Cooperation and Regional Fisheries Management

by G.L. Lugten*

I. Introduction

In recent years the international community has become accustomed to controversial fishery disputes making global news. These disputes are a product of our times, and come about because too many fishers compete for too few fish. In July 1999 such an international dispute occurred south of Tasmania, Australia on the South Tasman Rise. This region is geographically within the high seas and just beyond the Australian Exclusive Economic Zone (EEZ) of fisheries. Biologically the South Tasman Rise (STR) is a fishing ground rich in highly prized stocks of Orange Roughy, a straddling stock which straddles both the Australian EEZ and the high seas. This dispute involved three South African trawlers (two of which were factory ships) that were found by the Australian Fisheries Management Authority (AFMA) to be harvesting Orange Roughy. The South Africans claimed they had not breached either international or South African law. The trawlers were owned by the giant Irwin and Johnston (I & J) Seafood Corporation.[1] They had applied under South African law for a High Seas Fishing licence, the licence was granted, and the vessels went and fished.[2] However, from the Australian perspective, the vessels were not flying flags, nor would they radio identify themselves, they were fishing during the closed Orange Roughy spawning season, and the vessels ignored constant calls to leave the area where Orange Roughy stocks were managed according to a bilateral agreement between Australia and New Zealand.

This fishery agreement between Australia and New Zealand was itself riddled with tension due to the catch allocation of one-fifth going to New Zealand and four-fifths going to Australia. The New Zealanders were seeking a half share in the fishery. The South Tasman Rise dispute became even more confused when allegations emerged that a New Zealand skipper was working with the South African trawlers in order to reveal the location of the highly lucrative South Tasman Rise.[3]

The incident concluded when the South African trawlers were joined by a fourth reflagged vessel registered in Belize, but allegedly owned by a Korean corporation.[4] By the time the Australian Government had negotiated permission from Belize to seize the reflagged vessel, the trawlers had left the region.

Australian fishers expressed concerns that the unregulated vessels could have taken as much as twice the annual quota of the Australian and New Zealand fishers, during their three-week period of unregulated fishing. Furthermore, as this was the spawning period, the unregulated fishers were taking the catch biomass out of the spawning stock.[5]

The example of the South Tasman Rise dispute encapsulates many of the problems facing the contemporary law of marine capture fisheries. These include:

- Enforcement – how could Australia force the vessels to leave the area?
- Legal uncertainty – the exact status of the law for management and conservation of straddling stocks and highly migratory stocks remains unclear. An international agreement completed in 1995 (known as the Fish Stocks Agreement)[6] is yet to be ratified by the requisite thirty states.
- Poor fisher conduct when resources such as the Orange Roughy are seen as an asset to be immediately plundered, rather than an ecologically sustainable resource of which the fishers are both the guardians and the long-term beneficiaries.
- Reflagging of vessels where vessels change their State of registration in order to avoid the international law obligations of their home State.

Since the creation of the United Nations Organization over fifty years ago, there has been widespread support for the notion that international problems of an economic, social, cultural or humanitarian character (such as the marine capture fishery problem described above) are best resolved by State cooperation.[7] The purpose of this paper is to examine the notion of cooperation as a tool of effective management for remedying contemporary fishery problems in international law. The exercise is done by an examination of the South Tasman Rise dispute and its subsequent intergovernmental negotiations.

The paper begins with an examination of the concept of cooperation in international fisheries law, and its most popular embodiment in the form of regional fishery organizations. This includes a discussion on those international instruments that have promoted regional cooperation as a means of achieving effective conservation and management of marine capture fisheries. The paper then examines the South Tasman Rise Fishery dispute and how regional cooperation is being used to manage that particular incident. In particular, focus is given to the recent 2000 South Tasman Rise Fishery Arrangement, negotiated by Australia and New Zealand, and coming into effect on 1st March 2000. Finally, the paper examines the difficulties involved in applying cooperation theories to third parties in a dispute. It will be shown that the international legal regime is changing to allow some measure of regulation over third states, but despite these changes, the onus ultimately remains for states in dispute to exercise cooperation.

In September 2000 (over a year since the fishing dispute on the South Tasman Rise), the long term success of the Australia/New Zealand 2000 Arrangement as a tool for managing both Orange Roughy fish stocks and third parties still remains to be seen. What is clear with regard

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to the 2000 spawning season is that no unregulated or illegal fishing has been detected by either authorized fishing vessels or Australian surveillance flights within the STR fishery zone. Such a result further strengthens the argument that regional cooperation is the most realistic and effective option for achieving effective international fisheries management.

