Minimum Terms And Conditions Of Access Discussion Paper Prepared For A Small Working Group Meeting On The Minimum Terms And Conditions Of Access And Their Implementation

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CONTENTS

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One of the most significant management tools which has been developed in the South Pacific region over the past decade is the concept of harmonised minimum terms and conditions of access for foreign fishing vessels. The authority to impose terms and conditions of access is found in Article 62(4) of the United Nations Convention on the Law of the Sea, which requires nationals of States fishing in the exclusive economic zone to comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. The laws and regulations which may be established under Article 62(4) must be consistent with the Convention and may relate, *inter alia*, to a number of matters which are set out in detail in Article 62(4).

Since the concept of minimum terms and conditions was first introduced in the early 1980's there has been a number of significant developments in State practice both internationally and within the region which have clear implications for the future application of minimum terms and conditions. Combined with this is an increasing reluctance on the part of distant water fishing nations to accept the imposition of what are perceived as regional attempts to impose additional controls over foreign fishing activity, and a misunderstanding as to the basic nature and function of minimum terms and conditions. Some of these misunderstandings are shared by distant water fishing nations and coastal States alike.

The purpose of this paper is to examine some of the options open to member countries in implementing minimum terms and conditions and to attempt to develop strategies for dealing with the objections raised by distant water fishing nations. The paper begins with a chronological outline of the development of the minimum terms and conditions, beginning with the establishment of the Forum Fisheries Agency. An appreciation of the progressive development of minimum terms and conditions is critical to an understanding of the present situation.

An analysis of the present minimum terms and conditions follows, with reference to their status under UNCLOS. This is contrasted with a summary of the positions commonly put forward by DWFN in opposition to the MTCs, and some suggestions for alternative strategies.

THE DEVELOPMENT OF HARMONISED MINIMUM TERMS AND CONDITIONS OF ACCESS IN THE SOUTH PACIFIC REGION

The issue of harmonised minimum terms and conditions has been addressed in the South Pacific region on several occasions. The history of the recommendations and determinations that have led up to current State practice in implementing legislation and inclusion of the harmonised minimum terms and conditions requirements in bilateral and multilateral access agreements is as follows.

The South Pacific Forum Fisheries Agency

In 1976, at the Seventh South Pacific Forum Meeting in Nauru, the leaders of the independent Island States began discussing the need to establish an organisation that would assist them manage the rich tuna resource in their EEZs. In response to papers from Fiji and Papua New Guinea the meeting issued a declaration (the Nauru Declaration) emphasising the importance of the developments taking place at UNCLOS III. It was decided to hold a further meeting to consider, *inter alia*, the possible creation of a South Pacific fisheries agency and the prospects for joint action and regional cooperation in matters such as surveillance and policing.

The proposal was further developed at the Eighth Forum Meeting at Port Moresby in August 1977. Agreement was reached that the role of the proposed organisation should be limited to assisting member governments in the exercise of their sovereign rights of management. It was stressed that the proposed agency "should not usurp States' sovereign rights to regulate fishing". Following a directive of the Port Moresby Forum a technical meeting was held in Suva in June 1978 at which a draft Convention was concluded.

The issue which dominated discussion at this stage was whether the proposed organisation should be open to participation by fishing nations active in the region. Some of the island States were firmly of the view that membership of the organisation should be limited to Forum member countries, whereas others favoured the participation of distant water fishing nations. The Suva meeting eventually agreed to recommend the establishment of a broad based Article 64 organisation open to participation by Forum members, independent States in the region, territories in the region and independent States from outside the region sharing a common interest in the conservation, use or management of the marine living resources of the region.

This recommendation, and the draft Convention, were decisively rejected by the Ninth South Pacific Forum Meeting at Niue in 1978. All the Forum members, with the exceptions of Cook Islands, Niue and Western Samoa wished to limit membership to the island States of the region. The end result of these negotiations was the adoption of the South Pacific Forum Fisheries Agency Convention in July 1979. Membership of the Agency is limited to members of the South Pacific Forum, and other States or territories in the region on the recommendation of the Committee and with the approval of the Forum.

This background is recited because it is apparent that the issue of the broad based fisheries organisation has pervaded the relationship between FFA member States and the distant water fishing nations from the outset. The controversy arises from the terms of Article 64 of the Law of the Sea Convention, and has been articulated at length in various learned articles[1]. As we shall see, however, the question of the role of FFA in relation to Article 64 has assumed significance in connection with the implementation of the MTCs, and it is important that FFA's position is clearly understood.

While it has been argued[2], and is maintained by certain DWFNs, that FFA does not meet the requirements of an Article 64 type organisation, it is submitted that there are equally, if not more compelling, interpretations of the relevant provisions of the Convention. According to Burke[3], Article 64 does not require cooperation exclusively through an international (broad-based) organisation. On the contrary, Article 64 leaves States with the choice to co-operate directly or

indirectly, through international organisations or otherwise. Previous and current practice has been to cooperate simultaneously through international organisations and directly. Further, Article 64 offers no guidance on the structure or functions of "appropriate international organisations". It is to be assumed from this that it is left up to the States concerned to develop such international bodies as they can agree upon or to co-operate directly.

A compelling argument put forward by Sutherland[4] is that the duty to co-operate set out in Article 64 extends only to a duty to cooperate in conservation. Therefore, if the island States had agreed to create an Article 64 organisation, its competence would necessarily be confined to conservation measures. The implication is that the intention of the island States was to create an organisation which was not concerned with conservation, but would assist them to manage the resource.

It is submitted that this interpretation is clearly correct. The need of the newly independent island States in the South Pacific region to have a regional organisation with the mandate to assist them manage the tuna resource arose out of the fact that most of the States could not afford to police their EEZs. Furthermore, clear advantages could be seen in the harmonization of policies towards DWFNs, while still retaining sovereign rights of management and control over migratory resources such as tuna.

The fact that FFA exists purely as a management tool is further reinforced by the terms of Article III (2) of the Forum Fisheries Agency Convention, which states as follows -

> *" Without prejudice to Paragraph (1) of this Article the Parties recognise that effective cooperation 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 cooperation between all coastal States in the region and all States involved in the harvesting of such resources."*

In accordance with Article III, cooperation takes place through such regional and international programmes as the Regional Research and Development Programme and the Tuna and Billfish Assessment Programme (TBAP) (administered by SPC). FFA member countries have always strongly opposed any extension of the role of TBAP to cover management. Management is a function of the member countries, using FFA as a source of information and advice.

The FFA Convention does create certain obligations with respect to harmonization and co-ordination of fisheries policies. Under Article V the Committee is given the responsibility of promoting intra-regional coordination and cooperation in various fields including the harmonization of policies with respect to fisheries management, cooperation in respect of relations with DWFNs, and cooperation in surveillance and enforcement. It is to a consideration of the efforts made to fulfil the requirements of Article V that we now turn.

The Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest

Perhaps one of the most significant regional developments since the establishment of the FFA has been the emergence of the sub-regional group known as the Parties to the Nauru Agreement (PNA) and the influence of this group on regional fisheries policy. Originally, the group comprised the Federated States of Micronesia, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea and Solomon Islands. In 1991 Tuvalu was admitted to membership. The significance of the Nauru Group is largely due to the fact that between them, the coastal States that are Party to the Nauru Agreement exercise jurisdiction over a very large proportion of the tuna resource of the western and central Pacific.

Discussions between the original Parties began in 1981 and centred on the particular problems of the Parties' relationships with distant water fishing nations active in their area of the western Pacific[5]. Recognizing the fact that DWFNs were able to weaken their negotiating positions by playing one State off against another, the group adopted and subsequently ratified the Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest.

