

# **LEGAL INITIATIVES FOR COMBATTING ILLEGAL, UNREPORTED AND UNREGULATED FISHING ACTIVITY IN THE PACIFIC ISLANDS REGION**

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## **Introduction**

Fisheries and the marine environment support the livelihood and aspirations of communities and national economies in the Pacific Islands. This paper provides an overview of the legal initiatives to combat Illegal, Unreported and Unregulated (IUU) fishing activity in the Pacific Islands region.

## **Overview of the Legal Framework for Fisheries Conservation and Management**

The legal framework for fisheries conservation and management is built on the provisions of the 1982 United Nations Convention on the Law of the Sea<sup>1</sup> (LOSC) and customary international law. The LOSC has been supplemented by both hard law and soft law instruments including:

- 1992 Declaration of Cancún;
- 1992 Rio Declaration on Environment and Development;
- Agenda 21, Chapter 17 UNCED;
- 1995 FAO Code of Conduct for Responsible Fisheries; and the
- 1995 United Nations Fish Stocks Agreement (Fish Stocks Agreement).

In relation to the prevention, deterrence and elimination of IUU fishing, notable instruments are the: International Plan of Action on IUU fishing<sup>2</sup>, Fish Stocks Agreement, the Western and Central Pacific Fisheries Convention (WCPFC Convention), and the Agreement on Port State Measures to prevent, deter and eliminate Illegal, Unreported and Unregulated fishing (Port State Agreement).

The Pacific Islands region has also adopted instruments for the conservation and management of fisheries as well as the prevention of IUU fishing, namely,

- i) the *South Pacific Forum Fisheries Agency Convention*<sup>3</sup>;
- ii) *Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America*<sup>4</sup>;
- iii) *Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific*<sup>5</sup>;

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<sup>1</sup> 21 *ILM* 1245 (1982).

<sup>2</sup> The IPOA-IUU was adopted by consensus at the Twenty-fourth Session of COFI on 2 March 2001 and endorsed by the Hundred and Twentieth Session of the FAO Council on 23 June 2001. FAO. International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing. Rome, FAO. 2001. 24p. Available at: <http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM>.

<sup>3</sup> [1979] PITS 2 (10 July 1979).

<sup>4</sup> [1987] PITS 2 (2 April 1987).

<sup>5</sup> Adopted 24 November 1989, entered into force 17 May 1991.

- iv) *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*<sup>6</sup> (Niue Treaty); and the
- v) *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*<sup>7</sup> (WCPFC).

At the regional, sub-regional and bilateral level the Driftnet Convention, the Niue Treaty, the WCPF Convention, and agreements on cooperation in fisheries surveillance<sup>8</sup> are noteworthy instruments. FFA members in November 1989 adopted the Driftnet Convention which prohibits the use of a gillnet or other net or a combination of nets which is more than 2.5 kilometres in length. There are two protocols to the Convention. In the first Protocol (open to all countries fishing in the region) Parties agreed to prevent their nationals and vessels from fishing with driftnets in the Convention Area. Parties to Protocol II (open to all countries in the Pacific Rim), are required not to assist or encourage the use of driftnets in the Convention area and are also obligated to prohibit the use of driftnets in all areas under their fishery jurisdiction and to prohibit the transshipment of driftnet catches within areas under their jurisdiction.

Adopted in 1992, the Niue Treaty is a framework agreement that supports cooperation amongst its parties in fisheries monitoring, control and surveillance as well as in prosecutions.<sup>9</sup> Given that the Niue Treaty is a framework agreement, parties would need to enter into subsidiary agreements to operationalise its provisions. In addition, Parties to the Niue Treaty are considering approaches to review and strengthen the Treaty.

Further, a useful mechanism to combat IUU fishing employed by FFA members is the listing of IUU vessels by the Western and Central Pacific Fisheries Commission. Documentation on vessels alleged to have engaged in IUU fishing activity are submitted for the listing process and considered in the first instance by the Technical and Compliance Committee of the Commission.

The instruments at the international, regional and sub-regional levels outlined above are complemented by decisions of Forum Leaders. Forum Leaders have under the Pacific Plan made a commitment to maximise sustainable returns from fisheries by developing an ecosystem based fisheries management planning framework; encouraging effective fisheries development, including value-adding activities; and to collaborate to ensure legislation and access frameworks are harmonised.

