Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsa 1* and the *South Tomi*

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ABSTRACT

Illegal fishing for toothfish (*Dissostichus* spp.) in the maritime zones around sub-Antarctic islands in the Southern Ocean has been a considerable problem for many years. Enforcement of fisheries regulation is problematic as the remoteness of these islands has enormous logistic and financial implications. Multilateral hot pursuit, meaning hot pursuit involving pursuing vessels, aircraft or officials with different nationalities, can contribute to making enforcement, and thereby regulation, more effective. The article discusses the hot pursuits of the *South Tomi* and the *Viarsa 1* in the context of applicable international law and state practice. Some of the conclusions are that these types of hot pursuits are not inconsistent with Article 111 of the LOS Convention, that they do not erode the freedom of the high seas or affect the LOS Convention's jurisdictional balance and that they are fully consistent with the objectives of the IPOA on IUU Fishing.

Introduction

On 28 August 2003 the Uruguayan-flagged fishing vessel *Viarsa 1* was apprehended after a record-breaking 21-day hot pursuit by the Australian-flagged *Southern Supporter*.[1] The 3,900-nautical mile (nm) chase commenced on 7 August

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[1] The description of events is based on the "Joint Media Releases by Australia's Federal Minister for Fisheries, Forestry and Conservation—Senator Ian Macdonald, its Federal Minister for Justice and Customs—Senator Chris Ellison and its Parliamentary Secretary to the Minister for the Environment and Heritage—Dr Sharman Stone" (available at www.affa.gov.au). The Media Releases consulted are: No. AFFA03/149MJ of 12 August 2003, No. AFFA03/152MJ of 13 August 2003, No. AFFA03/155MJ of 14 August 2003, No. AFFA03/164MJ of 22 August 2003, No. AFFA03/165MJ of 24 August 2003, No. AFFA03/166MJ

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2003 after the sighting of the *Viarsa 1*, allegedly engaged in illegal fishing in Division 58.5.2 in the Australian exclusive economic zone (EEZ)[2] around Heard Island and McDonald Islands in the Southern Ocean. The pursuit ended 2,000 nm south-west of Cape Town, South Africa, in the Atlantic Ocean. The chase is not only interesting due to the factual circumstances under which it took place but also because it raises questions about the interpretation and application of the international law of the sea. The main focus of this article relates to the fact that the apprehensions of the *Viarsa 1* in August 2003 and the *South Tomi* in April 2001 were only made possible by so-called multilateral hot pursuit. This concept is used in this article to refer to exercises of hot pursuit that involve pursuing vessels, aircraft or officials with different nationalities. Multilateral hot pursuit can therefore have many forms. In the cases of the *Viarsa 1* and the *South Tomi*, the multilateral dimension ensued from the fact that while the pursuits were commenced by an Australian vessel, boarding and arrest was clearly enabled by the involvement of vessels from South Africa and the United Kingdom.

The article begins with some facts on the two hot pursuits, followed by background information on their regulatory context. Subsequently, attention is devoted to the right of hot pursuit under international law in a general sense. The next section then discusses the legality of the hot pursuits of the *Viarsa 1* and the *South Tomi*. The examination of the rights and duties of the pursued vessel and its flag state in the section thereafter approaches the issues from a different perspective. The article ends with some conclusions and observations.

Some Facts

After sighting the *Viarsa 1*, the *Southern Supporter*, chartered by the Australian Customs Service to patrol the Australian EEZ in the Southern Ocean for illegal fishing activity, ordered it to proceed to the Australian port of Fremantle to investigate allegations of illegal fishing for toothfish (*Dissostichus* spp.)[3] in the Australian EEZ. The *Viarsa 1* ignored the order of the Australian Fisheries Management Authority (AFMA) officers embarked on the *Southern Supporter* and set out in a westerly direction. The fact that the *Southern Supporter* would only have been able to deploy an unarmed boarding party

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of 25 August 2003, No. AFFA03/169MJ of 26 August 2003, No. AFFA03/171MJ of 28 August 2003, No. AFFA03/191M of 11 September 2003, No. AFFA03/210MJ of 3 October 2003 and No. AFFA03/219M of 10 October 2003. Other info can *inter alia* be found at www.colto.org.

[2] Although the Australian Fishing Zone (AFZ) is not completely identical to the Australian EEZ, for present purposes the terms can be used interchangeably. For the precise definition see s. 4(1) of Australia's Fisheries Management Act 1991 (Cth; No. 162 of 10 November 1991, text at: www.austlii.edu.au/au/legis/cth/consol_act).

[3] There are two species of toothfish: Patagonian toothfish (*Dissostichus eleginoides*) and Antarctic toothfish (*Dissostichus mawsoni*).

may have contributed to ignoring the order. Any uncertainty about the exact identity of the suspected poacher was finally resolved on 23 August when the crew repainted the vessel's name, number and port of registration on the hull. Those in charge may have recognised at that stage that an apprehension was likely to occur and that the vessel should not be treated as one without nationality.[4] Entering a Uruguayan port without these markings would not have been in their interest either.

Faced with a potentially unsuccessful pursuit, Australia sought the co-operation of other Southern Ocean states. This led to the involvement of the South African icebreaker *SA Agulhas*, the South African ocean-going salvage tug *John Ross* and the Falkland Islands (*Islas Malvinas*)-based United Kingdom fisheries patrol vessel *Dorada*. Although Uruguay was initially reluctant to admit that it was their flag vessel, or not fully convinced thereof, and potentially limited by its own domestic legal framework, it repeatedly expressed its willingness to co-operate with Australia and the other states involved. In an early phase of the pursuit, the Uruguayan authorities seem to have ordered the *Viarsa 1* to comply with the orders of the *Southern Supporter*. Instead, the *Viarsa 1* continued its westerly course, hoping perhaps that the *Southern Supporter* would give up, that they could bring an end to hot pursuit by entering the territorial sea of a state other than Australia, or that they could reach Montevideo and be dealt with mildly by Uruguayan authorities. The course of the *Viarsa 1* took the vessels through areas with pack ice, thereby endangering itself. At a later stage of the pursuit, the Uruguayan authorities appear to have ordered the *Viarsa 1* to proceed to a Uruguayan port. This order therefore conflicted with the earlier order. Eventually, it seems to have become gradually clear that Uruguay not just preferred but in fact insisted on dealing with the *Viarsa 1* itself and effectively asked the other states involved to discontinue the hot pursuit.

During the pursuit, the *Viarsa 1* was fitted with ropes tied at regular intervals from high points to its railings for almost the entire length of the ship. These must be presumed to have been intended to dissuade helicopter boardings. Even with the *John Ross* and the *Dorada* within close proximity of either bow of the *Viarsa 1*, she still did not decrease speed. This only happened when the *Viarsa 1* was "boxed in" after the *Southern Supporter* positioned itself directly ahead of the *Viarsa 1*.[5] The boarding party that apprehended the *Viarsa 1* on 28 August was launched from the *John Ross* using two Australian "640 pursuit boats" and consisted of Australian customs and fisheries officers from the *Southern Supporter* and armed South African fisheries control officers. The *Southern Supporter* and the *Viarsa 1*

[4] See Art. 92(2) of the LOS Convention, note 21 below. A ship without nationality cannot request any state to exercise diplomatic protection in the ship's interests.

