The Seas They Are A Changin': Natural Law & Local Custom As Marine Enforcement Strategies for Pacific Island Nations

Caleb W Christopher
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NATURAL LAW & LOCAL CUSTOM AS MARINE ENFORCEMENT STRATEGIES FOR PACIFIC ISLAND NATIONS

Caleb W. Christopher*

Violations of international law are often subtle and beyond the immediate reaches of august international tribunals. For example, in 2000 an unlicensed Philippine fishing vessel arrived in the small island of Taroa (set within the Maloelap atoll), a far-flung, sparsely populated island in the Pacific nation of the Marshall Islands. Eager to harvest the island’s bountiful fishing stock, the vessel’s crew provided the island’s residents with several cases of beer and corned beef; the supplies were welcomed by the Marshallese islanders, who generally live a basic subsistence lifestyle, and have very limited trade, economic and transportation opportunities. In exchange, the vessel deployed several dozen skiffs and, after several hours in the nearby shallow reefs, loaded the 200-foot vessel with live native grouper and Napoleon wrasse fish, which would each fetch several hundred dollars in Taipei’s markets, where they are a prized aphrodisiac.¹ The transaction between the Marshallese islanders and the fishing vessel underscores the web of social, economic and conservation conflicts surrounding the enforcement of international fisheries agreements within small island Pacific nations. Yet the legal solution for enhanced enforcement need not arrive from the desks of distant diplomats, but from within the traditional cultures themselves.

Composing the world’s largest uninterrupted continual marine habitat, the biodiversity within the control of Pacific island nations is an unquestioned scientific treasure. The species and natural resources have long served as a central focus for the diverse collection of traditional island cultures, which have continued traditional fishing practices for centuries.

* AICP, BA Macalester College (1998), MS The School of the Art Institute of Chicago (2003), JD (2007), Environmental Law Certificate, Pace University School of Law. The author is an Advisor to the United Nations Mission of the Republic of the Marshall Islands; this article reflects the author’s personal conclusions and not necessarily that of any other party.

Imposed across this rich relationship are both international law (allegedly dictating the terms of who catches what), and the short end of the global economy, in which geography and global governance conspire to leave islanders with stagnant economic growth and dwindling natural resources. While international law has, in theory, provided a remedy to illegal marine resource exploitation, a variety of structural challenges prevent effective enforcement. By examining the inherent complexities of enforcement within small Pacific states, as well as the link between social and legal systems, this article identifies potential strategies to link traditional cultures and enforcement strategies for international maritime law.

An understanding of how such bridges are constructed is rooted first in the foundations of law as a primary social tool. Legal enforcement is more than simply the means to achieve a legal or policy mandate; rather, enforcement is a primary building block through which we enforce social norms. Enforcement of law (rather than law itself) functions as social glue, for the choice of specific enforcement alternatives serves as a collective self-definition. Community ethics are enforced (or tacitly encouraged) through incentivized or deterred behavior. At a very primary level, such social ethics are unquestionable goals and serve as the basis for common law traditions and international human rights. Environmental law’s foundations are in tort law and nuisance (a duty owed not to harm one’s neighbor). These very basic, uncodified principles may be neglected within a complex regulatory and administrative environment. Local or community-based customary law is “found” within texts or behavior patterns, but is not unilaterally “created” by any one singular source. While this theory of law, which explores the enforcement of social norms outside of legal institutions, may at first appear on the fringes of scholarship, it is more apparent when the reader considers experiences

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(“Effective marine compliance and enforcement in the region relies upon the involvement of customary/traditional leaders at the local level, pragmatic national laws and regulations, strong national institutions that follow a coordinated and participatory approach, and regional cooperation in information sharing, surveillance, enforcement and prosecutions.” Id at 17). See generally Nicola Kieves Crisis at Sea: Strengthening Government Regulation To Save Marine Fisheries, 89 Minn. L. Rev. 1876 (2005); Jessica K. Ferrell, Comment: Controlling Flags of Convenience: One Measure to Stop Overfishing of Collapsing Stocks 35 Envtl. L. 323 (2002).

3 Id at 8.


which they have likely had visiting or living in a small town. In close, rural settings is rapidly clear that there are strong expectations for behavior, and these are generally not intentionally violated by visitors. This “natural law” approach is so common and obvious that it often eludes detailed legal study.

These strategies of enforcement as a root of natural or traditional law may be utilized as a worthy tool by small island nations charged with protecting substantial amounts of natural marine resources. These nations present the perfect storm of enforcement challenges; their expansive geography is coupled with low economic development and government funding. Therefore, more traditional means of enforcement, centering around a “cops and robbers” approach, will not be effective or even feasible. Island nations face two primary challenges in marine fisheries enforcement in protecting both their traditional fisheries as well as fisheries in the high seas, including the more unique, and often more distant, deep seabeds. Both of these resources are loosely covered under the United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS is an extension of uncodified, and loose, principles of international maritime law imperfectly shoehorned to fit contemporary political and economic demands. UNCLOS leaves nations with substantial enforcement obligations for some resource issues within areas under their control, but provides little means of enforcing on the global commons of high seas fisheries. International law is frequently limited by sovereignty; however, this traditional model is threatened by the increased global competition for scarce resources. However, UNCLOS evidences that even when more forceful international law is created, its enforcement is limited by both the resources and will of member nations. Such law is typically distant, and rarely includes participation from the local level in its formation. Recognizing that small island nations have a vast responsibility and few formal enforcement resources, such nations should explore the resources which they do have at hand regarding domestic fisheries - residents of outer islands who retain a very strong traditional culture. In utilizing existing customary cultural structures, formal legal structures are linked with the “natural law” of social and moral authority. Such an enforcement strategy relies upon not only public participation within enforcement, but a personal sense of global citizenship. Both local communities and different island nations must band together, creating a coherent network of information. Absent any alternative, the long-term future of these island cultures is

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7 Prows, supra note 6.

8 Id.
seriously jeopardized by the failure to enforce a sustainable and balanced marine ecosystem.

The challenge of “open sea” fishery issues, within international waters, is more complex, particularly in relation to deep sea bed fishing practices. The existing enforcement regime rests upon the traditional role of flag states (which issue fishing vessel registrations); flagged vessels become legal extensions of dry national territory. This enforcement strategy is also imperfect, as it relies upon outdated notions of sovereignty rather than pursuing the “natural law” tradition that those who benefit most from illegal acts (e.g., the “consuming nations”) should also bear liability for their ill-gotten gains. Small island states have a vested interest in this issue – they are uniquely dependent upon interlocking biodiversity and healthy fish stocks, and several small island states have increased “flag of convenience” registration programs as a means to gain additional income. A more effective enforcement system would address the larger policy and economic reasons as to why such nations undertake registration systems. It is clear that many flag states do not have the resources to fully enforce open seas measures. An effective enforcement strategy would incorporate their role as sponsors of fishing vessels, but would also include participation from “consumer nations” as means of addressing the economic disparity leading to the existing ineffective enforcement system. Such an enforcement structure is not grounded in traditional maritime law, but instead finds its justification in the “natural law” concepts of equity and fairness applied to a global scale.

**NATURAL LAW AS AN ENFORCEMENT TOOL**

Natural law was initially rooted in a religious understanding of the will. Much as one might treat a customary supernorm, natural law was considered as one which was above mortal human structures, and pervasive in all aspects of life.

In effect, natural law is reflective of God's will and therefore commands greater obedience given its more lofty genesis. These laws are of divine prescription and, therefore, remain embedded within the confines of human nature. They occur "naturally," making them an inexorable part of the world in

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which we live.  

If this natural order is all-pervasive, then, it was reasoned, human nature was connected to a Supreme being and thus human nature was a means by which to broadcast this “supernorm.” It was this fundamental linkage between human society and, in the most general of terms, an omnipotent order, which “would make natural law presumptively and completely valid.” The understanding of natural law expanded, as society became more complex, as more of a mandate for social order and structure rather than a reflection of divine prescription." The increased emphasis on both social structure and the basic human needs required to sustain that structure began to lay the groundwork for inherent social expectations. This is seen in the US Constitution, which weighed equally “the right of self-preservation of life as well as the right to live and develop in community.”

