and traditional fishing activities.[27] Restricting access to these waters also serves a conservation purpose.[28]

The Limited Area, however, is not defined in the Treaty on Fisheries. This is ironic since US fishing vessels have access to this area. Nonetheless, the Pacific Island States may specify the boundaries of the Limited Area within their respective jurisdictions.[29] In the case of the Solomon Islands, the Treaty on Fisheries defines the Limited Area as "all of the Licensing Area within the Fishery Limits of the Solomon Islands as described in the *Fishery Limits Act* of 1977."[30] Within the Limited Area, the Pacific Island States may prescribe the number of days within which US fishing vessels may fish. This allows the

---

25 Treaty on Fisheries, Art. 1.1(k).

26 Ibid., Art. 1.1(e). "Licensing Area" is defined as all waters in the Treaty Area except:
(i) waters subject to the jurisdiction of the United States in accordance with international law; and
(ii) waters closed to fishing by fishing vessels of the United States in accordance with Annex I.

27 FAO, *Coastal State Requirements for Foreign Fishing Vessels*, (Rome: Food and Agriculture Organisation, Rev. 3, 1993).

28 W.M. Sutherland and B.M. Tsamenyi, note 23 above at p. 70.

29 Ibid.

30 Treaty on Fisheries, Annex I (Schedule 3) para. 1.

Pacific Island States to implement conservation measures.[31] The conservation objective is illustrated again in the case of the Solomon Islands where the Limited Area applies:

> There shall be no fishing in the Solomon Islands Limited Area after the expiry of the [500th] fishing day from the earliest date on which any licensing Period takes effect in any given year.[32]

The Treaty Area concept reflects an attempt by the Pacific Island States to strike a balance between respecting the principles of the LOSC, in particular those pertaining to conservation, and giving the US reasonable access to the region's tuna resources.[33]

### Conditions of Access

Access to the Licensing Area is subject to certain conditions. The basic condition of entry to the Licensing Area is that the vessel must hold a valid licence.[34] The licence is issued by the Director of the FFA who is the Administrator of the Treaty on Fisheries.[35] No US fishing vessel is allowed to fish in the Licensing Area unless it has good standing on the Regional Register of Foreign Fishing Vessels.[36] Once licensed, US fishing vessels have to observe certain conditions. Apart from the requirement to observe the applicable national laws of the Pacific Island States, the Treaty on Fisheries prohibits fishing by any method other than the purse seine method.[37] Licensed vessels are to catch only tuna except for southern bluefin tuna. Other species may not be caught except as incidental by-catch.[38] The Treaty on Fisheries provides that the US Government take "all reasonable measures" to assist the Pacific Island States investigate a breach of the Treaty by a US fishing vessel.[39]

---

31 W.M. Sutherland and B.M. Tsamenyi, note 23 above at p. 70.
32 Treaty on Fisheries, Annex I (Schedule 3) para. 3.
33 W.M. Sutherland and B.M. Tsamenyi, note 23 above at p. 70.
34 Treaty on Fisheries, Art. 3.1.
35 Ibid., Annex II(2). See discussions on Good Standing and the Regional Register in Chp. 9.
36 Treaty on Fisheries., Annex II(4).
37 Ibid., Annex I, Part 3(6).
38 Ibid., Annex I, Part 3(5).
39 Ibid., Art. 4.2.

The Treaty on Fisheries provides that consideration for issuing a licence is the payment of fees. The total financial package under the Treaty on Fisheries includes:

- an annual industry payment of four million dollars for 55 vessels;[40] and
- an annual US Government grant of fourteen million dollars for ten years.[41]

In addition, licensed US vessels contribute four thousand dollars each towards the cost of placing observers on board US fishing vessels.[42]

### Treaty Enforcement Provisions

The Treaty on Fisheries contains provisions that demarcate the enforcement powers of the Pacific Island States. The Pacific Island States have the right to enforce the provisions of the Treaty and licences in their respective EEZs.[43] This reflects the provisions of the LOSC, which gives coastal States the power to exercise their sovereign rights to enact measures necessary to enforce their fisheries laws and regulations.[44]

However, some limitations are placed on the Pacific Island States' enforcement powers. Under the Treaty on Fisheries, the Pacific Island States have a duty to notify the US Government of any arrest of a US fishing vessel or crew and of any charges filed against the vessel.[45] Significantly, the US. Government has a duty not to impose sanctions of any kind, including deductions however affected from any amounts which otherwise might have been paid to any Pacific Island State and restrictions on trade as a consequence of enforcement measures taken by a Pacific Island State.[46]

### Flag State Responsibilities

The concept of flag States responsibilities was developed because of difficulties with enforcement. Traditionally enforcement was through the physical inspection of vessels at

---

40 Ibid., Annex II (Schedule 3) para. 1(a).
41 Agreement between the Government of the US and the FFA, Art. 4.
42 Treaty on Fisheries, Annex I, (Part 7) para. 24(b).
43 Ibid., Art. 5.1.
44 W.M. Sutherland and B.M. Tsamenyi, note 23 above at p. 72.
45 Treaty on Fisheries, Art. 5.2.
46 Ibid., Art. 5.4.

sea. This strategy worked if coastal States had the necessary resources to carry out physical inspection of foreign fishing vessels at sea. The Treaty on Fisheries is the first major example where the concept has been applied. The Treaty imposes flag State responsibility on the US Government which has a duty to enforce the provisions of the Treaty and to ensure that US vessels comply with the conditions of their licences.[47] The US Government also has a duty to take the necessary steps to ensure that US nationals and fishing vessels do not fish in the Licensing Area and Closed Areas.[48] This provision is clearly significant for the Pacific Island States because they lack the resources necessary to ensure that the Treaty is implemented successfully. More specifically, the US. Government must ensure that measures are taken to, *inter alia*, resolve any claim that arises out of the activities of a US fishing vessel, including a claim for the total market value of any fish taken without authorisation from the Licensing Area.[49] The US. Government is also obliged to facilitate the service of legal process, prompt adjudication of claims and satisfaction of judgement.[50]

To facilitate the effective discharge of its duties, the Treaty on Fisheries obliges the US to appoint an agent based in Port Moresby.[51] The responsibility of the agent is to receive and respond to any legal process issued by a Pacific Island State.

### Assessment of the Treaty on Fisheries

From the perspective of the Pacific Island States, the Treaty on Fisheries has met a number of objectives. It has removed the source of conflict with the US by putting in place a framework to resolve their differences.[52] It has been argued, however, that the source of conflict has only been set aside, not resolved.[53] This view is inconsistent with the current position of the US in recognising that coastal States have sovereign rights over tuna in the

---

47 Ibid., Art. 4.1.

48 Ibid., Art. 4.5(a).

49 Ibid., Art. 4.3.

50 Ibid.

51 Ibid., Art. 4.9.

52 W.M. Sutherland and B.M. Tsamenyi, note 23 above at pp. 74-76.

53 This statement was made by David Bolton, Legal Adviser in the US State Department during discussions between representatives of the FFA member countries and the US Delegation to the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, Second Substantive Session, March 1994, New York. The author was present at those discussions.

EEZ.[54] Thus, the Treaty on Fisheries has not "set aside" the problems but has resolved them.[55]

From the perspective of the Pacific Island States, the Treaty on Fisheries is seen as important because of improvements in data acquired from US fishing vessels.[56] It has also led to increased compliance and control over US vessels which provide the bench mark for all fleets operating in the region. The Treaty on Fisheries has also provided the basic framework for co-operation in investment and development between the US Tuna Industry and the Pacific Island States[57] although there is some doubt,whether the Treaty has provided the benefits that the Pacific Islands' expected.[58]

The rate of return from the Treaty on Fisheries is approximately 10 percent of the value of the catch taken by the US tuna fleet in the Pacific Island States EEZs.[59] This

---

54 FFA, "Record of Proceedings of the Fourth Annual Consultation on the Treaty on Fisheries, Suva, Republic of Fiji, 6-13 December, 1991", (Honiara: Forum Fisheries Agency Report No. 91/81, 1991): Attachment J. The US in response to a question posed by the Pacific Island States stated:

> You indicated a desire to discuss the revision of the Magnuson Act and the premises on which the Treaty was initially negotiated. From our perspective, we negotiated the Treaty at a time when the United States did not claim or recognise coastal State jurisdiction over tuna. Now we do. Thus, the problem we once had, the potential for sanctions in the event of a seizure of a US tuna vessel for fishing in the zone of a Pacific Island State, no longer exists.

55 Ibid., The US delegation went on to say:

> However, we do not believe that change in legal position has a bearing on the need or usefulness of our Treaty Arrangements. As a matter of fact, our Treaty Arrangements fully respect the jurisdiction of the Pacific Island States. Further, the Treaty also establishes a regional agreement for tuna licensing that makes sense from both our perspectives. Thus, the Treaty reflects a certain reality concerning tuna fishing operations by purse seiners in the region. There remains a need in a region such as this for co-operation between countries like ours with capability to fish on the high seas and the countries exercising coastal State jurisdiction in the region. We believe this Treaty reflects that reality.

56 FFA, "Report of the Administrator to the Internal Meeting of the Pacific Island Parties", Ninth Annual Consultation of the Parties to the Treaty on Fisheries, Port Vila, Vanuatu, 11-14 March, 1997", (Honiara: Forum Fisheries Agency Doc. PTF9/WP.1, 1997): p. 1.

57 Treaty on Fisheries, Art. 2.

58 FFA, "Report of the Administrator to the Internal Meeting of the Pacific Island Parties Seventh Annual Consultation of the Parties to the Treaty on Fisheries, Nadi, Fiji, 13-16 March, 1995", (Honiara: Forum Fisheries Agency Doc. PTF7/WP.1, 1995): p. 1. A special Working Group has been established to examine ways to give effect to the broader co-operation provisions of the Treaty on Fisheries, see FFA, "Broader Co-operation", (Honiara: FFA Doc. PTF9/WP.6, 1997). Paper prepared for the Ninth Annual Meeting of the Parties to the Treaty on Fisheries, Port Vila, March 11-14, 1997.

59 FFA, "Cumulative Treaty Payments and Benefits", Paper prepared for the Ninth Annual Meeting of the Parties to the Treaty on Fisheries, Port Vila, Vanuatu, March 11-14, 1997, (Honiara: FFA Doc. PTF9/INFO.F, 1997): 3.

compares with 5 percent which is the rate of return being paid by other fleets.[60] In terms of the theme of this thesis, the regionalist approach which is reflected by the Treaty on Fisheries has facilitated better compliance of the Pacific Island States laws and regulations and improved the provision of catch information. The general consensus is that the Treaty on Fisheries, in broad terms, has been beneficial both to the Pacific Island States and the US.

From the perspective of the US Government and industry, the Treaty on Fisheries has stabilised the relationship with the Pacific Island States and guaranteed long-term access to the rich tuna grounds in the region.[61] The US Government and the tuna industry's treaty objectives were to maintain a higher base price and have secure access for their fishing vessels.[62] For the US State Department, the Treaty on Fisheries has stabilised relations with the Pacific Island States and strengthened the viability of the US tuna Industry in the WCPO region.

The Treaty on Fisheries contains some very important provisions that would enhance management of the tuna resource in the WCPO region and meet the challenges posed by the EEZ regime. Through the broad definition of the "Treaty Area" which encompasses areas of high seas, a better picture of exploitation patterns throughout the range of the tuna stock may be obtained. Since US vessels are required to submit various reports to the Pacific Island States, the data collected would help give them a better picture of the status of the stock.

Important management provisions are found in Annex I, Schedules 4, 5, and 6 of the Treaty. A list of reporting requirements for individual Pacific Island States' parties is provided in Schedule 4. The US fishing vessels are required to report their entry and exit from the EEZ of the Pacific Island States with the catch on board by weight and species.

---

60 Ibid.

61 Summary on benefits realised under the Treaty on Fisheries, FFA, Report of the Administrator, note 59 above at p. 1.

62 FFA, "Report of the Administrator to the Internal Meeting to the Third Annual Consultation of the Parties to the Treaty on Fisheries, Honiara, Solomon Islands, 4-6 March, 1991," (Honiara: Forum Fisheries Agency Report No. 91/11, 1991): p. 8.

The information that is provided to the Pacific Island States is important because it tells them how much time the vessel has spent in their EEZs, and where it has been fishing. This information could also assist surveillance and enforcement efforts. Schedule 5 contains a detailed form which the master of the vessel is required to submit to the Administrator. The form, in essence, is a logsheet containing particulars of the species of tuna harvested, the quantity of fish caught, fish that have been discarded, and the school type of fish caught. The information contained in the logsheets would give an indication of the activities of the fishing vessel.

Schedule 6 is an unloading sheet which all vessels are required to complete. The form contains information such as the vessel's name, the unloading point and, more significantly, the quantity of fish unloaded. This information is broken down by species of tuna unloaded and how much is rejected or accepted. This would help the Pacific Island States analyse how much fish has been put to productive use and how much is wasted. This information also serves a conservation purpose because it gives an indication of the overall catch of fish species being caught and not just the targeted species. It also reflects the requirement in the LOSC to manage and conserve the by-catch.[63] The logsheets have to be completed by the master of the vessel and verified by an agent of the company receiving the fish.

Measures to extract information about the activities of US vessels include national reporting requirements.[64] US fishing vessels have to report their entry and the catch on board to the Pacific Island States. While they are within a EEZ, the vessels have to report their position and catch on board. When they leave a EEZ, they have to report their exit and the catch on board. From these reports, the Pacific Island States fisheries authorities can calculate how much tuna has been caught in their waters. This will give them information from which management and conservation measures can be taken. These reports are subsequently verified against the catch reports submitted to the Administrator.

---

63 LOSC, Art. 61(3).

64 Treaty on Fisheries, Annex I, Schedule 4 (Part 2). The Treaty specifies four types of reports. These are (i) zone entry and exit; (ii) weekly reports; (iii) port entry reports; and (iv) transhipment reports.

Conventional surveillance and enforcement measures are also achieved under the Treaty on Fisheries by placing trained observers from the Pacific Island States on the vessels. Observers have full access to the bridge, fish on board, the vessels' records including its logs and documentation.[65] The information provided by observers and the sampling reports derived from their work would help the Pacific Island States know more about the size of stocks being caught and landed. This would assist them make management decisions about the tuna resource.

Viewed as a whole, the Treaty on Fisheries contains important management measures. Some of these arise from the application of the Regional Register and harmonised minimum terms and conditions,[66] and others have been developed specifically to deal with the complexities of the Treaty. In terms of the challenges arising from the EEZ regime, the Treaty on Fisheries has helped to stabilise some of the more intractable problems facing the Pacific Island States when they claimed EEZs.

### B. Multilateral Licensing Arrangements with Japan

The success of the Treaty on Fisheries prompted the South Pacific Forum to call for a multilateral agreement with Japan.[67] Japan has the largest fishing fleet in the region where it has been operating since the 1930s.[68] Unlike the US, Japan recognised the sovereign rights of coastal States over the tuna resource, and negotiated agreements with several Pacific Island States after they claimed EEZs.[69] Nonetheless, Japan continued to divide

---

65 Ibid., Annex I (Part 7).

66 See discussions in Chp. 9.

67 Forum Secretariat, *South Pacific Forum Communiqué* (Suva: Forum Secretariat, 1987).

68 FFA, "Japanese Fishing Fleet Operations in the EEZs of Member Countries" (Honiara: Forum Fisheries Agency Report No. 89/10, 1989). See Norio Fujinami, "The Development of Japan's Tuna Fisheries", D. Doulman (ed), *Tuna Issues and Perspectives in the Pacific Islands Region*, (Honolulu: East-West Centre, 1987): pp. 57-69.

69 E.g., Kiribati - Agreement between the Government of Japan and the Government of the Gilbert Islands concerning Fisheries off the coasts of the Gilbert Islands, signed 26 June, 1978.

Pacific Island States against each other, especially with respect to the value of licence fees.[70]

There were three basic issues in the fisheries relations between the Pacific Island States and Japan which were resented by the Pacific Island States.[71] The first was the low rate of return paid by the Japanese fleet. Most of the Pacific Island States were not receiving the 4 percent rate of return under their access agreements with Japan. This was acknowledged by the Japan who agreed to make minor adjustments to the method of determining the access fee payments to ensure that the Pacific Island States received the 4 percent rate of return. Secondly, Japan had a monopoly on data (catch and prices) used for calculating access fees and were generally reluctant to fully co-operate with the Pacific Island States to provide the information even though they were legally obligated to do so.[72] Thirdly, the Japanese longline fleet was overcapitalised, resulting in the oversupply of tuna in Japan. The Japanese therefore argued that the longline fleet was not in a position to meet increased fees.[73]

The proposed multilateral licensing arrangement involved developing a framework agreement which would govern fisheries access by authorised vessels. The arrangement would designate an Agreement Area to include the EEZs of the Pacific Island States and high seas areas. It would regulate such things as information and scientific data pertaining to all fishing in the Area, reporting requirements and observers. There would be provision for governing the standardisation of access conditions and a provision calling for closer co-operation in marine scientific research, promotion of investment and facilitation of port access for Japanese vessels. In terms of monitoring and enforcement, the draft proposed the inclusion of flag State responsibility, and general enforcement requirements such as the

---

70 FFA, "Review of Operations of Japanese Fleets 1984-1987", Paper prepared for the Meeting of Members on Multilateral Access Arrangement with Japan, Honiara, Solomon Islands, 13-18 November, 1987, (Honiara: FFA Doc. JAA2/4, 1987).

71 FFA, "Fisheries Access Arrangements between FFA Member Countries and Distant Water Fishing Nations", (Honiara: Forum Fisheries Agency Report No. 88/58, 1988): p. 6. The Japanese vessels were paying between 2.3 and 3.5 percent of the landed value of the catch

72 Ibid.

73 N. Fujinami, "Expected Problem of Multilateral Agreement", Letter circulated to Pacific Islands dated 29 September, 1987, (Honiara: Forum Fisheries Agency Doc. JAA2/6, 1987).

authorisation of enforcement officers to board fishing vessels. There would be a provision for regular consultations and a dispute settlement mechanism.[74]

It was envisaged by the Pacific Island States that the framework arrangement would permit discussion of issues pertaining to conservation and management of the stock. The actual licensing arrangements, however, would remain still be regulated under bilateral access agreements. The regulation of licence fees and national terms of access would also remain under the purview of bilateral access agreements. These agreements would also regulate transhipment as well as the level of fees to be paid.[75]

Four rounds of unsuccessful negotiations have been held with Japanese officials after the South Pacific Forum mandated the FFA to negotiate a multilateral agreement with Japan as "a matter of urgency". The key imperatives for Japan in a multilateral arrangement would be the standardisation of access conditions to facilitate compliance by their vessels throughout the region where they operate, and broader access for its fleet. Other advantages for Japan could include facilitation of fuelling and victualling and improved fisheries relations with the region.[76] Japan, however, consistently refused to see it in those terms.[77]

The Japanese argued that they had difficulties with the concept of a multilateral arrangement modelled on the Treaty on Fisheries between the Pacific Island States and the US. Instead, they raised the issue of standardisation of terms and conditions of fishing operations arguing that they wanted to see a simplification of unnecessary reporting

---

74 Ibid., Attachment M.

75 Ibid.

76 FFA, "Briefing notes to FFA member countries to the third meeting of FFA member States to consider a multilateral access arrangement with Japan, Port Moresby, Papua New Guinea, 5-9 June, 1989", (Honiara: Forum Fisheries Agency Report No. 89/41, 1989): p. 3.

77 FFA, "Record of Proceedings of the Fourth Meeting of FFA Member States to consider a Multilateral Fisheries Arrangement with Japan, Port Moresby, PNG, 5-10 June, 1989", (Honiara: Forum Fisheries Agency Report No. 89/44, 1989): Attachment K. When the Pacific Island States met with the Japanese delegation they stated:

> ...we believe there may be many advantages in addition to conservation of the stocks for future generations of fishermen. Broadly standardised terms and conditions of access would facilitate compliance by Japanese fishing vessels throughout different countries EEZ.... We believe that a multilateral arrangement would produce a warm and stable climate for Japanese industry expansion, fisheries investment and closer relations with FFA member countries.

requirements and burdens to mitigate administrative and labour costs. The Japanese delegation said that standardisation could best be achieved by a multilateral approach. They proposed the establishment of groups of experts to formulate guidelines to be incorporated into bilateral agreements and other regulations. The Japanese argued that it was not necessary to enter into a multilateral arrangement to deal with this issue.

Underpinning Japan's position was their intention to have a broad based organisation to manage and conserve the tuna resource in the WCPO region. The Japanese argued that tuna is one of the most important highly migratory species and that optimum utilisation of the species is in the mutual interest of both coastal States and fishing States. Therefore, all States should co-operate for the optimum utilisation, conservation and rational management of the resources in the region as was being done in the Atlantic Ocean through the International Commission for the Conservation of Atlantic Tuna (ICCAT) and the eastern Pacific through the Inter-American Tropical Tuna Commission (IATTC). Paradoxically, Japan reiterated its support to co-operate with the Pacific Island States to conserve and manage the tuna resource in the WCPO region.[78]

The best way to further progress on the development of multilateral licensing arrangements with Japan is for the Pacific Island States and Japan to understand each others' tuna policies and aspirations. The negotiations between 1987 and 1989 did not succeed because of the lack of effort, in particular on the part of the Japanese to appreciate the proposal by the Pacific Island States.

The Pacific Island States are still keen to negotiate a multilateral licensing arrangement with Japan. In 1993 a Task Force was established by the FFA to consider options for the structure of multilateral arrangements with Japan.[79] The Task Force reviewed the nature of bilateral access agreements between Japan and the Pacific Island States and identified the disadvantages of such arrangements. The Task Force also

---

78 Ibid., Attachment L.

79 PNA, "Record of Proceedings and Working Papers of the Parties to the Nauru Agreement Task Force Meeting, Honiara, Solomon Islands, 30 August-3 September, 1993," (Honiara: Forum Fisheries Agency Report No. 93/52, 1993).

analysed existing multilateral arrangements such as the Treaty on Fisheries, the consultations on a management regime for southern albacore tuna, and the Japanese proposals for management arrangements for tuna in the WCPO region.

The Task Force mooted the concept of a multilateral head agreement between Japan and all the Pacific Island States with subsidiary bilateral, sub-regional or multilateral access agreements. The head agreement would provide general terms and conditions of access, including minimum terms and conditions, elaborate the flag State responsibility, and give provisions for the settlement of disputes. Each Pacific Island State's would be free to enter into subsidiary licensing arrangements covering access to their EEZs, individually or as a group.[80] These proposals, however, were not different from those that the Japanese rejected.

The prospects for a multilateral access arrangement with Japan remain poor. The FFA Director reported to the 1995 and 1996 meetings of the Forum Fisheries Committee that it has been difficult to make progress with the multilateral agreement with Japan.[81]

> It will take a concerted effort from the FFA countries to increase fee levels from Japan above their existing five percent level. As emphasised by the Brisbane South Pacific Forum in August 1994, a multilateral approach by the FFA countries offers the best prospects for achieving such an increase. However, unlike the changing views of other fleets, Japan has made no indication that they are willing to consider the possible implementation of a regional fisheries arrangement. Japan will closely monitor developments with Taiwan and Korea and any breakthrough with either fleet may improve the prospects for a multilateral arrangement with Japan.[82]

### C. Multilateral Licensing Arrangement with Korea

In 1994 the Korean tuna industry expressed an interest in negotiating a multilateral access agreement with the Pacific Island States. Although no formal negotiations have taken place, the FFA has held informal discussions with representatives of the Korean tuna

---

80 Ibid., See paper titled "Consideration of Options for the Structure of Multilateral Arrangements", Attachment D.

81 FFA, *Director's Report 1994/1995*, Forum Fisheries Committee Twenty-sixth Meeting , Port Moresby, Papua New Guinea, 1-5 May, 1995: p. 7.

82 Ibid.

industry.[83] The talks were essentially exploratory around the key issues in any multilateral arrangement. These were the likely Korean parties to the arrangement, the vessels that would be covered by the arrangement, its possible geographic scope, potential vessel numbers, likely fee levels, terms and conditions of access, vessel monitoring systems and the duration of the arrangement.[84]

The Korean Delegation's view was that it was not their intention to raise access fees through a multilateral arrangement because the Korean Government was not in a position to subsidise its tuna industry. They saw the arrangement as applying to purse seine vessels who were most supportive of the concept. Some of their longline fishing companies had also expressed an interest in joining, but were not certain of the extent to which they would participate. They indicated that they were interested in having access to all of the eight member countries of the Nauru Group and the Cook Islands for their longline vessels. Like Japan, Korea said it was interested in establishing a management body in which all States could become members.[85]

The Korean fishing fleet has a poor record of compliance with the laws and regulations of the Pacific Island States.[86] Therefore, any multilateral co-operative arrangements will depend on the extent to which the Korean vessels improve their record of compliance. The Pacific Island States should ensure that broader co-operation issues contain specific measures such as assistance in infrastructure development, and the provision of shore-based developments as well as technical assistance, training and research activities.

The willingness of the Korean Government to discuss a multilateral arrangement with the Pacific Island States contrasts with the lack of enthusiasm shown by Japan. A

---

83 FFA, "Report To FFA Member Countries on the Informal Meeting Between Representatives of FFA Member Countries and Korea To Discuss a Possible Multilateral Fisheries Access Arrangement", Seoul, Korea, 6-7 July, 1995, (Honiara: Forum Fisheries Agency Report No. 95/42, 1995).

84 Ibid.

85 Ibid., Attachment C.

86 See AusAid, *A Study of the Economic and Social Costs of Under Pricing of Resource Rent and Under Reporting of Tuna Catches in the South Pacific*, (Canberra: Australian Aid for International Development, 1994): p. ii.

possible reason is because of the intense competition among DWFNs, Korea wants security of access for its vessels. However, the Pacific Island States should proceed cautiously with their negotiations. The Korean fleet will need to improve its poor record of compliance in the WCPO region and must go beyond mere commitment to do so. They have to demonstrate their capability to provide timely and accurate data to countries with whom they have bilateral agreements. Unless they do so, there is no reason to expect that they will behave any better under a multilateral approach.

### D. Multilateral Licensing Arrangement with Taiwan

Since 1992 the Pacific Island States and representatives of the Taiwanese Government and tuna industry have been holding talks on the possibility of developing a multilateral licensing arrangement. Taiwanese fishing associations have had access agreements with the Solomon Islands, Papua New Guinea, the Federated States of Micronesia, Palau, Kiribati, Cook Islands, Fiji, Western Samoa, Vanuatu and Niue.[87]

The most vexed issue is the political status of Taiwan and thus the nature of the arrangement to be negotiated. Only four Pacific Island States - the Solomon Islands, Nauru, Tonga and Tuvalu have diplomatic relations with Taiwan. Taiwan would prefer to have a Government to Government agreement with Treaty status. It may be argued that this is an attempt by Taiwan to gain further international recognition. However, in order to progress the negotiations the Taiwanese have indicated their willingness to consider an arrangement of lesser status.[88]

One possible solution to the Taiwanese issue is for the arrangement to be entered into between the Taiwanese Government and the FFA on behalf of the Pacific Island States. However, this raises the legal issue of the FFA's competence to act on behalf of its members. Article I of Annex IX of the LOSC defines an "international organisation" as an intergovernmental organisation constituted by States to which its member States have

---

87 FFA, "Report on Preliminary Discussions with Taiwan on a Multilateral Fisheries Agreement", (Honiara: Forum Fisheries Agency Report No. 92/113, 1992).

88 Ibid., p. 2.

transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters. The FFA Convention does not confer competence on either the Secretariat or the Forum Fisheries Committee over matters governed by the LOSC. Thus there is some doubt whether the FFA is competent to enter into such an arrangement.

### E. Multilateral Licensing Arrangement for Taiwanese Longline Albacore Vessels

The failure of the negotiations with DWFNs (with the exception of the US) has prompted the Pacific Island States to negotiate with tuna industry representatives from the DWFNs. Several sessions of negotiations have been held between several Pacific Island States and the Taiwan Deep Sea Tuna Boatowners and Exporters Association for a regional licensing agreement for longline vessels.[89] The objective of the proposed joint licensing arrangements is to improve the level of compliance by Taiwanese longline vessels. At the first meeting of the participating Pacific Island States, the Minister for Fisheries of the Cook Islands stated:

> Although nominal increases had been obtained the "poor even non-existent reporting behaviour of the vessel operators means that our understanding of the fishery has changed very little in the past 15 years. We know very little about fishing patterns, catch rates or vessel profitability. Our lack of understanding means that we have no way of determining the true value of access to our waters.[90]

### F. The Draft Agreement between the FFA and the Taiwan Deep Sea Tuna Boatowners and Exporters Association

The draft agreement authorises the FFA Secretariat to issue licences on behalf of the participating Pacific Island States.[91] The draft agreement imposes an obligation on the

---

89 The FFA member countries involved are; Cook Islands, Fiji, New Zealand (Tokelau), Niue, Solomon Islands, Tonga, Vanuatu and Western Samoa.

90 FFA, "Record of Proceedings Internal Meeting of Pacific Island Parties to Consider the Possible Implementation of a Regional Licensing Arrangement for Taiwanese Longline Albacore Vessels, Rarotonga, Cook Islands, 3-5 October, 1994", (Honiara: Forum Fisheries Agency Report No. 94/35, 1994): Attachment B.

91 This is the draft as at November, 1995. Since then there has been no subsequent developments.

longline vessel representatives to be liable in any legal proceedings to respond to any legal process and to bear responsibility for any legal orders.[92] Provision is made for the implementation of an observer programme.[93] Furthermore, the draft agreement imposes an obligation on the associations to ensure that all vessels comply with the conservation and management regulations under the agreement.[94] These regulations relate to, amongst other things, reporting of the catch in the EEZs of the participating Pacific Island States, prohibition of transhipment unless done in an authorised area, and stowage of gear in closed areas. The agreement also imposes an obligation on the associations to prosecute its vessels if they do not comply with the agreement.[95] At the time of writing no agreement has yet been reached on the issues outlined in the draft agreement.[96]

## III. CONCLUSION

The discussion in this Chapter has shown that the Pacific Island States' response to the problems of dealing with DWFNs has been a regionalist one. The challenge posed by the EEZ regime is best tackled through regional co-operation. It was shown that the problems the Pacific Island States faced with the non-recognition of their sovereign rights by the US was resolved through a multilateral access agreement. The success of the Treaty on Fisheries prompted the Pacific Island States to enter into negotiations with other DWFNs to conclude similar arrangements.

The discussion has shown that the Pacific Islands have taken steps to control and regulate the activities of foreign fishing vessels in their EEZs. This was one of the biggest challenges arising from the EEZ regime.

---

92 Draft agreement, Art. 2: Agency.

93 Ibid., Art. 9.

94 Ibid., Art. 8.

95 Ibid., Art. 11 & Art. 12.

96 See FFA, "Record of Discussions of the Second Informal Meeting of Pacific Island Countries and the Taiwan Deep Sea Tuna Boatowners and Exporters Association to Discuss a Regional Licensing Agreement for Longline Vessels, Taipei, Taiwan/ROC, 13-14 July, 1995", (Honiara: Forum Fisheries Agency Report No. 95/40, 1995).

# 8

# NATIONAL STRATEGIES TO DEAL WITH DISTANT WATER FISHING NATIONS

## I. INTRODUCTION

This chapter discusses the national response of the Pacific Island States to the challenges of the EEZ regime. It examines the legal arrangements they have developed to respond to the challenge of dealing with the DWFNs operating within their EEZs. The chapter will show that the national responses of the Pacific Island States to the challenge was to conclude bilateral access agreements with the DWFNs. Part II discusses the LOSC framework for bilateral access agreements. Part III examines several bilateral access agreements which have been concluded between Pacific Island States and DWFNs. The discussion will examine the legal aspects of the bilateral access agreements and attempt to ascertain the extent to which the agreements reflect the provisions of the LOSC.[1] Chapter 8 concludes that although the bilateral access agreements are not inconsistent with the LOSC, they do not reflect all the pertinent provisions of the LOSC in respect of the conservation and management of tuna.

---

1 For a more comprehensive analysis see FAO, *Coastal State Requirements for Foreign Fishing*, FAO Legislative Study 21 Rev. 4, (Rome: Food and Agriculture Organisation, 1993).

## II. THE LEGAL FRAMEWORK FOR BILATERAL ACCESS AGREEMENTS

As discussed in Chapter 2, article 56(1)(a) of the LOSC provides that coastal States have sovereign rights to manage, conserve, explore and exploit the living resources in the EEZ.[2] Furthermore, coastal States are required under article 62(2) to determine their capacity to harvest the living resource. If they do not have the capacity to harvest the entire allowable catch, coastal States are required under article 62(2) to grant other States access to the surplus through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4 of article 62 of the LOSC. The LOSC provides an adequate list of things that could be included in the bilateral access agreements. For instance, it deals, *inter alia*, with the licensing of fishermen, determination of what species may be caught, the areas where foreign fishing vessels can and cannot enter, the landing of catch and the placing of observers.

Article 62(4) is only a guide as to what conditions coastal States may impose on foreign fishing vessels and there are no limits to the conditions that may be applied. However, in modern legislation dealing with fishing in the EEZ, it is not uncommon to find that the legislative provisions are wider in their scope than article 64(2).[3] Most of the contents of bilateral access agreements can be based on article 62(4) of the LOSC and the discretion of policy makers. Coastal States, however, have considerable flexibility under article 62(3). These factors may include:

- the significance of the living resources of the area to the economy of the State concerned, and its other national interests;
- the provisions of articles 69[4] and 70;[5]

---

2 See W.T. Burke, "Highly Migratory Species in the New Law of the Sea", *Ocean Development and International Law* 14 (1985): p. 273.

3 W.R. Edeson, "Access by Foreign Fishing Vessels to Economic Zones, and Problems of Enforcement", in *Prospects for a New Law of the Sea*, Paper read at a Seminar conducted by the International Law Association in Sydney on 19 June, 1982, Martin Place Papers, No. 2, International Law Association (Australian Branch), Sydney, p. 60.

4 LOSC, Art. 69(1) states:

> Landlocked States shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region, taking

- the requirements of developing States in the region or sub-region in harvesting part of the surplus;
- the need to minimise economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

These are discretionary matters as evidenced by the exception in article 297(3)(a). Under this article, coastal States are not obliged to submit a dispute regarding inter alia, "the allocation of surpluses to other States" though a conciliation procedure may be invoked if no settlement has been reached and it is alleged, amongst other things, that "a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under the terms and conditions established by coastal States consistent with this Convention, the whole or part of the surplus it has declared to exist."

There are basically three types of bilateral access agreements concluded by Governments under the LOSC.[6] These include

> (a) agreements to phase out the operations by foreign fishing vessels in established zones of national jurisdiction as local fisheries gradually take the place of these vessels;
>
> (b) agreements giving reciprocal fishing rights to vessels of both parties in their respective zones of jurisdiction; and
>
> (c) agreements stipulating the terms and conditions under which the fishing vessels of one party may operate in waters under the jurisdiction of another party.

Most, if not all, the bilateral access agreements that the Pacific Island States have entered into with DWFNs belong to the third category.[7] The bilateral access agreements can be

---

into account the relevant economic and geographical circumstances of all States concerned and in conformity with the provisions of this article and articles 61 and 62.

5 LOSC, Art. 70(1) states:

> Geographically disadvantaged States shall have the right to participate on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region, taking into account the relevant economic and geographical circumstances of all the States concerned and in conformity with the provisions of this article and of articles 61 and 62.

6 J.E. Carroz and M.J. Savini, "The New International Law of Fisheries emerging from Bilateral Agreements", *Marine Policy* (April) (1979): pp. 79-98 at p. 82.

seen as the main tool for giving effect to the LOSC's provisions. It follows that the bilateral access agreements in the WCPO region can be tested against the following headings which generally encapsulates the list in article 62(4) of the LOSC. These are: authorised foreign fishing vessels; delimitation of area; catch quotas; payment of fees; landing of catch and port calls; enforcement; transhipment; training and research; flag State responsibility and settlement of disputes.

## III. BILATERAL ACCESS AGREEMENTS IN THE WCPO REGION

To understand the analysis of the bilateral access agreements in the WCPO region better, it is important to see the significance of the agreements against the wider economic spectrum of the Pacific Island States development aspirations.

The Pacific Island States have bilateral access agreements with at least four major DWFNs - Japan, Taiwan, South Korea and the US. The access agreement with the US is exceptional because it is a multilateral agreement involving all the Pacific Island States.[8] Several other States have also signed bilateral access agreements with some of the Pacific Island States in the past. These include agreements with Australia, Indonesia and Mexico. Table 6.1 below shows the Pacific Island States which have had bilateral access agreements with DWFNs from 1978 to 1996. Because tuna resources are not distributed uniformly throughout the region, not all the Pacific Island States have an equal interest in the licensing of DWFNs fleets. Those to the north of the WCPO region tend to be better endowed with the tuna stock and, consequently, the interaction between these States and DWFNs are more active than their southern neighbours. In recent years, the Philippines has emerged as an important DWFN operating in the WCPO region.[9] The longline fleet from the People's Republic of China is rapidly expanding into the WCPO region.[10]

---

7 Judith Swan, "Foreign Fishing: The Legal Regime in Small Jurisdictions", (Honiara: Forum Fisheries Agency Report No. 89/4, 1989).

8 See discussions in Chp. 7 on the Treaty on Fisheries.

9 See SPC, *Tuna Fishery Yearbook 1994*, (Noumea: Oceanic Fisheries Program, South Pacific Commission, 1994).

10 FFA, "Directors Report 1995-1996 to the Twenty Ninth Meeting of the Forum Fisheries Committee, Vava'u, Tonga, 13-17 May, 1996", (Honiara: Forum Fisheries Committee Doc. 29/2, 1996): pp. 11-12.

Although not apparent from Table 6.1, longline vessels from the People's Republic of China are being licensed by several Pacific Island States in record numbers since the mid 1990s.

From the perspective of coastal States, the primary objective of bilateral access agreements is to profit from non-exploited or under-exploited resources under their jurisdiction.[11] There are also other economic benefits which coastal States will want to gain such as licence fees, transfer of technology from joint venture agreements, and in some cases commercial benefits or comparable fishing rights.[12] At present, bilateral access agreements provide the major means of obtaining information about catch data and statistics in the WCPO region. The benefits from bilateral access arrangements are mutual. For the flag State, the benefit may be in the form of catch quotas or participation in joint ventures which in turn flow on to give it benefits in the form of employment opportunities and sustaining the level of production and raw material to the processing industry.[13]

TABLE 6.1:

BILATERAL ACCESS AGREEMENTS
IN THE REGION FROM 1981 - 1996

| | JAPAN | KOREA | TAIWAN | PHILIPPINES | USSR | CHINA |
|---|---|---|---|---|---|---|
| Cook Islands | | X | X | | | |
| FSM | X | X | X | | | X |
| Fiji | | | X | | | |
| Kiribati | X[a] | X | X | | | |
| Marshall Is | X[a] | | | | | X |
| Nauru | X | | | | | |
| Niue | | | X | | | |
| Palau | | | X | | | |
| PNG | | X[a] | X | X | X[a] | |
| Solomon Is. | X[a] | X[a] | X[a] | | | |
| Tuvalu | X[a] | X[a] | X[a] | | | |
| Vanuatu | | | X | | | |
| W. Samoa | | | X | | | |

Source: Forum Fisheries Agency

N/B: [a] denotes agreements on a government to government basis has also been concluded.

11 Judith Swan, "Trends in Fisheries Treaties in the South Pacific", (Honiara: Forum Fisheries Agency Report No. 89/102, 1989): p. 1.

12 OECD, *Fisheries Issues: Trade and Access to Resources*, (Paris: Organisation for Economic Co-operation and Development Publications Service, 1989): p. 134.

13 Ibid.

Many of the Pacific Island States have small and narrowly based economies.[14] The fees received from bilateral access agreements, therefore, form a significant part of their gross domestic product (GDP). Kiribati exemplifies the dependency of a State on the fees received from bilateral access agreements. Table 6.2 below shows the amount of access fees received by Kiribati from various DWFNs from 1981-1992 and illustrates the significance of access fees to the Kiribati economy as a whole.

Table 6.2 clearly indicates that access fees have fluctuated over the years. It also shows that Japan has maintained the most stable access arrangement with Kiribati since Kiribati started having bilateral access agreements. Japanese fishing vessels have fished in Kiribati's waters every year since 1981 except in 1983 when talks broke down over disagreements about the level of fees. The highest access fees, however, have been received from US vessels.

TABLE 6.2:

FISHING ACCESS FEES TO KIRIBATI WATERS, 1981-1992

| | USA ('000 A$) | KOREA ('000 A$) | OTHERS ('000 A$) | JAPAN ('000 A$) | TOTAL ('000 A$) |
|---|---|---|---|---|---|
| 1981 | 0 | 161 | 0 | 317 | 478 |
| 1982 | 0 | 0 | 0 | 1014 | 1014 |
| 1983 | 603 | 0 | 0 | 0 | 603 |
| 1984 | 482 | 227 | 0 | 1141 | 1850 |
| 1985 | 0 | 0 | 0 | 2142 | 2142 |
| 1986 | 28 | 597 | 2510 | 945 | 4080 |
| 1987 | 527 | 916 | 0 | 564 | 2008 |
| 1988[a] | 166 | 0 | 0 | 1037 | 1203 |
| 1989 | 2243 | 1299 | 316 | 648 | 4545 |
| 1990 | 4293 | 2463 | 0 | 419 | 7175 |
| 1991 | 5940 | 1599 | 246 | 673 | 8458 |
| 1992 | 7606 | 557 | 345 | 882 | 9390 |

Source: Forum Fisheries Agency Report No. 93/39.
(a) Fees received under the Multilateral Treaty with the USA from 1988.

14 Teo I.J. Fairbairn, *Island Economies: Studies from the South Pacific*, (Suva: Institute of Pacific Studies, 1985).

TABLE 6.3:

SIGNIFICANCE OF FISHERIES ACCESS FEES TO THE KIRIBATI ECONOMY

| | GDP ('000 A$) | Gov. Revenue ('000 A$) | Access Fees ('000 A$) | Access Fees (% of GDP) | Access Fees (% of Gov. rev.) |
|---|---|---|---|---|---|
| 19981 | 25505 | 17039 | 478 | 2 | 3 |
| 1982 | 28733 | 16356 | 1014 | 4 | 2 |
| 1983 | 30299 | 15783 | 603 | 2 | 4 |
| 1984 | 33535 | 19098 | 1850 | 6 | 12 |
| 1985 | 32797 | 13697 | 2142 | 7 | 11 |
| 1986 | 35943 | 17981 | 4080 | 11 | 30 |
| 1987 | 36874 | 18540 | 2008 | 5 | 11 |
| 1988 | 44930 | n/a | 1203 | 3 | 6 |
| 1989 | 46500 | n/a | 4545 | 9 | n/a |
| 1990 | 44400 | n/a | 7175 | 16 | n/a |
| 1991 | 46900 | n/a | 8458 | 18 | n/a |
| 1992 | n/a | n/a | 9390 | n/a | n/a |

Source: Forum Fisheries Agency Report 93/39.
(a) Excludes external grant aid.

