

## **Island nations of the South Pacific and jurisdiction over highly migratory species**

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*This article reviews a topic at which two of Professor Quentin-Baxter's many areas of interest meet: the law of the sea and the interests of Pacific island nations. The issue of jurisdiction over highly migratory species recently found its way into the spotlight of international politics with the arrest of the U.S. purse-seiners Danica and Jeannette Diana by Papua New Guinea and the Solomon Islands respectively. This article provides a context to the issue by examining the background, organisations and interests behind the different positions of the U.S. and the South Pacific island nations. It goes on to analyse the existing and evolving Pacific island institutional mechanisms of scientific research on fisheries. A theme of both areas of analysis is that international co-operation is necessary if this vital resource is to be managed and developed to its full potential.*

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### **I. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND THE SOUTH PACIFIC**

In 1970 Professor Quentin-Baxter addressed the New Zealand Institute of Public Administration on "The Legal Aspects of Exploiting Maritime Resources".<sup>1</sup> Having pointed out that no branch of international law was "better settled" than the concept of the open sea, he went on to review some of the extensive changes that were taking place in the law of the sea. In the face of these changes he still felt constrained to say that "a coastal state can seldom discharge the onus of claiming against the world a territorial or exclusive fishing limit broader than the present norm of twelve miles". Nevertheless, within a few years, the United Nations Convention on the Law of the Sea was to introduce further dramatic changes in the law relating to the exploitation of maritime resources — changes which included a 200 mile fishing zone. With his experience as New Zealand Senior Commissioner to the South Pacific Commission and as constitutional adviser to island nations, Quentin-Baxter fully appreciated the importance of these changes for those nations. They were, therefore, to be welcomed.

The ocean waters of the South Pacific region probably contain the world's richest resources of tuna and other migratory fish. Fishing fleets have been attracted from

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1 *Maritime Resource Administration in New Zealand*, Twenty-Second Annual Convention of Institute of Public Administration (Wellington 11-14 May 1970). A cyclostyled copy is held in the Ministry of Foreign Affairs Library, Wellington.

Japan, the United States, Taiwan, Korea and the Soviet Union. These fleets account for about 90% of the region's annual commercial catch of tuna — predominantly skipjack — of about 450,000 to 550,000 metric tonnes. The landed value approximates US\$500 million per annum. This value is almost as great as that of the combined exports of all other renewable natural resource products from all South Pacific island countries. Since it is accepted that the economic returns from skipjack could be increased “tuna represent the Region's most valuable renewable resource, and, in the long term, probably its most valuable asset overall.”<sup>2</sup> As Shepard and Clark, in their report on *South Pacific Fisheries Development Assistance Needs*, continue:<sup>3</sup>

At present, the very substantial benefits flowing from the 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 approaching this goal.

In these circumstances it was to be expected that the Pacific island nations would take a keen interest in international discussions on the law of the sea. The subject had a conspicuous place on the agenda of annual meetings of the South Pacific Forum and island governments saw to it that their views were canvassed, through the Australian and New Zealand delegations, in United Nations discussions that preceded the convening in 1973 of the Third United Nations Conference on the Law of the Sea (LOS). On occasion, representatives of island governments appeared before the LOS Conference to press successfully their own claims that island states, and islands generally, should have the same territorial sea, economic zone and continental shelf as was to be fixed for other land territory.<sup>4</sup>

The provisions in Part IV (Archipelagic States), Part V (Exclusive Economic Zone) and Part VIII (Regime of Islands) of the United Nations Law of the Sea Convention (signed in December 1982)<sup>5</sup> in particular reflect causes espoused by island states. Also, under Article 305 of the Final Provisions (Part XVII), the Convention was open for signature not only by “all States”, but also by “self-governing associated States” and “territories which enjoy full internal self-government”, in each case if the state or territory had the appropriate competence. This provision enabled the associated States

2 Michael P. Shepard and L. G. Clark *South Pacific Fisheries Development Assistance Needs*. A consultancy report prepared on behalf of FAO and UNDP (March 1984 Draft) Vol. 1, 5-6, 24.

3 *Ibid.*, 6.

4 An account of the events leading up to the establishment of the South Pacific Forum Fisheries Agency appears in C.C. Aikman “The South Pacific Forum Fisheries Agency” Essays in International Law, Twenty-fifth Anniversary Commemorative Volume, Asian-African Legal Consultative Committee (Tara Art Press, New Delhi, 1981) 86-103. See also George Kent *The Politics of Pacific Island Fisheries* (Westview Press, Boulder, Colorado, 1980); and W. M. Sutherland *Regional Co-operation and Fisheries Management in the South Pacific* Master of Laws in International Law dissertation (University of Hull, September 1985). R. E. Kearney “The Law of the Sea and Regional Fisheries Policy” (1978) 5 *Ocean Development and International Law Journal* Nos. 2 and 3, 249 gives an account of the fishing resources of the South Pacific and makes a case for a regional fisheries agency. See also Anthony Bergin “Fisheries and the South Pacific” (1983) *Asia Pacific Community*, Fall 20-32.

5 *The Law of the Sea, United Nations Convention on the Law of the Sea* (United Nations, New York, 1983).

of Cook Islands and Niue to sign the Convention. The Micronesian states — Marshall Islands, Federated States of Micronesia (FSM) and Palau — did not sign, but they can accede.

Part V of the LOS Convention, in establishing the Exclusive Economic Zone (EEZ) of 200 nautical miles, gives the coastal state “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil . . .” (Article 56). It is now the accepted view, in the face of the contrary view taken by the United States, that Article 56, subject to the provisions of the Convention, does indeed give coastal states sovereign jurisdiction over all living resources within the zone, including highly migratory species such as tuna, and that Article 64 does not deny them this jurisdiction.<sup>6</sup> That Article says:

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall co-operate to establish such an organization and participate in its work.

2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.

Although the LOS Convention has not yet come into force, the 200 mile EEZ has received such widespread international support, indicated by the substantial number of states throughout the world that have passed legislation to give effect in their domestic law to the zone, that it must now be regarded as having the status of customary international law.<sup>7</sup> All the members of the South Pacific Forum (Australia, Cook Islands, Fiji, Kiribati, Nauru, New Zealand, Niue, Papua New Guinea (PNG), Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa) along with Federated States of Micronesia (a Forum observer), Marshall Islands and Palau have asserted their authority over their EEZs (Tonga has passed but not implemented the necessary legislation). Of about some 132 coastal states in all, well over half (including the United States and Japan) were by 1980 claiming fisheries jurisdiction limits of 200 miles.<sup>8</sup>

## II. CO-OPERATION BY SOUTH PACIFIC ISLAND STATES

The island states have been quite clear as to their interpretation of the effect of Article 56. The Eighth South Pacific Forum (Port Moresby, Papua New Guinea, August 1977) in its Port Moresby Declaration on the Law of the Sea had asserted that each island state

6 See B. Martin Tsamenyi “The South Pacific states, the USA and sovereignty over highly migratory species” (1986) 10 *Marine Policy* 29; W. T. Burke “Highly Migratory Species in the New Law of the Sea” (1984) 14 *Ocean Development and International Law* No. 2, 273. A. J. Slayter, then FFA Legal Officer, in a report on his participation in the 18th Annual Conference of the Law of the Sea Institute, held in San Francisco, September 1984, said “The U.S. Position on tuna . . . was not shared by any other participant, and motivated some cynicism about US oceans policy generally.”

7 Tullio Scovazzi “Explaining exclusive fishery jurisdiction” (1985) 9 *Marine Policy* 120, 125.

8 Gerald Moore “National Legislation for the Management of Fisheries Under Extended Coastal State Jurisdiction” (1980) 11 *Journal of Maritime Law and Commerce* 153, 154 n.4.

had “the sovereign rights . . . to conserve and manage living resources, including highly migratory species, in its 200-mile zone.”<sup>9</sup> The significance of this assertion for the members of the Forum is apparent from any map showing how the EEZs of the scattered islands of the South Pacific take in vast areas of the Pacific Ocean. The interlocking zones cover the great majority of the ocean surface and an area of some 300 million square kilometres is involved.

