

Illegal Fishing and Fisheries Law Enforcement in Small Island Developing States: The Pacific Islands Experience

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ABSTRACT

The Pacific islands provide a good case study of how small island states have responded to the challenges of enforcing their fisheries laws and regulations. The Pacific islands, all of which are geographically small and are in their early stages of economic development, viewed the LOS Convention and the exclusive economic zone regime established as providing the opportunity for generating economic wealth. The area of ocean space under the Pacific islands' jurisdiction was inordinately disproportionate to the resources available to them to assert effectively their sovereign rights. The article examines how they have responded to the challenge. The article discusses the co-operative approach adopted by the Pacific islands and the innovative arrangements developed to control better the fishing activities of fishing states. The article concludes that, while considerable progress has been made, there is scope to improve on current arrangements to make them more effective.

Introduction

One of the results of the 1982 United Nations Convention on the Law of the Sea¹ was the acceptance of the 200-mile exclusive economic zone (EEZ).² The LOS Convention has enabled the Pacific island states³ of the western and central Pacific

¹ The 1982 United Nations Convention on the Law of the Sea, UN. Doc. A/CONF. 62/122, reprinted in (1982) 21 ILM 1261. The FFA member countries who have ratified the LOS Convention are: Australia, the Cook Islands, the Federated States of Micronesia, Fiji, the Marshall Islands, Nauru, New Zealand, Palau, Papua New Guinea, Samoa, the Solomon Islands, Tonga and Vanuatu.

² For a general discussion of the EEZ regime, see M. Dhamani, *The Fisheries Regime of the Exclusive Economic Zone* (Dordrecht, Martinus Nijhoff Publishers, 1987); and D.J. Attard, *The Exclusive Economic Zone in International Law* (Oxford, Clarendon Press, 1987).

³ The Pacific island states referred to here are those developing country members of the South Pacific Forum Fisheries Agency: the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, the Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, the Solomon Islands, Tonga, Tuvalu and Vanuatu. Australia and New Zealand are also members of the FFA but they do not share the same socio-economic conditions as the Pacific island states.

Ocean region to claim custody over a vast area of ocean space. The area of ocean space that has come under the jurisdiction of the Pacific island states is estimated to be approximately 30M square kilometres. This is about the size of the African continent. In contrast, the Pacific island states' collective landmass is only 2 per cent of this area or approximately 500,000 square kilometres. The area over which the Pacific island states must keep constant surveillance and enforce their fisheries laws is considerable. Traditional means of enforcement require expensive physical platforms which most of the Pacific island states cannot afford.

This article will look at how the Pacific island states have addressed the problem.⁴ The discussion commences by providing a brief overview of the fisheries in the region, and the relevant principles of international law applicable to fisheries enforcement. This will be followed by a review of the responses of the Pacific island states to the challenges. The article concludes by suggesting that although much has been achieved considerable enforcement problems still remain.

The Fisheries of the Western and Central Pacific Ocean Region

There are a variety of fisheries resources commonly found throughout the region. However, the most significant fishery in terms of its commercial value is the tuna fishery. The tuna fishery consists mainly of skipjack (*Katsuwonus pelamis*), yellowfin (*Thunnus albacares*), south pacific albacore (*Thunnus allalunga*) and bigeye (*Thunnus obesus*). Over 90 per cent of the catch are taken by fishing vessels from Japan, Korea, the USA and Taiwan. The value of the catch is estimated to be in excess of US\$1 billion. Much of this is taken by fishing states such as Japan, the USA, Taiwan and Korea. One of the issues being discussed presently is how to increase revenue from the resource.⁵

The major source of revenue from the resource is through the licensing of foreign fishing vessels under bilateral access agreements. At present estimates, the rate of return is about 5 per cent. The US and the Pacific island states have a multilateral agreement. This entered into force in June 1988 and is not due to lapse until the June 2003. Under this Treaty, the USA pays US\$18M each year to the Pacific island states. Attempts to negotiate similar agreements with other fishing states have not been successful.

⁴ For a comprehensive discussion of fisheries management arrangements in the region and the response of the Pacific island states to the challenge posed by the LOS Convention, see W. Sutherland, "Coastal State Co-operation in Fisheries: Emergent Regional Custom in the South Pacific", (1986) 1 *International Journal of Estuarine and Coastal Law* 1, 15-28; W. Sutherland, "Management, Conservation and Co-operation in EEZ Fishing: The Law of the Sea and the South Pacific Forum Fisheries Agency", (1987) 1 *Ocean Development and International Law* 613-640; 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); T. Aqorau, *Analysis of the Responses of the Pacific Island States' to the Fisheries Provisions of the Law of the Sea Convention* (PhD thesis, University of Wollongong, Australia, 1997).

⁵ See Forum Communiqué of 1998 reproduced in *Pacific Islands Monthly*, September 1998.

