

**COMBATTING IUU FISHING:
VANUATU'S DUAL ROLE AS A COASTAL STATE AND A
FLAG STATE**

By

Debra McKenzie

A thesis submitted in partial fulfillment of the
requirements for the degree of
Master of Laws

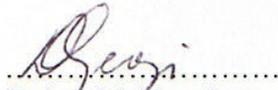
School of Law
The University of the South Pacific

November, 2007

DECLARATION OF ORIGINALITY

Statement by Author

I hereby declare that the work contained in this thesis is my own and where I have used the thoughts and works of others I have clearly indicated this.


.....
Debra McKenzie
S11017277
14 January 2009

Statement by Supervisor

I hereby confirm that the work contained in this thesis is the work of Debra McKenzie unless otherwise stated.


.....
Yoli Tomtavala
Lecturer
14 January 2009

ABSTRACT

Vanuatu's dual role in the fishing industry provides a framework for a study of combatting IUU fishing. Although Vanuatu is not an important fishing State, it plays a role on both sides of IUU fishing activity. On one side, Vanuatu has a role as a flag State which sells the right to fly its flag to fishing vessels which are often involved in IUU fishing on the high seas. It is an opportunity for the island nation to profit from fishing on the high seas. However, it is a difficult and expensive endeavour to ensure that international obligations to regulate the fishery are met given the country's limited resources, and foreign vessels may reflag to take advantage of this situation. On the other side, Vanuatu has a role as a coastal State, with obligations under regional agreements to regulate fisheries and control IUU fishing in its EEZ. In this case, Vanuatu profits from licensing fees from foreign vessels, but again is not an active participant in the fishery.

Vanuatu's rights and obligations which underlie its dual roles in these fisheries are increasingly defined by international and regional agreements. Vanuatu has exclusive flag state responsibility for its flagged fishing vessels on the high seas, and the country has followed evolving international initiatives to regulate this once largely uncontrolled activity. Vanuatu has had a longer history in the regulation of fishing in its EEZ, having utilized bilateral agreements and legislated licensing provisions since 1980. More recently, Vanuatu has joined other Pacific island States to harmonize conservation and management measures in the EEZ.

Vanuatu's access to offshore fisheries is limited but its evolving role to combat IUU fishing in the high seas and EEZ demonstrates a resolve to participate in the conservation of international fisheries. However, the effort is limited by economic and geographical realities that are difficult to overcome.

TABLE OF CONTENTS

| | |
|---|----|
| Abstract | i |
| I INTRODUCTION | 1 |
| II ILLEGAL, UNREPORTED AND UNREGULATED FISHING | 3 |
| III INTERNATIONAL FRAMEWORK TO COMBAT IUU FISHING | 6 |
| <i>United Nations Convention on the Law of the Sea</i> | 8 |
| Cancun Declaration and Agenda 21 | 12 |
| FAO Compliance Agreement | 14 |
| <i>Code of Conduct for Responsible Fisheries</i> | 16 |
| UN Fish Stocks Agreement | 18 |
| International Plan of Action- IUU Fishing (IPOA-IUU) | 21 |
| IV VANUATU'S ROLE AS A FLAG STATE | 24 |
| Open Registries or Flags of Convenience | 25 |
| The Link Between IUU Fishing and Open Registries | 26 |
| Vanuatu's Open Registry | 29 |
| V VANUATU'S ROLE AS A COASTAL STATE | 37 |
| <i>Maritime Zones Act</i> | 38 |
| 1982 <i>Fisheries Act</i> | 38 |
| IUU Fishing in the EEZ | 39 |
| VI REGIONAL INITIATIVES TO COMBAT IUU FISHING | 41 |
| <i>South Pacific Forum Fisheries Agency Convention</i> | 41 |
| Regional Register of Foreign Fishing Vessels | 43 |
| Harmonized Minimum Terms and Conditions for Foreign Fishing Vessel Access (MTCs) | 44 |

| | |
|---|----|
| Multilateral Tuna Fishing Treaty with the US | 46 |
| Niue Treaty | 48 |
| Regional Fishery Bodies | 49 |
| Western and Central Pacific Fisheries Commission (WCPFC) | 52 |
| Indian Ocean Tuna Commission (IOTC) | 56 |
| Inter-American Tropical Tuna Commission (IATTC) | 57 |
| International Commission for the Conservation of Atlantic Tunas (ICCAT) | 58 |
| | |
| VII THE NEW ERA: | |
| TUNA MANAGEMENT PLAN AND 2005 FISHERIES ACT | 61 |
| Management of Foreign Vessels in the EEZ | 62 |
| Licensing | 62 |
| Monitoring, control and surveillance | 64 |
| Management of Flagged Vessels | 65 |
| | |
| VIII CONCLUSION | 69 |
| | |
| SOURCES CONSULTED | 73 |
| Treaties and Conventions | 81 |
| Vanuatu Legislation | 83 |
| Cases Cited | 83 |

I INTRODUCTION

Vanuatu is a small Pacific island State set in the midst of some of the richest tuna fishing areas in the world. Vanuatu is not a fishing state itself in the sense that it does not have an off-shore fishing fleet of nationally owned vessels. Vanuatu fishing is restricted to mostly fishing within its coastal region.

However, Vanuatu does have an important connection to the phenomenon of ‘illegal, unreported and unregulated fishing’ (IUU fishing)¹, and it is in the incongruous position of playing on both sides of this issue even though it is not an offshore fishing state itself. As an open register, Vanuatu has reflagged fishing vessels which have engaged in IUU fishing on the high seas. As a coastal state, it has been plagued by IUU fishing in its exclusive economic zone (EEZ). On one hand, it is a country with exclusive flag state responsibilities for its flagged vessels on the high seas; and on the other hand, as a coastal state it must ensure that foreign vessels do not engage in IUU fishing in its EEZ.

The control of IUU fishing poses a challenge to the conservation and management of worldwide fisheries. By undermining fisheries management, IUU fishing results in lost economic opportunities for legitimate fishers, as well as posing a threat to international food security. This challenge has been addressed by the international community through the development of a framework of binding and non binding instruments. This paper reviews the role of Vanuatu within that framework.

Vanuatu provides an interesting region for this review because of its dual role as mentioned above. Vanuatu’s involvement in the offshore fisheries began shortly after it became an independent nation in 1980. Initiatives to combat IUU fishing began with participation in regional arrangements, the drafting of a tuna management plan, and culminated in the adoption of new national fisheries legislation in 2005² which specifically addressed flag state responsibility.

¹ As defined in the IPOA-IUU which is discussed below

² *Fisheries Act* (No. 55 of 2005).

Capital and technology requirements to access the offshore fisheries are beyond the reach of Vanuatu. It receives only a small percentage of the value of the resources taken through licensing agreements, and flag registrations. However, Vanuatu has made a concerted effort to address IUU fishing by non nationals fishing under its flag, and fishing in its EEZ. Vanuatu cannot resolve the problem of IUU fishing on its own. Beyond legislative initiatives and membership in regional fishery bodies, there are the practical difficulties of effective implementation and control. Vanuatu has taken great initiatives to meet its management objectives, and in doing so has developed its own framework to encourage sustainable fisheries.

This paper begins with a definition of IUU fishing and a brief description of its effect on worldwide fisheries and the threat that it poses to sustainability. Next, the international framework for fisheries conservation is outlined starting with the historical developments that led up to the 1982 LOSC³, and reviewing the recent international declarations and voluntary agreements, as well as binding agreements that target IUU fishing. Lastly, Vanuatu's involvement in IUU fishing is reviewed in more detail, looking at its participation in fisheries and its obligations and responsibilities both as a flag state and as a coastal state.

³ *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982. In force 16 November 1994, (1982) *ILM* 1245. www.un.org/Depts/los.

II ILLEGAL, UNREPORTED AND UNREGULATED FISHING

IUU fishing is a generic description of fishing activity which ‘undermines efforts to conserve and manage fish stocks in all capture fisheries’.⁴ Generally IUU fishing includes unauthorized fishing, unlicensed fishing, as well as the use of banned gear, catching fish over the allocated quota, fishing in closed areas, exceeding by-catch limits or failing to report accurate data. The worldwide value of IUU catches has been estimated to be a staggering 4-9 billion USD, 1.25 billion from the high seas, and the remainder from EEZs.⁵ IUU fishing has been characterized as “one of the most severe problems currently affecting world fisheries,”⁶ and it has been estimated that IUU fishing may account for up to 30 percent of total catches.⁷

The term was first coined by the Commission established under the Convention on the Conservation of Antarctic Marine Living Resources⁸ (CCAMLR) when it described the problem of noncompliance by CCAMLR members who had been observed fishing illegally within the CCAMLR waters and adjoining EEZs. The Commission differentiated this illegal activity from fishing within the Convention area by non-members, and classified this latter activity as ‘unreported and unregulated fishing by non-Members’.⁹

⁴ FAO, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, (Rome: FAO, 2001), para. 1.
<http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM> (accessed 13 November 2007).

⁵ High Seas Task Force, *Closing the Net: Stopping Illegal Fishing on the High Seas*, (Governments of Australia, Canada, Chile, Namibia, New Zealand and United Kingdom, WWF, IUCN, and the Earth Institute at Columbia University, 2006),5. www.highseas.org (accessed 13 November 2007).

⁶ UN General Assembly, Fifty-fourth Session, Agenda Items 40(a) and (c), Oceans and the Law of the Sea: Law of the Sea: Results of the Review by the Commission on Sustainable Development of the Sectoral Themes of *Oceans and Seas*, Report of the Secretary General, A/54/429, 30 September 1999, para. 249. http://www.un.org/Depts/los/general_assembly/general_assembly_reports.htm (accessed 13 November 2007).

⁷ David J. Douman, “A General Overview of Some Aspects of Illegal, Unreported and Unregulated Fishing”, in *FAO Report of and papers presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing*, Sydney, Australia, 15-19 May 2000, FAO Fisheries Report No. 666 (Rome: FAO,2001), para. 9. <http://www.fao.org> (accessed 13 November 2007).

⁸ *Convention on the Conservation of Antarctic Marine Living Resources*, Canberra, Australia, 20 May 1980. In force 7 April 1982, 1329 UNTS 47.

⁹ CCAMLR Commission, Report of the Sixteenth Meeting of the Commission (27 October-7 November 1997) Annex 5 para.1.20.
<http://www.ccamlr.org/pu/E/pubs/cr/97/cc-xvi-all.pdf> (accessed 13 November 2007).

The concern over the growth of IUU fishing in the 1990's led to the adoption of an International Plan of Action (IPOA) on IUU Fishing in 2001. Paragraph 3 of this voluntary agreement defined the individual components of IUU fishing as follows:

Illegal fishing refers to activities conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State or in contravention of its laws and regulations; or by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of measures adopted by that organization; or in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

Unreported fishing refers to fishing activities which have not been reported or have been misreported to the relevant national authority in contravention of national laws and regulations; or activities undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or misreported in contravention of the reporting procedures of that organization.

Unregulated fishing refers to fishing activities in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality or those flying the flag of a State not party of that organization in a manner not consistent with, or in contravention of the conservation and management measures of that organization; or in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where the fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.¹⁰

Illegal and unreported fishing can occur within regulated areas of the high seas, as well as within EEZs. These activities are seen as the result of an inability or failure to implement existing management arrangements. Unregulated fishing occurs on the high seas outside of legal management regimes and has been described as the result of a global governance of high seas fisheries that is 'fundamentally flawed'.¹¹ It follows that Vanuatu is better able to combat IUU fishing in its EEZ through national and regional initiatives, while management of fishing vessels at the international level is more

¹⁰ *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Rome, March, 2001 (24th Session, COFI) www.fao.org/fi/ipa/ipae.asp. (accessed 13 November 2007).

¹¹ High Seas Task Force, 'High Seas Governance', Paper prepared for the Meeting of the High Seas Task Force, Paris, France, (09 March 2005), HSTF/09, February 2005. http://www.high-seas.org/docs/HSTF_09_February_2005_Final.pdf. (accessed 13 November 2007).

complex given the dominance of the principle of freedom of fishing on the high seas which prevails where there are no regional fishery bodies, or where vessels fish under flags not party to those organizations.

Generally, IUU fishing describes the taking of fish outside of relevant conservation and management measures. The practical result is to give a competitive advantage to those fishers who fish outside of, or choose not to comply with catch and effort limitations, and this often leads to unsustainable fishing practices with ecosystem effects.¹² As noted by a recent OECD report, the most deleterious effect of IUU fishing is the undermining of conservation measures by the unauthorized and unrecorded removals of fish from a fisheries ecosystem.¹³

Because it undermines conservation measures, IUU fishing is directly linked to over-fishing. This is a problem that threatens the sustainability of worldwide fish stocks. The FAO has estimated that one half of all fish stocks monitored were fully exploited and producing catches at, or close to, their maximum sustainable limits, while nearly one quarter were either overexploited, depleted or recovering from depletion. Only approximately one quarter of fish stocks were found to be underexploited or moderately exploited and could perhaps produce more.¹⁴

The underlying economic rationale for IUU fishing is the same whether it occurs on the high seas or in areas under national jurisdiction. The effects are the same as well in that management regimes are undermined and sustainable fisheries are threatened. However, this paper will deal with IUU fishing on high seas and the EEZs separately in order to illustrate Vanuatu's different role in each scenario and the options available to it to control IUU fishing.

¹² Erik Jaap Molenaar, "Participation, Allocation and Unregulated Fishing: The Practice of Regional Fisheries Management Organisations" (2003) 18:4 *The International Journal of Marine and Coastal Law* 457-480, 460.

¹³ David J. Agnew and Colin T. Barnes, "Economic Aspects and Drivers of IUU Fishing: Building a Framework", AGR/FI/IUU/(2004)2, (Paris: OECD,2004).
<http://www.oecd.org/dataoecd/17/7/29468002.PDF>. (accessed 13 November 2007).

¹⁴ FAO, *The State of the World Fisheries and Aquaculture 2006*, (Rome: FAO, 2007).
<http://www.fao.org>.

III INTERNATIONAL FRAMEWORK TO COMBAT IUU FISHING

Even though it has taken on a new name, IUU fishing is not a new phenomenon. Overfishing and unsustainable fishing practices in the high seas have been an issue of concern for decades. As a result there has been an evolution of fisheries management approaches which has seen the extension of coastal state jurisdiction as well as the development of an ecological approach to fisheries management that extends to the high seas.

Prior to the mid 1970's the concern of international law regarding fisheries conservation was limited to allocating the competence to adopt conservation measures.¹⁵ Jurisdictional competence was distributed between coastal states, flag states and international fisheries commissions. Coastal states had the competence to prescribe and enforce regulations governing fishing by all vessels in its territorial sea, exclusive fishing zone and in respect of the sedentary species of its continental shelf. A flag state had the competence to prescribe fishery regulations for vessels flying its flag, and could exclusively enforce such regulations on the high seas.

The division of jurisdictional competence between coastal states and flag states did not provide an adequate framework for effective conservation for a number of reasons.¹⁶ First, territorial seas and exclusive fishing zones formed only a narrow coastal band giving coastal states practical control over a limited portion of fish stocks. Second, migratory fish stocks were caught both within and without the area of coastal state jurisdiction, again limiting the control of coastal states over the fishery. Lastly, the principle of the freedom of fishing in the high seas made effective fisheries management difficult, and provided a disincentive for flag states to take conservation measures.

Freedom of fishing in the high seas was (and still is) a well established principle of customary international law. However, that freedom is to be exercised subject to other

¹⁵ Robin R. Churchill and A. Vaughan Lowe, *The Law of the Sea (3rd ed.)* (Manchester: Manchester University Press, 1999), 285.

¹⁶ Churchill and Lowe, 286.

controlling principles of customary law.¹⁷ For example, in the 1893 Bering Sea Fur Seals Arbitration,¹⁸ the tribunal upheld the freedom of the high seas, but also recognized the need for conservation to prevent overexploitation, the regulation of which was to be agreed by the participants in the fishery. In the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas¹⁹ the freedom of fishing in the high seas was recognized as being subject to treaty obligations, to the interests and rights of other states as provided for under a convention, and to the conservation of living resources.

Although the requirement for the application of conservation principles had been recognized, flag State jurisdiction as the sole source of authority over vessels in the high seas was not altered in spite of a poor record of ensuring enforcement of international obligations.²⁰ Moreover, international fisheries agreements to regulate fisheries had little success because if one or more flag States did not accept conservation measures, or if there was poor enforcement by the member flag States, there was no incentive for fishers to comply and thereby put themselves at a disadvantage. Even if a flag State did enforce conservation measures against its own vessels, those measures could not have any beneficial conservation effect unless other flag States took the same measures.

Throughout the 1960's there was increasing concern about the magnitude of distant water fishing and over-fishing in the high seas.²¹ There were increased pressures put on coastal fisheries by large fleets of sophisticated new vessels, and this was accompanied by the failure of international bodies to effectively provide regulatory control, and the lack of effective flag state management. In response, there was a trend for coastal states to claim extended fisheries jurisdiction beyond their narrow territorial sea. By 1977, customary international law recognized that coastal state sovereign rights could extend

¹⁷ Francisco Orrego Vicuna, *The Changing International Law of High Seas Fisheries*, (Cambridge, UK, New York: Cambridge University Press, 1999), 12.

¹⁸ *Bering Sea Fur Seals Arbitration* (1893), I International Arbitration Awards, 755 (Moore).

¹⁹ *Convention on Fishing and Conservation of the Living Resources of the High Seas*, Geneva, Switzerland, 29 April 1958. In force 20 March 1966, 559 UNTS 285; TIAS 5969.

²⁰ Orrego Vicuna, (1999), 20.

²¹ William T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond*, (Oxford: Clarendon Press; New York: Oxford University Press, 1994), 15.

over living resources within 200 miles of the coastal state.²² The development of this concept of extended coastal state jurisdiction or exclusive economic zone (EEZ) reflected the aspiration of developing countries for economic development, as well as the desire to gain control over their coastal resources which were being largely exploited by fishing fleets from developed countries.²³

*United Nations Convention on the Law of the Sea (1982 LOSC)*²⁴

The 1982 LOSC defined the concept of an exclusive economic zone (EEZ) in some detail.²⁵ Article 57 provided for the right of the coastal state to establish an EEZ which may extend to 200 miles from the territorial sea baseline. Within this zone, the coastal state authority is formulated as sovereign rights for the purpose of exploring, exploiting, conserving, and managing the living resources of the zone.²⁶ These rights are subject to a number of duties. The coastal State must take conservation and management measures to ensure that fish stocks in its EEZ are not endangered by over-exploitation, and that stocks are maintained at or restored to 'levels which can produce the maximum sustainable yield , as qualified by relevant environmental and economic factors'.²⁷ Subject to this, the coastal State is required to promote the objective of optimum utilization of the living resources of its EEZ,²⁸ and the coastal state is also to establish the allowable catch for each fish stock within its EEZ.²⁹

Article 62(2) provides that the coastal state shall, through agreements and other arrangements, give other states access to the surplus of the allowable catch where the coastal state does not have the capacity to harvest the entire allowable catch. Where the fishers of other states are given access to its EEZ, the coastal state can prescribe conditions to govern such fishing including licensing, fishing regulations, and

²² Ibid., 23

²³ Churchill and Lowe, 160.

²⁴ See fn. 3.

²⁵ 1982 LOSC, Part V

²⁶ Ibid., article 56(1).

²⁷ Ibid., article 61(3).

²⁸ Ibid., article 62(1).