The South Pacific Forum leaders were quick to realise that, if they were to obtain the maximum benefit for their peoples from developments in the law of the sea, and particularly from the establishment of EEZs, they would need to co-ordinate their policies. They announced in their Port Moresby Declaration their intention to establish a South Pacific Regional Fisheries Agency “open to all Forum countries and all countries in the South Pacific with coastal state interests in the region who support the sovereign rights of the coastal state to conserve and manage living resources, including highly migratory species, in its 200-mile zone.”<sup>10</sup>

At an early stage it was apparent that there was a choice between two forms of regional fishing organisation. The first would be a widely representative organisation that included not only the coastal states having jurisdiction over EEZs with fishing potential, but also distant water fishing nations that were exploiting the fish. Such an organisation was contemplated by Article 64 of the LOS Convention. It would manage the resource with a view to ensuring its conservation and optimum utilisation. The alternative choice would be a narrower organisation, comprising the South Pacific island states — essentially members of the South Pacific Forum. It would represent their common interest in protecting and exploiting their fishing resources.

*Draft Convention for a South Pacific Regional Fisheries Organisation*<sup>11</sup>

Early meetings convened by the Director of the South Pacific Bureau for Economic Co-operation (SPEC), the executive arm of the South Pacific Forum, included not only representatives of Forum countries, but also of the metropolitan powers in the region (United States, United Kingdom and France) and of Chile (in respect of Easter Island). Observer status was granted to Canada, Japan and the Republic of Korea. The composition of the meetings meant that early discussions centred around a draft convention establishing a South Pacific Regional Fisheries Organisation with a broad range of functions. This was potentially an Article 64 organisation in that it would consider regional co-operation for the effective conservation and utilisation of living resources in the area. It would study and collect information on the resource and facilitate, without detriment to the sovereign rights of coastal countries, a regional approach to management and licensing and to surveillance and enforcement. The United States saw itself able, within the terms of its domestic legislation, the Magnuson Act,<sup>12</sup> to participate in an international fisheries agreement establishing such an organisation that provided for the conservation and management of tuna. However, the

9 (1977) 27 *New Zealand Foreign Affairs Review* (hereafter cited as NZFAR) July-September 43, 45. See also (1976) NZFAR October-December 37, 40.

10 (1977) 27 NZFAR July-September 43, 45.

11 See *supra* n.4; see also (1977) 48 *Australian Foreign Affairs Record* (hereafter cited as AFAR) 632.

12 *Infra* n.29.

proposal foundered over United States unwillingness to recognise the sovereign jurisdiction of the independent Forum countries over migratory fish within their EEZs.

The Ninth South Pacific Forum (Alofi, Niue, September 1978) rejected the draft Convention for a South Pacific Regional Fisheries Organisation for “the immediate future”. It decided to set up a South Pacific Forum Fisheries Agency “and to examine further the more broadly based organisation proposed in the draft convention”.<sup>13</sup>

#### *South Pacific Forum Fisheries Agency (FFA)*

The Convention on the South Pacific Forum Fisheries Agency,<sup>14</sup> adopted and opened for signature at the Tenth South Pacific Forum (Honiara, Solomon Islands, July 1979),<sup>15</sup> established an Agency (FFA) with two organs, a Forum Fisheries Committee (FFC) and a Secretariat. The FFC comprises representatives of member countries and the FFA operates from headquarters in Honiara. The members now are Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, New Zealand, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa.<sup>16</sup>

The concern of the Forum members to maintain their stand on highly migratory species is shown in the recitals in the preamble to the Convention and again in Article III, para.1, which reads:

1. 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 zone or fishing zone which may extend 200 nautical miles . . . .

Article III also makes a bow in the direction of Article 64 of the LOS Convention by recognising, in paragraph 2, that effective co-operation for the conservation and optimum utilisation of the highly migratory species requires the establishment of additional international machinery providing for co-operation between coastal states in the region and distant water fishing nations.

The FFC provides detailed policy and administrative guidance and directions to the Agency and a forum for parties to consult together on matters of common concern in the field of fisheries. In particular, Article V requires the FFC to promote intra-regional co-ordination and co-operation in certain fields:

13 (1978) 49 AFAR 496.

14 *New Zealand Treaty Series* (Ministry of Foreign Affairs, Wellington) 1979 No. 6; NZ Parliament, House of Representatives, Appendix to the Journals, 1980, A16 (Honiara 6 July; in force 10 July).

15 (1979) 29 NZFAR July-December 57; (1979) 50 AFAR 435.

16 Palau was admitted as a full member at the sixteenth South Pacific Forum (Rarotonga, Cook Islands, August 1985) (1985) 35 NZFAR July-September 14, 21; (1985) 56 AFAR 699, 703. When considering the application of Palau for membership the FFC established membership criteria (*Report of the Tenth Meeting of the Forum Fisheries Committee*, Rarotonga, Cook Islands, 29 April - 3 May 1985 (FFA, Honiara) paras. 6-8. Marshall Islands was admitted at the Seventeenth Forum (Suva, Fiji, August 1986 — South Pacific Bureau for Economic Co-operation).

- (a) harmonisation of fisheries management policies;
- (b) relations with distant water fishing nations;
- (c) surveillance and enforcement;
- (d) onshore fish processing;
- (e) marketing;
- (f) access to 200 mile zones of other parties to the Convention.

### *The work of FFA*

The preamble to the FFA Convention expresses concern that the maximum benefits from the living resources of the region should be secured "for the peoples and for the region as a whole . . ." Although FFA has not ignored the need to preserve and develop the traditional area of island fishing — the near-shore fisheries — its main area of concentration has been offshore fishing for highly migratory species — particularly skipjack tuna. Here island governments have had three major concerns:<sup>17</sup>

1. The development of national tuna fishing and processing industries.
2. The control of foreign fishing in their national waters to ensure the greatest possible benefit for island peoples.
3. The co-ordination of their policies on the management and exploitation of migratory species and the development of co-operative relationships with distant water fishing nations.

The first of these concerns is a priority objective for most island states.<sup>18</sup> It is seen as a source of employment, increased national income and foreign exchange earnings. Locally based fishing operations have been established in Fiji, Kiribati, Solomon Islands, Tonga, Tuvalu and Vanuatu. There are processing facilities in American Samoa, Fiji and the Solomon Islands and transshipment facilities in Kiribati, Palau, Papua New Guinea and Vanuatu. United States purse-seiners have landed catches at transshipping depots in Guam and in Tinian in the Northern Marianas. Substantial external assistance in the form of grant aid, credits, technical assistance, training, technical advice, study tours and tariff concessions are contributing to the development of these industrial operations. FFA itself has been shifting its overall emphasis from the control of foreign fishing towards providing technical assistance to member state programmes for the development of national and locally-based fishing operations. On the other hand, the depressed state of the tuna market, increasing emphasis on the use of purse-seiners (a high-technology, low-manpower operation), difficulties in acquiring relevant technology, competition between island states, lack of knowledge of the resource and lack of skills present obstacles to these developments.

17 FFA Secretariat Paper presented to 18th Annual Conference of the Law of the Sea Institute, San Francisco, September 1984.

18 See generally Shepard and Clark *supra* n.2, Vols.1 and 2; Semisi T. Fakahau and Michael P. Shepard *Fisheries Research Needs in the South Pacific*, a Consultancy Report prepared on behalf of FFA and the Canadian International Centre for Ocean Development (SPC/Fisheries 18/WP.21, July 1986) 23; W. A. Wilkinson "Pacific Island Look to Tuna Resource" *Fishing News International* April 1986; "Tuna fleet rides out recession" (1986) *Pacific Islands Monthly* (hereafter cited as PIM) April 11-13, 47.

At the time the island nations assumed sovereignty over their own EEZs, fishing fleets carrying the flags of powerful distant water fishing nations were operating throughout the Pacific. An early task for FFA was to assist the island nations in asserting control over their EEZs and in gaining as much advantage as possible from the operations of distant water fishing nations. As FFA itself has said:<sup>19</sup>

To achieve this [FFA member governments] have adopted an attitude to foreign fishermen which is one of the most positive anywhere to non-reciprocal access rights, in pursuit of the benefits of fees, technology transfer, development assistance, employment and information which well-managed foreign fishing operations can provide.