[5] Information provided by M. Kroese, November 2003.

subsequently set course for Fremantle where they arrived on 3 October. Upon arrival, the vessel, its catch and its fishing equipment were seized and five of the crew members charged with offences under the 1991 Fisheries Management Act.[6]

An earlier but equally spectacular multilateral exercise of the right of hot pursuit led to the apprehension of the Togo-registered *South Tomi* on 20 April 2001.[7] The *Southern Supporter* first sighted the *South Tomi* on 29 March 2001 in the EEZ around Heard Island. At that time the *Southern Supporter* was under charter by AFMA for a similar mission as in August 2003. Whereas the *South Tomi* initially complied with the order to proceed to the port of Fremantle, once on the high seas it turned into a north-westerly direction. As in the case of the *Viarsa 1*, it was decided that the *Southern Supporter* should continue hot pursuit while waiting for assistance.

As Australia did not at that time have the necessary resources for assistance, and the ultimate destination of the *South Tomi* was still unclear, both France and South Africa were contacted. Both agreed to help. As it became clear that the *South Tomi* was headed for the Atlantic, South Africa's President Mbeki approved the South African involvement in Australia's "Operation Cosmo". Cape Town was used as a base for the interception of the *South Tomi*. Australian personnel, including members of the Special Air Service Regiment and other Australian Defence Force (ADF) personnel, were flown on a commercial flight to South Africa. Weapons accompanied the contingent in a sealed container in the cargo hold of the aircraft. The South African navy survey ship, the *SAS Protea*, and a patrol boat, the *SAS Galeshewe*, eventually closed in on the *South Tomi* 320 nm south of Cape Town. The 14-day chase, the longest at that time, covering a distance of 3,300 nm, had finally come to an end. On 20 April a party of armed ADF personnel and AFMA fisheries officers boarded and apprehended the *South Tomi*. This boarding is quite different from that of the *Viarsa 1*, where no armed Australian personnel were involved. The *South Tomi*, escorted by the *Southern Supporter*, arrived in Fremantle on 5 May 2001. In October 2001, the Spanish captain of the *South Tomi* was convicted on two charges and ordered to pay $AUS136,000. The boat and the 100 tonnes of toothfish were forfeited to the Australian government. On 14

[6] See note 2.

[7] This description of events is based on the *Report of the 20th Meeting of the CCAMLR Commission* (2001) (Doc. CCAMLR-XX), para. 5.9 and Annex 5, paras. 2.4, 2.15, 2.21 and 3.9; *Report of Member's Activities in the Convention Area, 2000–2001, Australia*, Doc. CCAMLR XX/MA/?? of 22 October 2001, p. 3 (text available at www.ccamlr.org/pule/pubs/ma/drt.htm); AFFA Media Releases No. AFFA01/35TU of 5 May 2001 and No. AFFA03/058M of 13 April 2003 (available at www.affa.gov.au); AFMA Media Release No. 05/01 of 20 April 2001 (available at www.afma.gov.au); ANZIL (Australia and New Zealand Society of International Law) Newsletter No. 1 (April 2001), p. 4; I. Hay, "Another One that Didn't Get away", (Spring 2001) 2 *Australian Antarctic Magazine* 5–6; "SAS Hook Fish Pirates", *The Saturday Mercury*, 14 April 2001, p. 3.

April 2003 the *South Tomi* left Fremantle for Geraldton to be scuttled nearby as a dive wreck.

These two cases of hot pursuit raise interesting questions as to their consistency with the right of hot pursuit under the international law of the sea in the context of an increasingly serious problem of illegal, unreported and unregulated (IUU) fishing for toothfish in the Southern Ocean. In this remote part of the world, IUU fishing has become a highly organised activity involving significant numbers of vessels fishing simultaneously. The limited seaborne and airborne surveillance capability has only a marginal impact and there are well-founded suspicions that vessels are occasionally sacrificed to keep the surveillance capability present in the area occupied so that the rest can continue.

The Regulatory Context of the Hot Pursuits

The (alleged) illegal fishing activity of the *Viarsa 1* and the *South Tomi* took place in the Australian EEZ around Heard Island and McDonald Islands. Australia's 1991 Fisheries Management Act prohibits fishing by foreign boats without a licence.[8] This part of the Australian EEZ is wholly included in the regulatory area of the CCAMLR Convention.[9] Australia is a party to the CCAMLR Convention and a member of its main regulatory body, the Commission.[10] Together with the other members of the Commission[11] and contracting parties to the Convention,[12] Australia is legally bound to the Convention's objective of conserving Antarctic marine living resources.[13] However, Commission members with islands "over which the existence of State sovereignty is recognized by all Contracting Parties"[14] and whose maritime zones overlap in part or entirely with the CCAMLR Convention Area,[15] have a considerable margin of discretion in prescribing and enforcing conservation measures within these maritime zones.[16] Heard Island and McDonald Islands are widely regarded to be among

[8] See *inter alia* s. 100.

[9] Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980. In force 7 April 1982, (1980) 19 *International Legal Materials* 837; www.ccamlr.org.

[10] Australia ratified on 6 May 1981 (info at www.austlii.edu.au/au/other/dfat/treaty_list/deposity) and automatically became a member of the Commission pursuant to Art. VII(2)(a) of the CCAMLR Convention.

[11] At the time of writing there were 24 members of the Commission: Argentina, Australia, Belgium, Brazil, Chile, the European Union, France, Germany, India, Italy, Japan, Republic of Korea, Namibia, New Zealand, Norway, Poland, the Russian Federation, South Africa, Spain, Sweden, Ukraine, the United Kingdom, the United States and Uruguay.

[12] At the time of writing there were seven "Acceding States": Bulgaria, Canada, Finland, Greece, the Netherlands (the Kingdom in its entirety), Peru and Vanuatu.

[13] Art. II of the CCAMLR Convention.

[14] Para. (5) of the "Statement by the Chairman of the Conference on the Conservation of Antarctic Marine Living Resources" (Chairman's Statement). This statement was included in the Final Act of the Conference.

[15] Paras. (1) and (4) of Art. I of the CCAMLR Convention.

[16] Cf. the Chairman's Statement, note 14 above.

the islands for which this discretion applies.[17] Unlike France and South Africa, however, Australia has so far never formally invoked this discretion to ensure that CCAMLR's conservation measures do not apply to the EEZ around Heard Island and McDonald Islands.[18] In reality, however, regulation in the EEZ around these islands is more stringent than required by CCAMLR's conservation measures. For instance, Australia has repeatedly stated that foreign vessels also need licences to fish in the EEZ around Heard Island and McDonald Islands.[19] But as all of the available concessions are commonly already allocated,[20] foreign vessels are effectively barred from fishing in the EEZ around Heard Island and McDonald Islands.

The way in which Uruguay and Togo are involved in international fisheries is fundamentally different from each other. Uruguay has an excellent record as regards formal participation in international instruments and inter-governmental organisations related to international fisheries. Uruguay is not only a party to the LOS Convention,[21] but also to the 1993 Compliance Agreement[22] and the 1995 Fish Stocks Agreement.[23] Its involvement in the Antarctic Treaty System (ATS) is also strong. Uruguay acceded to the Antarctic Treaty[24] and subsequently became an Antarctic Treaty Consultative Party.[25] It moreover acceded

[17] See, however, the Declaration of Vice-President Vukas in the Judgment of the International Tribunal for the Law of the Sea (ITLOS) in the *Volga* case (*Russian Federation* v *Australia*; application for prompt release, Judgment of 23 December 2002, text at www.itlos.org), by which he criticises the proclamation of the EEZ around Heard Island and McDonald Islands on the basis of Art. 121(3) of the LOS Convention.

[18] This would be achieved by invoking the Chairman's Statement, note 14 above. See *inter alia* CCAMLR Conservation Measures 10-02 (2001) and 21-01 (2002), which do not apply to Kerguelen and Crozet Islands (France) and Prince Edward Islands (South Africa). See also E.J. Molenaar, "CCAMLR and Southern Ocean Fisheries", (2001) 16 *International Journal of Marine and Coastal Law* 465–499, at 479–480.

