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Enforcement cooperation in combating illegal and unauthorized fishing: an assessment of contemporary practice

Stuart Kaye

University of Wollongong, skaye@uow.edu.au

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Abstract

The emergence of the exclusive economic zone (EEZ) in the 1970s placed potentially vast areas of the sea under national jurisdiction. Moving from relatively modest territorial seas close to the coast as the only basis of fisheries jurisdiction for States, the international community suddenly embraced a new form of jurisdiction over resources that extended fisheries up to 200 nautical miles from land. This extension brought over one third of the world's oceans, or, more importantly, approximately 90% of the world's wild fish catch, under national jurisdiction.

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Enforcement Cooperation in Combating Illegal and Unauthorized Fishing: An Assessment of Contemporary Practice

Stuart Kaye*

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INTRODUCTION

The emergence of the exclusive economic zone (EEZ) in the 1970s placed potentially vast areas of the sea under national jurisdiction. Moving from relatively modest territorial seas close to the coast as the only basis of fisheries jurisdiction for States, the international community suddenly embraced a new form of jurisdiction over resources that extended fisheries up to 200 nautical miles from land. This extension brought over one third of the world's oceans, or, more importantly, approximately 90% of the world's wild fish catch, under national jurisdiction.¹

While the possibility of bringing these areas' resources under national control was of tremendous value to many developing States, the difficulties of

* Director and Professor of Law, Australian National Centre for Ocean Resources and Security, University of Wollongong, Australia.

1. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, FISHERIES AND AQUACULTURE DEP'T, THE STATE OF WORLD FISHERIES AND AQUACULTURE, 94 (2012).

enforcement over such areas were not so readily considered. Some States, notably the States of the South Pacific, but by no means restricted to them, simply lacked the capacity to police their waters and protect their resources from the depredation of others. Adding a vast area subject to national jurisdiction often required that States expend substantial assets—at sea and in the air—in order to effectively patrol, police, and enforce their new jurisdiction. For oil and gas exploitation, the lack of a significant coast guard or naval force to deploy in the EEZ was not a huge problem as exploitation of the seabed is a slow and expensive business. For fisheries, which can be exploited far more cheaply, and in a more transitory fashion, this lack of enforcement capacity represented a potentially serious impediment.

In the years since the United Nations Convention on the Law of the Sea² was opened for signature, many States have learned that maintaining a capability to enforce their laws in their EEZ is expensive and difficult. Some valuable fisheries have been seriously damaged by illegal, unreported, and unregulated (IUU) fishing, often in areas that are difficult to patrol by virtue of geography and lack of capacity. In the latter case, the inability to enforce the fisheries laws of the coastal State has been credited as a contributing cause of the rise of piracy in the waters around Somalia in the past decade.³ Considering the difficulties present in enforcing coastal State law, combined with the inexorable rise in IUU fishing and a greater emphasis on international cooperation in the management of straddling and high seas fish stocks, it is natural that States have begun to explore the possibility of cooperation in the patrol and enforcement of their EEZ.

This paper will consider the range of responses by States to their individual lack of enforcement capacity and the types of cooperative response that have arisen from the present situation.

I. TYPES OF COOPERATION

Cooperation between States over issues of maritime enforcement can be characterized into a number of types based on a continuum of engagement in cooperation. For the purposes of argument here, cooperation has been placed into one of three categories:

- Data exchange and observers
- Boarding and referral to the flag State
- Boarding and arrest by a third State

2. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

3. Ishaan Tharoor, *How Somalia's Fishermen Became Pirates*, TIME (Apr. 18, 2009), <http://content.time.com/time/world/article/0,8599,1892376,00.html>.

Each type of cooperation represents a different level of enforcement engagement along a continuum from virtually nothing to another State stepping into the shoes of the flag State. Strictly speaking, exchanging data and the deployment of independent observers is very much at the lowest end of engagement, where everything but the collection of the most basic eye-witness testimony as to fishing activities and catch volumes still rests with the flag, coastal, or port State. Boarding and referral represents a greater level of engagement, where only a portion of the authority is vested in a third party. Finally, boarding and arrest represents the complete vesting of jurisdiction and authority in a third party.

The frequency of the use of these different arrangements is inversely proportional to the level of authority given to a third State seeking to enforce the law. Such a situation is to be expected given the great reluctance of States to cede their authority to others. Nevertheless, the difficulties of enforcement and concerns over IUU fishing have compelled some States to be prepared to cooperate even at the expense of what they might see as their traditional prerogatives.