This approach can result in stable overall access and flexible licensing arrangements for vessels whose flag governments are prepared to ensure that their fleets comply with the regulatory requirements of island States.

Relations between some of the island states and distant water fishing nations have been defined in a series of bilateral access agreements, negotiated with the assistance of FFA. These agreements are usually two-tiered.<sup>20</sup> There is a short formal agreement between the island government and the distant water fishing nations concerned. This provides an overall framework for access, with obligations on the flag state to assume responsibilities for the actions of its vessels. This agreement is supplemented by an agreement between a commercial fishermen's association and the island government. (There may be more than one such agreement with the same island government). The access conditions in these supplementary agreements have been harmonised with the assistance of FFA. They prescribe the species of fish to be caught, the method of fishing and area to be fished. They lay down permit issuing procedures; registration and permit fees; requirements for vessel identification, maintenance of catch records and reporting; and boarding procedures. They provide for the appointment of agents in the island state on whom legal process can be served. Standard forms for information on vessel catches and fishing activities are in use. The data supplied is used by SPC for scientific purposes and FFA for monitoring and negotiation purposes.

Regimes along the above lines have been in place between Cook Islands, Federated States of Micronesia, Kiribati, Marshall Islands, Palau, Papua New Guinea, Tuvalu and Solomon Islands with one or more of Japan, Korea and Taiwan.

#### *Subregional arrangements*

The harmony of the member states of FFA appeared to be threatened by the signature in February 1982 of the Nauru Agreement Concerning Co-operation in the Management of Fisheries of Common Interest to which Federated States of Micronesia, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea and Solomon Islands were parties. The aim was to establish a sub-regional management area which would comprise the 200 mile zones of the parties, and pockets of high seas.<sup>21</sup> The

<sup>19</sup> *Supra* n.17.

<sup>20</sup> *Idem*; Shepard and Clark, *supra* n.2, Vols. 1 and 2; Dean H. Robb "Foreign Fishing Access Regimes in the Pacific Basin" *The Emerging Marine Economy of the Pacific* (Chennat Gopalakrishan ed., Butterworth, Boston, 1984) 107, 112-115.

<sup>21</sup> David Anderson "Developing island states move to protect tuna" (1982) 2 *Papua New Guinea Foreign Affairs Review*, No. 1, 13-17; Sutherland, *supra* n.4, 44-46.

agreement was to be fully implemented through subsidiary arrangements. The seven contracting parties as a group have not entered into such an arrangement, but in 1980 and 1981 FSM, Marshall Islands and Palau had agreed to enter into arrangements with the American Tunaboat Association (ATA) under which they would offer a single licence for fishing in their combined zones. These arrangements were followed by an ATA agreement with Kiribati, the Micronesian Maritime Authority (FSM), and the Palau Maritime Authority. This was effective from 1 January 1983 to 31 December 1984.

Concern, expressed by Fiji, the Polynesian nations, Australia and New Zealand, that the establishment of the sub-regional Nauru group would lead to fragmentation of FFA were not realised. The administration of the group, in so far as it has continued to operate, has been handled within FFA Secretariat. Moreover, the regional arrangement involving the Micronesian countries was followed by one in the Eastern Pacific by the Cook Islands, New Zealand (for Tokelau), Niue, Tuvalu and Western Samoa with ATA. This agreement was also effective from 1 January 1983 to 31 December 1984 and was administered by FFA on behalf of Tuvalu.

The parties to the Micronesian and Eastern Pacific Agreements were unable to reach agreement on their renewal.<sup>22</sup> It did not prove possible to settle on the level of fees—ATA offered one half the level paid for 1984. Also, relations were exacerbated by complaints of late payment and non-payment of fees and failure on the part of ATA to provide catch data and information as to the location of vessels. This breakdown led to the Kiribati arrangement with the Soviet Union.

#### *The Soviet Union and Kiribati*

In October 1985 the Republic of Kiribati concluded an agreement with a Soviet fishing company, Sovrybflot. This agreement, negotiated with FFA assistance, allowed the Soviet company to operate 16 purse-seiners and longliners in Kiribati waters for a fee of A\$2.4 million. Soviet fishing vessels were, however, prohibited from fishing within the 12-mile territorial limit and from landing in Kiribati, except on the main atoll of Tarawa in an emergency. The agreement was to be for one year. A decision on its renewal has reached stalemate because the Russians are offering a reduced annual fee.<sup>23</sup> This Kiribati agreement may nevertheless be the forerunner of a more substantial Russian involvement in tuna fishing in the region. Fiji, Papua New Guinea, Solomon

<sup>22</sup> Temaia Mackenzie "Fish talks deadlock" (1984) 10 *Islands Business* December 42-43.

<sup>23</sup> Paul Dibb "Soviet Strategy towards Australia, New Zealand and the South-West Pacific" (1985) 39 *Australian Outlook* August 69, 73-74; U. F. Neemia "Russophobia and Political/Economic Self-determination in Kiribati" Paper presented to International Conference on Peace and Security in Oceania, Auckland, 3-6 April 1986; "Kiribati-Soviet Deal Goes Through" (1985) 56 *PIM* October 7; "Uproar Over Soviets" (1985) 11 *Islands Business* September 19-20; "Ratu Mara plays the Russian Card" (1986) 57 *PIM* August 20-22; David Robie "Soviets deal for Pacific port access" *New Zealand Times* 14 September 1986.



Islands, Tonga, Tuvalu, Vanuatu and Western Samoa are said to have had Soviet offers for fishing deals; and negotiations are proceeding with Vanuatu and Fiji. Papua New Guinea has denied reports that it may be interested. In the case of Vanuatu and Fiji the grant of shore-based facilities has not been excluded. In response to criticism Father Lini, Prime Minister of Vanuatu, has pointed to the Soviet Union's fishing agreement with New Zealand — where there are no shore-based facilities.<sup>24</sup>

### *Surveillance and Enforcement*

When dealing with the problem of non-compliance with fisheries law and agreements, island governments are faced with vast distances, shortage of trained manpower, inadequate equipment, and communications difficulties. Thus the region presents unique problems for fisheries surveillance using conventional techniques with ships and aircraft.

An important step was taken in May 1983 with the establishment of the Regional Register by the FFC.<sup>25</sup> The Register has made a significant contribution to the control of the fishing operations of distant water fishing nations. All foreign fishing vessels fishing in waters of any FFA member state, including vessels registered with another member of FFA, are required to register. Licences to fish in a particular EEZ are given only to vessels in good standing on the Register. Good standing can be withdrawn, i.e. a vessel may be blacklisted if persons responsible for the operation of the vessel have committed a serious offence against the laws or regulations of any of the participating countries. Elaborate due process procedures must be followed before a vessel is blacklisted.

The Regional Register was soon used effectively against a United States purse-seiner which was fishing illegally in Federated States of Micronesia waters. The vessel was not given a licence to fish until it had paid back fees and a heavy fine. Except for the United States, the Register has been accepted by distant water fishing nations. It has significantly improved compliance.

The FFA has been working on surveillance and enforcement in other directions. A programme established early in 1986 aims to enhance surveillance and enforcement capacity in member countries through provision of technical assistance; co-ordination of operations; collation of reports on vessel activities, and other relevant information, for distribution to governments; and training for officials. Also the FFA is interesting itself in the application of satellite technology for surveillance and enforcement

24 "Tuvalu says 'niet'" (1985) 11 *Islands Business* 34; *The Evening Post* 6 June 1986; *The Dominion* 12 and 21 June 1986. For the New Zealand fishing agreement with USSR see New Zealand Treaty Series (Ministry of Foreign Affairs, Wellington) 1978 No. 5; N.Z. Parliament, House of Representatives, Appendix to the Journals, 1978 A55. The agreement was renewed in 1982, 1984 and in September 1986, the recent renewal being for four years.