One of the problems with fisheries law enforcement is the mobility of the fleets and the migratory nature of the resource. There are approximately 2,000 foreign fishing vessels in the region. Most of the fleet vessels are licensed in more than one country. This poses a problem for monitoring. Naturally, it would be prudent to manage a migratory resource on a regional basis. Most of the Pacific island states do not have the capacity to monitor effectively the patterns of fishing. As will be discussed later in the article, the Pacific island states have been compelled because of the constraints they face to respond collectively. This is not a problem unique to the Pacific island states. According to Burke, while the LOS Convention has assured coastal states of sufficient formal enforcement authority within national jurisdiction, many states lack effective means for its exercise.⁶ Thus, coastal states must develop relevant management measures. However, as has been observed, although increased attention has been given to implementation of management measures, enforcement and compliance, in particular the need for coastal states to monitor and control the activities of foreign fleets off their coasts, there has been “too little consideration of the extent to which inappropriate management measures can themselves be a source of whinges”.⁷ The Pacific island states have been well aware of these pitfalls and thus, have been prudent about the choices they have adopted.

International law, however, gives coastal states considerable discretion in the choices and enforcement policies they pursue.

The International Law Framework for Fisheries Law Enforcement

Traditionally, the enforcement of fisheries laws and regulations was governed by the principle that, “within territorial waters, each State has exclusive use and control over 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”.⁸ This rule and exceptions to this rule were incorporated in the 1958 Geneva Convention on the High Seas⁹ in particular articles 2,¹⁰ 6¹¹ and 13–

⁶ W.T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (Oxford, Clarendon Press, 1996), p. 303.

⁷ J.A. Gulland, “Fishery Management: How Can We Do Better?”, in Edward L. Miles (ed.), *Management of World Fisheries: Implications of Extended Coastal State Jurisdiction* (Seattle, University of Washington Press, 1989), p. 269.

⁸ A.P. Dagget, “The Regulation of Maritime Fisheries by Treaty”, (1934) 23 *American Journal of International Law* 704.

⁹ The 1958 Geneva Convention on the High Seas, (1963) 450 UNTS 83–84.

¹⁰ *Ibid.*, Art. 2 states: “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; freedom to fly over the high seas. These freedoms, and others 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.”

22.¹² 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 entered the territorial sea of a third state or its flag state.¹³

The enforcement of management and conservation measures is fundamental to the discharge by coastal states of their obligations to manage and conserve the fisheries resources in their EEZ. 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.¹⁴ In recognition of this, Article 64(2) of the LOS Convention gives coastal states wide discretionary powers to control the fishing activities of foreign fishing vessels in their EEZ. The right of coastal states to take enforcement action in the EEZ closely follows their right to protect the fishery resources in the territorial seas. Article 62(4) of the LOS Convention is reinforced by Article 73 which is the relevant provision governing the enforcement of the fisheries laws and regulations of coastal states in the EEZ. 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 LOS Convention. 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 LOS Convention, 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 LOS Convention with regard to the preservation of the freedom of navigation which, in turn, must be read together with Articles 88–115 dealing with the high seas. 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.¹⁵

¹¹ *Ibid.*, Art. 6 states: “1. Ships 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 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.”

¹² *Ibid.*, Arts 13–22 deal with the suppression of piracy and slavery.

¹³ See *ibid.*, Art. 23.

¹⁴ Dhamani, note 2 above at p. 84.

¹⁵ K. Mfodwo and B.M. Tsamenyi, *Enforcement of Marine Fisheries Laws and Regulations: A Case Study of Papua New Guinea in International and Comparative Perspective* (Canberra, Australian Centre for Agricultural Research Report 1992/9, 1992), p. 8.

The United Nations Fish Stocks Agreement

The LOS Convention provisions on enforcement have been supplemented by a recent international agreement known as 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.¹⁶ The United Nations Fish Stocks Agreement has transformed the customary international law rule that only the flag state has jurisdiction over its vessels on the high seas. Article 21(1) of the United Nations Fish Stocks Agreement provides that:

“In any high seas area covered by a subregional or regional fisheries management organisation or arrangement, a state party which is a member of such organisation or a participant in such arrangement may, through its duly authorised inspectors, board and inspect, in accordance with paragraph 2, fishing vessels flying the flag of another State Party to this Agreement, whether or not such State Party is also a member of the organisation or participant in the arrangement, for the purpose of ensuring compliance with conservation and management measures for straddling stocks and highly migratory fish stocks established by that organisation or arrangement.”

The Agreement has made a fundamental change to the traditional international law principle that, on the high seas, only the flag state has jurisdiction over its vessels. Article 21(1) embodies the sentiment that it is not enough to rely on flag state control for the purposes of managing and conserving fisheries resources.

The Agreement is also prescriptive and details the basic procedures for boarding and inspection.¹⁷ The Agreement requires the authorised officers of the inspecting state, *inter alia*, to present credentials to the master of the vessel and produce a copy of the text of the relevant conservation and management measures; initiate notice to the flag state at the time of the boarding and inspection; and provide a copy of a report on the boarding and inspection to the flag state. In turn, the flag state has a duty to ensure that vessel masters accept and facilitate prompt and safe boarding by the inspectors; co-operate and assist in the inspection of the vessel; and provide reasonable facilities including food and accommodation to the inspectors.