II. Cooperation and Regional Fishery Bodies

As contemporary international relations are marked by a division between wealthy, developed States and a majority of weak, developing States, cooperation is needed to address inequities and fulfil the provisions of the world order envisaged by international agreements such as the United Nations Charter. Kwiatkowska describes such references as providing a "general duty of States to cooperate with one another."[8]

Since the 1970s, and probably as a result of negotiations within the Third United Nations Conference on the Law of the Sea, there has been a recognizable trend within international instruments towards institutional cooperation at the regional level. The concept of cooperation is a prominent theme in the 1982 United Nations Law of the Sea Convention (hereinafter referred to as the 1982 Convention). Here, provisions articulate specific obligations to cooperate on a variety of subjects, including, *inter alia*, the conservation and management of EEZ[9] and high seas[10] fisheries. Furthermore, Articles 61 and 119 of the 1982 Convention elaborate on the duty to cooperate by specifically providing for cooperation through competent subregional, regional or global organizations. In fact, international cooperation in the management of marine capture fisheries has led to the existence and proliferation of Regional Fishery Bodies (RFBs).

It must be noted that although the 1982 Convention makes only limited references to RFBs, all subsequent United Nations and FAO Fishery instruments have given an increasingly important role to regional cooperation through RFBs. These instruments are considered below.

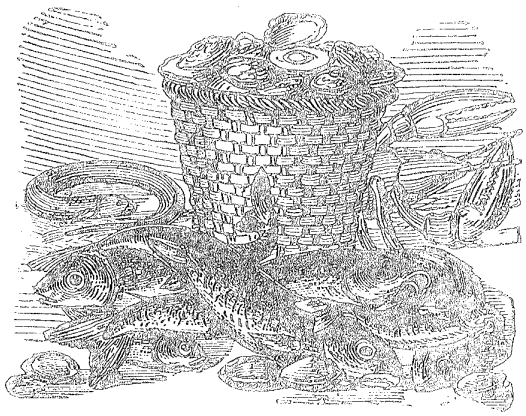
First, Chapter 17 of Agenda 21 (the blueprint of 21st century environmental protection) produced at the 1992 Earth Summit (UN Conference on Environment and Development – UNCED) emphasizes a need for "new approaches" to marine management and conservation at the national, subregional, regional and global levels.[11]

As part of its structure, Agenda 21 includes with each subject heading a proposed framework on how best to effect environmental improvement. This includes Objectives,[12] suggested Activities,[13] and a programme for Means of Implementation.[14] Of particular relevance to regional fishery bodies, Program Area C (which deals with the contemporary problems of high seas fishing) makes numerous references to subjects which require cooperation at subregional, regional and global levels. These include, *inter alia*, the convening of an intergovernmental conference under United Nations auspices on straddling stocks and highly migratory fish stocks;[15] promoting enhanced data collection and exchange of data;[16] encouraging cooperation with other subregional, regional or global fishery bodies, and where none exist, States should cooperate to establish one;[17] enhanced resource assessment, and the upgrading of systems for monitoring, control and surveillance of marine resources.[18]

Two years after the Rio Earth Summit, the United Nations and the Food and Agriculture Organization (FAO) were assigned joint responsibility for overseeing the implementation of Agenda 21's Programme Area C (Marine Living Resources of the High Seas). At the same time, the FAO was given responsibility for the implementation of Programme Area D (Marine Living Resources in National Jurisdictions).[19] Subsequent UN and FAO fisheries management instruments have accordingly reiterated this emphasis on cooperation, particularly at the regional level. This is clearly demonstrated by the provisions of three 1995 instruments which create a more regulated legal regime for fisheries management.

First, the Code of Conduct for Responsible Fisheries[20] covers fishing activity both within and beyond zones of national jurisdiction. It embraces a wide range of subjects that encourage better conservation and management of fisheries including, *inter alia*, the gross over-capacity of the global fishing fleet, the inadequate control of vessels by flag States, the inadequate provision of fishery data to both flag and coastal States, and trade restrictions intended to achieve environmental protection.

The Code of Conduct makes numerous references to the role of RFBs in establishing a responsible international



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fisheries regime. Article 1.2 notes that the Code is global in scope, and directed towards fishing entities that include RFBs. From Article 4.1, such entities are charged with collaborating in the fulfilment and implementation of the Code. In Article 6.5 RFBs should apply a precautionary approach to the conservation, management and exploitation of living aquatic resources. The Article 7 provisions on Fisheries Management make numerous references to the role of RFBs in attaining management objectives;[21] providing a management framework and procedures;[22] data gathering and management advice;[23] application of the precautionary approach;[24] describing management measures;[25] and implementation of the code.[26]

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A parallel legal initiative that took place at the same time as the Code of Conduct was the negotiations to construct an international agreement that would deal with the increasing problem of reflagging of fishing vessels on the high seas. The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas[27] (the Compliance Agreement) was negotiated under Article XIV of the FAO Constitution and adopted by FAO Conference on 24th November, 1993.