²⁹ Ibid.

information requirements such as catch and effort statistics and vessel position reports.³⁰ Where a coastal state has prescribed regulations or laws in conformity with the Convention for foreign vessels fishing in its EEZ, it may enforce them by measures including ‘boarding, inspection, arrest and judicial proceedings’.³¹

The issue of conservation is a prominent feature of the 1982 LOSC EEZ regime, and the sovereign rights of the coastal state in respect of the living resources in the EEZ are qualified by obligations to conserve and manage the resources. It appears that there is a reversal of the historical situation because access to the resources under the Convention becomes secondary to conservation, as the access of other states in article 62 is conditional upon the success of conservation and the availability of a surplus of resources.³²

The high seas fisheries regime did not receive the same treatment in regards to conservation. Rather, it has been suggested that the 1982 LOSC high seas fisheries regime is exploitation oriented, and seems to favor utilization over the conservation of living resources of the high seas.³³ A review of the relevant portions of the Convention supports this contention. Section 2, entitled “Conservation and Management of the Living Resources of the High Seas” begins with Article 116 setting out the right of all states to fish on the high seas subject to their treaty obligations, and the interests of the coastal states. The states are obligated to take, individually or in cooperation with other states, such measures for its respective nationals as may be necessary for the conservation of the living resources of the high seas pursuant to Article 117, and there is a further duty to cooperate in Article 118. However, there are no substantive standards by which to measure conservation practices except in Article 119 whereby fish

³⁰ Ibid., article 62(4).

³¹ Ibid., article 73(1)

³² Francisco Orrego Vicuna, “The International Law of High Seas Fisheries: from Freedom of Fishing to Sustainable Use” in Olav Schram Stokke (ed.) *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (United Kingdom: Oxford University Press, 2001), 23-52, 26.

³³ Ulrich Beyerlin, “New Developments in the Protection of the Marine Environment: Potential Effects of the Rio Process” (1995), 55 *Heidelberg Journal of International Law* 544, 551.
http://www.zaoerv.de/55_1995/vo55.cfm (accessed 14 November 2007).

populations of harvested species have to be maintained or restored “at levels which can produce the maximum sustainable yield”.

The 1982 LOSC lacks any clear guidelines for international cooperation³⁴ for the management of high seas fisheries, even though it directs states to take a cooperative approach to conservation and management. The same approach is seen in the requirements³⁵ concerning cooperation between states for the management of straddling and highly migratory fish stocks. In effect, the management of the high seas fisheries is largely left to the discretion of the fishing nations. In other words, the freedom of fishing on what was left of the high seas after the development of the 200 mile EEZ remained largely intact given the lack of clear guidelines for management and conservation of high seas fisheries provided by the 1982 LOSC.

The 1982 LOSC maintains a heavy reliance on flag states for the enforcement of maritime and marine protection provisions on the high seas. However, a review of the Article 94 which sets out the duties of the flag state reveals a particular focus of the duties enumerated. The duties for the flag state include maintaining a register of its flag ships, assuming jurisdiction under its internal law over them, and taking the necessary measures to insure various aspects of their vessels’ safety. Nowhere is there any specific mention of fisheries, although safety and navigational provisions as well as marine pollution are explicitly dealt with. The result is a double gap in the flag state management for fishing vessels on the high seas. Not only does Section 94 not mention the manner of applicability of the duties to fishing vessels, the terms are very general, and again there are no substantive standards against which to measure the exercise of flag State responsibility with regard to high seas fisheries.³⁶

³⁴ Martin Tsamenyi, Lara Manarangi-Trott, and Shilpa Rajkumar, “The International Legal Regime for Fisheries Management”, UNEP Workshop on Fisheries and Sustainable Fisheries Management, Geneva, 26-27 April 2004, (Geneva: UNEP, 2004).

<http://www.unep.ch/etu/Fisheries%20Meeting/submittedPapers/MartinTsamenyiLaraManarangiTrottShilpaRajkumar.pdf> (accessed 14 November 2007).

³⁵ 1982 LOSC, articles 63, 64(1), 66(5)

³⁶ Rachel Baird, “Illegal, Unreported and Unregulated Fishing: an Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence”, [2004] *MelbJIL* 13, 20.

Article 91 which provides that vessels will have the nationality of the flagging state also has an element of vagueness. The ‘genuine link’ which must exist between vessel and flag State is not defined. A certain amount of controversy has surrounded this issue of the ‘genuine link’ and its definition and relation to the proliferation of open registers.³⁷ However, as to the treatment of the ‘genuine link’ requirement at the time of the negotiations for the 1982 LOSC, it is important to recall that the concern about open registers at that time was substandard merchant shipping vessels and the problems of safety at sea and pollution rather than high seas fishing.³⁸ If there had been a nationality requirement for ownership or crew to establish a prerequisite ‘genuine link’, then that would have been the end of open registers. Therefore the final text represents a compromise in that the ‘genuine link’ requirement is kept vague, but there are clear provisions for the jurisdiction and control of flag States over pollution of the marine environment by vessels flying their flag.³⁹ However, there are no corresponding provisions for the enforcement of fisheries management and conservation agreements.

To summarize, there are duties to conserve and manage high seas fisheries pursuant to articles 87(2) and 116-120. A flag State has a duty under Article 94 to effectively exercise its jurisdiction and control over ships flying its flag, but there can be no international measures (without agreement) to ensure that this takes place given the primacy of flag state jurisdiction. Further, note that article 110 does provide for intervention on the high seas by non-flag States in a limited number of circumstances, but the list does not include fisheries.

In the late 1970’s fishing in the high seas began increasing considerably as distant water fishing vessels were displaced from their traditional fishing grounds when coastal states

³⁷ For a comprehensive review of the topic see Alex G. Oude Elferink, “The Genuine Link Concept: Time for a Post Mortem?”, in Ige Dekker and Harry Post (eds.), *On the Foundation and Sources of International Law*, (UK: Cambridge University Press, 2000), 41-64; and Ariella D’Andrea, “The Genuine Link Concept in Responsible Fisheries: Legal Aspects and Recent Developments”, *FAO Legal Papers Online* #61, November, 2006. www.fao.org/legal/prs-ol/paper-e.htm (accessed 17 November 2007).

³⁸ Satya Nandan, Keynote Address at the Conference on Governance of High Seas Fisheries and the United Nations Fish Agreement: Moving Words to Action, 1-5 May 2005, St. John’s and Labrador, Canada. http://www.dfo-mpo.gc.ca/fgc-cgp/documents/presentations/nandan_e.pdf (accessed 20 November 2007).

³⁹ 1982 LOSC, articles 211, 217, and 222.

chose to phase out much of the foreign fishing from their 200 mile EEZs.⁴⁰ The increased competition for fewer stocks in the high seas resulted in an exacerbation of the problems which had not been adequately addressed by the international Convention including the exploitation of straddling stocks and the free rider problem.

Straddling stocks are stocks of fish that migrate between, or occur in both, the EEZ of one or more states and the high seas. There are problems of allocation and management of these stocks. Any management measures taken by a coastal state to manage such stocks in its EEZ may be undermined by the activities of vessels fishing in the high seas which are not bound by the coastal states' conservation measures. The 1982 LOSC did not provide any substantive guidance as to how the problem of straddling stocks was to be addressed, but did direct in article 63(2) that "the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate sub regional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area".

The other problem was the issue of free riders which occurred when vessels from states not party to a fisheries conservation agreement fished for the managed stocks, and thereby undermine conservation measures observed by parties to that agreement. It was often the case that free riders avoided fisheries conservation agreements by reflagging their vessels to states which were not party to the agreement. This problem of reflagging, as well as the straddling stocks issue revealed inadequacies in the 1982 LOSC high seas regime and there followed several international initiatives to address these problems.

Cancun Declaration⁴¹ and Agenda 21⁴²

Reflagging to avoid fishing agreements and enforcement was not a new issue at this time. A century earlier British fishing trawlers reflagged to fish under the Norwegian

⁴⁰ Churchill and Lowe, 299.

⁴¹ Declaration of Cancun, Cancun, Mexico, 8 May 1992.

⁴² United Nations Conference on Environment and Development, Agenda 21, Chapter 17 and Declaration of Principles, Rio de Janeiro, Brazil, 14 June 1992.

flag in order to avoid being bound by a British law restricting fishing in the Moray Firth. In the 1970's and 1980's tuna vessels from the United States reflagged to avoid compliance with costly restrictions required by U.S. legislation for the protection of dolphins. As to straddling and migratory stocks, the issue became more urgent for the coastal states who could not effectively manage their fish stocks as long as uncontrolled fishing continued on the high seas. By the 1990's the need for effective management of the world's fisheries took on a new sense of urgency because of the increasing over-fishing of fish stocks, overcapacity in the fishing industry, a concern for the sustainability of the world's fish stocks under the existing regime, and the real threat of the loss of this important world food source.

These concerns were addressed in 1992 at the first global forum on responsible fishing⁴³ held under the auspices of the FAO Committee on Fisheries (COFI). The resulting Cancun Declaration asked the FAO to draft a Code of Conduct for Responsible Fishing. In that same year, the United Nations Conference on Environment and Development (UNCED) addressed the issue of reflagging as one of the many problems of unregulated fishing, and called on the UN to convene a conference to promote effective implementation of 1982 LOSC provisions on straddling and highly migratory fish stocks,⁴⁴ stressing that States should take steps to monitor and control fishing activities by vessels flying their flags on the high seas. UNCED's Agenda 21 expressly recognized that the present enforcement of conservation measures was inadequate, and that further action by states whose nationals and vessels fished on the high seas was required. In response to the Cancun Declaration and the concerns expressed in Agenda 21 the FAO produced two instruments: the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*⁴⁵ (FAO

⁴³ International Conference on Responsible Fishing, Cancun, Mexico, 6-8 May 1992.

⁴⁴ Para. 17.46

⁴⁵ *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, adopted Rome, Italy, 24 November 1993. In force 24 April 2003. 1860 UNTS 148; (1994)33 ILM 968.

Compliance Agreement) in 1993, and the *Code of Conduct for Responsible Fisheries*⁴⁶ (the Code) in 1995.

FAO Compliance Agreement

This is a binding international agreement which addresses the effective management of high seas fisheries. The focus of the Agreement is twofold as it addresses the responsibilities of flag states, as well as the promotion of the free flow of information about high seas fishing activities. Both issues are directed at the accountability of flag states and their willingness to effectively exercise flag state responsibilities to ensure that conservation measures are observed when their flagged vessels are fishing in the high seas. Article III (1)(a) defines the primary responsibility of flag states: “each Party shall take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures.”

Parties to the Agreement must ensure that their flagged fishing vessels which are fishing on the high seas are duly authorized to fish there. The primary objective is “to deal with the problem of the reflagging of fishing vessels as a means of avoiding compliance with conservation and management measures”.⁴⁷ The underlying rationale is that authorization should enhance flag state control in high seas fisheries and enable these fisheries to be more effectively managed.

The FAO Compliance Agreement clarifies those duties found in the 1982 LOSC, requiring flag states to take specified measures to ensure fishing vessels entitled to fly their flag “do not engage in any activity that undermines the effectiveness of international conservation and management measures”.⁴⁸ For the first time, an

⁴⁶ *Code of Conduct for Responsible for Responsible Fisheries*, adopted Rome, Italy, 31 October 1995. FAO Doc. 95/20/Rev. 1 (1995), Reproduced in 11 *International Organizations and the Law of the Sea Documentary Yearbook* 700-34 (1995).

⁴⁷ UN General Assembly, Oceans and the law of the sea, Consultative group on Flag State Implementation, A/59/63, 5 March 2004, para. 42.

⁴⁸ FAO Compliance Agreement, Article III.1.

international instrument made a connection between the right to fly a state's flag and the right to fish on the high seas through an extensive list of flag State responsibilities set out in Article III: Parties are required to provide authorization for their flagged vessels to fish on the high seas;⁴⁹ and must be able to exercise effectively its responsibilities under the Agreement.⁵⁰ There is a requirement for Parties to maintain a record of their fishing vessels authorized to be used for fishing on the high seas.⁵¹ Authorizations may be subject to conditions,⁵² and will be deemed cancelled if a vessel is no longer entitled to fly the flag of the authorizing state.⁵³ A Party cannot authorize a fishing vessel previously registered by another Party if that vessel has undermined international high seas conservation and management measures.⁵⁴

There are monitoring requirements as well; recorded fishing vessels must be marked so as to be readily identified in accordance with international standards⁵⁵, and fishing vessels must provide its flag state with information as to its fishing operations⁵⁶. Parties are required to take enforcement measures against vessels that contravene the Agreement, and must establish offences under national legislation and impose sanctions to enforce compliance.⁵⁷

The Agreement provides for international cooperation whereby Parties are directed to share information related to the activities of fishing vessels;⁵⁸ and this cooperation is extended to vessels in the ports of Parties other than the flag state.⁵⁹ Parties are also directed to enter into cooperative agreements to promote the achievement of the objectives of the Agreement.⁶⁰ As to the new transparency requirements, the collection and exchange of information of fishing vessels fishing on the high seas is facilitated by

⁴⁹ Ibid., article III.2.

⁵⁰ Ibid., article III.3.

⁵¹ Ibid., article IV.

⁵² Ibid., article III.2.

⁵³ Ibid., article III.4.

⁵⁴ Ibid., article III.5.

⁵⁵ Ibid., article III.6.

⁵⁶ Ibid., article III.7.

⁵⁷ Ibid., article III.8.

⁵⁸ Ibid., article V.1.

⁵⁹ Ibid., article V.2.

⁶⁰ Ibid., article V.3.

the establishment of a database managed by the FAO.⁶¹ Importantly, the information regarding vessels which have been found to have engaged in activities that have undermined the effectiveness of international conservation and management measures is collected by the FAO, and circulated among the parties to the Agreement and to international fisheries organizations.

The ‘genuine link’ requirement from article 91 in the 1982 LOSC is not repeated in this Agreement. There is mention of a ‘link’ in article III.3, but that refers to the ability of a State to exercise effective control in respect of its vessels. Thus the emphasis moved away from a genuine link requirement between state and vessel owner in order to register a vessel to a post-registration responsibility by the flag state to exercise effective jurisdiction over high seas fisheries. Apparently there was no political will to define or enforce a ‘genuine link’ requirement, and thus put an end to open registers. An earlier draft of the FAO Compliance Agreement did set out specific elements for a ‘genuine link’, but its inclusion proved to be too controversial and the concept was not included.⁶²

The FAO Compliance Agreement has not been widely accepted. It did not receive the requisite 25 signatures to enter into force until 2003, 10 years after its adoption. At present its efficacy is limited by the small number of ratifications.⁶³ The agreement has 35 ratifications and of those, only 2 states have open registers. Vanuatu is not a Party to the Agreement.

Code of Conduct for Responsible Fisheries

The Code is a voluntary agreement whose aims were to establish principles for responsible fishing in accordance with the rules of international law, and to serve as a reference source to assist states to establish or improve legal, institutional and managerial arrangements required for responsible and sustainable fishing. It is a far

⁶¹ Ibid., article VI.

⁶² Oude Elferink, 11.

⁶³ Kelly Rigg, Remi Parmentier and Duncan Currie, “Enforcing International Fisheries Agreements”, (*OceanDocs*, December, 2003),8. <http://hdl.handle.net/1834/350> (accessed 14 November 2007).

reaching document, applying to all fisheries globally from the high seas to inland waters. The broad scope of the Code addresses all aspects of fishing from catching to trade. The broadness of the Code's application reflects its underlying rationale that structural adjustment within the fisheries sector is required if long-term sustainability goals are to be realized.⁶⁴

The framework of the Code is provided by Article 6 which sets out the general principles and serves as an introduction to the substantive provisions. Particularly relevant to this paper are those provisions dealing with fisheries management, and fisheries operations. Article 7 encourages the establishment of effective measures for monitoring, control, surveillance and enforcement, as well as the implementation of international conservation agreements. Further, it is recommended that fisheries management measures should provide for the avoidance of excess fishing capacity, protection of the biodiversity of aquatic habitats and ecosystems, restoration of depleted stocks and avoidance of adverse environmental impacts. The Code urges the precautionary approach be applied to conservation and management measures, and stresses the need for fisheries management to be based on effective data.

Article 8 deals with fisheries operations and specifically provides for the duties of flag States. Flag State duties are enumerated in Article 8.2. It is recommended that flag States should: maintain records of fishing vessels entitled to fly their flag including details of the vessels, their ownership and authorization to fish; ensure that no fishing vessels entitled to fly their flag fish on the high seas or in waters outside of the flag State jurisdiction unless they have been issued with a Certificate of Registry and have been authorized to fish; ensure compliance with appropriate safety requirements for fishing vessels; take enforcement measures where their flagged fishing vessels have been found to have contravened applicable conservation and management measures, including

⁶⁴ David J. Doulman, "1995 FAO Code of Conduct for Responsible Fisheries: Development Considerations and Implementation Challenges", FAO Regional Workshop on the Elaboration of the National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, (29 August- 2 September 2005, Nadi, Fiji), 3.

sanctions which provide for the refusal, withdrawal or suspension of the authorization to fish.

Flag States are also encouraged to provide protection for vessels and crew, and are directed that fishing vessels and fishing gear should be marked in accordance with internationally recognizable vessel marking systems. Flag states not party to the FAO Compliance Agreement are encouraged to accept the Agreement and to adopt laws and regulations consistent with the provisions of that agreement.

UN Fish Stocks Agreement⁶⁵

As noted above, by the 1990's it had become clear that the 1982 LOSC had not effectively addressed the management and conservation of marine living resources in the high seas. Freedom of fishing on the high seas remained unfettered to a large extent, and even though the high seas area had been geographically confined, the transboundary and migratory nature of some fish stocks throughout and between zonal delimitations had not been adequately dealt with.⁶⁶ There is mention of the special management requirements of these fish stocks in the 1982 LOSC,⁶⁷ but there is no framework for management. In order to address this situation, the U.N Fish Stocks Agreement was adopted, and this agreement built on the straddling and highly migratory stocks provisions in the 1982 LOSC. Article 2 refers to that agreement:

The objective of this Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention.

One of the most important achievements of the agreement is that it balances the rights and obligations of the coastal States with the rights and obligations of the high seas

⁶⁵ *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, adopted New York, United States, 4 December 1995. In force 11 December 2001, 2167 UNTS 88; (1995) 34 ILM 1542; [2001] ATS 8; *Law of the Sea Bulletin* No. 29, p.25.

⁶⁶ Molenaar, 458.

⁶⁷ 1982 LOSC article 63(2) and articles 64-67 specifically deal with fish stocks; and articles 87 and 116 make high seas fishing subject to the interests of other states

fishing States.⁶⁸ There is the recognition that there must be compatibility between the management and conservation measures taken by the fishing states on the high seas, with the management and conservation measures taken by the coastal states in their EEZs because, in effect, both entities are managing the same fish stocks. Therefore, there had to be a framework for cooperative management or the “future commercial availability of stocks would be jeopardized for everyone.”⁶⁹

In general, the field of application of the Fish Stocks Agreement is restricted to straddling fish stocks and highly migratory fish stocks which are found beyond areas under national jurisdiction.⁷⁰ Unlike the FAO Compliance Agreement, the UN Fish Stocks Agreement does not focus solely on the duties of the flag state. A substantial part of the agreement deals with international cooperation. The involvement of other actors in the agreement serves to enhance enforcement by covering the eventuality that a flag state proves either unwilling or unable to discharge its obligations.⁷¹

Article 18(3) sets out the measures that a party to the Agreement must adopt with respect to vessels flying its flag. It is similar to the FAO Compliance Agreement in providing for collection and supply of information and record keeping, catch verification and reporting for the purpose of monitoring and enforcement, the marking of fishing vessels and gear, and the control of fishing through the granting of the authorization to fish. The Agreement does not however require states to transmit information gathered from their fishing vessels to any global organization.

The mechanisms which are designated to carry out UN Fish Stocks Agreement goals are regional fisheries management organizations (RFMOs). Part III defines the aims and proposed activities of RFMOs whereby coastal states and states fishing on the high seas are directed to pursue cooperation to ensure effective conservation and management of

⁶⁸ Nandan, 3.

