The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean: ***Challenges facing Implementation by Small Islands Developing States with a focus on Tonga***

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Abstract

The Western and Central Pacific Fisheries Ocean (WCPO) is the world's largest tuna fishery accounting for more than 50% of the world tuna catches, most of which is caught in the exclusive economic zones of Pacific Island States. Tuna are highly migratory species and represent an important renewable resource for food security and economies of these States. As such, Pacific Island States established the Pacific Islands Forum Fisheries Agency in 1979 to assist them in the development of their fisheries, in particular tuna, in a coherent and coordinated way. Recognizing the need for cooperation in conservation and management of these resources as articulated in Article 63 and Article 64 of the United Nations Convention on the Law of the Sea 1982 (LOSC) and Article 7 and 8 of the Agreement for the Implementation of the Provision of the United Nations Convention on Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA), Pacific Island States and Distant Water Fishing Nations (DWFNs) of the western and central pacific ocean (WCPO) negotiated and adopted the *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* (WCPF Convention) in September 2000 and entered into force on 19 June 2004. The WCPF Convention established the Western and Central Pacific Fisheries Commission (WCPFC).

This paper discusses the obligations of members arising out of the WCPF Convention and the WCPFC's decisions to-date. These obligations are looked at from a Small Island Developing States (SIDS) perspective, focusing on Tonga, to highlight the challenges SIDS need to address in implementing, complying with and enforcing these obligations and decisions. It will be shown that Tonga, a SIDS, faces numerous challenges including: financial resources to meet Tonga's obligations; overworked minimal number of senior, qualified staff for participation in Commission related meetings, legal and policy challenges; difficulties in data collection and analyses obligations; and monitoring, control and surveillance (MCS) challenges. It is proposed that these challenges can be mediated with, *amongst other things*, increased capacity building, provision of technical and financial support, assistance in a range of fisheries management issues, and development of long term training and operational

capacity building attuned to meet the needs of SIDS. These challenges also present opportunities for Tonga, and all SIDS, to regain control of their marine resources and to maximise the long term, social and economic benefits from these resources for their States within the limits of sustainable resource management.

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Acronyms

ALC	Automatic Location Communicator
CA	Convention Area
CCMs	Commission Members, Cooperating Non-Members and Participating Territories
CMMs	Conservation and Management Measures
CNM	Cooperating Non-Members
DWFNs	Distant Water Fishing Nations
EEZ	Exclusive Economic Zone
EU	European Union
FAD	Fish Aggregating Device
FAO	Food and Agriculture Organization of the United Nations
FFA	Pacific Islands Forum Fisheries Agency
FFA Convention	South Pacific Forum Fisheries Agency Convention of 1979
FFC	Pacific Islands Forum Fisheries Committee
FMA	Fisheries Management Act
HMFS	Highly Migratory Fish Stock
HMS	Highly Migratory Species
IATTC	Inter-American Tropical Tuna Commission
IPOA	International Plan of Action
IUU	Illegal, Unreported and Unregulated [fishing]
km²	square kilometres
LOSC	United Nations Convention on Law of the Sea of 10 December 1982
MCS	Monitoring, Control and Surveillance
MHLC	Multilateral High Level Conference
MSY	Maximum Sustainable Yield
mt	metric tonnes
NC	Northern Committee (of the WCPFC)
OFP	Oceanic Fisheries Programme (of the SPC)
PICs	Pacific Island Countries

PNA	Parties to the Nauru Agreement
PrepCon	Preparatory Conference (of the WCPFC)
RFMO	Regional Fisheries Management Organization
RFV	Record of Fishing Vessels
ROP	Regional Observer Programme
SC	Scientific Committee (of the WCPFC)
SEAFO	South-East Atlantic Fisheries Organisation.
SIDS	Small Island Developing State
SPC	Secretariat of the Pacific Community
TAC	Total Allowable Catch
TCC	Technical and Compliance Committee (of the WCPFC)
UN	United Nations
UNCED	United Nations Conference on Environment and Development Earth Summit in 1992
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS II	Second United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNFSA	Agreement for the Implementation of the Provision of the United Nations Convention on Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks
UNGA	United Nations General Assembly
US	United States
USD	United States Dollar
VMS	Vessel Monitoring System
WCPF Convention or the Convention	Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean
WCPFC	Western and Central Pacific Fisheries Commission
WCPO	Western and Central Pacific Ocean

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1 Introduction

The Pacific Small Island Developing States (SIDS),[1] small and resource poor, traditionally regard the oceans as an important way of life. One of the most important resources is tuna which represents an important renewable resource that can provide not only a source of protein, but also major economic benefits for the people of the Pacific. The importance of the marine resource, in particular tuna, to the SIDS of the Pacific cannot be underestimated, and is continually stressed at regional and international fora. President of the Republic of Nauru reiterated this at the recent 65th session of the United Nations General Assembly.[2] However, tuna, as highly migratory species, transcend all boundaries, moving through waters under national jurisdictions onto the high seas and vice versa. Thus, conservation and management of these species require a concerted cooperative effort. Historically, Pacific SIDS has cooperated, amongst themselves, through the Forum Fisheries Agency (FFA) in the conservation and management of tuna. Recently, the Western and Central Pacific Fisheries Commission (WCPFC), a new regional fisheries management organisation (RFMO) have been established bringing together both Pacific SIDS and Distant Water Fishing Nations (DWFNs), implementing the duty to cooperate enshrined in international instruments.

This paper will analyze the challenges Pacific SIDS faced in implementing the obligations arising from the *Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* ("WCPF Convention" or simply "the Convention"), establishing the WCPFC, and its decisions, with a focus on Tonga. The first part of this paper examines the international legal requirements to manage tuna, how these are implemented by Pacific SIDS and the historical development leading to the formation of the WCPFC. It will discuss the WCPF Convention and the WCPFC decisions to-date, to highlight members' obligations. The other focus of the paper will be on the challenges SIDS, in

[1] The UN defines the SIDS of the Asia and Pacific region as: American Samoa, Bahrain, Commonwealth of Marianas, Cook Islands, Fiji, French Polynesia, Guam, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, New Caledonia, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu and Vanuatu. UN website http://www.un.org/esa/sustdev/sids/sidslist.htm#Asia_ accessed 27/09/2010

[2] H.E President Marcus Stephen, Republic of Nauru, Statement at the General Debate of the sixty-fifth session of the United Nations General Assembly, found at http://gadebate.un.org/Portals/1/statements/63420945478500000NR_en.pdf accessed 27/09/2010

particular Tonga, face in discharging and implementing their obligations as a member of the WCPFC.

It will be shown that SIDS such as Tonga face numerous challenges including participation at WCPFC meetings; meetings its assessed contribution as a member of the WCPFC; difficulties with a small fisheries administration to meet data collection, analyses and reporting obligations; challenges to implement the MCS actions; and understanding and implementing the legal and policy requirements of the WCPF Convention and its decisions. It is argued that these challenges can be addressed with, amongst other things, increased capacity building, provision of technical and financial support and assistance in a range of issues and development of long term training and operational planning attuned to the needs of Pacific SIDS.

2 International legal framework for the management of highly migratory species

This chapter discusses the legal framework for the management and conservation of highly migratory species. It starts by providing a brief historical background leading to the adoption of the *United Nations Convention on the Law of the Sea of 10 December 1982* (hereafter: LOSC) before discussing the framework provided by the LOSC for the management of highly migratory species. In addition, series of both binding and non-binding instruments were adopted after the LOSC to fill the gaps in the management of highly migratory species. Some of these initiatives are also discussed in this chapter.

2.1 Background

Prior to the adoption of the LOSC, the seas were largely subject to a *laissez-faire* regime. Beyond the narrow belt of the coastal seas, most of the world's oceans were high seas and the resources therein considered common property which was open and free for use by all.[3] Freedom of the seas was advocated during this era, where ships were small, technology was limited and fish thought to be inexhaustible.[4] Most of the marine resources were located on the high seas as waters under jurisdiction of the coastal States were mostly only up to three nautical miles.[5] However, the narrowness of the three nautical mile jurisdiction can make protection of living marine resources difficult to realize. Grotius advocated the "freedom of the seas" doctrine based on the premise that fish is inexhaustible and trade and freedom of navigation was the paramount concern.[6] Nevertheless, there were two implications of the "freedom of the seas" doctrine on fisheries management: first, coastal States did not have any

[3] R. R. Churchill and A.V. Lowe, *The Law of the Sea 3rd ed.*, Manchester University Press, Manchester 1999, pp.2
[4] For a overview of the history of the ocean, the freedom of the sea advocated by Grotius, the origin of the three-mile sea and the cannon-shot rule, see Chapter 1of Robert Jay Wilder, Listening to the Sea: The Politics of Improving Environmental Protection, University of Pittsburgh Press, Pittsburgh, 1998, pp.1-27
[5] Ibid
[6] Ibid

rights to the resources beyond the territorial sea and second, the doctrine did not promote effective conservation of the marine resources.[7]

The premise that fish is inexhaustible was challenged in the 19th century.[8] In 1956, the United Nations convened the First Conference on the Law of the Sea (hereafter: UNCLOS I), resulting in four treaties being concluded in 1958, collectively known as the Geneva Conventions.[9] One of these treaties, the *Convention on Fishing and Conservation of Living Resources of the High Seas*, made some attempt to address the issue of the conservation of fisheries resources in the high seas. In 1960, the United Nations held the Second Conference on the Law of the Sea (hereafter: UNCLOS II) but did not produce any treaties. As technology advanced, particularly post-World War II, and the premise that fish is not inexhaustible became clear, extension of coastal States maritime jurisdictional area was becoming a focus of international legal activity in the 1970-s up to today. These developments culminated in the Third United Nations Conference on the Law of the Sea (hereafter: UNCLOS III) which took place from 1973 to 1982, resulting in the adoption of the LOSC.

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[7] Martin Tsamenyi, Lara Manarangi-Trott, Shilpa Rajkumar "The international legal regime for fisheries management", pp.2 and 3 http://www.unep.ch/etu/Fisheries%20Meeting/submittedPapers/MartinTsamenyiLaraManarangiTrottShilpaRajkumar.pdf accessed 31/07/2010

[8] Stuart M. Kaye, *International Fisheries Management*, The Hague: Kluwer Law International, 2001 pp.44

[9] The four treaties resulting from UNCLOS I, collectively known as the Geneva Conventions, are the:

- Convention on the Territorial Sea and Contiguous Zone, entered into force on 10 September 1964
- Convention on the Continental Shelf, entered into force on 10 June 1964
- Convention on the High Seas, entered into force on 30 September 1962
- Convention on Fishing and Conservation of Living Resources of the High Seas, entered into force on 20 March 1966

2.2 United Nations Convention on the Law of the Sea of 10 December 1982

The LOSC opened for signature on 10 December 1982 in Montego Bay, Jamaica and subsequently came into force on 16 November 1994, with 320 articles and nine annexes. Currently, there are 157 signatories and 160 parties to the LOSC.[10] With respect to its relationship with the Geneva Conventions, Article 311 of the LOSC states that "this Convention [LOSC] shall prevail, as between State Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958".[11]

Intrinsically, the LOSC provides a framework where it sets forth rights and obligations of States regarding their use of the ocean and its resources. This is reflected in the preamble where it states that the LOSC established

> "a legal order for the sea and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment".[12]

Further, the LOSC created different zones and provides jurisdictional powers over the different zones established therein. In creation of these different legal regimes of the ocean, "under the new regime of the seas [LOSC], the world community has willed to the Coastal States the bulk of living resources in waters off their shores".[13] Figure 1 illustrates the different legal regimes established under the LOSC. These legal regime includes: zones under full sovereignty of the coastal State which includes the internal waters, archipelagic waters and territorial seas; zones under sovereign rights which are those of the EEZ and the continental shelf; and then the high seas and the Area, which is under the control of no one party. These different zones have

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[10] UN website: http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en accessed 13/7/2010

[11] LOSC, Article 311

[12] LOSC preamble

[13] R. Hamlishch, "Methodology and guidelines for fisheries development planning with special reference to the developing countries in the African Region", FAO Technical Paper 297, http://www.fao.org/docrep/003/T0010E/T0010E05.htm#ch5 accessed 13/7/2010

different management and conservation regimes, the most important for the management of highly migratory species, in particular tuna, is the EEZ and the high seas. The contiguous zone is established for the purpose of customs, fiscal, immigration or sanitary[14] enforcement therefore is irrelevant to tuna management and thus is not mentioned further here.

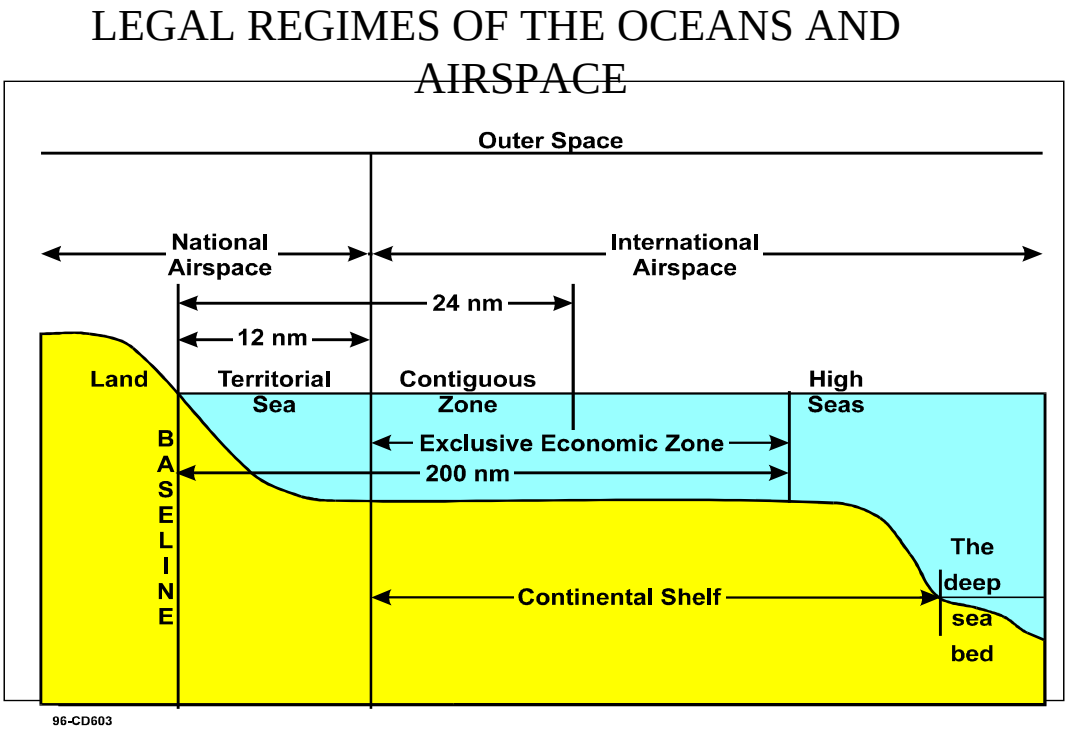

Figure 1. Legal Regimes of the Oceans and Airspace
(Source: Martin Tsamenyi, International Fisheries Law, CMP914, lecture, Fisheries Enforcement Framework under International Law, University of Wollongong, 2009)

In the territorial seas, and in the case of an archipelagic State, in the archipelagic waters, the coastal State has full sovereignty.[15] In essence, the LOSC is silent on matters in these waters because these waters form part of the territory of the coastal State. As Yturriaga pointed out,

> "to have provided a set of management principles with application to the territorial sea would have marked a direct attack on a State's sovereignty over sea areas, in circumstances where the only substantial concession made by States to their sovereignty was to confirm existing international law rights of innocent passage".[16]

[14] LOSC Article 33
[15] LOSC Article 2(1) and Article 49 for Archipelagic States
[16] J.A. de Yturriaga, The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea (The Hague: Martinus Nijhoff, 1997) in Stuart M. Kaye, *International Fisheries Management*, The Hague, Kluwer Law International, 2001, pp.92

Therefore, the coastal State has the competence to prescribe regulations governing these waters by vessels of whatever nationality. Further, the coastal State has the legal authority to enforce such regulations. The only exception is the right of innocent passage through the territorial sea granted to foreign ships under Article 17.[17] As such, management of resources in waters under sovereignty of the coastal State is largely at the discretion of the coastal State, as it is treated as sovereign territory of that State.

On the other hand, zones under sovereign rights are those of the EEZ[18] and the continental shelf.[19] The EEZ is subject to the specific legal regime established under Part V of the LOSC where rights and duties of coastal States, rights and duties of other States, and the formula provided to regulate activities that do not fall within previous two categories are specified.[20] Hence, the framework for the conservation and management of resources in the EEZ is comprehensively provided for in Part V. In Article 55 and 57, the EEZ is defined as an area beyond and adjacent to the territorial sea[21] and shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured[22] (see Figure 1 for illustration).

Within the EEZ regime, the principal Articles dealing with the management of highly migratory species are Article 56, Article 61, Article 62 as well as Article 64.[23] Tuna are highly migratory species and although the LOSC does not define highly migratory species,[24] it

[17] LOSC Article 17 states "subject to this Convention [LOSC], ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea". Section 3 of the LOSC regulates innocent passage
[18] For a comprehensive discussion of the EEZ regime, see David J. Attard, *The Exclusive Economic Zone in International Law*, Oxford: Clarendon Press, 1987
[19] LOSC Part VI is dedicated to the continental shelf. Continental shelf is defined in Article 76 to "comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea[…]". It is not relevant to tuna management so is not discuss here.
[20] LOSC Article 55
[21] Ibid Article 55
[22] Ibid Article 57
[23] Ibid Article 56 spells out the rights, jurisdiction and duties of the coastal State in the EEZ, Article 61 deals with conservation, Article 62 deals with utilization and Article 64 deals with highly migratory species and the duty to cooperate
[24] Stuart M. Kaye, *International Fisheries Management*, The Hague, Kluwer Law International, 2001 pp.124

provides a list in Annex 1, most of which are tuna or tuna-like species.[25] It is worth noting that the LOSC takes a single species-group approach to management, evidenced by provisions made for individual species such as shared and straddling stocks,[26] highly migratory species,[27] marine mammals,[28] anadromous stocks,[29] catadromous species[30] and sedentary species.[31] The highly migratory species classification, resulting in Article 64, was due to a number of States political interests in tuna fishing, particularly the United States and Japan, plus the highly migratory nature of species of tuna, which travel vast expanses of ocean, through numerous zones under national jurisdiction as well as the high seas.[32]

Article 56 gives coastal States jurisdictional competence in the EEZ, granting coastal States:

> sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;[33]

This is significant because it symbolise a move away from open access to resources and regulation based primarily on flag State jurisdiction, to near-exclusive coastal State access to maritime resources and regulation based primarily, though not exclusively, on coastal State jurisdiction.[34] However, coastal State's sovereign rights are subject to specific obligations, the most important being the conservation and management of living resources.[35] These

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[25] LOSC Annex I list these 17 species under Highly Migratory Species: albacore tuna, bluefin tuna, bigeye tuna, skipjack tuna, yellowfin tuna, blackfin tuna, little tuna, southern bluefin tuna, frigate mackerel, pomfrets, marlins, sail-fishes, swordfish, sauries, dolphin, oceanic sharks and cetaceans
[26] Ibid Article 63
[27] Ibid Article 64
[28] Ibid Article 65
[29] Ibid Article 66
[30] Ibid Article 67
[31] Ibid Article 68
[32] William T. Burke, "Highly migratory species in the new law of the sea", *Ocean Development and International Law*, Vol. 14 No. 3, 1984, pp.274
[33] LOSC Article 56 (1) (a)
[34] R. R. Churchill and A.V. Lowe, *The Law of the Sea 3rd ed.,* Manchester University Press, Manchester 1999 pp.176
[35] Francisco Orrego Vicuna, *The Changing International Law of High Seas Fisheries*, Cambridge University Press, UK, 1999 pp.26

obligations, includes, *inter alia*, conservation (Article 61), optimum utilization (Article 62) and a duty to cooperate (Article 64).

In Article 61, coastal States have a duty to conserve the living resources within the EEZ and in doing so; determine the total allowable catch (TAC) of these resources.[36] Further, coastal State also has a duty to ensure through proper conservation and management measures that the living resources are not "endangered by over-exploitation".[37] These conservation and management measures shall "take into account the best scientific evidence available" and shall also be designed to restore populations at levels which can produce "maximum sustainable yield", qualified by relevant environmental and economic factors.[38] Recognising the importance of associated and dependent species, coastal States are also obligated to "take into consideration" this issue.[39]

In Article 62, the coastal State has a duty to "promote the objective of optimum utilization"[40] and in doing so, determine its capacity to harvest the living resources within the EEZ. In the event that the coastal State cannot harvest the entire TAC, the coastal State is obliged to allow other States access to the surplus stock, keeping in line with the principle of optimum utilization.[41] Such access is to be guided by factors in Article 62(3)[42] and coastal States can prescribe conditions to govern such access.[43]

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[36] Ibid Article 61 (1)
[37] Ibid Article 61 (2)
[38] Ibid Article 61 (2) and (3)
[39] Ibid Article 61(4)
[40] Ibid Article 62(1)
[41] Ibid Article 62 (2)
[42] Ibid Article 62 (3) - these factors includes, *inter alia*, "the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70 [Right of land-locked States and Right of geographically disadvantaged States], the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks".
[43] Ibid Article 62 (4)

In addition, the conservation and management of tuna, needs to take into account the highly migratory nature of some of the tuna species. Some tuna species travel considerable distances throughout the ocean, sometimes travelling through several zones of national jurisdiction as well as those of the high seas. The LOSC recognise that tuna knows no political or man-made boundaries, thus, Article 64 calls on:

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

Therefore, Article 64 impose a duty, for all States fishing for highly migratory species to cooperate by working in a concerted, cooperative effort to conserve and manage these resources in a sustainable manner. Such is the rationale for the establishment of regional fisheries management bodies such as the Western and Central Pacific Fisheries Commission (WCPFC) which is the focus of this paper.

The last jurisdictional zone is those that are not subject to sovereignty or sovereign rights, which are the high seas and the area.[44] In the *high seas*, the traditional freedom of fishing in these seas embodied in Article 87(e), is "subject to the conditions laid down in section 2"[45] and to be exercised with "due regard"[46] to the interest of other States. Therefore, State's freedom of fishing is no longer an unqualified right on the high seas, but now subject to:

[44] LOSC Part XI deals with the Area. The resources in the Area "means all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules", Article 133 (a). Thus, the Area is not relevant to management of highly migratory species such as tuna so it is not discussed here
[45] LOSC Article 87 deals with freedom of the sea high which comprises, *inter alia*, of: freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, freedom of fishing, and freedom of scientific research
[46] Ibid Article 87 (2)

(a) their treaty obligations;
(b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67; and
(c) the provisions of this section.[47]

As stated before, Articles 116 to 119,[48] together with Article 64 expressly qualify the freedom to fish on the high seas, imposing a duty on flag States and relevant coastal States to cooperate and adopt conservation and management measures to ensure highly migratory species are conserved and managed responsibly. Burke point out that Article 64 deals with highly migratory species within the EEZ and beyond, joining Article 56, 61 and 62 for application within the EEZ and Articles 87 and Articles 116-119 for application beyond the EEZ.[49] Specifically, Article 119 provides the criteria to achieve conservation of the living resources of the high seas.

[47] Ibid Article 116
[48] LOSC Articles 116 to Articles 119 are under Section 2 (Conservation and Management of the Living Resources of the High Seas) of Part VII (High Seas)
[49]William T. Burke, "Highly migratory species in the new law of the sea", *Ocean Development and International Law*, Vol. 14 No. 3, 1984, pp.285

2.3 Post-LOSC initiatives

After the adoption of the LOSC, negotiations and adoption of a series of 'hard' and 'soft law' followed, adding to the growing legal framework that deals with fisheries related issues today. Hard law are binding instruments and although soft law are non-binding, they represent commitments made by negotiating parties. Of particular relevance to tuna conservation and management are:

- The 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement), in force from 24 April 2003
- 1995 Agreement for the Implementation of the Provision of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA), in force from 11 December 2001
- The 1995 FAO Code of Conduct for Responsible Fisheries
    - Various FAO International Plans of Actions addressing specific key issues of the 1995 Code of Conduct for Responsible Fisheries

The growing body of both hard and soft law show that international fisheries law is evolving in response to a number of political and economic issues and a growing component being environmental in nature. The following discussion will look at some of these initiatives and how it has contributed to the conservation and management regime governing tuna.

2.3.1 FAO Compliance Agreement

The 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (hereafter: FAO Compliance Agreement or simply the Agreement) was approved by the FAO Conference at its 27th session in November 1993, containing sixteen articles, later came into force on 24 April 2003.[50] The agreement forms an integral part of the Code of Conduct for Responsible Fishing.[51] Its aim is to deter re-flagging of vessels with the flags of States that are unable or unwilling to enforce compliance with applicable conservation and management measures for fishing activities in the high seas.[52] Thus, it is closing the loop-hole in international fisheries management by deterring re-flagging to avoid compliance with conservation and management measures which would undermine the effectiveness of these measures.

State Parties are called upon to exercise their flag State responsibilities by ensuring they can legally exercise control over a vessel before authorizing it to fish in the high seas and prohibit a Party from authorizing a vessel with a history of non-compliance.[53] The Agreement obligates Parties to maintain a record of fishing vessels,[54] promote international cooperation in the implementation of the Agreement,[55] exchange information by making required information available to the FAO[56] as well as Parties to cooperate to provide assistance to Parties that are developing States.[57] Currently, there were 39 States parties to the Agreement.[58] It is interesting to note, only Australia, Cook Island and New Zealand, amongst the FFA members', are parties to this Agreement. Tonga is amongst those that are not party to the Agreement yet. However, some of the provisions in the Agreement have been given binding effect by means of other obligatory legal instruments, such as the WCPF Convention.

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[50] FAO, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, http://www.fao.org/Legal/treaties/012s-e.htm, accessed 29/08/2010
[51] FAO, Agreement to Promote Compliance with international conservation and management measures by fishing vessels on the high seas, preamble
[52] Ibid
[53] Ibid, Article III
[54] Ibid, Article IV
[55] Ibid Article V
[56] Ibid Article VI
[57] Ibid Article VII
[58] Supra note 50

2.3.2 United Nations Fish Stock Agreement (UNFSA)

The *1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (UNFSA) came into force as from 11 December 2001. The LOSC provides a comprehensive framework for conservation and management of living resources within the EEZ, but gives very little attention to that of the high seas. As such, many regard the provisions of the LOSC for the high seas as inadequate for the conservation and sustainable use of living marine resources.[59] A result of the DWFNs relocating to the high seas, after the adoption of LOSC, led to increase catches in these areas. Recognising the insufficient regime provided by the LOSC to manage stocks in the high seas, the United Nations Conference on Environment and Development (UNCED) Earth Summit in 1992, as part of Agenda 21, Chapter 17 called on States to convene an international conference to address the problems of conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas.[60] The United Nations General Assembly Resolution 47/192 tasked the conference to:

> (a) Identify and assess existing problems related to the conservation and management of such fish stocks;
> (b) Consider means of improving fisheries cooperation among States;
> (c) Formulate appropriate recommendations; [61]

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[59] Michael Lodge and Sataya N. Nandan, "Some Suggestions Towards Better Implementation of the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995", *The International Journal of Marine and Coastal Law,* Vol 20, Nos 3-4, 2005 pp.347

[60] Agenda 21, Chapter 17, Protection of the Oceans, All Kinds of Seas, Including Enclosed And Semi-enclosed Sea, And Coastal Areas And The Protection, Rational Use And Development Of Their Living Resources, paragraph 49 (e):

> "States should convene, as soon as possible, an intergovernmental conference under United Nations auspices, taking into account relevant activities at the subregional, regional and global levels, with a view to promoting effective implementation of the provisions of the United Nations Convention on the Law of the Sea on straddling fish stocks and highly migratory fish stocks. The conference, drawing, inter alia, on scientific and technical studies by FAO, should identify and assess existing problems related to the conservation and management of such fish stocks, and consider means of improving cooperation on fisheries among States, and formulate appropriate recommendations. The work and the results of the conference should be fully consistent with the provisions of the United Nations Convention on the Law of the Sea, in particular the rights and obligations of coastal States and States fishing on the high seas", http://www.un-documents.net/a21-17.htm accessed 13/07/2010

[61] United Nations General Assembly, RES/47/192 found on UN website at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/063/23/IMG/N9306323.pdf?OpenElement accessed 13/07/2010

The Resolution further directed that the work and results of the conference should be fully consistent with the LOSC.[62] Thus, the conference on straddling fish stocks and highly migratory fish stocks was convened in July 1993, and concluded in 1995 after six sessions. The product of this conference was the adoption, through consensus, on 4 August 1995, of the UNFSA with fifty articles and two annexes. The UNFSA later came into force on 11 December 2001. Currently, there are 77 parties to the UNFSA.[63] China, Vanuatu and the Philippines, all being members of the WCPFC, have signed but have yet to accede to the UNFSA. It is worth noting that the LOSC refers to highly migratory species, but the UNFSA uses the term highly migratory fish stocks (HMFS). This is due to the fact that UNFSA explicitly excludes cetaceans - marine mammals such as whales, dolphins and porpoises.

The objective of the UNFSA is to "ensure the long term conservation and sustainable use of straddling fish stocks and HMFS through effective implementation of the relevant provisions"[64] of the LOSC. With respect to the relationship between the UNFSA and the LOSC, the UNFSA explicitly stated that "nothing in this Agreement shall prejudice the rights, jurisdiction and duties of State under the Convention [LOSC]".[65] Hayashi submitted that the UNFSA represented an important contribution to the LOSC by facilitating the implementation of the LOSC's provisions, strengthening the LOSC's regime and that it develops general or framework rules set out in the LOSC.[66] Thus, the UNFSA is sometimes dubbed the "implementing arm" of the LOSC for highly migratory fish stocks.

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[62] UN General Assembly Resolution 47/192 paragraph 3

[63] UN website: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-7&chapter=21&lang=en, accessed 13/07/2010. These are: the European Union, Australia, Austria, Bahamas, Barbados, Belgium, Belize, Brazil, Bulgaria, Canada, Cook Islands, Costa Rica, Cyprus, Czech Republic, Denmark, Estonia, Federated States of Micronesia, Fiji, Finland, France, Germany, Greece, Guinea, Hungary, Iceland, India, Indonesia, Iran, Ireland, Italy, Japan, Kenya, Kiribati, Latvia, Liberia, Lithuania, Luxembourg, Maldives, Malta, Marshall Islands, Mauritius, Monaco, Mozambique, Namibia, Nauru, Netherlands, New Zealand, Nigeria, Niue, Norway, Oman, Palau, Panama, Papua New Guinea, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saint Lucia, Samoa, Senegal, Seychelles, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Sweden, Tonga, Trinidad and Tobago, Tuvalu, Ukraine, United Kingdom, United States and Uruguay.

