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Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency

Jon Van Dyke
by Jon Van Dyke and Susan Heftel

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TUNA MANAGEMENT IN THE PACIFIC: AN ANALYSIS OF THE SOUTH PACIFIC FORUM FISHERIES AGENCY*

by
Jon Van Dyke**
Susan Heftel***

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** Associate Dean and Professor of Law, University of Hawaii at Manoa; Adjunct Research Associate, Environment and Policy Institute, East-West Center, Honolulu.

*** Third-year law student, University of Hawaii at Manoa; Grantee, Environment and Policy Institute, East-West Center, Honolulu.

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I. INTRODUCTION

A. *The New Law-of-the-Sea Regimes*

During the past several years, most of the South Pacific island nations have claimed 200-mile exclusive economic zones in the oceans around their island boundaries,¹ thus bringing more than six million square miles of the tropical Pacific under national jurisdiction.² These island nations are now debating how to take advantage of their new marine resources.³ Some leaders feel that one important way they can expand their economy is to exploit the highly migratory tunas and bill fishes,⁴ the most significant of the living resources harvested in this region.⁵ These fish roam throughout the South Pacific, moving quickly in and out of the 200-mile zones. Biologists maintain that all nations participating in a region's fisheries must cooperate if the species are to be managed successfully.⁶ The most pressing management question is therefore whether each nation should individually manage the fish within its exclusive economic zone or whether a regional agency should take a regional approach and manage the species with reference to their highly migratory patterns.

Article 64(1) of the Draft Convention on the Law of the Sea (Informal

¹ See, e.g., Krueger & Nordquist, *The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin*, 19 VA. J. INT'L. L. 321 (1979).

² R. KEARNEY, *THE LAW OF THE SEA AND REGIONAL FISHERIES POLICY* 1 (South Pacific Commission Occasional Paper No. 2) (April, 1977) [hereinafter cited as KEARNEY (1977)].

³ See generally *REGIONALIZATION OF THE LAW OF THE SEA* 309-22 (D. Johnston ed. 1978) (Proceedings, Law of the Sea Institute Eleventh Annual Conference, November 14-17, 1977) [hereinafter cited as REGIONALIZATION].

⁴ *PAC. ISLANDS MONTHLY*, Nov., 1978, at 17.

⁵ KEARNEY (1977), *supra* note 2, at 4-5.

⁶ See generally J. JOSEPH & J. GREENOUGH, *INTERNATIONAL MANAGEMENT OF TUNA, PORPOISE, AND BILLFISH* (1979) [hereinafter cited as JOSEPH (1979)]; KEARNEY (1977), *supra* note 2; S. SAILA & V. NORTON, *TUNA: STATUS, TRENDS, AND ALTERNATIVE MANAGEMENT ARRANGEMENTS* (1974); G. KNIGHT, *MANAGING THE SEA'S LIVING RESOURCES, LEGAL AND POLITICAL ASPECTS OF HIGH SEAS FISHERIES* (1977); F. Christy, *Changes in the Law of the Sea and the Effects on Fisheries Management: With Particular Reference to Southeast Asia and the Southwest Pacific* (July 25, 1978) (unpublished draft, ICLARM, Manila, Philippines) [hereinafter cited as Christy]; J. KASK, *TUNA—A WORLD RESOURCE* (The Law of the Sea Institute, Occasional Papers Nos. 1-5) (1968). See also text accompanying notes 18 & 19 *infra*.

Text) calls for the establishment of "appropriate international organizations" to ensure conservation and promote "optimum utilization" of highly migratory species.⁷ The degree of management authority over highly migratory species that Article 64 actually grants to such international organizations is unclear, however, because Article 56 of the 1980 LOS Draft Convention gives coastal nations sovereign rights over all natural resources within their 200-mile economic zones, without making any exception for the highly migratory species. This apparent contradiction will be examined in detail below.⁸

In 1979, the South Pacific Forum (Forum),⁹ a regional organization comprised of the ten self-governing South Pacific island nations along with their larger neighbors Australia and New Zealand, adopted a convention establishing the South Pacific Forum Fisheries Agency (SPFFA)¹⁰ to coordinate regional fishing concerns. Article III of the Convention explicitly recognizes the coastal nations' sovereign rights over all living marine resources, *including the highly migratory species*, within their 200-mile zones.¹¹ This provision rejects the argument made by the United

⁷ Draft Convention on the Law-of-the-Sea (Informal Text) art. 64(1) (1980) [hereinafter cited as 1980 LOS Draft Convention]. The 1980 LOS Draft Convention is the latest of a series of draft conventions to be considered by the Third United Nations Conference on the Law of the Sea (UNCLOS III). After several years of preparations, the first substantive meeting took place in Caracas, Venezuela, in the summer of 1974. Since then, the Conference has been meeting once or twice a year. As of this writing, no final agreement has been reached. See text accompanying notes 276-303 *infra* for a brief discussion of some of the negotiating history of UNCLOS III.

⁸ See text accompanying notes 268-75 *infra*.

⁹ In 1947, six of the developed nations with territories in the South Pacific organized the South Pacific Commission (SPC). These countries were Australia, France, Netherlands, New Zealand, United Kingdom, and the United States. (The Netherlands withdrew in 1962 after its territories achieved independence). As island dependencies gained independence, they joined the Commission on their own right.

The main purpose of the SPC has been to advise the participating countries on ways to improve the well-being of their people. Activities sponsored by the SPC concern marine resources, food, technology, information services, and data analysis. The Commission meets annually at the South Pacific Conference.

Many of the island nations became dissatisfied with the constraints imposed by the Commission. Delegates felt that it was impossible to discuss political matters and that the developed countries dominated the discussions. As a result, these island-countries formed the South Pacific Forum (Forum), which met officially for the first time in August 1971. The current membership consists of Australia, New Zealand, Papua New Guinea, the Solomon Islands, Fiji, the Cook Islands, Kiribati (formerly the Gilbert Islands), Western Samoa, Nauru, Niue, Tuvalu, Tonga, and Vanuatu (formerly the New Hebrides). The operating arm, or "Secretariat" of the Forum is the South Pacific Bureau for Economic Cooperation (SPEC). SPEC's activities to date have focused on developing free trade among its members.

¹⁰ South Pacific Forum Fisheries Agency Convention (Honiara, Solomon Islands, 1979) [hereinafter cited as the SPFFA Convention]. See Appendix A for a complete text of the SPFFA Convention.

¹¹ SPFFA Convention, *supra* note 10, art. III states:

1. The parties to this Convention recognise that the coastal state has sovereign

States and other nations that individual coastal nations' exclusive jurisdiction over highly migratory species conflicts with effective management control over such species, which requires greater regional and international cooperation.¹³ The 1979 SPFFA Convention limits the membership in the SPFFA to Forum members and other nations or territories in the region,¹⁴ thereby excluding the United States, Japan, and other distant water fishing nations.

The SPFFA Convention leaves unresolved many problems concerning the management and conservation of highly migratory species. This paper will provide background information on the disputed rights over these species, outline the current fisheries situation, explore unresolved issues, and analyze the alternative solutions that might be adopted by the South Pacific nations to govern their fishing resources effectively.

B. The Island Nations of the South Pacific

The South Pacific region stretches from Papua New Guinea in the west to Easter Island in the east; the Micronesian islands in the north are also generally included in this region. The dependent islands now excluded from the Forum and the SPFFA include the islands in the United States' political community (Guam, American Samoa, the Northern Marianas, Belau (formerly Palau), the Marshall Islands, and the Federated States of Micronesia), the French Overseas Territories (French Polynesia, New Caledonia, and Wallis and Futuna Islands), and Easter Island (a possession of Chile). The New Hebrides became independent in 1980 under its new name of Vanuata and has been accepted as a member of the Forum and the SPFFA.

The developing islands of the South Pacific share many similar economic problems: low per capita incomes, increasing imports in relation to exports, high unemployment, heavy reliance on foreign aid, and limited land resources.¹⁵ Although most have achieved independence or at least a

rights, for the purpose of exploring and exploiting, conserving and managing the living marine resources, including highly migratory species, within its exclusive economic zone or fishing zone which may extend 200 nautical miles from the baseline from which the breadth of its territorial sea is measured.

2. Without prejudice to Paragraph (1) of this Article the parties recognise that effective co-operation for the conservation and optimum utilisation of the 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.

¹³ See text accompanying notes 18 & 19 *infra*. See, e.g., Taft, *The Third U.N. Law-of-the-Sea Conference: Major Unresolved Fisheries Issues*, 14 COLUM. J. TRANS. L. 112 (1975); G. KENT, *THE POLITICS OF PACIFIC ISLAND FISHERIES* 168 (1980).

¹⁴ SPFFA Convention, *supra* note 10, art. II. For further discussion of this, see text accompanying notes 41-59, 70-72, & 215-20 *infra*.

¹⁵ See G. KENT, *supra* note 12, at 12-53. Nauru is an exception, having a high per capita

self-governing status, many are still largely supported by their former governing countries and by other foreign aid. These island nations desire economic independence and look to the ocean's resources for a means to control their economic destiny.

C. The Fisheries Resources in the South Pacific Region

The principal living resources of economic significance currently harvested in the South Pacific are the various species of highly migratory tunas and billfishes.¹⁶ Of the major tuna species, skipjack (called *aku* in Hawaii) is the most significant in the Pacific,¹⁷ and is thought to be underexploited at present throughout most of its range.¹⁸

Because of the tuna's highly migratory nature, what happens in one portion of a stock's range affects the stock throughout its entire range. Scientists have warned that all nations participating in a region's fisheries must cooperate if conservation and optimum utilization are to be achieved.¹⁹ One commentator has characterized the dangers in the following way: "[I]f coastal states alone were to be given management authority for highly migratory species, they might well find themselves, as a result of overfishing in mid ocean, exercising sovereign rights over 200 miles of empty water."²⁰ Statistical data on the migratory species in the South Pacific region are inadequate.²¹ In order to manage the fisheries resources effectively, the magnitude, distribution, and dynamics of the resource will have to be assessed.

income because of its phosphate deposits.

¹⁶ KEARNEY (1977), *supra* note 2, at 5.

¹⁷ R. KEARNEY, AN OVERVIEW OF RECENT CHANGES IN THE FISHERIES FOR HIGHLY MIGRATORY SPECIES IN THE WESTERN PACIFIC OCEAN AND PROJECTIONS FOR FUTURE DEVELOPMENTS 1, SPEC (79)17 (1979) [hereinafter cited as KEARNEY (1979)].

¹⁸ JOSEPH (1979), *supra* note 6, at 12; *see also* note 321 *infra*.

¹⁹ See sources cited in note 6 *supra*.

²⁰ Joseph, *The Management of Highly Migratory Species*, MARINE POLICY, Oct., 1977, at 275,282 [hereinafter cited as Joseph (1977)].

²¹ KEARNEY (1977), *supra* note 2, at 11. Some international cooperation in tuna research is underway. With support from the United States, France, Japan, New Zealand, and the United Kingdom, the South Pacific Commission sponsored a skipjack tagging project to survey and assess skipjack tuna and bait fish resources in the waters of fourteen countries in the central and western Pacific Ocean. Field work began in October 1977 and approximately 90,000 skipjack have been tagged so far. J. BARDACH & Y. MATSUDA, *FISH, FISHING, AND SEA BOUNDARIES: TUNA STOCKS AND FISHING POLICIES IN SOUTHEAST ASIA AND THE SOUTH PACIFIC* 477 (East-West Center Environment and Policy Institute, Reprint No. 12, Nov., 1980); R. Shomura, *Draft for Comment: Fisheries Aspects of Central and Western Pacific Islands Area* (Southwest Fisheries Center Administrative Report No. 17 H (1977)) [hereinafter cited as Shomura].

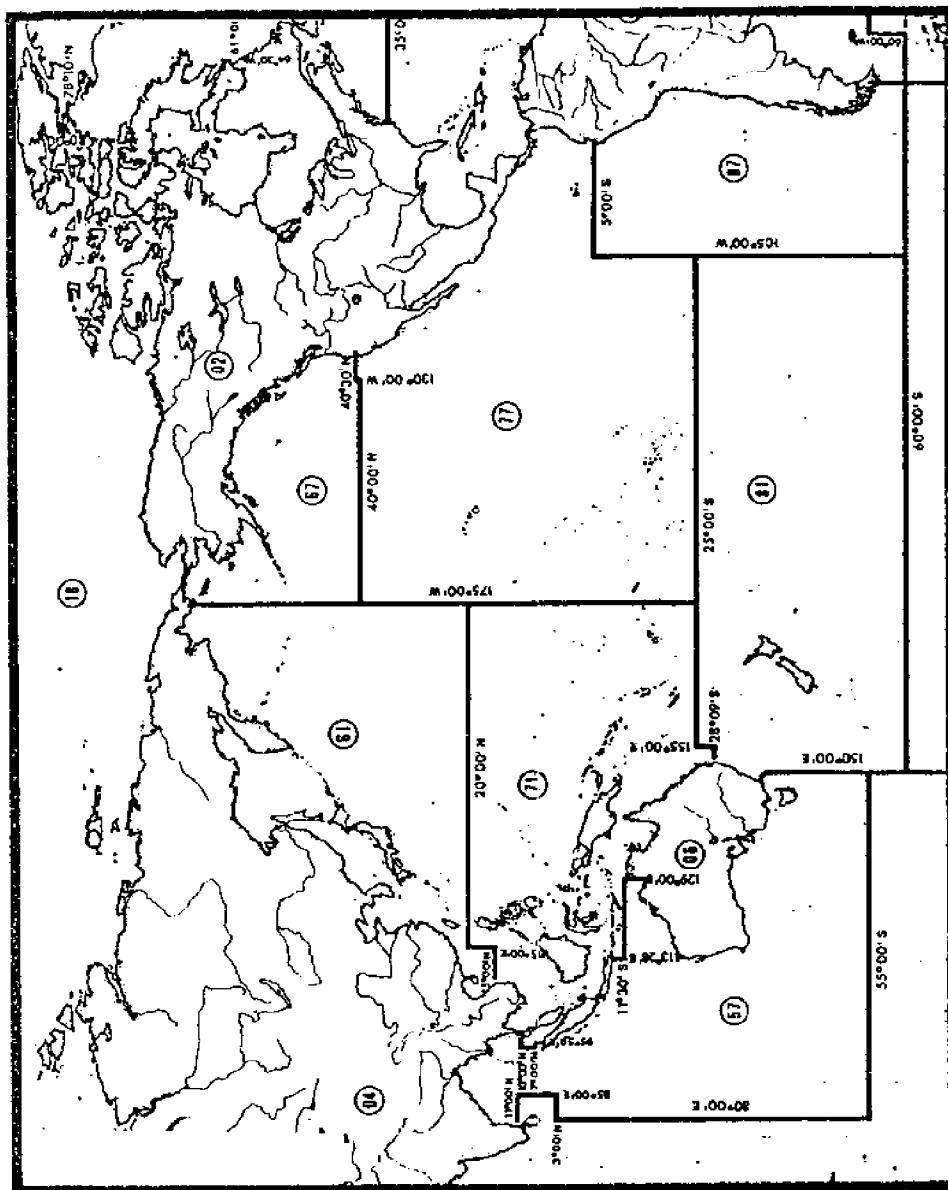
D. The Fishing Industry in the South Pacific Region

Data on the fishing industry in the South Pacific is fragmentary and frequently out of date.²¹ Estimates based on the United Nation's Food and Agricultural Organization (FAO) statistical area 71 (see figure 1), which substantially overlaps with the area of the South Pacific Commission (see figure 2), indicate that total catch of skipjack tuna rose from 205,387 metric tons in 1975 to 363,493 in 1978.²²

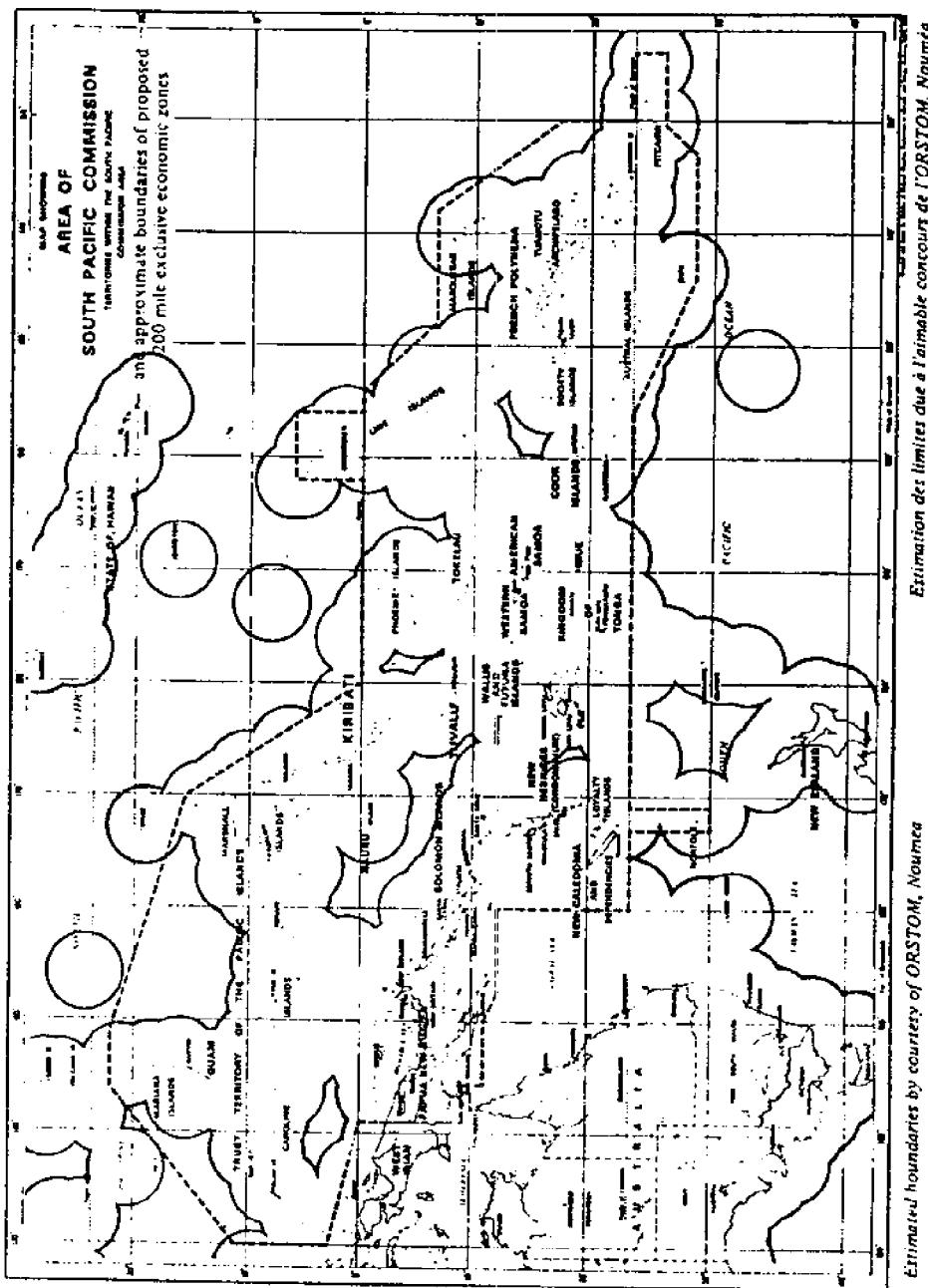
²¹ REPORT BY THE DIRECTOR OF SPEC ON THE ESTABLISHMENT OF A SOUTH PACIFIC FISHERIES AGENCY, Annex 2, SPF(77)13 (1977) [hereinafter cited as SPF(77)13]. See generally G. KENT, *supra* note 12, at 12-53 for a good survey of the fishing industry in the South Pacific.