25 Report of the Eighth Meeting of the Forum Fisheries Committee, Apia, Western Samoa, 2-5 May 1983 (FFA, Honiara) Appendix E; Sutherland *supra* n.4, 46-57; Judith Swan, Regional Cooperation in Fisheries Legislation and Enforcement, A Case Study (Draft, FFA, Honiara); Progress Report on the Regional Register (FFA Report 86/23, Honiara).

purposes.<sup>26</sup>

Surveillance and enforcement is an area in which Australia, New Zealand and Canada,<sup>27</sup> with their greater resources, can make significant contributions.

### III. THE UNITED STATES AND JURISDICTION OVER TUNA

#### *The Magnuson Act*

The United States has over the years rejected coastal state jurisdiction over tuna beyond 12 nautical miles of the coast. The Fishery Conservation and Management Act 1976 (the Magnuson Act), which extends exclusive United States fishery management authority over all living resources within 200 nautical miles, excepts "highly migratory species". However, the Act defines those species as "species of tuna which, in the course of their life cycle, spawn and migrate over great distances in waters of the ocean."<sup>28</sup> This definition has the effect of excluding all highly migratory species other than tuna from the operation of the exception, the object being to facilitate the operations of ATA vessels in coastal waters of ocean states. To this end, the Act requires the United States to withhold recognition of the EEZ of a country which does not accept that tuna are to be managed by "applicable international fishing agreements". The Act contemplates the negotiation of such agreements which "provide for the conservation and management" of tuna. The system of sanctions established by the Magnuson Act encourages United States tuna fishermen to flout coastal country EEZs, or to make hard bargains over agreements for access. If an American fishing vessel has been seized in violation of an applicable international fishing agreement, or without the authorisation of a bilateral agreement between the United States and the country in question, or as a result of a claim to jurisdiction which is not recognised by the United States, action can be taken to prohibit the importation into the United States of all fish or fish products from the country concerned.

26 Gordon R. Munro, Draft Report of Pacific Economic Cooperation Conference (PECC) Task Force on Fisheries Development and Co-operation (Vancouver, 19-21 May 1986) and supporting papers: Report on the Use of Satellites in Fisheries Surveillance (FFA, Honiara) and Norman J. Wilimovsky, The Feasibility of Satellite Surveillance of High Seas Fisheries in the Central Pacific Ocean (University of British Columbia). See also "Fisheries Development and Management" *Pacific Economic Cooperation, Issues and Opportunities*, Report of the Fourth PECC Conference, Seoul, April 29 - May 1, 1985 (Korea Development Institute, Seoul) 74, 80; *Ocean Management, A Regional Perspective*, Report by a Commonwealth Group of Experts (Commonwealth Secretariat, London) 119-123; Eugene R. Fidell *Legal Provisions and Procedures for the Exercise of Civil and Criminal Jurisdiction over Foreign Fishing Vessels no longer physically present within the Jurisdiction of the Coastal State* (Washington, Exclusive Economic Zone Programme, Legislative Studies Series, March 1983); Robb *supra* n.20, 116-118.

27 Robert Keith-Reid "Patrol boat doubts" (1985) 11 *Islands Business* March 50-51; "Patrol-boat saga goes on" *ibid*, October 48; "Patrol Boats Accepted" (1986) 57 *PIM* August 8; "NZ Plans More Active Role" (1985) 56 *PIM* May 7; "Canada lends a hand" (1986) 12 *Islands Business* May 46.

28 Public Law 94-265, ss. 3 (14), 202(a)(4)(B) and 205. See W.T. Burke "U.S. Fisheries Management and the New Law of the Sea" (1982) 76 *The American Journal of International Law* 24-55.

The Magnuson Act is complemented by the Fishermen's Protective Act of 1967. This Act provides for the reimbursement of United States vessels seized by a foreign country "on the basis of claims to jurisdiction that are not recognised by the United States . . . ." The reimbursement extends to any fine, licence fee, registration fee, or other direct charge that must be paid to secure the release of the vessel. The amount of the reimbursement is then claimed from the foreign country concerned and if not paid it is deducted from United States foreign assistance payable to that country. The Act also establishes an insurance scheme under which commercial fishing vessels can be compensated for damage to or destruction of the vessel or its equipment, for loss or confiscation of vessel or equipment, from dockage fees, for fish confiscated or spoiled, and for income lost as a result of the seizure.<sup>29</sup>

#### *The Danica and Jeanette Diana incidents*

Two South Pacific incidents illustrate the operation of the Magnuson Act.

The *Danica*, a United States-registered purse-seiner, was arrested in February 1982 while fishing without a licence within Papua New Guinea's EEZ. The captain was convicted and fined K500 and the vessel was forfeited under the Fisheries Act. The United States invoked the Magnuson Act with an import embargo on all PNG tuna exports to the U.S.A. PNG was also told that United States aid and private foreign investment could be affected. In face of this pressure, PNG released the *Danica* on payment of a nominal fine and conclusion of an interim and unfavourable access agreement with the ATA.<sup>30</sup> As might have been expected, the United States action left a legacy of bitterness.

The *Jeanette Diana*, a 1200 ton United States purse-seiner, was arrested by the Solomon Islands in June 1984 on the charge of illegal fishing. This action automatically triggered the provisions of the Magnuson Act. Solomon Islands fish exports affected by the trade embargo were worth about SI\$12 million a year and comprised one-sixth of the island nation's export trade. The Solomons High Court confiscated the vessel and its catch and fined the master and owners. This was followed by the calling of international tenders for the sale of the *Jeanette Diana* at a reserve price of SI\$3.9 million. The United States, thereupon, issued a statement warning potential buyers that the vessel would be "subject to seizure and forfeiture proceedings in the United States." One of the Solomons' responses was to threaten to invite the Soviet Union to fish in its EEZ, although it had earlier rejected a Soviet request for fishing rights.

Solomon Islands sought support from the Fifteenth South Pacific Forum (Funafuti, Tuvalu, August 1984)<sup>31</sup> for a ban on all United States fishing vessels in Pacific Island

29 Public Law 90-482 as amended; (1982) 9 *United States Code* 290-294 and (1985) 2 *Supplement III* 504-506. See also T. Meron, "The Fishermen's Protective Act: A Case Study in Contemporary Legal Strategy of the United States" (1975) 69 *The American Journal of International Law* 290-309.

30 Tsamenyi *supra* n.6, 37.

31 (1984) 34 *NZFAR* July-September 36, 38. See also Thirteenth South Pacific Forum (Rotorua, New Zealand, August 1982) (1982) 32 *NZFAR* July-September 21, 22.

ports and the withdrawal of licences for United States vessels fishing in the region. The Forum was not prepared to inflame the issue by taking this action, but it expressed its continuing concern at the failure of the United States to recognise the applicability of the 200 mile EEZ to tuna and at the United States' endeavour to enforce its position by embargo legislation. The long-term solution, it was considered, lay in the conclusion of a multilateral agreement with the United States.

It was in the context of negotiations for such a multinational agreement that the immediate issue of the *Jeanette Diana* was resolved. In February 1985 Sir Peter Kenilorea, the newly elected Prime Minister of the Solomon Islands, agreed to release the vessel back to the owners for SI\$830,000, comprising \$700,000 buy-back, \$70,000 maintenance charges and \$60,000 court fine. However, the embargo was not immediately lifted. When FFA representatives convened in Port Moresby in the following month for the third of a series of meetings to discuss an agreement with the United States on the tuna issue, it became clear that the talks would be prejudiced if the Solomons' embargo continued. As the meeting assembled the United States representative announced that steps would be taken for its removal.<sup>32</sup>

#### *A fisheries treaty with the United States*

The *Danica* incident provoked a proposal in the United States Congress that the United States should convene and host a meeting of Pacific island nations with a view to concluding a fisheries treaty. This would demonstrate United States willingness to co-operate in the conservation and management of fisheries stocks "and to encourage the rational use of such resources by [U.S.] fishermen while still helping the small developing nations of the world to make use of, and prosper from the use of, their own natural resources".<sup>33</sup> And there was, of course, anxiety to avoid more *Danica* type incidents and to forestall Soviet penetration into the region. American officials visited several South Pacific countries in 1983 to float the possibility of a fisheries agreement. On Papua New Guinea initiative an FFA meeting was held in Honiara in December 1983. The FFA Secretariat was instructed to prepare a position paper on the issue, and, as indicated above, the Tuvalu Forum, in August 1984, favoured the conclusion of a multilateral agreement with the United States. The willingness of the island countries to pursue a government to government agreement reflected their irritation and disappointment with the ATA in meeting its obligations under the existing two sub-regional arrangements. Also there were persistent instances of poaching by American vessels. Island frustration had been publicly expressed by Philipp Muller, the Director of FFA, when he said that illegal fishing and non-payment of licensing fees could lead to major confrontations between island states and tuna boats.<sup>34</sup>

Representatives of FFA countries agreed on a draft treaty and a common approach for a first meeting with United States representatives. This meeting, held in Suva in

32 Tsamenyi supra n.6, 37-38; John Richardson "End of the tuna war" (1985) 11 *Islands Business* February 39; "Why that ban was lifted" *ibid.* April 39.