Article I sets out the purpose of the Nauru Agreement:

> *" The Parties shall seek, without any derogation of their respective sovereign rights, to co-ordinate and harmonise the management of fisheries with regard to common stocks within the Fisheries Zones, for the benefit of their peoples."*

Article II requires the Parties to "seek to establish a co-ordinated approach to the fishing of the common stocks in the Fisheries Zones by foreign fishing vessels". This is to be achieved, *inter alia*, by the mechanism of minimum terms and conditions of access. The areas in which these minimum terms and conditions may be developed are set out in Article II(b) and (c) as follows. However, it should be noted that the obligations on the Parties differ in respect of each sub-paragraph. Article II(b) requires that the Parties

> *"shall establish, as a minimum, uniform terms and conditions under which the Parties may licence foreign fishing vessels to fish within the Fisheries Zones regarding:*
>
> *(i)* *the requirement that each foreign fishing vessel apply for and possess a licence or permit;*
>
> *(ii)* *the placement of observers on foreign fishing vessels;*
>
> *(iii)* *the requirement that a standardized form of log book be maintained on a day-to-day basis which shall be produced at the direction of the competent authorities;*
>
> *(iv)* *the timely reporting to the competent authorities of required information concerning the entry, exit and other movement and activities of foreign fishing vessels within the Fisheries Zones; and*

(v) *standardized identification of foreign fishing vessels."*

Article II(c), on the other hand, merely requires the Parties to:

> *"seek to establish other uniform terms and conditions under which the Parties may licence foreign fishing vessels to fish within the Fisheries Zones, including:*
>
> *(i)* *the payment of an access fee, which shall be calculated in accordance with principles established by the Parties;*
>
> *(ii)* *the requirement to supply to the competent authorities complete catch and effort data for each voyage;*
>
> *(iii)* *the requirement to supply to the competent authorities such additional information as the Parties may determine to be necessary;*
>
> *(iv)* *the requirement that the flag State or organisations having authority over a foreign fishing vessel take such measures as are necessary to ensure compliance by such vessel with the relevant fisheries laws of the Parties; and*
>
> *(v)* *such other terms and conditions as the Parties may from time to time consider necessary."*

The Nauru Agreement is closely linked to the FFA Convention. The role of the Agency in promoting regional cooperation and co-ordination of fisheries policies is given express recognition in the Preamble, and the Agreement specifically states that the Parties shall seek the assistance of the Agency in providing secretariat services for implementing and co-ordinating the provisions of the Agreement.

The First Implementing Arrangement

Article IX of the Nauru Agreement provides that the Parties shall conclude arrangements where necessary to facilitate the implementation of the terms and to attain objectives of the Agreement.

Several meetings were held between 1982 and 1983 at which the development of an arrangement to implement the Nauru Agreement was discussed. A final revised version of the arrangements was not adopted until September 1983. However, before that a number of events took place which began to sow seeds of confusion with regard to the status of the MTCs.

Workshop on Harmonization and Co-ordination of Fisheries Regimes and Access Agreements (Suva, Fiji, 22 February - 5 March 1982)

This workshop, attended by all FFA member countries and observers may be regarded as the first real step the FFA took in the process of developing MTCs. The workshop discussed a wide range of issues on the harmonization and co-ordination of access agreements. It was the first of its kind to be held in the region and therefore attracted a lot of interest.The workshop considered the draft implementing arrangement proposed for the Nauru Group and in essence agreed on the principles embodied in the draft[6].

With regard to licensing procedures, the workshop again considered the draft implementing arrangement a suitable basis and recommended the establishment of a regional register of foreign fishing vessels to be maintained by FFA. In accordance with arrangements to be developed by the coastal States of the region, only fishing vessel which are accorded "good standing" on the register would be granted fishing licences in the region.

The workshop also recommended that foreign fishing vessels be required to comply with minimum reporting conditions throughout the region. These would include giving notice to FFA of entry into and departure from any zone, regular reporting of position and catch to FFA at seven day intervals and the use of standardized tuna catch and effort log sheets.

One of the most important innovations to come out of the workshop was the formulation of the concept of "flag State" responsibility whereby the flag State is required in access agreements to take measures to ensure compliance by their fishing vessels with coastal State laws.

The South Pacific Forum Decision, August 1982

The Suva workshop presented its report to the 7th meeting of the Forum Fisheries Committee in Honiara, Solomon Islands in May 1982. The recommendations of the workshop were reviewed and as a result the following recommendations were submitted to the 13th South Pacific Forum at Rotorua, New Zealand in August 1982[7].

The decision of the FFC on the recommendations of the Suva workshop is significant and is worth setting out in some detail.

> *"A) The FFC recommends to Forum that the following action with regard to foreign fishing vessels should be taken by Forum countries, together with other participants : -*
>
> *(1) A regional register of foreign fishing vessels should be established at the Forum Fisheries Agency.*
>
> *(2) Only vessels which are accorded good standing status on the register would be granted fishing licenses in the region, in accordance with detailed arrangements to be agreed by member countries.*

(3) Uniform vessel identification requirements should be adopted. The international radio call sign or, in its absence, the number from the regional register should be used.

...

B) The FFC recommends to Forum that the following harmonised minimum standards for foreign fishing vessel access should be adopted at this stage by Forum countries, together with other participating countries: -

(1) Foreign Fishing vessels 20 gross registered tons or over be required to comply with the following minimum reporting conditions while in the fisheries zone of a country in which they are licensed to fish:

- *give notice to FFA or the licensing country of entry into and departure from any zone or port;*

- *regularly report position and catch to FFA or the licensing country.*

(2) Foreign fishing vessels be required to complete standard regional tuna catch and effort log sheets, while in the fisheries zone of the licensing country, and to return such sheets directly to the regional agency (SPC) or the licensing country for processing within 45 days after completion of the voyage.

(3) Flag States or, in the absence of access agreements with flag States, the appropriate national fishermen's organisations be required to take measures to ensure compliance by their fishing vessels with coastal State laws.

(4) Provision for on-board observers and port calls when required by the licensing country."

These recommendations were endorsed by the South Pacific Forum[8]. Decisions of the FFC and of the South Pacific Forum apply to all the members of those organisations. Thus we see that the draft arrangement which was originally intended to become legally binding only upon the Parties to the Nauru Agreement, took on a greater regional significance by becoming a parallel initiative of the Forum Fisheries Committee and the South Pacific Forum.

The First Implementing Arrangement was finally concluded and entered into force in September 1983, 30 days following signature by the fourth Party thereto. This Arrangement, which embodies the minimum terms and conditions, clearly binds the Parties thereto at international law.

Article I of the Arrangement requires the Parties to participate in, and comply with, the Regional Register Rules adopted by the FFC. (see below)

The Arrangement goes on to require the Parties to ensure compliance with certain minimum terms and conditions of access which are set out in Article II, if necessary by legislation. The text of any such legislation enacted in order to give effect to the Arrangement is to be communicated to the Government of the Solomon Islands as depositary.

Article II sets out the obligation to establish minimum terms and conditions as follows:

> *" The Parties shall establish the following minimum terms and conditions and utilize the following common formats in all their subsequent foreign fishing agreements and their licensing requirements concerning foreign fishing vessels fishing the common stock of fish within the Fisheries Zones:"*

There are then set out the minimum terms and conditions relating to licensing procedures, authorised personnel, daily catch reporting and maintenance of log books, timely reports of catch, zone entry and zone exit, and identification of licensed vessels by means of radio call sign or registration number,

The Regional Register Rules

We have already seen that the Parties to the Nauru Agreement incorporated the Regional Register Rules in Article I of the First Implementing Arrangement. The concept of a Regional Register was one of the initiatives arising out of the 1982 Suva workshop. The concept was further developed and given formal status at the 8th meeting of the Forum Fisheries Committee in Apia, Western Samoa, in May 1983.