Table 6.3 shows that the Kiribati government's revenue has grown since 1981. Although figures for the period from 1989 are not available, it has been estimated that if the revenue levels continues to grow at its average rate over the period 1981-88, the access fees in 1992 would have accounted for one third of the total income of the Kiribati government.[15]

The total access fees received by the Pacific Island States in 1993 was US$56 million compared to a total catch valued at approximately US$1.2 billion. This figure represents an average rate of return of about 4.4 percent of the total landed value of the tuna catch. The US$56 million, however, includes the fees paid by the US under the Treaty on Fisheries. If the access fees paid by the US taken out of the equation, the overall rate of return would reduce to 3.7 percent. According to the World Bank this figure is low.[16] The low level of the rate of return has led to acrimonious debate between the Pacific Island States and DWFNs.[17] The Pacific Island States have argued that the tuna catch are under

15 Gerry Geen and Paul Tauriki, "Economic Appraisal of the Access Agreement between Kiribati and Japan", (Honiara: Forum Fisheries Agency Report No. 93/39, 1993): pp. 1-2.

16 World Bank, *Pacific Island Economies: Building a Resilient Economic Base for the Twenty-First Century*, Country Department III, East Asia and Pacific Region, (Washington DC: The World Bank, 1995): p. 54.

17 "PM Accuses Japan, S. Korea of Exploiting Pacific Neighbours", *The Australian*, Tuesday, August 2, (1994): p. 18.

priced while the DWFNs claim that the Pacific Island States are getting a fair return, considering the volatility of tuna and the high capital requirements of the sector.[18]

## A. Some Characteristics of Bilateral Access Agreements in the WCPO Region

### Nature of Bilateral Agreements

The bilateral access agreements which have been concluded in the WCPO region are characterised by various distinguishing features. The first is that the access agreements may be distinguished by two broad categories, namely: (a) government to government agreements and (b) government to industry agreements. The general practice is for the Pacific Island States to enter into a government to government agreement with the DWFNs as a matter of formality. These are normally referred to as "Head Agreements" or "Umbrella Agreements."[19] Head agreements normally set out the broad principles on which the fisheries relationship between the Pacific Island States and DWFNs is based.

Head Agreements do not normally generate any fishing activity. The actual access into the EEZs of the Pacific Island States is made possible by the conclusion of government to industry agreements. These government to industry agreements stipulate the terms and conditions of access, the level of access fees and generally provide a basic framework for the management and conservation of tuna. The harmonised minimum terms and conditions are generally incorporated into the access agreements.[20] Thus, foreign fishing fleets are required as a matter of policy and, in some cases, law to comply with the minimum terms and conditions.[21]

The fact that access agreements are, in some cases, negotiated under the umbrella of an existing government to government agreement provides an opportunity for enlisting the

---

18 World Bank, note 16 above at p. 54.

19 T. Aqorau, "International Management of the Living Resources in the South Pacific", (Honiara: Forum Fisheries Agency Report No. 91/49, 1991): p. 20. See G. Moore, *Principles of Fisheries Legislation under the New Law of the Sea*, Fisheries Law Advisory Program, Circular No. 5, (Rome: Food and Agriculture Organisation, 1986): p. 10.

20 See discussion on the Harmonised Minimum Terms and Conditions of Access in Chp. 6.

21 T. Aqorau, note 19 above at p. 21.

support of the flag State in ensuring that its vessels comply with the terms of the agreement and the fisheries laws of the Pacific Island States.[22]

### Duration of the Agreements

The access agreements may also be distinguished by their duration. Some access agreements only provide for a twelve month period in which the foreign fishing vessels may fish.[23] Other access agreements provide for a five year term.[24] Some agreements have "roll over" provisions. The agreements with "roll over" provisions usually remain in force for a period of one year after they are signed and continue in force unless terminated by written notice by either party.[25]

### Method of Payment

The access agreements in the WCPO region may also be distinguished by the method for calculating the access fees. For example, the 1992 Agreement between Kiribati and Taiwan provides for the payment of a lump sum access fee of US$65,000 per vessel for up to 9 purse seine vessels.[26] The lump sum method of payment is based on a specified number of vessels of particular gear types, normally for a period of one year. The payment is usually made at the beginning of the licensing period. The advantage of this system from the perspective of the national budget is that it is possible to know how much will be received in advance.[27] Moreover, it is generally easier to administer. The only

---

22 See Judith Swan, "International Law: Multilateral and Bilateral Access Agreements and Arrangements", (Honiara: Forum Fisheries Agency Report No. 89/50, 1989).

23 E.g., Foreign Fishing Agreement between the Micronesian Maritime Authority and the Taiwan Deep Sea Tuna Boatowners and Exporters Association, done at Phonpei ,1 November, 1994.

24 E.g., Agreement between the Government of the Independent State of Papua New Guinea and the Government of the Republic of Korea, done at Seoul , 25 January, 1992.

25 E.g., Arrangement between the Government of Solomon Islands and the Federation of Japan Tuna Fisheries Co-operative Associations and National Offshore Tuna Fisheries Association of Japan concerning Longline and Pole-and-Line Fishing within the Fishery Limits of Solomon Islands, done at Tokyo, 12 December, 1990.

26 E.g., Agreement between the Government of the Republic of Kiribati and Taiwan Deepsea Tuna Boatowners and Exporters Association of the Republic of China, done at Tarawa, September 1, 1992.

27 David J. Doulman, "Distant-Water Fishing Access Arrangements for Tuna in the South Pacific", (Honiara: Forum Fisheries Agency Report No. 90/14, 1990): p. 9.

disadvantage is that it has to be negotiated annually, which takes limited manpower resources and can often lead to stalemate at negotiations.[28]

Some access agreements provide for the payment of fees calculated on the basis of the market value of the fish and the number of trips made by the licensed vessels.[29] The Agreement between Palau and Four Japanese Fisheries Associations provides a hybrid system between a lump system and catch per trip per vessel system.[30] Under the per-trip system, the amount of fees paid is linked to the landed value of the catch. As a result, licence fees tend to change on a monthly basis reflecting fluctuations in fish prices at the major ports of landing. Generally, under such arrangements, annual renegotiation's is not necessary since the arrangements "roll over" from one year to the next. The only thing that needs renegotiating is the calculation of the access fee.[31]

The catch per trip system generally works well for the Pacific Island States. Foreign fishing vessels are usually required to pay a "registration fee" for one calendar year. The vessels are then registered to indicate an intention to fish at some stage during the year. In addition to the "registration fee", each fishing vessel pays an access or fishing license fee, based on the agreed formula set out in the access agreement which allows it to enter the Pacific Island States' EEZs to fish.[32] Efforts to standardise the method of calculating access fees in the WCPO region have so far been unsuccessful because the Pacific Island States have not been able to agree amongst themselves about which formula to apply.[33]

---

28 Paul Nicols, "Consideration for the Standardisation of Fee Calculation Formulae for Fisheries Access by DWFNs", (Honiara: Forum Fisheries Agency Report No. 90/71, 1990): p. 4.

29 See Arrangement between the Government of Solomon Islands and the Federation of Japan Tuna Fisheries Co-operative Associations and National Offshore Tuna Fisheries Association of Japan concerning Longline and Pole-and-Line Fishing within the Fishery Limits of Solomon Islands, done at Tokyo, 12 December, 1990.

30 E.g., Agreement between the Palau Maritime Authority and Four Fisheries Associations of Japan concerning Fishing in the Fishery Zone of Palau, (Honiara: Forum Fisheries Agency Report No. 92/1, 1992).

31 Paul Nicols, note 28 above at p. 4.

32 Ibid.

33 Ibid.

Some access agreements specifically provide for co-operation in the optimum utilisation and rational management of tuna resources.[34] The development of the national tuna industry is also a key element of some of the access agreements. For instance, the 1995 Agreement between Papua New Guinea and Mar Fishing Company of the Philippines acknowledges the Papua New Guinea government's wish to advance the social and economic welfare of Papua New Guineans. The Agreement recognises that Mar Fishing Company has extensive experience in tuna fishing and is prepared to use its skills, funds and technology to develop a viable tuna fishing industry in Papua New Guinea.[35]

**Recognition of Sovereign Rights**

Some access agreements specifically refer to the LOSC principle that where, coastal States do not have the capacity to harvest the entire allowable catch in the EEZs, coastal States shall give other States access to the surplus of the allowable catch.[36] Other access agreements incorporate the principles of article 56(1)(a) of the LOSC which recognises coastal States' sovereign rights over tuna in the EEZ. For example, the 1990 Agreement between Papua New Guinea and the former Soviet Union[37] recognises that in accordance

---

34 See Art. I of the Agreement between the Palau Maritime Authority and Four Fisheries Associations of Japan concerning Fishing in the Fishery Zone of Palau states:

> The Authority and the Associations undertake to ensure close co-operation in matters related to optimum utilisation and rational management of the living marine resources of mutual interest in the Fishery Zone of Palau, and establish a common understanding of the principles and procedures under which fishing may be conducted by the members of the Associations in the Fishery Zone of Palau.

35 E.g., Tuna Fishing Agreement between the Independent State of Papua New Guinea and the Mar Fishing Company, done at Port Moresby, 10 February, 1995.

36 LOSC, Art. 62(2). See Art II of the Agreement between the Government of the Independent State of Papua New Guinea and the Government of the Republic of Korea states:

> 1. The Government of the Independent States of Papua New Guinea shall determine each year, taking into account the results of the consultations with the Government of the Republic of Korea referred to in Article VIII of this Agreement, and on the basis of the best scientific available evidence and all other relevant factors:
>
> (a) the total allowable catch for individual stocks or complexes of stocks in the Fishery Limits;
>
> (b) the harvesting capacity of fishing vessels of the Independent State of Papua New Guinea for such stocks; and
>
> (c) the allocation for fishing vessels of the Republic of Korea, of parts of the surpluses of such stocks.

37 E.g., Agreement between the Independent State of Papua New Guinea and the Government of the Union of Soviet Socialist Republics concerning Co-operation in the field of fisheries, done at Port Moresby, June, 1990.

with international law, Papua New Guinea exercises sovereign rights for the purpose of exploring, exploiting, conserving and managing the living resources of its Declared Fisheries Zone and takes into account developments of international law including the LOSC. The Agreement also expresses Papua New Guinea's and the Soviet Union's mutual concern for the conservation, rational management and optimum utilisation of the marine resources.[38] Some access agreements are less specific and only take into account the LOSC. For instance, the 1992 Agreement between Papua New Guinea and the Republic of Korea only takes into account the work of UNCLOS III.[39]

There is widespread variation in the practice of recognition of coastal States' sovereign rights over tuna in the EEZs. Some agreements recognise the Pacific Island States' "jurisdiction" rather than "sovereign rights" over tuna. An example is the 1981 Agreement between the Marshall Islands' and Japan in which Japan recognises the Marshall Islands' "jurisdiction" over tuna resources within the Marshall Islands EEZ as defined by the *Marine Resources Jurisdiction Act* of 1978.[40] The Agreement also expresses the Marshall Islands and Japan's common concern for the rational management, conservation and optimum utilisation of tuna off the coasts of the Marshall Islands. However, there is no mention of the LOSC and international law in the Agreement.

In contrast, the 1978 Agreement between the Solomon Islands and Japan is far more expansive.[41] Under the Agreement, Japan recognises the Solomon Islands' jurisdiction over tuna resources in the EEZ and the Solomon Islands' sovereign right to explore, exploit, conserve and manage this resource is specifically mentioned.[42] Furthermore, the

---

38 Preamble para. 4 of the Agreement between the Independent State of Papua New Guinea and the Government of the Union of Soviet Socialist Republics concerning Co-operation in the field of fisheries states:

> Having regard to their mutual concern for the conservation, rational management and optimum utilisation of the marine living resources.

39 See Agreement between the Government of the Independent State of Papua New Guinea and the Government of the Republic of Korea

40 Agreement between the Government of the Marshall Islands and the Government of Japan concerning fisheries off the coasts of the Marshall Islands, done at Tokyo, 25 March, 1981.

41 Agreement on Fisheries between the Government of Japan and the Government of Solomon Islands, done at Honiara, 20 September, 1978.

42 Preamble, para. 3 of the Agreement on Fisheries between the Government of Japan and the Government of Solomon Islands states:

Agreement acknowledges the right of the Solomon Islands to determine the allowable catch and its harvesting capacity. One of the terms of the Agreement is for Japanese fishing vessels to be permitted to pursue their traditional interests in the utilisation of tuna in the Solomon Islands' EEZ and that the Solomon Islands give Japanese fishing vessels reasonable access to the surplus catch in the EEZ.[43] It is not clear what "reasonable access" means since the LOSC merely refers to "access to the surplus". It is possible, however, that when the Agreement was negotiated, the Solomon Islands was not able to determine its harvesting capacity.[44] However, the Agreement makes no reference to the LOSC in particular, nor to principles of international law in general. The 1978 Agreement between Kiribati and Japan[45] also recognises Kiribati's jurisdiction over tuna in Kiribati's EEZ as defined by the *Proclamation by the Governor of the Gilbert Islands of 10 March 1978*.[46]

Most of the access agreements reviewed were concluded before the LOSC entered into force. Almost all the access agreements are still in force. Although most agreements

---

> Recognising that the Government of Solomon Islands has extended its jurisdiction over the living resources in adjacent waters of Solomon Islands and exercises sovereign rights in the 200 nautical mile fishery limits of Solomon Islands for the purpose of exploring and exploiting, conserving and managing these resources.

43 Preamble, para. 6 of the Agreement on Fisheries between the Government of Japan and the Government of Solomon Islands states:

> Considering the desire of the Government of Japan that fishing vessels of Japan continue to pursue their traditional interest in the utilisation of the fishery resources in the 200 nautical mile fishery limits of Solomon Islands and be accorded reasonable access to the surplus catch in the 200 nautical mile fishery limits of Solomon Islands.

44 A more plausible explanation is that when the Agreement was concluded Solomon Islands harvesting capacity consisted of fishing vessels by a joint venture agreement between the Solomon Islands Government and a Japanese fishing company in which the joint company was given exclusive access to the tuna resource. Solomon Taiyo Limited (STL) was established in 1972 between the Solomon Islands Government (SIG) and Taiyo Fishing Company of Japan (TGK). The company has been governed by two joint venture agreements, JVA1 running from 1972 to 1980, and JVA2 from 1981 to 1992. Since 1992, the JVA2 has been replaced by a simpler Shareholders Agreement. See A.V. Hughes, "High Speed on an Unmade Road: Solomon Islands Joint-Venture Route to a Tuna Fishery", David. J. Doulman (ed), *Tuna Issues and Perspectives in the Pacific Islands Region*, (Honolulu: East-West Centre, 1987): pp. 225-244.

45 Agreement between the Government of Japan and the Government of the Gilbert Islands concerning Fisheries Off the Coasts of the Gilbert Islands, done at Tokyo, 26 June, 1978.

46 The application of LOSC principles can be found in the Agreement between Tuvalu and Japan. The Agreement takes into account the adoption of the LOSC and recognises Tuvalu's sovereign rights in the conservation, management, exploration and exploitation of the fisheries resources in the 200 mile zone. It expresses their common concern for the rational management conservation and optimum utilisation of fishery resources. See Agreement on Fisheries between the Government of Japan and the Government of Tuvalu, done at Suva, 2 June, 1986.

refer to general principles of international law only a few specifically mention that they are based on the relevant provisions of the LOSC.[47] Some access agreements only take account of the LOSC, while others fail to acknowledge the LOSC.[48] As discussed in Chapter 4 not all the Pacific Island States are party to the LOSC. The basis of the coastal States' claims to tuna is founded on the principle of coastal States' sovereign rights in the EEZ. Although the principle is already accepted as customary international law, it is useful to have it enshrined in access agreements to underline its significance as the basis of coastal States' rights in the EEZ.[49]

**Authorised Foreign Fishing Vessels**

Article 62(4)(a) of the LOSC permits coastal States to licence fishers and fishing vessels. In accordance with the LOSC requirement, most access agreements prescribe the number and type of vessels authorised to fish in the EEZs. Some agreements also stipulate the species of fish that can be taken.[50] In some cases, the authorised vessels are listed by name in the agreement. In the agreement between the Federated States of Micronesia (FSM) and Taiwan Deep Sea Boatowners and Exporters Association, the former agreed to licence a maximum of 44 purse seine fishing vessels provided they had good standing on the Regional Register of Foreign Fishing Vessels.[51] Most access agreements provide that

---

47 E.g., Agreement between the Government of the Independent State of Papua New Guinea and the Government of the Republic of Korea, done at Seoul , 25 January, 1992.

48 E.g., Agreement between the Government of Japan and the Government of the Gilbert Islands concerning Fisheries Off the Coasts of the Gilbert Islands, done at Tokyo, 26 June, 1978.

49 P. Brazil, "Legal Analysis of Bilateral Fisheries Access Agreements between Parties to the Nauru Agreement and Japan", (Honiara: Forum Fisheries Agency Report No. 94/40, 1994): p. 10.

50 See Art. III of the 1989 Agreement between Vanuatu and Kaohsiung Fishermen's Association, which states:

> Each licensed vessel shall only be used for longline fishing for tuna and tuna-like species.

51 Art 3 of the Agreement between Federated States of Micronesia (MMA) and Taiwan Deep Sea Tuna Boatowners and Exporters Association states:

> The Authority agrees to permit fishing within the EEZ by the Association's purse seine vessels in good standing on the South Pacific Forum Fisheries Agency Fishing Vessel Regional Register up to a maximum of forty-four (44) vessels. The fishing which is allowed under this Agreement shall be conducted in accordance with the terms and conditions of this Agreement and all applicable laws, rules and regulations of the Federated States of Micronesia and its States. The Association's purse seine fishing vessels authorised to fish in the EEZ pursuant to this Agreement shall hereinafter be referred to as "Authorised Vessels."

authorisation is conditional upon the foreign fishing vessel paying the prescribed fees and agreeing to comply with all the laws and regulations of the licensing State.[52]

**Delimitation of Area**

Under article 62(4)(c) of the LOSC, coastal States may regulate the seasons and areas of fishing by foreign fishing vessels. Hence, most access agreements generally prescribe the area in which authorised vessels can operate, albeit for different reasons. In the case of the Solomon Islands, this is to protect the domestic tuna industry. Consequently, all foreign fishing vessels licensed by the Solomon Islands are prohibited to fish inside the territorial sea and archipelagic waters.[53] In the Agreement between Nauru and Japan, certain areas within Nauru's EEZ may be closed to protect local and artisanal fishing.[54] The delimitation of areas where foreign fishing vessels can operate is also influenced by ecological reasons, and the need to comply with international law obligations. This is the case in Papua New Guinea where foreign fishing vessels are prohibited from fishing in protected areas including the waters of the Torres Strait.[55]

---

52 E.g., Agreement between the Fisheries Association of the Republic of Korea and the Government of the Cook Islands concerning the Licensing of Fishing Vessels of the Republic of Korea to Fish within the Cook Islands Exclusive Economic Zone, done at Rarotonga, 29 May, 1990.

53 See Attachment II of the Arrangement between the Government of Solomon Islands and the Federation of Japan Tuna Fisheries Co-operative Associations and National Offshore Tuna Fisheries Association of Japan concerning Longline and Pole-and-Line Fishing within the Fishery Limits of Solomon Islands

54 Agreement between the Government of the Republic of Nauru and the Federation of Japan Tuna Fisheries Co-operative Associations, National Offshore Tuna Fisheries Association of Japan, Japan Far Seas Purse Seine Fishing Association and the Federation of North Pacific District Purse Seine Fisheries Co-operative Association of Japan, done at Nauru, 1 July, 1994. Art. 9(1). states:

> In order to protect local and artisanal fishing operations, the Government of Nauru may from time to time, after consultation with the Associations, close certain areas in the Nauru zone from certain types of fishing operations. Where such closed areas have been established pursuant to this paragraph, the operator shall, at least 24 hours prior to entry into or departure from a closed area, send a notice to the Government of Nauru in the format set out in Appendix D.

55 Tuna Fishing Agreement between the Independent State of Papua New Guinea and Frabelle Fishing Corporation, 1991. Art. 4.

> 4.1 Fishing under this Agreement shall be confined to the PNGFZ excluding the waters of the Torres Strait, the archipelagic waters, the territorial seas and internal waters and islands and reefs within the PNGFZ.
>
> 4.2 Fishing is prohibited in areas designated by the State from time to time as Prohibited Areas. The existing Prohibited Areas are identified in Schedule 3 of the Appendix to this Agreement.

### Catch Quotas

Article 62(4)(b) of the LOSC allows coastal States to determine the species which may be caught and fix catch quotas. Article 62(4)(c) also allows coastal States to regulate the types, sizes and amount of gear, and the types, sizes and number fishing vessels that may be used. Some access agreements do not impose restrictions on vessel numbers.[56] Other access agreements, however, impose restrictions on vessel numbers.[57] In the 1994 Agreement between Tuvalu and Taiwan Deep Sea Tuna Boatowners Association, provision is made for the licensing of only fifteen vessels.[58] The reasons why a catch quota system is not preferred is because of the difficulties of verifying the catch. The Cook Islands also imposes a limit on the number of vessels which it licenses.[59]

More specific catch quotas, however, are prescribed in the 1990 Agreement between the Solomon Islands Government and the Kaohsiung Fishermen's Association.[60] Under the agreement, a maximum allowable catch of 1,500 metric tonnes has been set for all species of tuna.[61] The number of vessels which can be licensed is also limited to only twenty longline vessels.[62] A catch quota of 6,000 metric tonnes and 6,500 metric tonnes for pole-

---

4.3 The State in order to protect existing fisheries and to avoid conflict with locally based fishing operations, reserves the right to exclude additional areas in the PNGFZ from certain types of fishing operations.

56 E.g., Agreement between the Government of the Republic of Nauru and the Federation of Japan Tuna Fisheries Co-operative Associations, National Offshore Tuna Fisheries Association of Japan, Japan Far Seas Purse Seine Fishing Association and the Federation of North Pacific District Purse Seine Fisheries Co-operative Association of Japan.

57 Access Fishing Agreement between the Government of Tuvalu and the Taiwan Deep Sea Tuna Boatowners Association and Exporters Association, done at Tuvalu, 1 February, 1994.

58 Art. 7 of the Access Fishing Agreement between the Government of Tuvalu and the Taiwan Deep Sea Tuna Boatowners Association and Exporters Association.

59 Art. IV of the Agreement between the Fisheries Association of the Republic of Korea and the Government of the Cook Islands concerning the Licensing of Fishing Vessels of the Republic of Korea to Fish within the Cook Islands Exclusive Economic Zone.

60 Arrangement between the Government of Solomon Islands and the Kaohsiung Fishermen's Association concerning Longline Fishing by Association Vessels within the Fishery Limits of Solomon Islands, done at Honiara, 16 August, 1990.

61 Art. 9 of the Terms and Conditions of the Arrangement between the Government of Solomon Islands and the Kaohsiung Fishermen's Association concerning Longline Fishing by Association Vessels within the Fishery Limits of Solomon Islands.

62 Art. 10 of the Arrangement between the Government of Solomon Islands and the Kaohsiung Fishermen's Association concerning Longline Fishing by Association Vessels within the Fishery Limits of Solomon Islands.

and-line vessels and long vessels respectively has been imposed for Japanese vessels under the agreement between the Solomon Islands and Japan.[63] The quotas are determined by the Solomon Islands although, under the Head Agreement with Japan, both parties are to consult with each other regarding the implementation of regulatory measures to be applied by Solomon Islands.[64] Under the framework agreement between Papua New Guinea and Korea, the former is required to determine the allowable catch of tuna within its EEZ; determining its harvesting capacity; and allocating a portion of the surplus to Korean fishing vessels after consultations with Korea.[65]

**Payment of Fees**

Under article 6(4)(a) of the LOSC, coastal States are allowed to impose conditions in respect of the payment of fees and other forms of remuneration.[66] In all access agreements in the WCPO region, access to foreign fishing vessels is conditional upon the payment of fees. The method of payment is either a lump sum system which is calculated according to the number of vessels, or the trip per vessel system which is based on fees paid as a percentage of the value of catch taken by vessels per trip. In the 1990 Agreement between the Cook Islands and Korea, a lump sum fee of US$100,000 is prescribed in return for licences for up to forty longline vessels.[67] The Agreement does not state how the access fee is derived. In contrast the 1989 Agreement between Vanuatu and the Kaohsiung Fishermen's Association provides that the fees are to be calculated on a per vessel per

---

63 See Art. 10 of the Terms and Conditions of the Arrangement between the Government of Solomon Islands and the Federation of Japan Tuna Fisheries Co-operative Associations and National Offshore Tuna Fisheries Association of Japan concerning Longline and Pole-and-Line Fishing within the Fishery Limits of Solomon Islands.

64 See Art. III of the Agreement on Fisheries between the Government of Japan and the Government of Solomon Islands.

65 See Art. II of the Arrangement between the Government of Solomon Islands and the Federation of Japan Tuna Fisheries Co-operative Associations and National Offshore Tuna Fisheries Association of Japan concerning Longline and Pole-and-Line Fishing within the Fishery Limits of Solomon Islands.

66 LOSC, Art. 62(4)(a) also stipulates that in the case of developing coastal States, the remuneration may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry.

67 See Art. II of the Agreement between the Fisheries Association of the Republic of Korea and the Government of the Cook Islands concerning the Licensing of Fishing Vessels of the Republic of Korea to Fish within the Cook Islands Exclusive Economic Zone.

annum basis determined annually by consultation between the two parties. In 1990 the fee was set at US$5,000 per vessel.[68] Most access agreements provide that no licence will be issued unless the requisite fees are paid.[69]

The access agreements which are based on catch per vessel per trip have a complicated system of calculating the fees. However, attempts to standardise the method of calculating the fees have not been successful.[70] The methods of fee payments also differ according to the types of vessels licensed. For example, the Agreement between the Solomon Islands and the Japanese Fishing Associations, provides that the access fee calculation formula for pole-and-line vessels is based on a tabulation of the compositions of the species catch per trip, relative landings at ports, and the three month weighted running average price by species.[71] The access fee is calculated by multiplying the initial access fee by the catch per trip.[72] This is then multiplied by the monthly all tuna price and divided by the initial tuna price.[73] In contrast, a different information base is used to calculate the access fee for longline vessels.[74] In Nauru, different formulae apply to pole-and-line vessels, longline vessels and purse seine vessels.[75]

---

68 See Art. VIII(1) of the 1990 Agreement between the Republic of Vanuatu and the Kaohsiung Fishermen's Association.

69 See Art. VIII(3) of the 1990 Agreement between the Republic of Vanuatu and the Kaohsiung Fishermen's Association.

70 FFA, "A Review of Access Fees Arrangements and their Development in FFA Member Countries", (Honiara: Forum Fisheries Agency Report No. 90/81, 1990).

71 See Attachment 1(a) of the Terms and Conditions of the Arrangement between the Government of Solomon Islands and the Federation of Japan Tuna Fisheries Co-operative Associations and National Offshore Tuna Fisheries Association of Japan concerning Longline and Pole-and-Line Fishing within the Fishery Limits of Solomon Islands.

72 See Arrangement between the Government of Solomon Islands and the Federation of Japan Tuna Fisheries Co-operative Associations and National Offshore Tuna Fisheries Association of Japan concerning Longline and Pole-and-Line Fishing within the Fishery Limits of Solomon Islands. The initial access fee per metric tonne is defined as the Access fee per metric tonne for June 1990 and is Yen 30,080 for all vessel classes, namely under 100 gross registered tonnes (grt) and over 100 grt.

73 See the Arrangement between the Government of Solomon Islands and the Federation of Japan Tuna Fisheries Co-operative Associations and National Offshore Tuna Fisheries Association of Japan concerning Longline and Pole-and-Line Fishing within the Fishery Limits of Solomon Islands. The initial 'All Tuna' price is the monthly 'All Tuna' price for June 1990 and is Yen 752 per kg.

74 The information is based on the different sashimi markets where the tuna is landed. The difference is really one based on market prices for sashimi tuna which is more lucrative and highly prized than frozen tuna.

75 Brazil, note 49 above at Appendix B.

The reasons for the different information required between the Agreements is historical. Japanese fishing vessels have fished in the Solomon Islands' EEZ longer and, therefore, have accumulated more information on which to base the access fees. A comparison of fee levels must also take into account the payment of goods and services by the DWFNs. The goods and services include fishing equipment and computers. Although fee levels may appear to be low in some cases, this is compensated for by the provision of goods and services which contribute towards the development of fisheries in the Pacific Island States.[76] In some cases the fee level depends on the size of the vessels being licensed. For instance, in the 1995 Agreement between Papua New Guinea and the Mar Fishing Company, the operation fee is classified according to the size of the purse seine vessels.[77] The fees range from US$93,346.56 for vessels below 400 grt to US$153,779.70 for vessels above 1000 grt.

**Landing of Catch and Port Call**

Article 62(4)(h) of the LOSC allows coastal States to require foreign fishing vessels to land all or any part of the catch in the ports of coastal States. This has several advantages for the coastal States. The landing of catch in the coastal States creates employment for stevedores, and generates revenue through port charges. The DWFNs are opposed to the landing of catch in the coastal States because of the extra financial costs involved. Because of the limited facilities in the WCPO region, most access agreements do not require the catch to be landed in port.

However, some access agreements require vessels to make a certain number of port calls during the period of validity of their licence. For instance, in the case of Papua New Guinea and the Mar Fishing Company, licensed motherships are required to make port

---

76 E.g., Agreement between the Government of Solomon Islands and Federation of Japan Tuna Fisheries Co-operative Associations and National Offshore Tuna Fisheries Association of Japan, concerning the supply of Goods and Services for the Development of Fisheries of Solomon Islands, done at Tokyo, December, 1990.

77 Schedule I of Attachment 11 of the Tuna Fishing Agreement between the Independent State of Papua New Guinea and Mar Fishing Company.

calls at least six times during the period of their licence.[78] Licensed purse seine vessels are obliged to make at least one port call.[79] It is not clear why the Agreement stipulates that purse seine vessels only make one port call. Most access agreements, however, are silent on this point. In contrast, the Agreement between the Solomon Islands and Japanese Fishing Associations specifically mentions that Japanese fishing vessels are not required to make port calls unless instructed by the authorities to do so.[80]

### B. Conservation and Management Related Measures

Article 62(4) of the LOSC requires nationals of other States fishing in the EEZ of coastal States to comply with the conservation and management measures of the coastal States. Specifically, article 62(4) allows coastal States to specify the information required of foreign fishing vessels, including catch and effort statistics and vessel position reports. Generally, all the access agreements require foreign fishing vessels to comply with the management and conservation measures found in national legislation. In all cases, there are strict reporting duties imposed on the foreign fishing vessels. Taiwanese fishing vessels for example are obliged to report at least 24 hours prior to entry and departure from Tuvalu's EEZ. Furthermore, Taiwanese fishing vessels must report to the Tuvalu authorities every Wednesday while they are within the Tuvalu EEZ.[81] All the access agreements provide that data must be provided to the national authorities usually within a

---

78 Art. 19.1 of the Tuna Fishing Agreement between the Independent State of Papua New Guinea and Mar Fishing Company.

79 Art. 19.2 of the Tuna Fishing Agreement between the Independent State of Papua New Guinea and Mar Fishing Company.

80 Art. 12 of the Arrangement between the Government of Solomon Islands and the Federation of Japan Tuna Fisheries Co-operative Associations and National Offshore Tuna Fisheries Association of Japan concerning Longline and Pole-and-Line Fishing within the Fishery Limits of Solomon Islands.

81 Art. 11 of the Agreement on Fisheries between the Government of Japan and the Government of Tuvalu which reads:

> 1. The operator of every Association vessel issued with a license to fish under this Agreement shall provide to the GOT information relating to the position of, and catch on board, the vessel by telex or cable in the form prescribed in Appendix 4 at the following times:
>
> (a) at least 24 hours prior to entry into the fishery limits;
>
> (b) each Wednesday while within the fishery limits;
>
> (c) at least 24 hours prior to the estimated time of entry into any port in Tuvalu; and
>
> (d) upon departure from the fishery limits.

specified period of time. The data normally consists of the species of the catch, the position of catch and other relevant information pertaining to by-catch and discards. Most of this data pertains to the catch within the EEZ. However, in some cases, the access agreements provide for the supply of high seas data as well.[82]

In recognition of the importance of by-catch, the agreement between Nauru and Japanese Fishing Associations obliges the Association's vessels to take into account the dependence of the people of Nauru on the living resources in the EEZ and adopt reasonable measures to reduce the mortality of non-target species. These measures include using equipment and techniques that are known to minimise the risk to non-target species.[83]

### Enforcement

Most access agreements require the master and crew of the foreign fishing vessel to comply with every instruction of authorised officers including directions to stop, move to a specified location, and to have the vessel inspected.[84] To assist in the identification of the

---

82 Art. 12(2) of the Tuna Fishing Agreement between the Independent State of Papua New Guinea and Mar Fishing Company which provides that:

> The company shall ensure that its vessel operators:
>
> (a) duly complete in the English language, daily reports in the prescribed form of all catch in the PNGFZ and on the high seas and shall certify that such information is true, complete and accurate.
>
> (b) provide to the State in the prescribed form (i) a preliminary report within 14 days of the completion of the trip; and (ii) a final report within 45 days of the completion of a trip.

83 Art. 9(3) of the Agreement between the Government of the Republic of Nauru and the Federation of Japan Tuna Fisheries Co-operative Associations, National Offshore Tuna Fisheries Association of Japan, Japan Far Seas Purse Seine Fishing Association and the Federation of North Pacific District Purse Seine Fisheries Co-operative Association of Japan.

84 Art. 7(2) of the Agreement between the Government of the Republic of Nauru and the Federation of Japan Tuna Fisheries Co-operative Associations, National Offshore Tuna Fisheries Association of Japan, Japan Far Seas Purse Seine Fishing Association and the Federation of North Pacific District Purse Seine Fisheries Co-operative Association of Japan which states:

> The master and each member of the crew of the vessel, while operating in Nauru Zone, shall immediately comply with every instruction and direction given by an authorised officer, including to stop, to move to a specified location, and to facilitate safe boarding and inspection of the vessel, its licence, gear, equipment, records, facilities, fish and fish products. Such boarding and inspection shall be conducted as much as possible in a manner so as not to interfere unduly with the lawful operation of the vessel. The operator and each member of the crew shall facilitate and assist in any action by an authorised officer and shall not assault, obstruct, resist, delay, refuse boarding to, intimidate or interfere with an authorised officer in the performance of his or her duties.

vessels, some agreements require foreign fishing vessels to have their radio call sign painted in a conspicuous location on the side of the vessel in contrasting colours. Where the foreign fishing vessels do not have a radio call sign, they are required to have their registration number appropriately displayed.[85] The Agreement between Tuvalu and the Taiwan Deep Sea Tuna Boatowners Associations is more specific as regards vessel marking and identification. Article 12(2) provides that all of the Association's vessels must comply with the 1989 FAO standard specifications for the marking and identification of vessels. Moreover, it requires that these markings must be clear and distinct at all times while the vessel is in Tuvalu's EEZ.[86]

All access agreements provide for the taking on board of observers. However, the extent to which the foreign fishing vessel meets the costs of the observers differs. For instance, the 1990 Agreement between the Solomon Islands and the Japanese Fishing Associations provides that the placement of observers is to be mutually agreed upon between the parties. As regards the costs of placement, the agreement states that this is to be met by the Solomon Islands government.[87] In contrast, the Agreement between Papua New Guinea and the Frabelle Fishing Company provides that the operator meets the full travel costs of the observer including his salary and full insurance coverage.[88]

---

85 Art. IX of the Agreement between the Palau Maritime Authority and Four Fisheries Associations of Japan concerning Fishing in the Fishery Zone of Palau which states:

> A member vessel of the Associations within the Fishery Zone of Palau shall be identified by the radio call sign painted in a conspicuous location on the side of the vessel in contrasting colour in blocks of at least one metre by forty centimetres per letter. Until a more suitable mark may be developed through consultations between the Authority and the Associations, a vessel with no radio call sign shall be identified by the fishing vessel registration number displayed in accordance with the laws and regulations of the State registry. Communications between the vessels of the members of the Associations and the patrol boats of the Republic of Palau shall be made by international signal codes as prescribed in Appendix 7.

86 Art. 12 (3) of the Agreement between Tuvalu and the Taiwan Deep Sea Tuna Boatowners and Exporters Association.

87 Art. 8 of the Terms and Conditions of the Arrangement between the Government of Solomon Islands and the Federation of Japan Tuna Fisheries Co-operative Associations and National Offshore Tuna Fisheries Association of Japan concerning Longline and Pole-and-Line Fishing within the Fishery Limits of Solomon Islands.

88 Schedule 8 of the 1991 Agreement between the Independent State of Papua New Guinea and Frabelle Fishing Company.

Some of the access agreements require foreign fishing vessels to have good standing on the Regional Register before they are licensed.[89] To facilitate the institution of legal process, some agreements provide for the appointment of agents. The functions of these agents include, *inter alia*, receiving legal notices from the national authorities.[90]

**Transhipment**

Transhipment is closely regulated and monitored under bilateral agreements in the WCPO region. In the Agreement between Papua New Guinea and the Mar Fishing Company, a fishing trip is deemed to have ended once any or all of the fish on board the vessel are removed from the vessel.[91] The operator of the vessel is not allowed to tranship at sea unless authorised to do so by the Papua New Guinea authorities. Any foreign fishing vessel that intends to tranship must provide 72 hours notice of a request to tranship. The notice must also include the name of the vessel, its radio call sign, its position, the catch on board by species and the time and port where the transhipment is to take place. The Agreement also requires the vessel operator to submit a full report of the transhipment and pay the stipulated fees. The rationale behind these provisions is to provide coastal States with information about the vessel and the catch on board the vessel. This information is used by coastal States to monitor the activities of the vessel and the level of fishing in their EEZs.

---

89 Art. V of the 1989 Agreement between the Republic of Vanuatu and the Kaohsiung Fishermen's Associations which states:

> 1. Vessels of the Association shall be accorded and maintain good standing on the Regional Register.
> 2. Vessels of the Association which do not comply with paragraph (1) shall not be:
>  (a) eligible for licence issuance; or
>  (b) used for fishing or related activities in Vanuatu waters.

See Chp. 9 for discussions on the Regional Register.

90 Art. 12 of the Arrangement between the Government of Solomon Islands and the Federation of Japan Tuna Fisheries Co-operative Associations and National Offshore Tuna Fisheries Association of Japan concerning Longline and Pole-and-Line Fishing within the Fishery Limits of Solomon Islands.

91 Schedule 7 of the Tuna Fishing Agreement between the Independent State of Papua New Guinea and the Mar Fishing Company.

### Training and Research

Some agreements specifically make provision for training and research. In the case of Papua New Guinea, its Agreement with the Mar Fishing Company obliges the company to take on board scientific observers to undertake scientific studies.[92] Furthermore, the company has undertaken to provide statistical and biological information for the purpose of managing and conserving tuna.[93]

Tuvalu's agreement with the Taiwan Deep Sea Tuna Boatowners Association contains provisions that oblige the parties to co-operate to promote greater involvement of Tuvalu nationals in tuna fisheries, train Tuvaluans as tuna fishing vessel deckhands and explore the possibility of entering into a joint venture agreement to develop Tuvalu's fishing industry.[94] The Company is, however, only obliged to use its "best endeavour" to develop Tuvalu's fishing industry.

More specific obligations can be found in the Agreement between Papua New Guinea and the Mar Fishing Company. Under the agreement, the Company is obliged to co-operate with Papua New Guinea authorities to implement its national fisheries and development programs.[95] To ensure that this is done, the parties are required to hold

---

92 Art. 16 of the Tuna Fishing Agreement between the Independent State of Papua New Guinea and the Mar Fishing Company which provides:

> 16.1 This Agreement obligates the Company to take on board its vessels technical observers as from time to time assigned by the State.
> 16.2 The Company agrees to pay full board, daily allowance, fare and insurance coverage for the observer.
> 16.3 The selection of appropriate vessels upon which observers may be placed shall be made following consultation with the National Fisheries Authority of the State and the Company in accordance with the procedure set out in Schedule 8 of the Appendix to this Agreement.
> 16.4 Such observers shall be allowed to board vessels at the designated ports within PNGFZ at agreed locations. The Company shall render all possible assistance to facilitate the boarding of its vessels by the observers.
> Observers referred to under this clause shall be placed on board in such a manner that no additional accommodation facilities will be required, nor fishing operations unreasonably hindered.

93 Art. 17 of the Tuna Fishing Agreement between the Independent State of Papua New Guinea and the Mar Fishing Company.

94 Art. 14 of the 1993 Agreement between Tuvalu and the Taiwan Deep Sea Tuna Boatowners and Exporters Association.

95 Art. 18.1 of the Tuna Fishing Agreement between the Independent State of Papua New Guinea and the Mar Fishing Company.

annual consultations to identify development projects and establish implementation programs.[96]

The Agreement between Papua New Guinea and the former Soviet Union provides a comprehensive framework for mutual co-operation in fisheries research and training. More specifically the parties agree to co-operate in marine fishery research, commercial utilisation of biological resources and training of the Papua New Guinea nationals, especially in the development of its fishing industry.[97] In return for access to its vessels, the Soviet Union agreed to assist Papua New Guinea develop its tuna harvesting and processing industry, train Papua New Guinea nationals to become fisheries specialists, and conduct research to determine the state of the biological resources in Papua New Guinea's EEZ.[98]

**Flag State and Association's Responsibility**

The concept of flag State responsibility and fishermen's associations responsibility attempts to shift some of the liability for enforcing the agreements on to the flag State or the Association to which the fishing vessel belongs.[99] Under article VIII(1)(a) of the Agreement between Vanuatu and the Kaohsiung Fishermen's Association, the Association is responsible for ensuring that its vessels do not fish illegally in Vanuatu's waters; that the vessels comply with the fisheries laws and regulations of Vanuatu;[100] and that any penalty or other compensation is promptly paid.[101] Not all access agreements, however, are as precise. In the agreement between the Solomon Islands and the Japanese Fishing

---

96 Art. 18.2 of the Tuna Fishing Agreement between the Independent State of Papua New Guinea and the Mar Fishing Company.

97 Art. 1(1) of the 1990 Agreement between the Independent State of Papua New Guinea and the Soviet Union.

98 Art. 5 of the 1990 Agreement between the Independent State of Papua New Guinea and the Soviet Union.

99 See discussions on flag State responsibility in Chp. 9.

100 Art. VIII(1)(b) of the Agreement between the Republic of Vanuatu and the Kaohsiung Fishermen's Association.

101 Art. VIII(1)(e) of the Agreement between the Republic of Vanuatu and the Kaohsiung Fishermen's Association.

Association, the latter only undertakes to use its 'best efforts' to ensure that its members comply with the terms and conditions of the Agreement.[102]

With regards to flag State responsibility, the Agreement between Solomon Islands and Japan provide that the Government of Japan will ensure in accordance with Solomon Islands laws and regulations, that Japanese fishing vessels do not fish in Solomon Islands' EEZ, and that licensed vessels comply with the terms of the Agreement.[103] This obligation, however, does not establish that the Government of Japan will assume responsibility for the failure of its vessels to comply with Solomon Islands' fisheries laws.

