

**REGIONAL FISHERIES POLICY IN THE PACIFIC;**  
**A case study on the Treaty between Certain Pacific Islands States and the**  
**United States on Fisheries**

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## ABSTRACT

The delimitation of EEZ under coastal states sovereignty as subscribed by UNCLOS was crucial for the Pacific region. For the Pacific Islands states narrow-based land resources, inherently meant greater dependence on the oceanic resources. As such ocean governance regime established by UNCLOS, giving coastal states rights to control and regulate fishing operations for their economic development and food security was widely received by the Region.

For Pacific states, engaging with DWFNS presents a mix of promises and challenges. However, the promises of economic prosperity are often outweighed by challenges encompassing unmet fisheries management and conservation objectives, at national and regional level, and real value-for-money for the fisheries resources being removed through access agreements.

Although US had maintained strong political links and influence within the region, it was one of most problematic DWFN in early stages of tuna fisheries industry in the region. Conflicting fisheries policies, industry protection interests and non-recognition of UNCLOS were factors responsible. A deal-breaker treaty was signed in 1987 between the US and 16 Pacific Islands states. USM treaty, is comprehensive and remarkable, in that it gives one particular state access rights to enormous jurisdictional waters in all the states in Pacific region.

The Treaty is important to US and Pacific Islands States broadly on two levels (1) political and (2) economic. From a political perspective (a) it is testament of US-Pacific Islands firm relations and (b) Cooperation between Pacific Islands states harmonious agreement to the Treaty. The economic denotes financial benefits from treaty - economic financial package which Pacific Islands countries receive in exchange from access fees, and for the US returns on fisheries resources.

From another perspective, the Treaty also presents an opportunity for Pacific Islands states to make assessments on different fisheries access agreement (multilateral or bilateral) and scope in specific development objectives.

From the viewpoint of the study, the dynamics of the Treaty and associated processes encapsulates the complexities and linkages between, national interests, sustainable development and regional policy. In this regards, regional fisheries issues are not isolated; but all aspects of regionalism are important considerations to understanding how a comprehensive multilateral agreement as this would pan out in the future.

In analyzing this agreement, the study also briefly looks at the challenges that exist within multilateral arrangements in comparison to bilateral arrangements. An aspect that will prove to test multilateral framework is national interest. The solidarity between Pacific Islands Parties, and the strong advocator of Pacific Islands interests the PNA Group, has marked a milestone in seeking out to attain maximized benefits from fisheries access agreements operations in the region. But there also exist a weak common ground, recognized in economic development challenges. The unequal economic development status of pacific Islands states, reinforced by diverse economic dependence on fisheries revenue will become a critical factor in sustaining multilateral arrangements as the USMT.

## ACRONYMS

ATA	American Tuna boat Association
DWFN	Distant Water Fishing Nations
EEZ	Exclusive Economic Zone
FAD	Fishing Aggregating Devices
FAO	Food and Agricultural Organization
FFA	Forum Fisheries Agency
PIPS	Pacific Islands Party States
MFMCA	Magnusson Fisheries Management and Conservation Act
NOAA	National Oceanic and Atmospheric Administration
PAE	Party Allowable Effort
PIFS	Pacific Islands Forum Secretariat
PNA	Parties to the Nauru Agreement
RFMO	Regional Fisheries Management Organizations
SPC	Secretariat of the Pacific Community
SPREP	Secretariat of the Pacific Regional Economic Programme
TAE	Total Allowable Effort
UNCLOS	United Nations Convention of Law of the Sea
USMT	United States Multilateral Treaty
VDS	Vessel Day Scheme
WCPFC	Western Central Pacific Fisheries Commission
WCPO	Western Central Pacific Ocean

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## INTRODUCTION

With growing interest by distant water fishing nation's interests in fishing opportunities looming, Pacific Islands States face the challenge of balancing the need for economic return and ensuring the sustainability of fish stocks.

The US is among the most active DWFNs in the region. A land-mark multilateral Treaty on Fisheries between Certain Pacific Islands States and the US concluded in 1988 permits U.S Fishing fleet<sup>1</sup> to fish in EEZ<sup>2</sup> of the contracted 16 Parties<sup>3</sup>. The treaty was important for both parties primarily because it promised to deliver economic prosperity for Pacific Islands states, and to maintain US fishing industry stay afloat.

As the treaty draws to the end of its second implementation stage, this has presented an ideal opportunity for Pacific Islands states and US to renegotiate terms and conditions to continue cooperation under the arrangement. Furthermore, the discussions on this multilateral fishing access arrangement has also prompted further discussions and perspectives on how best coastal states can engage with DWFN, either through a bilateral or multilateral arrangement, with the objective to maximize the economic value of the tuna resources being exploited.

Fisheries access agreements This paper seeks to highlight some of the complexities that exist in fishing access agreements, in particular multilateral agreements. It will also provide an analysis on the critical role of regional fisheries dynamics, and its influence on fishing access agreements (with specific focus on the USMT and its key issues of

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<sup>1</sup> In 2008, their catch was approximately four million tonnes, which represents about 67% of the total catch of all tuna and tuna-like species. Most catches of the principal market tuna species are taken from the Pacific (70.2% of the total catch of principal market tuna species in 2008), with the Indian contributing much more (20.4% in 2008) than the Atlantic and the Mediterranean Sea (9.5% in 2008), FAO, Global Tuna Catches

<sup>2</sup> Economic Exclusive Zone; The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention. (200 nautical miles (370 kilometers; 230 miles) from the coastal baseline. UNCLOS Article. 55

<sup>3</sup> The 16 Pacific islands States are: Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu, Forum Fisheries Agency



Distribution of islands in the region is characterized by three main ethnic groupings – Melanesian group in the west, Micronesians in central region and the Polynesians in the east.

The Pacific Islands made up of 14 independent states and 8 territories, and is host to the one of the remaining productive fishing grounds in the world. “The small island countries support 5.25 million residents (67% in Papua New Guinea), who rely heavily on living marine resources as a source of food (The average consumption of fish is about 50 kg per person per year, but reaches 250 kg in some atolls) and foreign currencies from license fees as well as exports”<sup>6</sup>.

### ***1.2 Pacific Islands fisheries***

The region fisheries resource is divided into two broad areas;

**Oceanic resources** include tunas, billfish and allied species. They are characterized by an open-water pelagic habitat, potentially extensive individual movements, and wide larval dispersal. These resources form the basis of the region’s industrial fisheries. Although oceanic in habit, some of the important species in this category are also found and harvested in coastal waters, where in some cases they are thought to form essentially resident populations.<sup>7</sup>

**Coastal resources** include a wide range of finfish and invertebrates. They are characterized by their shallow water habitats or demersal life-styles, restriction of individual movements to coastal areas, and in most cases, more restricted larval dispersal. Because of their relative accessibility, these resources form the basis of most of the region’s small-scale fisheries.<sup>8</sup>

The two categories of fisheries resources are important both to food security and economic development of the Pacific Islands. Oceanic resources include highly valued species such as the *Thunninis* (tuna), which is most sought after by industrial fishing

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<sup>6</sup> Marashi, S.H, FAO, Summary information on the role of international fisheries and other bodies with regard to the conservation and management of living resources in the high-seas

<sup>7</sup> Gillet, R, Fisheries of the Pacific Islands, Regional and national information, 2011, FAO pg 6

<sup>8</sup> Ibid pg6

nation – thus its significance to the economy and global market has prompted international and regional attention toward effective management and conservation efforts. The coastal resources covers are broader range for marine resources (including crustaceans, sea shells, seaweed) that support food security across the region.

### ***1.3 Categories of fishing in the region:***

The Pacific Islands is among the most active fishing regions in the world. A report by FAO calculated the Marine fisheries production in the region amounts to 1,391,323 metric tons from all recorded fishing activities undertaken in 2007<sup>9</sup>.

Fishing in the region is categorized as (a) Offshore fisheries and (b) Coastal Fisheries. The two fisheries are distinguished by the area (zone) of fishing, and translates also to the species fished. Coastal fishing describes fishing activity carried out in waters close to the shore or inshore (inland), while Offshore fishing is usually carried in deep-sea and highly mobile depending on the schooling of fish species.

Offshore fishing in the region can be further sub-divided into two categories:

- *Locally-based offshore fishing:*

Locally-based offshore fishing characterizes industrialize fishing undertaken by domestic fishing operators. Most of the locally-based offshore fishing is carried using the long-line, purse seine and pole-and-line gear. According to a survey carried out in 2008 and captured in FAO Report on Fisheries in the Pacific Islands records that about 1 169 people from the Pacific Islands are employed on these tuna vessels<sup>10</sup>.

- *Foreign-based offshore fishing:*

While foreign off-shore based fishing operate on the prerogative of coastal states, they have out-numbered coastal local fleets; and this margin has been continuously risen over the past years. At present foreign based off-shore vessels have dominated fishing

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<sup>9</sup> Gillet, R, Marine Fishery resources of the Pacific Islands, 2010, , FAO

<sup>10</sup> Gilliet, R, Fisheries of Pacific Islands; Regional and National Information, 2011, pg 4 FAO

activity in the region. The FAO Report also, indicated 1,200 foreign-based vessels operate in the waters of Pacific Island countries. Most of these vessels originate from East Asia, Japan, Korea and US. Similar to domestic fishing, most of the fishing activities are carried by purse seiners, long-lining and pole-and-line vessels.

Often the foreign off-based fishing vessels have advanced technology, faster speed, greater capacity, so their ability to capture fish at much larger volumes is much than locally based fleets. Furthermore, access fees and license fees paid by foreign offshore-based vessels fishing in the region are an important source of revenue for Pacific Islands' states.

Coastal Fishery is of fundamental importance in the Pacific Islands. It supports Pacific Islands livelihoods – provides economic opportunities, provides employment and important source protein and recently regarded and opportunity for future development (aquaculture) It is categorized in three categories as, subsistence, artisanal or small-scale and industrial (aquaculture – shrimp farming in PNG. While Coastal fisheries have positive impacts on national developments, it is Off-shore fisheries that hold huge economic gains and interest for Pacific Islands states.

#### ***1.4 'Fish and People' - Importance of the ocean to Pacific people***

The Oceania sub-region contains 8.5 million km<sup>2</sup> of land, but its exclusive economic zones (EEZs) cover an estimated ocean area of 41.7 million km<sup>2</sup>, equivalent to about 40 percent of the world EEZ area.<sup>11</sup>

The importance of the ocean and fishing activities for the Pacific Islands cannot be separated nor can it be understated. Firstly, Pacific people value the ocean because of its traditional importance. Various coastal communities in the region continue to maintain traditional practice and beliefs revering gods represented by ocean creatures, such as sharks, dolphins and sea water crocodiles. Secondly, traditionally the ocean was once a

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<sup>11</sup> Weber, P., 1994. Net Loss: Fish, Jobs and the Marine Environment. Worldwatch paper 120, Worldwatch Institute, Washington D.C., USA.

vast space for navigation by the traditional seafaring communities of Polynesia. This affinity that Pacific people tag the ocean with their cultural heritage is important to these islands states. Thirdly, “fisheries play an important role in many aspects of food security in the Pacific Islands area. The high consumption of fish (on some islands as high as 250 kg per year) attest to the importance of fish as a source of animal protein.”<sup>12</sup> Fourthly, fisheries resources provide important economic income for individual families at subsistence and artisanal level, and national revenue from access fishing operations and trade of fisheries products. Furthermore, fishing activities provide opportunities for employment for Pacific islanders. For example, in a survey carried in 2008 on locally-based offshore fishing, Gillet recorded that 1, 169 local people worked on these local fleets. Artisanal or small-scale commercial fishing, also provide self-employment for small scale fishing efforts. While the income values between the categories may differ between the categories of fishing – however, they all contribute towards improving the socio-economic status of states.

## *2. Brief history of distant-water fishing activities in the Pacific region*

According to Gillet<sup>13</sup>, fishing activities<sup>14</sup> by distant water fishing nations (DWFNS) occurred in the Pacific region at “small-scale” before 1900’s but gained momentum in after the World War I. The Japanese were the early players in the Pacific and dominated industrial fishing in the region – after establishing control over Western Central Pacific Islands from Germany in 1914, Japan’s fishing activity expanded and by 1930’s “Japan’s tuna fishing was well developed...with 45 pole-line vessels based in Palau<sup>15</sup>, 52 in Federated States of Micronesia<sup>16</sup> and 19 in the Northern Mariana Islands<sup>17</sup>”. In addition

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<sup>12</sup> Gillet, Preston and Associates Inc, The Sustainable contribution of Fisheries to food security in the Ocean, FAO

<sup>13</sup> Gillet, R, *Short history of Industrial Tuna Fishing in Pacific*

<sup>14</sup> Described as per method of fishing and gear used in; Long-line fleets, pole-and-line fleets, purse seine fleets

<sup>15</sup> This region become under US control after the 2<sup>nd</sup> WWII and US has special relations with countries of Western Central Pacific – this will be reflected in their widespread and momentous establishment of fisheries development infrastructures in these areas.

<sup>16</sup> *ibid*

<sup>17</sup> *ibid*

60 to 100 long-line fleets were operated by Japan, within the region, and by 1937, Gillet stated that tuna catches in Micronesia reached 330, 000 tons.

After World War II, distant water fisheries in the region grew exponentially. Firstly, with industrial revolution, distant water fishing states technical capacities improved and consequently their ability to yield greater outcomes from fishing. As a result, fishing grounds (Northern Europe, North Atlantic) closely situated near these industrial countries fell under pressure from over exploitation and fishing stocks began to decline – prompting states to venture to areas that were under-exploited. Secondly, America WWII success in overcoming Japan gave the region a new dominant power, and the large regions formerly under Japanese control became subject to America’s external territorial reign<sup>18</sup>.

By mid-1960’s, new distant water fishing interests spawned in the Pacific, and there new comers into the South Pacific such as, Republic of Korea, Taiwan and China began fishing ventures in the region.

The 1970’s and 1980’s were an interesting time for Pacific Islands on three accounts, firstly, many of the states were emerging out of colonization to becoming independent states. Secondly, global fisheries governance was momentarily progressing towards its pinnacle – the establishment of the Law of the Sea Convention. Thirdly, development of regional initiatives in fisheries governance and management;

- a) The transitioning of states to self-governing<sup>19</sup> status had significant impact on regional fisheries and regional fisheries management and conservation (which will be discussed in Part Two). It provided Pacific Islands’ states a new sense of absolute autonomy<sup>20</sup> over resources and decisions regarding sustainable

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<sup>18</sup> America exerted its power over the Northern West Pacific region, claiming rights over these islands. Since WWII the maritime corridor between north western central Pacific towards the east is an important (America’s dominance in Pacific post-WWII)

<sup>19</sup> Majority of the Pacific Islands states obtained independence from colonial powers – UK, US, NZ, Australia and France in 1970’s and early 1980’s.

<sup>20</sup> Exceptions of those in Free Association or Compact Agreement with former colonial powers

development of resources. Thus, gave a greater sense of ownership by Governments and people.

However, on the other hand, these newly established Governments had the onerous tasks of delivering to public and economic expectations the full potential should be derived from a key resource<sup>21</sup> – such as fisheries. In addition, state obligations and commitments to international and regional conventions such, LOSC, Convention of Highly Migratory Species etc., to maintain these resources

b) Secondly, the conclusion of the Law of the Sea Convention in 1982 in particular provisions of Article 61 delivered to the advantage of the newly developed Pacific Islands states (then) - with a larger extent of ocean water under their control. In fact, the LOSC according Doulman consolidated the 200nm claims that Pacific Islands had declared, since late 1970's. As this is so, mid-1980's, states and the region as whole observed major shifts<sup>22</sup> in ocean governance - fisheries operations and fisheries management.

c) Another factor is attributed to the developing regional approach to fisheries issues and governance. Forum Leaders decision 1979<sup>23</sup> to establish the South Pacific Fisheries Agency was a key point in regional fisheries in the Pacific. "Members of the South Pacific Forum recognized that their individual capacity to respond to these changes was limited and so decided to pool their resources to promote intra-regional co-ordination and co-operation through harmonization of fisheries management policies, and co-operation in the areas of fisheries development, access and enforcement".<sup>24</sup> Since then, there has been numerous

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<sup>21</sup>Dependence on Fisheries resources is a common feat around the region, however, low-lying coastal have higher reliance on Fisheries by comparison to larger coastal states

<sup>22</sup> National level: The need for the development of national fisheries policies, domestic legislation purporting sovereignty over claimed EEZ. At the Regional level; regional management approaches for the management of tuna marine resources (highly migratory species) - which led to the establishment of South Pacific Forum Agency.

<sup>23</sup>South Pacific Forum Communique, 9-11 July, 1979

<sup>24</sup>FFA Strategic Plan 2005 - 2020

advancements in both fisheries management and development at national and regional levels. In context to fisheries access, a major headway was the agreed 'Minimum Terms and Conditions' for foreign vessel access and the establishment of the Regional Register of Foreign Vessels.

By 1985 the FFA Regional Register of Foreign Fishing Vessels recorded 1, 456 vessels (long-line, purse seine and pole-and-line) in Pacific Islands waters. Majority were Japanese fleets operating under various bilateral agreements with Solomon Islands, Australia and New Zealand, PNG, FSM, Kiribati and Nauru. U.S had the second largest fleets; and concentrated on fishing grounds around the Western Central Pacific, in Palau and FSM (mainly) and Western Samoa, Tuvalu.

## **1.2. SIGNIFICANCE OF US FISHING IN THE REGION**

U.S fishing operations in the Pacific Islands region has always been predominately purse seiner tuna fishery. Catches target was tuna; skip jack (*Katuwonus pelamis*) and Yellow fin (*Thunnas albacares*), albacore (*Thunnus alalunga*) and Southern Bluefin tuna (*Thunnus maccoyii*)

Literature on US fishing activities (of industrial scale) in the region recorded being active in the 1950's after the Second World War. Many commentators expressed linkages between US tuna fisheries and war, and how the war consolidated to promote America's tuna operations<sup>25</sup> in the early years of US fishing ventures in the Pacific. Gillet and fellow co-authors in the article *Status of the United States Western Pacific Tuna Purse Seine Fleet and Factors Affecting its Future*" stated that;

"The war in the Pacific was instrumental in creating awareness in Americans of the size and fishery potential of the western pacific region....More significantly the WWII

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<sup>25</sup> "During World War II the USA government commandeered 49 California-based tuna pole-and-line vessels for service in the Pacific. Over 600 tuna fishermen served on these vessels. This activity was apparently quite instrumental in creating awareness in American tuna fishermen of the size and fishery potential of the western Pacific region..."*Short History of Industrial Fishing in the Pacific Islands, Gillet. R.pg. 4*

brought in U.S tuna vessels as naval support craft and exposed American tuna fishermen and fishery scientists to the possibilities of the surrounding waters”<sup>26</sup>

With the realization of the potential of fisheries in region, coupled by accessibility and adequately capable fishing vessels, U.S fishing operations expanded throughout the Pacific, and by mid-1950’s American tuna companies established cannery operations in Pago Pago - Van Camp Tuna<sup>27</sup> and StarKist<sup>28</sup>.

Although there is a degree of ambiguity on the precise demarcation of jurisdictional areas<sup>29</sup> fishing was being undertaken U.S, pre-WWII and early post-WWII, by 1970’s and 1980’s this was no longer the case. Pacific Islands states unilaterally declared sovereignty over 12nm territorial waters and later 200nm of adjacent waters, the customary practice applied throughout the region and internationally<sup>30</sup> (prior to UNCLOS)

As a result of the extended claims made by Pacific Islands States, distant-water fishing nations entered in various fishing access bilateral agreements with certain Pacific Islands countries, the U.S included.

### *US Fisheries Access Agreements in the South Pacific prior to 1987*

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<sup>27</sup> Van Camp, is an American Seafood Company that has produced seafood products (including tuna) in 1903. The Company has produced canned tuna fished from waters of Eastern and Western Pacific, and is a biggest competitor to another big name in canned tuna industry Star-kist. <http://www.encyclopedia.com/doc/1G2-2841100177.html>

<sup>28</sup> Starkist, is another an American tuna cannery company. It established a tuna cannery in American Samoa 1985 – and is one of two tuna canneries majority of the US fishing vessels (1980s) in the region were supplying fish

<sup>29</sup> Referring to fishing areas demarcated or limited to the rights of a respective state.

<sup>30</sup> More countries were preparing towards self-governance, and greater administrative powers shifted to countries – thus the ability to make choices. Secondly, there was greater appreciation and value placed on fisheries resources and its sustainability – pacific people perspectives for future

A contributing factor to US's fisheries interactions with the Pacific Islands is the shifts in US Policy towards the region. US interest in the South Pacific centers on various important factors. In literatures on conventional history of US' prevailing prominence post-WWII in the region associates US from a political viewpoint as administrating power of the Western Central Pacific<sup>31</sup>. US have also established a strong security alliance with Australia and New Zealand, as well military base in Guam and Hawaii. US economic interest in the region was Tuna<sup>32</sup>. A Statement presented by Mr. *William Bodde, Director, Office of the Pacific Islands Affairs of the Department of States*, sums up this relations as follows:

“In the first two decades after the war (WWII). US policy in the South Pacific was confined to the SPC, ANZUS, the Trust Territory of the Pacific Islands (US became the administrating power by agreement with the United Nations in 1947) and the US Pacific Territories - Guam and American Samoa. However, the emergence of independent South Pacific Nations, a desire on the part of the US territories to play a greater role in their own destination, political pressure in Micronesia for a new political status and proliferation of 200 miles fisheries zones all called for changes in U.S Policy towards the South Pacific”<sup>33</sup>

Clearly, US policy towards the South Pacific was in tandem with US fisheries interests. While the US Government expressed its interest in fisheries in the region in broad agreements (e.g Treaty of Friendship between Tuvalu and Kiribati), it was the US Tuna industry through the American Tunaboad Association that pursued majority of the fisheries access agreement with Pacific Islands states before the Multilateral Treaty. Two examples of these broad agreements were:

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<sup>31</sup> After the WWII UN declared US to have administrative powers of certain countries in the Northern and Western, Central Pacific. It maintains administrative powers over North Marianas, American Samoa and Guam, and established Free-Association with self-governing (former US Territories) of Palau, Marshall Islands and Federated States of Micronesia

<sup>32</sup> Herr, R.A, 1990, *United States Interests in the South Pacific in the 1990's*: “ *Economics- Although never a dominant theme in US relations south of the equator...US economic interests in the region have been expressed in terms of tuna.*

<sup>33</sup> See Statement by William Bodde, Director of Pacific Islands Affairs, United States Policy on South Pacific, Department of State, pg 48

### *1. Treaty of Friendship with between Tuvalu and US*

The provisions for US access to Tuvalu's claimed waters was initially espoused in the Treaty of Friendship between Tuvalu and US (1979) as one of the areas for cooperation between the two states. The primary intention of the Agreement was a legal affirmation by US' relinquishing four islets<sup>34</sup> (under US administration), to the newly independent Government and broad promises for economic development thorough bilateral cooperation. Some commentators like; bargain exchange, US sought from the Tuvalu Government cooperation in fisheries, indirectly implying US access to fishing grounds, and development assistance in the domestic industries or some sort of economic assistance as compensation.