The Regional Register is basically an enforcement tool. The general intention behind it is to shift some of the responsibility for ensuring compliance to the flag State or fishing association. The fundamental requirement of the Register, which is administered by the Director of FFA, is that before any vessel may be licensed to fish in the region, it must be in good standing on the Regional Register. Good Standing is a status which is automatically conferred on a vessel upon registration. The status may be withdrawn in certain circumstances, including where the vessel has committed a serious fisheries offence. Once good standing is withdrawn, the vessel is effectively prevented from fishing in the region. Recently, a procedure of suspension of good standing was introduced.

One of the major difficulties with the Regional Register has been the procedure for registration. From the outset the practice has been to permit applications to be submitted either by the vessel operator in person, or by the licensing State. In the case of those countries which licence on a per vessel per trip system, when individual licences may be issued within 24 hours of the application this means that the application for registration is submitted contemporaneously with the application for a fishing permit. Since applications for registration inevitably take time to process this means that vessels are often licensed to fish before they receive good standing on the Regional Register. To a great extent, this negates the effect and demeans the status of the Regional Register.

Efforts to insist that applications for registration are submitted direct to FFA have not met with total success. Some DWFNs, notably Japan, refuse to submit applications to FFA, though they are prepared to submit substantially similar information in a similar form to the licensing country for onward transmission to FFA. The reason for this is that Japan does not recognise FFA as a genuine Article 64 organisation - an argument which, as we have seen, is fallacious. Given that the fundamental basis upon which good standing is accorded is the acceptance by the fishing nation of the reasonable laws and regulation imposed by the coastal State under Article 62(4) of UNCLOS, it would seem anomalous to allow this situation to continue. Acceptance of the laws and regulations implies an acceptance of the practical requirements, and it would seem that to allow vessel operators to circumvent these procedures seriously undermines the whole concept of good standing. [In these circumstances, it is suggested that, if the Japanese are serious about cooperation, the greatest sign of good faith would be to accept the Regional Register]

1984 - 1989: An increase in access agreements

During this period there was relatively little regional activity as regards the development of the minimum terms and conditions. FFA member countries did manage to incorporate the agreed terms and conditions into their access agreements. Interestingly, the period 1984 - 1986 coincides with what has been called the "third period" of Japanese bilateral access agreements, in which both parties became more realistic and co-operative in their demands[9]. By contrast, the period during which the minimum terms and conditions were being developed and applied, 1980 - 1983 is described by Matsuda as the "difficult" phase of negotiations.

By 1989 bilateral access agreements with Japan were in place with the following countries in the FFA region. Australia (Government to Government Agreement 1979, annual subsidiary agreements, lump sum). New Zealand (from 1979, quota). Kiribati (entered into in 1978 as a lump sum agreement, changed in 1984 to a per vessel per trip system with automatic extension), Solomon Islands, (Government to Government Agreement 1978, annual subsidiary agreement, lump sum. This was changed in 1983 after a four month break off to per vessel per trip system). Marshall Islands (Agreement entered into in 1981 on a per vessel per trip system). Tuvalu, (Agreement entered into in 1986 on a lump sum basis, expired in 1988 and not renewed). Papua New Guinea, (Agreement entered into in August 1981 on a lump sum basis. Broken off in 1987 and not renewed). Federated States of Micronesia (Agreement with fisheries associations in 1984 on a per vessel per trip system). Palau (Agreement since 1979. Break off in 1982 - 1983 followed by new lump sum system. Partial break off in 1991 followed by a new hybrid agreement 1992).

Several countries also had access arrangements with Korea and Taiwan, both of which rapidly expanded their fishing fleets during the 1980s. By 1989 access arrangements were in place between Korea and Tuvalu, Kiribati, and Federated States of Micronesia. The agreement between Tuvalu and the Korea Deep Seas Fisheries Association (KDSFA) lapsed in 1991 and was not renewed after the Association claimed that the fishing in Tuvalu's EEZ was poor. (In 1990 the Association was paying $US154,000 for access by up to 100 longliners - a mere US$1,540 per vessel at a time when the world price for yellowfin tuna was approximately US$850 per tonne). The agreement between KDSFA and Federated States of Micronesia was suspended in 1990 and has not been renewed. The decision by Federated States of Micronesia to cancel the agreement was a reflection of several issues including Korea's refusal to accept the

minimum terms and conditions, dissatisfaction with the reporting practices of the Korean fleet and the financial compensation offered by the Korea Deep Seas Fisheries Association. The KDSFA-Kiribati agreement, which has an automatic renewal clause, was renewed without any change in the conditions for another year in January 1991.

Korean purse-seine vessels operate in Papua New Guinea under *ad hoc* arrangements. Korea and Papua New Guinea signed a Government to Government Agreement in January 1992 but were unable to conclude the subsidiary agreements with the Association.

Agreements which were formerly in place between Taiwan and Federated States of Micronesia and Tuvalu have lapsed. As with Korea, Federated States of Micronesia cancelled the agreement as a result of dissatisfaction with the reporting practices of the Taiwanese fleet. There have since been negotiations between Taiwan and Federated States of Micronesia and there agreements have been signed with Taiwanese fishing associations. However, the Government of Taiwan refused to accept the minimum terms and conditions, claiming that as Papua New Guinea had not insisted on them in recently signed agreements with Taiwanese companies it was inappropriate for Federated States of Micronesia to do so. In fact, the revised minimum terms and conditions are reproduced verbatim in Papua New Guinea's agreements.

In Tuvalu's case Taiwan did not wish to renew the agreement because of the alleged absence of fish in Tuvalu's EEZ.

Papua New Guinea has signed agreements in principle with three Taiwanese companies and these will become effective when some outstanding matters, unrelated to the minimum terms and conditions, are completed by the companies concerned. All these agreements incorporate the minimum terms and conditions.

Taiwan has also signed an agreement with Cook Islands under which up to 55 longliners will have access to the Cook Islands EEZ for the payment of $US158,000.

Certainly the most significant development in the period 1984 - 1989 was the conclusion of the multilateral Treaty with the United States[10]. For the purposes of the present discussion the most important aspect of the Treaty is that the Regional Register procedures and the minimum terms and conditions were incorporated in the Annexes to the Treaty and thus received binding legal effect as between the Parties thereto.

Revision of the Minimum Terms and Conditions, 1990

By 1990 it became apparent that certain amendments were necessary to the minimum terms and conditions. This was largely due to concerns expressed by PNA countries over the substantial increases in foreign fishing activity in the region, particularly purse-seining, as well as discontent over disparities in fee levels and methods of calculation throughout the region[11]. The move was also partly due to the increased level of compliance noted on the part of the U.S. fleet following the introduction of the minimum terms and conditions.

Ninth Annual Meeting of the Parties to the Nauru Agreement, Nauru, April 1990

At the Ninth Annual Meeting of the Parties to the Nauru Agreement in Nauru in April 1990 Papua New Guinea introduced a paper calling for revisions to be made to the First Implementing Arrangement to cover urgent matters such as transhipment at sea, observer programmes, surveillance and monitoring, and an annual registration fee under the Regional Register. At the same time the Federated States of Micronesia proposed that a Second Implementing Arrangement be adopted to cover the areas of high seas catch reporting, observer costs and transhipment at sea.

A legal drafting group was commissioned to prepare a draft of a Second Implementing Arrangement. The resulting draft was endorsed by the Meeting and referred to a Ministerial Level Meeting of the Parties to the Nauru Agreement to be convened in Palau in October 1990.

Sixth Special Session (Ministerial Level Meeting) of the Parties to the Nauru Agreement, Palau, September 1990

This meeting, which for the first time included Tuvalu as a full member, further considered the draft Second Implementing Arrangement and examined in detail comments made by member countries. Of these, the most significant comments were made by the Kiribati delegation. Kiribati, while acknowledging that "We have also, for most of us, continued licensing Japanese vessels under a system that we consider disadvantageous to us"[12], expressed concern that the minimum terms and conditions should not be made mandatory but should be regarded as guidelines only. It was felt that to make the minimum terms and conditions mandatory would limit the ability of some countries to negotiate access agreements to their own advantage. Specific problems were pointed out in relation to observer costs, which Kiribati felt had only a remote chance of acceptance, and the Regional Register procedures, which it was noted amounted to double registration. It was also noted that to charge a fee for the Regional Register would discourage applications for access.