Natural law graduated from a strictly religious notion to the justification for community needs within a social structure; in so doing, natural law served as the moral and ethical roots for later attempts to codify law. This moral root evades easy and specific description, but continues to serve as a “litmus test” for subsequent codified law;

in other words, naturalist principles can be used as a device to check the validity of civil laws. Consequently, laws that are moral and rational are maintained and enforced since they naturally serve human needs and promote general well-being. True natural law, then, is fundamentally just and must be obeyed. On the other hand, laws that are "unnatural," that is, inimical to human nature, should be altered or rejected.

Emphasis on the concept of natural law is important within the sphere of legal enforcement, but too often, attorneys take the codification of a law (rather than its meaningful enforcement) as evidence of social validity. Codified laws which are not synced with their natural law justification will be implicitly rejected by societies through purposefully inadequate enforcement. Traditional cultures – a broad term intended to cover any established social group – enforce law (the ethics of social behavior) through a wide variety of social actions, of which legal punishment is but one of multiple tools. The fallacy unrealized by many social activists is that political change comes not through merely changing codified laws, but in changing the fundamental social underpinnings which created those

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11 Id.
12 Id.
13 Id at 75-78.
14 Id at 77.
15 Id at 77.
policies. Certainly, advocates of equal opportunity education, or plaintiffs in an environmental pollution lawsuit, have realized that the litigation or trial process can be at best an arduous and prolonged victory which may ultimately exist only on paper. The truly effective attorney, in seeking to enforce laws or advance a client interest, must not limit analysis to the four corners of the hornbook, but must instead play the roles of politician and anthropologist.

More familiar examples of natural law exist within persistent small town, rural traditions. Social alienation, discriminatory pricing or essential services suddenly “unavailable” are all potential weapons against one who has violated accepted social norms. These methods are all “punishment” and are designed to extract mere retribution, or deterrence (either general among the population, or specific to the individual). A familiar story is one of a small New England coastal town, with a historic district full of white, colonial homes, where an out-of-state architect sought, and was denied, permission from the town’s historic district commission to build a rear addition to his historic weekend house. Upset with the decision, the architect decided to paint his house black. While this was well within his legal rights, one suspects that he got into “another kind of trouble” within the town. Such social exclusion would serve as a means of deterrence to others who sought to violate the spirit (if not the letter) of the local law. One also suspects that the civil law of the historic district is rooted in the natural law of the village; the “natural law preservation” and social custom of building and retaining the picturesque historic houses well predated the enactment of the codified ordinance.

16 Cathy Alter, Paint it Black: Stonington, Conn., turned back the British. Can it handle an architect from New Jersey? Preservation Magazine (July 25, 2001) available at http://www.nationaltrust.org/magazine/archives/arch_story/072501.htm. The article describes the battles between the out-of-state Kimmerles family, who painted their historic house black after being denied a rear addition (facing a lighthouse), and the Stonington, Connecticut town Historic District Commission. An excerpt from the article illustrates the interplay between regulation and the social ethics of natural law:

The Kimmerles also paid a Hollywood set designer $5,000 to draft a life-size mural depicting the facade that, if executed, would face the lighthouse. As soon as they draped it over a scaffold, the borough invoked a sign regulation and ordered the trompe l’oeil removed. The Kimmerles’ tactics haven’t exactly endeared them to the community. Letters posted on the Web site of the local newspaper, the Stonington Intelligencer, and on the Kimmerles’ own www.ctblackhouse.com read like an update of Peyton Place. “How dare you cast your lustful eyes upon our community,” begins one, “and then assault us in this unforgivable way.” Many residents consider the New Jerseyites part of a disturbing trend: Wealthy weekenders looking for second residences are buying and tearing down houses once owned by Portuguese fishermen and factory workers. Id
The relationship between natural law and civil law is rooted medieval legal traditions which stated that civil law should be created in accordance to natural law.\footnote{Philip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L.J. 907, 937-944 (1993).} Natural law theory was also rooted in the reasoning and justification behind the American constitution; this legal document has had influence beyond domestic boarders in its inspirational ideals of freedom and basic human rights. Natural law is viewed as a progenitor of law, and thus is properly placed within the legal system (alternatively, it is above the legal system). As a result, natural law is not a judicially recognized concept insofar as it does not provide a specific cause of action.

Commentators had long observed that natural law was so general and so imprecise that it invited a variety of conflicting opinions about its requirements. Therefore, they said, civil laws had to provide details and clarity absent from natural law. Natural law was also inefficacious. Sadly, all too many individuals did not conform their behavior to natural law, and the reasoning that constituted natural law could not make them do so. For this reason, civil law not only had to be more detailed and clear than natural law, but it also had to provide sanctions.\footnote{Id at 943-944.}

Accordingly, natural law alone is not sufficient as a means of contemporary law, and is only effective in that it can be linked as the powerful root of civil law. The concept of natural law, however, should not be overlooked as a source of moral code. A civil law which has strayed too far apart from natural law will not be enforced or will otherwise inspire some form of rejection, as it is not compatible with society’s norms. Thus, an effective law is one which creates a dialogue with traditional cultural structures.

In working within a region with strong traditional societies, and a reduced enforcement capacity, natural law serves as a critical building block for developing an effective legal mechanism. Enforcement strategies must exist within the context of a regional or local “moral code.” Small island nations in the Pacific region, as a case study, must examine not only the reasons for weakness of current enforcement regimes, but also examine the unique characteristics of their own forms of natural law. Simply put, the question of the Marshallese islanders must ask not only why they willingly waived national restrictions on the foreign vessel, but also what qualities of their society could be used as tools in creating an effective enforcement regime.
THE GLOBAL ROLE OF PACIFIC SMALL ISLAND NATIONS

Pacific small island developing states (SIDS), including Micronesia, the Marshall Islands, the Cook Islands, Fiji, Papua New Guinea, the Solomon Islands, Kiribati, Tuvalu, Tonga, Nauru, Palau, Vanuatu and Samoa, are situated northeast of Australia, and feature some of the world’s greatest cultural and marine biodiversity. The area covers one sixth of the world’s surface, and is home to over 8 million people. Contrasting the isolated, beautiful settings, are complex questions regarding political structure and resource management.

A. Political and Development Challenges

Many Pacific SIDS emerged during the 1970s and 1980s as a result of the end of a global effort to decolonize following World War II. They share many common struggles with other, larger postcolonial states and region. Typically, Pacific SIDS are small islands, such as Nauru, or a collection of small island groups and atolls, such as the Federated States of Micronesia. While some possess natural resources subject to exploitation, for many, the surrounding ocean represents its most valuable collection of resources. Tourism is an emerging force, but is still absent in many areas (due to diverse factors, including limited transportation, lodging and marketing).

As a result of both their size and geographic isolation, Pacific SIDS are often limited in their participation within the foreign arena. Even when their small size poses no formal entry barriers to international bodies, they are often prevented from participation by their own internal limitations, including struggling domestic budgets and challenged educational systems. Even though Pacific SIDS have emerged into the august halls of global diplomacy, they are still challenged to undertake international law-making. However, Pacific SIDS have spoken up in matters of great importance, and have been particularly active in shaping UNCLOS.

In addition, Pacific SIDS are often limited by dire economic

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circumstances. The aftermath of the colonial era left many SIDS ravaged by World War II, postwar nuclear weapon testing, ongoing military activities, and resource exploitation.\textsuperscript{21} With little governmental infrastructure upon which to build, SIDS governments have to reach across challenging geographies to solve complex policy issues with little money. In many island nations, the gross domestic product is less than $2,000 per person.\textsuperscript{22} Many remote atolls and islands include citizens who often lead a traditional subsistence lifestyle, and may live below the global per-capita poverty threshold of $1 per day earned; besides foreign aid, one of the largest industries is the painstaking, and low-margin harvesting of copra (coconut oil).\textsuperscript{23} The following description aptly describes the degree to which geography has challenged economic development:

One reason economic depression pervades the region is the lack of land-based resources needed for economic development. Most have very limited land areas. What scarce land is available is often unsuitable for agricultural development because many nations are either coral atolls or uplifted coral islands. Another deterrent to economic development is isolation from industrialized areas, making participation in the global market difficult. Air services are economically viable to only a few major cities at rates among the most expensive in the world. Goods are transported primarily by container ships, which are restricted to major ports. Communication services that exist are poor and costly. These factors cause serious delays in providing goods and services to and from rural areas and outer islands.\textsuperscript{24}

Many of the Pacific SIDS have evolved into independent nations, but also exhibit some persisting form of legal and economic dependence. There are very few economic opportunities to overcome remote geography and gain broader participation within the global economy.