Interestingly the provisions for fisheries cooperation under this Treaty conveniently included committing Tuvalu to long-term US access into its waters. In view of the circumstances and political bargaining at the time, it could be suggested that provisions for fisheries cooperation under this Treaty was a political propaganda in the interest of U.S fisheries industry in anticipation that coastal states, like Tuvalu would react positively to International measures imposed by LOSC, and therefore pre-conditioning the provisions of the Friendship Treaty would strengthen U.S position and eliminate doubts on the part of Tuvalu (regarding its stance/commitment on the Treaty) that may emanate from a prospective successful

### *2. Treaty of Friendship between US and Kiribati*

The US adopted a similar Treaty of Friendship with Kiribati. Again the Agreement it was primarily an affirmation of US' relinquishing the Line and Phoenix Islands of in the Kiribati Islands group. The provisions for fisheries cooperation between US and Kiribati is entailed in Article 4 of the Treaty - committing both Governments for "close cooperation for their mutual benefit in economic development relating to fisheries off

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<sup>34</sup> Tuvalu was colonized by UK, and gained independence in 1978, however, the extended islands that were once part of greater Tuvalu were controlled by US

their coasts” Furthermore, both countries agreed also to “encourage and facilitate cooperative arrangements and fishing ventures of mutual interest and benefit”<sup>35</sup>. Perhaps it in the intention of the US Government to ensure that this Article would be a prelude to the multilateral fisheries access agreement that the Government of Kiribati later signed with American Tunaboat Association and Federated States of Micronesia, Palau and Kiribati, 1983 (2 years duration agreement)

These agreements were between U.S industry, American Tuna Association<sup>36</sup> and Pacific Islands States. They are as follows:

### *3. Agreement between ATA and Micronesian States*

According to Doulman<sup>37</sup>, the agreement between ATA and FSM and Palau, signed in 1980 was the first fisheries multilateral agreement by US industry and Pacific Islands. The agreement provided for US Fleets to fish in 200nm claimed by the FSM and Palau. In the third year of agreement, other Pacific Islands States become interested to join the multilateral agreement with ATA. Doulbman highlighted that PNG and Marshall Islands participated in preliminary negotiations but later opted not to sign. The reasons were, “Marshall Islands - did not accept the fee levels proposed by the ATA, and Papua New Guinea could not reach agreement with the participating Pacific Islands on how the revenue obtained under the agreement would be shared”<sup>38</sup>.

Interestingly the position<sup>39</sup> of ATA and action taken by Marshall Islands and PNG in a way has foreshadowed the same realities and dissatisfaction resonating Pacific Islands Parties views in the ongoing negotiations, that the US is simply not paying enough to corresponding catch value.

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<sup>35</sup> Treaty of Friendship between US and Kiribati, Article 4, [www.pacii.org](http://www.pacii.org)

<sup>36</sup> The American Tuna boat Association (ATA) was formed in 1923 as a non-profit fishery cooperative association to assist boat owners and their crews. The ATA has been instrumental in promoting U.S fisheries industry Eastern Pacific, prior to Western, Central Pacific. See also; Wade, S.O, *A proposal to include Tuna in U.S fisheries jurisdiction*, Ocean Development & International Law

<sup>37</sup> Fishing for tuna: The operation of the DWFN in the South Pacific, David Doulbman

<sup>38</sup> Doulman. D, *Fishing for Tuna: The operation of Distant-water fleets in the Pacific Region*, Pacific Islands Development Program, East-West Centre.

<sup>39</sup> Provided justification to why they cannot pay value as the Japanese fleets, and this was due to the decrease in us tuna fisheries markets

Kiribati eventually signed to the multilateral treaty with Marshall Islands and Palau in 1983.

#### *4. ATA and Polynesian States*

The 'Polynesian Agreement' was another multilateral agreement between American Tunaboat Association and respective Polynesian countries of; Cook Islands, New Zealand, Niue, Tuvalu and Samoa (formerly Western Samoa)

From the various agreements established between Pacific Islands States and U.S fishing fleets, suggests deep interactions between the two parties had existed between the two parties before the Treaty.

An aspect worth capturing at this point is elements of inconsistencies between US fisheries industry and US Fisheries Policy and Agreements being entered into by US Industry. An analysis by Wade<sup>40</sup> suggests that ATA agreements with Pacific Islands' states often did not reflect US policy on tuna. A casing point is the ATA agreement with Micronesian Maritime Authority. Wade state<sup>41</sup>s;

"In the Agreement, the ATA acknowledged the exclusive fishery management authority of the Federated States of Micronesia according to Title 52 of the Trust Territory Code, as amended; the Government of Palau, P.L 6-7-14, as amended; and the Government of the Marshalls, Chap. 8, Marshall Islands Code.

There is a common basis for jurisdiction in these laws including a twelve-mile exclusive fishery zone over which the coastal state has sovereign rights, and a two-hundred mile

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<sup>40</sup> Wade, O.S, (1986) *A proposal to Include Tunas in U.S Fishery Jurisdiction, Ocean Development and International Law*, 16:3, 255-304

<sup>41</sup> Other examples are provided on inconsistencies between US fisheries policy and US Fisheries are presented, from US fishing endeavors in Eastern Pacific as well as Western Pacific in the same article.

extended fishery zone over which the coastal state has exclusive management authority over all living resources. However, in the Agreement, there was no exception for highly migratory species and no separate provision for their management.”<sup>42</sup>

In this regard, Wade suggested, clearly the US industry perceived that these short-term agreements with these Pacific Islands states, were not high enough stakes to apply the MFCMA - especially against the backdrop of the fisheries management status quo of the region at that point.

From assessments made on ATA agreements in response to the U.S fisheries policy, it is clear that (a)US Industry did not act consistent to US fisheries policies (b) the US industry uses the U.S provisions of Fisheries Conservation and Management Act as counter-measure when jurisdictional conflicts arise - it does so to protect its own interest.

The question raised amidst the competing interests between the Industry and Fisheries policy and taking into consideration US’ response to Pacific Islands terms and conditions – should agreements revert to US Industry-Government arrangement.

Interestingly, Fig. 2, shows that since 1980, only Federated States of Micronesia and Palau have maintained consistency in its agreement the ATA group.

**Fig 3: American Tunabout Association Agreements with Pacific Islands Countries**

Country	1980	1981	1982	1983	1984
South Pacific Forum Members					
Cook Islands					
FSM	x	X	x	x	x
Kiribati				x	
Marshall Islands	x	X	x		
Niue					x

<sup>42</sup> Wade, *Ibid*, pg 275

Palau	X	X	X	x	x
Papua New Guinea			x		
Tuvalu				x	x
Western Samoa				x	x

#### ***4. HISTORY OF THE MULILATERAL TREATY BETWEEN CERTAIN PACIFIC ISLANDS STATES AND THE U.S ON FISHERIES***

The 'Multilateral Treaty on Fisheries between U.S and Certain Pacific Islands Countries'<sup>43</sup> is unique and one of the important multilateral commitments the region has ever engaged in<sup>44</sup>. Referred to as a Treaty - this fisheries access Agreement was concluded between the Government of the United States of America and 16 independent states<sup>45</sup> of the Pacific Islands in April, 1987. It provides for U.S fishing vessels (capped)<sup>46</sup> to enter and fish within 200nm Exclusive Economic Zones of all Pacific Islands parties (subject to certain terms and conditions). The Treaty was negotiated coincidentally at a juncture of Pacific history, and evolution in global ocean order. These were considerations that influenced the Treaty process and respective party positions and objectives - which will be in this chapter.

In 1990, the Treaty was further amended; one of the significant changes was aligning the management aspects of Tuna Management to Western Central Pacific Fisheries

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<sup>43</sup> The Treaty is commonly referred to as the 'South Pacific Tuna Treaty' in some literatures, and in public statements US congressional hearing publications.

<sup>44</sup> The treaty is the only multilateral fisheries access agreement with Pacific Islands states, and is attached to US largest aid assistance to Pacific Islands.

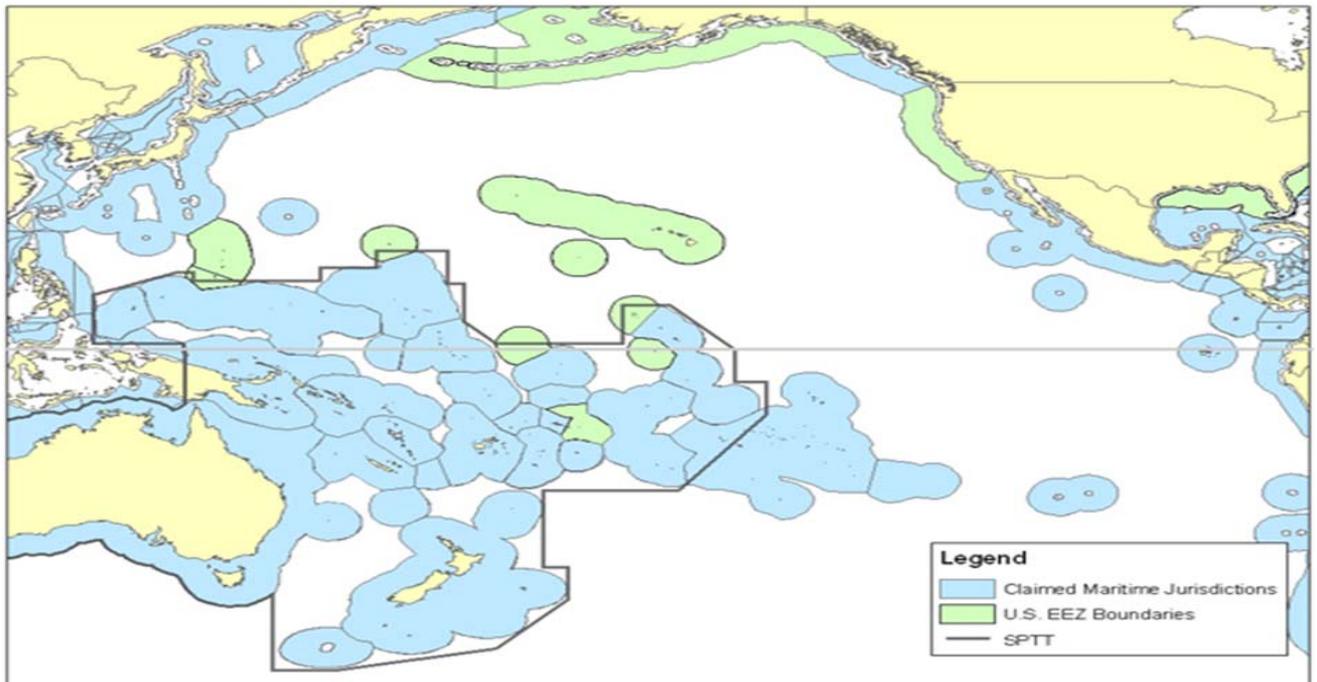
<sup>45</sup> The 16 Pacific islands States are: Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. All 16 states are also members to the Forum Fisheries Agency.

<sup>46</sup> At the time of the initial negotiations the cap on vessels was 35, however, over the years as fishing industry expanded and to 50 vessels cap.

Convention regarding Highly Migratory Species. (This will be discussed in the next chapter)

The current Treaty life will expire in June 2013, and ongoing negotiations are pursued for a new one to replace it. What is clear though is that, circumstances that, led to and shaped both the original and 1990 negotiations differ to the current situation. Furthermore, there are considerations in fisheries politics and regional regimes in the region that has made current approach to negotiations differ from the past two negotiations.

**Fig 1. Map of the Treaty Area**



NOAA Fisheries Service, Pacific Islands Regional - [www.fpir.noaa.gov/IFD/ifd\\_sptt.html](http://www.fpir.noaa.gov/IFD/ifd_sptt.html)

#### ***4.1 Overview of current US Purse Seine Fishery in the WCPO***

This brief overview aims to capture the current of the US Purse Seine Fishery in the WCPO fishing under USMT.

In June this year, the FFA Vessel Registry issued a total of 37 licenses to US purse vessels to fish in the WCPO in the USMT arrangement. The license year in the US Tuna Treaty runs from 15<sup>th</sup> June of one year to 14<sup>th</sup> June of the following year. This year's total license has increased by 1 compared to 2010-2011 vessel count. In the last (2008 - 09 to 2011 - 2012) four license years, total number of registered vessels was within a difference of 1 or 2 less or more of each other. However, the years preceding that period recorded the lowest numbers of US fishing fleet.

With regards to the US fleet catch/landing figures, 2008 - 2011 all recorded total catch over two hundred thousand metric tons. From comparing the data on catch and vessel registration, it appeared that although the average of number of vessels registered in mid 1990's were equal to the numbers to the average total of the past four years, there was huge difference in the catch between two this periods of time. For example, in 1997-98 the total number of US fleets registered was 36, and the total of catch was 174, 624 mt. For the same number US fleets registered in 2010-2011, the total catch recorded in 2010 was 246, 133 mt. The reason for this increase is mostly attributed to increase in vessel capacity and technical capacity of vessels.

According to a study undertaken by School of the Ocean and Earth and Technology (SOEST), University of the Hawaii, identified that there two major interest groups in the US Western Pacific Purse Seine fishery, categorized in two sectors. The industrial sector consists of all the stakeholders engaged in the fishery's commercial aspects; (a) Vessels owners, (b) Tuna processors and (c) Other important supply chain participants

The second sector is comprises of Governments that have direct and vested interest in the continued existence of the fleet; (a) US Government (b) Government of the Territory of Samoa (c) Coastal States of Pacific Islands (PIPS) - whose EEZ's are being fished.

## CHAPTER ONE

### 1. OCEAN GOVERNANCE REGIME DEVELOPMENT - FISHERIES ACCESS AGREEMENTS

#### Overview

The conclusion of United Nations Convention on Law of the Sea (UNCLOS) in 1982 “sought to establish a truly comprehensive regime”<sup>47</sup> order of the ocean. A provision fundamental to UNCLOS is the delimitation of the Exclusive Economic Zone (EEZ) – which establishes coastal states sovereign right for the purpose of exploring, exploiting, conserving and managing the living and non-living resources, over 200nm water adjacent within its limit. Consequently the delimitation of EEZ, meant that waters (and resources) that were commonly accessible, prior to the Convention have become subject to states jurisdictions.

However, Article 58 of UNCLOS provided a compromise between the strong views against EEZ delimitation and those in favor of it; this was further consolidated by provision on utilization of marine resources by other states, in Art. 62.3 and 62.4. Premised on principles as articulated in Article 58 and 62.3 and 64.4 states began to

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<sup>47</sup> Rothwell, R. Donald and Stephens, Tim, 2010, *The International Law of the Sea*

engage in fishing arrangements – whereby a DWFN (or second state) either **pays a fee** or a **reciprocal arrangement** for access to fisheries resources in another coastal state.<sup>48</sup>

The objective of this chapter is to highlight, the nature of Fisheries Access Agreements – in particular the USMT. It aims to highlight the factors which influenced the need for a multilateral treaty (discusses why a multilateral arrangement was established over a bilateral one). Secondly it will look at parties (Pacific Island Parties and United States) objectives, and how anticipate the partnership forges through an agreement will be useful, mutually benefit or maybe even challenge existing relations between state parties. Thirdly, it would provide a brief overview of the negotiation process involved towards concluding the treaty.

## 2.1 Fisheries Access Agreements

Fisheries Access Agreements are legal instruments recognized under international law that facilitate the access for fisheries resources in the jurisdiction of one state by a second state.

The coming into force of UNCLOS in 1982 brought new dimension to ocean governance, and consequently the practice for fisheries access arrangements. Firstly, Article 55 entail provisions exclusive rights to coastal states for 200 nautical miles of adjacent coastal water (Exclusive Economic Zone)<sup>49</sup>. Simultaneously, Article 58 of UNCLOS provide limited rights for states (coastal or land-locked) to access resources from within the EEZ of another state in accordance to international law (Article 58, UNCLOS).

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<sup>48</sup> Mbithi Mwikya, S. (2006) *Fisheries Access Agreements: Trade and Development Issues*, ICTD Natural Resources, International Trade and Sustainable Series Issue Paper No.2, International Centre for Trade Development, Geneva, Switzerland

<sup>49</sup> UNCLOS Article 55 and 56

Global demand<sup>50</sup> for fisheries resources and economic opportunities has driven large fishing nations seeking to fish in waters beyond their own jurisdictions to meet this demand. Often it is the rich tuna fishing grounds of less developed states with minimal capacity to exploit resources that draw interests from the DWFNS.

Majority of fishing efforts undertaken by DWFN's in foreign waters are facilitated either under bilateral or multilateral arrangements. A bilateral arrangement can either be between : (a) State and States or (b) State and Industry

Fisheries access agreements have three interfaces; economic (trade), legal and political. Economics denotes the exchange or trade of access rights for financial compensation or other forms of payment. Furthermore, the economic opportunities derived from fisheries resources. The legal, refers to the obligations and responsibilities of the coastal state and DWFN established in agreement in conformity to international law and international legal norms. The political interface denotes the inter-relations between DWFN and coastal states, and other regional frameworks which regional fisheries cooperation is premised on. For this particular case study, an agreement multilateral in nature, naturally places great importance in the political sphere - political dynamism in at regional, sub-regional and national will have an impact on inter-relations between states.

## **2.2 Changes in Ocean Governance - factors that influenced the Treaty.**

### ***2.2.1 Developments in regional fisheries and LOSC***

“The extension of coastal state jurisdiction, culminating with the wide spread establishment of 200nm EEZ is one of the far-reaching institutional changes in

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<sup>50</sup> Overall, global markets for fish and fishery products are expanding, representing a growing source of foreign currency earnings for many developing countries. In 2008, world exports of fish and fishery products reached a record US\$102 billion, up 9 percent on 2007., FAO, Report, State of the World Fisheries, 2010

international society of the twentieth century”<sup>51</sup>. Majority of Pacific Islands declared claims over EEZ in late 1970’s and 1980’s (See Fig. 3), in pursuant to the South Pacific Forum Leaders decision meeting in 1977<sup>52</sup> which Forum members agreed to establish 200 mile fishing or economic zones.

In declaring the 200nm fishing or economic zones, extension of waters that were previously open as high seas and with unhindered fishing activities became under the exclusive rights of coastal states. Furthermore, it placed significant and primary productive parts of the ocean under coastal states jurisdictions. As for the Pacific Islands States, majority who are low-lying coastal states with limited land-based resources – the delimitation of productive fisheries ground under states jurisdictions provided enormous economic development prospects for their countries. Consequently majority of Pacific Islands like, Samoa (then Western Samoa)<sup>53</sup>, New Zealand<sup>54</sup>, Solomon Islands<sup>55</sup>, Cook Islands<sup>56</sup>, Nauru<sup>57</sup> immediately domesticated legislations over their respective Territorial waters that same year.

**Fig 3: South Pacific Islands Countries and the years’ declared jurisdictional powers of 200nm over adjacent waters**

County	Status of 200nm	Year declared	Zone in (000) km
Cook Islands	Economic	1977	1, 830
FSM	Fishing	1979	2, 978
Fiji	Economic	1981	1, 290
Kiribati	Economic	1983	3, 550
Marshall Islands	Fishing	1979	2, 131

<sup>51</sup>Hoel, A.H & etal, *Ocean Governance and Institutional Change*, A Sea Change: Exclusive Economic Zone and Governance Institutions for Living Marine Resources, pg 3

<sup>52</sup> Eight South Pacific Forum, Forum Communique, Port Moresby, 1977

<sup>53</sup> Territorial Sea Act, 1971

<sup>54</sup> Territorial Sea and Exclusive Economic Zone Act, 1977

<sup>55</sup> Fisheries Act, 1971 and Fisheries Limits Act, 1977

<sup>56</sup> Territorial Sea and Economic Exclusive Zone Act, 1977

<sup>57</sup> Interpretation Act, 1971

Nauru	Fishing	1978	320
Niue	Economic	1978	390
Palau	Fishing	1979	629
PNG	Fishing/Economic	1978	3, 120
Solomon Islands	Economic	1978	1,340
Tonga	Economic	1979	700
Tuvalu	Economic	1984	900
Vanuatu	Economic	1978	680
Western Samoa	Economic	1977	120

*Why has this influenced the treaty?*

The progress of the UNCLOS II and UNCLOS III negotiations were being keenly observed by Pacific Islands. The South Pacific Forum was provided updates on the UNCLOS II by Australia and New Zealand<sup>58</sup>. Various literatures have captured South Pacific Islands position supporting and international binding agreement for the sea. For example, Keaney – “appreciating the implications to the island nations to the outcome of the Sixth Session of UNCLOS III...Islands nations fully endorsed the spirit and intention of the Forum Declaration (unanimous political statement) Furthermore, according to the records from the Forum Communiqués (1972 - 1981) showed, persistent unanimous support for measures or provisions that reinforced states sovereignty over fisheries resources. At the 3<sup>rd</sup> Conference on the Convention, Pacific Islands states together with other coastal states expressed their support for an international binding arrangement.

The Law of the Sea Convention endorsement for the creation of the Exclusive Economic Zones and its prevailing provisions (Articles 55 - 77) fundamentally was in the favour

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<sup>58</sup> At that time, Australia and New Zealand were actively involved in the negotiations process of the UNCLOS II, therefore, Pacific Island Leaders, sought the leadership and guidance of the ANZ in this regard. This would therefore, enable the South Pacific Forum to align its priorities to international obligations.

of Pacific Islands States views on claiming sovereignty over adjacent waters of their coasts. Article 56 of UNCLOS states, “sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources, whether living or non-living of the water superjacent to the seabed and the seabed, and its subsoil, and with regards to other activities for economic exploitation and exploration of the zone such as production of energy from water, currents and winds.”<sup>59</sup>

In this regard, the LOSC became a convenient tool; setting internationally rules - obligations and rights to foster cooperation between states with regards to developing and utilization of the marine resources. Conservation Provision (Article 58) recognizes the importance of conservation and management of resources. Art. 78, recognizes the importance of cooperation between states on marine resource management. Hence, the LOSC as international bidding agreement based on shared values makes it convenient for states to participate in agreements

### ***2.2.1 Conflicts in Fisheries Policies***

One of the considerations that prompted the need for a multilateral treaty stems from the conflicts in fisheries policies between U.S and the Pacific States. Although the U.S and Pacific Islands recognize the 200nm delimitation of sovereign jurisdiction, the US and the Pacific Islands States had differing policies towards the one particular fishery mutually common to both - tuna. This is further compounded by US’ non-recognition of UNCLOS.

For Pacific Islands States, principally the position was activity undertaken with EEZ must be consistent to domestic laws regulating fisheries. In addition to observing domestic legislature, Pacific States through the FFA established and implemented through national policies mechanisms to control and regulate fishing such as the Harmonized Minimized Access Terms and Conditions for Foreign Fishing Vessels, Registry of Foreign Vessels.

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<sup>59</sup> UNCLOS, Article 56

The US on the other hand, under the Magnuson-Steven Fisheries, Conservation and Management Act expressed that, tuna as highly migratory species cannot be subject to coastal state jurisdiction.<sup>60</sup>

US tuna policy has been contested by many states for since it was implemented. For the purposes of this discussion the paper will focus on two objective rationales for US's position.

