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

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

Stuart Kaye¹

Introduction

The emergence of the exclusive economic zone (EEZ) in the 1970s placed potentially vast areas under national jurisdiction. From relatively modest territorial seas close to the coast as the only basis of fisheries jurisdiction for States, suddenly the international community embraced a new form of jurisdiction over resources that extended to fisheries up to 200 nautical miles from land. This extension brought over one third of the world's oceans under national jurisdiction, or more importantly, approximately ninety percent of the world's wild fish catch.²

While the possibility of bringing the resources of these areas under national control was of tremendous value to many developing States, the difficulties of 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. A vast area subject to national jurisdiction would potentially require substantial assets at sea and in the air in order to effectively patrol, police, and enforce the new jurisdiction vested in States. For oil and gas exploitation, deployment of few if any coast guard or naval assets in the EEZ was not a huge difficulty, as exploitation of the seabed is a slow and expensive business. For fisheries, which can be far more cheaply exploited, and in a more transitory fashion, a lack of enforcement capacity represented a potentially serious impediment.

In the years since the opening of the United Nations Convention on the Law of the Sea³ was opened for signature, many States have learned that the maintenance of a capability to enforce their laws in their EEZ is expensive and difficult to maintain. Some valuable fisheries have been seriously damaged by illegal, unreported and unregulated (IUU) fishing in any areas which 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

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² FAO, *State of World Fisheries and Aquaculture 2012* (Rome: FAO, 2012) 94.

³ United Nations Convention on the Law of the Sea, 1833 UNTS 3

credited as a contributing cause to the rise of piracy in the waters around Somalia in the past decade.⁴ When the difficulties present in enforcing coastal State law are coupled with the inexorable rise in IUU fishing, and the greater emphasis on international cooperation in the management of straddling and high seas fish stocks, it is natural that States would begin to explore the possibility of cooperation in the patrol and enforcement of their EEZs.

This paper will consider the range of responses by States to their individual lack of enforcement capacity, and considers the types of cooperative response to which the present situation has given rise.

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

Each type of cooperation represents a different level of enforcement engagement, passing through a continuum from virtually nothing to another State stepping into the shoes of the flag State for the purpose of conducting an arrest. 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 represent 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.

As might be expected, the frequency of the use of these different arrangements is inversely proportionate to the level of authority required of 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 might be seen as traditional prerogatives.

a. Data Exchange and Observers

⁴ I. Tharoor, "How Somalia's Fishermen Became Pirates" *Time* 18 April 2009: <<http://www.time.com/time/world/article/0,8599,1892376,00.html>>

Far and away the most common arrangement for cooperation in maritime enforcement is in the context of data exchange and the deployment of observers. Cooperation in the sharing of data and the use of observers in fisheries has been employed across a number of agreements.⁵ 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 the facilitation by a Regional Fisheries Management Organisation (RFMO) to arrange the placement of an observer on board a fishing vessel for all or part of its voyage. The observer will typically be from another State, although this need not always be the case, and will be able to watch the fishing activities, and inspect the catch. The observer would also have the ability to report back to the RFMO in respect of any possible breaches of fisheries conservation measures that occurred on board the vessel.

It is important to note, that an observer has no ability to affect the conduct of fisheries operations on board a vessel, nor does the observer have a power of arrest. The observer's presence is passive, and the report they provide is typically factored into discussions by State parties at meetings of the RFMO, rather than the report providing a basis for punitive action by the flag State.⁶

An example of an observation and inspection scheme in action can be found in the Convention on the Conservation of Antarctic Marine Living Resources⁷ (CCAMLR). The Convention itself provides for the scheme, under Article XXIV, although the details in relation to its operation are limited, as the State Parties chose to leave the mechanics of such a scheme to a later date.⁸ 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;⁹

⁵ A short contemporary summary of RFMO practices can be found at *RFMO Report Card: On Governance of Bycatch and Discards by Regional Fisheries Management Organizations* August 2012
<http://www.lenfestocean.org/sites/default/files/lenfest_rfmo_en_20120816_x1a.pdf>

⁶ See S.B. Kaye, *International Fisheries Management* (The Hague: Kluwer, 2001) 389-397.

⁷ Convention on Antarctic Marine Living Resources, 1329 UNTS 48

⁸ Article XXIV(1), CCAMLR 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.

⁹ Article XXIV(2)(a), CCAMLR 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,

- observation and inspection of vessels engaged in harvesting or research;¹⁰ and
- inspectors remaining subject to jurisdiction of the member State of which they are nationals, and reports from them being transmitted to the Commission.¹¹

The scheme itself took over half a decade to bring to fruition¹², and was formally adopted by the State parties in 1989, eight years after the Convention entered into force. It was to be operated under the auspices of a Standing Committee on Observation and Inspection (SCOI), which in 1988 established a system of observation and inspection.¹³

The system provides for the designation of qualified individuals as inspectors and observers who may be placed aboard vessels engaged in scientific research or harvesting in the CCAMLR area.¹⁴ Inspectors are drawn from a register maintained by the CCAMLR¹⁵, must be nationals of the State party nominating them¹⁶, and must speak the language of flag State of the vessel to be

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;

¹⁰ Article XXIV(2)(b), CCAMLR 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;

¹¹ Article XXIV(2)(c), CCAMLR 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.

