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***Jurisdiction and Enforcement in the Ross Dependency
Maritime Areas***

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Abstract/executive summary (ca. 200 words):

There are significant practical and jurisdictional challenges to the implementation and enforcement of international agreements. New Zealand is highly involved with Antarctic maritime regulation in three key capacities, as a Flag State, as a gateway Port State and as a claimant Coastal State. These three capacities come with varying jurisdictions and enforcement capacities, each with different challenges for exercising these powers. A further regulatory step taken by New Zealand in respect of its Antarctic claim is the proposed Ross Sea Marine Protected Area which comes with its own regulatory and enforcement challenges. With its Flag State enforcement powers limited by its small Antarctic fleet, there is an increased need to develop effective enforcement mechanisms and means to ensure that other States live up to their own Flag State responsibilities as regards Law of the Sea, Antarctic Treaty System and Marine Protected Areas.

Introduction

The Southern Ocean is among the most productive ocean regions in the world.¹ It plays host to a complex and delicate ecosystem, containing a diverse range of marine species from phytoplankton to whales. With the ecosystem evolving in relative isolation, it is particularly susceptible to the introduction of pollutants, non-native species and other shipping by-products, and to the effects of overfishing of key species.² It is also a region containing significant challenges to the safe operation of vessels, with vast areas of seasonal ice, icebergs, transient and uncharted hazards and freezing conditions, the risk of running into difficulty is high, even for experienced operators.³ It is for this reason that effective regulation and enforcement of that region are of such great international significance. However, there are a complex array of competing international interests and legal regimes within the region which make effective regulation and enforcement challenging.

Context

The following is a summary of some of the key pressures and challenges facing the management of the Southern Ocean.

Fisheries

There are several states with interests in the economic potential of the region, New Zealand numbering among them. However, this potential must be balanced with the ecological considerations relating to concerns about overfishing. With species such as Antarctic Toothfish having long maturity cycles but fetching high prices, they are both attractive to fishing operations and highly sensitive to overfishing.⁴ New Zealand's fishing interests in the Southern Ocean are based within the Ross Dependency. This region plays host to a significant Antarctic Toothfish fishery which brings approximately \$20 million to the New Zealand economy and is, therefore, of significant concern to its strategic interests.⁵ This fishery is highly regulated and operated on a strict quota management system under the auspices of CCAMLR. Quota is carefully assessed and catches monitored meaning Illegal, Unregulated and Unreported (IUU) fishing is of particular concern to New Zealand and those other States with interests in Antarctic fisheries. It has been estimated that IUU

¹ C.C. Joyner 'The Antarctic Treaty System and the Law of the Sea – Competing Regimes in the Southern Ocean?' in *The International Journal of Marine and Coastal Law* Vol.10, No.2 (1995) pp301-331 at p311

² 'Antarctic Shipping' *Information paper submitted by ASOC to the XXXI ATCM, Kiev, 2-14 June 2008* ATCM Agenda Items 5 & 11 and CEP Agenda Item 13, at p3

³ J. Jabour 'Safe Ships and Clean Seas: Evading a Mandatory Shipping Code for Antarctic Waters' *New Zealand Yearbook of International Law*, Vol. 6, (2008) pp91-110, at p91

⁴ A. Brady 'New Zealand's strategic interests in Antarctica' in *Polar Record* Vol.47, No. 241 (2011) pp126-134 at p126

⁵ *Ibid* at p131

fishing operations are responsible for landing 25 million tonnes of Toothfish (at a conservative estimate) from the Southern Ocean every year.⁶ It is estimated that for every tonne of legally caught toothfish, a further 5-6 tonnes were caught illegally.⁷ This has both implications for those States' economic interests as well as raising larger concerns about the overall sustainability of Antarctica's marine ecosystem. Crafting and implementing effective regulation and enforcement measures to combat IUU fishing and limit pollution are therefore vital for the maintenance of the Southern Ocean ecosystem. With demand for resources from the Southern Ocean likely to increase in future years as the world's population grows, it is of increasing importance that effective enforcement measures be put in place to prevent these ecosystems from being depleted beyond repair.

Tourism

Increasing numbers of tourists are visiting Antarctic every year, the overwhelming majority of whom travel by sea. While travel predominantly departs from States which are party to the ATS, 50% of tourist vessels operating in Antarctic waters are flagged to non-ATS States.⁸ This creates significant challenges when it comes to regulation as, again, each operator is bound only by the regulations of its Flag State. Although large numbers of tour operators belong to international bodies such as the International Alliance of Antarctic Tour Operators (IAATO) which carries with it additional standards above and beyond the bare minimum, others do not, creating risks for both the people on board and the environment. This matter is further complicated by the rise in number of private tourists wishing to visit the continent with their own vessels, rather than through commercial operators.⁹ These vessels are often not designed for operation in Antarctic waters and are not crewed with people experienced in such a climate.¹⁰

Jurisdictional Issues

The entirety of the Southern Ocean and Antarctic maritime realm are subject to a complex interplay of international, regional and domestic legal agreements, each with varying levels of subscription by States, and which each either complement, overlap or contradict one another. There are two key regimes operating within the Southern Ocean: the first is Law of the Sea with its general application to global oceans; and the second is the Antarctic Treaty System, which specifically seeks to regulate

⁶ <http://www.fish.govt.nz/en-nz/International/Fishing+in+the+Ross+Sea.htm>

⁷ B.K. Sovacool & K.E. Siman-Sovacool 'Creating Legal Teeth for Toothfish: Using the Market to Protect Fish Stocks in Antarctica' in *Journal of Environmental Law* Vol.20, No.1 (2008) pp15-33