¹⁶ 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 1995, UN. Doc. A/CONF. 164/33, reproduced in (1995) 34 ILM 1542 (hereinafter referred to as the “United Nations Fish Stocks Agreement”). The following FFA member countries have ratified the United Nations Fish Stocks Agreement: the Cook Islands, the Federated States of Micronesia, Fiji, Nauru, Samoa, the Solomon Islands and Tonga.

¹⁷ See *ibid.*, Art. 22.

The FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas¹⁸

The FAO Reflagging Agreement was adopted in November 1993.¹⁹ The objective of the Reflagging Agreement is to prevent vessels from undermining the effectiveness of international conservation and management measures through reflagging. It provides that no fishing vessel may be authorised to fish on the high seas unless it is authorised by the appropriate authorities of the party. The Agreement also expands on the concept of a genuine link between vessels and their flag states. 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.

These obligations no doubt impose an enormous burden on the Pacific island states. Their response as will be seen below has been to adopt a regionalist approach.

The Response of the Pacific Island States to the Enforcement of the Fisheries Provisions of the EEZ

Traditional approaches to fisheries enforcement involved physically inspecting vessels at sea.²⁰ The Pacific island states recognised their limitations in traditional approaches to fisheries surveillance and enforcement and therefore agreed to work within existing resources. Hence the task assigned to the South Pacific Forum Fisheries Agency (FFA,²¹ a regional fisheries organisation established in 1979²² under the auspices of the South Pacific Forum²³) was to “assemble available data” and evaluate the capacity of the efficiency of “existing and

¹⁸ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 1995, Food and Agriculture Organisation, Rome (hereinafter referred to as “FAO Reflagging Agreement”).

¹⁹ 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).

²⁰ G. Moore, “Enforcement Without Force: New Techniques in Compliance Control for Foreign Fishing Operations Based on Regional Co-operation”, (1993) 24 *Ocean Development and International Law* 197–203.

²¹ For a discussion of the history of the Forum Fisheries Agency, see Florian Gubon, “History and Role of the Forum Fisheries Agency”, in David Doulman (ed.), *Tuna Issues and Perspectives in the Pacific Islands Region* (Honolulu, East-West Centre, 1987).

²² South Pacific Forum Fisheries Agency Convention, opened for signature 10 July 1979, reprinted in Bill Campbell and Michael Lodge (eds), *Regional Compendium of Fisheries Legislation (Western Pacific Region)* (3 vols, Rome, Food and Agriculture Organisation, Rome), pp. 1617–1623.

²³ The South Pacific Forum is the annual summit of the heads of governments of the Pacific island states.

proposed equipment”.²⁴ The Pacific island states 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 their fisheries laws can be divided into non-physical enforcement mechanisms and physical enforcement mechanisms.

The development of enforcement arrangements in the region have been co-ordinated through the FFA. The FFA’s functions are to:

- (1) 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;
- (2) collect and disseminate relevant information concerning management procedures, legislation and agreements adopted by other countries both within and beyond the region; and
- (3) collect and disseminate relevant information on prices, shipping, processing and marketing of fish and fish products; and
- (4) 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 FFA has been instrumental in the development of arrangements to assist the Pacific island states. According to one observer:

“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 Secretariat for the Pacific Community (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”.²⁵

²⁴ 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, the Secretariat for the Pacific Community, the Pacific Islands Marine Resources Information Systems (PIMRIS) and other regional databases, as well as gateways to international information-providers and database services.

²⁵ David Doulman, “In Pursuit of Fisheries Co-operation: The South Pacific Forum Fisheries Agency”, (1988) 10 *University of Hawaii Law Review* 145.

Part of the success of the FFA is the close nexus between the FFA and its governing council, the Forum Fisheries Committee. The Committee is charged by the FFA Convention with providing detailed policy and administrative guidance and direction to the Agency. Because tuna is the only renewable resource for many of the Pacific island states, the Committee which is constituted by the Pacific island states has been active in promoting measures to ensure the sustainable development of the resource.²⁶

The FFA has various technical divisions which provide the Pacific island states with assistance in the management and conservation of the tuna resource.²⁷ The two which are of relevance to this discussion are the Legal Division and the Monitoring, Control and Surveillance (MCS) Division. The objective of the Legal Division is to strengthen the ability of Pacific island states to fulfil their responsibilities and take advantage of their legal rights in relation to fisheries. The MCS Division is charged with reinforcing the Pacific island states' capacity to achieve compliance by fishing operators with national regulations and regional arrangement licence conditions. The following section examines the arrangements developed through the FFA.

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.²⁸ 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 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".²⁹

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

²⁶ For a listing of the major achievements of the FFA, see T. Aqorau and A. Bergin, "The UN Fish Stocks Agreement – A New Era for International Co-operation to Conserve Tuna in the Central Western Pacific", (1998) 29 *Ocean Development and International Law* 21–42.

²⁷ See Forum Fisheries Agency, *South Pacific Forum Fisheries Agency Corporate Plan 1998–2001* (Honiara, Forum Fisheries Agency, 1998).

²⁸ Moore, note 20 above at p. 198.