[19] For instance in the *Report of the 21st Annual CCAMLR Meeting* (2002) (Doc. CCAMLR–XXI), para. 11.78 and in the *Report of the 22nd Annual CCAMLR Meeting* (2003) (Doc. CCAMLR–XXII; Preliminary Version of 12 November 2003), para. 10.72.

[20] *Ibid*.

[21] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994, 1833 *United Nations Treaty Series* 396; www.un.org/Depts/los. Uruguay ratified on 10 December 1992 (info at www.un.org/Depts).

[22] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Rome, 24 November 1993. In force 24 April 2003, (1994) 33 *International Legal Materials* 969; www.fao.org/legal. Uruguay accepted on 11 November 1999 (info at www.fao.org/legal/treaties).

[23] 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, 4 December 1995. In force 11 December 2001, (1995) 34 *International Legal Materials* 1542; www.un.org/Depts/los. Uruguay ratified on 10 September 1999 (info at www.un.org/Depts).

[24] The Antarctic Treaty, Washington DC, 1 December 1959. In force 23 June 1961, 402 *United Nations Treaty Series* 71; www.antdiv.gov.au. Uruguay acceded on 11 January 1980 (*Handbook of the Antarctic Treaty System* (U.S. Department of State 9th ed., 2002 text available at www.state.gov/gloes/rls/rpts/ant/), p. 12.

[25] On 7 October 1985 (*Handbook of the Antarctic Treaty System* (9th ed., 2002), p. 16).

to the CCAMLR Convention[26] and became a member of the CCAMLR Commission sometime between the 14th (1995) and the 15th (1996) Annual Meetings of the Commission.[27] As Uruguay was at that time not yet actually engaged in fishing,[28] it must be inferred that it was able to rely on the other basis for entitlement to membership of the Commission: being engaged in relevant research.[29] Besides the CCAMLR Commission, the only other regional fisheries management organisation (RFMO) in which Uruguay appears to participate is ICCAT.[30] While Uruguay's formal participation in relevant international instruments, the ATS and the CCAMLR Convention, can only be applauded, recent years have witnessed a troublesome number of incidents with Uruguayan vessels alleged to have been engaged in IUU fishing activities in the Southern Ocean.[31] This raises the concern that Uruguay is unable or unwilling to exercise effective jurisdiction and control over its vessels.

As Uruguay appears not to have licensed the *Viarsa 1* to fish in the CCAMLR Convention Area,[32] the alleged fishing activity by the *Viarsa 1* was not only in violation of Australian law, but also in contravention of various CCAMLR conservation measures[33] and, it could reasonably be presumed, in violation of the Uruguayan laws and regulations implementing these conservation measures. At the 22nd Annual CCAMLR Meeting (2003), Uruguay did not object to the inclusion of the *Viarsa 1* in CCAMLR's IUU Vessel List and displayed a very cooperative attitude. Unfortunately, two incidents involving Uruguayan fishing vessels in the CCAMLR Convention Area in January 2004[34] once more cast doubts on Uruguay's willingness or capability in exercising effective jurisdiction and control over its vessels.

[26] On 22 March 1985 (info at www.austlii.edu.au/au/other/dfat/treaty_list/deposity).

[27] *Report of the 15th Meeting of the CCAMLR Commission* (1996) (Doc. CCAMLR-XV), para. 1.5. The procedure for becoming a member of the Commission is laid down in Art. VII(2)(d) of the CCAMLR Convention.

[28] Cf. para. 1.86 of the 1996 *Report of the Standing Committee on Observation and Inspection (SCOI)*, included in Doc. CCAMLR-XV, note 27 above, as Annex 5.

[29] Cf. Art. VII(2)(b) of the CCAMLR Convention.

[30] International Commission for the Conservation of Atlantic Tunas. Uruguay has been a member since 16 March 1983 (info at www.iccat.es).

[31] See *inter alia* Doc. CCAMLR-XX, note 7 above, paras. 5.20–5.22 and paras. 2.4–2.12 of Annex 5; and Doc. CCAMLR-XXI, note 19 above, paras. 8.21, 8.24, 8.44–8.50, 14.26 and paras. 2.10–2.11, 5.2, 5.4, 5.8–5.12, 5.25–5.29 of Annex 5. It is also informative to search for "Uruguay" in the "ASOC IUU Vessel Red List" (www.asoc.org) and COLTO's list of "Toothfish vessels" and its document "Rogues Gallery. The New Face of IUU Fishing for Toothfish" (both at www.colto.org). The latter document led to heated substantive and procedural discussion at the 22nd Annual CCAMLR Meeting (2003) (see Doc. CCAMLR-XXII, note 19 above, paras. 14.25–14.43).

[32] Information provided by J. Davis, AFMA, 20 November 2003.

[33] See *inter alia* Conservation Measure 10–02 (2001).

[34] One involving the *Maya V* in relation to Heard Island and McDonald Islands (cf. Media Release AFFA04/015MJ, of 24 January 2004; text at <www.affa.gov.au>) and one involving the *Lugalpesca* (cf. CCAMLR COMM CIRC 04/09, of 23 January 2004). At the time of the incident, the *Lugalpesca* was even included in CCAMLR's IUU Vessel List (cf. Doc. CCAMLR-XXII, note 19 at para. 8.20(ii)).

Whereas Togo is a party to the LOS Convention,[35] it is not a party to the 1993 Compliance Agreement or the 1995 Fish Stocks Agreement and is not involved at all in the ATS or any RFMO.[36] After the incident with the *South Tomi*, it was decided in accordance with CCAMLR's "Policy to Enhance Co-operation between CCAMLR and Non-Contracting Parties",[37] to invite Togo to attend the 21st Annual CCAMLR Meeting (2002).[38] As the CCAMLR Secretariat was unable to establish contacts with the appropriate persons within the government of Togo, this invitation was never issued.[39] While an invitation to attend the 22nd Annual CCAMLR Meeting (2003) seems to have reached Togo, it did not attend.[40] Several alleged IUU fishing incidents in 2003 involved Togolese vessels[41] and the *Lome*, when included in CCAMLR's IUU Vessel List in 2003, was at that time flagged to Togo.[42]

The Right of Hot Pursuit under International Law

The distinction between the various maritime zones of coastal states on the one hand and the high seas on the other hand is one of the most fundamental in the international law of the sea. The legal regime in the maritime zones of coastal states recognises their sovereignty, sovereign rights and/or jurisdiction therein which empower them with various degrees of legislative and enforcement jurisdiction over (foreign) activities.[43] By contrast, the legal regime of the high seas is based on the freedom of the high seas, implying that the high seas cannot be subjected to sovereignty and that states have exclusive jurisdiction (or primacy) over ships flying their flag (flag states).[44] One the most prominent freedoms of the high seas is the freedom of navigation.[45]

The right of hot pursuit under international law is one of the exceptions to the flag state's primacy on the high seas that allows coastal states to engage in enforcement activities on the high seas against ships not flying their own flag. Other such exceptions[46] are *inter alia* related to piracy, slave trade, unau-