B. Traditional Culture

However, geographic isolation has also reinforced traditional cultural structures. The concept of extended family and quasi-tribal structures persists even in competition with more contemporary social structures.

\textsuperscript{21} Tuiloma Neroni Slade, \textit{supra} note 19.
\textsuperscript{22} \textit{Id}.
\textsuperscript{23} \textit{Id}.
Island nations generally lack large urban structures, and feature small communities with a strong leadership structure.

The local or community level refers to hamlets, villages, islands or towns where the population is relatively homogenous and the livelihood of the inhabitants depend mainly on natural resource extraction and use through farming, fishing or foraging. As well, the significance of customs and the role of traditional authorities remain strong and vibrant. The majority of Pacific Islanders live in such communities. Participation is guided by existing customary law and national laws that give powers to village or island leaders.²⁵

These communities rely upon a close relationship with natural resources, and have developed traditional environmental management strategies which are rooted in both cultural beliefs as well as local political structures. Enforcement of norms within these close communities is relatively strong; violation may mean a social offence against neighbors and family.

Marine resources are of particular concern to SIDS. A precious few citizens serve as guardians of thousands of fish species along one of the world’s largest reef systems. Plentiful fish stocks provide one of the only means of food or income for residents on outlying islands. SIDS have identified with particular emphasis the Exclusive Economic Zone (EEZ), an extended marine area under UNCLOS; while open to some international activity, the EEZ is also a partial extension of national sovereignty. The geography of the EEZ is greatly enhanced with the presence of multiple islands, and is thus one of the few venues of political muscle for these nations. “Put differently, for most SIDS, assertion of an EEZ in accordance with the Law of the Sea Convention increased, sometimes by orders of magnitude, the potential wealth of the state.”²⁶ The political importance of the EEZ is so strong that it could, in theory, continue after the loss of surrounding land territory due to climate change impacts.

In addition to the political relationship with the surrounding ocean, the resource is also a central cultural focus. The natural marine environment is also significant in traditional mythology and culture. “Historically, almost every aspect of Pacific Islanders’ culture, way of life, and economic prosperity has depended on the sea.”²⁷ Many of the indigenous traditional

²⁵ Manoa & Tomtavala, supra note 2 at 2.
²⁶ Larocque supra note 24.
²⁷ Id.
knowledge and skills which developed over time were directed towards navigation, open-water canoe transportation, and fishing. In addition, traditional Pacific cultures are known for their continued emphasis on the closeness of extended families, and the persistence of the tribal land ownership structure. Fishing methods were traditional, and had a host of specific taboos and unique practices. Traditional Marshallese culture had relied upon the use of open-water canoes and complex celestial navigation systems (using a foldable “stick chart”) as an inter-island communication method. While this tradition began to decline after the advent of colonization (when tribal chiefs purchased European-style boats or ran European trading companies), the practice of canoe-building fell into decline. However, islanders would look to this traditional cultural practice much later as a solution for the disenchantment of unemployed youth; in the 1990s, tribal elders started a successful apprenticeship in traditional canoe-building. The organization is illustrative of a broader pattern within Pacific island nations; contemporary problems are solved in part through the resurgence of traditional cultural values.

The importance of cultural traditions, and in particular those which express a relationship with natural resources, has recently been emphasized by the Asian Development Bank, a regional organization which provides targeted loans to island governments. In a regional study of development and resource management activities, the Bank noted that the most successful projects integrate traditional environmental management practices with contemporary conservation situations, “that integrating traditional knowledge and modern approaches, plus active private and public participation, are critical conditions to attaining an effective environmental and natural resource management regime.”

29 Giff Johnson, Marshalls Canoe Building Takes Off: Resurgence of Interest in Outriggers Fueled by Youth, PACIFIC MAGAZINE AND ISLANDS BUSINESS (May 2001) available at http://www.spc.int/youth/Best_Practice/marshalls_canoe_building_takes_o.htm
30 Ponzi et al eds. Asian Development Bank “Pacific Region Environmental Strategy 2005-2009 Volume II: Case Studies; Chapter 1- Towards Environmental Mainstreaming” 6 (2004) available at http://www.asiandevbank.org/Documents/Studies/PRES/vol2/chap1.pdf. As further evidence of the success of the strategy of mutual cooperation between contemporary regulation and traditional structures, the study describes a workshop on the Marshall Islands between tribal leaders (Alaps) and the national environmental protection agency concerning solid waste management practices. The Alaps Workshop was a key event in the TEM project. The Alaps of Majuro attended in large numbers, and the working group members acted as facilitators. For EPA, the highlight was hearing the traditional leaders affirm that they are 100% behind EPA in their efforts to improve the environment, and that they (the Alaps) will work with EPA to effect improved SWM on Majuro. Previously, at least some of the Alaps had had a feeling that the EPA was trying to assume
the struggles facing the marine environment in regards to increased tourism on the Micronesian island of Yap, the study noted that very little integration of traditional and modern systems of natural resource management has taken place. Traditional systems prevail by default, even in their weakened form, because the government is reluctant to confront traditional land and water use rights. Communications between the state government and the traditional leaders and communities are weak and sometimes clouded in mutual suspicion.”

The Bank’s most successful case studies were those in which neither contemporary nor traditional systems prevailed, but in which both were integrated. Contemporary environmental regulation would be strengthened and more effective if the “natural law” of social structure justified regulatory decisions and that “that the regulatory relationship between the national and provincial/municipal planning and environment offices needs strengthening through development of an integrated strategic planning structure that specifically allows for inputs of community and traditional knowledge at all levels of decision making.” The Bank’s study revealed that many of the social, political and environmental challenges within the region could be more effectively addressed by remembering that unwritten customs are the foundation for contemporary actions. While the Bank’s study focused primarily on the role of participation and traditional knowledge within the context of environmental planning, its conclusions are useful in understanding how “natural law” and social custom may be used to define an effective marine enforcement strategy. In so doing, the enforcement of international law is defined through citizenship at the most local and personal levels. A successful enforcement strategy for national and global fisheries would incorporate both traditional practices as well as the region’s political and social situation.

**Effective Enforcement for Domestic Fisheries**

Pacific SIDS find their unique geography is both a blessing and a curse. Domestic jurisdiction over plentiful fisheries extends outward from the

31 *Id.*

32 *Id* at 7.
many distant small islands and atolls which compose many of the nations. These fisheries not only offer a sustainable, and profitable, yield of commercial fishing, but also are rooted firmly within traditional culture and identity. For many traditional cultures in the region, the subsistence fishing of these resources serves as the primary means of survival. However, the continued existence of these bountiful domestic fisheries also demands dutiful enforcement of protection measures. Such enforcement is difficult, in not impossible, as these nations lack the resources and capacity to patrol and monitor such a broad area.

A. Benefits and Burdens of the Exclusive Economic Zone

When UNCLOS defined the Exclusive Economic Zone (EEZ) as creating sovereign rights over marine natural resources and fisheries, coastal nations in the Pacific gained the potential for economic and political power greatly exceeding their small populations and land mass. The EEZ extended such rights to a 200 mile radius from any land mass. This zone included responsibility and economic opportunity for the harvesting of valuable fish stocks; for example, Pacific EEZs include two-thirds of the world’s tuna stock, with an annual value of between $1.5 and $2 billion dollars. UNCLOS provides the opportunity for both economic development and the responsibility for sustainable management of these stocks. However, this opportunity is largely unrealized, as distant fishing nations and vessels harvest the vast majority of tuna within the Pacific EEZs.

Challenged by their geographic isolation, small populations and struggling educational systems, many of these SIDS are seriously challenged to become active players within the world economy. The greatest economic benefit which many of these nations do realize is from licensing fees to distant fishing nations for rights within an EEZ. However, the comparative return on these fees is modest; developed nations, including the US, Japan, Korea and Taiwan, represent the “vast majority of the fishing effort.” In 1997 and 1998, Pacific SIDS received $55 million in licensing fees, which represented only four percent of the total value. The increasing rate of the overall catch extraction, coupled with the expansion into new fishing grounds, has led some scientists to warn that, absent increased conservation efforts, many fisheries may close to the point of collapse, at which replenishment will be difficult.

\[\text{Larocque supra note 24.}\]
\[\text{Id.}\]
\[\text{Id.}\]
efforts aimed at establishing more accurate fishing restrictions, Pacific nations must be able to enforce license conditions within their EEZs or risk the irreversible depletion of their most valuable resource.