33 Tsamenyi supra n.6, 37-40. Quotation is from a statement by Congressman Paul McCloskey, Jr on the floor of the House, 11 March 1982 (unpublished).

34 "Piracy Feared as Americans Fail to Put Up Tuna Cash" *N.Z. Herald* 12 April 1984.

September 1984, was succeeded by 9 further rounds of negotiations culminating in a meeting in Nuku'alofa, Tonga, in October 1986.

As early as December 1984 the negotiations were described by island officials as "tediously slow but steady" and there were suggestions that some of the island nations were threatening to withdraw from the negotiations. There was mounting pressure from a wide range of sources for the United States to reach an agreement, pressure which in part reflected concern at the increasing involvement of the Soviet Union in the region. Statements from academic commentators in the United States and Australian and New Zealand diplomats stressed the dangers for the United States and the region if the United States did not come to terms with the islands on marine resources development; and it was stressed that any settlement would have to include United States economic and technical assistance for the island nations in establishing their own national fishing capabilities. For its part, the United States was stepping up its economic assistance in the region — including a fisheries aid program separate from any aid package to be negotiated under the tuna treaty. State Department spokesmen were giving other indications that the United States had the political will to overcome any obstacles that might still face a final agreement. And the State Department had a powerful ally in the Defence Department, concerned at the strategic implications of the fishing issue. The powerful tuna fishing lobby began to have less influence on the negotiations. Thus, when the negotiating parties met in Hawaii in February 1985, the President of the ATA was for the first time absent from the United States delegation. ATA representatives did, however, continue to maintain a presence while negotiations were in progress.<sup>35</sup>

The joint communique, issued at Nuku'alofa on 20 October 1986, announced that agreement in principle had been reached on a fisheries treaty under which United States tuna vessels might fish in the fishing zones of South Pacific nations:

the delegates of the 16 members of the Forum Fisheries Agency and of the United States resolved virtually all the outstanding issues and reached an accord on the financial arrangements which will apply under the new treaty . . . . The treaty is expected to be signed late this year or early in 1987.

Outstanding issues include bilateral negotiations with those island countries which wish to exclude areas in their EEZs from the scope of the treaty. Also, signature of the treaty will need to be followed by ratification (by 10 FFA members and the United States). It is significant that the 16 members of FFA involved include Australia and

35 Robert Keith-Reid "The talks shuffle on" (1985) 11 *Islands Business* January 30; Dora Alves *The South Pacific Islands; New Focus Needed for U.S. Policy* (Heritage Foundation, Washington, August 1985) 9; F. Rawdon Dalrymple (Australian Ambassador to U.S.) "Partners, friends and allies: Australia and the Pacific" (1985) 56 *AFAR* 818, 824; Robert C. Kiste and R. A. Herr *The Potential for Soviet Penetration of the South Pacific Islands: An Assessment* (National Technical Information Service, U.S. Department of Commerce, ADA 153015); "No-nuke stance chance for fence-mending" *The Evening Post* 22 February 1986; "US eyes Soviet's Pacific role" *ibid* 27 March 1986; "US close to deal on islands' rights" (1986) 57 *PIM* January 19; "Pacific vulnerable to Soviets, but only if US errs" *ibid* February 11-13; "US chorus grows for new policy", *ibid* March 27; "Tuna fleet rides out recession" *ibid* April 11-13, 47; "US Hints at Separate Tuna Deal" *ibid* July 25-26.

New Zealand who will, therefore, have to decide whether they wish to become parties to the treaty. New Zealand will need to become a party on behalf of Tokelau if that overseas territory is to be covered by the treaty.<sup>36</sup>

The main issue at the Nuku'alofa meeting was that of fees. Going into the round of negotiations held at Rarotonga, Cook Islands, in July 1986 the United States was offering US\$5.5 million a year, made up of \$1.5 million from the American tuna industry in return for access rights and \$4 million in United States government economic assistance. The island states were claiming US\$20 million. At Rarotonga the figures narrowed to an American offer of \$7.5 million (\$1.5 million tuna industry and \$6 million United States aid) against an island claim of \$16.5 million. Under the agreement reached at Nuku'alofa, FFA members will receive US\$60 million in fishing fees and aid over the next five years. The annual figure of \$12 million is made up by \$2 million from the tuna industry (\$1.75 million in fees, \$250,000 in development money) and \$10 million from the United States Government (\$9 million cash and \$1 million project aid).<sup>37</sup>

At the time of writing no draft text of the treaty has been issued. The United States negotiator has described it as the most complex fishing treaty in the world. The treaty will deal with access rather than management and will not, therefore, follow the lines of the draft convention for a South Pacific Regional Fisheries Organisation. Care will have been taken to find wording that prejudices neither the island claim to jurisdiction over all fishing resources within their EEZs nor the United States position with regard to migratory species. The island countries will have established both their right to proceed against United States vessels for violations of the treaty and United States responsibility as the flag state to ensure that their vessels observe island fisheries laws; and the treaty will override the provisions of the Magnuson Act.

In welcoming the Nuku'alofa agreement, the New Zealand Prime Minister, David Lange, said "[It] will remedy an injustice that has become increasingly obvious in the eyes of Pacific Islanders. It will do wonders for the United States' image in the South Pacific . . . ."<sup>38</sup>

36 Joint Communiqué, 20 October 1986 (Ministry of Foreign Affairs, Wellington); "Fisheries Access Agreement in the South Pacific" Press Statement by Rt. Hon. David Lange, N.Z. Minister of Foreign Affairs, 23 October 1986; "Lange sees merit in Pacific tuna pact" and "Pacific fish deal unique, says US" *The Dominion* 24 October 1986; "Fishing deal in Pacific" *The Press* 22 October 1986.

37 "U.S. is offering 11 Pacific Nations \$5.5 Million for Tuna Fishing Rights" *International Herald Tribune* 28 - 29 June 1986; "Forum changes tack on fishing talks" (1986) 57 PIM September 21 and 35; "Haggling over the price of fish" (1986) 12 *Islands Business* August 10-15; "Pacific fish deal unique, says US" *The Dominion* 24 October 1986.

38 Lange, supra n.36; "Lange sees merit in Pacific tuna pact" *The Dominion* 24 October 1986.

#### IV THE SOUTH PACIFIC COMMISSION AND ITS TUNA AND BILLFISH ASSESSMENT PROGRAMME

The South Pacific Commission (SPC) is a South Pacific regional body whose involvement in fisheries issues predated by many years the establishment of FFA. The Commission is primarily a technical assistance organisation which aims to promote the economic and social welfare of the South Pacific peoples. Representatives from 27 governments and territorial administrations, including all the members of FFA, comprise the South Pacific Conference which meets annually to decide the work programme of the Commission. Australia and New Zealand, along with the United Kingdom, France and the United States are participating governments. The Committee of Representatives of Participating Governments and Administrations (CRGA), established in 1983, is a Committee of the whole which meets twice annually. It considers the budget and work programme presented by the Secretary-General of the Commission and recommends themes for discussion by the Conference.<sup>39</sup>

Since 1952 SPC has maintained a fisheries programme directed towards assisting Pacific islanders in the development of their fisheries. At present, the Commission is involved in two fisheries projects — the Deep Seas Fisheries Development Project<sup>40</sup> and the Tuna and Billfish Assessment Programme (TBAP). The Deep Sea project concentrates on small-scale fisheries and is a continuation of work that has been going on since 1952. It has appeared as a regular item on the SPC budget.