⁸ E.J. Molenaar 'Sea-Borne Tourism in Antarctica: Avenues for Further Intergovernmental Regulation' in *The International Journal of Marine and Coastal Law* Vol. 20, No 2 (2005) pp247-295 at p267

⁹ M. Lamers, D. Liggett & B. Amelung 'Strategic challenges of tourism development and governance in Antarctica: taking stock and moving forward' in *Polar Research* Vol.31 (2012) at p4

¹⁰ Molenaar at p249

Antarctica and its waters.¹¹ These two systems overlap in places and conflict in others which creates confusion and contradiction as to which regime takes precedence.¹² While some operators within the Southern Ocean either hail from or are sponsored by States which are party to the Antarctic Treaty System, others do not. Those not party to the Antarctic Treaty System (the ATS) view Law of the Sea instruments as applying, as well as the customary freedoms of navigation, fishing and scientific research associated with the High Seas. To these states, the Antarctic Treaty System has no standing to be binding on them. States party to the ATS view Antarctica's suite of regional instruments as being more specific and where a conflict arises between their terms, ATS provisions take precedence over more generally applicable Law of the Sea instruments and customs.¹³ Even within those states which are party to the ATS, there are also differing levels of subscription and interpretation where Law of the Sea and ATS instruments are concerned. The matter is further complicated, as it is within any international maritime space, by the operation of so-called 'Flag of Convenience' vessels, which are registered to states which do not subscribe to either the ATS or Law of the Sea instruments and are, therefore, subject to different, and often lower, safety and environmental standards.

An example of the differing environmental standards applicable to ships flagged to States party to the ATS is the requirement that they undertake an environmental impact assessment, prior to undertaking an activity within the Treaty Area, to ensure that the impact of the proposed activity will be 'not more than minor or transitory'.¹⁴ There are also prohibitions on the discharge of waste, ballast water and other noxious substances within the Treaty Area.¹⁵ These requirements only apply to those vessels flagged to States which are party to the Madrid Protocol. Under the Law of the Sea, High Seas freedoms of navigation, fishing and scientific research prevail, albeit subject to the limitations of whichever Law of the Sea instruments which the Flag State in question happens to be a party to.¹⁶ With Antarctic Treaty measures more suited to the particular challenges encountered in the Southern Ocean, it is arguable that those measures are more appropriate for regulating vessels operating in Antarctic Waters. However, as is a constant challenge in international law, operators are only bound by the instruments their State chooses to subscribe to and enforce.

¹¹ D.R. Rothwell, 'The Law of the Sea and the Antarctic Treaty System: Rougher Seas Ahead for the Southern Ocean?' in Jabour-Green, J. & Howard, M. (Eds) *The Antarctic: Past, Present and Future*, Antarctic CRC Research Report #28. Hobart, 2002 pp 113-125 at p114

¹² Joyner 'The Antarctic Treaty System and the Law of the Sea' at p305

¹³ Ibid at p318

¹⁴ Protocol on Environmental Protection to the Antarctic Treaty 1991 - Article VII(5)

¹⁵ Ibid - Article IV

¹⁶ Rothwell at p134

The status of the waters surrounding Antarctica is unsettled, with most viewing the waters all the way to the coast as High Seas which carry with them all associated customary freedoms.¹⁷ This view is supported by Article VI of the Antarctic Treaty 1959 which states that nothing in the treaty will alter the rights associated with the High Seas within the treaty area.¹⁸ However, there are also seven unsettled claims to the continent capable of creating maritime jurisdictions reaching into the Southern Ocean. To those claimants, although the issue of sovereignty remains unsettled and frozen under Article IV of the Treaty, the area around the continent is not High Seas in the same manner as other world oceans and is subject to the restrictions ATS and, to some limited extent, the stewardship of each claimant nation.¹⁹ Some claimant states, such as Australia and Chile, have asserted a full suite of maritime claims, including territorial sea, contiguous zone, Exclusive Economic Zone (EEZ) and have submitted data to the International Seabed Authority in respect of an Extended Continental Shelf claim. New Zealand has limited its maritime claim to a 12 mile Territorial Sea, at least at this stage.²⁰ While enforcement of, or any attempt to assert, these rights is politically impermissible while the Treaty remains in force, it further complicates matters within the Southern Ocean's overall jurisdictional quagmire.

New Zealand and the Southern Ocean

New Zealand is an original signatory to the Antarctic Treaty 1959 and is one of the seven claimant states to the continent. Based on its territorial claim, New Zealand's interests in the Antarctic are more or less limited to the boundaries of the Ross Dependency. This area, ranging from 60° South Latitude to the pole and between longitudes 150° and 160° East, contains a large maritime area consisting of both the Ross Sea and the Southern Ocean. New Zealand inherited its claim to this region from the United Kingdom following the final break-up of the British Empire and its resulting independence in 1948. New Zealand has historical, geographical and political links to this region both from its time as a British Colony and post-independence.²¹ New Zealand maintains an active presence in the Ross Dependency, with facilities such as Scott Base operating year round to deliver New Zealand's scientific objectives.²² As touched on above, New Zealand benefits from the Ross Sea Toothfish fishery and has a significant economic interest in the region. Christchurch, New Zealand's third city, is an Antarctic Gateway City, providing a jumping off point for flights to the continent and ship based traffic, both New Zealand and foreign flagged, ranging from logistics support for national

¹⁷ Joyner 'The Antarctic Treaty and Law of the Sea' at p307

¹⁸ The Antarctic Treaty 1959 - Article IV

¹⁹ Rothwell 'The Law of the Sea and the Antarctic Treaty System' at p115

²⁰ Brady 'New Zealand's strategic interests in Antarctica' at p128

²¹ Ibid at p126

²² Ibid at p127

programmes to tourist ventures, to fishing expeditions.²³ New Zealand therefore has three key roles to play with regard to regulation of maritime activities in the Southern Ocean: as Flag State, as Port State and, at least to some limited extent, as Coastal State. The following provides an overview of New Zealand's practices in each of these capacities and offers some critiques and suggestions for a way forward in order to advance the cause of Southern Ocean sustainable management.