[35] Togo ratified on 16 April 1985 (info at www.un.org/Depts).
[36] Whereas Togo is a member of CECAF (Fishery Committee for the Eastern Central Atlantic), due to its lack of core management functions this is not regarded as an RFMO.
[37] Text at www.ccamlr.org, under "Catch Documentation Scheme".
[38] Doc. CCAMLR-XX, note 7 above, paras. 5.27 and 17.2.
[39] Doc. CCAMLR-XXI, note 19 above, para. 1.5.
[40] Doc. CCAMLR-XXII, note 19 above, para. 1.5. Para. 17.1 notes that Togo will be invited to attend the 23rd Annual CCAMLR Meeting (2004).
[41] See Doc. CCAMLR-XXII/59 of 3 November 2003, *Report of the Standing Committee on Implementation and Compliance (SCIC)*, paras. 2.7 and 3.20 and Appendix III. See also the information available on the websites in note 31 above.
[42] Doc. CCAMLR-XXII, note 19 above, para. 8.20(ii).
[43] See *inter alia* Arts. 2(1), 56(1) and 77(1) of the LOS Convention.
[44] Arts. 89 and 92(1) of the LOS Convention.
[45] Art. 87(1)(a) of the LOS Convention.
[46] See in general the discussion by I. Brownlie, *Principles of Public International Law*, (Oxford, Clarendon Press, 4th ed., 1990), pp. 238–249.

thorised broadcasting, ships without nationality[47] and situations in which a relevant mandate of the United Nations Security Council exists.[48] As regards high seas fisheries, additional exceptions include *ad hoc* consent by the flag state[49] or by the vessel's captain[50] and multilateral agreements by which (flag) states agree that their ships may be subjected to enforcement activities on a reciprocal (*inter se*) basis.[51] The provisions allowing for non-flag state fisheries enforcement on the high seas in the 1995 Fish Stocks Agreement can also be seen as prior consent by flag states to deviate from the principle of flag state primacy on the high seas. Such enforcement would be possible as between states parties to the 1995 Fish Stocks Agreement in the high seas part of the regulatory area of an RFMO and could be undertaken by the RFMO's members against a ship of another member or a non-member.[52]

The right of hot pursuit (at sea) is firmly rooted in customary international law.[53] Article 111 of the LOS Convention recognises a coastal state's right to engage in hot pursuit and lays down the cumulative conditions under which it can be exercised. The basis for the exercise of the right of hot pursuit is laid down in paragraph (1) of Article 111: "when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State".[54] The right only exists for violations that have occurred within one of the coastal state's maritime zones (internal waters, archipelagic waters, territorial sea, EEZ or continental shelf).[55] The laws and

[47] See Arts. 107, 109 and 110 of the LOS Convention.

[48] See A.H.A. Soons, "A 'New' Exception to the Freedom of the High Seas: The Authority of the UN Security Council" in T.D. Gill and W.P. Heere (eds.), *Reflections on Principles and Practice of International Law* (Kluwer Law International, The Hague, 2000), pp. 205–221.

[49] See also Art. 20(6) of the 1995 Fish Stocks Agreement.

[50] See e.g. para. 7 of the Non-Contracting Party Scheme of NEAFC (North-East Atlantic Fisheries Commission), available at www.neafc.org.

[51] One of these is the CCAMLR System of Inspection (text at www.ccamlr.org) which allows for boarding and inspection by designated inspectors who do not necessarily have the nationality of an inspected vessel's flag state. Consistent with the *inter se* approach, however, vessels flying the flag of non-parties to the CCAMLR Convention cannot be subjected to such enforcement measures (see footnote 2 at Art. III).

[52] Art. 21(1) of the 1995 Fish Stocks Agreement. At the time of writing, no RFMOs had yet adopted procedures based on this provision; which would allow for high seas enforcement against ships of non-members of which the captain or the flag state had not given their consent. For a discussion of these issues see R. Rayfuse, *Enforcement By Non-Flag States of High Seas Fisheries* (Martinus Nijhoff, 2004).

[53] Cf. N.M. Poulantzas, *The Right of Hot Pursuit in International Law* (Martinus Nijhoff Publishers, The Hague, 2nd ed., 2002), p. xxxiv; Brownlie, note 45 above, p. 245; R.C. Reuland, "The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention", (1993) 33 *Virginia Journal of International Law* 557–589, at p. 561; R.R. Churchill and A.V. Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed., 1999), p. 214; and C.H. Allen, "Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices", (1989) 20 *Ocean Development and International Law* 309–341, at p. 312.

[54] Art. 111(1) of the LOS Convention.

[55] The contiguous zone is omitted here as Art. 33 of the LOS Convention does not provide

regulations that were violated must of course have been enacted in accordance with international law, most importantly the scope and extent of the sovereignty, sovereign rights and jurisdiction of the coastal state. For instance, as the LOS Convention does not grant coastal states jurisdiction over customs issues in their EEZs,[56] violations of laws or regulations in this sphere do not entitle a coastal state to a right of hot pursuit.[57] In fact, the mere enactment of such laws and regulations would be inconsistent with the LOS Convention and their application a violation thereof. Moreover, even though the LOS Convention may recognise coastal state prescriptive jurisdiction, there may be important limitations on its enforcement powers.[58] It is submitted that the right of hot pursuit cannot be exercised in order to circumvent these limitations. In the case of fisheries, however, the sovereignty and sovereign rights of a coastal state are so extensive that this is not likely to happen often.[59]

The right of hot pursuit is thus fundamentally different from the other recognised exceptions to flag state primacy on the high seas. High seas enforcement based on the right of hot pursuit derives from jurisdiction under the (quasi-)[60] territorial principle whereas enforcement related to, for instance, piracy or slave trade, is based on jurisdiction under the universality principle.

In addition to ensuring that there is a basis for exercising the right of hot pursuit, pursuit has to be both hot and continuous. The need for the pursuit to be hot is laid down in Article 111(1), which dictates that pursuit must be commenced while the ship is still within the coastal state's maritime zones. The same paragraph requires that pursuit can only be continued beyond the coastal state's maritime zones if it has not been interrupted.[61] These conditions are aimed at avoiding abuse and incorrect exercise by coastal states, including situations in which the wrong vessel is pursued by accident, and thereby to safeguard the freedom of navigation on the high seas. Moreover, they also help to ensure that the coastal state gathers enough evidentiary material to support subsequent enforcement action.

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coastal states with prescriptive and enforcement jurisdiction over activities that actually occur in that zone. See also the last sentence of Art. 111(1). Contra Brownlie, note 45 above, p. 247.

[56] Cf. para. 136 of the Judgment of the ITLOS in the M/V *'Saiga'* case (*No. 2*) (*Saint Vincent and the Grenadines* v *Guinea*; Judgment of 1 July 1999; text at www.itlos.org). In para. 127 the Judgement notes the exception in relation to artificial islands, installations and structures in accordance with Art. 60(2) of the LOS Convention.

[57] Cf. paras. 136 and 149 of the Judgment in the *Saiga* case, note 55 above. In paras. 139–152 the ITLOS nevertheless takes the trouble to determine whether or not the conditions for the exercise of hot pursuit had been met, which was not the case.

[58] See e.g. Art. 24(1) and paras. (2), (3), (5), (6) of Art. 220 of the LOS Convention.

[59] See also Arts. 19(2)(i), 21(1)(d), 42(1)(c) and 73(2) of the LOS Convention, which confirm the broad enforcement powers of the coastal state in relation to fishing.

[60] The term "quasi" is meant to encompass the EEZ and the continental shelf. It is used to denote that these maritime zones are not part of a state's territory.

[61] See also para. (6)(b), which ends with the words "without interruption".