In so far as the last point is concerned it is suggested that this arises from a fundamental misconception of the role of the Regional Register. As noted above, where a per vessel per trip system is in force, and registration on the Regional Register is handled by the licensing country, the system does indeed amount, prima facie, to double registration. However, this element of confusion is precisely the effect the Japanese have set out to achieve and have very cleverly manipulated to their own advantage. As articulated above, the Japanese objection is not to the Regional Register *per se*, but to the existence of a regional management body of which Japan is not a member. The Japanese negotiators have managed to convince some FFA member countries that the Regional Register is an unnecessary encumbrance to the system of per vessel per trip licensing.

The concerns expressed by Kiribati were not shared by all the PNA members. The minimum terms and conditions as finally adopted and signed by the Ministerial Level Meeting in the form of the Second Implementing Arrangement[13] included provisions relating to observer costs and read as follows:

Transhipment at Sea Prohibited

The owner, charterer, operator, master or any other person responsible for the operation of a licensed vessel (hereafter referred to as "the operator") shall not tranship fish at sea whether such transhipment is done within fisheries zone of a licensing Party or on the high seas and shall tranship only through ports designated by the licensing Party.

High Seas Catch Reporting and Maintenance of Log Books

Where a vessel is licensed to fish in one or more Fisheries Zones and is also used for fishing in the high seas during a fishing trip, the operator shall:

(a) keep daily catch and effort records on board the vessel within the high seas on prescribed forms;

(b) keep the relevant catch data form current at all times and produce it on demand to any authorised personnel;

(c) in accordance with the Minutes of an Agreement made in Palau on 19 September 1990, send by registered airmail to each licensing Party or its representative the following reports covering catch and effort in each Zone and the high seas for the whole trip:

(i) a preliminary report within 14 days of the completion of a trip; and
(ii) a final report within 45 days of the completion of the trip.

Observers

Upon request by a licensing Party, observers shall be placed on board licensed vessels and the operator and/or fishermen's association and /or flag State government shall pay the costs of such observers including:

(a) full travel costs from the licensing country to the vessel and return;

(b) salary; and

(c) full insurance coverage.

It was agreed by the Nauru Group that the Second Implementing Arrangement would come into effect on 1 January 1991, but that existing access arrangements would be allowed to run their course.

The latter proviso has caused some problems. Many of the existing access arrangements in the region are of the "roll-over" type, subject to automatic extension. The terms and conditions of access may only be negotiated by the licensing country giving notice to the other Party. Given

the extreme reluctance of some PNA members to run the risk of a break-off in access arrangements, a few countries have made little effort to introduce the new minimum terms and conditions, preferring to allow present arrangements to continue in force until it is seen that all other countries have successfully applied the minimum terms and conditions. This has led to a degree of disenchantment on the part of those countries which have fought long and hard for the incorporation of the minimum terms and conditions into access arrangements.

Forum Fisheries Committee, Fourth Technical Sub-Committee Meeting, Nauru, April 1990

Almost simultaneously with the Ninth Annual Meeting of the Parties to the Nauru Agreement the Fourth Technical Sub-Committee of the Forum Fisheries Committee considered the question of minimum terms and conditions and the Regional Register Rules in a workshop specially convened for the purpose. The workshop produced a draft of the harmonised minimum terms and conditions and modified Regional Register Rules and this was presented, along with the report of the Fourth Technical Sub-Committee to the 18th Meeting of the Forum Fisheries Committee. The Forum Fisheries Committee agreed that the revised minimum terms and conditions should be referred to member governments before adoption. Member countries were requested to inform the Secretariat of their positions by 1 July 1990 and should no response be forthcoming by 1 August 1990 it would be assumed that there was agreement to the implementation of the revised minimum terms and conditions.

21st South Pacific Forum Meeting, Port Vila, July 1990

The amendments to the minimum terms and conditions were endorsed by the 21st South Pacific Forum Meeting at Port Vila, Vanuatu in July 1990. The Forum Communique records that "Forum members agreed to give high priority to the implementation of the revised minimum terms and conditions as the basic standard of access to the FFA members' EEZs".

Differences between the Implementing Arrangements and the Revised Minimum Terms and Conditions

From the foregoing, it is quite clear that there are two separate sets of minimum terms and conditions. The Parties to the Nauru Agreement are bound by the provisions of the First and Second Implementing Arrangements. The revised (harmonised) minimum terms and conditions on the other hand, have a somewhat uncertain legal status (which is discussed below). These apply to all member countries of FFA.

There are certain differences in form between the revised minimum terms and conditions and the Implementing Arrangements, though the two are not necessarily inconsistent. These differences are referred to, where appropriate, in the more detailed discussion of the terms and conditions below.

Developments in 1991

The difficulties being encountered by PNA members with respect to the implementation of the minimum terms and conditions were reviewed at the Tenth Annual Meeting of the Parties to the

Nauru Agreement at Wellington, New Zealand in April 1991. A statement of common position concerning the implementation of minimum terms and conditions was drafted which was referred to FFC for endorsement. The relevant portion of the statement reads thus -

> *" FFA member countries reaffirm their total commitment to apply the Minimum Terms and Conditions as a non-negotiable standard of access for foreign fishing vessels to the EEZs of member countries. Communication of this position of solidarity to foreign fishing industries and governments should occur at every opportunity including exchange of visits by government representatives and their attendance at access negotiations.*
> ...
> *The position should also be raised with DWFN capitals during visits by FFA, Ministers and Heads of Government."*

This statement was endorsed by the 20th Meeting of the Forum Fisheries Committee also at Wellington, in April 1991.

The revised minimum terms and conditions were raised with the United States in connection with negotiations for an extension of the financial arrangements under the Treaty. The U.S. fleet has been required to report high seas catch data in the Treaty area since the Treaty came into force in 1987. Despite some resistance to the revised minimum terms and conditions, particularly those relating to transhipment, agreement has been reached whereby terms substantially similar to those set out in the revised minimum terms and conditions will be incorporated in the Annexes to the Treaty from 1993[14].

THE PRESENT STATUS OF THE MINIMUM TERMS AND CONDITIONS AND IMPLEMENTATION

The minimum terms and conditions originated, as we have seen, as an initiative of the Parties to the Nauru Agreement. They are contained in the two implementing arrangements entered into pursuant to Article II of the Nauru Agreement and, as such, are binding on the Parties.

The Regional Register Rules, an initiative of the Forum Fisheries Committee, were incorporated by reference into the First Implementing Arrangement and thus are also binding upon the Parties to the Nauru Agreement.

Having been adopted by FFC and endorsed by the South Pacific Forum it is also arguable that both the revised minimum terms and conditions and the Regional Register Rules are binding on all countries represented at those fora. Although the traditional position under international law is that Treaties are written agreements made between two or more States and is governed by international law, it cannot be asserted with confidence that international law requires a Treaty to be in written form. It is arguable that the agreement made by South Pacific Forum members committing themselves to making the minimum terms and conditions non-negotiable is binding on them in international law. For example, the International Court of Justice Report has expressed "no doubt" that "declarations made by way of unilateral acts, concerning legal or

factual situations may have the effect of creating legal obligations. The test applied by the Court was that of the intention of the declarant States:

> *"When it is the intention of the state making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the state being thenceforth legally required to follow the course of conduct consistent with the declaration*[15]*"*

The Forum leaders as Heads of their Governments have the authority to make commitments that would bind their countries under international law. To say otherwise is to vitiate the role of the Forum and the authority that they yield as political leaders of their countries. The minimum terms and conditions that were adopted by the Forum must therefore have legal effect in international law.