A. Data Exchange and Observers

Far and away the most common arrangement for cooperation in maritime enforcement is data exchange and the deployment of observers. Cooperation in the sharing of data and the use of observers in fisheries has been employed in a number of agreements.⁴ It has typically been used as a mechanism to ensure that compliance is effectively monitored by flag and port States.

A system of observation and inspection typically involves a Regional Fisheries Management Organization (RFMO) facilitating the placement of an observer aboard a fishing vessel for all or part of its voyage. Generally, the observer will be from another State and will be able to watch the fishing activities and inspect the catch. The observer will also have the ability to report back to the RFMO with respect to any possible breaches of fisheries conservation measures that occurred aboard the vessel.

It is important to note that an observer has no ability to affect the conduct of fisheries operations aboard a vessel, nor does the observer have a power of arrest. The observer's presence is passive, and the report he or she provides typically factors into discussions by State parties at meetings of the RFMO, rather than providing a basis for punitive action by the flag State.⁵

The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) gives an example of an observation and inspection scheme in action.⁶

4. *See generally* LENFEST OCEAN PROGRAM, RFMO REPORT CARD: ON GOVERNANCE OF BYCATCH AND DISCARDS BY REGIONAL FISHERIES MANAGEMENT ORGANIZATIONS (2012) (providing a short contemporary summary of RFMO practices).

5. *See* STUART B. KAYE, INTERNATIONAL FISHERIES MANAGEMENT 389–97 (2001).

6. Convention on Antarctic Marine Living Resources, May 12, 1980, 33 U.S.T. 3476, 1329

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The Convention itself provides for the scheme under Article XXIV, although the details of its operation are limited since the State parties chose to leave the mechanics of such a scheme to a later date.⁷ The Convention did, however, prescribe three principles under which the scheme would operate:

- Cooperation between States to establish procedures for boarding and inspection and for flag State prosecutions, consistent with international practice;⁸
- Observation and inspection of vessels engaged in harvesting or research;⁹ and
- Inspectors remaining subject to jurisdiction of the member State of which they are nationals, and reports from them being transmitted to the Commission.¹⁰

It took over half a decade to bring the scheme to fruition,¹¹ and the State parties formally adopted it in 1989, eight years after the Convention entered into force. It operated under the auspices of a Standing Committee on Observation and Inspection (SCOI), which established a system of observation and inspection in 1988.¹²

The system adopted provides for the designation of qualified individuals as inspectors and observers who may be placed aboard vessels engaged in scientific

U.N.T.S. 48 [hereinafter CCAMLR].

7. CCAMLR, *supra* note 6, art. XXIV(1) provides: “In order to promote the objective and ensure observance of the provisions of this Convention, the Contracting Parties agree that a system of observation and inspection be established.”

8. CCAMLR, *supra* note 6, art. XXIV(2)(a) provides:

Contracting Parties shall cooperate with each other to ensure the effective implementation of the system of observation and inspection, taking account of the existing international practice. This system shall include, inter alia, procedures for boarding and inspection by observers and inspectors designated by Members of the Commission and procedures for flag State prosecutions and sanctions on the basis of evidence resulting from such boarding and inspections. A report of such prosecutions and sanctions imposed shall be included in the information referred to in Article XXI of this Convention;

9. CCAMLR, *supra* note 6, art. XXIV(2)(b) provides:

In order to verify compliance with measures adopted under this Convention, observation and inspection shall be carried out on board vessels engaged in scientific research or harvesting of marine living resources in the area to which this Convention applies, through observers and inspectors designated by Members of the Commission and operating under terms and conditions to be established by the Commission;

10. CCAMLR, *supra* note 6, art. XXIV(2)(c) provides: “[D]esignated observers and inspectors shall remain subject to the jurisdiction of the Contracting Party of which they are nationals. They shall report to the Member of the Commission by which they have been designated which in turn shall report to the Commission.”

11. The implementation of Article XXIV was not immediate, and the issue itself was only raised at the third Commission meeting in 1984. *See* Comm’n for the Conservation of Antarctic Marine Living Res., Rep. of the 3d Meeting of the Comm’n, ¶¶ 26–29 (1984).