²² [1978] FAO YEARBOOK OF FISHERY STATISTICS: CATCHES AND LANDINGS 120 (1979). See also KEARNEY (1977), *supra* note 2, at 4; STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 95TH CONG., 2D SKSS., SOUTH PACIFIC REGIONAL OVERVIEW AND SOLOMON ISLANDS INDEPENDENCE CEREMONIES: A TRIP REPORT BY SENATOR JOHN GLENN 9 (Comm. Print 1978) [hereinafter cited as GLENN TRIP REPORT].

FIGURE 1: FAO Statistical Areas²³



³³ [1978] FAO YEARBOOK OF FISHERIES STATISTICS: CATCHES AND LANDINGS (1979).

FIGURE 2: Area of the SPC With Estimated 200-Mile Zones²⁴

²⁴ J. CROSSLAND & R. GRANDPERRIN, FISHERIES DIRECTORY OF THE SOUTH PACIFIC COMMISSION REGION (1979). Reprinted by the courtesy of the SPC. The precise demarcation of each nation's 200-mile exclusive economic zone is still a matter of controversy. The zones as shown in Figure 2 are not official.

Islanders, however, receive only a fraction of this bounty.²⁵ Throughout the 1970's, vessels from the developing island nations took only 10 to 13% of the total tuna catch, while Japanese vessels took 60%, with Korean, Russian, and Taiwanese vessels accounting for most of the remaining catch.²⁶ The island governments have been considering three approaches to expand their economic returns from their fishing resources: (1) Direct participation in fisheries; (2) licensing or catch taxes; and (3) joint ventures with the dominant fishing nations.

1. *Fisheries*

Many of the developing island nations have very small fisheries, and most do not have the capital or the expertise to develop commercial fisheries on their own.²⁷ Several of the less-developed Pacific Island nations even import large quantities of canned fish.²⁸ Papua New Guinea is the only one of the developing nations with a major fishing industry.²⁹

²⁵ G. KENT, *supra* note 12, at 4-10.

²⁶ GLENN TRIP REPORT, *supra* note 22, at 9. The world's tuna fishing operations can be divided into two groups: the longline fisheries, primarily used by Japan, the Republic of Korea, and Taiwan; and the surface fisheries, primarily of the United States and Japan. The longline fishery technique, used to take tuna at great depths, involves setting a main line, usually eighty miles long, containing branch lines with a total of up to 2,000 hooks. Bait fishing and purse seining are both surface fishing methods. In live bait fishing, when schools of tuna are sighted, chummers throw live bait into the ocean to attract and excite the tuna into a feeding frenzy. Fishermen use poles with short lines and lures with barbless hooks. Because purse seining is highly efficient, it has been replacing bait fishing. A large net surrounds the schools of tuna, and is then drawn shut at the bottom to prevent tuna from escaping. See generally JOSEPH (1979), *supra* note 6, at 8-12.

²⁷ For details concerning fisheries and shore facilities of the South Pacific island nations, see G. KENT, *supra* note 12, at 12-53; Shomura, *supra* note 20. The development of South Pacific fisheries has been further enhanced in recent years by development projects from a number of international organizations and individual foreign governments to promote research and development in this field. The Food and Agriculture Organization (FAO) has established a new program to help fisheries development in countries with extended fishing limits, a category that includes all the Pacific island nations. PAC. ISLANDS MONTHLY, Nov., 1979, at 20. The South Pacific Commission has allocated funds for 1980 for marine resource expenditures, including deep-sea fisheries development, research on fish poisoning, and the skipjack survey project. PAC. ISLANDS MONTHLY, Dec., 1979, at 19. The Japanese government has donated substantial sums to some South Pacific countries for fisheries development, especially Papua New Guinea and Fiji. Y. Matsuda & K. Ouchi, Legal and Economic Constraints on Japanese Strategies in Distant-water Tuna Fisheries in the South China Sea and Western Pacific 14-15 (unpublished manuscript in Environment and Policy Institute of the East-West Center, 1980) [hereinafter cited as Economic Constraints]. In 1979, Fiji signed a "technical specification agreement" with Japan, which provides an aid package worth \$2 million for Fiji's fishing industry. This money will pay for a skipjack training boat, a research and development vessel, a rural fishing training laboratory, and an icemaking plant. *Id.* at 55.

²⁸ G. KENT, *supra* note 12, at 92-93.

²⁹ Allen, *Fisheries Development: An Advisor's View*, NEW PAC. MAGAZINE, Jan./Feb.,

The government of Kiribati recently bought a fishing boat and in the spring of 1979 exported thirty metric tons of fish to Japan.³⁰ The Tongan government now operates two longline vessels, which generate some foreign exchange earnings.³¹ French Polynesia's longline fishery has been shrinking in recent years.³² Residents of large population centers in American Samoa and Micronesia heavily fish the nearshore and lagoon resources. Truk and Ponape of the Federated States of Micronesia, the Marshalls, and Guam have very small fishing fleets.³³

2. Licenses

The developing countries of the South Pacific have begun to generate revenue from licensing fees and catch taxes paid by foreign boats fishing in the waters around the islands. Although many have negotiated bilateral agreements with major fishing powers, principally Japan, efforts have not been coordinated on a regional level.³⁴ The United States fishing industry has concluded fishing agreements with the Federated States of Mi-

1979, at 14.

³⁰ Carter, *Kiribati: Free But Red Taped to Britain*, *PAC. ISLANDS MONTHLY*, Sept., 1979, at 23.

³¹ G. KENT, *supra* note 12, at 41.

³² *Id.* at 22.

³³ Allen, *supra* note 29, at 17.

³⁴ G. KENT, *supra* note 12, at 170-71; Kent, *South Pacific Fisheries Diplomacy*, *NEW PAC. MAGAZINE*, Jan./Feb. 1980, at 27; Interview with Dr. Langi Kavaliku, Minister of Education, Works, and Civil Aviation, Tonga, and General Secretary of the Program Planning Committee of the Pacific Islands Conference in Honolulu (Feb. 15, 1980) [hereinafter cited as Interview with Dr. Kavaliku].

In 1979, Japan's payment for fishing fees to New Zealand, Papua New Guinea, the Solomon Islands, and Kiribati totaled over \$6 million. Economic Constraints, *supra* note 27, at 4. Negotiations between Papua New Guinea and Japan to renew their fishing agreement came to a stalemate after Papua New Guinea demanded that Japan pay an annual fee of \$1.25 million, which was also the cost for initial fishing rights. *PAC. ISLANDS MONTHLY*, Aug., 1979, at 59. Fiji and Japan reached their first fishing agreement in the 1960's then renegotiated it in the 1970's. The Solomons made a compact with Japan in 1971. Interview with Dr. Kavaliku *supra*. Kiribati signed a pact with Japan in 1979, *ASIA WEEK*, Jan. 19, 1979, at 36, and is negotiating with Taiwan and South Korea. *NEW PAC. MAGAZINE*, Jan./Feb., 1980, at 58. New Zealand, which has already signed a licensing agreement with South Korea, Russia and Japan, has been discussing Fijian access to historical fishing grounds in New Zealand's exclusive economic zone. Interview with Dr. Kavaliku *supra*; *PAC. ISLANDS MONTHLY*, Feb., 1979, at 74. The new island nation of Tuvalu has been negotiating fishing rights with Japan, *ASIA WEEK*, Jan. 19, 1979, at 36, and Nauru has negotiated fishing agreements with Peru. Interview with Dr. Kavaliku *supra*. The Federated States of Micronesia signed an interim fishing agreement with Japan for calendar year 1979 whereby Japan would pay a fee of \$2 million for 900 fishing permits. *Marianas Variety*, Apr. 20, 1979, at 1, col. 3. The second bilateral agreement between the two countries, the Goods and Services Agreement for calendar year 1980, provided for a direct fee of \$1.8 million as well as a fee of \$300,000 to be paid in goods and services. *COMM. ON RESOURCES AND DEVELOPMENT, STANDING COMM. REP. NO. 1-176*, Cong. of Federated States of Micronesia, 1st Cong. (1979).

cronesia, Belau and the Marshalls, but the United States government thus far has no formal agreements with any of the South Pacific nations.³⁵

3. *Joint Ventures — Fishing, Processing, and Transshipment*

Many of the South Pacific nations have been negotiating for new joint ventures, particularly with Japan.³⁶ Despite some problems, joint ventures between Japan and the South Pacific countries have fared relatively well.³⁷

II. THE FISHERIES CONTROVERSY

A. *Events Contributing to the Current Fisheries Situation in the South Pacific*

Leaders of the member nations of the South Pacific Forum have disagreed on the type of regional fisheries agency they should create. They

³⁵ Speech by William Bodde, Jr., United States Ambassador to Fiji, in Honolulu (March 12, 1981). Previously, Stanley Swerdloff of the Hawaii State Fish and Game Department stated that the United States tuna industry has had little success in negotiating fishing rights in the South Pacific area. Interview with Stanley Swerdloff, Hawaii State Fish and Game Department, in Honolulu (July 11, 1979). But August Felando, general manager of the American Tuna Boat Association, indicated in 1979 that neither the United States tuna industry nor the United States government had yet attempted to negotiate for fishing rights within the island nations' 200-mile zones. Interview with August Felando, general manager of the American Tuna Boat Association, in San Diego, Cal. (Aug. 30, 1979). The American Tuna Boat Association at that time told United States fishermen that they may fish for tuna within 200 miles of a coastal state—but outside the 12-mile territorial zone—and that they should not attempt to negotiate for fishing rights in exchange for licenses or catch fees. Peter Wilson from Papua New Guinea declared about the same time, however, that a few United States vessels had been seeking fishing rights. "There are two or three United States purse seiners operating out here at any one time and they are all quite willing to buy licenses under terms determined by us." Letter from Peter Wilson, Advisor/Consultant, Division of Fisheries, Department of Primary Industry, Papua New Guinea, to Jon Van Dyke (Nov. 2, 1979) [hereinafter cited as Wilson letter].

³⁶ For a detailed description of Japanese joint ventures in the Pacific area, see PAC. ISLANDS MONTHLY, Sept. 1979, at 34-72; G. KANT, *supra* note 12, at 12-53. The governments of Fiji, Papua New Guinea, the Solomon Islands, French Polynesia, Nauru, Ponape, and Belau now participate in joint ventures in tuna fishing, mostly with Japanese corporations but also with American and Australian interests. A fishing and canning operation jointly owned by the Solomon Islands government and a Japanese company has enjoyed exclusive rights in the Solomon Islands' 12-mile zone in return for a 4% government stake. Joint venture operations between the Japanese and the Fijian and the Solomon governments include the freezing, transshipment, and canning of tuna. American-owned companies operate canneries in American Samoa and Papua New Guinea. Star Kist Fish Company, a United States firm, is currently negotiating with Papua New Guinea to construct a tuna cannery in that country. NEW PAC. MAGAZINE, Jan./Feb. 1979, at 48.

³⁷ United States Dep't of Commerce, National Oceanic & Atmospheric Administration, National Marine Fisheries Service Translation No. 31 (March 25, 1978).

have had to resolve internal dissension and conflicts with major world powers, especially the United States.³⁸ At the Forum meeting in Suva, Fiji, October 13-14, 1976, the members declared their intention to establish 200-mile exclusive economic zones, but made no decision on the highly migratory species.³⁹

At the next Forum meeting, held in Port Moresby, Papua New Guinea, August 29-31, 1977, the members decided to establish a South Pacific regional fisheries organization open to "all Forum countries and all countries in the South Pacific with coastal state interests in the region who support the sovereign rights of the coastal state to conserve and manage living resources, including highly migratory species, in its 200-mile zone."⁴⁰ Negotiations to establish the new organization began in Suva during November 1977, at the headquarters of the Forum's "trade secretariat"—the South Pacific Bureau for Economic Cooperation (SPEC). The Forum countries were joined at this meeting by the United States, Chile, France, and the United Kingdom, which participated as voting members in representing their island dependencies in the region. At a later meeting in Suva, June 5-10, 1978, these participants concluded a draft convention.

Two major issues dominated the discussions leading up to the 1978 meeting. The first issue was the type of organization to be established. Some favored a body with a broad membership representing not only the countries whose waters contain the resource, but also the countries who are active in harvesting it.⁴¹ This body's primary aim would be conservation and optimum use of the living resources. Others argued for a body limited to Forum members whose primary aim would be to ensure maximum benefits for the islands. The delegates to the 1978 Suva meeting finally agreed upon the broader-based open-membership organization. Article XV of the 1978 Draft Convention would have opened membership in the organization to South Pacific Forum members, independent states in the region, nations with territories in the region, territories in the region with authorization from the responsible government, *plus* independent nations (outside the region) that share a common interest in the conservation, use, or management of the living resources and whose application was supported by two-thirds of the Convention's parties.⁴²

The participants disagreed sharply on the second issue, whether highly migratory species should be claimed by coastal nations as a part of their exclusive economic zones. The United States argued vigorously that these

³⁸ G. KENT, *supra* note 12, at 1.

³⁹ SPF(77)13, *supra* note 21, at 1.

⁴⁰ 8th South Pacific Forum, Declaration on the Law of the Sea and a Regional Fisheries Agency art. 7 (Port Moresby, Papua New Guinea, Aug. 19-22, 1977).

⁴¹ See generally G. KENT, *supra* note 12, at 166-72.

⁴² South Pacific Bureau for Economic Development (SPEC), South Pacific Regional Fisheries Organization Draft Convention art. XV, SPEC(75) FA-CONV (Suva, Fiji, June 10, 1978) [hereinafter cited as 1978 SPRFO Draft Convention].

species should be excluded, pointing out that given their highly migratory nature, these fish cannot be effectively managed by individual nations.⁴³ The South Pacific nations responded that because highly migratory species are the only significant resources within their zones, they *must* be controlled by the coastal nations.⁴⁴ The 1978 Draft Convention skirted this issue. Article II(1) simply requested that those parties claiming highly migratory species within their zones notify the director of the organization of their claim.⁴⁵

The 1978 Draft Convention would have established a South Pacific Regional Fisheries Organization as a regional coordinating body.⁴⁶ The Organization would have consisted of a Conference of Parties and an Agency which was to be responsible to the Conference. All decisions of the Conference were to be reached by consensus, the so-called "Pacific Way" of resolving disputes, whereby all nations must agree to a particular proposal without taking a formal vote. By developing this consensus method, the participants avoided the difficult question of voting rights for non-Forum nations and their Pacific island dependencies.

The agency anticipated by the 1978 Draft Convention was to have had only advisory powers, and not powers of enforcement, surveillance, or regulation. The agency's major functions were (a) to study the living resources; (b) to provide advice, information, and assistance in fisheries negotiations, the development and implementation of fisheries policies, the issuance of licenses, the collection of fees, and matters pertaining to surveillance and enforcement; (c) to prepare proposals on regional cooperation in conservation and use of the living resources; and (d) to facilitate, without detriment to the sovereign rights of coastal countries, a regional approach to management, licensing, surveillance, and enforcement.

At the Ninth South Pacific Forum meeting in Niue, September 18, 1978, the island nations' leaders rejected the draft convention prepared by lower-level officials at Suva,⁴⁷ because they could not agree whether to allow the United States and other non-Forum states into the agency. Western Samoa, Niue, and the Cook Islands wanted to admit the larger fishing nations into the organizations.⁴⁸ Apparently these smaller island nations wanted to license out their rights to the resources, and thus desired a regional body with broad membership.⁴⁹

⁴³ Interview with Doyle Gates and Robert Iverson, National Oceanic & Atmospheric Administration, National Marine Fisheries Service, in Honolulu (June 29, 1979) [hereinafter cited as Interview with Gates & Iverson]; Taft, *supra* note 12; G. KENT, *supra* note 12, at 168.

⁴⁴ G. KENT, *supra* note 12, at 168.

⁴⁵ 1978 SPRFO Draft Convention, *supra* note 42, art. II(1).

⁴⁶ *Id.* art. III(2).

⁴⁷ The Forum meetings are attended by the prime ministers of the member nations. PAC. ISLANDS MONTHLY, Nov., 1977, at 9.

⁴⁸ PAC. ISLANDS MONTHLY, Nov., 1978, at 17.

⁴⁹ *Id.*

On the other side, Fiji, Papua New Guinea, and the Solomon Islands led the movement against granting membership to the metropolitan nations. Nauru, Tonga, and Kiribati reportedly joined that movement. These developing nations wanted to retain control over their newly-acquired marine resources and feared that an open-membership organization would be dominated by the larger metropolitan powers.⁶⁰ Thus the Prime Minister of the Solomons, Peter Kenilorea, stated:

We do not interfere in the coal mines of America—why should America be able to interfere in the fisheries of the independent Pacific Forum countries? . . . We will not sign that convention until and unless there is a provision to safeguard the immediate concerns of the South Pacific nations. We should have the complete say over our fisheries⁶¹

The Prime Minister's fears were not unfounded. The United States is presently governed by the Fishery Conservation and Management Act of 1976 (FCMA), which bars the United States from recognizing exclusive jurisdiction by coastal nations over migratory fish.⁶² The United States' argument, that these species cannot be managed by individual nations

⁶⁰ The Honolulu Sunday Star-Bulletin & Advertiser, Apr. 29, 1979, § A, at 28, col. 4; General Manager August Felando of the American Tuna Boat Association does not, however, think the United States poses a threat to the island nations and their 200-mile sovereignties. NAT'L FISHERMAN, Apr., 1979, at 49. According to Felando, the United States has never had more than five tuna boats in the South Pacific, and as of April 1979, only three vessels were in South Pacific waters.

⁶¹ NEW PAC. MAGAZINE, March/Apr., 1979, at 9.

⁶² 16 U.S.C. § 1822(e) (1976) states:

NON RECOGNITION—It is the sense of the Congress that the United States Government shall not recognize the claim of any foreign nation to a fishery conservation zone (or the equivalent) beyond such nation's territorial sea, to the extent that such sea is recognized by the United States, if such nation—

- (1) fails to consider and take into account traditional fishing activity of fishing vessels of the United States;
- (2) fails to recognize and accept that highly migratory species are to be managed by applicable international fishery agreements, whether or not such nation is a party to any such agreement; or
- (3) imposes on fishing vessels of the United States any conditions or restrictions which are unrelated to fishery conservation and management.

The statute goes on to say that if a foreign nation does not permit United States vessels to harvest highly migratory species within that nation's coastal waters, the United States must then prohibit imports of tuna and tuna products from that nation, and may prohibit imports of other fish or fish products from any fishery of that nation as appropriate. 16 U.S.C. § 1825 (1976).