New Zealand as a Flag State

In order to understand New Zealand's role within the context of Southern Ocean management, it is important to first examine how its own vessels are regulated. Without living up to the highest possible standards with regards to the exercise of its jurisdiction over its own vessels in the Southern Ocean and Ross Sea, New Zealand cannot hope to influence positive practice amongst other operators in that area.

Flag State jurisdiction is the longest founded and most widely accepted means of regulating a vessel operating outside areas of national jurisdiction. A ship on the High Seas assumes the nationality, and consequently the laws, of the State to which it is registered, or 'flagged'. This basic principle of Law of the Sea has its foundations in customary law and is accepted globally. Safety and environmental standards of ships operating on the High Seas, or exercising innocent passage through the waters of other states, are set by their Flag State and any breaches of those standards are remediable only through the legal system of that State.²⁴ Compliance with international agreements is, therefore, also the responsibility of the Flag State to enforce. Which agreements will be enforced will depend entirely on whether that State is a party to any given convention, treaty or agreement. A natural consequence of this is that ships flagged to different States operate under widely different standards within international spaces, with some Flag States requiring significantly higher levels of safety and environmental management within their registries than others. Within the Antarctic context, where the environment is particularly sensitive to contaminants and the conditions particularly conducive to creating accidents, the standards to which vessels operating in that area are particularly important.

New Zealand is a Flag State to several vessels which operate in the Southern Ocean and Antarctic Treaty Area. As a Flag State, New Zealand is responsible for setting minimum standards to which each vessel must adhere, assessing compliance with those standards, issuing permits and taking action against vessels which are in breach. New Zealand is party to all major Law of the Sea and ATS instruments, including United Nations Convention on Law of the Sea 1982 (UNCLOS), International

²³ Brady 'New Zealand's Strategic Interests in Antarctica' at p130

²⁴ Joyner 'The Antarctic Treaty and the Law of the Sea' at p302

Convention for the Prevention of Pollution from Ships (MARPOL), Convention on Safety of Life at Sea (SOLAS), Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Environmental Protocol to the Antarctic Treaty (Madrid Protocol), to name a few. Under these instruments, New Zealand has committed to passing domestic laws to ensure that its vessels meet minimum standards of construction, crewing, life-saving equipment, safe operation and pollution control, as well as ensuring compliance and taking appropriate enforcement action in case of a breach by any ship in its registry.

Within Antarctica, New Zealand's ATS obligations require that it take additional regulatory steps as regards its vessels operating in the Southern Ocean. One such instrument is CCAMLR which is the primary instrument dealing with access to and preservation of Antarctic marine living resources. As a Flag State, New Zealand holds jurisdiction over its vessels operating within the CCAMLR area and must ensure that they comply with its provisions. If any of New Zealand's ships were to be found in breach, either by New Zealand or as the result of an inspection by another Party, then New Zealand would be responsible for prosecuting the vessel and, where appropriate, imposing sanctions on that vessel.²⁵ Any Party which has inspected and suspects a New Zealand vessel of breaching CCAMLR's terms must provide an inspection report to New Zealand and the CCAMLR commission.²⁶ It is then up to New Zealand to determine whether or not to prosecute and, if so, what punitive action to take against the vessel. While New Zealand is obliged to take action against vessels in breach,²⁷ there arises a question of interpretation as between the inspector and the Crown as to whether it accepts that there has been a breach worth prosecuting. If New Zealand elected to take no enforcement action there would be no power held by another Party to compel it to do so.

With regards to the Ross Sea Toothfish fishery, New Zealand is responsible for issuing permits for its vessels which set out requirements for are operating strictly within the fisheries management systems in place under CCAMLR, including enforcing Total Allowable Catch allocation and Catch Documentation requirements.²⁸ New Zealand's Ministry of Primary Industries is receives and reviews permit applications and vets the applicant for compliance with both CCAMLR provision and the numerous other regulations. A permit is then issued in accordance with CCAMLR's permitting system. New Zealand must then submit to the Secretariat details about the vessel and the permit issued.²⁹ New Zealand currently has two operators interested in the Ross Sea fishery, Sanford and Talley, which send between two and three vessels between then each season. All vessels operating

²⁵ Convention on the Conservation of Antarctic Marine Living Resources Article XXIV(1)(a) (CCAMLR)

²⁶ <https://www.ccamlr.org/en/compliance/system-inspection> (15.2.16)

²⁷ CCAMLR Article XXI(1)

²⁸ CCAMLR Conservation Measure 10-20(2015)

²⁹ Ibid

in the Ross Sea for these two companies are New Zealand owned, operated and flagged.³⁰ As required by CCAMLR, the vessels are staffed with inspectors, being one government observer and one observer from another State in order to ensure that the vessels are operating safely (both for the crew and the wildlife in the area), cleanly and within the bounds of their permit and the quota system.³¹ Once the total allowable catch is exhausted, the catch is then landed in New Zealand, where its compliance with CCAMLR regulations in respect of volume, fish size and by-catch can be checked again, reported to CCAMLR and any breaches addressed.³² None of these stringent checks and balances apply to IUU operators which are flagged to States without these rigorous processes.