12. *Id.* ¶¶ 111–21. The SCOI recommendations were adopted by State parties the following year *in toto*. *See id.* ¶¶ 29–36.

research or harvesting in the CCAMLR area.¹³ Inspectors are drawn from a register maintained by the CCAMLR,¹⁴ must be nationals of the State party nominating them,¹⁵ and must speak the language of the flag State of the vessel to be observed or inspected.¹⁶ When aboard a vessel, an inspector remains solely subject to the jurisdiction of his or her nominating State.¹⁷ Each State party must provide prior notification of all vessels intending to enter the CCAMLR area to harvest resources during the year commencing July 1 by May 1 of the same year.¹⁸ Any such vessels are potentially subject to inspection.

The inspector has wide powers with respect to access, but not enforcement. Inspectors may observe and inspect the catch, the gear used, data collected, and any records of and reports on catch and location data.¹⁹ Inspectors also may photograph alleged violations of conservation measures and affix identification marks to gear allegedly used in contravention of conservation measures.²⁰ In the event a breach is observed, the inspector is only empowered to alert the master of the vessel of the breach and log it in the official inspection report.²¹ This report is transmitted to the flag State from the inspector's State via CCAMLR, although the flag State can comment upon the report prior to its formal consideration at a Commission meeting.²² Enforcement action is the responsibility of the flag State alone.

It is clear from this system that although the inspector has wide powers to collect evidence of a breach, only the flag State has the right to prosecute an offense. There is no requirement that the flag State take any action, even when

13. Comm'n for the Conservation of Antarctic Marine Living Res., Rep. of the Standing Comm. on Observation and Inspection, *Observation and Inspection System*, items I(a), III (1984) [hereinafter *Observation and Inspection System*], reprinted in Comm'n for the Conservation of Antarctic Marine Living Res., Rep. of the 7th Meeting of the Comm'n, 93-101 (1984). Inspectors can be either placed aboard or inspect from a vessel under their own State's flag. See *id.* items I(d), I(e), III(a), III(b), III(c); see also Rosemary Rayfuse, *Enforcement of High Seas Fisheries Agreements: Observation and Inspection Under the Convention on the Conservation of Antarctic Marine Living Resources*, 13 INT'L J. MARINE & COASTAL L. 579, 589 (1998).

14. *Observation and Inspection System*, *supra* note 13, item II.

15. *Id.*, item I(c). This is consistent with CCAMLR art. XXIV(2)(c). See CMMALR, *supra* note 6.

16. *Observation and Inspection System*, *supra* note 13, item I(d) (appearing to assume that the captain and crew also speak the language of the flag State).

17. *Observation and Inspection System*, *supra* note 13, item I(c). This is consistent with CCAMLR art. XXIV(2)(c). See CMMALR, *supra* note 6.

18. Parties must provide information including the name of the vessel, the call sign of the vessel registered with appropriate flag State authorities, the home port and nationality of the vessel, the owner or charterer of the vessel, and notification that the vessel's master is aware of the conservation measures in force for the areas where the vessel will be harvesting. See *Observation and Inspection System*, *supra* note 13, item IV.

19. *Id.*, item VI.

20. *Id.*, item VI(e).

21. *Id.*, item VIII.

22. *Id.*, item IX. These procedures were amended in 1992, 1996, and 1997 to provide for time limits on the submission of reports, and expedition of consideration of reports by flag States. See Comm'n for the Conservation of Antarctic Marine Living Res., Rep. of the 11th Meeting of the Comm'n, 92 (1992); Rayfuse, *supra* note 13, at 593.

presented with conclusive evidence of the most egregious breach. This demonstrates the significant limitation inherent in the inspection and observation system.

B. Boarding and Referral to Flag State

The next type of cooperative response vests an ability to board and inspect in a third State but continues to leave enforcement action in the hands of the flag State. To some extent, this type of action superficially resembles the placing of an inspector aboard, although the reality of the intervention is a little more involved.

Upon the high seas, there are substantial restrictions upon the boarding of a vessel by any ship other than a Government vessel of the vessel's flag State. The circumstances where a boarding can be undertaken are extremely limited and largely apply to Stateless vessels or instances of serious international crimes such as piracy or the slave trade. In the ordinary course of events, without the concurrence of the flag State, a boarding to do anything more than establish identity is contrary to international law.