The Agreement provides that each State party shall take measures to ensure that fishing vessels entitled to fly its flag do not engage in any activity which undermines the effectiveness of international conservation and management measures.[28] Further, no party should allow any of its vessels to be used for high seas fishing unless the vessel has been authorized to do so by an appropriate authority of the party.[29] Paragraph (5) of Article III seeks to limit the freedom of vessels with a bad compliance record in high seas fisheries from "shopping around" for a new flag.[30]

Again, regional cooperation for implementing the provisions of the Compliance Agreement is envisaged. Specifically, the Preamble to the Compliance Agreement calls upon States which do not participate in global, regional or subregional fishery organizations or arrangements to do so with a view to achieving compliance with international conservation and management measures. This theme is further reiterated and supported by other articles within the Agreement.[31] In accordance with Article XI, the Compliance Agreement will enter into force when twenty-five instruments of acceptance have been deposited with FAO.[32] At the time of writing this paper (April 2000), there were fourteen instruments of acceptance which do not include either Australia or New Zealand, the two parties most at risk of experiencing loss of stocks in the South Tasman Rise fishery due to illegal fishing by reflagged vessels.[33]

Apart from the Code of Conduct for Responsible Fisheries, and the Compliance Agreement, a third 1995 instrument represents the most realistic possibility for reform of the contemporary legal regime for straddling fish stocks such as the STR Orange Roughy. This is the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1992, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the Fish Stocks Agreement or FSA).[34]

The great strength of the Fish Stocks Agreement is that whereas the 1982 Convention articulated principles of conservation and management of fish stocks, the Fish Stocks Agreement goes further and constructs a scheme as to how these objectives can be achieved. For example, Article 117 of the 1982 Convention refers to a "duty to cooperate" with respect to national measures for the conservation of the living resources of the high seas. However, the provision does not provide advice on how this is best to be achieved. Articles 5, 8 and 14 of the Fish Stocks Agreement describe a number of ways that the duty to cooperate can be effectuated. Central to these provisions is the need to establish and participate in regional fishery bodies which share information and cooperate in scientific research.

Other Fish Stocks Agreement provisions which would impact on the South Tasman Rise dispute are discussed below. First, Article 18(2) provides that States are not permitted to authorize the use of their flag to vessels fishing on the high seas unless they are able to exercise responsibility effectively over such vessels. Moreover, by Article 19(1) the flag State must ensure compliance by its vessels with regional conservation and management measures. Such measures are further reinforced by that provision which caused particular controversy in the conference proceedings to negotiate the Fish Stocks Agreement – Article 21. By this provision, a State which is party to the UN Fish Stocks Agreement, and a member of a relevant regional fishery body, has the right to board and inspect fishing vessels of another State party in order to ensure compliance with conservation and management measures, even where the flag State is not a member of the regional fishery body.

A final significant development of the UN Fish Stocks Agreement is with regard to port State jurisdiction. Under Article 23, when a fishing vessel is voluntarily in a port, the port State may inspect documents, fishing gear and any catch on board the vessel in order to ensure compliance with subregional, regional and global conservation and management measures.

The UN Fish Stocks Agreement was opened for signature in New York on 4 December 1995. Article 40 provides that the Agreement will enter into force 30 days after the date of deposit of the thirtieth instrument of ratification or accession. At the time of writing this paper, there are 59 signatures and 27 ratifications/accessions.[35] Australia signed the Agreement on 4th December 1995 and ratified the Agreement after the South Tasman Rise dispute on 23rd December 1999. New Zealand also signed on 4th December 1995, but has yet to ratify this Agreement which is so relevant to management of the South Tasman Rise fishery.