### *2.2.2 Protection of U.S tuna industry*

The US Government has protectionist approach to its tuna industry. The exclusion of tuna in FCMA according to a statement by Theodore G. Kronmiller, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs (address to Congressional Committee on Commerce, Science and Transportation on consideration of an amendment to the Magnuson Act, 8<sup>th</sup> December, 1983) "is both symbolic and practical evidence of U.S Government support of our tuna industry". In the rest of his statement, Kronmiller explicitly describes the impact the exclusion of the tuna industry.

"If the US...[recognized jurisdiction over]...tuna, the embargo provisions of the MFCMA and the compensation programmes of Fishermen's Protective Act would, in effect, be eliminated, insofar as they relate to the tuna industry. These provisions of law provide the U.S with important negotiating leverage and without them; the U.S tuna would be at the mercy of the Latin American coastal states in the 200nm zones. Without the embargo sanction and the FPA compensation programs the coastal states with whom we must negotiation would be convinced that if they simply had the patience to wait, a negotiated settlement would go their way since the US Government would not in the long run stand behind out industry. Under this circumstance, there would be almost no chance that Mexico, and others would made the accommodation necessary to achieve an acceptable agreement."

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<sup>60</sup> The US 1979 Fisheries Conservation and Management Act excludes tuna from the US 200nm fisheries jurisdiction, as stipulated in Sections 1813 and 1802(14) of the act.

Understandably the US like any state would put out to protect the interest of its own industry. However, what was most compelling about this stern policy was the rationale given by US on MFCMA, as reflected in this excerpt of the same statement by Kronmiller;

“Without these legal protections, the US tuna would...be compelled to by very expensive coastal state licenses and adhere to whatever arbitrary or discriminatory regulations were imposed by the coastal states, or indeed to remain outside certain zones entirely, without regard to the location and abundance of this rich resource.”

Clearly, the US at that point was willing to trade off international good-will to protect its own industry. As will be discussed in greater detail in latter chapters of this paper, this perspective, has led to shape the early negotiations in 1987, and in many ways influence the current negotiations between US and PIPs.

### *2.2.3 Conservation requirements - tuna highly migratory species and effectively management through international arrangements*

The US rationalized that unilateral governance of tuna over 200nm is not effective for management and conservation of tuna species (because of its highly migratory nature). As this is so, international management regime is a more appropriate approach for tuna management. Some commentators have critiqued USs’ view on this particular issue<sup>61</sup>. An example on the divide on this position is presented in the question posed by Wade; why US fisheries policy selected certain species (closely related to tuna) such as billfish and swordfish under the category for high-migratory management approaches and

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<sup>61</sup> See, Statement by Theodore G. Kronmiller, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs, to Congressional Committee on Commerce, Science and Transportation on consideration of and amendment to the Magnuson Act.

excluded. The Pacific Islands view on this position was, the regions has existing regional institutional arrangements to provide a framework for 'international management' of resources in zones of national jurisdictions.

Consequently, US's failure to recognize and accept the application of national laws states, led to the alleged illegal fishing and further capture of US fishing vessels *Danica*<sup>62</sup> in Papua New Guinea and *Jeanette Diana*<sup>63</sup> in Solomon Islands.

What became clear was, it wasn't only the Western Central Pacific fisheries that were encountering problems with US implemented fisheries policies. Conflicts in jurisdiction and access policies between US and Coastal States, was prevalent in regions in East Pacific where US vessels were actively fishing.

In a nutshell, the controversies of the Danica and Jeanette Diana incidents exposed the complexities that exist because of the conflicting policies. The US was slowly loosing trust and coastal states became reluctant to pursue fisheries arrangements with the US. This consequently prompted the US Government to propose a multilateral agreement with the Pacific Islands states. (Mizukami)<sup>64</sup>

## **2. USMT Parties Objectives**

The question as to why states enter into agreements could be justified by many means. In particular relevance to this agreement, it is important to identify justifications that lead to unanimous support by the Pacific Islands States to commit to an agreement with the US – these could be provided in what objectives states (parties) seek to gain from the Agreement. Assessment on literature available on fisheries access agreements, reflect recurring objectives by parties in various fisheries access agreements around the

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<sup>62</sup> Danica, a US purse seiner reprimanded by the PNG Government, in February 1982 after it was alleged to have fished illegally within waters it wasn't licensed to fish.

<sup>63</sup> The Jeanette Diana was another US purse seiner, reprimanded by the Government of Solomon Islands, in 1984 after it was caught fishing in the EEZ of Solomon Islands. In response to the actions by the Solomon Islands Government US issued an embargo on all US goods destined to Solomon Islands.

<sup>64</sup> See, Mizukami, C, 1991, *Fisheries problems in the South Pacific Region*, Marine Policy Journal

world. For the purposes of this paper the objectives are categorized as follows: (a) the shared objectives of Pacific Islands' countries, (b) secondly, the US objectives and

## 2.1 Pacific Islands Objectives

### *a. Economic gains/revenue*

For Pacific Islands the prime objective for entering the Treaty was the economic gains/benefit to be gained from access to fisheries resources. Most Pacific Islands are small and will limited land-based resources, thus the ocean provides the main resource for wealth. The establishment of EEZ thus conferred substantial economic wealth, and the primary being economic revenue paid by DWFN for access to fish stocks. For example, Japan in the period of 1978 – 1982 paid a total of USD\$27. 3 million of access payments to all Pacific Island countries

The reality of Pacific Islands' states reliance on ocean resources for food security and source of national revenue cannot be underestimated. Access fees, although low are important to the development of small islands developing states, where they contribute up to 50% of Gross Domestic Product (GDP)<sup>65</sup>. For example, access fees make up as much as 40–50 per cent of Kiribati's revenue, and 22 per cent of the gross domestic product.<sup>66</sup> Therefore, any prospective fisheries access agreement brings hope to expand its economic revenue base.

While States were optimistic about the economic gains and benefits from access fees and licenses by DWFN's an emerging issue that have become a concern to Pacific Islands states is the question on whether Pacific Islands states are being paid access fee's to the true value of tuna catch by DWFN (This will be discussed in chapter 3)

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<sup>65</sup> See, Mbithi, M.S, 2006, *Fisheries Access Agreement: Trade and Development Issues*, Executive summary

<sup>66</sup> Government of Kiribati. Kiribati Tuna Development and Management Plan 2003–2006. Executive summary and the plan, vol. I.

Bairiki, Tarawa, Kiribati: Ministry of Natural Resources Development; 2003.

From assessing meeting documents (statements from the preliminary talks and negotiations) and available literature, it is clear that at the time the Pacific Islands states were not able to extend their bargaining scope to other sectors to satisfy the view by Mwkyiwa's identifying Fisheries Access Agreements as a product of North-South<sup>67</sup> Relationship. Rather, the U.S promised a lump sum of economic package that would be available to FFA and eventually for states to disperse as they desire.

### ***b. Development Cooperation***

Another reason for the unanimous consideration by PIPS to proceed with treaty was, premised on regional aspirations on marine resource development and maximizing that development to benefit Pacific Islands' peoples<sup>68</sup>. At the time of the negotiation there was great anticipation and optimism from Pacific Islands' states that the economic benefits (licensing and access fees) derived from this arrangement would have positive ripple effects impacting other sectors of the economy and therefore stimulate economic development and growth.<sup>69</sup> In particular, Pacific Islands wanted to see greater cooperation in developing their own domestic fisheries industries. For example, the partnership agreement adopted between Japan and Solomon Islands (Solomon Taiyo ventures)<sup>70</sup> provided sustainable revenue for domestic economic development – it that contributed to strengthen its economy as it transitioned from decolonization. These domestic industries, enabled these states to respond to domestic demands for tuna

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<sup>67</sup>'North-South' relations is a concept describing a form of donor partnership, where by assistance (funds or technical assistance) is provided by developed countries to a less developed or developing state.

<sup>68</sup> Press Release, on the outcomes of Forum Fisheries Committee Meeting relating to the proposed Treaty, 12, September, 1984, Suva

<sup>69</sup>Mwikya : The Long-term objective should be to enable developing coastal and islands countries to build up their capacities to fish.

<sup>70</sup> Barclay, K, F *Fishing. Western, Japanese and Islander Perceptions of Ecology and Modernization in the Pacific* Solomon Taiyo Ltd was established in 1973 as a joint venture between the Solomon Islands government and the fishing giant Taiyo Gyogyo. Solomon Taiyo was one of the few companies in the world that produced tinned skipjack according to the requirements of large British supermarket chains such as Sainsbury's and Waitrose, which preferred high quality, socially and ecologically responsible products. Solomon Taiyo grew steadily over the years until by 1999 it had an annual turnover of around USD\$100 million, employed close to 3,000 Solomon Islanders on its fleet of more than twenty fishing boats, and had a large shore base with a canning factory. <http://www.japanfocus.org/-kate-barclay/2508>

products, provide employment and value-adding processing of tuna products and have generated yield greater revenue (GDP) to these local economies, in addition to revenue from access fees. Ultimately, Development Cooperation – became a key element of the Treaty, subscribed in Article 2 of the final draft of 1987 Treaty.

*c. Recognition of sovereignty of jurisdiction*

An important objective that Pacific Islands states sought to achieve from the treaty was to establish an understanding through an agreement with US on the recognition of sovereign rights of Pacific Islands States for purposes of exploiting, conserving and management within 200nm, in accordance to international law. The intention is to eliminate possible conflicts that may arise in the interpretation and implementation of the two different policies within EEZ. An agreement premised on mutual understanding was seen as a way forward. Thus, the Treaty provide an opportunity for a compromise on both the US and Pacific Islands on either respective policies.

**2.2 United States objectives:**

*a. Access to fish stocks for US Fishing fleets and support US canneries*

For U.S one of its primary objectives for a multilateral treaty was; (a) to establish an agreement that would foster close cooperation in fishing activities and in turn ensure U.S distant-water fisheries industry is maintained, through accessing waters of Pacific Islands' states. US intention to maximize its opportunities for access to fisheries resources as DWFN was summed up by Mr. Larry Snead, as “ the focus of US international fisheries policy and the responsibilities of the Department of State under MFCMA also concerns fisheries issues beyond U.S EEZ. Furthermore, he stated that negotiation of favorable access agreements for the benefit of US distant water fisheries is important, as some important sectors of the US industry were looking to maintain and possibly increase their access to stocks.<sup>71</sup>

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<sup>71</sup> Snead, L.L , Director, Office of Fisheries Affairs, Bureau of Oceans and International Environment and Scientific Affairs, Department of State, Washington D.C

*b. Importance of regional fisheries supporting U.S fisheries industry.*

The U.S Government's proposal to establish a multilateral treaty with the Pacific Islands could be viewed as an intervention to circumvent any possible economic losses to U.S fisheries industry should more Pacific Islands states declined partnership with ATA. While tuna industry may not have been a significant contributor to the US economy, U.S fisheries in the Pacific was important to the U.S tuna industry. For example the tuna industry, in 1984 total value of catch was USD\$662.7 million of which US\$131million is created from added-value in the industry<sup>72</sup>. And as Pacific Islands (as highlighted in the earlier in the paper) reacted negatively U.S fisheries agreements the economic value this loss would mean for the industry was bound to be drastic. In this regard, political intervention by the U.S Government on behalf of the industry was important – hence the fervent drive by U.S Government for a multilateral treaty.

**3. Negotiating the original Treaty '1987'**

The proposal by US to the Pacific Islands for a multilateral fishing agreement was met with mixed reaction. While majority of the Pacific Islands states agreed in principle to enter into negotiations with the U.S, and recognize the prospective benefits the region stand to gain from it, some held reservations and were particularly concerned over ambiguities in U.S objectives and intentions. Uncertainties by Pacific Islands States were created by U.S Fisheries policies and reflected in positions and statements<sup>73</sup> (public) relating management of tuna resources, and highly-migratory species, as well from observed U.S's fisheries industry engagement in other regional fisheries arrangements.

Negotiations on the Treaty began in 1983 and progressed through numerous discussions, disagreements and concessions between the parties towards an acceptable compromise.

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<sup>73</sup> Statement by Theodore G Kronmiller, Deputy Assistant Secretary of State for Ocean Affairs and Fisheries

FFA has played a critical role<sup>74</sup> since the initial discussions of the original treaty, and continues to do in the present ongoing negotiations. Firstly, Pacific Islands states (apart from New Zealand and Australia) as young democracies the consolidated support of FFA in this particular undertaking was critical. From 1983 through 1986, FFA conducted a number of meetings on behalf for the Pacific Islands, and played a mediatory role between U.S and the Pacific Islands states, in progressing preparatory talks towards and during negotiations on the Treaty.

The US was very clear from the start about their intentions and desired to have the proposed Treaty portray a similar arrangement to the existing arrangement their have with Eastern Pacific states<sup>75</sup>.

This section attempts to reflect on the negotiations and the position of US and Pacific Islands parties during, consider factors that influenced this process.

### *3.1 Access Areas*

#### Harmonized Minimum Terms and Conditions for Foreign Fisheries Vessels

An aspect of the treaty that was overly contested by positions from the US and Pacific Islands States was the issue on 'Minimum Terms and Conditions of Access' for access by U.S Fishing vessels. This

The Minimum terms and condition of access for Foreign Fishing Vessels is "one the most significant management tool" developed for fisheries management in the region Premised on UNCLOS Article 64 (4) it imposes terms and conditions that require nationals of foreign states fishing in the EEZ to comply with conservation measures and

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<sup>74</sup> *FFA Strategic Plan, Role of the Secretariat* - To achieve the outcomes set out in the Strategic Direction the FFA Secretariat's primary focus will be on providing members with high quality, timely and relevant policy advice with respect to fisheries management and development. The Secretariat will also provide members with appropriate technical and support services having regard to their needs and priorities, in accordance with the broad direction approved by the FFC. Consideration will be given to ensuring these services are delivered in the most effective and efficient manner.

<sup>75</sup> Refers to fishing arrangements under Eastern Pacific Tuna Agreement - between the U.S Tuna industry and Governments of Costa Rica, Panama, Guatemala, Honduras and Mexico

other terms and conditions of national laws, consistent to LOSC. For Pacific Islands States, a the Minimum Terms and Conditions of Access was endorsed in by Forum Leaders at the Rotorua Summit, 1982.<sup>76</sup>

These minimum Terms and Conditions according to Moore<sup>77</sup>, focused on 4 main types of action (1) the establishment and functioning of regional register of foreign vessels to be maintained by the FFA (2) the adoption by FFA member countries of a number of harmonized minimum stands for foreign vessels access (3) establishing the basis for future regional cooperation in surveillance, and (4) the identification of common interests, agreements on methods of calculating access fee payments and on minimum uniform access fee levels.

While the concept of ‘Minimum Terms and Condition’ was widely accepted at the time, many States were uncertain about its implementation realities, mainly because of the varying national fisheries policies<sup>78</sup>. The exception in this case was the Parties to the Nauru Agreement (1982) – had already established a similar mechanism and progressed to implementing into respective national policies. Despite the uncertainties, Pacific Islands states recognized that this approach was ideal for negotiating a multilateral agreement – strengthens Pacific Islands negotiation position and eliminates gaps (national policies) the US may use as counter-attacks to the negotiations on the terms and conditions.

Similarly, US also has imposed strict terms and conditions on access by other DWFN in its 200nm (excluding tuna, as highly migratory species) as expressed in the Magnuson Act under Section, 204 of the Act (“Permits for Foreign Fishing Vessels” )<sup>79</sup> The

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<sup>76</sup> ‘Harmonized Minimum Terms and Conditions of Access for Foreign Fishing Vessels’

<sup>77</sup> Moore pg 163 and 164 on FFA workshop on Harmonization and Coordination, Suva

<sup>78</sup> The FFA has been assisting Pacific Islands members, towards creating regional harmonized fisheries policy for the purposes of management of fisheries resource and consistent to regional regimes (Pacific Plan) but the progress has been slow - capacity issues, lengthy reforms processes, conflicting national interests are some of the challenges for progress therein (and continuing)

<sup>79</sup> Under the Magnuson Fisheries Conservation and Management Act of the U.S, SEC. 204. Permits for Foreign Fishing 16 U.S.C. 1824, outlines the conditions for which a foreign vessel intending to fish in the US EEZ must adhere to.

Magnuson Act is comprehensive and casts obligations on flag states to ensure compliance and imposed additional terms and conditions aimed at the particular states; in the same manner and intention in which FFA Minimum Terms and Conditions was created and implemented.

Given the comparability of conditions set within the FFA Minimum Terms and Conditions and the provision within Magnuson Act for the purposes of access by foreign vessels, it could be suggested that, US reserved response to terms and conditions proposed by Pacific Islands states is not because of the limitations expressed by Magnuson Act regarding tuna - the underlying factor is the interest and protection of the US fisheries industry and its competitiveness in tuna world market.

### *3.2 Compliance to Agreement and National Laws*

An issue that dominated discussion at the initial negotiations (and has re-surfaced in various annual meetings on the Treaty) between the US and Pacific Islands is the conflicting views on applicability of national laws.

Article 58.<sup>80</sup> UNCLOS stipulates a flag state into another country mutually party to the Convention is obligated to comply with the national/domestic laws as long as it is within the coastal state's jurisdiction. Most Pacific Islands State at the time of negotiation had exiting domestic legislations to regulate access of foreign fishing vessels and fishing activities consistent with regional and international obligations and national sustainable management strategies. For example, under the Fisheries Acts (1998 *Eds*) of Solomon Islands, Article 15.1.<sup>81</sup> provides for Solomon Islands to enter into access agreements, with another state either on bilateral or regional basis and with

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<sup>80</sup>Article 58; In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

<sup>81</sup> Article 15.1.b; Solomon Islands Fisheries Act (1998) The Minister may with the approval of Cabinet; enter into agreements and associations representing foreign fisheries owners or charterers, on a bilateral or regional basis, providing for the allocation of fishing rights in Solomon Islands waters to vessels from those States.

organizations representing fishing vessels. However, Article 15.2<sup>82</sup>, places conditions for any agreement between Solomon Islands and another states or fisheries association must ensure provision for compliance by its vessels with terms and conditions - to ensure responsibility on fishing vessels. This has been the platform and understanding which agreements Pacific Islands states and other DWFNs have been established. US' non-signatory to the UNCLOS presented many complexities in negotiation agreements -and this was the case in the initial negotiation of the 1987 Treaty.

The US' position is argued from the point that as a non-signatory to UNCLOS, it has no obligation to conform to national laws applied to EEZ jurisdiction, (obligations and duties subscribed in Article 58.2 which apply to states party to UNCLOS. Pacific Islands' countries main questioned how US's position would be accommodated within the various parameters of respective existing domestic fisheries legislations. The Pacific Islands were able to leverage their position through the Harmonized Minimum Terms and Conditions for access, however, were not able to extend this leverage to support their position on applicability of national laws. A reason for this difficulty lies in the differences in domestic fisheries legislations in individual Pacific Islands States, regulations would be tied into a multilateral arrangement. Despite this, Pacific Islands made strong positions the Treaty should have provisions that recognize and respect sovereignty. Perhaps, as the final text agreed to in 1987 reflected, a compromise to accommodate U.S adherence issues may have been to have an agreement that constraint its application to itself. As captured in the definition of "applicable of national laws" Annex 1, Article 1<sup>83</sup>, acknowledges the existence of domestic laws/legislations, limited

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<sup>82</sup> Article 15.2; Solomon Islands Fisheries Act (1998) Any agreement entered into under sub-section (1) (b) shall include a provision establishing the responsibility of foreign state of association to take all necessary measures to ensure compliance by its vessels with the terms and conditions of the agreement and with the laws relating to fishing in Solomon Islands waters.

<sup>83</sup> Annex 1, Article 1 of Agreed text to of the Treaty (1987) "applicable national laws" means any provision of a law however described, of a Pacific Islands party however described which governs the fishing activities of foreign fishing vessels being a law identified in Schedule 1 (which lists all laws relating to this treaty) and which is not inconsistent with the requirements of this Treaty and shall be taken to exclude any provisions which imposes a requirement which is also imposed by this Treaty;

its application by the provision clause itself, where condition and terms in the agreement prejudice the national laws, the provisions within the agreement will prevail.

As fish stocks reduced, coastal states enforce policies or legislation towards greater control over fishing activities to ensure longer sustainability, therefore it is critical these national laws are not undermined in any way, so as to compromise national efforts. As this so, Pacific Islands Parties have pursued for a change in this current negotiations, for greater recognition of their sovereign jurisdictions and corresponding laws regulate to individual respective coastal resources.

### *3.3 Financial Compensation and Licensing/Access Fees*

While Article 58.1, provides for other (landlocked or not) coastal states to allow other states to access surplus resources, the LOSC does not speak of compensation or fees that the state accessing another's resources should or ought to pay for the exploitation of its resources. The concept of payment for access fees rests on coastal state discretion (through negotiation) – determining the degree of access (licensed area), the number of vessels permitted to fish (efforts), and duration of access to waters.

Literature on fisheries access agreements say very little on neither access payments nor how it is worked out by two states. Perhaps a reason for this is that “fisheries access payments are not based on well-defined resource rent principles.”<sup>84</sup> For, Pacific Islands countries, generally the access fee are valued in relation to value of tuna harvested by each class and the type of vessel per period of time.<sup>85</sup>

With regards to this particular issue, there were several conflicting positions that arose in during the negotiations on and contested issues that PIPS and US are negotiating today – all relating to the true value of fish that DWFN should pay for access.

It was difficult for Pacific Islands states to negotiate access fee price with US, firstly because US initially was reluctant to accept payment of access fees and secondly there

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<sup>84</sup> Mwikya. M.S, 2006, *Fisheries Access Agreements: Trade and Development Issues*

<sup>85</sup> See Doulman. D, 1986, *Fishing for Tuna: The Operation of Distant Water fleets in the Pacific Region*

was a range of values of access fee being applied in different bilateral agreements (with other DWFN).

In as far as the negotiations on this particular issue, Pacific Islands learning from past experiences with ATA agreements<sup>86</sup> (where dissatisfied states have opted out the agreement because of U.S' under payment of the net value of fish, compared to other DWFNs)<sup>87</sup> were adamant that any outcome on access fee negotiations would be in their favour.

When US finally agreed to pay for access, the next primary concern then was how this would be calculates, as the approach of lump sum payment lacked of flexibility for fee setting by Pacific Islands states (to reflect the maximum value of catch). Secondly, countries would not get real value for fish catch from their respective EEZ.<sup>88</sup> This particular issue was raised by fishing nations (countries with rich fishing grounds), and in effect introduced the concept of 'free-riders' i.e other countries which few resources (being exploited) are benefiting from economic returns provided under this treaty while countries where active exploitation is done are not compensated proportionally

By the 10<sup>th</sup> round of negotiation (held in Tonga, 9<sup>th</sup> - 22<sup>nd</sup> October, 1986) US Government made a firm announcement of its agreement to commit to a financial payment of \$12 million over a 5 year period.

This is expressed as period to Pacific Islands States is expressed as:

- i. USD9 million - cash by US Government (USAID)
- ii. USD1 million - cash for projects by US Government
- iii. USD0.25 million - for projects by Tuna industry

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<sup>86</sup> Ibid; Under the ATA agreements, fee payments in the Pacific region based on an annual per vessel basis. This calculation was done only in relation to registered tonnage (NRT) of vessels and disregarded the quantity of tuna harvested and its market value.