[64] UNFSA Article 2

[65] UNFSA Article 4

[66] Moritaka Hayashi, "The 1995 Agreement on the conservation and management of straddling and highly migratory fish stocks: significance for the Law of the Sea Convention", *Ocean and Coastal Management*, Vol. 29 No. 1-3, 1995, pp.53

In addition, the UNFSA only applies to the high seas except Articles 5, 6 and 7 which also apply to areas under national jurisdiction.[67] For the purpose of conservation and management of straddling fish stocks and HMFS, UNFSA provided the general principles in Article 5, including ensuring sustainability, the principle of precautionary approach and the ecosystem management approach. The principle of precautionary approach[68] is to be applied both in the high seas and also within areas under national jurisdiction[69] for the conservation and management of the straddling fish stocks and HMFS. Article 6 provides guidelines on the application of this principle. UNFSA also seeks to ensure compatible conservation and management measures are in place both for the high seas and within areas under national jurisdiction,[70] in order to ensure conservation and management of the aforementioned stocks in their entirety.[71] In so doing, it imposes a "duty to cooperate" on relevant coastal States and those States whose nationals fish for HMFS in the region with a view to ensuring conservation and promoting the objective of optimum utilization.[72]

The duty to cooperate is enshrined in the LOSC in Article 63(2) for shared and straddling fish stocks; Article 64(1) for highly migratory species; Article 117 and Article 118 for the conservation and management of living resources in the high seas but gives no guidance on how to fulfil these obligations. Article 5 of UNFSA provides a number of ways to put these provisions into practice.[73] To fulfil States' duties to cooperate, UNFSA encourages and regulates the institutional framework for the governance of the high seas. It calls on States to cooperate either directly or through appropriate subregional or regional fisheries management organisations or arrangements to ensure effective conservation and management of the aforementioned stocks.[74] It further provides some guidelines for the allocation on fishing rights within the regional organizations and regulates the consequences of failing in the cooperation required by the LOSC. Finally, it also provides for improved enforcement

[67] UNFSA Article 3
[68] Ibid Article 5 (c)
[69] Ibid Article 3 (1); Are K. Sydnes, "Regional fisheries organisations in developing regions: adapting to changes in international fisheries law", *Marine Policy*, vol 26 issue 5, 2002, pp.377
[70] Ibid Article 7
[71] Ibid Article 7 (2)
[72] Ibid Article 7 (b)
[73] Supra note 66 pp.54
[74] UNFSA Article 8 (1)

systems, complementing the flag State jurisdiction with port States' and coastal States' jurisdiction. UNFSA summarize the basic guidelines for fisheries governance, which have been repeated and, to some extent, strengthened in more recent developments.

2.3.3 FAO Code of Conduct for Responsible Fisheries

The 1995 FAO Code of Conduct for Responsible Fisheries (hereafter: "the Code") was another initiative under the auspices of the FAO. The FAO Committee of Fisheries meeting in 1991 call for more responsible practice and better management and in the 1992 Cancun Conference on Responsible Fishing, the conference requested FAO to prepare a Code of Conduct to address this issue. Technical consultations took place between 1992-1995 leading to the adoption of the Code by consensus at the 28th Session of the FAO Conference on 31 October 1995, with twelve articles and two annexes. The Code is voluntary and global in scope[75] and its objectives are succinctly listed in Article 2.[76] It seeks to provide sustainable benefits from fisheries in terms of food, employment, trade and economic well-being for people throughout the world by providing principles and standards applicable to the conservation and management and development of all fisheries.

[75] FAO, Code of Conduct for Responsible Fisheries, Article 1.1
[76] Ibid, Article 2

3 The Western and Central Pacific Fisheries Commission

This chapter provides a background on the Western and Central Pacific Ocean (WCPO) region, in particular, the area of competence of the WCPFC (hereafter: Convention Area or CA) and present a summary of the status of the tuna fisheries in the WCPO. The chapter trace the history of the development of the WCPF Convention before discussing its main features and the WCPFC decisions, highlighting the members' obligations arising out it. It will be shown that SIDS incurred obligations and responsibilities which, although they fully supported, can be very challenging to honour due to factors beyond their control, in particular, resource constraints.

3.1 Background

3.1.1 The WCPO region

The WCPO region encompasses 24 States and territories including Australia and New Zealand, seventeen of which are members of the Pacific Islands Forum Fisheries Agency (FFA). Whilst some areas maybe fish resource scarce, the WCPO is reportedly the world's largest and most valuable remaining tuna fisheries with the most productive area.[77] Fleets of DWFNs are attracted to the most productive places, wherever they are. As a result, fleets gather wherever an upwelling of nutrient-rich water occurs, where the continental shelf is very extensive and where tuna schools migrate.[78] This is evident in the WCPO with more and more new players shifting to the region.[79] Specifically, Figure 2 clearly shows the vast expanse of ocean space that makes up the WCPO region, in particular, the WCPFC Convention Area, which is depicted by the red line in Figure 2.

[77] Laurence Cordonnery, "A Note on the 2000 Convention for the Conservation and Management of Tuna in the Western and Central Pacific Ocean", *Ocean Development and International Law*, vol. 33, 2002, pp.1
[78] Michael Berrill, *The Plundered of the sea*, Sierra Club Books, San Francisco, 1997, pp.18
[79] This is evident in the increase interest in membership in the WCPFC with many countries seeking Cooperation Non-Members (CNM) status annually

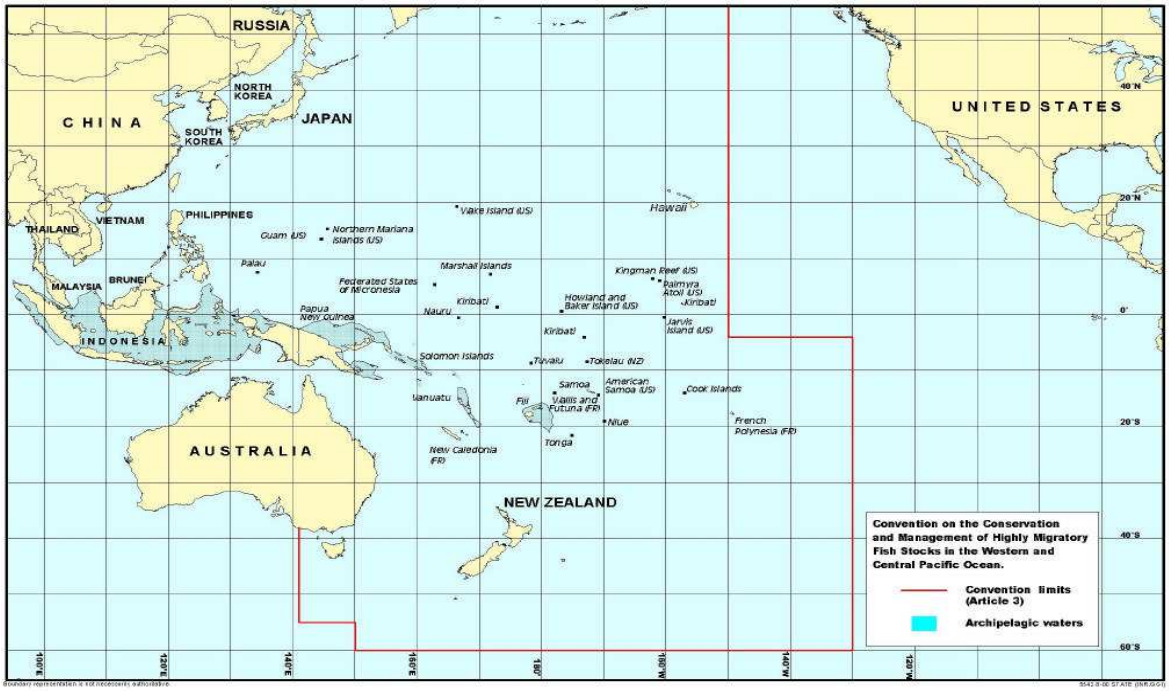


Figure 2. The WCPFC Convention Area
(Source: WCPFC http://www.wcpfc.int/doc/convention-area-map)

In essence, there are many actors in the tuna fisheries of the WCPO. Using Aqorau's classification,[80] the actors in the tuna fisheries may be classified as:

- the small island developing states and territories in the region[81]
- the fishing States[82]
- coastal States[83]
- fish exporting States[84]
- fish consuming States[85]
- developing coastal States[86]
- industry groups[87]
- and environmental organisations[88]

[80] Transform Aqorau, "Challenges and prospects for effective tuna management in the western and central Pacific", *New Zealand Journal of Public and International Law*, 2007, pp.36
[81] Includes the island members and non-members of the FFA in the region – see Table 1
[82] The fishing States may be classified as all the distant water fishing States which are: China, European Union, Japan, Korea, Taiwan and the United States
[83] May be classified as all the small island developing states and territories including Indonesia, Philippines and Japan
[84] Fish exporting States may include Fiji, Papua New Guinea, Samoa, Solomon Islands and Tonga
[85] Fish consuming States may be classified as China, the European Union, Japan and the United States
[86] May be classified as all the small island States and territories, including Indonesia and the Phillipines
[87] The industry groups in the WCPO that play an active role are the National Association of Fishing Industries of the Pacific Islands, the World Tuna Boat Owners Association, and the Organization for the Promotion of Responsible Fishing

The compositions of actors show the diversity of the interest involved. Here are some of the most powerful States of the world which come together with some of the smallest and poorest islands States of world, with the aim to ensure, through effective management, the long-term conservation and sustainable use of the highly migratory species of the WCPO.[89] As the Pacific Island States and territories make up majority of the composition of the WCPO region, it is worthwhile to present a profile on these States and some of the initiatives they have taken in implementing the international legal requirements for the conservation and management of tuna. This will be presented in section 3.2 but the subsequent section will provide a brief overview of the status of tuna fisheries.

[88] These includes Greenpeace International, Worldwide Fund for Nature, Marine Stewardship Council and the International Gaming Association
[89] WCPF Convention, Article 2

3.1.2 Status of tuna fisheries

Globally, key fish stocks are rapidly depleting. The latest statistics reports that 77%, of the world fish stocks are significantly depleted, fully exploited or overexploited and 23% underexploited or moderately exploited.[90] Overall, the Western Central Pacific accounted for fourteen percent (11.2 million tonnes) of the world marine catches in 2006, the third largest fishing areas contribution to world marine catches after the Northwest Pacific (26%) and the Southeast Pacific (15%).[91] In the tuna fisheries, the Western and Central Pacific Ocean accounts for more than 50 percent of the world tuna catches,[92] making it the world's largest tuna fisheries. Annual catches exceed 2 million metric tonnes (mt) with an estimated value of USD3 billion in 2005,[93] majority of which is taken from the exclusive economic zones (EEZs) of the Small Island Developing States (SIDS). Catch is ever increasing despite effort to curtail it through various measures and strategies. In 2009, the provisional total tuna catch in the WCPO was estimated at 2,467,903 mt, the highest annual catch recorded and 70,000mt higher than 2008.[94]

The four main targeted tuna species in the Western and Central Pacific are: skipjack tuna (*Katsuwonus pelamis*), yellowfin tuna (*Thunnus albacares*), bigeye tuna (*T.obesus*) and albacore tuna (*T. alalunga*).[95] These are taken by the full range of fleets from small-scale artisanal operations in the coastal waters of States to large-scale, industrial purse seiners, longline, and pole and line operations both within the EEZ of coastal States and on the high seas. Historically taken by DWFNs, the advance in fishing technology and fishing gears has been a major factor in the rise in total catches, particularly with the purse seine fishery.[96] In the WCPO, total catch of the four main target tuna species has increased steadily during the

[90] Food and Agriculture Organization, State of the World Fisheries and Aquaculture 2008
[91] Food and Agriculture Organisation (FAO) Fisheries and Aquaculture Department, State of World's Fisheries and Aquaculture 2008, pp.33
[92] Ibid pp.83
[93] Langley, A, Wright A, Hurry G, Hampton J, Aqorua, T and Rodwell, L "Slow steps towards management of the world's largest tuna fishery" *Marine Policy*, Vol. 33 issue 2, 2009, pp.271 – 279
[94] 6th Regular Session of the Scientific Committee of the WCPFC, Final Report, paragraph 19
[95] Peter Williams and Peter Terawasi, (2010) "Overview of tuna fisheries in the Western and Central Pacific Ocean, including economic conditions – 2009", paper presented at the Sixth Regular Session of the Scientific Committee, SC6-2010-GN-WP 01, Nuku'alofa, Tonga, 10-19 August 2010, pp.1
[96] Robert Gillett, "A short history of industrial fishing in the Pacific Islands", RAP Publication 2007/22, 2007

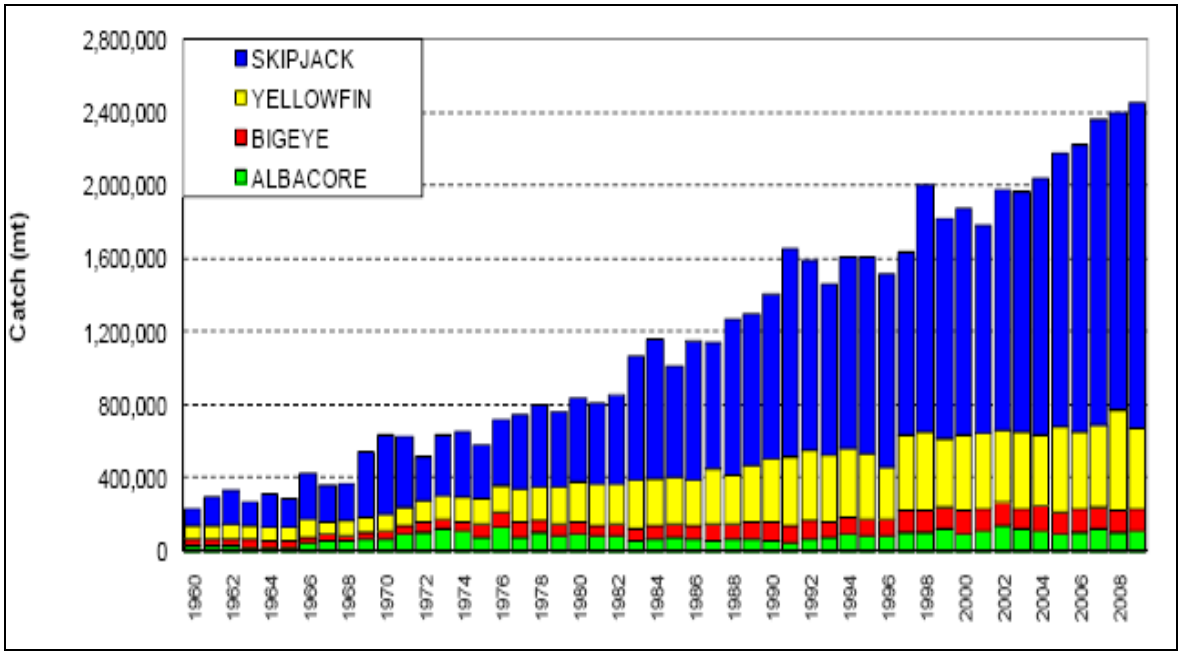
1980s, due mainly to increases in the purse seine fleet.[97] Total catch of target species remained relatively stable during most of the 1990s until the sharp increase in catch during 1998. Increase of total catch over the past six years is mainly attributed to the increase in catch in the purse seine fishery related to the advent of more efficient fishing technology related to purse seines, for example, the use and electronic monitoring of fish aggregating devices (FADs).[98]

The provisional total tuna catch for 2009, in the Convention Area, was estimated at 2,467,903 mt, the highest annual catch recorded to date, and 70,000 mt higher than the previous record in 2008 (2,398,664 mt).[99] The 2,467,903 mt tuna catch for 2009 represented 81% of the total Pacific Ocean catch of 3,042,092 mt, and 58% of the global tuna catch (the provisional global tuna catch estimate for 2009 is 4,222,289 mt).[100]

Total catch by species in the Convention Area has predominantly been made up of skipjack tuna for almost the last thirty years. The skipjack catch has been taken principally by purse seiners over the last 6 to 7 years. In 2009, skipjack in the convention area made up 73% (1,789,979mt) of the total tuna catch, making this the highest recorded total to date, nearly 120,000 more than the previous record catch in 2007. Yellowfin tuna in the convention area for 2009 accounted for 18% (433,7888mt) of total catch, 21% lower (115,000mt) than the catch taken in 2008 (547,985mt). Bigeye catch in the convention area made up 5% (118,657mt) of the total tuna catch. This was the lowest bigeye catch recorded since 2003. Albacore catch in the convention area also made up 5% (125,479mt) of total catch, thus being the second highest albacore catch on record, with very good catches from the longline fishery.[101] Figure 3 shows the total catch by the four main targeted tuna species in the Convention Area over the years.

[97] Supra note 95 pp.2
[98] Ibid
[99] Ibid
[100] Ibid
[101] Ibid

Figure 3. Catch (mt) of albacore, bigeye, skipjack and yellowfin in the Convention Area



(**Source:** Peter Williams and Peter Terawasi, (2010) "Overview of tuna fisheries in the Western and Central Pacific Ocean, including economic conditions – 2009", paper presented at the Sixth Regular Session of the Scientific Committee, SC6-2010-GN-WP 01, Nuku'alofa, Tonga, 10-19 August 2010, pp.2)

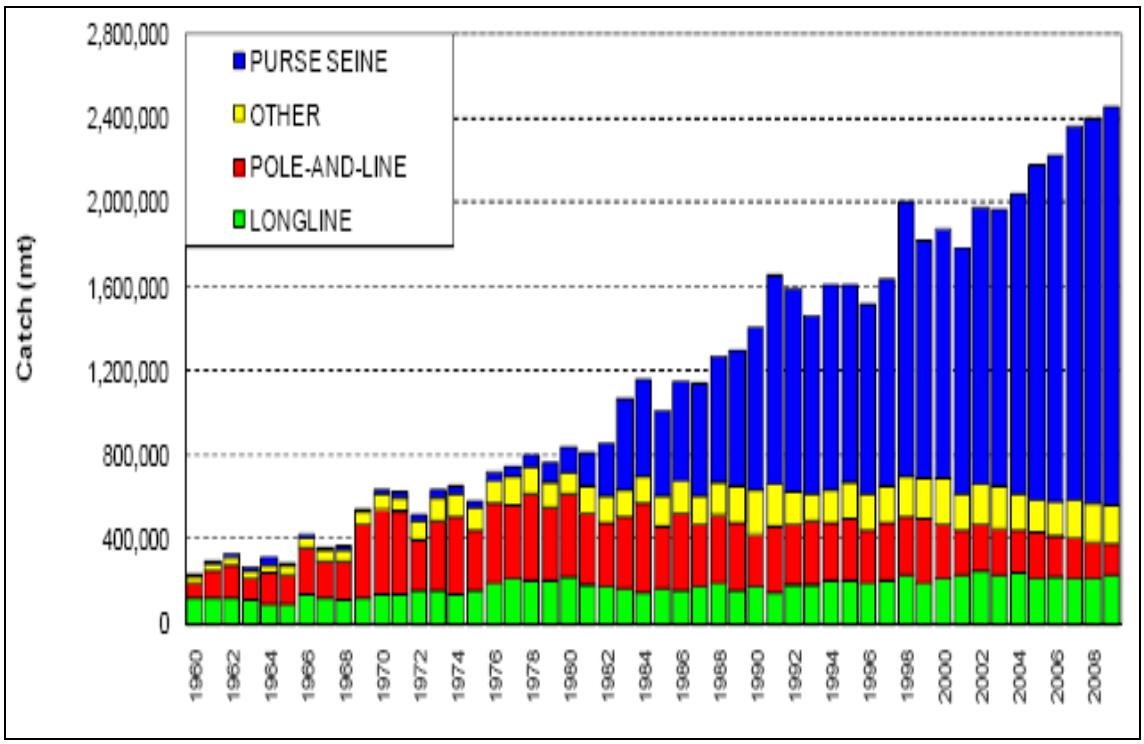
At the global level, the 2008 Food and Agriculture Organisation Status of Fisheries and Aquaculture (FAO SOFIA) publication reported skipjack and yellowfin on the ten top species caught in 2006.[102] Total global tuna reached a new maximum in 2006 at more than 6.4 million tonnes, of which skipjack catches was higher than ever, recorded at 2.5 million tonnes.[103] In comparison, skipjack catch in the WCPFC convention area in 2006 was recorded at 1,537,524 mt.[104] Thus, more than 60% of the world's skipjack supply came from the WCPFC convention area. At the global scale, yellowfin catch in 2006 was recorded at 1.1 million tonnes, reported to have decreased by about 20 percent from the peak reached in 2003.[105] In the WCPFC convention area, yellowfin in 2006 was recorded at 426,726 mt,[106] thus providing

[102] FAO, State of World Fisheries and Aquaculture 2008, pp.12
[103] Ibid
[104] Peter Williams and Chris Reid, (2007) "Overview of tuna fisheries in the Western and Central Pacific Ocean, including economic conditions – 2006", paper presented at the Third Regular Session of the Scientific Committee, SC3_GN_WP_1, Honolulu, Hawaii 13-24 August 2007, pp.1
[105] Supra note 102
[106] Supra note 104

nearly 40% of the world's yellowfin supply. As evident from the figures provided, the WCPFC convention area contributes significantly to the global tuna catch.

On the other hand, looking at the catches based on gear type, the following evolves. The purse seine fishery estimated a total record catch of 77% (1,894,500mt) of the total tuna catch volume in 2009, compared to 40% of total catch during the mid-1980s.[107] Pole and line estimated at 7% (165,814mt); the longline fishery at 9% (223,792mt) and the remainder 7% taken by troll gear and a variety of artisanal gears, mostly in eastern Indonesia and the Philippines.[108] Figure 4 shows the total catch of target species by fishing gear type.

Figure 4. Catch (mt) of albacore, bigeye, skipjack and yellowfin in the Convention Area by longline, pole-and-line, purse seine and other gear types



(**Source:** Peter Williams and Peter Terawasi, (2010) "Overview of tuna fisheries in the Western and Central Pacific Ocean, including economic conditions – 2009", paper presented at the Sixth Regular Session of the Scientific Committee, SC6-2010-GN-WP 01, Nuku'alofa, Tonga, 10-19 August 2010, pp.2)

[107] Supra note 95 pp.2
[108] Ibid

The latest stock assessment for the four main targeted tuna species, by the SPC-OFP,[109] concluded that overfishing is occurring in the bigeye tuna stock.[110] On the other hand, skipjack is moderately exploited and that overfishing is not occurring,[111] yellowfin also is not experiencing overfishing[112] and the South Pacific albacore stock is not in an overfished state.[113]

[109] The Oceanic Fisheries Programme of the Secretariat of the Pacific Community (SPC-OFP) entered into a formal arrangement with the WCPFC to provide the majority of the WCPFC's science services. This arrangement was formalized at the first regular session of the Commission in December 2005. Since then, the SPC-OFP has been contracted to provide a broad range of administrative and technical services to the WCPFC, for target and non-target species, including data administration, biological research, stock assessment and website administration SPC, "WCPFC and SPC-OFP: A Key partnership" paper presented at the 6th SPC Heads of Fisheries Meeting, 9–13 February 2009, Noumea, New Caledonia

[110] Final Report of the 6th Regular Session of the Scientific Committee, paragraph 232(vii); Shelton Harley, Simon Hoyle, Peter Williams, John Hampton and Pierre Kleiber, "Stock assessment of bigeye tuna in the Western and Central Pacific Ocean", paper presented at the Sixth Regular Session of the Scientific Committee, SC6-2010-GN-WP 01, Nuku'alofa, Tonga, 10-19 August 2010, pp.5

[111] Ibid paragraph 293; Simon Hoyle, Pierre Kleiber, Nick Davis, Shelton Harley and John Hampton, "Stock assessment of skipjack tuna in the Western and Central Pacific Ocean", paper presented at the Sixth Regular Session of the Scientific Committee, SC6-2010-GN-WP 01, Nuku'alofa, Tonga, 10-19 August 2010, pp.2

[112] Final Report of the 5th Regular Session of the Scientific Committee, paragraph 18

[113] Ibid, paragraph 26

3.2 The Pacific Island States: implementing international legal requirements for tuna

As stated in section 3.1.1, the 22 Pacific Island States and territories plus Australia and New Zealand largely make up the WCPO region. A snapshot of these 22 States and territories is presented in Table 1, seventeen of which are members of the FFA.

Table 1: Demographic, Economic and Geographical Profile of Pacific Island Countries

	Island Members of FFA	Pop. (est) mid-2010	Sea area 000 sq km **	Land area Km²	GDP Total (000s USD)	GDP per capita (USD)
1	Cook Islands	15,708	1,830	237	230,541	10,875
2	Federated States of Micronesia	111,364	2,978	701	235,00	2,183
3	Fiji	847,793	1,290	18,273	2,928,039	3,499
4	Kiribati	100,835	3,550	811	144,810	1,490
5	Marshall Islands	54,439	2,131	181	149,219	2,851
6	Nauru	9,976	320	21	19,115	2,071
7	Niue	1,479	390	259	15,639	9,618
8	Palau	20,518	629	444	170,144	8,423
9	Papua New Guinea	6,744,955	3,120	462,840	5,552,190	897
10	Solomon Islands	549,574	1,340	30,407	582,000	1,014
11	Tonga	103,365	700	650	270,223	2,629
12	Tuvalu	11,149	900	26	17,514	1,831
13	Vanuatu	245,036	680	12,281	507,454	2,218
14	Samoa	183,123	120	2,785	497,146	2,672
15	Tokelau (a territory of NZ)	1,165	290		-	-
	Island Non-Members of FFA					
16	American Samoa	65,896	390	199	558,800	9,041
17	French Polynesia	268,767	5,030	3,521	5,403,938	21,071
18	Guam	187,140	218	541	3,700,000	22,661
19	New Caledonia	254,525	1,740	18,576	9,397,063	37,993
20	Pitcairn*	-	800	5	-	-
21	Wallis and Futuna	13,256	300	142	-	-
22	Northern Mariana Islands	63,072	-	457	948,659	12,638

Source: SPC 2010 Pocket Statistical Summary, **SPC Economics Pocket Statistical Summary 1992 in William Sutherland & B. Martin Tsamenyi, *Law and Politics in Regional Co-operation: A Case Study of Fisheries Co-operation in the South Pacific*, Pacific Law Press, 1992, pp.3

The twenty two Pacific Islands States and territories in Table 1 cover an aggregate area of over 31 million km².[114] The aggregate area of these States and territories is said to be about the size

[114] Vina Ram-Bidesi and Martin Tsamenyi, "Implications of the tuna management regime for domestic industry development in the Pacific Island States", *Marine Policy*, 2004, pp.383

of the African continent.[115] However, total land mass only accounts for 553,357 km², 84% of which is Papua New Guinea alone (see Table 1). They are also resource poor and have very small populations - only Papua New Guinea has a population greater than one million.[116] Majority of these States and territories have limited land-based resources, but vast EEZ areas. Thus, marine resources become critically important to these States and territories, particularly those with a large EEZ, a small population and a tiny land mass. For some of these Pacific Island States, especially the Federated States of Micronesia, Kiribati, Marshall Islands and Tuvalu, tuna is their most important economic resource.[117] In the case of the Federated States of Micronesia, Tuvalu and Kiribati, the value of fish caught in their EEZs exceeds their gross national income while in the Marshall Islands, Samoa and Solomon Islands it is almost half of their national income.[118] The demographic, economic and geographical profile of these States and territories (Table 1) thus, highlights the plights of the Pacific SIDS.

The possible maritime boundaries for these 22 island States and territories are shown in the map in Figure 5. Although all FFA members have claimed EEZ, many are yet to finalize delimitation of their boundaries. Figure 5 shows Provisional Treaty Lines (PTLs), adopted by the FFA members for purposes of distributing the license fees and satisfying reporting and enforcement activities pursuant to the US Treaty.[119]

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[115] Transform Aqorau, "Illegal Fishing and Fisheries Law Enforcement in Small Island Developing States: The Pacific Islands Experience", *The International Journal of Marine and Coastal Law,* 2000, vol. 15 No.1, pp.37

[116] See Table 1 - PNG has a population of 6,744,955

[117] For a comprehensive discussion of the economics of tuna to the Pacific, see Robert Gillett, Mike McCoy, Len Rodwell and Josie Tamate "Tuna A Key Economic Resource in the Pacific Islands", A Report prepared for the Asian Development Bank and the Forum Fisheries Agency, 2001 http://www.adb.org/documents/reports/tuna/tuna.pdf accessed 31/07/2010

[118] Hannah Parris and R. Quentin Grafton, "Tuna-Led Sustainable Development in the Pacific", *Australian National University Economic and Environment Network Working Paper,* 2005

[119] The full name of the Treaty is *Treaty on Fisheries between the Governments of certain Pacific Island States and the Government of the United States of America*. The text of the treaty can be found in the FFA website at: http://www.ffa.int/system/files/USA-PI%20States%20Treaty%20on%20Fish.pdf

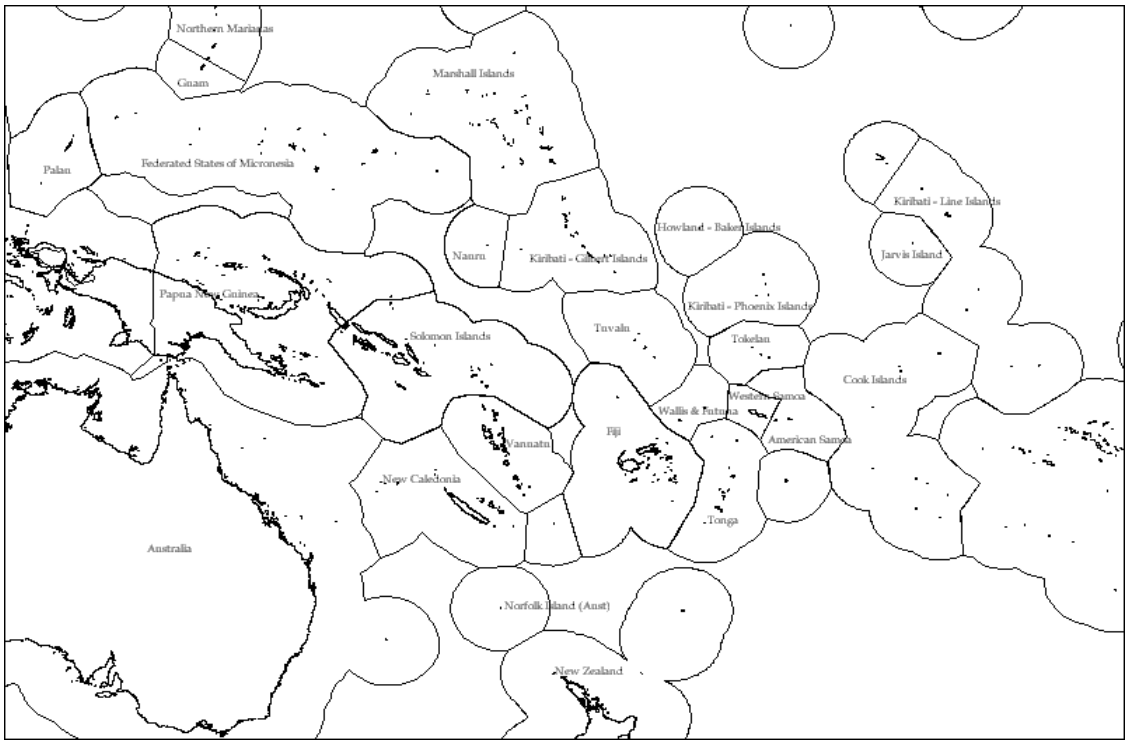

Figure 5. FFA Map for Pacific Island EEZs
Source: FFA

Due to the smallness and lack of land-based resources within these States, the ocean represents a major source of livelihood for its people. Fishing in the past was mostly carried out just outside the reef with traditional canoes or inshore by traditional methods. The development of industrial fishing in the Pacific Ocean commenced in the pre-World War II era with United States and Japan as the main super powers to attempt to develop industrial fishing in the Pacific. Industrial fishing in the Pacific Ocean picked up after World War II by these powerful nations, and by the mid-1960s, Korea and Taiwan fleets had also appeared in the region.[120] The development of fishing technology for more cost effective harvesting, the increased realisation of the economic value of the tuna resources; and the depleted status of tuna stocks in other regions resulted in a surge of interest and advent of several new players into the region. Currently, the major distant water fishing nations fishing in the Pacific are the United States, Japan, Korea, Taiwan and China. To-date, three main industrial tuna fishing techniques have enjoyed varying degrees of commercial success in the region, and these include: purse-

[120] For a history of industrial fishing in the Pacific, see Robert Gillet, "A short history on industrial fishing in the Pacific Islands" RAP Publication 2007/22, 2007

seining, longlining and pole and line fishing.[121] The fishery expanded rapidly from the mid 1980s following the development of the purse seine fishing gear technology.