Whether or not the minimum terms and conditions have effect as part of the domestic laws of the member countries would depend on their Constitution and the extent to which the Courts would apply them as part of the domestic law, and this will be considered in due course.

However, as between individual FFA member countries and distant water fishing nations the arrangements entered into by the Nauru Group and the various declarations of intent made by FFC and the South Pacific Forum clearly have no binding legal effect. The minimum terms and conditions are no more than contractual terms in access arrangements and, except where the minimum terms and conditions are enshrined in domestic legislation, are open to negotiation along with other contractual terms. The extent to which such terms and conditions can be incorporated into access arrangements depends upon many factors, not least of which is the relativity of the bargaining power of the parties to the proposed access arrangement. Clearly, it is much easier for a powerful country, which is not solely dependent on fisheries access, to insist on a particular term than it is for a small and weak country.

It is necessary therefore to consider the justification for imposing each of the minimum terms and conditions and the best approach to ensuring that they are accepted by distant water fishing nations.

The Justification for the Minimum Terms and Conditions under UNCLOS and within the South Pacific Region

Vessel Reporting Requirements

The revised minimum terms and conditions require that vessel operators report position and catch on board every Wednesday, on entry into the zone and on departure from the zone. Although reporting conditions are standard features of most access agreements, these standardised provisions were introduced in order to improve the level of compliance given the lack of resources available to most FFA countries.

Competence to impose conditions relating to catch and effort statistics and vessel position reports is expressly conferred by UNCLOS Article 62(4)(e).

Transhipment at sea

The coastal State has an obligation to conserve and manage the living resources in the EEZ, and to promote optimum utilization. The practice of transhipment at sea makes the fulfilment of this obligation difficult because it distorts catch data. It also distorts the calculation of a "fishing trip" which is of special concern to those countries which have adopted a per vessel per trip licensing system. In this regard the Fourth Technical Sub-Committee noted that transhipment and provisioning at sea were becoming important issues. It is expected that Taiwanese and Korean fleets are likely to expand ad increase their transhipping activities in order to remain competitive. In these circumstances, and in a situation where consistent under-reporting is already prevalent, significant economic benefits will be lost to the region unless transhipment is strictly controlled.

In an attempt to control this practice the Second Implementing Arrangement provides that -

> *" The owner, charterer, operator, master or any other person responsible for the operation of a licensed vessel (hereafter referred to as "the operator" shall not tranship fish at sea whether such transhipment is done within a fisheries zone of a licensing Party or on the high seas and shall tranship only through ports designated by the licensing Party; "*

The revised minimum terms and conditions provide as follows -

> *" [3] (b) the operator of a foreign fishing vessel shall -*
>
> *(i) not tranship at sea under any circumstances except for the transfer of catch by a licensed group seiner to its licensed carrier vessel each of which holds good standing on the Regional Register;*
>
> *(ii) provide 72 hours notice to a licensing country of a request to tranship any or all of the fish on board and shall provide the name of the vessel, its international radio call sign, position, the catch on board by species, the time and port where such transhipment is requested to occur and an undertaking to pay all fees as required under the laws of the licensing country;*
>
> *(iii) only tranship at the time and port authorised for transhipment;*
>
> *(iv) submit full reports on transhipping on the prescribed forms; "*

Although the revised minimum terms and conditions are considerably more detailed, both these provisions effectively prohibit transhipment at sea, including on the high seas, with the exception of authorised transhipment at a port of a licensing party. The language used is extremely wide and may be construed as a prohibition on transhipment anywhere on the high seas - this is indeed the construction used by Japan as an argument against accepting the provision.

Such a general prohibition cannot be supported in law and it has been suggested that to attempt to support it, or even to be perceived as supporting it, would seriously undermine the credibility of FFA member States. There is an arguable case in international law for some form of restriction on transhipment in areas of high seas adjacent to EEZs, but even this has to be weighed against the practicability of enforcing such a regime.

In these circumstances, the prohibition on transhipment could be brought within international law in two ways. The first is by limiting the area of application to those areas of high seas which are "adjacent" to the EEZs of the licensing countries. For this purpose the Parties could agree as an interim measure to define "adjacent" by reference to the area covered by the Treaty with the United States. The second way is by amending the provision to allow transhipment in the EEZ subject to express authorisation by the coastal State, payment of fees and compliance with reporting requirements.

The advantage of adopting either of these approaches would be that Parties would be acting consistently with international law and would be fully justified in enacting appropriate legislation to support their position. The problem is of most significance in relation to Taiwanese and Korean fleets. Japan, although it will not agree to a general prohibition of transhipment in access agreements, does not permit its fleet to tranship at sea, and the issue is of little practical significance. Indications from the US fleet are that it is prepared to accept a general prohibition on transhipment at sea in the Treaty area otherwise than in accordance with coastal State requirements.

High Seas Catch Reporting

The second implementing arrangement provides -

> *" Where a vessel is licensed to fish in one or more Fisheries Zones and is also used for fishing in the high seas during a fishing trip, the operator shall:*
>
> *(a) keep daily catch and effort records on board the vessel within the high seas on prescribed forms; "*

The revised minimum terms and conditions contain a similar provision but in a different form as follows -

> *" The operator shall:*
>
> *(a) duly complete in the English language, daily reports on the prescribed forms of all catch in the zone of any licensing country and on the high seas and shall certify that information is true, complete and accurate. "*

There is considerable justification in law for requiring high seas catch data. Such data is required in order to assist the coastal State in fulfilling its obligation under UNCLOS: (i) to promote optimum utilization of the living resources in the EEZ (Article 62), (ii) to conserve those resources (Article 61), (iii) in relation to highly migratory species to co-operate with a view to ensuring conservation and optimum utilization of highly migratory species both within and

beyond the EEZ (Article 64). It should be stressed that Article 64 imposes the same obligation to cooperate on both the coastal State and the fishing State. Cooperation in this sense implies exchange of data. High seas data is seen as essential to the proper conservation of stocks within the EEZ, particularly straddling stocks and highly migratory species.

Until recently, DWFN, led by the Japanese have refused to countenance any requirement relating to the provision of high seas catch data. While they acknowledge the insufficiency of data which does not include high seas data, they have used this issue as another avenue of attack on the validity of FFA as an Article 64 organisation.

Recently, however, a change in the Japanese attitude has been noted. In recent bilateral access negotiations between Japan and Australia and Japan and Palau some progress was made. In the course of negotiations on the recently concluded Government to Government agreement between Australia and Japan in 1991, the Australian delegation stressed the necessity of all tuna catch data, including high seas catch data, being provided to assist research on tuna stocks in the Pacific Ocean in particular. In response, the Japanese delegation stated that, in order to contribute towards the conservation of highly migratory species such as tuna, it is a basic policy of Japan to provide tuna catch data both within and outside the 200 mile fishing zone to appropriate international fishery research and management bodies including such bodies in the South Pacific in which Japan has full membership. The Japanese delegation also stated that internal consideration to make all such tuna catch data available to such bodies was being given priority attention, and that it intended to complete this consideration by the end of 1991[16].

Following this discussion the Japanese Fisheries Agency wrote to the Australian Fisheries Service[17] stating their policy to make high seas catch data available on request to international organisations if such organisations intend to conduct research in cooperation with Japan. SPC was cited as an example of an organisation of which Japan is not a member but which carries out research in cooperation with Japanese researchers.

A new bilateral access agreement with Palau was concluded in January 1992, after Palau gave notice to Japan that it wished to re-negotiate the previous agreement concluded in 1983 to incorporate the minimum terms and conditions. In relation to the provision of high seas catch data Japan was unable to agree to this requirement being included in the agreement itself. The parties did agree, however, to a separate Memorandum of Understanding setting out the position of each party with regard to this data. Since the agreement is with the Associations rather than the Government of Japan, it was not possible for the Associations to undertake to supply the data to SPC. However, the Japanese Government did agree to supply a letter setting out Japanese policy on the provision of high seas catch data. This letter was appended to the record of discussions and basically provides that Japan will provide data to those organisations of which Japan is not a member but which conduct fisheries resource research in cooperation with Japan. The letter went on to state that Japan regards SPC as such an organisation. The Japanese also agreed to keep under review the question of the supply of the data to the licensing country.