The concurrence of the flag State can be supplied in a variety of ways. First, a flag state can concur by way of a bilateral agreement between it and the boarding State. Such an agreement would be a treaty-level document and would permit a right to stop and board in certain circumstances. The most widely cited examples of these are the agreements, which are not directed at fishing activity, between the United States and a range of largely open registry States to permit boarding to investigate for the presence of weapons of mass destruction or their precursors.²³

Second, a flag State can provide consent to a third party through the use of multilateral agreements. This is the most common way such boarding permission is achieved, and a number of examples of this can be identified. For example, under Article 21 of the United Nations Fish Stocks Agreement,²⁴ State parties to a regional fisheries arrangement effectively authorize other State parties to board and inspect their fishing vessels while fishing on the high seas in the area covered by that arrangement.²⁵ If a boarding were to take place pursuant to Article 21 in relation to violations of any conservation measures, any

23. See generally *Ship Boarding Agreements*, U.S. DEP'T OF STATE, <http://www.state.gov/t/isn/c27733.htm> (last visited July 31, 2014) (providing background information and links to the agreements).

24. United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Sept. 8, 1995, 2167 U.N.T.S. 88 [hereinafter UNFSA].

25. *Id.* art. 21(1), 21(2); see also Howard L. Brown, *The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: An Analysis of International Environmental Law and the Conference's Final Agreement*, 21 VT. L. REV. 547, 583 (1996).

evidence is secured and the flag State notified.²⁶ The flag State then has a limited period in which to initiate an investigation itself or to authorize the inspecting State to do so.²⁷ Serious violations²⁸ that are not the subject of a response by the flag State could see a vessel directed to the nearest appropriate port.²⁹

In practice, few boardings under Article 21-style arrangements appear to have taken place. That this is so should not be surprising. First, the efficacy of undertaking boardings in these circumstances still depends upon the flag State undertaking a prosecution—a circumstance that would not be certain without prior arrangement between the State parties. As a result, there have been few boardings stemming from an opportunistic encounter at sea. Second, few States will be interested in undertaking enforcement operations far from home in waters beyond their national jurisdiction.

C. Boarding and Arrest By a Third State

The rarest and most invasive form of cooperative enforcement is where one State empowers another to act on its behalf, effectively placing itself in the position of the flag State. This is essentially using another State's vessel and personnel to undertake boarding and arrest. The ultimate prosecution of arrested individuals is still retained by the coastal State, but all elements prior to the handover of arrested persons and their vessel are in the hands of a third State. This mechanism gives tremendous reach of enforcement, as, in addition to a coastal State's own platforms, it may be able to make use of the ships and aircraft of another State.

There are a number of issues to be considered in such a situation. First, one should look at the jurisdictional space in which such activities might occur. In the ordinary course of events, there is no freedom of navigation in the territorial sea of a coastal State for foreign ships. A right of innocent passage can be asserted, but undertaking enforcement operations will manifestly fall within the list of matters in Article 19 of the Law of the Sea Convention that are inconsistent with such passage. As such, any enforcement arrangement will need either to be inapplicable to illegal fishing in its territorial sea or to provide the

26. UNFSA, *supra* note 24, art. 21(5).

27. *Id.*, art. 21(6).

28. The term "serious violation" is defined to include nine offenses, including: fishing without a valid authorization from the flag State; failing to maintain accurate records of the catch as required by the regional fisheries organization; fishing in a closed area, during a closed season, or without or beyond an authorized quota; fishing for a stock that is prohibited or subject to a moratorium; using prohibited gear; falsifying or concealing the markings, identity, or registration of the vessel; concealing, tampering with, or disposing of evidence relating to an investigation; multiple violations that constitute a serious disregard of conservation and management measures; and, other violations specified as such by the regional organization. *See* UNFSA, *supra* note 24, art. 21(11).

29. UNFSA, *supra* note 24, art. 21(8), 21(10).

flag State with an authority to undertake actions beyond what is permitted by innocent passage.³⁰

Second, mechanisms need to be in place to facilitate consistency between the flag State and the coastal State's laws. The use of another State's personnel in enforcement will naturally require harmonization of laws with respect to matters such as the appropriate use of force, search and evidentiary matters, custodial matters and handover, and the liability of personnel in the event of an authorized activity taking place. Each of these matters has a substantial impact upon a specific operation. A prosecution may ultimately fail if there are breaches of rules of evidence or mistreatment of arrested persons. In addition, future cooperation may be jeopardized if personnel undertaking a boarding or arrest are pursued through the coastal State's courts.