As of July 1980, this provision had been invoked to cut off tuna imports from Canada, Peru, Costa Rica, and Mexico because of those nations' refusal to allow United States vessels to harvest tuna in their 200-mile zones. Interview with Brian S. Hallman, United States State Dep't Division of Fisheries, in Washington, D.C. (June 30, 1980) [hereinafter cited as Interview with Hallman]; N.Y. Times, July 13, 1980, § 1, at 10, col. 6 (tuna imports from Mexico banned after seizure of United States fishing boats). See generally G. KNIGHT, *supra* note 6.

because of their widespread patterns of migration, was viewed as puzzling by the Foreign Minister of Papua New Guinea, Ebia Olewale, "particularly when the United States claims management rights over marlin, another highly migratory species, in order to safeguard the interests of its sports fishermen."⁵³

It has also been suggested that the powerful United States tuna industry, which seeks to maintain its access to tuna in the 200-mile zones of other countries, has dictated the United States Government's fishing policy.⁵⁴ Negotiators representing the United States have at times expressed a willingness to be flexible on the migratory fish question. The United States' representatives at the 1978 Niue meeting explained to officials from the island nations that the United States could sign a multilateral treaty recognizing coastal nation jurisdiction over highly migratory species within a 200-mile fishing zone only if the treaty created an appropriate regional management organization.⁵⁵ If such a treaty were ratified by the Senate, it would take precedence over the FCMA, because the most recent prevails when a treaty and a statute conflict⁵⁶ and because the

⁵³ PAC. ISLANDS MONTHLY, July, 1979, at 83. Annex I of the 1980 LOS Draft Convention lists seventeen different categories of "highly migratory species" including marlins, swordfish, sailfish, and sharks as well as eight types of tunas. The 1976 United States statute, however, restricts its definition of "highly migratory species" to "species of tuna which in the course of their life cycle, spawn and migrate over great distances in waters of the ocean." 16 U.S.C. § 1802(14) (1976) (emphasis added). Marlin, swordfish, and sailfish (which are called "billfish") are, in fact, highly migratory. As the director of the Inter-American Tropical Tuna Commission has stated, "Regardless of whether or not billfish are legally categorized as highly migratory species, they are in fact very migratory . . . To be effective, the management of billfish, like the management of tuna, must apply to the entire stocks of animals being considered." JOSEPH (1979), *supra* note 6, at 179 (emphasis added).

⁵⁴ Speech by Ira Wolff, United States Foreign Service Officer, in Honolulu (January 23, 1980).

⁵⁵ Interview with Gates & Iverson, *supra* note 43.

⁵⁶ Whitney v. Robinson, 124 U.S. 190, 194 (1888). Under Article II, § 2, cl. 2 of the United States Constitution, the President has the power to make treaties, "provided two thirds of the Senators present concur." The Senate may be reluctant, however, to pass a treaty requiring the United States to recognize coastal jurisdiction over highly migratory tunas within a South Pacific nation's 200-mile zone. The powerful tuna industry would strongly object to such a treaty because it would set undesirable precedent in other parts of the world where United States vessels fish. Leaders in the tuna industry believe that if countries in the eastern Pacific find that those in the South Pacific receive fishing fees from United States vessels, the industry would face serious trouble in the eastern Pacific. At present, American vessels catch little tuna within the fishing zones of South Pacific nations, about 15,000 tons, compared with the large volume caught within the exclusive economic zones of eastern Pacific countries, approximately 220,000 tons. The United States tuna industry, therefore, has a strong incentive to retain the present United States laws regarding highly migratory tunas. Interview with August Felando, General Manager, American Tuna Boat Association, and James Cary, Executive Director, United States Tuna Foundation, in San Diego, Cal. (Aug. 30, 1979).

The Senate may be more enthusiastic over ratifying a treaty that merely required the United States to recognize jurisdiction over highly migratory species to the extent exercised through a regional organization of the South Pacific, rather than to recognize coastal state

FCMA appears to permit such a formula in any event.⁵⁷ Although the treaty would have to be phrased carefully to meet the concerns of the tuna industry,⁵⁸ the United States representatives felt that it would be acceptable if the treaty created an organization with real power to manage the migratory resource on a regional basis.⁵⁹

The negotiators from the young island nations were not impressed with this "flexibility" at the 1978 meeting. They decided to postpone creation of an open-membership organization until their own sovereign claims over the marine resources were more firmly established.

B. The Current Fisheries Situation: The SPFFA

After rejecting the 1978 draft at Niue, officials from the Forum nations met in Honiara, Solomon Islands, in May 1979 to prepare a second draft convention which was subsequently approved by the leaders of the Forum at their July 1979 meeting in Honiara.⁶⁰ The SPFFA Convention clearly asserts coastal nation sovereignty over migratory species while they are within a 200-mile zone. Article III(1) recognizes that the coastal nation has sovereign rights over the living resources within its exclusive economic zones "for the purposes of exploring and exploiting, conserving and managing the living resources, including *highly migratory species*

^{60.1}

The SPFFA Convention establishes a South Pacific Forum Fisheries Agency consisting of a Forum Fisheries Committee—composed of representatives from all the Forum members—and a Secretariat.⁶¹ Both the

jurisdiction. United States negotiators have agreed to certain provisions in a Latin American proposal for a new international tuna treaty in the eastern Pacific whereby the regional agency would have the power to (1) set an overall quota for yellowfin tuna; (2) allocate portions of the resource to adjacent states (which would exclude the United States); (3) collect fees from member nations for the fish caught; and (4) redistribute the revenue to coastal states based on distribution of the catch. Interview with Dr. James Joseph, Director of Investigation, IATTC, in San Diego, Cal. (Aug. 31, 1979); [1977] IATTC ANN. REP. 55-57 (1978). These negotiations were stalemated as of July 1980 over the size of the allocations that will be given to the coastal nations. See text accompanying notes 90-99 *infra*.

⁶² See text of statute in note 52 *supra*.

⁶³ See note 56 *supra*. The United States tuna industry consists of 150 boats (of which 130 are modern and efficient) based primarily in San Diego, California. The value of the catch as landed is approximately \$400 million.

⁶⁴ See text accompanying notes 254-58 *infra*.

⁶⁵ See text accompanying note 10 *supra*.

⁶⁶ SPFFA Convention, *supra* note 10, art. III(1) (emphasis added).

⁶⁷ SPFFA Convention art. I(2), *supra* note 10, states that "The Agency shall consist of a Forum Fisheries Committee and a Secretariat." The Convention does not specifically explain the membership and structure of the Committee, but the remainder of the Convention indicates that all members are represented on the Committee and that each member has equal voting rights. Interview with W.E. Razzell, then Director of the SPFFA, in Mexico City (Oct. 15, 1979) [hereinafter cited as Interview with Razzell]. See text accompanying note 208 *infra*.

Forum Fisheries Committee and the Secretariat are designed to be consultative and advisory. Neither body has the power to determine the allowable catch or allocate the surplus catch to foreign countries. The Committee's functions include: (a) preparing policy and administrative guidelines for the SPFFA; (b) providing a forum for consultation on common fisheries; (c) carrying out tasks necessary to give effect to the convention; and (d) promoting intraregional coordination and cooperation in fisheries management, relations with distant water fishing countries, surveillance and enforcement, processing and marketing of fish, and accessibility to the 200-mile zones of other parties.⁶²

To oversee these assignments, the Committee appoints a Director of the Agency, who is responsible for hiring a staff and preparing an annual report on the Agency's activities, a draft work program and a budget for the forthcoming year.⁶³ If accepted by the Committee, the annual activities report, budget, and work program are submitted to the Forum for approval.⁶⁴ The Committee holds meetings at least once a year and adopts its own rules of procedure and internal regulations.⁶⁵ The SPFFA Convention urges the Committee to make decisions by consensus,⁶⁶ but departs from the "Pacific Way" by providing for decisions by two-thirds of the voting parties in attendance when consensus is not possible.⁶⁷ Only amendments to the Convention itself require a unanimous vote.⁶⁸

The Secretariat's duties are to: (a) collect, analyze and distribute information on living marine resources, especially the highly migratory species; (b) collect and disseminate information on management, legislation, and agreements adopted by other countries; (c) provide assistance in the development of fisheries policies, negotiations, issuances of licenses, collections of fees, surveillance and enforcement; and (d) establish working arrangements with regional and international organizations, especially the South Pacific Commission.⁶⁹

Membership in the SPFFA is restricted to Forum countries plus other nations or territories *in the region* that are recommended by the Committee and approved by the Forum.⁷⁰ This formula excludes distant water fishing nations, and nations with island dependencies, although it may allow these latter nations to participate indirectly through their dependencies.⁷¹ Whether the governing countries will allow, or legally can allow

⁶² SPFFA Convention, *supra* note 10, art. V.

⁶³ *Id.* art. VI.

⁶⁴ *Id.* art. VI(5).

⁶⁵ *Id.* art. IV(1).

⁶⁶ *Id.*

⁶⁷ *Id.* art. IV(2).

⁶⁸ *Id.* art. XI(2).

⁶⁹ *Id.* art. VII.

⁷⁰ *Id.* art. II.

⁷¹ *Id.* art. IV(5) permits observers to attend meetings. See also text accompanying notes 13 and 41-42 *supra* and 215-20 *infra*.

their dependencies to sign the SPFFA Convention is an unresolved issue.⁷²

Members joining the SPFFA cannot make reservations to the Convention;⁷³ each must accept the Convention without qualifications. Members can withdraw one year after giving written notice.⁷⁴ The Convention enters into force 30 days after the eighth signature by a Forum member.⁷⁵ All Forum members have now signed the Convention.⁷⁶

Contributions from members provide the major funding for the SPFFA, but the Committee may also accept contributions from private or public sources.⁷⁷ Australia and New Zealand each contribute one-third of the SPFFA's current budget, and the other ten members each contribute one-thirtieth.⁷⁸

III. THE SPFFA CONVENTION: UNRESOLVED ISSUES

The SPFFA Convention represents a significant step toward regional cooperation in the South Pacific and toward the creation of a regional fisheries agency. The Convention provides the means by which the governments of the island communities can meet and consult on fisheries problems. It requires its members to collect and distribute critically needed information on the living marine resources and on the management, marketing, and processing of fish.⁷⁹

The SPFFA Convention is, however, a political compromise that only begins to solve tuna management problems. The Convention leaves many issues unresolved and contains certain ambiguous provisions. In order to understand these problems, it is useful to review the conventions of other regional and international fisheries commissions. After this review, the SPFFA Convention can be compared with these other fisheries conven-

⁷² The Cook Islands, a free associated state with New Zealand, is a Forum member, but it has the right unilaterally to seek complete independence from New Zealand at any point. Clark, *Self-Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1, 55 (1980). Puerto Rico, a "free associated state," and the Northern Marianas, a commonwealth of the United States, can achieve independence only with the concurrence of the United States Congress.

The difficult legal problem of whether governing nations can allow their island dependencies to join the SPFFA, and the political question of whether these metropolitan powers will allow their territories and possessions to join, are beyond the scope of this article. See generally M. RIESMANN, *PUERTO RICO AND THE INTERNATIONAL PROCESS* (1975); T. FRANCK, *CONTROL OF THE SEA RESOURCES BY SEMI-AUTONOMOUS STATES* (1978).

⁷³ SPFFA Convention, *supra* note 10, art. X(5).

⁷⁴ *Id.* art. XI(1).

⁷⁵ *Id.* art. X(2).

⁷⁶ Interview with Razzell, *supra* note 61. Ratification of the Convention is discussed at notes 197-201 and accompanying text *infra*.

⁷⁷ SPFFA Convention, *supra* note 10, art. VI(6) (7).

⁷⁸ *Id.* Annex.

⁷⁹ *Id.* art. IX.

tions to focus on the problems and challenges facing the SPFFA.

A. International and Regional Fisheries Commissions

1. The Inter-American Tropical Tuna Commission (IATTC)

The Inter-American Tropical Tuna Commission (IATTC) has operated in the eastern Pacific Ocean since 1950 under the authority of an agreement first negotiated between Costa Rica and the United States.⁸⁰ The IATTC Convention allows any nation fishing in the eastern Pacific Ocean to join, if unanimously approved by the existing members of the organization.⁸¹ Seven other countries subsequently joined the Commission, but Mexico, Costa Rica, and Ecuador have recently withdrawn, leaving only the United States, Canada, France, Japan, Nicaragua and Panama as members.⁸²

From the beginning, the IATTC experienced difficulties, stemming from disagreements between the United States and the Latin American countries.⁸³ One such conflict started in the early 1950's when several Latin American countries claimed that their fisheries jurisdiction extended 200 miles off their coasts.⁸⁴ The United States, the major harvesting nation in the region, argued that because of the highly migratory nature of tuna, they should belong to whomever can catch them, regardless of national fishing zones.⁸⁵ Chile, Peru, and Ecuador disagreed and began seizing United States tuna boats found within their zones.⁸⁶ The United

⁸⁰ W. BAYLIFF, ORGANIZATION, FUNCTION, AND ACHIEVEMENTS OF THE IATTC 1 (IATTC SPECIAL REPORT No. 1, 1975). Convention Between the United States of America and the Republic of Costa Rica for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, 1 U.S.T. 230, T.I.A.S. No. 2044, 80 U.N.T.S. 3 (entered into force March 8, 1950) [hereinafter cited as IATTC Convention].

⁸¹ The IATTC Convention, *supra* note 80, art. V(3) states in pertinent part:

Any government, whose nationals participate in the fisheries covered by this Convention, desiring to adhere to the present Convention, shall address a communication to that effect to each of the High Contracting parties. Upon receiving the unanimous consent of the High Contracting Parties to adherence, such government shall deposit with the Government of the United States of America an instrument of adherence

⁸² Interview with Hallman, *supra* note 52. See also [1978] IATTC ANN. REP. 7 (1979).

⁸³ JOSEPH (1979), *supra* note 6, at 53.

⁸⁴ G. KNIGHT, *supra* note 6, at 50; G. KNIGHT, THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS 707 (1978) [hereinafter cited as KNIGHT (1978)]. Chile, Ecuador, and Peru, for example, signed an international agreement in 1952 resolving to preserve and make available to their respective peoples the natural resources of areas of sea within 200 miles from their coasts. Agreements between Chile, Ecuador, and Peru were signed at the First Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, Santiago, Chile, Aug. 18, 1952. G. KNIGHT, *supra* note 6, at 50. Eventually, all the countries bordering the eastern Pacific extended their fisheries zones to at least 200 miles.

⁸⁵ G. KNIGHT, *supra* note 6, at 50; JOSEPH (1979), *supra* note 6, at 14-15.

⁸⁶ G. KNIGHT, *supra* note 6, at 51.

States responded by offering an economic subsidy under the 1967 Fisher- man's Protective Act⁸⁷ to any United States tuna vessel seized by another country.⁸⁸ Thus began the conflict known as the "tuna war."

A related disagreement concerned catch allocations.⁸⁹ Because studies showed that yellowfin tuna (known in Hawaii as *ahi*) were being overfished, the Commission initiated a regulatory program for the conservation of yellowfin tuna in 1966 by setting an overall annual catch quota to govern the amount that could be harvested (on a first-come-first-served basis) within a defined area called the Commission's Yellowfin Regulatory Area (CYRA).⁹⁰ The Latin America coastal nations argued that because of their proximity to the tuna resource they were entitled to larger shares than they could take under the first-come-first-served approach and demanded that national quotas be established.⁹¹ The distant water fishing nations, especially the United States, refused to recognize any special allocation claims based on resource adjacency.⁹² When the coastal nations threatened to extend their fisheries jurisdiction to 200 miles and exclude all foreign fleets, the treaty members agreed to a temporary compromise; special national allocations were to be reserved from the total quota, but these allocations were based on economic hardship rather than resource adjacency.⁹³ Most of the Latin American coastal nations, still unhappy with the situation, withdrew from the IATTC—Mexico and Ecuador in 1978 followed by Costa Rica in 1979.⁹⁴

The Latin American coastal nations have remained firm in their posi-

⁸⁷ 22 U.S.C. § 1971-1979 (originally enacted Aug. 27, 1954, 68 Stat. 883).

⁸⁸ G. KNIGHT, *supra* note 6, at 51.

⁸⁹ JOSEPH (1979), *supra* note 6, at 14.

⁹⁰ W. BAYLIFF, *supra* note 80, at 24; S. SAILA & V. NORTON, *supra* note 6, at 39. The CYRA is a large area that includes both 200-mile coastal zones and high seas areas.

The staff began a research program in 1950, studying yellowfin and skipjack. On the basis of these studies, estimates were made of the sustainable yield of yellowfin. As fishing efforts increased in the eastern Pacific, studies showed that overfishing of yellowfin was occurring in the early 1960's. Although the staff and the Commission recommended catch quotas, they were not implemented until 1966. W. BAYLIFF, *supra* note 80, at 24.

The IATTC has imposed regulations for yellowfin tuna each year from 1966 until the present, making it the only tuna fishery organization to implement a regulatory scheme. The regulations consist of an overall quota for the CYRA, with all participants competing on a first-come-first-served basis for shares of the overall quota. When the reported catch plus expected catches of unregulated vessels and expected incidental catches equals the quota, vessels must stop fishing for yellowfin. JOSEPH (1979), *supra* note 6, at 53. Each nation must regulate the fishery in such a way that the incidental catch of yellowfin by a vessel does not exceed 15% of its total catch of skipjack, bigeye tuna, bluefish tuna, albacore tuna, billfishes, and sharks. W. BAYLIFF, *supra* note 80, at 26. Figure 3, reprinted from the [1978] IATTC ANN. REP. 132 (1979), shows the extent of the area regulated by the IATTC.

See Figure 3 on next page.

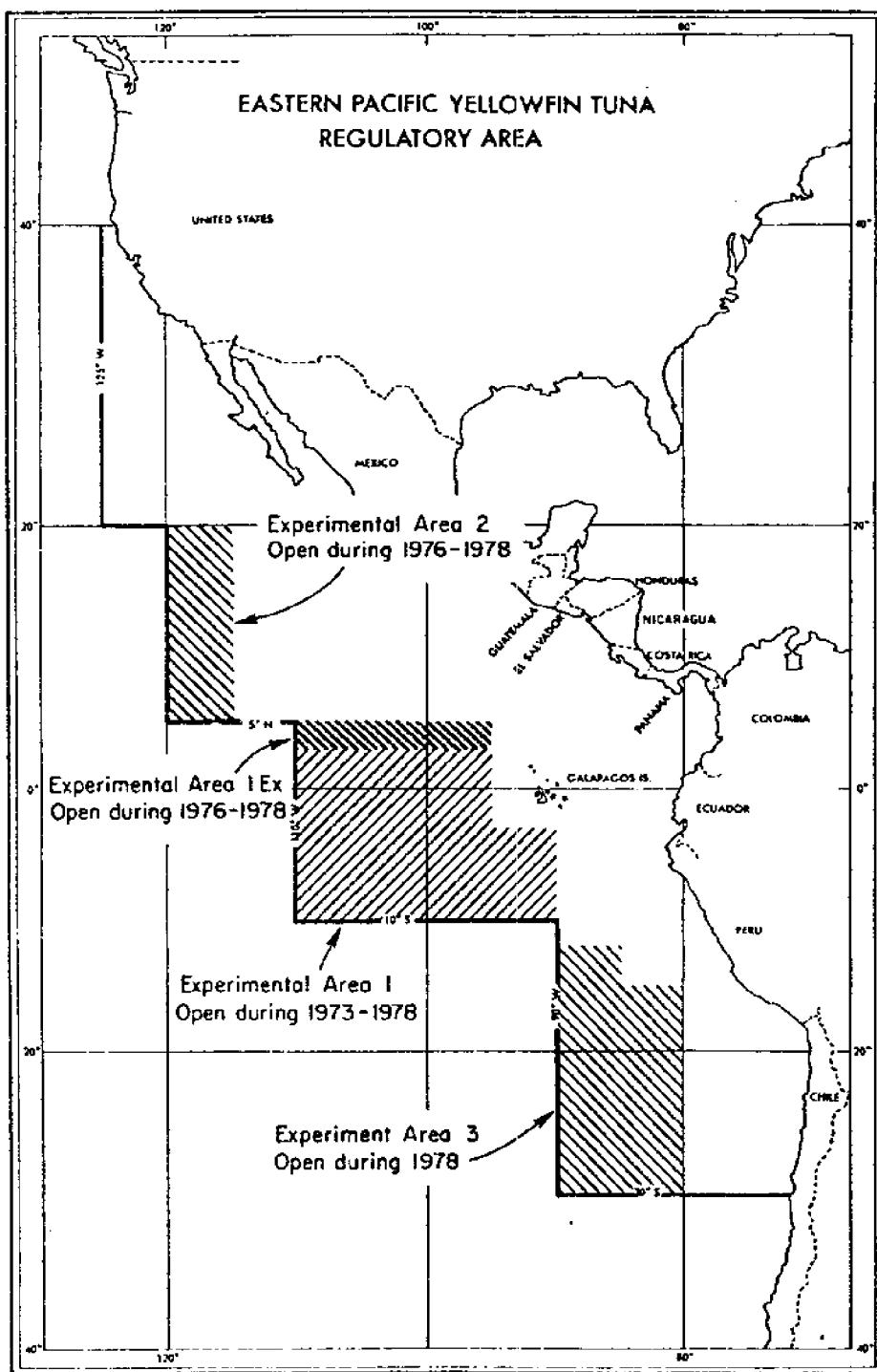
⁹¹ JOSEPH (1979), *supra* note 6, at 53.