The Leaders' Vava'u Declaration of 2007 provides additional directions, namely, the development and implementation of a comprehensive regional Monitoring, Control and Surveillance (MCS) strategy, and the endorsement of efforts by the Forum Fisheries Agency, supported by the Forum Secretariat, to take forward as a matter of urgency work to examine the potential for new multilateral Pacific regional arrangements patterned on the Niue Treaty Subsidiary Agreement model for exchange of fisheries law

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<sup>6</sup> [1992] PITS 8 (9 July 1992).

<sup>7</sup> [2000] PITS 4 (5 September 2000).

<sup>8</sup> Such as the *Agreement between the Government of the United States of America and the Government of the Kingdom of Tonga Concerning Cooperation in Joint Maritime Surveillance Operations*, adopted 24 August 2009.

<sup>9</sup> See Article VII for Cooperation in prosecutions and Article VIII for Cooperation in enforcement of penalties.

enforcement data, cross-vesting of enforcement powers, and use of fisheries data for other law enforcement activities”. The regional MCS Strategy is expected to be considered first by the Forum Fisheries Committee in May 2010 before submission to Forum Leaders.

### **Role of the Pacific Islands Forum Fisheries Agency**

The FFA was established by the *South Pacific Forum Fisheries Agency Convention* in 1979 to help countries in the Pacific Islands region to sustainably manage their fishery resources within their 200 mile exclusive economic zones. The Vision of the FFA Members is: “We will enjoy the highest levels of social and economic benefits for our people through the sustainable development of our fisheries resources”, while the Mission is: “To support and enable our members to achieve sustainable fisheries and the highest levels of social and economic benefits in harmony with the broader environment”.<sup>10</sup> The FFA's 17 members are: Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu.

The Agency is an advisory body providing expertise, technical assistance and other support to its members who make sovereign decisions about their tuna resources and participate in regional decision making on fisheries management through agencies such as the Western and Central Pacific Fisheries Commission.

The Agency is comprised of four divisions: Corporate Services, Fisheries Operations, Fisheries Development and Fisheries Management. Although within the Fisheries Management Division, Legal Services provides support to all divisions as well as member countries directly in:

- a) the provision of general legal advice to FFA members at all meetings;
- b) participating at relevant international meetings;
- c) building of capacity and prosecution support at national level; and
- d) strengthening of national legislative frameworks including promoting the harmonisation of such frameworks.

The Fisheries Operations division conducts regular monitoring and surveillance activities in the region. Operations such as “Kurukuru” and “Island Chief” were designed to jointly coordinate the activities of the Pacific Island nations surveillance assets (mainly the Pacific Patrol Boats) and the support provided by regional military surveillance aircraft and surface vessels. The operations also allowed Pacific Island nations to exercise their respective subsidiary agreements under the Niue Treaty and to improve the communications, and coordination and between the Joint Coordination Centre and the individual national headquarters. The success of these operations has depended greatly on agreement between participating nations to share fisheries data and information for the duration of the operation, in order to develop a regional fisheries surveillance picture to identify vessels at risk of conducting IUU fishing. More recently the establishment of the Regional Fisheries Surveillance Centre at the FFA Secretariat in Honiara has seen the daily production of a regional fisheries surveillance picture, which is being provided continuously to the regional military

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<sup>10</sup> FFA Strategic Plan 2005 – 2020.

surveillance headquarters and to the national headquarters of the Pacific Islands nations who have agreed to share fisheries data and information on a continuous and unlimited basis. The effectiveness of regional MCS activities will be greatly enhanced by the unconditional sharing of data and information.

In addition to the FFA, the regional institutional framework in support of combating IUU fishing includes surveillance and enforcement agencies of Australia, France, New Zealand and the United States.<sup>11</sup>

### **Initiatives to Strengthen National Legislative Frameworks**

With the rate of evolution of international fisheries law in the region, the strengthening of national legislation is a continuing challenge for all FFA members. Legislative implementation of commitments under international obligations is one part of the strengthening process. The other part is the inclusion of ‘forward-looking’ provisions that will significantly enhance the monitoring, control and enforcement activities within national waters and beyond.

National legislation must include the option for **extra-territorial application**. In accordance with the LOSC, coastal States have the prerogative of determining terms and conditions of access by foreign fishing vessels to their EEZ.<sup>12</sup> The absence of this option in legislation of several FFA members has been severely limiting. Legislation in these countries confined application to national fisheries waters only. Licensed foreign fishing vessels for instance fishing in national waters are not required to comply with access conditions that apply beyond areas under national jurisdiction. To illustrate, the requirement for port to port reporting (operation of the vessel monitoring system (VMS) on board) at all times during the period of validity of a licence has not been implemented. A licensed vessel with a VMS unit on board is likely to switch the unit off when departing national waters and entering the high seas knowing that national legislation and conditions cannot extend beyond national waters.

