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Increased emphasis on the Law of the Sea

While trying to raise funding for the programme had remained my primary focus over the previous six months, I had been spending an increasing amount of time on Law of the Sea issues and their implications for Pacific Island states. I began my research on this issue in the last two years of my involvement with the Papua New Guinea tuna program (see Chapter 1). It was inevitable that some big changes were coming. I had little doubt that these changes would result in greater emphasis on tuna fisheries assessment and, therefore, the requirement for better science.

It is very easy to forget just how different the Pacific was in the 1970s. Many people today have little or no knowledge of the major political changes that took place in the region between 1970 and 1980, and how quickly it was changing. During that short time span, no less than seven South Pacific states – Tonga, Fiji, Papua New Guinea, the Solomon Islands, Tuvalu, Kiribati and Vanuatu – obtained their independence from, or severed their voluntary ties with, various colonial powers. During the same decade, three other Pacific Island states entered voluntarily into new agreements of free association with metropolitan powers – Niue, the Northern Mariana Islands and the Marshall Islands.

As a result, towards the end of the 1970s, most of the member countries of the SPC were either independent or self-governing. During the same period, many discussions and meetings were held in the region to develop national and regional strategies and policies to protect sovereignty over the use of the region's fisheries and other oceanic resources. (The preceding two paragraphs were taken largely from Judd [2016].)

Most of these meetings were under the auspices of the South Pacific Forum at the headquarters of their secretariat (South Pacific Bureau for Economic Co-operation [SPEC]) in Suva, Fiji. I was to play a major role in most of them, particularly the early ones, which set the objectives for regional initiatives and established the guidelines for how regional cooperation could best be nurtured. These meetings, and the documents I wrote for them, were hugely important for my efforts to raise the money for the Skipjack Programme.

Even though the subject matter was of vital interest to all countries and territories, it was the South Pacific Forum, with membership of approximately half of the countries and territories, that took the running on organising these meetings. The SPC, as an institution, played no formal part in the influential discussions on the Law of the Sea or regional fisheries policy.

At the request of Mahe Tupouniua, the secretary of SPEC and a former senior minister in the Tongan government, I wrote the foundation policy discussion document for the first meetings of Pacific Island leaders on how to progress regional approaches to the Law of the Sea. I believe that Mahe's invitation was a result of him having heard the presentation I gave on this subject at the Regional Technical Meeting on Fisheries in Tonga in 1974. The title of this first paper was 'A Regional Approach to Fisheries Management in the South Pacific Commission Area' (Kearney 1976). It was published initially by the SPC and subsequently republished by invitation and unedited in the *San Diego International Law Journal*. The title alone highlighted the dichotomy between consideration of events over the whole of the area of the SPC and having the meeting convened by the South Pacific Forum, which had a lesser membership than the SPC and thus did not cover the whole area. Several non-Forum member countries had representatives at these meetings. A few non-Forum member countries, such as the United States and France, had very large delegations.

The paper I wrote for the first meeting in Suva was a rather brief introduction to the key issues that I believed Pacific leaders needed to address as they moved towards agreement on a Law of the Sea strategy. These items were identified as:

1. The need for cooperation.
2. The fisheries resources and the importance of each.
3. The impact of a regional management approach on the surveillance of foreign vessels.
4. Possible adverse effects of the failure to adequately manage the tuna resources.
5. *The possible structure and role of a regional fisheries management body* [emphasis added].

The first document may have been relatively short, but it had a considerable impact. One consequence was that I was invited to prepare a second major document, which was a far more detailed dissertation on these same issues, for a meeting approximately six months later. Its title, 'The Law of the Sea and Regional Fisheries Policy: The Impact of Extended Jurisdiction on Fisheries Management in the Central and Western Tropical Pacific Ocean and the Need for a Regional Fisheries Agency' (Kearney 1977b), confirmed the increase in the priority commanded by the Law of the Sea. It was also republished (unedited) by the *Ocean Development and International Law Journal*. The paper highlighted the progression of the debate from the possible role of a regional fisheries management body to the need for one. I wrote several smaller articles for these meetings, including one with Fred Popper, and several in response to questions raised at the meetings, including one rather brief one with Sidney Holt. The fact that both of my two major papers were republished, unedited, in international law journals had a big impact on the potential donor governments. The French acknowledged the importance of both papers by arranging for a particularly scholarly translator, Louis Devambez, to translate both for publication in French through the SPC. A few weeks later, Louis came to my office to tell me what a privilege and pleasure it had been for him to translate documents that were well researched and written and were having such an impact on the whole Pacific region. He advised that they were definitely having an impact on the French attitude to my work and were therefore likely to influence the French attitude to funding the Skipjack Programme. The content and intent of this second paper were prominent in the draft convention to establish a South Pacific regional fisheries organisation, which was debated at the Ninth South Pacific Forum meeting in Alofi, Niue, in September 1978.