Finally, although an enforcement operation is being undertaken, it may be assumed that a flag State will not wish to prejudice the sovereign immunity of its vessel. Although it is exercising the jurisdiction of another State, a flag State will not wish to consent to any action that might create a situation where the coastal State's laws have any application aboard their ship.

1. Case Study: *Ad Hoc Cooperation—South Tasman Rise Disputes*

The South Tasman Rise is an area in which the continental shelf extends a substantial distance to the south of the large Australian island of Tasmania. The area of relatively shallow water extends a little over 200 nautical miles from the territorial sea baselines around Tasmania's south-eastern coast; consequently, there are rich fishing grounds in waters just outside Australia's EEZ. These waters provide a habitat for the orange roughy, a species that has suffered from heavy commercial fishing around southern Australia and New Zealand since the early 1980s.

The orange roughy is an unusual fish whose life cycle has impacted efforts at commercial exploitation. The species is extremely long-lived, and breeds only when decades old, meaning that its exploitation was unsuited to a more common pattern of size being used as a designator of breeding maturity. Full-sized orange roughy might be decades away from breeding, and their removal from the biomass has implications for the stock's ability to regenerate. Unfortunately, the details of the orange roughy's life-cycle were not fully understood when commercial exploitation began. As a result, stocks in waters proximate to Australia and New Zealand were heavily overfished. This made more remote stocks, like those on the South Tasman Rise, very appealing to fishing vessels.

The two disputes concerning orange roughy exploitation on the South Tasman Rise both have their origins in the element that was responsible for the *Estai* dispute between Spain and Canada.³¹ In both the *Estai* and Tasman cases,

30. This situation is dealt with explicitly in the 2007 Australia-France Enforcement Agreement, *infra* note 44.

31. Rep. of the Int'l Court of Justice, Fisheries Jurisdiction (Spain v. Can.), ¶¶ 177–90, U.N.

a fishery with a straddling stock extended just out of a coastal State EEZ, the coastal state was concerned about limiting exploitation of a threatened stock, and Distant Water Fishing Nations (DWFN) sought to exploit the stock in the waters beyond national regulation. In 1997, New Zealand fishing vessels targeted the South Tasman Rise fishery just outside the Australian EEZ. The Australian response was to raise the matter at a diplomatic level with New Zealand and attempt to negotiate a solution.³² Australia did not pursue a more forthright response along the lines of Canada's arrest of the *Estai* in 1995 because it endeavored to remain within the bounds of accepted international practice. Rather, the parties initiated negotiations, consistent with Article 116 of the Law of the Sea Convention, and reached a mutually acceptable solution. Early in 1998, the two States concluded an arrangement that set precautionary catch limits for orange roughy in the areas beyond the Australian Fishing Zone and provided for collaboration of the two States in a research program to better manage the stock.³³ Both the arrangement and cooperation on the management of the fishery have continued.³⁴

The travails of the orange roughy on the South Tasman Rise by no means ended in 1998. The following year, vessels flagged in States outside the region began to take an interest in the stock, again just outside the Australian Fishing Zone. In 1999, at least four vessels were observed on the high seas portion of the South Tasman Rise fishing for orange roughy. The vessels were flagged in South Africa and Belize, and the Australian Government immediately approached these two States to request that the vessels cease fishing orange roughy. The requests were based on the fact that the stocks were subject to an international management regime with New Zealand, and that South Africa and Belize should desist fishing pending their participation in negotiations to assist in the management of the fishery, consistent with Article 116 of the Law of the Sea Convention.³⁵

Doc. A/54/4 (1999) (providing a summary of the facts given by the ICJ in subsequent litigation arising out of the case).

32. See AUSTRALIAN GOVERNMENT DEPARTMENT OF AGRICULTURE, FISHERIES AND FORESTRY, FISHERY STATUS REPORTS 2007 (2007), http://data.daff.gov.au/brs/data/warehouse/brsShop/data/19_FSR07_sttrf.pdf.

33. Arrangement Between the Government of Australia and the Government of New Zealand for the Conservation and Management of Orange Roughy on the South Tasman Rise, AUSTRALIAN-NEW ZEALAND, Feb. 18, 1998 (expired Feb. 28, 1999), reprinted at https://www.dfat.gov.au/geo/new_zealand/documents/roughy.pdf.