⁶⁹ Lawrence Juda, “The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique” (1997), 28:2 *Ocean Development and International Law* 147-166, 151.

⁷⁰ Fish Stocks Agreement, article 3.

⁷¹ Erik Franckx, *Fisheries Enforcement: Related Legal and Institutional Issues: National, Subregional or Regional Perspectives*, FAO Legislative Study 71, (Rome: FAO, 2001), 5.

straddling fish stocks and highly migratory fish stocks.⁷² Art. 10 sets out the duties of the participants in the RFMO, and it includes data collection and sharing, and establishing appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement.

Under the Agreement, a party to an RFMO is responsible, as a flag state, to enforce conservation and management measures against its own vessels, but must also accept that vessels flying its flag will be subjected to a system of regional surveillance and enforcement. This Agreement allows the boarding and inspection of vessels flying under a flag of a state Party to the Agreement by other Parties to the Agreement where there is evidence of a violation. The boarding inspector may only secure evidence and notify the flag state, but may remain on board and further investigate, including if necessary, bringing the vessel to port.⁷³

The Fish Stocks Agreement recognizes the important management measures that may be taken by a port State including inspections and prohibitions of landings and transshipments.⁷⁴ Another new approach is the requirement that even if parties to the UN Fish Stocks Agreement are not parties to regional fisheries bodies they must nonetheless cooperate in the conservation and management measures of that body. Further, parties to the UN Fish Stocks Agreement may not authorize fishing operations in areas managed by a regional fishery body to which they are not members.⁷⁵

The Agreement also introduces new obligations and overall criteria. Article 5 requires parties to adopt measures to ensure the long-term sustainability of straddling stocks; apply the precautionary approach in accordance with article 6; assess the impacts of fishing, other human activities and environmental factors on target stocks and species belonging to the same ecosystem or associated with or dependent upon the target stocks; minimize pollution, waste, discards, catch by lost or abandoned gear, catch of non-target

⁷² Fish Stocks Agreement, article 8.

⁷³ *Ibid.*, article 21.

⁷⁴ *Ibid.*, article 23.

⁷⁵ *Ibid.*, article 17.

species and utilize selective, environmentally safe and cost-effective fishing gear and techniques; protect biodiversity in the marine environment; and collect and share complete and accurate data concerning fishing activities, including vessel location and catch of target and non-target species.

The UN Fish Stocks Agreement has not attained its full potential as a global comprehensive agreement because not all important coastal, fishing and flag states are party to it.⁷⁶ The High Seas Task Force compiled a list of key countries who should be encouraged to become party to Agreement.⁷⁷ The list included Vanuatu, which has signed but not ratified the agreement. By doing so, Vanuatu has indicated support for the agreement, but nonetheless is not legally bound by its provisions. It seems appropriate for Vanuatu to have taken this stance because Vanuatu plays two roles under the Agreement. The Agreement is specifically aimed at the migratory tuna which Vanuatu manages in its EEZ. However, Vanuatu's open register may also flag vessels that undermine those very same management measures when these vessels fish for tuna in the high seas.

International Plan of Action – IUU Fishing⁷⁸ (IPOA-IUU)

The last international instrument to be considered is the IPOA-IUU. There were four such plans concluded within the framework of the FAO Code of Conduct⁷⁹, with the IUU Fishing IPOA as the most comprehensive and dealing with the widest range of matters. The overall objective of the IPOA-IUU is to prevent, deter and eliminate all elements of IUU fishing in waters inside and outside of national jurisdiction.⁸⁰ This is a voluntary agreement and, though not binding, is a useful source of ideas for states to develop their own national or regional strategy to fight IUU fishing. This IPOA is based on four main sections or areas of action including flag state responsibilities, coastal state

⁷⁶ High Seas Task Force, HSTF/09, 2.

⁷⁷ Ibid., 3.

⁷⁸ See footnote 10.

⁷⁹ Earlier IPOAs dealt with reducing incidental catches of seabirds in longline fisheries; the conservation and management of sharks; and the management of fishing capacity.

⁸⁰ IPOA-IUU, section III para. 8.

measures, port state measures and internationally agreed market measures. The general obligations of all states are considered, as is the role of RFMOs.

As to general obligations, all states are urged to join the 1982 LOSC, the U.N. Fish Stocks Agreement and the FAO Compliance Agreement.⁸¹ States are called upon to identify nationals who are the beneficial owners of vessels involved in IUU fishing.⁸² It is recommended that national legislation be enacted to address related issues including state control over nationals,⁸³ vessels without Nationality,⁸⁴ consistent and transparent application of appropriate sanctions,⁸⁵ the prevention and deterrence of the activities of non-cooperating States to a relevant regional fisheries management organization which engage in IUU fishing,⁸⁶ avoiding conferring economic support entities that are involved in IUU fishing,⁸⁷ and monitoring, control and surveillance (MCS) which should include monitoring from the commencement of fishing to the point of landing.⁸⁸

All states are encouraged to develop and implement a national plan of action to give effect to the objectives of the IPOA.⁸⁹ Cooperation between states through regional fisheries management organizations is encouraged, and states are urged to cooperate in the exchange and acquisition of data, to make policies and measures compatible, and to enter into agreements or arrangements with other states. There is an overlying theme of harmonization so that there is no one state or region that lacks appropriate implementation of conservation and management measures. In other words, there is no advantage to be gained by shopping around for a convenient flag.

The measures suggested for flag states and coastal states are particularly relevant to Vanuatu. As to flag state responsibilities,⁹⁰ the IPOA urges states to ensure that vessels

⁸¹ Ibid., section IV para. 11.

⁸² Ibid., section IV para. 18.

⁸³ Ibid.

⁸⁴ Ibid., section IV, para.19.

⁸⁵ Ibid., section IV, para.21.

⁸⁶ Ibid., section IV, para.22.

⁸⁷ Ibid., section IV, para.23.

⁸⁸ Ibid., section IV, para.24.

⁸⁹ Ibid., section IV, para.25.

⁹⁰ Ibid., section IV, paras. 34-50.

flying their flag do not engage in or support IUU fishing. It is suggested that states link the registration of a vessel with the issuance of an authorization to fish. States are directed to maintain a record of fishing vessels entitled to fly its flag, and to adopt measures to ensure that no vessels are allowed to fish unless authorized to fish in conformity with international law on the high seas, or in conformity with national legislation within areas of national jurisdiction. It is recommended that flag states should make information from catch and transshipment reports available to relevant national, regional and international authorities.

Paragraph 50 of the IPOA urges coastal states to implement measures to deter IUU fishing in their EEZs. The IPOA lists a number of measures that the coastal state should consider to address this issue including effective monitoring, control and surveillance; cooperation and exchange of information with other states and RFMOs; insuring vessels have the necessary authorization to fish; ensuring that transshipment and processing are authorized or conducted lawfully; and avoiding the licensing of vessels which have a history of IUU fishing.

The review of Vanuatu's roles in combating IUU fishing are considered in the following sections, and it is interesting to note the large extent to which Vanuatu has followed the suggestions offered by the IPOA and the Code. There are also similarities between the conservation and management measures that Vanuatu has adopted and those found in the FAO Compliance Act and the Fish Stocks Agreement, but it is notable that many of the measures found in those agreements were adopted at the regional level by the South Pacific Island countries before the international agreements were drafted.

IV VANUATU'S ROLE AS A FLAG STATE

Vanuatu is a fishing state in the sense that it does have a high seas fishing fleet. However, the reality is that the beneficial ownership of that fleet rests in the hands of non nationals who pay a fee to fish under the Vanuatu flag. In fact, Vanuatu, unlike many of its Pacific Islands neighbors, has no industrial tuna vessels, but only a small domestic fleet.⁹¹ Vanuatu cannot access the high seas fisheries because it lacks the infrastructure and finances necessary to profitably fish on the high seas.

Realistically, barring unforeseen changes, Vanuatu will never have a national (where the vessels are beneficially owned by Vanuatu nationals) high seas fishing fleet for a number of reasons. The only economically viable way to access the high seas fisheries is by large industrial vessels that are unaffordable to Vanuatu. Moreover, there is presently an overcapacity of fishing vessels in the high seas fisheries as discussed above. Therefore it is unlikely that developing, newly independent states will be able to participate in the high seas fisheries if their participation can only be accomplished at the expense of a diminished allocation to the developed states which already have an established stake in the industry. It would, as one Japanese fishery advisor commented, require “difficult negotiations”.⁹²

Apparently there is no room for expansion in the high seas fishery particularly if it means displacing a traditional distant water fishing nation. The high seas fisheries are theoretically open to any state, but this concept of freedom is truncated by economic as well as ecological realities. Part XI of the 1982 LOSC envisages a form of sharing resources⁹³ from the seabed beyond national jurisdiction, but there is no such provision

⁹¹ PricewaterhouseCoopers, “Sustainability Impact Assessment (SIA) of the EU-ACP Economic Partnership Agreements: Key Findings, Recommendations and Lessons Learned”, (Paris: PricewaterhouseCoopers, 2005), 151. http://www.sia-gcc.org/acp/download/pwc_sia_acp20July2005. (accessed 14 November, 2007).

⁹² Miwako Takase, “Problems of Illegal, Unreported and Unregulated Fishing and Overcapacity of Tuna Fishing Vessels”, in Proceedings of the Second Meeting of the Technical Advisory Committee of the FAO Project Management of Tuna Fishing Capacity: Conservation and Socio-economics, 15-18 March 2004, Madrid, Spain. (Rome: FAO, 2005), 7. <http://www.fao.org/docrep/008/y5984e/y5984e00.HTM> (accessed 14 November 2007).

⁹³ 1982 LOSC, article 136.

for an international system of governance for high seas fisheries. The traditional distant water fishing nations continue to predominate on the high seas.⁹⁴

Open Registries or Flags of Convenience

Vanuatu has found a niche to benefit from the high seas fisheries. Shortly after independence the 1981 enactment of the Maritime Act⁹⁵ established the Vanuatu international ship registry as an open registry. Fishing vessels beneficially owned by foreign interests and registered in the open registry are governed by the Vanuatu Maritime Act and the 2005 Fisheries Act. Vanuatu attracts foreign capital through registration fees and fishing licensing, and is responsible, as the flag state, for the implementation and enforcement of conservation and management measures for those registered vessels on the high seas.

Open registry States are also known as ‘flags of convenience’. Functionally a flag of convenience can be defined as “the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels.”⁹⁶ The classic English textbook definition presented the flag of convenience as “a form of competition in international navigation whereby some countries ... allow the use of their flags by foreign shipping by a simple administrative formality”.⁹⁷ There is no legally accepted definition for classifying a flag of convenience or open registry, but in practice if the percentage of ships on the register owned by non-nationals of the flag State is higher than 99%, it is considered to be an open registry.⁹⁸

⁹⁴ Including Russia, Japan, Spain, Poland, Republic of Korea, Taiwan, United States and China

⁹⁵ [Cap 131].

⁹⁶ Boleslaw A. Boczek, *Flags of Convenience: An International Legal Study*, (Cambridge, Mass.: Harvard University Press, 1962), 2.

⁹⁷ *Ibid.*, 3.

⁹⁸ Judith Swan, “Fishing Vessels Operating Under Open Registers and the Exercise of Flag State Responsibilities- Information and Options, FAO Fisheries Circular No. 980,(Rome: FAO, 2002), footnote 11.

<ftp://ftp.fao.org/docrep/fao/005/y3824e/y3824e00.pdf> (accessed 14 November 2007)

A vessel owner who chooses to reflag to an open registry may enjoy a significant competitive advantage because of lower fees and taxation rates levied by such states, as well as the avoidance of employing a national crew requiring national wage and employment standards. These circumstances are equally applicable to merchant ships as they are to fishing vessels. In the case of a fishing vessel a state may also reflag to an open registry which is not Party to a specific fishing agreement as a means of avoiding the application of conservation measures under that agreement. There is also a possibility that a vessel owner may seek out an open registry where the flag state is unwilling or unable to effectively exercise jurisdiction over their ships in matters of pollution control, shipping safety and fishery conservation measures.

Reflagging fishing vessels is a growing business, and in 2005, there were 2900 large scale fishing vessels (17.5% of the world's fishing fleet by tonnage) flagged to one of the 14 top open registries or listed as 'flag unknown'.⁹⁹ The list of the top fourteen open registries, which includes Vanuatu, is completely comprised of developing countries.¹⁰⁰ As to the link between IUU fishing and these open registries, the important questions become whether these states are Parties to regional fisheries bodies or have implemented conservation measures of their own, and whether or not these cash strapped states are able to effectively exercise their flag state jurisdiction to ensure compliance with conservation and management measures by their flagged vessels fishing on the high seas.

The Link Between IUU Fishing and Open Registries

IUU fishing may be facilitated by registration to an open registry. The avoidance of conservation measures can be accomplished within the ambit of the international law framework. Pursuant to Article 91 of the 1982 LOSC, vessels have the nationality of the state whose flag they are flying. There is a requirement for a 'genuine link' between the

⁹⁹ High Seas Task Force (2006), 36.

¹⁰⁰ Belize, Bolivia, Cambodia, Cyprus, Equatorial Guinea, Georgia, Honduras, Marshall Islands, Mauritius, Netherlands Antilles, Panama, St. Vincent, Sierra Leone, and Vanuatu

state and the vessel¹⁰¹, but this requirement can normally be complied with by off shore incorporation of a shell company. The result is that the beneficial owners of fishing vessels may choose to register under a flag where the flag state is not party to relevant regional fisheries agreements, or where the flag state is unable or unwilling to effectively exercise control over that vessel. Further, the possibility of prosecution or recovery of damages is curtailed by the absence of assets of the beneficial owner in the flag state.

The case of the Taiwanese large-scale tuna longline fishery provides a fine illustration of how an open registry may facilitate IUU fishing.¹⁰² As a newly expanding Asian fishing country, Taiwan expanded its longline fishing capacity at a particularly rapid pace. Previous to the 1980's Taiwan operated approximately 100 large-scale tuna longline fishing vessels (LSTLVs) on the high seas. By the early 1990's the number of Taiwanese LSTLVs equipped with super-freezers had increased to more than 300. Excessive fishing reduced the prices of sashimi-grade tuna and this impacted the Japanese market. The governments of Japan and Taiwan established an export quota in order to rectify the situation. Subsequently in the mid 1990's Taiwanese LSTLVs shifted their operations from the Indian Ocean to the Atlantic Ocean. In response to the rapid increase of catches of bigeye tuna by the Taiwanese vessels in that area, the regional fishery body adopted a catch limit by Taiwanese vessels. In accordance with this catch limitation, Taiwanese authorities allocated quotas to individual Taiwanese LSTLVs.

The quotas meant that even if Taiwanese fishers wanted to increase the number of LSTLVs, there were no excess licenses to be issued by the government. As a result, from 1993 Taiwanese residents purchased and owned large numbers of LSTLVs registered in other countries. By the year 2000 Japan estimated that there were at least 250 LSTLVs owned by Taiwanese residents and registered in other countries operating in the Atlantic, Pacific and Indian Oceans. They operated outside of the fishery body regulations, and were not subject to Taiwanese export quotas.

¹⁰¹ Article 91 states that "There must exist a genuine link between the State and the ship".

¹⁰² Takase, c.3.

In response to the situation, Japan and Taiwan set up programs to scrap older vessels, and to re-register newer vessels. By 2002 there remained approximately 100 LSTLVs that were owned by Taiwanese residents and registered outside Taiwan, mainly in Vanuatu and the Seychelles. In 2003, the government of Japan reached an agreement with the governments of Vanuatu and the Seychelles to put the vessels under strict control. The owners of 69 of the vessels committed themselves to comply with cooperative management schemes which included strict monitoring and control measures, fishing licensing by Japan, and authorization to fish in only specified areas and for specified species.

The foregoing illustrates the use of open registries first as facilitators of IUU fishing when Taiwanese fishers sought to elude national controls, but then as facilitators of a solution when a joint agreement was reached to monitor and control the fishing activities of those vessels. The availability of an open registry allowed the Taiwanese fishers as well as Vanuatu and the Seychelles to receive an economic benefit from the fishery while at the same time observing conservation parameters. Observe that the determining factor as to whether or not IUU fishing occurred was not whether there existed a genuine link between the Taiwanese operator and the state of Vanuatu for example, but whether or not the flag state effectively exercised its jurisdiction over the fishing vessel.

Another manner by which open registries may facilitate IUU fishing is through the ease of registration which they offer. Because reflagging to an open registry is often relatively easy, IUU vessels are able to reflag several times in a season in order to confuse management and surveillance authorities.¹⁰³ Consider the case of the *Camouco* flagged to Panama and arrested by France in 1999 around the Crozet Islands.¹⁰⁴ Following its release on bail the vessel changed its name and reregistered twice before being arrested again by France for illegal fishing in Kerguelen waters in 2002. Again, the IUU fishing did not occur as a result of the existence of the open registry in itself but rather occurred because of the ineffective exercise of flag state jurisdiction which

¹⁰³ Agnew and Barnes, 8.

¹⁰⁴ *The Camouco*, (*Panama v. France*), 2000(ITLOS Case No. 5).

followed lax procedures that allowed re-registration of vessels without consideration of their prior illegal fishing activities. This specific issue of re-registration has been addressed by the recent international and regional instruments, as well as by Vanuatu's legislative changes which will be discussed below.

Open registries can be linked to IUU fishing, but there are other factors that contribute to IUU fishing which may be present with or without an open registry. In a 2003 FAO Questionnaire,¹⁰⁵ regional fisheries bodies were asked what they perceived to be the predominant cause of IUU fishing. Respondents identified the main causes as the lack of effective flag state control by both members and non-members of the regional fishing body, the operation of open registries, and the profit motive. Profit is probably the overall motivation for IUU fishing, and it is the competitive nature of the fishing industry that may lead fishers to seek out open registries where there is ineffective flag state control or where they may avoid conservation measures. However, any direct link between open registries and IUU fishing begins to break down when the open registry joins regional fisheries bodies, and implements and enforces conservation measures. In other words, the “distinction between ‘convenience’ and other flags, based on the existence of a genuine registration, is by no means clear-cut and is of less practical importance than the question of the vigour with which the flag State exercises its jurisdiction and control over ships after registration.”¹⁰⁶

Vanuatu's Open Registry

The Vanuatu ship registry was established by the Maritime Act¹⁰⁷ in 1981 with a stated objective “to provide for the establishment of a shipping register for vessels of Vanuatu engaged in foreign trade and for matters connected therewith”. The Act was modeled on

¹⁰⁵ Judith Swan, “International Systems for Monitoring and Verifying Fisheries Agreements” in Trevor Findlay (ed.), *Verification Yearbook 2004* (London: VERTIC, 2004) 171-191, 184. www.vertic.org

¹⁰⁶ Churchill and Lowe, 259.

¹⁰⁷ [Cap 131]

the Liberian legislation,¹⁰⁸ Liberia having already established a well known ship registry by that time. Liberia was a small underdeveloped country with very little tradition in the shipping industry when it established its open register in 1950, but has become the second largest ship registry in the world today. The policy of the Liberian government was that Liberia was entitled to develop its merchant marine even if that development took place with foreign capital,¹⁰⁹ and this sentiment was later embraced by many small economically disadvantaged countries, including Vanuatu.

The requirements for the registration of vessels under the Maritime Act are easily met. Section 17 sets out the criteria that must be satisfied for vessel documentation and includes: the vessel must not be more twenty years of age; vessels registered as pleasure yachts must be used solely for pleasure; and the vessel must be owned by a citizen or national of Vanuatu. For the purpose of ownership, a Vanuatu corporation meets this condition, or the condition may be waived upon application and where it is proven that there is a need (which is undefined by the legislation) for such a waiver. Once the vessel satisfies the conditions for documentation a certificate of registration is issued upon provision of proof of ownership, proof of seaworthy condition, legal cancellation of previous foreign registrations, and satisfying requirements as to markings and measurements. Beyond registration, the Act provides for a variety of matters relative to the legal status and rights in sea going vessels, navigation, carriage of goods at sea and related matters; records relating to vessels; issue of radio station licenses; builder's certificate; ship mortgages and maritime liens; recording of bills of sale; risks, responsibilities and liabilities of carriage of goods by sea, and the rules of navigation.