In terms of conservation and management of the tuna resources, the Pacific Island States acted in response to the EEZ concept advanced at the UNCLOS III negotiations, in two major ways. First, majority of the Pacific Island States individually claimed EEZ by enacting legislation to that effect, prior to the conclusion of the UNCLOS III. Second, collectively, they adopted the *South Pacific Forum Fisheries Agency Convention of 1979* (hereafter: FFA Convention)[122] which established the Forum Fisheries Agency (FFA), which currently have 17 members.[123] These States recognise their individual limitations in terms of resource constraints to maximize the benefit offered by the EEZ regime so a regionalist approach was adopted in the form of the FFA. In doing so, the Pacific Island States were seeking regional cooperation and coordination in respect of fisheries issues in order to secure maximum benefits from the living marine resources of the region, in particular the highly migratory species,[124] for themselves. In addition, FFA members can together discharge their tuna management and conservation obligations arising out the LOSC as individually, they lack the resources to do so.[125]

This regionalist approach for tuna management has its origins in the South Pacific Forum meeting of July 1976 in Nauru and taken up at the 8th Forum Meeting held in Port Moresby in August 1977,[126] which adopted the Declaration on the Law of the Sea and a Regional Fisheries Agency. The Declaration, amongst other things, announced the decision to establish a regional fisheries agency.[127] Thus, the Pacific Islands established the FFA[128] in July 1979 with the objective to "assist member countries to develop their fisheries resources in a

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[121] Ibid
[122] Text of the FFA Convention can be found at http://www.austlii.edu.au/au/other/dfat/treaties/1979/16.html
[123] 15 States noted in Table 1 plus Australia and New Zealand
[124] Supra note 25
[125] Transform Aqorau, *"Analysis of the responses of the Pacific Island States to the fisheries provision of the Law of the Sea Convention"*, PhD thesis, Centre for Natural Resources Law and Policy, University of Wollongong, 1998, pp. 83and88
[126] William Sutherland and B. Martin Tsamenyi, *Law and Politics in Regional Co-operation: A Case Study of Fisheries Co-operation in the South Pacific* (Tarona: Pacific Law Press, 1992) pp.25 and 32
[127] Ibid, pp.32
[128] Initially known as the South Pacific Forum Fisheries Agency, it is now known as the Pacific Islands Forum Fisheries Agency More information on FFA can be found on their website at http://www.ffa.int/

coherent and coordinated way".[129] Under the 1979 FFA Convention, the agency consists of the Forum Fisheries Committee (hereafter: FFC) which is the governing body, with its Secretariat based in Honiara, Solomon Islands.[130] The functions of the FFC[131] and the Secretariat,[132] do not have any management responsibilities, but merely facilitate management decisions taken collectively and in some cases individually by the member countries.[133] Thus, the FFA functions in a consultative and advisory body for its members.[134]

The FFA members have galvanized a number of initiatives aimed at realising the objectives of the FFA Convention, thereby implementing the international legal requirements for conservation of tuna. These initiatives included the Nauru Agreement, the Palau Arrangement,

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[129] D Doulman, "In pursuit of fisheries cooperation: the South Pacific Forum Fisheries Agency", *University of Hawaii Law Review*, 1988, pp. 137 - 150

[130] FFA Convention Article 1

[131] FFA Convention Article V states:

The functions of the Committee shall be as follows:

- to provide detailed policy and administrative guidance and direction to the Agency;
- to provide a forum for Parties to consult together on matters of common concern in the field of fisheries;
- to carry out such other functions as may be necessary to give effect to this Convention.

In particular the Committee shall promote intra-regional co-ordination and co-operation in the following fields:

- harmonisation of policies with respect to fisheries management;
- co-operation in respect of relations with distant water fishing countries;
- co-operation in surveillance and enforcement;
- co-operation in respect of onshore fish processing;
- co-operation in marketing;
- co-operation in respect of access to the 200 mile zones of other Parties.

[132] Ibid, Article VII states that subject to the direction by the Committee the Agency shall:

(a) collect, analyse, evaluate and disseminate to Parties relevant statistical and biological information with respect to the living marine resources of the region and in particular the highly migratory species;
(b) collect and disseminate to Parties relevant information concerning management procedures, legislation and agreements adopted by other countries both within and beyond the region;
(c) collect and disseminate to Parties relevant information on prices, shipping, processing and marketing of fish and fish products;
(d) provide, on request, to any Party technical advice and information, assistance in the development of fisheries policies and negotiations, and assistance in the issue of licenses, the collection of fees or in matters pertaining to surveillance and enforcement;
(e) seek to establish working arrangements with relevant regional and international organisations, particularly the South Pacific Commission; and
(f) undertake such other functions the Committee may decide.

[133] Transform Aqorau and Anthony Bergin, "The UN Fish Stock Agreement – A New Era for International Cooperation to Conserve Tuna in the Central Western Pacific", *Ocean Development and International Law,* vol.29 1998, pp.22

[134] Michael W Lodge, "The development of the Palau Arrangement for the management of the western Pacific purse seine fishery", *Marine Policy vol. 22 No.1,* 1998, pp.8

the Federated States of Micronesia Arrangement, Driftnet fishing Convention, and others which will be briefly presented here.

In 1989, concerned with the effect of high seas driftnet fishing in the South Pacific albacore fisheries, the FFA members' concluded the *Convention for the prohibition of fishing with long driftnets in the South Pacific* (hereafter: Driftnet Convention) which came into force on 17 May 1991.[135] The concern with driftnet fishing is because it is unsustainable, and could lead to the collapse of the albacore stock.[136] In addition to stock and environmental consequence of driftnet fishing, economic and navigational threats were also of concern.[137] Thus, the South Pacific Forum held the view, advocated in the Tarawa Declaration in 1989,[138] that driftnet fishing was inconsistent with the principles in the LOSC. In essence, the Driftnet Convention prohibit the use of driftnets in "the area 10 degrees North latitude and 50 degrees South latitude and 130 degrees East longitude and 130 degrees West longitude",[139] thus encompassing both waters under national jurisdiction of the Parties as well as high seas. The Driftnet Convention has a conservation objective beyond simply prohibiting the use of driftnets in EEZ of the parties.[140] It is intended to achieve regional and international cooperation in fisheries management by parties agreeing to cooperate within themselves and also appropriate DWNFs and other organizations in the development of conservation and management measures for the South Pacific albacore tuna within the said Convention Area. In December 1989, the United Nations General Assembly (UNGA) debated the issue on banning driftnet fishing in the South Pacific, leading to the adoption of Resolution 44/225 on Large-scale Pelagic Drift-net Fishing and its Impact on the Living Marine Resources of the

[135] Text of the Driftnet Convention can be found at William Sutherland and B. Martin Tsamenyi, Law and politics in Regional Co-operation: A Case Study of Fisheries Co-operation in the South Pacific, 1992, Pacific Law Press: Taroona, pp.141-pp.153 and http://untreaty.un.org/English/UNEP/driftnets_english.pdf
[136] Grant James Hewison, "High Seas Driftnet Fishing in the South Pacific and the Law of the Sea", *The Georgetown International Environmental Law Review* (1993), vol. 5 pp.319
[137] Supra note 126, pp.80
[138] Tarawa Declaration is appended as Appendix 1 in Andrew Wright and David J. Doulman, "Drift-net fishing in the South Pacific: From controversy to management", *Marine Policy*, 1991, pp.329
[139] Convention for the Prohibition of fishing with long driftnets in the South Pacific, Article 1 (a) (i)
[140] Martin Tsamenyi, "The institutional framework for regional cooperation in ocean and coastal management in the South Pacific", *Ocean and Coastal Management*, 1999, pp.477

World's Oceans and Sea. In December 1992, there was a global ban on high seas pelagic driftnet fishing. [141]

Another initiative of the Pacific Island States was the *Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest*[142] (hereafter: Nauru Agreement) was concluded in 1981 by the Federated States of Micronesia, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea and Solomon Islands. Tuvalu became a party in 1991. These States, recognising the fact that DWFNs were able to weaken their negotiating positions by playing one State against another, adopted the Nauru Agreement, which sought:

> "without any derogation of their [parties] respective rights, to co-ordinate and harmonise the management of fisheries with regard to common stocks with the Fisheries Zones, for the benefit of their peoples".[143]

The key elements of this subregional Agreement include the establishment of principles giving priority to fishing vessels of the Parties to the Nauru Agreement (hereafter: PNA) over foreign fishing vessels and also establishing minimum terms and conditions (hereafter: MTCs) under which foreign fishing vessels would fish in the parties' waters.[144] To this effect, two *Arrangements implementing the Nauru Agreement setting forth Minimum Terms and Conditions of Access to the Fisheries Zones of the Parties*[145] were adopted. The First Implementing Arrangement, entered into force in September 1983, requires PNA to ensure compliance with the MTCs set out in Article II of the Agreement. The Second Implementing Agreement, adopted in 1990, sets out revised MTCs under which foreign fishing vessels are prohibited from transhipment at sea, as a condition of license, provide high seas catch data and

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[141] For a detail discussion of the Driftnet fishing in the South Pacific, see Grant James Hewison, "High Seas Driftnet Fishing in the South Pacific and the Law of the Sea", *The Georgetown International Environmental Law Review* (1993), vol. 5 pp.315-374 and Andrew Wright and David J. Doulman, "Drift-net fishing in the South Pacific: From controversy to management", *Marine Policy*, (1991), pp.303-pp.329

[142] Text for the *Nauru Agreement Concerning Co-operation in the Management of Fisheries of Common Interest* can be found in William Sutherland and B. Martin Tsamenyi, *Law and Politics in Regional Co-operation: A Case Study of Fisheries Co-operation in the South Pacific*, Pacific Law Press, Tarona, 1992 pp.98-pp.103 or at http://www.ffa.int/system/files/%252Fhome/ffaadmin/%252Ffiles/ffa/Nauru%20Agreement.pdf

[143] The Nauru Agreement, Article I

[144] Ibid, Article II

[145] Text for the implementing arrangements are reprinted as Annex II in the Palau Arrangement, found at http://www.ffa.int/system/files/%252Fhome/ffaadmin/%252Ffiles/ffa/Palau%20Arrangement.pdf

to pay the full costs of observers.[146] Thus, the measures adopted by the PNA, such as the FFA Vessel Register and Harmonized Minimum Terms and Conditions of Access by Foreign Fishing Vessels (MTCs), have now provided the basis for region-wide arrangements that are now applicable to fishing vessels in the WCPO.[147]

The MTCs, originally adopted in 1982, was revised in 1990, 2003 and 2008[148] and now apply to all arrangements for fisheries access to the EEZ of FFA members. It is empowered by Article 62(4) of the LOSC, giving coastal State power to regulate the conduct of foreign fishing vessels within the coastal State's EEZ.[149] As discussed above, the MTCs was initially a PNA initiative but became a wider initiative of the whole FFA membership. In 1983, the FFC adopted a resolution not to license a foreign fishing vessel for tuna unless the vessel is in good standing on the regional register. Article 1 of the First Implementing Agreement requires the parties to participate in, and comply with, the Regional Register Rules adopted by the FFC and Article II requires Parties to ensure compliance with the MTCs. In short, the MTCs require foreign fishing vessels to report their entry into and departure from the EEZ; provide regular reports of catch and position to the licensing State, prohibit transhipment at sea and require foreign fishing vessels licensed by Pacific Island States to provide reports of high seas catch. [150]

In addition to the Nauru Agreement, two arrangements were adopted for the purse seine fishery within the PNA waters to deal with the concern of increase capacity: first, *the Palau Arrangement for Management of the Western Pacific Purse Seine Fishery of 2 October 1992* (hereafter: Palau Arrangement),[151] entered into force in November 1995 and second, the

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[146] Michael W Lodge, "The development of the Palau Arrangement for the management of the western Pacific purse seine fishery", *Marine Policy vol. 22 No.1*, (1998), pp.10
[147] Transform Aqorau, "Recent Developments in Pacific Tuna Fisheries: The Palau Arrangement and the Vessel Day Scheme", *The International Journal of Marine and Coastal Law*, 2009, pp.558
[148] MTCs can be found at http://www.ffa.int/system/files/Revised%20MTCs%202008.pdf
[149] Michael Lodge, "Minimum terms and conditions of access: Responsible fisheries management measures in the South Pacific region", *Marine Policy*, (1992), pp.277
[150] For a comprehensive discussion of the MTCs, see Michael W Lodge, "The development of the Palau Arrangement for the management of the western Pacific purse seine fishery", *Marine Policy vol. 22 No.1*, 1998
[151] Text of the Palau Arrangement is available at http://www.ffa.int/system/files/%252Fhome/ffaadmin/%252Ffiles/ffa/Palau%20Arrangement.pdf

Federated States of Micronesia Arrangement for Regional Fisheries Access of 29 November 1994 (hereafter: FSM Arrangement).[152] The Palau Arrangement, in the preamble stated, it takes into account the LOSC, in particular Article 56(1) (a) [granting coastal States sovereign rights] and Article 61 [conservation]. The major fisheries management initiative under The Palau Arrangement was a cap imposed on the number of purse-seine vessels licensed by PNA in their EEZs.[153] In imposing limits on licences, the PNA assume that it will increase competition and thus, raise access fees thereby increasing the returns from the licensing regime but this did not happen due to continued increase number of licenses.[154] The FSM Arrangement on the other hand, gave preferential access to PNA countries' EEZ to fishing vessels engaged in domestic developments of the Parties.[155]

In recent years, the Palau Arrangement was reviewed in response to changes in international laws and the Parties decided to do away with the vessel cap and impose a limit on the number of purse-seine days.[156] Developed from 2000-2004, the Vessel Day Scheme (VDS) established a regional Total Allowable Effort (TAE) where days are allocated to the Parties as Party Allowable Effort (PAE). Quoting then Deputy Director of the FFA, now PNA Director, he stated:

> "the objective of the VDS is to enhance the management of purse-seine fishing-vessel effort in the waters of the Parties by promoting optimal utilisation and conservation of tuna resources, maximizing economic returns, employment generation and export earnings from sustainable harvesting of tuna resources, supporting the development of domestic and locally based purse-seine fishing industries, promoting effective and efficient administration, management and compliance, and encouraging collaboration between all Parties".[157]

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[152] Text of the FSM Arrangement is available at http://www.ffa.int/system/files/%252Fhome/ffaadmin/%252Ffiles/ffa/FSM%20Arrangement.pdf

[153] FFA, Palau Arrangement for the Management of the Western Pacific Purse Seine Fishery, Article 6, paragraph 6.1 and Annex 1, can be found at http://www.ffa.int/system/files/%252Fhome/ffaadmin/%252Ffiles/ffa/Palau%20Arrangement.pdf ; For a detail discussion of the Palau Arrangement, see Michael W Lodge, "The development of the Palau Arrangement for the management of the western Pacific purse seine fishery", *Marine Policy vol. 22 No.1*, 1998, pp.1-28

[154] Transform Aqorau, "Recent developments in Pacific tuna fisheries: The Palau Arrangement and the Vessel Day Scheme", *The International Journal of Marine and Coastal Law, vol 24*, 2009, pp.564

[155] Ibid, pp.559

[156] Ibid pp.565;

[157] Supra note 154 pp.567

In addition, PNA adopted in 2008 the 3rd Implementing Arrangement through which a three months FAD Closure was prescribed, 100% observer coverage, retention of all fish caught and the closure of the two high seas pockets in the central Pacific.[158] Follow on from the PNA initiative, the FFA's Polynesian countries; Cook Islands, Niue, Samoa, Tokelau, Tonga including New Zealand, established early this year, the 'Te Vaka Moana' group, in a collective effort to enhance sustainability and derive greater economic benefits from the South Pacific longline fishery.[159]

Collectively, the FFA members have put in place initiatives to discharge their obligations required under the international laws for the conservation and management of tuna. Initiatives discussed above plus others, such as the US Treaty and other bilateral access agreements shows FFA members actively implementing the requirements for conservation and management of tuna. In addition to the regionalist approach, the members with the help of the FFA Secretariat have enacted legislations encompassing the principles set out by the international legal framework, such as, the principle of precautionary approach which is now embodied in most, if not all, national legislations of FFA members.

Historically and to-date, as can be seen from the FFA membership composition, it is limited to coastal Pacific Island States. As such, it has been criticized that it fails to fulfil the requirements of Article 64 of the LOSC because of its limited membership by excluding the distant water fishing nations.[160] Sutherland and Tsamenyi argue that Article 64 gives States flexibility to choose to "cooperate directly or through appropriate international organizations" therefore FFA does not necessarily need to be a broad-based organisation.[161] As submitted by these authors, the scope of Article 64 deals only with conservation and not management of

[158] Text of the 3rd Implementing Arrangement can be found at http://www.spc.int/coastfish/countries/nauru/nfmra/laws/PNA_Third_Implementing_Arrangement.pdf accessed 22/09/2010
[159] FFA website at http://www.ffa.int/node/369, accessed 22/09/2010
[160] Jon Van Dyke and Susan Heftel, "Tuna management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency", *University of Hawaii Law Review*, 1981 pp.38
[161] Supra note 126, pp.36

highly migratory species, however FFA members envisage an organisation that would help them discharge their management functions.[162]

However, FFA members', despite its push for limited membership, recognised early on, the additional need for a broader based organisation, as envisaged by Article 64 and Article 118 of the LOSC[163] that would include all parties. This is evident in Article III of the FFA Convention where it states, in part, that:

> the Parties effective cooperation for the conservation and optimum utilization of highly migratory species of the region will require the establishment of additional international machinery to provide for co-operation between all coastal states in the region and all states involved in the harvesting of such resources.[164]

Parallel to the UNFSA negotiation, FFA members' initiated, in 1994, a negotiation process with DWFNs for the establishment of the "additional machinery" envisaged by the FFA Convention. The process leading up to the establishment of this "additional machinery" is discussed in the subsequent section.

[162] Ibid pp.37; Michael Lodge, "Minimum terms and conditions of access: Responsible fisheries management measures in the South Pacific region", *Marine Policy*, 1992, pp.279

[163] Much of the criticism of the FFA since its inception was that, due to its limited membership, it does not fulfil the mandate of Article 64 of the LOSC due to its limited membership. See J. Van Dyke and S. Heftel, "Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency", *University of Hawaii Law Review*, 3 (1981). For a counter-view, see Sutherland and Tsamenyi, 126, pp.35-41

[164] South Pacific Forum Fisheries Agency Convention, Article III (2)

3.3 Development of the WCPF Convention

The negotiation process became known as the Multilateral High Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific (MHLC). The MHLC process brought together the coastal States and territories as well as distant water fishing nations with interests in the WCPO in a bid to promote responsible fishing operations in the South Pacific region.[165] The UNFSA was the main stimulus for the MHLC process[166] coupled with the increased concern about the decreasing status of fish stocks in the region.[167] Seven MHLCs[168] took place leading to the adoption of the WCPF Convention, by majority vote, in September 2000. The WCPF Convention became the first to be signed under the UNFSA although the latter was not in force, at the time.[169] A historical overview of the MHLC process is provided in the next section to give a brief overview of the historical journey and the main issues discussed leading to the adoption of the WCPF Convention.

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[165] States, territories and fishing entities that participated at MHLC were: Australia, Canada (observer on MHLC 2 and 3, admitted as a participant at MHLC 4), China, Cook Islands, Federated States of Micronesia, Fiji, France, French Polynesia, Indonesia (participated from MHLC 3), Japan, Kiribati, Marshall Islands, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Philippines, Republic of Korea, Samoa, Solomon Islands, Chinese Taipei, Tonga, Tuvalu, United States of America, United Kingdom of Great Britain and Northern Ireland, on behalf of Pitcairn, Henderson, Ducie and Oeno Islands (observer on MHLC 5, admitted as a participant at MHCL 6), Vanuatu, Wallis and Futuna. For a list of observers and intergovernmental and regional organizations that also took part in the MHLC, see Final Act of the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, found at http://www.wcpfc.int/system/files/documents/convention-texts/FinalAct.pdf accessed 21/07/2010

[166] Sandra Tarte, "Negotiating a Tuna management regime for the western and central pacific: The MHLC process 1994-1999", *The Journal of Pacific History*, vol. 34 issue 3, 1999, pp.274

[167] Sandra Tarte, "The Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean: Implementation Challenges from a Historical Perspective" in Quentin Hanich and Martin Tsamenyi, (ed), *Navigating Pacific Fisheries: Legal and Policy Trends in the Implementation of International Fisheries Instruments in the Western and Central Pacific Region'*, 2009, Ocean Publications, University of Wollongong

[168] MHLC meetings and technical consultations: MHLC 1 in Honiara, Solomon Islands, 1-5 December 1994; Technical consultation on fishing-vessel monitoring systems in Honolulu, Hawaii, September 1995; Technical consultation on the collection and exchange of fisheries data, tuna research and stock assessment in Noumea, New Caledonia, 15-19 July 1996; Technical consultation on fishing vessel monitoring systems in Suva, Fiji, 13-15 November 1996; MHLC 2 in Majuro, Marshall Islands, 10-13 June 1997; Intersessional technical consultation on issues relating to fisheries management in Honiara, Solomon Islands, 1-5, December 1997; Intersessional technical consultation on issues relating to monitoring, control and surveillance in Suva, Fiji, 10-13 March 1998; MHLC 3 in Tokyo, Japan, 22-26 June 1998; MHLC 4 in Honolulu, Hawaii, 10-19 February 1999; MHLC 5 in Honolulu, Hawaii, 6-15 September 1999; MHLC 6 in Honolulu, Hawaii, 13-19 April 2000; MHLC 7 in Honolulu, Hawaii 30 Aug – 5 September 2000

[169] The UNFSA came into force from 11 December 2001

3.3.1 Historical Overview (MHLC 1 – 7)

The first MHLC (MHLC 1) was of exploratory nature with the objective to promote the full implementation of responsible fishing operations in the South Pacific region.[170] Its main outcome was an agreement to hold a technical consultation "to consider options for improved provision of complete catch and effort data and compilation and exchange of data" and "options under which scientists from all parties involved in the fishery can more fully participate in the stock assessment process".[171]

MHLC 2[172] represented the first stage of the negotiation process as it had a specific mandate to discuss the development of comprehensive management arrangements for the region's tuna fisheries, consistent with LOSC and the UNFSA.[173] The most important outcome of MHLC 2 was the adoption of the Majuro Declaration[174] outlining guiding principles on which the continued process was to be based. The declaration also committed Parties to a timeframe of three years for the negotiation of a legally binding conservation and management mechanism in accordance with the LOSC and the UNFSA.[175]

MHLC 3[176] saw negotiation on the first draft text which was largely base on the UNFSA.[177] The draft text proposed a Commission for the Conservation and Management of Highly Migratory Fish Stocks in the WCPO. Some were nervous that the proposed regime may erode sovereign rights of coastal states, enshrined in the LOSC, by assuming powers over in-zone management, given that the proposed arrangement would be required to manage tuna

[170] Final Act of the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, found at http://www.wcpfc.int/system/files/documents/convention-texts/FinalAct.pdf accessed 21/07/2010; Sandra Tarte, "A duty to cooperate: Building a regional regime for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific", Ocean Yearbook 16 (Chicago: University of Chicago Press, 2002), pp.271

[171] Sandra Tarte, "A duty to cooperate: Building a regional regime for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific", Ocean Yearbook 16 (Chicago: University of Chicago Press, 2002), pp.271

[172] MHLC 2 was attended by all FFA members, Taiwan, Japan, Korea, China, Philippines, USA and the French territories: French Polynesia, New Caledonia and Wallis and Futuna.

[173] Sandra Tarte, Supra note 171, pp.274

[174] Majuro Declaration, Majuro, Marshall Islands, 13 June 1997.

[175] Sandra Tarte, Supra note 171 pp.275

[176] MHLC 3 was attended by all previous attendants (see Supra note172) plus Indonesia

[177] Sandra Tarte, Supra note 171, pp.278

throughout their range. The issues of compatibility, how to allocate quotas and determine participatory rights, decision-making, compliance and enforcement and precautionary approach proved contentious during this conference. This highlights the different interests of DWFNs and those of the Pacific SIDS.

MHLC 4 considered the issues of convention area, allocation, minimum terms and conditions of fishing, enforcement, institutional arrangements, decision making and dispute settlement.[178] Significant progress was made on the framework of the future regime including the institutional arrangements, the agreement that an independent scientific staff be included, drawing from existing regional organisations (SPC-Oceanic Fisheries Program). In principle, agreement on Convention Area was reached, although it will be refined in future negotiations. Discussion on the role of the Commission on allocation and setting of TACs proved inconclusive. DWFNs preferred the Commission to play an active role in determining TACs and allocation of fishing opportunities throughout the convention area whilst Pacific Island States sought the Commission's role to be limited to high seas only, excluding EEZs. In essence, the DWFN desire for the Convention to address the entire Convention Area and Pacific Island States wants it limited to the high seas. Further, MHCL 4 adopted a resolution relating to the exercise of restraint in the expansion of future fishing effort and capacity.[179]

MHCL 5 consider the issues of decision making, financial arrangements, preamble and final clauses and consideration of an interim regime plus the outstanding issues of convention area and compliance and enforcement measures.[180] A particularly sensitive issue during this conference was the status of Taiwan or Chinese Taipei, reflecting the political sensitivity between Taiwan and China. The issue of VMS and decision making also proved inconclusive. The United States preferred to see opt out and objection clauses and Japan prefer a weighted voting system in favour of DWFNs. Interesting to note also the continued opposition from DWFNs, Japan in particular, to the principles in the UNFSA. Japan sought to remove all references to the UNFSA arguing that it was not yet in place but also that it did not provide

[178] Sandra Tarte, Supra note 171 pp.282
[179] "Resolution," Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in Western and Central Pacific, Fourth Session, Honolulu, Hawaii, 10-19 February 1999
[180] Sandra Tarte, Supra note 171 pp.285

clear guidelines on how to implement its provisions at the regional level.[181] Overall, Tarte concluded that this was "the most difficult session so far" as it dealt with some of the most difficult and sensitive issues and compromises in this session were more in favour of DWFNs[182] with inconclusive discussions on matters such as decision-making.

In MHLC 6, the FFA members regarded decision making as one of the 'make or break' issues. The chair continued to advocate that opt-out clauses, as advocated by some DWFNs, should not be included, nor consensus appropriate, as pushed by the US, except in limited issues. The chair proposed a four-fifths majority vote but again, agreement proved elusive. The entry into force provision saw DWFNs opposed entry into force without any DWFNs ratification whilst FFA members believed it should come into force after two years on the basis of 12 ratifications, in the event that DWFNs have not ratify the convention. The chair's compromise was that the propose Convention may enter into force after three years on the basis of 13 ratifications. The financial arrangement of the Commission was also discussed. FFA members sought to ensure that the funds of the Commission include a special fund for developing states to participate in the work of the Commission and its subsidiary bodies. A draft resolution, prepared by the chair, establishing a Preparatory Conference for the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean was also considered.

MHCL 7, the last of these conferences, was to be the decision-making session of the conference. The expected outstanding issues to be discussed were: decision making, position of fishing entities and participation of territories. Following a difficult and contentious MHLC and on 4 September 2000, the *Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* as well as the *Resolution establishing a Preparatory Conference for the establishment of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western Central*

[181] Sandra Tarte, The Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean: Implementation Challenges from a historical perspective, in Quentin Hanich and Martin Tsamenyi (ed.), *Navigating Pacific Fisheries*, Ocean Publications, University of Wollongong, 2009 pp.213

[182] Sandra Tarte, Supra note 171, pp.289

Pacific Ocean was adopted by majority vote.[183] The Convention was opened for signature for 12 months from 5 September 2000 to all States that participated in the MHLC process. All except Japan signed the Final Act on 5 September.[184] Taiwan signed a separate agreement with the chair providing for its participation in the Preparatory Conference and its agreement to be bound by the provisions of the Convention.