⁹² *Id.*

⁹³ *Id.* at 54.

⁹⁴ Interview with Dr. James Joseph, Director of Investigations, IATTC, in San Diego (Aug. 31, 1979); Interview with Hallman, *supra* note 52.

FIGURE 3: CYRA



tion and continue to argue that the IATTC management agreement must be renegotiated on a basis of resource adjacency to give them a greater share of the tuna catch.⁹⁵ Negotiations to create a new regional organization began in 1977, with Mexico and Costa Rica submitting a working draft to a meeting in Costa Rica of representatives from the nations bordering on the eastern Pacific Ocean plus all the remaining members of the IATTC.⁹⁶ The United States presented its own draft convention a few months later, and then in January 1979, Mexico, Costa Rica, and the United States jointly introduced a Draft Convention on Tuna Conservation and Fisheries in the Eastern Pacific Ocean.⁹⁷ This draft convention left several key articles blank because of differences which still remain unresolved through subsequent negotiations. Attempts to negotiate this long-term agreement were set aside in 1979, and the nations tried to conclude simply an interim agreement to last three years.⁹⁸

By mid-1980, the positions had further hardened and prospects for a new agreement—interim or otherwise—do not now seem good. The Mexicans have taken the position that coastal nations should have national quotas equal to the entire amount of tuna caught in their 200-mile national zones, leaving to the distant water fishing nations only the tuna beyond the 200-mile limit or that which the coastal nation cannot harvest.⁹⁹

Although the original IATTC Convention is still in force as of 1981 for only six nations, the organizational structure is nonetheless worth evaluating. The IATTC Convention establishes a Commission as its governing body; each member nation has one vote and decisions require unanimous agreement.¹⁰⁰ The Commission's principal duties are to study the tuna's

⁹⁵ [1977] IATTC ANN. REP. 56 (1978).

⁹⁶ *Id.*; Letter from Brian S. Hallman, Office of Fisheries Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, Dep't of State to Jon Van Dyke (Jan. 28, 1980) [hereinafter cited as Hallman Letter].

⁹⁷ Hallman Letter, *supra* note 96. 1979 Draft Convention on Tuna Conservation and Fisheries in the Eastern Pacific Ocean [hereinafter cited as 1979 Eastern Pacific Draft Convention].

⁹⁸ Hallman Letter, *supra* note 96.

⁹⁹ About 65-70% of the tuna caught in the Commission's Yellowfin Regulatory Area are caught within 200 miles of the west coast of South America. The 1980 Mexican proposal was that the coastal states should be allocated rights to 65-70% of the entire annual catch quota. Under this proposal, if the coastal nation could not harvest its quota, the surplus would be available to other nations. Because the United States harvested about 65-70% of the tuna yearly as of 1980, this proposal would severely reduce the catch of the United States fleet. In earlier years, United States vessels caught 90% of these fish. The United States tuna industry and the United States government have been, therefore, unreceptive to the Mexican initiative. Interview with Hallman, *supra* note 52. See notes 118-23 *infra*.

¹⁰⁰ IATTC Convention, *supra* note 80, art. I(8) states: "Each national section shall have one vote. Decisions, resolutions, recommendations, and publications of the Commission shall be made only by a unanimous vote." Under the Rules of Procedure, amendments to rules can be adopted only by a unanimous vote. Inter-American Tropical Tuna Commission, Rules of Procedure, Rule IV, *reprinted in* [1950-51] IATTC ANN. REP. annex (1952). Votes

biology and recommend proposals for joint action by the member nations to maintain fish levels at the maximum sustainable catch.¹⁰¹ The Com-

may be obtained by mail or by other means of communication when voting is conducted between meetings or in cases of emergency. *Id.* rule V.

The Convention requires the Commission to meet at least once each year, Article I(6), but in recent years more than one meeting has been held each year. W. BAYLIFF, *supra* note 80, at 10. Members may use either English or Spanish, the official languages of the Commission, during meetings and may obtain translations upon request. IATTC Convention, *supra* note 80, art. I(14).

The area covered by the Convention is the eastern Pacific Ocean. The Commission must also examine other areas to understand the resources of the eastern Pacific Ocean, because yellowfin, skipjack, and other species of concern travel from east to west across the Pacific Ocean. Scientists have pointed out that IATTC's geographical area of responsibility is considerably less than the ranges of some of the tuna stocks exploited in the eastern Pacific Ocean. Joseph, *Scientific Management of the World Stocks of Tunas, Billfishes, and Related Species*, 30 CANADA FISHERIES RESEARCH BOARD J. 2476, 2479 (1973) (hereinafter cited as Joseph (1973)); Joseph, *Problems Associated with the Exploitation and Management of Tunas and Billfishes*, in *TRANSACTIONS: FORTIETH NORTH AMERICAN WILDLIFE AND NATURAL RESOURCES CONFERENCE* 63, 69 (1975) (hereinafter cited as Joseph (1975)).

The species of fish covered by the Convention are (1) yellowfin tuna, (2) skipjack tuna, (3) baitfish, and (4) other kinds of fish taken by tuna fishing vessels. IATTC Convention, *supra* note 75, art. II(1). Yellowfin catches have exceeded those of any other species in most years, followed by skipjack, and the IATTC staff has paid particular attention to these two species. W. BAYLIFF, *supra* note 80, at 4-5.

¹⁰¹ IATTC Convention, *supra* note 80, art. II states:

The Commission shall perform the following functions and duties:

1. Make investigations concerning the abundance, biology, biometry, and ecology of yellowfin (*Neothunnus*) and skipjack (*Katsuwonus*) tuna in the waters of the eastern Pacific Ocean fished by the nationals of the High Contracting Parties, and the kinds of fishes commonly used as bait in the tuna fisheries, especially the anchoveta, and of other kinds of fish taken by tuna fishing vessels; and the effects of natural factors and human activities on the abundance of the populations of fishes supporting all these fisheries.

2. Collect and analyze information relating to current and past conditions and trends of the populations of fishes covered by this Convention.

3. Study and appraise information concerning methods and procedures for maintaining and increasing the populations of fishes covered by this Convention.

4. Conduct such fishing and other activities, on the high seas and in waters which are under the jurisdiction of the High Contracting Parties, as may be necessary to attain the ends referred to in subparagraphs 1, 2, and 3 of this Article.

5. Recommend from time to time, on the basis of scientific investigations proposals for joint action by the High Contracting Parties designed to keep the populations of fishes covered by this Convention at those levels of abundance which will permit the maximum sustained catch.

6. Collect statistics and all kinds of reports concerning catches and the operations of fishing boats, and other information concerning the fishing for fishes covered by this Convention, from vessels or persons engaged in these fisheries.

7. Publish or otherwise disseminate reports relative to the results of its findings and such other reports as fall within the scope of this Convention, as well as scientific, statistical, and other data relating to the fisheries maintained by the nationals of the High Contracting Parties for the fishes covered by this Convention.

Based on the research of the scientific staff, the Commission makes recommendations, as necessary, to the member states to take appropriate action to maintain the fish populations

mission appoints a Director of Investigations who is responsible for carrying out the technical, scientific, and administrative functions of the Commission with the assistance of an appointed staff.¹⁰² The IATTC is the only tuna organization with an independent, permanent, scientific staff which is adequately funded to carry out an effective research and management program.¹⁰³ Unlike other tuna organizations, the IATTC does not have to rely on potentially biased scientists from member countries for its data.¹⁰⁴

The IATTC Convention has no enforcement provisions. Each member nation agrees to adopt and enforce Commission regulations pertaining to its vessels.¹⁰⁵ Unfortunately, not all members have been physically able or politically willing to enforce the conservation regulations, and so enforcement has not been uniform.¹⁰⁶

Nonetheless, the IATTC management program for yellowfin has been relatively effective in maintaining the stock at desirable levels.¹⁰⁷ The organization's "total catch quota" which produces an annual tuna "free-for-all" has, however, caused not only a breakdown among the members but also over-capitalization and economic waste.¹⁰⁸ Because this regulatory approach places no limits on entry, it encourages intense competition and national fleets have consequently become increasingly large and efficient. The yellowfin open season has decreased from ten months in 1966 to fewer than three months in 1975.¹⁰⁹ When the yellowfin catch limit is reached, the vessels either fish for other tuna species, such as skipjack or

at the proper level. The member states are responsible for enacting the necessary legislation. W. BAYLIFF, *supra* note 80, at 14.

¹⁰² IATTC Convention, *supra* note 80, art. III; Joseph (1973), *supra* note 100, at 2477. According to Article I(13), the Director of Investigations is in charge of:

- (a) the drafting of programs of investigations, and the preparation of budget estimates for the Commission;
- (b) authorizing the disbursement of the funds for the joint expenses of the Commission;
- (c) the accounting of the funds for the joint expenses of the Commission;
- (d) the appointment and immediate direction of technical and other personnel required for the functions of the Commission;
- (e) arrangements for the cooperation with other organizations or individuals in accordance with paragraph 16 of this Article;
- (f) the coordination of the work of the Commission with that of organizations and individuals whose cooperation has been arranged for;
- (g) the drafting of administrative, scientific and other reports for the Commission;
- (h) the performance of such other duties as the Commission may require.

¹⁰³ Joseph (1975), *supra* note 100, at 67; see text accompanying notes 133-34, 152-54, and 175-77 *infra* for comparisons.

¹⁰⁴ See text accompanying notes 135-38 *infra*.

¹⁰⁵ W. BAYLIFF, *supra* note 80, at 28.

¹⁰⁶ Joseph (1977), *supra* note 19, at 280. For a comparison with other organizations, see text accompanying notes 142-43 *infra*.

¹⁰⁷ JOSEPH (1979), *supra* note 6, at 14.

¹⁰⁸ *Id.*; S. SAILA & V. NORTON, *supra* note 6, at 39.

¹⁰⁹ S. SAILA & V. NORTON, *supra* note 6, at 24-26.

secondary market species not yet fully exploited, or move on to other areas. The tremendous acceleration in fleet growth since the mid-1960's has meant decreased productivity for each individual vessel.¹¹⁰ The catch in tons of tuna per ton of vessel carrying capacity, for example, declined from 5.0 in 1967 to 2.3 in 1975. This decrease in the eastern Pacific has also forced the expansion of fishing by eastern Pacific fleets westward and into the Atlantic.

Although the jointly introduced Draft Convention on Tuna Conservation and Fisheries in the Eastern Pacific Ocean (1979)¹¹¹ (1979 Eastern Pacific Draft Convention) left many issues unresolved, it still merits review. The IATTC is one of the world's oldest and most active regional fisheries organizations, and the draft convention focuses on some of the conflicts between major fishing nations and coastal nations, and provides some insights into the future of any tuna organization in the eastern Pacific.

The 1979 Eastern Pacific Draft Convention would grant the tuna organization more management powers than does the current IATTC Convention. Under the 1979 draft, the IATTC's responsibilities would include setting the total catch quota, assessing, collecting, and redistributing fishing fees, determining national annual allocations, establishing a uniform system of sanctions, and maintaining an international inspection program. The Organization would no longer use the system of a "total catch quota" on a first-come-first-served basis, but would instead guarantee annual allocations from the total quota to certain members.¹¹² It would require each member to purchase an annual "fishery access certificate" for each of its vessels.¹¹³ The Secretariat would then distribute the proceeds among coastal nations in proportion to the concentration of fish within their respective 200-mile zones.¹¹⁴

The 1979 Eastern Pacific Draft Convention also would establish a uniform system of sanctions, and members would be required to adopt the necessary internal legislation to carry out their enforcement responsibilities.¹¹⁵ Vessels of member nations would keep a daily logbook of their fishing operations and obtain position-fixing devices sanctioned by the

¹¹⁰ JOSEPH (1979), *supra* note 6, at 15.

¹¹¹ The 1979 Eastern Pacific Draft Convention would establish an Organization consisting of a Conference of member nations and a Secretariat, which would be further divided into a scientific and administrative section. The Conference is the decision-making body of the Organization; each member has one vote in the Conference and decisions must be made unanimously. 1979 Eastern Pacific Draft Convention, *supra* note 97, arts. 5, 9(4). These provisions are discussed at notes 210-11 *infra*.

¹¹² *Id.* arts. 13, 15, 16, 17. Only species listed in Section A of Annex I would be subject to an overall catch limit. *Id.* art. 13(1)(a). At the time of this writing, yellowfin is the only species listed in Section A.

¹¹³ *Id.* art. 14.

¹¹⁴ *Id.* art. 19.

¹¹⁵ *Id.* art. 20(6).

Organization.¹¹⁶ The Conference would establish and maintain an international inspection program to train and designate national and international inspectors, and set rules and regulations for conducting inspections.¹¹⁷

Despite agreement on these provisions, the Latin American nations and the United States continue to battle over other important issues,¹¹⁸ the most divisive being the annual guaranteed allocations.¹¹⁹ Adoption of the Mexican's position—that the coastal nations are entitled to *all* the tuna found within their 200-mile zones and thus that they must receive allocations equal to the tuna traditionally caught in their areas—would sharply curtail the activities of the United States fishing fleet.¹²⁰ The United States agrees that coastal nations should receive a preference based on the concentration of tuna in their 200-mile zones. The United States argues, however, that a scheme giving coastal nations *all* the tuna in their zones would ignore the historical and traditional fishing activities of the United States tuna fleet,¹²¹ and the migratory nature of tuna.¹²² This issue is not likely to be resolved quickly and could disrupt tuna management in the region for years to come.¹²³

The United States and the Latin American nations also disagree over the amount of fees to be paid for fishing certificates. The United States has proposed that a specified dollar amount be paid per net registered ton of the vessel. Each vessel would pay a fee of \$100 per ton (or approximately \$80,000 per vessel) at the beginning of each year, to be divided among the coastal nations in proportion to the percentage of fish caught in each zone.¹²⁴ The Latin American nations, on the other hand, favor a payment of 6% of the commercial value of the catch.¹²⁵

Finally, the nations disagree on membership eligibility for nations that are neither coastal nations of the eastern Pacific nor former IATTC members.¹²⁶ The United States would allow any nation to become a member of the Organization provided the Conference unanimously agreed.¹²⁷ The Latin American nations would keep out new nations and argue that mem-

¹¹⁶ *Id.* art. 21(2) (3).

¹¹⁷ *Id.* art. 21(5).

¹¹⁸ Hallman Letter, *supra* note 96; Interview with Hallman, *supra* note 52.

¹¹⁹ See text accompanying notes 90-94 *supra*.

¹²⁰ See note 99 *supra*.

¹²¹ See note 99 *supra*, and text accompanying notes 227-29 *infra*.

¹²² Interview with Hallman, *supra* note 52.

¹²³ The legal issues raised by this dispute are analyzed *infra*, text accompanying notes 221-33.

¹²⁴ Interview with Hallman, *supra* note 52. Because the fee would be paid at the beginning of each year, no vessel would have an incentive to lie and could be relied on to keep accurate records as to the location of its catch. These data could also be checked through a transponder-satellite monitoring system.

¹²⁵ 1979 Eastern Pacific Draft Convention, *supra* note 97, Annex II(1).

¹²⁶ *Id.* art. 3.

¹²⁷ *Id.*

bership should be open only to those nations that have fished regularly and substantially in the area prior to October 1, 1978, and that receive the Conference's unanimous approval.¹²⁸

2. *The International Commission for the Conservation of Atlantic Tunas (ICCAT)*

The Convention for the Establishment of the International Commission for the Conservation of Atlantic Tunas (ICCAT Convention), signed in Rio de Janeiro in 1966, covers the Atlantic Ocean and its adjacent seas.¹²⁹ The ICCAT is responsible for the study of tuna and other fish species exploited in tuna fishing within the convention area that are not under investigation by another international organization.¹³⁰ It is open for membership to any United Nations member or any of the United Nations' specialized agencies.¹³¹ Members contribute funds on the basis of catch and utilization.¹³²

The ICCAT has a minimal staff—an Executive Secretary and a few administrative and clerical assistants.¹³³ Because of its minimal funding for scientific research and programs, the ICCAT lacks adequate scientific data.¹³⁴ Despite recent efforts to increase the budget, the collection of basic catch and effort data and the implementation of biological studies remain the responsibilities of the individual member governments.¹³⁵

Members have disagreed on the need to establish catch quotas. Their conflicting views stem from differences in scientific opinion¹³⁶ and from fears by members that statistical information reflects the biases of a scientist's country rather than an impartial report of the data.¹³⁷ During meetings, ICCAT members accuse each other's scientists of presenting biased data, and they are consequently unable to make much progress in the management of the species.¹³⁸ Thus, agreement has not yet been reached on catch quotas for yellowfin and northern bluefin tuna notwithstanding.

¹²⁸ *Id.*

¹²⁹ Joseph (1973), *supra* note 100, at 2477.

¹³⁰ *Id.*

¹³¹ *Id.* As of Dec., 1980, the member nations of the ICCAT were Angola, Benin, Brazil, Canada, Cape Verde, Cuba, France, Gabon, Ghana, Ivory Coast, Japan, Republic of South Korea, Morocco, Portugal, Senegal, Zimbabwe, Spain, the United States, and the Union of Soviet Socialist Republics. JOSEPH (1979), *supra* note 6, at 18.

¹³² Joseph (1973), *supra* note 100, at 2479.

¹³³ *Id.* at 2478.

¹³⁴ JOSEPH (1979), *supra* note 6, at 18.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Interview with Clifford Peterson, Assistant Director, IATTC, in San Diego, Cal. (Aug. 30, 1979).

¹³⁸ *Id.*

standing many observers' concern over the condition of these stocks.¹³⁹

ICCAT members have, however, agreed on a few regulations.¹⁴⁰ They have set minimum size limits for yellowfin and northern bluefin tuna, and members are cooperating to limit fishing mortality for the northern bluefin to recent levels.¹⁴¹ Each member government is responsible for enforcing the size limits for its own vessels.¹⁴² As with the IATTC,¹⁴³ the enforcement has neither been uniform nor adequate.

3. *The Indian Ocean Fishery Commission (IOFC) and the Indo-Pacific Fisheries Commission (IPFC)*

The Indian Ocean Fishery Commission (IOFC) and the Indo-Pacific Fisheries Commission (IPFC) are even more primitive in structure than the ICCAT. The IOFC was established in 1967 by the Council of the United Nations Food and Agricultural Organization (FAO) under a mandate of the FAO Constitution.¹⁴⁴ This Commission's geographical area of responsibility covers the Indian Ocean and adjacent seas (excluding the Antarctic area), an area broad enough to encompass the range of most of the exploited stocks.¹⁴⁵ The Commission is permitted to study any of the species of living marine resources in this area.¹⁴⁶

The IPFC was formed in 1948, also under the mandate of the FAO Constitution.¹⁴⁷ The IPFC's area of responsibility includes the marine

¹³⁹ JOSEPH (1979), *supra* note 6, at 18.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 19.