Two further 1995 instruments should be mentioned:

- the Rome Consensus on World Fisheries,[36] and
- the Kyoto Declaration and Plan of Action on the Sustainable Contribution of Fisheries to Food Security.[37]

Both instruments acknowledge the role of international cooperation in addressing contemporary problems in world marine capture fisheries. Furthermore, as with all the above instruments, this notion of cooperation is to be realized by the establishment and proliferation of regional fishery bodies.[38]

Subsequent to these international fishery instruments, an attempt has been made to define the term "Regional Fishery Body." According to the *1998 FAO Text of Document placed before the High Level Panel of External Experts in Fisheries*, RFBs are defined as:

> "…a mechanism through which *three or more* States or international organizations that are parties to any international fishery agreement or arrangement collaboratively engage each other in multilateral management of fisheries affairs related

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> to transboundary, straddling and highly migratory fish stocks, through the collection and provision of scientific information and data, serving as a technical and policy forum, or taking decisions pertaining to the development and conservation, management and responsible utilization of the resources… . A RFB in other words is the instrument for fishery governance at the regional level."[39]

For the purposes of this paper, it should be noted that a *two* party Fisheries Agreement (such as that concluded between Australia and New Zealand in March of this year, for the purpose of managing the South Tasman Rise Orange Roughy) is not strictly to be interpreted as a RFB within the definition provided above. With only two member parties, the technical description is that of a Regional Fishery Arrangement. Nevertheless, the Australia/New Zealand Arrangement complies with both the FAO functions described above as well as the definition proffered by Alexander which includes:

- conservation, management and/or development of living marine resources;
- the protection of the special interests of States (within or outside the region);
- the provision of a framework for collecting and assessing data;
- the allocation of catch quotas;
- acquiring better scientific and/or technical knowledge on stocks; and
- formalizing dispute settlement mechanisms.[40]

The content of the 2000 Australia/New Zealand Arrangement is the subject of Part III of this paper.

III. Cooperating for a New South Tasman Rise Fishery Arrangement

As a result of meetings held in the latter half of 1997, it was agreed by the governments of Australia and New Zealand that a bilateral Arrangement should be made for the Conservation and Management of Orange Roughy on the South Tasman Rise (STR). The subsequent Arrangement, which came into effect on 1st March 1998, and expired on 28th February 1999 was the original Arrangement dealing with South Tasman Rise Orange Roughy, and the precursor to the current Arrangement which forms the basis of this paper.[41] Articles 2–8 of the original agreement construct a Program of Scientific Research, of which Article 3 provides that the Parties accept:

> A precautionary total catch limit [that] will not exceed two thousand one hundred (2,100) tonnes. The precautionary total catch limit of 2,100 tonnes will be shared between the government of Australia and the government of New Zealand in the proportion of verified catches of Orange Roughy made by Australian and New Zealand vessels in the high seas area of the South Tasman Rise during the period of 1 January to 17 December 1997. On current information, Australian catches are estimated at approximately 1,600 tonnes and New Zealand catches are estimated at approximately 500 tonnes. Final catch figures, and hence shares of the precautionary total catch limit, will be determined by 31 January 1998.

Thus, the total allowable catch (TAC) was split according to the catch history of each country's vessels in the course of 1997, prior to a moratorium on fishing introduced in mid-December 1997. The final percentage of the TAC allocation was close to an 80:20 split with Australia taking the greater share.

The period of operation for this original agreement was undoubtedly marred by New Zealand fisher dissatisfaction with the TAC split. In addition, any catches that occurred outside of, or in excess of, the original Arrangement, were a concern that required attention in any future bilateral negotiations. From 1st March 1999 until 29th February 2000, there was no formal Management Arrangement in place to govern the fishery. An exchange of letters between the New Zealand and Australian Ministers agreed on a cessation of fishing in the latter half of that period while a new Arrangement was negotiated. It was during this cessation of fishing that the dispute involving unregulated South African and reflagged vessels took place.[42]

On 3rd and 4th February 2000, Australian and New Zealand officials met to finalize the new South Tasman Rise Fishery Arrangement that would take effect from 1st March, 2000. The concluded arrangement (hereinafter referred to as the 2000 Agreement), only agrees on management measures to be applied to the high seas portion of the South Tasman Rise. Australia and New Zealand retain the authority to determine catch limits and domestic management arrangements for Orange Roughy within their respective EEZs. Accordingly, for that part of the South Tasman Rise that lies within the Australian EEZ, the 2000 Agreement requires Australia to convey to New Zealand any data on catches taken within, and management measures applied to, the area.[43]

The 1998 and 2000 Agreements are similar in many areas of content, and any significant differences are largely the result of either changes in international fishery theory and practice, or the 1999 South Tasman Rise fishery dispute. These differences are considered in greater detail below.