The administration of the Maritime Act is carried out by a Commissioner of Maritime Affairs and a Maritime Administrator appointed by the responsible Minister.¹¹⁰ Vanuatu Maritime Services Limited (VMSL),¹¹¹ a privately held Vanuatu company, operates

¹⁰⁸ See *The Liberia Maritime Law*, Title 21 of the Liberian Code of Laws 1956 as amended. This link between the Vanuatu legislation and the earlier Liberian statute is mentioned in Lowtax.net, an offshore service provider's directory at: <http://www.lowtax.net/lowtax/html/jvaobs.html#ship>

¹⁰⁹ Boczek, 40

¹¹⁰ *Maritime Act* [Cap 131], sections 3-5.

¹¹¹ http://vanuatuships.com/coponent/option.com_frontpage/Itemid,1.

under contract to the Vanuatu government as the Maritime Administrator. According to its promotional literature¹¹² VMSL “handles all the details of registration including vessel registration, mortgage recordation, crew documentation, and all matters relating to safety and proper vessel inspection and documentation”. VMSL has an office in Port Vila, Vanuatu but maintains the vessel registry in New York. It is a burgeoning business, and Vanuatu’s extensive international shipping register is one of the largest in the world, having registered over 600 vessels¹¹³. The company maintains ship registration offices in Greece, Hong Kong, Japan, Singapore, the United Kingdom, the United States and Vanuatu.¹¹⁴

Flags of convenience have been under close scrutiny for many years due to incidents of poor labour and safety conditions, as well as pollution concerns. Vanuatu has adopted many IMO Conventions, and has given some ILO Conventions the effect of law through the enactment of the Maritime Regulations.¹¹⁵ This is an important consideration for flag shoppers who must satisfy the concerns of bankers and insurers, and must be welcome at international shipping ports. Safety and pollution matters are largely addressed by foreign port inspections, and Vanuatu vessels have enjoyed a fairly good record as to safety, security and the environment.¹¹⁶

Whereas vessel registration and the Maritime Act deal extensively with international compliance as to safety and environmental standards, there is no mention of compliance

¹¹² Ibid.

¹¹³ <http://www.lowtax.net/lowtax/html/jvaobs.html>.

¹¹⁴ As reported by the Minority Staff of the U.S. Senate Permanent Subcommittee on Investigations, *Report on Correspondent Banking: A Gateway to Money Laundering* (Feb. 5, 2001), 280. <http://tax-news/asp/res/gateway/pdf>. (accessed 14 November 2007)

¹¹⁵ *International Convention for the Safety of Life at Sea, 1974; International Load Line convention, 1966; International Convention for the Prevention of Pollution from Ships, 1973; International Convention on Civil Liability for Oil Pollution Damage, 1969; International Convention on Tonnage Measurement of Ships, 1969; International Telecommunications Convention and Radio Regulations, 1965; International Sanitary Regulations, 1951; Facilitation of International Maritime Traffic, 1966; International convention for Safe Containers, 1972; Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974; International Convention on the Construction of Mobile Offshore Drilling Units 1979, 1989 and 2002; and International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978: listed in Maritime Act [Cap 131] Regulations s. 16(1).*

¹¹⁶ In 2006 Vanuatu flagged vessels are on the white list of the Tokyo MOU, but on the grey list of the Paris MOU

with any fisheries matters. In fact, there is scant mention of fishing vessels¹¹⁷ in the Maritime Act, or in the promotional literature of VMSL.¹¹⁸ All of the standards relating to safety, financing, and navigation found in the Maritime Act are applicable to fishing vessels, but there is no mention of fishing activities. It is clear from the legislation that the vessel register was not established with any intention to monitor fishing activities.

Throughout the 1990's Vanuatu registered fishing vessels although the consideration of the management of vessels fishing on the high seas appears to have not been an issue. The first legislative connection between vessel registration and the Vanuatu Department of Fisheries is found in the Vanuatu Maritime Authority Act¹¹⁹ which entered into force in 1999, and established the Vanuatu Maritime Authority (VMA). The duties of the VMA included ensuring compliance with the law in respect of the registration, licensing, operation and crewing of vessels. The VMA is composed of a comprehensive group of representatives from Vanuatu government departments¹²⁰, including the Director General responsible for fisheries.

At this time there the beginning of an awareness of the necessity to address Vanuatu's responsibility as a flag state for the registered fishing vessels. It was a new concern as is evidenced by the report on Vanuatu flagged fishing vessels in the National Tuna Report for Vanuatu¹²¹ which was prepared in 2000, and stated:

The Vanuatu Maritime Authority of Vanuatu has indicated that the number of Vanuatu flagged vessels stands around 80. Two of these are purse seiners fishing in the western central pacific and the others elsewhere, particularly in the Eastern Pacific – IATTC zone. The Fisheries Division does not have any say in the current administration of this subject. These vessels come under the Vanuatu's international vessel registry, which has been contracted out to a private entity in

¹¹⁷ s.17; s.28(4)

¹¹⁸ However, the *Vanuatu 2005 Fisheries Act* is available as a download on VMSL promotional website.

¹¹⁹ *Vanuatu Maritime Authority Act* (No. 29 of 1998).

¹²⁰ section 4

¹²¹ William Naviti, "National Tuna Fishery Report for Vanuatu", Working Paper NFR 22, 13th Standing Committee on Tuna and Billfish, New Caledonia, 5-12 July, 2000.

www.spc.org.nc/OceanFish/Html/SCTB/SCTB13/nfr22.pdf (accessed 17 November 2007).

New York. They have considered the subject of fishing vessel matter as not priority, especially collection of fish catch data. This matter is currently being dealt with by the Vanuatu Maritime Authority to ensure that this responsibility be undertaken.

The Vanuatu Fisheries Department had remained separated from management of the flagged vessels and appeared in this report to have had a laissez faire attitude towards the flagged vessels, given the incomplete data as to numbers and locations of those vessels fishing under the Vanuatu flag.

At that time the effective fisheries legislation¹²² did not address the activities of Vanuatu's flagged fishing vessels. The objective of the 1982 legislation was to provide for the control, development and management of fisheries in Vanuatu waters. Vanuatu flagged fishing vessels are mentioned for the first time in a 1989 amendment¹²³ to the Fisheries Act. The definition of "local fishing vessel" was amended with the addition: "Provided that any fishing vessel which is registered or documented pursuant to the Maritime Act ... shall not be a local fishing vessel for the purpose of this Act." This amendment was directed at the practice whereby foreign owned vessels were reflagged to the Vanuatu registry in order to take advantage of preferential treatment of local vessels in regional fishing agreements. However, fishing on the high seas by reflagged vessels was still not addressed.

The seemingly disinterested treatment of high seas fisheries in Vanuatu's legislation and administration was not an oversight, but was representative of the situation at that time. The open register, created by the Maritime Act in 1981, was directed at merchant shipping rather than fishing. Consider the era in which the new Maritime Act was enacted in Vanuatu. The 1982 LOSC was just about to be adopted after nine years of negotiation and compromise. While the 1982 LOSC has been described as "one of the

¹²² *Fisheries Act* [Cap 158], repealed 2006.

¹²³ *Fisheries (Amendment) Act*, No. 2 of 1989, repealed 2006.

most comprehensive international agreements in history”¹²⁴, it has been found to have, over time, some weaknesses in a few key areas related to the high seas fisheries.¹²⁵ It is these weaknesses or gaps that facilitated or perhaps encouraged IUU fishing by fishing vessel operators who may have sought out open registries such as Vanuatu which had not addressed the high seas fishing issue in terms of their responsibilities as flag states.

The 1982 LOSC deals extensively with international standards as to safety, navigation and pollution. Article 94 specifically deals with the duty of the flag state to maintain a ship register and to take measures to ensure safety at sea with attention to crewing, seaworthiness and pollution measures. However, the requirements are vague as to fishing on the high seas. There is a duty to adopt measures for conservation, and to cooperate with other states for the conservation of the living resources of the high seas. These issues were not specifically dealt with on an international basis until the 1990’s, and at that time the authorization to fish became a separate issue from vessel registration for flag state management of high seas fisheries. Fishing authorization became the primary means to ensure compliance with fisheries conservation measures rather than through vessel registration¹²⁶ which, particularly in Vanuatu’s case, was never meant to take on this activity.

A search of publicly available sources as to the activities of Vanuatu’s flagged vessels illustrates this point. Vanuatu began registering foreign fishing vessels in the early 1990’s, and by 1995 it was reported that 20% of its fishing fleet had been involved in fisheries violations.¹²⁷ This is compared to 1.8%, and 3.8% of China’s and Korea’s large national fleets respectively. In 1999 Vanuatu was named as one of the ‘top’ flags

¹²⁴ Patricia Devaney, “Regional Fisheries Management Organizations: Bringing Order to Disorder”, in Lawrence E. Susskind, L., and William Moomaw (eds.) *Papers on International Environmental Negotiation*, vol. 14 (Cambridge, US, Harvard University: PON Books, 2005).
http://www.pon.org/downloads/ien14_4Devaney.pdf

¹²⁵ Rigg, Parmentier and Currie, 7.

¹²⁶ William Edeson, “Towards Long-Term Sustainable Use: Some Recent Developments in the Legal Regime of Fisheries” in Alan Boyle and David Freestone (eds.) *International Law and Sustainable Development: Past Achievements and Future Challenges*, (UK, Oxford University Press, 2001), 165-204, 176.

¹²⁷ Swan, (2002), 39.

of convenience in a Greenpeace report aptly entitled “Dodging the Rules: Flags of Convenience”.¹²⁸

In the following four years, Vanuatu was identified as one of the fastest growing open registers for fishing vessels; between 1999 and 2003, the numbers of fishing vessels registered to Georgia, Togo, Vanuatu and Bolivia rose from a total of 70 to 184 vessels.¹²⁹ In 2005 Vanuatu was identified as being among those countries with the highest number of fishing vessels on their registers.¹³⁰ Of the 478 new fishing vessels built worldwide from 2001 to 2003 inclusive, 58 of them were flagged in the top 14 open registers, and of those, 20 were flagged in Vanuatu.¹³¹ This growth led to Vanuatu being identified as one of the ‘up and coming’ flags of convenience by the High Seas Task Force in 2005.¹³²

Vanuatu has been identified by regional fisheries bodies as a ‘flag of concern’ to their areas.¹³³ However, it was also indicated that Vanuatu did exercise flag state control,¹³⁴ and has instituted a number of measures to this end which will be discussed below. In the same report, Vanuatu indicated that the exercise of effective flag state enforcement was hampered by geographical separation of fishing vessels from Vanuatu.¹³⁵

Vanuatu might be regarded as a country that is unable to effectively implement conservation measures on the high seas fisheries because of economic constraints, both because it is a developing country and also because it has flagged vessels fishing at great distances from its own ports or registry location. However, fisheries management goes

¹²⁸ Greenpeace, “Dodging the Rules: Flags of Convenience Fishing”, (1999).

<http://archive.greenpeace.org/oceans/piratefishing/dodgingrules.htm> (accessed 16 November 2007).

¹²⁹ High Seas Task Force, (2006), 36.

¹³⁰ UN General Assembly, A/59/63 (2004).

¹³¹ Matthew Gianni and Walt Simpson, *The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing*, (Australian Department of Agriculture, Fisheries and Forestry, International Transport Workers’ Federation and WWF International, 2005), Table 1.4, 20. <http://www.mua.org.au/news/general/files/iulowres.pdf> (accessed 15 November 2007).

¹³² High Seas Task Force, (2006), 39.

¹³³ Swan (2002), 34: CCAMLR, IATTC and IOTC identified Vanuatu as a flag of convenience of concern.

¹³⁴ *Ibid.*, 34.

¹³⁵ *Ibid.*, 31.

beyond actual physical surveillance and monitoring. There is a necessity for good information gathering and, most importantly, information sharing between national authorities so that the onus does not fall solely on the flag state to monitor and enforce on its own. The new international framework has addressed this issue, and Vanuatu's recent legislation has adopted new means to manage its flagged vessels. This new direction will be discussed below after a consideration of the foreign fishing vessels in Vanuatu's EEZ.

V VANUATU'S ROLE AS A COASTAL STATE

Vanuatu is a Pacific Island State located within a region which holds the largest tuna resources in the world. The EEZs of the Pacific Island States cover approximately 50% of the Western and Central Pacific Ocean, but provide 65%-75% of the total regional tuna catches.¹³⁶ The total size of Vanuatu's EEZ is 680,000 square kilometers and it shares maritime boundaries with France in respect of New Caledonia, Solomon Islands and Fiji.

Vanuatu's fisheries are divided into three groups consisting of tuna, deep-water bottom fish made up primarily of snappers and related species, and reef fish that inhabit the coastal waters inside of the reefs. Domestic fishing activities include subsistence fishing that targets reef associated and lagoon fish as well as shellfish and small pelagic fish; small-scale commercial fishing that targets shallow and deep-water snapper species; sports fishing which includes commercial charter boat sport fishing for tourists; and locally based skiffs that troll for surface tunas.¹³⁷ Vanuatu has been unable to develop a large scale domestic tuna industry given the high costs of operation and the lack of airfreight capacity. However, subsistence and artisanal fishing is important locally given that 35% of the 22,000 rural households in Vanuatu are engaged in fishing, and of those more than 40% are selling fish for some sort of income.¹³⁸

There has been a long history of commercial tuna fishing by non nationals in the Vanuatu maritime region. Japan established a longline fleet in the area in the early 1950's, the Korean fleet arrived in 1957, and the Taiwanese fleet in the 1960's. There was a transshipment base on the Espiritu Santo Island established by the Japanese in the

¹³⁶ Vina Ram-Bidesi, "Sustainable Use of Marine Resources: Lessons From the Pacific Islands" presented at *Oceans: Interaction Between Man and Maritime Environments*, UNU Global Seminar 5th Shimane Session, 2-5 August 2004, The University of Shimane, Japan. <http://www.unu.edu/hq/Japanese/gs-j/gs2004j/shimane5/Bidesi-e.pdf> (accessed 20 November 2007).

¹³⁷ Moses Amos, "Vanuatu Fishery Resource Profiles", *IWP-Pacific Technical Report* (International Waters Project) No.49, (Apia, Samoa, SPREP, 2007), 17. http://www.sprep.org/att/publication/000557_IWP_PTR49.pdf (accessed 20 November 2007).

¹³⁸ FAO, "Fishery Country Profile: The Republic of Vanuatu", FID/CP/VAN Rev. (Rome: FAO, 2002). <http://www.fao.org/fi/fip/en/VUT/profile.htm> (accessed 20 November 2007).

1950's which consisted of a wharf and cold storage facilities, but it ceased operation in the late 1980's.¹³⁹

The management of the Vanuatu tuna fisheries underwent fundamental changes in the 1980's. Vanuatu became an independent nation in 1980, and the recently endorsed international convention on the law of the sea provided a tailor-made opportunity to formalize a system for the use and management of the region's fisheries.¹⁴⁰

*Maritime Zones Act*¹⁴¹

In 1982 Vanuatu enacted the Maritime Zones Act which provided for the delimitation of maritime zones of Vanuatu measured from archipelagic baselines. It established and defined a 12 nautical mile territorial sea and archipelagic waters, a 24 nautical mile contiguous zone, a continental shelf extending to the outer edge of the continental margin or to a distance of 200 nautical miles, and a 200 mile nautical mile exclusive economic zone. It also provided that Vanuatu had sovereign rights for the purpose of exploration, exploitation, conservation and management of all resources in the exclusive economic zone and continental shelf. Section 11 of the Act ended any unrestricted access to the offshore fisheries. Pursuant to this legislation, resources of the EEZ or continental shelf could not be explored or exploited except in accordance with an agreement entered into with the Government of Vanuatu or under the authority of a license granted by the responsible Minister.

*1982 Fisheries Act*¹⁴²

In 1982 Vanuatu enacted the Fisheries Act in order to address the management and development of fisheries in Vanuatu waters. The provisions which dealt with fisheries

¹³⁹ Western Pacific Regional Fishery Management Council, First Workshop on South Pacific Albacore Longline Fisheries, (Honolulu, Hawaii, 19-21 September 2006). <http://www.wpcouncil.org/pelagic/Documents/Albacore%20Workshop%20final%20Feb%202%202007.pdf> (accessed 20 November 2007).

¹⁴⁰ Joel Veitayaki, "A Changing Sea: New and Emerging Institutional Directions for the EEZ" in Syma Ebbin, Alf Hakon Hoel and Are K. Sydes (eds.), *The Exclusive Economic Zone and Governance Institutions for Living Marine Resources* (The Netherlands: Springer Netherlands, 2005), 150-165, 150. <http://www.Springerlink.com/content/k0408290um86x164/> (accessed 20 November 2007).

¹⁴¹ *Maritime Zones Act* [Cap 138]

¹⁴² *Fisheries Act* [Cap 158], amended *Fisheries (Amendment) Act*, No. 2 of 1989, repealed 2005.

management in the EEZ will be briefly considered here to illustrate the first conservation regime that was implemented after Vanuatu attained independence. The fisheries legislation provided for access agreements and the allocation of fishing rights to foreign vessels.¹⁴³ The total fishing rights to be allocated under the access agreements were not to exceed the total resources and amount of fishing allowed under the fisheries management plans.¹⁴⁴ The access agreements were to include a provision establishing the responsibility of the foreign country for ensuring compliance by its vessels with the agreement and fishing laws. There was no fishing to be allowed without a license.¹⁴⁵ As to the regional management aspect, s.6 provided for powers of the Minister to enter into agreements with other states in the region on the harmonization of licensing and enforcement; and s.7 stipulated that the Minister could require that foreign fishing vessels be listed in good standing on a regional register in order to be issued a fishing license.

Thus by the mid 1980's Vanuatu had established a national regime for the management of the fish stocks in its EEZ. The Fisheries Act was repealed and replaced by new legislation in 2005 (discussed below), but the system of access agreements, licensing and reflagging remained the basis for authorized foreign fishing in Vanuatu's EEZ. By 2005 Vanuatu had over 120 vessels legitimately fishing in its EEZ,¹⁴⁶ made up of predominantly Chinese, Fijian, Korean and Taiwanese vessels. There were a number of initiatives implemented to monitor these fleets and ensure their compliance with fishery regulations, and these will be outlined later in this paper.

IUU Fishing in the EEZ

In addition to those fleets authorized to fish, it is unknown how many unauthorized vessels also fish in Vanuatu's EEZ. Fisheries surveillance is limited. Vanuatu operates one patrol craft, and this surface activity is supported by aerial surveillance by New

¹⁴³ Ibid., Part II, s.3(1)

¹⁴⁴ Ibid., Part II, s.3(2)

¹⁴⁵ Ibid., Part II, s.4

¹⁴⁶ FFA, *DevFish Trip Report #2*, February, 2006. <http://www.ffa.int/node/863> (accessed 20 November 2007).

Zealand, Australia and France, and surface patrols by the French Navy.¹⁴⁷ Despite these efforts the level of IUU fishing is considered to be unacceptably high as evidenced by repeated reports of illegal fishing from inter-island ferries, commercial flights and the inhabitants of outer islands.¹⁴⁸

IUU fishing in the EEZ takes two forms; unlicensed fishing, and licensed fishing in violation of licensing conditions such as failure to comply with conservation and management measures, fishing on the boundary of the EEZ and high seas, and misreporting of catches. The latter is especially problematic where access fees are conditional upon the volume of catch.¹⁴⁹ While loss of revenue is a very important consideration, the loss of management data is also extremely vital because without accurate data covering catches, fishing effort and vessel position, Vanuatu cannot effectively manage fisheries stocks.