¹⁴³ See text accompanying notes 105-06, *supra*.

¹⁴⁴ Joseph (1973), *supra* note 100, at 2478. Constitution of the Food and Agricultural Organization art. VI(1). The IOFC's membership includes over thirty-five nations. Discussions were held in 1977 and again in early 1980 as to the possible dismantling of the IOFC and its replacement with a number of smaller regional bodies. IOFC/80/9 (Dec. 1979).

¹⁴⁵ Joseph (1973), *supra* note 100, at 2478; Joseph (1975), *supra* note 100, at 69.

¹⁴⁶ The objectives of the IOFC are:

1. to promote, assist, and coordinate national programs over the entire field of fishery development and conservation;
2. to promote research and development activities in the area through international sources, and in particular international aid programs;
3. to examine management problems, with particular reference (because of the need to take urgent action) to those relating to the management of offshore resources.

Joseph (1973), *supra* note 100, at 2478.

¹⁴⁷ The stated functions and duties of the IPFC are:

- a. To formulate the oceanographical, biological and other technical aspects of the problems of development and proper utilization of living aquatic resources;
- b. To encourage and co-ordinate research and application of improved methods in everyday practice;
- c. To assemble, publish or otherwise disseminate oceanographical, biological and other technical information relating to living aquatic resources;
- d. To recommend to Members such national or co-operative research and develop-

and fresh waters of the Indo-Pacific region,¹⁴⁸ an area that apparently extends as far east as the fisheries of Hawaii and as far west as those of India and Sri Lanka.¹⁴⁹ None of the independent island nations of the South Pacific has, however, joined this organization.¹⁵⁰ No restrictions are placed on the species that can be studied.¹⁵¹

Neither commission employs a permanent secretariat or a research staff, nor has either implemented a regulatory program,¹⁵² and thus depend on working groups of scientists affiliated with other organizations.¹⁵³ Consequently, progress has been slow in collecting adequate statistical data, assessing the impact of the fisheries on the stocks of fish, and making recommendations for management.¹⁵⁴ These two commissions have no provision for an operating budget in their founding documents, and must rely on the FAO for support.¹⁵⁵ Membership is restricted to United Nations members,¹⁵⁶ a requirement that excludes Taiwan, which is active in tuna fishing in the regions.

Stock assessment studies have been made by a special ad hoc group of experts serving both commissions.¹⁵⁷ Concerned over the condition of certain fisheries in both the western Pacific and Indian Oceans, the group

ment projects as may appear necessary or desirable to fill gaps in such knowledge;

e. To undertake, where appropriate, co-operative research and development projects directed to this end;

f. To propose, and where necessary to adopt, measures to bring about the standardization of scientific equipment, techniques and nomenclature;

g. To extend its good offices in assisting its Members to secure essential material and equipment;

h. To report upon such questions relating to oceanographical, biological and other technical problems as may be recommended to it by Members or by the Organization [FAO] and other international, national or private organizations with related interests;

i. To transmit biennially to the Director-General of the Organization a report embodying its views, recommendations and decisions, and make such other reports to the Director-General of the Organization as may seem to be necessary or desirable. Reports of the committees and working parties of the Council provided for in Article III of this Agreement shall be transmitted to the Director-General through the Council.

Agreement For the Establishment of the Indo-Pacific Fisheries Council, Feb. 26, 1948, as amended, Jan. 20, 1961, art. IV. 418 U.N.T.S. 348. As of May 1980, the membership of the IPFC included Australia, Bangladesh, France, Indonesia, Japan, the Republic of South Korea, Malaysia, Nepal, New Zealand, Philippines, Sri Lanka, Thailand and the United Kingdom.

¹⁴⁸ *Id.* art. V.

¹⁴⁹ Shomura, *supra* note 20, at 5.

¹⁵⁰ See note 147 *supra*, for the list of current members of the IPFC.

¹⁵¹ Shomura, *supra* note 20, at 4.

¹⁵² JOSEPH (1979), *supra* note 6, at 19.

¹⁵³ Joseph (1975), *supra* note 100, at 67.

¹⁵⁴ *Id.*

¹⁵⁵ Joseph (1973), *supra* note 100, at 2479.

¹⁵⁶ JOSEPH (1979), *supra* note 6, at 21.

¹⁵⁷ *Id.* at 20.

strongly recommended that the commissions be given the authority and funding necessary to collect basic data on harvesting activities and the habits of the major species.¹⁶²

4. *The International Whaling Commission (IWC)*

After a disastrous whaling season in 1945-1946 that demonstrated once again how depleted the whale stocks had become, fourteen nations convened in 1946 to draft the International Convention for the Regulation of Whaling,¹⁶³ which established the International Whaling Commission (IWC).¹⁶⁴ Although whales are mammals and not fish, and present problems different from those associated with tuna, the IWC is nonetheless a relatively highly evolved international organization concerned with ocean harvesting.

The IWC originally established an overall catch quota expressed in terms of the "blue-whale unit."¹⁶⁵ One blue whale equalled one unit, and other whales were valued at some fraction of this unit.¹⁶⁶ Whaling ships primarily sought the blue whale, the most valuable species, until it was depleted to the point of commercial extinction. As blue whale catches fell, whaling vessels shifted their efforts first to the finback whale and then to the sei whale, with similar results. Whalers understood that it was in their best interest to catch whales as rapidly as possible before the overall quota was reached and the season closed. Companies invested in bigger and faster boats that could cover more area in a shorter period, resulting in what has become known as "The Whaling Olympics." The two problems that have developed in the eastern Pacific tuna industry—over-capitalization and economic waste—occurred in similar fashion in the whaling industry.¹⁶⁷

In 1971, the IWC abandoned the "blue-whale unit" approach, and be-

¹⁶² *Id.*

¹⁶³ International Convention for the Regulation of Whaling, Dec. 2, 1946, Schedule of Whaling Regulation, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72 [hereinafter cited as IWC Convention]. Although the Schedule has been frequently amended, the Convention has been amended only once, in 1956. Protocol to the International Convention for the Regulation of Whaling, signed under Nov. 19, 1956, 10 U.S.T. 952, T.I.A.S. No. 4228, 338 U.N.T.S. 366 (entered into force, May 4, 1959).

¹⁶⁴ IWC Convention, *supra* note 159, art. III(1). A complete discussion of the IWC is contained in Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment* (pts. 1 & 2), 6 ECOLOGY L.Q. 323, 571 (1977). As of 1979 the members of the IWC included Argentina, Australia, Brazil, Canada, Chile, Denmark, France, Iceland, Japan, Republic of South Korea, Mexico, Netherlands, New Zealand, Norway, Panama, Peru, Seychelles, Zimbabwe, Spain, Sweden, Union of Soviet Socialist Republics, United Kingdom, and the United States.

¹⁶⁵ IWC Convention, *supra* note 159, schedule, § 8(a).

¹⁶⁶ *Id.* § 8(b).

¹⁶⁷ See text accompanying note 108 *supra*.

gan setting quotas by species.¹⁶⁴ The species-quota approach has proved much more effective in conserving whales.¹⁶⁵ Under this scheme, a total allowable catch is established for each species. Because no national quotas have been established, however, nations still compete on a first-come-first-served basis.

Under the IWC Convention, each member nation has one vote.¹⁶⁶ The Commission has the authority to promulgate regulations that apply to factory ships, land stations, and whale catchers under the jurisdiction of the member nations.¹⁶⁷ If any member objects to an amendment to a regulation within ninety days of the vote, the amendment is not binding on that nation.¹⁶⁸ A member can withdraw from the convention by giving six months notice,¹⁶⁹ and members have often employed threats of withdrawal to, in effect, veto a proposed conservation measure.¹⁷⁰

The IWC relies on voluntary national funding to finance research.¹⁷¹ Fishery experts have argued over the wisdom of continuing the IWC's near total reliance on nationally financed research¹⁷² and many feel that an independent research staff is essential to producing sound research. It has been suggested that those nations currently exploiting whales should bear the cost of research necessary to protect whale stocks.¹⁷³

The Commission has three permanent committees—Administration, Scientific, and Technical.¹⁷⁴ Nations may have any number of representatives on the Scientific or Technical Committees, but have only one vote. Each major whaling nation usually has several representatives at the Scientific Committee meetings. This committee reviews catch data and research programs of member nations, and makes recommendations to the Commission concerning depletion of stocks and research needs.

Scientists have criticized the IWC, asserting that the procedures used by the Scientific Committee to give advice to the Commission have been largely ineffective and that no adequate outside review of Scientific Committee advice currently exists.¹⁷⁵ The Commission's ineffectiveness has also been exacerbated by staff and budgetary constraints.¹⁷⁶ The situation has improved since 1976 when the Commission employed a permanent cetologist as Executive Secretary. The Executive Secretary now has the

¹⁶⁴ Scarff, *supra* note 160, at 367.

¹⁶⁵ JOSEPH (1979), *supra* note 6, at 122.

¹⁶⁶ IWC Convention, *supra* note 159, art. III(1).

¹⁶⁷ *Id.* art. I(2).

¹⁶⁸ *Id.* art. V(3)(b).

¹⁶⁹ *Id.* art. XI.

¹⁷⁰ Scarff, *supra* note 160, at 357.

¹⁷¹ *Id.* at 594, 638. The IWC 1978-79 budget was £ 167,166.

¹⁷² *Id.* at 594, 638.

¹⁷³ *Id.* at 638.

¹⁷⁴ *Id.* at 355.

¹⁷⁵ *Id.* at 628.

¹⁷⁶ *Id.* at 355.

power to hire outside consultants to conduct research, so the Commission no longer must rely solely on research of member nations.¹⁷⁷

During the past thirty years, the IWC's conservation program has clearly improved.¹⁷⁸ The IWC has followed the Scientific Committee's advice closely and the Scientific Committee has developed more accurate techniques for stock assessment. Still, conservationists and scientists have harshly criticized the IWC's unwillingness to adopt adequate conservation measures.¹⁷⁹

The IWC's enforcement scheme can be described as "national enforcement with international supervision."¹⁸⁰ Each nation must report catches to the IWC, hire two whaling inspectors for each of its flag ships to oversee the whaling operation, and report infractions and measures taken to prosecute violators to the Commission. In 1972, the Commission began an international observer system, whereby observers from member governments are exchanged under bilateral agreements to report violations to the IWC.¹⁸¹ This effort has deterred violations somewhat. The IWC Convention also prohibits payments to gunners or catcher crews for the capture of protected whale species.¹⁸² The primary responsibility for prosecuting violators remains, however, with the nation under whose flag the ship sails.

As of 1977, only eight of the seventeen countries hunting whales belonged to the IWC, and non-IWC whaling threatened to deplete certain stocks.¹⁸³ In addition, several whaling operations circumvent IWC regulations by working under the "flags of convenience" of non-IWC countries even though owned by companies of member nations.¹⁸⁴ The IWC is, in summary, an organization that has gradually evolved toward greater emphasis on conservation, but which is still hampered from pursuing this goal more rigorously by the reluctance of some of its members and the recalcitrance of its non-members.¹⁸⁵

B. The SPFFA Convention: Ambiguities In Drafting And Unresolved Problems

The SPFFA is the first independent regional fisheries organization ac-

¹⁷⁷ *Id.* at 355-56.

¹⁷⁸ *Id.* at 635.

¹⁷⁹ *Id.* at 327, 626.

¹⁸⁰ *Id.* at 357.

¹⁸¹ *Id.* at 367, 607.

¹⁸² IWC Convention, *supra* note 159, schedule, § 14.

¹⁸³ Major nonmember countries as of 1979 included the People's Republic of China, Portugal, the Republic of South Korea, and the Somali Republic. Scarff, *supra* note 160, at 598.

¹⁸⁴ *Id.*

¹⁸⁵ The prospects for the survival of the whale increased greatly in late 1980 when the Soviet Union, one of the major whaling nations, announced that it would be terminating all whaling activities.

tive in this area. As the previous section illustrates, most fisheries organizations have had difficulties in identifying their goals and in achieving a unified approach. This section begins with an examination of the SPFFA Convention itself from a drafting perspective, and then turns to some of the major unresolved legal and economic issues.

1. *Legal Status of the Agency*

The Convention's provisions on the Agency's legal status appear to be contradictory. Article VIII(1) states that the SPFFA shall have the capacity "to sue and be sued." Article VIII(2), however, states that "[t]he Agency shall be immune from suit and other legal process and its premises, archives and property shall be inviolable." Former Director Razzell explained that the intent behind these two paragraphs was to immunize the Agency for its "governmental" or "sovereign" activities, but not for its "commercial" activities.¹⁸⁶ This distinction is similar to that of the "restrictive sovereign immunity" theory which denies immunity to nations for their commercial or private activities, but retains the doctrine of sovereign immunity for governmental or public activities.¹⁸⁷

The SPFFA Convention clearly grants the SPFFA "legal personality" and the "capacity to contract to acquire and dispose of . . . property"¹⁸⁸ The Convention directs the Agency to make an agreement with its host government, the Solomon Islands, subject to the Committee's approval, providing for "such privileges and immunities as may be necessary for the proper discharge of the functions of the Agency."¹⁸⁹ The governing charters of other international organizations,¹⁹⁰ including the United Nations Charter¹⁹¹ and the Convention on Privileges and Immunities of the United Nations,¹⁹² contain similar provisions. Most multi-national organizations have been deemed to possess international legal personality,¹⁹³ and the SPFFA is no exception.

¹⁸⁶ Interview with Razzell, *supra* note 61.

¹⁸⁷ See *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964).

¹⁸⁸ SPFFA Convention, *supra* note 10, art. VIII(1).

¹⁸⁹ *Id.* art. VIII(3).

¹⁹⁰ J. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 491-92 (6th ed. 1967). See, e.g., Constitution of the International Labour Organization art. 39; Constitution of the Food and Agricultural Organization art. XV(1); Articles of Agreement of the International Monetary Fund art. IV(1).

¹⁹¹ Article 104 of the United Nations Charter provides that the United Nations should possess in the territory of each of its members "such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes."

¹⁹² Article 1 of the Convention on the Privileges and Immunities of the United Nations provides that: "The United Nations shall possess juridical personality. It shall have the capacity: (a) To contract; (b) To acquire and dispose of immovable and movable property; (c) To institute legal proceedings."

¹⁹³ J. STARKE, *supra* note 190, at 491.

The charters for the IATTC, ICCAT, IOFC, and IPFC do not contain provisions on their legal status, nor do they specify their capacity to perform their duties under international or national law.¹⁹⁴ These fishery organizations have usually been able to accomplish necessary legal activities on an ad hoc basis, although in some cases this lack of legal status or capacity has obstructed the timely performance of their duties.¹⁹⁵ As one scientist has noted, even though ad hoc arrangements have generally sufficed to permit the international fisheries bodies to operate in the past, it is desirable that conventions creating such bodies include a provision establishing their legal capacity to perform acts necessary to accomplish their duties.¹⁹⁶ Thus, the SPFFA took a bold step forward by including such provisions in its convention.

2. Ratification

Unlike many international conventions, the SPFFA Convention states that it is not subject to ratification, but shall enter into force 30 days following the eighth national signature.¹⁹⁷ Ratification is the process through which governments formally adopt, through constitutionally authorized procedures, the international agreements reached by their delegates.¹⁹⁸ In modern practice, whether an agreement requires ratification is a function of the parties' intent.¹⁹⁹ If a treaty is not subject to ratification, in the absence of a contrary provision, the instrument is binding from the time of signature.²⁰⁰ The SPFFA members intended to dispense with the requirement of ratification in order to avoid the two-step process of signature and ratification by each nation.²⁰¹ Thus, in accordance with the intent of the members, the SPFFA Convention became binding 30 days after the eighth signature.

¹⁹⁴ Joseph (1973), *supra* note 100, at 2479. The 1979 Eastern Pacific Draft Convention, *supra* note 97, art. 1(2), contains a provision explicitly establishing its "legal personality" and "legal capacity."

¹⁹⁵ Joseph (1973), *supra* note 100, at 2479.

¹⁹⁶ *Id.*

¹⁹⁷ SPFFA Convention, *supra* note 10, art. X(2).

¹⁹⁸ J. STARKE, *supra* note 190, at 353.

¹⁹⁹ *Id.* at 354. The practice of ratification rests partially on the following grounds:

a. Nations have the right to review the decisions of their delegates before undertaking the obligations the delegates agreed to;

b. Nations possess the right, by reason of their sovereignty, to withdraw from participation in any treaty; and

c. The period between signature and ratification enables nations to pass the necessary legislation or obtain the necessary parliamentary approvals so that they can obtain ratification.

J. STARKE, *supra* note 190, at 54-55.

²⁰⁰ *Id.* at 352.

²⁰¹ Interview with Razzell, *supra* note 61.

3. Publication

The SPFFA Convention makes no explicit provision for the publication of findings and scientific data collected by the SPFFA. By comparison, the IATTC Convention requires the Commission to: "[p]ublish or otherwise disseminate reports relative to the results of its findings and such other reports as fall within the scope of this Convention, as well as scientific, statistical, and other data relating to the fisheries. . . ."²⁰² The IATTC staff feels that the timely and thorough publication of research data is one of the most crucial parts of its program of scientific investigation for two reasons. First, publications keep the member states, the scientific community, and the general public informed of the staff's findings. Second, through such publications other researchers can review the data critically, thereby ensuring the soundness of the IATTC's conclusions.²⁰³

Once the SPFFA has set up its committee for scientific research, the Agency should review the publication systems of the IATTC and other fishery bodies and consider adopting one of its own. The publication of the staff's research results will provide valuable information to the governments of the member nations for use in their fisheries plans, to the scientific community, and to the public at large.

4. Funding

The level of funding for the SPFFA was left open by the SPFFA Convention. The Agency has been assembling a staff of twelve, consisting of scientists, fishery experts, and attorneys²⁰⁴ who will focus their efforts on examining the resources in the region and on technical, legal and policy issues.²⁰⁵

The SPFFA can look to other regional fishery commissions for comparative budget estimates. The IATTC, for example, started with an annual budget of \$59,000.00 for fiscal year 1951-1952.²⁰⁶ By fiscal year 1977-1978, the Commission employed a staff of 52 and operated on a budget of \$2,196,762.00.²⁰⁷

5. Structure

The SPFFA Convention leaves unclear the nature and duties of the

²⁰² IATTC Convention, *supra* note 80, art. II(7).

²⁰³ W. BAYLIFF, *supra* note 80, at 33.

²⁰⁴ Interview with Razzell, *supra* note 61.

²⁰⁵ Interview with Dr. Kavaliku, *supra* note 34.

²⁰⁶ [1950-1951] ANN. REP. 7 (1952).

²⁰⁷ [1978] ANN. REP. 15 (1979). The two largest expenditures in 1977-78 went to the regular tuna research program (about \$1,225,500) and for salaries (about \$708,470).

Committee, the Secretariat and the Director. Like the Commission of the IATTC, the Committee is composed of all the member nations and is responsible for setting Agency policies.²⁰⁴ The Secretariat, the staff or bureaucracy of the Agency, is analogous to an executive department. The exact duties of the Director are still unclear. Article VII directs the Agency to collect, analyze, and disseminate to member nations scientific information, particularly concerning highly migratory species.²⁰⁵ The SPFFA Convention does not state whether an independent scientific staff will be funded or whether the Agency will rely on member governments and outside experts.