Created in 1982, UNCLOS represents a tension between the historical view of the sea as an unbounded “global commons” with unlimited resources, and contemporary demands for new arrangements to ensure technology and population would not deplete such stocks. UNCLOS ceded responsibility of fishing within the EEZ to coastal states, as “the theory behind the Convention is that coastal States, due to the great economic potential of EEZ resources, are best suited to protect those resources."36 UNCLOS grants coastal states jurisdiction over the EEZ for the limited purposes of “exploring, exploiting, conserving, and managing their living resources.” Resources outside of the EEZ include the traditional “high seas” in which States must only give “due regard” for the interests of other nations. UNCLOS contains only general obligations and its provisions set forth an overarching duty to cooperate in all situations involving shared fisheries, have, however, "crystallized [into] an 'emergent rule of international law.'”37 As such, UNCLOS is mired in diplomacy and, reluctant to sacrifice sovereignty, lacks meaningful enforcement methods.

Coastal states are required to undertake several key responsibilities for resources within their own EEZ, including determining the allowable catch of marine resources, analyzing their own capacity to harvest such resources, providing foreign access to any surplus under reasonable conditions, and undertaking management and enforcement measures which will prevent overexploitation. The coastal state is provided with broad discretion in determining sustainable yield, management and enforcement issues.38

In 1995, after UNCLOS, the United Nations Conference on Straddling and Highly Migratory Fish Stocks was held. The resultant agreement recognizes that there is no firm boundary between the EEZ and high seas regarding migratory fish stocks which travel between these boundaries. The agreement creates duties for both distant fishing nations and coastal states which center upon a duty for mutual cooperation and a mutual goal of long-term conservation. The Stock Agreement also contains the provisions for a dispute resolution court. The Agreement encourages regional agreements,

36 Id.
37 Id.
such as the Honolulu Convention governing migratory tuna within the Pacific, as well as existing regional fisheries organizations (such as the South Pacific Forum Fisheries Agency).\(^{39}\)

The Honolulu Convention's cooperative regime recognizes the need to ensure conservation and promotion of "the objective of optimum utilization of highly migratory fish stocks throughout their range." In contrast, the main regional agreement currently in force, the South Pacific Forum Fisheries Agency Convention, primarily promotes regional cooperation for the economic benefit of Pacific Island nations.\(^{40}\)

The mechanisms of international law have placed the ball squarely in the corner of Pacific SIDS. Domestic fisheries within the EEZ, and straddling fish stocks partially outside of the EEZ, are protected within the discretion of the coastal state. The economically impoverished nations have access to control a substantial share of the global fishing industry. However, enforcement of this international structure remains a primary challenge. Illegal fishing practices, both by unlicensed parties and by licensed parties violating catch limits, seriously undermine the international benefits otherwise provided by UNCLOS.

\section*{B. Enforcement Challenges within the EEZ}

The enforcement challenges for domestic fisheries are a result of geography and economics. The benefit afforded by an expansive EEZ is likewise a burden. Small nations with miniscule domestic budgets are simply unable to fund traditional patrols or on-board monitors.\(^{41}\) It is difficult to verify what ships are within the EEZ, let alone their actual activities. Visits by enforcing vessels are often sporadic at best, taking place only once every several years, or sometimes not at all. Greenpeace, an environmental nonprofit, has warned that the lack of effective enforcement has led to a situation in which several key species are critically overfished and may suffer irreversible species collapse within three to five years.\(^{42}\) Limited enforcement actions often net serious fines for illegal

\begin{itemize}
  \item \(^{39}\) Larocque \textit{supra} note 24.
  \item \(^{40}\) Id.
  \item \(^{41}\) Manoa & Tomtavala \textit{supra} note 2 at 12, quoting \textit{State v Hung Kuo Hui & Waikava Marine Industries Limited} (High Court, Fiji) HAC40 of 2004 (judgment delivered 24 February 2006) per Winter J. ("[Foreign] Captains, charters and owners must conduct themselves with care and prudence when harvesting our Pacific ocean. They are well warned. They are deemed to know the law. The burden of compliance is on them and not on poor states that cannot police the pirates.")
\end{itemize}
fishing, often upwards of several hundred thousand dollars. But such action is rare, and may be written off as a cost of business. Furthermore, the lax enforcement creates little incentive for the industry as a whole to strictly follow the international permitting system; the lawful fishers are penalized for doing so by nature of their illegal competitors. However, pleas for stronger monitoring and compliance systems will go unheard until national budgets are expanded.

Several pilot international agreements are attempting to address the problem, including joint enforcement action and patrols between several Pacific SIDS. In one example, Greenpeace started a pilot collaboration in 2006 with the Federated States of Micronesia, to undertake a joint patrol. The two-week pilot project resulted in boarding of five fishing boats; four of those were found to be in violation of domestic provisions. The experience allowed Lagi Toribau, a Greenpeace staffer, to experience the enforcement challenge. He noted that:

We’ve had first-hand experience of how difficult it is for Pacific Island countries to monitor and control their waters - their limited resources are completely overstretched. The sheer size of the Pacific, and the ever increasing number of foreign fishing boats in the region already makes enforcement a real challenge. When you add to this the serious problems with the current vessel monitoring system and the limited resources available, you can see why the Pacific is such a hotspot for illegal activity.

The study noted that domestic monitoring of foreign vessels was insufficient. Domestic coastguards were generally unaware of foreign activity. Absent increased domestic enforcement, the only apparent option is to appeal to the goodwill of sponsoring nations (flag states) to enforce and encourage lawful behavior of their vessels. However, this goodwill diplomacy is not likely to be a successful deterrent to illegal fishing piracy; there is little disincentive created within the EEZ or among the fishing vessels themselves.

The key to a more successful enforcement strategy for domestic

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43 Id.
45 Id.
46 Id.
47 Manoa & Tomtavala supra note 2 at 1-2.
fisheries within the EEZ may already be at hand. By examining and
drawing upon existing cultural structures and social ethics, the justification
for personal action may be linked with formalized legal enforcement. The
legal framework within many Pacific SIDS already anticipates this link.
Customary law and traditional rights are recognized in many of the
constitutions and domestic laws of Pacific SIDSs. In several nations,
including Nauru, Micronesia, Vanuatu, Papau New Guinea, Solomon
Islands, Kiribati and Tuvalu, customary law is stated to be superior to
written domestic law in certain circumstances. Palau notes that
“constitutional law and traditional law are equally authoritative” and has a
constitutional structure that
precludes the government from prohibiting or revoking the
role or function of a traditional leader recognised by custom
and tradition and not contrary to the constitution. The
government also cannot prevent a traditional leader being
recognised, honoured, or given a formal or functional role
“at any level of government”. Traditional leaders have broad
powers and have an important role at the community level
and, where permitted, in government. By implication, they
also have wide powers in environmental compliance and
enforcement activities. However, the rights of enforcement are often limited to discrete traditional
fishing grounds, and not within the wider EEZ. The traditional cultural
structures are ineffective in enforcing law outside of their discrete
residential group; traditional penalties do not hold strength and have little
deterrent value. “Traditional rules apply primarily to those under the sway
of a chief and are generally not able to command compliance from outsiders
or companies.”
Within traditional fishing grounds, government enforcement is also lacking and “enforcement must come largely through
informal social pressure and the influence of local village leaders”.