The period between the adoption of the Convention and its entry into force (2000-2004) was taken up by a series of Preparatory Conferences (also known as PrepCon), in accordance with the resolution adopted in Honolulu. The task of the Preparatory Conferences was to lay the foundations for the Commission to commence its work and to ensure that no vacuum would exist in the period between the adoption of the WCPF Convention and its entry into force.[185] The PrepCon process was to establish the organisation and financial framework for the new Commission and its subsidiary bodies, as well as facilitate future work of the Commission. It also started to formalise the process of collecting and analyzing data on the status of the fish stocks and had the mandate to recommend conservation and management measures (CMMs).[186] The first PrepCon was convened by New Zealand as depository of the vote. Seven PrepCon sessions took place from 2001-2004, including the final session, which merged into the inaugural meeting of the Commission in December 2004 in Pohnpei.[187] EC and Russia were admitted as participants in PrepCon II in early 2002 with Japan rejoining the process in PrepCon III later the same year. The Convention was set to enter into force after ratification by three DWFNs and seven Pacific Island states.[188] Further, if within three years

[183] The result of the vote was 19 in favour, 2 against (Japan and Republic of Korea) with three abstentions (China, France and Tonga). China abstained because of its opposition to the participation of fishing entities (Taiwan) in the decision-making process. France abstained in reaction to the change on the issue of French territories ie. French territories, along with other territories in the region, may participate fully in the work of the Commission however, the extent of that participation would depend on their respective competence under international law and would be spelt out in separate rules and procedures. Tonga abstained in order to state its dissatisfaction with the new decision-making provisions. (Sandra Tarte, Supra note 171 pp.295-296)
[184] Supra note 170
[185] WCPF Convention, Introductory Note
[186] Adam Langley, Andrew Wright, Glenn Hurry, John Hampton, Transofrm Aqorau, Len Rodwell, "Slow steps towards management of the world's largest tuna fishery", *Marine Policy* vol. 33 issue 2 (2009), pp.276
[187] The seven Preparatory Conference sessions were in: Christchurch April 2001, Madang February 2002, Manila November 2002, Suva May 2003, Rarotonga October 2003, Bali April 2004 and Pohnpei December 2004. (Tarte, S. Supra note 171)
[188] DWFNs refer to those states situated north of the 20˚ parallel of north latitude and the Pacific Island states is described as those states situated south of the 20˚ parallel of north latitude, WCPF Convention Article 36(1).

of the adoption of the Convention, three DWNFs have not acted, the Convention would still enter into force six months after the deposit of the thirteenth ratification, acceptance, approval or accession.[189]

[189] WCPF Convention, Article 36 (2)

3.3.2 WCPF Convention

On 19 June 2004, the WCPF Convention, consisting of twelve parts and four annexes, entered into force with thirteen ratifications all by Pacific Island States, and none from DFWNs.[190] The WCPF Convention is the first comprehensive regional fisheries agreements adopted since the conclusion of the UNFSA in 1995, drawing on the principles in the UNFSA.[191] The WCPF Convention established the *Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* (hereafter: WCPFC or the Commission)[192] which currently have 25 members, 7 participating territories and 7 cooperating non-members.[193] The subsequent discussion provides an overview of the main features of the WCPF Convention and in so doing, identifies the requirements and obligations arising out of it.

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[190] Sandra Tarte, "The Convention for the Conservation and Management of Highly Migratory fish stocks in the Western and Central Pacific Ocean: Implementation challenges from a historical perspective," in Quentin Hanich and Martin Tsamenyi (ed), *Navigating Pacific Fisheries*, Ocean Publication, University of Wollongong, 2009 pp.207. In July 2004, all ratifications or accessions were by the following Pacific Island States: Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Papua New Guinea, Samoa, Solomon Islands, Tonga and Tuvalu. Andrew Wright, Natasha Stacey and Paul Holland, "The cooperative framework for ocean and coastal management in the Pacific Islands: effectiveness, constraints and future directions", *Ocean and Coastal Management*, vol 49 issue 9, 2006, pp. 739–763

[191] The Convention establishing the South East Atlantic Fisheries Organisation (SEAFO) was also post UNFSA involving a smaller number of states: EU, Iceland, Japan, Korea, Namibia, Norway, Poland, South Africa, UK and USA were invited to participate in the negotiations. However, its applications is to straddling stocks and only to one discreet high seas stock (Transform Aqorau, "Tuna Fisheries Management in the Western and Central Pacific Ocean: A critical analysis of the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and its implications for the Pacific Island States," *The International Journal of Marine and Coastal Law*, Vol. 16, no.3, 2001, pp.381

[192] WCPF Convention, Article 9

[193] WCPFC Members**:** Australia, China, Canada, Cook Islands, European Union, Federated States of Micronesia, Fiji, France, Japan, Kiribati, Korea, Republic of Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Philippines, Samoa, Solomon Islands, Chinese Taipei, Tonga, Tuvalu, United States of America, Vanuatu (16 of these are also FFA members)
Participating Territories**:** American Samoa, Commonwealth of the Northern Mariana Islands, French Polynesia, Guam, New Caledonia, Tokelau, Wallis and Futuna (1 FFA participating territory)
Cooperating Non-member(s): Belize, Indonesia, Senegal, Mexico, El Salvador, Ecuador, Vietnam. See WCPFC website at http://www.wcpfc.int/, accessed 28/06/2010

Part I of the WCPF Convention provides the general provisions, objective, area of application and relationship between this Convention and the LOSC.[194] The objective as stated in Article 2 is:

> to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the 1982 Convention [LOSC] and the Agreement [UNFSA].[195]

The WCPFC area of competence or Convention Area is defined in Article 3, with the boundary defined along the eastern and southern ends at 150˚ East longitude and 55˚ South latitude and the western boundary, undefined (see Figure 2).[196] The reason for the undefined western boundary is the uncertainty over the disputed South China Sea and the inability of the conference to agree on the western boundary.[197] Stocks under the purview of the WCPFC are "all stocks of highly migratory fish within the Convention Area except sauries".[198] Highly migratory fish stocks is defined as "all fish stocks of the species listed in Annex 1 of the 1982 Convention [LOSC] occurring in the Convention Area, and such other species of fish as the Convention [WCPF Convention] may determine".[199] In addition, conservation and management measures shall be applied throughout the range of the stocks or to specific areas

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[194] WCPF Convention Part 1 General Provisions includes Article 1: Use of terms; Article 2 Objective; Article 3 Area of Application; Article 4 Relationship between this Convention and the 1982 Convention

[195] WCPF Convention, Article 2. Aqorau (Supra note 191) noted that the objective is taken from the principle that HMFS must be managed throughout their migratory range both in areas under national jurisdiction and areas of the high seas (UNFSA Article 7(1)(b)).

[196] WCPF Convention Article 3 states, in part, that:

> "the area of competence of the Commission (hereinafter referred to as "the Convention Area") comprises all waters of the Pacific Ocean bounded to the south and to the east by the following line:
> From the south coast of Australia due south along the 141˚ meridian of east longitude to its intersection with the 55˚ parallel of south latitude; thence due east along 55˚ parallel of south latitude to its intersection with the 150˚ meridian of east longitude; thence due south along the 150˚ meridian of east longitude to its intersection with the 60˚ parallel of south latitude; thence due east along the 60˚ parallel of south latitude to its intersection with the 130˚ meridian of west longitude; thence due north along the 130˚ meridian of west longitude to its intersection with the 4˚ parallel of south latitude to its intersection with the 150˚ meridian of west longitude; thence due north along the 150˚ meridian of west longitude". See Figure 1

[197] Transform Aqorau, "Tuna Fisheries Management in the Western and Central Pacific Ocean: A Critical Analysis of the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and Its Implications for the Pacific Island States", *The International Journal of Marine and Coastal Law, Vol 16, No.3,* 2001, pp.386

[198] WCPF Convention, Article 3(3)

[199] Ibid, Article 1(f)

within the Convention Area, as determined by the WCPFC.[200] Importantly, the WCPF Convention is to be interpreted and applied consistent with the LOSC and UNFSA and nothing in the WCPF Convention shall prejudice the rights, jurisdiction and duties of States under the LOSC and the UNFSA.[201]

Part II provides principles for the conservation and management of highly migratory fish stocks, drawing attention to the application of the precautionary approach and the use of best scientific information available as well as the need for compatible measures, both for the high seas and for areas under national jurisdiction. The WCPF Convention obligates members, in giving effect to their duty to cooperate, to adopt measures that ensure long-term sustainability of highly migratory stocks in the convention area and the duty to promote optimum utilization using the "best scientific evidence available [,,,] to maintain or restore stocks at levels capable of producing the maximum sustainable yield."[202]

In addition, the WCPF Convention promotes the principle of precautionary approach,[203] and incorporates the guideline for application of precautionary reference points in Annex II of the UNFSA[204] to form an integral part of the WCPF Convention.[205] It also obligates members to "adopt measures to minimize waste, discards, catch by lost or abandoned gear, pollution originating from fishing vessels, catch of non-target species and impacts on associated or dependent species".[206] The principles articulated in Article 5, include *inter alia*, protection of biodiversity, prevention or elimination of over-fishing and excess fishing capacity, consideration of interests of artisanal and subsistence fisher's, collection and sharing complete and accurate data in a timely manner and effective MCS mechanisms. These principles shall

[200] WCPF Convention Article 3(3)
[201] WCPF Convention Article 4
[202] Ibid, Article 5
[203] Ibid; Aqorau is of the view that the WCPF Convention contains a weakened provision on the application of the precautionary approach, due to the insistence of Japan that the principle is virtually unknown in tuna fisheries management, and that the WCPF Convention does not clearly spelt out whether the Commission is obliged to apply the precautionary approach, Supra note 191 pp.387
[204] UNFSA, Annex II, Guidelines for the application of precautionary reference points in conservation and management of straddling fish stocks and highly migratory fish stocks.
[205] WCPF Convention Article 6
[206] Ibid Article 5

be applied by coastal States within areas under national jurisdiction in the exercise of their sovereign rights enshrined in the LOSC.[207]

Further, members have a duty to cooperate to ensure that measures adopted for the high seas and the areas under national jurisdictions are compatible.[208] This recognizes the necessity to manage fish stocks in their entirety, taking into account their "biological unity and other biological characteristics", as stated in the UNFSA.[209] Coastal States are also required to ensure that measures adopted within areas under its national jurisdiction do not undermine the effectiveness of measures adopted by the WCPFC.[210] Unlike the UNFSA which gives preference to coastal State measures, it has been argued that Article 8(3) of the WCPF Convention raises practical difficulties, in that, it is unclear which measure would take precedence in the event that a conflict arises between measures applied by coastal States and those adopted by the WCPFC.[211] However, where there are high seas pockets, the WCPFC is required to pay special attention to ensuring compatibility of measures established for these pockets with those established by surrounding coastal States.[212]

Part III of the WCPF Convention deals with the institutional framework establishing the WCPFC and its subsidiary bodies, and identifying their functions as well as the financial arrangements of the WCPFC, decision-making processes and transparency and cooperation with other organizations. Specifically, the WCPF Convention established the WCPFC which shall have international legal personality and shall hold an annual meeting to carry out the functions of the Commission.[213] The functions of the WCPFC, without prejudice to the

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[207] Ibid, Article 7
[208] Ibid, Article 8
[209] UNFSA Article 7(2). WCPF Convention Article 8(2) mirrors UNFSA Article 7(2)
[210] WCPF Convention, Article 8(3)
[211] Transform Aqorau, "Tuna Fisheries management in the Western and Central Pacific Ocean: A Critical Analysis of the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and its implications for the Pacific Island States", *The International Journal of Marine and Coastal Law, vol. 16 no. 3,* 2001, pp.388
[212] WCPF Convention Article 8(4)
[213] WCPF Convention, Article 9. With regards to meetings, the Commission shall hold other meetings as may be necessary but the principle of cost-effectiveness shall apply to the frequency, duration and scheduling of Commission meetings and its subsidiary bodies.

sovereign rights of coastal States, are provided for in Article 10 and include, *inter alia*, determining total allowable catch or total level of fishing effort within the Convention Area.[214]

Subsidiary bodies established by the WCPF Convention include a Scientific Committee (SC) and a Technical and Compliance Committee (TCC).[215] A committee (known as the Northern Committee) is also established for the area north of the 20˚ north latitude to provide recommendations on conservation and management measures for stocks in this area. The functions of the SC are provided for in Article 12 but primarily, it is to ensure that the WCPFC obtains the best scientific information available for its consideration.[216] The TCC, on the other hand is to provide the WCPFC with information, technical advice and recommendations relating to the implementation of, and compliance with conservation and management measures; monitor and review compliance with CMMs; and review the implementation of cooperative measures for MCS and enforcement.[217]

The WCPF Convention established a permanent Secretariat with an Executive Director who shall appoint qualified scientific, technical staff and other personnel to fulfil the functions of the WCPFC.[218] The Secretariat's functions, as shown in Article 15(4), primarily facilitate the work of the WCPFC and its subsidiary bodies.[219] The funding of the work of the WCPFC is by assessed contributions, voluntary contributions, funds established by Article 30(3),[220] called the special requirement fund,[221] and such other funds as the WCPFC may receive.[222] Assessed contributions shall be determined in accordance with a scheme adopted by the WCPFC.[223] In its first regular session in 2004, the WCPFC adopted the schedule of contributions for its

[214] WCPF Convention Article 10
[215] WCPF Convention Article 11(1)
[216] WCPF Convention Article 12
[217] WCPF Convention Article 14
[218] WCPF Convention Article 16
[219] WCPF Convention Article 15
[220] WCPF Convention Article 30(3) established a fund to facilitate the effective participation of developing States, particularly SIDS, territories and possessions, in the work of the Commission
[221] Western and Central Pacific Fisheries Commission, Financial Regulations, Regulation 7 established the Special Requirements Fund for the purposes identified in Article 30 (Recognition of the special requirements of developing States) of the WCPF Convention. See Western and Central Pacific Fisheries Commission, Financial Regulations, at http://www.wcpfc.int/guidelines-procedures-and-regulations
[222] WCPF Convention Article 17
[223] WCPF Convention Article 18(2)

members.[224] The WCPFC's Financial Regulation[225] provides the formula for assessing the financial contribution of members.

In addition, as a general rule, decision making in the WCPFC shall be by consensus.[226] If all effort to reach consensus is exhausted, on questions of procedure, decisions shall be taken by majority of those present and voting. Otherwise, if it is on a question of substance, a two chamber voting system is employed.[227] A member can seek a review of the decision by a review panel within 30 days of the adoption of the decision. During this time, the decision is not binding on any members until the conclusion of the findings of the review panel. The WCPF Convention also promotes transparency and cooperation with other organizations as articulated in Article 21 and 22.[228] In its second regular session, the WCPFC adopted the nomenclature for WCPFC decisions in order to have a common interpretation on how the WCFPC will record its decision.[229]

Part IV of the WCPF Convention specifies the obligations of members of the WCPFC. Members are to promptly implement the WCPF Convention and any CMMs adopted by the WCPFC.[230] Members also shall provide annually to the WCPFC statistical, biological and other data and information as may be required and keep the WCPFC informed of measures it has taken with regards to the conservation and management of HMFS in waters under its jurisdiction. Members are also to keep the WCPFC informed of measures it has adopted in

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[224] First regular session of the WCPFC Summary Record, paragraph 15 and Annex I

[225] Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Financial Regulations paragraph 5.2, at http://www.wcpfc.int/guidelines-procedures-and-regulations

[226] WCPF Convention Article 20 deals with Decision Making and Part VII of the WCPFC Rules of Procedure, at http://www.wcpfc.int/doc/commission-01/rules-procedure

[227] On questions of substance, decision shall be taken by a three-fourths majority of those present and voting provided that such majority includes a three-fourths majority of the FFA members' present and voting and three-fourths majority of non-FFA members' present and voting and the proposal is not defeated by two or fewer votes in either chamber (WCPF Convention Article 20(2))

[228] WCPF Convention Article 21 and 22

[229] 2nd Regular Session of the WCPFC, 12-16 December 2005, Pohnpei, FSM, paragraph 91 and pp.63. Decisions relating to administrative matters and directives to the Secretariat or subsidiary bodies must be recorded in the records of the meeting; decisions relating to conservation and management measures shall be called Conservation and Management Measures and are legally binding; non-binding statements or recommendations are not legally binding but can serve a wider political or diplomatic purpose or provide the basis for future binding measures

[230] WCPF Convention Article 23(1)

dealing with highly migratory fish stocks and activities of vessels flying its flag in the Convention Area. Further, members also, shall to the greatest extent possible ensure its nations comply with the provisions of the WCPF Convention.[231] These data are reported to the Scientific Committee through members Annual Report Part 1[232] and to the Technical and Compliance Committee through members Annual Report Part 2.

Part V, in Article 24, require members to discharge their duties effectively as a flag State by exercising control over their vessels, both in areas under national jurisdiction and on the high seas.[233] Members are to ensure that vessel flying its flag, comply with national laws of other States and where it is operated in the high seas, shall comply with the terms and conditions set out in Annex III of the WCPF Convention.[234] Members also are required to maintain a record of fishing vessels entitled to fly its flag and authorized for fishing in the Convention Area[235] and provide these information, as set out in Annex IV, on an annual basis to the WCPFC.[236] Moreover, any addition and deletion from the record of fishing vessels shall promptly be communicated to the Commission.[237] The Commission shall use the information provided to maintain its own record of fishing vessels and circulate it periodically to members.[238] In addition, members shall require its fishing vessels that fish for HMFS on the high seas and in areas under the national jurisdiction of another member to use near real-time satellite position fixing transmitters.[239]

Part VI sets out the compliance and enforcement provisions for fishing vessels in the Convention Area. Each member is required to investigate fully any alleged violation by fishing vessels flying its flag, at the request of any other member.[240] Article 25 also provides guidance on the reporting of the investigation. The WCPFC can also develop procedures

[231] WCPF Convention Article 23
[232] Members Annual Report Part 1 is treated as public domain data and is available at the WCPFC website. Annual Report Part 2 is not available publicly.
[233] WCPF Convention, Article 24
[234] Ibid, Article 24 (3) (a) and (b)
[235] Ibid, Article 24(4)
[236] Ibid, Article 24(5)
[237] Ibid, Article 24(6)
[238] Ibid, Article 24(7)
[239] Ibid, Article 24(8) and (9)
[240] WCPF Convention, Article 25(2)

which allow for non-discriminatory trade measures to be taken, consistent with the international obligations of the members, against any State or entity whose fishing vessels undermines the effectiveness of the CMMs adopted by the WCPFC.[241] The compliance enforcement mechanisms includes the use of VMS, [242] boarding and inspection of vessels on the high seas,[243] measures taken by a port State,[244] and in Part VII - the establishment of a regional observer programme[245] and regulation of transhipment.[246]

Part VII recognizes the special requirements of developing States, calling on the WCPFC to take into account the vulnerability of developing State Parties, in particular small island developing States, the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers and the need to ensure that measures taken do not result in transferring a disproportionate burden onto developing States.[247] In recognizing the financial limitation of SIDS, the WCPFC is tasked to establish a fund to facilitate the effective participation of the SIDS in the work of the WCPFC.[248] In addition, Article 30(4) calls on members to cooperate in the provision of financial assistance, human resources development, technical assistance, transfer of technology and advisory and consultative services.[249]

Part IX deals with peaceful settlement of disputes, Part X deals with non-parties to the WCPF Convention, Part XI require members to fulfilled obligations in good faith; Part XII deals with the final provisions of the WCPF Convention. Annex I sets out how to deal with Fishing entities, Annex II established a review panel, Annex III is the terms and conditions for fishing and Annex IV list the information required to be provided to the WCPFC in respect of each fishing vessel entered in the RFV.

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[241] Ibid, Article 25 (12)
[242] Ibid, Article 24(8)
[243] Ibid, Article 26
[244] Ibid, Article 27
[245] Ibid, Article 28
[246] Ibid, Article 29
[247] Ibid, Article 30(2)
[248] Ibid, Article 30(3)
[249] Ibid, Article 30(4)

3.4 Conservation and Management Measures (CMMs) and Resolutions

The subsidiary bodies of the WCPFC, in carrying out its functions as stipulated under the WCPF Convention, meet annually and make recommendations to the regular session of the WCPFC which normally meets in December. The regular session of the WCPFC then makes decisions taking into consideration the recommendations from its subsidiary bodies. In interpreting the WCPFC's decisions, the Second regular session adopted the following classification:[250]

- Resolutions describe non-binding statements and recommendations addressed to members of the WCPFC and co-operating non-members.
- Conservation and Management Measures describe binding decisions relating to conservation and management measures.
- Other Decisions of the Commission describe all other decisions made by the WCPFC.

Currently, there are 6 Resolutions and 25 CMMs in effect.[251] The CMMs become binding sixty days after its adoption[252] unless a member sought review of the decision by a review panel.[253] The subsequent discussion will look at the resolutions first followed by a discussion of the CMMs, grouped largely based on a classification in a paper presented to the sixth regular session of the Technical and Compliance Committee (TCC 6).[254] The structure of the following discussion will be to present the resolutions or CMMs under each group upfront before preceding into a discussion of each resolution or CMM.

[250] WCPFC website at http://www.wcpfc.int/conservation-and-management-measures accessed 13/08/2010 and 2005 WCPFC Summary Records, paragraph 91 and Attachment M

[251] Text for these Resolutions and Conservation and Management Measures can be found at http://www.wcpfc.int/conservation-and-management-measures

[252] WCPF Convention Article 20(5)

[253] WCPF Convention Article 20(6)

[254] Draft Compliance Monitoring Scheme for CCMM, WCPFC-TCC6-2010/21, paper presented by Australia to the Sixth Regular Session of the Technical and Compliance Committee, 30 Sept – 5 Oct 2010, Pohnpei, Federated States of Micronesia, Attachment C

3.4.1 Resolutions

The Resolutions currently in effect are presented below and briefly discussed there under.

Table 2: Resolutions

Conservation and Management Measure	Symbol
Resolution on expansion of fishing effort and capacity (MHLC IV, February 1999)	
Resolution on expansion of fishing effort and capacity (MHLCV, September 1999)	
Resolution relating to illegal, unreported and unregulated fishing and limits on fishing capacity (PrepCon3, November 2002)	
Resolution on reduction of overcapacity	Res.-2005-02
Resolution on reduction of non-target fish species	Res.-2005-03
Resolution on Aspirations of Small Island developing States and Territories	Res.-2008-01

Source: **http://www.wcpfc.int/conservation-and-management-measures**

Res.-2005-02 deals with overcapacity by calling on CCMs whose nationals are beneficial owners of purse seiners that entered the WCPFC convention area after the three previous resolutions came into effect, that is after 1999, to reduce by 31 December 2007 such overcapacity created by these fishing vessels through a reduction of equivalent fishing capacity of other fishing vessels operating in the convention area. This applies to capacity increase from the year 1999 – 2005. More important to SIDS, paragraph 2 states that reduction of fishing vessels capacity shall be implemented to ensure that no adverse effect is given to the coastal processing and transhipment facilities and associated vessels of developing coastal States and territories and should not affect investment that has occurred legally in the FFA members.[255] However, in the past, this resolution has been used by developed CCMs to block legitimate development aspirations of SIDS.[256]

Res.-2005-03, noting the importance of non-target species, calls on CCMs to encourage fishing vessels to avoid to the extent practical, the capture of all non-target fish species[257] that are not to be retained and shall, to the extent practicable, be promptly released and unharmed.

[255] Resolution 2005-02 paragraph 2

[256] Tuvalu at the 3rd regular session of the WCPFC drew the Commissions attention to this fact as a developed CCM, place restrictions on the building and export of purse seine vessel to develop the domestic tuna fisheries of Tuvalu and Marshall Islands. See 3rd Regular session of the WCPFC, Summary Report 2006, paragraph 83-89 and Tuvalu State on overcapacity, Attachment E

[257] The non-target species specifically mentioned in the resolution are mahi mahi, rainbow runner and wahoo

Res.-2008-01 on aspirations of SIDS and territories elaborates Article 30 of the WCPF Convention[258] articulating the special requirements of developing States. The resolution resolves that CCMs will develop, interpret and apply CCMs in the context of, and in a manner consistent with the LOSC as articulated in Article 4 of the WCPF Convention and the UNFSA. As such, CCMs shall cooperate to enhance the ability of developing States, particularly the least developed among them and SIDS and Territories in the Convention Area, to develop their own fisheries for highly migratory fish stocks, including but not limited to the high seas within the Convention Area.[259] Developed CCMs are also called upon to make concerted efforts and consider innovation options to reduce and or restructure their fleet to accommodate aspirations of SIDS and territories in the convention area.[260] CMMs are to make efforts to achieve the goal of ensuring that by 2018, the domestic fishing and related industries of developing States, in particular the least developed SIDS and Territories, accounts for a greater share of the benefits than what is currently realized of the total catch and value of HMFS harvested in the Convention Area.[261] The resolution also provided a number of principles that the Commission when adopting CMMs should take into account.[262] In essence, the resolution seeks to reverse the tide of constraints in SIDS and territories ability to develop their domestic fisheries which stemmed from abuse of Resolution 2005-02 (Resolution on reduction of overcapacity).[263]

In addition to the above resolutions, in 2004, the Resolution on Conservation and Management Measures (CMM 2004-04) was adopted to give guidance to the work of SC, TCC and WCPFC for 2005. Thus, the content of this has become redundant except for the last paragraph which carries over the two resolutions on expansion of fishing effort and capacity (the first two resolutions in Table 2). As a result, these still continue to apply.

[258] WCPF Convention, Article 30 Recognition of the special requirements of developing States
[259] Res.-2008-01 paragraph 1
[260] Res.2008-01 paragraph 2
[261] Ibid paragraph 3
[262] Ibid paragraph 5
[263] Supra note 256

3.4.2 Vessel identity measure

Current CMMs' that seeks to identify vessels fishing within the WCPO is presented in a summary form below and briefly discussed individually, there under.

Table 3: Vessel identity CMMs

Conservation and Management Measure	Symbol	Date adopted	Date in force
WCPFC Record of Fishing Vessels and Authorization to Fish (Revised)	CMM 2009-01	11-12-2009	09-02-2010
Specifications for the Marking and Identification of Fishing Vessels	CMM 2004-03	8-12-2004	8-02-2005
Charter Notification Scheme	CMM 2009-08	11-12-2009	09-02-2010

Source: http://www.wcpfc.int/conservation-and-management-measures

WCPFC Record of Fishing Vessels and Authorization to Fish (Revised) (CMM 2009-01)

CMM 2009-01 replaces CMM 2004-01 and obliges members[264] to exercise its flag State duties consistent with Article 24 of the Convention.[265] Members are also task to maintain a record of fishing vessels (member RFV) entitled to fly its flag and authorized to fish in the Convention Area and communicate this to the Commission, which shall establish and maintain a WCPFC Record of Fishing Vessels (WCPFC RFV). Fundamentally, members can only authorize fishing vessels flying the flag of a WCPFC member to fish in the Convention Area and the vessel is on the WCPFC RFV[266] or in the case of non-member carriers and bunkers – only those that are in the Interim Register of Non-Member Carrier and Bunker Vessels. As a result, this effectively limits the partnership endeavour of any member, particularly Pacific Island States who wishes to license foreign fishing vessels, with only those who are members of the WCPFC. In addition, it is the responsibility of the flag State to ensure that their fishing vessels have been placed on the WCPFC RFV before they commence fishing.[267] A vessel that is not on the WCPFC RFV is deemed not to be authorized to fish for, retain on board, tranship or land highly migratory fish stocks in the Convention Area beyond the national jurisdiction of its flag State[268] unless the vessel operate entirely in the EEZ of a CCM and that are flagged to that CCM.[269]

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[264] The term "member" is used in CMM 2009-01 to include cooperating non-members (CMM 2009-01 footnote 2)
[265] WCPF Convention, Article 24 details the duties of the flag State
[266] CMM 2009-01 paragraph 16
[267] WCPCF 6 Final report, paragraph 205
[268] CMM 2009-01 paragraph 16
[269] CMM 2009-01 paragraph 20

In essence, CMM 2009-01 places a substantial number of reporting and data requirements on members. This includes provision of substantial vessel information[270] to the Executive Director within 15 days, or 72 hours before fishing, of any addition, change or deletion to the member's RFV. In addition, a member is to respond to vessel information request from the Executive Director within 15 days of such request. Further, before 1 July each year, each member is to submit a list of vessels in its RFV plus the WCPFC identification number (WIN) for each vessel and an identification of whether the vessel "fished" or "did not fish" in the preceding year. The vessel information required by CMM 2009-01 as listed in paragraph 6 is mandatory to be provided by members to the Executive Director however, in the past, members have submitted incomplete information due to various difficulties. In such cases, the view is that the measure appears not to empower the WCPFC Secretariat to decline to place these vessels on the WCPFC RFV on the basis of missing information.[271] However, an incomplete WCPFC RFV can also affect and hinder the ability of the WCPFC and its members in carrying out effective compliance and enforcement. As noted, the measure contain considerable reporting obligations on members, a fact that is found challenging by SIDS such as Tonga. This is discussed in detail in section 4.2.3.

Moreover, CMM 2009-01 established an Interim Register of Non-Member Carrier and Bunker Vessels (the "Register") and encouraged flag States of carrier and bunker vessels that operate in the WCPFC convention area and have been listed on the Temporary Register of Non-CCM Carrier and Bunker Vessels to apply for Cooperating Non-Member (CNM) status as soon as possible. CMM 2009-01 establish the Register for non-member carrier and bunker vessels whereby vessels included in the Register are authorised to be used in the Convention Area to receive transhipment, bunker or supply CCM-flagged fishing vessels, used to fish for highly migratory fish stocks in the Convention Area. Members can submit a list of carrier and bunker vessels it wished to be included in the Register, together with vessel information as listed in paragraph 6. In addition, a condition for inclusion in the Register is that the owner/manager/operator of the vessel provides a written undertaking agreeing to be bounded

[270] The list of information required to be submitted for each vessel is listed in paragraph 6 of CMM 2009-01. See CMM 2009-01 in Appendix 1
[271] Summary Report, TCC 5, 2009 paragraph 185

by the decisions and the CMMs of the Commission. The vessel operation shall also pay a nominal fee of US$2500.[272] The measure anticipates that after the annual regular session of the Commission, majority of the bunker and carrier vessels will be flagged to members.