The IATTC Convention, by contrast, explicitly delineates the duties of the Director of Investigations, which include the appointment and direction of a scientific staff and the drafting of research programs.²⁰⁶ The 1979 Eastern Pacific Draft Convention goes further and explicitly separates the administrative section of the Secretariat from the scientific section.²⁰⁷

The IATTC employs a scientific staff to collect data for the Commission's own use and is the only tuna commission with a permanent research staff. The staff's work has proved adequate for making management recommendations in the eastern Pacific Ocean.²⁰⁸

The ICCAT, the IOFC, and the IPFC, on the other hand, have been largely ineffective in collecting and assessing data, and in making recommendations for management, mainly because of an absence of adequate funding and independent scientific staff.²⁰⁹

Based on the success of the IATTC and other international commissions with independent research staffs, and the relative lack of success of those without scientific bodies, scientists recommend that fishery commissions maintain independent scientific staffs with the financial support necessary to carry out research and management.²¹⁰ The SPFFA should consider this recommendation in forming its own scientific program and in allocating funds for such a program.

6. Limited Membership and Control Over "High Seas" Pockets

The Forum rejected a broad-based membership agency in 1978 because many members feared domination by the large metropolitan powers.²¹¹

²⁰⁴ Interview with Razzell, *supra* note 61.

²⁰⁵ SPFFA Convention, *supra* note 10, art. VII(1).

²⁰⁶ IATTC Convention, *supra* note 80, art. I(13).

²⁰⁷ 1979 Eastern Pacific Draft Convention, *supra* note 97, art. 9(4).

²⁰⁸ Joseph (1975), *supra* note 100, at 67.

²⁰⁹ Joseph (1977), *supra* note 19, at 280-81; Joseph (1975) *supra* note 100, at 66.

²¹⁰ Joseph (1979), *supra* note 6, at 23. See also text accompanying notes 134-41 & 152-58 *supra*.

²¹¹ See the discussion of this controversy in text accompanying notes 47-50 *supra*.

Article 64 of the 1980 LOS Draft Convention, however, calls for an organization consisting of both coastal nations and other nations that fish in the region for highly migratory species.²¹⁶ Thus, the SPFFA Convention fails to fulfill the requirements of Article 64 because it limits membership to coastal nations, and excludes distant water fishing nations. From a conservation and management perspective, membership should be open not only to nations situated within the region but also to nations that fish in the region, nations with island dependencies in the region, and nations with waters through which the fish swim at various stages of their life cycle.²¹⁷ The SPFFA Convention does recognize a future need for such an agency:

[E]ffective co-operation for the conservation and optimum utilization of the 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.²¹⁸

No action has yet been taken, however, to establish such an international organization.

Because of the SPFFA's limited membership, the exclusive economic zones around the dependent island territories (American Samoa, New Caledonia, etc.) may not come under the Agency's jurisdiction, thus thwarting an effective regional management approach.²¹⁹ A more complex problem concerns the pockets of high seas left open after nations claim their exclusive economic zones. If the Agency does not control the pockets of high seas outside individual nations' zones, then distant water fishing nations could fish in those pockets and escape regulation.²²⁰ Whether the SPFFA or even an Article 64 organization would have the legal basis for regulating the resources within these pockets of high seas is not clear.

²¹⁶ The 1980 LOS Draft Convention, *supra* note 7, art. 64 states:

Highly migratory species

1. The coastal State and other States whose nations fish in the region for the highly migratory species listed in annex I, shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions where no appropriate international organization 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.

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

²¹⁷ Joseph (1975), *supra* note 100, at 68; SPEC, PROPOSALS FOR THE ESTABLISHMENT AND OPERATION OF A SOUTH PACIFIC FISHERIES AGENCY, app. IV, SPEC(77)13 (May, 1977). This latter category would include Indonesia and the Philippines.

²¹⁸ SPFFA Convention, *supra* note 10, art. III(2).

²¹⁹ See text accompanying notes 70-72 *supra*.

²²⁰ S. SAILA & V. NORTON, *supra* note 6, at 52.

Four examples in the area of international law help clarify the legal arguments both for and against regional agency control of the high seas.

a. *The Fisheries Jurisdiction Case: United Kingdom v. Iceland*²²¹

When Iceland declared jurisdiction over a 50-mile exclusive fishing zone around its coast, the United Kingdom objected and sought a remedy in the International Court of Justice (ICJ). In 1974, the Court found that Iceland was entitled to claim preferential fishing rights in the waters adjacent to its coast, but was not entitled unilaterally to exclude United Kingdom vessels from fishing within the area between this 12-mile limit and the proposed 50-mile limit.²²² Three of the Court's pronouncements bear particularly on the issue of control over the high seas.

First, citing what the Court said was customary international law, the Court gave preferential fishing rights to Iceland in the high seas off Iceland's coast because of its special dependence on these fisheries and because the intensity of exploitation of the resources made it imperative to limit the catch.²²³ This finding established that a state that has "exceptional dependence" upon its fisheries may be entitled to preferential fishing rights in those parts of the high seas adjacent to its fishing zone. This principle can be extended to apply to the South Pacific. The island nations of the South Pacific contend that because of their dependence upon the resources of the sea for their economic future, they must ensure that the high seas resources of the region are not exploited to their detriment.²²⁴ These nations could argue that because of the highly migratory nature of the region's resources, any effective management program must apply to the pockets of the high seas as well. The Iceland analogy does not, however, apply directly to the situation in the South Pacific. First, the fishery resources have not been overexploited. In fact, skipjack, the region's major resource, appears to be underexploited.²²⁵ Moreover, given the island nations' nascent fisheries, it is unlikely they can show the dependence on the fishery resources in the highseas pockets that was established by Iceland.

In its second pronouncement, the Court recognized the right of all nations to fish freely on the high seas, subject to the duty of all nations to respect the rights of other nations and to conserve for the benefit of all.²²⁶ The Court ruled that a coastal nation entitled to preferential fishing rights could not totally exclude other nations from fishing in the disputed waters, particularly if other states had traditionally fished in these waters

²²¹ [1974] I.C.J. 3.

²²² *Id.* at 34.

²²³ *Id.* at 26-27.

²²⁴ REGIONALIZATION, *supra* note 3, at 310.

²²⁵ See note 17 *supra* and note 321 *infra*.

²²⁶ [1974] I.C.J. at 22.

and had established an economic dependence on the same fishing grounds.²²⁷ The Court noted that statistics indicated that United Kingdom vessels had fished in the disputed area on a continuous basis since 1920, that their annual total catch had not varied greatly, and that the waters around Iceland constituted the most important of the United Kingdom's distant water fishing grounds for bottom dwelling species.²²⁸ The Court also found that because the United Kingdom's vessels lacked adequate alternate fishing grounds in the North Atlantic, Iceland's exclusion of them from the Icelandic area would produce widespread unemployment in the British fishing industry.²²⁹

Some of the distant water fishing nations now excluded from the SPFFA could similarly argue that they possess traditional fishing rights in the region and are economically dependent on fishing within the South Pacific region. Japan, for example, was the first country to develop longline fisheries in the central and western Pacific Ocean in the early 1950's.²³⁰ In 1958, Korean vessels entered the fishery and in the mid-1960's Taiwan began longline fishing in this area.²³¹ Prior to 1965, skipjack catches from the central and western Pacific were negligible except for Japan's efforts, and the rapid expansion of the skipjack fisheries in this region since 1966 was largely the result of increased fishing by the Japanese pole-and-line fishing fleet.²³² Japan continues to be the major fish harvesting nation in this region, with Taiwan and South Korea expanding their fishing efforts.

In order to counter these strong, historical rights of Japan, Taiwan and South Korea, the SPFFA, or an Article 64 agency in the South Pacific, would have to argue that effective conservation of highly migratory species is impossible if foreign flag vessels can fish without control in the pockets of high seas in the region.

In a third pronouncement in the *Fisheries Jurisdiction Case*, the ICJ directed Iceland and the United Kingdom to negotiate an equitable solution and jointly to examine measures needed to insure conservation, development, and equitable exploitation of the fishery resources.²³³ If applied to the South Pacific, the Court's pronouncement would arguably require the island nations of the South Pacific to negotiate a compromise with the distant water fishing nations regarding fishing in the high seas pockets. Article 64 of the 1980 LOS Draft Convention appears to require similar negotiations.

²²⁷ *Id.* at 27-28.

²²⁸ *Id.* at 23.

²²⁹ *Id.*

²³⁰ KEARNEY (1979), *supra* note 16, at 20.

²³¹ *Id.*

²³² *Id.* at 3.

²³³ [1974] I.C.J. at 34-35.

b. The 1980 Draft Convention on the Law-of-the-Sea (Informal Text)

As of this writing, the Third United Nations Law-of-the-Sea Conference (UNCLOS III) has not produced a formal treaty. Certain parts of the 1980 LOS Draft Convention may, however, be considered as emerging, customary, international law.²³⁴ The 1980 LOS Draft Convention provides a basis for arguing that a properly organized regional fisheries organization would have jurisdiction over the highly migratory species as they swim beyond the exclusive economic zones.

Articles 64, 86, 87, 116, 118 and 119 of the 1980 LOS Draft Convention suggest that a regional management body with broad membership has the right to establish management and conservation measures on the "high seas." Under Article 86, ocean areas outside individual nations' 200-mile zones would be "high seas," because these pockets "are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."²³⁵ Article 87 confirms the basic principle that the "high seas are open to all States."²³⁶ The freedoms enumerated, however, including the freedom to fish, are subject to other states' exercise of their freedom of the high seas.²³⁷ Article 89 prohibits any nation from exercising sovereignty over any part of the high seas,²³⁸ but does not mention whether a *regional body* may do so.

Article 64 requires both coastal and fishing nations to cooperate directly or through "appropriate international organizations."²³⁹ Such cooperation is required "with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the re-

²³⁴ G. KNIGHT, *supra* note 6, at 58. The negotiating texts produced after the 1975, 1976, 1977, 1978, 1979, and 1980 sessions of the United Nations Conference on the Law-of-the-Sea reflect a general sense of agreement of participating nations concerning most of the provisions on fisheries. These informal texts as well as national viewpoints expressed during the debates indicate the trend of emerging international law on fisheries issues. G. KNIGHT, *supra* note 6, at 58. The *Fisheries Jurisdiction Case* provides significant precedent for treating the negotiating texts as at least emerging international law. The International Court of Justice in that case referred to documents from earlier law-of-the-sea conferences and subsequent practice of nations as "existing rules of international law." [1974] I.C.J. at 22-23. These documents included the 1958 Geneva Convention on the High Seas and resolutions adopted at the 1958 and 1960 Conferences concerning preferential fishing rights for coastal nations dependent upon coastal fisheries. *Id.* The International Court of Justice in 1974 did not look at the negotiating text as authoritative law because at that time the discussion had just begun. *Id.* at 23. An international tribunal today might take these texts much more seriously, particularly if the practices of fishing and coastal nations were beginning to conform to the emerging language.

²³⁵ 1980 LOS Draft Convention, *supra* note 7, art. 86.

²³⁶ *Id.* art. 87(1). See also Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958. 559 U.N.T.S. 286.

²³⁷ 1980 LOS Draft Convention, *supra* note 7, art. 87(2).

²³⁸ *Id.* art. 89.

²³⁹ *Id.* art. 64(1).

gion, both within *and beyond the exclusive economic zone.*²⁴⁰ This goal is urged somewhat weakly—"with a view to." Nonetheless, it is stated in terms that do have specific meaning if the data are adequate to evaluate the impact of harvesting the highly migratory fish species. The organization required under this Article logically should have the power to achieve its goal, at least in any situation affecting nations that will have ratified the Law-of-the-Sea treaty. If all relevant nations have ratified the treaty, the fishery organization would effectively be able to exercise jurisdiction over the migrating fish while they are traveling through the high seas.

Freedom of fishing is also subject to the conditions set out in Section 2 of Part VII on the High Seas titled "Management and Conservation of the Living Resources of the High Seas."²⁴¹ Under this section, the right to fish on the high seas is subject to other treaties as well as the rights, duties, and interests of coastal nations, including those of Article 64.²⁴²

Article 118 extends the cooperation requirement of Article 64 to nations fishing for identical resources, such as for highly migratory species, "in the areas of the *high seas.*"²⁴³ Article 119 provides for all states concerned to adopt conservation measures to maintain harvested species in the high seas at levels that can produce the maximum sustainable yield (qualified by the special requirements of developing countries).²⁴⁴ Further, they must exchange and contribute scientific information and other data relevant to the conservation of fish stocks.²⁴⁵

Taken together, these articles suggest that *any* nation can fish on the

²⁴⁰ *Id.* (emphasis added).

²⁴¹ *Id.* pt. VII, § 2.

²⁴² *Id.* art. 116.

²⁴³ *Id.* art. 118 (emphasis added).

²⁴⁴ See, e.g., text accompanying note 242 *supra*.

²⁴⁵ 1980 LOS Draft Convention, *supra* note 7, art. 119 states:

Conservation of the living resources of the high seas.

1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:

(a) Adopt measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing countries, and taking into account fishing patterns, the interdependence of stocks and any generally recommended subregional, regional or global minimum standards;

(b) Take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

2. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through subregional, regional and global organizations where appropriate and with participation by all States concerned.

3. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.

high seas, including the pockets in the South Pacific region, providing that all nations fishing for similar species, including the highly migratory species, in the same area of the high seas (such as within one pocket) cooperate with each other in the management and conservation of such species. A further obligation is placed on those nations also fishing for highly migratory species in the exclusive economic zones of other nations to cooperate with the coastal states in adopting conservation measures.

Under the 1980 LOS Draft Convention, the SPFFA could not exclude any distant water fishing nation from fishing within these pockets of high seas, unless that nation failed to cooperate with the Forum nations' management and conservation efforts. The text does not offer any specific guidance on how to apportion limited resources on the high seas, but it does require that the conservation measures that are adopted "not discriminate in form or in fact against the fishermen of any State."²⁴⁶ Thus, the SPFFA probably could not unilaterally adopt measures that would adversely affect only non-Forum nations, and would be required to negotiate conservation measures with non-Forum nations that fish in the high seas areas. Once such negotiations begin, arrangements similar to the regional fishing commissions discussed previously might be established, including licensing arrangements and fee requirements. Only an organization open to all, however, would be authorized to set such fees.

Article 119(1) (a) of the 1980 LOS Draft Convention states that conservation measures are to be adopted with reference to the "special requirements of developing countries."²⁴⁷ The exact benefits that this provision will afford to the South Pacific nations are unclear, but the language does imply that developing nations can claim preferences with regard to limited resources.

c. The International Whaling Commission (IWC)

The IWC has a management program that governs its members' activities on the high seas as well as in the fishing zones of member nations.²⁴⁸ Most major whaling nations belong to the IWC, and it has slowly been able to establish more restrictive quotas on its members. Whaling does take place outside the IWC framework,²⁴⁹ however, and non-IWC whaling poses a threat to certain stocks.²⁵⁰ The IWC has regulated whaling on the high seas only to the extent that member nations' vessels have been involved, and it has had to induce non-members to join before it could impose regulations on their activities. The IWC does not, therefore, provide a precedent for the proposition that a management organization can re-

²⁴⁶ *Id.* art. 119(3).

²⁴⁷ *Id.* art. 119(1)(a).

²⁴⁸ See text accompanying notes 159-85 *supra*.

²⁴⁹ JOSEPH (1979), *supra* note 5, at 122; Scarff, *supra* note 160, at 598.

²⁵⁰ Scarff, *supra* note 160, at 598.

strict activities of unconsenting nations on the high seas.

d. Tuna management in the eastern Pacific Ocean

The IATTC is an example of a fisheries management organization whose members agree to take joint and individual action to maintain fish populations at proper levels on the high seas. In the IATTC's case, the focus is on the high seas area adjacent to the national fisheries zones off the west coast of South America.²⁸¹ Member nations have agreed to establish annual catch quotas and special catch allocations for yellowfin tuna²⁸² that apply to their fishing fleets on the high seas. In the years since the establishment of the IATTC in 1950, all the Latin American members have claimed 200-mile zones, thus reducing the size of the high seas area involved. Nonetheless, parts of the high seas are still subject to regulation under the IATTC Convention.²⁸³

e. Conclusion

Taken together, these international precedents suggest that:

- (1) all nations fishing within the pockets of high seas in the South Pacific region and all countries in the region should cooperate together to establish conservation and management measures;
- (2) developing coastal nations in the region may be able to receive special benefits based on their particular needs;
- (3) under the regime that would be established under the 1980 LOS Draft Convention, nations not willing to cooperate in the establishment of management and conservation measures could be prohibited from fishing within the pockets of high seas in the region;
- (4) otherwise, regulations governing fishing on the high seas cannot discriminate against the citizens of any nation;
- (5) nations may have a claim for a preference in allocation based on traditional fishing patterns if related to a bona fide economic need; and
- (6) a regional organization not open to all interested nations would not have the power to set license fees or allocate limited stocks in the high seas areas.

²⁸¹ See IATTC Convention, *supra* note 80, arts. II(5), III.

²⁸² W. BAYLIFF, *supra* note 80, at 24.

²⁸³ See Figure 3 at note 90 *supra*.

IV. MANAGING THE HIGHLY MIGRATORY SPECIES

A. *The Alternative Models Available in the Pacific*

Several experts have suggested strategies to manage highly migratory species in the South Pacific region. Although these experts differ in approach, they agree that any effective management scheme must include all nations participating in the fisheries, and should give considerably more strength to the regional organization than has been given to the SPFFA.

R. E. Kearney proposes a multiphase approach to the development of a fisheries body designed to ensure that the fish stocks are maintained at the maximum sustainable yield and also to give the Forum nations control over the development of their fisheries.²⁵⁴ In Phase I, membership of the proposed agency would include all countries and territories of the region; island members of the South Pacific Commission²⁵⁵ as well as the Forum nations would be encouraged to participate. A small team of biologists and economists would be responsible for the compilation of relevant data, and the continued study of the fisheries as they developed. In addition, this advisory group would submit interim management and development proposals to the member governments.

In Phase II, membership would be expanded to nations fishing in the region plus all resource adjacent nations (the Asian coastal nations of the western Pacific, particularly Indonesia and the Philippines). This phase would involve implementing the management licensing procedures recommended by the agency during Phase I, upon the members' consent. A much larger research and administrative staff would be needed because of the increase in membership, and the agency's additional functions. After Phase II, a final phase would incorporate a surveillance network that could more than double the agency's operating costs.

G. Kent agrees that a new fisheries agency should be initially limited although he rejects the multiphase approach.²⁵⁶ Under his scheme, the agency's scope of authority to manage the fisheries would be narrowly limited, but where it did have authority, its powers would be strong. Thus, in the area of conservation, individual nations might retain the authority to manage fish stocks off their coast, but the agency would be empowered to intervene if a nation permitted sustained overexploitation, or otherwise abused its powers. If the new agency proved successful, its scope of authority could be expanded.

The Papua New Guinea government,²⁵⁷ along with others,²⁵⁸ has pro-

²⁵⁴ KEARNEY (1977), *supra* note 2, at 26-28.

²⁵⁵ See note 9 *supra*.

²⁵⁶ G. KENT, *supra* note 12, at 161-64.

²⁵⁷ Letter from Jacob Lemeki, Acting Minister for Foreign Affairs and Trade of Papua New Guinea to Congressman John Breaux, Chairman, House and Merchant Marine Sub-

posed a two-tiered system of management over highly migratory species in the South Pacific. The Forum countries would exclusively comprise one agency, much like the SPFFA, but membership in the second agency would be open to other interested countries. The larger agency's functions would be limited to research, development, and recommendations of measures for conservation and optimum utilization of the stocks. It would have little actual management authority and no regulatory powers. The larger agency would report to the smaller agency, and act as its research and development arm. Assuming agreement by all members, the limited membership agency would determine common terms of access, fees, licenses, and taxes; set overall and national catch quotas if needed; redistribute revenue; and direct surveillance. The area covered by the regional agency would include the pockets of high seas enclosed by the exclusive economic zones of Forum nations. Distant water fishing vessels would be required to purchase a license and to pay a fee based on the amount of fish harvested from each nation's exclusive economic zone. This license would allow a vessel to fish anywhere within the region, subject to the laws and regulations of each coastal nation. Members could restrict fishing within their respective zones to a class of vessels, to certain areas, to certain species, or to certain nations. As a condition to licensing, all distant water fishing nations would carry a transmitter which would automatically give the daily location and name of the vessels via satellite to a regional control center. Further, each vessel would be required to fill out a daily log to be sent to the agency. This data would then be checked against data relayed to the control center by satellite.