48 Id at 3-4 referencing : Article V(1), Palau Constitution; Article XIV, Constitution of the
Marshall Islands; Article 111, Constitution of Samoa; Section 93(3), Constitution of Vanuatu; Article
186, Constitutional Amendment Act 1997 (Fiji); Sch. 1.2 Papua New Guinea Constitution; Article
XI, Constitution of the Federated States of Micronesia; Article 81, Constitution of Nauru; Preamble,
1986 Constitution of Tuvalu; Preamble, Kiribati Constitution; Schedule 3, Solomon Islands
Constitution; Papua New Guinea’s Customs Recognition Act 1963 and Underlying Law Act 2000,
and the Solomon Islands Customs Recognition Act 2000.
49 Id at 4.
50 Id at 3.
51 Id at 6.
52 Id at 6, quoting Johannes, R. E. Managing Small-scale Fisheries in Oceania: Unusual
Constraints and Opportunities. ACIAR Proceedings No. 26 (1988) 85 – 92. See also Fong, G. M.
Case Study of a Traditional Marine Management System: Sasa Village, Macuata Province, Fiji. FAO
C. Using Traditional Knowledge and natural law to build a better enforcement strategy

The development of an effective enforcement strategy is an imperative given the rates of illegal activity and species depletion, and coupled with the potential value of fisheries to nations with few other potential avenues of economic development. Several key challenges are evident: despite enabling laws, traditional monitoring from the domestic level is, for the near future, going to be sparse and is unlikely to deter illegal fishing; while traditional social structures have a strong “natural law” relationship to marine resources, local customs or punishments also fail to serve as an effective deterrent, and may lack full effect outside of traditional fishing grounds. A successful enforcement strategy would create a ladder between international goals, domestic legal framework and local action. Drawing upon “natural law” of local Pacific customs and social structures will likely produce a strong local response. Rather than actions which are initiated at a weak federal or domestic level, increased vigilance and citizen patrols can supplement domestic action.

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53 Manoa & Tomtavala supra note 2, remark that there are several examples of early initiatives within Pacific SIDS which are attempting to integrate traditional leaders into marine compliance. The formalized linkage between customary law and marine regulation remains a primary challenge.

At the local level, customary or traditional leaders should play an important role in compliance and enforcement. This is clearly intended in Tuvalu through the Falekaupule Act, in Palau by the explicit recognition and authority of traditional leaders, and in Samoa through the disciplinary actions that can be imposed on a member of a village. In other countries such as Fiji, the law is silent on the role of customary leaders in marine compliance and enforcement but in practice customary rules may still apply to those under the sway of a local, district or provincial chief. Key challenges with all customary/traditional forms of compliance and enforcement are: a) the incongruity between customary/traditional and contemporary offences and penalties; b) the continual need to enhance the skills and capacity of local enforcement agents; c) the lack of resources (individuals, equipment, finance) to carry out tasks; d) vague and unclear roles and responsibilities in law; e) conflicting or overlapping roles between local and national enforcement agents; and f) the need to garner more political support for the involvement of local community in compliance and enforcement. Having said this, the Tuvalu Council of Elders is a positive example of the involvement of customary leaders in marine compliance and enforcement. While the law bestowing broad powers to the Council is in its infancy, a similar concept may be adapted by other island countries which maintain strong traditional leadership. An important consideration would be to set higher penalties for violations at the local level in order to deter companies or individuals from abuse. Id at 18.

54 Manoa & Tomtavala, Id, describe the formal integration of local citizen inspectors within the Solomon Islands.

In the Solomon Islands, environmental inspectors can be appointed by the Minister responsible for the environment or in accord with the constitution if the
A useful example of citizen enforcement is found in the establishment of Riverkeeper and related Waterkeeper organizations. While primarily focused upon monitoring “end of pipe” point-source water pollution, the organization provides a compelling illustration of the power of citizen action when it utilizes traditional or common social ethics.\[^{55}\] Initially founded in New York State by local recreational and commercial fisherman as the Hudson River Fisherman’s Association in 1966, the group has – and continues – to patrol the river using a small, refurbished fishing boat.\[^{56}\] The boat collects water samples and data from various permitted emitters and is vigilant regarding other activities. It is important not only for its success as a citizen enforcement tool, but in the way it achieves enforcement by linking traditional knowledge, natural law and legal structure. Participatory enforcement strategies are rooted within a traditional social ethic or “natural law” justification. A description by the current chief prosecuting attorney of the Hudson Riverkeeper evidences the group’s grounding in local cultural tradition:

We have on the Hudson River one of the oldest commercial fisheries of North America. It’s 350-years-old. Many of the people that I represent come from families that have fished the river continuously since Dutch Colonial times. They still use the same fishing methods - the small open boats, the ash poles, the gill nets - using the methods taught by the Algonquin Indians to the original Dutch settlers of New Amsterdam, and then passed down through the generations. One of the enclaves of the commercial fishery on the Hudson is a little village called Crotonville, New York, which is thirty miles north of New York City on the east bank of the river. The people that lived in Crotonville in 1966 were not your prototypical tweed-jacketed, pipe smoking, bearded,

\[^{55}\text{See generally John Cronin & Robert F. Kennedy Jr. THE RIVERKEEPERS (1997).}\]

\[^{56}\text{Id at 177-201.}\]
affluent environmentalists trying to protect distant wilderness areas in Montana, Wyoming, or the Rocky Mountains. They were factory workers, carpenters, and electricians. Half the people in Crotonville made their living, or part of it, either crabbing or fishing in the Hudson River. For the most part, they had little expectation that they would ever see Yosemite or Yellowstone National Park. For them, the environment was their backyard. It was the beaches, the swimming holes, and the fishing holes of the Hudson and Crotonville Rivers. Richie Garrett, who was the first president of the Riverkeeper, used to say about the Hudson, "It's our Riviera, it's our Monte Carlo."\footnote{Speech of Robert F. Kennedy, Jr., University of Arkansas, April 8, 2004 57 Ark. L. Rev. 885, 890-892 (2005)}

The Riverkeeper organization illustrates the success between linking traditional local customs and formalized legal structures. The primary justification of the organization lies in a well-defined social group protecting an area – and a lifestyle – which was the root of their culture. The group has no special enforcement powers beyond those normally afforded other members of the public, but it did pursue action within existing legal framework.\footnote{Id.} The organization draws upon common social values to change the attitudes of potential illegal actors through enforcing natural law (the social value of the water body) within the context of existing regulatory structures. The localized values create a perception of the water body as a protected resource, and this perception is as valuable of a tool as are the group’s subsequent citizen-based lawsuits.\footnote{Cronin & Kennedy, \textit{supra} note 55. The parallel between the Hudson River fishermen and traditional island cultures, who also carried out traditional fishing practices, is striking considering the substantial geographic distance, and suggests that the Riverkeeper method of citizen enforcement could be applied, in some fashion, within traditional Pacific society.} Given the importance of marine ecosystems and fishing within local structures, the citizen-based enforcement model is readily transferable to local Pacific island communities.\footnote{Manoa & Tomtavala, \textit{supra} note 2 at 10-11, describe a current effort in Palau to establish a dialogue between traditional communities and marine enforcement agencies, noting that “…given the respective role of States, local communities and government and non-governmental organisation in the protection of the marine environment and the need for better coordination, Palau established its Marine Environmental Enforcement Response Team (MEERT) in 2003. The MEERT bolsters coordination between law enforcement officers, government and non-government agencies, and traditional leaders and communities and is a worthy example of the meaningful involvement of all stakeholders.”}

Traditional local communities within the Pacific region could emulate this model in expanding the enforcement of social norms outside of
immediate groups or traditional fishing areas into the broader realm of foreign vessels within the EEZ. Citizen vigilance and monitoring of vessels would greatly bolster the validity of federal-level vessel monitoring (knowing the activities and locations of specific vessels). The studies conducted by the Asian Development Bank already provide credence to the success of cooperation and mutual goals between local communities and domestic environmental agencies in the realm of environmental planning.\(^{61}\)

It would logically follow that such cooperation can be extended to enforcement of fishery laws and permits within the EEZ. In so doing, domestic enforcement statutes would have to be enlarged, through either amendment or administration, to recognize the role of citizens in providing monitoring data. Formalized administration of this program would need to be accomplished using simple, alternative technologies given the lack of electricity and other communications challenges. However, a wide variety of simple communications methods may solve this, including the use of citizen-band radios. In addition, domestic enforcement would need to be expanded to permit some degree of citizen participation in the “follow through” stage, including citizen participation in the violation prosecution process. Given the low level of domestic funding for patrol vessels, it is likely that a successful program would need to establish some formal satellite relationship between citizen and federal patrol programs, to allow citizens to personally verify foreign vessel activity and potential violation with full legal effect. Such an enforcement scenario could only be developed with the mutual dialogue and workshops between traditional leaders and federal environmental administrators.