²⁹ FAO, *Report of the World Conference on Fisheries Management and Development, Rome, 27 June–6 July, 1984* (Rome, Food and Agriculture Organisation, 1984), p. 20. See also Michael Lodge, "New Approaches to Fisheries Enforcement", (1993) 2 *Review of European Community and International Environmental Law* 3, 277–284.

agreed to impose on all foreign fishing vessels operating in their EEZs.³⁰ To regulate the operations of foreign fishing vessels in the western and central Pacific Ocean region, all foreign fishing vessels are prohibited from fishing unless licensed by a Pacific island state.³¹ The MTCs requires that the Pacific island states adopt a common licence form.³² To further control and monitor the operations of foreign fishing vessels, transshipment by foreign fishing vessels is closely regulated.³³ The MTCs prohibit transshipment by licensed foreign fishing vessels unless the vessel is a licensed group seiner.³⁴ All other classes of licensed foreign fishing vessels can only tranship at designated ports in the licensing state.³⁵ 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.³⁶ These reports must be provided to the licensing state 45 days after the completion of the trip.³⁷ Furthermore, foreign fishing vessels must provide the licensing state with regular

³⁰ 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, 26 September–1 October 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, 22 February–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 MTCs, 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 [distant-water fishing nation] 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).

³¹ See s. 2 of the Minimum Terms and Conditions.

³² *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 of the name of the foreign fishing vessel; the 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 its 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 condition of the licence is that the vessel's radio call sign and various identification marks should be clearly displayed.

³³ See s. 3 of the Minimum Terms and Conditions.

³⁴ *Ibid.*, s. 3(b)(i).

³⁵ *Ibid.*, s. 3(b)(iii).

³⁶ *Ibid.*, s. 4.

³⁷ *Ibid.*, s. 4(b)(ii).

catch reports while operating within the licensing state's EEZ.³⁸ 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 measures. In order to verify these reports, the MTCs require foreign fishing vessel operators to carry observers on their vessels.³⁹ Observers may board foreign fishing vessels for scientific, compliance and monitoring purposes. The observer's 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.⁴⁰

Enforcement of tuna management regulations has always been a problem for the Pacific island states. The problem of prosecuting vessels that have evaded the jurisdiction of the licensing state is dealt with by the requirement that foreign fishing vessels maintain an agent resident in the licensing state.⁴¹ 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 require 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.⁴² Moreover, foreign fishing vessel operators have a duty to comply with the instructions issued by authorised officers from the licensing state.⁴³ 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.⁴⁴

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 1983.⁴⁵ The Regional Register is a database holding information about the vessel's owners,

³⁸ *Ibid.*, s. 5.

³⁹ *Ibid.*, s. 6.

⁴⁰ *Ibid.*, s. 6(iii).

⁴¹ *Ibid.*, s. 7.

⁴² *Ibid.*, s. 8.

⁴³ *Ibid.*, s. 9(a).

⁴⁴ *Ibid.*, s. 9(f). The FAO Standard Specifications for the Marking and Identification of Fishing Vessels was endorsed by the 18th session of the FAO Committee on Fisheries in April 1989 for adoption by states as a standard system to identify fishing vessels operating, or likely to operate, in waters of states other than those of the flag state.

⁴⁵ For a discussion and analysis of the regional register, see David Douman and Peter Terawasi, "The South Pacific Regional Register of Foreign Fishing Vessels", (1990) 14 *Marine Policy* 4, 234.

operators and 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 the 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.

The Regional Register is also a compliance mechanism.⁴⁶ Its intention is to shift the burden for compliance onto 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.⁴⁷ 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 have been discussions to broaden the Register to encompass information about where the vessel is licensed to fish.⁴⁸ Its success in the western and central Pacific Ocean region has attracted the attention of other parts of the world. The small island states of the Organisation of Eastern Caribbean States (OECS), the wider grouping of the Caribbean Community (CARICOM) countries, as well as the sub-regional commission grouping of the northern countries of west Africa have all shown an interest in the Register.⁴⁹

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.

⁴⁶ As at November 1999, there were 756 vessels registered on the Regional Register. See also FFA, *Report of the Director to the 39th Meeting of the Forum Fisheries Committee, 2-6 May, Apia, Samoa* (Honiara, Forum Fisheries Committee Doc. 39/2, 1999), p. 10.

⁴⁷ FFA, "Regional Register" (Honiara, Forum Fisheries Agency Report No. 93/42, 1993).

⁴⁸ *Ibid.*, p. 5.

⁴⁹ Moore, note 20 above at p. 200.

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 may 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 LOS Convention allows the Pacific island states to co-operate to ensure that foreign fishing vessels that violate one island state's fishery laws do not get licensed by other Pacific island states. No distant-water fishing nation has objected to the Regional Register⁵⁰ so it may be argued that a regional custom has emerged in the western and central Pacific Ocean.⁵¹

Flag State Responsibility

One of the means through which enforcement is carried out in the context of regional co-operative schemes in the western and central Pacific Ocean 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.⁵² 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 with coastal State fisheries laws and regulations. Coastal States should consider including provisions to this effect in bilateral access agreements.”⁵³

The concept is now firmly entrenched in international law having being incorporated in the Fish Stocks Agreement⁵⁴ and the FAO Compliance Agreement.⁵⁵ 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

⁵⁰ J. Charney, “The Persistent Objector Rule and the Development of Customary International Law”, (1985) 56 *British Yearbook of International Law* 1.