Experts agree as to the advantages of having a strong fishing agency with actual management powers as opposed to an advisory agency such as the SPFFA as presently constituted. However, the legal issue still remains as to whether this type of management scheme complies with the requirements of the emerging relevant international law. A related question pertains to the type of regional organization United States law requires. This latter question is important because United States participation in the licensing negotiations for fishing rights in the South Pacific region could benefit Forum members significantly. The next sections will analyze the legal requirements for a new regional fisheries organization under United States legislation, and under the 1980 LOS Draft Convention.

committee on Fisheries, Congress of the United States (May 8, 1980) [hereinafter cited as Breaux Letter].

³⁰⁰ Hawkins, *Fisheries: One For the Forum—One For Everybody*, PAC. ISLANDS MONTHLY, July, 1979, at 83; T. Friend, An Economist's Perspective on the Need for a Stronger Forum Fisheries Agency in the Southwest Pacific 32-63 (Unpublished paper for the Food Project, Resource Systems Institute, East-West Center) (1980) [hereinafter cited as Friend.]; Wilson Letter, *supra* note 35.

B. The United States Fishery Conservation and Management Act of 1976

The United States Fishery Conservation and Management Act of 1976 (FCMA)²⁶⁰ is important to the Forum nations for three reasons. First, by not complying with United States law, the South Pacific nations could inhibit, rather than encourage United States participation in their fisheries. Second, by reaching an agreement with the United States on the issue of highly migratory species, the Forum nations could avoid conflict with the United States and the economic retaliation provided for by the FCMA. Finally, the FCMA provides at least one country's view on the meaning of "conservation and management," terms which neither the SPFFA Convention nor the 1980 LOS Draft Convention define.

The FCMA prohibits the importation of fish and fish products into the United States from any nation that seizes a United States vessel beyond its territorial sea under a jurisdictional claim not recognized by the United States.²⁶⁰ It also prohibits the United States from recognizing a fishing zone claimed by any country that "fails to recognize and accept that highly migratory species are to be managed by applicable international fishery agreements."²⁶¹ The FCMA defines "highly migratory species" as tuna,²⁶² and defines "international fishery agreement" as a fishing agreement, convention or treaty to which the United States is a party.²⁶³ The FCMA does not define the term "manage." However, the term "conservation and management" is defined as all rules, regulations, and other measures required to maintain or restore any fishery resource, and assure that fishery resources can be taken on a continuing basis with options available for future uses of these resources.²⁶⁴ The exact duties of the regional or international agency are left open by the FCMA, but the definition of management and conservation is broad enough to include all those duties required to manage the fish stocks in such a way as to ensure their continued supply for a variety of uses. Missing from the definition, however, is the requirement that fish stocks be managed so as to ensure maximum or optimal economic returns.

A tuna fishery agreement for the South Pacific region would thus satisfy the requirements of the FCMA if the United States were a party to the agreement and the organization established by the agreement were given the management and conservation powers needed to maintain tuna stocks and assure their continued supply for a variety of uses.

The two-tiered agency approach may not satisfy the FCMA's literal re-

²⁶⁰ 16 U.S.C. §§ 1801-1882 (1976). *See also* text accompanying notes 52-57 *supra*.

²⁶¹ 16 U.S.C. § 1825 (1976). *See* note 52 *supra*.

²⁶² 16 U.S.C. § 1822 (1976).

²⁶³ 16 U.S.C. § 1803(14) (1976).

²⁶⁴ 16 U.S.C. § 1803(15) (1976).

²⁶⁵ 16 U.S.C. § 1802(2) (1976).

quirements because the organization to which the United States would belong would be only an advisory body with no rule-making powers. Three reasons exist, however, why the United States might be willing to accept such a management scheme for highly migratory species, and thus loosely interpret the FCMA. First, the broad based agency would have advisory power with respect to conservation of the tuna resources. Second, the FCMA does not explicitly state that tuna management by international agreement must include such regulations as fee schedules, national quotas, and surveillance and enforcement regulations. Finally, and perhaps most important, such an agency would satisfy the United States' concern that all nations participating in the region's fisheries cooperate, at least to the extent of ensuring the conservation of the highly migratory resources.

C. The Third United Nations Law-of-the-Sea Conference and Emerging International Law

The most crucial concern of the SPFFA with regard to the Law-of-the-Sea treaty that now appears to be reaching final form is the power of the agency in relation to its member nations and to the non-member nations, that is, the extent to which members of the SPFFA would have to recognize the regulatory power of an open-membership organization to manage and conserve the highly migratory species. More specifically, to what extent must the SPFFA members share their power and duties concerning the highly migratory species with the distant water fishing nations?

It must be remembered that notwithstanding the SPFFA's significance in being the first regional fisheries organization in the South Pacific, the Forum nations intended it to be merely advisory. Its convention grants the SPFFA only limited duties, for example, to collect data and provide advice and assistance to member nations upon their request.²⁶⁵ The SPFFA Convention²⁶⁶ reserves ultimate management and conservation responsibilities over living marine resources within the 200-mile zones, including the highly migratory species, to the individual coastal nations.²⁶⁷ Moreover, as previously established, because of its limited membership, the SPFFA does not fulfill the mandate of Article 64 of the 1980 LOS Draft Convention for a broad based fisheries agency.²⁶⁸ How would the SPFFA operate under the 1980 LOS Draft Convention?

The 1980 LOS Draft Convention is ambiguous on how the highly migratory species should be regulated within individual nations' 200-mile zones. Article 64 of the 1980 LOS Draft Convention states that coastal

²⁶⁵ SPFFA Convention, *supra* note 10, art. VII.

²⁶⁶ Omitted.

²⁶⁷ SPFFA Convention, *supra* note 10, art. III(1).

²⁶⁸ See text accompanying notes 7 & 216-253 *supra*.

nations and nations fishing for highly migratory species shall cooperate in the conservation and promotion of optimum utilization of such species.²⁶⁹ On the other hand, Article 56 gives to the coastal nation sovereign rights over the natural resources within its exclusive economic zone.²⁷⁰ These sovereign rights include the power to conserve and manage the living resources. The article makes no exception for highly migratory species. Further, Article 61 directs the coastal nation to determine the allowable catch of the living marine resources within its exclusive economic zone²⁷¹ and to maintain each species at the maximum sustainable yield.²⁷² Article 62 requires coastal nations to promote the optimum utilization of the living resources within their exclusive economic zone²⁷³ and to allocate the "surplus" catch to other nations.²⁷⁴ This latter article also permits the coastal nation to establish regulations relating to licensing, catch quotas, and enforcement procedures.²⁷⁵

Given the unqualified language of Articles 56, 61, and 62, the degree of management authority that Article 64 gives to a regional agency over highly migratory species and the exact role of such an organization remains ambiguous. The negotiating history of the Third United Nations Law-of-the-Sea Conference (UNCLOS III) sheds some light on these issues.

1. Pre-Caracas Discussion

During the negotiations in the early 1970's, the United States opposed extending exclusive fishing zones to 200 miles, and submitted a draft article giving coastal nations jurisdiction over *coastal species* to the full extent of their migratory range.²⁷⁶ However, it also suggested that *highly migratory species* be managed by an international or regional organization.²⁷⁷ Japan and Russia also opposed the 200-mile zone idea but called

²⁶⁹ See text accompanying note 7 *supra*.

²⁷⁰ 1980 LOS Draft Convention, *supra* note 7, art. 56(1).

²⁷¹ *Id.* art. 61(1).

²⁷² *Id.* art. 61(3).

²⁷³ *Id.* art. 62(1).

²⁷⁴ *Id.* art. 62(2).

²⁷⁵ *Id.* art. 62(4).

²⁷⁶ Draft Article on the Breadth of the Territorial Sea, Straits, and Fisheries, Submitted to Sub-Committee II by the United States of America. U.N. Doc. A/AC.138/SC.II/L.4 (Aug. 3, 1971). G. KNIGHT, *supra* note 6, at 58-59; Hollick, *United States Ocean Politics*, 10 SAN DIEGO L. REV. 467, 489 (1973). See also Stevenson & Oxman, *The Preparations for the Law-of-the-Sea Conference*, 68 AM. J. INT'L. L. 1, 14 n.45, 20-22 (1974) [hereinafter cited as *Preparations for LOS*] for a discussion on and cites to the draft fisheries articles submitted to the Seabed Committee by the Union of Soviet Socialist Republics; Japan; the United States; Australia and New Zealand; Bulgaria, Czechoslovakia, Hungary, Poland, and the Union of Soviet Socialist Republics; Canada; India, Kenya, Madagascar, Senegal, and Sri Lanka; Ecuador, Panama, Peru, and Zaire.

²⁷⁷ *Preparations for LOS*, *supra* note 276, at 21.

for offshore preferential fishing rights for developing countries.²⁷⁸ However, Japan and Russia would not have extended preferential fishing rights to highly migratory species. Other delegations remained virtually silent on the issue²⁷⁹ and the effect of other proposals is unclear.²⁸⁰

During the early negotiations, many nations did stress the need to continue international and regional fishery commissions.²⁸¹ Every comprehensive fisheries proposal referred to international fishery arrangements in either permissive or mandatory language,²⁸² and delegates spoke in favor of the continuation of such commissions. Norway's representative, Jen Evensen, although unwilling to commit his country to any specific proposal, spoke for many others present when he stressed that it was "necessary to strengthen the scope and powers of international and regional fisheries organizations with respect to the conservation of the living resources of the sea, the management and allocation of fisheries and the settlement of the disputes."²⁸³

2. *The Caracas Session (1974)*

During the Caracas Session of the Conference, over 100 nations spoke in favor of a 200-mile exclusive economic zone,²⁸⁴ and a strong consensus began to emerge on this concept. Advocates of the 200-mile zone disagreed, however, on many important issues, notably on the role of regional and international organizations in fisheries management and on special provisions for highly migratory species.²⁸⁵

The Second Committee of the Conference summarized the major themes emerging from proposals submitted to the Seabed Committee, and produced the "Main Trends" working paper.²⁸⁶ This paper outlined two alternative positions with specific and detailed provisions on the functions and powers of regional organizations to manage highly migratory species. "Formula A", based in part on the United States proposals,²⁸⁷ would have allowed coastal nations to regulate fishing for highly migratory species within their fishing zones, but only in accordance with

²⁷⁸ G. KNIGHT *supra* note 6, at 59-60; Gutteridge, *The U.N. and the Law of the Sea*, in *NEW DIRECTIONS IN THE LAW OF THE SEA* 322 (P. Churchill, K. Simmonds, J. Welch eds. 1973) [hereinafter cited as Gutteridge]; *Preparations for LOS*, *supra* note 276, at 21.

²⁷⁹ *Preparations for LOS*, *supra* note 276, at 23.

²⁸⁰ *Id.* at 22.

²⁸¹ *Id.* at 20; Gutteridge, *supra* note 278, at 322-23.

²⁸² *Preparations for LOS*, *supra* note 276, at 20.

²⁸³ U.N. Doc. A/AC.138/SC.II/SR.33-47 (Nov. 29, 1972).

²⁸⁴ Stevenson & Oxman, *The Third United Nations Conference on the Law-of-the-Sea: The 1974 Caracas Session*, 69 AM. J. INT'L. L. 1, 16 (1975) [hereinafter cited as Caracas Session]; Taft, *supra* note 12, at 113.

²⁸⁵ Taft, *supra* note 12, at 113.

²⁸⁶ U.N. Doc. A/Conf.62/C.2/WP.1 (Oct. 15, 1974).

²⁸⁷ U.N. Doc. A/Conf.62/C.2/L.47 (Aug. 8, 1974), Art. 19.

regulations established by the appropriate regional or international organizations.²⁸⁸ The organizations would have had the responsibility for setting catch quotas, other conservation measures, and fees. All coastal nations in the region and any other country whose nationals fished for highly migratory species would participate.²⁸⁹

"Formula B" was based on a draft submitted by Australia and New Zealand.²⁹⁰ This formula also proposed that highly migratory species be managed by regional or international organizations,²⁹¹ but it differed from "Formula A" in one major respect. The Director-General of the Food and Agriculture Organization (FAO) was to decide, upon request by a coastal or distant water fishing nation, whether the highly migratory species of a region required the establishment of a regional agency.²⁹² The FAO Director-General was also to be responsible for designating the members of the organization.

3. The 1975 Geneva Session

By the time the Geneva session began, the highly migratory species issue had become so contentious that no agreement could be reached.²⁹³ The issue was raised by the "Evensen Group," forty nations representing all regions that met informally under the leadership of Jen Evensen of Norway.²⁹⁴ Article 12 of the Evensen Group draft represented a final attempt by the United States and the Union of Soviet Socialist Republics to develop a compromise whereby the coastal nation could regulate fishing for highly migratory species within its 200-mile zone, but cooperate with others through an international organization.²⁹⁵ The proposed organization would have set the fishing standards and would have made recommendations to ensure conservation and optimum utilization, including recommendations concerning catch and allocation, permits, a uniform fee system, and penalties.²⁹⁶ The organization itself would have decided which regulations were to be binding on member nations, and which were

²⁸⁸ U.N. Doc. A/Conf.62/C.2/WP.1 (Oct. 15, 1974), Provision 112, Formula A.

²⁸⁹ *Id.*

²⁹⁰ U.N. Doc. A/Conf.62/C.2/L.57 Rev. 1 (Aug. 13, 1974).

²⁹¹ U.N. Doc. A/Conf.62/C.2/WP.1 (Oct. 15, 1974), Provision 112, Formula B.

²⁹² *Id.*

²⁹³ STAFF OF SUBCOMMITTEE ON MINERALS, MATERIALS, AND FUELS, SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, STATUS REPORT ON THE LAW-OF-THE-SEA CONFERENCE, 94th Cong., 1st Sess., pt. 3, at 1236 (1975) [hereinafter cited as STATUS REP. ON LOS]; Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The Geneva Session*, 69 AM. J. INT'L. L. 763, 779 n.32 (1975).

²⁹⁴ STATUS REP. ON LOS, *supra* note 293, at 1218.

²⁹⁵ Miles, *An Interpretation of the Geneva Proceedings, Part III*, 3 OCEAN DEV. & INT'L. L. 303, 309-10 (1976).

²⁹⁶ *Id.* at 331-32.

to be merely advisory.²⁹⁷ The proposed article would have protected coastal nations by requiring a two-thirds majority vote, including the votes of *all coastal nations* present,²⁹⁸ to adopt any regulation or recommendation.

Few nations liked the proposed article. The Japanese, the Group of 77,²⁹⁹ and their allies all argued strongly against it.³⁰⁰ Consequently, during their last meeting, the Evensen Group withdrew the proposal and left the article on highly migratory species blank.

4. *After the 1975 Geneva Session*

At the close of the Geneva Session, the Conference produced the Informal Single Negotiating Text (ISNT) to serve as a basis for future negotiations. The provision on highly migratory species (Article 53) is identical to Article 64 of later negotiating texts including the 1980 LOS Draft Convention.³⁰¹ The United States, pressured by the powerful tuna industry, still sought to amend the article at the New York session in 1980 to give regional fisheries commissions explicit and detailed management and conservation powers over highly migratory species.³⁰² The revised version of the text produced after this session, however, contained no changes regarding highly migratory species.³⁰³ In short, the 1980 LOS Draft Convention's uncertain treatment of the highly migratory species issue represents a major disagreement by the participants.

5. *Management of Highly Migratory Species Under Emerging International Law*

Clearly the highly migratory species controversy remains unsettled. The extent to which coastal nations must share or coordinate conservation and management authority with a regional organization is still open for debate. Some experts argue that the 1980 LOS Draft Convention places no restrictions whatsoever on the coastal nation to manage tuna within its own exclusive economic zone. One writer,³⁰⁴ for example, has asserted that the governing article

²⁹⁷ STATUS REP. ON LOS, *supra* note 293, at 1237.

²⁹⁸ Miles, *supra* note 295, at 331-32.

²⁹⁹ The Group of 77 consists of a large number of mostly under-developed countries.

³⁰⁰ Miles, *supra* note 295, at 310.

³⁰¹ See 1980 LOS Draft Convention, *supra* note 7, art. 64.

³⁰² Interview with Choon-Ho Park, Research Associate, East-West Center, in Honolulu (March 5, 1980).

³⁰³ 1980 LOS Draft Convention, *supra* note 7, art. 64.

³⁰⁴ Interview with Dr. Gary Knight, Campanile Professor of Marine Resources Law, Louisiana State University Law Center (March 6, 1980).

merely *requests* the coastal state and states whose nations fish for tuna to cooperate on their conservation and optimum utilization either directly or through appropriate international organizations. Where these do not exist, the parties are *requested* to cooperate to establish them. There are again no restrictions on the authority of the coastal state to regulate tuna fisheries occurring within the Exclusive Economic Zone.³⁰⁶

Others have argued that Article 64 does not represent a consensus because no agreement could ever be reached in the Evensen Group on provisions for highly migratory species.³⁰⁷ Coastal nations could also legitimately contend that a regional fisheries agency need not be given actual management and conservation duties because during the Law-of-the-Sea negotiations only the United States and a few other nations supported such proposals.

The language of Article 64 and the negotiating history of UNCLOS III present another side to the highly migratory species controversy which tends to refute the notion that the 1980 LOS Draft Convention places no restrictions on the coastal nation to manage tuna within its 200-mile zone. First, the language of Article 64 is cast in mandatory terms. Article 64 states that coastal nations and distant water fishing nations *shall* cooperate directly or through appropriate international organizations in the conservation of highly migratory species and *shall* cooperate to establish appropriate international organizations in regions where none exist.³⁰⁸ Second, a coastal nation is not given unfettered discretion over living marine resources within its exclusive economic zone. Article 56, for example, directs the coastal nation, in exercising its rights in the exclusive economic zone, to "have due regard to the rights and duties of other States" and to "act in a manner compatible with the provisions of the present Convention."³⁰⁹ The mandate of Article 61—to ensure the "conservation of the living resources"³¹⁰—reflects one of the major goals of UNCLOS III. Biologists agree that the conservation of highly migratory species will be possible only with the cooperation of *all* nations in whose waters the species travel or spawn and *all* distant water fishing nations.³¹¹ Third, throughout the negotiations of UNCLOS III, nations recognized the need for strengthening or at least continuing international and regional fishery organizations.³¹² Finally, the "practice of nations" throughout the world (at least until very recent years) would counter the argument that a coastal nation may manage highly migratory species within its exclusive

³⁰⁶ Miles, *supra* note 295, at 310 (emphasis added).

³⁰⁷ STATUS REP. ON LOS, *supra* note 293, at 1204.

³⁰⁸ 1980 LOS Draft Convention, *supra* note 7, art. 64(1).

³⁰⁹ *Id.* art. 56(2).

³¹⁰ *Id.* art. 61.

³¹¹ See JOSEPH (1979), *supra* note 6; KEARNEY (1977), *supra* note 2; S. SAILA & V. NORTON, *supra* note 6. See also text accompanying notes 4-6, 18 *supra*.