Fisheries law enforcement by a Pacific Island coastal state is particularly difficult given the vastness of the region, the mobility of the fishing fleets, and the migratory nature of the resource.¹⁵⁰ Physical surveillance is extremely difficult given the limited resources available. The fishing fleets are mobile and are often licensed in more than one country, and the fish are migratory. The result is fish and fishing vessels which move freely between Pacific Island EEZs, thus complicating national monitoring and surveillance efforts. Vanuatu's efforts to benefit from and to manage the fish stocks in its EEZ have been greatly hampered by the geographical and economic realities of the region. However, these factors have been somewhat overcome by Vanuatu's membership in regional initiatives designed to improve fisheries management through sharing information about, and the physical monitoring of fishing activities in the region.

¹⁴⁷ FFA, *Pacific Islands Oceanic Management*, (Pacific Islands Oceanic Management Project, 2004). <http://www.ffa.int/gef/node/22> (accessed 20 November 2007), 203.

¹⁴⁸ Ibid.

¹⁴⁹ Transform Aqorau, "Illegal, Unreported and Unregulated Fishing: Considerations for Developing Countries", background paper prepared for Expert Consultation on Illegal, Unreported and Unregulated Fishing, Document AUS/IUU/2000/15, (Sydney, Australia, 15-19 May 2000), para.3. http://www.daffa.gov.au/_data/assets/word_doc/0010/5878/ausiuu200018.doc (accessed 20 November 2007).

¹⁵⁰ Transform Aqorau, "Illegal Fishing and Fisheries Law Enforcement in Small Island Developing States: The Pacific Islands Experience", (2000) 15:1 *The International Journal of Marine and Coastal Law* 37-63, 39.

VI REGIONAL INITIATIVES TO COMBAT IUU FISHING¹⁵¹

Regional cooperation is the key to successful fisheries control in this region where fish swim freely between zones, and fishing vessels may be licensed in more than one country, and in any case compete for the same fish stocks as the vessel in the adjoining EEZ. The recognition of this transboundary impact led to a realization by the South Pacific Island countries that they could not manage the highly migratory resource independently of their neighbors.¹⁵²

*South Pacific Forum Fisheries Agency Convention*¹⁵³

The tuna is a migratory fish stock and it was necessary to address the regional management of the fishery, especially given the unique geography of the Pacific Islands region. The adoption of the South Pacific Forum Fisheries Agency Convention addressed this issue. The Convention established the Forum Fisheries Agency (FFA), and membership included all of the independent Pacific Island countries,¹⁵⁴ Australia and New Zealand. Vanuatu became a Party to the agreement in 1981. The objectives of the Convention are set out in the Preamble and include the conservation and optimum utilization of all living marine resources in the South Pacific region, in particular highly migratory species; the promotion of regional cooperation and coordination in respect of fisheries policies; securing of maximum benefits from the living resources of the region; and facilitating the collection, analysis, evaluation and dissemination of relevant statistical scientific and economic information.

¹⁵¹ This paper reviews only those regional agreements or measures in which Vanuatu participates.

¹⁵² FFA, "Overview of the Biological, Economic, Social and Political Concerns Related to Interactions of Pacific Tuna Fisheries", in Richard Shomura, Jacek Majkowski and Robert Harman (eds.), *Status of Interactions of Pacific Tuna Fisheries in 1995: Proceedings of the second FAO Expert Consultation on Interactions of Pacific Tuna Fisheries*, Shimizu, Japan, 23-31 January 1995, FAO Technical Paper No. 365, (Rome: FAO, 1995), para. 3.1. <http://www.fao.org/docrep/003/W3628E/w3628e00.HTM> (accessed 20 November 2007).

¹⁵³ *South Pacific Forum Fisheries Agency Convention*, adopted 10 July 1979, In force 9 August 1979. 1579 UNTS 307; 1979 ATS 16; 1979 NZTS 6.

¹⁵⁴ Cook Islands, FSM, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu

The Convention was adopted to provide a forum for South Pacific Island countries to coordinate fisheries management and policies on a regional basis. The main intention behind its establishment was the intention of presenting a common front to distant water fishing nations seeking access to the tuna in the EEZ of member countries.¹⁵⁵ The function of the FFA is mainly to facilitate promotion of intra-regional coordination and co-operation. The FFA has no regulatory functions but plays an advisory and coordinating role to assist member States in the exercise of their sovereign rights over the living resources of their EEZ.

The key function of the FFA has been the accumulation of detailed and up-to-date information on fisheries in the region, as well as development of a communications network for the dissemination of information to member countries.¹⁵⁶ The FFA has been instrumental in the development of the agreements that are described below. In addition to these agreements, the FFA has coordinated aerial surveillance flights covering member country EEZs with the participation of the New Zealand, Australian and French air forces. This surveillance effort has been made more effective because the FFA is able to supply fisheries information to surveillance flights.¹⁵⁷ The FFA has also developed a regional observer programme for the South Pacific aimed at the collection of data as well as foreign vessel compliance with the terms and conditions of fishing access.

Moore describes the approach to fisheries enforcement that has been taken by the FFA in the South Pacific as ‘enforcement without force’.¹⁵⁸ Physical enforcement is extremely difficult given the vastness of the area and the limited finances available. For example, in 2006 it was reported that there were fewer than 30 patrol vessels throughout

¹⁵⁵ Franckx, E., 74.

¹⁵⁶ Budislav Vukas, and Davor Vidas, “Flags of Convenience and High Seas Fishing: The Emergence of a Legal Framework” in Olav Schram Stokke (ed.), *Governing High seas Fisheries: The Interplay of Global and Regional Regimes* (New York: Oxford University Press, 2001), 53-90, 70.

¹⁵⁷ Franckx, 77.

¹⁵⁸ Gerald Moore, “Enforcement without Force: New Concepts in Compliance Control for Foreign Fishing Operations”, (1993) 24 *Ocean Development and International Law*, 197-203.

the FFA members' EEZs.¹⁵⁹ Therefore, the approach to enforcement has necessarily been non-physical, and has consisted of acquisition and collation about fishing activities in the members' EEZs, and an inducement of compliance on the basis of the information acquired. The FFA has been innovative in developing low cost non-physical means of compliance control including blacklisting on the Regional Register, and putting pressure on flag States to ensure that vessels flying its flag either submit to coastal States jurisdiction, or are punished through the flag State's judicial system.

Regional Register of Foreign Fishing Vessels¹⁶⁰

The Regional Register of Foreign Fishing Vessels was established by the Pacific Island countries in May 1983 under the auspices of the FFA. The register provides a cost effective means of registering and controlling distant water fishing nations' vessels operating in the EEZs of the Pacific Island states.¹⁶¹ The Register constitutes a database of details of foreign fishing vessels including information on vessel owners, operators, masters and the physical characteristics of the vessels and their fishing gear.

The intention of the Register is to shift some of the responsibility for compliance to the flag state.¹⁶² Each fishing state or fishing company must nominate a national correspondent with whom the FFA Director liaises. All foreign fishing vessels in the Pacific Islands region are required to register by the submission of a completed application form to the Director of the FFA. The details of the vessel are entered in the FFA database, and the vessels are given a registration number and accorded good standing which allows them to fish in the EEZ of member countries provided they

¹⁵⁹ FFA, "Status of Regional Cooperative Surveillance and Enforcement", Ninth Working Group Meeting, 22-27 September 2006, Brisbane, Australia, Paper no. MCS9/WP2.1, 3. http://www.ffa.int/system/files/MCS9_2.1_status-of-cooperative-surveillance-and-enforcement.pdf (accessed 20 November 2007).

¹⁶⁰ see FFA website www.ffa.int/

¹⁶¹ Barbara Hanchard, "South Pacific Forum Fisheries Agency (FFA)", address delivered at Technical Consultation of South Pacific Small Island Developing States on Sustainable Development in Agriculture, Forestry and Fisheries, Apia, Samoa, 6-9 May 1996 (FAO, Rome: 1998). <http://www.fao.org/docrep/X0625E/X0625e00.HTM> (accessed 20 November 2007).

¹⁶² Peter Flewelling, et. al., "Recent Trends for Monitoring, Control and Surveillance Systems for Capture Fisheries", FAO Fisheries Technical Paper 415 (Rome: FAO, 2003), Annex D. <http://www.fao.org/docrep/005/Y4411E/y4411e00.htm#Contents> (accessed 20 November 2007).

comply with the national fisheries laws and access agreements. The register serves as a data bank which can be used for the purpose of economic research on the fishing fleets operating in the region, as well as a source of information for licensing purposes. The register has become a “centerpiece for the cooperative enforcement in the South Pacific”.¹⁶³

The good standing status may be withdrawn either where the owner or master of a foreign fishing vessel has been convicted of a serious offence under the fisheries laws of a member country and fails to comply with the judgment entered against him, or where there is a prima facie case of a serious offence and the offender has not submitted to the jurisdiction of the member country concerned. Any member country may instigate the withdrawal of good standing after a full investigation of the infringement. Once the status is suspended, that vessel is effectively prevented from fishing in the region because no FFA country will issue a fishing license. The vessel retains that status even if it is sold, renamed or reflagged. There have been very few withdrawals and that may be an indication of the effectiveness of the Regional Register as a management and compliance measure. It appears that vessel operators and owners have chosen to comply with court orders or enter into settlement negotiations regarding the payment of compensation for infringements rather than face the prospect of a change in Register standing.¹⁶⁴

Harmonized Minimum Terms and Conditions for Foreign Fishing Vessel Access (MTCs)

In 1981 the FFA adopted a Regional Research and Development Program to initiate a region-wide program of cooperation in the harmonization of fisheries access, surveillance and enforcement. The first development as a result of this program came at the subregional level with the adoption of the Nauru Agreement¹⁶⁵ in 1982. In 1990 the

¹⁶³ Moore, 199.

¹⁶⁴ Veitayaki, 156.

¹⁶⁵ *Nauru Agreement Concerning Co-operation in the Management of Fisheries of Common Interest* adopted Nauru, Nauru, 11 February 1982. In force 4 December 1982. www.ffa.int/ Vanuatu is not a

MTCs were revised and harmonized to apply to all arrangements for fisheries access to FFA members' EEZs. In 1997 the MTCs were amended in order to include the FFA VMS (Vessel Monitoring System) programme. The MTC list is comprehensive and contains the following requirements:

No foreign vessel will fish in a member State's EEZ unless it is issued a license in the prescribed common license form; transshipment at sea is prohibited and transshipments can only be done in designated ports; foreign fishing vessels must give full access to the authorized officers from the licensing State to the vessels log and catch records; vessel operators must maintain and submit catch log for operations in the EEZ and adjacent high seas areas and such reports are to be provided to the licensing State within 45 days after completion of the fishing trip; vessel operators must provide regular catch records to the licensing State while operating within EEZs; vessel operators may carry observers to verify reports and those observers must be given full access to certain parts of the vessel and records for the purposes of observation; fishing gear is to be stowed while transiting the EEZ; vessel operators must comply with the orders of the authorities of the licensing State; operators must mark their vessels in accordance with the FAO Standard Specification for the Marking and Identification of Fishing Vessels; and vessel operators must register automatic location communicators on the VMS Register of Foreign Fishing Vessels.¹⁶⁶

It is an ambitious list, and although the FFA MTCs do not bind FFA member states, all of the rules have been implemented either in access agreements or in national legislation, or both. (Vanuatu is bound by these provisions as a Party to the Niue Treaty which is discussed below) The implementation of the MTCs supplies the South Pacific States with the necessary information for effective management of fishing activities in the EEZ, and additionally the harmonization of license fees and conditions minimizes allocation problems among individual coastal State zones.¹⁶⁷

member of this Agreement; it is included because it was the first subregional agreement to institute the MTCs which Vanuatu has included in its own legislation.

¹⁶⁶ FFA, Harmonized Minimum Terms and Conditions for Foreign Fishing Vessel Access as amended by FFC34 (24-28 November 1997).

¹⁶⁷ Moore, 200.

Multilateral Tuna Fishing Treaty with the US¹⁶⁸

In 1987 the Pacific Islands States signed the Multilateral Tuna Treaty with the United States, which has been described as the most comprehensive fisheries access agreement in the world.¹⁶⁹ The objectives of the agreement were to maximize the benefits flowing from the development of the fisheries resources within the EEZs of the Pacific Island parties; and, in particular, to regulate the fisheries of United States' vessels within and beyond the national jurisdiction of Pacific State parties in a uniform manner. Participation is open to all Pacific Island countries¹⁷⁰ and the United States. The FFA acts as administrator on behalf of the Pacific Island countries and this role is set out in a separate agreement which covers matters such as cooperation in negotiations, the provision of information and the distribution of payments.¹⁷¹

The Treaty permits US fishing vessels access to the Pacific Island member states' EEZs subject to the procurement of a fishing license, permission to catch only tuna, the use of only licensed purse seiners, and adherence to the requirements of the Regional Register of Fishing Vessels.¹⁷² There are also specific provisions as to extensive self reporting requirements,¹⁷³ the use of observers on board US vessels,¹⁷⁴ and boarding and inspection of US vessels by officers of Pacific Island countries.¹⁷⁵ The Treaty is the epitome of the harmonization principle sought in South Pacific fisheries enforcement because although it is a multilateral treaty, in many respects it is bilateral in terms of

¹⁶⁸ *Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America*, adopted Port Moresby, Papua New Guinea, 2 April 1987. In force 15 June 1988, 1988 *ATS* 42; *NZTS* 1988 no. 32; *TIAS* 11100; [1987] *PITSE* 2.

¹⁶⁹ Veitayaki, 157.

¹⁷⁰ Pacific Island member States are Vanuatu, Tuvalu, Tonga, Solomon Islands, Samoa, Papua New Guinea, Palau, Niue, Nauru, Marshall Islands, Kiribati, Fiji, FSM, Cook Islands, New Zealand and Australia

¹⁷¹ *Implementation and Administration of the Treaty on Fisheries between the Governments of Certain Pacific Islands States and the United States of America*, adopted 2 April 1987 Port Moresby, Papua New Guinea. In force 15 June 1988.

¹⁷² Annexes I and II

¹⁷³ Annex I, Part 4

¹⁷⁴ Annex I, Part 5 and supplemented by Agreed Statement on Observer Programme

¹⁷⁵ Annex I, Part 5

being one agreement between a distant water fishing nation and a group of cooperating coastal States.

The Multilateral Tuna Fishing Treaty sets new standards for flag state responsibility.¹⁷⁶ Pursuant to article IV, the United States government specifically obligates itself to take the necessary steps to ensure that nationals and United States fishing vessels refrain from fishing in the Treaty area unless authorized to do so. Further, the U.S. government has a duty to assist in the investigation of any alleged breach of the agreement and to communicate the results of the investigation to the requesting party. It also has a duty to take measures to facilitate the service of legal process arising out of the activities of its fishing vessels, and a duty to take all measures to facilitate prompt and full adjudication of any claim made under the agreement. The agreement also details the procedure for the investigation by the U.S. Government of the offence, and the imposition of penalties. In effect, U.S. administrative and judicial bodies act as agents for the Pacific island states in the area of fisheries compliance control.¹⁷⁷

In furtherance of the cooperative arrangement between the U.S. and the Pacific island states, an Agreed Minute on Co-operation on Surveillance and Enforcement was signed in 1994.¹⁷⁸ This provides for cooperation between FFA member countries and the U.S. in all matters relating to fisheries compliance in the area. It includes the exchange of intelligence on fishing vessel activities in the region, the exchange of personnel to assist with the investigation of fisheries infringements, the exchange of information in the case of suspected violations, and fisheries enforcement training.¹⁷⁹

¹⁷⁶ Michael Lodge, "New Approaches to Fisheries Enforcement" (1993), 2:3 *Review of European Community and International Environmental Law (RECIEL)* 277-284, 281.

¹⁷⁷ *Ibid.*

¹⁷⁸ FFA, Agreed Minute on Surveillance and Enforcement Co-operation Between the Parties to the Treaty on Fisheries Between the Governments of Certain Pacific island States and the Government of the United States of America, opened for signature 8 March 1994. Reproduced in "Record of Proceedings Sixth Annual Consultation of Parties to the Treaty, 4-8 March 1994, Nadi, Fiji.

¹⁷⁹ FAO, "Monitoring, Control and Surveillance Systems Guide for Coastal and Offshore Capture Fisheries", FAO Fisheries Technical Paper 415 (Rome: FAO, 2000), p.87.

<http://www.fao.org/fi/projects/fishcode/publicationpdf/files/Other/415.pdf> (accessed 20 November 2007).

Niue Treaty¹⁸⁰

The Niue Treaty entered into force in 1993 and has been signed by all of the FFA countries, and ratified by all but three.¹⁸¹ The Treaty is based on the principles found in article 73 of the 1982 LOSC, and the objective is to promote cooperation in the enforcement of the fisheries laws and regulations of Parties, and in developing regionally agreed procedures for the conduct of fisheries surveillance and law enforcement.¹⁸² The two bases for cooperation provided for by the Treaty are the harmonization of licensing arrangements for fisheries access¹⁸³ which is basically an implementation of the FFA MTCs, and the sharing of information,¹⁸⁴ physical assets and personnel between parties.¹⁸⁵

The Treaty establishes a framework for the development of subsidiary agreements between parties to the Treaty, and these subsidiary agreements may provide for the shared use of surveillance equipment, cross authorization of surveillance and enforcement officers and/or mutual assistance in evidence gathering and prosecutions.¹⁸⁶ There have been few negotiated subsidiary agreements under the Treaty. A 2002 agreement between Palau, FSM and Marshall Islands has allowed the three nations to participate in law enforcement operations within each others' EEZs,¹⁸⁷ and Samoa and Cook Islands share patrol boats in their EEZs pursuant to a 2005 agreement.¹⁸⁸ Tonga and Tuvalu signed an agreement to cooperate in fishery surveillance and law enforcement in 2000, but this is not considered subsidiary to the Niue Treaty because

¹⁸⁰ *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region* adopted Honiara, Solomon Islands, 9 July 1992. In force 20 May 1993. 1993 *ATS* 31; 32 *ILM* 136.

¹⁸¹ New Zealand, Tokelau and Tuvalu have not ratified.

¹⁸² Niue Treaty, article III

¹⁸³ *Ibid.*, article IV

¹⁸⁴ *Ibid.*, article V

¹⁸⁵ *Ibid.*, article VI

¹⁸⁶ Aqorau has noted that unless the scope of article VI(1) is expanded to cover violations in the EEZ it will have limited practical value because most of the tuna stocks are located in the EEZ, in Transform Aqorau, "Illegal Fishing and Fisheries Law Enforcement in Small Island Developing States: The Pacific Islands Experience" (2000), 15(1) *International Journal of Marine and Coastal Law* 37-63, 56.

¹⁸⁷ See report in MCS Newsletter (2002) vol.4 issue 1
<https://www.ffa.int/systems/files/MCS.newsletter.vol4.i1.pdf>

¹⁸⁸ See report in MCS Newsletter (2005) vol.7 issue 3
<https://www.ffa.int/systems/files/MCS.newsletter.vol7.i3>

Tuvalu has not ratified the Treaty.¹⁸⁹ Vanuatu has been negotiating with Fiji, Tonga and Tuvalu since 2005, but has yet to finalize a subsidiary agreement. The Niue Treaty appears to be the ideal mechanism for increasing the level of surveillance and fisheries enforcement in the area, but it appears that it has been underutilized given the small number of agreements in place.¹⁹⁰

The Niue Treaty is primarily aimed at cooperative efforts by the member states to improve the control of fisheries access and the enforcement of fisheries regulations in their EEZs. The Treaty also addresses the notion of flag state responsibility in fisheries access agreements.¹⁹¹ Article IV(5) provides that the ‘Parties shall, as far as possible, ensure that foreign fishing arrangements with flag States require the flag state to take responsibility for the compliance by its flag vessels with the terms of any such agreement and applicable laws’.