Article 111 also lays down various procedural requirements that stipulate when hot pursuit can begin, how it should proceed and when it ends. Paragraph (5) provides: "The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect." Paragraph (4) observes that hot pursuit is not deemed to have begun unless the coastal state's pursuing ship or aircraft has verified that the ship pursued is within the relevant maritime zone and an effective visual or auditory signal to stop has been given. This ensures that the vessel realises that it is suspected of having committed a violation, that it is aware of the enforcement powers of the coastal state under international law and that disobeying an order to stop will constitute a separate offence in many, if not most, states. Requiring the coastal state to verify whether it is entitled to engage in hot pursuit and to gather evidentiary material also avoids abuse and incorrect exercise of the rights and assists the coastal state in subsequent enforcement action. Paragraph (6) recognises that hot pursuit can be commenced by an aircraft but subsequently be taken over by a ship, provided the pursuit has not been interrupted.

Paragraph (3) stipulates that the "right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State". The rationale for this rule appears to be that enforcement activities by a foreign warship or other government vessel would render its passage in the territorial sea non-innocent.[62] With regard to foreign aircraft the matter is more straightforward as they have no right of overflight over another state's territorial sea. However, nothing prevents the coastal state to authorise the pursuing state from continuing its hot pursuit.[63] Such authorisation can be given on an *ad hoc* basis,[64] but also more permanently as part of a bilateral or multilateral agreement.[65] The rule in Article 111(3) implies that hot pursuit can be continued in any state's EEZ.

[62] Either based on para. (1) of Art. 19 or on subparas. (b), (e), (f) or (l) of Art. 19(2). Reuland, note 52 above, pp. 578–579 argues that passage by the pursued vessel is not innocent and allows the coastal state to take action.

[63] See Allen, note 52 above, p. 320.

[64] For instance the *ad hoc* consent given by the French government in December 2001 when the *Lena*, then flagged in the Russian Federation, entered the territorial sea of Kerguelen Island under hot pursuit by the Australian-flagged and authorised vessel *Southern Supporter* (see Doc. CCAMLR-XXII/BG/48 of 5 November 2003, "Vessel Sighting CCAMLR Statistical Area 58.5.2 (Delegation of Australia)", at the second page of the Statement by J. Davis).

[65] For instance the 2003 Canberra Treaty, note 83 below, which does so in Art. 4. Interestingly, the pursuing vessel is not allowed to take "physical law enforcement or other coercive action against the vessel pursued during this phase of the hot pursuit" (Art. 4). See also Art. 3 of the Convention on Subregional Co-operation in the Exercise of Maritime Hot Pursuit (Conakry, 1 September 1993. No information on entry into force. Adopted in the framework of the 1985 Convention for the Establishment of a Sub-Regional Commission on Fisheries (info at www.oceanlaw.net)).

Finally, the cumulative substantive and procedural conditions for the exercise of hot pursuit in Article 111 of the LOS Convention may be complemented by other restraints imposed by (general) international law.[66] For instance, the use of force during hot pursuit shall be subject to the principles of necessity, reasonableness and proportionality.[67]

The Legality of the Hot Pursuits of the *Viarsa* 1 and the *South Tomi*

As all the states involved in the hot pursuits of the *Viarsa 1* and the *South Tomi* are parties to the LOS Convention,[68] the legality of the pursuits depends first of all on Article 111 of the LOS Convention. In applying this provision to the two pursuits, it is noticeable that whereas paragraph (6) caters for a ship taking over from an aircraft, neither this paragraph nor any other paragraph of Article 111 mentions that one ship can take over from another. It is submitted that to accept on the one hand that ships can take over from aircraft but to reject on the other hand that ships can take over from other ships would be both unreasonable and illogical. This view was shared by a considerable majority of the members of the International Law Commission (ILC), in discussing what would become Article 23 of the 1958 Convention on the High Seas.[69] This provision was reproduced almost verbatim in Article 111 of the LOS Convention.[70] The issue arose as a consequence of the decision of the ILC that the increasing use of aircraft in marine surveillance should be acknowledged in the right of hot pursuit. To confirm that more than one vessel can be used in the hot pursuit, the ILC agreed on inserting a paragraph in the Commentary to the draft provision of what would become Article 23.[71] This paragraph reads:

> The ship finally arresting the ship pursued need not necessarily be the same as the one which began the pursuit, provided that it has joined in the pursuit and has not merely effected an interception.[72]

[66] See the Preamble to the LOS Convention and Art. 293.
[67] Cf. paras. 155–156 of the Judgment of the ITLOS in the *Saiga* case, note 55 above. See also Art 22(1)(f) of the 1995 Fist Stocks Agreement.
[68] Info at www.un.org/Depts.
[69] Geneva, 29 April 1958. In force 30 September 1962, 450 *United Nations Treaty Series* 11; www.un.org/law/ilc/texts. See the *Yearbook of the International Law Commission* (1956), vol. I, pp. 54–58. Allen, note 52 above, p. 319, argues that this is already part of customary international law. Poulantzas, note 52 above, pp. 223–227, seems to share that view.
[70] An important distinction concerns para. (2) of Art. 111, which makes the right of hot pursuit *mutatis mutandis* applicable to the EEZ and the continental shelf. This provision did obviously not exist in the 1958 Convention.
[71] *Ibid*., para. 41, p. 58.
[72] *Yearbook of the International Law Commission* (1956), vol. II, p. 285 (para. (2)(c)).

The second part of this sentence was inserted at a late stage,[73] presumably in response to concerns that the use of more than one vessel could lead to situations where arrests by a second vessel would occur at a great distance from the vessel that had initiated the pursuit.[74] The discussion also touched on the 1929 hot pursuit of the Canadian ship *I'm Alone*. The pursuit of the *I'm Alone*, suspected of "rum running", was commenced by the United States cutter *Wolcott* while another United States cutter, the *Dexter*, coming from an entirely different direction, later joined the pursuit and eventually sank the *I'm Alone*.[75] The discussion in the ILC[76] and its decision on the paragraph in the Commentary suggest that the hot pursuit of the *I'm Alone* should be regarded as joining a pursuit and not an interception.[77]

The hot pursuits of the *Viarsa 1* and the *South Tomi* are in one way essentially similar to the facts of the pursuit of the *I'm Alone*. In both cases, the *Southern Supporter* remained within a very short distance throughout the pursuit. The other vessels should therefore be regarded as having joined the *Southern Supporter* and not as merely effecting interceptions of the pursued vessels.

In another respect, however, the hot pursuits of the *Viarsa 1* and the *South Tomi* are fundamentally different from the *I'm Alone* because the nationalities of the vessels joining the pursuit were different from the vessel initiating the pursuit. In other words, the apprehensions of the *Viarsa 1* and the *South Tomi* were the result of multilateral hot pursuit. The concept of multilateral hot pursuit is, as far as the author is aware, not an existing concept. The LOS Convention does not use the concept and also does not otherwise refer explicitly to the involvement of vessels or aircraft with nationalities other than that of the coastal State. In fact, when referring to "a ship or another aircraft" taking over from the aircraft that commenced hot pursuit, paragraph (6)(b) explicitly adds the words "of the coastal State". In view of the continued presence of the *Southern Supporter* throughout both pursuits, the involvement of the South African and United Kingdom vessels does not qualify as relay or 'taking over'. This notwithstanding, it is clear that the involvement of these latter vessels was instrumental in enabling the halting and boarding of the vessels. As this involvement was not explicitly authorised by the Uruguayan and Togolese governments and could also not rely on a general (independent) exception to the flag State's primacy on the high seas, this raises the question as to its consistency with Article 111 or with the freedom of the high seas and

[73] *Yearbook of the International Law Commission* (1956), vol. I, p. 266.
[74] *Ibid*., para. 30, p. 57.
[75] *Reports of International Arbitral Awards*, vol. III, pp. 1611–1618. Brownlie, note 45 above, p. 247, n. 93, agrees that the paragraph of the Commentary is "Cf. the facts of the *I'm Alone* case".
[76] *Yearbook of the International Law Commission* (1956), vol. I, paras. 28–29, p. 57.
[77] Poulantzas, note 52 above, p. 225, also takes this view.

flag State primacy on the high seas pursuant to Articles 87(1)(a) and 92(1) of the LOS Convention.