While there are few fishing vessels operating out of New Zealand in the Southern Ocean, there are even fewer Tourist operators. The vast majority of ship borne tourism to Antarctica operates out of South America, given its proximity to the Antarctic Peninsular. In the 2014/15 season there was only one company operating in the Ross Dependency, the New Zealand based Antarctic Heritage Tours.³³ Operating New Zealand flagged vessels, this small company takes relatively small groups to the Ross Sea and back. Despite the small scale of commercial tourism in New Zealand, it has some of the highest standards of regulation of those operations of the Antarctic Treaty nations. New Zealand is alone in requiring a government observer to accompany the voyage to monitor continuing compliance with its permit and regulations.³⁴

The limitation of Flag State jurisdiction, particularly from a New Zealand point of view, is that there are relatively few vessels flagged to New Zealand operating in the Southern Ocean at any given time. New Zealand does not make up a high proportion of Ross Dependency maritime traffic and, as such, does not have direct control over the majority of seaborne activity in that area.³⁵ Similarly, none of the vessels currently engaged in IUU fishing or other dubious activities in the Southern Ocean are New Zealand registered.³⁶ Most are registered to Flag of Convenience States, chosen for their lax regulation and enforcement. With high numbers of foreign flagged operators in an area to which New Zealand has such strong economical and political interests, it needs to look elsewhere if it wishes to exert meaningful control over the Ross Dependency's maritime areas.

³⁰ Pers Coms – Jack Fenaughty, Silvifish Resources Ltd 15/01/2016

³¹ CCAMLR Article XXIV

³² Conservation Measure 10-20(2015)

³³ Pers Coms - Jack Fenaughty, 15/01/2016

³⁴ Ministry of Foreign Affairs and Trade *New Zealand Procedures for Non-Governmental Visitors to Antarctica* (2005) 3.9.5

³⁵ Brady 'New Zealand's Strategic Interests in Antarctica' at p

³⁶ Pers Coms - Jack Fenaughty, 15/01/2016

New Zealand as a Port State

New Zealand's ports provide a gateway for vessels bound for the Southern Ocean. A jumping off point for both New Zealand vessels and vessels registered overseas, ports like Lyttelton see a reasonable amount of Antarctic traffic both heading to and returning from the region. Being a gateway Port State means that New Zealand ports come into contact with vessels bound for the Southern Ocean which comply with different, and sometimes lower, safety and environmental standards than its own fleet.³⁷ It might, therefore, seem contrary to New Zealand's interests to facilitate these vessels in their travels to the Southern Ocean where they might run the risk of endangering the lives of their crew or the environment. However, under traditional Law of the Sea principles, a Port State has no jurisdiction to either deny a ship entry to its ports or prevent it from leaving purely on the grounds that the vessel does not comply with the Port State's domestic laws, even where those laws give effect to international agreements to which its Flag State is a party.³⁸ Neither has a Port State held authority take punitive action against a foreign flagged vessel for a breach of any of international law occurring while the vessel was on the High Seas.³⁹ Traditionally, the regulation and enforcement of those maritime activities has been solely the domain of the Flag State, regardless of where their vessels put in to port.

However, in recent years there has been a growing trend towards the exercise of a greater level of regulatory authority within the Port State. So-called "Port State jurisdiction" is a controversial topic as it grants more powers to the States whose ports are used by operators, allowing them to impose conditions and restrictions on vessels and to take punitive action for breaches of international obligations.⁴⁰ It essentially means the Port State can impose its territorial jurisdiction on visiting vessels and use this as a basis to exercise prescriptive and enforcement jurisdiction over it.⁴¹ This acts to erode the traditionally held freedoms associated with Flag State jurisdiction and attempts to exercise this form of jurisdiction have been viewed by many as *ultra vires*.⁴² However, with a growing awareness of the interconnectivity of the world's oceans and the anthropogenic effects on the environment, there is already in motion a gradual shift away from these customary freedoms of the High Seas which are no longer deemed entirely appropriate in the modern world.⁴³ By moving

³⁷ B. Marten 'Port State Jurisdiction in New Zealand: The Problem with *Sellers*' in *Victoria University Wellington Law Review* Vol.44 (2013) pp559-571 at p561

³⁸ *Ibid* at p562

³⁹ D. Devine 'Port State Jurisdiction: A Judicial Contribution from New Zealand' in *Marine Policy* Vol.24 (2000) pp215-219 at p216

⁴⁰ *Ibid* at p215

⁴¹ Marten at p560

⁴² *Ibid* at p562

⁴³ T. Scovszi 'Marine Protected Areas on High Seas: Some Legal and Policy Considerations' in *The International Journal of Marine and Coastal Law* Vol.18 No.1 (2004) at p7

towards alternative forms of jurisdiction, operators flagged to States with notoriously lax regulation would no longer be free to operate as they pleased within sensitive environments, such as the Southern Ocean. With Antarctic Port States taking on a regulatory function, it enables them to act to preserve their Antarctic interests beyond the vessels in their registry. The proximity and convenience of the Antarctic gateway ports for vessels bound for the Southern would ideally act as an incentive for those operators to comply with that State's ATS compliant standards, rather than those of their Flag State, or face being denied entry.⁴⁴ Of course, the flip side of this is that it places a significant burden, both financially and politically on Antarctic gateway ports.⁴⁵