First, the opening provisions of the 2000 Agreement consider not just a shared commitment to the implementation of the 1982 Convention, but also note a shared intention on the part of both Australia and New Zealand to become parties to the 1995 UN Fish Stocks Agreement. It has been seen that Australia has ratified the Fish Stocks Agreement, and New Zealand intends to do likewise. Both countries have jointly lodged the 2000 Agreement with the United Nations, in preparation for the coming into effect of the Fish Stocks Agreement.[44] In fact, Australia and New Zealand are seeking to have the 2000 Agreement recognized as a "regional fisheries agreement" under the terms of the Fish Stocks Agreement.

Of further interest in the preliminary provisions of both agreements is the need to achieve an agreed understand-

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ing of Orange Roughy stock structures "as soon as possible," but only the 1998 Agreement recognizes the need for conservation and management measures to be established "as a matter of urgency." Clearly, it was felt that such strong language had little impact or effect in the earlier agreement and there was no need to repeat the requirement in the 2000 Agreement.

Next, primarily as a result of the 1999 dispute, there was a need for the 2000 Agreement to provide more specific definitions for controversial subjects. Thus, "annual catch limit," "quota," "season," and "South Tasman Rise" are defined for the first time in the latter agreement. On the first two of these terms, the 2000 Agreement provides that a Party's annual catch limit for the season is equal to its quota,[45] therefore the term "annual catch limit" and the word "quota" are both described as the whole-weight tonnage of Orange Roughy that a Party may take in a season as its allocation. "Season" is the twelve-month period that begins on 1st March and ends on the last day of February in the following year.[46]

The 2000 Agreement further imposes a prohibition on trawling and demersal fishing for all species on the high seas area of the South Tasman Rise, except with authorization, and for the purposes of implementing the Agreement.[47]

Total allowable catch figures, party quotas and catch limitations are all outlined in the 1998 Agreement provisions on Scientific Research. In the 2000 Agreement, these were the most controversial of subjects and AFMA have subsequently described their negotiation as "protracted." Finally agreement was reached on a 75:25 per cent split, with Australia taking the greater percentage.[48]

In compliance with both the Code of Conduct, and the Fish Stocks Agreement, the 2000 Agreement places significant emphasis on exchange of information (such as catch and effort information) between all parties. Article 17 regulates this requirement by noting that such exchanges must be "at least on a weekly basis."

The international legal regime for fisheries can only operate successfully if there is effective monitoring, control and surveillance (MCS) of vessels at the national, and desirably, regional, level.

Within the provisions of the 2000 Agreement, MCS is dealt with by Articles 20–23. These provisions reflect the comparatively advanced nature of fisheries management in both Australia and New Zealand. Thus, each Party is to ensure that its respective vessels operate a satellite based monitoring system, that the vessels report their position to national authorities on a daily basis, that they report their catch to national authorities on a daily basis and a shot-by-shot basis once 75 per cent of the annual catch has been taken (real time monitoring), that they retain on board all catch taken (to avoid bycatch and discard problems), and record catches in official log books.[49] Each Party is to place observers on its own vessels,[50] and each party is to ensure that its appropriate authorities monitor the dockside unloading of catch.[51] The 2000 Agreement also provides that State Parties must act to not permit in their jurisdictional waters any transshipment at sea of catch taken.[52] Furthermore, AFMA advises that Australia actually places greater requirements on its STR vessels than are specified in these provisions. For example, prior to landing any fish taken from the STR, AFMA requires that the vessel skipper ring a pager system and file a report on how much fish is on board the vessel, where the fish will be unloaded, and the estimated time of landing in port. The pager system then sends this message to fisheries enforcement officers in areas near the port of unloading so that they can choose to attend the unloading either overtly or covertly.[53] AFMA then cost-recovers its fisheries management services and the STR permit holders are levied to pay for the costs of the management controls placed upon them. In 2000/2001, the fourteen permit holders will pay approximately A$ 100,000 in management costs.[54]

The Australia/New Zealand 2000 Agreement demonstrates the effectiveness of regional negotiation and cooperation in fisheries management. However, the effectiveness is ultimately restricted by the fact that the Agreement is purely bilateral. No attempt was made to negotiate or cooperate with those States which were third parties to the 1999 dispute – South Africa and Belize. Part IV of this paper examines the provisions within the 2000 Agreement which deal with third parties. It will be shown that whilst developments in international law afford some measure of regulation over third party States, there remains a primary obligation to resolve disputes with third parties by cooperation. The failure of the 2000 Agreement to address this obligation must ultimately impact upon its effectiveness as a management tool.

IV. Cooperation with Third Parties

Articles 26 to 32 of the 2000 Agreement deal with Cooperation with Third Countries. These are new provisions, clearly arising out of the 1999 South Tasman Rise fishery dispute, and therefore not dealt with by the 1998 Agreement. The provisions are discussed in greater detail below.