### C. Assessment of Bilateral Access Agreements

Bilateral access agreements currently provide the only mechanism to regulate catch limits. With the exception of the Palau Arrangement, bilateral access agreements also provide the only avenue to prescribe limits to the number of vessels. The access agreements reviewed show that the Pacific Island States view bilateral access agreements as a means of raising revenue and controlling the activities of foreign fishing vessels. Broadly, the access agreements merely establish a framework within which foreign fishing vessels can fish in the Pacific Island States' EEZs. In return for access, the foreign fishing vessels agree to compensate the Pacific Island States by paying access fees. The foreign fishing vessels also agree to satisfy certain reporting requirements and provide data so that the Pacific Island States can estimate how much fish is being taken from their waters. Access rights given to foreign fishing vessels are not, however, reciprocated in most cases by access to markets and market intelligence, transfer of technology, conduct of scientific research and exchange of market and scientific data. Where these are stipulated in the agreements, they are often expressed as "best endeavour clauses". From a practical perspective, it is hard to enforce such provisions.

---

102 Art. 9 of the Arrangement between the Government of Solomon Islands and the Federation of Japan Tuna Fisheries Co-operative Associations and National Offshore Tuna Fisheries Association of Japan concerning Longline and Pole-and-Line Fishing within the Fishery Limits of Solomon Islands.

103 Art. V of the Agreement between the Government of Japan and the Government of Solomon Islands.

The Government to Government agreements have outlived their usefulness. In essence, these agreements simply provide a basic framework to allow DWFN vessels to fish in the WCPO region. The Government to Government agreements recognise the Pacific Island States' sovereign rights over tuna and acknowledge the Pacific Island States' desire to develop the resource. The Government to Government agreements enunciate the principle that DWFNs will be licensed by the Pacific Island States, but the actual details are left to subsidiary agreements between the Pacific Island States and various Associations representing the vessels. In general terms, most of the access agreements are used to extract economic fees from tuna. However, the Pacific Island States should use their bilateral agreements to establish closer co-operation with DWFNs in trade and economic development. All the DWFNs fishing in the WCPO region have advanced fisheries research institutions. The Pacific Island States should use the access agreements to foster closer working relations with these institutions. There are mutual long term benefits for both the Pacific Island States and DWFNs to co-operate in scientific research. The more that is known about the waters in the WCPO region, the better it is for both parties, since they both have a mutual interest in the state of the tuna.

Most of the access agreements reviewed contain similar provisions pertaining to the terms and conditions of access. However, although the access agreements are not inconsistent with the LOSC, the agreements need to be strengthened to be fully compatible with the LOSC provisions and Fish Stocks Agreement regarding tuna.

The issue of flag State responsibility, especially in the Government to Government Agreements, needs to be strengthened. The precedent in the Treaty on Fisheries between the Pacific Islands and the US should be applied to bilateral access agreements. Access agreements must contain firm commitments from the flag States to enforce the provisions of the agreements. Moreover, the access agreements should oblige the flag State to take necessary steps to ensure that their nationals and fishing vessels do not fish in a Pacific Island State's EEZ unless authorised under the agreement. In some of the Government to Government agreements, the duties of the flag State are qualified to the extent permitted by

the flag State's laws and regulations. For instance, the Agreement between the Solomon Islands and Japan states that Japan "will ensure in accordance with the relevant laws and regulations of Japan that Japanese fishing vessels do not engage in unlawful fishing in the Solomon Islands' EEZ."[104]

Improvements to the access agreements in this direction should not be subject to negotiation, but a matter of course to improve the relations between coastal States and flag States. Indeed, the United Nations Conference on the Sustainable Development of Small Island Developing States called for co-operation between coastal States and fishing States to develop mutually advantageous fishing agreements, in particular between small island developing States and fishing groups.[105] The failure of the flag State to assist coastal States enforce their fisheries laws is disadvantageous to coastal States because, in most cases, flag State enforcement is the most effective means of enforcing coastal States' fisheries laws. The Fish Stocks Agreement creates a comprehensive framework for the operation of flag State responsibility and its implementation will contribute towards removing the ambiguities surrounding the application in the flag State responsibility concept in the WCPO region.[106] The Pacific Island States should seek greater flag State commitments, especially in enforcing their fisheries laws in return for broader co-operative arrangements.

Where there is no Government to Government agreement between a Pacific Island State and the flag State of the foreign fishing vessels, the Pacific Island States have sought to secure the commitment of the Association to which the vessels belong. However, the agreements reviewed indicate that the Associations are merely required to use their "best efforts" to ensure compliance. The "best effort" clauses are generally unenforceable. Consequently, the "best effort" clauses should be supplanted by a firmer commitment to enforce the Pacific Island States' fisheries laws. This can be done by making the

---

104 Art. V of the Agreement between the Government of Japan and the Government of Solomon Islands.

105 United Nations, *Report of the Global Conference on the Sustainable Development of Sam Island Developing States, Bridgetown, Barbados, 25 April - 6 May, 1994*, Global Conference on the Sustainable Development of Sam Island Developing States, (New York: United Nations Doc. A/CONF. 167/9, October 1994): para. 26(c)(ii).

106 See discussions in Chp. 9.

Associations liable jointly and severally for the undischarged liabilities of their vessels.[107] The draft regional licensing arrangement for Taiwanese longline vessels contains more precise commitments.[108] Importantly, the draft obliges the Association to ensure that fishing vessels and persons who contravene the Pacific Island States' fisheries laws do not engage in further fishing. Further, the Association must ensure that the fishing vessels leave the EEZs of the Pacific Island States concerned.[109] The draft also contains specific obligations as to what the Associations have to do after the vessel is arrested and penalised. The duties imposed on the Association include responsibility to remit any fines imposed by the Pacific Island States against the vessel for violating its fisheries laws and meet the cost of legal proceedings.[110] In regards to liability for damages, the draft agreement states that "the Association shall take all necessary measures to facilitate prompt and adequate settlement of a claim for loss or damage incurred by FFA, or by the government of a Pacific Island State, or by a citizen of a Pacific Island State for which fishing vessels licensed under this Agreement or unlicensed fishing vessels of Taiwan are responsible while they are within the authorised fishing area."[111] It is possible for similar sorts of commitments to be transposed to the bilateral agreements in the region.

None of the access agreements reviewed contain strong flag State commitment to settle claims by Pacific Island States or nationals for fees, for loss or damage caused by the foreign fishing vessels. In the absence of any such commitment, it will be difficult to seek legal redress through due process of law. For this reason, the Pacific Island States should

---

107 Brazil, note 49 above at p. 12.

108 FFA, *Draft Agreement between the South Pacific Forum Fisheries Agency and the XXX Association and the ZZZ Association of Kaohsiung, Taiwan*, Prepared for the Third Meeting of Pacific Island Countries to consider the possible implementation of a Regional Licensing Arrangement for Taiwanese Longline Albacore Vessels, Nadi, Fiji, 10-11 March, 1995, (Honiara: Forum Fisheries Agency Doc. Appendix A/RLAT3/WP. 1, 1995).

109 Art. 11.1 of the Draft Agreement between the South Pacific Forum Fisheries Agency and the XXX Association and the ZZZ Association of Kaohsiung.

110 Art. 11.2(a) and (b) of the Draft Agreement between the South Pacific Forum Fisheries Agency and the XXX Association and the ZZZ Association of Kaohsiung.

111 Art. 15 of the Draft Agreement between the South Pacific Forum Fisheries Agency and the XXX Association and the ZZZ Association of Kaohsiung.

reinforce the Government to Government agreements by incorporating provisions that will oblige the flag State to facilitate the prompt settlement of any claims for fees or damages.

The link between the protection of the marine environment and tuna management is well established. However, the link is not adequately reflected in the bilateral access agreements. An exception is the Agreement between Nauru and Japanese Fishing Associations which has provision requiring the latter to minimise by-catch. Most agreements, however, do not have similar provisions. Also of significance is the need to enforce MARPOL V[112] obligations which require proper disposal of plastic and other wastes in the EEZ. Consideration should be given to incorporating MARPOL V responsibilities in the Government to Government agreements.[113]

The need to promote responsible fisheries management practices is now recognised as essential to the conservation and management of tuna. According to the FAO, "the lack of responsible and effective management of marine resources, whether within national jurisdiction or on the high seas, is the major reason why many fisheries can be characterised by a condition of unconstrained fishing, stock depletion and lack of profitability."[114] Sadly, many of the bilateral access agreements do not reflect these principles. The reason is that the primary motivation of the Pacific Island States in harnessing tuna is economic. The Pacific Island States perceive it as an economic resource, rather than as a natural resource which must be developed and managed sustainably. The view that tuna is perceived as an economic resource is underscored by a

---

112 Art. V of the *Convention for thePrevention of Marine Pollution by Dumping from Ships and Aircraft*, Oslo, 15 February, 1972 [hereinafter "MARPOL"]. Reproduced in Alexandre Charles Kiss (ed.), Selected Multilateral Treaties in the Field of the Environment, (Nairobi: United Nations Environment Program Reference Series 3, !983): pp. 266-269. Art. V of MARPOL states: "The dumping of the substances listed in Annex Iof this Convention is prohibited."

113 Brazil, note 49 above at p. 11.

114 FAO, *Guidelines for Responsible Management of Fisheries*, Paper prepared for the Technical Consultation on the Code of Conduct for Responsible Fishing, Rome, 26-5 October, 1994, (Rome: FAO Doc. FI:CCRF/94/Inf. 5 August 4, 1994): p. 10.

statement made by the Deputy Prime Minister of the Solomon Islands to the first Multilateral High-Level Conference on South Pacific Tuna Fisheries.[115]

> I cannot emphasise enough the value the people of Solomon Islands place on the tuna resources of the South Pacific. For the last ten years, tuna has made a significant contribution to Solomon Islands economy being among the top two export earners each year. Solomon Islands, in common with all other members of the Forum Fisheries Agency, is determined to promote the prospects for tuna to continue to contribute to the economic development of the region in the long term. Solomon Islands will not stand idly by while others jeopardise this aspiration.[116]

These sentiments clearly underline the attitude of the Pacific Island States towards the conservation and management of tuna. Economic considerations tend to take precedence over conservation concerns. Another plausible explanation for the failure to apply the principles of responsible fisheries management is, the relative health of the tuna stock in the WCPO region has not given rise to the need to adopt conservation measures, although both the Pacific Island States and DWFNs have an equal interest in their conservation.[117] However, it is argued that the Pacific Island States have the opportunity to advance responsible fishing by incorporating elements of the FAO's Code of Conduct for Responsible Fishing.[118] Whether the Pacific Island States take more responsible conservation and management measures will ultimately depend on their management objectives and national policies. Increasingly, the international community expects coastal States and fishing States to adopt a more responsible attitude towards fisheries management. The bilateral access agreements in the region should reflect these concerns.

The first step is to incorporate specific management objectives in the access agreements. The overriding objective of the access agreements should be the long-term

---

115 FFA, "Record of Proceedings of the Multilateral High-Level Conference on South Pacific Tuna Fisheries, Honiara, Solomon Islands, 5-9 December, 1994", (Honiara: Forum Fisheries Agency Report No. 95/1, 1995).

116 Ibid., Attachment B

117 Anthony Bergin, "Political and Legal Control over Marine Living Resources - Recent Developments in South Pacific Distant Water Fishing", *The International Journal of Marine and Coastal Law* 19(3) (1994): pp. 289-309 at 293.

118 See discussions in Chp. 3. See FAO, *Code of Conduct for Responsible Fishing*, (Rome: Food and Agriculture Organisation, 1995).

sustainable use of the tuna stocks. In addition to those measures which are already contained in agreements, the Pacific Island States should incorporate measures which provide for (a) avoidance and reduction of excess fishing capacity so that the exploitation of the stocks remains economically viable;[119] (b) economic conditions under which fishing industries operate to promote responsible fishing;[120] (c) the interests of fishermen, including those engaged in subsistence, small-scale and artisanal fisheries are taken into account;[121] (d) the conservation of the biodiversity of aquatic habitats and ecosystems and protection of endangered species;[122] (e) recovery and restoration of depleted stock;[123] (f) minimisation of adverse environmental impacts from human activities;[124] (g) reduction of pollution, waste, discards, catch by lost or abandoned gear, catch of non-target fish and non-fish species, impacts on associated or dependent species, and the development and use of selective, environmentally safe and cost-effective fishing gear and techniques;[125] and (h) assessment of the impacts of environmental factors on the target stock and species that belong to the same ecosystem or associated or dependent on the target stock.[126]

The access agreements in the WCPO region can be criticised for the lack of consistency in the application of national laws in the agreements. Under article 62(4) of the LOSC, coastal States are empowered to enact a wide range of conservation and management measures. However, the significance of this aspect of the LOSC is not adequately reflected in the access agreements. For instance, the Agreement between the Solomon Islands and Japan, states that Japanese vessels will only comply with the terms and conditions of the Agreement.[127] In contrast, the Agreement between Tuvalu and Japan

---

119 Code of Conduct, Art. 6.2.2(a).

120 Ibid., Art. 6.2.2(b).

121 Ibid., Art. 6.2.2(c).

122 Ibid., Art. 6.2.2(d).

123 Ibid., Art. 2.6.6(e).

124 Ibid., Art. 6.2.2(f).

125 Ibid., Art. 6.2.2(g).

126 Ibid., Art. 6.2.3.

127 Art. V of the Agreement on Fisheries between the Government of Japan and the Government of Solomon Islands.

stipulates that fishing by Japanese fishing vessels is to be "in accordance with the relevant laws and regulations of Tuvalu in relation to fishing and this Agreement."[128]

Another criticism relates to the provisions in the access agreements with respect to observers. Under the LOSC, the right to place observers is expressly recognised as one of the measures which may be taken by coastal States.[129] Moreover, the harmonised minimum terms and conditions (MTCs)[130] of access by foreign fishing vessels deals with the provision of observers in greater detail.[131] However, the requirement that foreign fishing vessels must have observers on board is not fully reflected in the agreements. For instance, the 1991 Agreement between Palau and various Japanese Fishing Associations states that the placement of observers depends on mutual agreement of the parties.[132] While it will be necessary for the parties to co-operate to place observers on board vessels,

---

128 Art. 1 of the 1986 Agreement on Fisheries between the Government of Tuvalu and the Government of Japan.

129 LOSC, Art. 62(4)(g).

130 See Chp. 6 for discussions on the MTCs

131 The MTC's deal with observers as follows:

(a) The operator and each member of the crew of a vessel shall allow and assist any person identified by a country as an observer to:

(i) board the vessel for scientific, compliance, monitoring and other functions;

(ii) embark at a place and time agreed to;

(iii) have full access to and use of all facilities and equipment on board which the observer may determine is necessary to carry out his or her duties, including:

a) full access to the bridge, fish on board, and areas which may be used to hold, process, weigh and store fish;

b) remove samples;

c) full access to the vessel's records including its logs and documentation for the purpose of records inspection and copying;

d) reasonable access to navigation equipment, charges and radios;

e) other information relating to fishing;

(iv) disembark at an agreed place and time; and

(v) carry out all duties safely.

(b) The operator or any crew member of the vessel shall not assault, obstruct, resist, delay, refuse boarding to, intimidate or interfere with an observer in the performance of his or her duties.

(c) The operator shall provide the observer, while on board the vessel, at no expense to the licensing country, with officer level accommodation, food and medical facilities.

(d) The following costs of the observer shall be met by the operator:

(i) full travel costs from the licensing country to and from the vessel;

(ii) salary; and

(iii) full insurance coverage for the observer.

132 Art. IX of the Agreement between the Palau Maritime Authority and Four Fisheries Associations of Japan concerning Fishing in the Fishery Zone of Palau.

the implementation of this obligation does not depend on the mutual consent of the foreign fishing operators.

There are also varying degrees of compliance with the Regional Register of Foreign Fishing Vessels.[133] The benchmark for registration on the Regional Register has been set by the Treaty on Fisheries with the US, and the Memorandum of Understanding (MOU) between the FFA and Japanese Fishing Associations.[134] Some access agreements do not adequately reflect the requirement that no licences can be issued unless the vessel is in good standing on the Regional Register. With the MOU between Japan and the FFA, all access agreements should incorporate provisions which specifically require good standing as a precondition for authorisation to fish.

One of the issues that should be given consideration, is the extent to which the terms and conditions of access agreements are reflected in national legislation. Although national legislation does not directly impede the implementation of the access agreements, the terms and conditions of access should be fully reflected in domestic legislation. For instance, Nauru's fisheries legislation does not provide for observers. However, there is provision in Nauru's access agreement with Japan dealing with observers.[135] While observers can be dealt with in the licence conditions, this is not the most satisfactory way of obliging operators to comply, or to provide a basis for recovering costs.[136]

Since bilateral access agreements provide the main means of interaction between the Pacific Island States and DWFNs, it is imperative that the agreements also reflect regional agreements such as the MTCs and Regional Register and Palau Arrangements for the

---

133 See discussions in Chp. 9 on the Regional Register

134 See Memorandum of Understanding between the South Pacific Forum Fisheries Agency and the Federation of Japan Tuna Fisheries Co-operative Associations, National Offshore Tuna Fisheries Association of Japan, Japan Far Seas Purse Seine Fishing Association and Federation of North Pacific District Purse Seine Fisheries Co-operative Associations relating to the Registration of Japanese Vessels on the Regional Register of Foreign Fishing Vessels, *opened for signature* 4 July, 1994, Honiara.

135 Art. 19 of the Agreement between the Government of the Republic of Nauru and the Federation of Japan Tuna Fisheries Co-operative Associations, National Offshore Tuna Fisheries Association of Japan, Japan Far Seas Purse Seine Fishing Association and the Federation of North Pacific District Purse Seine Fisheries Co-operative Association of Japan.

136 Brazil, note 49 above at p. 16.

Management of the Western Pacific Purse Seine Fishery. The incorporation of regional standards would strengthen the Pacific Island States' weaker negotiating positions.[137] However, the agreements reviewed indicate that there are still marked differences in the way regional standards are being applied. For instance, some of the agreements do not reflect the need to tranship at port[138] and do not require foreign fishing operators to meet the cost of observers.[139] This should be a matter for concern for all the Pacific Island States. The regional standards would be rendered meaningless without effective implementation.

Finally, some comment needs to be made about dispute settlement procedures in the agreements. Most agreements contain provisions for the convening of consultations, upon request, on the implementation of the Agreements.[140] However, not all of them provide specific details as to what should be done, nor how soon after an incident consultations should take place. An exception is the agreement between Tuvalu and Japan which states that:

> In the event of any dispute arising as to the interpretation or implementation of any of the provisions of this Agreement, the Government of Japan and the Government of Tuvalu shall endeavour to settle it by consultations between themselves to be commenced as soon as practicable after the receipt by either party of a formal request from the other for the opening of such consultations

Moreover, many of these agreements do not state what recourse is available if consultations fail to resolve the dispute. There are suggestions that arbitration should be

---

137 Judith Swan, "Fisheries Access Agreements" (Honiara: Forum Fisheries Agency Report No. 87/31, 1987): p. 4.

138 Art. 31 of the Foreign Fishing Agreement between the Micronesian Maritime Authority of the Federated States of Micronesia and Japanese Fishing Associations.

139 See Arrangement between the Government of Solomon Islands and the Federation of Japan Tuna Fisheries Co-operative Associations and National Offshore Tuna Fisheries Association of Japan concerning Longline and Pole-and-Line Fishing within the Fishery Limits of Solomon Islands.

140 Art. 2 and 13 of the Arrangement between the Government of Solomon Islands and the Federation of Japan Tuna Fisheries Co-operative Associations and National Offshore Tuna Fisheries Association of Japan concerning Longline and Pole-and-Line Fishing within the Fishery Limits of Solomon Islands.

considered as a possible option.[141] Indeed, article 6 of the Treaty on Fisheries provides a precedent for the use of arbitration which is worthy of further consideration.

### D. Joint-Venture Agreements

In spite of the relative stability which licensing arrangements under bilateral access provide, most Pacific Island States want to enter into joint venture agreements with foreign partners. Thus, according to Teiwaki, writing in respect of Kiribati:

> A joint venture between Kiribati and a reputable overseas partner is still regarded as the most effective and efficient operation to give the country its greatest economical return, create local employment, generate foreign exchange and provide other local economic spin-offs. It also minimises the risk if the venture fails. With the depressed state of the tuna industry, caused in part by inflation, the possibility of joint ventures becomes more attractive as tuna companies or fishermen may prefer to establish bases closer to the fishing grounds in order to cut production costs.[142]

A joint-venture agreement in the tuna industry has been defined as "an association of two or more partners who share the risks and benefits of joint commercial or in some cases, non-profit use and development of marine living resources."[143] Ideally, joint-venture agreements are probably the best way of managing tuna because there are distinct advantages in such arrangements. Essentially, they would allow the Pacific Island States to participate in a fishing venture according to their own technical and managerial skills.

However, these perceptions are more apparent than real. Very few joint-venture agreements have been successful. While there may be an abundant resource, there is usually a shortage of qualified manpower and an insufficient infrastructure to adequately support a joint-venture industry, particularly on a scale that would ensure its viability and profitability.[144] One of the major problems with joint-venture agreements in the region is

---

141 Brazil, note 49 above at p. 16.

142 Roniti Teiwaki, *Management of Marine Resources in Kiribati*, (Suva: Institute of Pacific Studies, 1988): p. 98.

143 V.M. Kaczynski, A. Lein, & F. Hasegawa, "Foreign Investment in International Fishery Ventures in Asia/Pacific", *Infofish Marketing Digest* No. 3 (1984): p. 13.

144 FFA, "Smaller Island Countries Joint Venture Cannery Pre-feasibility Study", (Honiara: Forum Fisheries Agency Report No. 86/39, 1986):

the lack of proper planning.[145] It is often assumed that signing a joint-venture agreement will automatically bring about all the anticipated benefits. These problems prompted the FFA to initiate a study in 1995 of all joint venture agreements in the region. It is expected that the recommendations from this study will contribute towards improving the climate for investment in the region's domestic tuna industry.[146]

### Nature of Joint-Venture Agreements

The joint-venture agreements in the region typically provide for the establishment of a company. The responsibilities of each party are also laid down in the agreement. For instance in the agreement between the Choisuel Provincial Assembly and Marrisco Limited,[147] the company, amongst other things, is entitled to engage in pelagic, mid-water and deep water fishing operations in the Solomon Islands waters;[148] and market and sell the catch.[149] The agreement provides for the registered office of the company, its duration, apportionment of dividends and dispute settlement provisions.

Most of the agreements reviewed are silent on the question of the promotion of responsible fishing practices. Moreover, they are also silent on the application of regional standards. Although these matters may be incorporated as part of the licence conditions, the Pacific Island States must use the agreements to promote responsible fishing practices and implement regional standards.

On the assumption that Pacific Island States have joint-venture agreements, fisheries management goals could easily be achieved by the creation of employment opportunities, establishment of shore based facilities and procurement of revenue to government through

---

145 David J. Doulman, "A Critical Review of Some Aspects of Fisheries Joint Ventures", (Honiara: Forum Fisheries Agency Report No. 89/15, 1989).

146 FFA, "Directors Report 1995-1996, Forum Fisheries Committee Twenty-Ninth Meeting, Vava'u, Tonga, 13-17 May, 1996", (Honiara: Forum Fisheries Committee Doc. FFC 29/2, 1996): 23.

147 Agreement between the Choisuel Provincial Assembly, the Provincial Government of the Province of Choisuel, Solomon Islands and Marrisco (PTE) Limited a Company Incorporated in the Republic of Singapore, Done at Singapore, 11 September, 1992.

148 Art 4.1.1 of the Agreement between the Choisuel Provincial Assembly, the Provincial Government of the Province of Choisuel, Solomon Islands and Marrisco (PTE) Limited.

149 Art. 4.1.3 of the Agreement between the Choisuel Provincial Assembly, the Provincial Government of the Province of Choisuel, Solomon Islands and Marrisco (PTE) Limited.

excise duties. Also, conformity to national laws and regulations would not create any major problems. Joint venture companies would be obliged to provide data to licensing authorities and comply with the national laws of the host country. It is these perceived advantages which have persuaded several Pacific Island States to establish joint-venture enterprises with foreign fishing companies. However, the Pacific Island States have often neglected warnings that joint venture arrangements are not a solution to fisheries development.[150] According to Christy:

> The situation in which a joint venture offers good prospects are relatively few because the number of conditions that must be fulfilled. The first is an adequate, marketable resource. ... Even if a resource is available, it may require careful choice of foreign partner to assure access to favourable markets. The technical feasibility of a joint venture is much more complex than that of a foreign distant-water operation. The technology used is typically that possessed by the foreign partner, which is frequently poorly suited to the aptitudes and technical preparation of the local labour force. The foreign technology will also usually require elaborate infrastructure (assuming a locally-based operation), which few developing countries possess. Attempts to create the infrastructure as part of the joint venture have frequently turned out to be more than the enterprise could afford. Attempts to do without the infrastructure have run into very high operating costs and/or loss of production due to excessive repair time. A final major requisite for a successful joint venture is capable management. What constitutes good management is endlessly debatable, but the effects of bad management are not: loss of sea time, inability to keep good skippers, lower catches, poor product quality, lower prices and large losses. Many coastal States are under the impression that the foreign partner will supply the management. If the partner is well chosen, this is true to a certain extent, but the local partner must contribute to good management as well. If he does not, he is unlikely either to assure himself proportionate benefits from the enterprise (he will be cheated) or to assimilate the techniques introduced by it. An inexperienced partner can also interfere, thus nullifying its effects. Countries which have neither a well developed private sector nor an efficient public sector are not likely to provide

---

150 William Sutherland and B. M. Tsamenyi, *Law and Politics in Regional Co-operation: A Case Study of Fisheries Co-operation in the South Pacific*, (Hobart: Pacific Law Press, 1992): p. 16.

> suitable partners for a joint venture. They would therefore be wiser to avoid them, even where the resource, market and techniques are favourable.[151]

By the mid 1980s, most of the joint-venture agreements established in the region were closed, vindicating many of Christy's concerns. Doulman explains that:

> The reasons for the poor performance of conventional joint ventures in fisheries in the South Pacific are varied, but they are due partly to inexperienced government appointed directors, loosely drafted agreements, political intervention, and a lack of understanding of overseas industry connections of the foreign partner.[152]

These problems, however continue to hamper the development of joint venture companies in the region. A study of Solomon Islands joint venture companies identified the following constraints to development of the sector:

> A number of factors inhibiting development of the local sector of the tuna industry were identified ... notably lack of capital (and collateral), know-how, risk-taking and entrepreneurial propensities, marketing skills and contacts, managerial and higher level skilled labour, and easily accessible land. The gains to the host economy from inward foreign investment in the tuna industry were also seen to be curtailed by the failure of SIG to ensure that STL and NFD made a full financial contribution to the domestic economy; the feeble performance of local negotiators, who have rarely succeeded in achieving a satisfactory level of local involvement of local appropriation of value added; and inadequate monitoring of fishing activities.[153]

According to a World Bank Report:

> The outcomes of these past investments are easy to quantify - not a single financially viable public enterprise is known to exist in the region. This has usually meant that in addition to the initial capital outlay, many governments have remained burdened by a continuing call on their budgets to keep these enterprises running, on the

---

151 L. Christy, *Forms of Foreign Participation in Fisheries: Coastal State Policy*, Fisheries Law Advisory Program, Circular No. 2, (Rome: Food and Agriculture Organisation, 1983) p. 2.

152 David J. Doulman, "A Critical Review of Some Aspects of Fisheries Joint Ventures", H.F Campbell, et.al., (eds), *Economics of Fishery Management in the Pacific Islands Region*, (Canberra: ACIAR Proceedings, No. 26, 1989): p. 30.

153 Roman Grynberg, "Solomon Islands Country Paper", FFA/ADB Project on the Domestic Tuna Industry in the Pacific Islands Region, (Honiara: Forum Fisheries Agency, 1995): 131.

> grounds of maintaining employment or income. Thus, it is vitally important for governments in the region not to become involved in direct public investment in the sector, when it requires a financial contribution. This applies equally to foreign and domestic investment.[154]

Despite these failures, joint-venture arrangements are seen as the major means for the long term development of the tuna industry in the region. These perceptions, however, must be matched by a commitment to enter into arrangements that do not disadvantage the local partners. In spite of the rhetoric in the WCPO region, it is unlikely that joint-venture arrangements will play a significant role in the development of tuna in the region. The initial report of the ADB/AusAid Study of the domestic tuna industry in the region is broadly critical of Pacific Island States' policy for the failure to provide an investment climate conducive to the promotion of economic development.[155] According to Wright, "without major policy changes and a conscientious effort to improve public sector productivity, for a large number of States in the region domestic industry development will never materialise."[156]

### Alternative Options and Strategies

The foregoing discussion clearly demonstrates that proximity to the tuna stocks is not necessarily a precondition for successful joint-venture arrangements. The tuna industry is a highly competitive industry. In other words, the highly mobile distant water fleets will relocate to areas where there are better alternative economic and political conditions.[157] In this regard, clarity, consistency and reliability of official policy towards foreign investment are critical requirements.[158] The excessive fuel costs must be reduced to attract the use of

---

154 World Bank, note 16 above at p. 59.

155 Andrew Wright, "Tuna and Pacific Island States: Some Considerations for Local Industry Development", (Honiara: Forum Fisheries Agency Report No. 95.47, 1995): p. 8.

156 Ibid.

157 Teiwaki, note 142 above at p. 98.

158 R. Grynberg, note 153 above at p. 129.

local services.[159] Moreover, there must be adequate facilities for cold storage, dry docking, water supply, provisioning of food, medical treatment and recreational and other facilities.[160] Because of the shortage of skilled manual, engineering, technical and managerial labour, active partnership between local and foreign parties in a joint venture and developing a genuinely independent local component will not happen unless these skills are more readily available.[161] The Pacific Island States should ensure that they have the right institutional, administrative and legal frameworks in place to facilitate the operation of joint-venture companies. It is important that the Pacific Island States have the commercial and professional capability to deal with foreign fishing companies.

The agreements must provide for firm commitments to train local staff and have a set time table for the transfer of technology, and the establishment of shore based facilities. Much of this will depend on the ability of the foreign partner to provide these services. For this reason it is important that some research is carried out into the background of the foreign partner. The Pacific Island States should know what type of partner with whom they are negotiating; whether they have any vessels; whether they are a reputable fishing company; what experience have they had in fishing in the region; and what connections they have to international markets and their knowledge of the international tuna industry. Significantly, the Pacific Island States need to fix economic fundamentals to make investment more attractive to genuine investors. Finally, these agreements should reflect the need to promote responsible fishing practices. As Roman Grynberg said, "the nation's efficient management of its fishing industry is, of course, a necessary condition for sustainable long term development of tuna resources."[162]

---

159 See W.S. Pintz, "Fuel Use in Tuna Fishing: A Study Funded by Forum Fisheries Agency, Forum Secretariat, and ESCAP/UNDP Pacific Energy Development Program", (Honiara: Forum Fisheries Agency Report No. 89/52, 1989).

160 Teiwaki, note 142 above at p. 98.

161 R. Grynberg, note 153 above at p. 130.

162 Ibid., p. 131.

## IV. CONCLUSION

This Chapter has shown that the national response of the Pacific Island States to the EEZ regime has been to enter into bilateral agreements with DWFNs. The discussion has also shown that although the bilateral access agreements are not necessarily inconsistent with the LOSC, they do not implement all the conditions stipulated in article 62(4) of the LOSC. In responding nationally to the challenges of the EEZ regime, the Pacific Island States have had to accommodate the interests of DWFNs who traditionally fished in the region, and their own economic interests in the exploitation of tuna.

The discussion in this Chapter has highlighted the need to strengthen bilateral agreements. It has shown that the legal structures of the access agreements generally reflect the overall goal of providing a framework for access by DWFNs to the EEZs of the Pacific Island States. The national response of the Pacific Island States should not simply reflect their economic aspirations. More importantly for the long term future of tuna, the access agreements must incorporate and apply relevant management and conservation principles.

# 9

# ENFORCEMENT OF THE FISHERIES PROVISIONS OF THE LOSC

## I. INTRODUCTION

Chapter 9 analyses the Pacific Island States response to the challenges arising from the enforcement of the fisheries provisions of the LOSC in the EEZ. It will be shown that the Pacific Island States adopted a regional strategy in response to the challenges of enforcing the fisheries provisions of the LOSC. This was co-ordinated by the FFA and involves the development of regional legal arrangements which attempts to achieve non-conventional long arm enforcement of coastal State fisheries jurisdiction. Part II discusses the relevant provisions of the LOSC dealing with enforcement of the fisheries provisions of the LOSC. Part III discusses the strategies adopted by the Pacific Island States to respond to the legal obligations dealing with the enforcement of the fisheries provisions of the LOSC. It will be shown that some of the Pacific Island States responses do not comply with the LOSC.

## II. THE LOSC PROVISIONS ON THE ENFORCEMENT OF COASTAL STATES FISHERIES JURISDICTION

Traditionally, enforcement of fisheries laws and regulations was governed by the principle that, "within territorial waters, each State has exclusive use and control over the fisheries, and outside such waters the fisheries are free to all, subject to the control of no one, save as

each nation may enact legislation concerning its own fishermen."[1] This rule and exceptions to this rule were incorporated in articles 2[2], 6[3] and 13-22[4] of the Geneva Convention on the High Seas. Under the system established in the Geneva Convention on the High Seas, hot pursuit of vessels that violated territorial seas and fisheries zones laws was allowed into the high seas, but terminated when the pursued vessel enters the territorial sea of a third State or its flag State.[5]

The enforcement of management and conservation measures is fundamental to the discharge by coastal States of their obligations to manage and conserve tuna[6] in their EEZs.

---

1 A. P. Dagget, "The Regulation of Maritime Fisheries by Treaty", *American Journal of International Law* 23 (1934): p. 704.

2 Geneva Convention on the High Seas, 450 UNTS (1963) pp. 83-84. Article 2:

> The high seas being open to all nations, no State may validly purport to subject them to any part of its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law. It comprises, *inter alia*, both for coastal States and non-coastal States: (1) Freedom of navigation; (2) Freedom of fishing; (3) Freedom to lay submarine cables and pipelines; (4) Freedom to fly over the high seas.
>
> These Freedoms, and others recognised which are recognised by the general principles of international law shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

3 Article 6 of the Geneva Convention on the High Seas states:

> 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.
>
> 2. A ship which sails under the flags of two or more States, using them in according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality. 450 UNTS (1963) at p. 86.

4 Articles 13-22 deal with suppression of piracy and slavery, 450 UNTS (1963) pp. 91-94.

5 See Article 23 of the High Seas Convention, 450 UNTS (1963) at p. 94.

6 For general and applied studies on fisheries enforcement see FAO, *Report on Expert Consultation on MCS for Fisheries Management*, (Rome: Food and Agriculture Organisation, 1981); D. Aldous, "Functions of Foreign Fishing Vessel Management", (Honiara" Forum Fisheries Agency Report No. 86/53, 1986); Peter Flewwelling, *An Introduction to Monitoring, Control and Surveillance Systems for Capture Fisheries*, FAO Fisheries Technical Paper 338, (Rome: Food and Agriculture Organisation, 1994); A.W. Koers, *The Enforcement of Fisheries Agreements on the High Seas: A Comparative Analysis of International State Practice*, Law of the Sea Institute, University of Rhode Island Occasional Paper No. 6, (1970); M. Dahmani, *The Fisheries Regime of the Exclusive Economic Zone*, (Dordrecht: Martinus Nijhoff Publishers, Dordrecht, 1987): pp. 83-84. According to Dahmani the enforcement of fisheries laws by the coastal State involves two kinds of activities:

> First preventative activities which include surveillance, stopping, boarding and inspection. ....Surveillance ...in this sense means detecting possible violations of fisheries laws and regulations and a means of deterrence in that the presence of surveillance vessels or aircraft may deter fishing vessels from committing those violations. Stopping and boarding are activities undertaken to confirm suspected violations detected by surveillance or in order to perform inspection. The latter

It is also fundamental to the obligation to protect and preserve the marine environment. It follows that the competence of coastal States to enforce their fisheries laws and regulations within the EEZ is a necessary corollary of the right to establish an EEZ.[7] In recognition of this, article 62(4) of the LOSC gives coastal States wide discretionary powers to control the fishing activities of foreign fishing vessels in their EEZ.[8] The right of coastal States to take enforcement action in the EEZ closely follows their right to protect the fishery resources in their territorial sea. These rights are found in article 19(2)(i)[9] and article 21(1)(d) and (e)[10] in respect of innocent passage through the territorial sea; article 42(1)(c);[11] in respect of transit passage through straits used for international navigation; and article 54[12] in respect of archipelagic sea lanes passage.

---

refers to activities carried out by appointed officials on board fishing vessels to ascertain or verify that suspected vessels have or have not complied with fisheries regulations. The second ... refers to the means available to punish violations. They include arrest and seizure before the trial phase and penalties after the vessel has been found guilty at the trial.

7 Dahmani, ibid., p. 84.

8 See FAO, *Coastal State Requirements for Foreign Fishing*, Food and Agriculture Organisation of the United Nations Legislative Study 21 Rev. 4, (Rome: Food and Agriculture Organisation, 1993) for a comprehensive survey. LOSC, Art. 62(4) reads: "Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, *inter alia*, to enforcement procedures."

9 LOSC, Art. 19(2) states:

> Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
>
> (a) (i) any fishing activities.

10 LOSC Art. 21(1) states

> 1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:
>
> (d) the conservation of the living resources of the sea;
>
> (e) the prevention of infringement of the fisheries laws and regulations of the coastal State.

11 LOSC, Art. 42(1) states:

> 1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:
>
> (c) with respect to fishing vessels, the prevention of fishing including the stowage of gear

12 LOSC, Art. 54 states that Arts. 39, 40, 42 and 44 apply *mutatis mutandis* to archipelagic sea lanes.

Article 62(4) is reinforced by article 73[13] which is the relevant provision governing the enforcement of the fisheries laws and regulations of coastal States in the EEZ. Articles 116-120 of the LOSC, which deal with the high seas, do not specifically refer to enforcement. Under article 73(1), coastal States are empowered to take the necessary measures to ensure that foreign fishing vessels or ships comply with the management and conservation measures they have adopted in conformity with the LOSC. These measures may include boarding, inspection, arresting and instituting legal proceedings against the foreign fishing vessel. Article 73(1) is couched in permissive terms, and therefore the range of measures which are specified in the LOSC is not exhaustive.

While article 73 provides the basic right of coastal States to take enforcement measures in the EEZ, it must be read together with article 58(2) of the LOSC with regards to the preservation of the freedom of navigation[14] which, in turn, must be read with articles 88-115 dealing with the high seas.[15] These should then be applied by analogy to the EEZ bearing in mind that they should not conflict with the provisions relating to sovereign rights.[16]

---

13 LOSC, Art. 73 reads:

> 1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
> 2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.
> 3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporeal punishment.
> 4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

14 LOSC, Art. 58(3) states:

> In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention and other rules of international law in so far as they are not incompatible with this Part.

15 See discussions on Arts. 88-115 of the LOSC in Chp. 2

16 K. Mfodwo and B.M. Tsamenyi, *Enforcement of Marine Fisheries Law and Regulations: A Case Study of Papua New Guinea in International and Comparative Perspective*, (Canberra: Australian Centre for Industrial and Agricultural Research Report 1992/9, 1992): p. 8.

The interpretation of article 73 raises several issues. The first is, what is the extent of the broad authority for enforcement conferred by the LOSC? Does article 73 apply to the enforcement of other laws as well? The common view is that the powers of coastal States are confined to the actions required in the exercise of their sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ.[17] Thus, the enforcement powers stipulated in article 73 do not relate to coastal States sovereign rights over the non-living resources of the EEZ which is governed by Part VI;[18] or to the matters over which coastal States have jurisdiction or other rights under article 56(1)(b) and (c) respectively.[19]

However, while not disagreeing with this view, it may be argued that such measures may also be applied to any vessels and not just fishing vessels, found guilty of violating coastal States fisheries laws and regulations.[20] This argument is based on the interpretation that while articles 73(1) and (2) are expressly only concerned with fisheries laws and regulations, paragraphs 3 and 4 are not solely confined to fisheries laws and regulations. For example, a research vessel which obtains a fish sample in contravention of the fisheries laws for fisheries research purposes, might be subject to the enforcement powers provided for under article 73.[21]

Another issue which arises relates to the term "boarding". The term is not defined. However, it implies going on board a vessel for enforcement purposes by the appropriate authorities of coastal States. This may include the use of force provided it is not in violation of the Charter of the United Nations.[22] Similarly, the reference to "inspection" in article 73 is not qualified. However, by way of guidance, the term "physical inspection" in

---

17 This refers to the rights given to the coastal State under article 56(1) of the LOSC; see M.H. Nordquist, (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II, (Dordrecht: Martinus Nijhoff Publishers, 1993): p. 794.

18 See LOSC, Art. 77(2) which states that the rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

19 Nordquist, note 17 above at p. 794.

20 Dahmani, note 6 above at p. 85.

21 Ibid.

22 See Art. 2(4) of the UN Charter

article 200(5) of the LOSC is restricted to the examination of various documents by article 226(1)(a).[23]

Article 73(2) requires the prompt release of arrested vessels and their crews upon posting of a reasonable bond or other security. This obligation is also found in article 226, and the subject of the prompt release of vessels and crews is dealt with under article 292. Under article 292, the International Tribunal for the Law of the Sea has residual jurisdiction if, at the time of arrest or detention there is no other court with jurisdiction over the case. Paragraph 3 prohibits imprisonment as a penalty unless there is an agreement to the contrary with the flag State. This differs from article 230, which provides that only monetary penalties may be imposed with respect to national laws and regulations or applicable rules and standards for the prevention, reduction and control of pollution of the marine environment. Paragraph 4 requires the flag State to be promptly notified if any of its vessels or crew are arrested. Although it does not specify the means of communication, in practice this is done through diplomatic or consular channels.[24]

Article 73 is supplemented by article 111(2)[25] which grants the power of hot pursuit for violation of fishery regulations in the EEZ. Article 111(2) assimilates the hot pursuit

---

23 Nordquist, note 17 above at p. 794.

24 E.g., Agreement on Fisheries between the Government of Japan and the Government of Solomon Islands 1978, Art. VI provides:-

> 1. In cases of arrest or seizures by the authorities of Solomon Islands of nationals or fishing vessels of Japan which do not comply with the provisions of this Agreement, notification shall be given promptly informing the Government of Japan of the action taken.

25 The general principles of hot pursuit in LOSC, Art. 111 states as follows:

> 1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State and may only be continued out side the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to sop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.
>
> 2. The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in

power into one that is permitted for addressing violations of the rules governing the internal waters, the territorial sea and the contiguous zone.[26]

The implementation of article 73 by coastal States has been inconsistent.[27] This has given rise to disagreements between coastal States and DWFNs. Of particular significance is the question whether forfeiture and imprisonment of foreign fishing vessels that violate the laws and regulations of coastal States are compatible with the LOSC.[28] Article 73(1) clearly gives coastal States wide discretionary powers over the range of measures which they may take in order to enforce their sovereign rights in the EEZ. The provision does not appear to limit the discretion of coastal States when it clearly envisages that the measures may include other mechanisms apart from boarding, inspection, arrest and judicial proceedings. The forfeiture of a foreign fishing vessel is a measure which coastal States may take to enforce their laws. This is one of the most effective means which coastal States may use to deter foreign fishing vessels from fishing illegally in their waters. It is difficult to interpret article 73(2) as prohibiting forfeiture of a foreign fishing vessel when paragraph 1 of the article confers wide discretionary powers on coastal States.

Furthermore, article 73(3) does not necessarily prevent coastal States from imprisoning foreign fishermen who infringe their laws and regulations. Coastal States may do so if they have an agreement with the flag State to that effect. What article 73(3) implies is that unless there is an agreement between coastal States and flag States, penalties

---

accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of that of a third State.