There are two main types of Port State jurisdiction under which a State might attempt to undertake enforcement action against a vessel in breach of international or domestic law, where that breach has taken or will take place outside its national jurisdiction. The first is *ex post facto* jurisdiction which involves the Port State taking action against a ship which has breached an international obligation or a domestic law before it has entered that State's port. The other is *a priori* jurisdiction where the Port State seeks to impose some prescriptive authority over a vessel which it believes will breach a law or obligation after it leaves port.⁴⁶ The former is punitive and the latter preventative, each carrying its own benefits and its own problems. *Ex post facto* jurisdiction applies where the Port State in question has been effected in some way by the foreign flagged vessel, with the exception of where the incident is navigational.⁴⁷ *A priori* jurisdiction does not rely on the effects doctrine but is more controversial in its application in that it subverts traditionally held concepts of Flag State supremacy.⁴⁸ While certain international agreements grant Port States certain enforcement rights, such power of detention, on an *a priori* basis, the position is less clear when it comes to the exercise of unilateral authority by a Port State to enforce its own laws, or a law to which the Flag State is not party, on this basis.⁴⁹ As a gateway Port State, New Zealand could make a significant contribution to the safeguarding of Antarctic waters if it had the power to detain dangerous or poorly operated vessels before they venture into the Southern Ocean.

New Zealand has been receptive to the concept of Port State jurisdiction and has taken steps in the past to assert authority over foreign flagged vessels. Although this was not exercised in the context of an Antarctic bound vessel, it sets a precedent for New Zealand's future exercise of its power as an Antarctic Port State. The key New Zealand case relating to Port State jurisdiction is the case of

⁴⁴ EJ Molenaar 'Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage' *Ocean Development & International Law*, Vol.38 (2007) pp:225–257 p244

⁴⁵ Ibid at p266

⁴⁶ Devine 'Port State Jurisdiction' at p214

⁴⁷ Ibid at p216

⁴⁸ Ibid at 215

⁴⁹ Ibid at 216

Sellers v. Maritime Safety Inspector.⁵⁰ In this case, New Zealand's Maritime Safety Authority (MSA) declined to clear Mr Sellers's yacht, registered to Malta, from exiting the port of Opuia without installing the radio communications and location equipment required under New Zealand law. The yacht proceeded to exit port and the yacht was arrested on its return to a New Zealand port and Mr Sellers was prosecuted for breaching s21(1)(b) of the Maritime Transport Act 1994.⁵¹ Mr Sellers appealed the decision and was successful but the discussion of the Court and surrounding academic debate has raised some interesting questions in relation to the exercise of unilateral Port State jurisdiction to enforce safe shipping standards. The Crown argued that the effects doctrine normally used as a basis for *ex post facto* jurisdiction could also form the basis for *a priori* regulation as the consequences of the breach of its domestic law would be detrimental to New Zealand's interests, in this case the significant cost of a search and rescue operation should the vessel have found itself in trouble.⁵² Were this to be established, this would have significant implications for New Zealand to impose its authority over maritime traffic using its ports to access the Ross Dependency. New Zealand has a vast search and rescue area which includes its Antarctic maritime territories. However, the Court held that there was no rule in customary law which had developed to support this position. This poses a significant challenge to New Zealand's efforts to enforce prescriptive jurisdiction over foreign vessels.

Despite the apparent blow to Port State jurisdiction represented by the *Sellers* Case, there is still significant interest internationally in bestowing Port States with greater levels of authority to act on and enforce international obligations. An example of this is the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2010 (Port State Measures). This international agreement is designed to empower Port States which come into contact with operators suspected of being IUU operators to actively take part in the enforcement regional and international fisheries agreements.⁵³ The Port State Measures have been signed and ratified by New Zealand but do not come into force until 25 States have ratified or adopted the agreement. By January 2016, seventeen States had achieved this, with a further 8 required before matters can progress.⁵⁴ When the Port State Measures come into force, States will be empowered to apply its terms to vessels which are flagged to other states seeking entry to its ports.⁵⁵ Port States' are required under these measures to deny suspected IUU vessels the right to land, tranship, process

⁵⁰ *Sellers v. Maritime Safety Inspector* [1999] 2 NZLR 44

⁵¹ *Ibid* at pp47-48

⁵² Devine 'Port State Jurisdiction' at p217

⁵³ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2010 at v. (Port State Measures)

⁵⁴ Status of the Agreement of Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Dated 22 January 2016

⁵⁵ Port State Measures at Article 3

or package their catch, as well as utilise their port services, including refuelling where that State has evidence to suggest that the vessel in question has breached international or regional fisheries obligations to which their flag state is a party.⁵⁶ The agreement empowers and requires the Port State to undertake inspections of the foreign flagged vessels using its ports and to set appropriate inspection targets at a regional level.⁵⁷ In the context of Antarctic fisheries, CCAMLR, as a regional fisheries management organisation, would arguably be the most appropriate body to set inspection targets for vessels operating in Antarctic waters. These inspections would allow Port States to ascertain whether or not there had been a breach of fisheries obligations by the vessels using its ports. It can therefore gather information on IUU operators and operators with lax standards which can be shared with other States. Inspections results are required to be submitted to Parties, Fisheries Management Organisations to which the Flag State belongs, and the Flag State of the inspected vessel.⁵⁸ While this agreement augments the powers of the Port State, again the responsibility to take enforcement and punitive action is left solely to the Flag State. Flag States agree, under these measures, to take action against vessels where the result of the Port State inspection provides sufficient evidence that it has taken part in IUU fishing.⁵⁹ The Port State Measures also only apply to vessels flying flags of one of the Parties. This, once again, does not address the key challenges to regulation of international waters, that vessels operating under a Flag of Convenience remain effectively unregulated.