⁵¹ See *Nottebohm Case (Liechtenstein v Guatemala)* [1955] ICJ Rep 4, para. 4.

⁵² Mfodwo and Tsamenyi, note 15 above at p. 63.

⁵³ FAO, note 29 above at p. 20.

⁵⁴ Fish Stocks Agreement, Art. 17.

⁵⁵ FAO Compliance Agreement, Art. III. For background 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, 2nd Session, Treaty Doc. 103-24 (Washington, DC, US Government Printing Office, 1994).

aspect to the sovereign enforcement authority of coastal states and the ultimate sanction of repudiation of the agreement.⁵⁶

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).⁵⁷ 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.⁵⁸ The US is also required to assist if requested to investigate the alleged breach of the Treaty by a US fishing vessel.⁵⁹ To accelerate the processing of claims, the US facilitates claims made against a US fishing vessel, including a claim for the market value of the fish taken without authorisation.⁶⁰ 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.⁶¹

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, forfeitures and penalties collected. Under the Treaty on Fisheries, the US has a duty to investigate fully any alleged infringement involving a US vessel. It is required to report within two months to the Pacific island state that requested the investigation.⁶² 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.⁶³ If the vessel is alleged to have committed a more serious

⁵⁶ Moore, note 20 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).

⁵⁷ The revised text of the Treaty is reproduced by the 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* (Honiara, Forum Fisheries Agency, 1994).

⁵⁸ Treaty on Fisheries, Art. 4.1.

⁵⁹ *Ibid.*, Art. 4.2.

⁶⁰ *Ibid.*, Art. 4.3.

⁶¹ *Ibid.*

⁶² *Ibid.*, Art. 4.4.

⁶³ *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; (c) the vessel fished in closed areas, limited areas and used other fishing methods apart from purse seining; or (d) the vessel

offence, the US has a duty to ensure that the vessel submits to the jurisdiction of the party whose laws have been violated.⁶⁴ Furthermore, the US can penalise the vessel at similar levels for like violations by foreign vessels operating in the US. If a judgment 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.⁶⁵ Thus, US administrative and judicial machinery would be acting as agents for the Pacific island states in the area of fisheries compliance control.⁶⁶ Although sanctions have not been applied by the US to date, it has been requested to initiate investigatory action under the Treaty against several unlicensed US flag vessels.⁶⁷

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 distant-water fishing nation and the principles of flag state responsibility in the Treaty on Fisheries implements the LOS Convention 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.⁶⁸ Furthermore, coastal states must also promote the optimum utilisation of such living resources.⁶⁹ 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.

contd.

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.

⁶⁴ *Ibid.*, Art. 4.6(a).

⁶⁵ *Ibid.*, Art. 4.7.

⁶⁶ Moore, note 20 above at p. 202.

⁶⁷ 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.

⁶⁸ See generally E. Hey, “The Provisions of the United Nations Law of the Sea Convention on Fisheries Resources and Current International Fisheries Management Needs”, in *The Regulation of Driftnet Fishing on the High Seas: Legal Issues* (FAO Legislative Study 47, Rome, Food and Agriculture Organisation, 1991), pp. 1–11.

⁶⁹ LOS Convention, Art. 61.

The Agreed 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 measures adopted by the Pacific island states.⁷⁰ 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 to develop a vessel monitoring system, and to 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.⁷¹

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.⁷² The Lacey Act was developed in the US in response to concerns about trade in endangered species.⁷³ In 1981 and 1988, it was amended to prohibit the importation into the US of fish caught illegally. 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 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.⁷⁴

A number of Pacific island states have incorporated provisions prohibiting the importation of fish caught illegally in another states waters. For example, section 56 of the Solomon Islands' Fisheries Act 1998 provides as follows:

⁷⁰ FFA, 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).

⁷¹ 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), p. 28.

⁷² 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.

⁷³ 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, 4-6 December 1996).

⁷⁴ *Ibid.*

- “(a) on his own account, or as a partner, agent or employee of another person, lands, imports, exports, transports, sells, receives, acquires or purchases; or
- (b) causes or permits a person acting on his own behalf, or uses a fishing vessel, to land, import, export, transport, sell, receive, acquire or purchase,
- (1) Subject to subsection (3), a person who—
any fish taken, possessed, transported or sold contrary to the law of another State, shall be guilty of an offence and shall be liable to a fine not exceeding one million dollars.
- (2) This section does not apply to fish taken on the high seas contrary to the laws of another State where Solomon Islands does not recognise the jurisdiction of that State to extend to the high seas.
- (3) Where there is an agreement with another State relating to an offence referred to in subsection (1)(b), the penalty provided by section (1), or any portion of it according to the terms of the agreement, shall, after all the costs and expenses have been deducted, be remitted to that State according to the terms of the agreement.”