Specifications for the Marking and Identification of Fishing Vessels (CMM 2004-03)

CMM 2004-03 includes specifications intended to implement the FAO Standard Specifications for Marking and Identification of Fishing Vessels and to be applied to all fishing vessels authorized to fish in the Convention Area beyond areas of national jurisdiction. It obliges members to mark their vessels with the International Telecommunication Union Radio Call Signs (IRCS) or with the characters allocated by the International Telecommunication Union (ITU) to the member of the Commission concerned or such other characters of national identification as may be required under bilateral fishery agreements and followed by, as appropriate, the fishing authorization or vessel registration number assigned to the vessel by the member of the Commission concerned.[273] Whichever system is used, that identifier shall be called the WCPFC Identification Number (WIN) [274] which members are obliged to enter into the member's RFV.[275]

Charter Notification Scheme (CMM 2009-08)

CMM 2009-08 is concerned with ensuring that charter arrangements do not promote IUU fishing activities or undermines CMMs.[276] Only vessels on the WCPFC RFV and Interim Register of Non-CCM carriers and bunkers are eligible for charter and exclude IUU listed vessels whether on the WCPFC or any other RFMO IUU list. The measure includes notification process to keep the Commission informed and updated of charter arrangements in the WCPO. Specifically it oblige member to submit vessel information[277] by 1 July 2010 to the Executive Director and upon receipt of information, Executive Director is to notify the flag State. After 1 July 2010, chartering member shall notify Executive Director and flag State

[272] WCPFC 6 Final report, paragraph 200
[273] CMM 2004-03 paragraph 2.1.1
[274] Ibid paragraph 2.1.2
[275] Ibid paragraph 3.1
[276] CMM 2009-08 preamble
[277] Vessel information required are: name of the fishing vessel, WCPFC Identification Number (WIN), name and address of owner(s), name and address of the charterer, the duration of the charter arrangement and the flag state of the vessel (CMM 2009-08 paragraph 2)

within 15 days, or within 72 hours before fishing of any additional chartered vessel accompanied with the information required in paragraph 2, any change in the vessel information of a chartered vessel or any termination in charter of a vessel previously notified. In addition, the WCPFC will continue to develop a broader framework for the management and control of the chartered vessels[278] and measure expires on 31 December 2011 unless renewed by the Commission.[279]

This measure is particularly important to Pacific SIDS as charter offers these SIDS opportunities for commercial partnerships with developed States, in developing their domestic fisheries within their national waters. Pacific Island States have in the past been chartering foreign fishing vessels for this purpose. They have successfully, through the FFA, put in place framework for management and control of these chartered vessels such as, inter alia, the FFA Regional Register, the FFA VMS, and observer programme. The concern of these SIDS is to ensure that a framework for chartering vessels developed by the Commission will not inhibit their development aspirations. One way this can happen is through requiring cooperation or permission of the flag State for commercial partnerships in national waters. The current measure only requires notification of the flag State by the chartering State of any chartering arrangement. In discussing the current measure, there were concerns raised that flag State notification could lead to restrictions which can hinder the ability of SIDS to develop their fisheries.[280] However, there is a real threat to Pacific SIDS development aspiration should a chartering scheme in the future includes acquiring flag State permission before chartering a vessel flying its flag. Should this happen, this will give flag State avenue to directly control or limit development in the national waters.

[278] CMM 2009-08 paragraph 7
[279] CMM 2009-08 paragraph 8
[280] TCC 5 Summary Report 2009, paragraph 103 (iv)

3.4.3 Stock specific/Effort limit measure

The WCPFC has put in place CMMs to help curtail catch and of specific stock species. These measures are presented in a summary form below and briefly discussed there under.

Table 4: Stock specific CMMs

Conservation and Management Measure	Symbol	Date adopted	Date in force
Conservation and Management Measure for South Pacific Albacore	CMM 2005-02	16-12-2005	16-02-2006
Conservation and Management Measure for North Pacific Albacore	CMM 2005-03	16-12-2005	16-02-2006
Conservation and Management Measure for Striped Marlin in the Southwest Pacific	CMM 2006-04	15-12-2006	15-02-2007
Conservation and Management Measure for Bigeye and Yellofin Tuna in the Western and Central Pacific Ocean	CMM 2008-01	12-12-2008	12-02-2009
Conservation and Management for Swordfish	CMM 2009-03	11-12-2009	09-02-2010
Conservation and Management Measure for Pacific Bluefin Tuna	CMM 2009-07	11-12-2009	09-02-2010

Source: http://www.wcpfc.int/conservation-and-management-measures

Conservation and Management Measure for South Pacific Albacore (CMM 2005-02)

CMM 2005-02 restricts CCMs from increasing their number of fishing vessels actively fishing for South Pacific albacore, south of 20˚S above 2005 levels or 2000-2004 levels. However, the measure also state that it "shall not prejudice the legitimate rights and obligations under international law of small island developing State and Territory CCMs in the Convention Area for whom South Pacific albacore is an important component of the domestic tuna fishery in waters under their national jurisdiction and who may wish to pursue a responsible level of development of their fisheries for South Pacific albacore".[281] CCMs are also to "cooperate to ensure the long-term sustainability and economic viability of the fishery for South Pacific albacore, including cooperation and collaboration on research to reduce uncertainty with regard to the status of this stock".[282]

The measure was set to be review in 2006. SC advised in 2006 that the current catch levels of South Pacific albacore appear to be sustainable and that an increase in fishing mortality and yields would be possible.[283] Therefore, CMM 2005-02 continues to apply without amendment and is still in effect. CMM 2005-02 does not contain in itself any reporting requirements but

[281] CMM 2005-02 paragraph 2
[282] Ibid, paragraph 3
[283] Third regular session of the WCPFC, Summary Report, 2006, paragraph 79

WCPFC required CCMs to submit data on their catch of albacore and the number of vessel fishing for albacore.[284] Due this lack of specific reporting provision in the measure but relying on CCMs to report in their Annual Report, this has not proven effective.

South Pacific albacore is an important component of the domestic tuna fishery of coastal States such as Tonga. Thus, for these States, it is important, to protect this fishery from a transfer of fishing effort from northern waters; to promote a precautionary approach to the development of the South Pacific albacore fishery, in light of the degree of uncertainty in the current assessment; to ensure that the domestic longline fisheries for South Pacific albacore remain economically viable in the long term; to promote optimum utilization of the South Pacific albacore stock; and to avoid the transfer of disproportionate burden to FFA members, especially small island developing States and territories.[285]

Conservation and Management Measure for North Pacific Albacore (CMM 2005-03)

CMM 2005-03 limits the total level of fishing effort for North Pacific albacore in the Convention Area north of the equator to that of the current levels. The measure requires CCMs fishing for this stock to report catches of North Pacific albacore and the first report was due on 30 April 2006 for the calendar year 2004. This reporting of catches of North Pacific albacore is to be every six months, except for small coastal fisheries which shall be reported on an annual basis. It is worth noting that the advice from the SC 2 is that the stock is considered to be fully exploited.[286] The measure is not applicable to some FFA members such as Tonga and others who are situated in the south. In 2009, NC proposed amendment to CMM 2005-03 that would see a southern extent of the applicable area of the measure down to north from the equator. The concern with FFA members' is that propose measure would exceed the area of competence of the NC.[287] Currently, CMM 2005-03 continues to apply.

[284] Fourth regular session of the WCPFC, Summary Report, 2007 paragraph 256
[285] FFA Brief for the third regular meeting of the Western and Central Pacific Fisheries Commission, unpublished, pp.57
[286] SC 2 Report, paragraphs 164 and 165
[287] Authority of the NC for the Convention Area is from north of 20˚North but the proposal was to also cover areas north of the equator

Conservation and Management Measure for Striped Marlin in the Southwest Pacific (CMM 2006-04)

CMM 2006-04 limit CCMs' number of fishing vessels fishing for striped marlin in the Convention area south of 15˚S, to the number in any one year between the period 2000-2004.[288] However, in paragraph 2, the measure states this shall not prejudice the legitimate rights and obligations of SIDS and territories and coastal States who may wish to pursue a responsible level of development in the Convention Area south of 15˚S from 2000-2004 and within their fisheries waters.[289] CCMs are obligated to cooperate to protect the long-term sustainability and economic viability of the fisheries for striped marlin, particularly on research. In addition, reporting requirements is stipulated in the measure which requires CCMs to provide by 1 July 2007, the number of vessels fishing for striped marlin in the Convention Area south of 15˚S during 2000-2004, nominate the maximum number of vessels, CCM shall permit to fish for striped marlin south of 15˚S and annually report to the Commission the catch levels of their fishing vessels that have taken striped marlin as a bycatch as well as the number and catch levels of vessels fishing for striped marlin in the Convention Area south of 15˚S. FFA members is of the view that nominating a maximum number of fishing vessels is not applicable to them, as it they are exempted from such a limit under paragraph 2.[290] Further, this measure do not apply to coastal State CCMs south of 15°S of the Convention Area that have already taken, or continue to take, significant steps to address concerns over the status of striped marlin in the southwest Pacific region.[291]

Conservation and Management Measure for Bigeye and Yellofin Tuna in the Western and Central Pacific Ocean (CMM 2008-01)

CMM 2008-01 together with its attachments contains some 42 pages (see appendix 1). It contains headings for: objectives, general rules of application, purse seine fishery, longline fishery, other commercial tuna fishing effort restrictions, data provision, port controls, capacity, reporting, review of measures, final clause and attachments. The measure lists four succinct objectives that it is trying to achieve. SC 6 advise that

> "CMM-2008-01 is likely to achieve one of its objectives: not exceeding levels of fishing mortality on the WCPO yellowfin tuna stock beyond the

[288] CMM 2006-04 paragraph 1
[289] CMM 2006-04 paragraph 2
[290] Fourth regular session of the WCPFC, Summary Report, 2007 paragraph 266 and 260
[291] CMM 2006-04 paragraph 5

> level experienced either in 2004 or the annual average of the period 2001–2004. However, even if fully implemented and complied with, CMM-2008-01 is extremely unlikely to achieve its most important objective: reducing fishing mortality on the WCPO bigeye tuna stock to at least 30% below the level experienced either in 2004 or the annual average of the period 2001–2004. Furthermore, if the high seas pockets closure results in effort being transferred to high seas areas to the east, where bigeye tuna generally form a greater proportion of the purse-seine catch, the objectives of CMM-2008-01 will be even less likely to be achieved."[292]

CMM 2008-01 is aimed at purse seine fishery, spelling out what measures to be taken in 2009 and 2010-2011 in the EEZ and the high seas. Similarly, longline fishery is also captured in the measure plus other commercial tuna fishing effort.

Conservation and Management for Swordfish (CMM 2009-03)

CMM 2009-03 replaces CMM 2008-05 and is set to be reviewed in 2011. It limits the number of fishing vessels for swordfish in the area south of 20˚S to the number in any one year between the period 2000 to 2005.[293] Catch is also limited to the amount caught in any one year during the period 2000-2006. The measure also tasked CCMs to nominate by 30 April 2010 the maximum total catch of swordfish that it shall continue to be permitted to fish in the area south of 20˚S, which shall be no more than their verified catch for any one year during the period 2000-2006. The aforementioned requirements shall not prejudice the legitimate rights and obligations of SIDS and participating territory CCMs who may wish to pursue a responsible level of development of their own fisheries. As such, FFA members are of the view that they are exempted from such a limit.[294] In addition, of particular importance to FFA members which charter plays an integral part of their domestic fleet, such vessels operated under charter, lease or other similar mechanisms shall be considered to be vessels of the host State or Territory. The measure further requires total number of vessels fishing for swordfish and total catch of swordfish, to be reported to the Commission for vessels flying their flag anywhere in the Convention Area south of 20°S other than vessels operating under charter, lease or other similar mechanism as part of the domestic fishery of another CCM; vessels

[292] 6th Regular Session of the Scientific Committee, Final Report, 2010, paragraph 271

[293] The number of CCM-flag vessels that have fished for swordfish in the Convention Area south of 20˚S during the period 2000 – 2007 is provided in Annex 1 of CMM 2009-03

[294] Fourth regular session of the WCPFC, Summary Report, 2007 paragraph 266 and 260

operating under charter, lease or other similar mechanism as part of their domestic fishery south of 20°S; and any other vessels fishing within their waters south of 20°S.[295]

Conservation and Management Measure for Pacific Bluefin Tuna (CMM 2009-07)

CMM 2009-07 applies to Pacific bluefin tuna, north of 20˚N, with CCMs total fishing effort not to increase from 2002-2004 level in 2010, except for artisanal fisheries. Korea's EEZ is also exempted. The measure also encourages cooperation with IATTC as Pacific bluefin tuna occur in the Convention Areas of both organizations. It also tasks CCMs to report to Executive Director, measures they have taken to implement curtailing of fishing effort to 2002-2004 level and strengthening data collecting systems for this stock.

[295] CMM 2009-03 paragraph 8

3.4.4 MCS measures

The WCPFC is one of the RFMO that has the most comprehensive MCS regime in place. CMMs' that seeks to put in place this MCS regime is presented in a summary form below and briefly discussed individually, there under.

Table 5: MCS CMMs

Conservation and Management Measure	Symbol	Date adopted	Date in force
Conservation and Management Measure for the Regional Observer Programme	CMM 2006-07	15-12-2006	15-02-2007
Conservation and Management Measure for the Regional Observer Programme	CMM 2007-01	15-12-2007	15-02-2008
Western and Central Pacific Fisheries Commission Boarding and Inspection Procedures	CMM 2006-08	15-12-2006	15-02-2007
Commission Vessel Monitoring System (Revision of CMM 2006-06 to include the requirement that vessels in the Convention Area must maintain VMS transmission even while beyond the Commission boundaries at 20 degree N and 175 degree E	CMM 2007-02	15-12-2007	15-02-2008
Conservation and Management Measure to Establish a List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the WCPO	CMM 2007-03	15-12-2007	15-02-2008
Conservation and Management Measure for Vessels without Nationality	CMM 2009-09	11-12-2009	09-02-2010

Source: http://www.wcpfc.int/conservation-and-management-measures

Conservation and Management Measure for the Regional Observer Programme (CMM 2006-07) and Conservation and Management Measure for the Regional Observer Programme (CMM 2007-01)

CMM 2006-07 establish the procedures to develop the ROP with the ROP to be adopted at the 4th regular session of the Commission in 2007. The measure established an intersessional working group to develop the regional observer programme (IWG-ROP) and forwarded to the IWG-ROP a proposal from the FFA members' for consideration and stated that the ROP will be adopted at the 4th regular session of the Commission in 2007.

In 2007, CMM 2007-01 established the WCPFC ROP, stated its objective and define the scope of the ROP, functions of observers, obligations of CCMs, the role of the WCPFC and its subsidiary bodies, the Secretariat and that of the coastal States plus provided a list of guiding principles for operation of the ROP. The objective of the ROP is to collect verified catch data, other scientific data, and other information related to the fishery in the Convention Area and to monitor the implementation of the CMMs. The measure state that the ROP shall apply to

fishing vessels authorized to fish in the Convention Area in accordance with CMM 2004-01, which are:

- fishing exclusively on the high seas in the Convention Area, and
- vessels fishing on the high seas and in waters under the jurisdiction of one or more coastal States, and vessels fishing in the waters under the national jurisdiction of two or more States.

In turn, ROP is to be implemented according to the schedule in Attachment K, Annex C, setting out the timeframe for all vessels in each fishery to reach coverage of at least 5% by 30 June 2012, except for vessels provided for under Special Circumstance in paragraphs 9 and 10 of the Attachment. CCM are to ensure that fishing vessels, except for those that fish exclusively within waters under national jurisdiction of the flag State, are prepared to accept an observer from the Commission ROP if required by the Commission. CCM also are responsible for meeting the level of observer coverage and shall explain to the vessel captain, observer duties relevant to appropriate measures adopted by the Commission. One of the outstanding issues related to this measure is the definition of some of the key terms used in the measure.[296]

Western and Central Pacific Fisheries Commission Boarding and Inspection Procedures (CMM 2006-08)

CMM 2006-08 is boarding and inspection procedures applicable to the high seas (HSBI) within the Convention Area and has the purpose to ensure compliance with the provisions of the WCPF Convention and CMMs. The measure provides a comprehensive detail on general rights and obligations, general principles of the procedure, those who can participate in high seas boarding and inspection and what data is required of them and dedicate a deta il section to procedures of carrying out HSBI. The measure also deals with use of force, a requirement for submission of inspection reports and annual reports, what constitutes a serious violation, deals with the role of the Commission as a coordinating and oversight of the HSBI measure as well as a provision for settlement of disagreements. The measure is very detail consisting of some

[296] 6th Regular Session of the WCPFC, Summary Report, paragraph 102 – the ROP-IWG reported that consensus was not reached on vessel size limits (i.e. whether small vessels can carry observers); the source of observers (i.e. a definition of the hybrid approach); and definitions of “adjacent”, “occasional”, “principally”, “independent” and “impartial”, and “observer trip”

eleven pages, incorporating the different section identified above (see the measure in Appendix 1).

Commission Vessel Monitoring System (CMM 2007-02)

The CMM 2007-02 adopts a Commission VMS, which is activated from 1 January 2008, for the area of the Convention Area south of 20˚N, and east of 175˚E in the east of the Convention Area north of 20˚N. The activation date for the areas north of 20˚N and west of 175˚E of the Convention Area will be determined by the Commission in the future. The measure also identifies the applicability of the measure which in general applies to all fishing vessels that fish for highly migratory stocks on the high seas within the Convention Area. Fishing vessels fishing for highly migratory fish stocks on the high seas in the area of the Convention Area south of 20˚N, and east of 175˚E in the east of the Convention Area north of 20˚N and moving into the area north of 20˚N and west of 175˚E of the Convention Area are also required to keep their ALCs activated and continue to report to the Commission VMS. The measure applies to fishing vessels in excess of 24 metres in length, with an activation date of 1 January 2008. Fishing vessels 24 metres in length or less have an activation date of 1 January 2009. The measure also states that a CCM may request that waters under its national jurisdiction be covered by the Commission VMS. However, expenses incurred shall be borne by the requesting CCM. In addition, the nature and specification of the Commission VMS is stated in the measure and draft minimum standards for ALCs attached as an annex.

The obligation arising out of this CMM for CCM requires ensuring that fishing vessels that fall under the purview of this measure are equipped with ALCs that shall communicate such data determined by the Commission. CCM are also obligated to cooperate to ensure compatibility between national and high seas VMSs.

Conservation and Management Measure to Establish a List of Vessels Presumed to have Carried Out IUU Fishing Activities in the WCPO (CMM 2007-03)

CMM 2007-03 replaces CMM 2006-09 and contains seven sub-headings: Identification of IUU activities (paragraph 1 – 3), Information on alleged IUU fishing activities (paragraph 4 – 5), Draft IUU Vessel List (paragraph 6 – 11), Provisional and current IUU Vessel List (paragraph 12 – 19), WCPFC IUU Vessel List (paragraph 20 – 24), Modification of the

WCPFC IUU Vessel List (paragraph 25 – 29) and Review (paragraph 30). Two controversial issues consistently discussed throughout the past years in this measure are paragraph 3(j) and paragraph 15.

In 2007, at the regular session of the Commission, Korea sought to remove paragraph 3(j) of the measure which calls for the description of IUU activities to include vessels that "are under the control of the owner of any vessel on the WCPFC IUU Vessel List".[297] Korea's argument is that paragraph 3(j) is not a relevant example of IUU fishing activities as defined in the FAO IPOA-IUU and that other RFMOs other than IATTC and SEAFO have not adopted such provision.[298] The issue was unresolved and deferred to the next Commission meeting. This issue was discussed at TCC 4 and was recommended to the Commission not to apply paragraph 3(j) of CMM 2007-03 as a criterion for IUU listing in developing the Draft IUU Vessel List in 2009. Meantime, the Secretariat, in consultation with interested CCMs will develop additional procedures to give effect to this paragraph for discussion at TCC 5.[299] The issue was again discussed at TCC 5[300] with the regular session of the Commission at the same year (2009) agreeing that "specific procedures for applying CMM 2007-03, para. 3j would be developed for discussion at TCC6 [in 2010] to be facilitated by the USA".[301]

In 2009, Tonga on behalf of FFA members, proposed amendments to paragraph 15 to ensure that where an offence has occurred in a coastal State's waters, that the matter must be resolved to the satisfaction of the coastal State otherwise the vessel shall be included in the Provisional IUU List. The issue arises in 2008, from Tonga's propose listing of a Chinese Taipei flagged fishing vessel which was sighted fishing without a license in Tonga's EEZ in 2008.[302] Chinese Taipei argued that it has taken effective action to address the issue, by ordering the vessel to port, suspending the vessel's fishing license for three months and suspending the captain's

[297] WCPFC 4 Summary Report, paragraph 306
[298] Ibid
[299] WCPFC 5 Summary Report, paragraph 108(h)
[300] TCC 5 Summary Report, paragraph 230-238
[301] WCPFC 6 Summary Report, paragraph 128
[302] A contravention of CMM 2007-03 paragraph 3(b): "Conduct fishing activities in waters under the jurisdiction of a coastal State, without permission of that State, or in contravention of its laws and regulations"

license for six months, thus it has met the requirements of paragraph 15(b).[303] Tonga on the other hand, claims that the case has not been resolved to its satisfaction.[304] The amendment proposed, makes separate provisions for violations that occur in national waters and those that occur on the high seas.[305] Specifically, the amendments provide for the flag State to determine if the violation occurred on the high seas, but when the violation occurred outside of the high seas, that the CCM in whose jurisdiction the violation occurred be satisfied with the settlement of the case.[306]

In addition, the implementation of this measure over the years has brought to light some ambiguities. The measure require consensus for both listing and de-listing of vessels which may be difficult to achieve since either flag State of the vessel nominated for listing or the coastal State nominating the vessel can unilaterally block a consensus decision.[307] Further, some view the measure does not assist coastal States in bringing IUU vessels to justice under their own legal systems and thus do not assist coastal States in obtaining compensation for damages incurred.[308] There is also the 120 day deadline in CMM 2007-03 which was discussed in TCC 5 and highlighted in WCPFC 6 for discussion at TCC 6.[309] CMM 2007-03 requires CCMs to transmit nominations for the Provisional IUU Vessel List, 120 days in advance of the TCC meeting. The implication of this is that it would appear to allow vessels to continue fishing on the high seas until the Commission considers whether to list them at its subsequent meeting.

Conservation and Management Measure for Vessels without Nationality (CMM 2009-09)

CMM 2009-09 declares vessels without nationality, which are vessels with no flag or flying more than one flag, to be operating in contravention of the WCPF Convention and the CMMs.

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[303] CMM 2007-03 paragraph 15 states: "The TCC shall not include a vessel on the Provisional IUU Vessel List if the vessel's flag State demonstrates that:

> b. Effective action has been taken in response to the IUU fishing activities in question, such as, inter alia, prosecution or the imposition of sanctions of adequate severity;"

[304] TCC 4 Summary Report, paragraph 67-68, pp.8
[305] See WCPFC6-2009/DP11
[306] TCC 5 Summary Report paragraph 250
[307] WCPFC 5 Summary Report paragraph 156
[308] WCPFC 6 Summary Report paragraph 215
[309] WCPFC 6 Summary Report paragraph 178

The measure encourages CCMs to take necessary measures to prevent such vessels from undermining CMMs and report any sightings to the Secretariat.

3.4.5 By-catch mitigation measures

In addition to the target species, the WCPFC recognize the importance of by-catch species. Specific CMMs dealing with by-catch species are presented in a summary form below and briefly discussed, there under.

Table 6: MCS CMMs

Conservation and Management Measure	Symbol	Date adopted	Date in force
Conservation and Management Measure to Mitigate the Impact of Fishing for Highly Migratory Fish Stocks on Seabirds	CMM 2007-04	15-12-2007	15-02-2008
Conservation and Management of Sea Turtles	CMM 2008-03	12-12-2008	12-02-2009
Conservation and Management for Sharks	CMM 2009-04	11-12-2009	09-02-2010

Source: http://www.wcpfc.int/conservation-and-management-measures

Conservation and Management Measure to Mitigate the Impact of Fishing for Highly Migratory Fish Stocks on Seabirds (CMM 2007-04)

CMM 2007-04 resolves that CCMs shall, to the extent possible, implement the IPOA-Seabirds and report to the Commission on their implementation of the IPOA-Seabirds. It obliges CCMs to require their vessels to use of at least two specified mitigation measures in Table 1 with at least one from Column A (see CMM 2007-04 in Appendix 1) in area south of 30˚S and north of 23˚N and encourages use of one mitigation measure in other areas. Tonga is outside the area specified above but is required, "where necessary" to encouraged its fishing vessels to employ one or more of the mitigation measure in Table 1. All CCMs are encouraged to adopt measures to ensure that seabirds captured alive during longlining are released alive. CCMs are also required to report in their Part 1 Annual Report all information on seabird interactions including bycatches and details of species.

Conservation and Management of Sea Turtles (CMM 2008-03)

CMM 2008-03 requires CCMs to implement, as appropriate the FAO Guidelines to Reduce Sea Turtle Mortality in Fishing Operations and ensure the safe handling of all captured sea turtles, in order to improve their survival. CCMs are also to report to the Commission, in their Part 2 report, the progress of this implementation. The measure also requires that longline

fishing vessels fishing for swordfish in shallow set, reduce their sea turtle interaction rate starting on 1 January 2010, prescribing a number of requirements for implementation. These includes only using large circle hooks, use only whole finfish for bait and use any other measure, mitigation plan or activity approved by the WCPFC.[310] Australia tabled a report on its sea turtle mitigation plan which was approved by WCPFC 6.[311] On the other hand, purse seine vessels are to employ measures provided in paragraph 5.[312]

Conservation and Management for Sharks (CMM 2009-04)

CMM 2009-04 revised and replaces CMM 2008-06 to include silky shark in the list of key shark species together with blue shark, oceanic whitetip shark, mako sharks and thresher sharks.[313] CCMs are required to provide data through their Part 2 Annual Report and report on the implementation of this measure and any alternative measures adopted. At the 2008 WCPFC regular session, the USA noted that the new reporting requirements for sharks, that is, to include key shark species in CCMs annual reporting to the Commission of annual catch and fishing effort statistics by gear type, including available historical data,[314] will require modification of existing data forms and protocols, and thus may require time to implement.[315] In the past up to now, sharks is the most poorly reported species. SPC-OFP reported to the 6th regular session of the Scientific Committee that there is a lack of data available for sharks, due to non-reporting of shark data or very few sharks are reported.

The measure further obligated CCMs to take necessary measures to require their fishers to fully utilize any retained catches of sharks. The measure provides for mandatory 5% fin to carcass ratio, unless require landing of complete carcass. Alternative measures may be applied within areas under national jurisdiction, including through national plans of action. CCMs shall also take measures to prohibit their fishing vessels from retaining, transhipping, landing or trading any fins harvested in contravention of this CMM. In fisheries for tuna and tuna-like species not directed to sharks, CCMs are to take measures to encourage the release of live

[310] CMM 2008-03 paragraph 7(a)
[311] WCPFC 6 Summary Report, paragraph 280
[312] CMM 2008-03 paragraph 5
[313] CMM 2009-04 footnote 2
[314] This reporting requirement was in CMM 2008-06 paragraph 4 and is now in CMM 2009-04 paragraph 4
[315] 5th regular session of the WCPFC, Summary Report, 2008, paragraph 248

sharks caught incidentally and are not used for food or other purposes.[316] As can be seen, CCMs have a lot of obligations under this CMM. The challenge faced is that of implementation and enforcement, for example, ensuring vessels observe the 5% fin to carcass ratio.

Fundamental to SIDS is that the measure succinctly states that nothing in the measure shall prejudice the sovereignty and sovereign rights of coastal States, to apply alternative measures.[317] At the same time, CMM 2009-04 state "the Commission shall consider appropriate assistance to developing State Members and participating Territories for the implementation of this measure, including, in accordance with Article 7 of the Convention, in areas under national jurisdiction".[318] Although the measure recognises the sovereign rights of coastal States to apply alternative measures within areas under national jurisdiction,[319] the measure does require the CCM to advise the Commission of such alternative measure[320] and require CCM shall review the implementation and effectiveness of such alternative measure, on the basis of advice from SC, TCC and WCPFC and consider additional measures as appropriate.[321] In turn, it is submitted that, the WCPFC jurisdiction extends in zone to areas under national jurisdiction in this measure.

[316] CMM 2009-04 paragraph 10
[317] CMM 2009-04 paragraph 11
[318] CMM 2009-04 paragraph 16
[319] CMM 2009-04 paragraph 11
[320] Ibid paragraph 12
[321] Ibid paragraph 13

3.4.6 Vessel control measure

CMMs that regulate the conduct of fishing by fishing vessels allowed to be fishing in the WCPO are presented in a summary form below, and briefly discussed individually, there under.

Table 7: Vessel control CMMs

Conservation and Management Measure	Symbol	Date adopted	Date in force
Conservation and Management Measure to Prohibit the Use of Large Scale Driftnets on the High Seas in the Convention Area	CMM 2008-04	12-12-2008	12-02-2009
Conservation and Management Measure on the Application of High Seas FAD Closures and Catch Retention	CMM 2009-02	11-12-2009	09-02-2010
Conservation and Management Measure Prohibiting Fishing on Data Buoys	CMM 2009-05	11-12-2009	09-02-2010
Conservation and management Measure on Regulation of Transhipment	CMM 2009-06	11-12-2009	09-02-2010
Conservation and Management Measure to Monitor Landings of Purse Seiners at Ports so as to Ensure Reliable Catch Data by Species	CMM 2009-10	11-12-2009	09-02-2010

Source: **http://www.wcpfc.int/conservation-and-management-measures**

Conservation and Management Measure to Prohibit the Use of Large Scale Driftnets on the High Seas in the Convention Area (CMM 2008-04)

CMM 2008-04 prohibits the use of large-scale driftnets on the high seas of the Convention Area, the use of which will constitute a serious violation of Article 25 of the WCPF Convention.[322] "Large-scale driftnets" is defined in the measure as "gillnets or other nets or a combination of nets that are more than 2.5 kilometre in length whose purpose is to enmesh, entrap, or entangle fish by drifting on the surface of, or in, the water column".[323] The obligations for CCM is to include in their Part 2 Annual report, a summary of MCS actions related to large-scale driftnet fishing on the high seas in the Convention Area. Although, CMM 2008-01's prohibition is only for the high seas, the South Pacific Driftnet Convention discussed in section 3.2 applies to both high seas and area under national jurisdiction.

Conservation and Management Measure on the Application of High Seas FAD Closures and Catch Retention (CMM 2009-02)

[322] WCPF Convention Article 25 deals with Compliance and Enforcement
[323] CMM 2008-04 footnote 1

The WCPFC 6 adopted CMM 2009-02, to be read together with CMM 2008-01 which provided for a FAD closure and catch retention by purse seine vessels in the area bounded by 20˚N and 20˚S. CMM 2009-02 provides detail rules for FAD closure and catch retention and its objectives are set out in paragraph 1.[324] The rules are compatible with PNA applied rules for FAD Closure and Catch Retention in their EEZs. In adopting the CMM, the Commission stipulated that the measure is to be reviewed by TCC 6 and the results reported back to WCPFC 7 for further consideration. Noting that there are some CCMs' domestic regulations that are compatible with, but not identical to, the PNA rules, those CCMs will submit copies of these regulations to the WCPFC Secretariat prior to the 2010 FAD closure, WCPFC6 agreed to permit some flexibility in the implementation of the measure for 2010 for those CCMs. This flexibility was in response to a USA request given that they have regulations already.

Conservation and Management Measure Prohibiting Fishing on Data Buoys (CMM 2009-05)

CMM 2009-05 banned fishing within 1 nautical mile of, or interacting with, a data buoy in the high seas, except for scientific research programme notified to and authorised by the Commission. Data buoys are defined as floating devices, either drifting or anchored, that are deployed by governmental or recognized scientific organizations or entities of electronically collecting and measuring environmental data and not for the purpose of fishing activities.[325] Tuna species aggregate in the vicinity of data buoys, thus a reduction of fishing around data buoys may assist the Commission in its efforts to reduce the mortality of juvenile bigeye and yellofin tunas.[326] In addition, it seeks to advance responsible conduct of fishing operations in order to avoid vandalising and damaging of data buoys.