<sup>87</sup> Kiribati for example, in 1984 withdrew from the multilateral agreement with ATA and established a fisheries agreement with USSR, because of its dissatisfaction that terms for access payment did not reflect the true value of fish that were being captured by US purse seiners in its EEZ.

<sup>88</sup>.This particular concern gave rise to the need for a more effective mechanism that would see countries are paid/compensated according to the level of exploitation. Thus, led to the development to the current VDS scheme.

iv. USD1.75 million – by US vessel owners

*3.4 Reporting: Obligations*

Reporting was recognized by U.S and PIPs as crucially important. For Pacific Islands States, 'Reporting' is entailed the 'Minimum Terms and Conditions' for access by foreign fishing vessel. Furthermore, its functions are a requisite for calculation of access fees and records also assist research's and work undertaken SPC on fish stock assessments.<sup>89</sup> For the former, under reporting obligations foreign vessels must maintain a daily catch data or log book to record total catch by Foreign Vessels – based on this access fees are formulated.

While US agrees to Reporting obligations by vessels, it's view was the reports produced from US vessels are deemed property of US Government, therefore the US Government has the discretion to transmit and release data thereafter to other Parties.

The position taken by US conflicted certain provisions within the Minimum Terms and Conditions – and the Pacific Islands states (in particular PNA) felt USs' conditions on Reporting fell well below Reporting obligations imposed on other DWFN in partnership with PNA members.<sup>90</sup> With these conflicting positions, a compromise agreed to was for FFA, to become the administrator of the Treaty and its implementation, and to be the custodian of the reports collected fishing activities on US vessels.

**4. The Negotiation process**

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<sup>89</sup> Fish Stock Assessment are provided to FFA to and member countries to assist them in mapping out fisheries policies on conservation and management

<sup>90</sup> Implementing Agreement under the Nauru Agreement has detailed reporting requirements as follows:

“The owner, charterer, operator, master of any other person responsible for the operation of a licensed vessel shall ensure the maintenance of catch data and log books in the following respects:

- a. Keep daily catch and effort records on board the vessel within the Fisheries Zones on common catch data forms, formats of which are set out in Appendix I)
- b. Keep relevant common catch data form current at all times and produce it on demand to any authorized personnel:
- c. Make the data required on the regional catch data form available to the licencing party or its representative within 45 days

Negotiating the treaty was a major undertaking for both the US Government and Pacific Islands' Governments. This was a five-year process that involved lengthy discussions, collaborations, and time from the officials of both US and Pacific Islands' states. As it is the intention of this paper, to analyze the success of the treaty - understanding the dynamics of the negotiations on the original treaty is important.

At this juncture, this next section will discuss some challenges and realities of the negotiations that lead to the final original treaty.

- a. An aspect that stood out, in the process of preparatory talks leading up to the negotiations of the treaty, was the **significant difference in levels of preparedness and experience from both sides of the party**. On the part of the US, approaching the negotiations was much simpler, primarily because, their leverage position would center on finding a compromise between their preferred<sup>91</sup> "terms and conditions" for access with the conditions proposed by the Pacific Islands parties. Moreover, the US has experience in negotiating and operations of fisheries access agreements. This comparative edge, US, led to significant breakthrough for US Government in the negotiations.

Pacific Islands, although have varied domestic laws on Fisheries, negotiated the terms and conditions of the treaty collectively as a group. Therein lies weakening end on the part of Pacific Islands parties negotiating strength. (Discussed further in point 3)

- b. The second consideration was the nature of the agreement and the method of negotiation applied by parties. The agreement in its nature is a multilateral, however, the intended operation and the mechanisms almost mirrors a bilateral arrangement. Firstly, the two distinct parties in the negotiation was US and

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<sup>91</sup>US Ambassador, Schaeffer to PNG in informal talks with PNG officials (on behalf of PIPs) that US would like an arrangement similar to existing arrangements of Eastern Pacific Ocean

Pacific Islands Parties, through regional mechanisms (FFA), negotiating as a block<sup>92</sup>.

This negotiation arrangement was ideal for Pacific Islands parties because (a) strengthen Pacific Islands negotiating positions (b) logical given US intentions to have access waters of all the Pacific Islands states (c) FFA technical support and advice. However, there were certain draw-backs that this negotiation approach (for a multilateral agreement of this nature) would have on Pacific Islands Parties and to an extent their flexibility to limit their conditions of negotiation in their favour.

The draw-back was particularly on the Pacific Islands states side – this was the complexities of negotiating to commit to a uniform set of terms and conditions when policies and domestic laws applicable to these “terms and conditions” is varied to each respective state. This leads to the third consideration.

- c. Another consideration is the drafting of the Treaty. The varying degree of capabilities between parties can influence the drafting of treaty texts. Again the supporting institutions and capabilities supporting US in this process had greater experience and resources in this exercise than newly developed states do. And it was reflected through supporting (meeting records and documents of the negotiations) that majority of the Treaty texts were drafted by the US Government. From documentation compiled by FFA on the treaty drafting process indicated that most of the texts that were proposed and eventually adopted to the final text were submissions from the US Government. Furthermore, meeting records from the 1983 and 1984 negotiations show that Pacific Islands drafts texts were always met counter-proposal from US. A general comparison on the texts provided by each side of the party, and the final

original draft of the Treaty supports a strong U.S dominance in the Treaty drafting process.

Understandably, US's strength in this process is attributed to it's technically capabilities - this however became a draw-back for the Pacific Islands States. For example, U.S had the adequate resources to support its negotiating team and enabled the U.S party to make profound contributions to defend their positions on the texts. On the part of the Pacific Islands States, representation by states was infrequent at negotiation meetings, national fisheries departments were in their infant stage and were struggling with capabilities and capacities issues. The Forum Fisheries Agency, although provided technical capacity and advice to Pacific Islands States; it was limiting in its role in the text drafting process discussions because of its personality.

## **CHAPTER TWO**

### **RENEGOTIATING THE USMT - KEY ISSUES OF CONTENTION**

A multilateral fisheries agreement may present many complexities and challenges; these challenges derive from (and not limited to); diverse national interest, challenges harmonizing national fisheries polices, diverse economic and development statuses of state parties. Moreover, because of the diversified interests between states, and their desire to it expressed within the agreement, often consensus comes at the cost of national sovereignty. On other hand some scholars applaud and recognize that multilateral arrangements encourages good governance practices, in particular the process of negotiation is transparent, states conditions ... Moreover, collective efforts and cooperation fostered under a multilateral arrangement is appropriate for management of highly-migratory.

While the Treaty provides enormous economic opportunities and strengthens political relations between US and PIPS, certain parties to the agreement (in particular from the PIPS) over the years, fisheries dynamics with the region has shifted and PIPS have adopted approaches and mechanisms necessitating a need for a review on the conditions to the treaty. The timely expiration of the current treaty life provided an opportunity for such review. Since 2009 the US and PIPs have been engaged in series of

intensive negotiations<sup>93</sup> and consultations towards a new comprehensive treaty anticipated to be concluded before June 2013. At the time of writing, parties involved have progressed into 9<sup>th</sup> Round of negotiations.

In general, both parties have expressed their participation and commitment in continuing the spirit of cooperation under a multilateral access agreement is subject to conditions favorable in PIPS best interest. However, before another new Treaty is formalized to continue US fishing operations in this region, there are number of issues that is being considered before state parties.

Hence, the objective of this paper is to highlight this discuss how complexities of multilateral fisheries agreements are translated in the USMT and it's processes. It discusses the key issues of contention being negotiation by state parties and provides an analysis this how these issues relate to the overall sustainability of the Agreement, or its renewal in June this year.

It is important to mention at the outset, that the agreement provides for parties to review the Treaty. Provision for review is entailed in Article 7 of the agreement, whereby it states;

“The Parties shall meet once a year for the purpose of reviewing the operation of this Treaty”

This annual Treaty review session is an opportunity for the US and PIPs to meet and discuss issues relating to the Treaty, however, this review focuses mainly on the operational and implementation mechanisms of the Treaty. Substantive treaty conditions and amendments subject to negotiation between parties are undertaken at the end of a treaty life; new proposals are considered at the juncture of the renewal of a new treaty life.

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<sup>93</sup> Article 7 provides for annual consultations and review of the Treaty by the US and PIPS. However, this review is often and usually dominated by operational issues, minimal coverage of substantive policy issues,, according to the FFA.

## 1. APPLICABILITY OF NATIONAL LAWS

While US vessels are granted rights to enter and access the resources within licensed areas, they are obligated to operate or undertake fishing within these areas, in a manner that conforms to national legislation of respective PIPS jurisdiction.

This paper argues that the issue of applicability of national laws is two folds. The first lies in the differences fisheries policies between US and PIPS (as highlighted in the chapter Two) creating conflicts in interpretation and implementation (operations). Secondly the different national laws in PIPS and constraining elements in the Treaty that to some degree compromise PIPS sovereignty to exercise legislative reforms in fisheries (in particular legislations that have a bearing on provisions of the Treaty)

To understand the difference in provisions of the current treaty (and provide justifications to the way it has been drafted) an important consideration is the Policies and perspectives of US and Pacific Islands states in 1987 and 1988. (See discussion in Chapter 2, *Conflict in fisheries policies*)

In hindsight, from a Pacific Islands State perspective it would be difficult to grasp the culmination of negotiations that resulted in legally binding overbearing commitment that allows for its own domestic laws become subjective to the conditions set by another state. On the contrary, the prevalent US political dominance in the region and fisheries industry was an important leverage to negotiate conditions in the best interest of its fisheries industries. As reflected in the discussions in under Chapter 2 *Conflicts in fisheries policies* and *US protectionist over tuna fisheries*, point to the suggestion that the constraint imposed within the Treaty was a firm stance by the US Government – strategic move to substantiate its rigid Fisheries Policies under the Reagan Administration.

As US adopts a more liberal approach and perspective on its fisheries policy in recent times, this is mirrored in US interaction with the global community on fisheries issues and its own domestic legislations<sup>94</sup>. Moreover, as US intentions point towards possible accession to UNCLOS – such of action will eliminate conflicts in fisheries policies, instead foster understanding and appreciation towards PIPS position should the parties seek to continue cooperating in the future under this arrangement.

### *Issue*

The concerns regarding applicability of national laws was raised by PIPS and has been extensively discussed in the course of the negotiations since 2009. The resonating theme that PIPS continue to emphasize is for; recognition of states sovereignty and PIPS ability to apply its national laws within its jurisdiction.

Applicable national law is defined in the treaty as:

“Applicable national law” means any provision of a law, however described, of a Pacific Islands party which governs the fishing activities of foreign fishing vessels, being a law identified in Schedule 1, and which is not inconsistent with the requirements of this treaty and shall be take to exclude any provision which imposes a requirement which is Also imposed by this Treaty:

Under Annex 1 Art. 2, states:<sup>95</sup>

Schedule 1 maybe be amended from time to by the inclusion by any Pacific Islands Party of any applicable national law and, for the purpose of this Treaty, except as provided in this paragraph, the amendment shall take effect from the date that the amended Schedule has been notified to the Government of the United States. For the purpose of any obligation on the United States pursuant to paragraphs 4 and 5 of

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<sup>94</sup> Apply and implement conditions to those UNCLOS for foreign vessels fishing its own waters.

<sup>95</sup> Article 2, Annex 1 Multilateral Treaty on Fisheries between Certain Pacific Islands Countries and the United States.

Article 4, the amendments shall take effect 60 days from the date that the amended Schedule has been notified to the Government of the United States. The Government of the Pacific Islands party shall use its best endeavors to provide advance notice to the Government of the United States of the amendment.

1.1 There are some fundamental concerns that emerges from the provisions the Article above. Firstly, the constriction of PIPS sovereignty and ability to amend and apply domestic laws on US vessels without the concurrence of the US Government. Under the current arrangement any Applicable National Laws (amendments or new laws) to impact fishing operations under the Treaty requires US Government notification and approval before it becomes effective under the treaty. Although PIPS are required four months advance notice to the Administrator (FFA) and US Government on any intended reforms or amendments to national laws, this provision doesn't provide enough justification for US Government to concur to the national law of Party before it becomes effective under the Treaty.

An underlying factor for the two differing views in the applicability of laws under this Treaty, lies in US non-recognition of UNCLOS. As signatories to the UNCLOS for Pacific Islands parties' international law permits states the right to apply or enact national law to conserve, manage, explore and exploit fisheries resources within its EEZ as subscribed under Art. 61 in the Convention of Law of the Sea. In the case of US, a non-signatory, it is not bound by the responsibilities prescribed under this same Article, therefore there is no guarantee that it would agree or participate in an arrangement set out by the Convention. In this regard, the condition for its fishing operations to conduct themselves within the parameters of coastal states regulations and laws rests entirely on the negotiations and good will of US.

However, despite US being a non-signatory to the Convention the MFMCA has conditions that obligate foreign fishing fleets within its waters to operate within

legislated rules and conditions<sup>96</sup>. Moreover, there are international commitments and legal norms which the US and Pacific Islands States are party to which apply principles recognizing Flag State obligation to ensure observance to coastal states laws, for example the WCPFC, FAO Code of Conduct, General Assembly Resolution on Sovereignty and G.A. Resolution No.2158 (XXI) (1966), Article 4<sup>97</sup>. Hence, it seems that the provision for prior consideration of a PIP national law by the US Government before its application in the Treaty, is viewed to be conflicting to the principles in which the US government places in it agreement under these commitments. This paper therefore asserts that, the provisions of Annex 1, Art.2 are where drafted at time when stern US fisheries policies were understandably necessary measures to protect the US fishing industry against US rising unpopularity among coastal states (discontinuing fishing agreements with US fishing vessels because of conflicts in policies – discussed in Chapter two). As US fisheries policy leans towards recognition of states sovereignty over resource, this will yield greater understanding and compromise resulting in conditions that allows Pacific Islands States exercise the full extent of their sovereignty over their resources.

1.2 The prolonged period of notification also undermines the sovereign duty of a coastal state and its freedom under international law, to extend or enforce its laws as and when it becomes instituted. Why does US need 60 days to consider the law of another state – or the applicability of its law for that matter? It is assumed that the 60 days period allows US to complete its processes and for the US system consider and take account of these changes, notify and implementing agencies. (including notification of fishing vessels). The provided timeframe is viewed lengthy and again constricting to states rights to enforce its laws. Especially when other active DWFNs like Japan and Taiwan, who also have active fishing fleets in more than one country under bilateral arrangements, have no difficulty to comply with national laws of

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<sup>96</sup> Magnuson-Stevens Fishery Management and Conservations Act, Section 201 *Foreign Fishing*

<sup>97</sup> Confirms that the exploitation of natural resource in each country shall always be conducted in accordance with its national laws and regulations

respective coastal state as and when it becomes effective.

- 2 The diverse national applicable laws to PIPS were expressed to pose great difficulty (regulations vary across the region). In a multilateral access agreement where coastal states national laws are not uniform, compliance by DWFN can be tricky. The challenge lies in the (a) notification process, where information on amended laws fail to be transferred quickly or (b) ineffective coordination between coastal states and US Government leave fleets vulnerable to committing violation. In addition, foreign fleets have an enormous responsibility of familiarizing the domestic legislation of 16 coastal states, and conduct its practice in accordance to respective domestic legislation.

One of the reasons undermining the progress and compromising positions between the PIPS and US is the lack of understanding and appreciation of positions from either side of the table. In a statement to US Congressional House, the head negotiator to the US delegation, Mr. Gibbons-Fly explicitly stated PIPS non-cooperative manner, withholding information from the US has clouded US delegation views in the negotiations. However, this has been eliminated through mechanisms such as Technical Working Groups (TWG). Some delegates have expressed that the TWG provides an ideal opportunity for thorough discussion, furthermore the informal setting enables better and free communication between members of the US and PIPS. Thus, this process has been the catalyst in ironing out differences between the Parties towards toward compromise.

At this juncture, a point worth mentioning is in reference to US fleets/vessels operating under this agreement, in particular US efforts and mechanisms to observe high compliance by its vessels under the Treaty. While conflicting views exist on the provision for Applicability of National Laws between US and PIPs, an aspect that PIPs have acknowledged and ought to be highlighted is the good conduct and high

compliance by US fleets among DWFNs in the region. This view was shared by the FFA, the administrator of the treaty; and reiterated in various commentaries on DWFNs conduct in the region. Moreover, unlike other fishing arrangements, there is adequate information publically available that reflect the US Government's seriousness in ensuring its vessels that operate in foreign waters adhere to highest standards of compliance through its own comprehensive domestic regulations and measures. For example, under the provisions of US domestic legislation "South Pacific Tuna Treaty Act, 1988" the Pacific Islands Regional Office of the National Oceanic and Atmospheric Authority (NOAA)<sup>98</sup> has been mandated to coordinate and monitor fishing vessels to the required standard as expected by coastal states - to avoid fishing fleets face penalties that would lead to detrimental impacts on the agreements that the US is party to.

## ***2. FISHING OPPORTUNITIES FOR US FISHING VESSELS IN PIPS WATERS AND FINANCIAL PACKAGE***

One of the main reasons why tuna fisheries has become a profit yielding industry is because of the increasing demand for fisheries product (correlated to global population growth) and high value of tuna as commodity.

Economic profit and revenue is the primary objective of both US and PIPs for entering into an agreement. For example, it was estimated that in 2008 the value of landed catch by US fleets in WCPO was \$250 million, and the total annual contribution to the U.S. economy, from tuna processed products (canning etc) was as approximate value \$400-\$500 million. For the Pacific Islands Parties the agreement currently provides financial assistance of USD 21 million dollars. However, recently, Pacific Islands' states contested

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<sup>98</sup> The PIRO International Fisheries Division provides policy advice on and technical and administrative support for, international fisheries agreements and related issues in the Western and Central Pacific Ocean (WCPO). [www.fpir.noaa.gov](http://www.fpir.noaa.gov)

the financial payments under the USMT was undervalue and compare US fleets/vessels accessibility to 16 EEZs.

Under this particular sub-heading the discussion will be divided into parts – integration of VDS in the agreement and financial package. At the outset, it's important to note, the review of the conditions relating to the financial compensation (access fee) was proposed by the PIPS.

*a. Application of the Vessel Day Scheme in the Treaty*

The PNA countries have worked collaboratively to manage tuna stock within their waters, under an arrangement called “Palau Arrangement for the management of Western and Central Pacific Purse Seine Fishery”<sup>99</sup> The aim of the Palau Arrangement was to protect tuna stocks from overfishing and improve economic benefits to Pacific Islands’ members through access fees and fisheries development.<sup>100</sup> In 2007, the PNA members adopted a new mechanism under the Palau Arrangement which changed from the initial arrangement of placing restriction on vessels number to program of limited days fished within the waters of PNA.<sup>101</sup>

Some commentators have expressed that VDS would increase bargaining power of PNA states, encourage competition between DWFN that would in turn drive fishing-day values up. The total allocation of fishing days (TAE<sup>102</sup>) is set annually by PNA, in annual meeting, taking into consideration best available, economic, management information as well as provision of the Convention and Management of Highly Migratory Fish Stocks in WCPO. The TAE is distributed amongst Parties as their Party

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<sup>99</sup> Shanks, S, Introducing a transferable fishing day management regime for Pacific Islands countries 2010

<sup>100</sup> Hanich, Parris, Tsameny; Sovereign and cooperation in regional Pacific tuna fisheries management: Politics, economics, conservation and the vessel day scheme, 2010

<sup>101</sup> Shanks, S, Introducing a transferable fishing day management regime for Pacific Islands countries

<sup>102</sup> The TAE is the maximum number of fishing days undertaken by all licensed purse seine vessels in all EEZ of the Parties to the Palau Arrangement in a Management Year.

## Allowable Effort (PAE)<sup>103</sup>

The US has been skeptical of the VDS since it was introduced in 2005. This reaction was primarily because little was known (at the stage) about the dynamics of the intended scheme and secondly, its impact on the US fishing industry. In 2009, PNA's decisions to include the US Treaty in the VDS received mixed responses from the US Government. However, although the US fleets were incorporated in the PNA VDS in 2009, no hard limit restrictions were applied to the US fishing fleet. This was primarily because of, the limited scope in under the existing Treaty to adopt the VDS arrangement and secondly the different methods of payment of financial compensation applied under the current USMT arrangement (lump sum payment) and the VDS (pay according to allocated days fished).

Concerns and questions were raised on the VDS intentions from an ecological perspective and secondly its impact on US fishing fleets. In a statement before House of Congress the US Chief Negotiator, Mr. Gibbons-Fly highlighted US Government's concerns that unrestricted fishing under VDS encourages overcapitalization, overfishing and resource depletion and therefore would have adverse impacts on the long-term conservational and sustainable efforts of the region. (Given it is still in its early stages of application it's real impacts on conservation and long-term sustainability of fish stock is questionable) Moreover, the US Government were concerned that lack of documented information or publications on the mechanisms of the VDS made it harder to see if US fleets were going to get a fair deal out of the Scheme.<sup>104</sup>

Now that parties have agreed in principle for financial payment of USD 63million for 8000 days, subject to review after 2 every years – the next main issue is the distribution

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<sup>103</sup> Palau Arrangement for the Management of Western Pacific Fishery as amended – management scheme (VDS)

<sup>104</sup> Gibbon-Fly, W, Statement to the Hearing o the Multilateral Treaty on Fisheries between Certain Pacific Islands States and the US, US House of Representative, Committee on Foreign Affairs, Subcommittee on Asia, the Pacific and Global environment

of payments among states. Some commentators have also expressed cynicism on the VDS in its application under the Treaty will result in disproportionate shares (income) among PNA and non-PNA states. However, PNA states are of the view that values (pending the distribution percentage agreed) under the VDS will commensurate the resources removed from a respective EEZs. Ultimately, since fishing will be carried within allocated fishing days, fleets will seek to fully utilize their days in areas that would yield greater catch – will increase concentration in PNA waters.

**Fig 1: Financial payment by US Government to Pacific Islands Parties under the US Multilateral treaty**

Phase	Years	Duration	Financial Commitment	Percentage by Industry	Percentage by Government	Total catch under Phase
1 <sup>st</sup> Phase	1988 – 1993	5 years	USD 12 million (USD 2 million Industry and USD10 million Govt)	20%	80%	872 251
2 <sup>nd</sup> Phase	1993-2003	10 years	USD 18 million (USD 4 Million, Industry and USD14million, Govt)	28%	72%	1 476 919
3 <sup>rd</sup> Phase	2003 – 2013	10 years	USD 21 million (USD 3 million, industry and USD18 Million, Government)	16.6%	83.4%	1 252 485 (2004 – 2011)
4 <sup>th</sup> Phase	2013 - 2015	2 years (financial commitment)	63 million			

*b. Financial Package*

The need to review the financial package under Treaty was strongly supported PIPS. This was premised on the rationale that US total incoming earnings from tuna fishery

was increasing yet, and US financial payment to Pacific Islands Parties under the arrangement had increased only by 14% a period of 10 years. In particular, concerns were expressed over US Government heavy subsidies on the US fishing fleet in the WCPO region. Significant subsidies by the US Government means US fishing vessels out compete domestic fleets with enormous profits. The US industry being the biggest winners in this arrangement, has been at the mercy of its Government, to negotiate the most cost effective agreement and the US Government successfully did so the past two treaty renewal negotiations. However, this renegotiation is different; the Pacific Islands States' clearly stated their position, - the industry must up its value of contribution to the financial package.