Both meetings for which these papers were written were well attended by extremely high-level representatives of the many governments: approximately half the representatives of Pacific Island states were heads of government.

Many of the rest were the relevant ministers of foreign affairs. The former 'colonial powers' – Australia, France, New Zealand, the United Kingdom and the United States of America – were also well represented: Australia and New Zealand were Forum members. At the second meeting, the US delegation numbered 39, whereas the French had 17. Fiji was the only island state with a sizable delegation; they had seven, led by Winston Thompson, who, from memory, was either the minister or the secretary for foreign affairs at the time. Presumably, being the host nation made travel costs less restrictive for Fiji. Several island states had a delegation of a single person, but in most cases, it was the prime minister, or equivalent, such as the president of Nauru.

These meetings afforded me the opportunity, as the author of the primary discussion documents, to stress the importance of research on key resources, such as skipjack and other tunas, and the need to have the management of the waters of all countries and territories in the total area of concern (the area of the SPC) covered by common policies. It also allowed me to convince possible funders of the vital role of the proposed Skipjack Programme in future developments in the region as a whole. Of course, it also allowed potential donors to assess whether I, as the proponent and presumed leader of this programme, had the appropriate knowledge and skill to carry the day. In effect, each day of the meetings was, for me, an eight-hour job interview, with a very large selection panel. Then there were the opportunities afforded by after-hours meetings and discussions. There were lots of these. I remember two at the second meeting particularly well.

The first of these informal meetings occurred as the formal meeting was breaking at the end of the first day. The leader of the US delegation (I think it was Bill Bode, who was later to become the US ambassador to the Pacific and to play a very prominent role as the informal chairman of the committee of donors that was formed to oversee the Skipjack Programme) approached me and asked if we could have a confidential chat, and perhaps a quiet drink. The lounge at the Grand Pacific Hotel was the obvious place.

Mr Bode opened by stating that he thought the performance of his delegation, particularly the young State Department lawyer who was their spokesperson, had been excellent. But despite this, in his words, 'We were not getting traction'. He felt that many of the Pacific Island delegations actually 'switched off' when the US representative spoke. What did I think?

My response was to be in complete agreement. This response by Pacific Island leaders had been obvious. The US lawyer had given a virtually word-perfect dissertation on the legal aspects of each subject he addressed. He really had done his homework, and his presentation was noteworthy. Had he been addressing a United Nations budget committee meeting in New York, it would have been perfect. But the audience he was addressing here was not similarly experienced nor intentioned. Papua New Guinea had brought a very senior lawyer (Geoffrey Dab, the government's most senior lawyer) to the meeting, but as far as I could tell, the other island states had not. Plus, they were all dealing with what were huge issues for small island countries, and they had little, if any, experience with them. They wanted to have free and open discussions as equals, not be lectured to by the former colonial powers.

Many of the issues were completely new to most delegates. They had little information on the subject matter, except for what was in my papers. But perhaps most importantly, this was the first time for them to be in what was in effect a 'negotiation' with powerful countries, like the United States. They had come to these meetings with the impression that they were, perhaps for the first time ever, equals. For a change, they were not asking for aid or favours. They were not on bended knee. These were their waters, as were the resources that were being discussed. It would be nice if they were asked about issues and what they thought, not lectured about the legal implications of alternatives, that they could assume would be biased towards the outcomes preferred by the United States: not only a colonial power but also a distant-water fishing nation.