Conservation and Management Measure on Regulation of Transhipment (CMM 2009-06)

CMM 2009-06 regulates the conduct of tranship in the convention area and commences as soon as possible no later than July 1, 2010 except for that specified in paragraph 13(c). In

[324] CMM 2009-02 paragraph 1 set out the objectives of this measure [CMM 2009-02]:
(a). to ensure consistent and robust application of FAD closures and catch retention in the high seas between 20˚S and 20˚N through the specification of minimum standards.
(b). to apply high standards to the application of the FAD closure and catch retention in order to remove any possibility for the targeting of aggregated fish, or discard of small fish.

[325] CMM 2009-05 paragraph 2

[326] CMM 2009-05 preamble

essence, HMFS covered by the Convention shall not be transhipped at sea by purse seine vessels outside the Convention Area consistent with paragraph 25 of this measure. Paragraph 25 gives WCPFC leniency to grant exemptions for transhipment at sea for existing group seine operations flagged to Papua New Guinea and Philippines that meets certain conditions listed in the measure and transhipment activities involving New Zealand flagged domestic purse-seine vessels. Transhipment from fishing vessels other than purse seine vessels is also regulated as well as transhipment to and from non-CCM vessels.

Conservation and Management Measure to Monitor Landings of Purse Seiners at Ports so as to Ensure Reliable Catch Data by Species (CMM 2009-10)

CMM 2009-10 tasked the Commission and concerned CCMs to establish in 2010 an arrangement with a non-CCM to enable collection of species and size composition data from canneries in non-CCM, regarding purse seine catches in the Convention Area.[327] The aim of such a port sampling and monitoring of purse seine catches in ports of non-CCMs programme is to help reduce uncertainty noting the high possibility that the reported bigeye catch by purse seine vessels are significantly lower than the actual bigeye catches. Data obtained from such a port sampling and monitoring arrangement is to be handled as non-public domain data.[328]

[327] CMM 2009-10 paragraph 1
[328] Ibid paragraph 2

3.4.7 Cooperating Non-members measure

The application for cooperating non-member status is increasingly made to the Regular Sessions of the WCPFC for consideration. This CMM sets out the procedures and criterias to be fulfilled by States seeking cooperating non-member status.

Table 8: Vessel control CMMs

Conservation and Management Measure	Symbol	Date adopted	Date in force
Cooperating Non-Members	CMM 2009-11	11-12-2009	09-02-2010

Source: http://www.wcpfc.int/conservation-and-management-measures

CMM 2009-11 replaces CMM 2008-02 and gives effect to Article 31 of the Convention.[329] It provides a process for considering applications for cooperating non-members (hereafter: CNMs) by providing guidance to non-members on what to include in its request. Many members, during the WCPFC 6, considered that CNMs who do not make monetary contribution to the work of the Commission but who gain financially from the fisheries of the Convention Area are in effect, free riders.[330] At the same time, the Commission budget has increases over the years placing increasing financial burden on SIDS. As such, non-members seeking CNMs status is required to include in their request "an explicit commitment to make financial contributions...".[331] Criteria for the TCC and the Commission to determine whether a non-party is accorded CNM status is also provided.

A major issue associated with seeking CNM is the participatory rights of CNM, which in past, were granted based on voluntary undertakings by CNMs in relation to CMMs and other decisions of the Commission. Paragraph 12 of CMM 2009-11 address this by obligating the Commission, where necessary, to determine how the participatory rights of CNMs will be limited by the CMMs adopted by the Commission. Moreover, from the increase number of application for CNM status to the WCPFC, it is evident that more States are seeking access to the world's largest and most valuable remaining tuna fisheries. Whilst it is advantageous to have States become CNM so that they can be bounded by the WCPFC CMMs, there is also the

[329] WCPF Convention Article 32, Non-parties to this Convention
[330] WCPFC 6 Final report, paragraph 47
[331] CMM 2009-11 paragraph 2(g)

fear that as the membership increases, the allocation of a TAC when it is set by the WCPFC will become smaller and smaller.

4 Challenges facing implementation by SIDS: a focus on Tonga

This chapter will analyze the challenges facing Pacific SIDS in implementing, complying with and enforcing their obligations arising out of the WCPF Convention and the WCPFC decisions. Tonga, a SIDS, is used as a case study to provide examples to highlight the reality of what SIDS face. The chapter starts by providing a profile of Tonga to set the scene before it discusses the challenges faced in implementing, complying with and enforcing obligations under the WCPF Convention.

4.1 Profile of Tonga

4.1.1 Geography

Tonga, with a population estimated at 103,365[332] is made up of a group of 176 islands, 36 of which are inhabited and is divided into three main groups: Vava'u in the north, Ha'apai in the centre and Tongatapu in the south. Nearly all islands of Tonga are located along the Tonga Ridge, on a north-east to south-west orientation.[333] In terms of the extent of Tonga's maritime jurisdiction claim, Royal Proclamation of 1887 claimed Tonga's total area as the area bounded by the 15˚S to 23.5˚S latitude and 173˚W to 177˚W longitude.[334] This covers an area, both land and sea, of 395,000 square kilometers.[335] The Royal Proclamation of 1972 proclaimed Teleki Tonga and Teleki Tokelau (the Minerva Reefs) as part of the Kingdom of Tonga.[336]

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[332] SPC 2010 Pocket Statistical Summary
[333] SPC, Tonga National Tuna Fishery Status Report No.16, pp.11
[334] Royal Proclamation 1887, Tonga Government Gazette, Vol. II-No.55, August 24. 1887 http://www.paclii.org/to/legis/procl/rp1887191/ accessed 19/09/2010
[335] Hanns J. Buchholz, *Law of the Sea Zones in the Pacific Ocean*, Institute of Southeast Asian Studies, Singapore, 1987 pp.86
[336] Royal Proclamation 1972, Tonga Government Gazette, No. 7, Thursday 15th June 1972, http://www.paclii.org/to/legis/procl/rp1972191/ accessed 19/09/2010. Tonga Interpretation Act 1988, Section 32, states:

> "Where in an Act the expression "extent and boundaries", "limits" or any other expression whatsoever is used in relation to the Kingdom to denote the total area of the Kingdom, that expression shall be construed to mean the total area bounded by the fifteenth and twenty-third and half degrees of south latitudes and the one hundred and seventy-third and the one hundred and seventy-seventh degrees of west longitude, and the area bounded by the Proclamation *made on the 15th day of June, 1972 affirming and proclaiming Teleki Tokelau and Teleki

With the development of the EEZ concept during UNCLOS III, Tonga enacted legislation claiming a 12nm territorial sea and an EEZ of 200nm in 1978[337] which was revised in 1987.[338] A Maritime Zone Act (2009) is currently in draft form.

Tonga's EEZ is dominated by Lau Basin (2,500-3,000m) to the West and Tonga Trench (greater than 6,000m) located to the east of the Tonga Ridge.[339] It is estimated that Tonga has potentially an EEZ area of at least 700,000 square kilometres sharing borders with Fiji to the West, Wallis and Futuna, Samoa and American Samoa to the North, Niue to the East and high seas to the South. Tonga has not finalized EEZ boundaries with its neighbours except for Wallis and Futuna and American Samoa. The challenge now for Tonga is to negotiate and agree on boundaries with Fiji, Samoa and Niue although boundary negotiations between Tonga and these neighbouring States are understood to be ongoing. The boundary depicted in Figure 2 is used by the FFA for the purpose of the US Treaty[340] but other view of Tonga's EEZ is as shown in Figure 6. This is presented to highlight the fact that there may be differing views of Tonga's maritime boundaries, thus it is critical that there is a clear delineation of Tonga's maritime boundaries and is formally agreed to. This is because this will have a flow on effect on Tonga's obligations for the conservation and management of the resources within those boundaries. The dashed lines in Figure 6 illustrate the Royal Proclamation in 1887.

Tonga part of the Kingdom. *(Inserted by Act 6 of 1971 and Amended by Act 1 of 1972.)" at* *http://legislation.to/Tonga/DATA/PRIN/1988-001/InterpretationAct.pdf* *accessed 19/09/2010*

[337] Tonga, The Territorial Sea and Exclusive Economic Zone Act – 30 of 1978

[338] Tonga, Territorial Sea and Exclusive Economic Zone Act 1987

[339] Tonga National Tuna Fishery Status Report 2007, pp.11

[340] Full title of the treaty is *Treaty on Fisheries between the Governments of Certain Pacific Islands States and the Government of the United States of America,* can be found in FFA website at http://www.ffa.int/system/files/USA-PI%20States%20Treaty%20on%20Fish.pdf

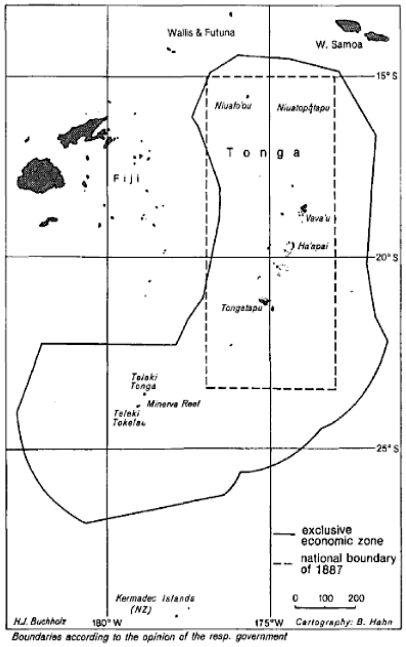


Figure 6. Tonga: Historical National Boundary and Exclusive Economic Zone
Source: Hanns J. Buchholz, Law of the Sea Zones in the Pacific Ocean, Institute of Southeast Asian Studies, Singapore, 1987, pp.86

4.1.2 Tuna fisheries

The historical tuna fishery (1952-1982) in the EEZ of Tonga was dominated by the DWFNs, namely Japan, Korea and Taiwan, after which, tuna fishery in Tonga has been dominated by Tongan flagged vessels and locally based foreign vessels. [341] The main fishing method used is longline fishing with very insignificant pole-and-line and purse seine fishing.[342] Commercial tuna operations in Tonga only started in 1967 on an experimental basis as initiated by the Government, when it received its first longliner "Ekiaki" from Japan. A second long liner, "Tavake" (maximum storage capacity of 40 mt) was donated by the Government of Japan in 1976. The operations were unprofitable until the arrival of the third, 37 meter 188-GT steel long-liner "Lofa" in 1982. Operation of "Lofa" was transferred to a semi-private fishing company, Sea Star Fishing Company Ltd, in 1991.[343] Table 9 shows historical catch for the past six years.

[341] SPC, Tonga National Tuna Fisheries Stock Status Report, 2007, pp.5
[342] Ibid, pp.13
[343] FFA and Ministry of Fisheries, Country Report – Fisheries Profiles: Kingdom of Tonga, pp.50

Table 9: Annual catch an effort estimate, by primary species, for the Tongan longliners in the CA, for 2004-2009

Year	No. Of Longline Vessels	Effort Average no. of hooks	Primary species catch (mt)						
			Albacore	Bigeye	Yellowfin	Skip jack	Swordfish	Marlins	TOTAL
2004		1633500	187.8	37.7	163.3	3.4	30.3	16.5	439
2005	11	2827800	178.2	77.3	114.5	1.7	22.3	35.9	429.9
2006	14	3388600	380	101	183	0.5	34	41	739.5
2007	13	3285600	390	129	341	0.8	31	49	940.8
2008	9	2109300	220.2	81	290.8	0.3	29	28.6	649.9
2009	7	1023900	124.3	37.6	109.4	0	22	19	312.3

Source: Tonga's Annual Report Part 1 to SC 6, WCPFC, pp.5

Historically, catches within Tonga's EEZ is dominated by albacore and total tuna catch average at 600mt per year.[344] Since 2003, longline vessels shifted from targeting albacore to yellowfin and bigeye for the fresh fish market. Tuna fishery total catch in quantity and value for 2009 further declined from 2008 and was the lowest in the history of this fishery in Tonga after it peaked in 2007 for the last five years due to various reasons including, big reduction in fishing effort (no. of hooks), by 69 % as compared to 2007 which is consistent with the decline in number of active fishing vessels. This reduction in effort was due to, *inter alia*, some fishing vessels changing to *bechdemer* fishery which started in Tonga in 2008.[345]

[344] Ibid
[345] Tonga, Annual Report Part 1 to the Scientific Committee of the WCPFC, pp.1

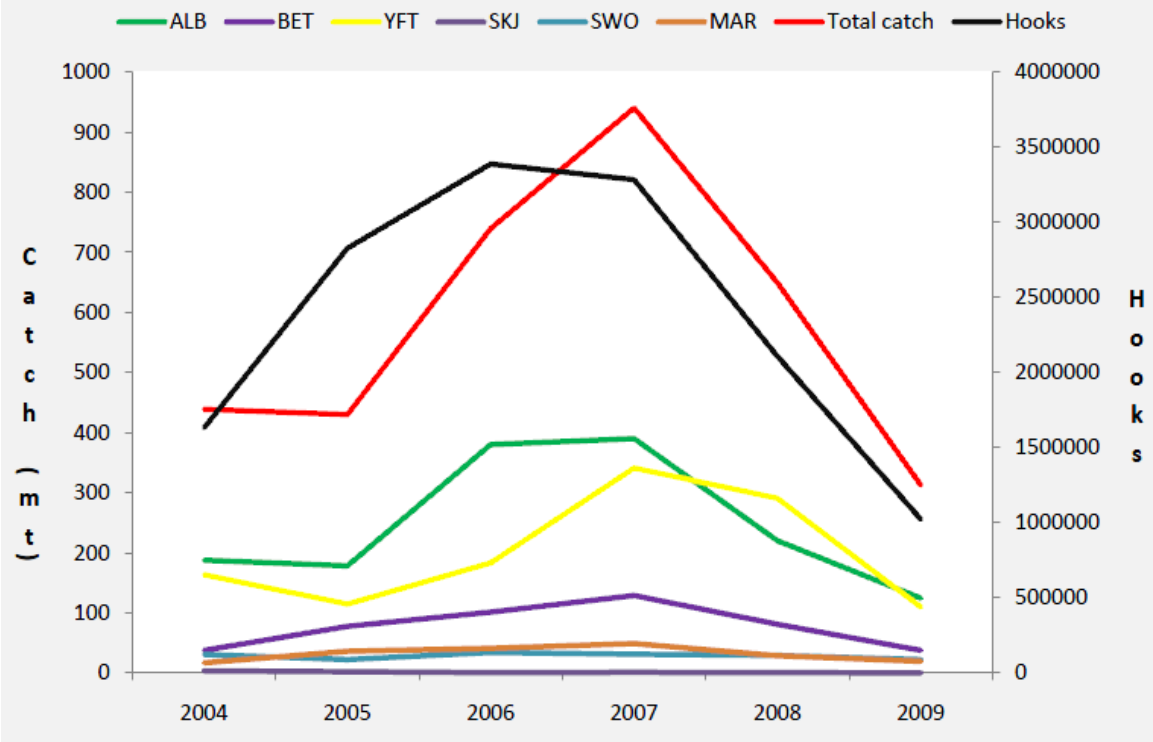


Figure 7. Historical annual catch (mt) and effort (no. hooks) by primary species, for Tongan longliners, active in the CA, 2005-2009
(Source: Tonga's Annual Report Part 1 to the SC, WCPFC, pp.5**)**

4.1.3 Economy

Tonga has a GDP per capita of only UDS$2,629.[346] Tonga's economy heavily relies on remittances, tourism, agriculture and fisheries. The Ministry of Finance estimated economic grown to contract 0.4% in 2008/09, a downward revision from 0.4% growth estimated in the Budget Statement for 2009/10. Tonga's primary export commodity, squash, experience decline in 2008/09 and total fish exports were subdued for the year ending June 2009 but the entrance of sea cucumber into the export market has contributed to the development of the export sector.[347]

[346] SPC 2010 Pocket Statistical Summary
[347] National Reserve Bank of Tonga, Annual Report 2008/09, pp.2, http://www.reservebank.to/docs/ANNUAL%20REPORTS/2009/NRBT_AR_0809_English.pdf accessed 16/08/2010

The Fisheries Division Annual Report 2009 reported the major export (value) of marine products in 2009 were bechdemer (71%), aquarium product (14%), tuna (6%), snapper (5%) and others (3%). The total export value for the year was approximately T$4.8million pa'anga, of which tuna contributed 88.8mt which is equivalent to T$310,998. The total estimated catch of tuna species by weight from logsheet during 2009 was 394 mt. This was a decreased of 49% as compared to the year 2008 due to decrease in the number of fishing trips in 2009 and again only 4 fishing vessels actively fishing in 2009.[348]

4.1.4 Institution and Management

Institution(s): The agency mandated with the conservation and management of the highly migratory species in Tonga is the Fisheries Division, under the Ministry of Agriculture and Food, Forests and Fisheries (MAFFF).[349] The enforcement of fisheries laws and regulations is carried out primarily by the Fisheries Division with the help of the Tonga Defence Services and the Police force.[350] It is worth noting the capacity of the Fisheries Division in terms of budget and staff, as this will have a direct effect on the capacity of Tonga to undertake its obligations enshrined in the WCPF Convention and implement and enforce WCPFC CMMs and decisions. In 2009, the Fisheries Division had 54 established permanent posts, shown in Table 10.

[348] Tonga, Ministry of Agriculture and Food, Forests and Fisheries Annual 2009 pp.
[349] The Fisheries Division was a Ministry on its own up until 2006. Government reform initiative saw the amalgamation of Agriculture, Food, Forests and Fisheries into one Ministry. Now, Fisheries is a Division under the Ministry of Agriculture and Food, Forests and Fisheries
[350] Fisheries Management Act 2002 define "authorised officer" to mean:

> "any fisheries officer, any member of the police force, any member of the Tonga Defence Services, or any person designated by the Minister under section 70"

Table 10: Fisheries Division Permanent Posts as at December 31, 2009

Level	Post Title	Post Abbreviation	No. of Post	No. of Vacancies
L/2	Deputy Director	DD	1	
	Deputy Secretary	DS	2	
L/5	Principal Fisheries Officer	PFO	3	
L/7	Senior Fisheries Officer	SFO	2	
	Senior Computer Programmer	SCP	1	
L/9	Fisheries Officer	FO	6	
	Technical Officer Grade. I	TOI	2	
	Computer Programmer	CP	1	
	Accountant	ACC	1	
L/11	Technical Officer Grade II	TOII	9	
	Computer Operator Grade I	COI	1	
	Senior Fisheries Assistant	SFA	5	
	Fisheries Assistant	FA	5	
L/13	Computer Assistant	CA	2	
L/14	Fisheries Trainee	FT	12	
L/14	Drivers	D	1	1
Total Established Posts			**54**	**1**

Source: Tonga, MAFFF, Annual Report 2009

The Head of the Fisheries Division is the Deputy Director who reports to the Director of MAFFF and from him to the Minister. In terms of qualifications, L/2 to L/7 posts are occupied by university graduates and three Fisheries Officers post at L/9. In 2009, three key senior officers (one Level 7 and 2 Level 9) were all of full time study leave. In early 2010, two senior officers (Deputy Secretary and Senior Fisheries Officer) were lossed from the Fisheries Division. In addition, four key senior officers are on study leave, thus Tonga Fisheries currently only have 6 senior officers (university graduates) on full time duty. Two junior officers (Fisheries Assistant and Driver) also vacated their posts in early 2010. Therefore, currently the total number of staff has decrease to 50, the lowest number of staff Tonga Fisheries has seen in years. This is presented to highlight how small Tonga's fisheries administration is, but it still must wrestle with the challenges discussed in section 4.2 such as participation in regional meetings, fulfilling reporting and data obligations and so on.

In terms of financial capacity, the total budget allocation for FY 2009/2010 was T$1.68m *pa'anga* – 13% was the Development Estimate and 87% was Government of Tonga funds.[351] The salary allocation accounted for the largest share of the budget (73%) leaving only 27% for operation.[352] The total revenue collection for the year 2009 was T$714,079 *pa'anga*.[353] Historically, both the Fisheries budget allocation and the number of staff have steadily declined, further affecting Tonga's ability to carry out its duties, such as implementing its obligations arising out of the WCPF Convention, discuss in detail in section 3.2.

Management: The primary legislation dealing with highly migratory species is the Fisheries Management Act – 26 of 2002 (FMA 2002), which came into force in April 2004. FMA 2002 tasked the Minister responsible for Fisheries with the "conservation, management, sustainable utilization and development of fisheries resources in the Kingdom and the fisheries waters".[354] Regulations are enacted under FMA 2002 for the implementation of the Act.[355] The Fisheries (Tuna Management and Development) Regulations 2009 and Fisheries (Management and Infringement) Regulations 2009 were resubmitted to the Drafting Sub-Committee for processing whilst some are already in force:

- Fisheries Management (Process & Export) Regulations 2008;
- Fisheries Management (Conservation) Regulations 2008;
- Aquaculture Regulations 2008
- Fisheries (Local Fishing) Regulations 2009;
- Fisheries (Vessel Monitoring System) Regulations 2009;
- Fisheries (Coastal Community) Regulations 2009
- Fisheries (Limutanga'u Sea Weeds) Regulations 2009

[351] Tonga, Ministry of Agriculture and Food, Forests and Fisheries Annual 2009
[352] Ibid
[353] Ibid
[354] Tonga, Fisheries Management Act – 26 of 2002, Section 3
[355] Ibid, Section 101 empower the Minister to make regulations for implementation of the Act

As can be deduced from the names of these regulations, these regulations are very recent and one of the major focuses was to incorporate regional obligations such as those from the WCPFC, into Tonga's national legislations. In addition, Tonga's National Tuna Management Plan 2010-2014 has recently been finalized. The Plan's goal is "to manage Tonga's national tuna fisheries resources through an ecosystem-based, sustainable use and economically efficient tuna fisheries business".[356] At the international level, relevant to tuna management, Tonga is party to the LOSC and the UNFSA. Although it is not a party to the FAO Compliance Agreement, Tonga incorporates most of the instrument's provisions into its national legislation.[357] At the regional level, Tonga is a party to the WCPF Convention, and the FFA Convention. As stipulated under the FMA 2002, no fishing vessel shall be used in the fisheries waters without a license, permit or other authorisation required under the Act.[358] Application for the license shall be made in the prescribed form and every fishing license issued is subject to the conditions provided by the Act and any that may be prescribed.[359] Currently, Tonga does not license foreign and locally based foreign fishing vessels for the tuna fisheries but only Tongan flagged vessels.

[356] Tonga National Tuna Management Plan 2010-2014, pp.8
[357] Tonga, Fisheries Management Act 2002 dedicates Part VIII to High Seas fishing, containing Section 44 – Section 64
[358] Tonga, FMA 2002 Section 21
[359] Ibid, Section 22

4.2 Challenges:

The WCPFC Convention is hailed as a major achievement in that it provides a framework for the management of the highly migratory species in the WCPO, particularly in previously unregulated areas, such as the high seas. WCPFC will provide benefit for the Pacific Island States to realise potential fisheries development aspirations however, on the other hand, it can also pose a threat in that, it can be used as a vehicle by DWFNs to dilute sovereign rights of the Pacific Island States in the exploring, exploiting, conserving and managing the highly migratory resources, particularly within the areas under national jurisdiction. In addition, the WCPF Convention and the decisions of the Commission impose obligations on member countries. However, SIDS lack the capacity and resources to fully honour their obligations and implement these decisions. Tonga, a SIDS certainly is currently faced with this dilemma. The experience of Tonga, as a SIDS member of the WCPFC is drawn upon to highlight some of the challenges Tonga faces in observing, implementing and enforcing the Commission's decisions and honouring its responsibilities and obligations enshrined in the WCPF Convention.

4.2.1 Participation

Participation at the WCPFC and its related meetings can be looked at in terms of the frequency of the meetings and the effectiveness of participation. Tonga, as a member of the WCPFC, has participated in meetings leading up to the adoption of the WCPF Convention and since. The WCPFC and its subsidiary bodies, the SC and the TCC, have since hold regular sessions annually which amount to at least three meetings annually. The Northern Committee (NC), another subsidiary body, also have annual meetings. Tonga is not a member of the NC so the NC meetings are not included in Table 11 except for the 5th regular session of the NC in 2009 which Tonga attended as an observer. The country where the meeting was held is also noted to give an idea of the time required to travel to these meetings. The number of days for each meeting is provided to highlight the duration of these meetings. In essence, the WCPF

Convention directly creates a number of meetings - the WCPFC, SC and TCC[360] and other subsidiary bodies established under its auspices: the Ad Hoc Task Group for Data (AHTG [Data]) and the Inter-sessional Working Group for the Regional Observer Programme (ROP-IWG).[361] As seen from Table 11, since its inaugural session in 2004, there have been four WCPFC directly created meetings each year that Tonga had to cover in 2005 to 2010.

Table 11: WCPFC and its subsidiary bodies meetings, 2004- 2010

Year	No. of meetings each year	No. of staff attending	Meeting	Venue	From	To	No. of days
2004	1	2	WCPFC 1	FSM	09-Dec-04	10-Dec-04	2
2005	4	2	SC 1	New Caledonia	08-Aug-05	19-Aug-05	12
		1	Informal consultation towards WCPFC 2	Japan	08-Sep-05	09-Sep-05	2
		2	TCC 1	FSM	05-Dec-05	09-Dec-05	5
		2	WCPFC 2	FSM	11-Dec-05	16-Dec-05	6
2006	4	1	AHTG [Data]	Philippine	31-Jul-06	04-Aug-06	5
		2	SC 2	Philippine	13-Aug-06	24-Aug-06	12
		3	TCC 2	Brisbane	28-Sep-06	03-Oct-06	6
		6 +1 industry	WCPFC 3	Samoa	11-Dec-06	15-Dec-06	6
2007	4	1	SC 3	Hawaii	13-Aug-07	24-Aug-07	12
		2	ROP-IWG 1	FSM	24-Sep-07	25-Sep-07	2
		1	TCC 3	FSM	27-Sep-07	02-Oct-07	6
		1 (industry)	WCPFC 4	Guam	03-Dec-07	07-Dec-07	5
2008	4	1	ROP-IWG 2	Fiji	07-Jul-08	10-Jul-08	4
		1	SC 4	PNG	11-Aug-08	22-Aug-08	12
		2	TCC 4	FSM	02-Oct-08	07-Oct-08	6
		2+1 industry	WCPFC 5	Korea	08-Dec-08	12-Dec-08	5
2009	4	-	ROP-IWG 3 *	Guam	17-Mar-09	20-Mar-09	
		2	SC 5	Vanuatu	10-Aug-09	21-Aug-09	12
		1	NC 5 *	Japan	07-Sep-09	10-Sep-09	4
		2	TCC 5	FSM	01-Oct-09	06-Oct-09	6
		2+1 other Ministry	WCPFC 6	Tahiti	07-Dec-09	11-Dec-09	5
2010	4	2	WCPFC Special session	Brisbane	02-Jul-10	02-Jul-10	1
		3	SC 6 (+1 consultant + 1 industry)	Tonga	10-Aug-10	19-Aug-10	10
		2	TCC 6	FSM	30-Sep-10	05-Oct-10	6
		3	WCPFC 7	Hawaii	06-Dec-10	10-Dec-10	5

Source: The above information in this table were extracted from the Fisheries Division annual reports and Fisheries Division training database

* Tonga did not attend the ROP-IWG 3 and attended NC 5 as an observer

Furthermore, in the past, during the WCPFC and its subsidiary bodies meetings, it is common to hold different working groups and breakout sessions in the margin of these meetings. For

[360] WCPF Convention Article 9(3) for the WCPFC meetings and Article 11(3) for the subsidiary bodies meetings
[361] WCPF Convention Article 11(6) allow the Commission to establish other subsidiary bodies as it deems necessary, thus the creation of the AHTG[Data] and the ROP-IWG

the meetings in Table 11, the WCPFC funded the participation of one participant from each developing State party.[362] In the past, the number of participants Tonga send to these meetings is 1 to 3 officers with the exception of WCPFC 3 (see Table 11). Funds available in the past to send additional participants to the WCPFC and its related meetings include the fund established under Part VII of the UNFSA and Tonga's share of the Project Development Fund (PDF) from the US Treaty. However, Tonga's delegation to these meetings, like most SIDS, is by large very small and limited in expertise compared to other delegations.[363] The DWNFs usually send a substantial number of participants with diverse expertise that enable them to fully cover the side meetings plus the main meeting as well as the diverse issues deliberated at these meetings. In contrast, small delegations, such as that of Tonga, often find themselves struggling to cover these side meetings, due to limited number of participants, let alone fully grasp the diversity of the issues discussed, due to limited composition of expertise of the participants to these meetings.

It is important to note that the WCPFC and its related meetings is one of many that the national fisheries administration strives to cover annually. The year 2009 (highlighted in Table 11) is expanded upon in Table 12 to show all major fisheries regional meetings Tonga attended in 2009. This clearly highlights the enormous number of meetings national administrations has to cover in a year. In addition to the meetings in Table 11 (also highlighted in green in Table 12), the WCPF Convention indirectly influences the creation of other meetings such as the FFA members Management Option Consultations (MOC) and other FFA workshops to deal with WCPFC issues (in blue in Table 12) aimed at developing the capacity of its members to deal with WCPFC issues. The WCPF Convention also influences the creation of FFA members' preparatory meetings, which meet days in advance of each WCPFC, SC and TCC meeting (in pink in Table 12). The aim of these FFA preparatory meeting is for FFA members to come up with common positions to the WCPFC and its subsidiary bodies meetings. As

[362] WCPF Convention Article 30(3)

[363] Using some of the member's number of delegates to the 6th regular session of the WCPFC in 2009 to highlight this issue, the major DWFNs such as US send more than 30 delegates, Japan send 28, EU and Korea send 10 each and China send 11. In comparison, some of the coastal States do send a big delegation such as PNG and FSM which each send 15 and 10 delegates, respectively. However, majority of the coastal States (SIDS) delegation, such as that of Tonga, consist of 1 to 3 participants.

such, it is submitted that the WCPF Convention has directly and indirectly generated immense number of meetings which SIDS such as Tonga finds challenging to cover. This is illustrated using the number of meetings in 2009 and Tonga's capacity to cover these meetings.