Another important goal would be to link enforcement with the economic development of a domestic fishing industry. This would further incentivize enforcement activity and, as with the Marshallese canoe-building apprentice program, turn to traditional ethics to find a solution to contemporary problems. Citizen enforcement can be an economic tool by linking violation fines with targeted funding of domestic fishing industries (in particular, directing violation fines as restricted bounties to the islands or groups which reported the violation). This linkage would allow enforcement to become a small cottage industry, and would spur greater domestic participation within the fishing industry. Enforcement can be used as a strategic (if only secondary) economic development tool.

The citizen-based model of enforcement would reverse the earlier fable of the Philippine vessel exploiting local fisheries near Taroa island. Imagine instead a scenario where local islanders, acting upon the conviction

\(^{61}\) Ponzi et al supra note 30.
of their own cultural identity, were able to verify the vessel’s activity, and were rewarded (in both protected resources and financial bounties) for enforcing, and not breaking, fishery conservation law. Further imagine a scenario in which the reward of enforcement helped to foster the integration of these traditional fishing communities within the global marketplace, through both the enforcement of sustainable yield goals and the more specific seed funding for boats, equipment and communication technology. By incorporating local participation and traditional values into an enforcement strategy, domestic fishery enforcement would be aligned with natural law and, as a legal expression of social ethics, gain the faith and of those whom it seeks to benefit.

**Effective Enforcement Measures for Fishing on the High Seas**

The challenges of Pacific SIDS in the protection of marine biodiversity extends beyond the enforcement of domestic fisheries within the EEZ. There is a twofold interest in enforcement of fishing practices on the “high seas” as straddling stocks and other species within the EEZ are dependant or interdependent on more distant ecologies, and, as a number of Pacific SIDS serve as “flags of convenience” by registering foreign vessels which fish in such areas, certain SIDS must find a means to ensure compliance of their distant, registered fleets. Just as a proposed domestic EEZ enforcement strategy would engage local communities based upon natural law and other social factors, the enforcement role of these “flag states” must not be strictly limited to their enumerated responsibilities, but must also incorporate the very economic development issues which leads to both their inability to enforce their flagged vessels, and their initial economic decision to accept such sponsorship.  

In other words, the same socio-economic factors at play when the islanders on Taroa looked the other way in regards

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62 See generally Christopher J. Carr & Harry N. Scheiber, Dealing with a Resource Crisis: Regulatory Regimes for Managing the World's Marine Fisheries, 21 STAN. ENVTL. L.J. 45, 59-62 (2002) (’Traditionally, compliance with “closed area” restrictions has been monitored not only by at-sea patrols, but also by dockside analysis of fishing vessel logbooks that record when and where vessels fish. However, such logbooks are notoriously subject to falsification, and vessels have been known to carry one logbook for their own purposes to record favorable fishing grounds, and another logbook for review by enforcement officials. Although at-sea transshipment of catch is widely prohibited in order to aid enforcement of catch reporting requirements, it still takes place. Some of these difficulties of enforcement can be addressed by placement of neutral observers on fishing vessels to record fishing locations and catches. But observer coverage, like at-sea patrols, is prohibitively expensive.” Id at 62).
to domestic fishery violations are those which implicitly tempt flag states to adopt minimal oversight of their registered vessels. In both cases, a successful legal enforcement strategy will be one which also addresses other political and cultural issues, rather than stubbornly holding up pages of written law against a torrent of human needs.

Deep sea fishing is a result of declining results within domestic and EEZ fishing areas. As fisheries closest to large consuming nations have been drawn down since the 1990s, fishing vessels are increasingly looking to other regions, including towards southern waters offshore Pacific SIDS. Overfishing has thus become more globalized, as drastic declines are snowballing in certain fish populations; these population declines have some measured impact on their greater marine ecosystems. This crisis is escalated by the introduction of new fish harvesting technology and equipment. The scientific study of new fishing regions, particularly in deep sea mountain beds, has not kept pace with industrial increases. The international law surrounding deep sea fishing practices is marked by a sharp conflict between distant fishing nations, which desire less regulation, and coastal states, which are generally concerned about the conservation of domestic fishery stocks within their EEZs and, by association, related offshore fisheries outside of the EEZ. The long term sustainable yield of fisheries, ensuring employment for future generations of fishermen, is pitted against an extension of the historical legal argument regarding international freedom within high seas. Although international agreements have been addressing this conflict, and more are in the current stages of formulation, the development of such agreements does not end inquiry into the issue. Rather, it is only through studying the implementation and enforcement of such agreements through state responsibilities that one can truly understand the political meaning of such agreements.

International fishery rules must be inherently fair; just as local communities are unlikely to support or enforce domestic laws which fail to mesh with their own natural law, member nations are unlikely to implement or enforce an agreement which fails to also address global gaps in development.

When fishery rules are being formulated by coastal and fishing states, it is critical to stamp as much of an imprimatur of fairness upon them as possible. It seems reasonable to expect that governments would more readily comply with

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63 Joyner supra note 38 at 271-274.
64 Id at 272.
65 Id at 276.
international fisheries rules that are supported by natural law notions of fairness and rectitude than rules that appear to be contrived. Perceptions of equity and justice are critical in this respect, as are appearances of impartiality. Further, compliance may be more likely for rules that are stated in reciprocal terms. To be sure, no two states will be affected in the same way, nor to the same degree, by some rule of international fisheries law.\textsuperscript{66}

International law regarding high seas fishing affords some degree of incorporation of the historical freedom of sovereignty within the global high seas; however, such a right does not exist without limitations, and is subject to other treaty limitations, coastal state rights \textsuperscript{67} and fundamental obligations to cooperate in the conservation and management of high seas living resources.\textsuperscript{67} UNCLOS creates for all states “the unqualified obligation to protect and preserve the entire marine environment” and notes that future agreements will further detail the legal framework; these agreements “furnish new principles and duties for the conservation of marine living resources, as well as rules on compliance and enforcement for high seas fishing and binding settlement of ocean disputes.”\textsuperscript{68} Underscoring the need for enforcement measures developed by UNCLOS, the problems with enforcement on the high seas will likely snowball as more domestic fisheries are overfished or eventually collapse.

A particular concern for both Pacific SIDS and the global marine ecosystem as a whole is the growing practice of bottom-trawling within deep sea mountains. Although this practice represents only .2\% of the annual global fish extraction, bottom-trawling within these areas is particularly devastating impact upon areas with unparalleled biodiversity.\textsuperscript{69} Deep sea mountains are often within the “high seas” and thus subject to little regulation. These areas are one of the “last frontiers” of the marine ecosystem, and, although intensive scientific exploration has not been conducted, it is likely that between 500,000 and 1 million species, many undocumented, exist within these areas and use them as a breeding ground.\textsuperscript{70} Utilizing the precautionary principle, certain UNCLOS member states have proposed a limited moratorium on deep seabed bottom trawling; this measure would have been enforced primarily by a reiteration of flag state responsibilities.

\textsuperscript{66} Id.

\textsuperscript{67} Id at 278-279.

\textsuperscript{68} Id at 279.

\textsuperscript{69} Matthew Giani, High Seas Bottom Trawl fisheries and their impacts upon deep sea ecosystems. (2005).

\textsuperscript{70} Id.
A. The Flag State Enforcement Gap

One of UNCLOS’ primary means of enforcement is through the actions of flag states, which are nations that sponsor and register fishing vessels. The practice of “reflagging” is common and may be used to hide identities or past violations. The reflagging of vessels undermines multilateral fisheries agreements and hinders effective enforcement. It is as though a criminal may move from state to state and avoid capture by simply changing identities. Several international agreements have generally recognized flag state enforcement and reflagging as international issues. The 1992 Cancun Declaration, and Agenda 21 from the 1991 Rio summit, both mention the need to bring transparency to flag registration, and to deter reflagging.\(^71\) In 1993, the international Food and Agriculture Organization (FAO) completed consultations on the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.\(^72\) While this document has never taken force due to a lack of signatories, it nonetheless establishes “soft law” on minimum requirements for flag state authorization of fishing vessels, with the goal of preventing reflagging from eroding fishery conservation measures.\(^73\) The agreement relies upon flag state enforcement measures as the primary means to enforce specific actions and fishing behaviour on the high seas.

