# CONSERVATION & MANAGEMENT OF LIVING RESOURCES AND LAW OF THE SEA

***Analysing the legitimacy and effectiveness of the legal efforts taken by the South Pacific coastal states in prohibiting High Seas Driftnet Fishing***

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## Legitimacy of the Legal Efforts

Given the traditional principle of 'Freedom of Fishing' in the open seas, numerous driftnetting nations have the perception that this activity cannot be prohibited. In accordance with the characteristic of *res communis*, the high seas are open to the use and enjoyment of all states on an equal basis.[1] This freedom extends to fishing which implies that both geographically land-locked and coastal states do not have the right to claim control over the fishery resources of the seas beyond the 'Exclusive Economic Zone' (EEZ).[2] In addition, they have the freedom to engage in any type of fishing technique to maximise the size and quantity of their fish stock.[3]

However as provided by the *Fisheries* Case,[4] the States fishing on the high seas have a duty to attend to the conservation and management of the living sea resources.[5] Consequently, international legal principles have been incorporated to prevent the destructive effects of driftnet fishing which is evident by the over-exploitation and incidental killing of target and non-target marine species. In accordance with Article 87(1)(e) of *UNCLOS*, the freedom of the fishing is not absolute and is subject to specific provisions which have the purpose of conserving the marine living and non-living resources.[6] Moreover, those nations which intend to fish on the high seas need to cooperate with the rights, duties and interests of the coastal States in formulating agreements on conservation and management measures.[7]

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[1] Grant Hewison, 'High Seas Driftnet Fishing in the South Pacific and the Law of the Sea' (1993) 5 *The Georgetown International Environmental Law Review* 313, 334.
[2] Ibid 335.
[3] William Burke, 'Regulation of Driftnet Fishing on the High Seas and the New International Law of the Sea' (1990) 3 *The Georgetown International Environmental Law Review* 265, 271.
[4] *Anglo-Norwegian Fisheries Case (UK v Norway)* (International Court of Justice, Rep, 1951)
[5] Ibid.
[6] *United Nations Convention on Law of the Sea* art 87.
[7] *United Nations Convention on Law of the Sea* art 116.

The regular deployment of large amounts of nets into the high seas of the South Pacific by numerous driftnet fleets from Japan, South Korea and Taiwan highlights the disregard of these States in conserving the marine environment in this region.[8] This is in breach of Article 117 of *UNCLOS*, which provides the obligation of States to co-operate with other States.[9] For the purpose of conserving and managing the living sea resources on the high seas, the nations engaged in fishing have to cooperate by entering into negotiations with the coastal states and also have to take 'due regard' for the interests of the other States in relation to their freedom of the open seas. [10]

The duty to cooperate is directed at nations and territories which fish on the high seas, and is incorporated to prevent over-exploitation of principal target species and incidental killings of various marine creatures.[11] The extent of this cooperation is dependent on the type of marine life being targeted by the driftnetting nations. The principal targets of driftnetters in the South Pacific are the albacore tuna, bill fish and other tuna-like fishes.[12] Given the highly migratory nature of these species of fish, the driftnetters have an obligation to cooperate with the coastal states in limiting the exploitation of these marine creatures.[13] In accordance with Article 64 of *UNCLOS*, the States fishing for tuna on the high seas with driftnets are subject to the conservation measures as imposed by the coastal state within whose waters the tuna originated.[14]In order to cooperate with the coastal states, the nations involved in this fishing activity have to enter into bilateral, regional or global agreements. These negotiations have the aim of ensuring conservation and optimum utilisation of highly migratory species, which may be achieved by maintaining the original levels of the 'Maximum Sustainable Yield' (MSY) of a particular fish stock.[15] Furthermore, the States whose nationals use driftnets for fishing on the high seas have a duty to other nations which exploit the same living resources.[16] The over-exploitation of the albacore tuna in the South Pacific would have an economic threat to this region due to the heavy reliance on 'Albacore tuna' as a source of