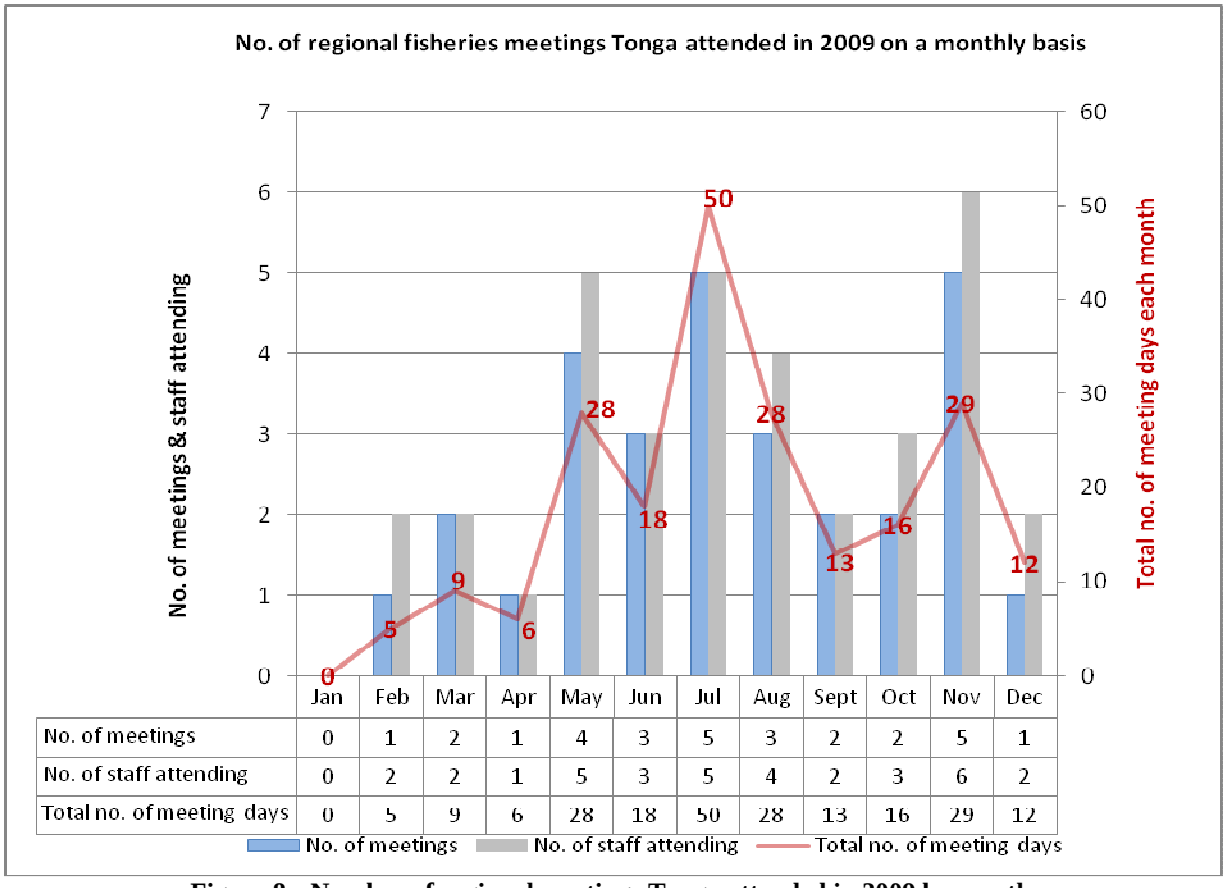
Table 12: Regional fisheries meetings Tonga attended in 2009

No. of staff	Meeting	Venue	Duration	No. Of days
2	6th Biennial meeting of Head of Fisheries (HOF 6) and 6th Advisory Committee	Noumea, New Caledonia	9 - 13 Feb, 2009	5
1	28th FAO-COFI meeting	Rome	02 – 06 Mar, 2009	5
1	21st Annual Treaty Consultation (2009) with United States of America	Koror, Palau	10 – 13 Mar, 2009	4
1	FFA 12th Monitoring Control & Surveillance Working Group meeting	Honiara	03 – 08 Apr, 2009	6
2	Sub Committee-SPTF5 & Annual meeting of FFC & Ministerial Fisheries Meeting	Niue	07 – 19 May, 2009	13
1	7th International Consultation of South Pacific Regional Fisheries Management Organisation	Lima, Peru	18 – 22 May, 2009	5
2	Illegal Fishing (IUU fishing)	Wellington, NZ	25 – 29 May, 2009	5
	Polynesian Risk Assessment and Planning	Wellington, NZ	25 – 29 May, 2009	5
1	Technical meeting for the 1st meeting of ACP Ministers in charge of Fisheries	Bruseels, Belgium	02 – 04 Jun, 2009	3
1	Stock Assessment workshop for Tuna Fishery and Ecosystem Monitoring & Analysis (EMA) workshop	Auckland, NZ	18 – 27 Jun, 2009	10
1	3rd Tuna Data Workshop	Auckland, NZ	22 – 26 Jun, 2009	5
1	Fellowship attachment for the review of the Tonga National Tuna Management & Development Plan	Solomon Island	27 Jun – 18 Jul, 2009	22
1	2nd Tuna RFMO meeting	San Sebastian, Spain	29 Jun – 03 Jul, 2009	5
1	17th Annual Conference for Australia and New Zealand Society of International Law (ANZ SIL)	Wellington, NZ	02 – 04 Jul, 2009	3
1	Special meeting of the Pacific Islands Parties as Preparation for Re-negotiation of multilateral treaty on fisheries with the United States of America & **FFA sub regional workshop on Western and Central Pacific**	Nadi, Fiji	10 & 13 - 17 Jul, 2009	8
1	Fisheries Legal Workshop on WCPFC	Honiara, Solomon Is	03 – 07 Aug, 2009	5
1	Regional Management of Sustainable Fisheries for Giant Clams (Tridacnae) and CITES Capacity Building Workshop	Nadi, Fiji	04 – 07 Aug , 2009	4
2	FFA Science Working Group - in preparation to the 5th Scientic Committee (3-7 Aug 09)	Port Vila, Vanuatu	3 - 9 Aug 2009	7
	5th Regular Session of the Scientific Committee (10-21 Aug 09)		10-21 Aug 2009	12
1	WCPFC Northern Committee 5th Regular Session 08 – 10 Aug and 5th Consultation b/w Japan and FFA	Nagasaki, Japan	05 – 11 Sept, 2009	7
1	12th FAO Round table meeting for Pacific Island Countries on WTO and Regional Trade Agreements and	Wellington, NZ	21 – 26 Sept, 2009	6
2	FFA preparation for TCC 5	Pohnpei, FSM	28 - 30 Sept 2009	3
	5th Regular Session of the Technical and Compliance Committee (TCC5)		01 – 06 Oct, 2009	6
1	Sub-Committee (SC-SPTBF) meeting	Honiara, Solomon Is	26 - 27 Oct 09	2
2	1st Renegotiation of US Treaty with the United States	"	28 Oct – 30 Oct, 2009	3
2	Management Options Consultation (MOC)	"	02 - 04 Nov 2009	3
2	FFC 71	"	05 - 06 Nov, 2009	2
1	5th Oceanic Fisheries Management Project Steering Committee Meeting	"	7-Nov-09	1
1	FFA South Pacific Regional Fisheries Management Organisation (SPRFMO)	Nadi, Fiji	21 – 23 Oct, 2009	3
1	8th International Meeting of the South Pacific Regional Fisheries Management	Auckland, NZ	08 – 14 Nov, 2009	7
2	Regional Seminar on EC system to prevent, deter and eliminate IUU fishing	Noumea, New Caledonia	12 – 13 Nov, 2009	2
1	ACP FISH II Assessment	Honiara, Solomon Is	17 – 18 Nov, 2009	2
2	FFA preparation for WCPFC 6	Tahiti, French Polynesia	30 Nov - 06 Dec 2009	7
	Annual Tuna Commission (WCPFC) 06th Meeting		07 – 11 Dec, 2009	5

Source: Adapted from Tonga, MAFFF, Annual Report 2009

Key: Blue – FFA meetings directly dealing with WCPFC issues
Pink – FFA preparatory meetings prior to SC, TCC and WCPFC
Green - Meetings directly created by the WCPF Convention (SC/NC/TCC/WCPFC) also highlighted in Table 11
Majority of the rest of the meetings are tuna related so it will have some influence on, or by, the WCPFC

The capacity of the Tonga to cover these meetings in a year is demonstrated using 2009 as an example. Using the information in Table 12, the graph below shows the number of meetings per month for 2009, the number of Tonga Fisheries officers attending these meetings as well as the total number of meeting days. For example, in February, there was one meeting with duration of 5 days, attended by 2 officers. In March, there were 2 meetings attended by two officers (one officer to each meeting), with a combined number of days of 9 days taken up by these two meetings. If two or more meetings are held back to back, for example, for December there were the FFA preparatory meeting to the WCPFC 6 and the WCPFC 6, this is counted as one meeting. It is also worthwhile to note that the number of days presented is only for the actual number of days for the meeting, not counting the number of days that is loss when the officer spend travelling to the meeting. A conservative estimate of the number of days officer(s) attending FFA preparatory meeting, the SC/TCC/WCPFC and the travelling days required to get to the meeting usually mean the officer(s) is/are away from Tonga for at least, two weeks for each meeting.



	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
No. of meetings	0	1	2	1	4	3	5	3	2	2	5	1
No. of staff attending	0	2	2	1	5	3	5	4	2	3	6	2
Total no. of meeting days	0	5	9	6	28	18	50	28	13	16	29	12

Figure 8. Number of regional meetings Tonga attended in 2009 by month (Source: Tonga, MAFFF, Annual Report 2009)

In terms of Tonga Fisheries staff capacity to cover the meetings in Table 12, in 2009, there were 10 key officers who deal with regional fisheries issues available, 8 of which have in the past dealt with and attended WCPFC related meetings. These 10 officers [Head of Fisheries (Level 2) to Fisheries Officers (Level 9) (see Table 10)] cover the 2009 meetings listed in Table 12. As can be seen from the graph, apart from January and April, two or more of these officers are attending meetings each month. The highest was in the month of November with 6 officers out of Tonga attending meetings, followed by May and July with 5 officers each month. This is presented to highlight the frequency of regional fisheries meetings and the drain it has on national administration to cover these meetings.

At the same time, these same officers covering regional meetings are the key officers to implement the regional initiatives at the national level. However, as seen from the graph presented, the frequency of the regional fisheries meetings means these same officers are constantly on the road attending meetings leaving them with not enough time to implement the regional initiatives at the national level. This is not to belittle the importance of attending these regional meetings because it is vital that Tonga is represented at these meetings to ensure that its views and interests are taken into account at the regional level. However, SIDS such as Tonga are seen to be caught between a rock and a hard place, facing the dilemma of constantly sourcing out key officers to cover the ever increasing number of regional meetings and the challenge of finding ample time to implement action of the regional initiatives at the national level. In essence, the WCPFC and the frequency of its related meetings take away key personnel from an already understaffed national fisheries administration, which at the national level also has to deal with various fisheries issues, other than tuna.[364]

Tonga's situation is aggravated by the loss of two key senior officers (Deputy Secretary and Senior Fisheries Officer who was the Fisheries Management and Planning officer) in early 2010. These officers have been directly dealing with WCPFC and its related issues over a

[364] Hanich and others found that there is lack of capacity to address national priorities, exacerbated by heavy travel requirements to attend regional meetings, reported interviewee (who are FFA member' officials) were of the view that there are too many meetings. Quentin Hanich, Feleti Teo, Martin Tsamenyi, "Closing the Gaps: Building Capacity in Pacific Fisheries Governance and Institutions", ANCORS, 2008 pp.40

number of years and represented Tonga to previous WCPFC, SC and other WCPFC related workshops. In 2009, these two officers cover around 25% of the meetings listed in Table 12. This is not only a major loss of corporate knowledge to Tonga but it will also further stress, the already overstress capacity of Tonga Fisheries to cover the regional meetings. Current Government downsizing policy also does not alleviate Tonga Fisheries situation. Majority of the Fisheries posts that have been vacated in the preceding years have been abolished as a cost-saving initiative by the Government. As a result, Tonga Fisheries have seen the lowest number of staff (see Table 10) in years. In contrast, the number of fisheries regional meetings has historically increased over the years.

Furthermore, an important issue that warrant consideration is the effectiveness of the participations in these regional meetings. In order to effectively participate in the meetings, preparation leading up to the meeting is vital. However, a study found that some Pacific Island States have little capacity to analyze national interest and participate effectively in regional fisheries management deliberations.[365] In Tonga's case, it is exacerbated by high turnover of Ministers and senior staff leading to loss of corporate knowledge. In the past six years alone, Tonga Fisheries have seen 5 different Ministers.[366] Meanwhile, regional fisheries issues at regional fora such as WCPFC are very dynamic. In turn, there is a real challenge in keeping Ministers and officers up to speed with these dynamic issues, hence weakening their ability to participate effectively in regional meetings.

In addition, prior to attending meetings, there is a lack of systematic process for preparation for these meetings whereby relevant internal sections within the fisheries agency is properly consulted, as well as other line agencies and stakeholders. This is usually because identifying officer(s) to attend these meetings is done on the fly, leaving officer(s) not enough time to prepare appropriately and consult with relevant stakeholders and prepare national positions prior to these meetings. Thus, the officer's ability to contribute to, and effectively participate

[365] Ibid pp.73; Quentin Hanich, Feleti Teo, Martin Tsamenyi, "A collective approach to Pacific islands fisheries management: moving beyond regional agreements", *Marine Policy*, no.34, 2010, pp.88
[366] Three confirmed Ministers plus two (Prime Minister and Minister for Labour, Commerce and Industries) taking the fisheries portfolio on an acting basis for a period of time.

in, the regional meeting is compromised. There is also a lack of consistency and continuity in officer(s) attending these regional meetings and a lack of debriefing at the end of the meeting, at the national level, thus corporate knowledge is not shared. In Tonga, although there is a reporting template for staff to submit report upon returning from a meeting, this report is very minimal.

The discussion above have shown that the WCPF Convention have both directly and indirectly created enormous number of meetings which SIDS such as Tonga struggle to participate in. The SIDS's participation is both discussed not only in terms of being able to attend the meetings but also of being able to participate effectively during the meeting. The preceding discussion highlighted issues which contribute to undermine the effectiveness of Tonga's participation at the WCPFC and its related meetings. In not being able to participate effectively, the national interest of a member such as Tonga is marginally represented and at the same time, national delegates do not fully comprehend the implications of the decisions agreed to, at the national level. As pointed out by Hanich and others, some Pacific Island States lacked the capacity and confidence to negotiate at international levels and often found them overwhelmed by the speed in which the discussion took place at the WCPFC.[367]

[367] Quentin Hanich, Feleti Teo, Martin Tsamenyi, "A collective approach to Pacific islands fisheries management: moving beyond regional agreements", *Marine Policy*, no.34, 2010, pp.88

4.2.2 Financial contribution and obligations

As stated before, the work of the Commission is funded by, *inter alia*, assessed contributions[368] which shall be determined in accordance with a scheme which the Commission shall adopt and amend as required by consensus.[369] The WCPF Convention further provides guidance in Article 18(2) on factors that need to be taken into consideration when assessing each member's contribution. Each member shall be assessed an equal basic fee, based upon national wealth and a variable fee, to be based on, *inter alia*, total catch taken within the member's EEZ. The scheme adopted shall be set out in the financial regulations of the Commission.

The Financial Regulation of the WCPFC, in regulation 5, deals with provision of funds of the Commission and sets out a formula on how each member of the Commission shall contribute to the budget. It requires each member to contribute to the budget: [370]

> (a) a 10 per cent base fee divided in equal shares between all members of the Commission;
>
> (b) a 20 per cent national wealth component based upon an equal weighting of proportional gross national income (calculated on a three-year average) per capita and proportional gross national income (calculated on a three-year average); and
>
> (c) a 70 per cent fish production component based upon a three-year average of the total catches taken within exclusive economic zones and in areas beyond national jurisdiction in the Convention Area of all the stocks covered by the Convention for which data are available (including the main target tuna species, as well as the four main billfish species (black marlin, blue marlin, striped marlin and swordfish)), subject to a discount factor of 0.4 being applied to the catches taken within the EEZ of a member of the Commission which is a developing State or territory by vessels flying the flag of that member.

[368] WCPF Convention Article 17(1)(a)
[369] WCPF Convention Article 18(2)
[370] WCPFC, Financial Regulations, Regulation 5 (paragraph 5.2)

The budget is adopted on an annual basis by consensus at the annual regular sessions of the WCPFC. Following adoption of the budget, the assessed contribution is payable in full within 60 days of the receipt of communication from the Executive Director.[371] Historically, Tonga's assessed contributions, in USD, to the WCPFC's budget have been as follows:

Table 13: Tonga's annual assessed contribution to the WCPFC

Year	Assessed Contribution (USD)
2004	4701 [372]
2005	4701 [373]
2006	8304 [374]
2007	13,160 [375]
2008	15,144 [376]
2009	19,016 [377]
2010	26,016 [378]
2011	31,396 – indicative [379]
2012	32,635 – indicative [380]

Source: As indicated in the footnote

This assessed contribution is an annual cost that Tonga bears as a member of the WCPFC, annually contributing 0.48% of the WCPFC's budget from members' assessed contribution. As can be seen from the figures provided above, Tonga's assessed contribution has annually increased by around 56% from that of the previous year, since 2006. The indicative budget for the next two years is forecast to increase - a trend observed in the past and will likely continue into the future as the work of the Commission increases.

It is submitted that Tonga, as most of the SIDS, faces the challenge of meeting its annual assessed contribution as a member of the WCPFC. To illustrate this fact, in 2009, Tonga Fisheries budget allocation was T$1.68m of which salary allocation absorbs 73% leaving only

[371] WCPFC, Financial Regulations, paragraph 5.5
[372] Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Financial Regulations paragraph 5.2, at http://www.wcpfc.int/guidelines-procedures-and-regulations
[373] 2004 WCPFC 1 Summary Record, paragraph 15 Annex 1
[374] 2005 WCPFC 2 Summary Records, paragraph 77 and Attachment L
[375] 2006 WCPFC 3 Summary Report, paragraph 181 and Attachment Q, Annex III
[376] 2007 WCPFC 4, Summary Report, paragraph 335, 338 and 352, Attachment P, Annex V
[377] 2008 WCPFC 5, Summary Report paragraph 276 and Attachment BB
[378] 2009 WCPFC 6, Final Summary Report paragraph 368 and Attachment JJ, Annex IV
[379] Ibid
[380] Ibid

27% for operation. Hence, in 2009, only T$453,600[381] is available to Tonga Fisheries to carry out all its duties and obligations, one of which is to meet its assessed contribution to the WCPFC of USD$19,016. This means, in 2009, around 8% of the operation share of the budget is absorb into meeting Tonga's share of assessed contribution to the WCPFC alone. Tonga currently uses its Project Development Fund (PDF)[382] held at the FFA, which makes up its major share of the total annual revenue collected, to meet this annual contribution to the WCPFC. In fact, the challenge to meet Tonga's annual assessed contribution will intensify with the continuing increase trend in assessed contribution, exacerbated by decrease in budget allocation from Tonga government to Tonga Fisheries.

As shown in Table 13, Tonga's assessed contribution in 2009 was USD$19,016, which is equivalent to T $35,214.81.[383] In contrast, the tuna export value for 2009 in Tonga only accounted for 6% (T$288,000) of a total export value approximated at T$4.8 million. Thus, in 2009, around 12% of the estimated export value of tuna is required to cover Tonga's assessed contribution to the WCPFC. In comparison to the contribution of other fisheries to Tonga's economy, in 2009, bechedemer export value was estimated at 71%, aquarium product at 14%, snapper at 5% and others at 3%.[384] It is interesting to note that the two fisheries which are the major export contributor (bechedemer and aquarium) currently and in the past, do not bring with them the financial burden tuna fisheries does, in terms of paying annual assessed contribution to a RFMO or other regional organisation that deals specifically with that fishery (bechdemer and aquarium).

In addition, these fisheries (bechdemer and aquarium) scarcely have directly related regional meetings in which key senior officers are required to travel to. In 2009, the only directly

[381] T$453,600 = USD$244,944.37 using the rate on 10/11/202 of 1 TOP = 0.54001 USD http://www.xe.com/ucc/convert.cgi?Amount=453600&From=TOP&To=USD&image.x=52&image.y=11
[382] This refers to Tonga's share from the distribution of payments received through the US Treaty. Schedule 1 of the US Treaty (pp.44) provides the formula on how to distribute funds received by the Treaty Administrator (the FFA) amongst FFA members.
[383] Using exchange rate of 1USD = 1.85185 TOP on 10/11/2010 at http://www.xe.com/ucc/convert.cgi?Amount=19016&From=USD&To=TOP
[384] Tonga, MAFFF Annual Report 2009, pp.

related regional meetings to these fisheries Tonga attended was a CITES[385] capacity building workshop in August (see Table 12). Hence, in comparison to other fisheries in Tonga, the tuna fisheries place an enormous financial burden, such as assessed contribution to WCPFC and covering numerous annual meetings, on Tonga. The above may indicate that the financial return to Tonga from its membership at WCPFC is hazy. However, such argument is feeble as a SIDS, such as Tonga, can also financially gain substantially from being a part of the WCPFC. This was clearly demonstrated in 2008 when Tonga gained direct financial return from utilizing the WCPFC process to pressure a foreign fishing vessels fishing illegally in its EEZ, gaining USD$250,000.[386]

[385] Convention on International Trade in Endangered Species of Wild Fauna and Flora, entered into force on 1 July 1975 and currently have 175 Parties (Tonga is currently not a party to CITES). See http://www.cites.org

[386] Tonga, MAFFF Annual Report 2008, pp.73. In brief, a foreign fishing vessel was sighted by the Royal New Zealand Airforce fishing illegally inside Tonga's EEZ. Tonga took the case to the WCPFC and proposed to list this vessel in the WCPFC IUU Vessel List. Negotiation between Tonga and the vessel owner and flag State saw the vessel paying monetary compensation to Tonga. This propose listing of the vessel on the WCPFC IUU list played a significant part, putting pressure on the flag State and the vessel owner to pay compensation to Tonga.

4.2.3 Reporting obligations

At the First Regular Session of the Technical and Compliance Committee (TCC1) in December 2005, Commission Members, Cooperating Non-Members and Participating Territories (CCMs) agreed to provide an Annual Report to the Commission. The purpose of this report is to provide information to the Commission on fisheries research and statistics during the preceding calendar year (Part 1), and management and compliance issues since the previous report (Part 2). Part 1 should be submitted one month prior to SC and Part 2 should be submitted one month prior to TCC.[387]

Thus, Part 1 and Part 2 reports are one of the major reporting requirements for CCMs such as Tonga, to fulfil on an annual basis. Initially, the Commission passed guidelines on what it was looking for in these reports thereby providing a template for Part 2 report. This is also aimed to guide CCMs and in turn, limit the time and resources spend on putting together the report. However, from the historical record of compliance with the submission of these reports on time, it is clear that members are struggling to fulfil this obligation.[388] This is due to small national fisheries administration struggling to find the time and personnel with Commission related knowledge in-country to put together these reports. Studies conducted for the Pacific Islands found that reporting requirements to the WCPFC is a concern, voiced by interviewees, suggesting a lack of capacity to comply with these reporting requirements.[389] In a report to the 6th Regular Session of the TCC in 2010, the WCPFC Secretariat reported the compliance with Part 1 and Part 2 report (see Table 14). [390] At TCC 6 in 2010, there were 25 CCMs yet to

[387] WCPFC, Summary of annual reports (Part 1 and Part 2) and revised template for the annual report Part 2 for report on 2010, WCPFC7-2010/19, paper to the 7th Regular Session of the WCPFC

[388] For example, at the end of TCC 2 in 2006, only 15 CCMs have submitted Part 2 report to the Secretariat. TCC 2 Summary Report, paragraph 2. This has continued to be the case. At TCC 6 in 2010, the Compliance Manager of the WCPFC reported only 13 Annual Report Part 2 was received by the deadline (31 Aug 2010) and by 30 Sept 2010, it went up to 24 reports. The Compliance Manager is of the view that judging by the late submission of these reports, it appears to represent a challenge for many CCMs. TCC 6 Report [Draft] 2010, paragraph 159

[389] Quentin Hanich, Feleti Teo, Martin Tsamenyi, "Closing the Gaps: Building Capacity in Pacific Fisheries Governance and Institutions", ANCORS, 2008 pp.90

[390] Review of CCM's implementation of, and compliance with, conservation and management measures, paper presented to 6th Regular Session of the Technical and Compliance Committee, Pohnpei, Federated States of Micronesia, 30 Sept – 5 Oct 2010, Attachment 8

submit Annual Report Part 2 to the WCPFC. Tonga was one of the CCMs identified yet to submit Part 2 report as at TCC 6 for the year 2009 at the time the paper containing Table 14 was out.[391] This has been rectified. As can be seen from the untimely submission of many Part 1 and Part 2 Reports by the due dates, it is submitted that the reporting obligations associated with complying with the Convention's principles and implementing the Commission's decisions are continuing to present significant challenges for many CCMs, including Tonga.

Table 14: Number of Annual Reports submitted (outstanding reports in parenthesis)

Annual Report (Part 1)

Submission Date	Reporting Period	Number of Reports
07 Jul. 2006	Previous year	26(2)
31 Jul. 2007	1 Jan.-31 Dec. 2006	25(3)
31 Jul. 2008	1 Jan.-31 Dec. 2007	26(3)
10 Jul. 2009	1 Jan.-31 Dec. 2008	32(1)
9 Jul. 2010	1 Jan.-31 Dec. 2009	10(23)

Annual Report (Part 2)

Submission Date	Reporting Period	Number of Reports
28 Aug. 2006	Previous year	29(1)
31 Jul. 2007	1 Jan.-31 Dec. 2006	30
31 Jul. 2008	1 Jan.-31 Dec. 2007	29(1)
31 Jul. 2009	1 Jan.-31 Dec. 2008	28(5)
31 Aug. 2010	1 Jan.-31 Dec. 2009	14 (25)

Source: Review of CCM's implementation of, and compliance with, conservation and management measures, paper presented to the 6th Regular Session of the Technical & Compliance Committee, Pohnpei, Federated States of Micronesia, 30 September – 5 October 2010, Attachment 8

In addition to the information reported via the Annual Reports Part 1 and Part 2, the SC, TCC and WCPFC regular sessions may as a decision during these meetings require information to be reported to the Commission. Moreover, CMMs also may have reporting requirements. Most of these information are required to be reported in the Annual Report Part and Part 2. However, there are some that may have its own time limit and may require CCMs to report to the Secretariat or others at a certain time. Some of these reporting requirements that are or may be relevant to Tonga, arising out of current CMMs, are identified in the table below.

[391] Ibid

Table 15: Some other reporting requirements

Symbol	Other reporting requirements
CMM 2007-03 (IUU List)	At least 120 days before the annual meeting of the Technical and Compliance Committee (TCC), CCMs shall transmit to the Executive Director (ED) their list of vessels presumed to be carrying out IUU activities during the current or the previous year
	Before or at the same time as notifying the ED, CCM shall notify the flag State providing a copy of the pertinent suitably documented information, either directly or through the ED
CMM 2009-01 (WCPFC RFV)	After 1 July 05 – notify ED within 15 days, or within 72hrs before vessel's fishing, of:
	(a) Any vessel added to its RFV
	(b) Any change to its RFV
	(c) Any vessel deleted from RFV
	If ED request fishing vessel information in member's RFV – member is to submit this to ED within 15days of such request
	Before 1 July each year – submit to ED a list of vessels in its RFV + WIN + "fished" or "did not fish"
CMM 2009-05 (Data buoys)	Fishing vessels to report to the member flag State of any entanglements
	Member to notify Secretariat of all such report (para 5
CMM 2009-08 (Charter)	Notify WCPFC of any charter vessel (para 2) by 1 July 2010:
	a) name of the fishing vessel;
	b) WCPFC Identification Number (WIN);
	c) name and address of owner(s);
	d) name and address of the charterer;
	e) the duration of the charter arrangement; and
	f) the flag state of the vessel.
	After July 1, 2010:
	Notify ED & flag State within 15days or 72hrs before fishing of any addition/change/termination in charter arrangement (providing information listed in (a)-(f) above for additional charter vessels

Source: CMMs identified in the Table

The challenge Tonga encountered with meeting Part 1 and Part 2 Annual Report submission for Tonga was manifold; and primarily due to the number of available officers within Tonga Fisheries, the ability of the available officers to complete these reports, the ease with which to understand the requirements of the reports, the user-friendliness of the report template and the availability of the data required to be reported. Data required to be reported needs to be available and with this, most CCMs especially SIDS such as Tonga found it challenging, which will be discussed under data obligations in section 4.2.4.

The availability of officers and the ability of the officers to complete these reports (Part 1 and Part 2) play a major role in Tonga's ability to fulfil its reporting obligations. As shown in Table 10 and discussed in section 4.2.1 (participation), Tonga Fisheries have very limited number of senior officers. In 2009, there were 10 key senior officers, 8 of which have in the past dealt with and attended WCPFC related meetings (see Table 10 and participation

discussion in section 4.2.1). Of these 8 officers, one is on study leave and one has left in early 2010 leaving only 6 available officers.

For these reports to be confidently put together, firstly one has to be available and secondly, one has to understand and be aware of the issues involved. This relates to participation at meetings as one needs to, in order to be aware and understand the issues involved. At the moment, the 6 key officers alluded to earlier have participated in a SC, TCC or WCPFC meeting – 3 officers have attended one TCC meeting each. The Head of Fisheries, although have consistently participated in most of the meetings is, due to the requirements of his post, normally plays a minimal role in the preparation of these Part 1 and Part 2 reports. In essence, currently there are only three officers at Tonga Fisheries who can prepare these annual reports with some certainty. Of these three officers, one does Part 1 and two are from the MCS sections who do Part 2 reports in previous years. Although these three officers deals with completing Part 1 and Part 2 reports, they have not, in the past consistently participated in the related meetings (SC/TCC/WCPFC). Thus, officers can sometimes struggle to understand what is required in the report and what information are to be reported. Although the template format does help, it can still take some time for one who may not be very familiar with the issue to understand what is required.

Furthermore, at the national level, there are also other fisheries issues that may take away these three key officers from preparing the reports which can lead to a late submission of these reports. In essence, the lack of staff and the lack of understanding of the required reporting requirements are challenges that hinder Tonga's meeting its reporting obligations. Judging from the submission of Tonga's Annual Report Part 1 and Part 2 in the past, it is clear that Tonga continues to find fulfilling its reporting obligations a challenge.

In addition to Part 1 and Part 2 reports, some information is required to be reported as identified in Table 15 during the year. The challenge Tonga faced with reporting these information, is not only related to lack of staff, but also the challenge of keeping track of what

is required to be reported and by when. A clear example is the requirement by CMM 2009-01 to submit to the Executive Director, before 1 July each year, a list of all vessels in the national record of fishing vessels, together with WCPFC identification number (WIN) and an indication of "fished" or "did not fish". Often, because these reporting requirements are contained in either the CMMs or the record of proceedings of the meetings, it can easily be forgotten. This requirement is often forgotten and in Tonga's case, was not updated for the past number of years.