I suggested to Mr Bode that one thing they might try is for their spokesperson to be a little less definitive, and perhaps less obviously confident that he knew the way every issue should be resolved. Rather than espousing the only way forward, he might suggest, perhaps even with some trepidation, possible approaches that island states might like to consider. Even showing a little uncertainty, perhaps even an occasional grammatical error on his part, might make him appear more empathetic – or at least more human. Then there was the issue of the size of their delegation, particularly when compared to those of the island states. Americans dominated the space, even at coffee breaks.

We had a rather in-depth discussion around these issues. We were in agreement.

The second memorable meeting occurred after Winston Thompson approached me at the afternoon coffee break on day two, I think, and asked if he and some selected Pacific Island leaders could have a meeting with me at 6 pm that evening. Of course, I agreed. Winston did not need to tell me what it was going to be about: whatever it was, I would be there. Those present included four prime ministers (Kiribati and Tuvalu, almost for certain, and I think Tonga and Samoa), Winston and myself. Winston ran the meeting. As usual, he spoke with authority and conviction. I had always found him impressive.

I was not ready for what they wanted of me. I was almost immediately made somewhat uncomfortable. They requested me to take back to the secretary general of the SPC, Macu Salato, the message that they were very unhappy with his commission. In their opinion, it was continuing to primarily be a service institution for the colonial powers and not a forum for the development of the aspirations of Pacific Island countries and territories. This sentiment did not surprise me: I had heard that the prime minister of Fiji, Ratu Sir Kamisese Mara, the revered elder statesman of the region, had actually told the secretary general that the commission was quickly becoming 'a colonial anachronism'.

Winston and his colleagues then used these Law of the Sea meetings as examples of why they were concerned. The Law of the Sea and the future management of marine resources were extremely important to all Pacific Island states. As leaders of these states, they had found my supposition that the area under discussion needed to be the whole of the area of the SPC with all its members to be logical, perhaps even compelling. They found the information and data I presented on the need for quality scientific research easy to understand and convincing. They had no doubt where I was coming from and what I was proposing. They knew what I was trying to do with the Skipjack Programme, and their fisheries officers had already unanimously, strongly, supported it, as they did themselves. They all wanted to be part of it. Most importantly, they accepted my fundamental position that the research and management of fisheries resources would best be done with the involvement of all stakeholders. Therefore, there was likely a prominent role for the SPC in future negotiations.

But the SPC was not formally involved. Winston and his colleagues knew that I was an independently funded consultant to the SPC, not a regular staff member. I was not even funded from the SPC core budget (I was a little surprised they knew that). I had been invited to these meetings because of

my knowledge and expertise on technical and scientific issues, not to present the official position of the SPC. Where was the SPC Executive when it was needed? Who was going to explain what the SPC was going to do to help Pacific Island states further the agreements that would come from these and presumably future fisheries meetings? If they were not going to help at this critical stage of a major issue that was clearly of great interest to all Pacific Island countries and territories, what could island states expect them to help with? Why did they not take advantage of my superior understanding of the issues being discussed to explain how the commission could contribute?

I repeated my apprehension at presenting the feelings of this august group to another very senior Pacific statesman. I expressed my surprise that they felt I could do it better than they. I specifically asked Winston why he, as a Fijian, or the others present, as heads of Pacific Island states, felt that I was more likely to get the message across to another Fijian, Macu Salato, and one far more senior than I. Winston's answer was simple: 'He does not hear what we say. But we understand he listens to you'. I found Winston's skilful differentiation between the words 'hear' and 'listen' powerful. Flattering though Winston's statement was, I found it difficult to believe. I had enjoyed numerous chats with the secretary general, and I liked him and felt we had a good relationship. But our discussions were, indeed, chats. I had had very few in-depth discussions with him and none on major issues of policy.

But they were unmoved by my protestations. I concluded that even if they were wrong, and I would not have much influence with the secretary general, they were such senior Pacific leaders that I could not deny their request.

Upon my return to Noumea, I sought a meeting with the secretary general at his earliest convenience. The next afternoon, we spoke in his office. The subject was delicate: I tried to be. He was very gracious and thanked me for being the reluctant messenger. He understood my apprehension.