Consequently, one of the conditions that PIPS proposed to the US is for an increased contribution by the industry to final package. As observed in over the past three treaty phases, industry contribution has minimum with 28% the highest. This current treaty life is the lowest at 16% of the total package paid to PIPS (USD 3 million). The proposed percentage for US industry payment agreed among PIPs is 10.5% of value catch. The US Government in the defense of its tuna fishing industry counter-proposed a lesser percentage of 6.9%. In a press statement on an interview with the Director of PNA, Dr. Aqorau reveals that both parties have reached a consensus on US industry contribution to the financial package; USD42 million for 8000 days, which is calculated at USD5, 250 per day.<sup>105</sup>

Negotiations are progressing the consensus reached on the US financial package is a milestone. The agreement (in principle) to have the financial package review biennially is one that will work to the advantage of both the US and Pacific Island, in particular the latter - as it provides the opportunity for reassessment on the financial package to ensure that PIPS obtain maximized benefits.

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<sup>105</sup> Press Release, PNA: US Treaty Price Fixed only for 2 years, Secretariat of the Parties to the Nauru Agreement, August 27, 2012

### **3. PIPS DOMESTIC FISHERIES DEVELOPMENT ASPIRATIONS**

The irony that exists in Pacific Islands' fisheries is that - the region is endowed with productive fishing grounds, yet Pacific Islands are poor and incapacitated by a small pool of fishers while foreign fishing industries coming in numbers are gaining huge returns from region.

Of course, Pacific Islands states endeavor to develop fisheries sector, however, these efforts have hampered by minimum capitals, lack of capacity (vessels), high costs to operate and infrastructure to develop down-streaming products. Joint ventures and conditioning domestic fisheries development projects with Access agreements is an approach Pacific Islands States have taken in pursuit of realizing this aspiration.

The socio-economic prospects of tuna domestic processing in the region is an important consideration for Pacific Islands - firstly, downstream processing of tuna adds value to resource<sup>106</sup> and secondly the 'spin-off' benefits including employment opportunities, periphery services, development and improvement of infrastructure etc., contribute towards improving living standards

Around the time of the negotiations on the initial treaty (late 1980s) tuna processing was undertaken only by a handful countries, such as PNG, Fiji, Solomon Islands and Kiribati.<sup>107</sup> Records from statements presented by Pacific Islands Parties at the initial negotiations, showed a deep interest by Pacific Islands states for US Government to assist Pacific Islands states develop their domestic fisheries processing capacity. The US Government on its part, did recognize the importance and economic potential its assistance to Pacific Islands in developing the domestic tuna processing industry would mean for the narrow-based economies of Pacific Islands countries. The US Government initially were slightly reluctant in their response to this proposal, more from a

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<sup>107</sup> The fish processing industry in Fiji, PNG, Kiribati and Solomon Islands were established through joint ventures with other DWFN and respective Governments.

protectionist view that it did not want make too many concessions on behalf of its own industries. A compromise was reached at the end of the negotiations in 1987 and is reflected in the treaty text under Article 2, “Broader Cooperation”

*Article 2: Broader Cooperation*

2.1 The Government of the United States shall, as appropriate, cooperate with the Pacific Islands Parties through the provisions of technical and economic support to assist the Pacific Islands Parties to achieve the objective of maximizing benefits from the development of their fisheries resources.

2.2 The Government of the United States shall, as appropriate, promote the maximization of the benefits generated for the Pacific Islands Parties from the operations of fishing vessels of the United States licensed pursuant to this Treaty, including:

(a) the Use of canning, transshipment, slipping and repair facilities located in the Pacific Islands Parties

(b) the purchase of equipment and supplies, including fuel supplies, from suppliers located in Pacific Islands Parties: (the difficulties in fulfill these - lies in the limitation of PIPS capacity to meet the demands that the establishment of such service will require) (Petroleum supply is both costly and often unreliable)

(c) the employment of nationals of the Pacific Islands Parties on board licensed fishing vessels of the United States (issue of cheap labour accessed from Asia)

This next part paper raises the questions why this sub-topic has becomes an issue for renegotiation, furthermore explore justifications from parties perspectives?

This particular issue was raised by PIPS over concerns that the US Government did not

fulfill its commitment under the provision of Article 2, in addition to PIPS view that US could do a lot more within the ambit of Broader Cooperation. PIPS therefore proposed that a new Treaty must contain specific time-frames and quantifiable development elements- it US response was, although there is an element of commitment to assist PIPS under Article 2, the text itself did not make it obligatory for US to respond in a manner that PIPS had envisaged.

In general, Article 2 provides two elements of US commitment to Pacific Islands Parties; in Art. 2.1 provide a commitment for technical and economic support to enable PIPs maximize its benefits from tuna resources. Art. 2.2 focuses on assistance associated with fisheries industry operations that in turn would stimulate economic prosperity through means of maximizing benefits of fisheries operations.

A cause for the difference between PIPS expectations and US response to its commitment lies within the interpretation of the text by respective parties. This is not to suggest that the intentions of both parties are not true to how they interpret the text, they are; the point is the differing interpretations may cause for parties to believe that either have diverged or devalued its commitment to the spirit in which Article 2 was intended and ultimately transitioning of expectations over the 25 years of the treaty life. For PIPS their expectation emerges from the understanding that the provisions are clear on US Government. The US Government on the other hand, does not view its commitments as obligatory, purely because the Treaty text does not place any firm commitments on US Government. (For example; the use of loose text such as “shall as appropriate” is not restrictive or conclusive. Moreover places too much responsibility on the US Government to decide, rather than set conditions that would be interpreted and warrant compulsory responses by US Government. This paper, thus agree that the obligations and responsibilities of the US Government under this article, has been ‘watered-down’ therefore, places minimal responsibility to respond in manner that is expected by PIPS.

Given the circumstances and the lack of responsiveness under the provision under this article, perhaps the island states should have taken a proactive approach – thoroughly assess Art. 2.2 against the backdrop of US assistance, and forward identified areas as proposals for the US Government and US fisheries industry to consider how the US could best target its assistance to each party. Of course this does not necessarily guarantee approval, nonetheless, this process develops and foster understanding<sup>108</sup> between what both parties. (These are areas where avenues such as the Pacific Islands Forum meetings are useful platform to leverage attention to the US Government at the highest level)

Another limitation in the Treaty (in particularly true in the implementation of Art. 2.2) lies within responding authorities, in this case the US Government to the commitment it made. This is observed in the disconnect between the US Government US Tuna industry in terms of how they relate and respond to the Treaty. While it is the US Government that is in agreement with Pacific Islands States, the provisions under Article 2.2 hinge entirely on the US tuna industry operations – effectively this component of the agreement is dependent on the concession the US Tuna Industry are willing to make. (either a standing side agreement either bilateral between US industry and a PIPS or multilateral).

The concerns raised by PIPS do not only indicate failure in implementation in particular relation to Art. 2.2 provisions but also raises a few important questions – (a)firstly, whether the US Government and the US industry together value Treaty its commitments to this provision and (b)secondly, the level of existing cooperation between the two stakeholders in meeting US’s commitments under the agreement.

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<sup>108</sup> Understanding the objective that each parties seek in the agreement is important – it creates an atmosphere for consultation and compromise. It also enables parties to focus on its original objectives, avoid divergence of original objectives by parties.

The main justification by the US Government on the lack of implementation of provisions under “Broader Cooperation” was due to Government limited to control over the US Industry and its inability to persuade the industry to utilize services and facilities in the region other than services provided outside the region. This US position stems from the fact that the US Government naturally takes a ‘protectionist’ approach (if it means their industries would be subject to conditions to make them worse off) over its industry.

Given the prevalent circumstances surrounding the ineffective implementation of Art.2 (as highlighted in earlier paragraphs) the Treaty should be structured giving US the responsibility to ‘promote’ the maximizing of benefits to foster growth and development in PIPS domestic fisheries industry. If it is indeed the intention of the Treaty (especially from the PIPS perspective) to see real progress and growth in region’s domestic fisheries sector - how did the negotiators envisage any outcome against the backdrop of US Government position (which has been maintained all along) and to make matters worse agree to throw ‘loose text’ into an agreement which the PIPS anticipated to gain so much from. It is as if the provisions of Art. 2.2 are irrelevant and are included in the text only to give moral satisfaction to the US Government - this being another of their contribution to international commitment to less developed regions.

As PIP Governments continue to argue US failure or emphasize the need for greater contribution by the US Fisheries industry under the provided notion of ‘maximized benefits’ - however, this paper would suggest that for this provision to be fully implemented is not only rested on US responsibility to fulfill its obligations but also on PIPS ability to create competitive services, up to standard facilities to accommodate the service required by the vessels (taking into consideration that fishing vessels would surely opt for prompt and cheaper service to maximize their profits rather than incur costs). The tuna fishery is a profit-oriented industry, and the perils of economic loss that

would be incurred if its industry conform to commitment under Art.2, are worse off than, the no-cost reluctance commitment to the Treaty.

### **3. TRADE ISSUE: PIPS ACCESS TO US MARKETS**

The US is amongst the largest tuna markets in the world. Although the US has a vibrant fishing industry, it still depends on exports to meet high domestic market demands. The Pacific Islands common tuna export destination is Asian. With high market access requirements and trade barriers, the US and EU, Pacific Islands tuna export industry have not really been able penetrate these markets. In a report<sup>109</sup> by FAO on US tuna imports, Fiji (the only Pacific Islands that was reflected in this reports) contributed 5.67% of the total imports of fresh Yellow Fin tuna. The majority of US tuna imports originated from Asia and South America.

The Compact states, because of the political attachment with US, have provisions for Market access to the US for canned tuna. The Compact Agreement, allows for duty-free exports to the US from the Freely Associated States – however these products are conditioned to certain market criteria; that is (a) it must exported directly from FAS (b) sufficient value has been added to the product.<sup>110</sup>

Market access by PIPS to US markets was initially one of the key issues for consideration to include under framework of a new USMT. This intention comes amidst arguments driven particularly by the PNA group that in addition to the conditions for a new treaty agreement, US should consider market access for PIPS products in particular

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<sup>109</sup> FAO, *Recent developments in the tuna industry*, pg 84

<sup>110</sup> FFA, Pacific Islands countries, the Global tuna industry and international trade regime – A Guidebook

fisheries products to its markets. PIP strategy was to tie the renewal of the treaty US Government conditional for the renewal of a new Treaty arrangement. From PIPS perspective access into the market would be two-fold (a) increase export market opportunities for domestic fisheries (enormous potential that Pacific Islands could benefit from access to US markets, moreover the increase in demand for fisheries products in the US. For instance, in 2010, the US imported a total of 215 694 tonnes of fresh and frozen tuna, and 200 653 tonnes of canned tuna (with both figures recording an increase to the 2009) and (b) added trade-off for extensive access (premium) to fishing waters.

However, at the last Round of negotiations parties agreed that the issue of Market Access falls outside the ambit of the Treaty negotiation. According to the Islands Business Magazine the US representative stated that “market access has been taken out by a process that was outside of the negotiations of the Treaty because market and trade access issues are broader than the US Treaty”. Furthermore, the issue of Trade and Market Access as sought by PIPS transcends<sup>111</sup> into the jurisdiction of the office US Trade Representative therefore, another separate process is required to consider PIPS proposal. US Government’s response to this PIPs proposal and eventual sidelining of this issue was not well received by PIPs, in particular the PNA group in which the Director of PNA Dr. Transform described it as “a missed opportunity”<sup>112</sup>.

This Market access issue was an important component of this negotiation package and its relevance to the ongoing negotiation was discussed rigorously in numerous regional meetings<sup>113</sup>. The sidelining of issue, has prompted doubts and difficult to gauge a possible outcome as envisaged by Pacific Islands parties, or will be eventually become

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<sup>111</sup> Negotiations on the USMT are led by the US State Department, whereas Trade issues fall under the jurisdiction of the US Trade Representative.

<sup>112</sup> There was anticipation by PICs that once the issue on Trade is sidelined, the chances of PIPS gaining access to US Markets will remain minimal. Ultimately, the option for PIPS leverage US support/approval from

<sup>113</sup> This issue first sprung up in PNA meetings, PNA members introduced it to FFC and Forum Trade meetings.

watered-down after June 2013. Nonetheless, on the part of the US steps have been taken; the proposal has been placed with the US Trade Representative. On the PIPS side, Pacific Islands Forum Secretariat, has now taken leadership of this issue to prepare PIC should a trade negotiating opportunity for market access eventuates.

Although the PIPS failed to gain the outcome desired from the negotiations with regard to this issue, the US have taken to consideration and launched a 'joint' study on development-oriented trade and investment arrangement for the Pacific Island Countries.

There is the pessimistic view that striking a trade deal with the US, will take some time. However, it will be interesting to see what the joint study will suggest and what arrangement would best suit - perhaps it would be strengthen existing market arrangements or establish a preferential or development oriented arrangements.

## CHAPTER THREE

### TREATY ON FISHERIES BETWEEN THE GOVERNMENTS OF CERTAIN PACIFIC ISLANDS STATES AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

#### PROSPECTS AND CHALLENGES

A provision by Law of the Sea fundamental to the practice of Fisheries Access is the delimitation of Exclusive Economic Zones<sup>114</sup> – the zoning of water recognized under international law, gives coastal states sovereign rights over 200nm adjacent to its coast for the purpose of exploring, exploiting, conserving and managing the living and non-living resources.

A compromise between the opposing views, (mainly land-lock states and states with active fishing operation) and those that favored the EEZ regime was the provision of Article 58<sup>115</sup>; obligating coastal states to allow other states access surplus resources in its EEZ. The expression of granted access to a state (usually a DWFN) to access fisheries/resources in another state (coastal) is facilitated either through bilateral or multilateral agreement, which is the end result of what often can be a long arduous negotiation process.

States objectives to enter into an access arrangement with another (or other) state(s) may differ – whatever the reasons maybe, the act of exchange in this process can be

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<sup>114</sup> UNCLOS, Articles 55 and Article 56:

<sup>115</sup> UNCLOS, Article 58

described as a form of trade between two countries. One state has the good (access to fish), which it is willing to trade with another – and this practiced within the parameters of international law governing the rights and obligations of both partners.<sup>116</sup>

Fishing agreements bilateral or multilateral in nature are sustained mainly by mutual interests and participating states or parties' willingness to cooperate under the spirit to which the agreement is made on. For bilateral agreements, updating an agreement is a lesser complex process as only two parties are involved. Multilateral agreements on the other hand, can be complex and involve lengthy negotiations because of the difficulty to arrive at consensus agreeable by all states concerned. The same is said for the renegotiating in this case study on the USMT.

The current treaty was last reviewed in 2002 (10 years ago) at the end of 2<sup>nd</sup> Treaty phase. In this time regional fisheries dynamics have shifted regional management and conservation objectives; states adopted pragmatic measures to ensure maximized returns fisheries resources. As the 3<sup>rd</sup> Treaty phase draws to its end – this has prompted the need for a new treaty to reflect this. The negotiation process is an opportunity for US and PIPS to reassess their commitment and conditions fitting to current situations. In this regard, a series of negotiations has been undertaken since 2009 between the US Government the Governments of the sixteen Pacific Islands states parties with a view to arrive to a new agreement by June 2013.

Commentaries on the Treaty particularly the recent years reflect mixed views on the Treaty. The expressed statements in favour of the treaty, is narrowed down to advantages of multilateral approach for fisheries access, benefits derived from the agreement and the treaty a mean of maintaining political link with US. The critics draw their views on the conditions of treaty. The main critics in this regard, are Pacific Islands states themselves. (Much of views has been translated into the conditions currently negotiated between the parties)

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<sup>116</sup> Mwikya, S, (2006) Fisheries Access Agreement: Trade and Development Issues

In this regard, this Chapter will focus on two key issues; (a) the prospects of the treaty, entailing future outlook and the Treaties sustainability and (b) challenges, the areas requiring further cooperation between Parties, considerations on developmental factors perceived to threaten the arrangement between the Pacific Islands Governments and the US Government. Justifications and discourses are categorized under the 3 broad areas; economics, politics and legal.

## PART ONE: PROSPECTS

### 1. *Economic*

#### a. *Economic Benefits – Tuna as a valued commodity*

The tunas (Thunnini) are referred to as the principle market tunas because of their global economic importance and the intensive international trade for canning and sashimi<sup>117</sup> Tuna species are classified as member of the fish family *Scombridae* and are scientifically known as follows:

Atlantic Bluefin tuna – *Thunnus Thynnus*

Pacific Bluefin tuna – *Thunnus maccoyii*

Albacore tuna – *Thunnus alalunga*

Yellowfin tuna – *Thunnus albacore*

Bigeye tuna – *Thunnus obesus*

Skipjack tuna (bonito) – *Katsuwonus pelamis*

Southern Bluefin tuna – *Thunnus maccoyii*

Pacific Islands' countries relate to tuna fishery in the following three main ways. Firstly, tuna is a source protein and critical to regional food security; secondly, tuna is a commodity for export (income/revenue) for coastal states with active domestic tuna

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<sup>117</sup> FAO, [www.fao.org](http://www.fao.org)

fishery and; thirdly, tuna a highly sought after living-resource that is relatively in abundance in the region, accessed by industrialized fishing states in exchange for access fees (also another important source of revenue). Ultimately, the economic importance of tuna for Pacific Islands lays in the financial compensations for access, export and trade opportunities of tuna products.

The value and importance of tuna as a commodity in global fish production is a prospect for maintaining the Treaty. If tuna fisheries prices continue to rise or are maintained at market high end, fishing operations will remain interested to participate in offshore fishery, hence, create new or maintain opportunities for fisheries access arrangements.

The principle market tunas are frequently divided into tropical (bigeye, skipjack and yellowfin) and temperate (albacore and Bluefin)<sup>118</sup>. As shown in Fig.1 the WCPO hosts both the tropical and temperate tuna species, but landings for tropical species are far greater than temperate species.

Tuna prices and value fluctuates depending on the market forces (supply and demand) and prices vary for the different species. The Bluefin tuna are on the high end of the market scale, while skipjack is at the lesser end of the market value.

Given the global importance and demand for the principle market tunas, and their stock high yields reflected in the total of landings in the WCPO, this has led to the region become a hot-spot for tuna fishery (64% of global catch is from the Pacific Ocean)<sup>119</sup>.

While the US may not be a major DWFN's globally (terms of catch weights) compared to Japan, China, Korea and France etc., its status in the region according to report by PNA - it is listed together with Taiwan, Japan, Korea, Philippines and China as countries with the most number of fishing fleets making up 92% of the total number

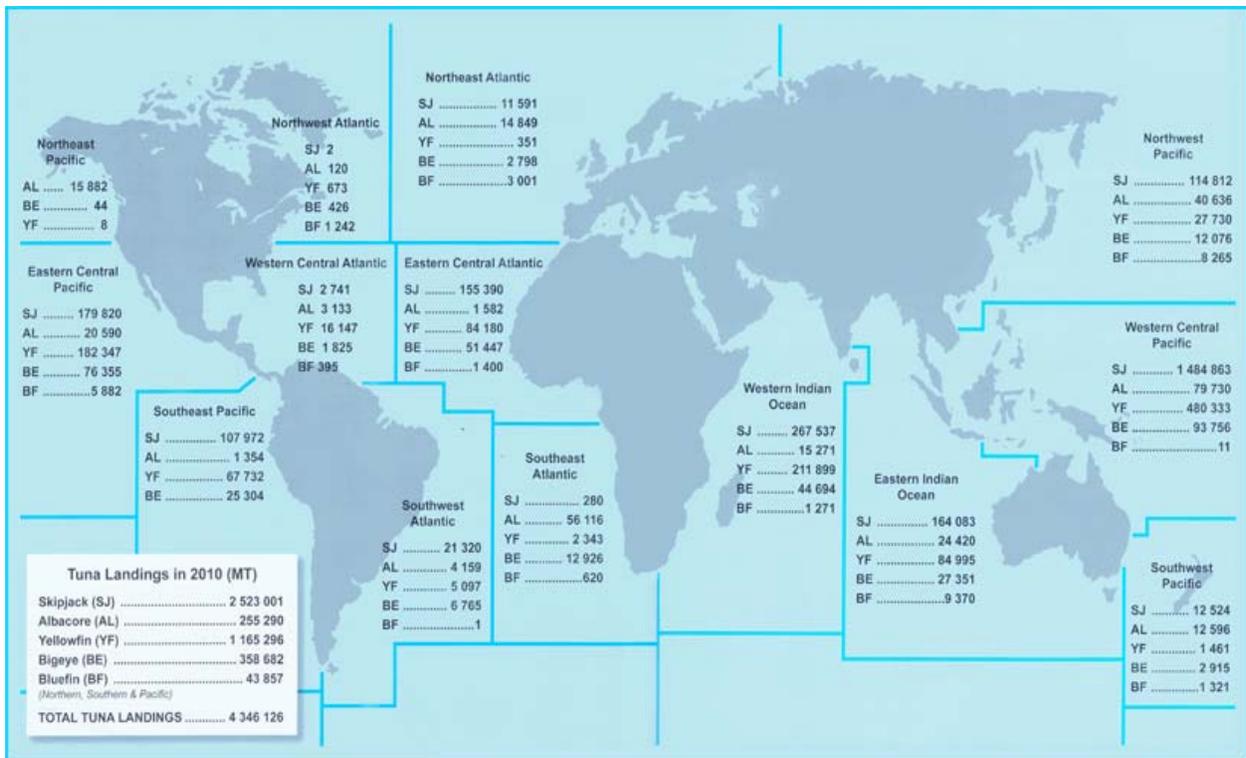
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<sup>118</sup> FAO, Global fishery resource of tuna and tuna-like species, [www.fao.org](http://www.fao.org)

<sup>119</sup> FAO, Global Trends in Fisheries, [www.fao.org](http://www.fao.org)

of fishing fleets in the PNA region.

**Fig 1: Global Tuna landings**



Source: Atuna; [www.atuna.com](http://www.atuna.com)

The demand for tuna in US is one of the driving factors why the US Government and American Tuna industry are rigorously pursuing the Treaty. The US is among the countries with the largest tuna markets in world for fresh, frozen, smoked and canned tuna<sup>120</sup>. Domestic catch by US itself is not sufficient to supply to market demands, so much so that the US market relies on imports provide for the shortfall. Moreover, the

<sup>120</sup> Interests and Influence: A snapshot of the Western and Central Pacific Tropical Tuna Fisheries, Hanich, pg 20

treaty is critical to support the economy of US territories in the region. For instance, as reflected in the statement by Senator to American Samoa before the US Subcommittee on Asia, Pacific and Global Environment:

“The treaty is important to the US tuna industry and especially to the US Territory of American Samoa as its private sector economy is more than 80% dependent, directly and indirectly. Without the agreement the two US canneries will not be supplied and jobs of around 5,000 tuna cannery workers will be at risk”<sup>121</sup>

Premised on this market pattern and expressed views it is important that US maintains the arrangement under the treaty. To forfeit this opportunity for access or should the treaty fails to be renewed would result would result in major disruptions for tuna product supply in for the US as well as have enormous repercussions for US territories.