In 1976 the Commission established a Skipjack Survey and Assessment Programme. This was succeeded in 1981 by the TBAP.<sup>41</sup> This programme has eight current priorities but its major preoccupation is

1. Collection and valuation of fisheries data and maintenance of regional oceanic fisheries assessment data base.

Priorities 2 and 3 jointly constitute its second emphasis:

2. Assessment of interaction between fisheries for oceanic species.
3. Assessment and monitoring of the levels of stocks of commercially important tuna and billfish species.

Senior fishery specialists from states and territories in the SPC region meet annually at SPC-sponsored Regional Technical Meetings on Fisheries (RTMF) to discuss issues of regional fisheries concern.

#### *FFA research and development programme*

Article III of the FFA Convention contemplated the establishment of further international machinery. The Honiara South Pacific Forum (1979),<sup>42</sup> at which the

39 Report of the Twenty-third South Pacific Conference, Saipan, Northern Mariana Islands, 1-7 October 1983 (SPC, Noumea) 18, 22.

40 Fakahau and Shepard, *supra* n.18, 42 ff.; Wilkinson, *supra* n.18.

41 R. A. Herr and T. B. Curtin *Review of Possible Alternative Institutional Arrangements for the South Pacific Commission's Tuna and Billfish Assessment Programme* (SPC/CRGA 4/WP.7, 14 August 1985) *passim*; Fakahau and Shepard *op.cit.* *supra* n.18, 52 ff.

42 *Supra* n.15.

Convention was adopted, reiterated this intention by recognising in its communique the need "for further consideration of a more broadly-based fisheries organisation, such as that proposed in article 64 [of the LOS Convention]". Officials from Forum members, meeting in February 1980<sup>43</sup>, realised that the difficulties that had arisen over the sovereign rights of coastal states and the rights of distant water fishing nations militated against the early establishment of a single management authority. It followed that there should be caution so far as a broad-based organisation was concerned. It was, nevertheless, recognised that the objectives envisaged by Article 64 called for an improved understanding of the fisheries resources of the region. There was need for a research and development programme on highly migratory species aimed at determining the number, size and distribution of tuna populations, the need for conservation and regulation of stocks, and improved methods of fishing. It was decided that such a programme could be carried out within the existing framework of FFA and SPC, possibly with the co-operation of other organisations.

Difficulties then arose over the division of responsibilities between the FFA and SPC. It was agreed that, to avoid duplication so far as possible, SPC should continue its work on resource survey and assessment while FFA concerned itself with the development, exploitation and management interests of South Pacific Forum members. Nevertheless, the Eleventh South Pacific Forum (Tarawa, Kiribati, July 1980)<sup>44</sup> decided that Forum members needed "to clearly establish their own research and development objectives with the help of expert consultants". So the Regional Research and Development Programme meeting, held in May the following year,<sup>45</sup> was convened by FFA with SPC, FAO and UNDP present as observers only. The meeting arrived at 30 projects, the first being the TBAP, with SPC named as the implementing agency along with the South China Seas Fisheries Development Programme.

#### *Collaboration with distant water fishing nations?*

The Twelfth South Pacific Forum (Port Vila, Vanuatu, August 1981)<sup>46</sup> endorsed the research and development programme. FFA was directed, in implementing the programme, to convene a Steering Committee of Forum officials and "to liaise with appropriate regional and international institutions with a view to holding a meeting of regional and distant water fishing nations and other interested organisations". Two of the objectives of such a meeting would be (i) to examine the feasibility of combining the programme with the research and development programmes of other Pacific nations and organisations, and (ii) to consider whether the establishment of a broadly based organisation to co-ordinate and conduct such research and development on a Pacific wide basis would be desirable.

The increasing disenchantment of South Pacific Forum countries with the conduct of distant water fishing nations emerged in the Steering Committee's report, adopted by

43 (1980) 30 NZFAR January-March 26.

44 (1980) 51 AFAR 257.

45 *Compendium of Documents Relating to the Establishment, Work Programme and Workshops of the South Pacific Forum Fisheries Agency* (FFA, March 1985) Part 3.

46 (1981) 31 NZFAR July-September 60, 62.



the FFC in May 1982.<sup>47</sup> In discussing the proposed meeting with distant water fishing nations, the report pointed to the primary role of FFA as the protector of coastal state rights in the region and the possibility of conflict between that role and the convening of such a meeting — “. . . the involvement of distant water fishing nations in the [research and development programme] could possibly result in a loss of control of the [programme] by the Forum countries.” Although the LOS Convention provided for co-operation between coastal states and distant water fishing nations with regard to highly migratory species, it was considered that wider international acceptance of the principles embodied in the Convention should precede a meeting with distant water fishing nations.

#### *Collection of data from distant water fishing nations*

While members of FFA were having second thoughts about discussing its research and development programme with distant water fishing nations, SPC was having difficulty in obtaining from those nations the data which were necessary if its TBAP was to be effective.<sup>48</sup> In particular, no data had been coming from United States vessels and no information on high seas catches from Japanese, Korean and Taiwanese vessels. The Fifteenth RTMF (Noumea, August 1983) faced up to this issue and recommended that a meeting be convened of coastal states, distant water fishing nations and interested international organisations “to identify methods of collection, integration, and analysis of statistical and other scientific data on highly migratory species in the region”. It was also recognised that the suggested meeting might need “to explore possible structural arrangements which might be required for the conservation of tuna stocks of the region”. Also, the Technical Meeting was not unmindful of the need for financial support for the programme. The Twenty-third South Pacific Conference (Saipan, October, 1983) agreed that the SPC Secretariat should consult with FFA about convening and meeting.

The SPC Meeting of Coastal States and Distant Water Fishing Nations was held at Noumea in June 1984.<sup>49</sup> United States, Japan, France and Mexico, but not Korea and Taiwan, attended the meeting, along with the coastal states. Indonesia came as an observer. It was the first time since the ill-fated meetings on the South Pacific Regional Fisheries Organisation in 1978 that the coastal states and distant water fishing nations had met together. The holding of the meeting was in itself successful in that the United States was able to persuade the ATA to arrange for its vessels to supply detailed data in respect of those areas in which they had access agreements and summary data in respect of other parts of the SPC region. (ATA vessels were obliged to provide this data to participating island countries under the Micronesian and Eastern Pacific Agreements). The Japanese also offered further co-operation. The meeting itself recognised that the

47 High level meeting on regional co-operation in fisheries management and development (Honiara, Solomon Islands 26-29 March 1985) FFA HLM7 — Record of Decisions on the Future of the SPC Tuna and Billfish Assessment Programme; see also *op.cit.* supra n.45, Parts 5, 7 and 8.

48 High level meeting, *op.cit.* supra n.47. See also Review of Tuna and Billfish Assessment Programme (SPC/Fisheries 18 WP. 2, 19 June 1986).

49 High level meeting, *op.cit.* supra n.47.

ad hoc financial arrangements under which the programme was operating were not satisfactory. Legal mechanisms would have to be found which would enable (a) the United States, as a member of the TBAP, to compel its fishermen to provide data on all their catches, and (b) Japan and other distant water fishing nations, which were not members of SPC, to participate by contributing both data and funds. However, any suggestion that these mechanisms should take the form of a broader based management and conservation body were firmly opposed by island countries.

The SPC Secretariat proceeded to prepare a paper outlining possible international mechanisms to meet the problems exposed at the Meeting of Coastal States and Distant Water Fishing Nations. The Sixteenth RTMF (Noumea, August 1984) considered the paper and recommended the SPC should meet representatives of FFA and SPEC and "taking into account the views of member governments and distant water fishing nations, prepare a specific proposal on the future of [TBAP] . . ."<sup>50</sup>

#### *High Level Meeting on Regional Co-operation in Fisheries*

The FFC had already taken a relevant initiative by convening a High Level Meeting on Regional Co-operation in Fisheries Management and Development (Honiara, March 1985).<sup>51</sup> The objectives of this meeting were outlined as being:

- renewal of high-level commitment to a further phase of regional co-operation in fisheries management and development;
- assessment of the issues associated with the establishment of an integrated regional tuna management regime; and
- consideration of a response to the recommendation of the 16th SPC Technical Meeting on Fisheries that FFA should be involved in the preparation of a specific proposal on the future of the Tuna and Billfish Assessment Programme.