³¹² See text accompanying notes 281-92 *supra*.

economic zone without restriction.³¹² Since 1966, coastal nations bordering the eastern Pacific Ocean, for example, have delegated various conservation and management powers to the IATTC, such as setting the total allowable catch and the fishing season for yellowfin tuna.³¹³ The new tuna agreement for the eastern Pacific currently being negotiated may grant the regional agency additional management duties, including the allocation of national quotas, the setting, collection, and redistribution of fees, and the establishment of surveillance and enforcement regulations (although the coastal nations are insisting on greater rights over the resources adjacent to their shores).³¹⁴

Based on the language of Article 64 and other articles of the 1980 LOS Draft Convention, on the negotiating history of UNCLOS III, and on the somewhat ambiguous "practice of nations," emerging international law arguably requires, at a minimum that a broad-based regional fisheries agency be established whose membership includes the coastal nations and island territories of the South Pacific region, other nations in whose waters highly migratory species travel or spawn and distant water fishing nations. Further, a certain degree of cooperation is required from the member nations to ensure the conservation of highly migratory species.

A two-tiered management plan, as outlined above,³¹⁵ would seem to comply with emerging international law. Most important, the broad-based body would satisfy the requirement that membership be open to all states concerned. Moreover, cooperation among members to ensure conservation of the highly migratory species would be achieved at least to the extent that this open-membership body would be empowered to perform necessary scientific studies and to recommend conservation measures, such as catch quotas, for any species requiring such regulation. The limited membership body would further ensure the conservation of the highly migratory species for two reasons. First, the Forum nations would be required to cooperate among themselves to carry out such management duties as issuing licenses, setting, collecting, and redistributing fees, determining common terms of access, setting catch quotas, and establishing surveillance and enforcement regulations. Second, the Forum nations would cooperate with the larger membership body at least to the extent that they would take into account this body's recommendations on the conservation of highly migratory species.

³¹² See text accompanying notes 221-33 *supra*.

³¹³ See text accompanying notes 89-90 *supra*.

³¹⁴ See text accompanying notes 111-28 *supra*.

³¹⁵ See text accompanying notes 257-58 *supra*.

D. Benefits of a Strong Regional Agency and of the Two-Tiered Approach to Fisheries Management in the South Pacific Region

The stated concern of the nations comprising the South Pacific Forum, to "secure the maximum benefits from the living marine resources of the region,"³¹⁸ will require a common approach to fisheries management and conservation through a strong regional fisheries agency. Such an agency should be delegated specific duties, including broadly based research and, as agreed upon by the member nations, common terms of access, licensing, revenue collection and redistribution, surveillance, and conservation regulations. The Forum nations could create such an agency by strengthening and expanding the SPFFA's responsibilities. At the same time, co-operation by foreign fishing nations and non-Forum resource adjacent nations could be gained through including them in a second, broadly based agency. This greater cooperation is one of the chief benefits of the two-tiered system. Other advantages of a strong regional fisheries agency and the two-tiered approach are discussed below.

I. Conservation and Research

The highly migratory nature of the resources, the variability in catch, and the mobility of the fishing fleets have convinced biologists that fisheries management in the South Pacific requires a regional approach.³¹⁹ Although the SPFFA has set up a small research body,³²⁰ all the nations participating in the fisheries are not currently included, and a non-member fishing nation that refused to cooperate in monitoring a species could make the agency's work pointless.³²¹ A broadly based regional agency could play a vital role in providing resource assessment and analysis over the entire range of any species both within the region and on the high seas.

Experts have pointed out that future development and management strategies will be directed towards optimizing socio-economic returns from the harvest.³²² Conservation of the skipjack species is unlikely to be a significant issue in the near future because skipjack resources for the

³¹⁸ SPFFA Convention, *supra* note 10, preamble.

³¹⁹ See text accompanying notes 18-19 & 289-93 *supra*; SPF(77)13 (1977) *supra* note 21, at Annex 2. Papua New Guinea Dep't of Primary Industry, Regional Management Programme, Discussion Paper on the SPFFA (no date) (received with Wilson Letter, *supra* note 35, on Nov. 2, 1980) [hereinafter cited as PNG Discussion Paper].

³²⁰ See text accompanying note 204 *supra*.

³²¹ Friend, *supra* note 258, at 58-59.

³²² KEARNEY (1979), *supra* note 16, at 58; Friend, *supra* note 258, at 34-40; SPC Secretariat, Some Economic Aspects of the Development and Management of the Fisheries in the Central and Western Pacific 3, 3-15, SPConf. 20/WP.14 (1980) [hereinafter cited as SPConf. 20/WP.14].

Pacific region appear currently to be under-exploited.³²¹ Monitoring the species over their entire range will, however, continue to be an important task in the event some species do require conservation.³²² With the perfection of purse-seining techniques, for example, large-scale fishing could result in the rapid depletion of a species.³²³ In this regard, the IATTC demonstrates the importance of research, for when it was shown that yellowfin tuna had become overfished, the Commission initiated a regulatory program for the conservation of yellowfin.³²⁴ Biologists do not know what impact surface fishing will have on the resources of the larger tuna species, particularly yellowfin and bigeye, and it is impossible to predict if the present yields of these species can be maintained.³²⁵ Thus, in order to be effective, the study and conservation of the highly migratory species should involve *all* nations participating in the fisheries and *all* nations with resources in the region through a broadly based agency.

2. Negotiations, Licensing, and Access

The member nations of the SPFFA could help to increase the benefits from their resources by implementing common policies on access and licensing and presenting a united front for negotiations with the distant water fishing nations.³²⁶ A strong power block could serve as a cartel, drawing its power from its control over resources that others desired.³²⁷ The present system, where nations negotiate *individually* with foreign countries, encourages Forum nations to compete with each other to sell fishing rights by lowering their fees. By preventing competitive undercutting, the SPFFA could demand better terms in licensing foreign fishing vessels, selling fish, and establishing joint ventures. In addition, the Agency could increase the flow of benefits to the nations with smaller fishery zones, thereby lessening the gap between rich and poor in the region.³²⁸

Uniform, regional licensing would also solve a problem faced by the distant water fishing vessels. The fish they seek are highly migratory, making it difficult for them to predict where concentrations of fish will be

³²¹ KEARNEY (1979), *supra* note 16, at 58; Friend, *supra* note 258, at 35; JOSEPH (1979), *supra* note 6, at 12.

³²² Breaux Letter, *supra* note 257.

³²³ Friend, *supra* note 258, at 35.

³²⁴ See text accompanying note 90 *supra*.

³²⁵ KEARNEY (1979), *supra* note 16, at 59; Friend, *supra* note 258, at 35-40.

³²⁶ KEARNEY (1979), *supra* note 16, at 59-60; G. KENT, *supra* note 12, at 162; SPP(77)13, *supra* note 21, at 3-6; SPFFA, The Economic Aspects of Fisheries Development and Management, SPConf. 20/WP.11 (1980).

³²⁷ G. KENT, *supra* note 12, at 162; Friend, *supra* note 258, at 4; PNG Discussion Paper, *supra* note 317.

³²⁸ G. KENT, *supra* note 12, at 137-47.

found,³²⁹ and accordingly, from which nations to buy licenses. Because most fishing ventures already operate on small profit margins (5-10%), vessels from distant water fishing nations may be unable to pay individual access fees to every nation in the region.³³⁰ By offering access to the region under the uniform conditions, the Forum nations would give foreign fishing vessels the opportunity to range freely without concern for national licenses and boundaries. Only when these vessels operate effectively and profitably can the region fully realize the economic benefit of its fisheries resources.

3. Surveillance and Enforcement

Serious problems exist in providing adequate surveillance and enforcement for this vast region. A major concern at the twentieth South Pacific Conference, held in October 1980 at Port Moresby, Papua New Guinea, was the poachers from foreign countries.³³¹ Experts have recognized that conventional methods of policing by boats and airplanes are inadequate because of the immense ocean area involved. They suggest the addition of a satellite system.³³² Such a system would clearly require regional cooperation to share the high cost and avoid duplication of facilities.³³³ A regional approach could also facilitate the enforcement of access fee payments, licensing, and conservation regulations.³³⁴

4. Summary

A two-tiered approach to fisheries management in the South Pacific region presents several distinct advantages. First, such a system complies with both international and United States law. Further, including the distant-water fishing nations in a regional agency will encourage their participation in the fisheries and their cooperation in research and conservation. Distant water fishing countries that were members would be more inclined to contribute aid and expertise to the SPFFA because the benefits of having such an agency would also accrue to them. Finally, the two-tiered approach allows the island nations to retain control over their fisheries resources.

For these reasons, a strong regional fishing agency with specific conservation and management duties, combined with a broadly based agency

³²⁹ SPF(77)13 Annex, *supra* note 21, at 3-4; KEARNEY (1977), *supra* note 2, at 6; Friend, *supra* note 258, at 12.

³³⁰ KEARNEY (1979), *supra* note 16, at 59.

³³¹ Honolulu Advertiser, Jan. 12, 1981, § A, at 6, col. 1.

³³² KEARNEY (1977), *supra* note 2, at 13; Friend, *supra* note 258, at 53-56.

³³³ Friend, *supra* note 258, at 53-56. See also Christy, *supra* note 6, at 234-35.

³³⁴ *Id.*

with research responsibilities, will help the Forum nations realize their goal of maximizing yields and optimizing the socio-economic returns from their ocean resources.

V. CONCLUSION AND SUMMARY

From a biological perspective, highly migratory species should be managed on a regional basis. Any management scheme should encompass the entire range of these species and involve the participation of all nations and territories whose waters these fish migrate through and spawn in, as well as the participation of all foreign fishing nations. The actual management of highly migratory tunas is plagued, however, with complex legal, political, and operational problems. The South Pacific island countries regard tuna temporarily in their fishing zones as their own property and subject to each individual nation's management, authority and control. United States legislation requiring tuna to be managed by international agreement clashes with the Forum countries' stance on highly migratory tuna. These United States laws have created significant tension between the island nations and the United States. The successive negotiating texts of UNCLOS III, including the 1980 Draft Convention, all recognize the need for, and call for international and regional cooperation to ensure the conservation and optimum use of highly migratory species. Simultaneously, however, these negotiating texts also grant to the coastal nations sovereign rights to exploit and manage the tunas within their exclusive economic zones.

Certain principles have emerged from arrangements in other regions and from the negotiating texts of UNCLOS III to reconcile the conflicting interests and viewpoints. First, coastal nations should have a preference in harvesting their living marine resources. They are obligated, however, to share any fish surplus with other countries. A specific preference is available to the developing nations in the region, though the contours of this preference remain ambiguous. Nations that have traditionally fished in the region or within a coastal nation's exclusive economic zone should be allowed to continue to fish there if the coastal nation lacks the capacity to harvest all of its fish. The 1980 Draft Convention and the 1974 *Iceland Fisheries Case* both recognize some limited historical fishing rights of a non-coastal nation, particularly when that nation would experience economic dislocation or hardship if denied access to its traditional fishing grounds.

Cooperation and negotiation to resolve disputes and ensure the conservation of highly migratory tunas have also emerged as guiding principles. Cooperation in the management of tuna is desirable between the Forum nations and the foreign fishing powers, and among the island nations themselves, both within the exclusive economic zones and on the high seas. The Forum countries have recognized that effective cooperation will

require additional international machinery. The SPFFA may provide the beginning of such cooperation, but greater cooperative efforts must clearly be sought. An agency composed of the Forum countries, other nations in whose waters the fish migrate or spawn, and distant water fishing nations should be established in order to obtain adequate biological data, to provide sound management advice, and to resolve disputes and develop a more active dialogue between the island nations and the foreign fishing powers. The SPFFA is the start of cooperative efforts among the island nations themselves. In order to secure the maximum benefits from their vast ocean resources, however, the Forum nations need to establish a fisheries body with broad regulatory management authority rather than weak advisory duties.

A two-tiered management approach appears to be a good strategy, at least for now. The developing island nations will benefit from having a forum where they can meet together to work out their own problems and differences, assess their own needs, and control the development of their fisheries. A second fisheries organization with a broad membership is needed to provide overall management advice and to assist with surveillance and enforcement. The enforcement and surveillance of tuna fisheries in this vast ocean region will be costly and difficult. Forum nations have already begun to experience problems with poachers from foreign countries. A regional agency with as much pooling of resources and with as much cooperation as the political and economic circumstances of the time permit, could help the island nations resolve their serious enforcement and surveillance dilemma.

The island communities of the South Pacific have already established an excellent reputation for working together to develop regional organizations to meet their collective needs. They have also been able to maintain good relations with the developed nations interested in the region. It should not be difficult to create a two-tiered formula for tuna management that will both preserve the community interests of the islands and also promote sound management and conservation by all the nations harvesting the highly migratory species.

Appendix A

SOUTH PACIFIC FORUM FISHERIES AGENCY

CONVENTION

THE GOVERNMENTS COMPRISING THE SOUTH PACIFIC FORUM

Noting the Declaration on Law of the Sea and a Regional Fisheries Agency adopted at the 8th South Pacific Forum held in Port Moresby in August 1977;

Recognising their common interest in the conservation and optimum utilisation of the living marine resources of the South Pacific region and in particular of the highly migratory species;

Desiring to promote regional co-operation and co-ordination in respect of fisheries policies;

Bearing in mind recent developments in the law of the sea;

Concerned to secure the maximum benefits from the living marine resources of the region for their peoples and for the region as a whole and in particular the developing countries; and

Desiring to facilitate the collection, analysis, evaluation and dissemination of relevant statistical scientific and economic information about the living marine resources of the region, and in particular the highly migratory species;

HAVE AGREED AS FOLLOWS:

*Article I**Agency*

1. There is hereby established a South Pacific Forum Fisheries Agency.
2. The Agency shall consist of a Forum Fisheries Committee and a Secretariat.
3. The seat of the Agency shall be at Honiara, Solomon Islands.

*Article II**Membership*

Membership of the Agency shall be open to:

- (a) members of the South Pacific Forum
- (b) other states or territories in the region on the recommendation of the Committee and with the approval of the Forum.

*Article III**Recognition of Coastal States' Rights*

1. The Parties to this Convention recognise that the coastal state has sovereign rights, for the purpose of exploring and exploiting, conserving and managing the living marine resources, including highly migratory species, within its exclusive economic zone or fishing zone which may extend 200 nautical miles from the baseline from which the breadth of its territorial sea is measured.
2. Without prejudice to Paragraph (1) of this Article the Parties recognise that effective co-operation for the conservation and optimum utilisation of the 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.

Article IV

1. The Committee shall hold a regular session at least once every year. A special session shall be held at any time at the request of at least four Parties. The Committee shall endeavour to take decisions by consensus.
2. Where consensus is not possible each Party shall have one vote and decisions shall be taken by a two-thirds majority of the parties present and voting.
3. The Committee shall adopt such rules of procedure and other internal administrative regulations as it considers necessary.
4. The Committee may establish such sub-committees, including technical and budget sub-committees as it may consider necessary.
5. The South Pacific Bureau for Economic Co-operation (SPEC) may participate in the work of the Committee. States, territories and other international organisations may participate as observers in accordance with such criteria as the Committee may determine.

*Article V**Functions of the Committee*

1. The functions of the Committee shall be as follows:
 - (a) to provide detailed policy and administrative guidance and direction to the Agency;
 - (b) to provide a forum for Parties to consult together on matters of common concern in the field of fisheries;
 - (c) to carry out such other functions as may be necessary to give effect to this Convention.
2. In particular the Committee shall promote intra-regional co-ordination and co-operation in the following fields:
 - (a) harmonisation of policies with respect to fisheries management;
 - (b) co-operation in respect of relations with distant water fishing countries;
 - (c) co-operation in surveillance and enforcement;
 - (d) co-operation in respect of onshore fish processing;
 - (e) co-operation in marketing;
 - (f) co-operation in respect of access to the 200 mile zones of other Parties.

*Article VI**Director, Staff and Budget*

1. The Committee shall appoint a Director of the agency on such conditions as it may determine.
2. The Committee may appoint a Deputy Director of the Agency on such conditions as it may determine.
3. The Director may appoint other staff in accordance with such rules and on such conditions as the Committee may determine.
4. The Director shall submit to the Committee for approval:
 - (a) an annual report on the activities of the Agency for the preceding year;
 - (b) a draft work programme and budget for the succeeding year.
5. The approved report, budget and work programme shall be submitted to the Forum.
6. The budget shall be financed by contributions according to the shares set out in the Annex to this Convention. The Annex shall be subject to review from time to time by the Committee.
7. The Committee shall adopt financial regulations for the administration of the finances of the Agency. Such regulations may authorise the Agency to accept contributions from private or public sources.
8. All questions concerning the budget of the Agency, including contri-

butions to the budget, shall be determined by the Committee.

9. In advance of the Committee's approval of the budget, the Agency shall be entitled to incur expenditure up to a limit not exceeding two-thirds of the preceding year's approved budgetary expenditure.

Article VII

Functions of the Agency

Subject to 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 licences, 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.

Article VIII

Legal Status, Privileges and Immunities

- 1. The Agency shall have legal personality and in particular the capacity to contract, to acquire and dispose of movable and immovable property and to sue and be sued.
- 2. The Agency shall be immune from suit and other legal process and its premises, archives and property shall be inviolable.
- 3. Subject to approval by the Committee the Agency shall promptly conclude an agreement with the Government of Solomon Islands providing for such privileges and immunities as may be necessary for the proper discharge of the functions of the Agency.

*Article IX**Information*

The Parties shall provide the Agency with available and appropriate information including:

- (a) catch and effort statistics in respect of fishing operations in waters under their jurisdiction or conducted by vessels under their jurisdiction;
- (b) relevant laws, regulations and international agreements;
- (c) relevant biological and statistical data; and
- (d) action with respect to decisions taken by the Committee.

*Article X**Signature, Accession, Entry into Force*

1. This Convention shall be open for signature by members of the South Pacific Forum.
2. This Convention is not subject to ratification and shall enter into force 30 days following the eighth signature. Thereafter it shall enter into force for any signing or acceding state thirty days after signature or the receipt by the depositary of an instrument of accession.
3. This Convention shall be deposited with the Government of Solomon Islands (herein referred to as the depositary) who shall be responsible for its registration with the United Nations.
4. States or territories admitted to membership of the Agency in accordance with Article II(b) shall deposit an instrument of accession with the depositary.
5. Reservations to this Convention shall not be permitted.

*Article XI**Withdrawal and Amendment*

1. Any Party may withdraw from this Convention by giving written notice to the depositary. Withdrawal shall take effect one year after receipt of such notice.
2. Any Party may propose amendments to the Convention for consideration by the Committee. The text of any amendment shall be adopted by a unanimous decision. The Committee may determine the procedures for the entry into force of amendments to this Convention.

IN WITNESS WHEREOF the undersigned, being duly authorised

thereto by their respective Governments, have signed this Convention
Opened for signature at Honiara this 10th day of July, 1979.

For the Government of Australia:

For the Government of the Cook Islands:

For the Government of Fiji:

For the Government of Kiribati:

For the Government of Nauru:

For the Government of New Zealand:

For the Government of Niue:

For the Government of Papua New Guinea:

For the Government of Solomon Islands:

For the Government of Tonga:

For the Government of Tuvalu:

For the Government of Western Samoa:

ANNEX

The following are the shares to be contributed by Parties to the Convention towards the budget of the Agency in accordance with Article VI(6):

Australia	1/3
Cook Islands	1/30
Fiji	1/30
Kiribati	1/30
Nauru	1/30
New Zealand	1/3
Niue	1/30
Papua New Guinea	1/30
Solomon Islands	1/30
Tonga	1/30
Tuvalu	1/30
Western Samoa	1/30

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William H. Matthews, Director
East-West Environment and Policy Institute
East-West Center
1777 East-West Road
Honolulu, Hawaii 96848