*b. Revenue for economies*

Fisheries Access agreements differ in their economic benefits/values depending on the negotiated conditions agreed upon by the DWFN and coastal state. This is determined by the objectives that either parties entering agreement desires from the agreement.

A reoccurring theme presented in this paper is the economic aspect of tuna fisheries and the opportunities growth of this industry may yield for development of states and the region as a whole. For many Pacific Islands they aspire to develop their domestic however, limited capacities, failed Government-financed tuna productions operations, and limited capital creates a gap between this aspiration and reality. Fisheries arrangements were provided a medium which surplus resources could be consumed by the industry while revenue from access fees and license for fishing rights in their EEZ is collected by Government. (Often collected in budgets for national development programmes/activities).

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<sup>121</sup> Statement by Honourable Eni F.H Faleomavaega, Senator of US Territory of American Samoa and Chairman of the Subcommittee on Asia, Pacific and the Global Environment

**Fig 2: DWFN tuna off-takes from WCPO and payments (2003)**

	US	Japan	China	Korea	Chinese Taipei (Taiwan)	EU
Off take (2003) Metric Tonnes	94 003	366 783	35 985	208 592	235 188	n.a
Fleet number	16 PS	157LL 35PS 35PL	106LL 8PS	150LL 27PS	153LL 34PS	5LL 3PS
Financial Compensation/ Economic Benefit	US21 million to 17 countries	5% catch value	5% catch value	6% catch value	6 %catch value	€100/tonne (12% catch value)

(PS: Purse Seiners, LL: Long-Liners, PL: Pole and Line)

Fig 2. Translates an example of how this access payment is calculated against the active six DWFN in the region.

Japan and other Far Eastern Countries access are under bilateral agreements and access fee (financial compensation) are based on reported value of the catch, as determined at certain ports calculated at five-six percent of the value catch. Whereas the US multilateral agreement access fee is paid as lump-sum of US21 million dollars divided equally among 16 Pacific Islands.

Commentators such as Dr. Grynberg criticized the East Asian DWFNs access fee formula, and argue that it leaves room for under-payment of financial compensation due to coastal states<sup>122</sup>. Dr. Grynberg further argues this is because little or nothing is publicly known about these agreements, except that access fee is worked based on percentage of last year's catch.<sup>123</sup> The US on the hand applies an access fee method that features a percentage of payment from the Government and industry. Although this method has been criticized to yield under-value payments compared other DWFNS it

<sup>122</sup> Grynberg, R, WTO fisheries subsidies negotiations: Implications for fisheries access agreements and sustainable development, Marine Policy, 2003

<sup>123</sup> Access fee values are subject to under-reporting and misreporting, often resulting in under payments to coastal states.

guarantees certainty of access fee value and transparency, as the access fee calculations is not affixed to total catch value or reports.

The absence of a standard justification or formula to ascertain financial compensation for access is the cause for the variant forms of formulas used by DWFNs (Fig.2) While UNCLOS has provided an international legal framework for the exploitation of fisheries resources, it is limited in its provisions on this particular issue, determining the value of financial compensation therefore falls on the negotiations between two contracting parties. However, it might be viewed or argued; this paper concurs with the view that the lack of regulated formula is a loophole that DWFNs use to their advantage when negotiating financial compensations/access fees with developing coastal states. Nonetheless, having considered the shortcomings of the method of payment by East Asian DWFNs, this paper concedes that the access fee payment applied under multilateral fisheries arrangement between US and Pacific Islands is a better approach for Pacific Islands. However, with the method applied by US, the responsibility rests on states to negotiate a high financial package. (This where with the bench-mark of \$5000 per day under the VDS approach by PNA works in favour for coastal states, as it sets a minimum value and any negotiated value may be above not below the bench-mark)

#### *USMT setting a bench-mark for future arrangements*

The management of the USMT (and its negotiation process) has received praise by various recent commentators (mainly from critics of fisheries access agreements of East Asia DWFNs). The views expressed in favor of the USMT come from comparisons drawn more from the negotiation processes undertaken between DWFNs and coastal states. In their view, coastal states are vulnerable to commit to agreements that offer less favorable conditions, because (a) more often than not details pertaining to the agreement (bilateral) are kept confidential (b) coastal states have weaker negotiating capacities compared to DWFNs. In this regard, the transparent process and manner in

which negotiations have been conducted between the US Government and Pacific Islands States and sets a benchmark for both DWFN's and Pacific Islands' parties to gauge future negotiations for fisheries access in the same way has it has been done for the USMT.

## ***1. Political***

### *a. Renewed relation US-Pacific focus*

The eminent link between the Treaty and US foreign policy towards the Pacific is an important consideration to determine the sustainability of the Treaty. This paper views that US-Pacific relations (US Foreign Policy) will impact the Treaty not only in the renegotiation process. Secondly, PIPS can capitalize on Obama's renewed Asia-Pacific policy to push for gains in their favour.

From the late 1980's US maintained the Pacific Region as strategically important to US interests with Security in the fore and economic, mainly because of active US Fisheries in the region. US continuous security interest in the region was characterized by WWII, and further reinforced by UN granted territorial powers to US over islands in Western Central Pacific. However, over the years US-Pacific engagement with the region was at minimum, and bias to larger economies in the region, Australia and New Zealand, US Territories and States under the Compact arrangement. Critics and followers of US Foreign Policy as well as Pacific Islands states themselves expressed, the super power failing in some respects to maintain pragmatic relations with the region. (In particular from a development assistance perspective)<sup>124</sup>

While the US pitches its priority and focuses on regional Security and attention to a certain few, other new relations and alliances were being developed between emerging Asia economies and Pacific States. This recent wave political alignment by Pacific Islands with China, South Korea, Japan and other emerging economies is harnessed by the influx of financial Aid assistance much needed by Pacific Islands' countries to

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<sup>124</sup> Remarks by the Samoa Prime Minister, Tuilaepa Lupesoliai Sailele critiques US lack of interest in the region as reported on ABC news, "Powerful diplomacy to play out at the Pacific Forum, [www.abc.net.au](http://www.abc.net.au)

further their development aspirations. (although there are also existing arguments about associated implications in relation to the funding assistance provided by certain donor partners). Consequently, this has led to observed shifts in balance of power and influence in the region by Asian economies.

There are some that perceive US Governments announcement on the renewed Pacific relations rhetoric propaganda; and question the value of the US Secretary of State Clinton attendance at the recent 43<sup>rd</sup> Pacific Islands Forum Leaders Summit in Rarotonga, should credit US on its political commitment to the region. For the Pacific Island countries, Secretary Clinton's (being the highest US official to attend the annual meeting) demonstrates US Governments seriousness in honoring its commitment to renew US-Pacific relations. However, the bigger and important question Pacific Islands states are asking is; whether, or not this commitment will be manifest in an increase in financial assistance<sup>125</sup> to contribute towards, development in the region. (With regards to USAID to the Pacific region, according OECD<sup>126</sup> rankings on foreign aid donors to the Pacific Islands the US is the second largest donor committing around 267 per annum. However, USAID assistance disbursement is selective to certain states only, mostly Compact States)

It could be assumed that there is an unspoken expectation (mostly from PIPS) that the Obama Pacific policy will be an important consideration and positive leverage for PIPS in the treaty negotiations. Drawing from the level cooperation between US and PIPs in the negotiations, it could be perceived that this is attributed to the US Pacific Policy reform.

*b. The process of negotiation and consultations is transparent compared to the other*

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<sup>125</sup> US Secretary of State, Hillary Rodman Clinton – Extracted from Speech at Post-Forum Dialogue in Rarotonga, 2012: “Currently, United States spends \$330 million every year supporting the nations and people of the Pacific Islands. Additionally, our Export-Import bank is active in the region, providing \$3 billion for investments in Papua New Guinea, helping in the last few years to finance U.S. trade with Tonga, Tuvalu, Fiji, and Micronesia” In the same speech she made reference to additional programmes targeted for Asia-Pacific region launched in July, valued at USD32 million.

<sup>126</sup> [www.oecd.org](http://www.oecd.org)

*arrangements.*

There are number of considerations pertaining aspects of the negotiation that have impacted the positive progress of the negotiations. For this purpose, considerations will be drawn from a comparative assessment to highlight the differences between of negotiations undertaken in 1987 Treaty and the current ongoing negotiation. Firstly, there is overwhelming evidence of consultation and collaboration between the PIPS and US. A major contributor to this is the establishment of Technical Working Groups by officials for the different aspects of the provision that discussions are being undertaken on. The TWGs allow for greater participation and involvement by relevant officials, in the course of these negotiations. Positive feedback from delegates concurs that this mechanism fosters understanding between the parties. It can be drawn from the responses, that delegates are satisfied that the process of negotiations conducted in a transparent and consultative manner in comparison to the negotiation undertaken in 1984-87.

Records from meetings and negotiations from 1984 to 1987, suggested the absence of mechanism encouraging consultative dialogue between parties.(although this may not have been apparent in the discussion on Treaty conditions/provision, this was particularly lacking at the drafting the text). Moreover, these records suggested a sense of US dominance in the negotiations, projected in firm positions. Proposed drafts texts were thrown back and forth between parties (US and PIPS), and according to the records PIPS at that point were weary of the US uncompromising acceptance of texts proposed by PIPs.

By stark contrast, the current negotiating arrangement underlines the importance of collaboration and cooperation in this process, and Parties have agreed on Technical Working Group to pursue the task of drafting the treaty text, in pursuant to decisions or outcomes reached in the negotiation rounds. (This arrangement was a non-conditional requirement made by PIPS before embarking on the negotiations. This approach is anticipated to eliminate any heavy handed bias from either parties.

There are several justifications that this paper will highlight, influencing the contrast between the 1987/88 negotiation process and the current. From the PIPS perspective, firstly, it could be argued that the approach and strategic preparedness reflects maturity in PIPS engagement in the international flora. Second point is the support from regional institutions in particular the increased technical capacity of FFA. Third point is the negotiating capacities of individual Governments.

- (a) As highlighted in the chapter two, the 1980's were a 'transition' period for majority of the PIPS states, going from being under a colonial rule to self-governing. The negotiation US Tuna treaty could possibly one of the earliest multilateral negotiations that most PICs would have been involved as independent states. Characterized by limited negotiating capacities, limited exposure and engagement in the international flora - these small island states were most probably challenged by the fact that (a) negotiation was with the world's largest economies (b) an agreement of access hinges one of their most importance resource. Continuous references by Pacific Islands for support by Australia and New Zealand (Australia and New Zealand) reflects a sense of reliance on NZ and Australia cushioning support throughout the 1987 Treaty negotiation (exclud. Australia and New Zealand). It's a different story today - negotiation is dominated by resources owners (in particular) have overshadowed Australia and New Zealand in this particular undertaking.

Global integration and increased participation by Pacific States in the international flora in individual capacity or as regionally exposure has added value and experience to PICs interaction with the global community. Arguably this is one of the strengths to the stronger and assertive PIPS side in treaty negotiations.

- (b) Following on to the argument above, the contrast in PIPS stronger position in the current negotiations than in 1987 negotiations is reflective of the strength and

The regional institutions/organizations are constituted by pool of experts and resources mandated to provide technical support and advice to member Governments. In this instance, FFA and PNA have had enormous influence in PIPS strategic positions in the negotiations. (Although the politics within these individual organizations may be point of concern, the role of these two organizations with regards to consolidating PIPS for the negotiation is fundamentally the important aspect in this argument).

FFA plays a dual role as far as Agreement is concerned, (a) as the common institutional body that all PIPS have membership to providing technical advice and support to PICs in management and surveillance of fisheries resources in the region and (b) as the administrator of the Treaty, as agreed to by PIPS and US Government.

FFA's immediate influence in the negotiations is in its earlier is described in its role as the regions premier organization on fisheries issues. It has played a pivotal role in facilitating and coordinating collaboration/dialogue between Pacific Islands Parties. With a team of experts allocated to administer US Treaty issues, FFA has advanced greatest in accommodating its member's needs and expectations, such as preparation of PIPS members for this negotiation. Complimenting the efforts of FFA in this exercise is the Parties to the Nauru group. Since establishing its own Secretariat the PNA characterized by its members states with productive fishing ground has emerged as the as an influential sub-group, calling the shots on the most eminent conditions proposed for US Government's consideration in a new treaty.

From the assessment made, it is clear that regional institutions and their growing credibility has positively influenced PIPS in this negotiations in comparison to 1987/88

negotiations. In addition to the work of FFA and PNA, the regional CROP agencies such SPC, SPREP have had contributed to overall level of preparedness of PIPS in so as far the negotiations is concerned.

- (c) There are various statement and remarks made by Pacific Islands' leaders and senior officials on Pacific Islands' states enhanced control and influence over regional issues, and notably in fisheries<sup>127</sup>. An example is cited from Dr. Aqorau's statement in marking 30<sup>th</sup> anniversary of the FFA, where he states "times have changes and along with it, the enormous power and influence the Pacific Islands States now wield over the management and conservation of the world's last remaining healthy tuna stocks".<sup>128</sup> Such statements resonate, as sense that Pacific Islands taking charge on regional issues and determining the future of the region - this has clearly been observed in fisheries and in particular in this negotiations, where the Australian and New Zealand who usually dominate in other regional issues, such as security and trade have been overshadowed in this negotiating process.

A reason for the increasing assertiveness observed in Pacific Islands States comes from relative improved national capacities through growing technical and human resources pool mainly in policy-making and Government institutions in these states. While this maybe not be a significantly growth, the level of improvement has sufficiently changed islands states abilities to engage in international and regional issues, much more than PIC states national capacities in early years of post-independence/ self-governing.

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<sup>127</sup> In the early years of post-independence majority PI states had minimal human resources, let alone technical capacities. States lack of interest or reluctance in participating in an issue(s) was associated with this lack of their technical ability to effectively participate. Hence the statements or comments articulated by PIPS are made to reflect a sense of confidence in their abilities now, in comparison to the past where views/positions were usually overpowered because of the imbalance in the negotiation abilities.

<sup>128</sup> Dr. Aqorau, Deputy Director-General, Pacific islands Forum Fisheries Agency, [http://www.islandbusiness.com/islands\\_business/](http://www.islandbusiness.com/islands_business/)

Improved national capacities and appropriate technical expertise in national delegations with specific knowledge on the Treaty; its association with other existing fishing agreements and arrangements has proven advantageous for PICs. And in comparison to 1987/1988 negotiations, PIPS individual national capacities and ultimately the overall groups negotiating capacity is clearly setting a course for the negotiations in direction that would see a new Treaty based on a compromise, with PIPS as resources owners calling the shots and not succumb to unfavourable conditions/terms because of the inability defend positions.

*iii. Legal*

- a. Easing of US position on coastal states sovereignty over tuna resources and US showing positive steps towards acceding to UNCLOS*

An aspect that could write as a positive step in so far the renegotiation of this treaty is concerned (and proven to be so in the last 9 round of negotiations) is the easing of US position on coastal states sovereignty over tuna resources, and consequently its advancement towards acceding to UNCLOS.

Despite wide criticism of its policy position on the UNCLOS, the Obama Administration has expressed deep seriousness for US to accede to the Convention. In a statement by Secretary of State, Clinton stated “whatever the arguments may have existed for delaying US accession cannot be even taken with a straight face”<sup>129</sup>. She further argues against the critics against US accession that “the benefits of joining have always been significant but the costs not of joining are increasing.”<sup>130</sup>

While US’s primary intention for accession to UNCLOS is hinged primarily on US maritime security interests, this step encompasses US’s concurrence to other provisions of the Convention relating to fisheries issues.

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<sup>129</sup> Hillary Clinton, US Secretary of State, Testimony before the Senate Committee on Foreign Relations, Washington, DC, May 23, 2012

<sup>130</sup> *Ibid*

In the event the US does formally recognize the Convention, this will no doubt positively impact its engagement as DWFN in fisheries, including the Treaty.

*b. Shift in US position on coastal sovereignty of highly migratory fish species (tuna)*

The recent years has seen a slow progressing shift in US position regarding coastal sovereignty over highly migratory fisheries. The US has always maintained a stern position on highly migratory species – at the time of the EEZ revolution (consequently UNCLOS I) the US remained this Fisheries policy relating on this particular issue.

When the US first signed the SPTT some commentators speculated challenges to long-term sustainability of the arrangement, because of the different positions US and PIPS hold regarding migratory species. The Treaty’s initial 5 years treaty-life is expressed to reflect US unwillingness to recognize coastal state sovereign rights over tuna resources. The optimists however, view the conclusion of the Treaty as representing “a turning point in the evolution of US tuna policy”<sup>131</sup>

## **PART TWO: PROSPECTIVE CHALLENGES**

### *Economic*

*1. Development – coastal state capacity increases*

An aspect that maybe considered a challenge to the long-term existence of this Treaty arrangement is the development of coastal states national fisheries capacities.

As observed in the history of fisheries activities in the region, **(a good proportion)** fish caught in the region is either shipped by fishing companies overseas for processing or those majority caught by domestic fleets and export unprocessed to international market. In the absence of adequate fish processing plants, for most Pacific Islands countries exporting tuna has been the only viable option. Until the later years of 1980’s and early 1990’s did Pacific Islands states began domestic processing of tuna – such as,

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<sup>131</sup> Kelly, C R; Law of the Sea: The Jurisdiction Dispute over Highly Migratory Species of Tuna

Fiji, Solomon Islands, Papua New Guinea, Palau and Kiribati.

Unfortunately, most of these enterprises because of their State-Owned nature succumbed to financial pressures Governments faced, compounded by dwindled tuna prices struggled to remain in operation. Some failed and most were rescued through sold off shares to larger tuna processing companies from abroad.

**Fig 1: Catches in the Pacific Islands States (2008)**

Country	Offshore - locally based (metric tones)	Offshore - foreign based (metric tones)
PNG*	256 397	619 568
Kiribati*	0	163 215
FSM*	16 222	143 315
Solomon Islands*	23 619	98 023
Marshall Islands*	63 569	12 727
Nauru*	0	69 236
Fiji	13 744	492
Tuvalu*	0	35 341
Vanuatu	0	12 858
Samoa	3 755	25
Tonga	1 119	0
Palau*	3 030	1 464
Cook Islands	3 939	0
Niue	640	0

Source: ADB: [www.adb.org](http://www.adb.org)

Fig 1, clearly show the disparity between the levels of catch between locally based fishing fleets and foreign-based fishing fleets. One hand it reflects foreign fishing based tuna fishery in the WCPO and on the other it shows the potential high yields and expanded domestic fishing fleet can catch. (This translated to high economic gains)

The shifting focuses to fisheries development for economic growth has taken on a new

turn in the region. For example, in the Solomon Islands, two consecutive governments have signed deals to establish fisheries processing plants on two provinces – Malaita and Guadalcanal, with the long-term view that these operations will stimulate economic growth other socio-economic factors. In addition, there has been renewed interest by Government in current only fish operating plant in Noro (Tri-Marine International and NPF). With these future plans and fisheries development prospects, there are two possible outcomes that will result from this (a) domestic fleet will be increased to supply for domestic production (intention is value-adding of fisheries products) or (b) coastal states to apply right of first refusal to foreign vessels fishing within EEZ.

Some commentators on fishing patterns between DWFN and domestic fishing, have identified a correlation between domestic fishing capacity and opportunities for fishing access arrangements. According to Mwikya, a recent emerging trend is observed in decreasing number of access agreements as a correlated response to improved or increased national capacities of coastal states to fish in their own EEZ.<sup>132</sup> Mwikya, further stated that as coastal states opt for domestic production they are more incline to resort to forms of fishing agreements compatible to their status and current development status. While there other aspects needed to be considered before such decision is made; such as the nature of the fisheries and domestic market and market opportunities<sup>133</sup>, this highlights the possible challenges or risks to long-term fisheries access agreements such as the USMT.

While the this paper supports the argument by Mwikya, it also sustains that that the state of Pacific Islands fisheries (apart from Australia and New Zealand) fishing activity

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<sup>132</sup> Mwikya. S, Fisheries Access Agreement: Trade and Development

<sup>133</sup> Ibid

and production; rate of national capacity improvement<sup>134</sup> can cater for the losses that Pacific Islands States will forfeit should they disengage in fishing agreements/arraignments. On the other hand, there are enormous opportunities (economic and socio-economic)<sup>135</sup> that Pacific Islands states could benefit from if national capacities were improved and domestic production increased. Ultimately finding the compromise or relationship that is beneficial for all parties is the important, for the best interest of Pacific Islands' states and economic interests of foreign states like the United States whose fishing rights and access to resources are bound by privileges granted under fisheries access agreements.

## *2. Politics*

In considering the prospects and challenges of Treaty, a particular area of importance that this paper will attempt to highlight is Fisheries access agreement reforms – this is against the backdrop of coastal states pursuing domestic fisheries development (economic development and prosperity). This issue is not only important but relevant as they hinge on two important facets of this the agreement; (a) future discussions relating to Fisheries access agreements and domestic fisheries development and (b) the coastal states and resources-hosts gaining maximum benefits from resources.

### *c. Multi-lateral vs Bilateral arrangements – best interest of coastal states*

One of the factors that will become crucial in the discourse on fisheries access is the conflicting views and considerations on the differences between multi-lateral arrangements and bilateral arrangements. Both arrangements could argue in their own strengths, however, for the purpose of this paper this will be viewed from the

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<sup>134</sup> This is measured against the development growth and the challenges to establishing domestic production and fleets that would lead to eliminate fishing agreements – though there maybe some necessary measures taken to ensure that domestic fleets and domestic productions interests are in the fore.

<sup>135</sup> Reference is made to economic and socio-economic impacts through increased domestic production – direct impacts (increase of income, more fish being caught by domestic fleets either for export or processing) or indirect impacts (spin-offs such as employment opportunities in the production facilities, support service jobs, Government improved service to reaching the communities).

perspective of a coastal developing state’s diverse interests and how different factors (developmental) may decide particular arrangement favorably over another. In the context of the treaty, it raises the question how states in response to their national and developmental aspirations - decide which arrangement offers conditions in the best interest of states.

The differences between multi-lateral and bilateral arrangements is a multi-layered argument and in most circumstances conditional to other factors.