In determining the legality of these instances of multilateral hot pursuit, an observation made by one of the ILC members during the discussion on what would become Article 23 of the Convention on the High Seas should be used as a point of departure:

> The important point was the fundamental right to give the order to stop and to undertake hot pursuit, not the specific means by which that right was exercised.[78]

Without disregarding the importance of procedural conditions and that these are in fact applicable treaty law, the merit of this observation is obvious. In light of this observation, it is submitted that multilateral hot pursuits like those of the *Viarsa 1* and the *South Tomi* are for several reasons consistent with Article 111 of the LOS Convention. The principal reason is that these pursuits satisfy the main substantive and procedural conditions and thereby safeguard the interests of the flag state and the international community in upholding the freedom of the high seas. In both hot pursuits, there was a *prima facie* basis for the exercise of hot pursuit and all procedural requirements seem to have been met. Most importantly, the requirement of continuity was fully satisfied, as the coastal state's authorised vessel that initiated the pursuit remained closely involved until the end.[79] Consequently, the hot pursuit did not constitute an interception and there was no risk of abuse or pursuing the wrong vessel. In addition, the coastal state ensured in both cases that one or more of its officials could formally apprehend the vessel. Under these circumstances, multilateral hot pursuit does not erode the freedom of the high seas and leaves the LOS Convention's jurisdictional balance unaffected.

While not necessary for justifying multilateral hot pursuit, attention should also be drawn to the sovereignty and sovereign rights of coastal states over marine living resources in their maritime zones and the difficulties they experience with illegal fishing, particularly in the Southern Ocean. In this respect, coastal state interests in combating IUU fishing frequently overlap with those of the international community. Multilateral hot pursuit is in fact fully consistent with the objectives of the IPOA on IUU Fishing,[80] in particular with its call for a comprehensive and integrated approach and the need to strengthen this by inter-state co-operation.[81]

Should an international court or tribunal be asked to rule on the legality of

[78] *Yearbook of the International Law Commission* (1956), vol. I, para. 58, p. 54.
[79] The condition of continuity during hot pursuit by relays is also regarded as critical by Poulantzas, note 52 above, pp. 223 and 227.
[80] International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Adopted by consensus by FAO's Committee on Fisheries on 2 March 2001 and endorsed by the FAO Council on 23 June 2001 (text available at www.fao.org/fi).
[81] See para. 9.3.

the hot pursuit of the *Viarsa 1* or similar cases, it may take account of state practice.[82] The hot pursuits of the *Viarsa 1* and the *South Tomi* and the (absence of) reactions of other states thereto would be important practice. Moreover, on 24 November 2003 Australia and France signed a bilateral treaty[83] on co-operative maritime surveillance and scientific research on marine living resources in the maritime zones around their sub-Antarctic islands[84] in the Southern Ocean.[85] The treaty *inter alia* provides for prior authorisation to continue hot pursuit through the territorial sea of the other state.[86] Subject to prior consent, co-operative fisheries surveillance missions may be undertaken by vessels of one state in the maritime zones of the other. These missions would be mainly aimed at the identification and recognition of vessels and would not include traditional enforcement action such as boarding, inspection or apprehension.[87] However, by means of Article 2 of Annex III on "Cooperative Surveillance Actions that May be the Subject of Further Agreements", the parties envisage the conclusion of agreements or arrangements "that may also provide for law enforcement operations possibly accompanied by forcible measures".[88] This Annex may therefore be the source of relevant state practice to multilateral hot pursuit.

Australia has also been engaged in consultations with South Africa on co-operation in surveillance and enforcement. The need to combat IUU fishing more effectively by means of multilateral enforcement and presumably multilateral hot pursuit was recognised already in October 1997, when the Eastern Antarctic Coastal States Group met for the first time in Wellington, New Zealand. The group is composed of Australia, France, New Zealand, Norway and South Africa.[89] In coming years, these states[90] are likely to create a web

[82] See Art. 31(3)(b) of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969. In force 27 January 1980, 1155 *United Nations Treaty Series* 331; www.un.org/law/ilc).

[83] Treaty Between the Government of Australia and the Government of the French Republic on Co-operation in the Maritime Areas Adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands (Canberra, 24 November 2003. Not in force; text at www.austlii.edu.au/au/other/dfat/treaties/notinforce/2003, [2003] ATNIF 20). See the Joint Media Release of 24 November 2003 at www.foreignminister.gov.au/releases/2003.

[84] The French sub-Antarctic islands are Kerguelen Islands, Crozet Islands, Saint-Paul Island and Amsterdam Island (cf. Art. 1(1)(b) of the 2003 Treaty).

[85] The treaty enters into force after the domestic ratification procedures in each state are completed and this has been notified to each other (Art. 9). At the moment, however, various aspects regulated by the treaty are already provisionally applied (information kindly provided by I. Hay, 11 September 2003).

[86] Art. 4.

[87] Arts. 1(5) and 3(2).

[88] See also Art. 1(5)(c). If this option is pursued, such agreements or arrangements would be quite similar to the "Shiprider Agreements" discussed in the main text below. A meeting between government officials of Australia and France held in La Reunion, in January 2004, may address these issues (see AFFA Press Release DAFF04/010M, of 20 January 2004, text at www.affa.gov.au).

[89] *Ibid*.

[90] Norway's participation is likely to be different or less substantial, *inter alia* due to the fact

of relevant bilateral and/or regional agreements, which would make an important contribution to state practice.[91]

It is not unlikely that the prospective instruments discussed above may show similarities with so-called "Shiprider Agreements". An example of such an agreement in the sphere of fisheries enforcement is a 1993 memorandum of understanding (MOU) between the United States and China which *inter alia* allows Chinese fisheries enforcement officials to embark on United States Coast Guard (USCG) cutters to facilitate enforcement action against Chinese vessels on the high seas.[92] Whereas this type of Shiprider Agreement does not enable enforcement action against vessels of third states, the many bilateral Shiprider Agreements that have been concluded since 1993 in the wider Caribbean region to combat maritime drug-trafficking do. These agreements are concluded between the United States on the one hand and various states in the wider Caribbean region, including the United Kingdom and the Netherlands, on the other hand.[93] For instance, pursuant to the 1996 Shiprider Agreement between the United States and Trinidad and Tobago,[94] law-enforcement officials from Trinidad and Tobago may *inter alia* embark on USCG vessels and United States Navy vessels and enforce the laws of Trinidad and Tobago as part of the right of hot pursuit.[95] The Agreement also establishes prior

cont.
that Norway has not claimed an EEZ or other jurisdiction over marine living resources in a 200 nm zone around Norway's sub-Antarctic Bouvetøya Island.

91 See also in this respect Art. VI of the Niue Treaty on Co-operation in Fisheries Surveillance and Law Enforcement in the South Pacific Region (Honiara, 9 July 1992. In force 20 May 1993; text at www.oceanlaw.net). However, no bilateral or multilateral "Subsidiary Agreements", which are necessary to implement the ideas in this provision, appear yet to have been agreed on.