In 1994, Papua New Guinea successfully prosecuted a Korean purse seine vessel that fished in Solomon Islands waters without a licence. The potential that a Lacey Act-type provision has to deal with illegal fishing is enormous. In order to ensure its effectiveness, there must be comprehensive boarding and inspections of foreign fishing vessels in port.

Vessel Monitoring System

Another non-physical enforcement strategy, which has been developed by the Pacific island states, is the 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.⁷⁵ 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'

⁷⁵ FFA, “Vessel Monitoring System: Concept Paper”, in “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.

fishing regulations and access agreements to determine whether illegal fishing is taking place.⁷⁶

The implementation of a satellite-based VMS raises a number of issues. Since foreign fishing vessels will use it, the co-operation of all fishing operators in the western and central Pacific Ocean region is essential. As distant-water fishing nations have developed their own system it is necessary to harmonise the VMS, not only internally within the western and central Pacific Ocean region, but also with the distant-water fishing nations. A broad legal framework within which the VMS can be implemented has been established. The 34th meeting of the Forum Fisheries Committee agreed to the revisions to the Harmonised Minimum Terms and Conditions which precondition access to registration on the VMS Register.⁷⁷ The Director of the FFA is required to accord registered status on the VMS Register to those foreign fishing vessels which have duly completed the application forms, paid the specified levy, and been confirmed to have installed the FFA-type approved automatic locations communicator (ALC).⁷⁸

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 Articles 73 and 62(4)(e) and (k) of the LOS Convention. 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.⁷⁹ Although the LOS Convention 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.⁸⁰ This development, however, should be pursued in terms of the formulation of regional management arrangements.

⁷⁶ 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).

⁷⁷ FFA, "Record of Proceedings of the 34th Meeting of the Forum Fisheries Committee, November 25–30 1997, Honiara, Solomon Islands" (Honiara, Forum Fisheries Agency, 1997).

⁷⁸ FFA, "Procedures for the Operation of the VMS Register of Foreign Fishing Vessels, Forum Fisheries Agency" (Honiara, Fisheries Agency, 1997), para. 4.

⁷⁹ LOS Convention, Art. 87.

⁸⁰ Fish Stocks Agreement, Arts 19–21.

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's 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.

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 Region⁸¹ provides a 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 LOS Convention 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 enforce effectively 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",⁸² 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.

⁸¹ The text of the Niue Treaty is reprinted in (1993) 19 *Commonwealth Law Bulletin* 702; (1993) 32 ILM 136. The Treaty entered into force on 20 May 1993.

⁸² A. Bergin, "New Fishery Agreements Concluded in the South Pacific", (1993) 19 *Ocean and Coastal Management* 299–330 at 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. First, 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 former’s 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: “Vessels 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 the violation should 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.⁸³

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 LOS Convention. However, Article VI(1) appears to cover only violations in the territorial sea and the archipelagic waters of the parties, but not the EEZ.⁸⁴ It may be argued that, since Article 73 of the LOS Convention 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.⁸⁵ 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.⁸⁶ This interpretation of the Niue Treaty is correct since the Niue Treaty is silent on the extension of enforcement powers to the EEZ.⁸⁷

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.⁸⁸ 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.⁸⁹ Similar agreements exist to counter drug trafficking between the US and the

⁸³ 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, Bangkok, 13–16 December 1994), pp. 2–3.

⁸⁴ 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.

⁸⁵ Tsamenyi, note 83 above at p. 4.

⁸⁶ *Ibid.*

⁸⁷ 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 Art. VI read as follows: "each 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."

⁸⁸ LOS Convention, Art. 111. The view in the region is that Art. 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 Art. IV: see *ibid.*

⁸⁹ Convention Between Denmark and Sweden for the Common Supervision in Order to Prevent the Smuggling of Alcoholic Liquors, signed on 28 October 1935, 166 LNTS 299 at 307.

Bahamas,⁹⁰ and Portugal and Spain, in which the parties have authorised each other's authorities automatic entry into the territorial waters in hot pursuit to enforce their laws against drug trafficking.⁹¹ However, these precedents do not affect the vessels of third states.

With regard 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.⁹² However, this view ignores the fact that the LOS Convention lists a category of activities which are considered as non-innocent, which would suggest that the mere presence or passage of a ship could not, under the LOS Convention, be regarded as prejudicial to coastal states.⁹³ 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".⁹⁴ This view is consistent with Article 27(5) of the LOS Convention 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.⁹⁵

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.⁹⁶ 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 LOS Convention or customary international law. The reason is that, although the enforcement measures which Article VI of

⁹⁰ P.E. Rogers, "International Initiatives to Combat Drug Trafficking: The Bahamian Experience", (1991) 17 *Commonwealth Law Bulletin* 1376-1390 at 1379.

⁹¹ P. Delaney, "Drug Trade for Europe is Overwhelming Spain", *New York Times*, 9 November 1988, p. A6, col. 1.

⁹² R.C. Reuland, "The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention", (1993) 33 *Virginia Journal of International Law* 557-585 at 579.

⁹³ R.R. Churchill and A.W. Lowe, *The Law of the Sea* (revised ed., Manchester, Manchester University Press, 1988), p. 72.