26 For a comprehensive discussion of hot pursuit as implemented within the framework of classical international law, see N.M. Poulantzas, *The Right of Hot Pursuit in International Law* (1969). For a discussion against the background of UNCLOS III, and current State practice, see Allen, "Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices", *Ocean Development and International Law* 20 (1989): pp. 309-341. Koroleva, "The Right of Hot Pursuit from an EEZ", *Marine Policy* 14 (1990): pp. 137-141 provides a less comprehensive exposition from the perspective of the former Soviet Union.

27 See FAO, (1993), note 8 above,

28 For example on 3 May, 1993, the Ministry of Foreign Affairs of the Government of Thailand issued a statement which provided, among other things, that forfeiture and imprisonment are clearly in breach, both in letter and in spirit of article 73 of the LOSC. The statement by Thailand is reproduced in the *Law of the Sea Bulletin*, No. 26, October (1994): p. 44.

for illegal fishing may not include imprisonment of the crew. The provision in article 73(3) would appear to be permissive and does not rule out imprisonment as a penalty.

## III. THE RESPONSE OF THE PACIFIC ISLAND STATES TO THE ENFORCEMENT OF THE FISHERIES PROVISIONS OF THE EEZ REGIME

Traditional approaches to fisheries enforcement involved physically inspecting vessels at sea.[29] The Pacific Island States recognised the limitations in traditional approaches to fisheries surveillance and enforcement and therefore agreed to work within existing resources. Hence the assigned task to the FFA was to "assemble available data and evaluate the capacity of the efficiency of "existing and proposed equipment."[30] They were also concerned about the costs which may become prohibitive if traditional enforcement and surveillance methods were pursued. Their enforcement efforts were therefore targeted to improving the effectiveness of existing arrangements and evaluating the likely economic implications of alternative administrative and enforcement arrangements. In essence, the Pacific Island States' responses to the challenges of enforcing the fisheries provisions of the LOSC can be divided into non-physical enforcement mechanisms and physical enforcement mechanisms.

### A. Non-physical Enforcement Mechanisms

Traditional forms of enforcement which involve physical inspection of vessels at sea are expensive and generally beyond the capability of most developing States.[31] This has led many developing countries to investigate new techniques for ensuring compliance with their national laws and regulations. This approach was reinforced by the recommendations

---

29 G. Moore, "Enforcement without Force: New Techniques in Compliance Control for Foreign Fishing Operations Based on Regional Co-operation", *Ocean Development and International Law* 24 (1993): pp. 197-203.

30 Leslie J. Allinson and Colin I. Brown, "Alternative Technologies in a Surveillance Network", (Honiara: Forum Fisheries Agency Report No. 89/113, 1989): p. 20. The authors argue that the key to improving this information access is the provision of a reliable, inexpensive and easy-to-use communications network which features both voice and data links between the member governments, access to the FFA, SPC, Pacific Islands Marine Resources Information Systems (PIMRIS) and other regional databases as well as gateways to international information providers and database services.

31 Moore, note 29 above at p. 198.

of the FAO World Conference on Fisheries Management and Development in 1984 which called for the design and establishment of "practical mechanisms of compliance control in exclusive economic zones at the national, bilateral, and regional levels, that reduce the need for costly enforcement and do not hamper fishing activities more than necessary."[32]

### The Harmonised Minimum Terms and Conditions of Access for Foreign Fishing Vessels

The Harmonised Minimum Terms and Conditions of Access for Foreign Fishing Vessels (MTCs) comprises a list of rules which the Pacific Island States have agreed to impose on all foreign fishing vessels operating in their EEZs.[33] To regulate the operations of foreign fishing vessels in the WCPO region, all foreign fishing vessels are prohibited from fishing unless licensed by a Pacific Island State.[34] The MTCs requires that the Pacific Island States adopt a common licence form.[35] To further control and monitor the operations of

---

32 FAO, *Report of the World Conference on Fisheries Management and Development, Rome, 27 June-6 July ,1984*, (Rome, Food and Agriculture Organisation of the United Nations, 1984): p. 20. See also Michael Lodge, "New Approaches to Fisheries Enforcement", *RECIEL* 2(3) (1993): pp. 277-284.

33 FFA, "Minimum Terms and Conditions of Fisheries Access in the South Pacific", Paper presented to the Pacific Latin-American--Pacific Islands Nations International Fisheries Conference, Lima, Peru, September 26 - October 1, 1988, (Honiara: Forum Fisheries Agency Report No. 88/60, 1988). For background into the history of the MTC see FFA, "Report of the Workshop on Harmonisation and Co-ordination of Fisheries Regimes and Access Agreements, SPEC Headquarters, Suva, Fiji, February 22-5 March, 1982", (Honiara: Forum Fisheries Agency Doc/FFC-VII/3/2, 1982); G.W. Coulter, "Harmonisation of Fisheries Regimes: The Pacific Islands Experience", (Honiara: Forum Fisheries Agency Report No. 83/7, 1983). The significance of the MTCs to the Pacific Island States is underscored by a declaration of the 18th Meeting of the Forum Fisheries Committee, in which the Pacific Island States reiterate their

> ...commitment to apply the minimum terms and conditions as a non-negotiable standard of access for foreign fishing vessels to the EEZs of member countries.

To demonstrate their commitment to the MTC's, they agreed that communication of their:

> ...position of solidarity to foreign fishing industries and governments should occur at every opportunity including exchange by visits of government representatives and their attendance at access negotiations. The position should also be raised with DWFN capitals during visits by FFA Ministers and Heads of Governments.

See FFA, "Record of Proceedings 18th Meeting of the Forum Fisheries Committee, Nauru, April 22-2 May, 1990", (Honiara: Forum Fisheries Agency Report No. 90/46, 1990).

34 See s. 2 of the Minimum Terms and Conditions

35 Ibid. The contents of the common licence form has particulars which would help the Pacific Island States to identify the foreign fishing vessel. The licence should have particulars about the name of the foreign fishing vessel; name and address of the licence holder; the foreign fishing vessel's licence or permit number; and the type of vessel being licensed (whether it is a purse seiner, pole-and-line, or longliner). The licence should have detailed information about the year the vessel was built; its country of registration and international radio call sign. The master of the vessel is required to keep the licence or a certified copy with him at all times. Furthermore, the vessel is not to fish in closed areas. One

foreign fishing vessels, transhipment by foreign fishing vessels is closely regulated.[36] The MTCs prohibit transhipment by licensed foreign fishing vessels unless the vessel is a licensed group seiner.[37] All other classes of licensed foreign fishing vessels can only tranship at designated ports in the licensing State.[38] To assist the enforcement authorities of the licensing State, the foreign fishing vessel must give full access to authorised officers from the licensing State to the vessel's log books and catch records.

All foreign fishing vessel operators are required to maintain and submit catch logs for operations in the EEZ and in adjacent high seas areas.[39] These reports must be provided to the licensing State forty five days after the completion of the trip.[40] Furthermore, foreign fishing vessels must provide the licensing State with regular catch reports while operating within the licensing State's EEZ.[41] These reports provide the relevant authorities in the licensing State with an idea of how much fish has been caught in their EEZ. From these reports, the licensing State can analyse the fishing patterns and take the necessary management and conservation. In order to verify these reports, the MTCs requires foreign fishing vessel operators to carry observers on their vessels.[42] Observers may board foreign fishing vessels for scientific, compliance and monitoring purposes. The observers duties are facilitated by an obligation on the part of foreign fishing vessel operators to give them full access to the bridge, fish on board and the vessel's records.[43]

Enforcement of tuna management regulations has always been a problem for the Pacific Island States. The problem of prosecuting vessels who have evaded the jurisdiction of the licensing State is dealt with by the requirement that foreign fishing vessels maintain

---

condition of the licence is that the vessels' radio call sign and various identification marks should be clearly displayed.

36 See s. 3 of the Minimum Terms and Conditions.

37 Ibid., s. 3(b)(i).

38 Ibid., s. 3(b)(iii).

39 Ibid., s. 4.

40 Ibid., s. 4(b)(ii).

41 Ibid., s. 5.

42 Ibid., s. 6.

43 Ibid., s. 6(iii).

an agent resident in the licensing State.[44] The agent is authorised to receive and respond to any legal process initiated by the licensing State.

One way of preventing illegal fishing by unauthorised vessels is to require the vessels to have their fishing equipment securely stowed while transiting through the EEZ. Thus, the MTCs requires all foreign fishing vessels that are not licensed to have their fishing gear stowed or secured in a manner that prevents the equipment from being used while transiting through the EEZ of the Pacific Island States.[45] Moreover, foreign fishing vessels operators have a duty to comply with the instructions issued by authorised officers from the licensing State.[46] To assist the authorities of the licensing State discriminate between foreign fishing vessels that are licensed and those which are not licensed, all licensed vessels must be marked and identified in accordance with the FAO approved Standard Specifications for the Marking and Identification of Fishing Vessels.[47]

### Regional Register of Foreign Fishing Vessels

The Regional Register of Foreign Fishing Vessels which is administered by the Director of the FFA was established and became operational in 1983.[48] The Regional Register is a database holding information about the vessel owners, operators, masters and provides a history of any changes in that information occurring over the years. This information must be provided on an annual basis and should also include information relating to its physical characteristics of the vessel as well as its base port, fishing master, vessel master and owner. A recent photograph of the vessel with the vessel name and call sign clearly displayed, must accompany the application.

---

44 Ibid., s. 7.

45 Ibid., s. 8.

46 Ibid., s. 9(a).

47 Ibid., s. 9(f). The FAO Standard Specifications for the Marking and Identification of Fishing Vessels was endorsed by the Eighteenth Session of the FAO Committee on Fisheries in April 1989 for adoption by States as a standard system to identify fishing vessels operating, or are likely to operate in waters of States other than those of the flag State.

48 For a discussion and analysis of the regional register see David Doulman and Peter Terawasi, "The South Pacific Regional Register of Foreign Fishing Vessels", *Marine Policy* 14(4) (1990): pp. 234.

The Regional Register is also a compliance mechanism.[49] Its intention is to shift the burden for compliance on to the flag State or fishing association. The fundamental requirement of the Regional Register is that before any foreign fishing vessel can be licensed, it must be in good standing. Good standing is a status which is automatically conferred on a vessel upon registration. The status may be withdrawn or suspended in certain circumstances, including where the vessel has committed a serious fishery offence. Once good standing is withdrawn or suspended, the vessel is effectively prevented from fishing in the region. Although this has not happened yet, the threat of instituting the procedure has been used in the past.

One of the major problems with the Regional Register has been the procedure for registration. From the outset the procedure has been to allow applications to be submitted either by the vessel operator in person, or by the licensing country. In the case of those countries which give licences on a per vessel, per trip system, individual licences may be issued within 24 hours of the application. The registration application is submitted contemporaneously with the application for a fishing permit. Since there is a time lag between the time the application is submitted and processed, some vessels are sometimes licensed before they receive good standing.[50] This defeats the purpose of the Regional Register.

The Regional Register is a fundamental part of the regional regime for the management of foreign fishing vessels. There has been discussions to broaden the Register to encompass information about where the vessel is licensed to fish.[51] Its success in the WCPO region has attracted the attention of other parts of the world. The small island States of the Organisation of Eastern Caribbean States (OECS) in the Caribbean, the wider grouping of the Caribbean Community (CARICOM) countries, as well as the sub-regional

---

49 As at February, 1997, there were 1400 vessels registered on the regional register. See also FFA, "Report of the Director to the 29th Meeting of the Forum Fisheries Committee, 13-17 May, Vava'u, Tonga", (Honiara: Forum Fisheries Committee Doc. 29/2, 1996): p. 16.

50 FFA, "Regional Register", (Honiara: Forum Fisheries Agency Report No. 93/42, 1993).

51 Ibid., p. 5.

commission grouping of the northern countries of West Africa have all shown an interest in the Register.[52]

The requirement that all foreign fishing vessels have good standing as a precondition to being licensed, is consistent with article 62(4)(a), which allows coastal States to enact laws to regulate the licensing of foreign fishing vessels. Thus, the Pacific Island States clearly have the authority to require that foreign fishing vessels have good standing before they can be licensed to fish in the EEZ. The question is whether the Regional Register be utilised as an enforcement device against foreign fishing vessels that infringe the fishery laws of other Pacific Island States. It may be argued that article 63(1) of the LOSC allows the Pacific Island States to co-operate to ensure that foreign fishing vessels that violate one Island States' fishery laws do not get licensed by the other Pacific Island States. No DWFNs has objected to the Regional Register[53] so it may be argued that a regional custom has emerged in the WCPO.[54]

**Flag State Responsibility**

One of the means through which enforcement is carried out in the context of regional co-operative schemes in the WCPO region is through flag State enforcement. The concept of flag State responsibility is designed to compel the flag State to accept some responsibility for its vessels that fish in the EEZs of third States. It also ensures that foreign fishing vessels comply with their licensing conditions and the fisheries laws and regulations of the licensing State.[55] The concept of the flag State responsibility was endorsed by the FAO World Conference on Fisheries Management and Development held in Rome in 1984. The Conference adopted the principle that:

> Where access is granted to foreign fishing vessels, the Flag States themselves should take measures to ensure compliance with the terms of the access agreements and

---

52 Moore, note 29 above at p. 200.

53 J. Charney, "The Persistent Objector Rule and the Development of Customary International Law," *British Yearbook of International Law* 56 (1985): p. 1.

54 See *Nottebohm Case* (Liechtenstein v Guatemala) ICJ Rep. (1955) para. 4.

55 K. Mfodwo and B.M. Tsamenyi, note 16 above at p. 63.

> with coastal State fisheries laws and regulations. Coastal States should consider including provisions to this effect in bilateral access agreements.[56]

The concept is now firmly entrenched in international law having being incorporated in the Fish Stocks Agreement[57] and FAO Compliance Agreement.[58] However, its implementation has not always been successful. Flag States have, on more than one occasion, entered into access agreements and then denied all responsibility for ensuring compliance by their vessels, leaving this aspect to the sovereign enforcement authority of coastal States and the ultimate sanction of repudiation of the agreement.[59]

The most comprehensive expression of the concept so far has been the extensive implementation of flag State responsibility in the *Treaty on Fisheries between the Governments of Certain Pacific Islands and the Government of the United States* (Treaty on Fisheries).[60] Under the Treaty on Fisheries, the US agrees to enforce the provisions of the Treaty and licences issued by the FFA. The US is obliged to take the necessary steps to ensure that all US fishing vessels do not fish in the Licensing Area and closed areas without appropriate authorisation.[61] The US is also required to assist if requested to investigate the alleged breach of the Treaty by a US fishing vessel.[62] To accelerate the processing of claims, the US facilitates claims made against a US fishing vessel, including

---

56 FAO, note 32 above at p. 20.

57 Fish Stocks Agreement, Art. 17.

58 FAO Compliance Agreement, Art. III. For back ground information on the Compliance Agreement see, *Message from the President of the United States transmitting the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, 103rd Congress 2d Session, Treaty Doc. 103-24 (Washington: US Government Printing Office, 1994).

59 Moore, note 29 above at p. 201. See also Eugene R. Fiddel et. al, *Flag State Measures to Ensure Compliance with Coastal State Fisheries Regulations: The United States, Japanese and Spanish Experience*, Fisheries Law Advisory Program Circular No. 6, (Rome: Food and Agriculture Organisation, 1986).

60 Revised text of the Treaty is reproduced by FFA in *Treaty on Fisheries between the Governments of certain Pacific Island States and the Government of the United States* incorporating the *Internal Agreement between the Pacific Island Parties*, the *Agreement between the Government of the United States and the Forum Fisheries Agency* and the *Agreed Statement on the Observer Program*, Forum Fisheries Agency 1994. For a discussion of the Treaty on Fisheries see Chp. 7.

61 Treaty on Fisheries, Art. 4.1.

62 Ibid., Art. 4.2.

a claim for the market value of the fish taken without authorisation.[63] Furthermore, the US institutes legal process by or on behalf of a national or government of a Pacific Island State. It also has a duty to take all measures to ensure the prompt and full adjudication in the US of any claims made pursuant to the Treaty.[64]

Although the concept of flag State responsibility is generally applied in other agreements, what is new in the Treaty on Fisheries is the detailed procedures for the investigation by the US of offences against the Treaty and Pacific Island States' laws, the imposition of penalties, and the payment of fines, forfeiture's, and penalties collected. Under the Treaty on Fisheries, the US has a duty to fully investigate any alleged infringement involving a US vessel. It is required to report within two months to the Pacific Island State that requested the investigation.[65] If the investigation shows that the Treaty, has been contravened, and the vessel has not submitted to the jurisdiction of the Pacific Island State, the US can take measures to ensure that the vessel concerned leaves the Licensing Area.[66] If the vessel is alleged to have committed a more serious offence, the US has a duty to ensure that the vessel submits to the jurisdiction of the party whose laws have been violated.[67] Furthermore, the US can penalise the vessel at similar levels for like violations by foreign vessels operating in the US. If a judgement is entered against the vessel, the US has a duty to pay the Treaty Administrator a sum of money equivalent to the total value of the forfeiture, fine, penalty or other amount it collects pursuant to its judicial sanctions.[68] Thus, US administrative and judicial machinery would be acting as agents for

---

63 Ibid., Art. 4.3.

64 Ibid.

65 Ibid., Art. 4.4.

66 Ibid., Art. 4.5. The offences listed in this article are:
(a) the vessel did not have fishing licence to fish in the Licensing Area;
(b) the vessel was involved in an incident in which an authorised officer or observer was allegedly assaulted causing bodily harm, physically threatened, forcefully resisted, refused boarding or subjected to physical interference; or
(c) the vessel fished in closed areas, limited areas and used other fishing methods apart from purse seining;
(d) the vessel fished for southern bluefin tuna, used an aircraft and was involved in an incident in which evidence which otherwise could have been used in proceedings against a vessel is destroyed.

67 Ibid., Art. 4.6(a)

68 Ibid., Art. 4.7.

the Pacific Island States in the area of fisheries compliance control.[69] Although sanctions have not been applied by the US to date, it has been requested to initiate investigatory action under the Treaty on Fisheries against several unlicensed US flag vessels.[70]

The concept of flag State responsibility is now accepted in international law. This is evident by its application through State practice. The detailed rules articulating flag State responsibility in the Treaty on Fisheries supports this view. The US is a major DWFN and the principles of flag State responsibility in the Treaty on Fisheries implements the LOSC obligation in article 95 that "every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." Coastal States have a duty to act on behalf of the international community by adopting appropriate conservation and management measures to prevent the over-exploitation of the living resources of the sea.[71] Furthermore, coastal States must also promote the optimum utilisation of such living resources.[72] The duty to conserve and manage tuna also extends to other States. Thus, nationals of other States who fish in the EEZs of coastal States must comply with the conservation and management measures. It follows that flag State responsibility reinforces the obligation of States to ensure that their nationals observe the conservation and management regulations of coastal States.

### Agreed Minute on Co-operation on Surveillance and Enforcement

The Agreed Minute on Co-operation on Surveillance and Enforcement is an agreement between the FFA on behalf of the Pacific Island States and the US. The Minute is an umbrella agreement which establishes the broad framework for co-operation between the Pacific Island States and the US in fishery surveillance and enforcement. It recognises the need for effective application and enforcement of the conservation and management

---

69 Gerald Moore, note 29 above at p. 202.

70 FFA, "Report of the Administrator to the 7th Annual Consultation of Parties to the Treaty on Fisheries, 13-16 March, 1995, Nadi, Fiji", (Honiara: Forum Fisheries Agency Doc. PTF7/WP.1, 1995): pp. 2-5.

71 See generally E. Hey, "The Provisions of the United Nations Convention on Fisheries Resources and Current International Fisheries Management Needs", *The Regulation of Driftnet Fishing on the High Seas: Legal Issues*, FAO Legislative Study 47, (Rome: Food and Agriculture Organisation, 1991): pp. 1-11.

72 LOSC, Art. 61.

measures adopted by the Pacific Island States.[73] The Agreed Minute acknowledges the Pacific Island States' plans to develop regional schemes for fishery surveillance and enforcement. The parties agree to exchange records of violations of the Pacific Island States' conservation and management measures. To assist in enforcement, the parties agree to exchange information held on their databases. This means that the FFA will disclose information from the Regional Register, while the US will provide data on its Fishing Vessel Port Call Register which is maintained by the US National Marine Fisheries Service (NMFS).

The parties' agree to co-operate by exchanging personnel and develop a vessel monitoring system, and enhance surveillance and enforcement to monitor and deter illegal fishing activities. The collaboration between the parties has resulted in significant improvements in the detection of vessels which fish illegally in the Pacific Island States' EEZs.[74]

One significant development in the US-Pacific Island States co-operative arrangement as a result of the Agreed Minute is the application of the *Lacey Act* to foreign fishing vessels that fish illegally in the Pacific Island States' EEZs.[75] The *Lacey Act* was developed in the US in response to concerns about trade in endangered species.[76] In 1981 and 1988, it was amended to prohibit the importation of fish caught illegally to the US. Under the *Lacey Act* procedures, the Pacific Island States in co-operation with the US, can seek the prosecution of foreign fishing vessels which infringe their fisheries laws and who subsequently attempt to discharge fish caught illegally at US ports. At present, the Pacific

---

73 Agreed Minute on Surveillance and Enforcement Co-operation between the Parties to the Treaty on Fisheries between the Governments of certain Pacific Island States and the Government of the United States of America, opened for signature 8 March, 1994, *reproduced in* "Record of Proceedings Sixth Annual Consultation of Parties to the Treaty, 4-8 March, 1994, Nadi, Fiji". (Honiara: Forum Fisheries Agency, 1994).

74 FFA, "Briefing Document for the Multilateral High Level Conference on South Pacific Tuna Fisheries, 1-9 December, 1994", (Honiara: Forum Fisheries Committee Doc. FFC25/WP. 5, 1994): p. 28.

75 FFA, *Monitoring, Control and Surveillance in the South Pacific*, Paper presented to the Global Fisheries Enforcement Workshop, Washington DC, 25-27 October, 1994, p. 10.

76 For brief description of the history of the *Lacey Act* see A.P. Ortiz, *Model International Fisheries Enforcement Act*, Paper presented to the Port State Enforcement Workshop, Honiara, Solomon Islands, 4-6 December, 1996.

Island States do not receive any financial settlement from prosecutions under the Act. However, its effect in deterring foreign fishing vessels from fishing illegally in the Pacific Island States' waters and the promotion of improved compliance is significant.[77]

### Vessel Monitoring System (VMS)

Another non-physical enforcement strategy being considered by the Pacific Island States is the development of a vessel monitoring system (VMS). The VMS is a satellite based monitoring system which can provide real time data to coastal States. The VMS requires foreign fishing vessels to carry position determination and communications terminal equipment capable of transmitting vessel position and fishing operations in a systematic manner.[78] The Regional Fisheries Surveillance Centre (RFSC) facilitates the retrieval of fisheries data and processing and dissemination to the Pacific Island States. The RFSC is linked directly to the Pacific Island States' National Fisheries Surveillance Centres (NFSC). The proposed system has been designed to enable position reports to be submitted electronically to the RFSC. From these reports, the RFSC can analyse the data to determine the vessel's location and activity. Cross references can be made to the database holding the vessel's details and the Pacific Island States' fishing regulations and access agreements to determine whether illegal fishing is taking place.[79]

The implementation of a satellite based VMS raises a number of issues. Since it will be used by foreign fishing vessels, the co-operation of all fishing operators in the WCPO region is essential. As DWFNs have developed their own system it is necessary to harmonise the VMS, not only internally within the WCPO region, but also with the

---

77 Ibid.

78 FFA, *Vessel Monitoring System: Concept Paper,* "Record of Proceedings of the Third Consultation on Vessel Tracking, Cairns, Australia, 29-30 September, 1993", (Honiara: Forum Fisheries Agency Report No. 93/60, 1993): Attachment H.

79 FFA, "A Regional Vessel Monitoring System", Ninth Regional Fisheries Surveillance Officers Meeting, FFA Conference Centre, Honiara, Solomon Islands, 4-6 April, 1996, (Honiara: Forum Fisheries Agency Doc. RFSM9/INFO. 11, 1996).

DWFNs. A broad legal framework within which the VMS can be implemented will have to be established.[80]

The implementation of the VMS in the EEZs does not raise any legal difficulties. This is because the enforcement of tuna conservation and management measures is the sovereign right of coastal States. The VMS is part of the wider responsibilities of coastal States to enforce their fishery laws and regulations as allowed under article 73 and 62(4)(e) and (k) of the LOSC. Article 62(4)(e) gives coastal States authority to specify the information required from foreign fishing vessels, including catch and effort statistics and vessel position reports.

However, the implementation of the VMS on the high seas poses legal questions. In the context of a regional VMS, the Pacific Island States cannot compel foreign fishing vessels to use the VMS on the high seas. This is because the concept of the freedom of the high seas applies to fishing on the high seas.[81] Although the LOSC envisages that the Pacific Island States and flag States co-operate to manage and conserve high seas tuna stocks, the Pacific Island States cannot unilaterally impose controls on the high seas. The situation may change with the provision in the Fish Stocks Agreement for the development of VMS.[82] This development, however, should be pursued in terms of the formulation of regional management arrangements.[83]

While the VMS will enhance fisheries enforcement, the system cannot, by itself, provide conclusive evidence of illegal fishing. If a foreign fishing vessel is found in a restricted area, human assessment is still required to determine if it is actually fishing. The VMS' potential to enhance the enforcement is an attractive proposition for the Pacific Island States. However, its establishment should be closely integrated with other developments within the FFA work programme.

---

80 FFA, note 78 above at p. 2. The Pacific Island States have not identified all the legal issues that are involved in establishing a regional VMS.

81 LOSC, Art. 87.

82 Fish Stocks Agreement, Art. 19-21.

83 See discussions on the implications of the Fish Stocks Agreement in Chp. 10.

## B. Physical Enforcement Measures

Non-physical enforcement measures, although less costly cannot solve all the fisheries enforcement problems of coastal States. Some element of physical enforcement is still necessary to apprehend offending vessels. This section considers the measures developed by the Pacific Island States to supplement the non-physical measures discussed in the previous section.

### Niue Treaty on Co-operation in Fisheries Surveillance and Law Enforcement in the Pacific Region

The *Niue Treaty on Co-operation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*.[84] It provides the framework under which the parties can share their assets for fisheries surveillance and enforcement purposes. The basis of the Niue Treaty is article 73 of the LOSC and its purpose is to carry the concept of regional co-operation a step further by establishing a framework which would enhance the ability of the Pacific Island States to effectively enforce their fishery laws and deter breaches of such laws.

The principal provision of the Niue Treaty which is, arguably, "innovative in fisheries surveillance and law enforcement"[85] is article VI. This article provides

> 1. A Party may, by way of provisions in a Subsidiary Agreement or otherwise, permit another Party to extend its fisheries surveillance and law enforcement activities to the territorial sea and archipelagic waters of that Party. In such circumstances, the conditions and method of stopping, inspecting, detaining, directing to port and seizing vessels shall be governed by the national laws and regulations applicable in the State in whose territorial sea or archipelagic waters the fisheries surveillance or law enforcement activity was carried out.
>
> 2. Vessels seized by another Party pursuant to an agreement under paragraph 1 of this article in the territorial sea or archipelagic waters of a party shall, together with the persons on board, be handed over as soon as possible to the authorities of that party.

---

84 The text of the Niue Treaty is reprinted in 19 *Commonwealth Law Bulletin* (1993): 702 and 32 *International Legal Materials* (1993): p. 136. The Treaty entered into force on 20 May, 1993.

85 A. Bergin, "New Fishery Agreements Concluded in the South Pacific," *Ocean & Coastal Management* 19 (1993): pp. 299-330 at p. 230.

> 3. Any two or more Parties may enter into a Subsidiary Agreement under which they would co-operate in the provision of personnel and the use of vessels, aircraft or other items of equipment for fisheries surveillance and law enforcement purposes.
> 4. Any Party wishing to authorise its officers to perform fisheries surveillance and law enforcement functions on its behalf while on board a vessel or aircraft of another party shall by instrument in writing designate the officers accordingly.
> 5. Any Party wishing to authorise the officers of another Party to perform fisheries surveillance and law enforcement functions on its behalf while on board a vessel of that other Party shall by instrument in writing designate such officers accordingly.

The implementation of this Article raises a number of legal difficulties. Firstly, it is not clear whether the phrase "extend its fisheries surveillance and law enforcement" activities refers to the enforcement of the laws and regulations of the enforcing State or those of the consenting State in whose territorial sea or archipelagic waters the enforcement activity takes place. Secondly, it is not clear whether article VI(1) purports to extend the enforcement jurisdiction of a party into the territorial jurisdictional zones of another party, or whether it merely provides a framework for a State party to authorise another party to carry out enforcement functions on the formers behalf.

The third ambiguity in the Niue Treaty is that it is not clear whether article VI(1) refers only to the situation in which State party A authorises a naval vessel of State party B to enforce the laws and regulations of State party A on behalf of party A against the foreign fishing vessels of third States or whether it refers to the situation in which State party A authorises a naval vessel of State party B to enforce the laws and regulations of State party A in the EEZ of State party B. The former interpretation is supported by article VI(2), which provides that "[v]essels seized by another Party pursuant to this agreement under paragraph 1 of this Article in the territorial sea or archipelagic waters of a party shall, together with the persons on board, be handed over as soon as possible to the authorities of that party." The fourth ambiguity is that the Niue Treaty is not clear on where should the violation have occurred. It may be that the violation has to occur in the territorial sea or

archipelagic waters of the State whose sovereignty is violated before an enforcement action may be undertaken by another State.

Finally, a problem of interpretation arises from the requirement under article VI(1) that "the conditions and method of stopping, inspecting, directing to port and seizing vessels shall be governed by the national laws and regulations applicable in the State whose territorial sea or archipelagic waters the fisheries surveillance or law enforcement activity was carried out." This raises the practical issue of whether the enforcing officers of the State know the domestic laws and regulations of another State. In practice, for the joint enforcement scheme envisaged under the Niue Treaty to work effectively, the fishery laws of all the parties have to be the same.[86]

The Preamble to the Niue Treaty refers to coastal States sovereign rights in, and the economic significance of the Pacific Island States' EEZs, as well as article 73 of the LOSC. However, article VI(1) appears to cover only violations in the territorial sea and the archipelagic waters of the parties, but not the EEZ.[87] It may be argued that since article 73 of the LOSC deals with enforcement in the EEZ, it cannot be the legal basis of the extension of enforcement powers of a party to the Niue Treaty into the territorial sea or archipelagic waters of another State.[88] Unless the scope of article VI is expanded to cover violations in the EEZ, the Niue Treaty would have only minimal practical value, since most of the tuna resource is located in the EEZ.[89] This interpretation of the Niue Treaty is correct since the Niue Treaty is silent on the extension of enforcement powers to the EEZ.[90]

---

86 B.M. Tsamenyi, *Co-operation in Fisheries Law Enforcement in the South Pacific Region: An Analysis of the Niue Treaty*, Paper presented at the SEAPOL Tri-Regional Conference on Current Issues in Ocean Law Policy and Management: Southeast Asia, North Pacific, and Southwest Pacific, December 13-16, Bangkok, Thailand, pp. 2-3.

87 In its 1992 Declaration on Law Enforcement Co-operation, the South Pacific Forum noted that the implementation of the Niue Treaty "would significantly enhance the fisheries resource management capability of Forum member Countries," see Communiqué of the Twenty-Third South Pacific Forum (8-9 July, 1992), UN Doc. A/47/391, Annex, Declaration on Law Enforcement Co-operation, para. 17.

88 B.M. Tsamenyi, note 86 above at p. 4.

89 Ibid.

90 It would appear that the omission to refer to the EEZ is based on an oversight on the part of the Special Legal Working Group which drafted the final draft of the Niue Treaty. See "Record of Proceedings of the Special Legal Working Group to draft the Treaty on Co-operation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, Honiara, 22-23 January, 1992", (Honiara: Forum Fisheries Agency Report No. 92/4, 1992). The original text of read as follows: "each

The Niue Treaty also raises questions about the right of hot pursuit, in particular the principle that hot pursuit ceases, when the foreign fishing vessel pursued enters the territorial sea of another State.[91] It also has implications for the right of innocent passage, and the delegation of enforcement powers. With respect to hot pursuit, there is international precedent which would allow States to permit other States to extend the right of hot pursuit into their territorial sea.[92] Similar agreements exist to counter drug trafficking between the US and the Bahamas,[93] and Portugal and Spain, in which the parties have authorised each others authorities automatic entry into the territorial waters in hot pursuit to enforce their laws against drug trafficking.[94] However, these precedents do not affect the vessels of third States.

With regards to the right of innocent passage, third States could argue that the apprehension of their vessels in the territorial waters of another State is a violation of international law.

According to Reuland, the mere presence of the pursued vessel within the territorial sea of coastal States may justify coastal States to consider such passage as non-innocent and to arrest the vessel. It may also authorise the original pursuing State to seize the vessel.[95] However, this view ignores the fact that the LOSC lists a category of activities which are considered as non-innocent since which would suggest that the mere presence or passage of a ship could not, under the LOSC, be regarded as prejudicial to coastal States.[96]

---

party shall permit access to its territorial sea or archipelagic waters by a vessel of another party for the purposes of maintaining the continuous hot pursuit of a foreign fishing vessel, being a hot pursuit commenced in waters in which the other party claims jurisdiction for fisheries purposes, seizing that foreign fishing vessel, and escorting it back to waters in the jurisdiction of that other party".

91 LOSC, Art. 111. The view in the region is that article VI is intended to allow hot pursuit into the territorial seas of other parties to the treaty. This view is confirmed by the original draft of article IV, see ibid.

92 *Convention between Denmark and Sweden for the Common Supervision in order to prevent the Smuggling of Alcoholic Liquors,* signed on 28 October, 1935, 166 L.N.T.S. 299, at p. 307.

93 P. E. Rogers, "International Initiatives to Combat Drug Trafficking: The Bahamian Experience, *Commonwealth Law Bulletin* 17 (1991): pp. 1376-1390 at p. 1379.

94 P. Delaney, "Drug Trade for Europe is Overwhelming Spain", *N.Y. Times*, Nov. 9, 1988, p. A6, col. 1.

95 R.C. Reuland, "The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention", *Virginia Journal of International Law* 33 (1993): pp. 557-585 at p. 579.

96 R.R. Churchill and A.W. Lowe, *The Law of the Sea* (rev. ed.), (Manchester: Manchester University Press, 1988): p. 72.

Furthermore, it can be argued that "the innocence or lack thereof, of passage must be determined only by specific acts occurring during the passage in the territorial sea itself."[97] This view is consistent with article 27(5) of the LOSC which prohibits coastal States from carrying out any investigation, or arresting any person with respect to "any crime committed before the ship entered the territorial sea," except with respect to violations of environmental standards and of fishery laws and regulations in the EEZs of the coastal States in question.[98]

It could be counter argued that coastal States have a legitimate expectation that foreign fishing vessels who violate their fishery laws should not seek sanctuary in another coastal State's territory.[99] Some support for this argument is based on the application of the *Lacey Act* of the US. However, it is unlikely that this argument is tenable under the LOSC or customary international law. The reason is that although the enforcement measures which article VI of the Niue Treaty and the *Lacey Act* envisage are similar, the principles underpinning them fundamentally differ. Under the *Lacey Act*, the US' actions are compatible with international law since its enforcement powers are exercised while the vessel is voluntarily in port.[100] Therefore, the question about obstruction of innocent passage and extension of the right of hot pursuit does not arise. Furthermore, acts under the Lacey Act are taken against foreign fishing vessels that are alleged to have contravened US laws. The US' authorities are thus enforcing US laws and not those of third States.

Finally, the Niue Treaty raises the question of whether international law permits coastal States to delegate their enforcement powers under the LOSC. The general principle governing enforcement powers under international law is that "a State cannot take

---

97 W.T. Burke, "Exclusive Fisheries Zones and Freedom of Navigation", *San Diego Law Review* 20 (1983): pp. 595-623.

98 B.M. Tsamenyi, note 86 above at p. 7.

99 G.H. Allen, "Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices", *Ocean Development and International Law* 20 (1989): pp. 309-341. Allen argues that hot pursuit is necessary to effectively enforce coastal States interest. If vessels are able to evade apprehension by escaping to the high seas, coastal States enforcement efforts will be undermined. The right of hot pursuit enables coastal States to maintain enforcement credibility and deter infringements of their laws. See N.M. Poulantzas, note 26 above at p. 348.

100 The coastal State is exercising powers which are legitimate under international law.

measures on the territory of another State by way of enforcement of national laws without the consent of the latter."[101] However, a subsidiary agreement may overcome the problem of consent. Although article 73 of the LOSC does not specify which persons or vessels are empowered to board, inspect and arrest delinquent ships or persons, according to Shearer, "there is nothing in the LOS Convention, or in customary international law to prohibit this authorisation."[102]

The Niue Treaty is not self-executing, and requires the conclusion of subsidiary agreements to implement it. Its effectiveness therefore must be tested against the success of the subsidiary agreements and the co-operation it promotes amongst the its parties. So far, no such subsidiary agreement has been concluded. In 1993, Tonga and Tuvalu agreed to co-operate in fishery surveillance and law enforcement.[103] However, while Tonga was a party to the Niue Treaty, Tuvalu was only a signatory. The Agreement therefore was not a subsidiary agreement for purposes of the Niue Treaty.

In implementing the Niue Treaty, the Pacific Island States cannot ignore the legal issues discussed above. They have to consider the implications of the Treaty for third States. In particular, any limitations on the right to innocent passage and the right of hot pursuit have to comply with international law. Subsidiary agreements should address the question of State responsibility. For example. if a vessel from State party C is arrested in State party B's EEZ by State A's patrol vessel, which party is responsible for violations of international law. Is it State A or State B? To enhance the Niue Treaty's implementation, the Pacific Island States' fishery laws must be harmonised especially in areas such as

---

101 I. Brownlie, *Principles of Public International Law* (4th ed.), (Oxford: Oxford University Press, 1990): pp. 307.

102 I. A. Shearer, *Fisheries Legislation: The Case for Co-operation and Enforcement*, Commonwealth Secretariat, Meeting of Law Officers of Small Commonwealth Jurisdictions, (London: Commonwealth, 1985) p. 26.

103 *Agreement between the Government of Tonga and the Government of Tuvalu on Co-operation in Fisheries Surveillance and Law Enforcement*, Done at Nuku'alofa 7, May, 1993.

penalties, the licensing regime, nationality of fishing vessels, and management practices and statement of fisheries offences.[104]

The implementation of subsidiary agreements also raise logistical problems. For instance, article 111(5) of the LOSC provides that the right of hot pursuit may be exercised only by warships or aircraft clearly marked and identified as being on government service and authorised to that effect. If State party A authorises State party B to carry out an arrest in State party A's waters, the warship or aircraft must be clearly marked to be in the service of State party A. However, Shearer suggests how this problem may be resolved:

> The question remains whether a warship of one State might be commissioned by a friendly neighbouring State to exercise enforcement powers on the latter's behalf. There appears to be nothing in the LOSC, or in customary international law to prohibit this. Provided that the appropriate pennant is hoisted, showing the vessel to be in the service of the Government of A, the relevant rules would appear to be satisfied. In such co-operative arrangements, however, it might be wise of the participating governments to specify that in the exercise of powers of enforcement it is the government of the State whose pennant is hoisted, or on whose behalf the vessel is purportedly acting, that bears international legal responsibility for any breach of international law. In the event of a civil action being brought in the Courts of A against a law enforcement official of C in respect of acts performed on behalf of A, some difficult questions of law could arise. The instance bears some analogy to the situation of visiting forces under joint exercises and the provisions on the status of forces agreements and legislation of the NATO pattern.[105]

The Pacific Island States' surveillance officials must understand each States' fishery laws. A list of licensed foreign fishing vessels has to be exchanged on a regular basis. These practical and operational matters should be included in the subsidiary agreements. Lodge argues that "subsidiary agreements will clearly have to include detailed guidelines on operating procedures and procedures for enforcement operations in another party's zone,

---

104 FFA, "Record of Proceedings of the FFA Regional Legal Consultation on Fisheries Surveillance and Law Enforcement, Rabaul, Papua New Guinea, 4-7 October, 1993", (Honiara: Forum Fisheries Agency Reports No. 93/55, 1993): Attachment K p. 2.

105 I. Shearer, note 102 above at p. 26.

including procedures for authorisation of entry into zones, conditions of entry into each other's zones and detailed procedures for surveillance operations."[106]

Given the size of the Pacific Island States' EEZs, it is unlikely that their regional strategy has addressed all the challenges of enforcing the fishery provisions of the LOSC. Thus, according to a delegate to the Ninth Meeting of Regional Fisheries Surveillance Officials:

> Although we are perhaps somewhat boastful of our accomplishments, we are also cognisant of our shortcomings. Surface surveillance is managed by only two patrol boats. Increased fishing in our region and more and more transhipment from our ports tax already limited resources. Moreover, increased port transhipment has forced us to come to grips with the serious and pervasive problem of under and misreporting by many of the foreign fishing fleets in our area. For example, in one case, the radio officer of a Taiwanese purse seine admitted that part of his job was to falsify the catch records provided to the FSM. Unfortunately, these types of problems often seem to be the rule rather than the exception and make effective surveillance all the more difficult. Even with the help of the NMFS, the US Coast Guard, and FFA we realise that we are only catching a few of the actual violators. Under reporting, falsifying catch data and general non-compliance with record keeping requirements appears epidemic.[107]

## IV. CONCLUSION

This Chapter discussed the enforcement provisions of the LOSC and the responses of the Pacific Island States to implement these provisions. It was pointed out that enforcement is part of the sovereign rights of coastal States to conserve and manage tuna in the EEZ.

The Pacific Island States' strategy has been to develop regional arrangements. The Chapter discussed the functions of these arrangements which generally comply with the LOSC provisions regarding the conservation and management of tuna and enforcement. The discussion also highlighted legal difficulties with the VMS namely that the DWFNs cannot be compelled to implement the VMS on the high seas. Furthermore, certain

---

106 M. Lodge, note 32 above.

107 FFA, *A Regional Vessel Monitoring System*, Ninth Regional Fisheries Surveillance Officers Meeting, FFA Conference Centre, Honiara, Solomon Islands, 4-6 April, 1996, (Honiara: Forum Fisheries Agency Doc. RFSM9/INF. 11, 1996): Attachment H.

provisions of the Niue Treaty raise problems in international law. These problems were highlighted. It was pointed out that subsidiary agreements under the Niue Treaty need to address these anomalies to avoid legal challenges from third States.

# 10

# THE FISH STOCKS AGREEMENT AND ITS IMPLICATIONS FOR THE FUTURE MANAGEMENT OF TUNA IN THE PACIFIC ISLAND STATES

## I. INTRODUCTION

The management of international tuna fishery has been transformed with the conclusion of the Fish Stocks Agreement in 1995.[1] The conclusion of this Agreement affirms that tuna management under the EEZ regime has been inadequate in managing living marine resources, especially those that straddle between the EEZs of two or more States and the high seas (straddling stocks) and those that move across vast expanses of ocean space (highly migratory species).[2] The stocks that transcend international boundaries can only be

---

1 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 Straddling Fish Stocks and Highly Migratory Fish Stocks*, (New York: UN DOC. A/CONF. 164/33, 1995). Also *reproduced in* 34 I.L.M. (1995): p. 1542.