The meeting, described as representing "the highest level of participants that had ever attended a Fisheries Meeting in the region" had as participants member governments of FFA and as observers Marshall Islands, Palau, SPEC, UNDP/FAO and SPC.

Mr Philipp Muller, the Director of FFA, in his introductory statement, called attention to the strengthening commitment of FFA countries to co-operation in fisheries management and development. He rejected the contention that, because there was no international organisation with a full mandate for tuna management, tuna stocks were not managed. In his view, they *were* managed:

They are being managed through an overlapping series of national arrangements with foreign fishing interests and national fishing industry development plans. In addition, the foreign fishing arrangements are firmly set within a framework of regionally harmonised minimum terms and conditions. Through these arrangements the tuna fisheries of the region are being managed for the benefit of the region and being managed effectively. Indeed this framework is probably at least as effective as any management regime for tuna stocks elsewhere in the world.

<sup>50</sup> Idem.

<sup>51</sup> *Report of Proceedings, High Level Meeting on Regional Co-operation in Fisheries Management and Development*, Honiara, Solomon Islands, 26-29 March 1985 (FFA Report 85/10). See also supporting document — Review of Past Directions in Regional Co-operation in Fisheries Management and Development (FFA HLM 1).

The Director claimed that the FFA Convention continued to represent "a very appropriate statement of the aspirations of Governments with respect to regional co-operation." He suggested that there were two aspects of the Convention that had been superseded by events. First, there was undue emphasis in the Convention on FFA's interest in highly migratory species. Second, the provision in Article III (2), recognising that additional international machinery providing for co-operation between coastal states and distant water fishing nations would be required, did not correspond with current thinking. Indeed, by holding out the prospect of their participation in a broader based body concerned with "conservation and optimum utilization of the highly migratory species", it might have contributed, and be still contributing, to encouraging fishing nations not to co-operate with FFA.

#### *Extension of the TBAP*

The next development was a decision by the CRGA in May 1985<sup>52</sup> to ask two consultants, Dr R. A. Herr and Mr T. B. Curtin, to examine mechanisms that would enable distant water fishing nations, whether or not they were members of SPC, to participate fully in providing data and financial inputs for the TBAP.

The Herr-Curtin report,<sup>53</sup> after considering possible mechanisms ranging from short-term to long-term, recommended an interim solution. This recommendation became the basis of a CRGA decision, taken at its September 1985 meeting.<sup>54</sup> The TBAP would be continued within SPC for a five-year period beyond September 1986. There would be an extensive review of the programme no later than the third year of the extension. This review would seek a more permanent institutional arrangement which would involve SPC members not members of FFA. The four donor governments (Australia, France, New Zealand, and the United States) advised the CRGA of their willingness to continue funding the TBAP.<sup>55</sup> They expressed reservations on the TBAP budget and urged that a plan of action be devised "for soliciting additional contributors, with particular focus on the distant-water fishing nations of Japan and the Republic of Korea, as well as on Taiwan."

The Herr/Curtin Report had proposed that in order to enable those distant water fishing nations that were not members of SPC to participate more actively in the work of the TBAP, and particularly in the provision of catch and effort data and finance, the Expert Committee on Tropical Tuna should be revitalised.<sup>56</sup> It should be opened to wider membership to include distant water fishing nations and be given the role of an advisory body to the SPC and the TBAP. The CRGA asked the SPC to make proposals on the terms of reference and composition of the Expert Committee. (The Expert Committee had been established in 1974. In its early years its membership was dominated by participants from distant water fishing nations on the basis that they were

52 Report of the Twenty-Fifth South Pacific Conference, Honiara, Solomon Islands, 30 September - 4 October 1985, 106.

53 *Supra* n.41.

54 *Supra* n.52, 128.

55 *Ibid*, 136.

56 Standing Committee on Tuna and Billfish, Paper prepared by Secretariat (SPC/CRGA 5/WP. 5, 20 March 1986); see also Fakahau and Shepard *op.cit.* *supra* n.18, 55ff.

qualified and available. The original mandate of the Committee was taken over by the RTMF and it became moribund.)

The Secretariat paper<sup>57</sup> which came before the May 1986 Meeting of the CRGA, proposed that the Expert Committee should in future be called the Standing Committee on Tuna and Billfish. It should have an advisory and consultative role to the RTMF. It would assist in the conduct of pelagic fisheries research through the provision of expertise, information, funds and technical advice. After setting out more detailed terms of reference, the Secretariat paper suggested a composition for the new Standing Committee, making the point that the composition would vary according to the tasks before the Committee:

- Chairman and Vice-Chairman of the SPC RTMF;
- Secretary-General and/or Tuna and Billfish Assessment Programme Co-ordinator;
- Director of the Forum Fisheries Agency or his representative;
- representatives of governments or fishing associations of distant water fishing nations with licences to fish in the SPC area;
- independent consultants and technical experts nominated by the Programme Co-ordinator, FFA Director, or the RTMF to assist in analysis of specific problems; and
- observers from governments or fishing organizations outside the region with fisheries which may potentially interact with those of the SPC region or may in the future seek licences to fish in the region (eg. Indonesia, Philippines, Mexico, etc.).

The May 1986 meeting of the CRGA accepted the Secretariat's proposals for the formation of a Standing Committee on Tuna and Billfish, with a significant change in its composition. The first three of the categories listed above remain, but the next three were replaced by the following categories:

- technical experts nominated by the TBAP Co-ordinator, FFA Director, the RTMF and SPC donor governments; and independent consultants invited by the Committee as and when necessary to assist in analysis of specific problems;
- representatives of governments or fishing associations of distant water fishing nations with licences to fish in the SPC area, at the invitation of the Secretary-General in consultation with member governments.

This composition and the terms of reference of the Standing Committee came under criticism at the 18th RTMF (Noumea, August 1986). The SPC Paper submitted to the meeting proposed a list of invitees for the first meeting of the Standing Committee which involved five representatives of Governments or Fishing Associations of distant water fishing nations and six technical experts all drawn from research institutions outside the South Pacific region. This composition, in part, reflected the belief that distant water fishing nations, like Japan, who were not members of SPC, would not provide data and finance to an institution of which they were not members. However, views were expressed at the RTMF that the Standing Committee should comprise representatives of island governments, including technical people involved in research.

57 *Idem*.

The RTMF decided to defer taking a decision and the issue will come up again at the CRGA meeting to be held in October 1986.<sup>58</sup>

### *The future of the TBAP*

The High Level Meeting and the Herr/Curtin report discussed a number of institutional mechanisms<sup>59</sup> which can be expected to come under consideration again in the context of the review that is to be undertaken of the longer-term future of the TBAP. The possibilities include a broadly based organisation, which could be an inter-governmental organisation to conduct tuna research in the South Pacific region; a research programme jointly operated by SPC and FFA; an autonomous project under SPC or FFA; a research arm of FFA; an extension beyond five years of the TBAP; or the transfer of responsibility to the Institute of Marine Resources (IMR) of the University of the South Pacific, or some other research body, perhaps on a consultancy basis. At present the IMR is sited at the Laucala Bay campus in Suva, Fiji, but the Government of the Solomon Islands has been making a case for its transfer to Honiara.

The eventual decision will depend on the resolution of complex and conflicting issues. There are the views of both coastal states and distant water fishing nations to be taken into account, and the presence of the USSR is now a factor. The membership composition of FFA on the one hand and SPC on the other is relevant as are the relationships of the two regional organisations. There are problems about the confidentiality of information that has commercial value. And there is the continuing question of funding.