⁹⁴ W.T. Burke, "Exclusive Fisheries Zones and Freedom of Navigation", (1983) 20 *San Diego Law Review* 595-623.

⁹⁵ Tsamenyi, note 83 above at p. 7.

⁹⁶ G.H. Allen, "Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices", (1989) 20 *Ocean Development and International Law* 309-341. Allen argues that hot pursuit is necessary to enforce coastal states' interests effectively. 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, *The Right of Hot Pursuit under International Law* (1969), p. 348.

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.⁹⁷ 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's 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 LOS Convention. The general principle governing enforcement powers under international law is that "a State cannot take measures on the territory of another State by way of enforcement of national laws without the consent of the latter".⁹⁸ However, a subsidiary agreement may overcome the problem of consent. Although Article 73 of the LOS Convention 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".⁹⁹

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 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.¹⁰⁰ However, while Tonga was a party to the Niue Treaty, Tuvalu was only a signatory. The Agreement therefore was not a subsidiary agreement for the purposes of the Niue Treaty. There is also a significant practical reason why the pace of developing subsidiary agreements has been slow. Most of the Pacific island states have obtained patrol vessels under the Australian Defence Force Co-operation Programme. The costs of running the vessels are generally prohibitive and assume a substantial portion of the budget of the surveillance arm of government. Thus, while there is political will to share surveillance platforms, the costs involved have discouraged the Pacific island states from negotiating subsidiary agreements.

Three recent developments in the region are worthy of mention. In March 1999, the three Micronesian states of Palau, the Marshall Islands and the

⁹⁷ The coastal state is exercising powers which are legitimate under international law.

⁹⁸ I. Brownlie, *Principles of Public International Law* (4th ed., Oxford, Oxford University Press, 1990), p. 307.

⁹⁹ I.A. Shearer, *Fisheries Legislation: The Case for Co-operation and Enforcement* (Meeting of Law Officers of Small Commonwealth Jurisdictions, London, Commonwealth Secretariat, 1990), p. 26.

¹⁰⁰ 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.

Federated States of Micronesia concluded the Koror Memorandum of Understanding (MOU).¹⁰¹ The Koror MOU sets out principles guiding co-operation between the three countries in the enforcement of their respective fisheries laws. The MOU is an umbrella arrangement which articulates the broad principles for co-operation. The actual details for the implementation of the principles is to be negotiated through subsidiary arrangements. The MOU also provides for the implementation of the FFA satellite-based vessel monitoring system.

The Marshall Islands and Nauru have commenced negotiations on a subsidiary agreement under the Niue Treaty framework. The agreement has not been concluded yet, but the draft proposal includes the exchange of enforcement personnel and the sharing of enforcement platforms including the exercise of cross-jurisdictional powers by officers from both countries.¹⁰²

The most recent initiative which is being proposed at a larger scale has come from Papua New Guinea. In October 1999, a delegation from Papua New Guinea has been visiting a number of countries in the region proposing the idea of an integrated surveillance and enforcement co-operation project. The developments over the past few months augers well for enforcement of fisheries laws in the region. However, the effectiveness of the arrangements would depend on the availability of enforcement platforms.

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 penalties, the licensing regime, nationality of fishing vessels, and management practices and statement of fisheries offences.¹⁰³

The implementation of subsidiary agreements also raise logistical problems. For instance, Article 111(5) of the LOS Convention provides that only warships may exercise the right of hot pursuit 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:

¹⁰¹ FFA, "Micronesian Maritime Surveillance Co-operation Conference, Koror, Palau, 3 March–3 April 1999" (Honiara, Forum Fisheries Agency Report 99/17, 1999).

¹⁰² The negotiations only started in September 1999 and at the time of writing this article, no agreement had been reached.

¹⁰³ 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.

“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 LOS Convention, 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.”¹⁰⁴

The Pacific island states’ surveillance officials must understand each state’s 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, including procedures for authorisation of entry into zones, conditions of entry into each other’s zones and detailed procedures for surveillance operations”.¹⁰⁵

Fisheries law enforcement and surveillance in the region has been complemented by aerial surveillance from the Royal New Zealand Air Force, the Royal Australian Air Force and the French Air Force. While there is scope to develop co-operation in this area further, it is unlikely that the Pacific island states will be able to afford their own aircraft and thus will depend on the metropolitan countries at least in the foreseeable future to assist them with aerial surveillance.¹⁰⁶

National Legislation

In addition to regional initiatives, the Pacific island states have also taken steps at the national level to enforce their fisheries laws and regulations. An emerging trend is the incorporation of comprehensive provisions in national legislation giving fisheries officers and other authorised officers increased powers to deal with illegal fishing. Most of the legislation reviewed requires fishing vessels to

¹⁰⁴ Shearer, note 99 above at p. 26.

¹⁰⁵ Lodge, note 29 above.