[8] Grant Hewison, 'The Legally Binding Nature of the Moratorium on Large-Scale High Seas Driftnet Fishing' (1994) 25 *Journal of Maritime Law and Commerce* 557, 564.
[9] *United Nations Convention on Law of the Sea* art 117.
[10] *United Nations Convention on Law of the Sea* art 118.
[11] Hewison, above n 3, 345-46.
[12] M R Islam, 'The Controversial Driftnet Fishing in the South Pacific and the Duty of Conservation and Management of the Living Resources of the Sea' (1990) 6 *Queensland University of Technology Law Journal* 137, 140-41.
[13] Hewison, above n 3, 345-46.
[14] *United Nations Convention on Law of the Sea* art 64.
[15] Hewison, above n 3, 350.
[16] Ibid 352.

wealth.[17] This reinforces the critical role of cooperation between fishing and coastal states in conserving and managing the existence of specific species of fish. However, there has been a lack of cooperation between the fishing states and coastal states within the South Pacific region evident by the lack of exchanging of fisheries information by the driftnet fishing nations and insufficient scientific data to assess the effects of driftnet fishing by the developing Coastal States.[18]

A further critical condition imposed by *UNCLOS* is with reference to the fishing States having 'due regard for the interest of other States in their exercise of the freedom of the high seas'.[19] Driftnet fishing has the potential to impede on the freedom of navigation of other States in the high seas as a result of entire driftnets being lost, discarded or thrown away in the high seas every year.[20] These non-biodegradable and 'ghost-like' nets have a detrimental effect in not only entrapping and killing marine creatures, but also creating a navigational hazard for merchant ships which often navigate through these regions.[21] Furthermore, the discarded driftnets have the potential of scarring marine life which has the effect of reducing its economic value.[22] Therefore, it is evident that nations involved in driftnet fishing not only breach numerous articles of *UNCLOS* through their duty of cooperation and 'due regard' for the interests of South Pacific coastal states but also has a disparaging effect on the living sea resources.

## Effectiveness of the Legal Efforts

Having established that driftnet fishing has the potential to endanger species, cause pollution and destroy oceanic ecosystems, the South Pacific coastal states have a legitimate reason to prohibit the use of driftnets in their region. The legal efforts undertaken by the States has brought limited success in reducing the occurrence of driftnet fishing. The effectiveness has been restricted by the lack of enforceability of regional agreements and the unavailability of the accurate scientific data reflecting the adverse effects of this activity on the living sea resources in the South Pacific.[23]

[17] Islam, above n 12, 141.
[18] Hewison, above n 3, 351-52.
[19] *United Nations Convention on Law of the Sea* art 87.
[20] Hewison, above n 3, 341.
[21] Islam, above n 12, 140.
[22] Ibid.
[23] Leslie Davis, 'North Pacific Pelagic Driftnetting: Untangling the High Seas Controversy' (1991) 64 *Southern California Law Review* 1057, 1074.

The coastal States in this region have been heavily involved with numerous regional agreements which have a persuasive but non-binding effect.[24] The 'Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific' drafted through the Tarawa Declaration required parties to prohibit the practice of driftnet fishing in the region.[25] Furthermore, it invited the participant States to prohibit the landing, processing and importation of the driftnet-caught fish within their fishery zone.[26] However given the 'soft law' obligations of this regional agreement, the negotiations by the South Pacific Forum had a limited effect which was further weakened by the lack of enforceability of driftnet fishing in the high seas.[27] As opposed to the Tarawa Declaration, the Wellington Convention formulated a binding agreement to prohibit this fishing practice in the EEZs of the signatory nations. Given that a large expanse of the South Pacific is covered by the EEZ of different States, it had a considerable impact in reducing the number of driftnetting fleets only in the EEZ of the coastal States of the region. Consequently, the incorporation of this agreement did not completely prohibit this activity on the high seas but nonetheless provided impetus for global action.