All but one of the existing fishing access arrangements in the region are facilitated under bilateral agreements<sup>136</sup>. Majority of arrangements are categorized ‘Agreements with Financial Compensation’ - where a financial compensation and license fee is paid for fishing rights in coastal states without receiving reciprocal rights.<sup>137</sup> Although some DWFNs proposed to pursue multi-lateral fishing arrangement with the Pacific Islands region, only the US Government has successfully done so. The question this paper then raises is - which arrangements do coastal states stand to gain more from, bilateral or multi-lateral? The answer to this could be explained by various factors:

**Fig 2: Synopsis of bilateral and multi-lateral fisheries access agreement**

<b>Bilateral Arrangement</b>	<b>Advantages</b>	<b>Disadvantages</b>
	Easier to implement	
	Shorter negotiation and decision-making process	
		Closed and confidential to negotiating parties - opens possibilities for corruption practice
		Influence by other factors; a)Aid Assistance - Attachment of Aid Assistance/Technical cooperation packages with

<sup>136</sup>Bilateral Access Agreements are between two key players (DWFN and coastal state); either *Government –to-Government* or *Government-to-industry*

<sup>137</sup> Fisheries Access Agreements: Trade and Development Issues, Mwikya, M.S, 2006

		Access Fees – coastal states often caught out under-pressure from possible removal of vital aid assistance from DWFNs. b) negotiating capacity c) political alliance
	State's can dictate own conditions according economic environment	
		States lack competitive edge when negotiating financial compensations. DWFNs use conditions of pre-existing arrangement with another coastal state as a trade-off tactic
<b>Multilateral Arrangement</b>	<b>Advantages</b>	<b>Disadvantages</b>
	Compliments regional management efforts especially for highly-migratory and straddling stocks (tuna)	
		Longer negotiation process – difficulty to reach consensus.
	Open negotiation – encourages transparency and limiting corruption	
		Diverse national interests and different fish stock distribution patterns – conditions fair and for all parties.
	Bargaining as a bloc can yield high Financial Compensation value – consensus between coastal states on a financial compensation value proposed to fishing state	

An analysis on bilateral and multilateral fisheries access negotiations, Mwikya argued that when negotiating migratory and straddling stocks, such as tuna states it is difficult achieve a fair agreement through bilateral arrangements. This is because, multi-lateral approach compliments regional management efforts and takes into consideration straddling stock sustainability issues, whereas under a bilateral approach a migratory fishery only encourages 'opportunistic' bargaining in favor of DWFNs, whereby a DWFN can apply tactical fishing approaches – waiting on fish (tuna) to migrate in the

adjacent country of that which refuses to sign an agreement<sup>138</sup>. On the other hand, bilateral agreements are 'easy to implement and negotiation and decision-making process is shorter. Coastal states freedom to decide preferred conditions in an agreement is one main of the advantages of bilateral arrangements. While this paper appreciates the argument that bilateral arrangements exposes states vulnerability to corruptive practices and offered under-valued conditions - with this option States are at liberty to exercise their sovereign right to full extent<sup>139</sup>.

The objective of the discussion under this sub-heading is to highlight, that although arguments are in favor multi-lateral agreements if considerations were based on the mechanisms of negotiations, conservation and higher values of financial compensation (as per Fig.2) there are other factors at play which influence coastal states decision to which agreement conducive to its economical situation - often decisions are based on circumstances (development coastal challenges).

At this juncture, without preempting the outcomes of the current treaty negotiations - should the chances are that current US fishing arrangement with Pacific Islands states becomes reverted under bilateral arrangements, how would the US conduct it negotiations with Pacific Islands states, the conditions and compromises it willing make and give? This insertion is merely a hypothetical line of through, however, an equally important consideration, should the treaty renegotiations do not succeed.

#### *Competition between fishing fleets*

An issue that could pose a threat to the sustainability of the Treaty competition fishing fleets. As the WCPO becomes an area of interest for productive fishing, this in turn increases competition for access by DWFNs. This was a concern shared by the US in a report to the House of Congress. The report stated, the influence of the South Pacific Tuna Treaty in the region may decline in the future as competition from other fishing

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<sup>138</sup> Fisheries Access Agreement: Trade and Development Issues, Mwikya, M,S, 2006

<sup>139</sup> This is in reference to conditions of financial compensation (Access fees), other conditions bearing on regional management of conservation efforts ar

nations in the region grows, and at this time it is not clear how this potential trend may affect the negotiations for the renewal of the South Pacific Tuna Treaty or efforts by parties to the treaty to address issues of over- capacity.<sup>140</sup>

Pacific Islands' countries (PNA) have become pragmatic in their engagement with DWFNs, and seek to optimize their benefits from fisheries resources exploited. This is demonstrated early this year, when the PNA group sought fishing alliance with China who proposed better Fishing Days rates, as protest to US non-willingness to accept PIPs proposed conditions on the financial package. While the move was strategic to prompt action from the US Government - here it reflects the fluidity of the industry and the bargaining strengths of sub-regional groups and resource owners such as the PNA to leverage maximum revenue for their resources. Furthermore shows that indeed, in the future when tuna stocks become more valuable the issue of competition among tuna fleets for access to WCPO is crucial and effectively impact the sustainability of the Treaty.

### *Legal*

Application of national laws - As highlighted in the Chapter 3, the issue of application of national laws is an outstanding matter which the parties (at the time of writing this paper) are yet to resolve. Arguments from both parties are valid and justifications provided are relevant, however this paper will argue in favour of the PIPS view.

On one hand the 16 states, and to before its national law (or amendments) can be applied under the treaty in each respective EEZ - US has to fulfill its own requirements

-US to make allowance or waiver the process to ensure quicker endorsement or shorter time frame for processing 60 days to 30days/15 days.

Setting a bench-mark minimum condition for laws that would apply to Fishing vessels

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<sup>140</sup> Hearing before the Subcommittee on Asia, the Pacific and the Global Environment of the Committee on Foreign Affairs House of Representatives, One Hundreth and eleventh Congress, April 2, 2009

(how would this be applied and how would be effective) – with this approach sovereignty issues will be in question. (Look at domestic laws of individual countries – how realistic and what is the expectation that states need to a harmonized system is in place.

### *Monitoring, Control and Surveillance*

An issue that remains a challenge in terms of managing the implementation of the treaty (and does not only confine to fishing activities carried out under the Agreement) is Monitoring, Control and Surveillance. According to FFA rep interviewed, generally, Treaty vessels/fleets operating under the agreement have demonstrated high levels of compliance and have cooperated well with States in their fishing operations.

Measures such as Observer coverage on USMT fishing fleets have proved to be effective and vessels Reporting by US fleets requirements are done in a timely manner more so than other DWFN fleet. However, there gaps still exist and both the US authorities along with coastal states and FFA continue to work together to eliminate these problems.

With the Treaty being an addition to US already deep security interest in the region, the US Coast Guards incentive for partnership in this exercise has raised regional maritime surveillance and monitoring efforts targeting IUU fishing in the region.

## **CHAPTER FOUR:**

### **REGIONAL FISHERIES DYNAMICS AND ITS IMPACT ON THE TREATY AND A FUTURE ARRANGEMENTS**

Regional fisheries dynamics is an important consideration when analyzing management and conservation and coastal states interaction with global community and consequently, fisheries agreements that coastal states enter into with DWFN. Regional fisheries dynamics in this context is viewed at three levels, political, economic and social.

The objective of this chapter is to highlight regional cooperation in fisheries, role of fisheries institutions and factors driving regional fisheries dynamics, and provide an analysis on how fisheries dynamics impact states interactions with DWFNS, in particular fisheries access agreements – with particular focus on the USMT

In examining regional fisheries dynamics this section will focus on (a) regional fisheries bodies and regime interrelations and (b) interrelations of states within the regional bodies, and how this is played out with the economic interests of individual states in their interactions with DWFNs.

The first part of this chapter provides an overview of the political status of the Pacific Islands – the different political representation and powers have a stake in the overall fisheries interactions more importantly in regional fisheries policy decision-making forums.<sup>141</sup>

The Pacific Region is characterized mostly by “micro-states” (exceptions of Australia and New Zealand) and fall under three categories of political governance. Firstly, the independent states<sup>142</sup>, which have complete political autonomy and sovereign authority over their own domestic affairs. The second group, are independent states with political association with another external jurisdiction (in this case, a former colonial power). Under this category there are two groups, Free Association<sup>143</sup> and Compact Agreement<sup>144</sup> states. The third group is the Territories, of metropolitan<sup>145</sup> powers such as France and United States who continue to exert control and power over these islands.

**Fig 1: Pacific Islands States**

<b>Country</b>	<b>Land Area (sq km)</b>	<b>Area of 200nm zone</b>	<b>Estimated population (July 2007)</b>
Cook Islands	180	1 830 000	15 473
Federated States of Micronesia	702	2 978 000	109 999
Fiji	18 376	1 290 000	834 278
Kiribati	726	3 550 000	93 707
Marshall Islands	720	2 131 000	52 701
Nauru	21	320 000	9 930
Niue	258	390 000	1 587
Palau	500	629 000	20 162

<sup>141</sup> Regional Fisheries related issues are guided by an oversight committee; called FOC (Fisheries Officials Committee) FOC is represented by all members of the FFA. However, FOC is merely a technical arm of the structure, and that fisheries decisions and recommendations are the prerogative of political leaders.

<sup>142</sup> Independent states in the region: Australia, New Zealand, Solomon Islands, Fiji, Vanuatu, Tonga, Samoa, Tuvalu, Kiribati, Papua New Guinea,

<sup>143</sup> Free Association with New Zealand: Niue, Cook Islands and Tokelau

<sup>144</sup> Under Compact Agreement with US: Marshall Islands, Federated States of Micronesia and Palau

<sup>145</sup> The US and France are two metropolitan states with extended territories in the region. The US has control over most states in the North Western region (Northern Mariana Islands, American Samoa and Guam) and the French, have New Caledonia, Tahiti (French Polynesia) Wallis and Futuna

Papua New Guinea	461 690	3 120 000	6 332 751
Samoa	2 934	120 000	179 478
Solomon Islands	29 785	1 340 000	503 918
Tonga	696	700 000	102 264
Tuvalu	26	900 000	9 701
Vanuatu	12 189	680 000	227 146

Source: Gillet and Preston (1997) and SPC (2008)

For the purposes of this paper, the discussions will focus on the two earlier political governance structures i.e independent states and Free Association States and Compact states.

### *Small Islands, fewer resources*

Most Pacific Islands states (apart from NZ and Australia) became self-governing from the late 1970's into 1980's. For most of these states, attaining political independence brought both a mix of challenges and promises. One of the major challenges that these new states confronted was economic independence and conceptualizing the ideals of national development and socio-economic development. Reinforcing these challenges were limitations such as, lack of national capabilities, limited human-resource pool and finite resources and limited capital or revenue to create opportunities for economic growth.

While Pacific Islands' are confronted by the comparable tasks to develop self-sustaining economies from narrow-base resources the geographical differences between the islands has made addressing these development challenges difficult and unique to each state.<sup>146</sup> The importance in drawing on this difference is critical for latter discussions – which will reflect on the impact of value of Fisheries Access fees and its relative impact on the total economy.

Vetiyaki, described that the geographical make up of each Island was indicator to determining natural resources-base available to that island state/territory, moreover a

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<sup>146</sup> This *difference* will be expressed (in latter discussions) to reflect the importance and relevance of Access Fee's paid by DWFN to respective Pacific Islands States and its value to the total revenue.

determining factor to gauge its self-sustaining economic propensity. Veitayaki expressed the categorization as follows:

- i. The first category includes the relatively large countries (Papua New Guinea, Fiji, Solomon Islands, New Caledonia and Vanuatu which account not only for 84% of the region's population but these countries have also achieved relatively high degree for economic diversification.
- ii. The second category can be termed the middle level countries, such as Samoa, Tonga which have modest resources bases.
- iii. The third group consists of countries that are remote and poor such as Kiribati, Tuvalu, Niue, Tokelau, Nauru and Cook Islands which lack land-based resources and lack capacity to exploit their comparatively large EEZ's
- iv. The last category of countries are Palau, Guan, the Commonwealth Islands of Northern Mariana Islands, American Samoa, French Polynesia and Wallis and Futuna, who have managed to achieve high levels of living standards as result of maintained special relations with metropolitan powers such as US and France<sup>147</sup>.

In addition, the ocean has been an important facet of this region's economic prosperity. The economic potential of ocean resources for Pacific Islands' states became critical after states declared delimitation of maritime zones for economic purposes (EEZ); a transition in both sovereign ownership of living oceanic resources and fisheries governance - concept further consolidated by the conclusion of UNCLOS III. (Relevant references are made in the discussions in the Chapter 1)

Owing to the diversified economy of states described under first and second category, where the composition of economic revenue is derived from exploitation of land-based resources and ocean resource; the economic value gained or impact of fisheries related revenue (in this case Access fees) is less than other sectors of the economy. In contrast,

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<sup>147</sup> Veitayaki, J, Staking their claims: The Management of Marine Resources in the Exclusive Economic Zones of the Pacific Islands, A Sea Change; The Exclusive Economic Zone and the Governance Institutions for Living Marine Resources, 2005 pg151

for the low-lying islands revenue obtained from ocean resources makes up an important proportion of the total national revenue. For example, for Kiribati and Tuvalu in 1999 the calculated percentage that access fee accrues to national GDP is 53% (Kiribati) and 47% (Tuvalu) respectively, whereas for PNG the percentage of revenue gained from access fees is 0.2% of its total GDP.<sup>148</sup>

### **6.1 IMPORTANCE OF FISHERIES AND NEED FOR MANAGEMENT AND CONSERVATION:**

As tuna stocks in other parts of the world dwindle, this led DWFN's to shift their attention to the Pacific, in particular the Western and Central Pacific Ocean (WCPO)<sup>149</sup>. Given the heavily reliance by Pacific Islands' economies on this fisheries resource, (tuna) overfishing and over-exploitation would result a disastrous plight for the already fragile regional economies (mostly aid dependent). In addition, owing to the highly-migratory nature of tuna species, there was concern over growing illegal fishing in region, and the continuing of such practice would have detrimental impacts overall tuna stocks. Pacific Islands states recognized the enormous challenge to manage highly-migratory species such as tuna and resolved that an appropriate management and conservation approach to compliment the highly-migratory nature of tuna, must be considered in the context of their total distribution, that is, conservation measures must be established on a regional basis<sup>150</sup>

#### ***Management of fisheries in the Pacific - the need for Regional Cooperation***

Recognizing the need for regional cooperation in fisheries management and conservation in the Pacific is perhaps best captured by Kearney. As one of the earliest

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<sup>148</sup> The structure of tuna access agreement in the Western and Central Pacific Ocean: Lessons for Vessel Day Scheme Planning, Elizabeth Havice

<sup>149</sup> The WCPO stretches approximately 6, 000 nm from the archipelagos of Southeast Asia to the remote atolls of Kiribati in the Central Pacific. This area currently boasts the world's most productive tuna fisheries, supplying global market (of various tuna species) an close figure of US\$4.6 billion value of tuna fishes. (See also Fig 1, Chapter 4)

<sup>150</sup> R. E. Kearney (1978): The Law of the Sea and regional fisheries policy, Ocean Development & International Law

commentator's prelude formalized regional cooperation in fisheries, Kearney made the assertion that general principles for resource management are; (a) Maintenance of resource (b) Maximization of socio-economic benefit and (c) National and International objectives prompting the need for a regional approach to be taken when considering fisheries management.

Kearney further stated that, because of the highly-migratory nature of tuna against the limited capacity of coastal states in region, the existence of a regional body overseeing fisheries management issues would lessen the burden for coastal states, and eliminate/avoid duplication of fisheries management responsibilities. (A central coordinating framework providing member states with advice, data and information to enable states make sound decisions in managing their fisheries resources.) The regional management approach suggested by Kearney was indeed manifested through a consensus reached among Pacific Leaders, and the endorsement for the establishment of a regional fisheries body as expressed in the Forum Communique, 29<sup>th</sup>- 31<sup>st</sup>, August, 1977 (Port Moresby) and Annexed Declaration on the Law of the Sea and a Regional Fisheries Agency

"The Members of the South Pacific Forum meeting at Port Moresby decided to establish a South Pacific Regional Fisheries Agency open to all Forum countries and countries in the South Pacific with coastal state interests in the region who support the sovereign rights of the coastal state to conserve and manage living resources include highly migratory species in its 200 mile zone"<sup>151</sup>

Regional cooperation in fisheries developed further over years, towards creating homogenized fisheries policy system. Further commitments were made by Leaders to create institutions with specific objectives to manage fisheries issues, and provide technical support to its member's states.

## ***6.2 REGIONAL FISHERIES COOPERATION***

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<sup>151</sup>South Pacific Forum Communique, 29<sup>th</sup> -31<sup>st</sup> August, 1977, Port Moresby

The creation of regional institutions took regional fisheries cooperation to a new level. These institutions provide administrative structure enabling collective consultations by states. Furthermore, provide a mechanism to manage regional efforts towards regional objectives within specific area of interest. This is reflected in the roles and functions describe by following institutions.

### *Forum Fisheries Agency*

The Forum Fisheries Agency <sup>152</sup> is the leading regional institution mandated to provide advice and support to Forum Members, following a consensus at the Forum Leaders Summit, 1976 recognizing the need for a regional administrative body to take leading role in coordinating between Forum states on fisheries issues. Many commentators have hailed FFA as one of the more “successful examples of international fisheries cooperation in post-war history.”<sup>153</sup>

FFA’s primary objective is to assist its members in following the 3 broad areas;

- 1) Manage the fishery to ensure use is sustainable and will provide tuna now and in the future
- 2) Develop the fishery to harvest, process and market tuna to create jobs, income and a thriving industry
- 3) Monitor, control and survey the fishery to stop illegal fishing and make sure fishing benefits goes towards fishers who follow the rules of development and management set by governments.”

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<sup>152</sup> FFA members are: Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu. Its headquarter is based in Honiara, Solomon Islands.

<sup>153</sup> *The future of Regional Fisheries Cooperation in a Changing Economic Environment: The South Pacific Islands Countries in the 1990*, Schurman, A.R, University of Berkley

This paper endorses the assessment by Schurman<sup>154</sup>, that cooperation among FFA members has yielded significant benefits to both individual Pacific Islands Countries and the region.

FFA's does not have any fisheries management or conservation responsibilities. Neither can it enforce decisions reached by its governing council.<sup>155</sup> FFA however, supports the interests of Pacific Island states by facilitating regional cooperation and providing technical and policy advice.<sup>156</sup>

Regional cooperation through fisheries management and conservation efforts as a result has led to harness regional solidarity, in particular members support in of regional positions pertaining to fisheries issues beyond the regional periphery. States responsiveness to regional cooperation in fisheries matters has to some extent influenced and provided a boost to regionalism in other the areas of common interest being pursued through Forum frameworks, such security, economic, trade and fisheries etc.

Some commentators have endorsed FFA has been successful in it work to support sub-regional and regional cooperation relating access by foreign fleets into EEZs. In this area has facilitated the development of key regional arrangements, such as;

- a. Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest
- b. Niue Treaty
- c. Treaty on Fisheries between Pacific Islands and US
- d. FFA Harmonised Minimum Conditions and Terms for Access

FFA is among the few technical regional bodies under the auspices of the Forum, with membership limitations. There is mixed reviews on FFA's stance on this membership

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<sup>154</sup> Ibid pg 370

<sup>155</sup> Aqorau, Cooperative Management of Shared Fish Stocks in the South Pacific, 2002

<sup>156</sup> Regional Pacific Tuna Fisheries Management, 2010

issue. Some commentators argue that because its efforts do partner with other important stakeholders such as DWFN's or the industry, this limits its effectiveness<sup>157</sup>. On the contrary and in support of FFA's position this paper endorses the argument that FFA's strength and assertiveness in providing advice and support in on regional fisheries issues, without being compromised by politics of DWFN is attributed to its limited membership. In the early days of its establishment, many of the DWFNs sought membership with FFA - however, the Leaders then understood pre conceived consequences that any involvement of DWFN's or actors beyond the region might have on FFA's role and purpose for which it was established. In particular, the infiltration of politicking influence by DWFN's will diminish Pacific Islands States true purpose of regional collaboration and solidarity in fisheries management.

### *Oceanic Fisheries Programme of the Secretariat of the Pacific Community*

The Oceanic Fisheries Programme (OFP) of the Secretariat of the Pacific Community has also contributed immensely to regional efforts in fisheries issues. The programme compliments FFA's work by providing scientific analysis and research to member states.

The OFP is hosted by region's oldest institution, the Secretariat of the Pacific Commission. Formerly known as the South Pacific Commission, the institution was established in 1947 under the Canberra Agreement between metropolitan states<sup>158</sup> administering then territories in the region SPC's membership expanded with the advent of independence era, as former territories and colonies sought full membership as independent states in their own rights.<sup>159</sup>

As a technical institution with the primary purpose of creating enabling conditions for Pacific Islands States to achieve sustainable development, SPC's work is diversified and

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<sup>157</sup> Sovereignty and Cooperation in regional Pacific tuna fisheries management: Politics, economics, conservation and the vessel day scheme.

<sup>158</sup> Founding members of the South Pacific Commission were: Australia, France, Netherlands, New Zealand, United Kingdom and United States.

<sup>159</sup> By 1983, at the 23<sup>rd</sup> South Pacific Conference all 22<sup>nd</sup> Pacific Islands States become full members of SPC.

covers; health, geosciences, agriculture, forestry, water resources, disaster management, fisheries, education, statistics, transport, energy, ICT, media, human rights, gender, youth and culture.<sup>160</sup>

The work undertaken by OFP is important given the limited capacities of Pacific Island States – this simultaneous assistance (OFP and FFA) Pacific Islands States accessibility to updated data and useful information has serve as useful advice to policy-makers and decision-makers with the fisheries discourse both at national and regional level.

### *Western and Central Pacific Fisheries Commission*

The Western and Central Pacific Fisheries Commission<sup>161</sup> (hereafter referred to as WCPFC is the Regional Fisheries Management Organization for the Western and Central Pacific Ocean. The WCPFC was established in 2004 under the auspices of the Convention for Conservation and Management of Highly-Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC Convention).

As a Regional Fisheries Management Organization<sup>162</sup>, the WCPFC plays a critical role in the global system of fisheries governance, serving as the primary mechanism for achieving the cooperation between and among all fishing countries, including coastal states; that is essential for the effective management of international fisheries.<sup>163</sup>

WCPFC compliments the work of FFA and OFP (SPC) in assisting member states in their management and conservation efforts of tuna fisheries. However, the significance of WCPFC is it provides a medium for a more holistic approach in managing highly migratory stock such as tuna, by bridging all actors (DWFNs, Coastal States and Industry) in the fishing industry, their interests (market interests), fishing efforts and

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<sup>160</sup> [www.spc.int](http://www.spc.int)

<sup>161</sup> WCPFC members are: Australia, China, Canada, Cook Islands, European Union, Federated States of Micronesia, Fiji, France, Japan, Kiribati, Republic of Korea, Republic of Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Philipines, Samoa, Solomon Islands, Taiwan, Tonga, Tuvalu, US, Vanuatu

<sup>162</sup> FAO defines Regional Fisheries Management Organizations (RMFO) as ‘intergovernmental fisheries organizations or arrangements, as appropriate, that have the competence to establish fisheries conservation and management measures’

<sup>163</sup> Recommended Best Practices for regional Fisheries Management Organizations

other considerations in fisheries important to for the management and conservation of fisheries in the WCPO.

### *Parties to the Nauru Agreement (PNA)*

The Parties to the Nauru Agreement (PNA) is a sub-regional grouping of eight Pacific Islands' states that agreed to a coordinated approach in managing fisheries in between fishing zones of respective countries. PNA are global leaders global leader in conservation and fisheries management and the PNA sub-region currently controls 25% of the world's supply of tuna and 50% of the worlds skipjack catch, the major tuna species used for canned tuna.<sup>164</sup> Established in 2009 PNA operates under ambit of the Nauru Agreement Concerning Co-operation in the Management of Fisheries of Common Interest which was concluded in 1981 and the Agreement establishing the Pacific Islands Forum Fisheries Agency.