¹² The implementation of Article XXIV was not immediate, and the issue itself was only raised at the third Commission meeting in 1984.

¹³ CCAMLR, *Report of the Seventh Meeting of the Commission*, 24 October - 4 November 1988, pp.111-121. The SCOI recommendations were adopted by States Parties the following year *in toto*: CCAMLR, *Report of the Seventh Meeting of the Commission*, 24 October - 4 November 1988, pp.29-36

¹⁴ Items I(a) and III, Observation and Inspection System: reprinted CCAMLR, *Report of the Seventh Meeting of the Commission*, 24 October - 4 November 1988, p.30; Inspectors can be either placed aboard, or inspect from a vessel under their own State's flag: Items I(d), I(e) and III(a), III(b) and III(c), Observation and Inspection System. See also R. Rayfuse, "Enforcement of High Seas Fisheries Agreements: Observation and Inspection under the Convention on the Conservation of Antarctic Marine Living Resources" (1998) 13 *International Journal of Marine and Coastal Law* p.579 at 589

¹⁵ Item II, Observation and Inspection System

¹⁶ Item I(c), Observation and Inspection System. This is consistent with Article XXIV(2)(c), CCAMLR.

observed or inspected.¹⁷ When aboard a vessel, an inspector remains solely subject to the jurisdiction of their nominating State.¹⁸ Each party must provide prior notification of all vessels intending to enter the CCAMLR area to harvest resources during the year commencing 1 July, by 1 May of the same year.¹⁹ Any such vessels are potentially subject to inspection.

The inspector has wide powers in respect of access, but not enforcement. Inspectors may observe and inspect the catch, the gear used, data collected, and any records and reports on catch and location data.²⁰ Inspectors may also photograph alleged violations of conservation measures and affix identification marks to alleged gear used in contravention of conservation measures.²¹ 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.²² 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.²³ Enforcement action is only the responsibility of the flag State.

What is clear from this system is, although the inspector has wide powers to collect evidence of a breach, only the flag State has the right to proceed to prosecute an offence. There is no requirement upon the flag State to take any action, even when presented with conclusive evidence of the most egregious breach. This demonstrates the significant limitation inherent in the inspection and observation system under the CCAMLR.

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.

¹⁷ Item I(d), Observation and Inspection System. This provision appears to assume that the captain and crew also speak the language of the flag State.

¹⁸ Item I(c), Observation and Inspection System. This is consistent with Article XXIV(2)(c), CCAMLR.

¹⁹ 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: Item IV, Observation and Inspection System.

²⁰ Item VI, Observation and Inspection System

²¹ Item VI(e), Observation and Inspection System

²² Item VIII, Observation and Inspection System

²³ Item IX, Observation and Inspection System. 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 CCAMLR, *Report of the Eleventh Meeting of the Commission*, 26 October - 6 November 1992, p.94; see also Rayfuse, *supra* note 14, 593

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 are largely directed at Stateless vessels or with respect to 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, it can be achieved by way of a bilateral agreement between the flag State 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 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, which are not directed at fishing activity.²⁴

Second, multi-lateral agreements could be used to provide the consent of the flag State to a third party. This is the most common way such boarding permission is typically achieved, and for which a number of examples can be identified. For example, under Article 21 of the United Nations Fish Stocks Agreement²⁵, State parties to a regional fisheries management arrangement effectively authorise other State parties to board and inspect their fishing vessels while fishing on the high seas, in the area covered by that arrangement.²⁶ If a boarding were to take place pursuant to Article 21 in relation to violations of any conservation measures, any evidence is secured and the flag State notified.²⁷ The flag State then has a limited period in which to initiate an investigation itself, or, to authorise the inspecting State to do so.²⁸ Serious violations²⁹ which are not the subject of a response by the flag State could see a vessel directed to the nearest appropriate port.³⁰

²⁴ For a background and links to the agreements see the website devoted to the topic maintained by the State Department: <http://www.state.gov/t/isn/c27733.htm>> February 2013

²⁵ 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, 2167 UNTS 88 [hereinafter UNFSA]

²⁶ UNFSA, Articles 21(1) and 21(2); see also H.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" (1996) 21 *Vermont Law Review* 547 at 583.

²⁷ UNFSA, Article 21(5).

²⁸ UNFSA, Article 21(6).