Having achieved sufficient cooperation to construct a new fisheries management arrangement for the STR Orange Roughy, the 2000 Agreement goes on in Articles 26–30 to require the signatory Parties to cooperate with third countries for the conservation and management of the fishery. In doing so, it must be remembered that the Parties have no power under international law to regulate the STR fishing behaviour of third countries, and in seeking third country cooperation, the signatory Parties are merely fulfilling their obligations under the various international fishery governance instruments discussed above.[55]

It will be recalled that in the 1999 STR Orange Roughy dispute, the third countries were South Africa and Belize. Following the dispute, Australia sought to have both of these States recognize the validity of the Australian/New Zealand agreement for the sustainable management of the fishery, and the compliance of this agreement with international fisheries law as embodied in the UN Fish Stocks Agreement. On the strength of these arguments, both South Africa and Belize did request that their vessels cease to fish the STR and withdraw from the area.[56] In fact, AFMA

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have since reported that in July, 1999 both the South African and Belize governments were genuinely supportive of Australian attempts to conserve and manage the STR fishery. Despite the wide-ranging powers to board and inspect their vessels granted by the third parties to AFMA, neither the 1999 nor the new 2000 Agreement could address the scenario of foreign vessels which refused to comply with requests from their flag State. However, Article 18(2) of the UN Fish Stocks Agreement, soon to come into effect, does address such circumstances. It provides that States are not permitted to authorize the use of their flag to vessels fishing on the high seas unless they are able to exercise responsibility effectively over such vessels. Moreover, Article 19(1) of the Fish Stocks Agreement provides that the flag State must ensure compliance by its vessels with regional conservation and management measures.

Article 26 of the 2000 Agreement requires the signatory Parties to cooperate in the surveillance of fishing activity by both unauthorized domestic vessels and third country vessels. Article 27 goes on to note that where such unauthorized fishing takes place, the Parties will jointly approach the flag state of the third country vessel with a view to seeking that country's cooperation in the conservation and management of the Orange Roughy. Article 28 then notes that the Parties will approach a third country and request that country to deter any fishing activity by its vessels which could undermine or threaten the Agreement. More specifically, third countries may be requested to cooperate in deterring Orange Roughy landings in their ports, transshipment in their waters, and any transfer to its national registers by such offending vessels.

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Article 30 of the 2000 Agreement provides that the Parties will cooperate with third countries which have a *real interest* in the conservation and management of the STR fishery. Further, from Article 31 any third country with such a "real interest" may request to become a party to the 2000 Agreement. These provisions comply with obligations outlined in the UN Fish Stocks Agreement.

The UN Agreement provides that where a competent regional fishery arrangement exists, States should either become members of the arrangement, or they should agree to apply the conservation and management measures established by the arrangement.[57] At the time of negotiating this provision in the UN Agreement, there was some controversy over those Regional Fishery Bodies, such as the Northwest Atlantic Fisheries Organization (NAFO) which had effectively closed membership to new entrants, and therefore would make no provision for new members.

As a result of these stalemates, the final negotiating session of the Fish Stocks Agreement chose to include the provision that membership of a relevant regional fishery arrangement was open to States having a "real interest" in the fishery concerned. It is a significant oversight that the term "real interest" is nowhere defined in the UN Fish Stocks Agreement, and that presumably the question of whether or not a State has a "real interest" is a matter to be determined by the existing membership of the regional fishery arrangement. This assumption is supported by AFMA who, when questioned as to whether (hypothetically speaking) South Africa could join the Australia/New Zealand STR arrangement, replied that the matter is one for international diplomacy. AFMA's initial response would be, "What is your *real interest* in this fishery?" and, depending on South Africa's answer to this question, they may or may not receive a share of the spoils.[58]

A suggested reference for addressing the problem of "real interest" has been offered by Swan who notes that when forming a RFB or arrangement, States should define their own criteria for new members. Clearly this was not done in the 2000 Agreement between Australia and New Zealand. Swan then suggests that new membership within RFBs or arrangements be determined in accordance with Article 11 of the Fish Stocks Agreement. According to this provision States should look to a third States',

> interests, fishing patterns and fishing practices, contributions to conservation and management of the stocks, collection and provision of accurate data and conduct of scientific research on the stock.[59]

Article 11 goes on to give special recognition to the needs of coastal fishing communities and coastal States whose economies are overwhelmingly dependent on fishing for the stocks, plus the interests of developing States from the subregion or region.

Finally Article 32 of the 2000 Agreement provides that if a third country is included in the Australia/New Zealand STR arrangement, the change will be confirmed by an appropriate instrument which sets out the participatory rights of the new member.