While the provisions of the Second Implementing Arrangement in this respect can, to some extent be justified in international law (and the Japanese position is probably a recognition of the validity of the need for data in relation to the duty of conservation), there are drafting inconsistencies. Not least among these is the question of the area of application. There is nothing

in the minimum terms and conditions which defines or limits their area of application. If the minimum terms and conditions are incorporated into domestic legislation they would usually have binding effect within the fisheries waters of that State. If there is no such legislation in force and the minimum terms and conditions are included in an access arrangement the area of application would be a matter for the parties to that agreement to reach agreement upon.

The problem that has been highlighted by DWFN, particularly the Japanese, relates to the areas of high seas that are covered by the provisions in the minimum terms and conditions. In developing a strategy to overcome these objections, Parties need to consider very carefully the options open to them and the advantages and disadvantages of committing themselves to a definite position on the issue of high seas catch reporting and transhipment.

There are several options available. One is to clearly define the area of high seas to which the MTCs apply and use this definition both for catch reporting and transhipment. The area could be defined geographically (e.g. the US Treaty area), or by reference to the range of the stock (as in the draft Arrangement for the Management of the Western Pacific Purse-Seine Fishery). Alternatively the Parties could look at ways in which an area could be defined by reference to Article 63 of UNCLOS.

The catch reporting requirement could be limited by reference to the fishing trip, i.e. full catch reports are required for fishing trips in which fishing takes place both on the high seas and in a zone. The advantage of this approach is that the demand for data can be justified for reasons of conservation of the stock in the zone, and are not tied down to any specific area of high seas. The disadvantage of the approach is that compliance and monitoring may be difficult to ensure.

Alternatively, given that the Japanese are unlikely to agree to the inclusion of provisions relating to high seas data in access agreements, PNA and FFA member countries need to consider whether the compromise suggested by Japan in fact meets the objectives of this minimum terms and condition, at least as an interim measure.

Observer Costs

The placement of observers is clearly one of the matters in respect of which the coastal State is empowered to make regulations under Article 62(4)(g) of UNCLOS. The requirements relating to observers have not met with much resistance in the past except with respect to the costs of observers and the extent of the duties of observers.

Appointment of an Agent

The flag State or fishermens's association is required to nominate an agent in the licensing country who shall have authority to receive and respond to legal process. The purpose of this requirement is to reduce costs and ensure that greater responsibility for compliance is borne by the flag State or fishermen's association.

Again, Article 62(4)(k) of UNCLOS empowers the coastal State to make regulations relating to enforcement.

Foreign Fishing Vessels in Transit

The revised minimum terms and conditions require that vessels transitting zones shall be required to have all fishing equipment on board stowed or secured in such a manner that it is not readily available to be used for fishing.

This requirement is, in fact, a common requirement in national fisheries legislation. Ample justification for this requirement can be found in Article 62(4)(a)(c) and (k) of UNCLOS.

Flag State Responsibility

The minimum terms and conditions require that flag States or, in the absence of agreements with flag States, the appropriate Fishermen's Associations, be required in agreements to take measures to ensure compliance by their fishing vessels with coastal State laws. A similar requirement was also a feature of the original minimum terms and conditions in the early 1980s.

This requirement is authorised under UNCLOS Article 62(4)(k), as it relates specifically to enforcement procedures.

Although most access agreements contain a "best efforts" clause, which requires the DWFN to use its best efforts to ensure compliance with coastal State laws and regulations, the U.S. Treaty set new standards of flag State responsibility. Under Article 4 of the U.S. Treaty, the Government of the United States is obliged to investigate alleged infringements involving U.S. flag vessels and, where appropriate, to institute proceedings against such vessels. Obviously, such provisions are only appropriate to Government to Government agreements. The difficulty with most agreements with fishermen's associations, such as those with Japanese associations, is that the association itself is limited in the degree of control it can legally exercise over the members of the association.

Implementation through National Legislation

The only way to ensure that the minimum terms and conditions are truly non-negotiable is to incorporate them into national legislation. This was, indeed, one of the specific recommendations of the 1982 Suva workshop, and, as far as the Parties to the Nauru Agreement is concerned, is a requirement of Article III of the Nauru Agreement.

The approach taken to implementation through legislation has varied. A brief survey of regional legislation follows -

Australia

The comprehensive new Australian Fisheries Legislation[18] contains all the definitions set out in the revised minimum terms and conditions. The Act also contains provisions relating to the powers of enforcement officers and observers. Other provisions, such as flag State responsibility and the Regional Register are to be dealt with in the terms of access agreements, whereas the Act contains general provisions enabling regulations to be made to cover such matters as reporting.

Australian reporting conditions are, in fact, considerably more onerous than the minimum terms and conditions.

Cook Islands

Cook Islands' legislation[19] contains reference to most of the minimum terms and conditions. Good standing on the Regional Register is a pre-requisite to licensing[20], there must be provision for flag State responsibility before an access agreement may be entered into[21], and the Minister is given power to enter into arrangements relating to harmonised minimum terms and conditions. The definitions in the Act are substantially similar to those used in the minimum terms and conditions, and there are provisions relating to the stowage of gear and powers of authorised officers. Transhipment is only permitted in Cook Islands waters in accordance with conditions that may be prescribed. The Act is not as precise as the revised minimum terms and conditions in relation to observer cost recovery[22]. The Act is silent on reporting conditions and vessel markings, though these are both matters which may be covered in regulations made pursuant to the Act. Cook Islands is in the process of drafting regulations.

Fiji

The relevant Fiji legislation[23] was passed before the minimum terms and conditions came into effect and is silent on the requirement of good standing on the Regional Register. Under s.14 of the Act the Minister may attach conditions to the grant of any licence. Regulations made under the Act[24] there are requirements equivalent to or in excess of those in the minimum terms and conditions relating to zone entry and exit reporting, daily position reporting and weekly catch reporting while in the zone, liability to pay full observer costs, stowage of gear, and prohibition of transhipment.

Federated States of Micronesia

Legislation[25] contains comprehensive reporting requirements substantially in accordance with the minimum terms and conditions and provisions prescribing the following as minimum terms: observer cost recovery, powers of authorised officers and observers, vessel markings in accordance with regulations, appointment of an agent. The legislation is silent on the issues of flag State responsibility, the Regional Register, transhipment and gear stowage.

Kiribati

The Kiribati Fisheries Act[26] contains definitions which are substantially the same as those contained in the First Implementing Arrangement. There is also a requirement to stow gear during transit. The legislation makes no specific reference to the Regional Register, flag State responsibility, prohibition of transhipment, observer cost recovery or reporting conditions. There is a general power whereby the Minister may include reporting and other conditions as a condition of a licence[27], and the Minister may also limit the provisions of the Act relating to the fishery limits so far as it is necessary to do so to give effect to any international agreement or arrangement by which the Republic may become bound concerning fishing off the coast of Kiribati[28]. No fisheries regulations have been made since 1982.

Marshall Islands

Under the relevant legislation the power to conclude foreign fishing agreements is delegated to the Marshall Islands Marine Resources Authority (MIMRA)[29]. MIMRA is required, when negotiating access agreements, to "seek substantial agreement" to flag State responsibility, appointment of an agent, and provisions relating to enforcement. There are also specific provisions relating to the requirement of good standing on the Regional Register, harmonisation of terms of access, and stowage of gear. Under the regulations by which MIMRA conducts its affairs[30], the following are listed as "essential items"; appointment of a local agent, agreement to prescribed reporting conditions.