Given the immense diplomatic pressures imposed through numerous regional agreements, the U.N General Assembly proposed a moratorium on all high seas driftnet fishing.[28]As indicated by operative paragraph 4 of this resolution, the use of this technique over the high seas was to be prohibited unless an agreement could be made to prevent an 'unacceptable impact' on the marine environment.[29] In order to measure the impact, States in the region have the responsibility to review the 'best available scientific data' for the development of effective conservation and management measures.[30] Furthermore, it may be argued that the proposed moratorium satisfies the primary elements of establishing customary international law.[31] Given the significant degree of adherence by the international community about the detrimental effects of driftnet fishing, this practice may be considered as general practice.[32]

[24] Jane Jenkins, 'International Regulation of Driftnet Fishing: The Role of Environmental Activism and Leverage Diplomacy' (1994) 4 *Ind. Int'l & Comp. Law Review* 197, 199.
[25] Hewison, above n 3, 326.
[26] Ibid 327.
[27] Jenkins, above n 26, 203.
[28] Jenkins, above n 26, 212.
[29] Burke, above n 5, 275-76.
[30] Ibid 276.
[31] Hewison, above n 9, 558.
[32] Ibid 559.

Additionally, the numerous regional agreements negotiated around the world may be perceived to demonstrate that the deterrence of this fishing technique should be a necessary legal obligation.[33]However, this practice has also attracted diverse reactions as some fishing nations perceive the use of driftnets as being significantly effective which emphasises the lack of uniformity and hence its failure in being able to be constituted as a customary international law.[34]

Furthermore, analogous to the regional agreements by the South Pacific coastal States, this resolution has a non-binding effect and merely provides a recommendation for the establishment of a moratorium.[35] Additionally, the legality of the moratorium is further questioned due to an absence of any timeframe as this measure is imposed until an effective regulatory and management framework may be established limitation.[36] Therefore this resolution has various limitations which reduce its effectiveness in deterring the occurrence of this fishing activity.

The unavailability of accurate scientific data along with adequate disclosure of the relevant fishery information by the fishing nations has limited the success of not only the regional agreements but the measures which have been implemented through *UNCLOS*.[37] The mounting international concern has currently been addressed by Article 119 of *UNCLOS*, which promotes the conservation measures.[38] These preventative measures determine an 'allowable catch standard' based upon the maximum sustainable yield (MSY), which takes into account the biological, ecological and social interests of the coastal States.[39] Furthermore, the specified conservation measures address the by-catch problem by requiring an assessment of the effects of fishing activities on the highly migratory species whose numbers may be seriously threatened.[40] It is evident that there is a requirement for the application of extensive research in showing that driftnet fishing is causing the decrease in the number of fish species based on MSY.[41] However, given the lack of technological advancements of the numerous undeveloped States in the South Pacific, there has been

[33] Ibid 579.
[34] Jenkins, above n 26, 211-12.
[35] Ibid 570.
[36] Gurish, above n 1, 504-06.
[37] Burke, above n 267.
[38] *United Nations Convention on Law of the Sea* art 119.
[39] Hewison, above n 3, 355.
[40] Gurish, above n 1, 483.
[41] Hewison, above n 3, 360.

limited availability of fisheries information which has complicated the process of implementing, monitoring and enforcing these measures on the high seas.[42]Consequently once regulations have been publicised through regional agreements, it has been extremely difficult to ensure their adherence due to the vast distances and areas concerned on the high seas.[43] This reinforces that the current measures do not prohibit the use of driftnets and are limited by the non-binding nature of the agreements, lack of enforceability and unavailability of accurate fisheries information to assess the detrimental effects of driftnet fishing.

## Conclusion

Therefore, by violating numerous articles of *UNCLOS* through its adverse consequences on the conservation and management of the living sea resources, it is legitimate for the South Pacific coastal states to completely prohibit this activity on the high seas. Furthermore the failure of the regional agreements create hard law obligations in deterring this act, the coastal nations need to utilise the global concern created by the agreements, by negotiating a multi-lateral treaty which addresses the complete prohibition of driftnet fishing on the high seas.

[42] Ibid.
[43] Davis, above n 23, 1057.