V. Conclusion

If the notion of international cooperation (as used in the United Nations Charter, the 1982 Law of the Sea Convention, and all subsequent international instruments of fishery governance) is viewed as the fundamental philosophy underpinning the existence of regional fishery arrangements, then the South Tasman Rise Orange Roughy dispute of 1999 provides a good example of the notion in operation. Here we had a remote region, partly Australian EEZ and partly high seas, with a bilateral moratorium on fishing, mistrust and antagonism between the bilateral parties, and two additional, seemingly unaccountable third parties. Through cooperation and negotiation the conflicting bilateral parties have established a fisheries management regime, they have achieved consensus on the most divisive of subjects: TAC and quota allocation, and they have constructed seemingly effective regulations (although controversial) for third party States.[60] Furthermore, this has been achieved by full compliance with international

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instruments for fisheries governance including the UN Fish Stocks Agreement, soon to come into effect.

It is plausible to anticipate that the imminent coming into effect of the Fish Stocks Agreement will result in a worldwide proliferation of regional fishery bodies and arrangements. This is likely due to the fact that the FSA gives teeth to laws of fisheries conservation and management which have previously existed only as international principles. For this reason, Australia and New Zealand are keen to have their 2000 Agreement recognized by the UN as a regional fisheries arrangement under the terms of the Fish Stocks Agreement. The STR incident demonstrates that there are difficulties with the emerging legal regime, particularly with its treatment of third States, but despite such weaknesses, regional fisheries cooperation provides the most realistic option for the future conservation and management of world marine capture fisheries.

Notes

[1] I & J ownership was first noted by the Australian Broadcasting Commission in a documentary screened on 30th August, 1999, *"Four Corners – Sea of Trouble."*

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid.*

[6] *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, New York, 24th July – 4th August, 1995* (United Nations General Assembly, A/CONF. 164/37, 8th September, 1995).

[7] Article 1, paragraph 3 of the United Nations Charter (Emphasis by this author).

[8] Kwiatkowska B., "The Role of Regional Organizations in Development Cooperation in Marine Affairs" in Soons, A.H (ed.) *Implementation of the Law of the Sea Convention Through International Institutions* 1990.

[9] United Nations Convention on the Law of the Sea (done at Montego Bay, Jamaica) 10th December, 1982, and entering into force on the 16th November, 1994. Reprinted in (1982) 21 *International Legal Materials* 1261-1354, Articles 61(2), 64(1), 65, 66(3)(b).

[10] *Ibid*, Articles 117 and 118.

[11] Earth Summit, *Agenda 21*, Final Text of Agreements Negotiated by Governments at the United Nations Conference on Environment and Development (UNCED) 3–14 June, 1992, Rio de Janeiro, Brazil, p. 147, Paragraphs 17.1, 17.50, 17.57, 17.65, 17.58 and 17.60.

[12] Paragraphs 17.46 – 17.48, *Ibid*.

[13] Paragraphs 17.49 – 17.63, *Ibid*.

[14] Paragraphs 17.64 – 17.69, *Ibid*.

[15] Paragraph 17.50, *Ibid*.

[16] Paragraph 17.57 and 17.65, *Ibid*.

[17] Paragraph 17.60, *Ibid*.

[18] Paragraph 17.68, *Ibid*.

[19] 1994 United Nations Administrative Committee on Coordination/Sub-Committee on Oceans and Coastal Area (ACC/SC).

[20] *Code of Conduct for Responsible Fisheries*, FAO, Rome. ISBN 92-5-103834-1.

[21] *Ibid*, Article 7.2.1.

[22] *Ibid*, Article 7.3.2 and 7.3.4.

[23] *Ibid*, Article 7.4.6 and 7.4.7.

[24] *Ibid*, Article 7.5.3.

[25] *Ibid*, Article 7.6.9. and 7.6.10.

[26] *Ibid*, Article 7.7.3. and 7.7.4. and 7.7.5.

[27] FAO 1995, *Agreement to Promote Compliance with International Conservation and Management Measures By Fishing Vessels on the High Seas*, FAO Rome, 41. ISBN 92-5-103834-1.

[28] Article III (1)(a).

[29] Article III (2).

[30] FAO Legal Office, *Guidelines for the Implementation in National Legislation of the Agreement to Promote Compliance with International Conservation and Management Measures By Fishing Vessels on the High Seas*, D1/V 3815/E, Rome, August, 1994, p. 2.

[31] Note in particular Article V (3), Article VI (4),(10), and (11), and Article VII.