Even though there already is flag state responsibility under international law for the conduct of vessels operating under bilateral access agreements, this Treaty expressly details the terms of the potential assistance of the flag state in ensuring compliance with the terms of the agreement and with coastal state laws. This clarifies the matter and in doing so serves to reduce the physical and financial burden of fisheries jurisdiction which falls upon the coastal state.¹⁹² Therefore, as well providing a mechanism whereby member states are able to look to other members to share the burden of enforcement, the Treaty also reinforces flag State responsibility for the actions of its vessels.

Regional Fishery Bodies

The Pacific Island countries have initiated several regional initiatives to combat IUU fishing which occurs within their EEZs. Similar cooperative mechanisms have been developed to manage shared fish stocks which occur in both the EEZs and high seas.

¹⁸⁹ Agorau, (2000), 58

¹⁹⁰ Flewelling, et. al., Annex D.

¹⁹¹ Vukas and Vidas, 67.

¹⁹² Moore, 202.

The coastal states and DWFNs must work together to harmonize measures to effectively manage these stocks.

Recall that the UN Fish Stocks Agreement and the IPOA-IUU both looked to regional fisheries bodies to implement effective and harmonized measures to combat IUU fishing. The UN Fish Stocks Agreement called for the formation of “appropriate mechanisms for cooperation” to enable coastal States and fishing States to ensure conservation and the promotion of optimum utilization of fish stocks within and beyond the areas under national jurisdiction.¹⁹³ The IPOA-IUU encouraged states to act through regional mechanisms to develop ways to combat IUU fishing,¹⁹⁴ and provided a list of possible measures for the RFMOs to employ.¹⁹⁵

At the negotiations for the UN Fish Stocks Agreement the mechanism for regional fishing bodies was contentious. The coastal states wanted to extend the effects of coastal conservation and management measures to include the shared stocks beyond national jurisdiction, while the distant water fishing nations did not want the jurisdiction of the coastal states extended beyond the 200 mile limit.¹⁹⁶ Article 7(2) reflects the compromise reached whereby conservation and management measures established for the high seas and for the EEZs must be compatible, and coastal States and fishing States must cooperate to achieve compatible measures.

As to the enforcement of these measures on the high seas, the UN Fish Stocks Agreement retains the flag state priority from the 1982 LOSC.¹⁹⁷ The basic requirements for flag state enforcement is found in article 18(1) and (2) whereby flag states must be able to effectively exercise their responsibilities under the agreement, and ensure that their vessels comply with regional conservation and management measures, and do not engage in any activity which undermines the effectiveness of those measures.

¹⁹³ UN Fish Stocks Agreement, article 7.

¹⁹⁴ See IPOA-IUU III, para.9, IV.

¹⁹⁵ IPOA-IUU IV, paras. 78-84.

¹⁹⁶ Andre Tahindro, “Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks” (1997), 28 *Ocean Development and International Law* 1, 18.

¹⁹⁷ 1982 LOSC art.94.

Although the UN Fish Stocks Agreement does provide some specific requirements whereby compliance may be enforced,¹⁹⁸ flag state management on the high seas is basically the same as that found in the 1982 LOSC except for the right of non-flag boarding and inspection provided by article 21, and port State measures provided by article 23. Vanuatu has not ratified the UN Fish Stocks Agreement, but has joined a number of RFMOs which have defined Vanuatu's responsibilities under each agreement.

Vanuatu joined its first fisheries management organization in 1990, and has joined four since 2000.¹⁹⁹ Swan suggests that the two possible reasons for open register states to join RFMOs may be either the political will of states to comply with international requirements, or the cost of non compliance in terms of trade and related sanctions.²⁰⁰ A review of the events which coincided with Vanuatu's decisions to join RFMOs suggests that it was likely the latter reason which prevailed.

In 1990 the United States implemented a trade embargo in an effort to reduce dolphin mortality from the use of purse seine nets in the Eastern tropical Pacific.²⁰¹ Vanuatu, operating as a flag state in the area, was affected by the embargo along with Mexico, Venezuela, Panama and Ecuador. The embargo against Vanuatu was lifted when it was determined that the Vanuatu dolphin kill was no higher than that of the United States, and within a month of that decision, Vanuatu joined the IATTC. In 1986 the IATTC had instituted an observer program that had included the placement of observers on all tuna vessels capable of fishing for tuna in association with dolphins in the eastern tropical Pacific. It is suggested that by joining the IATTC at this time Vanuatu was able to open its vessels to IATTC observers and forestall any future trade problems with the United States.

¹⁹⁸ UN Fish Stocks Agreement, articles 18-19.

¹⁹⁹ IOTC, WCPFC, CCAMLR, and the ICCAT; it joined the IATTC in 1990.

²⁰⁰ Swan, (2002), 33.

²⁰¹ For an overview of this situation see: United States Restrictions on Imports of Tuna, Report of the Panel (DS29/R). <http://www.worldtradelaw.net/reports/gattpanels/tunadolphinII.pdf> (accessed 20 November 2007).

Again in 2000 Vanuatu faced a similar situation. There were two developments discussed at an Asian Development Bank meeting²⁰² that indicated a concern about the operation of Vanuatu's open register. First, Japan was proposing a moratorium on Vanuatu vessels attempting to access Japanese southern bluefin tuna markets because there was a perception of a lack of responsibility for conservation and management from the flag State. Second, the EU had just completed a formal investigation into the certification of the origin of fish marketed by Vanuatu-flag vessels in EU markets. In light of these actions, the report stated that "[I]f the government is committed to the continued operation of the open registry then the government should attempt to put in place an arrangement that demonstrates to the international community a commitment to take responsibility for the vessels on the registry." Vanuatu rose to this challenge, and in the next five years joined 4 RFMOs, drafted a tuna management plan and enacted comprehensive new fisheries legislation.

The regional fisheries bodies in which Vanuatu participates are briefly surveyed in order to review the range of measures which have been adopted in order to combat IUU fishing in the high seas. The WCPFC is examined in more detail for a few reasons. Vanuatu participates as both a coastal state and a flag state in this agreement; as a member state of the FFA, and as a flag state fishing in the high seas of the Convention area. Moreover, the WCPFC is the first regional agreement to implement the provisions of the UN Fish Stock Agreement and the FAO Compliance Agreement.

Western and Central Pacific Fisheries Commission (WCPFC)²⁰³

By the mid 1990s Vanuatu, along with the other FFA member States, had a comprehensive regional regime in place for the regulation of fisheries in its EEZ. Fisheries access was managed through licensing or bilateral agreements, or by the US arrangement. Up until this time the Pacific Island States had resisted the idea of

²⁰² Asian Development Bank (ADB), *Vanuatu: Agriculture and Fisheries Sector Review*, Appendix 7 (2000, online publication), p. 138.

http://www.adb.org/Documents/Reports/Vanuatu_Agri_Fisheries/default.asp

²⁰³ Established by the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Honolulu, 5 September 2000. In force 19 June 2004. (2004) ATS 15. www.paclii.org, www.WCPFC.int

international bodies for tuna management.²⁰⁴ However, in 1994, following the entry into force of the 1982 LOSC, the FFA convened a multilateral high-level conference on the management of South Pacific tuna fisheries. The objective of the conference was to promote responsible fishing operations for fishing vessels operating in the South Pacific region, and to address the FFA's concerns that the tuna management arrangements in the Western and Central Pacific did not meet the criteria for the precautionary approach, and the bilateral agreements in place were not sufficient to prevent the over exploitation of the tuna stocks.²⁰⁵

Following the adoption of the UN Fish Stocks Agreement a second multilateral conference was convened in 1997. That conference resulted in the Majuro Declaration²⁰⁶ which had the aim of establishing a mechanism for the conservation and management of highly migratory fish stocks of the Western and Central Pacific in accordance with the 1982 LOSC and the UN Fish Stocks Agreement. After lengthy negotiations between the coastal States of the Western and Central Pacific,²⁰⁷ other coastal States in the region,²⁰⁸ and States fishing in that region,²⁰⁹ the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (the Convention) was adopted in 2000. The Convention entered into force in 2004 and created the WCPFC along with two subsidiary bodies: a Scientific Committee and a Technical and Compliance Committee.

The Convention applies to all species of highly migratory fish stocks within the Convention area.²¹⁰ The objective of the Convention is to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish in the Convention area. The Convention is expressly designed to be consistent with, and

²⁰⁴ Churchill and Lowe, 313.

²⁰⁵ Transform Aqorau, "Current Legal Developments: Pacific Ocean, The Draft Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean" (2000), 15:1 *International Journal of Marine and Coastal Law*, 111-148, p.112.

²⁰⁶ (1997) 35 *Law of the Sea Bulletin* 125.

²⁰⁷ FFA member countries

²⁰⁸ Canada, France, French Polynesia, Indonesia, new Caledonia, the Philippines, and Wallis and Futuna

²⁰⁹ China, Japan, Korea, Taiwan and the United States; the European Union and Mexico participated as observers

²¹⁰ The Convention applies to the Western and Central Pacific Ocean. A precise definition is given in Article 3 of the Convention.

implement, the 1982 LOSC and the UN Fish Stocks Agreement. Article 5 stipulates a number of key conservation and management principles which are to be applied by Commission members including: adopting measures that would ensure the long-term sustainability of highly migratory fish stocks and promote their optimum utilization; assessing the impacts of fishing and other human activities belonging to the same ecosystem; taking measures to prevent or eliminate overfishing and excess fishing capacity; ensuring that levels of fishing effort do not exceed those that are commensurate with the sustainable use of fishery resources; and promoting the development and use of selective, environmentally safe and cost effective fishing gear and techniques.

Article 10 sets out the extensive functions of the Commission, and the list includes adopting conservation and management measures and recommendations; allocating the total allowable catch or total level of fishing effort amongst members and developing criteria on such allocations; adopting generally recommended international minimum standards for the responsible conduct of fishing operations; establishing mechanisms for monitoring, control, surveillance and enforcement, including a vessel monitoring system; promoting cooperation and coordination between members of the Commission to ensure that conservation and management measures for highly migratory fish stocks in areas under national jurisdiction and measures for the same stocks on the high seas are compatible; adopting measures for non-target species with a view to maintaining or restoring those populations; and adopting standards for collection, verification and for timely exchange and reporting of data and compiling and disseminating data.

Part IV lists the obligations of members of the Commission. The provisions deal mainly with the provision of information to the Commission, and its circulation amongst members, regarding fishing activities, and conservation and management measures. Members of the Commission are also directed to ensure that their nationals, and fishing vessels owned or controlled by their nationals fishing in the Convention area comply with the provisions of the Convention.²¹¹

²¹¹ Article 23(5)

The duties of the flag state are articulated in Part V. There is a requirement that only vessels which have been authorized to fish be allowed to fish, and an obligation to grant authorization only where the flag state is able to exercise effectively its responsibilities in respect of such vessels. There are also requirements for the maintenance of a record of fishing vessels and for the use of a vessel monitoring system. The details to be included in the record are provided in Annex IV, and the information contained in the record is circulated to all members of the Commission.

As to compliance and enforcement of the conservation and management measures, each member of the Commission is required to take measures to ensure that vessels under its jurisdiction comply with the provisions of the Convention.²¹² There are provisions for the establishment of a Boarding and Inspection scheme to be performed on the high seas by authorized officers of a member of the Commission.²¹³ There are also port state measures to include inspection of documents, fishing gear and catch on board fishing vessels. Port state measures may also include prohibition of landings and transshipments of fish caught in violation of conservation and management measures adopted by the Commission.²¹⁴ The Convention also contains provisions for the establishment and functioning of a regional observer programme.²¹⁵

The WCPFC Convention together with the FFA Convention provides Vanuatu with a comprehensive conservation and management framework for highly migratory stocks throughout the Western and Central Pacific Ocean. Vanuatu became a member of the Commission when it ratified the Convention in 2005. Vanuatu participates as a coastal state and fishing state in the convention area, and had 82 vessels in the region in 2006.²¹⁶ The vessel monitoring requirements on the high seas have been managed by the

²¹² Article 25(1)

²¹³ Article 26 Procedures for Boarding and Inspection procedure were adopted by the WCPFC at 3rd Regular Session 11-15 December 2006: Conservation and Management Measure 2006-08

²¹⁴ Article 27

²¹⁵ Article 28, and for implementation see WCPFC Conservation and Management Measure 2006-07

²¹⁶ Vanuatu Fisheries Department, "National Tuna Fishery Report", WCPFC Scientific Committee, 3rd Regular Session 13-24 August 2007, Honolulu, USA.

[http://www.wcpfc.int/sc3/pdf/Annual%20Report%20WP-32%20Vanuatu%20\(rev.1\).pdf](http://www.wcpfc.int/sc3/pdf/Annual%20Report%20WP-32%20Vanuatu%20(rev.1).pdf) (accessed 20 November 2007).

government appointed Tuna Fishing (Vanuatu) Ltd. since 2002, and all vessels licensed under bilateral fishing agreements in the EEZ must carry FFA type approved VMS equipment. Vanuatu has recently addressed its newly articulated flag state responsibilities in the 2005 Fisheries Act and the Tuna Management Plan which will be discussed below.

Vanuatu is a member of four additional regional fisheries bodies. The conventions which established these fishery bodies were negotiated prior to the adoption of the UN Fish Stocks Agreement and the FAO Compliance Agreement. As such, unless there is an amendment or a subsequent resolution or decision the Conventions do not necessarily implement the two Agreements but rather implement new management measures on an ad hoc basis. The list of conservation and management measures included with each agreement is by no means comprehensive, but is included to give an indication of the range of measures that Vanuatu must comply with as a member of each management body.

Vessels flagged to Vanuatu's open registry and fishing in the RFMO areas to which it is a participant are subject to an array of conservation and management measures such as authorizations to fish, compulsory registration, and mechanisms for information sharing between fishing states. The manner in which flag state responsibility is to be exercised is defined, and although flag state responsibility is still exclusive, failure to enforce the measures may result in catches being blocked from entering the market through port schemes, trade sanctions or market measures such as eco-labeling.²¹⁷

Indian Ocean Tuna Commission²¹⁸ (IOTC)

The Indian Ocean Tuna Commission was established under the auspices of the FAO. The agreement came into force in 1996, and Vanuatu became a Member in 2002. As of June, 2007 Vanuatu had 48 flagged vessels in the area.²¹⁹ The mandate of the

²¹⁷ Devaney, 9.

²¹⁸ Established by *Agreement for the Establishment of the Indian Ocean Tuna Commission*, Rome, Italy, 25 November 1993 (105th Session of the FAO Council). In force 27 March 1996 1927 *UNTS* 330; [1995] *OJL* 236/25. www.iotc.org.

²¹⁹ see list of authorized vessels at www.iotc.org

Commission is to manage tuna and tuna-like species in the Indian Ocean and adjacent seas, with the objective to promote cooperation among its Members to ensure appropriate management and conservation, and encourage the sustainable development of fisheries based on such stocks.

When the Commission meets, decisions are taken concerning the management of the fishery. These decisions are passed in the form of resolutions that are binding on the Commission Members. In order to combat IUU fishing in this area the IOTC has passed a number of resolutions. For example, there is a list of vessels authorized to fish in the area, and the flag state is responsible to ensure that its vessels comply with all IOTC conservation and management measures.²²⁰ There has been a satellite vessel monitoring system program established to verify vessel position,²²¹ and the provision of a list of vessels presumed to have carried out IUU fishing in the IOTC area. As an adjunct to flag state responsibility, there is a provision for port state inspections.²²² However, IUU fishing appears to be an ongoing problem and there have been a number of new resolutions in 2007. There are recent resolutions addressing provisions for inter alia effective flag state control²²³, authorizations to fish,²²⁴ fish catch records,²²⁵ and vessel registration and exchange of information.²²⁶

Inter-American Tropical Tuna Commission²²⁷ (IATTC)

The IATTC was established by international convention in 1950, and is responsible for the conservation and management of fisheries for tunas and other species by tuna-fishing vessels in the eastern Pacific Ocean. The convention was updated in 2003²²⁸ to recognize those principles from the UN Fish Stocks Agreement such as the

²²⁰ IOTC resolution 05/02

²²¹ IOTC resolution 06/03

²²² IOTC resolution 05/03

²²³ IOTC resolution 07/01

²²⁴ IOTC resolution 07/02

²²⁵ IOTC resolution 07/03

²²⁶ IOTC resolution 07/04

²²⁷ Established by the *Convention for the Establishment of an Inter-American Tropical Tuna Commission*, adopted Washington, DC, 31 May 1949. In force 3 March 1950, 80 *UNTS* 4. www.iattc.org

²²⁸ *Convention for the Strengthening of the Inter-American Tropical Tuna Commission*, adopted 23 July 2003, Antigua, Antigua. Not in force. IGIFL Document Centre: IAATC; <http://www.intfish.net/treaties/antigua.htm> (accessed 20 November).

precautionary approach, and enhanced provisions for monitoring, surveillance and enforcement. In particular, the new Convention provides for the duties of the flag state: each party is to ensure that its vessels fish only if properly authorized, and to take measures as may be necessary to ensure that vessels flying its flag comply with the provisions of the Convention and the conservation and management measures adopted under it.²²⁹ The new Convention will enter into force in 2008, 15 months after it received its 7th ratification.

Vanuatu became a member in 1990, and authorizes the same 48 flagged vessels that it authorizes to fish in the IOTC area. The IATTC has addressed IUU fishing in recent years through a number of resolutions. It has established a list of vessels authorized to fish in the area,²³⁰ established a regional vessel registry,²³¹ instituted a program for transshipment of tuna to combat IUU fishing and so-called ‘tuna laundering’,²³² proposed trade measures as a last resort to promote compliance with conservation and management measures,²³³ established a list of vessels presumed to have engaged in IUU fishing,²³⁴ encouraged the reporting of vessels fishing contrary to the conservation and management measures in the area,²³⁵ and established a vessel monitoring system.²³⁶

International Commission for the Conservation of Atlantic Tunas²³⁷ (ICCAT)

The ICCAT was created by international convention in 1966. The Convention covers all waters of the Atlantic Ocean and adjacent seas, including the Mediterranean Sea. The Commission was established because of concerns about the catch levels of many highly migratory species and the growth of international fishing fleets fitted with increasingly

²²⁹ Antigua Convention, article XX

²³⁰ IATTC resolution C-03-07

²³¹ IATTC resolution C-00-06

²³² IATTC resolution C-06-04

²³³ IATTC resolution C-06-05

²³⁴ IATTC resolution C-05-07

²³⁵ IATTC resolution C-04-03

²³⁶ IATTC resolution C-04-06

²³⁷ *International Convention for the Conservation of Atlantic Tunas*, Rio de Janeiro, Brazil, 14 May 1966. In force 21 March 1969, (1969) *UNTS* 9587. www.iccat.es.

more efficient gear in the 1950's and 1960's.²³⁸ The primary duty of the Commission has been to monitor and report on the biological status of tuna and tuna-like species.