Nauru

The Nauru legislation, which is out of date[31], makes no specific mention of any of the minimum terms and conditions. There is, however, power to set specific licence conditions which may include any of the matters referred to in the minimum terms and conditions[32].

New Zealand

New Zealand legislation[33] contains provisions substantially in accordance with the minimum terms and conditions in respect of definitions, licensing form, transhipment requirements, enforcement, observers, appointment of agents, vessel markings and stowage of gear. Reporting requirements under New Zealand legislation are substantially more onerous than those under the minimum terms and conditions. Flag State responsibility is embodied in all access agreements.

Niue

Niue's legislation is also out of date and is in the process of revision. However, at present the legislation[34] provides that foreign fishing licences may be granted by Cabinet subject to such conditions as Cabinet may impose.

Palau

Palau legislation[35] is similar to that of Marshall Islands in that authority has been conferred on the Palau Maritime Authority to conclude foreign access agreements. The Authority is fettered to the extent that the Authority is required to "seek substantial agreement" to flag State responsibility, appointment of agents, reimbursement of full observer costs, and enforcement provisions. The Authority is empowered to make regulations but to date none have been made. The legislation is silent on the issue of the Regional Register.

Papua New Guinea

Papua New Guinea legislation makes no specific reference to the minimum terms and conditions[36]. Terms and conditions may be imposed as a condition of any licence.

Solomon Islands

Earlier legislation[37] contained provisions relating to the stowage of gear, reporting of zone entry and exit and daily log sheets. Later amendments following the First Implementing Arrangement[38] introduced requirements relating to good standing on the Regional Register as a condition precedent to the issue of a permit, weekly reporting in zone, and full recovery of observer costs. The legislation remains silent on flag State responsibility.

Tonga

Recent legislation[39] in similar terms to the Cook Islands Marine Resources Act 1989 incorporates most of the minimum terms and conditions. Definitions in the Act are substantially similar to those et out in the minimum terms and conditions, and the harmonisation of minimum terms and conditions is given specific recognition. No access agreement may be entered into without an agreement with the flag State or fishermen's association. The Act is silent on the matter of the Regional Register, reporting conditions, vessel markings and local agents. All these matters may be covered by regulations[40].

Tuvalu

Regulations[41] contain comprehensive provisions relating to daily log sheets, weekly reporting, zone entry and exit reports, stowage of gear, prohibition of transhipment, and responsibility for observer costs. The definitions contained in the legislation[42] are substantially, though not entirely, in accordance with the minimum terms and conditions though there is no requirement of flag State responsibility or registration on the Regional Register.

Vanuatu

Definitions differ in some respects from those in the minimum terms and conditions. Vessels in transit are required to stow fishing gear. No licence may be issued unless a vessel is in good standing on the Regional Register[43]. Regulations[44] prescribe reporting requirements, vessel marking requirements, transhipment procedures and enforcement procedures substantially in accordance with the First Implementing Arrangement. There is no specific requirement of flag State responsibility.

Western Samoa

Recent legislation contains comprehensive provisions which mirror the requirements of the minimum terms and conditions in respect of flag State responsibility, general definitions, and stowage of gear[45]. No regulations have yet been made to cover observers and reporting conditions. There is no reference to the Regional Register.

Summary

It appears from the above brief survey that FFA member countries have met with varying degrees of success in implementing the minimum terms and conditions through national

legislation. While it would appear that the minimum terms and conditions contained in the First Implementing Arrangement were incorporated fairly quickly into national legislation in most countries, there has been no such urgency in the case of the Second Implementing Arrangement and the revised minimum terms and conditions.

It must be borne in mind that national legislation provides the basic framework for all fisheries activities in the region. In these circumstances, the incorporation of the minimum terms and conditions into domestic law is an important factor in ensuring the effectiveness of the minimum terms and conditions. Once the minimum terms and conditions are part of national law they can be enforced through the courts and are cannot be called into question during access negotiations.

In most countries considerable time is needed to effect changes to legislation. The Parliamentary process can be extremely slow, and it is obviously impracticable for a country to pass a new Fisheries Act every few years. To overcome this, many countries have used enabling provisions to allow regulations to be promulgated by the Minister or other authorities, or, in the cases of Palau and Marshall Islands, power is conferred on designated bodies to conclude access agreements in conformity with certain prescribed parameters. A less satisfactory mechanism is to confer upon the Minister or Cabinet (as in the case of Niue) power to attach conditions to a licence. The disadvantage of this approach is that it still leaves scope for the DWFN to enter into negotiations on the conditions to be attached to the licence.

Implementation through Bilateral Access Agreements

The implementation of the minimum terms and conditions through bilateral access agreements has not met with much success. This is due to a number of factors:

(1) There is considerable disparity between the economies of island countries, and consequently much greater inequality of bargaining power amongst those countries who derive a substantial portion of their revenue from access fees, there is extreme reluctance on the part of negotiators to terminate an access agreement for want of acceptance of the minimum terms and conditions - despite the stated policies of Heads of Government.

(2) Bilateral access agreements are negotiated and DWFN are able to take the opportunity to negotiate away some of the minimum terms and conditions which they do not agree with.

(3) The "roll-over" nature of many access agreements in the region makes it easy for island countries to avoid the issue of the minimum terms and conditions by simply extending the agreement for another year while awaiting the outcome of negotiations with other countries.

(4) Re-negotiation of a fisheries agreement can be a long and costly exercise. For example, Palau has recently concluded a new fisheries agreement with Japan. The new agreement can be seen as a victory for Palau, in that not only did it secure a substantial improvement in fee levels, but also acceptance of most of the

revised minimum terms and conditions. However, the new agreement took six rounds of negotiation over a period of more than twelve months and cam close to break-off on several occasions. Not many small island States can easily afford to prolong negotiations to such an extent.

The Attitude of Distant Water Fishing Nations

There is no doubt that the Japanese tuna fishing industry is in a state of flux. Although the trend has been for Japan to shift its emphasis from EEZ fisheries to the high seas, there is no doubt that Japan is concerned to maintain access to the 200 mile EEZs of coastal States in the South Pacific region[46]. However, because of the importance of highly migratory species such as tuna, Japan has taken the view that Article 64 of UNCLOS requires coastal States and fishing nations to cooperate directly or through international organisations. In respect of highly migratory species it is argued that management measures should be carried out uniformly by international organisations both within and beyond the 200 mile zones. Although this position is the underlying principle, there are also objections to specific elements of the minimum terms and conditions. In summary, these are -

- The objection to a common regional licensing form. Japan has no legal relationship with FFA and cannot exercise control over data submitted to FFA. Data will only be submitted to individual States.

- The prohibition of transhipment at sea is said to be a restriction on the freedom of the high seas. In practice, Japan has banned the practice in respect of its own vessel.

- There is no objection in principle to supplying high seas catch data to an international organisation of which Japan is a member. Supply of data to individual States is resisted on the grounds that the area of application is not defined.

- Japan objects to the requirement of stowage of gear during transit. It is argued that, strictly, UNCLOS only requires this in the territorial sea[47].

The present Japanese position, which would appear to be shared by Korea, is that management measures over the whole range of the stock should be decided under a mechanism in which all coastal States and fishing nations can participate on an equal basis. Such a mechanism should be established under a Treaty setting out the rights and obligations of all parties. It is claimed that FFA members, by excluding fishing nations, is taking sole management responsibility over the entire range of the highly migratory stock, including the high seas.

In this regard Japan has suggested the formation of a management body formed on the basis of a Treaty in which both coastal States and distant water fishing nations are equal partners. Such a body would have both management and research functions. Alternatively, it has been suggested

that management decisions could be taken by a body consisting of FFA representing the coastal nations and a similar coalition of fishing nations.