2 S. Nandan, "The Draft Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks", *Entry into Force of the Law of the Sea Convention*, Myron H. Nordquist and John Norton Moore (eds.), (Dordrecht: Martinus Nijhoff Publishers, 1995): pp. 291-297; See FAO, *Marine Fisheries and the Law of the Sea: A Decade of Change*, FAO Fisheries Circular No. 853, (Rome: Food and Agriculture Organisation, 1993). The problems with the fisheries provisions of the LOSC were identified as long ago as 1983 by S. Oda, "Fisheries Under the United Nations Convention on the Law of the Sea", *American Journal of International Law* 77 (1983): pp. 739-755 at p. 746 who argued that:

> ... it would be extremely difficult to implement the whole scheme requiring the coastal State to determine the allowable catch for the purpose of conservation and its capacity to harvest the fishery resources, and to give access to the surplus of the allowable catch to other States, in view of the fact that the ideas themselves are not always well defined in the Convention.

For background information on the political ideals behind the fisheries provisions of the LOSC, see R.L. Friedheim, "Fishing Negotiations at the Third United Nations Conference on the Law of the Sea", *Ocean Development and International Law* 22 (1991): pp. 209-257; L. Juda, "The Exclusive

managed and conserved through international co-operation between the coastal States in whose EEZs these stocks cross and States who harvest them on the high seas.[3]

Chapter 10 discusses the implications of the Fish Stocks Agreement for the future management of tuna by the Pacific Island States. It will be shown that the responses of the Pacific Island States to the challenges of the EEZ regime do not meet the criteria for precautionary management stipulated by the Fish Stocks Agreement. Part II discusses the main provisions of the Agreement. Part III analyses its implications for international fisheries law. Part IV analyses its implications for the future management of tuna by the Pacific Island States. Chapter 10 concludes that the Pacific Island States will need to review the existing tuna management and conservation arrangements, to meet the standards established by the Fish Stocks Agreement.

## II. THE UN AGREEMENT FOR THE CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS

The Fish Stocks Agreement was adopted through consensus at the sixth session of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks which met in New York from 24 July to 4 August 1995.[4] It explicitly asserts that "Nothing in this Agreement

---

Economic Zone and Ocean Management", *Ocean Development and International Law* 18(3) (1987): pp. 305-331. Juda argues that while the EEZ regime has several advantages over the traditional fisheries management regime, it has its disadvantages: (a) the legal division of the ocean space do not correspond to the national or ecological divisions of ocean space. The ecological division of ocean space is most important for fisheries management; (b) the legal and political boundaries are of no significance to the living resources whose life cycle and migration patterns are determined by natural sources; and (c) the division of coastal waters into EEZs transcends relevant ecosystems which require joint sharing of responsibility. Without effect inter-State co-operation effective management of transboundary species cannot be achieved.

3 E. Meltzer, "Global Overview of Straddling and Highly Migratory Fish Stocks: The Non-Sustainable Nature of High Seas Fisheries", *Ocean Development and International Law* 25(3) (1994); pp. 255-344; M. Hayashi, "The Management of Transboundary Fish Stocks under the LOS Convention", *The International Journal of Marine and Coastal Law* 8(2) (1993): p. 249; J. Joseph and J.W. Greenough, *International Management of Tuna, Porpoise, and Billfish: Biological, Legal and Political Aspects*, (Seattle: University of Washington Press, 1979). There is, however, some dispute whether international management of the tuna resources is necessary. For views supporting this proposition see, R. Hilborn and J. Sibert, "Is International Management of Tuna Necessary?", *Marine Policy* 12 (1988): p. 31.

4 For a comprehensive analysis of the Fish Stocks Agreement see D. Bolton, "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks". *Ocean Development and International Law* 27(1-2) (1996): pp. 125-151; Andre Tahindro, "Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995

shall prejudice the rights, jurisdiction and duties of States under the Convention on the Law of the Sea [LOSC]."[5] This indicates that the Fish Stocks Agreement and LOSC are intrinsically linked.[6] Essentially, the Agreement applies only to the high seas except that articles 5 and 6 also apply to the EEZ. Article 5 stipulates the principles for responsible conservation and management of straddling and highly migratory fish stocks. While article 6 provides for the application of the precautionary principle in the conservation and management of these stocks. However, articles 5, 6 and 7 specifically apply to the EEZ. The application of articles 5, 6 and 7, however, is subject to the different legal regimes that apply to the EEZ and the high seas.

### General Principles of Management and Conservation

Article 5 sets out general principles for conservation and management of straddling and HMS. These principles represent a significant addition to the LOSC and are to be applied by coastal and high seas fishing States. In giving effect to the duty to co-operate under the LOSC, States have a duty to enact measures to ensure the long term sustainability of straddling and highly migratory fish stocks and promote the objective of their optimum utilisation.[7] Such measures are to be based on the best scientific evidence available and must be designed to maintain or restore stocks at levels capable of producing the maximum sustainable yield (MSY).[8] However, the requirement is not absolute since it is qualified by environmental or economic factors, including the special needs of developing States and fishing patterns and the interdependence of stocks.

---

Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks", *Ocean Development and International Law* 28(1) (1997): pp. 1-58. For discussions on the history of the negotiations see, FAO, *Structure and Process of the 1993-1995 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks*, FAO Fisheries Circular No. 898, (Rome: Food and Agriculture Organisation, 1995).

5 Fish Stocks Agreement, Art. 4.

6 "Statement by the Chairman, Ambassador Satya N. Nandan, on August 4, 1995, upon the Adoption of 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", (New York: UN Doc. A/CONF. 164/35, 20 September 1995): p. 1.

7 Ibid., Art. 5(a).

8 Ibid., Art. 5(b).

The Fish Stocks Agreement takes an eco-system and holistic approach to tuna management. It imposes a duty on coastal States to assess the impacts of fishing and other human activities on target stocks and species that belong to the same ecosystem or are associated with dependent stocks.[9] States are required to minimise pollution, waste, discards, catch by lost or abandoned gear, catch of non target species and develop the use of selective, environmentally safe and cost-effective fishing gear and techniques.[10] These measures must also protect the biodiversity in the marine environment[11] and prevent or eliminate overfishing and excess fishing capacity to ensure that fishing effort does not exceed sustainable use of the fishery resources.[12]

Tuna management requires data and information. Thus, under article 5(j) and Annex I, coastal States have a duty to "collect and share in a timely manner, complete and accurate data concerning fishing activities on, *inter alia*, vessel position, catch of target and non-target species and fishing effort." Annex I sets out a comprehensive regime under which this can be achieved.

**Precautionary Approach**

Even if the above tuna management principles are applied, fishery managers generally work in an imperfect world. Thus, article 5(c) imposes a duty to apply the precautionary approach. The detailed provisions on the precautionary approach are found in article 6 and Annex II of the Agreement.[13] The approach "represents an effort to improve management

---

9 Fish Stocks Agreement, Art. 5(d).

10 Ibid., Art. 5(f).

11 Ibid., Art. 5(g).

12 Ibid., Art. 5(h).

13 The concept of the precautionary approach was discussed in the context of UNCED. The principle which has been incorporated in Principle 15 of the Rio Declaration requires that:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.

See United Nations, *Rio Declaration on Environment and Development*, UN Doc A/CONF. 151/5/Rev.1, (New York: United Nations, 1992). Chapter 17.5(d) of Agenda 21 reiterates the precautionary approach by stating that approaches to tuna management should be precautionary and anticipatory in ambit.

(and in turn reduce the incidence of overfishing and redundant effort) by explicitly considering uncertainties and risks in the decision making process."[14]

Article 6(1) of the Fish Stocks Agreement provides that:

> States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.

In applying the precautionary approach, States have a duty to improve decision making for the conservation and management of tuna by obtaining and sharing the best scientific information available and implementing improved techniques for dealing with risk and uncertainty.[15] States are to be more cautious when "information is uncertain, unreliable or inadequate."[16]

The Fish Stocks Agreement sets out a comprehensive regime for the application of the precautionary approach. States are required to apply the guidelines set out in Annex II and determine stock specific precautionary reference points. This is "an estimated value derived through an agreed scientific procedure which corresponds to the state of the resource and of the fishery" and can be used as a guide for tuna management.[17] Furthermore, the uncertainties in stock size and productivity must be taken into account[18]

---

14 B. Kaufman, "Review of Reference Points and the Precautionary Approach for Fisheries Management", (Honiara: Forum Fisheries Agency Report No. 94/27, 1994): p. 12. Also see E. Hey, "The Precautionary Concept in Environmental Policy and Law: Institutionalising Caution", *Georgetown International Environmental Law Review* 4 (1992): pp. 303-318. For an examination of the precautionary approach as an emerging principle of law see James Cameron and Juli Aboucher, "The Precautionary Principle of Law and Policy for the Protection of the Global Environment", *Boston College International and Comparative Law Review* 14 (1991): pp. 1-27, and Luther Gundling, "The Status in International Law of the Principle of Precautionary Action", in David Freestone and Ton Ijlstra (eds.), *The North Sea: Perspectives on Regional Co-operation*, (London: Graham & Trotman, 1990): pp. 23-30.

15 Fish Stocks Agreement, Art. 6(3)(a). Arthur Dahl of UNEP has described the precautionary approach or approach as essentially a reversal of the onus of proof. Rather than permit pollution to be released until harm is proven, the harmlessness of the pollutant must be established. In the event of uncertainty, the release is prohibited as a precautionary measure, "Land-Based Pollution and Integrated Coastal Management", *Marine Policy* 17 (1993): pp. 561-72 at 563.

16 Ibid., Art. 6(2).

17 Ibid., Annex II(1). There are two types of reference points; conservation or limit reference points which establish boundaries to constrain harvesting within safe biological limits which can result in the MSY, and target reference points which are intended to meet management objectives See Annex II(2).

18 Ibid., Art. 6(3)(c).

as must the reference points, stock condition in relation to such reference points, levels and distributions of fishing mortality, and the impact of fishing activities on non-target species. States have a duty to ensure that when reference points are approached, they will not be exceeded.[19]

The Fish Stocks Agreement also provides for research programs to assess the impact of fishing on non-target species and their environment, and adopt plans to ensure the conservation of such species and protect habitats of special concern.[20]

If a new fishery is developed, the Fish Stocks Agreement requires States to adopt cautious conservation and management measures which are to remain in force until sufficient data is available to assess the impact of fishing on the long term sustainability of the stocks.[21] States are required to adopt conservation and management measures on an emergency basis if a natural phenomenon significantly affects the status of the highly migratory fish stocks. The objective of these measures is to ensure that fishing activities do not exacerbate any adverse impacts.[22]

### Compatibility and Coherence between EEZs and the High Seas

Under the LOSC different legal regimes apply to the management of the tuna stocks in the EEZ and the high seas.[23] The problem this has created is that the tuna stocks that cross the 200 mile limit are liable to be subjected to potentially conflicting rules: those promulgated by a coastal State to regulate the stock in the EEZ(s), and those adopted multilaterally by coastal States and fishing States to regulate the stocks on the high seas.[24] Straddling stocks in particular may be affected since under article 63(2) of the LOSC the conservation rules adopted multilaterally for such stocks apply only to the high seas area adjacent to the EEZ. This raises the possibility of conflicting rules for the stock within the EEZ.[25] Article 64 of

---

19 Ibid., Art. 6(4).
20 Ibid., Art. 6(3)(d).
21 Ibid., Art. 6(6).
22 Ibid., Art. 6(7).
23 See discussions in Chapter 2.
24 See David A. Bolton, note 4 above at p. 136.
25 Ibid., p. 137.

the LOSC mitigates this danger by requiring multilateral development of rules to apply both within and beyond the EEZ.[26]

Article 7 of the Fish Stocks Agreement deals with the question of compatibility between management measures applied to straddling and highly migratory fish stocks on the high seas and the EEZ. Paragraph 1 restates the basic distinction between straddling fish stocks and highly migratory fish stocks based on articles 63(2) and 64 respectively, that multilateral measures for straddling stocks apply only to the high seas,[27] while those for highly migratory fish stocks apply both within and beyond the EEZ.[28] However, these distinctions are "without prejudice to the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing the living resources within areas under national jurisdiction" and the "right of all States for their nationals to engage in fishing on the high seas."[29]

The Fish Stocks Agreement provides guidelines to determine compatible measures. Many of these guidelines continue to respect coastal States' sovereign rights. The relevant provision regarding compatibility with respect to highly migratory fish stocks is article 7(1)(b) which states that:

> with respect to highly migratory fish stocks, the relevant coastal States and other States whose nationals fish for such stocks in the region shall co-operate, either directly or through the appropriate mechanisms for co-operation provided for in Part III, with a view to ensuring conservation and promoting the objective of optimum utilisation of such stocks throughout the region, both within and beyond the areas under national jurisdiction.

The involvement of fishing States within the EEZ is greater for highly migratory fish stocks than it is for straddling fish stocks. The reasons for this may be found in the

---

26 Ibid.

27 Fish Stocks Agreement., Art. 7(1)(a) states:
> with respect to straddling fish stocks, the relevant coastal States and the States whose nationals fish for such stocks in the adjacent high seas shall seek, either directly or through the appropriate mechanisms provided for in Part II, to agree upon measures necessary for the conservation of these stocks in the adjacent high seas area.

28 Ibid., Art. 7(1)(b).

29 Ibid., Art. 7(1).

biological differences between the two categories of stocks. Generally, "straddling stocks" such as cod in the Northwest Atlantic and pollock in the Bering Sea, occur primarily in the EEZs of very few coastal States.[30] Beyond the EEZs, straddling stocks are fished in relatively discrete areas of adjacent high seas. It is therefore acceptable for the coastal State "unilaterally" to determine conservation and management measures in its EEZ, while the high seas fishing States and coastal States develop measures for adjacent areas multilaterally.[31]

In contrast, most highly migratory fish stocks migrate through thousands of miles of open ocean and occur both in the EEZs and the high seas. They are fished in both the EEZ and the high seas. Because of these characteristics, it is argued that no single coastal State can adopt effective conservation and management measures for such a stock as a whole.[32] Consequently international co-operation is essential for the development of such measures for these stocks throughout their range, both within and beyond the EEZ.[33] However, these distinctions are artificial because a given stock can be both shared and straddling and highly migratory.[34]

---

30 However, it has been argued that the distinction is more political rather biological. See Gordon R. Munro, *Fishery Diplomacy in the 1990s: The Challenges and Constraints*, Paper presented at the SEAPOL International Workshop on Challenges to Fishery Policy and Diplomacy in South-East Asia, Rayong, Thailand, 6-9 December (1992): p. 5.

31 See Message from the President, United Nations Convention on the Law of the Sea, with Annexes, and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with Annex, Oct. 7, 1994, S. Treaty Doc. No. 103-39, 103d Cong., 2d Sess. at iii-iv (1994): p. 30.

32 See E.E Wolfe, *The International Implications of Extended Maritime Jurisdiction in the Pacific*, Paper presented to the 21st Annual Conference of the Law of the Sea Institute, August 4, 1987, Honolulu.

33 Ibid. For a contrary view see R. Hilborn and J. Sibert, note 3 above at p. 31. Also see J. Gulland, "Tuna and International Institutions, *Marine Policy* 12 (1988): p. 408.

34 Gordon R. Munro, note 30 above p. 5. The proposition that there are strong biological, legal and political distinctions between straddling fish stocks and highly migratory fish stocks has been advocated by the US in a position paper submitted to the Second Substantive Session of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, March 1994, "US Objectives for Conference Sessions in 1994", *reproduced in* FFA, "FFA Internal Documentation, Talking Points arising from the Second Substantive Session of the Conference", United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, United Nations, New York, March 14-31, 1994, Section C. The US position purported to draw a clear distinction on biological grounds, however, many of the species listed as HMS in Annex I of the LOSC do not fit the criteria proposed by the US. The US position used four biological criteria to distinguish between SS and HMS. They claim that:

1. Straddling stocks have a well defined spatial distribution, while HMS do not.

Article 7(2) sets out the basic obligation to achieve compatibility. It provides that:

> Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety. To this end, coastal States and States fishing on the high seas have a duty to co-operate for the purpose of achieving compatible measures in respect of such stocks.

In determining compatible conservation and management measures, States are required to take account of measures applied under article 61 of the LOSC[35] and any previously agreed measures established and applied for the high seas.[36] The responsibilities of coastal States under article 61 of the LOSC include the duty to determine the allowable catch of living resources in its EEZ;[37] ensure that such resources are not endangered by over-exploitation,[38] and take into account effects of its management measures on non-target species, with a view to maintaining or restoring such species at levels at which their

---

> 2. Straddling stocks are closely associated with topographic features critical in the life history of the population, while HMS are not.
> 3. HMS have widely ranging distributions often spanning entire oceans, while straddling stocks do not.
> 4. HMS generally do not aggregate, while straddling stocks do

The consequences are that different management considerations apply to straddling fish stocks and HMS. In response, the Pacific Island States sought to engage the US informally during negotiations of the text. In one of these informal sessions, the Pacific Island States said:

> We consider that from, a biological viewpoint, straddling stocks and highly migratory species are part of a biological continuum. We further consider that, biologically, too many species that are clearly regarded as either straddling stocks or highly migratory species do not fit the US criteria. Rather than discussing the technical issues, we consider our time would be better spent in more clearly exploring the issues of consistency in the context of EEZ sovereignty and high seas duties and obligations. We, like the US., recognise and claim coastal State sovereignty over all living resources within the EEZ. Similarly, we respect the concept of conservation and management of the stock as a biological unit across jurisdictional boundaries. Given the biological diversity amongst both straddling stocks and highly migratory species and, in many cases, limited understanding of critical life history features, we wish to avoid definitions that we feel will constrain our effectiveness as we learn more about each species.

Ibid., FFA, "Internal Documentation, Talking Points arising from the Second Substantive Session of the Conference Section C", *South Pacific Comments on United States Position on Straddling Fish Stocks and Highly Migratory Species*, (Honiara: Forum Fisheries Agency, 1994): p. 1.

35 Fish Stocks Agreement, Art. 7(2)(a).

36 Ibid., Art. 7(2)(b).

37 LOSC, Art. 61(1).

38 Ibid., Art. 61(2).

reproduction may become seriously threatened.[39] Coastal States must also take into account the biological unity and other biological characteristics of the stocks and the relationship between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned.[40] If no agreement is reached within a reasonable period of time, any of the States concerned may invoke the procedures for the settlement of disputes.[41]

Article 7 has far reaching consequences for the Pacific Island States because the management of tuna resources within their EEZs will come under intense scrutiny.[42] However, it may be argued that article 7 seems to tilt the emphasis on compatible measures in favour of coastal States to set the basic standard for how tuna will be managed. The Fish Stocks Agreement emphasises this balance by stating that management measures adopted must not undermine the effectiveness of measures taken in areas of national jurisdiction.[43] Where a large proportion of the tuna stocks is harvested within national zones, article 7 imposes pressure on coastal States(s) to ensure that conservation measures are in place and that high seas fishing States conform to those measures. Article 7(7) requires coastal States regularly to inform other States of the conservation and management measures it adopts for the EEZ.

### Mechanisms for Co-operation for Conservation and Management

Article 8 which deals with the form of international co-operation and membership of regional fisheries management organisations and arrangements provides in paragraph 1 that the

> Coastal States and States fishing on the high seas shall, in accordance with the Convention pursue co-operation in relation to straddling fish stocks and highly

---

39. Ibid., Art. 61(3). See Chp. 2.
40 Ibid., Art. 7(2)(d).
41 Ibid., Art 7(3).
42 See discussions by J. Van Dyke, "United Nations Straddling Stocks and Highly Migratory Stocks Agreement and the Pacific", *The International Journal of Marine and Coastal Law* 11(3) (1996): pp. 406-415.
43 Fish Stocks Agreement, Art 7(2)(a).

> migratory fish stocks either directly or through appropriate sub-regional or regional fisheries management organisations or arrangements, taking into account the specific characteristics of the sub-region or region, to ensure effective conservation and management of such stocks.

This article provides some degree of flexibility in resisting calls for a traditional article 64 of the LOSC type body since it allows for flexibility to establish arrangements rather than organisations.[44] DWFNs have argued that article 64 of the LOSC clearly requires the establishment of an international organisation to conserve the highly migratory fish stocks.[45]

---

44 LOSC, Art. 64(1):

> Coastal States and other States whose nationals fish in the region... for highly migratory species ... shall co-operate directly or through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilisation of such species throughout the region, both within and beyond the exclusive economic zone.

45 Will Martin, "Fisheries Conservation and Management of Straddling Stocks and Highly Migratory Stocks under the United Nations Convention on the Law of the Sea", *The Georgetown International Environmental Law Review* 7 (1995): pp. 765-69 at 768. Martin argues that:

> Article 64 requires that, if no international organisation exists to manage highly migratory species in the region, the coastal States and other States harvesting the species in the region shall co-operate to establish one. An example of an international organisation which manages highly migratory species is the International Commission for the Conservation of Atlantic Tunas...

In the context of the region, DWFNs have argued that there is no international tuna management organisation which includes all coastal States and States whose nationals fish in the region. For instance, Japan's view is:

> ...that the management of highly migratory species should be conducted scientifically in co-operation between coastal States and distant water fishing States that it should encompass the whole migrating areas of target species to be determined scientifically and biologically

See FFA, "Fourth Consultation on Arrangements for South Pacific Albacore Fisheries Management, Suva, Republic of Fiji, 16-18 December 1991", (Honiara: Forum Fisheries Agency Report No. 91/79, 1991): Attachment E. During the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, the Pacific Island States sought to resist any obligations that would circumscribe the options available for securing international co-operation. The Pacific Island States view is the type of regional co-operative arrangements for ensuring conservation and management of the resources are best addressed through institutional frameworks that are specifically appropriate to the region in question. See FFA, "United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, United Nations, New York, 12-30 July 1993: Brief for FFA member Countries", (Honiara: Forum Fisheries Agency Report No. 93/33, 1993): p. 7. The Pacific Island States sought flexibility in the text of the Fish Stocks Agreement to ensure it did not result in unreasonable constraint on the options through which the duty to co-operate could be discharged. The Pacific Island States preferred the ambiguity of article 64. See FFA, "Record of Proceedings of the South Pacific Strategy Meeting for the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, Honiara, Solomon Islands, 26-28 January 1994: Supplementary Negotiating Brief", (Honiara: Forum Fisheries Agency Report No. 94/6, 1994): 3.

The Fish Stocks Agreement refers to management arrangements which are defined as "a co-operative mechanism established in accordance with the LOSC and this Agreement by two or more States for the purpose, *inter alia*, of establishing conservation and management measures in a sub-region or region for one or more straddling fish stocks or highly migratory fish stocks."[46] The difference between an arrangement and an organisation would appear to be that an organisation is a material entity, possessing offices with personnel, equipment budgets and legal personality. However, the definition of "arrangement" has three basic elements. Firstly, an arrangement must provide a legal framework for co-operative and consultative engagement between coastal States and fishing States. Secondly, its establishment must conform either with the requirements of the LOSC and the Fish Stocks Agreement, and thirdly, the arrangement's primary purpose must be to promulgate conservation and management measures for straddling fish stocks or highly migratory fish stocks in a sub-region or region in which it applies. The practical implications of the distinction between "organisation" and "arrangement", however, would appear to be nominal as both would require some form of legal and administrative framework under which to operate. Any suggestion that "arrangement" is more flexible than an "organisation" is not apparent from the Agreement.

Article 8(2) defines when co-operative action is triggered. It provides that

> States shall enter into consultations in good faith and without delay, particularly where there is evidence that the straddling fish stocks and highly migratory fish stocks concerned may be under threat of over exploitation or where a new fishery is being developed for such stocks. To this end, consultations may be initiated at the request of any interested State with a view to establishing appropriate arrangements to ensure conservation and management of the stocks. Pending agreement on such arrangements, States shall observe the provisions of this Agreement and shall act in good faith and with due regard to the rights, interests and duties of other States.

The Fish Stocks Agreement calls on States to become members of or parties to the sub-regional or regional fisheries management organisation or arrangement, or agree to apply

---

46 Fish Stocks Agreement., Art. 1(a).

the measures of that organisation or arrangement. The terms of participation of such organisations or arrangements must not preclude other States from becoming members or participating. Furthermore, any such restrictions must not be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.[47] The Agreement, however, does not elaborate on what constitutes a "real interest" and it is likely that this will be a point of contention in the implementation of the Agreement.[48]

Where such an organisation or arrangement does not exist, States shall co-operate to establish such an organisation or arrangement.[49] Consultations to establish such arrangements may be initiated by any State. This implies that all States, that is, the relevant coastal States and States fishing on the high seas, should be allowed to participate in the formation of any new organisation or arrangements. The Fish Stocks Agreement does not merely encourage fishing States to join regional fisheries organisations or arrangements, it obliges them to do so. Coastal States on the other hand are obliged to permit fishing States to participate in the establishment of any new organisation or arrangement.

### Sub-regional and Regional Fisheries Management Organisations and Arrangements

The Fish Stocks Agreement provides specific guidelines on those areas which States must agree upon to establish sub-regional or regional fisheries management organisations or arrangements. States have a duty to agree on those stocks which require conservation and management, taking into account the biological characteristics of the stocks and the nature of the fisheries.[50] Moreover, they must also agree on the area of application, bearing in

---

47 Ibid., Art. 8(3).

48 Ibid., Art. 8(3). An attempt to define "real interest" has been made by Julie R. Mack, "International Fisheries Management: How the UN Conference on Straddling and Highly Migratory Fish Stocks Changes the Law of Fishing on the High Seas", *California Western International Law Journal* 26(2) (1996): pp. 313-333 at p. 326 who states "a State with real interest is one which is fishing for the particular straddling or migratory fish stock regulated by the organisation, or fishing generally in the region in question".

49 Fish Stocks Agreement, Art. 8(5).

50 Ibid., Art. 9(1)(a).

mind the characteristics of the sub-region or region including socio-economic, geographical and environmental factors.[51] Other factors which need to be taken into account include the relationship between the work of the new organisation or arrangement and the role of existing fishery management organisations or arrangements,[52] and the mechanisms by which the new organisation or arrangement will obtain scientific advice regarding the status of the stocks.[53]

Article 9(1)(b) distinguishes between straddling and highly migratory fish stocks when establishing sub-regional or regional management organisations or arrangements. The reference to article 7(1) in article 9(1)(b) suggests that States must establish arrangements for high seas areas as well as areas under national jurisdiction. While conservation and management measures have to include zones under national jurisdiction, nothing in the Agreement guarantees access to those zones.

### Functions of Sub-regional and Regional Fisheries Management Organisations and Arrangements

The functions and responsibilities of sub-regional and regional fisheries management arrangements are to ensure the long term sustainability of straddling fish stocks and highly migratory fish stocks[54] and the allocations of allowable catch and levels of fishing effort.[55] Article 10 is specific on the functions of a regional fisheries organisation or arrangement.[56]

---

51 Ibid., Art. 9(1)(b).

52 Ibid., Art. 9(1)(c).

53 Ibid., Art. 9(1)(d).

54 Ibid., Art. 10(a).

55 Ibid., Art. 10(b).

56 Ibid., Art. 10 states:

> In fulfilling their obligation to co-operate through subregional or regional fisheries management organisations or arrangements, States shall:
>
> (a) agree on and comply with conservation and management measures to ensure the long term sustainability of straddling fish stocks and highly migratory fish stocks;
>
> (b) agree, as appropriate, on any participatory rights such as allocations of allowable catch or levels of fishing effort;
>
> (c) adopt and apply any generally recommended international minimum standards for the responsible conduct of fishing operations;
>
> (d) obtain and evaluate scientific advice, review the status of the stocks and assess the impact of fishing on non-target and associated or dependent species;
>
> (e) agree on standards for collection, reporting, verification and exchange of data on fisheries for the stocks;

### New Participants in Regional Fisheries Management Organisations or Arrangements

Article 11 of the Fish Stocks Agreement deals with the issue of new members or participants to sub-regional or regional fisheries management organisations or arrangements. It provides the criteria for the nature and extent of new members' participatory rights. In deciding new members' participatory rights, States are to take account of the state of the straddling and highly migratory fish stocks, and also the level of fishing effort.[57] States must also consider the respective interests, fishing patterns and fishing practices of new and existing members and their potential contribution to the collection and provision of scientific information concerning the stock. The participating States are required to examine the needs of coastal fishing communities who are dependent on these stocks[58] and the interests of developing States from the sub-region or region, especially those in whose areas of national jurisdiction the stocks also occur.[59]

Article 17, on the other hand, creates reciprocal obligations for States which do not participate or co-operate in a sub-regional or regional fisheries management arrangement. Article 17(1) states:

---

(f) compile and disseminate accurate and complete statistical data, as described in Annex I, to ensure that the best scientific evidence is available, while maintaining confidentiality where appropriate;
(g) promote and conduct scientific assessments of the stocks and relevant research and disseminate the results thereof;
(h) establish appropriate co-operative mechanisms for effective monitoring, control, surveillance and enforcement;
(i) agree on means by which the fishing interests of new members of, or participants in, the organisation or arrangement will be accommodated;
(j) agree on decision making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner;
(k) promote the peaceful settlement of disputes in accordance with Part VIII;
(l) ensure the full co-operation of their relevant national agencies and industries in implementing the recommendations and decisions of the subregional or regional fisheries management organisation or arrangement; and
(m) give due publicity to the conservation and management measures established by the organisation or arrangement.

57 Ibid., Art. 11(a).

58 Ibid., Art. 11(d).

59 Ibid., Art. 11(e).

> A State which is not a member of a sub-regional or regional fisheries management organisation or is not a participant in a sub-regional or regional fisheries management arrangement, and which does not otherwise agree to apply the conservation and management measures established by such organisation or arrangement, is not discharged from the obligation to co-operate, in accordance with the Convention and this Agreement, in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks.

States who are members of regional organisations or participants in regional arrangements are obliged to request the co-operation of fishing entities, with a view to applying conservation and management measures *de facto* to fishing activities carried out by such entities.[60] Article 17(4) underlines the significance placed on effective sub-regional or regional conservation and management measures. Article 17(4), read in conjunction with Part III, implies that States are unlikely to gain access to managed fish stocks unless they co-operate within the framework for regional co-operation established by the Agreement.

### Sharing of Data and Scientific Information

Article 14(2) of the Fish Stocks Agreement imposes a requirement on coastal States and fishing States to exchange and share data. This may be done either directly or through sub-regional or regional fisheries organisations or arrangements.[61] They are also required to agree on the specification of the data and format in which they are to be provided.[62] Coastal States and fishing States are required to develop and share analytical techniques and stock assessment methodologies to improve measures for the conservation and management of straddling fish stocks and highly migratory fish stocks.[63]

---

60 Ibid., Art. 17(3). This is intended to accommodate the need to include Taiwan

61 Ibid., Art. 14(2). See Edward L. Miles, *Science, Politics & International Ocean Management: The Uses of Scientific Knowledge in International Negotiations,* (Berkeley: Institute of International Studies, University of California, 1987).

62 Fish Stocks Agreement, Art. 14(2)(a).

63 Ibid., Art. 14(2)(b).

**Compliance and Enforcement**

The Fish Stocks Agreement provides for an elaborate system of compliance and enforcement which significantly increase legal pressure on fishing vessels of the parties to conform to international fishery conservation and management rules. The Agreement elaborates on the principles of flag State responsibility and details the obligations of the flag State. Article 19 provides for compliance and enforcement by the flag State. The basic principle in article 19(1) is that a State is obliged to ensure that vessels flying its flag comply with sub-regional and regional conservation and management measures.

Pursuant to this basic obligation, States are to enforce conservation and management measures regardless of where the violations occur.[64] Where violations are alleged to have occurred, States are required immediately to investigate the violations including the carrying out a physical inspection of the vessels concerned. On completion of the investigation, a report has to be submitted to the State alleging the violations and the relevant sub-regional or regional organisation or arrangement.[65] The flag State is also obliged to ensure that its vessels give information to the investigating authority concerning vessel position, catches, fishing gear, fishing operations and other related activities in the area of an alleged violation.[66] If the flag State is satisfied that sufficient evidence is available, it may refer the case to its authorities for prosecution. The flag State may detain the vessel.[67] The flag State has a duty to ensure the vessel does not engage in fishing operations until such time as it has complied with all outstanding violation claims.

Article 20 requires States to co-operate internationally either though regional fisheries management organisations or arrangements to ensure compliance and enforcement of sub-regional or regional conservation and management measures. In this regard, article 21 calls on States to co-operate sub-regionally or regionally in enforcement. The general principle in article 21(1) is that a State party which is a member or participant

---

64 Ibid., Art. 19(1)(a).
65 Ibid., Art. 19(1)(b).
66 Ibid., Art. 19(1)(c).
67 Ibid., Art. 19(1)(d).

of a regional fisheries management organisation or arrangement may, through its authorised inspectors, board and inspect fishing vessels flying the flag of another State party, irrespective of whether or not that State party is a member or participant in the regional fisheries management organisation or arrangement.

The Fish Stocks Agreement introduces the concept of port State enforcement for the purpose of enforcing fisheries conservation and management measures. Under article 23, a port State has the right and duty to take measures to promote the effectiveness of sub-regional, regional and global conservation and management measures. The exercise of this right, however, is qualified, firstly, to the extent that its implementation must be in accordance with international law, and secondly, when taking such measures, the port State must not discriminate in form or in fact against the vessel of any State. The powers of the port State include inspecting documents, fishing gear and the catch on board fishing vessels.[68]

Under the LOSC, coastal States have the authority to enforce their fishery laws and regulations in their EEZ.[69] This mandate is reaffirmed in article 5 which stipulates that every State, including coastal States shall "implement and enforce conservation and management measures through effective monitoring, control and surveillance"[70] within the EEZ. One of the benefits of the Fish Stocks Agreement is that it reinforces coastal States authority by obliging each flag State to "prohibit vessels flying its flag from engaging in unauthorised fishing within areas under the national jurisdiction of other States."[71] It also broadens the power of coastal States against foreign fishing vessels on the high seas that have previously engaged in unauthorised fishing within the EEZ.[72] The Fish Stocks Agreement also incorporates elements of the Compliance Agreement which gives force to

---

68 Ibid., Art. 23(2).

69 LOSC, Art. 73.

70 Fish Stocks Agreement, Art. 5(1).

71 Ibid., Art. 18(3)(b)(iv).

72 Ibid., Art. 20(6), requires flag States to immediately investigate allegations by the coastal State that a vessel fishing on the high seas has fished illegally within its EEZ. The flag state is to co-operate with the coastal State in taking enforcement action, and may authorise authorities of the coastal State to board and inspect the vessel on the high seas. This provision is without prejudice to article 111 of the LOSC under which the coastal State can take enforcement action in 'hot pursuit' of such a vessel.

the concept of flag State responsibility. Under the FAO Compliance Agreement, flag States are to observe a range of more specific duties, the most important of which is to

> take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures.[73]

The Fish Stocks Agreement reflects this idea by providing that

> A State whose vessels fish on the high seas shall take such measures as may be necessary to ensure that vessels flying its flag comply with sub-regional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the effectiveness of such measures.[74]

The Fish Stocks Agreement provides an opportunity for coastal States and flag States to form a co-operative partnership to enhance monitoring, control and surveillance. Within the framework of the Agreement, coastal States may seek to obtain flag State responsibility in respect of:

- information collection, analysis and dissemination in respect of all high seas and EEZ fishing operations;
- the development and full implementation of regionally or sub-regionally agreed monitoring, observation, control and surveillance systems;
- the development, implementation, maintenance and sharing of registers or lists of vessels that satisfy agreed regional or sub-regional standards with respect to gear specifications;
- ensuring vessel and vessel operator compliance with regional or sub-regional management and conservation measures which must minimise the impacts of fishing activity on non-target species;
- develop and implement national programs to effectively monitor compliance by fishing vessels with regional or sub-regionally agreed terms and conditions for fishing. National programs must include systems for investigating alleged breaches of agreed arrangements; and

---

73 Compliance Agreement, Art. III(1)(a).

74 Fish Stocks Agreement, Art. 18(1).

- a commitment to contribute to an improved understanding of the status of fisheries resources, including non-target resources, and the environment through research.[75]

The other benefit of the Fish Stocks Agreement is the balance it provides between the principle of exclusive flag State jurisdiction over vessels on the high seas and the duty to co-operate in the conservation of the living resources of the high seas found in articles 117-119 of the LOSC. This balance is provided in articles 21 and 22 which provide an elaborate system of enforcement. However, the disadvantage is that not many coastal States have the resources or the desire regularly to board and inspect foreign fishing vessels on the high seas. In recognition of this difficulty, article 21(15) allows members of regional fishery arrangements to choose other mechanisms, such as observer requirements, instead of the boarding and inspection scheme.

The main drawback to the enforcement scheme under the Fish Stocks Agreement is that most developing countries, especially the smaller coastal States, do not have the resources to implement the enforcement provisions of the Agreement. The Agreement is therefore tilted in favour of fishing States. Nonetheless, viewed as a whole, the enforcement provisions of the agreement represent a significant step forward in making vessels play by the rules. Those provisions reaffirm and enhance coastal State responsibility for EEZ enforcement, elaborate further on the concepts of flag State responsibility and the duty to co-operate, and give non-flag States, in the context of regional agreements, a range of authority to board and inspect vessels of other parties to the Agreement."[76]

---

75 FFA, *The Management of High Seas Fisheries Resources and the Pacific*, Paper presented at the PECC Fisheries Task Force Workshop on Fisheries Development and Co-operation, Vancouver, Canada, 13-14 September 1993 (Honiara: Forum Fisheries Agency Report No. 93/53) p. 8.

76 Bolton, note 4 above at p. 141.

## III. ASSESSMENT OF THE FISH STOCKS AGREEMENT

It has been argued that the Fish Stocks Agreement's most important contribution is the linkage it makes between the LOSC, its own provisions and those of sub-regional and regional fisheries organisations.[77] It facilitates this through the role it attributes to conservation and management measures, and also through provisions on enforcement and dispute settlement.[78] However, the effectiveness of the Fish Stocks Agreement will depend on its implementation. In this regard, the extent to which States at the sub-regional and regional levels adopt conservation and management measures will be important. Also, of equal importance, is the extent to which States, other than flag States, are willing to enforce such measures.

However, there are some aspects of the Fish Stocks Agreement which raise questions in international law. Unlike the LOSC, the Fish Stocks Agreement defines the term "conservation and management measures" as connoting "measures to conserve or manage one or more species of living marine resources that are adopted and applied consistent with the relevant rules of international law as reflected in the Convention and in this Agreement."[79] This definition does not provide much guidance and needs further clarification. The Fish Stocks Agreement also uses the term "generally accepted standards for the conservation and management of living resources" in article 32(5), but it is not clear what these standards are.

The obligations in article 64(1) of the LOSC are somewhat modified by the Agreement. Under article 64(1), the duty to co-operate is imposed on coastal States and States whose nationals fish for such stocks in the region. The Fish Stocks Agreement, however, only speaks of States fishing on the high seas co-operating with coastal States. The question then arises whether States that operate largely in the EEZs of countries who have contiguous EEZs, such as the Pacific Island States, are covered by this provision.

---

77 Ibid.

78 Ibid.

79 Fish Stocks Agreement., Art. 1(b).

Another issue is the relationship between the LOSC, the Fish Stocks Agreement and the scope of coastal States' discretionary powers under articles 61 and 62. It is generally accepted that the basic framework for tuna management in the EEZ is the LOSC.[80] The Fish Stocks Agreement's objective is not to usurp the LOSC, but to "ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through the effective implementation of the relevant provisions of the LOSC."[81] The Fish Stocks Agreement states that it does not prejudice the rights, jurisdiction and duties of States under the LOSC.[82] In regards to which treaty will prevail in the event of an inconsistency, the Fish Stocks Agreement is explicit that it is to be interpreted and applied in the context of, and in a manner consistent with, the LOSC.[83] The obligation that States will agree on participatory rights such as the allocation of highly migratory fish stocks throughout their range appears to be inconsistent with the principle that, in the EEZ, coastal States have the right to determine participatory rights over fish stocks whether they be straddling or highly migratory fish stocks, unless it is forfeited by agreement to a supra-national body. The Fish Stocks Agreement, however, forfeits this right, and therefore the "without prejudice" clauses appear at least from a practical perspective, to be irrelevant.

A further issue is whether coastal States and other States can co-operate to establish more than one arrangement addressing (i) the different species of highly migratory stocks which are targeted by fishing vessels; (ii) the different gear types that target the stocks; and (iii) the geographic area(s) of such arrangements. Consideration of this issue may be of relevance in the context of the WCPO region because the tuna fishery consists of the

---

80 Agenda 21, Chapter 17.1; see Section III "Principles and practices for the rational management and optimum use of fish resources", para. 11. "The sovereign rights of coastal States with respect to the exploration, exploitation, conservation and management of the living resources in their exclusive economic zones are the basis for the rational management and optimum use of these resources", see FAO, *Report of the FAO World Conference on Fisheries Management and Development, Rome, 27 June - 6 July 1984*, (Rome: Food and Agriculture Organisation, 1984): p.17.

81 Fish Stocks Agreement, Art. 2.

82 Ibid, Art. 4.

83 Ibid.

surface fishery, which is targeted by purse seine vessels and pole-and-line vessels,[84] and the long-line fishery which targets deeper swimming tuna such as yellowfin and bigeye and albacore.[85] Different management considerations apply to each fishery, and therefore States will need to take this into account when implementing the Agreement.

The third issue relates to whether all coastal States are eligible or not to become members of a sub-regional or regional management arrangement, or only those in which the highly migratory fish stocks are caught in commercial quantities. Some attempt is made in article 8(3) of the Fish Stocks Agreement to answer this question. It provides that States having a "real interest" in the fisheries concerned may become members of such organisations or participants in such arrangements. However, it does not clarify what having a "real interest" means and therefore begs the question. The Fish Stocks Agreement does not state who is to determine whether a State has a real interest, neither does it prescribe what criteria to apply when making this determination. The Agreement does not state whether "real interest" is based on historical catch in the region, or number of vessels, or geographical proximity of the States concerned. Furthermore, no specific guidelines are provided which would assist States to resolve these issues. These are practical issues which will need to be answered. In the context of the WCPO region, the question has to be asked whether all the Pacific Island States should participate as one regional bloc. If they are to be represented in a regional management arrangement as a regional bloc, what weight should be given to the participatory rights of countries where there has historically been little fishing effort in their EEZs. Moreover, if they are represented as a single unit, should they be represented as the Forum Fisheries Agency or will they participate on an individual basis? Whatever outcomes are negotiated must take account the geographical situation of the region.

The Fish Stocks Agreement purports to regulate the activities of non-parties to the Agreement and to the relevant regional fisheries arrangements.[86] However, it is a

---

84 The surface fishery targets mainly skipjack tuna (*Katsuwonus pelamis*) for canning.

85 The longline fishery targets tuna for the more lucrative sashimi markets in Japan.

86 Fish Stocks Agreement, Art. 17(1) states:

fundamental principle of international law that a State cannot be bound by a treaty without its consent (*pacta tertiis nec nocent prosunt*).[87] In considering this issue Hey argues that:

> In the dominant perspective of international law, a conservation and management measure to which a State has consented, at most, may be regarded as an authoritative statement the relevance of which has to be determined depending on the circumstances of the case and the State in question. However, .... such a determination, ultimately, can only be made by a third party. In this respect the procedures for third party dispute settlement contained in the Fish Stocks Agreement, if used by States will be of great significance.[88]

However, Hey's opinion begs the question. It is based on the presupposition that the non-parties to regional fisheries arrangement are parties to the Fish Stocks Agreement. They could invoke the third party dispute settlement procedures only if they were parties to the Agreement. This moot point may have to be resolved judicially to have it clarified.