The Convention entered into force in 1969, and Vanuatu became a member in 2002. Vanuatu has two vessels authorized to fish in the area. ICCAT has implemented compliance schemes such as port inspection,²³⁹ a ban on IUU landings and transshipment,²⁴⁰ the creation of a list of authorized vessels in the area,²⁴¹ and the urging of importers, transporters and other concerned business people to refrain from transaction of tunas from IUU vessels.²⁴²

Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)²⁴³
The CCAMLR was established in 1982 for the purpose of protecting and conserving the marine living resources in the waters surrounding Antarctica. Vanuatu was identified as a flag state involved in unregulated fishing for Patagonian toothfish in the area throughout the 1990's, and was invited to co-operate in a catch documentation scheme (CDS) in 1999.²⁴⁴ Vanuatu acceded to the Convention in 2001 after giving an undertaking that it would take action against any vessels reported to have engaged in IUU fishing.²⁴⁵

The CDS²⁴⁶ which became binding in 2000 allowed the Commission to determine whether toothfish taken in the CCAMLR area were caught in a manner consistent with the conservation measures. The scheme was designed to track the landings and trade

²³⁸ Elizabeth deLone, "Improving the Management of the Atlantic tuna: The Duty to Strengthen the ICCAT in Light of the 1995 Straddling Stocks Agreement" (1996), 6(3) *New York University Environmental Law Journal* 656-673, 658.

<http://www.law.nyu.edu/journals/envtlaw/issues/vol6/3/6nyuelj656.html>

²³⁹ ICCAT recommendation 97-10

²⁴⁰ ICCAT recommendation 98-11

²⁴¹ ICCAT recommendation 02-22

²⁴² ICCAT recommendation 99-13

²⁴³ *Convention on the Conservation of Antarctic Marine Living Resources*, Canberra, 20 May 1980. In force 7 April 1982, (1980) *ILM* 837; www.ccamlr.org.

²⁴⁴ CCAMLR XIX- Report of the Nineteenth Meeting of the Commission (2000), para. 2.44.

www.ccamlr.org

²⁴⁵ CCAMLR XX- Report of the Twentieth Meeting of the Commission (2001), para. 2.47.

www.ccamlr.org

²⁴⁶ presently CCAMLR Conservation Measure 10-05(2006)

flows of toothfish caught in the area by requiring landings of toothfish at participants' ports, or transshipments to participants' vessels to be accompanied by a valid CCAMLR Catch Document. Further to conservation and management measures, the CCAMLR has implemented provisions for the marking of fishing vessels and gear,²⁴⁷ licensing and inspection obligations,²⁴⁸ port inspections,²⁴⁹ and automated satellite-linked vessel monitoring systems.²⁵⁰

By 2005 Vanuatu was party to all major tuna RFMOs as well to the CCAMLR. It was a member of the Commission of the WCPFC and participated as both a flag state and a coastal state. However, Vanuatu did not have a domestic legislative framework to implement effective flag state management on the high seas because it had never addressed this issue.

²⁴⁷ CCAMLR Conservation Measure 10-01(1998)

²⁴⁸ CCAMLR Conservation Measure 10-02(2006)

²⁴⁹ CCAMLR Conservation Measure 10-03(2005)

²⁵⁰ CCAMLR Conservation Measure 10-04(2006)

VII THE NEW ERA: THE TUNA MANAGEMENT PLAN AND THE 2005 FISHERIES ACT²⁵¹

Section 2 of the 1982 Fisheries Act stated that the Director of Fisheries ‘shall prepare plans for the management and development of fisheries in Vanuatu waters’. However, in 2000, an Asian Development Bank review of Vanuatu’s fisheries²⁵² reported that there had never been a formal development plan for any fishery in the country, and the ADB indicated that a plan was necessary to ensure that fisheries development be sustainable and in the national interest. It recommended that Vanuatu develop a tuna management plan before the WCPFC Convention was to take effect because under the Convention any conservation and management arrangements for the high seas were to be compatible with the coastal zone arrangements. Moreover, the 1982 legislation lacked any framework for Vanuatu’s participation in the WCPFC and other RFMOs. It was particularly important to draft a plan for the management of the tuna fishery because foreign vessels fished for tuna in Vanuatu’s EEZ, and in its role as a flag State, Vanuatu participated in all of the major tuna RFMOs.

Subsequently the Republic of Vanuatu Tuna Management Plan²⁵³ was drafted in 2000, and adopted by the government in 2001. The plan is applicable to highly migratory tuna species and other species taken in the course of fishing for tuna. It covers all Vanuatu waters as well as Vanuatu flagged tuna fishing vessels wherever they fish. The objectives of the plan are to ensure the sustainable exploitation of the resource while maximizing the long term economic and social benefits to the people of Vanuatu, and meeting regional and international responsibilities for tuna management.

Pursuant to these objectives, the plan listed 4 goal categories:

A. Information on the state of the resource and the activities of the fishery;

²⁵¹ No. 55 of 2005

²⁵² ADB (2000), p.137

²⁵³ Republic of Vanuatu, “Tuna Management Plan: A National Policy for the Management of Tuna Fisheries”, (Vanuatu: C-SPOD, 2000).

- B. The necessary tools and procedures (licenses, terms and conditions, bilateral agreements, authorizations, etc.) for the management of all vessels fishing for tuna with Vanuatu licenses or flying the Vanuatu flag;
- C. An administrative structure to effectively manage the fishery on an ongoing basis and respond to changing circumstances; and
- D. A programme for the development of a sustainable local tuna fishing industry.

The 1982 Fisheries Act was outdated and failed to meet these stated objectives, and the plan served as the basis for new legislation. The 2005 Fisheries Act came into force in March, 2006 and expanded upon the licensing and access provisions found in the 1982 Act, provided a framework for Vanuatu's participation in the international and regional fisheries Conventions to which it was a party, and addressed its responsibilities for its flagged fishing vessels. Together, the plan and the new legislation provided Vanuatu with new tools to combat IUU fishing and these are discussed below.

Management of Foreign Vessels in the EEZ

Licensing

All fishing in Vanuatu waters (which includes the EEZ by definition) must be authorized by a license or access agreement issued by the Director of Fisheries.²⁵⁴ The only exemptions apply to traditional canoes or outriggers, or to vessels used solely for subsistence or recreational fishing.²⁵⁵ Local fishing vessels, for the purposes of the Act, must be wholly owned and controlled by natural persons who are citizens of Vanuatu, wholly owned by a public corporation all of whose shares are beneficially owned by citizens of Vanuatu, or wholly owned by the Government of Vanuatu.²⁵⁶ This definition is aimed at discouraging the practice of foreign vessels reflagging to the Vanuatu flag in order to access preferential treatment given to 'local' vessels under FFA regional agreements.

²⁵⁴ 2005 *Fisheries Act*, Parts 3, 4.

²⁵⁵ *Ibid.*, s.4(2).

²⁵⁶ *Ibid.*, s.1.

The operators of local fishing vessels which are fishing within the jurisdiction of any member country of the FFA must conform to harmonized minimum terms and conditions for fisheries access, and must provide information in respect of its activities to the Director of Fisheries.²⁵⁷ Failure to comply may result in loss of license or fines.

The Director will not issue a license to a foreign or local vessel where there has been a previously a breach of the Act or any applicable access agreement by the vessel or any person associated with the vessel.²⁵⁸ A license may be cancelled or suspended if information required to be given or reported under the Act or applicable access agreement is false, incomplete, incorrect, misleading or not provided, or the vessel has been involved in a breach of a condition of the license, applicable access agreement or obligation or requirement imposed by a Scheduled Treaty²⁵⁹ or has committed any offence against the laws of Vanuatu.²⁶⁰

Part 4 sets out the obligations of foreign fishing vessels, which are in addition to those just listed. Foreign fishing vessels are defined as any fishing vessel other than a local fishing vessel, and include support vessels.²⁶¹ Except for test fishing operations or marine scientific research a foreign fishing license will not be issued unless an access agreement that relates to that vessel has been entered into.²⁶²

Access agreements are the underlying mechanism for the effective management of foreign fishing vessels in the EEZ. Section 7 sets out the requirements for and obligations pursuant to such an agreement. An agreement may be entered into with any government, association or other legally constituted entity. Fishery allocations are made under access agreements, and preferential access is accorded FFA member countries. Every access agreement must include provisions to implement minimum terms and conditions of fisheries (MTCs) including: establishing the responsibility of the foreign

²⁵⁷ Ibid., s.4.

²⁵⁸ Ibid., s.25.

²⁵⁹ This includes all regional agreements to which Vanuatu is Party as well as the 1982 LOSC.

²⁶⁰ Ibid., s.26.

²⁶¹ Ibid., s.1.

²⁶² Ibid., s.9

party to take all measures necessary to ensure compliance by its vessels; requiring the operator not to transship at sea, and only to transship through designated ports; and requiring the operator to ensure compliance with requirements relating the appointment of a local agent, the placement of observers, reporting requirements as to entry into and exit from Vanuatu waters, the maintenance of catch figures and log books, and the provision of data and information for the proper management and conservation of the fishery.

The Director of Fisheries may refuse to issue a foreign fishing license if the vessel does not have good standing on the Regional Register or the vessel has engaged in driftnet fishing which is a banned activity. A license may be suspended or cancelled if the good standing status on the Regional Register has been suspended or withdrawn, or there has been a breach of the Act or any applicable access agreement.²⁶³

Monitoring, control and surveillance

The Tuna Management Plan recognized that it was essential for effective management, as well as for the maximization of revenue, to have good information as to the activities of the foreign fishing vessels in the Vanuatu EEZ.²⁶⁴ To this end the plan has requirements for a Vessel Monitoring System (VMS), observers on longliners in Vanuatu waters, management and analysis of the logbook information, and compilation and cross checking of information.

A VMS registered with the FFA member country must be installed on all foreign fishing vessels and foreign carriers in Vanuatu waters, and this is part of the MTC requirements in the access agreement. The 2005 Act provides for observers to be designated in accordance with an access agreement.²⁶⁵ Fishing vessels in the EEZ must permit the boarding of an observer who may exercise scientific, compliance, and monitoring functions. The Act also has provisions for authorized officers who may stop, board and search any fishing vessel in Vanuatu waters which he reasonably believes has committed

²⁶³ Ibid., s.25

²⁶⁴ Tuna Management Plan, para. 4.3

²⁶⁵ 2005 Fisheries Act, s.52, 53

or is committing an offence against the Act.²⁶⁶ Licensed vessels are required to provide logbook data including daily reports of catch and fishing effort. The information received from the log books will be cross checked with VMS and Telex Reports also received from fishing vessels.

Patrol boat and overflights are to be coordinated (as discussed as part of regional measures above) by the Police Maritime Wing in order to monitor fishing activity in the EEZ. Periodically information gathered from VMS, the observer programme, and surveys from aircraft and patrol vessels will be cross checked for inconsistencies. All compliance activities in Vanuatu are performed by the Compliance and Licensing Section of Fisheries, in collaboration with the Police Maritime Wing.

It is an ambitious programme that is geared to work within the FFA regional plan, and will likely take many years to fully implement. In 2004 the Police Maritime Wing as well as the Compliance and Licensing Section were reportedly underfunded and understaffed.²⁶⁷ Presently there is no observer programme other than the occasional provision of observers under the US Treaty arrangements, and this has been recognized as a critical data ‘gap’.²⁶⁸ However, the key areas of controlled licensing, information gathering and analysis, surveillance and enforcement have been expanded upon, and combined with the regional agreements to which Vanuatu is a Party, it is a good start to effectively control foreign fishing vessels in the EEZ.

Management of Flagged Vessels

The Tuna Management Plan recognized the need to improve the management of Vanuatu’s flagged fishing vessels. There was little information gathered about the activities of these vessels on the high seas, and the concern was that if these vessels violated international agreements it could result in embargoes and retaliation by other

²⁶⁶ 2005 Fisheries Act, s.47-51

²⁶⁷ GEF SAP II Project for Oceanic Fisheries Management, Vanuatu National Needs Assessment, 2004 para. 2.2.3 <http://www.ffa.int/gef>

²⁶⁸ WCPFC, National Tuna Fishery Report Vanuatu, Scientific Committee, Second regular Session, 7-18 August 2006, p.11. http://wcpfc.int/sc2/pdf/SC2_CR_Vanuatu.pdf

countries against Vanuatu, and damage future fish exports.²⁶⁹ The position of the Tuna Management Plan was that there had to be a review of the costs, risks and benefits of the flagging of foreign fishing vessels to determine long term strategy.²⁷⁰ In the interim it was suggested that a programme be developed to gather information, and where necessary, exert control on all Vanuatu flagged vessels fishing for tuna. The treatment of the flagged vessels by the Tuna Management Plan was rather cursory, and it has been suggested that it did not adequately address Vanuatu's flag state responsibilities in regard to tuna fishing.²⁷¹

The issue was more comprehensively addressed by the 2005 Fisheries Act. Part V sets out Vanuatu's responsibilities as a flag state for fishing vessels operating inside or outside Vanuatu waters.²⁷² Section 12 deals with the application of Vanuatu's international obligations providing that obligations and requirements in the Scheduled Treaties apply to all Vanuatu flagged vessels.

An operator of a flagged vessel may not fish on the high seas without an international authorization to fish.²⁷³ Application for an authorization is made to the Director of Fisheries, and certain criteria must be met: the vessel must be registered and of good standing on the Regional Register or another applicable register; there is no evidence suggesting that the vessel has breached or may breach any obligation or requirement of a scheduled Treaty;²⁷⁴ the Director is satisfied that the applicant is aware of the obligations imposed by the Act; and the fee is paid. An authorization is valid for one year, and unauthorized fishing may draw a fine up to VT 100,000,000 (approximately 1 million USD). In addition, the general conditions as to issuance and cancellation which apply to licensing are also applicable to fishing authorizations.

²⁶⁹ Tuna Management Plan p. viii

²⁷⁰ Tuna Management Plan para. 4.4.1

²⁷¹ GEF SAP II Project for Oceanic Fisheries Management, Vanuatu National Needs Assessment, 2004 para. 1.2

²⁷² 2005 *Fisheries Act*, s.12.

²⁷³ *Ibid.*, s.13.

²⁷⁴ including RFMOs discussed in this paper as well as FFA Convention and 1982 LOSC

Every international authorization to fish is subject to a number of conditions,²⁷⁵ including all obligations and requirements of any scheduled treaty and fishery management plan, and all requirements stated in any applicable Instruction, Fleet Safety Letter or other similar document issued by the Vanuatu Maritime Authority (VMA). The Director of Fisheries will investigate a breach or non-compliance if a complaint is made to the Director by the administrator responsible for the implementation and enforcement of a scheduled treaty, the VMA refers a matter to the Director involving an allegation of breach of a condition of an international authorization to fish, or the Director believes that a breach of a condition has been committed.²⁷⁶ Penalties for breaches or non compliance include fines, and the Director must notify the Regional Register where the vessel may lose its good standing designation, and the VMA where the vessel may be deregistered.

The new legislation creates a link formed between the registration of the vessel and the authorization to fish. First, the Tuna Management Plan provides that the ultimate responsibility for the management of the tuna fishery rests with the Fisheries Division. The Director of the Fisheries Division issues and approves the international authorization to fish, and these authorizations are communicated to the vessel operators through the VMA. Then the VMA is responsible for activities related to flag state responsibility and these include the collection of fisheries related information for all treaties to which Vanuatu is a party.²⁷⁷ Section 18 provides for the sharing of information concerning vessels between the VMA and the Director of Fisheries. All information in the possession of the VMA is to be made available to the Director of Fisheries upon request. Conversely, fishing information related to the vessel that is in the possession of the Director of Fisheries is to be made available to the VMA upon request.

The most important linkage between the two bodies is found in s.20 which establishes the Fisheries Data and Compliance Unit. This unit is to be managed jointly by the Fisheries Department and the VMA. The unit is responsible in matters related to the

²⁷⁵ 2005 *Fisheries Act*, s.14.

²⁷⁶ *Ibid.*, s.15.

²⁷⁷ Tuna Management Plan, para. 4.4.2

compliance of international obligations under Part V. Functions include collection of catch information and data supplied by vessels, and provision of that data to the Administrators responsible for the enforcement of the Scheduled Treaties.

There are a few other means of information gathering which occurs on the high seas. Vanuatu operates a national VMS system contracted to Tuna Fishing (Vanuatu) Ltd. to monitor Vanuatu flag vessels operating throughout the world. Data downloads are passed on to relevant RFMOs as part of the monitoring process. There is an observer programme envisioned for the flagged vessels but it has not been implemented. Vanuatu has a port agreement with Japan whereby Japan records the catch that is landed by Vanuatu flagged longliners, and reports to the Fisheries Division. Additionally other vessels in RFMO areas report sightings of possible non-compliance to the regional bodies and this information is relayed to the VMA or to the Fisheries Division.

Prior to the implementation of the new legislation and the Tuna Management Plan the Fisheries Division had little information about flagged vessels fishing on the high seas, having left the management to the VMA. The VMA had no legislative guidelines as to fishing activities, and the flag State responsibility as to this activity was not effectively exercised. The national legislation as well as membership in several RFMOs has given the VMA a framework in which to manage the flagged fishing vessels, and it is up to the Fisheries Division to ensure that there is compliance with the new rules. Again, effective management of the flagged vessels is compromised by lack of resources, but the framework is in place.

VIII CONCLUSION

A review of Vanuatu's involvement in IUU fishing is interesting for a few reasons. The dual role of coastal state and flag state is compared, and it becomes clear that whereas management of foreign fishing vessels in the EEZ was an early priority for Vanuatu, the management of flagged vessels fishing in the high seas was neglected until fairly recently. Vanuatu has followed the evolving international perspective and today has a clear framework for the exercise of flag state responsibility for vessels fishing on the high seas.

As a coastal state Vanuatu chose to exercise sovereignty over the living resources in its EEZ, and since its independence in 1980 has taken steps to manage foreign fishing vessels in the zone through legislated licensing provisions and bilateral agreements. Membership in the FFA has given Vanuatu, along with its Pacific Island neighbors a centralizing focus that has allowed the harmonization of conservation and management measures throughout the region. This has increased the efficiency and effectiveness of compliance and enforcement measures because of the opportunity not only to share physical enforcement mechanisms, but also to compile and share fisheries information. Regional harmonization has been ideal for the South Pacific Islands region because of the member states' contiguous fishing zones, as well as the migratory nature of the tuna stocks which are the main target of foreign vessels. A particularly important adjunct to regional management has been the creation of the Regional Register which not only provides fisheries information but also may be employed as a means of enforcement through the good standing requirement.

Vanuatu did not address the management of its flagged vessels fishing on the high seas until it drafted the Tuna Management Plan in 2000. Although there was an economic incentive to exploit the resources in the high seas, there was no notion of sovereignty over the living resources so that the rationale for long term management that existed in the EEZ was absent in the high seas. Further, the 1982 LOSC had clearly addressed fisheries management in the EEZ, but not in the high seas.

In fact, the 1982 LOSC flag state responsibility had a rather general nature,²⁷⁸ the exercise of which was left to the discretion of the flag state. By the mid 1990s over-fishing, overcapacity and the depletion of fish stocks led to the demand for some sort of management regime in the high seas. The resulting new international agreements adopted to combat IUU fishing borrowed heavily from FFA initiatives already in use in the South Pacific region such as authorizations to fish, the regional registry, information exchange and compilation, state control over nationals and the provisions for observers on vessels. The notion of flag state responsibility acquired a more precise content, and the discretion of the flag state was diminished by the provisions of international agreements that specified various duties in respect of their vessels.²⁷⁹ Moreover, regardless of whether or not a flag state was Party to international agreements, there was the threat of market sanctions to those states who did not manage their high seas activities responsibly.

The concept of exploitation in the high seas has undergone a fundamental change since Vanuatu's early days as a flag state. Whereas the exploitation of the high seas fisheries was formerly exclusively in the interest of individual states, today the exploitation must be undertaken in the general interest of the international community.²⁸⁰ The rights of the fishing states must be balanced with the rights of the coastal states, as well as the ecological nature of the maritime resources and the environmental concerns of the international community. The goal is no longer narrowly economic in nature but rather broader fisheries management.²⁸¹

It is not clear whether or not Vanuatu was (and is) sought out as a flag of convenience in order to avoid RFMO regulations or perhaps because of its inability to effectively exercise flag state responsibilities. Vanuatu had originally operated an open register for merchant vessels and offered the advantages of a tax haven status and inexpensive

²⁷⁸ Vukas and Vidas, 81.