The determining factor could be the decisions that are taken as to the overall research needs of regional fishing, whether small or industrial scale. The Herr/Curtin report attached importance to the review of the region's research priorities that had been recommended by the High Level Meeting. This review has been undertaken for FFA by Semisi T. Fakahau, Principal Fisheries Officer, Tonga, and Michael P. Shepard, the Canadian Consultant.<sup>60</sup> The consultants, according to their terms of reference, were not expected "to make specific proposals on future institutional arrangements for regional fisheries research activities." Nevertheless, they appreciated that their findings would necessarily have some bearing on the institutional issue. Their report deals with the research needs of FFA member countries in aquaculture, coastal fisheries, island fisheries and offshore fisheries. It proposes that FFA should make more accessible non-confidential research it has undertaken in the fields of economics, technology, administration and law to support access negotiations between member states and distant water fishing states and to provide technical background for local industrial tuna fishery development.

58 Standing Committee on Tuna and Billfish, Paper prepared by Secretariat (SPC Fisheries 18/WP.4, 21 July 1986); and Draft Report of 18th RTMF (SPC/Fisheries 18/Draft Report).

59 Supra n. 51, 12-15; op.cit. supra n.41, passim.

60 Supra n.18.

The consultants comment on the sophisticated character of the research that has been coming from the TBAP — there has not been enough emphasis on the immediate needs of island countries in developing their own fishing industries. There is, the consultants say “too great a gap between the technical capabilities and interests of the professional staffs of regional organisations and the capabilities and interests of their clients, the Island fisheries administrations.”<sup>61</sup> There should therefore be more island technical specialists on the staff of the TBAP and more emphasis on creating local capabilities for biological and economic research related to oceanic tuna resources and fisheries. A Working Group of technical representatives of countries interested in strengthening research activity on tuna and other oceanic pelagic fishes should be formed, inter alia, to work with the TBAP to articulate the needs of those countries and to develop a better understanding of the work being carried out by the programme.

The Fakahau/Shepard Report was considered at the 18th RTMF and its findings were reflected in a decision to recommend the establishment of an Inshore Resource Assessment Project which would be separate from the Deep Seas Fisheries Development Project and the TBAP, but would draw on their resources. The Project would assist island countries in developing national capability in the general area of coastal fisheries research evaluation. It would work with national fisheries officers in assessment of resources, in provision of fisheries information from within and outside the region, and in training and in research.<sup>62</sup>

#### *Collaboration with distant water fishing nations*

The reluctance of island governments to establish an institutional relationship with distant water fishing nations is shown by the difficulties that have arisen over the future of the TBAP, and, more particularly, by the disagreements over the composition of the new Standing Committee on Tuna and Billfish. Island governments will not be unaware of the importance of establishing reliable data sources and maintaining financial support if the TBAP research programme is to be maintained. However, they can see data coming through the bilateral access agreements that have been concluded with distant water fishing nations. There is, too, the prospect that the problems with American tuna vessels will be resolved now that the multilateral agreement with the USA is about to be concluded. On the other hand, these sources will not provide important high seas data.

There is the ever present island concern that distant water fishing nations' participation on the institutional front could lead to their involvement in the management of the resource. It remains to be seen whether the resolution of the, at times, bitter differences that have arisen over United States positions and the actions of American tuna vessels can lead to closer collaboration with the distant water fishing nations as a whole.

61 Ibid. 89.

62 Proposal for an integrated SPC Inshore Resource Assessment Project (SPC Fisheries 18/WP.19, 1 August 1986); and Draft Report, op.cit. supra n.58.

*The rewards of co-operation*

The provisions of the LOS Convention as they bear on the management and development of fisheries in the South Pacific call for more detailed attention than has been attempted in this paper. And it can be said that the writer has taken a sympathetic view of the decisions of island countries, directed towards making the best possible use of the natural resources which the Convention has placed within their grasp. Those countries have appreciated that only by co-operating among themselves can they realise this aim. They have established the Forum Fisheries Agency; they have developed a set of standard provisions for tuna access agreements with distant water fishing nations; they have learned to co-operate on a sub-regional level; they are operating an effective regional register; they are planning further measures for regional surveillance and enforcement; and they have displayed skill and persistence and achieved success in the drawn-out negotiations with the United States.

It has been suggested that the model of separate pursuit of legal and economic interests through a coastal state-oriented organisation like the FFA with parallel scientific research programmes in broader based organisations like the SPC could provide a precedent for tuna fisheries in other parts of the world. In Latin America, West Africa, the Southwest Indian Ocean and the Caribbean there are initiatives that seem designed to ensure a greater emphasis on the interests of coastal states in decisions on tuna management. These initiatives are designed to stand alongside the scientific work undertaken by organisations such as the Inter-American Tropical Tuna Commission (IATTC), the International Commission for the Conservation of Atlantic Tuna (ICCAT) and FAO Regional Fishing Commissions. Also the possibility of inter-regional co-operation among Pacific developing coastal states is being canvassed. The establishment of a Western Pacific Fisheries Consultative Committee comprising ASEAN and Pacific island nations has been proposed. These two regions might also co-operate with Pacific coast Latin American countries.<sup>63</sup>

If the negotiations between island countries and the United States come to a successful conclusion, it will be in the areas of data collection and research that most work needs to be done in establishing patterns of cooperation. This will call for the involvement of the distant water fishing nations both within and outside the SPC. Those nations, through their fishing industries and their consuming publics, have their own interests in the natural resources that abound in Pacific waters. It follows that the establishment of a stable, viable and just fishing regime must be based on effective co-operation between all countries which have interests in the resource.

63 Judith Swan, *Tuna Management in the South Pacific* (FFA Report 86/44) 6; Munro *supra* n.26, Draft Report.

## ADDENDUM

On the 27 January 1986, in Port Vila, the Soviet Union and Vanuatu governments signed a 12-month agreement giving Soviet tuna boats the right to fish in Vanuatu's EEZ. Under the agreement a Soviet fleet of eight vessels will have access to the economic zone, but not to the 12-mile territorial zone. The Soviet Union will pay an access fee of US\$1.5 million for fishing access and will meet further costs for access to Vanuatu's ports for buying bait and supplies or for repairs. The Soviet airline Aeroflot is not given landing rights for crew changes, although it is reported that officials have said that this could be considered in future agreements.<sup>64</sup>

It has also been reported that the Kirabati government has made approaches to the Soviet Union to re-open negotiations on fishing rights.<sup>65</sup>

The negotiations on a fisheries treaty with the United States reached a further stage with the signature in Port Moresby, on 2 April 1987, of a Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America. Niue, Palau, Tonga and Vanuatu did not take part in the signature ceremony, but, with the possible exception of Tonga, were expected to sign later. The Treaty is complemented by an Agreement among Pacific Island States concerning the Implementation and Administration of the Treaty, and an Agreement between the United States of America and the South Pacific Forum Fisheries Agency dealing with the administration of the moneys being paid by the United States under the Treaty. The Treaty will not enter into force until it has been ratified by the United States and ten of the sixteen Island States, including the Federated States of Micronesia, Kirabati, and Papua New Guinea. Enabling legislation will be required in the United States as will amendments to existing legislation in New Zealand and presumably to the national laws of other Island signatories. The United States Congress must also appropriate the US\$10 million being provided by the government.<sup>66</sup>

Under the Agreement between the Island States, the US\$9 million cash from the US government and the \$1.75 in fees from American fishermen is to be distributed, as to 15%, equally between the Pacific Island Parties, and, as to 85%, among those Parties according to the volumes of catches in their EEZS.

The composition of the Standing Committee on Tuna and Billfish was not considered at the CRGA meeting held in October 1986, but the issue is on the Agenda for the May 1987 meeting of the CRGA. The October meeting decided to hold a Workshop on the Inshore Resource Assessment Project.

64 "Vanuatu, Soviets in Fishing Deal" (1987) 58 PIM March 6; "Vanuatu opens port to Soviets in \$2m tuna deal" *The Canberra Age*, 28 January 1987; "Soviets hook a deal" (1987) 13 *Islands Business* January 33.

65 "The Soviet deal folds" (1986) 12 *Islands Business* November 30; "Tabai: we are not for sale" *ibid* 32; *The Canberra Age*, 28 January 1987, loc.cit.n.64.

66 "Tuna deal pay out may be higher than expected" (1987) 58 PIM February 27; "US-Pacific fishing pact heralds change" *The Dominion* 9 April 1987.