Much as with New Zealand's exercise of Flag State jurisdiction, New Zealand simply does not have a significant impact factor when it comes to an exercise of its Port State authority over traffic bound for the Southern Ocean. Given its high regulatory standards, New Zealand is not a State frequented by IUU fishing operations with those operators instead choosing to land their catch at a more friendly port.⁶⁰ New Zealand primarily supports foreign flagged Antarctic bound traffic associated with national programme support, such as icebreakers bound for McMurdo Station, which are typically flagged to states party to the ATS. It also occasionally plays host to government vessels, such as the Royal Navy's HMS Protector, but these are subject to sovereign immunity both under Law of the Sea and the ATS⁶¹ and, as such, are beyond reproach by the New Zealand government. Although increased Port State authority would enable New Zealand to act in the event of an IUU fishing vessel entering New Zealand's ports, or an unsafe vessel attempting to leave, its measurable

⁵⁶ Port State Measures Article 11

⁵⁷ Ibid Article 12

⁵⁸ Ibid Article 15

⁵⁹ Ibid Article

⁶⁰ Molenaar 'Port State Jurisdiction' at p227

⁶¹ For example the Madrid Protocol Annex IV Article 11

effect would likely remain limited as it would simply encourage operators to utilise other ports which do not subscribe to this doctrine.

New Zealand as Coastal State

The third tier of maritime jurisdiction held by a State is over its adjacent waters is Coastal State jurisdiction. This gives a Coastal State certain rights over a suite of maritime zones radiating out from its coastline and powers of regulation and enforcement associated with those rights. Developments in Law of the Sea in the past 50 years have extended the reach of States over their associated ocean spaces from the customary 3M Territorial Sea up to a maximum of 350M from their coast as part of an Extended Continental Shelf Claim. There are differing strata of maritime zones within this potential overall maritime area, each with different levels of jurisdictional control and enforcement powers associated with them.

New Zealand, for example, has a full suite of maritime claims around its coastline, extending beyond its internal waters. It has a 12M Territorial Sea, over which it exercises full sovereign authority and jurisdiction. Vessels from other states have the right to use these waters for the purpose of innocent passage for navigation or for access in and out of New Zealand's ports but New Zealand otherwise retains full jurisdictional control of the region.⁶² New Zealand agencies have full authority to enforce its laws, with the exception of laws relating to the design or construction of visiting vessels, over any vessel operating within these waters.⁶³ New Zealand has the power to close its ports, to arrest vessels within the Territorial Sea which are in breach of its local laws, and to take action against vessels upon which a crime is committed where the impacts of that crime affect New Zealand's peace and good order.⁶⁴ There is then a further 12M Contiguous Zone over which New Zealand has the right to exercise more limited enforcement of its laws where the effects of activities in that area might detriment its Territorial waters.⁶⁵ Overlapping that 12M and extending to 200M from the coastal baseline is the Exclusive Economic Zone, over which New Zealand has sovereign rights to the exploration and exploitation of resources, including marine living resources, but which does not constitute its sovereign territory.⁶⁶ Other operators have freedom of navigation through this area, and rights to lay submarine cables and pipelines, but New Zealand has the authority to regulate activities relating to resources and take enforcement action against operators impinging on its

⁶² United Nations Convention on Law Of the Sea 1982 Article 2(1) (UNCLOS)

⁶³ Ibid Article 21(1)

⁶⁴ Ibid Article 27(5)

⁶⁵ A. Bardin 'Coastal State Jurisdiction Over Foreign Vessels' in *Pace International Law Review* Vol.14, pp27-76 at p33

⁶⁶ Ibid at p40

sovereign rights.⁶⁷ Under UNCLOS New Zealand has also submitted information to the International Seabed Authority as a claim to the extended continental shelf of New Zealand, up to 350M.⁶⁸ This would allow it sovereign rights over the seabed of its surrounding continental shelf but not the associated water column, which would remain high seas and subject to international jurisdiction and enforcement measures discussed above.

As discussed above, there is no universally accepted Coastal State anywhere on the Antarctic continent. All seven claims, including New Zealand's, are mutually unrecognised by the other claimants and unrecognised by the global community as a whole. This creates a unique situation as regards coastal waters in the Southern Ocean whereby waters right up to the tideline can be treated as High Seas.⁶⁹ While some claimants, such as Australia and Chile, have claimed a full suite of maritime zones adjoining their Antarctic claim, New Zealand has, as yet, only claimed a 12M Territorial Sea. Under the terms of the Antarctic Treaty it is questionable whether New Zealand, or any of the claimant States, even have the right to assert wider maritime zones associated with their territorial claims as this could be deemed as an expansion of a territorial claim.⁷⁰ In practical terms, whether a claim exists over a Territorial Sea or right out to the Extended Continental Shelf margin, it has little real impact on a State's right to attempt to enforce its territorial authority and enforce its laws in the Antarctic Treaty Area. These expressions of maritime territory remain claims only and, as such, cannot be acted upon.⁷¹

Despite this lack of sovereignty, New Zealand has assumed a stewardship role over the Ross Sea region of Antarctica, something which is generally associated with a sovereign Coastal State.⁷² This stewardship includes the preparation of a management strategy for the area, including typical Coastal State responsibility, such as charting and surveying of the region, undertaking patrols of the area by sea and by flyover, and performing search and rescue operations for the area, despite the significant distance from New Zealand itself.⁷³ Yet, despite this self-proclaimed stewardship, New Zealand's rights as regards enforcement of ATS and other regional or international laws against foreign flagged vessels is much the same here as it is anywhere else on the High Seas, extremely

⁶⁷ Ibid at p41

⁶⁸ Brady 'New Zealand's Strategic Interests in Antarctica' at p 128

⁶⁹ L. Cordonnery, A.D. Hemmings & L. Kirwoken 'Nexus and Imbroglia: CCAMLR, the Madrid Protocol and Designating Antarctic Marine Protected Areas in the Southern Ocean' in *The International Journal of Marine and Coastal Law* Vol.30 (2015) pp727-764 at p 738