Vessels outside of an EEZ are only subject to the jurisdiction and authority of their flag state. “The international community has traditionally viewed a fishing vessel as a floating piece of the territory of the nation whose flag it flies.”\(^74\) This customary international law was codified in UNCLOS and affirmed by the Permanent Court of International Justice in the Case of the S.S. Lotus, which stated:

> Vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon


\(^73\) Joyner supra note 38 at 283-284.

them.\textsuperscript{75}

While imperfect, flag state jurisdiction exists to avoid the apparent alternative, under which, in the words of the International Law Commission, "the absence of any authority over ships sailing the high seas would lead to chaos. One of the essential adjuncts to the principle of the freedom of the seas is that a ship must fly the flag of a single State."\textsuperscript{76} The Stock Agreement is intended to put a slight curb on the exclusivity of flag state jurisdiction, as “once a vessel is known to have undermined conservation and management measures, no party may authorize that vessel to fish on the high seas.”\textsuperscript{77} The Stock Agreement, in article 21, does allow non-flag or coastal states to board and inspect member and non-member fishing vessels to ensure compliance with conservation measures, if the vessel is in the high seas territory of a regional fishery organization; vessels with serious violations may be ordered to port.\textsuperscript{78} Within regional fisheries territory, non-flag state enforcement still provides considerable deference to flag state jurisdiction, and creates a complex or unfeasible communication system in which diplomacy could forestall real-time enforcement:

In the event that violations of conservation measures are detected, contemporary international fisheries law requires that evidence be secured and the flag state be notified promptly. The flag state is then given time to respond and to indicate whether it will take enforcement actions itself or whether it will authorize the inspecting state to investigate. Should the latter case prevail, the inspecting state is to communicate the findings of its investigation to the flag state, which then is either to take appropriate enforcement action, or to authorize the inspecting state to do so in a manner consistent with the rights and obligations of

\textsuperscript{75} Id.
\textsuperscript{76} Id at 228-230.
\textsuperscript{77} Id at 232-233.
\textsuperscript{78} Joyner supra note 38 at 287-289. In referencing the wide variety of regional fisheries organization, the author mentions that “coordinated under the FAO Committee on Fisheries, high seas regional organizations include the Asia-Pacific Fishery Commission (APFIC), the Indian Ocean Fishery Commission (IOFC), the Fishery Committee for the Eastern Central Atlantic (CECAF), and the Western Central Atlantic Fishery Commission (WECAFC). Three inland fisheries organizations, namely the European Inland Fisheries Advisory Commission (EIFAC), the Committee for Inland Fisheries of Africa (CIFA), and the Commission for Inland Fisheries of Latin America (COPESCAL) have been created by the FAO to coordinate the work of national institutions on the management of inland fisheries. Finally, it should be noted that a Regional Convention on Fisheries Cooperation among African States Bordering the Atlantic Ocean was promulgated in 1991 and entered into force in 1995. The focus of cooperation in this regional fisheries agreement was aimed at promoting conservation and protection of marine resources of offshore Member States.” Id.
Should a flag state choose to assert jurisdiction over the vessel at any time, there is no legal recourse or ability to enforce the regional fishery conservation measures. Even though imperfect, the system does permit limited non-flag state enforcement within regional fisheries areas. Such conservation measures are generally lacking on the true high seas, in which no such regional organization exists (despite the potential presence of threatened fish stocks and/or other natural resources). Ultimately, international fishery practices rely upon the good faith enforcement efforts of the flag state. Flag state enforcement extends enforcement obligations to a global scale, and would potentially require extensive resources and monitoring capacity of the flag state.

Contemporary international fisheries law mandates flag state enforcement, which must occur regardless of the geographic location where violations take place. The flag state is likewise mandated to investigate fully and promptly any alleged violation; to ensure that its vessels provide required information to an investigating authority; to ensure that a vessel involved in a violation does not engage in high seas fishing until pending sanctions are addressed; and to ensure expeditious judicial proceedings and penalties of adequate severity.

Although patrol of regional fisheries territory is permitted by non-states, it is neither mandated nor feasible for many small coastal states which already struggle to patrol and enforce within their EEZ. Specifically, many Pacific SIDS acting as coastal states may be hard-pressed to patrol regional fisheries territory outside of their EEZ, and must rely upon efforts of flag states.

Many coastal states and regional fisheries organizations have attempted to create enforcement measures against “bad actors” who violate conservation measures. Despite this concern, the reliance upon flag state jurisdiction poses substantial barriers to meaningful enforcement. In part because there are little consequences outside of diplomatic pressure, “generally, flag states are reluctant to prosecute vessels that fly their flags.” Many flag states accept foreign fishing vessel registration fees but provide no “accompanying oversight of their fishing practices. Parties to international agreements and regional organizations often exceed agreed

79 Id at 294-295.
80 Warner-Kramer & Canty, supra note 72, at 234-235.
81 Joyner supra note 38 at 292.
82 Becker supra note 9 at 631-632.
quotas or are out of compliance with conservation and management regimes.\textsuperscript{83}

The general failure of flag state enforcement is manifested in both the failure of flag states themselves to enforce at the federal level against registered vessels through monitoring and inspection, as well as at the level of personal deterrence or retribution, whereby liability or sanctions can be brought against individual vessels or ownership parties.\textsuperscript{84} “Governments of states make international fisheries law, nationals of states break that law, and it remains for governments of states to enforce that law. The international law regulating the use of high seas fisheries is only as strong and effective as governments make it.”\textsuperscript{85} In order to extend protection beyond the their EEZ, Pacific SIDS (and the international community as a whole) must devise a means by which flags states will undertake enforcement measures, either on their own volition or through international pressure. The failure to do so will continue to impair both regulated and unregulated high seas fisheries; the biological echo of ecosystem harm will be particularly acute within the domestic EEZ fisheries of Pacific SIDS.

B. “Flags of Convenience:” Examining the Motivation of “bad actors”

While there may be general agreement that the only feasible means by which conservation goals can be imposed within high seas fisheries is through the increased flag state enforcement, there is little guidance or analysis regarding as to how to achieve heightened scrutiny of flag states. One commentator noted that “for governments to reverse the unrelenting over-exploitation of global fishery resources, the most viable strategy is not to make new law. Rather, it is to improve state compliance and enforcement of the law that has already been agreed to by the international community.”\textsuperscript{86} Commentators and interested coastal nations have not explored the issue of flag state enforcement in detail. The most pointed issue is with “flag of convenience” nations, which offer registration to a high number of vessels with which they have minimal or no contact. A number of the most prominent nations regarded as “flags of convenience”, such as Panama, Liberia, Cambodia, Vietnam, the Bahamas, Belize, Cayman Islands, Tonga, Marshall Islands, Vanuatu, Bolivia, Mauritius, and North Korea,\textsuperscript{87} are developing nations with substantial governance and/or

\textsuperscript{83} Warner-Kramer & Canty, supra note 72, at 242-243.
\textsuperscript{84} Joyner supra note 38 at 299.
\textsuperscript{85} Id.
\textsuperscript{86} Id at 300.
\textsuperscript{87} International Transport Workers Federation Flag of Convenience Information. \textit{FOC Countries} available at http://www.itfglobal.org/flags-convenience/flags-convenience-183.cfm
internal budgetary problems. With a low national tax base and GDP, the
governments of these nations use registration fees as a means to supplement
meager national budgets, or meet overwhelming social needs of their
populations. A number of these nations are also small island developing
nations in Africa, the Caribbean or the Pacific, whose economic woes are
compounded by geographic isolation. The lack of a strong vessel
enforcement culture within these nations may be due to the lack of internal
capacity. These states lack the administrative capacity to impose any
government or international regulation against their vessels. In a race to the
bottom, these countries provide less stringent enforcement of environmental
regulations in order to benefit from the additional tax revenue generated by
ships registered under their respective flags, while ship owners may take
advantage of reduced labor restrictions, safety standards and tax rates. The
presence of the “flag of convenience” issue means that “due to the primacy
of flag state jurisdiction, this undoubtedly leads to marked decreases in the
quality of environmental compliance inspections and investigations.”

A statistical survey confirms suspicions that “flags of convenience” vessels
are far more likely to have accidents, cause pollution, or have ships in poor
condition than those of “non-convenience” nations with a verifiable
relationship with their registration state.

The weak enforcement within “flags of convenience” nations
compounds fishery violations by not only implicitly encouraging primary
violations, but then also encouraging repeat violators. Vessels are able to
hide their past identities and evade prosecution through the practice of
“reflagging.”