A question which may also arise in the implementation of the Agreement concerns the relationship between the Fish Stocks Agreement and the FAO Compliance Agreement. Once again, Hey argues that the Compliance Agreement would apply as the *lex generalis*, and the Fish Stocks Agreement, as the *lex specialis*.[89] Thus, "if of those States fishing for the same straddling or highly migratory stocks, only some become a party to the former Agreement while others become a party to the latter Agreement, then, under international law, two different treaty regimes would apply to those States fishing for the same stock, even if they are party to the relevant fisheries conservation and management organisation and arrangement."[90] This may not be a desirable situation because it could meant that

---

> A State which is not a member of a subregional or regional fisheries management organisation or is not a participant in a subregional or regional fisheries management arrangement, and which does not otherwise agree to apply the conservation and management measures established by such organisation or arrangement, is not discharged from the obligation to co-operate, in accordance with the Convention and this Agreement, in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks.

87 Art. 34, Vienna Convention on the Law of Treaties, 1969, *reprinted in* 8 I.L.M. (1969): p. 679.

88 E. Hey, "Global Fisheries Regulations in the First Half of the 1990s", *The International Journal of Coastal and Marine Law* 11(4) (1996): pp. 459-490 at p. 465.

89 Ibid.

90 Ibid.

States revert back to the problems which inspired the negotiation of these agreements in the first instance.

## IV. IMPLICATIONS OF THE FISH STOCKS AGREEMENT FOR THE PACIFIC ISLAND STATES

The conclusion of the Fish Stocks Agreement has presented additional challenges to regional co-operation on tuna management by the Pacific Island States. In previous years, the issue of how the tuna in the WCPO region should be managed has resulted in tensions between the Pacific Island States and the DWFNs. These tensions have been well documented.[91] While both parties recognise the need for some form of international co-operative arrangements to manage tuna (as required under Article 64 of the LOSC), they have not succeeded in agreeing on the constitution of an appropriate international management arrangement. Indeed, Article III(2) of the *South Pacific Forum Fisheries Agency Convention* recognises that "effective co-operation for the conservation and management of highly migratory species of the region will require the establishment of additional international machinery to provide for co-operation between all coastal States in the region and all States involved in the harvesting of such stocks."

Various attempts have been made by the Pacific Island States and the DWFNs to negotiate an international co-operative arrangement to manage the WCPO region's tuna resource. For example, in December 1991, negotiations between the Pacific Island States and the DWFNs for international arrangements for southern albacore tuna, collapsed because of disagreements over the scope of the proposed arrangements.[92] Whilst the Pacific Island States wanted an arrangement exclusively for southern albacore tuna restricted to the high seas, the DWFNs demanded that the arrangement cover all tuna

---

91 B.M. Tsamenyi, "The Jeanette Diana Dispute [Regina v. Jose Francisco Silva Finette and C & F Fishing Limited]", *Ocean Development and International Law* 16 (1986): pp. 353-367; B.M. Tsamenyi, "The Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States: The Final Chapter in United States Tuna Policy", *Brooklyn Journal of International Law* XXV (1989): 183-220; J. Van Dyke and S. Heftel, "Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency", *University of Hawaii Law Review* 3 (1981): pp. 1-66.

92 See FFA, "Record of Proceedings of the Fourth Consultations on Southern Albacore Tuna, Suva, Fiji, December 10-14, 1991", (Honiara: Forum Fisheries Agency, 1991).

species throughout their migratory range, effectively giving them a role in tuna management inside the EEZs of the Pacific Island States.

The Fish Stocks Agreement, potentially, removes the obstacles to co-operation by prescribing the mechanisms for international co-operation to manage tuna. This is a significant departure from the obfuscation surrounding the provisions of article 64(1) LOSC. While article 64(1) imposes obligations on both the coastal States and those DWFNs whose nationals fish for highly migratory fish stocks in regions for which no international organisation exists, to co-operate to establish such an organisation, it fell short of prescribing the mechanisms to attain this objective.

The question for the Pacific Island States is how the Fish Stocks Agreement will affect the present tuna conservation and management arrangements. Van Dyke has argued that the Fish Stocks Agreement favours coastal States by empowering them to initiate management regulations that apply beyond the 200 mile EEZ.[93] He further argues that, while precursors to this approach can be found in the LOSC, the text of the Fish Stocks Agreement transforms the legal regime by recognising the interests of coastal States in tuna beyond the EEZ.[94] In support, Van Dyke refers to precedents in the WCPO region for exerting jurisdiction beyond the 200 mile EEZ found in other treaties but they are not as extensive as the language in the Fish Stocks Agreement. Some examples in the WCPO region are the *South Pacific Nuclear Free Zone Treaty*[95] in which the contracting parties agree to confine their actions in the treaty zone area - which includes high seas areas beyond the 200 mile EEZs of the parties.

The Fish Stocks Agreement changes the way tuna has been managed and conserved. Unlike the LOSC, it stipulates the management and conservation principles and specifies the duty to co-operate between coastal and fishing States. However, many of the problems of conservation and management cannot be dealt with in isolation. The Agreement

---

93 J. Van Dyke, "Modifying the 1982 Law of the Sea Convention: New Initiatives on Governance of High Seas Fisheries Resources - The Straddling Stocks Negotiations", *International Journal of Marine and Coastal Law* 10(2) (1995): pp. 219-227 at p. 224.

94 Ibid., p. 225.

95 *South Pacific Nuclear Free Zone Treaty*, 6 August 1985, 24 I.L.M., (1985): p. 1440.

therefore calls for integration between measures that are taken for coastal and marine areas. Most States do not have enough information nor the research capacity to acquire that information. As a result, fish stocks become threatened before enough information becomes available. To avoid this situation arising, the Fish Stocks Agreement formalises the adoption of the precautionary approach. This requires States to take conservation and management measures regardless of the lack of scientific evidence. Further, the concept of flag State responsibility is given more support. However, a change in direction alone is not sufficient. States must give policy and legislative content to the conservation principles in the Fish Stocks Agreement. This will be the challenge for coastal and fishing States.

The implementation of the Fish Stocks Agreement in the WCPO region will be influenced by its interpretation by the Pacific Island States and the DWFNs. It is likely that the DWFNs will interpret the Agreement broadly. The DWFNs will argue that the Agreement requires the establishment of an international organisation in which all States, both coastal and fishing, are eligible for membership. Indeed, Van Dyke has stated that the question which remains now is whether DWFNs will have the right to join the South Pacific Forum Fisheries Agency, or, if not, whether a new fishery organisation will have to be established in the region.[96] Van Dyke argues that the Agreement calls for the establishment of an international organisation and that "it can no longer be suggested that a comprehensive fishery organisation for the Pacific is not necessary."[97]

In a subsequent article, Van Dyke argues that the Fish Stocks Agreement appears to require the Pacific Island States and DWFNs to form an organisation to manage shared fisheries.[98] He refers to article 8(3) which states:

> Where a sub-regional or regional fisheries management organisation or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to

---

96 J. Van Dyke, ibid., at p. .226.

97 Ibid.

98 J. Van Dyke, "United Nations: Straddling Stocks and Migratory Stocks Agreement and the Pacific", *The International Journal of Marine and Coastal Law* 11(3) (1996): pp. 406-415 at p. 408.

> co-operate by becoming members of such an organisation or participants in such arrangements, or by agreeing to apply the conservation and management measures established by such organisation or arrangement. States having a real interest in the fisheries concerned may become members of such an organisation or participants in such arrangement. The terms of participation of such organisation or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.

Van Dyke's argument is that this article compels coastal States to co-operate with the DWFNs either by allowing them to join an existing fishery management organisation, or by creating a new one in which all States are members.[99] He bases his argument on the term all States "having a real interest" and construes the article as mandating co-operation. However, the term " States having a real interest" is ambiguous and subject to conflicting interpretation. With respect, Van Dyke's views reflect the US position before 1992 on article 64 of the LOSC. He disregards the objective of the Fish Stocks Agreement which essentially is an agreement regulating the high seas fishery.

Article 3 of the Fish Stocks Agreement is unambiguous in that it applies only to the high seas, except articles 5, 6 and 7. Articles 5 and 6 specify the management and conservation principles which are to be applied by coastal States within the EEZ. Their implications for the Pacific Island States is that the conservation and management of tuna in the EEZs must be improved to meet the standards stipulated in articles 5 and 6.

Nandan[100] argued that the Fish Stocks Agreement requires Pacific Island States to "enhance co-operation amongst themselves by establishing common conservation and management policies and practices for the management of the resources of their respective exclusive economic zones."[101] Unlike other regions, the EEZs of the Pacific Island States are contiguous and cover a vast area of the WCPO region. To formulate conservation and

---

99 Ibid.

100 S. Nandan, (1995), "Report on the United Nations Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and its Implications for the South Pacific Region", (Honiara: Forum Fisheries Agency, 1995): p. 5.

101 Ibid., p. 1.

management standards for the entire region, the Pacific Island States must first develop standards for their EEZs.

To meet these new criteria, the Pacific Island States have to demonstrate that they have competent management and conservation arrangements in place which incorporate the precautionary principle. The Fish Stocks Agreement requires the development of a conservation regime for tuna. This raises the issue of the FFA's competence to conserve tuna. As shown earlier the FFA's functions are purely administrative and facilitative.[102] The FFA does not make any management or conservation decisions. These are left to the discretion of the Pacific Island States. In this regard, it is instructive to note the distinction Kent makes between "comprehensive management" and "positive management."[103] Kent argues that

> An agency with comprehensive authority would have responsibilities over a broad range of activities, with little or nothing excluded from its purview. However, this question of its scope is separate from the question of the degree to which it exercises power. The agency may be comprehensive but weak if the agency is only able to offer guidelines and recommendations with respect to a broad range of activities. The FAO's Committee on Fisheries, as an example, is very comprehensive in the scope of its responsibilities, but it has very little power to act. An agency with positive management power, in contrast, would be able to act decisively with respect to some issues, whether those issues are narrowly specified or cover a very broad range.[104]

The only mechanism at present which the Pacific Island States can invoke to reduce fishing effort is through bilateral access agreements and the Palau Arrangement.[105] Their weakness, however, is that they have not been ineffective in constraining growth in vessel numbers. To resolve this, it has been suggested that the FFA open its membership to all

---

102 See discussions on this in Chapter 4.

103 G. Kent, *The Politics of Pacific Islands Fisheries*, (Boulder/Colorado: Westview Press, 1980): p. 163.

104 Ibid.

105 G. Geen and A. Bergin, *Review of Tuna Management Arrangements in the Central Western Pacific*, Paper prepared for the Second Meeting of the FFC Sub-Committee on Future Management Arrangements in the South Pacific, October 16-20, 1995, (Honiara: Forum Fisheries Agency, 1995).

States.[106] However, it is unlikely to resolve the problem because the FFA's objectives are driven by the desire to maximise revenue for the Pacific Island States. Furthermore, the FFA Convention does not preclude other States from acceding to it.[107] The suggestion that the FFA should be open to all States is, therefore, an ineffective solution and potentially undermines the objectives of the Pacific Island States.

The FFA's present structure makes it an effective organisation in co-ordinating the Pacific Island States' policies and enhancing co-operation amongst themselves especially in their relations with DWFNs. Its effectiveness has been demonstrated in the role it played in co-ordinating the Pacific Island States' negotiations with the US to resolve the dispute over tuna fishing rights.[108] It also assumed an effective role in co-ordinating the rapid response of the Pacific Island States to the threat of large-scale driftnet fishing vessels in the late 1980s. Recently, its significance is underscored by its co-ordination of the Pacific Island States' input to the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. It is unclear, if the FFA can perform this function effectively in a broad based organisation.

The FFA was established to co-ordinate the Pacific Island States' fishery policies vis-à-vis DWFNs.[109] The FFA Secretariat would be placed in a precarious position if DWFNs were also members. On the one hand, it would have been obliged to help the Pacific Island States develop their fishery policies which largely depend on the licensing of foreign fishing vessels, while on the other hand, balancing the interests of the DWFNs. Depending on the decision-making procedures, it would have allowed the DWFNs to veto

---

106 J. Van Dyke, (1996), ibid., at p. 208. See Jon Van Dyke and Susan Heftel, "Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency", *University of Hawaii Law Review* 3 (1981): pp. 11-17. For a contrary view see, William Sutherland and Martin B. Tsamenyi, *Law and Politics in Regional Co-operations: A Case Study of Fisheries Co-operation in the South Pacific*, (Hobart: Pacific Law Press, 1992): Chp. 3, pp. 25-44.

107 South Pacific Forum Fisheries Agency Convention 1979, see Attachment I. Art. II states: Membership of the Agency shall be open to (a) members of the South Pacific Forum, (b) other States or territories in the region on the recommendation of the Committee with the approval of the Forum.

108 See Florian Gubon, "The Southwest Pacific Multilateral Fisheries Treaty: Some Possible Implications for Fisheries Development, Management and Conservation in the Pacific Islands Region", *Melanesian Law Journal* 22 (1994): pp. 1-22.

109 Kent, note 103 at p. 163.

management and conservation initiative, thus getting caught by the problems experienced by international fishery organisations.[110] Kent argued that a larger agency would have created economic and political imbalances within the membership, and polarised the organisation into two groups divided along geographical lines. According to Kent:

> Proposals for creating a supranational agency of this sort naturally arouse fear and mistrust. Weak nations may be afraid that it would be captured by the more powerful nations of the region and turned to serve their interests. Strong nations may be afraid that the agency would gain too much power and impose unwarranted constraints on their freedom of action.[111]

Although Kent is correct, his views disregard the practical problems the Pacific Island States would have faced in co-ordinating their policies to deal with the DWFNs if they belonged to the same organisation. Because of this, it is unlikely that the Pacific Island States will consent to the DWFNs acceding to the FFA Convention. The FFA's unique characteristics must be maintained. The Pacific Island States' strength in dealing with the DWFNs is their unity which is co-ordinated by the FFA. The FFA must maintain this role.

The Fish Stocks Agreement compels the Pacific Island States to review present tuna management arrangements and give practical effect to article III(2) of the FFA Convention. Article III(2) of the FFA Convention "recognises that effective co-operation for the conservation and optimum utilisation of the highly migratory species of the region will require the establishment of additional international machinery to provide for co-operation between all coastal States in the region and all States involved in the harvesting of such resources."

There are two phases to this process. The first phase is to ensure that there are competent management arrangements and measures in place which apply the precautionary principle within the Pacific Island States' EEZs. The second phase is to apply these arrangements and measures throughout the entire range of the tuna stocks including the

---

110 See R. Shomura and H. Jayewardene, *A Review and Analysis of International Tuna Management Bodies of the World*, (Rome: Food and Agriculture Organisation, 1992).

111 Kent, note 103 at p. 163.

high seas in collaboration with the DWFNs. These will have to be tested against the indicative competence criteria for fisheries management arrangements as specified in the Fish Stocks Agreement. The following indicative guidelines are taken from a comprehensive study undertaken by Gerry Geen and Anthony Bergin.[112] To be competent, the management arrangements would need to:

1. have clearly defined and identifiable management objectives;
2. apply precautionary operational targets and constraints, especially in the form of biological reference points for target species and constraints pertaining to the impact of fishing on by-catch species and the environment;
3. apply to all relevant gear types used in the fishery or, if specific to one or more gear types, link in a complementary manner with other management arrangements developed to control the use of gear types used for the same tuna species;
4. specify management procedures to be applied in the event that operational targets or constraints are approached or surpassed. Especially in the event that a stock is assessed as being over-fished, the identified management measures must be capable of significantly reducing the catch from the stocks and maintaining catches at the lower level to allow time for the stocks to rebuild;
5. establish a monitoring system for the collection of catch, effort and other relevant data from all participants in the fishery;
6. ensure an appropriate level of observer coverage of fishing activities to provide statistically sound biological and operational data for the fleet as a whole;
7. establish procedures for the setting of operational and strategic research priorities to support the precautionary management of the stocks and mechanisms to ensure that the appropriate research is carried out;
8. establish harmonised regional surveillance and enforcement approaches and co-ordinate the deployment of surveillance assets;
9. allow for membership or participation which is consistent with gaining effective management control of the fishery;
10. establish broad consultative mechanisms to allow the views of all stake holders to be taken into account in the decision making process to promote more informed decision making and better compliance with the resulting rules; and

---

112 Gerry Geen and Anthony Bergin, note 105 at p. 15.

> 11. anticipate that changes will occur in the economic, biological and political circumstances of the fishery and provide scope and flexibility to adjust accordingly.

The FFA and the various regional arrangements which have been developed under its auspices do not fare well against the indicative criteria listed above. They do not provide for a precautionary approach to fisheries management nor do they contain any explicit conservation objectives. The first priority of the Pacific Island States should, therefore, be to improve management and conservation measures within their respective EEZs to fulfil the indicative criteria as laid down in the Fish Stocks Agreement. The suggestion has been made that to fulfil the requirements of the Agreement, the FFA Convention should be amended so that the FFA takes on a more management oriented function.[113] Similarly, the role of the Forum Fisheries Committee should also be more management oriented. To ensure that decisions carry political weight, it is also suggested that a Committee comprising of Ministers be established. If decisions are to be adhered to, they must be enforced and be binding on the Pacific Island States. This will mean developing a mechanism so that decisions can be enforced. Existing regional arrangements such as the Nauru Agreement, the Palau Arrangements and the Federated States of Micronesia Arrangement for Regional Access must be integrated to achieve a cohesive region wide common standards.[114] However, these amendments must be carefully drafted so that they do not purport to extend the Pacific Island States' management responsibilities over the high seas. The FFA would continue to play its role as the policy co-ordinator of the Pacific Island States when they interact collectively with the DWFNs.

The need for the Pacific Island States to improve and strengthen the management and conservation measures in their EEZ is underscored by article 7(2)(a) of the Fish Stocks Agreement that contracting parties "take into account" the conservation measures established by the coastal State under article 61 of the LOSC for the exclusive economic

---

113 S. Nandan, note 100 above at p. 7.

114 Ibid., p. 7.

zone "and ensure that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such measures." Van Dyke argues that this clearly indicates that catch rates outside the EEZ cannot differ significantly from those within the EEZ.[115] More significantly, for the Pacific Island States, it implies that the driving force for the management of highly migratory species throughout its entire range are the measures taken for the stocks in the EEZ. The dominance accorded to measures taken in the EEZ is evident in the requirement that measures established for such stocks on the high seas do not undermine the effectiveness of those taken for the EEZ. It follows that if coastal States do not have such measures in place, they will be compelled to promote the measures which are applied for the stocks on the high seas. There is nothing wrong with this arrangement if perceived from a fisheries management perspective. However, politically it may be more acceptable for coastal States to drive the process and control the range of measures applicable in its EEZ.

The Pacific Island States must now give effect to article III(2) of the FFA Convention regarding the establishment of a broad-based organisation. The question is, how should they address this issue? Should the Pacific Island States establish a formal organisation or an informal arrangement? Whether the Pacific Island States will need to establish a formal organisation depends on the wording of the Fish Stocks Agreement. Article 7(1)(b) of the Agreement imposes a duty on States to co-operate with respect to highly migratory species. The objective of such co-operation is to ensure the conservation and promote the optimum utilisation of such stocks throughout their entire range both within and beyond the EEZ. This can be achieved either directly or through the appropriate mechanisms under Part III of the Agreement. Article 7(2) also obliges coastal States and high seas fishing States to co-operate for the purpose of achieving compatible conservation and management measures. The Agreement does not specify how States should co-operate.

If it is accepted that there is at present no competent regional fisheries management organisation or arrangement that can establish conservation and management for highly

---

115 J. Van Dyke, (1996), note 98 above at p. 407.

migratory species in the WCPO region, then the question arises whether there is a duty to establish one. The duty to establish a conservation and management organisation or arrangement is found in article 8(5) of the Straddling Agreement which states that

> Where is no sub-regional or regional fisheries management organisation or arrangement to establish conservation and management measures for a particular straddling fish stock or highly migratory fish stock, relevant coastal States and States fishing on the high seas for such stock in the sub-region or region shall co-operate to establish such an organisation or enter into other appropriate arrangements to ensure conservation and management of such stock and shall participate in the work of the organisation or arrangement.

Article 8(5) clearly indicates that there is no escaping the duty to co-operate. However, it is not obligatory that an international organisation be established. The Fish Stocks Agreement gives States considerable flexibility to enter into "other appropriate arrangements" which may best suit them. For the Pacific Island States, the issue of broader co-operative arrangements has been addressed in a Review of Institutional Arrangements for the Marine Sector in the South Pacific.[116] The Review suggests a progressive development of institutionalised co-operation with DWFNs. The first step is to institutionalise a multilateral conference between the Pacific Island States and the DWFNs. Two advisory committees should be established to assist the conference. The first is a scientific committee which would deal with data collection and scientific research and stock assessment. The second is to develop regional procedures for enforcement of conservation and management measures that may be agreed upon for the high seas.[117] The Review Committee saw this arrangement as "constituting an interim step towards meeting the requirements of the UN Law of the Sea Convention which envisages a more formal regional organisation."[118]

---

116 S. Tu'a Taumoepeau Tupou et. al., "Review of Regional Institutional Arrangements in the Marine Sector: Final Report", (Suva: Forum Secretariat, 1995).

117 Ibid., p. 22.

118 Ibid.

The intractable problem of decision making in such an arrangement could be dealt with by having a chambered system of decision-making.[119] Under the proposal, one chamber would consist of coastal States of the WCPO region including non-Pacific Island States and the other DWFNs. No decisions would be taken without the agreement of a majority of each chamber. This would ensure that DWFNs do not dominate the Pacific Island States when it comes to decision-making. Furthermore, this arrangement will avoid the defects of a consensus procedure under which one DWFN can frustrate a decision which may be in the interest of the region.[120] These proposals, however, will require careful review. The Pacific Island States will most likely adopt a conservative attitude towards the development of broader arrangements and they will want to seek greater compliance and flag State control from DWFNs before they engage them in formal broad-based arrangements.

The suggestion to require better compliance from the DWFNs as a precondition for discussions on broader co-operative management arrangements is not new. The Pacific Island States have argued that "a high degree of compliance by DWFN fleets with the fisheries laws of coastal States is a pre-requisite for the development of co-operative management arrangements between the two groups. A long history of poor compliance by DWFN fleets has seriously undermined their credibility as potential resource owners in the eyes of Pacific Island States."[121] This is evident from the Statement of the Delegate of the Federated States of Micronesia at the Multilateral High-Level Conference on South Pacific Tuna Fisheries.

> Some of the distant water fishing vessels have and continue to disregard minimum requirements necessary for the proper conservation and management of these valuable resources. On the other hand, the Pacific Island nations have recognised the need for uniform terms and conditions of access for the effective and optimum

---

119 S. Nandan, note 100 above at p. 10.

120 Ibid.

121 Gerry Geen and Andrew Wright, "Options for Tropical Tuna Management Considerations for the South Pacific", (Honiara: Forum Fisheries Agency Report No. 92/88, 1992): p. 8.

> utilisation of our resources. Accurate and complete scientific data is crucial to successful management and conservation efforts.[122]

Efforts to establish a broad-based arrangement in the South Pacific region will require creative diplomatic and political negotiations by all interested States. Underpinning these differences, however, is the common goal all States have in the conservation and sustainable utilisation of tuna in the region. The DWFNs and the Pacific Island States recognise that their differences must be carefully and tactfully negotiated. This is a view shared by the Japanese Delegation to the Multilateral High-Level Conference on South Pacific Tuna Fisheries. The Japanese Delegation

> share the common view that proper conservation and sustainable utilisation of tuna resource in central western Pacific are an ultimate goal. However, at the same time, we have to admit that distant water fishing nations and Pacific Island nations do not necessarily share the same views on how to secure the conservation and management of highly migratory fish stocks in the central western Pacific. The same applies to some other issues of principles on conservation and management of highly migratory fish stocks which are under discussions at the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. One should not of course expect these issues to be solved over night here. I believe that the most practical approach to resolve the various problems is to seek agreement in each specific area and try to expand such areas of agreements on a step by step basis rather than to stress different positions of both sides.[123]

The Fish Stocks Agreement has compelled the Pacific Island States to evaluate present management arrangements for tuna in the WCPO region. As a result of these new developments in international fisheries law, the Forum Fisheries Committee has, since the

---

122 FFA, "Record of Proceedings of the Multilateral High-Level Conference on South Pacific Tuna Fisheries, Honiara, Solomon Islands, 5-9 December, 1994", (Honiara: Forum Fisheries Agency Report No. 95/1, 1995): Attachment E.

123 Ibid., Attachment J.

beginning of 1995, established a Sub-Committee to develop an appropriate regional response to the Agreement.[124].

The process has also received support from the South Pacific Forum, the premier political decision-making body in the region. In its communiqué

> The Forum called on the Forum Fisheries Committee to continue with urgency its development and comprehensive arrangements for the sustainable development of the region's fisheries and endorsed the Marshall Islands' initiative to hold a meeting to advance this process.[125]

---

124 The terms of reference of the FFC Sub-Committee on Future Management Arrangements were agreed to at the Twenty-fifth meeting of the Forum Fisheries Committee Meeting, Honiara, Solomon Islands, 1-9 December, 1994. The terms of reference are:

> **Considering** the potential implications of recent international developments relating to the Law of the Sea, including the likely outcomes of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks,
>
> **Noting** the findings of the a study commissioned by the Secretariat on a strategic framework for the effective conservation and management of the tuna resources of FFA member countries,
>
> **The Committee agrees** to establish a sub-committee to develop strategies for the more effective conservation and management of the region's tuna resources, with a view to maximising the benefits to FFA member countries from the harvest of those resources while ensuring sustainable management.
>
> 1. The specific terms of reference of the sub-committee shall be to:
>
> (a) review the adequacy of existing tuna management arrangements in the South Pacific region in terms of their effectiveness in conserving the resource and maximising the economic benefits to FFA countries;
>
> (b) assess the impact of recent international developments relating to Law of the Sea and conservation and management of highly migratory fish stocks for tuna resource management in the South Pacific region, including the outcomes of the United Nations Conference on Environment and Development held in Rio de Janeiro in July 1992, the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, and the FAO Code of Conduct for Responsible Fishing;
>
> (c) identify possible alternative institutional approaches to tuna resource management in the South Pacific region;
>
> (d) assess the relative costs and benefits to FFA member countries and distant water fishing nations of alternative approaches to tuna resource management in the South Pacific region;
>
> (e) recommend strategies to strengthen and rationalise institutional and management arrangements; and
>
> (f) where appropriate, recommend, alternative structures for tuna management in the region, including in particular consideration of the establishment of a regional body to develop policy with respect to tuna management including the possible establishment of a ministerial level body for policy guidance.

125 "Communiqué of the 27th South Pacific Forum, September 4-6, 1996, Majuro, Marshall Islands", reproduced in *Pacific Islands Monthly*, October (1996): pp. 17-19.

Furthermore, the South Pacific Forum endorsed a second High Level Multilateral Consultation on the Conservation of Fisheries Resources of the Central and Western Pacific in early 1997.[126]

The likely shape of the co-operative framework between the Pacific Island States and DWFNs will be dictated by the biological characteristics of specific species of tuna and the nature of the fishery for those species. For instance, it is estimated that only 20 percent of the albacore tuna is caught in the EEZs of the Pacific Island States.[127] The degree to which the Pacific Island States can exert management competence over the albacore tuna and influence any likely outcomes is therefore limited. Consequently, in the case of albacore tuna, there is a strong argument for tfishing States with a real interest to participate in a common fisheries management regime for albacore tuna on the high seas. The incentive for the Pacific Island States to participate in such an arrangement depends on the extent to which their economic interests can be eroded by fishing activities that take place outside the EEZ.

The arguments with respect to the other species of tuna, with the possible exception of bigeye, are not as compelling as those for albacore. Approximately 80 percent of the skipjack and yellowfin catch is taken within the EEZs of coastal States in the WCPO region.[128] An estimated 30 percent of this catch is taken in the Philippines and Indonesia's EEZs. This underlies the significance of non-FFA coastal States in the region.[129] This, however, does not diminish the responsibility of these coastal States and the Pacific Island States to manage the tuna stocks in their EEZ responsibly. The possibility of tuna being over-exploited on the high seas and in the EEZs of the non-FFA coastal States as well as the Pacific Island States should be the main incentive for enhanced co-operation. This presupposition underpins the concerns of the United States delegation to the High-Level Conference on South Pacific Tuna Fisheries.

---

126 Ibid.

127 See Generally, SPC, *Tuna Fishery Yearbook 1995*, (Noumea: Oceanic Fisheries Programme, South Pacific Commission, 1995).

128 Ibid.

129 Ibid.

> We know that most of the fisheries which occur in this region take place inside the zones of the Pacific Island States. We respect the right of these States to manage and utilise the fish in their zones. There are, as well, high seas areas in the South Pacific region. Further, some tuna stocks do migrate very widely, beyond the South Pacific region, some to the North and others to the East Pacific Region. Although, we do not play this role in the Forum Fisheries Agency, we are a coastal State of the Central and Western Pacific. We have a State, territories and commonwealth, where we have responsibility for the fish stocks in our 200 nautical mile zones around those areas. Thus, for us the picture is complex. And we know that ultimately the only way to conserve a highly migratory resource is through co-operation among all involved.[130]

The involvement of the Pacific Island States in any proposed international co-operative arrangement will depend on their ability to commit resources to the arrangement. Theoretically, there are numerous models on which an international co-operative fisheries management arrangement can be based. However, in reality, there are complex political, legal and economic issues which have to be thrashed out before a suitable model can be agreed upon. From a practical point of view, the Pacific Island States and DWFNs will need to establish a co-operative framework to ensure compatibility of management and conservation measures in the EEZ and the high seas. Furthermore, to satisfy the obligation to manage highly migratory species throughout their entire range, the framework should allow for the determination of the total allowable catch by both the Pacific Island States and DWFNs. This process will also involve deciding what portion of the total allowable catch (TAC) is to be allocated between the Pacific Island States and DWFNs.

The question Pacific Island States will need to ask themselves is whether they should postpone the adoption of conservation and management measures for tuna until after a TAC or other control measures are determined. In other words, should they wait until the framework for international co-operation to determine the TAC is in place before they promulgate responsible conservation and management measures? This question must be answered negatively. The reason is that the Pacific Island States have a duty under the

---

130 FFA, (1995), note 122 above at Attachment R.

LOSC and Fish Stocks Agreement to manage and conserve tuna in a responsible manner. Therefore, they should not wait for a final agreement to be concluded with the DWFNs on a TAC or other measures before adopting management and conservation measures.

In spite of the apparent urgency of the matter, the Pacific Island States are likely to take a cautious approach to reforming the *status quo*. Their experiences with DWFNs, in particular Japan's failure to negotiate a multilateral head agreement which would have contained mechanisms for co-operation on conservation and management, will make them wary.

The tuna fisheries of the Pacific Islands region are at the crossroads between the prospects of over-exploitation and sustainable development. The new international fisheries law demands that coastal States be more responsible. It goes further than this by actually defining the principles of management and conservation which must be applied. Furthermore, it removes the confusion surrounding the interpretation of co-operation under article 64(1) of the LOSC by stipulating the requirements for co-operation.

Because the new international fisheries law clarifies these contentious issues under the LOSC, the Pacific Island States will be under pressure to negotiate a multilateral fisheries management arrangement. Despite these pressures, the Pacific Island States must take an objective view of the process. For instance, they must ascertain whether international management of tuna is the only way to manage tuna. They must closely study the operation of existing international tuna management organisations and carefully examine their strengths and weaknesses. Finally, they should ask themselves whether it is worth rewarding DWFNs like Japan for their intransigence in negotiating a multilateral approach to fisheries access in the region, by engaging in a process in which they will also make decisions regarding how much tuna can be taken in the EEZs of the Pacific Island States. By the same token, should they reward Taiwan and South Korea for under-

reporting their catch and their generally poor record of compliance with Pacific Island States' fisheries laws?[131]

At the national level, the Pacific Island States must improve management and conservation of tuna by having specific conservation and management objectives. They will need to transform present fisheries policies and practices from unlimited access (open access) to controlled and limited access. In terms of their international obligations, they will need to determine the allowable catch and enact measures that will ensure the resources are not endangered by over-exploitation. They must also adopt a precautionary approach to the management of the resource. These measures must be reflected in their (i) fisheries policies and practices; (ii) domestic legislation which provides the basis for fisheries management and conservation in the EEZ; and (iii) bilateral access agreements (limits must be placed on catch so that the MSY is not exceeded).

At the sub-regional and regional level, the Pacific Island States will need to enhance their co-operation and strengthen the co-ordination of their fisheries policies, fisheries legislation, and the management and conservation measures. They must work together and have similar conservation and management objectives. Measures which are applied by one Pacific Island State must also be applied by other Pacific Island States to be consistent throughout the WCPO region. The objectives of the various regional arrangements must reflect the need to avoid overexploitation of the tuna and provide sound basis for conservation and management.

The Pacific Island States will also need to enhance co-operation and co-ordination of tuna management arrangements with non-FFA coastal States, namely Indonesia and the Philippines and the non-self governing territories, . In this context, Pacific Island States would need to address the following questions: should they become members of the FFA or should they form an informal caucus with the Pacific Island States for the purpose of interacting with DWFNs? What would be the implications for existing legal agreements?

---

131 J.G.H Maxwell and A.D. Owen, South Pacific Tuna Fisheries Study, (Canberra: Australian Agency for International Development, 1994).

At the international level, there is the task of determining the appropriate framework for co-operation between the Pacific Island States, non-FFA coastal States and DWFNs. In developing a co-operative framework, issues that will need to be considered must include whether there be a legally binding agreement or an informal arrangement; how will decisions on compatibility be made and enforced; how will the TACs be apportioned; should there be a single total allowable catch for each species throughout its entire range; what are the criteria to be applied; how will existing scientific bodies be utilised; will new bodies be formed to provide scientific input; and who should be the parties to such an arrangement?

The Pacific Island States should develop broader co-operation incrementally depending on their control over the fisheries. It has been suggested that it would be feasible to have three levels of co-operation.[132] The first level of co-operation would be through the establishment of a consultative mechanism through which the views of DWFNs can be tailored into the FFA decision-making process. The second level of co-operation would entail negotiations with DWFNs and other coastal States with respect to management arrangements on the high seas or in the waters of other coastal States which are complementary to those applied by the Pacific Island States. The third, and highest level of co-operation, would involve the establishment of a broad-based decision-making body as contemplated under article 64 of the LOSC.[133] The final outcome, however, will depend on the level of trust between all sides.

## V. CONCLUSION

The developments in the LOSC over the past decade have provided the Pacific Island States with an opportunity to improve the way tuna is managed. The LOSC gave coastal States the leading role to manage and conserve tuna in the EEZs. However, the LOSC did not provide enough guidelines on how this could be achieved. As a result, management by coastal State jurisdiction did not fulfil the expectations of the international community. On

---

132 Gerry Geen and Anthony Bergin, note 105 above at p. 4.

133 Ibid.

the high seas, uncontrolled fishing by States led to the collapse of certain fish stocks. In some cases, the drive for efficiency resulted in the use of particular gear types that threatened not only the fish stocks but posed an environmental threat as well. The LOSC enjoined States to co-operate in the management of migratory stocks, and also co-operate to conserve the stocks on the high seas. But it did not specify how States are to co-operate. This gave rise to disputes and in some instances open conflict between States.[134]

The experience throughout the world is that unregulated fishing and open access can ultimately lead to the depletion of the resource. This poses an enormous challenge for the Pacific Island States. Many of them are not just coastal States, but mid-ocean States because they are virtually surrounded by large areas of sea.

The Pacific Island States will have to come to terms with the fact that their property rights over tuna are limited to its exploitation, exploration, conservation and management. These property rights are characterised as sovereign rights which are legally distinguishable from sovereignty. The basic obligation arising from these rights is that coastal States must manage tuna responsibly. This, in effect, means that coastal States should ensure that the resource does not become over-exploited. The present co-operative arrangements in the WCPO region do not directly respond to this obligation. Neither do they respond to the obligation to co-operate with DWFNs. The implementation of the Fish Stocks Agreement poses another challenge to regional co-operation in the WCPO region. As required by the Fish Stocks Agreement, coastal States and DWFNs must co-operate to manage and conserve the tuna stocks throughout their entire range. This can be achieved by ensuring that measures adopted for the EEZ and those adopted for the high seas are compatible.

From the perspective of the Pacific Island States any outcomes from the Fish Stocks Agreement should be one that preserves the property rights of coastal States over tuna in

---

134 On 28 March, 1995, Spain filed in the International Court of Justice an application commencing proceedings against Canada with respect to a dispute pertaining to the Canadian Coastal Fisheries Protection Act, as amended on 12 May, 1994, and the implementing regulations of that Act. The application was also in respect to certain measures taken by Canada on the basis of that legislation, especially the boarding on the high seas, on 9 March, 1995, of a fishing boat, the Estai, sailing under the Spanish flag. See United Nations, *Report of the Secretary-General on the Law of the Sea to the Fiftieth UNGA*, (New York: United Nations Doc. A/50/713, 1 November, 1995): para. 129.

the EEZs However, the successful implementation of the Fish Stocks Agreement and the principles inherent in the new international fisheries law will mark the coming of age of regional co-operation in tuna management in the South Pacific.

# 11

# CONCLUSION

In analysing the response of the Pacific Island States to the fisheries provisions of the LOSC, Chapter 1 discussed the constraints that have influenced their response. It was seen that they adopted a regional and national strategy to the fisheries provisions of the LOSC which was largely dictated by the geo-political circumstances of the WCPO region. The thesis showed in Chapter 1 that the Pacific Island States' regional response to the fisheries provisions of the LOSC was dictated by the large area of the EEZs which came under their control. This created problems for surveillance and enforcement because, individually, they did not have the financial and physical resources to undertake surveillance activities. The main species of commercial importance, tuna, is highly migratory and therefore biologically, it is not possible to manage it without co-operation between States. These factors provided the impetus for adopting a regional approach.

The thesis also examined post LOSC developments in particular, the Fish Stocks Agreement, and analysed its implications for the future management arrangements for tuna in the WCPO region. The Fish Stocks Agreement purports to clarify the obfuscation surrounding the duty to co-operate in the LOSC, and requires States parties to apply responsible fishery management policies including the precautionary approach.

The establishment of the FFA which is the centrepiece of the Pacific Island States' regional response helped to foster the development of a number of subregional and regional legal arrangements to conserve and manage tuna. The thesis argued that the FFA's major

strength was the role that it plays in co-ordinating and facilitating co-operation amongst the Pacific Island States. The FFA itself, however, does not have any direct role in the management and conservation of tuna. The FFA's weakness is its limited membership, although as argued in the thesis, this is not necessarily an impediment to the discharge of its functions.

The thesis discussed various subregional and legal arrangements which have been spawned through the auspices of the FFA. In testing these arrangements against the fisheries provisions of the LOSC, they were found to be generally consistent with the LOSC. However, it was argued that most of the legal arrangements merely address the need to regulate the orderly conduct of foreign fishing vessels. The arrangements do not specifically implement the conservation obligations to prevent the over-exploitation of the tuna resource. The only legal arrangement in place that has the potential to limit vessel numbers is the Palau Arrangement. However, as argued in the thesis, certain provisions of the Palau Arrangement would need to be amended to achieve consistency with the LOSC.

The thesis has raised the need for the Pacific Island States to integrate all the legal arrangements developed to establish a single cohesive tuna management and conservation arrangement. In the context of the Fish Stocks Agreement and future tuna management arrangements for the WCPO region, the thesis argued that the Pacific Island States will need to move to the second phase of regional co-operation. This will involve consolidating present legal arrangements by giving the FFA more competence to manage and conserve the tuna resource in the EEZ of the Pacific Island States. More significantly, the Pacific Island States must institutionalise co-operative arrangements with DWFNs to discharge the obligations in the LOSC and the Fish Stocks Agreement to manage the tuna resource throughout its entire range.

The conclusion that can be drawn from the analysis of the response of the Pacific Island States to the fisheries provisions of the LOSC is that while in general they are consistent with the LOSC, they do not go far enough to discharge all the obligations of the LOSC. For instance, the discussions showed that bilateral access agreements do not

contain the generalised list of terms and conditions of access in article 62(4) of the LOSC. Moreover, all the regional legal agreements do not have provisions that would prevent the over-exploitation of tuna. The next phase in regional co-operation in the WCPO region is to ensure that arrangements provide for precautionary approach to management.

Most of the world's fisheries resources have been over-exploited or fully exploited.[1] The Pacific Island States have an opportunity to avoid the mistakes that have been made in other fisheries in the world. The collapse of the tuna fisheries in the WCPO region would be detrimental to the economies of the Pacific Island States. In order to avoid the collapse of tuna, precautionary measures must be enacted as a matter of urgency. The tide of international fisheries law is changing. The international community's interests in tuna is its long term sustainability. For too long the Pacific Island States have viewed the tuna resource as an "economic resource." Thus, the legal arrangements put in place in response to the fisheries provisions of the LOSC, have largely been influenced by economic motives rather than the need to conserve and manage tuna sustainably. It is possible for the Pacific Island States to achieve their economic objectives within a conservation and management framework for the exploitation of tuna. The Fish Stocks Agreement provides good criteria against which precautionary management of tuna can be achieved. Moreover, the FAO Code of Conduct provide general guidelines to fill in the gaps in the tuna management and conservation arrangement in the WCPO region.

The challenge for the Pacific Island States is to respond to these new imperatives. To do this, the Pacific Island States must develop an integrated oceans policy within a conservation framework to manage and conserve tuna in the WCPO region.

The Pacific Island States and DWFNs must establish a mechanism for the conservation and management of tuna in the WCPO region which is consistent with the LOSC and the Fish Stocks Agreement. Furthermore, they must co-operate effectively to conserve and manage tuna in the WCPO region throughout their entire range in order to

---

1 FAO, *The State of World Fisheries and Aquaculture*, (Rome: Food and Agriculture Organisation Fisheries Department, 1995).

ensure the long-term sustainability of the tuna stocks. The conservation and management of tuna must be done in accordance with the principles contained in the LOSC and Fish Stocks Agreement, including the application of the precautionary approach.

The Pacific Island States and DWFNs must ensure that the fishing activities in the WCPO region are conducted in a manner that is consistent with the respective rights, obligations and responsibilities of coastal States and high seas fishing States that are found in the LOSC and Fish Stocks Agreement. In addition, the conservation and management measures for tuna in the EEZs and high seas must be compatible. The provisions of catch data is fundamental to the conservation and management of tuna. Thus, the Pacific Island States and DWFNs must be committed to collect and share, complete and accurate data regarding fisheries activities in accordance with Annex I of the Fish Stocks Agreement.

Finally, both parties must be committed to co-operate in monitoring, control and surveillance of fishing activities.

The Pacific Island States have committed themselves to develop comprehensive regional fisheries management arrangements consistent with the Fish Stocks Agreement which should be based on the precautionary approach to ensure the sustainable exploitation of WCPO region's tuna resources.

# BIBLIOGRAPHY

Adede O., "Towards the Formulation of the Rule of Delimitation of Sea Boundaries between States with Adjacent or Opposite Coasts", *Virginia Journal of International Law* 19(2) (1979): pp. 207-255.