Another example is the restriction of specific types of activity beyond national waters. In May 2008, a group of FFA members known as the Parties to the Nauru Agreement<sup>13</sup> (PNA) concluded the Third Implementing Arrangement.<sup>14</sup> The Third Implementing Arrangement (as well as the Second Implementing Arrangement) contains a range of measures applicable to licensed foreign fishing vessels within national jurisdiction and beyond. The measures were developed as a proactive response to the need to adopt a measure for the conservation and management of vulnerable fish stocks. Noteworthy measures in the Third Arrangement consist of the prohibition on fishing on two high seas enclaves as a condition of fishing access to

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<sup>11</sup> Particularly the Royal Australian Air Force, Royal Australian Navy, Royal New Zealand Air Force, Royal New Zealand Navy, United States Air Force, United States Coast Guard, and the French Air Force and Navy.

<sup>12</sup> Article 62(4).

<sup>13</sup> *Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest*.

<sup>14</sup> *Third Arrangement Implementing the Nauru Agreement Setting Forth Additional Terms and Conditions of Access to the Fisheries Zones of the Parties*, done at Koror, Republic of Palau on 16 May 2008.

national waters, the carriage of an observer at all times, and the requirement that approved vessel monitoring equipment on board is switched and operational at all times and can be monitored by the licensing State during the period of validity of a licence.

Other inclusions in most national legislation are:

- i) *Lacey Act* type provisions that allows a State to prosecute vessels and operators that have contravened laws of another State;
- ii) Cross-recognition (or cross-vesting) of observers and enforcement officers operating under regional and sub-regional instruments; and
- iii) Inclusion of regionally agreed minimum terms and conditions of access and additional reporting requirements.

### **Use of Technology in Combating IUU Fishing**

There are several technological requirements imposed on ships regulated under International Maritime Organisation instruments. These include: Automatic Identification Systems (AIS), Long Range Identification and Tracking Systems (LRITS), and Vessel Monitoring System (VMS). There is a gap in the international regulatory framework as fishing vessels are not covered under IMO instruments.

Fishing vessels fishing in the region are required to carry an approved VMS unit on board. The VMS is used to monitor the position and activities of fishing vessels in order to effectively manage fisheries. The VMS provides monitoring agencies with accurate locations of the fishing vessel at periodic time intervals which are set from time to time and with information on the vessel's speed and heading, it is possible for the monitoring agency to draw conclusions about the activities of a vessel. In addition, VMS can convey catch data from the vessel while at sea to the monitoring agency.

The VMS commonly used is part of a regional initiative coordinated and introduced to members by the FFA in 1999. The VMS relies on the installation of a device known as the automatic location communicator (or mobile transceiver unit) on the fishing vessel, and, satellites to transmit information back to the FFA and the licensing state. Although the fundamental components of VMS technology are not new, VMS has only been used in fisheries within the last fifteen years.

The accuracy and integrity of the system has been referred to various decisions of courts in the region. The ability of the monitoring agency to analyse movement patterns and determine that the vessel was fishing illegally has also been discussed. Recognition of the ability to determine vessel activity is an important contribution and sets a precedent for the use of VMS data to determine illegal fishing activity. However judicial recognition has not been attained in all FFA member jurisdictions

The inclusion of provisions in legislation that recognise the accuracy and integrity of vessel monitoring systems and instruments and outlines presumptions for the use and admissibility of information from such instruments would significantly assist in the prosecution of alleged offences.

Technology is rapidly evolving. New ALC models, now referred to as Mobile Transceiver Units, have the additional capability of transmitting catch data near real-time from the vessel to the monitoring agency. The development of a cadre of offences to apply to the operation of VMS unit on board and the transmission of true and accurate information is imminent.

In addition, the imposition of the requirement for Automatic Identification Systems on industrial fishing vessels would be advantageous from a surveillance and enforcement perspective. AIS on fishing vessels would mean that a vessel can be identified before entry and whilst it is present within national waters.