In the early 1990s, as the extent of the crisis in marine
fisheries became clear, individual nations and regional
management organizations began strengthening fisheries
management and drastically reducing allowable catches.
Many unscrupulous vessel owners reacted by changing their
ships' flags to nations with no oversight of their fishing
practices, or to states not participating in regional
management agreements.

Reflagged vessels will often continue reflagging through several nations in
an attempt to obscure their past and the identity of their parent corporations
or owners. This is also a means of evading enforcement of legal judgments
and fines levied against such vessels. The persistence of reflagged

88 Becker supra note 9 at 631-632.
89 Id at 633-634.
91 Tullio Treves, Flags of Convenience Before the Law of the Sea Tribunal 6 SAN DIEGO INT’L
vessels not only erodes attempts to enforce environmental conservation, but encourages a variety of other international crimes, such as money laundering, smuggling, piracy and global security. The interest in creating an effective international enforcement system on the high seas, and changing the behaviour of “flags of convenience” should be a worldwide priority, extending well beyond small Pacific nations concerned about fish stock conservation.

C. Better International Enforcement as a Development Goal

Beyond basic pleas to “flag of convenience” nations, more specific suggestions for increased flag state enforcement include such states undertaking a random inspection system, or empowering a regional fishery or international marine organization with additional enforcement authority; however, such proposals are limited by the lack of existing funding or the diminished likelihood of additional funding. An alternative scenario is joint inspections with inspectors from flag states and non-flag states; however, this does not fully address the reluctance of flag states to enforce against their vessels in the first place.

The most effective international enforcement scenarios would examine and incorporate the root causes regarding lax flag state enforcement. Through integrating small steps forward in changing vertical inequality between developing flag states and consumer or distant fishing nations, an enforcement scheme would better respond to the “natural law” social ethics behind flag state registration and enforcement. One critical step in creating more effective flag state enforcement is to share liability with consuming nations, who reap the benefit the ill-gotten fishery gains. The market demands for more plentiful and affordable fish, particularly within consuming nations of the west, is one of the driving forces behind fishery violations. Yet the “price” of violations (in either penalties or depleted ecosystems) is not paid by the market, but rather by small island nations impacted by the ramifications of depleted stocks, and/or the developing nations liable for actions of their registered vessels. Under the present system, the market bears no liability which might otherwise curb its thirst for fish at the lowest possible price. Placing the yoke of compliance upon flag states is an implicit endorsement of violations, as it is well know that certain flag states simply lack an enforcement ethic or capacity.

By examining – and addressing - the reasons which lead to the creation

92 Becker supra note 9 at 635.
93 Id at 638-639.
of “flag of convenience” flag states, a more equitable enforcement system may be achieved. An enforcement system which incorporates “natural law” on a diplomatic scale would be assigned more credibility by “flag of convenience” flag states, and, in incorporating their broader concerns, would lead to an acceptance of the system’s credibility. States which view enforcement obligations as closing, rather than broadening, the gap between the world’s developed and least developed nations, are more likely to act as responsible environmental stewards. It is well established that the reduction or elimination of poverty is a basic human right. Many of the “flag of convenience” flag states fall within or below standard indicators of poverty, and are caught within a vicious interlocking circle of low GDP, low tax base, minimal educational systems, reduced employment opportunities, increased government debt, reduced capacity and flawed governance models. Unable to unilaterally solve the puzzle of globalization, many of these states find revenues wherever they can, including the establishment of a “flag of convenience” registration system. In so doing, these states find a willing market of corporations from developed (and consumer) nations, which are eager to avoid increased labor, safety and environmental regulations. This proves to be an easy exchange for both parties, although the registration fees are not always substantial. It is unlikely that enforcement of “high seas” fishery obligations will be undertaken given the lack of capacity of such flag states, and the willing market from developed nations. The “flag of convenience” registration system is unlikely to be halted voluntarily given the dire economic and humanitarian needs of such states.

The existing enforcement system is contrary to a very fundamental and unwritten natural law – the ultimate beneficiary of ill-gotten gains should be responsible for the damage caused by their demand and use of such actions or resources. Pacific SIDS, although lacking a resounding international voice, can encourage increased environmental protection of fish stocks on the “high seas” by calling for joint enforcement responsibility, extending not only to the flag states, but to those whose nationals (and national corporations) own or operate such vessels, and as well to those whose economies may be proven directly benefit from the consumption of

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94 Brasseed off: How the war on terrorism could change the shape of shipping, THE ECONOMIST, (May 16th 2002). The article notes that United States corporations helped to establish the Flag of Convenience registration system. (“All this is rather ironic. It was America, after all, that helped Liberia to create its “open” register as an alternative to Panama, the first FOC, in the late 1940s. American oil companies, with Greek shippers riding piggyback, switched their tanker fleets to Liberia to avoid high labour costs at home (American-registered ships are required by law to use expensive American crews.” Id.)
illegally-harvested fish. The establishment of joint patrols between all parties, or the shared funding of such patrols, within regional international fisheries on the “high seas” would help to establish a shared sense of responsibility and thus foster a “culture of compliance” among all parties. In addition, the targeted distribution of penalties or targeted international aid would help to reduce the “race to the bottom” inherent within the “flag of convenience” registration system. In extending the potential sanctions and liability already incurred upon flag states to both consumer nations and those whose nationals control such vessels, it is more likely that unilateral action will be taken by all parties to more stringently enforce such laws. Without such measures, continued pleas to certain “flag states” to enforce obligations, without addressing inherent systematic inequalities, will not lead to meaningful enforcement action.

CONCLUSION

Small island nations within the Pacific have a good reason to be especially concerned about the declining state of the world’s fisheries; their economic health, and continued survival, depends heavily upon sustainable fish stocks and marine ecosystems. The region’s traditional cultural identity is closely interwoven with the surrounding sea, providing an inherent affinity and sense of responsibility. Such nations, otherwise challenged by their isolation, are afforded a considerable opportunity in the domestic jurisdiction over a large EEZ; Pacific nations can ensure both economic development and natural biodiversity for future generations. However, this opportunity has, in reality, proved a burden in the enforcement of fishery laws. Continued violation of fishing limits or permits, often by vessels of foreign nations, is slowly depriving these nations of their most important natural resource. Limited national economic capacity, and a substantial geography, both pose barriers to enforcement action taken on by federal-level agencies. Such efforts are reminiscent of a “needle in the haystack” and their continuance, without additional measures, will be devastating for nations already in a fragile state. By devising a domestic enforcement system which incorporates both the active participation and social structures of the traditional cultures within these nations, regulatory authority will become embedded within basic identity. In addition, such participation helps to solve logistical challenges facing regulatory agencies with limited budgets. This most fundamental link between the law and its people, while seemingly obvious, is too often overlooked in devising enforcement strategies.
Pacific island nations face a similar challenge regarding international fisheries within the “high seas,” including deep sea mountain fishing practices. As fish stocks neither respect political borders nor are wholly divorced from more distant ecosystems, these island nations feel the echo impacts of ecological damage on the “high seas.” The only meaningful enforcement measures within these areas are those of a distant “flag state” which registers a vessel, but may often decline or lack the capacity to enforce fishery conservation measures. This system lacks transparency, as “bad actor” vessels can easily hide from past violations by changing their flag state affiliation. Many such flag states are small, disadvantaged nations seeking any means possible of government revenue; their lack of capacity or poor governance is often a symptom of a much wider global disparity in wealth. However, developed nations have an implicit role in such violations; their nationals may control violator vessels, and their markets create ultimately drive the demand for such violations. An effective international enforcement scenario would look beyond the accepted understanding of a flag state’s legal responsibilities, and would address larger global disparities which underlie the creation of this flawed registration system. Furthermore, such an enforcement strategy would extend liability beyond the flag state to those actors which ultimately benefit from ill-gotten gains.

An effective enforcement strategy for Pacific island nations must look far outside of the narrow confines of the written law. In order to be effectively enforced by the agencies and societies charged with such action, such laws must incorporate traditional social structures as well as addressing existing political inequalities. That law can change society may be an overstated ideal; the difference between meaningful and ineffective enforcement proves that successful legal enforcement can not stray too far from unwritten social ethics. Law can indeed change society, but it cannot do so in isolation.

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