Aldous D., "Report to the Regional Surveillance Officers Workshop on the Status of the FFA Surveillance Program", (Honiara: Forum Fisheries Agency Report No. 86/51, 1986).

_____, "The Use of Automatic Transmitters in Fisheries Surveillance in the South Pacific", (Honiara: Forum Fisheries Agency Report No. 86/52, 1986).

_____, "Report to the Regional Surveillance Officers Meeting on the status of the FFA Surveillance Program", (Honiara: Forum Fisheries Agency Report No. 87/38, 1987).

Alexander L.M., *Marine Regionalism in Southeast Asian Seas*, (Honolulu: East-West Environment and Policy Institute Research Report No. 11, 1982).

_____, "The Co-operative Approach to Ocean Affairs: Twenty Years Later", *Ocean Development and International Law* 21 (1990): pp. 105-109.

Allen H.G., "Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices", *Ocean Development and International Law* 20 (1989): pp. 309-341.

Allinson L., "Forum Fisheries Agency: An Overview of Zone Data Report 1", (Honiara: Forum Fisheries Agency Report No. 85/3, 1985).

____, *Telecommunications Problems of National and Regional Fisheries Administrations in the South Pacific,* Paper presented at the Ninth Annual Pacific Telecommunications Council, Pacific Telecommunications Council, Honolulu, January, 1987.

_____, "Telecommunication Components of the FFA Regional Fisheries Management Information Service", (Honiara: Forum Fisheries Agency Report No. 88/34, 1988).

_____, and Brown C., "The Regional Fisheries Surveillance Program", (Honiara: Forum Fisheries Agency Report No. 89/112, 1989).

_____ and Brown C., *Developments in Data Management Technologies in Member Fisheries,* Ocean Resources Management Program In-Service Course, Forum Fisheries Agency-Canadian International Development Agency (CIDA), Cook Islands, 1989.

_____, and Brown C, "Alternative Technologies in a Surveillance Network", (Honiara: Forum Fisheries Agency Report No. 89/113, 1989).

_____, *Developments in Computers and Communications,* Paper presented at the Conference on Management and Development Strategies in the South Pacific, Forum Fisheries Agency, Honiara, Solomon Islands, 18-25 September, 1989.

_____, "The Regional Fisheries Surveillance Program", (Honiara: Forum Fisheries Agency Report No. 89/112, 1989).

_____, *Communications, Sources and Networking,* Paper presented at the Seminar on Securing the National Interest, Forum Secretariat/Strategic and Defence Studies Centre, Suva, Fiji, October 1990.

_____, "A Review of Communications Options", (Honiara: Forum Fisheries Agency Report No. 91/1, 1991).

Amoa F. and Lodge M, "The Implementation of the Minimum Terms and Conditions of Access through Legislation by Parties to the Nauru Agreement", (Honiara: Forum Fisheries Agency Report No. 93/50, 1993).

Amador Garcia F.V., *The Exploitation of the Living Resources of the Sea*, (The Hague: W.A. Sijthoff, 1963).

Anand P.R., *Origin and Development of the Law of the Sea: History of International Law Revisited*, (Dordrecht: Martinus Nijhoff Publishers, 1983).

Anderson H.D., "The Straddling Stock Agreement of 1995: An Initial Assessment", *International and Comparative Law Quarterly* 45 (1996): pp. 463-475.

Anderson Lee G., *The Economics of Fisheries Management*, (Baltimore: The John Hopkins University Press, 1977).

Applebaum G., "The Straddling Stock Problem: The Northwest Atlantic Situation: International Law and Options for Coastal State Action", A.H. Soons (ed.), *Implementation of the Law of the Sea Convention through International Institutions*, (Honolulu, Law of the Sea Institute, 1990): pp. 282-317.

_____, "The UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: The Current Canadian Perspective", Myron H. Nordquist and J.N. Moore (eds.), *1994 Rhodes Papers: Entry into Force of the Law of the Sea Convention*, , (Dordrecht: Martinus Nijhoff Publishers, 1995): pp. 299-303.

Aqorau T and Lili P., "The Nauru Agreement - The First Decade, 1982-1992: A Review of the Aims and Achievements of the Parties to the Nauru Agreement Concerning Co-operation in the Management of Fisheries of Common Interest", (Honiara: Forum Fisheries Agency Report No. 93/11, 1993)

_____, and Bergin A., "The Federated States of Micronesia Arrangement for Regional Fisheries Access", *The International Journal of Marine and Coastal Law* 12(1) (1997) : pp. 37-80.

_____, and Bergin A., "Ocean Governance in the Western Pacific Purse Seine Fishery - the Palau Arrangement", *Marine Policy* 21(2) (1997): pp. 174-188.

Armstrong A, *Preliminary Evaluation of the Effectiveness of P3 Orion Fisheries Surveillance Patrols,* Surveillance Officials Meeting, Forum Fisheries Agency, Cook Islands, 18-21 October, 1988.

_____, *HF Data Transfer: A Regional Surveillance Initiative,* 15th South Pacific Regional Telecommunications Committee, Wellington, New Zealand, 12 November, 1988.

_____, "Pacific Regional Civil Air Surveillance", (Honiara: Forum Fisheries Agency Report No. 88/65, 1988).

ADAB, *The Tongan Economy: Setting the Stage for Accelerated Growth*, (Canberra: Australian Development Assistance Bureau, 1991).

AusAid, *Tuvalu; Economic Situation and Development Prospects*, (Canberra: International Development Issues No. 29, 1993).

_____, *Australia and Solomon Islands Development Co-operation: Country Strategy Paper*, (Canberra: AusAid, 1994).

_____, *Papua New Guinea: The Role of Government in Economic Development*, (Canberra: International Development Issues No. 33, 1994).

_____, *Australia and Tonga Development Co-operation: Country Strategy Paper*, (Canberra: AusAid, 1994).

_____, *Australia and Vanuatu Development Co-operation: Country Strategy Paper*, (Canberra: AusAid, 1994).

_____, *Australia and Tuvalu Development Co-operation: Country Strategy Paper*, (Canberra: AusAid, 1994).

_____, *Australia and Kiribati Development Co-operation: Country Strategy Paper*, (Canberra: AusAid, 1994)

_____, *A Study of the Economic and Social Costs of Under Pricing of Resource Rent and Under Reporting of Tuna Catches in the South Pacific*, (Canberra: Report prepared by Marine Science and Resource Investigations Pty Ltd for AusAid, 1994)

_____, *The Western Samoan Economy: Paving the Way for Sustainable Growth and Stability*, (Canberra: International Development Issues No. 35, 1994)

_____, *The Solomon Islands Economy: Achieving Sustainable Economic Development*, (Canberra: International Development Issues No. 37, 1994)

Attard D.J., The *Exclusive Economic Zone in International Law*, (Oxford: Clarendon Press, 1987)

Baines K.B.G., "'Traditional Resource Management in the Melanesian South Pacific: A Development Dilemma", in Berkes F.(ed), *Common Property Resources: Ecology and Community-based Sustainable Development*, (London: Belhaven Press, 1988)

Bardach J.E. and Ridings P.J, "Pacific Tuna: Biology, Economics and Politics", *Ocean Yearbook*, Elizabeth Mann Borgese et.al. (eds.), (Chicago and London: The University of Chicago Press, 1985): pp. 29-57.

_____, "Sustainable Development of Fisheries", in *Ocean Yearbook 9*. Elizabeth Mann Borgese et al (eds), (Chicago and London: The University of Chicago Press, Chicago and London, 1993): pp. 57-72.

Beazley B.P., "Maritime Boundaries: A Geographical and Technical Perspective", E.D. Brown and R.R. Churchill (eds), *The UN Convention on the Law of the Sea: Impact and Implementation*, (Honolulu: Law of the Sea Institute 19th Annual Conference, 1986): pp. 319-337

Beddington J.R and Rettig R.B., *Approaches to the Regulation of Fishing Effort*, (Rome: FAO Fisheries Technical Paper 243, 1983)

Bell A.L. and Moses J.A., "Republic of Vanuatu Fisheries Profiles", (Honiara: Forum Fisheries Agency Report 93/49, 1993)

Bergin A., "Political and Legal Control over Marine Living Resources - Recent Developments in South Pacific Distant Water Fishing", *The International Journal of Marine and Coastal Law* 9(3) (1994): pp. 289-309.

_____. and Michaelis B.F., "Australia and the South Pacific: Implementing the UNCED Oceans Agenda", *Marine Policy* 20(1) (1996): 47-62.

Bilney G., *The Philosophy and Process of Australia's Development Co-operation Program with the South Pacific*, (Sydney: UNSW Centre for Pacific Studies Pacific Studies Monograph No. 14, 1994)

_____, *Australia's Overseas Aid Program 1995-96*, (Canberra: 1995/96 Budget Related Paper No. 2, AGPS, 1995

Binney R. and Brown C., "Solomon Islands Surveillance Profile 1992", (Honiara: Forum Fisheries Agency Report No. 92/72, 1992)

_____, "Vanuatu Surveillance Profile 1992", (Honiara: Forum Fisheries Agency Report No. 92/71, 1992)

Birnie W.P., "Aspects of International Law Concerning the Reflagging of Fishing Vessels", Informal Ad Hoc Meeting of Experts, Rome, 1-5 February, 1993.

_____, "Reflagging of Fishing Vessels on the High Seas", 2 *RECIEL* 2 (1993): pp. 270-276.

_____., "The Law of the Sea and the United Nations Conference on Environment and Development", in *Ocean Yearbook 10*, Elizabeth Mann Borgese et al (eds), (Chicago and London: The University of Chicago Press, 1992): pp. 13-39.

_____, and Boyle A., *Basic Documents on International Law and the Environment*, (Oxford: Clarendon Press, 1995)

Blanchet G., *Research and Development of Small-Scale Fisheries in the South Pacific*, (Canberra: National Centre for Development Studies, Islands/Australia Working Paper No. 90/11, 1990)

Boer B., *Review of Solomon Islands Environmental Law*, (Apia: South Pacific Regional Environment Program, 1992)

Bolton D.A., "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks", *Ocean Development and International Law* 27(1-2) (1996): pp. 125-152.

Bostwick L.K., "Empowering South Pacific Fishmongers: A New Framework for Preferential Access Agreements in the South Pacific Tuna Industry", *Law and Policy in International Business* 26(3) (1995): pp. 900-923

Bowett D.W., *The Law of International Institutions*, (4th Ed.), (London: Stephen & Sons, 1982)

Brazil P., "Legal Analysis of Bilateral Fisheries Access Agreements between Parties to the Nauru Agreement and Japan", (Honiara: Forum Fisheries Agency Report No. 94/40, 1994)

Broder S and Van Dyke J., "Ocean Boundaries in the South Pacific", *University of Hawaii Law Review* 4 (1982): pp. 1-59.

Brown E.D, *The UN Convention on the Law of the Sea, 1982: A Guide for National Policy Making, Legislation and Administration*, (London: Commonwealth Secretariat, Marlborough House, 1987)

_____, *The International Law of the Sea: Volume I & II, Documents, Cases and Tables*, (London: Dartmouth Publishing Company, 1994)

Brownlie I, *Basic Documents in International Law*, 4th Edition, (Oxford: Clarendon Press, 1995)

Burmester H., "The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement", *The American Journal of International Law* 76 (1982): pp. 321-341.

Burke W.T., Legatski R. and Woodhead W.W., (1975), *National and International Law Enforcement in the Ocean*, (Seattle: University of Washington Press, 1975): 10-46.

_____, "National Legislation on Ocean Authority Zones and the Contemporary Law of the Sea", *Ocean Development and International Law* 9(3-4) (1981): pp. 289-322

_____, *Impacts of the UN Convention on the Law of the Sea on Tuna Regulation*, (Rome: Food and Agriculture Organisation of the United Nations, 1982)

_____, "US Fishery Management and the New Law of the Sea", *American Journal of International Law* 76 (1982): pp. 24-55.

_____, "Highly Migratory Species (HMS) in the Law of the Sea, *Ocean Development and International Law* 14(3) (1984): pp. 273-314.

_____, "The Law of the Sea Convention Provisions on Access to Fisheries subject to National Jurisdiction", *Oregon Law Review* 63 (1984): pp. 73-120.

_____, "Driftnet and Nodules: Where Goes the United States?", *Ocean Development and International Law* 20 (1989): pp. 237-240.

_____, "Fishing in the Bering Sea Donut: Straddling Stocks and International Law", *Ecology Law Quarterly* 16(1) (1989): pp. 285-310.

_____, and Christy F.T., *Options for the Management of Tuna Fisheries in the Indian Ocean*, (Rome: FAO Fisheries Technical Paper 315, 1990)

_____, Freeburg M and Miles L.E, *The United Nations Resolutions on Driftnet Fishing: An Unsustainable Precedent for High Seas and Coastal Fisheries*, (Seattle: University of Washington, 1993)

_____, *The New International Law of Fisheries: UNCLOS 1982 and Beyond*, (Oxford: Clarendon Press, 1994)

_____, and Miles L.E, "United Nations Resolutions on Driftnet Fishing: An Unsustainable Precedent for High Seas and Coastal Fisheries Management", *Ocean Development and International Law* 25 (1994): pp. 127-186.

_____, "Introduction: Importance of the 1982 UN Convention on the Law of the Sea and its Future Development", *Ocean Development and International Law* 27(1-2) (1996): pp. 1-4.

Buss M., "Adrift? Oceans Management in the South Pacific", *Maritime Studies* May/June (1995): pp. 13-24.

Butler E.W (ed), *Control over Compliance with International Law*, (Dordrecht: Martinus Nijhoff Publishers, 1991)

Cameron J and Aboucher J., "The Precautionary Principle of Law and Policy for the Protection of the Global Environment", *Boston College International and Comparative Law Review* 14 (1991): pp. 1-27

Campbell F.H, Menz K and Waugh G., *Economics of Fishery Management in the Pacific Islands Region*, (Canberra: Australian Centre for International Agricultural Research Proceedings No. 26, 1989)

_____, and Owen A.D, *The Economics of Papua New Guinea's Tuna Fisheries*, (Canberra: ACIAR Monograph No. 28, 1994)

_____, "Prospects for an International Tuna Resource Owners' Cartel", *Marine Policy* 20(5) (1996): pp. 419-427.

Caporaso A.J., "International Relations Theory and Multilateralism: The Search for Foundations", *International Organisation* 46(3) (1992): pp. 699-632.

Carew-Reid J., *Environment, Aid and Regionalism in the South Pacific*, (Canberra: National Centre for Development Studies, ANU Pacific Research Monograph No. 22, 1989)

Carroz E.J., and Savini J.M., "The New International Law of Fisheries Emerging from Bilateral Agreements", April, *Marine Policy* April (1979): pp. 79-98.

Charles A.T, "Fishery Conflicts: A United Framework", *Marine Policy*, September (1992)

Charney J.I. and Alexander M.L., *International Maritime Boundaries*, (Dordrecht: The American Society of International Law, 1993)

_____, "Marine Environment and the United Nations Convention on the Law of the Sea", *International Lawyer* 28(4) (1994): pp. 879-901

_____, "Marine Environment and the United Nations Convention on the Law of the Sea". *International Lawyer* 28(4) (1994): pp. 879-901.

Christopherson M., "Toward a Rational Harvest: The United Nations Agreement on Straddling Fish Stocks and Highly Migratory Species", *Minnesota Journal of Global Trade* 5 (1996): pp. 357-379.

Christy T.F., *Territorial Use Rights in Marine Fisheries: Definitions and Conditions*, (Rome: FAO Fisheries Technical Paper No. 227, 1982)

_____, and Scott A., *The Commonwealth in Ocean Fisheries: Some Problems of Growth and Economic Allocation*, (Baltimore: The John Hopkins Press, 1965)

Chui H., "Some Problems concerning the Application of the Maritime Boundary Delimitation Provisions of the 1982 United Nations on the Law of the Sea between Adjacent or Opposite States", *MD. Journal of International Law and Trade* 9 (185): pp. 1-17.

Churchill R.R, *EEC Fisheries Law*, (Dordrecht: Martinus Nijhoff Publishers, 1987)

_____, "Fisheries Issues in Maritime Boundary Delimitation", *Marine Policy* January (1993): pp. 44-57.

_____, and Lowe A.V., *The Law of the Sea*, (Manchester: Manchester University Press, 1983)

_____, "The Greenland-Jan Mayen Case and its Significance for the International Law of Maritime Boundary", *The International Journal of Marine and Coastal Law* 9(1) (1994): pp. 1-29.

Cicin-Sain B. and Knecht R.W, "The Emergence of a Regional Ocean Regime in the South Pacific", *Ecology Law Quarterly* 16(1) (1989): pp. 171-215.

_____, and Knecht W. R., "Implications of the Earth Summit for Ocean and Coastal Governance", *Ocean Development and International Law* 24 (1993): pp. 323-353

_____, "Earth Summit Implementation: Progress since Rio", *Marine Policy* 20(2) (1996): pp. 123-143.

Clark J.R., *Integrated Management of Coastal Zones*, (Rome: FAO Fisheries Technical Paper 327, 1992)

Clingan T.A., "Overview of the Second Committee Negotiations in the Law of the Sea Conference", 63 *Oregon Law Review* 63 (1984): pp. 57-72

Cole R.V., (ed), *Pacific 2010: Challenging the Future*, (Canberra: National Centre for Development Studies, Research School of Pacific Studies, ANU, 1994)

Collet M., "Achieving Effective International Fishery Management: A Critical Analysis of the UN Conference on Straddling Fish Stocks", *Dalhousie Journal of Legal Studies* 4 (1995): pp. 1-33.

Commonwealth Secretariat, *Vulnerability: Small States in the Global Society*. Report of a Commonwealth Consultative Group, (London: Commonwealth Secretariat, Marlborough House, 1983)

Cook J., and Earle M., "The Precautionary Approach to Fisheries and Reference Points for Fishery Management", *RECIEL* 2 (1993): pp. 252-259

Copes P, "Tuna Management in the Pacific Islands Region", D. Doulman (ed), *Tuna Issues and Perspectives in the Pacific Islands Region*, (Honolulu: East-West Centre, Honolulu, 1987): pp. 1-22

Couper A.D. (ed), *Development and Social Change in the Pacific Islands*, (London: Biddles Ltd, Guildford and Kings Lynn, 1989)

Craven J.P., *The Management of Pacific Marine Resources: present Problems and Future Trends*, (Colorado: Westview Press/Boulder, 1982)

_____ (ed.), *The International Implications of Extended Maritime Jurisdiction in the Pacific*, Proceedings of the 21st Annual Conference on the Law of the Sea Institute, (Honolulu: University of Hawaii, 1987)

Crawford J and Rothwell R.D.(eds), *The Law of the Sea in the Asian Pacific Region*, (Dordrecht" Martinus Nijhoff Publishers, 1995)

Crocombe R, *The Pacific Islands and the USA*, (Suva: Institute of Pacific Studies, 1995)

Crossland J, "Seabed Mapping and Its Use for Fisheries in FFA member States", (Honiara: Forum Fisheries Agency Report No. 87/37, 1987)

Cushing D., *Fisheries Resources of the Sea and their Management*, (Oxford: Oxford University Press, 1975)

Dagget P.A., "The Regulation of Maritime Fisheries by Treaty", *American Journal of International Law* 28 (1934): pp. 693-717.

Dahl A.L., and Baumgart L.I., *The State of the Environment in the South Pacific* 31 UNEP Regional Seas Report and Studies 2 (1983)

_____, "Land-Based Pollution and Integrated Coastal Management", *Marine Policy* 17 (1993): pp. 561-72

Dahl C., "Traditional Marine Tenure: A Basis for Artisanal Fisheries Management", *Marine Policy* 12(1) (1988): pp. 40-48.

Davies G.G.P, "The EEC/Canadian Fisheries Dispute in the Northwest Atlantic", *International and Comparative Law Quarterly* 44(4) (1995): pp. 927-939.

Dallmeyer D.G and Devorsey L.(eds), *Rights to Oceanic Resources*, (Dordrecht: Martinus Nijhoff Publishers, 1989)

Dean A., "Geneva Conference on the Law of the Sea: What was Accomplished?", *American Journal of International Law* 52 (1958): pp. 810-830

Dhamani M., *The Fisheries Regime of the Exclusive Economic Zone*, (Dordrecht: Martinus Nijhoff Publishers, 1988)

Division for Ocean Affairs and the Law of the Sea, UN Office of Legal Affairs, *The Regime for High Seas Fisheries: Status and Prospects*, (New York: UN Sales No. E.92 v. 12, 1992)

Dixon M. and McCorquodale R., *Cases & Materials on International Law*, (Second Edition), (London: Blackstone Press Limited, 1995)

_____, *Textbook on International Law*, 3rd Edition, (London: Blackstone Press, 1996)

Douglas N. (ed), *Pacific Islands Yearbook*, 17th Edition, (Suva: Fiji Times Ltd, 1994)

Doulman D.J., *The Performance and Prospects of Small Island Developing Countries*, (The Hague: The Hague Institute of Social Studies Advisory Service, 1984)

_____ (ed), *Tuna Issues and Perspective in the Pacific Islands Region*, (Honolulu: East-West Centre, 1987)

_____, "In Pursuit of Fisheries Co-operation: The South Pacific Forum Fisheries Agency", *University of Hawaii Law Review* 10(1) (1988): pp. 137-150.

_____, "Distant Water Fishing in the Central and Western Pacific Ocean: A Status Report", (Honiara: Forum Fisheries Agency Report No. 89/36, 1989)

_____, "A Critical Review of Some Aspects of Fisheries Joint Ventures", (Honiara: Forum Fisheries Agency Report No. 89/15, 1989)

_____, "Perspectives on the Management of High Seas Fisheries: The UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: A View from Rome", *Reviews in Fish Biology and Fisheries* 5 (1995) pp. 103-119

_____, *An Overview of World Fisheries: Challenges and Prospects for Achieving Sustainable Resource Use*, Paper presented at the 30th Annual Meeting of the Law of the Sea Institute, Al-Ain, United Arab Emirates, May 19-22, 1996.

Dupuy R.J., *The Law of the Sea: Current Problems*, (Leiden: Oceana Publications Ltd, 1974)

_____ (ed), *A Handbook on International Organisations*, (Dordrecht: Martinus Nijhoff Publishers, 1988)

Edeson W.R., *Access by Foreign Fishing Vessels to Economic Zones and Problems of Enforcement", Prospects for a New Law of the Sea*, Papers read at a Seminar conducted for the International Law Association, Sydney, 19 June 1982.

_____, *Hot Pursuit from an Exclusive Economic Zone*, Paper prepared for the Workshop on Harmonisation and Co-ordination of Fisheries Regimes and Access Agreements, Suva, 22 February - 5 March 1982.

_____, and Pulvenis J.F, *The Legal Regime of Fisheries in the Caribbean Region*, (New York: Springer-Verlag, 1983)

_____, *Types of Agreements for Exploitation of EEZ Fisheries*, (Canberra: Faculty of Law, Australian National University, 1984)

Endel-Jakob K.,*The Pacific Quest: The Concept and Scope of an Ocean Community*, (Toronto: Lexington Books, D.C Heath and Company, 1976)

Evans D., "Fisheries Information and Surveillance: Increasing the likelihood of Encounters", (Honiara: Forum Fisheries Agency Report No. 87/39, 1987)

*Extended Fishery Jurisdiction: Problems and Progress*, Proceedings of the North Carolina Governor's Conference on Fishery Management under Extended Jurisdiction, October 11-12, 1977.

Fairbairn J.I.T., *Island Economies: Studies from the South Pacific*, (Suva: Institute of Pacific Studies, 1985)

Fidell R.E., Okatsu M., & Meseguer L.J., *Flag State Measures to Ensure Compliance with Coastal State Fisheries Regulations: the United States, Japanese and Spanish Experience*, (Rome: FAO Fisheries Law Advisory Program Circular No. 6, 1989)

Fleischer C.A., *The Exclusive Economic Zone under the Convention Regime and State Practice*, Paper presented at the 17th Annual Conference of the Law of the Sea Institute, San Francisco, June, 1984.

Flewwelling P., *An Introduction to Monitoring, Control and Surveillance Systems for Capture Fisheries* (Rome: FAO Fisheries Technical Paper 338, 1994)

Food and Agriculture Organisation (FAO), *Report of the FAO World Conference on Fisheries Management and Development*, Rome, 27 June - 6 July, 1984.

_____, *Review of FAO's Program in Fisheries (1991-1992),* (Rome: FAO Committee on Fisheries (COFI), COFI/93/2, December 1992)

_____, *Report of the Nineteenth Session of the Committee on Fisheries, Rome, Italy, 8-12 April 1991*, (Rome: Committee on Fisheries Twentieth Session, Rome, 15-19 March 1993, COFI/93/Info.11, December 1992)

_____, *Medium Term Perspectives in Fisheries (1994-99),* (Rome: Committee on Fisheries Twentieth Session, Rome, 15-19 March 1993, COFI/93/8, December 1992)

_____, *Fisheries Research Needs of Developing Countries*, (Rome: Committee on Fisheries Twentieth Session Rome, 15-19 March 1993, COFI/93/7, October 1992)

_____, *Declaration of the International Conference on Responsible Fishing, Cancun, Mexico, 6-8 May 1992*, (Rome: Committee on Fisheries Twentieth Session Rome, 15-19 March 1993, COFI/93/Info.7, December 1992)

_____, *World Fisheries After the Adoption of the 1982 United Nations Convention on the Law of the Sea*, (Rome: Committee on Fisheries Twentieth Session Rome, 15-19 March 1993, COFI/93/4 December 1992)

_____, *Technical Consultations on High Seas Fishing*, Rome 7-15 September 1992, (Rome: FAO Fisheries Report No. 484 Supplement, 1992)

_____, *Review of FAO's Program in Fisheries (1991-1992),* (Rome: FAO Committee on Fisheries (COFI), COFI/93/2, December 1992)

_____, *Report of the Nineteenth Session of the Committee on Fisheries, Rome, Italy, 8-12 April 1991*, (Rome: Committee on Fisheries Twentieth Session, Rome, 15-19 1993, COFI/93/Info.11, December 1992)

_____, *Medium Term Perspectives in Fisheries (1994-99),* (Rome: Committee on Fisheries Twentieth Session, Rome, 15-19 March 1993, COFI/93/8, December 1992)

_____, *Fisheries Research Needs of Developing Countries*, (Rome: Committee on Fisheries Twentieth Session Rome, 15-19 March 1993, COFI/93/7, October 1992)

_____, *An Introduction to the Economics of Fisheries Management*, (Rome: FAO Fisheries Technical Paper 226, 1992)

_____, *Report of the Technical Consultation on High Seas Fishing, Rome, 7-15 September 1992*, (Rome: FAO Fisheries Report No. 484, Food and Agriculture Organisation, 1992)

_____, *High Seas Fishing*, (Rome: Committee on Fisheries Twentieth Session Rome, 15-19 March 1993, COFI/93/6, December 1992)

_____, *Fish Utilisation and Trade*, (Rome: Committee on Fisheries Twentieth Session Rome, 15-19 March 1993, COFI/93/Info.5, January 1993)

_____, *The Work of FAO in Fisheries for 1994-1995*, (Rome: Committee on Fisheries Twentieth Session, Rome, 15-19 March 1993, COFI/93/9 February 1993)

_____, *Conservation and Rational Utilisation of Living Marine Resources with Special Reference to Responsible Fishing*, (Rome: Committee on Fisheries Twentieth Session, Rome, 15-19 March 1993, COFI/93/5, January 1993)

_____, *Review of FAO's Programs in Fisheries (1991-92) Field Program*, (Rome: Committee on Fisheries Twentieth Session Rome, 15-19 March 1993, COFI/93/3 January 1993)

_____, *Marine Fisheries and the Law of the Sea: A Decade of Change*, (Rome: FAO Fisheries Circular No. 853, 1993)

_____, *Review of the State of World Fishery Resources: Part I The Marine Resources and Part II Inland Fisheries and Aquaculture*, (Rome: Committee on Fisheries Twentieth Session Rome, 15-19 March 1993, COFI/93/Info.4, January 1993)

_____, *The Work of FAO in Fisheries for 1994-1995*, (Rome: Committee on Fisheries Twentieth Session, Rome, 15-19 March 1993, COFI/93/9 February 1993)

_____, *Fish Utilisation and Trade*, (Rome: Committee on Fisheries Twentieth Session Rome, 15-19 March 1993, COFI/93/Info.5, January 1993)

_____, *Conservation and Rational Utilisation of Living Marine Resources with Special Reference to Responsible Fishing*, (Rome: Committee on Fisheries Twentieth Session Rome, 15-19 March 1993, COFI/93/5, January 1993)

_____, *Review of FAO's Programs in Fisheries (1991-92) Field Program*, (Rome: Committee on Fisheries Twentieth Session Rome, 15-19 March 1993, COFI/93/3 January 1993)

_____, *Coastal State Requirements for Foreign Fishing*, (Rome: FAO Legislative Study 21 (Rev.4), 1993)

_____, *Reference Points for Fishery Management: Their Potential Application to Straddling and Highly Migratory Resources,* Information Paper prepared for the Third Substantive Session of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, March 1994, (New York: UN Doc. A/CONF. 164/INF/8, New York, 1994)

_____, *Guidelines in Support of Article 7 - Fishing Operations (First Draft)*, Technical Consultations on the Code of Conduct for Responsible Fishing, (Rome, 26 September-5 October 1994, FI/CCRF/94/Info. 6., August 1994)

_____, *Guidelines for Post-Harvest Practice and Trade (First Draft)*, Technical Consultations on the Code of Conduct for Responsible Fishing, (Rome, 26 September-5 October 1994FI:CCRF/94/Info. 9, July 1994)

_____, *Guidelines for Fisheries Research*, Technical Consultations on the Code of Conduct for Responsible Fishing, (Rome, 26 September-5 October 1994, FI:CCRF/94/Info. 10, July 1994)

_____, *Guidelines for the Integration of Fisheries into Coastal Area Management*. Technical Consultations on the Code of Conduct for Responsible Fishing, (Rome, 26 September-5 October 1994, FI:CCRF/94/Info. 8(Rev), August 1994)

_____, *Supporting Documents on the Drafting of the General Principles*, Technical Consultations on the Code of Conduct for Responsible Fishing, (Rome, 26 September-5 October 1994, FI:CCRF/94/Info. 4, July 1994)

_____, *Background Information on the Code of Conduct for Responsible Fishing*, Rome: CCRF/TC/94/Info. 3, July 1994)

_____, *Guidelines for Responsible Management of Fisheries*, Technical Consultations on the Code of Conduct for Responsible Fishing, (Rome, 26 September-5 October 1994, FI:CCRF/94/Info. 5, August 1994)

_____, *Preliminary Draft Code of Conduct for Responsible Fishing*, Technical Consultations on the Code of Conduct for Responsible Fishing, (Rome, 26 September-5 October 1994, FI:CCRF/94/2, August 1994)

_____, *Fisheries Needs of Small Island Developing States*, (Rome: Committee on Fisheries Twenty First Session, Rome, 10-15 March 1995, COFI/95/5, September 1994)

_____, *Review of the State of World Marine Fishery Resources*, (Rome: FAO Fisheries Technical Paper No. 335, 1994)

_____, *Guidelines in Support of Article 7 - Fishing Operations (First Draft)*, Technical Consultations on the Code of Conduct for Responsible Fishing, (Rome, 26 September-5 October 1994, FI/CCRF/94/Info. 6., August 1994)

_____, *Structure and Process of the 1993-1995 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks*, (Rome: FAO Fisheries Circular No. 898, 1995)

_____, *Sustainable Management of Natural Resources in the South Pacific*, Technical Consultation of South Pacific Small Island Developing States on Sustainable Development in Agriculture, Forestry and Fisheries, Apia, Samoa, 6-9 May, 1996.

_____, *The State of Food and Agriculture, Food Security: Some Macroeconomic Dimensions*, (Rome, FAO Agricultural Series No. 29, 1996)

Forum Fisheries Agency (FFA), "Workshop of National Tuna Fishing Operations, Tarawa, Kiribati, May 28 - June 2, 1984", (Honiara: Forum Fisheries Agency Report No. 84/7, 1984)

_____, "Economic Development and Management of Fisheries in EEZs of the Pacific Basin", (Honiara: Forum Fisheries Agency Report No. 84/19, 1984)

____, "The Problems facing Small Island Countries in the Management of their EEZs", (Honiara: Forum Fisheries Agency Report No. 84/20, 1984)

"

_____, "The Forum Fisheries Agency Fisheries Management Information Service: New Direction in Agency Computing", (Honiara: Forum Fisheries Agency Report No. 85/8 Honiara, 1985)

_____, "Information Paper presented to the Co-ordinating Party for World Tuna Statistics, Sri Lanka, December 1985", (Honiara: Forum Fisheries Agency Report No. 85/31, 1985)

____, "Analysis of Fee Revenues: Confidential Report to the Government of Kiribati", (Honiara: Forum Fisheries Agency Report No. 86/27, 1986)

____, "Report on a Study of the Marketing and Processing of Precious Coral Products in Taiwan, Japan and Hawaii", (Honiara: Forum Fisheries Agency Report No. 87/13, 1987)

_____, "Fisheries Research Needs in the South Pacific: Information Requirements for Effective Management and Development of the Island States of the South Pacific Volume 3 (Tokelau)", (Honiara: Forum Fisheries Agency Report No. 87/14, 1987)

____, "Review of Operations by Japanese Fleets 1984-1985", (Honiara: Forum Fisheries Agency Report No. 87/20, 1987)

____, "Some Problems of Tuna Management in the South Pacific", Forum Fisheries Agency Report No. 87/48, 1987)

____, "Inshore Fisheries Development and Management: The South Pacific Experience; An Overview", (Honiara: Forum Fisheries Agency Report No. 88/10, 1988)

____, "The South Pacific Regional Fisheries Surveillance and Enforcement Program", (Honiara: Forum Fisheries Agency Report No. 88/59, 1988)

_____, "Drift Nets in the South Pacific: Japan and Taiwan Perspectives", (Honiara: Forum Fisheries Agency Report No. 89/58, 1989)

____, "Recent developments in the US and European Canned Tuna Markets", (Honiara: Forum Fisheries Agency Report 89/66, 1989)

____, "Commentary on Japanese View on Driftnet Fishing in the South Pacific", (Honiara: Forum Fisheries Agency Report No. 89/90, 1989)

_____, "South Pacific Albacore Fisheries Management: Principles for a Management Regime", (Honiara: Forum Fisheries Agency Report No. 89/97, 1989)

____, *Alternative Technologies in a Regional Network,* Fifth Regional Fisheries Surveillance Meeting, Forum Fisheries Agency, Honiara, Solomon Islands, 13-17 October 1989.

____, "Notes for FFA's Report to the 22nd Regional Technical Meeting on Fisheries, South Pacific Commission, Noumea, 6-10 August 1990", (Honiara: Forum Fisheries Agency Report No. 90/68, 1990)

____, "Standardisation of Access Fee Calculation Formulae", (Honiara: Forum Fisheries Agency Report No. 90/71, 1990)

_____, "An Analysis of the Goods and Services Component in Access Agreements and an Assessment of its Role in Future", (Honiara: Forum Fisheries Agency Report No. 90/76, 1990)

_____, "A Review of Access Fees Arrangements and their Development in FFA Member Countries", (Honiara: Forum Fisheries Agency Report No. 90/81, 1990)

____, "Narrative Report on the Workshop on the Use of Length Frequency Data in Fisheries Analysis - South Pacific", (Honiara: Forum Fisheries Agency Report 90/90, 1990)

____, "Upgrade of FFA Regional Fisheries Management Information System", (Honiara: Forum Fisheries Agency Report No. 90/133, 1990)

_____, "Record of Proceedings of the Forum Fisheries Committee Sub-Committee, Noumea, New Caledonia, 22-23 October 1990", (Honiara: Forum Fisheries Agency Report No. 90/115, 1990)

____, "Fishing Vessel Activity-1989: Reported Monthly Effort in the FFA Region by Gear Type", (Honiara: Forum Fisheries Agency Report 91/5, 1991)

_____, "Management of South Pacific Albacore Tuna and the Purse Seine Fishery in the Western Pacific", (Honiara: Forum Fisheries Agency Report No. 91/54, 1991)

_____, "Report to Member Countries of the FFA on the Proceedings of the Meeting of a group of Experts on the Regime for High Seas Fisheries, New York 22-26 July 1991", (Honiara: Forum Fisheries Agency Report No. 91/63, 1991)

____, "The Relevant Provisions of the United Nations Convention on the Law of the Sea", (Honiara: Forum Fisheries Agency Report 91/65, 1991)

____, "The Role of the Forum Fisheries Agency with specific reference to Regional Fisheries Surveillance", (Honiara: Forum Fisheries Agency Report No. 91/70, 1991)

_____, "Record of Discussions between the Palau Maritime Authority and Four Fisheries Associations of Japan regarding Access to the Fishery Zone of Palau, Tokyo, Japan, 7-10 January 1992", (Honiara: Forum Fisheries Agency Report No. 92/1, 1992)

_____, "Record of Proceedings of the Special Legal Working Group on the Treaty on Co-operation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, Honiara, 22-23 January 1992", (Honiara: Forum Fisheries Agency Report No. 92/4, 1992)

_____, "Overview of Tuna Markets and Economic Condition of the Fisheries", (Honiara: Forum Fisheries Agency Report No. 92/47, 1992)

_____, "Options for Tropical Tuna Management: Considerations for the South Pacific", Paper presented at WPFCC/TPFCC Workshop on Economic and Legal Aspects of Tuna Management, Manila, Philippines, 12-13 October 1992, (Honiara: Forum Fisheries Agency Report No. 92/88, 1992)

_____, "Tools Available to South Pacific Coastal States", (Honiara: Forum Fisheries Agency Report No. 92/89, 1992)

____, "Fishing Catch and Effort of Fleets of Distant Water Fishing nations Based on Logsheet Data held at FFA at October 1992", (Honiara: Forum Fisheries Agency Report 92/94, 1992)

____, "Record of Proceedings of the Second Consultation on Vessel Tracking, Auckland, New Zealand, 20-21 October 1992", (Honiara: Forum Fisheries Agency Report No. 92/119, 1992)

_____, "Regional Tuna Fisheries Management Information Service: Annual Work Program and Budget 1993", (Honiara: Forum Fisheries Agency No. 93/2, 1993)

____, "Cook Islands Fisheries Resources Profiles", (Honiara: Forum Fisheries Agency Report No. 93/25, 1993)

____, *Record of Proceedings,* Eighth Regional Fisheries Surveillance Meeting, South Pacific Forum Fisheries Agency, Suva, Fiji, 9-11 March, 1993

_____, "United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, 12-30 July 1993", (Honiara: Forum Fisheries Agency Report No. 93/33, 1993)

____, "Regional Register", (Honiara: Forum Fisheries Agency Report No. 93/42, 1993)

____, "Kingdom of Tonga Surveillance Profile 1993", (Honiara: Forum Fisheries Agency Report No. 93/48, 1993)

____, "The Management of High Seas Fisheries Resources and the Pacific", PECC Fisheries Task Force Workshop on Fisheries Development and Co-operation, Vancouver, Canada, 13-14 September 1993, (Honiara: Forum Fisheries Agency Report No. 93/53, 1993)

____, "FFA Regional Legal Consultation on Fisheries Surveillance and Law Enforcement, Rabaul Papua New Guinea, 4-7 October 1993", (Honiara: Forum Fisheries Agency Report No. 93/55, 1993)

_____, "Record of Proceedings of the Third Consultation on Vessel Tracking, Cairns, Australia, 29-30 September 1993", (Honiara: Forum Fisheries Agency Report No. 93/60, 1993)

_____, "South Pacific Strategy Meeting for the United Nations Conference on Straddling Stocks and Highly Migratory Stocks", (Honiara: Forum Fisheries Agency Report 94/6, 1994)

_____, "Port State Enforcement: Its Relevance for the South Pacific in the context of the UN Conference on High Seas Straddling Fish Stocks and Highly Migratory Stocks", (Honiara: Forum Fisheries Agency Report No. 94/8, 1994)

____, *Report of the Twenty Fourth Meeting of the Forum Fisheries Committee,* May 2-5, 1994, Honiara, Solomon Islands.

____, *Surveillance Projects Regional Communications: Maritime Surveillance Communications Network*, Forum Fisheries Agency, Honiara, Solomon Islands, April 1994.

____, "Record of Discussion of the Third Meeting on Regional Aerial Surveillance, Honiara, 12 July 1994", (Honiara: Forum Fisheries Agency Report No. 94/22, 1994)

____, *Status of Stocks*, Paper prepared by the Standing Committee on Tuna and Billfish for the Multilateral high-Level Conference on South Pacific Tuna Fisheries, Honiara, Solomon Islands, 5-9 December 1994.

_____, *Collection and Exchange of Data*, Paper prepared by the Standing Committee on Tuna and Billfish for the Multilateral High Level Conference on South Pacific Tuna Fisheries, Honiara, Solomon Islands, 5-9 December 1994.

_____, *Transhipment*, Paper prepared by Graig Herbere for Multilateral High Level Conference on South Pacific Tuna Fisheries, Honiara, Solomon Islands 5-9 December 1994.

____, *Transponder Technology*, Paper prepared by Phil Marshall for the Multilateral High Level Conference on South Pacific Tuna Fisheries, Honiara, Solomon Islands 5-9 December 1994,

____, "Record of Proceedings of the Multilateral High Level Conference on South Pacific Tuna Fisheries", Honiara, Solomon Islands, 5-9 December 1994, (Honiara: Forum Fisheries Agency Report No. 95/1, 1995)

____, *Report to FFA on the United Nations Conference on Straddling Stocks and Highly Migratory Fish Stocks: Inter-Sessional Consultations*, Geneva, 13-17, February 1995

____, *Record of Proceedings and Documents,* Ninth Regional Fisheries Surveillance Officers Meeting, FFA Conference Centre, Honiara, Solomon Islands, 4-6 April 1995.

Freestone D, "The Effective Conservation and Management of High Seas Living Resources: Towards a New Regime?", *Canterbury Law Review* 5 (1994): pp 341-362.

Friedheim L.R., "Fishing Negotiations at the Third United Nations Conference on the Law of the Sea", *Ocean Development and International Law* 22 (1991): pp. 209-257.

Fulton T.W., *The Sovereignty of the Sea*, (Edinburgh and London: William Blackwood & Sons, 1911)

Garcia S, Gulland J.A., and Miles E., "The New Law of the Sea, and the Access to Surplus Fish Resources; Bioeconomic Reality and Scientific Collaboration", *Marine Policy* July (1986): pp. 192-200

_____, The Precautionary Principle: Its Implications in Capture Fisheries Management", *Ocean and Coastal Management* 22 (1993): pp. 99-110

Geen G. and Wright A., *Existing International Fisheries Management Arrangements: A General Review*, Paper prepared for the Workshop on Economic and Legal Aspects of Tuna Management, Manila, Philippines, 12-13 October 1992.

_____, Maeda T., and Tauriki P, "Overview of Tuna Markets", Paper presented at the Sixth Standing Committee on Tuna and Billfish, 15-18 June 1993, Pohnpei, Federated States of Micronesia, (Honiara: Forum Fisheries Agency Report 93/32, 1993)

_____, and Tauriki, "Economic Appraisal of the Access Agreement between Kiribati and Japan", (Honiara: Forum Fisheries Agency Report No. 93/39, 1993)

_____, "Tuna Industry Development in the South Pacific: A Co-ordinated Approach", (Honiara: Forum Fisheries Agency Report No 94/19, 1994)

_____,. and Bergin A., *Review of Tuna Management Arrangements in the Central Western Pacific*, Paper prepared for the Second Meeting of the FFC Sub-Committee on Future Management Arrangements in the South Pacific, October 16-20, 1995, Honiara, Solomon Islands.