He was aware of the problem and would speak to each of the gentlemen at the earliest opportunity. We concluded with a brief discussion of my opinion of the outcomes of the Law of the Sea meetings. I stressed that the meetings had progressed to the point that the communique from this most recent meeting included agreement to work towards the creation of a new regional fisheries body. I suggested to him that if this did occur, it could have major implications for the SPC, certainly at least for its fisheries programs. He did not seem worried and was genuinely pleased that I was happy with the progress that had been made at the meetings and that I believed my

involvement had furthered the cause of funding the Skipjack Programme and the involvement of the SPC in Law of the Sea discussions, should the executive choose to be involved. I came away thinking that though the meeting had been difficult for me, it had strengthened my relationship with the secretary general. He gave me the impression he was impressed by the responsibility Pacific Island leaders had bestowed on me.

Another issue involving my interactions with the United States and the Law of the Sea arose on the final day of the second meeting, discussed previously. There had been considerable discussion of how surveillance of licensed and unlicensed vessels might be carried out and paid for. This was described in my background papers and confirmed in the meeting's communique to be one of the major issues that cooperative, regional management would have to address successfully.

A workable system of having transmitters (transponders) on licensed vessels with associated satellite-facilitated reporting on each had been established in the eastern Pacific tuna fishery; some detail was given in my background paper (Kearney 1977b). Discussion of the possibility of having satellite surveillance methodology for detecting unlicensed vessels, which obviously would not have transponders, in the total management area under consideration in the southwestern Pacific also occurred. It was quickly accepted that these were technical issues about which the island states knew extremely little. The United States was clearly the country with by far the greatest knowledge. The US delegation to this meeting had not anticipated this discussion and did not include people who could answer the relevant questions. After a brief break in the meeting, I was asked by a subcommittee that included one of the US State Department representatives if I, as one of the most appropriately experienced scientists in the region, would be prepared to go to the United States and discuss the issues, including likely costs, with the relevant authorities, which it was assumed would include the US military.

I advised that I was scheduled to go to the United States in the next few weeks to discuss possible funding for the Skipjack Programme, and provided the arrangements for the necessary meetings to discuss surveillance issues were made with the full support of the office of the US ambassador for the Pacific, I would be honoured to do so.

That I might be accepting responsibility that was way above my pay grade was to the fore in my thinking, but this was, after all, only a fact-finding mission. I had been dealing with governments, including that of

the United States, for some time on a one-on-one basis in my attempts to get commitments to fund the Skipjack Programme. This was effectively just more of the same. Furthermore, taking on such responsibility would increase my communication with US authorities who could well influence the decision on funding for the Skipjack Programme. It would also unquestionably demonstrate the confidence Pacific leaders had in my ability, and I would politely make sure all potential donors to the Skipjack Programme were aware of this. All but one of them, Japan, were represented at this meeting anyway.

These Forum-sponsored meetings in Suva were particularly effective in furthering the cause of the creation of the broadly based fisheries body I had been championing for at least a year or two and had detailed in my discussion documents. They led to the creation of a draft convention for such a body (see Chapter 16). The impact of my documents on that draft convention was obvious. I left the last meeting feeling very confident that a new, broadly based organisation was not far away.

So, it was at about 6 pm on one of the coldest evenings ever recorded in Washington, DC, in pursuit of meaningful discussion on the use of satellite surveillance of fishing vessels that I arrived at the hotel Jim Joseph had recommended. Jim had also highly recommended a restaurant that was only about 100 yards down the street. So, after checking in, I put on my heavy coat, gloves and scarf and set off to the restaurant. As I got to the double air-locked doors of the hotel, a very large man in the hotel's uniform stepped into my path. He very formally asked me why I was clearly intending to go outside. When I told him I was going to the restaurant, the lights of which could be clearly seen from where we stood, he responded: 'I am sorry, Sir, but I cannot let you go outside to do that'. 'Why not' was my somewhat surprised reply. I was not sure what gave him the authority to stop me, but I thought it best not to question it. His answer was 'It is so cold out there [that] you will not be safe. The footpath is covered in black ice, and you may well have a fall which could be nasty'. My immediate thought was that he was just trying to restrict my movements so I would have to stay and have dinner in the hotel's restaurant. Black ice surely cannot be that dangerous? But he was persistent, and eventually I gave in. I had a rather nice meal at the hotel, but I remained a bit annoyed that I had missed out on trying the restaurant Jim Joseph had recommended.