92 See J. Davis, "How International Enforcement Cooperation Deters Illegal Fishing in the North Pacific", (Jan. 2003) 8 *Economic Perspectives* 1, at usinfo.state.gov/journals. See also the United States "Draft National Plan of Action to Prevent, Deter and Eliminate Illegal, Unregulated and Unreported Fishing" of 20 February 2003 (text also at www.state.gov), s. 3.8, which lists among the recommendations: "Pursue shiprider agreements and/or enforcement officer exchanges with critical fishing nations". It is presumed that these will be modelled on the 1993 (or 1991) MOU described in the main text and not on the agreements for combating drug-trafficking.

93 See info at www.state.gov (search for "shiprider") and www.hri.org/docs/USSD-INCSR/95/OtherUSG/USCG.html. These agreements have been concluded in the framework of Art. 108 of the LOS Convention and Art. 17(9) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988. In force 11 November 1990, 1582 *United Nations Treaty Series* 164). See also M.J. Williams, "Bilateral Maritime Agreements Enhancing International Cooperation in the Suppression of Illicit Maritime Narcotics Trafficking", in M.H. Nordquist and J.N. Moore (eds.), *Oceans Policy: New Insitutions, Challenges and Opportunities* (The Hague, Martinus Nijhoff Publishers: 1999), pp. 179–200 and H.W. Henke, "Drugs in the Caribbean: The 'Shiprider' Controversy and the Question of Sovereignty", *European Review of Latin American and Caribbean Studies* 27–47, No. 64 (1998).

94 Agreement between the Government of the Republic of Trinidad and Tobago and the Government of the United States of America concerning Maritime Counter-Drug Operations, 1996 (text at www.caricom.org/archives/agreement-tt-usa-drugtraffic.htm).

95 See para. 5(d).

authorisation by Trinidad and Tobago for enforcement action in its territorial sea, archipelagic waters and internal waters by designated United States vessels against vessels of third states in the absence of a shiprider from Trinidad and Tobago.[96] The States involved in these bilateral agreements are expected to become parties to the multilateral "Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area" (2003 San José Convention) in April 2003.[97] This regional agreement also enables a reciprocal shiprider concept which, however, still needs to be implemented at the national level.[98]

One final aspect of the pursuits of the *Viarsa 1* and the *South Tomi* that should be addressed relates to the use of the *Southern Supporter* for fisheries enforcement. The *Southern Supporter* is not a navy vessel and does not have fixed armament. In fact, when the *Viarsa 1* and the *South Tomi* were sighted, the *Southern Supporter* had no weapons on board whatsoever.[99] As the *Southern Supporter* is not designed to allow for landing or launching helicopters, its boarding capability is limited to using small pursuit craft. The rough weather and sea conditions in the Southern Ocean often make boarding with small surface craft a risky undertaking. After having found a vessel suspected of illegal fishing, in many cases the *Southern Supporter*'s only option is therefore to order the vessel to proceed to port for inspection.[100] For suspected violations in the EEZ off Heard Island and McDonald Islands the nearest Australian port is Fremantle, which is around 2,200 nm away. The inability to use or threaten with force to compel compliance with such an order obviously raises significant policy issues. However, as Article 111 of the LOS Convention only refers to orders to stop but says nothing about orders to proceed to port, this is an issue of treaty interpretation as well.

Whereas it cannot be denied that Article 111 says nothing about an order to proceed to port, there is also nothing which explicitly prohibits such an order. Moreover, while enforcement powers granted to the coastal state by the LOS Convention are often limited, in relation to marine living resources such powers are very extensive.[101] The reasonableness of an order to proceed to port would furthermore depend on specific circumstances. The hazardous nature of boarding vessels in rough seas or weather and the temporary or permanent lack of boarding capability on the part of coastal states would in principle

[96] See para. 8(c).
[97] San José, 10 April 2003. Not in force; text on file with author. Noted in UN Doc. E/CN.7/2003/8, of January 2003, at para. 12.
[98] See Art. 9. Note the use of "may" in para. (2) and the chapeau to para. (3). See also para. (3)(b) for the right of hot pursuit.
[99] Information provided by J. Davis, AFMA, 20 November 2003.
[100] This power is laid down in s. 84(1)(k)(ii) of the 1991 Fisheries Management Act, note 2 above.
[101] See notes 57 and 58 above and accompanying text.

justify such an order.[102] Some state practice already exists in this respect in relation to vessel-source pollution.[103]

It is finally submitted that coastal states are likely to use such powers with caution as they may risk having to compensate the vessel for loss or damage sustained by unjustifiable enforcement action. Compensation for an unnecessary inspection in Fremantle is likely to be substantial. A right to compensation will often be laid down in domestic legal frameworks. Whereas the LOS Convention implicitly confirms a vessel's right to compensation in relation to unjustifiable hot pursuit[104] and other unjustifiable enforcement action,[105] a similar right for vessels that comply with an order to stop or proceed to port for alleged violations related to the conservation and management of marine living resources in a coastal state's maritime zones is not explicitly or implicitly granted. The flag state may nevertheless claim such compensation on the basis that one or more provisions of the LOS Convention have been violated.[106] The relevant provisions require the coastal state to have due regard to the freedom of navigation and limit enforcement to what is necessary.[107]

On 17 December 2003 the Australian government announced its plan to "lease an ice-strengthened ship on an ongoing, full-time basis for surveillance and enforcement patrols – primarily in the Southern Ocean. The ship will carry a deck-mounted .50 calibre machine gun, a Customs boarding party armed with handguns, Australian Fisheries Officers and a civilian steaming party (merchant mariners able to crew apprehended illegal vessels)."[108] This patrol capability is expected to be in place around the middle of 2004.[109] This initiative complemented an earlier legislative initiative to allow the government to recover the costs of pursuit activities of foreign fishing vessels suspected of illegal fishing.[110] These costs can also be included in the bond for release of the vessel.[111] The new legislation also increases the maximum fine

[102] Cf. E.J. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (The Hague/Boston/London, Kluwer Law International, 1998), pp. 246 and 384 in relation to vessel-source pollution.

[103] *Ibid*., at p. 393, where reference is made to the 1997 incident with the *Atlantic Cartier*, flagged to the Bahamas, which was asked by Canadian authorities to proceed to the port of St. John's when it was 200 nm off shore, in relation to a suspected illegal discharge of oil (see Press Release of 1 December 1998 at www.atl.ec.gc.ca/press).

[104] Art. 111(8).

[105] See Arts. 106, 110(3) and 232. See also Arts. 21(18) and 35 of the 1995 Fish Stocks Agreement.

[106] See also Art. 304 of the LOS Convention.

[107] See Arts. 56(2) and 73(1) of the LOS Convention.

[108] Media Release AFFA03/277MJ, of 17 December 2003 (text at www.affa.gov.au).

[109] Information provided by D. Crisafulli, AFFA, 4 February 2004.

[110] By means of the Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Bill 2003, a new Subdivision CA of Part 6 (Sections 106J-106S) "Recovery of pursuit costs in relation to certain foreign boats" will be inserted in the 1991 Fisheries Management Act. See also Media Release DAFF03/258M, of 26 November 2003 (text at www.affa.gov.au).

[111] The 2003 Bill, note 3, will substitute the words after Section 88(1)(b) of the 1991 Fisheries

for vessels of 24 metres in length and over from AUS$ 550,000 to AUS$ 825,000.[112] Together these initiatives are likely to lessen the chance for long-range hot pursuits such as those with the *Viarsa 1* and the *South Tomi*. In view of the enormous costs of this surveillance capability, it is nevertheless expected that initiatives on cooperative enforcement with other Southern Ocean States, including forms of multilateral hot pursuit, will remain a high priority.[113]

The Rights and Duties of the Pursued Vessel and its Flag State

Whereas the LOS Convention explicitly or implicitly lays down basic rights and obligations for pursued vessels and their flag states,[114] Article 111 does not contain specific rights and obligations for them in relation to hot pursuit. However, as paragraph (8) stipulates that ships subjected to unjustified hot pursuit "shall be compensated for any loss or damage that may have been thereby sustained", this implies that the ship has a right to such compensation.[115] To obtain such compensation may nevertheless take considerable time and effort. As the LOS Convention does not give natural or juridical persons the option to institute proceedings against states,[116] local remedies must be exhausted before flag states can begin inter-state proceedings on behalf of their nationals.[117] However, states are not obliged to exercise diplomatic protection on behalf of their nationals and there may be various reasons for them not to begin such proceedings.