⁷⁰ S.B. Kaye & D.R. Rothwell 'Southern Ocean Boundaries and Maritime Claims: Another Antarctic Challenge for the Law of the Sea' in *Ocean Development and International Law* Vol.33 (2002) pp359-389 at p367

⁷¹ Ibid at p 379

⁷² T. Hughes 'CCAMLR In The Antarctic Treaty System: New Zealand's Initiative At ATCM XXIX' in *New Zealand Yearbook of International Law* Vol.4 (2007) pp305-307 at p305

⁷³ Land Information New Zealand *Ross Sea Region Strategy 2003-2012* Version 1.0, May 2003 at p3

limited. Regardless of its status as a claimant State, New Zealand holds no more authority over the Ross Dependency than any other State, be they party to the ATS or not. In fact, any attempt to exercise some form of sovereign authority over the coastal waters of Antarctic would likely land New Zealand in even greater strife legally and politically than it would in attempting to undertake enforcement action in any other area of the High Seas. Not only would it be in breach of Law of the Sea, but it would also be in breach of the ATS' provisions regarding sovereignty in the Antarctic Treaty Area.⁷⁴ New Zealand has no power to arrest or detain vessels in breach of any of its laws or international obligations or to impose sanctions on operators acting detrimentally to its interests in the region.⁷⁵ It can only board and inspect vessels which consent be inspected and only in accordance with CCAMLR and other ATS or Law of the Sea instruments. Again, this is entirely dependent on cooperation by the Flag State and its own subscription to international instruments. Efforts are further hampered by the practicalities of operating a vessel in Antarctic waters, particularly given that the New Zealand government does not possess a vessel with ice-breaking capabilities. In the current legal and political climate, New Zealand is not in a position where it can exercise meaningful Coastal State jurisdiction over its Antarctic claim. Any attempt to do so may cause be more detrimental to New Zealand's interests than not acting.

The Ross Sea Marine Protected Area

While New Zealand's efforts to assert its jurisdiction for the protection of the Southern Ocean and its interests therein may be problematic at best given the complex and unique situation in that region, it has also made significant efforts to install, through the international institutions to which it is party, other mechanisms for the protection and regulation of the Ross Sea region which do not rely on its national sovereignty. A prime example of this is the Ross Sea Marine Protected Area Proposal. While the this proposal is closely linked to New Zealand's self-assumed stewardship of the area, it is being proposed through the mechanisms of the ATS and in accordance with developing Law of the Sea principles. This proposal has met with wide support but also with some stubborn opposition and ,as such, has been reviewed and revised several times and is still in the process of being agreed to before it can be put into place.

Before looking at the intended benefits of the Ross Sea Marine Protected Area and how it might be enforced, it is worth touching on the designation of a Marine Protected Area outside of the national jurisdiction of a State more generally as this gives important context to how they function in practice. Marine Protected Areas (MPA) are able to be designated both through Law of the Sea

⁷⁴ Antarctic Treaty 1959 Article IV

⁷⁵ Cordonnery et al 'Nexus and Imbroglío' at p738

instruments and the ATS. Under Law of the Sea, Agenda 21 is a non-binding voluntary agreement which promotes the creation of a representative network of MPAs covering the world's oceans by 2012.⁷⁶ This target has yet to be reached with many States resistant to the concept of designation of MPAs in areas beyond national jurisdiction and the deadline has been extended to 2020.⁷⁷ It is worth noting that there is no specific convention or international agreement relating to the designation or enforcement of High Seas MPAs. Instead, the burden is placed on Regional Fisheries Management Organisations (RFMO) to incorporate this into their regional instruments.⁷⁸ Under the ATS, CCAMLR, which is essentially an RFMO for the Antarctic region, similarly requires that the Parties designate areas to be set aside and protected for the purpose of study and/or conservation through the declaration of 'Conservation Measures'.⁷⁹ This empowers the Commission to designate MPAs in the CCAMLR area of the Southern Ocean. As this area constitutes High Seas right up to the coast line, CCAMLR has the potential to designate an MPA anywhere in the Antarctic maritime region and cannot rely on a Coastal State to shoulder some of this responsibility. However, the lack of coastal state also makes reaching agreement on designation problematic as many states are still unsure about the prospect of an MPA network on the High Seas which would infringe upon customary freedoms.⁸⁰ While many states support the concept of MPAs in coastal waters, there are some misgivings as to High Seas MPAs where questions of the scientific basis for their establishment, their conformity with international law and their enforceability are on the minds of States.⁸¹ Where an MPA on the High Seas cannot be enforced, it is argued, there is little point in its designation.⁸² Due to this uncertainty and without a recognised coastal states, to date there has only been one MPA designated in the Antarctic Treaty Area, surrounding South Orkney Island, making up only 1% of the CCAMLR area.⁸³

In its current form, the proposal for a Ross Sea Marine Protected area covers a vast area surrounding a significant portion of the coastline of the Ross Dependency. It includes three general protection zones and two research zones, being a special research zone and a krill research zone (see figure 1).⁸⁴ The objectives of this MPA are to conserve a representative sample of the Ross Sea's natural ecosystems from human impacts and to preserve those regions for environmental monitoring

⁷⁶ Agenda 21, UN Conference on Environment and Development) Rio de Janeiro, Brazil, in 1992

⁷⁷ Scovszzi 'Marine Protected Areas on High Seas' at p5

⁷⁸ Ibid at p10

⁷⁹ CCAMLR Article IX

⁸⁰ Cardonnery et al 'Nexus and Imbroglio' at p738

⁸¹ UN, Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, advanced text, 6 June 2003 at [20](c.)