¹⁰⁶ B.M. Tsamenyi, “Enforcing Fisheries Jurisdiction in the EEZ: Some Legal and Policy Considerations”, in *Developing a Legal and Policy Framework to Implement the United Nations Law of the Sea Convention 1982* (Honiara, Forum Fisheries Agency, 1999), pp. 18–28.

be licensed in order to operate in the EEZs of the Pacific island states. The Papua New Guinea Fisheries Management Act 1998 prescribes the conditions that licensed vessels have to comply with.¹⁰⁷ These are, *inter alia*, that the vessel shall fly its national flag at all times; it shall not be registered in any other state; it shall be marked in accordance with the instructions of the Director; and it shall carry an approved satellite-based vessel monitoring system.¹⁰⁸ The Solomon Islands Fisheries Act 1998 prohibits the licensing of any foreign fishing vessel unless there is an agreement with the flag state to impose the provisions of the Act.

Most of the legislation provides for the powers of enforcement officers. These powers are fairly wide ranging and include the power to stop, board, enter, search and stay on board any vessel that an authorised officer has reason to believe has been used to breach the fisheries laws.¹⁰⁹

The Forum Fisheries Agency continues to play a pivotal role in this regard by providing training and seminars for enforcement officers. Recent developments in international fisheries law has compelled the Pacific island states to review existing tuna management arrangements. This has resulted in the negotiation of the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean. The Convention which is due to be concluded in June 2000 will have enormous implications for monitoring, control and surveillance arrangements in the region.

The Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and its Implications for Fisheries Law Enforcement

The final chapter in fisheries co-operation in the western and central Pacific Ocean is being negotiated under the chairmanship of Ambassador Satya Nandan of Fiji.¹¹⁰ Since June 1997, the Pacific island states and all the major fishing states in the region have been engaged in the negotiation of a comprehensive international convention for the conservation and management of the region's tuna resource. The negotiations are scheduled to finish in June 2000.¹¹¹

The impetus for the negotiations is the 1995 United Nations Fish Stocks Agreement which calls for co-operation to ensure conservation of highly migratory fish stocks throughout their entire migratory range. The Pacific island

¹⁰⁷ Papua New Guinea, Fisheries Management Act 1998, reproduced in *Papua New Guinea National Gazette*, 11 February 1999. See s. 43(3) of the Act.

¹⁰⁸ *Ibid.*

¹⁰⁹ E.g., *ibid.*, s. 49.

¹¹⁰ See Aqorau and Bergin, note 26 above.

¹¹¹ See FFA, "Report of the Second Multilateral High Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, Majuro, Republic of Marshall Islands, 10–13 June 1997" (Honiara, Forum Fisheries Agency, 1997).

states' concerns are underpinned by the need to have an effective management regime. Without the co-operation of fishing states, there is potential for vessels fishing on the high seas to impact on the status of the stocks in the EEZ.

The Convention will provide for a co-operative compliance and enforcement mechanism through the establishment of a commission. The function of the commission would include promoting co-operation and co-ordination between members of the commission to ensure that conservation and management measures for highly migratory fish stocks in areas under national jurisdiction and measures for the same stocks on the high seas are compatible.¹¹² A technical and compliance committee will be established which will be empowered to provide, *inter alia*, the commission with information, technical advice and recommendations pertaining to the implementation of, and compliance with, conservation and management measures.¹¹³ With respect to compliance and enforcement, the convention will require each member of the commission to enforce the provisions of the convention and any conservation and management measures adopted by the commission.¹¹⁴ In the event of a breach of the convention, the flag state will be required to investigate and the vessel involved in the breach will be obliged to cease fishing. The shifting of the burden onto the flag state will no doubt ease the burden on the Pacific island states.

The possibility of a regional coastguard appears likely through the powers that are to be given to the commission for the establishment of procedures for boarding and inspection of fishing vessels in the convention area.¹¹⁵ The convention provides for the establishment of a regional observer programme to collect verified catch data, other scientific data and additional information related to the fishery from the convention area.¹¹⁶ The development of a homogenous enforcement and surveillance regime in the region would certainly mark the final chapter in fisheries co-operation in the region.

Conclusion

This article has discussed the enforcement provisions of the LOS Convention and other relevant international treaties 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.

¹¹² See the draft Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, reproduced in FFA, "Report of the Fifth Session of the Multilateral High Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, Honolulu, Hawaii, 6–15 September 1999" (Honiara, Forum Fisheries Agency, 1999), pp. 35–70. See Art. 10(1)(b).

¹¹³ *Ibid.*, Art. 14(2)(a).

¹¹⁴ *Ibid.*, Art. 25.

¹¹⁵ *Ibid.*, Art. 26(1).

¹¹⁶ *Ibid.*, Art. 28(1).

The Pacific island states' strategy has been to develop regional arrangements. The article discussed the functions of these arrangements, which generally comply with the LOS Convention provisions regarding the conservation and management of tuna and enforcement. The discussion also highlighted legal difficulties with the VMS namely that the distant-water fishing nations cannot be compelled to implement the VMS on the high seas. Furthermore, certain 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.

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 LOS Convention. 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 transshipment from our ports tax already limited resources. Moreover, increased port transshipment 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.”¹¹⁷

The prospects, however, with the current negotiations on the Convention for the Conservation of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean appear to be positive. Although the Convention is still being negotiated, increased co-operation in fisheries surveillance and enforcement with the fishing states would ameliorate some of the problems highlighted in the article.

¹¹⁷ 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.