### **Recent Initiatives for Combatting IUU Fishing**

Over the last two years, the trend amongst Pacific Island States favours the resolution of alleged fisheries violations through settlement rather than prosecution. Settlements have been effect through compounding of offences provisions under fisheries legislation of these States.<sup>15</sup> Taking into account the time and resources requirements of prosecuting violations, the settlement option is attractive. However in promoting settlements, the body of law developed by national courts becomes dormant. Recent judgments in the region demonstrate creative conditions that can be attached to convictions.

A recent case decided in June 2009 and prosecuted by the United States Attorney's Officer, District of Guam against a Marshall Islands flagged fishing vessel imposed requirements on the owner of the vessel and the flag State.<sup>16</sup> In addition to the US\$500,000 fine paid by the vessel owner based on one violation of the Magnuson Act, the vessel owner, in cooperation with the flag State will allow United States authorities to monitor the activities of the vessel through a vessel monitoring system (VMS) for the next three years. In consenting to this condition, the flag State explicitly agrees to 'share' monitoring responsibilities with United States authorities. From one perspective, the condition undermines the primary jurisdiction of the flag State over its vessel.

Moreover, the vessel owner also agreed to participate in the U.S. National Oceanic and Atmospheric Agency's "Global Drifter Program" by deploying drifter data buoys in remote areas of the Central Pacific Ocean on each of its fishing trips for the next five years. The drifter data buoys are an important component of the U.S marine scientific research programme in the region. These creative conditions are useful and noteworthy examples for FFA members as similar (and other innovative) conditions can be placed on convicted foreign fishing vessel operators.

Prosecutors and the judiciary need to be mindful of the restrictions on the penalties that can be imposed on a foreign vessel. The LOSC whilst recognising the sovereignty of coastal States up to the outer limits of their territorial sea, provides sovereign rights to the coastal State to explore, exploit, conserve and manage natural resources within

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<sup>15</sup> See for instance s.49 *Fisheries Act* 1998 of the Solomon Islands.

<sup>16</sup> See media release at: <http://www.piersystem.com/go/doc/800/280829/>.

their exclusive economic zone. The rights of the coastal State in the exclusive economic zone are balanced with the right of other States.

Forfeiture of a vessel engaged in IUU fishing is subject to prompt release provisions in the LOSC.<sup>17</sup> The requirement of prompt release obliges coastal States to impose a reasonable financial bond or other security on the vessel. If the vessel owner has satisfied payment of the reasonable financial bond or other security, then the vessel and crew should be released. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment unless there is an agreement with the States concerned.

While focus has been on vessels and their operators, the control of nationals on fishing vessels is expected to receive greater attention. Binding international instruments mandate States to control their nationals to prevent, deter and eliminate IUU fishing activity.<sup>18</sup> Prosecutors and the judiciary would need to consider conditions that may be attached for the control of nationals on flagged fishing vessels and on foreign fishing vessels.

Pacific Island States are progressing gradually towards the recognition and empowerment of authorised enforcement officers and observers working across several jurisdictions. Legislative provisions that give effect to enhanced (and multi-jurisdictional) fisheries enforcement activity are now being considered. Putting aside the implications on State responsibility, the multi-jurisdictional use of enforcement officers and observers can on the one hand potentially reduce IUU fishing activity in the region and on the other hand, create further challenges for prosecutors and the judiciary.

Finally, the successful enforcement of fisheries violations in the region will continue to be impeded by the presence of various maritime boundaries that are yet to be agreed. In the *Gulf of Maine* case<sup>19</sup> the International Court of Justice confirmed that any delimitation must be effected by agreement with the States concerned 'either by the conclusion of a direct agreement or, if need be, by some alternative method, which must, however, be based on consent'.<sup>20</sup> States concerned are obliged to negotiate in good faith with the intention of achieving a positive result and agreement.<sup>21</sup> The map below illustrates boundaries that have been agreed and those yet to be agreed between the neighbouring States concerned.