[32] Compliance Agreement acceptance has come from (in chronological order): Canada, Saint Kitts and Nevis, Georgia, Myanmar, Sweden, Madagascar, Norway, United States of America, Argentina, the European Community, Namibia, Benin, Mexico and Tanzania.

[33] Refer to http://www.fao.org/fi/agreem/complian/tab1.asp.

[34] United Nations General Assembly, A/CONF. 164/37, 8th September, 1995.

[35] The States which have ratified are: Australia, Bahamas, Barbados, Brazil, Canada, Cook Islands, Fiji, Iceland, Islamic Republic of Iran, Maldives, Mauritius, Micronesia, Monaco, Namibia, Nauru, Norway, Papua New Guinea, Russian Federation, Saint Lucia, Samoa, Senegal, Seychelles, Solomon Islands, Sri Lanka, Tonga, United States of America, Uruguay. Refer – http: //www.un.org/Depts/los/los164st.htm.

[36] FAO, *The Rome Consensus on World Fisheries* (adopted by the Ministerial Conference on Fisheries, Rome, 14-15 March, 1995).

[37] *The Kyoto Declaration and Plan of Action*, published by the Government of Japan, 1995.

[38] An evaluation of the global success of RFBs in implementing the provisions of the above mentioned instruments is beyond the scope of this paper, but note, a publication written by this author as legal consultant to FAO, Lugten GL, *A Review of Measures Taken by Regional Fishery Bodies To Address Contemporary Fishery Issues*, FAO Fisheries Circular No. 940, Rome, 1999.

[39] Food and Agriculture Organization of the United Nations, *Text of the Documents Placed Before the Panel of the High Level Panel of External Experts in Fisheries* 26-27 January, 1998. (Rome, FAO Publication No. W9011/E, p. 16) (Emphasis by this author).

[40] Alexander, L. (1978) *Regional Cooperation in Marine Science*, Intergovernmental Oceanographic Commission (of UNESCO). Report for the Inter Secretariat Committee on Scientific Programmes Relating to Oceanography (ICSPRO), December, 1978, pp. 1-17,1-18.

[41] *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* – Signed by Australia 12th January, 1998, and by New Zealand 18th February, 1998. Hereinafter referred to as "the Original Agreement."

[42] Letter to this author from Geoff Richardson, Senior Manager for Southern Fisheries at the Australian Fisheries Management Authority, 24th March 2000.

[43] Correspondence to this author from Frank Meere, Managing Director Australian Fisheries Management Authority, 25th February, 2000.

[44] Correspondence to this author from the Australian Permanent Representation to the Food and Agriculture Organisation, *Note Verbale* No. 07/2000, 6th March, 2000.

[45] Article 7 of the 2000 Agreement.

[46] Article 1 of the 2000 Agreement.

[47] Article 2 of the 2000 Agreement.

[48] *Supra*, fn. 24.

[49] Article 20 of the 2000 Agreement.

[50] Article 21 of the 2000 Agreement.

[51] Article 22 of the 2000 Agreement.

[52] Article 23 of the 2000 Agreement.

[53] *Supra*, fn. 23.

[54] *Ibid*.

[55] For example, Article 117 of the 1982 *Convention* describes States as having a duty to cooperate with respect to national measures for the conservation of the living resources of the high seas. The provision does not provide advice on how this is best to be achieved. Subsequently, Article 5 of the *UN Fish Stocks Agreement* describes a number of ways that the duty could be effectuated. Such ways include, from Article 8, certain measures to be taken by coastal States and flag States which fish in the high seas, to facilitate cooperation by establishing and entering into regional fishery arrangements. Furthermore, it should be noted that under the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (the Reflagging Agreement) Article V(3) provides that parties shall cooperate on a global, regional, subregional or bilateral basis in order to promote the objectives of the Agreement.

[56] *Supra*, fn. 24.

[57] Article 8(3) of the *UN Fish Stocks Agreement*. This provision is stringently reinforced by Article 8(4) of the UN Agreement which provides that only those States which are members of such an arrangement, or which agree to apply the relevant conservation and management measures, shall have access to the fishery resources to which these measures apply.

[58] *Supra*, fn. 23. Richardson further notes that such comments are also hypothetical as we are dealing with untested waters.

[59] Swan J., "Implementation of the Law of the Sea Convention Straddling and Highly Migratory Fish Stocks and High Seas Fishing", *Prepared for the Thirty-First Annual Conference of the Law of the Sea Institute March 30-31, University of Miami*.

[60] AFMA have reported no sightings of third party vessels during the 2000 Orange Roughy Spawning season.

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