These arguments are based on a misinterpretation of FFA's function. FFA is not itself a management body in the sense that it does not impose management measures. The minimum terms and conditions are attempts to regulate foreign fishing within the zones of member countries for the benefit of those member countries. There is no attempt to regulate fishing on the high seas. The provision of high seas data is seen as essential to the proper conservation and management of the stock within the EEZ. In respect of management, such data is provided to the coastal State. For conservation purposes, under Article 64, the data is used by international organisations such as SPC (TBAP), which is already cooperating with fishing nations, including Japan.

Japan is also extremely concerned about the effects on its industry of the expansion of the western Pacific purse-seine fishery. It is possible that Japan is in somewhat of a dilemma in this regard. While it sees Korea and Taiwan as its major allies in attempts to divide the South Pacific States over the minimum terms and conditions, it also sees Taiwan and Korea as its major rivals in access to the yellowfin stocks of the central and western Pacific. FFA member States should exploit this situation to their advantage, stressing the far better compliance record of the Japanese, and the possibility, under the proposed Western Pacific Purse-Seine Management Plan, of including compliance with the minimum terms and conditions as one of the criteria for preferential access to limited purse-seine licenses.

It is difficult to suggest strategies to overcome the Japanese position. Japan, which to some extent speaks on behalf of the other Asian DWFN, is clearly committed to the establishment of the international management body. However, in countering Japan's arguments a few points can be stressed:

- The Regional Register system is an enforcement, rather than management tool. Entry on the Regional Register does not in any way imply a system of regional licensing. Japan is concerned about the increase in fishing activity in the region, and the Register is almost the only way in which accurate and timely information about the number and identity of properly licensed vessels in the region can be obtained. In this connection, Japan is to be commended for its efforts to ensure compliance with coastal State laws and has little to fear from the threat of blacklisting on the Regional Register. Cooperation in respect of the Regional Register would be perhaps the most significant display of good faith on the part of the Japanese if Japan is serious in its concerns over unlicensed fishing by new entrants in the region.

- There are difficulties with imposing flag State responsibility in respect of Japanese vessels. The Japanese industry is well regulated and compliance with coastal State laws where fisheries agreements are in effect is a requirement of Japanese law[48]. The situation with regard to Taiwan and Korea is less clear, and concern has been expressed at the very poor level of compliance by the fleets of those two countries.

- With respect to high seas catch data the point needs to be repeated that FFA member States are not seeking jurisdiction over the high seas. The data is required by the States concerned for proper management and conservation of the stock. Management decisions are not made by FFA. Since the requirement to provide data is linked to fishing activity within the zone of the licensing country it should be apparent that the requirement is being imposed as a voluntary condition of access to the zone, not as an extension of jurisdiction onto the high seas. Cooperation in respect of conservation is already taking place through the context of SPC and other international programmes.

- Transhipment at sea is not a problem in respect of the Japanese fleet. However, it remains a problem in respect of the Korean and Taiwanese fleets. Again, the prohibition is being imposed as a condition of access. Not as an extension of jurisdiction over the high seas. The limitations on transhipment are necessary in order to enable the coastal State to manage the resource effectively.

Notes:

[1] W.M. Sutherland, "Regional Co-operation and Fisheries Management in the South Pacific", 1985, Jon Van Dyke & Susan Heftel, "Tuna Management in the South Pacific: An Analysis of the Forum Fisheries Agency", University of Hawaii Law Review, Vol. 3 (1981)

[2] Jon Van Dyke & Susan Heftel, "Tuna Management in the Pacific"

[3] William T. Burke, "Highly Migratory Species in the New Law of the Sea", Ocean Development and International Law, (1984)

[4] W.M.Sutherland, "Regional Co-operation and Fisheries Management in the South Pacific"

[5] See David J. Doulman, "Fisheries Co-operation: The Case of the Nauru Group", in Tuna Issues and Perspectives in the Pacific Islands Region, Doulman (ed.) East West Centre, Hawaii, 1987 at pp.257-277

[6] Record of Proceedings, South Pacific Forum Fisheries Agency Workshop on the Harmonisation and Co-ordination of Fisheries Regimes and Access Agreements, Suva, Fiji, 22 February - 5 March, 1982

[7] Forum Fisheries Committee Recommendations to Forum on the Harmonisations and Co-ordination of Fisheries Regimes and Access Agreements, Honiara, Solomon Islands, 29 April - 5 May, 1982

[8] 13th South Pacific Forum Resolutions on Fisheries and the Law of the Sea Convention, Rotorua, New Zealand, 9 - 10 August, 1982

[9] Yoshiaki Matsuda, "Changes in Tuna Fisheries Negotiations between Japan and the Pacific Island Nations", Report of the First Conference of the Pacific Region and International Law, Fukoka Convention Bureau, 1990, pp 151 - 80

[10] Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America done at Port Moresby on the 2nd day of April 1987

[11] The Nauru Agreement (Article II(c)(i)) envisages that the Parties will seek to establish uniform principles for the calculation of access fees. Although a working group was convened to consider this matter at the First Technical Sub-Committee Meeting of the Ninth Annual Meeting of the Parties in 1990, no further progress has been made.

[12] National Statement of Kiribati, Record of Proceedings, Sixth Special Session of the Parties to the Nauru Agreement, Palau, 17 - 19 September, 1990 (Attachment E)

[13] A Second Arrangement Implementing the Nauru Agreement Setting Forth Additional Minimum Terms and Conditions of Access to the Fisheries Zones of the Parties

[14] Subject, of course, to satisfactory renegotiation of the financial aspects of the Treaty.

[15] Nuclear Test case, International Court of Justice Report, 1974. See also the Eastern Greenland case (1933) Permanent Court of International Justice Reports

[16] Record of Discussions, Canberra, December 1991

[17] Koji Imamura, Councillor, Japan Fisheries Agency, to David Coutts, Director, Australian Fisheries Service, 16 December 1991

[18] Fisheries Management Act 1991

[19] Marine Resources Act 1989

[20] s.16(6)(e)

[21] s.13(3)

[22] The Act provides only for payment of food and accommodation, not travel and full insurance costs.

[23] Marine Spaces Act (Cap.158A)

[24] Marine Spaces (Foreign Fishing Vessels) Regulations 1979

[25] Title 24 of the Code of the Federated States of Micronesia, Marine Resources

[26] Fisheries Act (Cap.33), amended by Act No. 9 of 1984

[27] s.5(11)

[28] s.20(2)

[29] Marshall Islands Marine Resources Authority Act 1988 (Title 33 Marshall Islands Revised Code, Chapter 4)

[30] MIMRA Rules & Regulations on Foreign Fishing Agreements and Fish Processing Establishments.

[31] Marine Resources Act 1978

[32] s.7(3)

[33] New Zealand Fisheries Act 1983, EEZ (Foreign Fishing Craft) Regulations 1978

[34] Territorial Sea and Exclusive Economic Zone Act 1978

[35] Palau National Code, Title 27: Fishing

[36] The legislation is also out-dated. See Fisheries Act (Cap.214), Fisheries (Amendment)(Use of Foreign Boats) Act 1978

[37] Fisheries Act 1972, Fisheries (Foreign Fishing Vessels) Regulations 1981

[38] Fisheries (Foreign Fishing Vessels)(Amendment) Regulations 1983

[39] Fisheries Act 1989

[40] Under s.59 of the Act

[41] Foreign Fishing Vessel Regulations 1983

[42] Fisheries Act (Cap. 45)

[43] Fisheries (Registration of Foreign Fishing Vessels) Order, No.27 of 1983

[44] Fisheries Regulations 1983

[45] Fisheries Act 1988

[46] See generally Anthony Bergin and Marcus Haward, Future Trends in Japanese Tuna Fisheries, 1991

[47] UNCLOS Article 19 and 21 relating to innocent passage. It is suggested that there is little substance in this objection. Gear stowage requirements have become so widespread that they could be said to have become customary international law.

[48] Morio Okatzu, Japanese Controls over their Distant Water Fishing Operations