²⁹ The term "serious violation" is defined to include nine offences, 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 authorised quota; fishing for a stock which is prohibited or subject to a moratorium; using prohibited gear; falsifying or concealing the markings, identity or registration of the vessel; concealing,

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 is still dependent upon the flag State undertaking a prosecution – a circumstance which would not be certain without prior arrangement between the State Parties. There has been no real practice where boardings have been derived 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 upon its behalf and effectively places itself in the position of the flag State. This is essentially accomplished by 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 is 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 a third State.

There are a number of issues to be considered in such a situation. First, 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 under Article 19 of the Law of the Sea Convention, but undertaking enforcement operations will manifestly fall within the list of activities which are inconsistent with such passage. As such, any enforcement arrangement will need either not to be applicable to illegal fishing in its territorial sea, or provide the flag State with an authority to undertake actions beyond what is permitted by innocent passage.³¹

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

tampering with, or disposing of evidence relating to an investigation; multiple violations which constitute a serious disregard of conservation and management measures; and, other violations specified as such by the regional organization: UNFSA, Article 19.

³⁰ UNFSA, Articles 21(8) and 21(10).

³¹ This situation is dealt with explicitly in the 2007 Australia-France Agreement: see below.

fail if there are breaches of rules of evidence or in the treatment of arrested persons. In addition, future cooperation may be jeopardized if personnel undertaking a boarding or arrest are pursued for criminal or civil violations 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 a third State may be asserting jurisdiction for the purposes of an enforcement operation, a flag State will not generally wish to consent to any action which might create a situation where the coastal State's domestic laws had any application against their ship.

Case Study: Ad hoc Cooperation - South Tasman Rise Disputes

To the south of the large Australian island of Tasmania, the continental shelf extends a substantial distance to the south, in an area known as the South Tasman Rise. The area of relatively shallow water extends a little over 200 nautical miles from the territorial sea baselines around Tasmania's south-eastern coast, and 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 been heavily fished commercially 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 prior to reaching sexual maturity had 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 disputes concerning orange roughy exploitation on the South Tasman Rise both have their origins in same element that was responsible for the *Estai* dispute between Spain and Canada.³² That is, a fishery with a straddling stock extending just out of a coastal State EEZ, where the coastal state is concerned to try to limit exploitation of a threatened stock, and the distant water fishing nations (DWFNs) seek to exploit the stock in the waters beyond national regulation. In 1997, the South Tasman Rise fishery, just outside the Australian EEZ was targeted by New Zealand fishing vessels. The Australian response was to raise the matter at a diplomatic level with New

³² See the summary of the facts given by the ICJ in subsequent litigation arising out of the case in *Fisheries Jurisdiction Case (Spain v Canada)* ICJ Reports 1998 p.432 para 13 - 22

Zealand, and attempt to negotiate a solution.³³ A more forthright response, along the lines of the Canada with the *Estai* arresting the vessel in international waters, was not pursued, as Australia endeavoured to remain within the bounds of accepted international practice. Rather negotiations, consistent with Article 116 of the Law of the Sea Convention were initiated, and a mutually acceptable solution was reached. Early in 1998, the two States concluded an Arrangement, which provided precautionary catch limits for orange roughy in the areas beyond the Australian Fishery Zone (AFZ), and the collaboration of the two States in a research programme to better manage the stock.³⁴ The arrangement has subsequently been continued, and cooperation on the management of the fishery has also continued.³⁵

The travails of the orange roughy on the South Tasman rise were 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 AFZ. In 1999, at least four vessels were observed operating 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 basis of the requests was that the stocks were the subject of an international management regime with New Zealand, and that it was appropriate for South Africa and Belize to desist pending their participation in negotiations to assist in the management of the fishery consistent with Article 116 of the Law of the Sea Convention.

The response from both States was encouraging. South Africa requested that its vessels cease fishing, on pain of revocation of high seas fishing licences. This sanction was ultimately applied. Belize requested its vessel to cease fishing, to no avail, whereupon it deregistered the vessel, and requested Australia, with a formal written authorization, to enforce Belize law on its behalf if the vessel continued to fish. Shortly after the authorization was given, 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.

Case Study: Enforcement Cooperation – Niue Treaty

³³ See <http://www.affa.gov.au/ministers/parer/releases/97_237p.html>

³⁴ Done on 18 February 1998, expired 28 February 1999. Reprinted at <http://www.dfat.gov.au/geo/new_zealand/roughy.pdf>

³⁵ The present agreed TAC for the stock on the South Tasman Rise is 2400 tonnes: <<http://www.affa.gov.au/content/output.cfm?ObjectID=D2C48F86-BA1A-11A1-A2200060B0A06484>>

³⁶ See (1999) 20 *Australian Yearbook of International Law* pp.422-423

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

The purpose of the Niue Treaty to facilitate cooperation is explicitly stated 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.