⁸² New Zealand and United States of America *A Proposal for the Establishment of a Ross Sea Region Marine Protected Area* Conservation Measure 91-XX (2015) CCAMLR XXXIV/9 rev.1 at p 12 (Ross Sea MPA Proposal)

⁸³ Cordonnery et al. at p 731

⁸⁴ Ross Sea MPA proposal at p 12

purposes.⁸⁵ The key opponent of this proposal to date has been Russia, which has been concerned with the grounds touched on above, in particular whether the proposal is founded on sound scientific evidence.⁸⁶ Also open to question is whether such an MPA could be enforceable in this High Seas context and, as such, capable of being designated.

Where an MPA is within a State's territorial waters, it has the power to unilaterally delegate and enforce its conditions based on its authority as a Coastal State.⁸⁷ However, as discussed above, in the absence of an Antarctic Coastal State, enforcement of any laws, domestic or international, is highly problematic. Once again, issues surrounding Flag State supremacy within High Seas jurisdiction come into play. While CCAMLR is capable of designating an MPA, problems arise were any of the conditions of the MPA to be breached, either by vessel flagged to a third party State or even a CCAMLR party, when it comes to the matter of enforcement. That Flag State would be the sole authority capable of taking action against their vessels for failure to comply with a Conservation Measure creating an MPA.⁸⁸ While there is an obligation on CCAMLR parties to take action against their flagged vessels, minimum enforcement standards are not provided for in the Convention. Political pressure as between Party States for failure to enforce is therefore the only real avenue for ensuring that the terms of CCAMLR's Conservation Measures, such as those designating an MPA, are being enforced. This is unfortunately true of almost all aspects of Antarctic law and Law of the Sea instruments, though its efficacy should not be underestimated. There is little provision for the power for Parties to sanction or otherwise have recourse against a State which does not live up to its enforcement obligations. There is even less power to take action against a State which is not party to the international body or RFMO which has designated the MPA. As we have seen above, there are very limited avenues whereby vessels flagged to third party States can be brought under regional regulation, none of which are particularly satisfactory in their current form.

Recommendations

1. On possible avenue for broadening the coverage and enforcement capabilities of MPA to include state which are not members of RFMOs or Parties to international agreements would be the crafting of a more globally applicable MPA convention which would mean that all members would be bound by the terms of High Seas MPAs designated across the world.⁸⁹ While under customary Law of the Sea it is arguable that Flag States are already responsible for ensuring that the global oceans environment is preserved, which would include adhering

⁸⁵ Ross Sea MPA Proposal at p11

⁸⁶ Cordonnery et al 'Nexus and Imbroglia' at pp742-743

⁸⁷ Ibid at p738

⁸⁸ CCAMLR Article XXI

⁸⁹ Scovszki 'Marine Protected Areas on High Seas' at p16

to regionally designated MPAs, a convention would further confirm this obligation and create a specific obligation to conform.⁹⁰ The convention would need to include provision for some form of enforcement action against States to ensure that they comply with their enforcement obligations, a provision which is notably lacking in other international agreements, including within the ATS, owing the political sensitivity. While this would do relatively little to address the matter of non-Party Flag States, it would at least extend the application of High Seas MPAs to a wider net of States.

2. Accountability could be incorporated into other ATS and Law of the Sea regimes relating to the regulation of Antarctic waters to ensure that States not living up to their enforcement obligations under those instruments were liable to the other Parties, thus encouraging compliance.
3. The currently pending Port State Measures need to be adopted by the remaining required States and brought into force. These measures could be amended to allow Port States to take enforcement action, whether unilaterally or with the consent of the Flag State, against vessels in breach, rather than relying on the Flag State to do this.
4. From a more practical perspective, New Zealand would benefit from purchasing an icebreaker which would augment its patrolling capacity in the Southern Ocean and strengthen its self-assumed Stewardship role of the Ross Dependency area. While behaving as a Coastal State is jurisdictionally problematic, it is practically impossible in the absence of the proper equipment required to operate in all latitudes of the Ross Dependency.

Conclusion

There are significant practical and jurisdictional challenges to the implementation and enforcement of international agreements. Traditionally held Flag State jurisdiction remains the primary means of taking enforcement action against vessels operating in the Southern Ocean. However, in a New Zealand context, this does not give it adequate means of regulating the largely foreign flagged cohort operating within the Ross Dependency. Coastal State jurisdiction is equally problematic in an effort to extend New Zealand's enforcement potential in Antarctic waters as the question of sovereignty is far from settled. Despite its stewardship of the area, New Zealand does not possess an internationally recognised competence to enforce its laws even within its claimed Territorial Sea. Port State Jurisdiction is currently the only means by which New Zealand can attempt to enforce its international obligations under the Law of the Sea and Antarctic Treaty System on vessels flagged to foreign States, but even this emerging area of international law is met with challenge on the rare

⁹⁰ Scovszzi 'Marine Protected Areas on High Seas' at p16

occasion that it is exercised. Until firmer Port State measures come into force the scope to exercise enforcement authority is limited. Similar challenges to enforcement come into play in respect of Marine Protected Areas in the Southern Ocean with even the validity of their designation in question by non-ATS States. If an MPA cannot be enforced then its very designation is questionable. Once the Ross Sea MPA is in place, States will need to ensure that enforcement mechanisms are both adhered to by each Party as regards their own vessels and that they take steps to extend its application to third party States. Without adequate enforcement powers, preservation of the Antarctic environment and strategic interests is highly problematic.

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