The challenge of fulfilling Annual Report Part 1 and Part 2, for Tonga, is exacerbated by a lack of in-house process within Tonga Fisheries to ensure that these reports are prepared to be submitted on time. In addition, it is the practice that the task of preparing the reports is the responsibility of the officer attending the meeting. However, identifying officers to attend meetings is largely done on the fly, thereby leaving the identified officer not enough time to prepare the required report leading to late submission. In addition, no specific officer(s) is identified to keep track of the reporting requirements other than Part 1 and Part 2 report, thus these requirements can easily be forgotten. In essence, the lack of available and capable officers couple with a lack of in-house advance planning to prepare these reports all lead to intensify the challenge Tonga faces when striving to meet its reporting obligations.

It is also worthy to note that CMM 2006-08 for high seas boarding and inspection have within the measure reporting requirements. However, current capacity and ability of Tonga to patrol its own EEZ indicate that it is unlikely Tonga will conduct high seas boarding and inspection in the near future. However, should Tonga wishes to conduct high seas boarding and inspection in the future, CMM 2006-08 reporting requirements must be fulfilled as well. This requires authorized inspectors prepare a full report on each boarding and inspection they carry out in accordance with a format that may be specified by the WCPFC. The authorities of the inspection vessel from which the boarding and inspection was carried out shall transmit a copy of the boarding and inspection report to the authorities of the fishing vessel being inspected, as well as the Commission, within three full working days of the completion of the boarding and inspection. Where it is not possible for the authorities of the inspection vessel to provide such

report to the authorities of the fishing vessel within this timeframe, the authorities of the inspection vessel shall inform the authorities of the fishing vessel and shall specify the time period within which the report will be provided.[392] In addition, prior to leaving the vessel, the authorized inspector is to provide to the master a copy of an interim report on the boarding and inspection.[393] These are more reporting requirements that Tonga must fulfil should it participate in conducting boarding and inspection in the high seas.

[392] CMM 2006-8 paragraph 30
[393] Ibid paragraph 24(e)

4.2.4 Data obligations

The WCPF Convention require members to provide data to the Commission in order for the Commission and its' subsidiary bodies to carry out its functions.[394] These data includes statistical and biological data, usually reported through Annual Report Part 1 to the SC and compliance and enforcement data, reported through Annual Report Part 2 to the TCC. Thus, WCPFC members, such as Tonga, are obligated to collect these data. This is important as a lack of accurate and comprehensive data have consequences. First, it undermines the quality of science advice provided for management purposes. Second, it undermines the ability of the State to understand their industry and develop opportunities accordingly. Third, it can potentially undermine the ability of State's to negotiate for a national allocation at the WCPFC.[395]

In compiling the review of CCM's implementation of, and compliance with, CMMs for TCC6,[396] the paper noted it only works with information received by the WCPFC Secretariat. The limited information available for an important exercise is thus, a concern. Data collection and reporting has also been identified as one of the many challenges faced by many States in the Pacific historically and to-date, with poor data collection and reporting.[397]

Operational catch and effort data is required for stock assessment. These data is mainly required under the stock related measures (see section 3.4.3) and the by-catch mitigation measures (see section 3.4.5). CMM 2005-02 for South Pacific albacore does not specifically state any data requirements in the measure although CCMs are encourage to report on the catches of this stock. CMM 2005-03 for North Pacific albacore and CMM 2009-07 for Pacific Bluefin tuna are not relevant to Tonga so the data requirements for these measures are not discussed.

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[394] WCPF Convention Article 23
[395] Supra note403, pp.40
[396] See Review of CCM's implementation of, and compliance with, conservation and management measures, paper presented to 6th Regular Session of the Technical and Compliance Committee, Pohnpei, Federated States of Micronesia, 30 September – 5 October 2010, Attachment 1
[397] Supra note 389

Table 16: Examples of operational catch and effort data required under CMMs

CMM	Data required
CMM 2006-04 (Striped Marlin in the Southwest Pacific)	Catch levels of their fishing vessels that have taken striped marlin as a bycatch Number and catch levels of vessels fishing for striped marlin south of 15°S.
CMM 2008-01 (Bigeye and Yellofin)	Catch and effort data and size composition data for all fleets in the format required by the rules and requirements adopted by WCPFC as "Scientific Data to be Provided to the Commission".
CMM 2009-03 (Swordfish)	Total number of vessels that fished for swordfish and the total catch of swordfish for the following: (a) vessels flying their flag anywhere in the Convention Area south of 20°S other than vessels operating under charter, lease or other similar mechanism as part of the domestic fishery of another CCM; (b) vessels operating under charter, lease or other similar mechanism as part of their domestic fishery south of 20oS; and (c) any other vessels fishing within their waters south of 20°S.
CMM 2007-04 (Seabirds)	Annually provide, in part 1 of their annual reports, all available information on interactions with seabirds, including by-catches and details of species
CMM 2008-03 (Sea Turtles)	Information collected on interactions with sea turtles & vessel operators to record all incidents involving sea turtles during sea operations
CMM 2009-04 (Sharks)	Key shark species annual catch and fishing effort statistics by gear type, including available historical data. CCMs shall also report annual retained and discarded catches in Part 2 of their annual report. CCMs shall as appropriate, support research and development of strategies for the avoidance of unwanted shark captures (e.g. chemical, magnetic and rare earth metal shark deterrents).

Source: CMMs identified in the Table

In Tonga's case, this is collected from vessel operators through logsheets, mandated by the Fisheries Management Act 2002 and the terms and conditions of the license issued. However, generally, there is a lack of monitoring of the compliance with the reporting obligations on the logsheets. In Tonga, logsheet must be submitted, as it is a requirement in order to be eligible for duty free fuel. There is also a lack of consistent cross-checking and validating of these logsheets to ensure that the data provided are complete and accurate. The major reason for this is due to lack of resources – human, financial and technical – to carry out these tasks. However, as commonly known, logsheet data are less reliable and sometimes incomplete, therefore observer data are more reliable.

On the other hand, observer coverage is sometimes not sufficient. The requirements for all the data required under Table 16 can be validated using observer data, particularly those for seabirds and sea turtles. In 2007 and 2008, number of observer trips on longline fishing vessels fishing within Tonga's waters was 6 and 15 trips respectively.[398] In 2009, observer coverage for Tonga was 12%.[399] The fluctuation in the number of observer trips covered annually is mainly depended on the number of available observers during the year.

The logsheets data are complemented by the port sampling data collected in port. Two sections under Tonga Fisheries directly involved with data collection – the Offshore Resource and Development Section (6 staff) and Monitoring, Control and Surveillance (MCS) section (11 staff). Although there is 17 staff for both these two sections, only around half of these staff directly deals collection of some of the data identified in Table 16. Majority of the data collection is done by port samplers in port when the vessel arrives. The port samplers are the 6 staff of the offshore resource and development section.

Another constraint to data collection is the issue of species identification. This can best be demonstrated with the CMM 2009-04 for sharks. Very few sharks are recorded/reported in the logsheets by species. However, CMM 2009-04 requires the collection of data on key shark species which is listed as blue shark, silky shark, oceanic whitetip shark, mako sharks and thresher sharks. SC 6 was told that there are a number of data-gap issues with respect to shark catches in the WCPFC convention area.[400] In Tonga's case, logsheet data does not normally record shark catches by species due to difficulties with species identification. Observer data sometimes attempt to record shark by species, usually for the most commonly known species. At SC 6, recommendation was made to add two shark species, porbeagle (south of 20°S) and hammerhead sharks to the list of key shark species.[401] The practical implication of this at the national level is that, data collectors, such as port samplers, observers and vessel operators

[398] Tonga observer programme report to SPC, 2007 and 2008
[399] Sixth Regular session of the Scientific Committee, Final Report, pp.23
[400] Peter Williams, Scientific data available to the Western and Central Pacific Fisheries Commission, WCPFC-SC6-2010/ST WP-1(rev.3), paper presented to the sixth Regular Session of the Scientific Committee, 10-19 August 2010, Nuku'alofa, Tonga
[401] Sixth Regular session of the Scientific Committee, Final Report, pp.84

need to be trained to correctly identify such species. Although there is currently no targeted fishery for sharks in Tonga, sharks are incidental catches of the tuna longline vessels.[402]

The above data requirements clearly demonstrate that meeting the data obligations required by the WCPFC, Tonga needs resources such as adequate number of staff and observers, appropriate trained to correctly identify species and know what to collect and record. In addition, because vessel operators also play a major role in meeting this obligation through data recorded in the logsheets, there is also a need to ensure that the operators can also correctly identify species and record them accurately on the logsheets.

In addition to the above catch and effort data, data is also required from CCMs to ensure they are complying with the CMMs of WCPFC. These data are normally reported through the Annual Report Part 2 and the reporting template for Part 2 (appended as Appendix 2) clearly show the type of data required by CCMs to enable the Commission to assess its compliance with the CMMs. Moreover, data required such as that by CMM 2009-01 for the WCPFC RFV is as shown below. However, as discussed in section 3.4.2, the data required by CMM 2009-01 is at times often proved difficult to acquire completely. Extract from CMM 2009-01 is replicated in Table 17 to show the extent of the data required to be reported under this measure. Clearly, with the increasing adoption of CMMs and the increase work of the WCPFC, data requirements is bound to increase thus, intensifying the challenge Tonga faces with meeting this obligation

[402] It has also been known that longline vessels acquire tuna fishing licence in the guise of targeting sharks. In 2004 in Tonga, a Taiwanese flag longline tuna fishing vessel on its first trip, was ordered back to port as Fisheries Division was suspicious from the VMS track that the vessel was fishing for shark, as the vessel spend most of its time inside the 12nm. The vessel was ordered back to port, and upon inspection, the vessel was estimated to have 13 tonnes of sharks and less than 500 kgs of tuna. The observer on port the vessel confirmed that the vessel was targeting sharks. The vessel's license was rescinded and ordered out of Tonga, after paying fines for contravention of its license condition.

Table 17: Extract from CMM 2009-01

CMM 2009-01 (WCPFC RFV)	Vessel info (paragraph 6) to provide to Executive Director by 1 July 2005: (a) name of the fishing vessel, registration number, WCPFC Identification Number (WIN), previous names (if known) and port of registry; (b) name and address of the owner or owners; (c) name and nationality of the master; (d) previous flag (if any); (e) International Radio Call sign (f) vessel communication types and numbers (Inmarsat A, B and C numbers and satellite telephone number); (g) colour photograph of the vessel; (h) where and when the vessel was built; (i) type of vessel; (j) normal crew complement; (k) type of fishing method or methods; (l) length (specify type and metric); (m) moulded depth (specify metric); (n) beam (specify metric); (o) gross registered tonnage (GRT) or gross tonnage (GT); (p) power of main engine or engines (specify metric); (q) carrying capacity, including freezer type, capacity and number, fish hold capacity and capacity of freezer chambers (specify metric); and (r) the form and number of the authorization granted by the flag State including any specific areas, species and time periods for which it is valid. After 1 July 2005, provide to the Executive Director: (a) any vessel added to its Record along with the information set forth in paragraph 6; (b) any change in the information referred to in paragraph 6 with respect to any vessel on its record; and (c) any vessel deleted from its record along with the reason for such deletion in accordance with article 24 (6) of the Convention, Before 1 July of each year - a list of all vessels that appeared in its RFV at any time during the preceding calendar year, together with each vessel's WIN and an indication of whether each vessel fished for HMFS in the Convention Area beyond its area of national jurisdiction. The indication shall be expressed as (a) fished, or (b) did not fish.

Source: CMM 2009-01

The above discussion has shown the enormity of the data obligations Tonga must fulfil as a member of the WCPFC. However, as shown by the discussion in section 4.2.1 to 4.2.3, Tonga has very limited number of staff, with limited skills, a limited budget and equipment to fulfil these obligations, data being one of them.

4.2.5 Legal and Policy implementation

The need for an effective legal framework is paramount in order to properly regulate and manage tuna fisheries at the domestic level. Hanich and others, in 2008, found that some Pacific island States continue to suffer from an inadequate legal framework to effectively implement their annual goals and regional obligations.[403] In some cases, there was no effective domestic framework, or the existing framework was inadequate, to properly regulate and manage fisheries.

In Tonga's situation, past legislations and regulations were drafted and finalized with the help of the FFA and other donors, such as the Commonwealth Secretariat. This helped put legal framework in place. In 2005, a legal officer was recruited to Fisheries, in recognition of the lack of in-house legal capacity to deal solely with fisheries related matters. Tonga Fisheries has put in place legal framework in place for the management of tuna. However, there is a real challenge in keeping up to speed with the development at the regional and international level, and incorporating Tonga's obligations from regional and international agreements, into the domestic framework. This will be aggravated with the current lack of staff at the fisheries management and planning section of the Fisheries Division, which formulates management and development plans for each fishery and provides management and policy advice. Both key senior officers in this section left the Division, one in 2009 and another in early 2010 with no recruitment to-date, due to current government policy.

[403] Supra note 365, pp.87; Quentin Hanich, Feleti Teo, Martin Tsamenyi, "Closing the Gaps: Building Capacity in Pacific Fisheries Governance and Institutions", ANCORS, 2008 pp.104-106

4.2.6 MCS challenges

Two of the most important MCS measures in place are CMM 2007-01[404] for observers and CMM 2007-02[405] for Vessel Monitoring System. These measures form the backbone for the WCPFC MCS regime. CMM 2007-01 established the Commission Regional Observer Programme (ROP). The objective of the ROP is to collect verified catch data, other scientific data, and other information related to the fishery in the Convention Area and to monitor the implementation of the CMMs.[406] The measure state that the ROP shall apply to fishing vessels authorized to fish in the Convention Area in accordance with CMM 2004-01, which are:

- vessels fishing exclusively on the high seas in the Convention Area, and
- vessels fishing on the high seas and in waters under the jurisdiction of one or more coastal States, and vessels fishing in the waters under the national jurisdiction of two or more States[407]

CMM 2007-01 states that the ROP is to be implemented on a phased basis. CCMs are to ensure that fishing vessels, except for those that fish exclusively within waters under national jurisdiction of the flag State, are prepared to accept an observer from the Commission ROP if required by the Commission.[408] CCM also are responsible for meeting the level of observer coverage[409] and shall explain to the vessel captain, observer duties relevant to appropriate measures adopted by the Commission.[410]

Currently, there are no Tongan flag vessels fishing exclusively on the high seas or in waters under the jurisdiction of another State. At the same time, there are limited available trained observers in Tonga, even to cover domestic longline fishing vessels. Sea allowance of observer deployments for the past number of years are borne by SPC, through an MOU with the Fisheries Division. This was in response to the lack of funds in-country to cover observer deployment. In essence, Tonga currently struggles to meet observer coverage level with the

[404] Conservation and Management Measure for the Regional Observer Programme, CMM 2007-01
[405] Commission Vessel Monitoring System, CMM 2007-02
[406] Supra note 404 paragraph 4
[407] Ibid, paragraph 5
[408] Ibid paragraph 7
[409] Ibid paragraph 8
[410] Ibid paragraph 10

domestic fleet due to lack of observers and equipment. Meeting the required level of observer coverage is a challenge felt throughout the CCMs. At the 6th TCC, it was reported that few programmes have a comprehensive level of observer coverage, whilst others have had little or no coverage at all. [411] Should Tonga license fishing vessels in the future that fall under the purview of the CMM 2007-01, this challenge will be exacerbated. Tonga will be faced with additional financial obligations, including, the need for more trained observers to meet the observer coverage, financial costs to cover sea allowances of deployed observers, debriefing process, data handling in-country and onward transmission to SPC.

The CMM 2007-02 adopts a Commission VMS, which is activated from 1 January 2008, for the area of the Convention Area south of 20˚N, and east of 175˚E in the east of the Convention Area north of 20˚N.[412] Fishing vessels fishing in the areas identified previously and moving to the area north of 20˚N and west of 175˚E of the Convention Area are also required to keep their ALCs activated and continue to report to the Commission VMS.[413] The Commission VMS applies to all fishing vessels that fish for highly migratory stocks on the high seas within the Convention Area.[414] The measure applies to fishing vessels in excess of 24 metres in length, with an activation date of 1 January 2008. Fishing vessels 24 metres in length or less have an activation date of 1 January 2009.[415] VMS is a tool to enable flag State to ensure vessels flying its flag adhere to relevant rules and regulations. As stated earlier, no Tongan flag fishing vessels currently fish in the high seas. However, should there be, Tonga must ensure that the vessel is reporting to the Commission VMS. Tonga currently operates the FFA regional VMS and a domestic VMS using Argos system. Cost of running these systems, particularly for the domestic system, includes the annual satellite transmission fee and cost of incurring the Automatic Location Communicator (ALC). These are some of costs involved that Tonga will bear should Tongan flag fishing vessels fish exclusively in the high seas in order to comply with the CMM 2007-02.

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[411] Annual Report – Regional Observer Programme, paper presented at the 6th Regular Session of the Technical and Compliance Committee, Pohnpei, Federated States of Micronesia, 30 Sept – 5 Oct 2010, paragraph 13
[412] Commission Vessel Monitoring System, CMM 2007-02, paragraph 1
[413] Ibid paragraph 4
[414] Ibid, paragraph 6(a)
[415] Ibid paragraph 6(b)

A related issue to the VMS is the boundary delimitation with respect to Tonga's EEZ. SOPAC is the regional agency working on boundary issues for the Pacific Island countries. As reported at TCC 6, SOPAC shared with the WCPFC Secretariat the Pacific Islands' 200 nautical mile notational boundaries, the same data delivered to the FFA Secretariat on a "without prejudice to boundary delimitation negotiations".[416] The challenge for Tonga is to expedite and finalise boundary delimitation negotiations with its neighbouring countries in order for Tonga to effective carry out enforcement of fisheries regulations.

The CMM 2006-08[417] adopts the WCPFC boarding and inspection procedures to ensure compliance with the provisions of the Convention and conservation and management measures. The procedures set out in this measure apply on the high seas within the Convention Area.[418] The challenge with this measure to a SIDS such as Tonga is the ability to participate and take part in the high seas boarding and inspection due to lack of resources.

[416] Annual Report – Regional Observer Programme, paper presented at the 6th Regular Session of the Technical and Compliance Committee, Pohnpei, Federated States of Micronesia, 30 Sept – 5 Oct 2010, paragraph 7
[417] WCPFC Boarding and Inspection Procedures, CMM 2006-8
[418] Ibid paragraph 4

5 Conclusion

5.1 Summary

This paper has highlighted the plights of SIDS, such as Tonga, in discharging its obligations as a member of the WCPFC. It describes the international legal requirements for the conservation and management of tuna, and how FFA members have implemented these, leading to the development of the WCPF Convention establishing the WCPFC for the WCPO.

The WCPO, home to the world's largest tuna fisheries is largely made up of the 22 Pacific Island States and territories bordering the region plus Australia and New Zealand. Marine resources are critical to these States and territories, both for food and socio-economic purposes. Seventeen of these States and territories, in their desire to secure maximum benefits from the living resources of the region through promoting regional cooperation and coordination in respect of fisheries policies, collectively established the Forum Fisheries Agency in 1979. The FFA membership was limited to Forum member States and territories, effectively excluding DWFNs, since its inception up to now. FFA member States have over the years adopted conservation and management measures for the conservation and management of tuna. A lot of these measures have provided the basis for region-wide arrangements that are now applicable in the WCPO.

The regionalist approach adopted by the FFA members was in response to the EEZ concept advanced during the UNCLOS III conference. The adoption of the LOSC codified the EEZ concept which gives coastal States sovereign rights for the purpose of exploring and exploiting, conserving and managing the resources within up to 200 nautical miles from the baseline.[419] In the EEZ regime, this signified a move away from open access to resources and regulation based primarily on flag State jurisdiction, to near-exclusive coastal State access to maritime resources and regulation based primarily, though not exclusively, on coastal State jurisdiction.

[419] LOSC Part V

However, whilst the LOSC provides a comprehensive framework for the conservation and management of tuna resources in the EEZ, the high seas was largely unregulated. Recognising the trans-boundary nature of tuna, and the need to provide a framework for the high seas, a number of instruments were adopted, most importantly the UNFSA and the FAO Compliance Agreement. The UNFSA provided the impetus to the negotiation of the WCPF Convention, enabling coastal States and DWFNs to fulfil their duty to cooperate for the purpose of conserving and managing this important resource.

The adoption of the WCPF Convention is hailed as a major success as it puts in place a RFMO in the WCPO to regulate fishing activities in the region. However, there are obligations for parties to the WCPF Convention. The Pacific Island States and territories are members of the WCPFC and as such, have obligations to discharge in implementing the conservation and management of the resources under the purview of the WCPF Convention. In addition, the WCPFC adopts measures and passes resolutions annually that add to the responsibilities and obligations of both members and cooperating non-members. SIDS, such as Tonga, are faced with real challenges in discharging their obligations under the WCPF Convention.

In essence, as a member of the WCPFC, Tonga is to pay its assessed contributions annually to the WCPFC, a way of financing the budget of the WCPFC. Historically, the assessed contributions have continually increased over the years and Tonga, with its very limited budget, has to look to other means to meet this obligation. In doing so, Tonga is utilizing its share of its Project Development Fund (PDF) from the US Treaty to cover its assessed contributions to the WCPFC. In addition, implementation and enforcement of the WCPFC decisions carry with them financial implications. Tonga finds it challenging to meet these costs with the limited budget available from the Government, seeing more than 70% of the budget is for staff salary alone, leaving a meagre portion of the budget for everything else. Moreover, the WCPFC and its subsidiary bodies hold annual meetings which members, such as Tonga, attend. The proliferation of WCPFC related meetings and the duration of these meetings draws key officers from an already understaffed national fisheries administration, whom at the national level, deals with various fisheries issues other than tuna. Thus, covering

these prolific meetings can be challenging, let alone effectively participating during these meetings. The lack of in-country planning and strategy further aggravates this problem.

Furthermore, the conservation and management of the tuna resources must be underpinned by an adequate and appropriate legal and policy framework. Keeping in pace with the development and decisions of the WCPFC and incorporating them into the national legal and policy framework is a challenge. In addition, data obligations and reporting obligations are continuous requirements of the WCPFC. However, this is one of the major challenges facing SIDS, such as Tonga including the challenge of implementing and enforcing these WCPFC's decisions.

In conclusion, these challenges are encountered predominantly due to the lack of resources available to Pacific SIDS such as Tonga, whether it's financial, technical, operational or human resources. However, Pacific Island States as coastal States of the WCPO have a vested interest in the success of the conservation and management measures put in place by the WCPFC for the sustainability of tuna and other marine resources under the purview of the WCPFC. Thus, it would be the coastal States who have much to lose should the WCPFC fail. These challenges also present opportunities for coastal States, such as Tonga, and all SIDS to regain control of their marine resources and to maximise the long term, social and economic benefits from these resources for their States within the limits of sustainable resource management. Therefore, it is critical that the challenges discussed are addressed so that Tonga can better fulfil its responsibility as a member of the WCPFC. To this end, some recommendations are made hereunder solely base on the views of the author in the hope to address the challenges discussed and do not reflect the views of any other party, unless otherwise referenced.

5.2 Recommendations

As the challenges are faced largely due to lack of financial, technical, operational and human resources, it follows that these challenges can be mediated with, increase aid in these areas. Generally, these challenges can be mediated with, amongst other things: increase capacity building both through short term and long term capacity building programmes, provision of technical and financial support, assistance in a range of issues and development of long term training attuned to the needs of SIDS in order for Tonga to be able to fully discharge its obligations as a member of the WCPFC. However, whilst there is much needed assistance from all relevant sectors, donors and other sources, there are also some immediate and important actions that the Fisheries Division of Tonga can immediately take, without much aggravation, which directly impacts on the capacity of the Fisheries Division to implement its obligations flowing from the WCPFC. These are identified in the recommendations below and include, *inter alia*:

1. Immediate recruitment to fill current key vacant posts within the Fisheries Division whom all play a direct role in the implementation of the obligations and decisions of the WCPFC at the national level in Tonga. Related to this, is the need for strong leadership within the Division in order to carryout its mandate including efficient and timely implementation of the regional initiatives at the national level as well as strong and effective representation of Tonga's national interests at the regional level.

2. Identifying a liaison officer within the Fisheries Division that shall act as the focal point to facilitate, coordinate and collate international and regional issues, in particular, those relating to WCPFC, at the national level. Tonga's current official focal point for the WCPFC is the Head of Fisheries and that should remain. What is proposed is a liaison officer to keep track of the regional issues and implementation of those issues at the national level, and advise the Head of Fisheries and appropriate staff and stakeholders accordingly. It is recognized that this is a tedious task for the Head of Fisheries whom in his position has a vast range of issues to deal with. The purpose of identifying a liaison officer should also address the challenge to Tonga in keeping track

of its obligations under the WCPFC, the most obvious being, meeting the data and reporting requirements to the WCPFC in a timely manner.

3. Ensure an appropriate mechanism is in place for the identification of appropriate officers for attendance at meetings. Advance identification of these appropriate officer(s) is necessary in order to allow time for proper collation of national views and preparation prior to attendance at these meetings. The FFA calendar of events is available on the FFA website at the start of each year, and is updated throughout the year. This maps out most, if not all, of the meetings relevant to all FFA members, including Tonga. It is advocated that the Fisheries Division do-away with current practice of identification of officer(s) for workshops/trainings/meetings on the fly but plan ahead utilising available information such as the FFA calendar of events. This should alleviate the challenges faced in terms of covering the proliferation of meetings and ensure enough time is allowed for proper preparation to ensure effective participation at these meetings.

4. The views of relevant staff and stakeholders, such as the industry and other line agencies, must also be sought and taken into account at the preparation stage. This preparation stage must assess the impact of propose measures on Tonga. Preparation for fisheries negotiation at the regional level must take a whole Government approach, thereby involving all relevant stakeholders. This is to ensure that Tonga's position at the regional fora is representative of Tonga's national interest as a whole. In addition, enhanced de-briefing mechanisms must be put in place for the officer(s) attending the meeting(s) to go through upon the officer's return. The current practice requires officer(s) to submit a travel report within a certain timeframe upon his/her return. However, the majority of the reports go unread, are a submission or attachment of the record of proceedings of the meeting or are filed without the information reaching the relevant staff or stakeholders. Proper de-briefing process should be in place and be in effect upon the officer(s) return. Presentations upon the officers returned, to inform relevant staff and stakeholders of the results and issues discussed during the meeting, may be utilized to help generate flow of information to relevant stakeholders and staff

also thereby ensuring that the WCPFC decision are understood and implemented at the national level.

5. Technical and financial support is significantly needed for SIDS such as Tonga to help in discharging its responsibilities as a WCPFC member. The requirements of the SIDS are recognized under Article 30 of the WCPF Convention. Article 30(3) requires the WCPFC to establish a fund to facilitate the effective participation of developing States, particularly SIDS. This fund is used to fund the participation of one delegate from SIDS to the WCPFC meetings. Under Part VII of the UNFSA, a fund is established to help build capacity of SIDS to discharge their responsibilities stipulated by the UNFSA. This fund has been utilized in the past to send a additional delegate from most FFA members to WCPFC and its related meetings. The Japanese Trust Fund (JTF), held with the WCPFC, is also accessible to SIDS. Projects related to discharging SIDS obligations, such as data collection and the like can be submitted to the JTF. Increased financial and technical support is needed in order to help SIDS such as Tonga, in their quest to discharge their obligations within the WCPFC. However, as identified, there are some available avenues Tonga can seek technical and financial support from. Thus, it is recommended that Tonga's Fisheries Division be proactive and pursue these avenues with vigour by actively submitting proposals to these funds and others.

6. Formulation of, and constant update of, a Fisheries Division training plan, that takes into account the Division's corporate vision, the current capacity of the Division, and what the Division needs to fulfil its goals and objectives. This is important, particularly for long term training as this requires long absent from the workforce. Currently, the Division is reactive on an *ad hoc* basis, only merely acting to endorse training without vigorously screening contents and benefits of these trainings to the Division. It is recognized that long-term training is crucial to building capacity within the Division however, it must be tied to the Division's vision and mandate, and as such, a training plan is envisaged to address this.

7. Linked to recommendation number 6, Tonga as any other SIDS, needs enhanced and appropriate capacity building in order to better address the challenges discussed. These capacity building projects must be developed within the national context of the particular State, and the needs and goals of the State must drive these initiatives. Hanich *et al* noted that a capacity building and engagement strategy is required that works in-country and builds the capacity of national Governments to prepare for, negotiate and implement its obligations.[420] Such a programme must secure political will and engage and involve leaders that can champion such programme. The involvement and buy-in of leaders and executives is important in order for the programme to work. The capacity building programme can be carried out with both a short and a long term focus. Short term can include a better coordination system to facilitate dialogue and flow of information from and to relevant stakeholders, both in-country and out, to help with preparation for and negotiating at the intended fora. The capacity building programme should also take into account the challenges identified in section 3.2, such as data and reporting obligations, MCS as well as legal and policy. To this end, the training plan proposed in number 6 is essential. In the author's view, areas that currently needs capacity development within the Fisheries Division include, *inter alia*:
    i. Fisheries Economics: to analyze economic implications of propose and current WCPFC measures to Tonga;
    ii. MCS programmes (eg: observer programme, expertise in VMS technicalities);
    iii. Fisheries Management and Planning;
    iv. International and regional negotiation strategy expertise;
    v. Management and leadership.

8. It is recognized that capacity building is the cornerstone to the development of any nation. Therefore, capacity building both at the short-term and long-term level are

[420] Quentin Hanich, Feleti Teo, Martin Tsamenyi, "A collective approach to Pacific islands fisheries management: moving beyond regional agreements", *Marine Policy*, no.34, 2010, pp.89

vital. Some of the long-term opportunities currently available to the Tonga Fisheries Division, and is recognized with appreciation, include, *inter alia*:

i. The UN-NF Fellowship;
ii. FFA-USP Fisheries Postgraduate Scholarship Programme; and
iii. Aid funded scholarships (eg. AusAid, NZAid, Japan government funded).

The above opportunities are some that are currently available, however the Fisheries Division must have a training plan that prioritise training accordingly. It is also proposed that as short term trainings or secondment should be sought from regional agencies to immediately address some of the vital skills lacking within the Division.

9. In closing, it is vital that the whole WCPFC membership, in particular the developed CCMs, give serious consideration to the reality faced by SIDS and their capacity to implement and enforce the CMMs adopted in order for these measures to have their desired effect. To this end, the idea discussed at the 7th Regular Session of the WCPFC that every proposed CMMs should be accompanied by at least a one page impact assessment on SIDS is advocated here. This can be used by individual SIDS as a starting point in further analysing the impact of the propose CMM at the national level.

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