²⁷⁹ Ibid.

²⁸⁰ Orrego Vicuna, 24.

²⁸¹ Ibid., 25.

registration both of which applied equally to fishing vessels. However, there has been a concern about the activities of its flagged fishing vessels, and Vanuatu has addressed the issue through the Tuna Management Plan, membership in RFMOs and finally the drafting of new fisheries legislation that expressly provides for management of the high seas fisheries through authorizations to fish.

Despite Vanuatu's initiatives, IUU fishing continues in the EEZ and by its flagged vessels in the high seas. The greatest difficulty lies in the effective implementation of the management measures given the vastness of the area, the shortage of trained personnel and the expense of the exercise. It may be helpful for Vanuatu to finalize agreements with its neighbors under the Niue Treaty, but overall Vanuatu has really done all that it can in the EEZ in terms of policy, and now must focus on effectively implementing the strategies. In the high seas fisheries Vanuatu has evidenced an intention to manage its flagged vessels by its membership in RFMOs, and by the recent national legislative changes. Perhaps the clearest indication of a commitment to effective flag state management would be the ratification of the UN Fish Stocks Agreement and the FAO Compliance Agreement. However, Vanuatu flagged vessels are already subject to many of the same measures found in these agreements pursuant to membership in RFMOs, and to its national fisheries legislation. Many of the problems of implementation are the same in the EEZ and the high seas, but in the latter the problems are exacerbated by the distance of the vessels from Vanuatu ports, the lack of harmonization between RFMOs with a central focus such as the FFA (although that has been proposed by the FAO Compliance Agreement), and the continuing burden, albeit better defined, of exclusive flag state jurisdiction.

Another interesting aspect of this review is the seemingly permanent role that a small developing state such as Vanuatu plays in the high seas (including the EEZ) fisheries. Because the players had already been decided before this present fisheries crisis, there is no room for new fishing opportunities. Over capacity in the fishing industry and declining fish stocks (due to over-fishing by the DWFNs) has limited the opportunities for developing coastal states. Vanuatu receives a small fraction of the value of the fish

catch in its EEZ through licensing, and an even smaller fraction through the registration of vessels and authorizations to fish on the high seas under its flag. However, in both of these scenarios, Vanuatu must assume a role to prevent IUU fishing, ironically to conserve the fish stocks to which it has virtually no direct access.

It is not surprising that the top 14 flags of convenience are developing countries. Vanuatu lacks the resources to access the high seas fisheries, and lacks the bargaining power to demand a fair share from the fisheries in its EEZ. Vanuatu would have gained far more if there had been a process for sharing the living resources of the high seas included in the 1982 LOSC. Such a provision for profit sharing may also have slowed the rate of exploitation of fish stocks. As it stands, Vanuatu has become somewhat of a steward for the fish stocks in the high seas, and overall, given the recent improvements, Vanuatu has developed a good framework for this role. Vanuatu has a duty under the 1982 LOSC to manage its EEZ fish stocks, and it faces international pressure to manage its flagged fishing vessels. It is also in Vanuatu's best interests in the long term to control the fishing activities of non nationals even if the short term economic rewards are small. In this way Vanuatu can continue to participate in the fisheries, while it preserves the possibility of its own future commercial fishery in the EEZ, and protects its important coastal fisheries and food security.

SOURCES CONSULTED

Agnew, David, J. and Colin T. Barnes, “Economic Aspects and Drivers of IUU Fishing: Building a Framework”, AGR/FI/IUU/2004:2. Paris: OECD, 2004.
<http://www.oecd.org/dataoecd/17/7/29468002.PDF> (accessed 13 November 2007).

Amos, Moses, “Vanuatu Fishery Resource Profiles”, IWP-Pacific Technical Report (International Waters Project) No. 49. Apia, Samoa: SPREP, 2007.
http://www.sprep.org/att/pblication/000557_IWP_PTR49.pdf (accessed 20 November 2007).

Aqorau, Transform, “Illegal, Unreported and Unregulated Fishing: Considerations for Developing Countries”, background paper prepared for Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia, 15-19 May 2000. Document AUS/IUU/2000/15.

http://www.daffa.gov.au/_data/assets/word_doc/0010/5878/ausiuu200018.doc (accessed 20 November 2007).

_____, “Illegal Fishing and Fisheries Law Enforcement in Small Island Developing States: The Pacific Islands Experience”, (2000) 15:1 *International Journal of Marine and Coastal Law* 37-63.

_____, “Current Legal Developments: Pacific Ocean, The Draft Convention for the conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean” (2000), 15:1 *International Journal of Marine and Coastal Law*, 111.

Asian Development Bank (ADB), Vanuatu: Agriculture and Fisheries Sector Review (online publication). http://www.adb.org/Documents/Reports/Vanuatu_Agri_Fisheries/default.asp

Baird, Rachel, “Illegal, Unreported and Unregulated Fishing: an Analysis of the Legal, Economic and historical Factors Relevant to its Development and Persistence”, [2004] *MelbJIL* 13.

Beyerlin, Ulrich, “New Developments in the Protection of the Marine Environment: Potential Effects of the Rio Process” (1995), 55 *Heidelberg Journal of International Law* 554. http://www.zaoerv.de/55_1995/vo55.cfm (accessed 14 November 2007).

Boczek, Boleslaw A., *Flags of Convenience: An International Legal Study*. Cambridge, US: Harvard University Press, 1962.

Burke, William, *The New International Law of Fisheries: UNCLOS 1982 and Beyond*. Oxford: Clarendon Press; New York: Oxford University Press, 1994.

Churchill, Robin and A. Vaughan Lowe, *The Law of the Sea*, 3rd ed. Manchester: Manchester University Press, 1999.

D’Andrea, Ariella, “The Genuine Link Concept in Responsible Fisheries: Legal Aspects and Recent Developments”, *FAO Legal Papers Online* #61, November, 2006. www.fao.org/legal/prs-ol/paper-e.htm (accessed 13 November 2007).

deLone, Elizabeth, “Improving the Management of the Atlantic Tuna: The Duty to Strengthen the ICCAT in Light of the 1995 Straddling Stock Agreement” (1996), *New York University Environmental Law Journal* 656-673.

Devaney, Patricia, “Regional Fisheries Management Organizations: Bringing Order to Disorder” in Susskind, Lawrence E., and William Moomaw (eds.) *Papers on International Environmental Negotiation*, vol. 14. Cambridge, US: Harvard University, PON Books, 2005.

Doulman, David J. "A General Overview of Some Aspects of Illegal, Unreported and Unregulated Fishing". FAO Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, 15-19 May 2000, FAO Fisheries Report No. 666. Rome: FAO, 2001. <http://www.fao.org>

_____, "1995 FAO Code of Conduct for Responsible Fisheries: Development considerations and Implementation Challenges" at the FAO Regional Workshop on the Elaboration of the National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 29 August-2 September 2005, Nadi, Fiji.

Edeson, William, "Towards Long-Term Sustainable Use: Some Recent Developments in the Legal Regime of Fisheries" in Boyle, Alan and David Freestone (eds.) *International Law and Sustainable Development: Past Achievements and Future Challenges*. UK: Oxford University Press, 2001, 165-204.

FAO, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Rome: FAO, 2001. <http://www.fao.org/DOCREP/003/y1224e/1224e00.HTM> (accessed 13 November 2007).

_____, The State of the World Fisheries and Aquaculture 2006, (Rome: FAO, 2007). <http://www.fao.org>

_____, "Fishery Country Profile: The Republic of Vanuatu", FID/CD/VAN rev.2, Rome: FAO, 2002. <http://www.fao.org/fi/fip/en/VUT/profile.htm> (accessed 20 November 2007).

_____, "Monitoring, Control and Surveillance Systems Guide for Coastal and Offshore Capture Fisheries", FAO Fisheries Technical Paper 415. Rome: FAO, 2000. <http://www.fao.org/fi/projects/fishcode/publicationpdf/files/Other/415.pdf> (accessed 20 November 2007).

FFA, DevFish Trip Report #2, February, 2006. <http://www.ffa.int/node/863> (accessed 20 November 2007).

_____, “Status of Regional Cooperative Surveillance and Enforcement”, Ninth Working Group Meeting, 22-227 September 2006, Brisbane, Australia, Paper No. MCS9/WP2.1. http://www.ffa.int/system/files/MCS9_2.1_status-of-cooperative-surveillance-and-enforcement.pdf (accessed 20 November 2007).

_____, Pacific Islands Oceanic Management, Pacific Islands Oceanic Management Project, 2004. <http://www.ffa.int/gef/node/22> (accessed 20 November 2007).

_____, “Overview of the Biological, Economic, Social and Political Concerns Related to Interactions of Pacific Tuna Fisheries”, in Shomura, Richard, Jacek Majkowski and Robert Harman (eds.) Status of Interactions of Pacific Tuna Fisheries in 1995, Proceedings of the second FAO Expert Consultation on Interactions of Pacific Tuna Fisheries, Shimizu, Japan, 23-31 January 1995, FAO Technical Paper No. 365. Rome: FAO, 1995.

<http://www.fao.org/docrep/003/W3628E/w3628e00.htm> (accessed 20 November 2007).

Flewwelling, Peter, “Recent Trends for Monitoring, Control and Surveillance Systems for Capture Fisheries”, FAO Fisheries Technical Paper No. 415. Rome: FAO, 2003. <http://fao.org/docrep/005/Y411E/y4411e00.htm#Contents> (accessed 20 November 2007).

Franckx, Erik, Fisheries Enforcement: Related Legal and Institutional Issues: National, Subregional or Regional Perspectives, FAO Legislative Study 71. Rome: FAO, 2001.

Gianni, Matthew and Walt Simpson, The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing. Australian Department of Agriculture, Fisheries and Forestry, International Transport Workers’ Federation and WWF International, 2005. <http://www.mua.org.au/news/general/files/iiulowres.pdf> (accessed 15 November 2007).

Greenpeace, “Dodging the Rules: Flags of Convenience Fishing”, online, 1999. <http://archive.greenpeace.org/oceans/piratefishing/dodgingrules.htm> (accessed 15 November 2007).

Hanchard, Barbara, “South Pacific Forum Fisheries Agency (FFA)”, address delivered at Technical Consultation of South Pacific Small Island Developing States on Sustainable Development in Agriculture, Forestry and Fisheries, Apia, Samoa, 6-9 May 1996. Rome: FAO, 1998.

<http://www.fao.org/docrep/X0625E/X0625e00.HTM> (accessed 20 November 2007).

High Seas Task Force, *Closing the Net: Stopping Illegal Fishing on the High Seas*. Columbia University, New York: Governments of Australia, Canada, Chile, Namibia, New Zealand, and United Kingdom, WWF, IUCN, and the Earth Institute, 2006. www.highseas.org (accessed 13 November 2007).

_____, “High Seas Governance”. Paper prepared for the Meeting of the High Seas Task Force, 09 March 2005, Paris, France. HSTF/09: February, 2005. http://www.highseas.org/docs/HSTF_09_February_2005_Final.pdf

Juda, Lawrence, “The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique”, (1997) 28:2 *Ocean Development and International Law* 147-166.

Lodge, Michael, “New Approaches to Fisheries Enforcement” (1993), 2:3 *Review of European Community and International Environmental Law* 277-284.

Molenaar, Erik Jaap, “Participation, Allocation and Unregulated Fishing: The Practice of Regional Fisheries Management Organizations”, (2003) 18:4 *The International Journal of Marine and Coastal Law*, 457-480.

Moore, Gerald, “Enforcement Without Force: New Concepts in Compliance Control for Foreign Fishing Operations”, (1993) 24 *Ocean Development and International Law*, 197-203.

Nandan, Satya, Keynote address at the Conference on Governance of High Seas Fisheries and the United Nations Fish Agreement: Moving Words to Action, 1-5 May 2005, St. John’s, Canada. http://www.dfo-mpo.gc.ca/fgc-cgp/documents/presentations/nandan_e.pdf (accessed 20 November 2007).

Naviti, William, “National Tuna Fishery Report for Vanuatu”, working paper NFR 22, 13th Standing Committee on Tuna and Billfish, New Caledonia, 5-12 July, 2000. www.spc.org.nc/OceanFish/Html/SCTB/SCTB13/nfr22.pdf (accessed 17 November 2007).

Orrego Vicuna, *The Changing International Law of the Seas Fisheries*. Cambridge, UK, New York: Cambridge University Press, 1999.

_____, “The International Law of High Seas Fisheries: from Freedom of Fishing to Sustainable Use” in Schram Stokke, Olav (ed.) *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes*, 23-52. United Kingdom: Oxford University Press, 2001.

Oude Elferink, Alex G., “The Genuine Link Concept: Time for a Post Mortem?” in Dekker, Ige and Harry H.G. Post (eds.) *On the Foundations and Sources of International Law*. United Kingdom: Cambridge University Press, 2003, 41-64.

PricewaterhouseCoopers, “Sustainability Impact Assessment (SIA) of the EU-ACP Economic Partnership Agreements-key findings, recommendations and lessons learned”. Paris: PricewaterhouseCoopers, 2005. http://www.sia-gcc.org/acp/download/pwc_sia_acp20July2005 (accessed 14 November 2007).

Ram-Bidesi, Vina, “Sustainable Use of Marine Resources: Lessons From the Pacific Islands”, presented at Oceans: Interaction Between Man and Maritime Environments, UNU Global Seminar, 5th Shimane Session, 2-5 August 2004.

<http://www.unu.edu/hq/Japanese/gs-j/gs2004j/shimane5Bidesi-e.pdf> (accessed 20 November 2007).

Rigg, Kelly, Remi Parmentier and Duncan Currie, “Enforcing International Fisheries Agreements”, OceanDocs, December, 2003.

<http://hdl.handle.net/1834/350> (accessed 14 November 2007).

Republic of Vanuatu, “Tuna Management Plan: A National Policy for the Management of Tuna Fisheries”, Vanuatu: C-SPOD, 2000.

Swan, Judith, “Fishing Vessels Operating Under Open Registers and the Exercise of Flag State Responsibilities- Information and Options: FAO Fisheries Circular No. 980. Rome: FAO, 2002. <ftp://ftp.fao.org/docrep/fao/005/y3824e/y3824e00.pdf> (accessed 14 November 2007).

_____, “International Systems for Monitoring and Verifying Fisheries Agreements” in Trevor Findlay (ed.) *Verification Yearbook 2004*. London: VERTIC, 2004. www.vertic.org

Tahindro, Andre, “Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks” (1977), 28 *Ocean Development and International Law* 1.

Takase, Miwako; “Problems of Illegal, Unreported and Unregulated Fishing and Overcapacity of Tuna Fishing Vessels” in Proceedings of the Second Meeting of the Technical Advisory Committee of the FAO Project Management of Tuna Fishing capacity: Conservation and Socioeconomics, 15-18 March 2004, Madrid, Spain. Rome:

FAO, 2005. <http://www.fao.org/docrep/008/y5984e/y5984e00.HTM> (accessed 14 November 2007).

Tsaminyi, Martin, Lara Manarangi-Trott and Shilpa Rajkumar, “The International Legal Regime for Fisheries Management”, UNEP Workshop on Fisheries and Sustainable Fisheries Management, Geneva, 26-27 April 2004. Geneva: UNEP, 2004.
<http://www.unep.ch/etu/Fisheries%20Meeting/submittedPapers/MartinTsaminyiLaraManarangiTrottShilpaRajkumar.pdf> (accessed 14 November 2007).

Vanuatu Fisheries Department, “National Tuna Fishery Report”, WCPFC Scientific committee, 3rd Regular Session, 13-24 August 2007, Honolulu, USA.
[Http://www.wcpfc.int/sc3/pdf/Annual%20Report%20WP-32%20Vanuatu%20\(rev.1\).pdf](http://www.wcpfc.int/sc3/pdf/Annual%20Report%20WP-32%20Vanuatu%20(rev.1).pdf) (accessed 20 November 2007).

Veitayaki, Joel, “A Changing Sea: New and Emerging Institutional Directions for the EEZ” in Ebbin, Syma, Alf Hakon Hoel and Are K. Sydes (eds.), *The Exclusive Economic Zone and Governance Institutions for Living Marine Resources*, 150-165. The Netherlands: Springer Netherlands, 2005.
<http://www.Springerlink.com/content/k0408290um86x164/> (accessed 20 November 2007).

Vukas, Budislav, and Davor Vidas, “Flags of Convenience and high Seas Fishing: The Emergence of a Legal Framework”, in Schram Stokke, Olav (ed.), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes*. New York: Oxford University Press, 2001, 53-90.

Treaties and Conventions

Agreement for the Establishment of the Indian Ocean Tuna Commission, adopted in Rome, Italy, 25 November 1993. In force 27 March. 1927 UNTS 330; [1995] OJL 236/25.

Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted New York, 4 December 1995. In force 11 December 2001. 21 UNTS 88; (1995) 34 ILM 1542; [2001] ATS 8.

Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted Rome, Italy 24 November 1993. In force 24 April 2003. 1860 UNTS 148; (1994) 33 ILM 968.

Code of Conduct for Responsible Fisheries adopted Rome, Italy, 31 October 1995. FAO Doc. 95/20/Rev. 1 (1995); reproduced in (1995) 11 International Organizations and the Law of the Sea Documentary Yearbook 700-34.

Convention for the Establishment of an Inter-American Tropical Tuna Commission adopted Washington, DC, USA, 31 May 1949. In force 3 March 1950. 80 UNTS 4; www.iattc.org.

Convention for the Strengthening of the Inter-American Tropical Tuna Commission, adopted Antigua, Antigua, 23 July 2003. Not in force. <http://www.intfish.net/treaties/antigua.htm> (accessed 20 November 2007).

Convention on the Conservation of Antarctic Marine Living Resources, adopted Canberra, Australia, 20 May 1980. In force 7 April 1982. 1329 UNTS 47.

Convention on Fishing and Conservation of the Living resources of the High Seas, adopted Geneva, Switzerland, 29 April 1958. In force 20 March 1966. 559 UNTS 285, TIAS 5969.

International Convention for the Conservation of Atlantic Tunas, adopted Rio de Janeiro, Brazil, 14 May 1966. In force 21 March 1969. (1969) UNTS 9587; www.iccat.es.

International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted Rome, Italy, March, 2001 (24th Session COFI) www.fao.org/fi/ipa/ipae.asp (accessed 13 November 2007).

Nauru Agreement Concerning Co-operation in the Management of Fisheries of Common Interest adopted Nauru, Nauru, 11 February 1982. In force 4 December 1982. www.ffa.int/

Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, adopted Honiara, Solomon Islands, Solomon Islands, 9 July 1992. In force 20 May 1993. 1993 ATS 31; 32 ILM 136.

South Pacific Forum Fisheries Agency Convention, adopted Honiara, Solomon Islands 10 July 1979. In force 9 August 1979. 1579 UNTS 307; 1979 ATS 16; 1979 NZTS 6.

Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America, adopted Port Moresby, Papua New Guinea, 2 April 1987. In force 15 June 1988. 1988 ATS 42; NZTS 1988 no. 32; [1987] PITSE 2.

United Nations Convention on the Law of the Sea, adopted Montego Bay, 10 December 1982. In force 16 November 1994. (1982) ILM 1245; www.un.org/Depts/los.

Vanuatu Legislation

Fisheries Act [Cap 158], repealed 2006.

Fisheries (Amendment) Act, (No. 2 of 1989), repealed 2006.

Fisheries Act (No. 55 of 2005).

Maritime Act [Cap 131].

Maritime Zones Act [Cap 138].

Vanuatu Maritime Authority Act (No. 29 of 1998).

Cases Cited

Bering Sea Fur Seals Arbitration (1893), I International Arbitration Awards 755.
(Moore)

The Camouco, (Panama v. France), 2000 ITLOS Case No. 5.