34. The TAC (total allowable catches) dropped dramatically from 2400 tons in 1999 to only 200 tons in 2006–2007, and even this modest level was not reached. Australia and New Zealand agreed to a TAC of zero tons in 2007–2008 and indefinitely thereafter. See AUSTRALIAN GOVERNMENT DEPARTMENT OF AGRICULTURE, SOUTH TASMAN RISE TRAWL FISHERY 239–41 (2007).

35. See JANE WILLING, ARRANGEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF NEW ZEALAND FOR THE CONSERVATION AND MANAGEMENT OF ORANGE ROUGHY ON THE SOUTH TASMAN RISE (2002), reprinted in PAPERS PRESENTED AT THE FAO-NORWAY EXPERT CONSULTATION ON THE MANAGEMENT OF SHARED FISH STOCKS, FOOD & AGRIC. ORG. OF THE UNITED NATIONS REPORT NO. 695. SUPPLEMENT (2003).

The responses from both States were encouraging. South Africa requested that its vessels cease fishing, on pain of revocation of high seas fishing licenses. South Africa ultimately applied this sanction. Belize requested that its vessel cease fishing, to no avail. Belize subsequently deregistered the vessel, and via formal written authorization, requested that Australia enforce Belize law on its behalf if the vessel continued to fish. Shortly after Belize gave its authorization, the vessel departed.³⁶ The incidents are good examples of the type of ad hoc cooperation that may be possible to deal with managing fisheries. In both cases, Australia lacked the regulatory responsibility to unilaterally enforce conservation measures on the South Tasman Rise as the waters were beyond national jurisdiction.

2. Case Study: Enforcement Cooperation—Niue Treaty

The Niue Treaty³⁷ was concluded in 1992, with a view to assisting the States of the South Pacific in patrolling and enforcing fisheries laws within the vast areas of maritime jurisdiction within their EEZs.

The Niue Treaty's purpose of facilitating cooperation is explicit in Article III:

1. The Parties shall cooperate in the enforcement of their fisheries laws and regulations in accordance with this Treaty and may agree on forms of assistance for that purpose.
2. The Parties shall cooperate to develop regionally agreed procedures for the conduct of fisheries surveillance and law enforcement. Where appropriate, fisheries surveillance and law enforcement will be conducted in accordance with such regionally agreed procedures.³⁸

The cooperation is made manifest in a variety of ways. First, there is cooperation on the dissemination of data about fishing activities throughout the region. This allows States to be more effective in their enforcement activities. This becomes particularly valuable where States have few platforms to conduct enforcement.

Article VI considers cooperation through boarding and arrest. It provides in part:

1. A Party may, by way of provisions in a Subsidiary Agreement or otherwise, permit another Party to extend its fisheries surveillance and law enforcement activities to the territorial sea and archipelagic waters of that Party. In such circumstances, the conditions and method of stopping, inspecting, detaining, directing to port and seizing vessels shall be governed by the national laws and regulations applicable in the State in whose territorial sea or archipelagic waters the fisheries surveillance or law enforcement activity was carried out.

36. See Rachel Lord, *Fisheries—straddling fish stocks—orange roughy*, 20 AUSTL. Y.B. INT'L L. (Centre for International and Public Law) 1, 422–23 (1999).

37. *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, July 9, 1992, 1974 U.N.T.S. 45 [hereinafter *Niue Treaty*].

38. *Id.* art. III.

2. Vessels seized by another Party pursuant to an agreement under paragraph 1 of this Article in the territorial sea or archipelagic waters of a Party shall, together with the persons on board, be handed over as soon as possible to the authorities of that Party.³⁹

In essence, Article VI provides that a State party can use a Subsidiary Agreement to allow for the boarding and arrest of vessels flying its flag by an enforcement vessel of another State. Such an agreement will spell out the circumstances and nature of the use of a power of boarding and arrest. The Subsidiary Agreement empowers the vessels of one State party to undertake EEZ enforcement operations on behalf of another State, effectively widening the range and number of enforcement vessels that can undertake enforcement operations.