The next morning was possibly even colder than the evening before. I found myself in a taxi on my way to the State Department when, about 100 yards from my destination, the driver completely lost influence on his vehicle as it spun out of control. The black ice on the road was the cause of our discontent. The taxi did a full 360-degree spin before coming to rest facing exactly where we had been headed. The driver was in shock. How we missed the vehicles coming the other way was a mystery, or a miracle. He suggested that it might be better if I walked from where we were. I needed no talking into this suggestion. Black ice is not something we learn how to deal with in the South Pacific, but I did think I had a better chance of surviving it on foot than in a spinning taxi.

Once in the State Department, I was escorted to a large office where one gentleman in full, and obviously very senior, military uniform and three others in civilian suits were waiting. After introductions, I was given an agenda for our discussions planned for the next two days. The man in uniform, who my memory suggests was a general, was obviously the ruling authority. All of them seemed very knowledgeable, and they were forthcoming with information on satellite surveillance based on using transponders on boats. The detail they gave me on how the system works and what the costs were was excellent, but as soon as I asked for information on satellite detection of vessels without transponders – that is, illegal vessels – I was told in no uncertain terms that this could not be done. It was stated categorically that the technology to do such surveillance had not yet been developed to the point that it was usable. This was contrary to the advice, albeit much less authoritative, I had been given by senior people in the US tuna industry.

The second day of the meeting was in a different building, which my memory suggests was the Pentagon, but my American friends now tell me that it was unlikely. Then again, how unlikely would it have been that I would be, wherever I was, discussing the details of satellite surveillance with the US military on my own? Regardless, the morning's exchange was again very courteous, until I once again mentioned the issue of surveillance based solely on satellites. It was again instantly dismissed as being impossible. The preparation I had done for these meetings had given me enough information to make me sceptical of this conclusion: I had been told that several US tuna boats had been apprehended via satellite surveillance for fishing illegally in other countries' waters.

When, a short while later, the general moved to draw the meeting to a close, I thought I would give it one last shot. I said to him words to this effect:

> General, you and your colleagues have been very forthcoming on information on transponders and satellites, and I thank you sincerely for what you have given me. But, with respect Sir, I am having great difficulty accepting that even with what we know of the depth of US satellite technology and the impressive might of the US military, you cannot use satellites to find a boat as large as a modern super-seiner in predetermined parts of the south Pacific Ocean.

His expression changed considerably. He was silent for a good 10 seconds. He then looked across at his colleagues. Their faces were as close to expressionless as a human face could be. If anything, they may have suggested, 'Why look at us? It is up to you, General. You are the defender of our country and the manager of this meeting'. The general then turned to me and said:

> Listen buddy, if there were two bastards out there in a rowboat we could tell you their names. Of course, we have the technology and the skill to find tuna boats in the south Pacific. Your problem is you can't afford it.

I had great difficulty keeping the smile off my face, but it was important that I did, so I managed to. It was my turn. I responded:

> My sincere thanks for your candour, General. And please forgive me for attempting to take advantage of it, but if you could please tell me how much money it is that we cannot afford, I would be able to give a far more meaningful report to Pacific Island leaders.

His response was illuminating. They had obviously done quite a bit of research on our dilemma, including the possibility that we could, in some way, get involved with satellite surveillance of unregistered vessels. They had tried hard to be helpful. He went on to tell me some of what they had concluded.

They had looked at the size of the area in question and run several models of factors such as how many boats were likely to be in the area and what precision in detection was necessary; for example, was it only the presence of boats we were worried about, or was the nationality of each boat, or even its name, necessary? He said they had made assumptions about what detail we would likely need. They had estimated that with the technology they had at the time, we would require three satellite scans a day on three days

a week in areas of greatest interest. Each scan would cost about $90,000. These costs would vary with the level of detail we required, but they were unlikely to come down in the foreseeable future.

Not much arithmetic was required to confirm that, yes, the general was obviously right; we could not afford it. But that knowledge of itself was a great help in focusing future discussions on what type of vessel surveillance the Pacific Island countries would need and could afford. I felt that my mission had been very successful. I could report back with information that was extremely valuable.

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