Gentle G.D., "The Price of Fish: The Use of Market Mechanisms in Australian Fisheries Management", *Issues in the Pricing and Management of Natural Resources*, (Canberra: EAPC Background Paper No. 16, 1990)

Gillet R. and Ianelli J. "Flying Fish", (Honiara: Forum Fisheries Agency Report No. 92/56, 1992)

Gordon S.H., "The Economic Theory of a Common Property Resource: The Fishery", *Journal of Political Economy* 61(2) (1954): pp. 124-142.

Gosselin J., *The Development of the International Law of Marine Fisheries*, Vol. I and II, (Canberra: PhD Thesis, ANU, 1988)

Government of Solomon Islands, *Fisheries Department Annual Report 1987*, Honiara, Solomon Islands.

_____, *Fisheries Department Annual Report 1988*, Honiara, Solomon Islands.

_____, *Fisheries Department Annual Report, 1989*, Honiara, Solomon Islands.

Grotius H, *The Freedom of the Seas, or the Right which Belongs to the Dutch to Take Part in the Eastern Indian Trade*, (The Hague: Carnegie Endowment for International Peace, 1911)

Grzybowski D.M. et.al., "A Historical Perspective Leading Up to and Including the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks", *Pace Environmental Law Review* 13(1) (1995): pp. 49-74

Gubon F., *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)

_____, "History and Role of the Forum Fisheries Agency", D. Doulman (ed), *Tuna Issues and Perspectives in the Pacific Islands Region*, (Honolulu: East-West Centre, 1987): pp. 245-256.

_____, "Development and Management of Marine Resources in the Pacific Islands Region: An Overview of Some Basic Issues and Constraints", in *Ocean Year Book 11*, Elizabeth Mann Borgese et al (eds), (Chicago and London: The University of Chicago Press, 1994): pp. 409-425.

_____, "The Southwest Pacific Multilateral Fisheries Treaty: Some Possible Implications for Fisheries Development, Management and Conservation in the Pacific Islands Region", *Melanesian Law Journal* 22 (1994): pp. 1-22.

Gündling L., "The Status in International Law of the Principle of Precautionary Action", D. Freestone and T. Ijlstra (eds.), *The North Sea: Perspectives on Regional Co-operation*, (London: Graham & Trotman, 1990): pp. 23-30

Gulland J.A., *The Management of Marine Fisheries*, (Bristol: Scientechnica (Publishers) Ltd, 1974)

_____, *Some Problems of the Management of Shared Stocks*, (Rome: FAO Fisheries Technical Paper No. 206, 1980)

_____, "Tuna and International Institutions", 12 *Marine Policy* 12 (1988): p. 408.

Hardaker J.B and Fleming E., *Pacific 2010: Strategies for Melanesian Agriculture for 2010: Tough Choices*, (Canberra: National Centre for Development Studies, Research School of Pacific and Asian Studies, ANU, 1994)

Hardin G. and Baden J.(ed), *Managing the Commons*, (San Francisco: W.H. Freeman and Company, 1977)

Harding E., *Review of the Republic of Marshall Islands Environmental Law*, (Apia: South Pacific Regional Environment Program, 1992)

_____, *Review of the Federated States of Micronesia's Environmental Law*, (Apia: South Pacific Regional Environment Program, 1992)

Harris D.J, *Cases and Materials on International Law*, (4th Ed.), (London: Sweet & Maxwell, London, 1991)

Hayashi M., "The Management of Transboundary Fish Stocks under the LOS Convention", *International Journal of Marine and Coastal Law* 8(2) (1993): pp. 245-261.

_____, "Enforcement by Non-Flag States on the High Seas Under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks", *Georgetown International Environmental Law Review* IX(1) (1996): 1-36.

Herr R and Saunders P., 'The Management of South Pacific Marine Resources: Regional Institutions and Canadian Development Assistance', in *Oceans Law and Policy in the*

*Post-UNCED Era: Australian and Canadian Perspectives*, Lorne K. Kriwoken, et al. (eds), (The Hague: Kluwer Law International, 1996): pp. 257-288.

Henningham S and May J.R. (eds.), *Resources, Development and Politics in the Pacific Islands*, (Bathurst: Crawford House Press, 1992)

Hewison G.J., "High Seas Driftnet Fishing in the South Pacific and the Law of the Sea", *Geo. Int'l Envtl. L. Rev.* 5 (1993): pp. 313-336

_____, "The Precautionary Approach to Fisheries Management: An Environmental Perspective", *The International Journal of Marine and Coastal Law* 11(3) (1996): pp. 301-332.

Hey E., *The Regime for the Exploitation of Transboundary Marine Fisheries Resources*, (Dordrecht: Martinus Nijhoff Publishers, 1989)

_____, et.al., *The Regulation of Driftnet Fishing on the High Seas: Legal Issues*, (Rome: FAO Legislative Study 47, 1991)

_____, The Precautionary Concept in Environmental Policy and Law: Institutionalising Caution", *Georgetown International Environmental Law Review* 4 (1992): pp. 303-318

_____, "Global Fisheries Regulations in the First Half of the 1990s", *The International Journal of Marine and Coastal Law* 11(4) (1996): pp. 459-490.

Hilborn R and Sibert J., "Is International Management of Tuna Necessary", *Marine Policy* 12(1) (1988): pp. 31-39.

_____, and Gunderson D., "Chaos and Paradigms for Fisheries Management", *Marine Policy* 20(1) (1996): pp. 87-89.

Hirth H.F., "Marine Turtles", (Honiara: Forum Fisheries Agency Report No. 92/65, 1992)

Hinds L., "World Marine Fisheries: Management and Development Problems", *Marine Policy*, September (1992): pp. 394-403

Hollick A.L., "The Origins of 200 Mile Offshore Zones", *American Journal of International Law* 71 (1977): pp. 494-500.

Hoole W. F et. al. (eds), *Making Ocean Polcy: The Politics of Government Organisation and Management*, (Boulder: Westview Press, 1981)

Howitt R et. al. (eds), *Resources, Nations and Indigenous Peoples: Case Studies from Australasia, Melanesia and Southeast Asia*, (Melbourne: Oxford University Press, 1996)

Hudson C., Fishery and Economic Zones as Customary International Law, *San Diego Law Review* 17 (1979-80): pp. 661-690.

ILA, *Principles applicable to Living Resources occurring both within and without the Exclusive Economic Zones of Overlapping Claims*, International Committee on the EEZ. Report of the Committee by Prof. R. Lagoni, International Law Association, Cairo Conference, Cairo, 1992.

IUCN (Australian Committee), *Towards a Strategy for the Conservation of Australia's Marine Environment,* (Sydney: ACIUN Occasional Paper No. 3, 1992)

Jacobs F.G. and Roberts S.(eds), *The Effect of Treaties in Domestic Law*, United Kingdom National Committee of Comparative Law, vol. 7, (London: Sweet & Maxwell, 1987)

Jacobson J.L, "Managing Marine Living Resources in the Twenty-First Century: The Next Level of Ocean Governance?", *1994 Rhodes Papers: Entry into Force of the Law of the Sea Convention*, Myron H. Nordquist and J.N. Moore, (Dordrecht: Martinus Nijhoff Publishers, 1995): pp. 311-322.

Johnston M.D., *The International Law of Fisheries: A Framework for Policy-Oriented Inquiries*, (Dordrecht: Martinus Nijhoff Publishers, 1987)

_____, "The Driftnetting Problem in the Pacific Ocean: Legal Considerations and Diplomatic Options", *Ocean Development and International Law* 21 (1990): pp. 5-39.

_____, "Is Coastal State Fishery Management Successful or Not?", *Ocean Development and International Law* 22 (1991): pp. 199-208.

_____, and Valencia M.J., *Pacific Ocean Boundary Problems: Status and Solutions*, (Dordrecht: Martinus Nijhoff Publishers, 1991)

_____, *Agenda 21: The Coastal and Ocean Challenge*, Paper prepared for the SEAPOL Singapore Conference on 'Sustainable Development of Coastal and Ocean Areas in Southeast Asia: Post Rio Perspectives', Singapore, May 26-28, 1994.

Johnston S.R., *Fisheries Development, Fisheries Management and Externalities*, (Washington DC: World Bank Discussion Papers Fisheries Series 165, The World Bank, 1992)

Joseph J., "The Management of Highly Migratory Species: Some Important Concepts", *Marine Policy* 1(4) (1977): pp. 275-288.

_____, and Greenough J.W., *International Management of Tuna, Porpoise, and Billfish: Biological, Legal and Political Aspects*, (Seattle: University of Washington Press, 1979)

_____, Klawe W., and Murphy P., *Tuna and Billfish: Fish without a Country,* (San Diego: Inter-American Tropical Tuna Commission, 1980)

_____, *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

_____, "The Tuna-Dolphin Controversy in the Eastern Pacific Ocean: Biological, Economic, and Political Impacts", *Ocean Development and International Law* 25 (1994): pp. 1-30.

Joyner C.C. and Alvaréz von Gustedt A., "The Turbot War of 1995: Lessons for the Law of the Sea", *The International Journal of Marine and Coastal Law* 11(4) (1996): pp. 425-458.

Juda L., "The EEZ: Compatibility of National Claims and the UN Convention on the Law of the Sea", *Ocean Development and International Law* 16 (1986): pp. 1-58.

_____, "The Exclusive Economic Zone and Ocean Management", *Ocean Development and International Law* 18(3) (1987): pp. 305-331.

_____, "World Marine Fish Catch in the Age of Exclusive Economic Zones and Exclusive Fishery Zones", *Ocean Development and International Law* 22 (1991): pp. 1-32.

_____, *International Law and Ocean Use Management: The Evolution of Ocean Governance*, (London: Routledge, 1996)

_____, "The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique", *Ocean Development and International Law* 28(2) (1997): pp. 147-166

Kaufman B., "A Strategic Framework for the Effective Management and Conservation of the Tuna Resources of FFA Member Countries", (Honiara: Forum Fisheries Agency Report No. 94/37, 1994)

_____, "Review of Reference Points and the Precautionary Approach for Fisheries Management", (Honiara: Forum Fisheries Agency Report No. 94/27, 1994)

Kearney R.E., *A Regional Approach to Fisheries Management in the South Pacific Commission Area*, Paper presented to the South Pacific Forum Meetings on the Law of the Sea, Suva, 13-14 October, 1976, South Pacific Commission, Noumea, New Caledonia.

_____, "The Law of the Sea & Regional Fisheries Policy", *Ocean Development and International Law* 5 (1978): pp. 249-286.

Kelly R.C., "Law of the Sea: The Jurisdictional Dispute over Highly Migratory Species of Tuna", *Columbia Journal of Transnational Law* 23(3) (1988): pp. 45-65.

Kenilorea P., "Trends and Concerns in High Seas Fishing", Paper presented at the Ocean Day at the Global Forum, Rio de Janeiro, 18 June 1992, (Honiara: Forum Fisheries Agency Report 92/38, 1992)

Kent G, *The Politics of Pacific Island Fisheries*, (Colorado: Westview Press/Boulder, 1980)

King M., *Understanding Fisheries in the South Pacific*, (Suva: Institute of Pacific Studies, 1991)

Klawe W., "What is Tuna?", *Marine Fisheries Review* 39(11) (1977): pp. 1-5

Klemm De C., "Migratory Species in International Law, *Natural Resources Law Journal* 29 (1989): pp. 935-960.

Knight G.H, *Managing the Sea's Living Resources: Legal and Political Aspects of High Seas Fisheries*, (Toronto: Lexington Books, 1977)

Koers W.A., *The International Law of Marine Fisheries: A Proposal for the Future*, A Background paper for the Commission to Study the Organisation of Peace, Washington DC., 1972

____, *International Regulation of Marine Fisheries: A Study of Regional Fisheries Organisations*, (Bristol: Fishing News (Books) Ltd, 1973)

Kriz A., "Marketing of South Pacific Seafood: A Case Study of Sea Cucumber", (Honiara: Forum Fisheries Agency Report No. 94/11, 1994)

Kronfol A.Z, "The Exclusive Economic Zone: A Contemporary Law of the Sea", *Journal of Maritime Law and Commerce* 9(2) (1977-78): pp. 461-480.

Krueger R.B. and Nordquist M.H., "The Evolution of the 200 Mile Exclusive Economic Zone: State Practice in the Pacific Basin", *Virginia Journal of International Law* 19 (1978): pp. 321-400.

Kwiatkwoska B, *The Exclusive Economic Zone in the New Law of the Sea*, (Dordrecht, Martinus Nijhoff Publishers, 1989)

_____, "Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice", *Ocean Development and International Law* 22 (1992): pp. 153-187.

_____, "The High Seas Fisheries Regime: at a Point of No Return?", *The International Journal of Marine and Coastal Law* 8(3) (19993): pp. 327-357.

Lagi V., "Issues in High Seas Enforcement", (Honiara: Forum Fisheries Agency Report No. 90/105, 1990)

Lagoni R., "Interim Measures Pending Maritime Delimitation Agreements", *The American Journal of International Law* 78 (1984): pp. 345-368

Lawson M.R., *Economics of Fisheries Development*, (London: Frances Pinter (Publishers), 1984)

Leonard L.L, *International Regulation of Fisheries*, (New York: Johnson Reprint Corporation, 1944)

Lepiz G.L and Sutinen G.J., "Surveillance and Enforcement Operations in the Costa Rican Tuna Fishery", *Marine Policy* 9 (1985): pp. 310-321.

Lieberman H.W, "Towards Improving Fishery Management Systems", *Marine Policy* 10(1) (1986): 42-50.

Lodge M., "Review of the Japanese Proposal for an International Convention for the Conservation and Management of the South Pacific Albacore Stock and the South Pacific Proposal for a Management Arrangement", (Honiara: Forum Fisheries Agency Report No. 91/82, 1991)

_____, "Minimum Terms and Conditions of Access: Responsible Fisheries Management Measures in the South Pacific Region", *Marine Policy* 16 (1992): pp. 277-305.

_____, "New Approaches to Fisheries Enforcement", *RECIEL* 2(3) (1993): pp. 277-284.

_____, "An Analysis of the FAO Draft Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas", (Honiara: Forum Fisheries Agency Report No. 93/47, 1993)

_____, *A Review of the Development of the Palau Arrangement for the Management of the Western Pacific Purse Seine Fishery*, (London: MSc. Thesis, London School of Economics, 1996)

Mack J.R., "International Fisheries Management: How the UN Conference on Straddling and Highly Migratory Fish Stocks Changes the Law of Fishing on the High Seas", *California Western International Law Journal* 26(2) (1996): pp. 313-333

Maxwell J.G.H and Owen A.D, *South Pacific Tuna Fisheries Study*, (Canberra: Australian Agency for International Development, 1994)

McDougal S.M. and Burke W.T., *The Public Order of the Oceans: A Contemporary International Law of the Sea*, (Dordrecht: Martinus Nijhoff Publishers, 1962)

McLoughlin K., "How Many Fish in the Sea", *Maritime Studies* 67 (1992): pp. 13-15

Meltzer E., "Global Overview of Straddling and Highly Migratory Fish Stocks: The Nonsustainable Nature of High Seas Fisheries", *Ocean Development and International Law* 25 (1994): pp. 255-344.

Mensah T., "The United Nations Convention on the Law of the Sea: Keynote Address", *The United Nations Convention on the Law of the Sea: What it Means to Australia*, B.M. Tsamenyi et. al. (eds.), (Wollongong: Wollongong Papers on Maritime Policy No. 3, 1996): pp. 9-16.

Mfodwo K., and Tsamenyi B.M., *Enforcement of Marine Fisheries Law and Regulations: A Case Study of Papua New Guinea in International and Comparative Perspective*, (Canberra: Australian Centre for Industrial and Agricultural Research Project No. 8928, 1992)

_____, Tsamenyi B.M. and Blay S.K.N, "The Exclusive Economic Zone: State Practice in the African Atlantic Region, *Ocean Development and International Law* 20 (1989): pp. 445-499.

Miles E., *The Management of Tuna Fisheries in the West Central and Southwest Pacific*, Paper prepared for the Expert Consultation on Monitoring, Control and Surveillance Systems for the Management of Fisheries, April 27-30, 1981

_____, *Science, Politics, & International Ocean Management: The Uses of Scientific Knowledge in International Negotiations*, (Berkeley: Institute of International Studies, University of California, 1987)

_____, and Burke T.W, "Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks", *Ocean Development and International Law* 20 (1989): pp. 343-357

_____, *The Approaches of UNCLOS III & Agenda 21 - A Synthesis*, Paper presented at the Twenty Ninth Annual Conference of the Law of the Sea Institute on Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21, Bali, Indonesia, 19-22 June, 1995.

Mirvahabi F., "Conservation and Management of Fisheries in the Exclusive Economic Zone", *Journal of Maritime Law and Commerce* 9(2) (1977-78): pp. 225-250.

Mizukami C., "Fisheries Problems in the South Pacific Region", *Marine Policy* 15(2) (1991): pp. 111-121

Moffit R.B., "Deepwater Demersal Fish", (Honiara: Forum Fisheries Agency Report No. 92/53, 1992)

Moore G., "National Legislation for the Management of Fisheries Under Extended Coastal State Jurisdiction", *Journal of Maritime Law and Commerce* 11 (1979-80): pp. 153-182.

_____, "Enforcement without Force: New Techniques in Compliance Control for Foreign Fishing Operations based on Regional", *Ocean Development and International Law* 20 (1993): pp. 197-204.

Moore J.N., *International and United States Documents on Oceans Law and Policy*, vols. 3 and 4, (United States: William S. Hein & Co., Inc, 1986)

Morrison J., et. al. (eds.), *Science of the Pacific Island Peoples: Ocean and Coastal Studies Vol 1*, (Suva: Institute of Pacific Studies, 1994)

Muller P. and Wright A., "Technology and Marine Resource Development", in *Minding the Machines: Technology for Development in the South Pacific*, Tony Majoram (ed), (Melbourne: University of Melbourne, 1990): pp. 1-8.

Munavvar M., *Ocean States: Archipelagic Regimes in the Law of the Sea*, (Dordrecht: Martinus Nijhoff Publishers, 1995)

Munro G., "Coastal States, Distant Water Fleets and EFJ: Some Long Run Considerations", *Marine Policy* January (1985): pp. 2-15

____, *The Pacific Islands, the Law of the Sea and Pacific Tropical Tuna*, Paper prepared for the Conference on the Economics of Fisheries Management in the Pacific Islands Region, Hobart, Tasmania, Australia, March 20-22, 1989.

____, "Extended Jurisdiction and the Management of Pacific Highly Migratory Species", *Ocean Development and International Law* 21 (1990): pp. 289-307

_____, *Fishery Diplomacy in the 1990s: The Challenges and Constraints*, Paper presented at the SEAPOL International Workshop on Challenges to Fishery Policy and Diplomacy in South-East Asia, Rayong, Thailand, 6-9 December, 1992

Munro L.J. and Fakahau S., "Methods and Appraisal and Assessment of Coastal Fishery Resources in the South Pacific Region", (Honiara: Forum Fisheries Agency Report No. 86/60, 1986)

____, "The Implementation of a cost-effective Data Acquisition System for the Assessment and Management of the Shelf Fisheries of Tongatapu", (Honiara: Forum Fisheries Agency Report No. 87/62, 1987)

Nagasaki F and Chikuni S, *Management of Multispecies Resources and Multi-Gear Fisheries: Experience in Coastal Waters Around Japan*, (Rome: FAO Fisheries Technical Paper 305, 1989)

Nandan S, "The Draft Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks", *1994 Rhodes Papers: Entry into Force of the Law of the Sea Convention*, Myron H. Nordquist and J.N. Moore, (Dordrecht: Martinus Nijhoff Publishers, 1995): pp. 291-297.

Neemia U.F., *Co-operation and Conflict: Costs, Benefits and National Interests in Pacific Regional Co-operation*, (Suva: Institute of Pacific Studies, 1986)

Nicols P., *Monitoring, Control and Surveillance in the South Pacific,* Global Fisheries Enforcement Workshop, Washington DC, 25-27 October 1994.

Nicholson A., "Co-operation Strategies for Information Technology in the Pacific Region", (Honiara: Forum Fisheries Agency Report No. 91/9, 1991)

Nomura I, *How Reflagging of Fishing Vessels Should be Addressed and Prevented*, Informal ad hoc Meeting of Experts, FAO, Rome, February 1-5, 1993.

Nordquist M.H. and Kruegar K.R., *New Directions in the Law of the Sea Documents*, vol. IX, (New York: Oceana Publications, 1980)

_____, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. IV, (Dordrecht: Martinus, Nijhoff Publishers, 1991)

_____, (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II, (Dordrecht: Martinus Nijhoff Publishers, 1993)

Northridge S. P., *Driftnet Fisheries and their Impacts on Non-target Species: A World Review*, (Rome: FAO Fisheries Technical Paper 320, 1991)

O'Connell D.P., *The International Law of the Sea*, vols. I and II, (London: Oxford University Press, 1982)

Oda S., *International Law of the Resources of the Sea*, (Dordrecht: Sijthoff & Noordhoff, 1979)

____, "Fisheries under the United Nations Convention on the Law of the Sea", *American Journal of International Law* 77 (1983): pp. 739-755.

____, *International Control of Sea Resources*, (Dordrecht: Martinus Nijhoff Publishers, 1989)

_____, "Dispute Settlement Prospects in the Law of the Sea", *International and Comparative Law Quarterly* 44(4) (1995): pp. 863-872.

OECD, *Fisheries Issues: Trade and Access to Resources*, (Paris: Organisation for Economic Co-operations and Development, 1989)

_____, *Fisheries Enforcement Issues*, (Paris: Organisation for Economic Co-operations and Development, 1994)

Ortiz A.P., *Model International Fisheries Enforcement Act*, Paper presented to the Port State Enforcement Workshop, Honiara, Solomon Islands, 4-6 December, 1996.

Panayotou T, *Management Concepts for Small-Scale Fisheries*, (Rome: FAO Fisheries Technical Paper 228, 1992)

Pardo A., "The Convention on the Law of the Sea: A Preliminary Appraisal", *Third World Attitudes Toward International Law: An Introduction*, Frederick E. Synder and Surakiat Sathirathia (ed), (Dordrecht: Martinus Nijhoff Publishers, 1987): pp. 737-749.

Parties to the Nauru Agreement, (PNA), (1994)., *Record of Proceedings and Working Papers of the Thirteenth Annual Meeting, Honiara, Solomon Islands, 27-29 April 1994,* (Honiara: Forum Fisheries Agency Report No. 94/14, 1994)

_____, *Record of Proceedings of the First Meeting of the Second Task Force, Honiara, Solomon Islands, 6-9 June 1994*, (Honiara: Forum Fisheries Agency Report No. 94/18, 1994)

_____, *Record of Proceedings of the Second Meeting of the Second Task Force, Honiara, Solomon Islands, 19-23 September 1994*, (Honiara: Forum Fisheries Agency Report No. 94/32, 1994)

_____, *Record of Proceedings of the Tenth Special (Ministerial Level) Session, Honiara, Solomon Islands, 28-30 November 1994*, (Honiara: Forum Fisheries Agency Report No. 94/41, 1994)

Pearse P.H., "From Open Access to Private Property: Recent Innovations in Fishing Rights as Instruments of Fisheries Policy", *Ocean Development and International Law* 23 (1992): pp. 71-83.

Picard J.M., "International Law of Fisheries and Small Developing States: A Call for the Recognition of Regional Hegemony", 31 *Texas International Law Journal* 31 (1996): pp. 317-342.

Pintz S.W., "Fuel Use in Tuna Fishing", (Honiara: Forum Fisheries Agency Report No. 89/52, 1989)

Pollard S, *The Pacific Tuna: Towards Policies that Support Sustained Investment*, (Canberra: Research School of Pacific and Asian Studies, 1995)

Pontecorvo G., "Fishery Statistics: What We Need to Know", *Ocean Development and International Law* 21 (1990): pp. 309-314

Pounds G.J.N, *Political Geography*, (London: McGraw-Hill Book Company, Inc, 1963)

Prescott V., "The Papua New Guinea - Solomon Islands Maritime Boundary", in *Ocean Yearbook 11*, Elizabeth Mann Borgese et al (eds), (Chicago and London: The University of Chicago Press, 1993): pp. 179-192.

_____., "International Maritime Boundaries in the Southwest Pacific Ocean", in *The Law of the Sea and Ocean Development Issues in the Pacific Basin*, E.L. Miles and Scott Allen (eds), (Honolulu: Law of the Sea Institute Fifteenth Annual Conference, 1981): pp. 488-511.

Pryor M.C., *The Short to Medium Term Future of the Maritime Communications Network*, (Honiara, Forum Fisheries Agency, 1994)

Pulea M., *Review of Cook Islands Environmental Law*, (Apia: South Pacific Regional Environment Program, 1992)

Rasmussen N.P., "The Tuna War: Fishery Jurisdiction in International Law", *University of Illinios Law Review* (1981): pp. 744-755.

Rawlinson N.J.F, Milton D.A and Blaber S.J.M., *Tuna Baitfish and the Pole-and-Line Industry in Kiribati*, (Canberra: Australian Centre for International Agricultural Research (ACIAR) Technical Reports 24, 1992)

Rawlinson N.J.F, Milton D.A, and Blaber S.J.M (ed),*Tuna Baitfish in Fiji and Solomon Islands*, (Canberra: Australian Centre for International Agricultural Research (ACIAR) Proceedings No. 52, 1993)

Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen, *International Legal Materials* v. 20: pp. 797-842.

Rembe S.N., *Africa and the International Law of the Sea: A Study of the Contribution of the African States to the Third United Nations Conference on the Law of the Sea*, (Dordrecht: Sijthoff & Noordoff International Publishers, 1980)

Reppy A., "The Grotian Doctrine of the Freedom of the Sea Reappraised", *Fordham Law Review* 9 (1950): pp. 25-254.

Rhees S., "Sea Boundary Delimitation between States before World War II", *The American Journal of International Law* 76 (1982): 555-588.

Richards A.H., "Live Reef Fish Export Fisheries in Papua New Guinea: Current Status and Future Prospects", (Honiara: Forum Fisheries Agency Report No. 93/10, 1993)

_____, "Historical Perspectives and Trends of South Pacific Albacore Fleets", (Honiara: Forum Fisheries Agency Report No. 93/18, 1993)

_____, et.al., "Inshore Fisheries Resources of Solomon Islands", (Honiara: Forum Fisheries Agency Report No. 94/1, 1994)

_____, et. al., "Fiji Fisheries Resources Profiles", (Honiara: Forum Fisheries Agency Report No. 94/4, 1994)

Rieser A., "International Fisheries Law, Overfishing and Marine Biodiversity", *Georgetown International Environmental Law Review* IX(2) (1997): pp. 251-279.

Riley T.N., "Fisheries Surveillance Vessels for Nations of the Central Pacific", (Honiara: Forum Fisheries Agency Report No. 87/56, 1987)

Robinson A.N., (ed), *Agenda 21 and the UNCED Proceedings*, vol. IV, (New York: Oceania Publications Inc, 1992)

Robinson M.A, "World Fisheries to 2000: Supply, Demand and Management", *Marine Policy* January (1980): pp. 19-32.

Sabek V., "Introduction", *Marine Policy* 18(2) (1994): pp. 94-98

Sands P.H., *Marine Environmental Law in the United Nations Environment Program: An Emergent Eco-Regime*, (London and New York: Tycooly Publishing, 1988)

_____, "International Law on the Agenda of the UN Conference on Environment and Development", *Colorado J. of IELP* 3 (1992)

_____, "UNCED and the Development of International Environmental Law, 3 *Yearbook of International Environmental Law* 3 (1992)

Schacter O. *International Law in Theory and Practice*, (Dordrecht: Martinus Nijhoff Publishers, 1991)

Shearer A.I., *High Seas: Drift Gillnets, Highly Migratory Species, and Marine Mammals*, Paper presented at the 24th Annual Conference of the Law of the Sea Institute, Tokyo, July 24-27, 1990: pp. 237-258.

_____, (ed), *Starke's International Law*, Eleventh Edition, (London: Butterworths Publishers, 1994)

Shepard P.M. and Clerk L, *South Pacific Fisheries Development Assistance Needs*, (Suva: Consultancy Report prepared for the Food and Agriculture Organisation and the United Nations Development Program, 1984)

_____, *Fisheries Research Needs of Small Island Countries*, (Nova Scotia: International Centre for Ocean Development, 1989)

Sherwood D., "Australian Port State Control - Operational and Strategic Implications", *Maritime Studies* 81 (1995): 10-20.

Shomura R and Jayawardene H, *A Review and Analysis of International Tuna Management Bodies of the World*, (Rome: Food and Agriculture Organisation, 1992)

Simmonds R.K. (ed), *Cases on the Law of the Sea: Volume IV*, (New York: Oceana Publications, Inc, Dobbs Ferry, 1984)

Siwatibau S, *The South Pacific Countries and Regionalism*, Paper presented at the Symposium on Co-operation in Asia and the Pacific, East-West Centre, Honolulu, 7-10 May, 1990

Slayter T, "The New International Law of Fisheries as it relates to the South Pacific", (Honiara: Forum Fisheries Agency Report No. 85/5, 1985)

Smith R.W., "A Geographical Primer to Maritime Boundary-Making", *The Law of the Sea and Ocean Development Issues in the Pacific Basin*, E.L. Miles and Scott Allen (eds), (Honolulu: Law of the Sea Institute Fifteenth Annual Conference, 1981): 488-511.

_____, *Exclusive Economic Zone Claims: An Analysis and Primary Documents*, (Dordrecht: Martinus Nijhoff, 1986)

South Pacific Bureau for Economic Co-operation (SPEC), *South Pacific Regional Fisheries Organisation - Coastal State Jurisdiction with regard to Highly Migratory Species in the 200 Mile Fishing Zone*, Working Paper prepared by Papua New Guinea for Meeting of SPEC Countries, Suva, 9-11 May, 1976.

_____, "Record of Proceedings of the Meeting of South Pacific Forum Officials to Discuss Law of the Sea Questions, Suva, 14 October 1976, *Australian Foreign Affairs Review* (AFAR) 47 (1976): pp. 55-60.

South Pacific Commission, *Status of Tuna Fisheries in the SPC Area During 1990, with Annual Catches Since 1952*, Working Paper 3, Standing Committee on Tuna and Billfish, Port Vila, Vanuatu 17-21 June 1991.

____ *Report of the Second Meeting of the Western Pacific Yellowfin Tuna Research Group*, Honolulu, Hawaii, June 17-24, 1992.

_____, *Report of the Third Meeting of the Western Pacific Yellowfin Tuna Research Group*, Phonpei, Federated States of Micronesia, June 21-23, 1993.

_____, *Report of the Workshop on Standardised Certification for Fishing Vessel Crews*, Forum Secretariat, Suva, Fiji, 26-30 September, 1994.

South Pacific Regional Environment Program (SPREP), *1991-1995 Action Plan for Managing the Environment of the South Pacific Region*, Apia, Western Samoa.

_____, *Report of the Third Meeting of the Regional Marine Turtle Conservation Program and the First Meeting of the Regional Marine Mammals Conservation Program*, 9-11 June, 1993, Apia, Western Samoa.

Stephen C., "The Evolution of the Objectives of Fisheries Management in the 1970s. *Ocean Management* 6 (1981): pp. 251-278.

Stephen N., *The United Nations Conference on Environment and Development: Beyond Brazil 1992*, (Victoria: Australian Institute of International Affairs Occasional Paper Number 7, 1991)

Stewart C, *Report on the Laws relating to Gillnet and Driftnet Fishing in Papua New Guinea*, Papua New Guinea Law Reform Commission Working Paper No. 25, 1990, Port Moresby.

Sutherland W., "Coastal State Co-operation in Fisheries: Emergent Regional Custom in the South Pacific", *International Journal of Estuarine and Coastal Law* 1(1) (1986): pp. 15-28.

_____, "Management, Conservation and Co-operation in EEZ Fishing: The Law of the Sea and the South Pacific Forum Fisheries Agency", *Ocean Development and International Law* 18 (1987): pp. 613-640.

_____, and Tsamenyi B.M., *Law and Politics in Regional Co-operation: A Case Study of Fisheries Co-operation in the South Pacific*, (Hobart: Pacific Law Press, 1992)

Sutinen G.J and Andersen E., "The Economics of Fisheries Law Enforcement", *Land Economics* 61(4) (1985): pp. 381-397.

_____, Rieser A, and Gauvin R.J, "Measuring and Explaining Non-compliance in Federally Managed Fisheries", *Ocean Development and International Law* 21 (1990): 335-372.

Suzuki D., *Time to Change*, (Sydney: Allen & Unwin Publishers, 1993)

Swan J., "Fisheries Access Agreements", (Honiara: Forum Fisheries Agency Report No. 87/31, 1987)

_____, "Implementation of the Law of the Sea Convention through International Institutions: Highly Migratory Species and the South Pacific Forum Fisheries Agency", (Honiara: Forum Fisheries Agency Report No. 89/55, 1989)

_____, "Trends in Fisheries Treaties in the South Pacific", (Honiara: Forum Fisheries Agency Report No. 89/102, 1989)

Tahindro A., "Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks", *Ocean Development and International Law* 28(1) (1997): pp. 1-58.

Teiwaki R, *Management of Marine Resources in Kiribati*, (Suva: Institute of Pacific Studies, 1988)

Thistlewait R. and Evans J.W, *Environment and Development: A Pacific Island Perspective*, (Manila: Asian Development Bank (ADB), 1992)

Townsend E.R., "Fisheries Self-Governance: Corporate or Co-operative Structures?", *Marine Policy* 19(1) (1995): pp. 39-45.

Tsamenyi B.M., "The South Pacific States and Sovereignty over Highly Migratory Species", *Marine Policy* 10(1) (1986): pp. 29-41.

_____, "The Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America: The Final Chapter in United States Tuna Policy", *Brooklyn Journal of International Law* XV(2) (1989): pp. 183-221.

_____, Blay S.K.N., "Extended Zones of Jurisdiction over Marine Resources: State Practice in the South Pacific Region", H. Campbell et. al. (eds.), *Economics of Fishery Management in the Pacific Islands Region*, (Canberra: ACIAR Proceedings No. 26, 1989): pp. 42-50

_____, and Kaye S., "The Southern Bluefin Tuna Convention: The Management of Highly Migratory Species and Third States", *Maritime Studies* 75 (1994): pp. 1-13.

_____, *Co-operation in Fisheries Law Enforcement in the South Pacific Region: An Analysis of the Niue Treaty,* Tri-Regional Conference on Current Issues in Ocean Law Policy and Management: Southeast Asia, North Pacific and Southwest Pacific, Bangkok, Thailand, 13-16 December, 1994.

_____, and Mfodwo K, (1995), "South Pacific Island States and the New Regime of Fisheries: Issues of Law, Economy and Diplomacy", *The Law of the Sea in the Asian Pacific Region*, J. Crawford and D. Rothwell, (eds.), (Netherlands: Kluwer Academic Publishers, 1995): pp. 121-153

_____, and Aqorau T., "Fishing Rights and Responsibilities at Sea: An Analysis of Relevant Provisions of the United Nations Convention on the Law of the Sea", in Tsamenyi B.M. and Herriman M, (eds.), *Rights and Responsibilities in the Maritime Environment: National and International Dilemmas*, (Wollongong: Wollongong Papers on Maritime Policy No. 5, 1996): pp. 68-81

_____, *Mechanisms for Integrated Resource Management*. Twenty Ninth Annual Conference of the Law of the Sea Institute on 'Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21'. Bali, Indonesia, 19-22 June, 1995

_____, Bateman S. and Delaney J.(eds), *The United Nations Convention on the Law of the Sea: What it means to Australia and Australia's Marine Industries*. (Wollongong: Wollongong Papers on Maritime Policy No. 3, University of Wollongong Press, 1996)

Tsuyoshi T., "The 200 Mile Regime and the Management of Transboundary and High Seas Stock", *Ocean Management* 9 (1984): pp. 7-20.

Tupou T.T.S. et al, *Final Report of the Institutional Arrangements in the Marine Sector*, (Suva: Forum Secretariat, 1995)

United Nations, *The Law of the United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea*, (New York: UN Publication, 1983)

_____, *Report of the Secretary General on Realisation of Benefits under the United Nations Convention on the Law of the Sea: Needs of States in regard to the Development and Management of Ocean Resources*, (New York: United Nations General Assembly Document A/45/712, 1990)

_____, *Report of the United Nations Conference on Environment and Development*, (New York: UN Doc. A/CONF.151/26/Rev.1 (1993), 1993)

_____, *Report of the Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barbados, 25 April - 6 May 1994*, (New York: United Nations Document A/CONF. 167/9, 1994)

_____, *Report of the Secretary-General on Large Scale Pelagic Driftnet Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas*, (New York: United Nations Doc. A/50/553, 13 October 1995)

_____, *Pacific Island Countries: Selected Issues in Development Policy and Subregional Co-operation in the 1990s*, (New York: Economic and Social Commission for Asia and the Pacific, 1995)

_____, *Report of the Secretary-General under Article 319 of the United Nations Convention on the Law of the Sea*, Meeting of States Parties, Fifth Meeting, New York, 24 July-2 August 1996, (New York: United Nations Document SPLOS/6, 1996)

_____, *Promoting Exports of Fish and Fishery Products in Selected Island Countries in the ESCAP Region*, (New York: Economic and Social Commission for Asia and the Pacific, 1996)

_____, *Report of the Secretary-General on the Protection of the Oceans, all kinds of Seas, including enclosed and semi-enclosed seas, and Coastal Areas and the Protection, Rational Use and Development of their Living Resources*, Commission on Sustainable Development Fourth Session 18 April - 3 May 1996, (New York: United Nations Document E/CN.17/1996/3, 1996)

_____, *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva, Switzerland, 26-28 September 1995*, Prepared by the Division for Sustainable Development for the Commission on Sustainable Development Fourth Session, 18 April - 3 May, 1996, New York.

_____, *Report of the Secretary-General on International Legal Instruments and Mechanisms (Chapter 39 of Agenda 21)*, Commission on Sustainable Development Fourth Session 18 April - 3 May 1996, (New York: UN Doc. E/CN.17/1996/17, 1996)

_____, *Report of the Secretary-General on Law of the Sea: Large-scale Pelagic Driftnet Fishing and its Impact on the Living Marine Resources of the World's Oceans and Seas; Unauthorised Fishing in Zones of National Jurisdiction and its Impact on the Living Marine Resources of the World's Oceans and Seas; and Fisheries By-catch and Discards and their Impact on the Sustainable Use of the World's Living Marine Resources*, (New York: UN DOC. A/51/404, 25 September 1996, 1996)

_____, *Report of the Secretary-General on the Law of the Sea: 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*, (New York: UN DOC. A/51/383, 4 October 1996)

United States Senate Committee on Foreign Relations, *Convention on Regulating Fishing Vessels on the High Seas (Treaty Doc. 103-24)* (Washington: US. Government Printing Office, June 28 1994)

Uwate K.R., and Kawai F., "A Perspective on the Rate of Return Concept in Bilateral Fishing Access Arrangements", (Honiara: Forum Fisheries Agency Report No. 90/4, 1990)

Vallejo S., "The Integration of Coastal Management into National Development Planning", *Ocean and Coastal Management* 21 (1993): pp. 1-39

Van Dyke J and Helftel S., "Tuna Management in The Pacific: An Analysis of the South Pacific Forum Fisheries Agency", *University of Hawaii Law Review* 2(1) (1981): pp. 1-65

_____, Nicol C., "US Tuna Policy: A Reluctant Acceptance of the International Norm", D. Doulman (ed), *Tuna Issues and Perspectives in the Pacific Islands Region*, (Honolulu: East-West Centre, 1987): pp. 105-122

_____, Zaelke D and Hewison G.(eds), *Freedom for the Seas in the 21st Century: Ocean Governance and Environmental Harmony*, (Washington DC, Island Press, 1993)

_____, "Modifying the 1982 Law of the Sea Convention: New Initiatives on Governance of High Seas Fisheries Resources: the Straddling Stock Agreement", *The International Journal of Marine and Coastal Law* 10(2) (1995): pp. 219-227.

_____, "United Nations: The Straddling Stocks and Migratory Stocks Agreement and the Pacific", *The International Journal of Marine and Coastal Law* 11(3) (1996): 406-415.

Vicuna O.F., *The Exclusive Economic Zone: Regime and Nature under International Law*, (Cambridge: Cambridge University Press, 1989)

_____, "Toward an Effective Management of High Seas Fisheries and the Settlement of the Pending Issues of the Law of the Sea," *Ocean Development and International Law* 24 (1993): pp. 81-92.

Vignes D. and René-Jean Dupuy, *A Handbook on the New Law of the Sea*, (Dordrecht: Martinus Nijhoff Publishers, 1991)

World Bank, *Pacific Island Economies: Building a Resilient Economic Base for the Twenty-First Century*, (Washington DC: Country Department III, East Asia and Pacific Region, Report No. 13803-EAP, 1995)

_____, *Pacific Island Economies: Sustainable Development of Fisheries*, (Washington DC: Country Depart III, East Asia and Pacific Region, Report No. 14615-EAP, 1995)

World Commission on Environment and Development, *Our Common Future*, (Melbourne: Oxford University Press, 1987)

Waugh G., "Trends in the US, European and Japanese Tuna Markets", (Honiara: Forum Fisheries Agency Report No. 88/29, 1988)

____, "Development, Economics and Fishing Rights in the South Pacific Tuna Fishery", *Rights Based Fishing*, Philip A. Neher et.al. (eds), (Dordrecht: Kluwer Academic Publishers, 1989): pp. 323-348.

Weld C.M., "Critical Evaluation of Existing Mechanisms for Managing Highly Migratory Pelagic Species in the Atlantic Ocean", *Ocean Development and International Law* 20 (1989): pp. 285-295

Wolfe E.E., *The International Implications of Extended Maritime Jurisdiction in the Pacific*, Paper presented to the 21st Annual Conference of the Law of the Sea Institute, August 4, 1987

Wolfers T.P., "Maritime Co-operation in the South Pacific", *Maritime Studies* March/April (1991): pp. 1-10.

_____, "The Law of the Sea and Security in the South Pacific", *Maritime Studies* 77 (1994): 22-29.

WPM Computer Consultants Pty Ltd, "A Computerisation Strategy to complement Business Plans of the South Pacific Forum Fisheries Agency over the next Decade 1989-1999", (Honiara: Forum Fisheries Agency Report No. 89/71, 1989)

Wright A. and Doulman D.J., "Driftnet Fishing in the South Pacific: From Controversy to Management", *Marine Policy* September (1991): pp. 303-337.

Yonezawa K., "Some thoughts on the Straddling Stocks Problem in the Pacific Ocean", *The Law of the Sea in the 1990s: A Framework for Further International Co-operation*, T. Kuribayashi and E.L. miles (eds.), (Honolulu: Law of the Sea Institute, 1990): pp. 127-135.

Zoloveke H., "Proposed Regional Fisheries Telecommunications Network", (Honiara: Forum Fisheries Agency Report No. 87/42, 1987)