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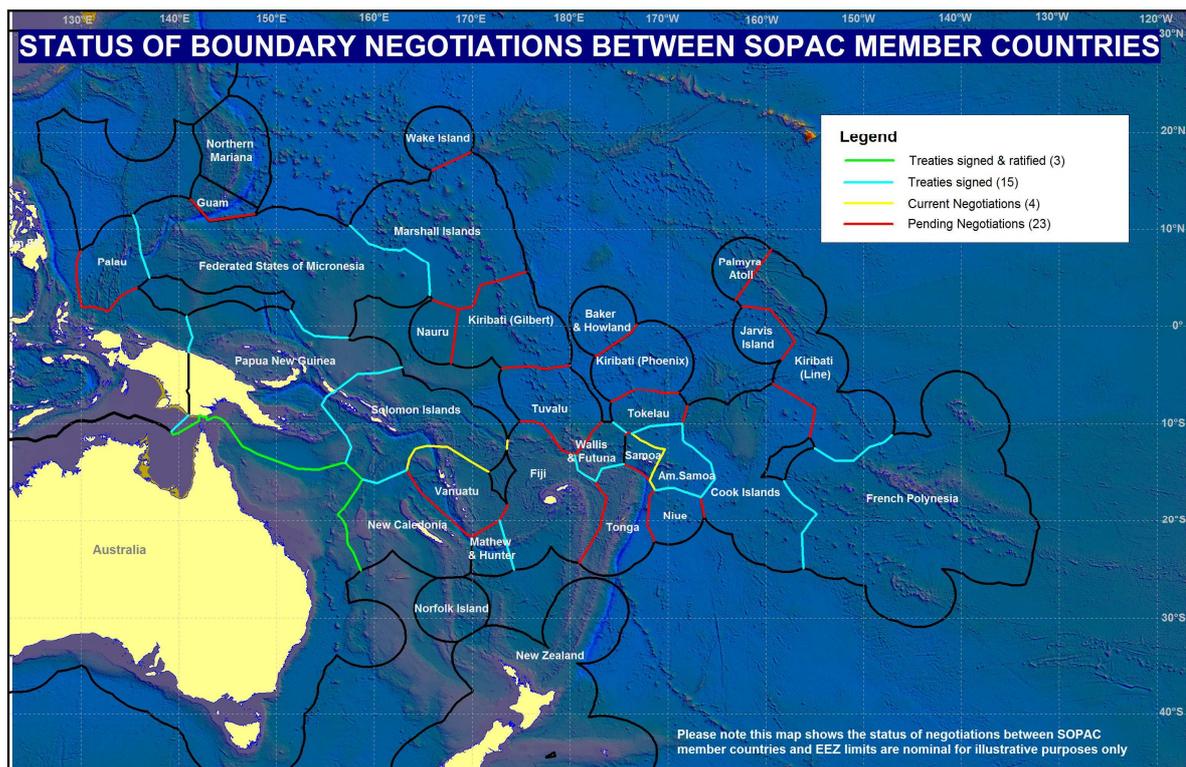
<sup>17</sup> See Articles 73 and 292 of the 1982 UN Law of the Sea Convention.

<sup>18</sup> See for example Article 117 LOSC, Article 23(5) WCPF Convention.

<sup>19</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (hereafter *Gulf of Maine Case*). Judgment, ICJ Reports, 1984.

<sup>20</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (hereafter *Gulf of Maine Case*). Judgment, ICJ Reports, 1984, para. 89.

<sup>21</sup> *Gulf of Maine Case*, para. 87; PCIJ, Series A/B, No. 42, (1031), 116.



## Concluding Remarks

Illegal, unreported and unregulated fishing activity continues to be a concern for all Pacific Island States. Justice Coventry has likened illegal fishing in national waters to removing a nation's assets and wealth.<sup>22</sup> Barwick CJ in equated the protection of fish stocks from foreign exploitation to smuggling.<sup>23</sup> Illegal fishing deprives Pacific Island States from benefiting from resources within its waters.

International, regional, sub-regional binding instruments and Forum Leaders decisions noted above commit FFA members to the responsibility of ensuring that MCS arrangements and legislative frameworks are strengthened to combat IUU fishing. Various initiatives such as the inclusion of *Lacey Act* type provisions, the cross-vesting of observers and enforcement officers, and the requirement for port-to-port reporting enhance national and regional capabilities.

Challenges remain. Constraints relating to capacity, time and resource availability and know-how affect national implementation. The absence of formal agreement amongst respective States on shared maritime boundaries is a continuing challenge that seeks consideration. Since 1979, FFA members have collectively cooperated and worked to address regional fisheries management concerns. The prevention, deterrence and elimination of IUU fishing in the region can only be effectively addressed if national efforts are supplemented by regional and international actions.

<sup>22</sup> *Regina v Finete & CNF Fishing Ltd* High Court of the Solomon Islands judgment of 30 July 1984.

<sup>23</sup> *Cheatley v The Queen* (1972) 127 CLR 291 at 296.