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 is particularly valuable where States have few platforms to conduct enforcement

Cooperation through boarding and arrest is considered in Article VI. It provides in relevant 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.
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.

³⁷ Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, 1974 UNTS 45

In essence, Article VI provides that a State Party can, under the Niue Agreement provide for the boarding and arrest of vessels flying its flag by an enforcement vessel of another State through the mechanism of a Subsidiary Agreement. 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 with the effectiveness of the Niue Treaty. First, there are very few Subsidiary Agreements that subsist on a permanent basis.³⁸ 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 RNZN ships, RNZAF aircraft, French and American patrol aircraft.³⁹ While 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 to patrol 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 2009.⁴⁰ Such an Agreement would be a boon to the operation of the Niue Treaty, as it would see a significant rise in the use of Article VI of the Treaty, and increase the level of enforcement operations in the South Pacific.

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 and so far that represents the most

³⁸ For example, the Te Vaka Toa Arrangement between the Cook Islands, New Zealand, Niue, Samoa and Tokelau was only finalised in July 2011: <<http://www.aid.govt.nz/media-and-publications/development-stories/october-2011/developing-and-protecting-marine-resources>> accessed at 16 October 2012; The text of the arrangement is at : <http://www.tevakamoana.org/sites/default/files/downloads/te-vaka-toa-arrangement.pdf>

³⁹ <<http://www.ciherald.co.ck/articles/h623d.htm>>

⁴⁰ <http://www.pilonsec.org/index.php?option=com_content&view=article&id=98:update-ntsa&catid=3:pacific-law-and-justice-news&Itemid=94>

complete level of cooperation between States with interests in managing the fisheries in and around their respective EEZs.

This *ad hoc* cooperation has been built upon by Australia and France in respect of their possessions in the Indian Ocean sector. Both States concluded a treaty in 2003⁴¹, providing for continuing cooperation in surveillance⁴², intelligence⁴³, and scientific research.⁴⁴ This arrangement will permit a speedier response to Southern Ocean cooperation, and allow 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 authorise vessels of the other to continue a hot pursuit through their territorial sea, providing no enforcement action took place within the territorial sea.⁴⁵ This may be inconsistent with the letter of Article 111 of the Law of the Sea Convention, but as none of the hot pursuits undertaken to date have passed through a third State's territorial sea the legality of the provision has not been tested and is still moot.

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.⁴⁶

The reach of the treaty is of interest. Cooperative enforcement is defined as:

“Cooperative enforcement” means fisheries enforcement activities such as the boarding, inspection, hot pursuit, apprehension, seizure and investigation of fishing vessels that are believed to have violated applicable fisheries laws, undertaken by one Party in cooperation with the other Party.

The definition makes it clear that the 2007 Agreement directly encompasses apprehension, seizure and investigation. As such, there is cooperation, with the policing elements up to handover of the offending vessel

⁴¹ 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 and McDonald Islands, [2005] Australian TS No.6. [hereinafter Australia-France Cooperation Treaty].

⁴² Australia-France Cooperation Treaty, Article 3 and Annex I.

⁴³ Australia-France Cooperation Treaty, Article 5.

⁴⁴ Australia-France Cooperation Treaty, Article 3(5) and Annex II.

⁴⁵ Australia-France Cooperation Treaty, Article 3(3).

⁴⁶ 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] Australian TS No.1 [hereinafter Australia-France Enforcement Agreement]

and its crew to the other party, and prosecution of offences through the coastal State's domestic courts.⁴⁷ 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 would be made to comply with the laws of the coastal State.⁴⁸

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 undertake in the course of enforcing the coastal State's law. This is an important safeguard in facilitating cooperation, as well as in maintaining the sovereign immunity of the warship undertaking enforcement.⁴⁹ It notes that cooperation is ordinarily assumed to have the cost borne by the enforcing rather than the coastal State. This would seem to suppose that both States will undertake cooperative operations to an approximately equal extent, although the Agreement does foresee some adjustment might need to be necessary if too much of the burden were to be borne by a single State.⁵⁰

The Agreement has now been on afoot for some time, and there are reports of its having been utilised in enforcement actions, although with little public fanfare. Given the two States concerned have similar capacities in the region at in 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 largely restricted to

⁴⁷ 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: Australia-France Enforcement Agreement.

⁴⁸ Article 5(1) Australia-France Enforcement Agreement provides:
1. 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.

⁴⁹ Article 5(2), Australia-France Enforcement Agreement.

⁵⁰ Article 8, Australia-France Enforcement Agreement.

either 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 cannot be under-estimated. Given the limited capacity of many States to effectively police their EEZs, many have great incentive to embark upon cooperative measures, and 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 cooperative measures to resolve the difficulties of enforcement are still being considered, and actively used to clamp down on illegal fishing. Perhaps in time, they may provide a way forward for greater cooperation.