There are a number of limitations on the effectiveness of the Niue Treaty. First, there are very few Subsidiary Agreements that subsist on a permanent basis.⁴⁰ Some agreements have been negotiated as temporary arrangements, but even these have been few and far between. Second, even with a larger number of Subsidiary Agreements, there is still a dearth of vessels to undertake enforcement operations. For example, during operation *Tui Moana 12*, which was designed to give effect to the Subsidiary Agreement between the Cook Islands and Samoa, vessels from the two States were joined by Royal New Zealand Navy ships, Royal New Zealand Air Force aircraft, and French and American patrol aircraft.⁴¹ While it is encouraging that such an operation took place at all, had the efforts been left to Samoa and the Cook Islands, there would have been very little impact given their relative paucity of equipment and platforms for patrolling a vast area.

The limited number of Subsidiary Agreements has undermined the effectiveness of the Niue Treaty, as it limits the efficacy of cooperation to essentially data exchange and related activities. This has long been a concern and has spurred along efforts to negotiate a multilateral Niue Treaty Subsidiary Agreement. The negotiation of a general multilateral Subsidiary Agreement has been afoot since 2009.⁴² Such an agreement would be a boon to the operation of

39. *Id.* art. VI.

40. For example, the Te Vaka Toa Arrangement between the Cook Islands, New Zealand, Niue, Samoa, Tonga and Tokelau was only finalized in July 2011. *See Developing and Protecting Marine Resources, New Zealand Aid Programme*, N.Z. MINISTRY FOREIGN AFF. AND TRADE, <http://www.aid.govt.nz/media-and-publications/development-stories/october-2011/developing-and-protecting-marine-resources> (last visited July 31, 2014). For the text of the agreement, *see Arrangement Between the Cook Islands, New Zealand, Niue, Samoa, Tonga and Tokelau on Cooperation in Fisheries Surveillance and Law Enforcement Subsidiary to the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region of 9 July 1992*, <http://www.tevakamoana.org/sites/default/files/downloads/te-vaka-toa-arrangement.pdf>.

41. *Fisheries Surveillance Mission Accomplished—Operation Tui Moana 12*, COOK ISLANDS HERALD (Mar. 21, 2012), <http://www.ciherald.co.ck/articles/h623d.htm>.

42. Update on the use of Information Exchange in combating Illegal Fishing, PACIFIC ISLANDS LAW OFFICERS' NETWORK, http://www.pilonsec.org/index.php?option=com_content&view=article&id=98:update-

the Niue Treaty, as it would see a significant rise in the use of Article VI of the Treaty and would increase the level of enforcement operations in the South Pacific.⁴³

3. *Case Study: Enforcement Cooperation—Australia-France Southern Ocean Agreements*

The remoteness of the far south of the Indian Ocean has encouraged cooperation between Australia and France. This represents the most complete level of cooperation between States with interests in managing the fisheries in and around their respective EEZs.

Australia and France have built upon this ad hoc cooperation with respect to their possessions in the Indian Ocean sector. Both States concluded a treaty in 2003,⁴⁴ providing for continuing cooperation in surveillance,⁴⁵ intelligence,⁴⁶ and scientific research.⁴⁷ This arrangement permitted a speedier response to Southern Ocean cooperation, and allowed both States to make more efficient use of precious assets in such a remote region.

More controversially, the treaty also provided that one State could authorize vessels of the other to continue a hot pursuit through its territorial sea, as long as no enforcement action took place within the territorial sea.⁴⁸ This may be inconsistent with the letter of Article 111 of the Law of the Sea Convention,⁴⁹ but the legality of the provision is still moot since none of the hot pursuits undertaken to date have passed through a third State's territorial sea.

The treaty was successful and was followed up with a more ambitious arrangement in 2007. Australia and France entered into a subsequent agreement to provide for cooperative enforcement within the EEZs of Australia and France in the Southern Indian Ocean.⁵⁰

The reach of the treaty is of interest. Cooperative enforcement is defined as: "Fisheries enforcement activities such as the boarding, inspection, hot pursuit, apprehension, seizure and investigation of fishing vessels that are

ntsa&catid=3:pacific-law-and-justice-news&Itemid=94 (last visited July 31, 2014).

43. See Niue Treaty, *supra* note 37, art. VI.

44. Treaty between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas Adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and McDonald Islands, [2005] ATS 6 (Austl.).

45. *Id.* art. 3 and Annex I.

46. *Id.* art. 5.