In pursuing the implementation of the provisions under the framework of the Nauru Agreement the parties created three implementing (subsidiary agreement). Under the first implementing arrangement the requisite was for parties to (a) participate in the Registry of vessels, hosted by the Forum Fisheries Agency and (b) establish harmonized licensing terms and conditions. The second implementing arrangement, provides for operational conditions for fishing fleets/vessel; transshipment, high seas catch reporting and maintenance of log books and addition of observers on foreign fleets. The third implementing arrangement is one that has prompted major changes in regional fisheries dynamics recently and no doubt change the direction of regional fisheries governance in the future. This implementing arrangement provides for, catch retention, closure of Fishing Aggregating Device, Prohibition of sets associate with whale sharks and closure of high seas pockets between PNA states.

The VDS is PNA's milestone management approach, which the group recently applied in 2009. Under this Scheme, the PNA agreed to convert the structure of the Palau

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<sup>164</sup> PNA fact file, [www.pnatuna.com](http://www.pnatuna.com)

Arrangement from a vessel based scheme to one where the total number of fishing days permitted in the fishery were capped in within at Total Allowable Effort (TAE) which is translated into fishing days (the VDS)<sup>165</sup> In addition, the PNA have applied a USD\$5,000 per fishing day bench-mark for foreign vessels fishing PNA waters. The objective of this is to encourage competition between DWFN's therefore giving coastal states the advantage as a price makers rather than price takers.

## **FACTORS DRIVING REGIONAL FISHERIES DYNAMICS**

### ***a. Politics***

Regional politics is identified as an aspect driving regional fisheries dynamics in the region. In particular an element of influence this paper wishes to propose is underlying unequal "balance of power" between rich tuna ground coastal states and other Pacific Islands states, and the impacts of this inter-play in shaping regional decisions on fisheries issues.

Although regional cooperation fosters collaboration and cooperation among states, after years of regional interactions between states on fisheries issues – there is an emerging distinguished power play between resource rich states (greater dominance) over other coastal states. As referred to in earlier discussions the dominant resource-rich states are identified or represented as the PNA bloc.

The FFC<sup>166</sup> is the (Forum's) regional oversight committee on fisheries issues, and is represented by each of the FFA members. FFC initiates discussions on issues for which are decided by *consensus* and forwarded for consideration and endorsement by Head's of States<sup>167</sup>. The point of importance intended here is that, despite the fact the issues are decided upon by consensus, resources-rich states have displayed increasing

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<sup>165</sup> Haniach & etal, Sovereignty and Cooperation in regional Pacific tuna fisheries management: Politics, economics, conservation and the Vessel day scheme, 2010, pg 9

<sup>166</sup> Forum Fisheries Committee (Constituent body of the Forum Fisheries) mandated by the Leaders under the provisions of the Agreement Establishing the Forum Fisheries Agency to act as an oversight committee on regional fisheries issues.

<sup>167</sup> These considerations are done through the Forum Leaders Summit meeting, which is held annually.

assertiveness and leadership in driving towards outcomes favorable to them. Hence, as PNA (the institution) strengthens, this paper proposes that its mandate will eventually influence and shape the discussions and decisions on Fisheries (Tuna) in the region, most notably the FFC, just as it has impacted PIPs positions in the current Treaty negotiations.

- **Shifts in National Policies (National Interests)**

Another aspect of influence this paper proposes, which has led to shape regional fisheries dynamics is shifts in National policies. National policies are created premised on respective states development aspirations or in its best interest.

Within the context of regional fisheries, this paper will highlight two strands of influences by national policies;

(a) Article 61 of UNCLOS obligates states to manage fisheries resources in a manner to allow for sustainability. Bound by International law and respective needs to maintain healthy fish stocks (because of economic dependence on the resource), there is eminent emphasis on Management and Conservation policies in Pacific Islands' states. This is further consolidated by improved and efficient national capacities. Consequently, there is an emerging general shift in national policies that recognize not only the importance of maintaining sustainable fisheries (through more effective management approaches) but also the potential for States to maximize their returns on exploited resources.

(b) States interaction with DWFN's is also another contributing factor to evolving regional fisheries dynamics. Interactions between Pacific Islands States and DWFN's differ in a number of ways, although exhibit similar outcomes.

While mutual understanding exists within regional cooperation frameworks for the purposes of management and conservation of fisheries - national decisions on fisheries arrangements (bilateral vs. multi-lateral) are often beyond the limits of regional influence. In general, (apart from USMT) most regional fishing arrangements (State-DWFNs relations) are facilitated under bilateral arrangement. In the history of tuna

fishery in the region, Pacific Islands States bilateral partnerships/arrangements have been subjects to criticism various reason. For example the early 1980 Kiribati was criticized for concluding an access agreement DWFN's - critiques viewed the fishing alliance Kiribati established would foster political support to Soviet regime<sup>168</sup>. These criticisms have recently expanded to Pacific Islands States suggested as subjects prone to the vulnerability; and of corruption practice. These criticisms surfaced amidst re-occurring observed practices of non-transparent processes undertaken in facilitating or negotiating these bilateral arrangements. However, from the perspective of Pacific Islands States the argument is far more complex than just a simple transaction of give-and-take, but this paper will not go into the details of this. Ultimately, the point to highlight here is that, the high number of bilateral fisheries arrangements in fisheries itself suggest a strong support by Pacific Islands States preference for bilateral fisheries agreements; as coastal states have greater autonomous control in what they wish to seek from DWFN or deem important and relevant according to their national priorities and development strategies.

#### *b. Economic*

Within the arguments of states sovereignty and evolving national policies is the 'economic potential of fisheries' which is by far the most important driving factor for the ongoing fisheries debate.

There is much literature linking economics to global evolution in fisheries issues, and there is no doubt that the starting point was the creation of EEZ. As it is understood, the principle for establishing EEZ's was the premised on States need for greater control of resources within proximity of its own jurisdiction - realizing the huge economic potential in living marine resources in adjacent waters. This economic justification for delimitation of maritime zones led to revolutionize fisheries governance and international order of the seas.

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<sup>168</sup> Teiwaki, R, Access agreements in the South Pacific; Kiribati and distant water fishing nations 1979 -1986

As discussed earlier, the economic environment differs for each individual state, however the common denominator is that, fisheries (tuna) is an important economic resource for the region; being a valued commodity its economic importance will continue to influence regional fisheries dynamics. Furthermore, this element economics of fisheries is very much intertwined with national interests this will have an impact on states inter-relations and consequently, states response to regional cooperation commitments.

The challenge here is when political commitments are being blurred by economic pressure and domestic circumstances; driving states to take decisions that often compromise its own commitment to regional agreements/cooperation.

In view of this, the direction taken by PNA to establish a benchmark price (USD\$5,000) under the VDS will maximize gains from resources – serving in the best interest of Pacific Islands coastal states. In addition, in defending PNA’s application of the benchmark price, Dr. Aqorau stated this approach will ensure stronger leveraging position behalf of coastal states, at the time where their economies are most vulnerable and risk being traded into arrangement that will the coastal state worse off.

*(a) Socio-economic*

Socio-economic considerations are crucial to understanding Pacific Islands States responses to fisheries issues, and ultimately understand how they contribute to shape or influence fisheries dynamics.

Although, socio-economic factors, may not have direct impact on states inter-relations within the region, it has a huge bearing on coastal states interests, which becomes a crucial consideration when analyzing states perspectives, and consequently states decisions for entering into agreements and with whom.

Coastal states prerogative for entering into fisheries agreement is not only for access fees; nearly all coastal states have underlying long-term aspirations is to develop

domestic capacity that would in turn stimulate other economic activities and create opportunities for its population.

While for many developing coastal state (Pacific Islands included) the long-term intention is to be so – these aspirations are compromised by more immediate challenges and often constraining financial budgets. States out of fear of losing out on crucial funding, eventually succumb to agreements that offer conditions below coastal states preferred conditions/terms. In such case, coastal state decision is premised on circumstance rather and preference.

Consequently, a scenario observed to emerge from such circumstance which commentators have been highly critical of is, DWFN's use Aid Assistance (bilateral) as leverage for Access to fishing grounds. There are two arguments which can be draw from this scenario – (a) DWFN's taking advantage of the vulnerable state of coastal states economies to achieve their objective and (b) Coastal states placed in a precarious situation in deciding where to draw the line in the trade-off between granting access to DWFN's and the possible removal or reduction of Aid assistance received from a respective DWFN. In emphasizing the point made earlier; often the reality for coastal states is that, forgoing the funding opportunity (aid) needed for crucial to development projects and plans etc., will have a much greater immediate impact domestically than losses that will be incurred through a DWFN favoured agreement.

While this point may not have direct relevance to the treaty discussion, the understanding coastal states interests and freedom to exercise sovereignty (state behaviour) is important to keep in view. Whether or not a state considers it is in its best interest to be party to the Treaty and eventually opt for an agreement that suits its interest is the prerogative of that respective state - this may prove a weak link to sustaining solidarity in a multi-lateral arrangement such as the USMT.

**(b) *Conservation/Management of Tuna fishery***

The viability of the Western and Central Pacific Tuna fishery depends on healthy fish stocks.<sup>169</sup> As discussed earlier, management of highly-migratory species such as tuna is most effective through regional cooperation. Regional cooperation in management and conservation in this regard is facilitated through legal-binding instruments between states such Agreements of Treaties.

Conservation and management approaches implemented in the Pacific Islands region have been successful and are considered among the best in fisheries conservation and management approached in the world.

The conservation and management approached applied within the parameters of finding balance between exploitation and sustainability of resources. In the past the conservation and management approaches/measures were subjected to states creating measures that would determine fishing vessel conduct, more recently though, the approaches/measures put the responsibility on the fishers. This includes: Harmonized Minimum Conditions and Terms for Access, Reporting Catch and Reports, Observers, Policy Harmonization and Monitoring, Control and Surveillance mechanisms - administered on behalf of the states by the FFA.

Regulating DWFN's access to fisheries a recent approach that effectively changed management and conservation and in turn DWFNs engagement in regional fisheries. This is recent approach of management has been successfully through the implementation of the Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest is a sub-regional agreement n terms and conditions for tuna purse seine fishing licenses in the region and Palau Arrangement for the Management of the Western Pacific Purse Seine Fishery.

Unanimous political statements made by Leaders, are often manifested through Leaders Declarations are often a point of references on These are demonstrated through

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<sup>169</sup> Schurman, The future of Regional Fisheries Cooperation in a Changing Economic Environment: The South Pacific Islands Countries in the 1990's, 1997

non-legally binding Leaders Declaration undertaken at the annual Forum Summit meetings.

Leaders Declarations provide a road map, on what the Leaders envision for the region (for that particular area of interest). This process assists Regional institutions gauge common interest of members as well they could work with members to achieve these shared regional goals. Effectively, a political declaration though non-legally binding in nature they may be, play an important role to shape and direct regional concerted efforts or concerns in fisheries issues.

- Vava’u Declaration on Pacific Fisheries Resources (2007)<sup>170</sup>

## **7 GENERAL ANALYSIS ON FISHERIES DYNAMICS IN THE REGION (ITS IMPACT ON USMT)**

### *a. Understanding interrelations in regional fisheries*

Fisheries dynamics in the region has evolved from the time when coastal states main concern was staking claims for territorial sovereignty over adjacent waters, transitioned to regional collaboration on fisheries management and conservation measures and negotiating agreements with global super powers seeking access to Pacific fishing grounds.

Fisheries management and conservation is one of the earlier issues to promote regionalism and regional cooperation in the post-colonial history of the Pacific Islands. In his view, Aqorau stated that understanding the different dynamics at play in the fishery and the diverse national interests at stake, is fundamental to appreciating how regional cooperation has been shaped in the South Pacific.<sup>171</sup>

Over the recent years the fisheries dynamics in the region has shifted and continue to see new and strong emerging stakeholders influencing and driving fisheries issues to a

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<sup>170</sup> The Vava’au Declaration on Pacific Fisheries Resources, “Our Fish, Our future” an unanimous statement made by Pacific Islands Leaders at the Forum Summit in the Tonga, 2007.

<sup>171</sup> Aqorau, Cooperative Management of Shared Fish Stocks in South Pacific, 2002

new level. The regional alliances formed in the region have an underlying aim of preserving tuna stocks; however, the strengthening of a particular sub-regional grouping has led and added a whole new dimension in the way Pacific Islands states interact with DWFNs. So much so, that its apparent dominance in the ongoing USMT negotiations has distinguished two groupings, the PNA and the non-PNA. (This particular argument is not intended to wane the importance of other regional institutions rather its purpose is to encapsulate how states within the regional frameworks/sub-regional groups interrelate in responding to current fisheries issues)

While regional cooperation is means to a common aim or outcome, this doesn't eliminate the occasional differences that may arise between institutions from time to time. An example can be drawn from the conflicting opinions in PNA's closure of High Sea pockets and the reaction within WCPFC.

The management of tuna fishing operations in High Sea's pockets of WCPO remains an issue for WCPFC to address. Commentators on Western and Central Pacific tuna fisheries, such as Hanich expressed that it is critically important that the skipjack, Yellowfin and bigeye fisheries are managed effectively throughout their range - within and between EEZs and High Seas. Unrestrained exploitation in a particular EEZ or the high seas (in particular) has the potential to significantly affect the catches elsewhere.

The freedom of the High Seas encourages IUU fishing practices - and given that tuna species migrate between EEZ and high-seas, over fishing in the high seas can potentially reduce stocks in adjacent EEZs. This was the argument presented by the PNA to the Scientific Committee in CMM 2008-01, in which announced the closure of two high sea pockets to purse seine fishing and again in another submission to WCPFC TCC6 2010<sup>172</sup> proposing further closure of the remaining of 5 high sea pockets within PNA waters.

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<sup>172</sup> Statement by PNA Chair to the WCPFC TCC6, High Seas Closure by PNA Group

The challenge this paper perceives is the cause for WCPFC's inability to apply a EEZ-High Sea's management approach in within its framework to address this, lies in the split views between the fishing interests of DWFNs and conservation concerns of Pacific Islands States.

The complexities and diverse interests represented in the makeup of the WCPFC will remain a challenge for an organization/body representing the interests of stakeholders in a very high-stake economically industry like fisheries.

*b. How do Non-PNA members view PNA members? Is there always support for PNA position between PNA states (some of the issues of conflict)*

PNA's important role in regional fisheries governance is crucial, and since its inception in 2009 it has expand its prominence and influence on issues relating to management of tuna in pragmatic way bringing management and conservation of tuna stocks in the region to a new and higher level.

Regional solidarity among the Pacific Islands states regional fisheries and in particular in the process of renegotiation has never been an issue of concern; however, this is not to suggest that all parties do agree and have similar positions. The comparative divide between PNA and non-PNA has been clearly featured in this ongoing negotiation.

PNA as a sub-region have application of rigorous control and management measures, have not always received support of all of non-PNA. This reaction, however, does not come from opposing PNA stand, rather, out of unknowing anticipation that measures applied by PNA will have an impact on the dynamics of fisheries - no so much in bilateral arrangement but particularly in this multilateral undertaking with the US.

## CONCLUSION

### LOOKING FORWARD - A NEW TREATY

Marine resources are one of the most important resources in the region Pacific Islands' states. For majority of the island states, limited land based resources necessitate heavy reliance on fisheries resources for protein, livelihoods and national income/revenue. As this is so the advent of the EEZ was met with enormous support from coastal states. The delimitation of EEZ under the new international ocean regime (UNCLOS) gave coastal states rights over 200nm of water. This however, became problematic for industrialized fishing states who once fished in productive fishing grounds that have now become subject to coastal states jurisdictions. Distant water fishing state could only exploit waters through access agreements which establishes conditions for fishing and what financial returns are gain in exchange for rights of access.

For most DWFN access to Pacific Islands fishing waters are facilitate under bilateral agreements. However, for the US differing fisheries policies and complicated by its non-recognition of UNCLOS particular proved difficult in earlier bilateral agreements. This lead to diminishing supports for US and coastal state fishing engagements; however, US strategic and political dominance was a power-breaker towards fostering support for a wider and comprehensive multilateral agreement.

The treaty on fisheries between Certain Pacific Islands States and United States is a unique multilateral access agreement - it characterizes US only largest commitment to the Pacific Islands, and is only multilateral of its kind the Pacific Islands (including Australian and New Zealand) engaged in. The treaty signed in 1987 become a legal framework, not only to permit US fleeting fishing in the region but served a as

compromise to conflicting fisheries policies that existed between US and Pacific Islands states.

Over the years, factors including, shifts in national policies/interests, regional cooperation efforts, politics etc, has caused shifts in regional fisheries dynamics, and ultimately, the focus of fisheries has shifted from management and conservation to maximizing benefits from fisheries resources. This shift has also influenced the way Pacific Islands States, in particular the countries with productive fishing grounds (PNA) to adopt strategic mechanisms to ensure coastal states have strong leverage to pursue fishing arrangements that derive optimum benefits for the countries and region.

The current treaty negotiation have put have put to test fundamental issues which has serve as an important platform to gauge the sustainability of the treaty in the future.

The Treaty has been in operation for 23years; and apart from the economic benefits – the treaty has strengthen US-PIPs and will continue to do as the US continue to implement its foreign policy mandate, build on the strengths of regional cooperation, provides a mechanism for US fishing activity, etc.

*Has the treaty successfully achieve the desired objective of parties*

The USMT is a multi-lateral arrangement between 17 states – each party coming to the table with its own desired outcome or goal. These desired outcomes can be further simplified as US a main stakeholder - primary desired outcome is access to fisheries. On the other side, the Pacific Islands parties which is a mix of developed states, Australia and New Zealand, larger economies of the region (PNG, Fiji, Solomon Islands etc) and the smaller economies of Kiribati, Nauru, Tuvalu, etc.

Clearly, for Australia and New Zealand (the big regional powers) their participation in the treaty is strategic; and is as compared to the objectives of Kiribati or Tuvalu. A clear example is shown in the non-receipt of funding allocation both countries. Funding allocated to ANZ from the distribution of funds paid under the financial package is not

collected by the respective Governments; rather it is diverted into FFA to meet other operational costs. Taking into consideration the arrangement by Australia and New Zealand, this points to the conclusion that their partnership in the arrangement is merely to demonstrate alliance to US rather an objective one.

For the rest of the Pacific Islands states, apart from the revenue aspect of the treaty, the other main goal is entailed in Article 2 of the Treaty – Broader Cooperation. As discussed in Chapter 4, Pacific Islands’ states, are yet to see real commitment by US to fulfill this provision. Although the argument there is rationale in the argument that the Article does not obligate US, it does not make the Article redundant or less important. The Article was incorporated from Pacific Islands states aspirations for US assistance towards fisheries development in the region; for it to have been overlooked the in the past 23 years in 3 consecutive treaty phases does put question US commitment and interest toward fisheries development in the region, besides cooperation in tuna fisheries operation.

*What is the long-term sustainability of a success Treaty?*

On the question of the long term sustainability of the Treaty, this is determined by various factors. In order for multilateral agreement like the USMT to be sustainable, conditions must be conducive to maintain states interest to participate in the partnership. Often this is challenged by diverse interests of states. For US its intention is to ensure the Treaty’s continuity, as fishing operations from this region are crucial for the domestic tuna fishery market. Secondly, catch from this region, subsequently processed into canned tuna products accounts for a substantial portion of revenue in the US economy, and drive economic activity for US territory American Samoa. For Pacific Islands’ states, the biggest push for the Treaty lies in the financial compensation (access fees).

USs’ ultimate response honor its commitment under the conditions for “broader cooperation” and work toward an arrangement “access to US market” will also be

crucial indicators that Pacific Islands' states may either deter or foster stronger multilateral partnership between US and the PIPs. The proposed "Market access" and "broader cooperation" are important to PIPs because of their development aspects. From the perspective of Pacific Islands, US failed to deliver to expectations subscribed under Art.2 "Broader Cooperation", in the current treaty phase. It clear Pacific Islands' states will insist on retaining the article in the Treaty. Furthermore, the anticipation on US to implement provisions under this Article under the new Treaty will be greater than before. Ultimately it will be interesting to see how these two issues are taken on by US - any manner in which the implementation eventuates will either confirm US commitment to Pacific Islands coastal states in fisheries development or question it. In fact, US's responsiveness to the commitments to the Treaty can also influence PIPs states good faith in the Treaty and may possibly influence PIPS inclination in continuing in the partnership. The decision for withdrawal by PNG in the early stages of the renegotiation (which it later revoked) as well as PNA parties expressed remarks on following PNG's lead; almost brought the negotiations to stall.

The importance of US fleet good standing in compliance in region is an aspect that will work to favor US purse seine fleet continued operations in the WCPO. The Registry of Vessels at FFA has recorded high compliance and good fisheries conduct by US fleets compared to other DWFNs. The US Government expressed this success comes from the multilateral arrangement and commitment by US Government to ensure that its vessels operate within the expectations and observe domestic laws of coastal states.

There are various factors that will influence the long-term sustainability of the Treaty. These factors are determined by the dynamics with the Treaty operation or inflicted by external factors relating to the dynamics of the tuna fishery industry.

### *Progress towards a New Treaty*

At the outset, reports from the treaty negotiations seem to indicate positive progress and key issues or differences on treaty conditions are being addressed, and the

conclusion of new treaty arrangement between the US and PIPS is attainable. Having said that, both sides admit there are still lots of ground to cover, and important conditions regarding Treaty operations are yet to be considered and deliberated on.

It has been interesting to note, the assertiveness position from Pacific Islands parties in the incumbent negotiation, comparatively different to past treaty renewal negotiations. This assertiveness is attributed to solidarity in regional cooperation, improved technical capacities, crucial support of regional organizations etc. Effectively, Pacific Islands' parties can influence the treaty toward an outcome that reflects coastal states interests. On the part of the US Government, there is a deep sense of cooperation and compromise in tandem with the responsibility of negotiating the best for US fleets.

The sidelining of the issue on Market Access to US maybe at this stage viewed as a setback for PIPs in terms of its intention to have market provisions within the treaty or some provision to hold US to a commitment in a new Treaty. However, it understood that relevant authorities have pursued this opportunities for a possible special trade arrangement between US and Pacific Islands States.

Finally, the success of a new agreement or treaty text (bilateral or multilateral) accepted and equally reflective of the consensus reached in negotiation depends on parties abilities and strength to ensure this is so in the drafting process of the treaty text.

An approach taken which officials argue has fostered understanding between parties and catalyst to progress in the series of negotiations is the Technical Working Groups (TWG). The TWG for treaty drafting was a condition by PIPs indicated at start of the negotiation. This approach of having systematic parallel medium (at a less formal environment) has been applied in various negotiations - and depending various factors may be useful or not. However, there is a sense of optimism that this process has enabled frank interactions fostering understanding and cooperation between parties.

Ultimately, the Treaty is important to both the US and Pacific Islands' parties, therefore a subsequent outcome of the negotiations in June 2013 are bound impact future

cooperation between US and Pacific Islands beyond fisheries issues. It is anticipated that treaty renegotiations would draw to a close in early 2013, and a new Treaty will be formally concluded by June 2013.

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