47. *Id.* art. 3.5 and Annex II.

48. *Id.* art. 3.3, 4.

49. UNCLOS, *supra* note 2, art. 111(3) (explaining that the right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State).

50. Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands, [2011] ATS 1 (Austl.).

believed to have violated applicable fisheries laws, undertaken by one Party in cooperation with the other Party.”⁵¹

Notably, the definition makes it clear that the 2007 Agreement directly encompasses apprehension, seizure, and investigation. As such, there is cooperation with respect to policing elements up to the handover of the offending vessel and its crew to the other party and prosecution of offenses through the coastal State’s domestic courts.⁵² This is a remarkable level of cooperation.

The Agreement deals with a range of matters that are designed to ensure the smooth running of any cooperative enforcement operations. Most importantly, there is a requirement that an appropriate fisheries officer of the coastal State be aboard the enforcing vessel. This presence is important as it gives the coastal State a scintilla of its own enforcement mechanisms within the enforcement activity undertaken upon its behalf. That said, the Agreement does not create a fiction of the single official exercising jurisdiction alone. Article 5 makes it clear that jurisdiction is being exercised by the other party in the coastal State’s EEZ, although every effort will be made to comply with the laws of the coastal State.⁵³

The Agreement deals with a range of aspects of cooperative enforcement that are also important. First, the officers undertaking the enforcement are given immunity for any actions they take in the course of enforcing the coastal State’s law. This is an important safeguard in facilitating cooperation as well as maintaining the sovereign immunity of the warship carrying out enforcement.⁵⁴ Second, the Agreement notes that the cost of cooperation is ordinarily assumed to be borne by the enforcing rather than the coastal State. This would seem to assume that both States will undertake cooperative operations to an approximately equal extent, although the Agreement does foresee that some adjustment might be necessary if too much of the burden is borne by a single State.⁵⁵

The Agreement has now been afoot for some time, and there are reports of its having been utilized in enforcement actions,⁵⁶ although with little public fanfare. Given that the two States concerned have similar capacities in the

51. *Id.* art. 1.4.

52. Vessels seized by a party pursuant to Article 3 in the maritime zone of the other party, or following a hot pursuit undertaken on behalf of the other party pursuant to Article 4, shall, together with the persons, equipment and any documents and catch on board, be handed over as soon as possible to the authorities of the other Party. *See id.*

53. Art. 5(1) provides: “The Party whose authorised vessel, and its crew, is undertaking cooperative and enforcement activities in accordance with this Agreement, shall take all appropriate measures to ensure that the laws of the other Party are observed and respected.” *Id.*

54. *Id.*, art. 5(2).

55. *Id.*, art. 8.

56. *See* COMMONWEALTH OF AUSTRALIA, RURAL AND REGIONAL AFFAIRS AND TRANSPORT LEGISLATION COMMITTEE, ANSWERS TO QUESTIONS ON NOTICE, Question 344 (Nov. 2013), http://www.aph.gov.au/~media/Estimates/Live/rrat_ctte/estimates/sup_1314/ag/AFMA.ashx.

region at issue and face similar challenges in combating illegal fishing in their EEZs, there is every reason to believe this effective cooperative regime will continue for the foreseeable future.

CONCLUSION

Cooperation in maritime enforcement is certainly growing, but to date examples beyond the most basal are relatively rare and are largely restricted either to areas that are very remote or where vast EEZs are essentially unpatrolled by extremely small States. Even in these unusual circumstances, anything beyond very simple cooperation is almost non-existent. Even an arrangement such as the Niue Treaty, which has existed for well over a decade, with the obvious and stated aim of facilitating cooperative enforcement, has largely gone unused. The reluctance of States to surrender any of their prerogatives to uphold their sovereign rights is certainly very strong and should not be underestimated. Given their limited capacity to effectively police their EEZs, many States have great incentive to embark upon cooperative measures, so it is telling that relatively little actual progress has been made.

That said, there is still some reason to be optimistic. The recent efforts to provide for a permanent subsidiary agreement to the Niue Treaty and the Australia-France Agreement demonstrate that cooperation as a solution is still an avenue for some States. In the far-flung reaches of the world's oceans, the prospect of using cooperative measures to resolve the difficulties of enforcement is still being considered, and such measures may be actively used to clamp down on illegal fishing. Perhaps in time, they may provide a way forward for greater cooperation.