An illustrative example in this context is the apprehension of the Russian Federation's fishing vessel *Volga* by the Royal Australian Navy frigate *HMAS Canberra* on 7 February 2002 for suspicion of illegal fishing in the EEZ of Heard Island and McDonald Islands.[118] In case it is eventually established that the signal to stop pursuant to Article 111(4) of the LOS Convention was only given when the *Volga* was already on the high seas, this will make the ensuing

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Management Act with new paragraphs (c), (d) and (e). It will be interesting to see whether the ITLOS regards these costs as "reasonable" in prompt-release procedures. See below in main text on the *Volga* case and D.R. Rothwell and T. Stephens, "Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests", 53 *International and Comparative Law Quarterly* 155–171 (2004).

112 The 2003 Bill, note 3, will replace subsection (2) of Section 100A of the 1991 Fisheries Management Act with new subsections (2) and (2A).

113 See note 88.

114 E.g. in Arts. 17, 21(4), 58(1), 58(3), 62(4) and 116.

115 See also the discussion on compensation above.

116 Cf. Art. 291(1). See the exception in Art. 187 based on Art. 291(2).

117 Art. 295. The prompt release procedure under Art. 292 is a *lex specialis* to this rule. See Art. 292(3).

118 Information based on AFFA Media Releases No. AFFA02/8MJ of 12 February 2002 and AFFA02/211MJ of 19 February 2002; the Judgment in the *Volga* case, note 17 above, and the Memorial of the Russian Federation of November 2002, and the Statement in Response of Australia of 7 December 2002, in the *Volga* case (both available at www.itlos.org).

hot pursuit and the apprehension on the high seas probably unjustified.[119] On 2 December 2002 the owners of the *Volga* were still challenging the legality of the apprehension and the forfeiture of the vessel when the Russian Federation commenced a procedure against Australia before the International Tribunal for the Law of the Sea (ITLOS) to secure the prompt release of the vessel. In its Judgment of 23 December 2002, the ITLOS held that Australia had failed to comply with relevant provisions of the LOS Convention and ordered Australia to release the *Volga* on the posting of a bond determined by the ITLOS.[120] Curiously, no bond was yet lodged at the time of writing and the *Volga* was therefore still in Fremantle. Also, the proceedings instituted by the owners of the *Volga* before the Federal Court of Australia had not yet been finalised.[121] Whereas the Russian Federation may bring a case against Australia under the LOS Convention to determine the legality of the hot pursuit, this seems unlikely to happen.[122]

In relation to the apprehension of the *Viarsa 1*, the LOS Convention would in principle allow Uruguay to bring a prompt release procedure against Australia pursuant to Article 73(2) and a case on the merits against Australia and/or South Africa and/or the United Kingdom in relation to the legality of the multilateral hot pursuit pursuant to *inter alia* Articles 87(1)(a), 92(1) and/or 111.[123] Whether or not Uruguay decides to go ahead with any or both of these procedures depends on a wide range of factual, political or other considerations. As the special nature and limited purpose of the prompt release procedure make it a relatively "technical" procedure in comparison with a case on the merits, it may raise fewer considerations of a political nature. Uruguay and the Russian Federation may have similar considerations in this respect. Most pertinently, in view of their status as Consultative Parties under the

[119] See pp. 4 and 9–10 of the Memorial of the Russian Federation, note 110 above, and para. 33 of the Judgment, note 17 above.

[120] Judgment, note 17 above, at para. 95.

[121] See *Olbers Co Ltd* v *Commonwealth of Australia* ([2002] FCA 1269 (16 October 2002); (*No. 2*): [2003] FCA 177 (11 March 2003); (*No. 3*): [2003] FCA 651 (26 June 2003); texts available at www.austlii.edu.au).

[122] The Statement in Response of Australia, note 110 above, p. 10, para. (5), observes that the ITLOS "has to satisfy itself as to whether the detention of the vessel occurred under Article 73 or whether in substance the application raises separate issues under Article 111". This seems to suggest that the ITLOS could have rejected the application on the ground that Art. 111 is not among the few provisions in the LOS Convention that provide for prompt release (Arts. 73(2), 226(1)(b), 226(1)(c) and 220(7)). However, the circumstances of the arrest of the *Volga* are such that Art. 73(2) provides a sufficient *prima facie* basis for jurisdiction. Para. 58 of the Judgment observes that this is conceded by Australia (see also the Statement in Response of Australia, p. 10, para. (7)). At the 22nd Annual Meeting of CCAMLR (2003), the Russian Federation "advised that *Volga* will be deregistered by Russia immediately upon the completion of court hearings in Australia" (Doc. CCAMLR-XXII, note 19 above, at para. 8.32).

[123] All these states are parties to the LOS Convention. See also Arts. 31–32 of Annex VII to the LOS Convention on the right to intervene in relation to proceedings before the ITLOS.

Antarctic Treaty and their membership of the CCAMLR Commission, bringing a case on the merits based on what are probably widely regarded as "legal technicalities", may be perceived by the other states involved in the Antarctic Treaty and the CCAMLR Convention as a lack of commitment to the objectives of these instruments.

A final issue that is addressed here relates to information suggesting that the Uruguayan authorities ordered the *Viarsa 1* to proceed to one of its own ports and requested the authorities of Australia, South Africa and the United Kingdom to discontinue hot pursuit in order to allow Uruguay to deal with the *Viarsa 1* itself. The main consideration here is that neither general international law, the LOS Convention nor the CCAMLR Convention give flag states the right of pre-emption in relation to enforcement action, including adjudication, by coastal states pursuant to their sovereignty or sovereign rights over the conservation and management of marine living resources.[124] A flag state that merely orders its vessels to proceed to one of its ports during the hot pursuit will thereby undermine the pursued vessel's willingness to comply with the orders of the pursuing coastal state. The exact motives for Uruguay's behaviour in this regard are not clear.[125] The fact that the flag state's laws and regulations left it with no other alternative cannot be used as a justification for its failure to comply with obligations under international law.[126]

Perhaps the assertions by Uruguay were in part inspired by the way in which the United Kingdom-flagged *Mila* was handled in 2000. On 10 September 2000, the *Mila* was sighted in the Australian EEZ of Heard Island and McDonald Islands by the Australian observer and the crew on board of the licensed Australian fishing vessel *Austral Leader*. Upon the *Austral Leader*'s return to Australia, statements and other evidence were forwarded to the United Kingdom. The *Mila* was immediately ordered back to Stanley. Eventually the captain and owners of the vessel were prosecuted under United Kingdom law for fishing in the CCAMLR Convention Area without an authorisation. The owners and captain pleaded guilty and were convicted and a monetary penalty was imposed. The 90 tonnes of toothfish on board of the Mila were forfeited and sold. Part of the proceeds (AUD$ 284,789.78) were deposited by the United Kingdom in a CCAMLR fund whilst the extra costs incurred by the *Austral Leader* were fully reimbursed.[127]

[124] Art. 228 of the LOS Convention allows flag state pre-emption in relation to vessel-source pollution. See also Art. 21(6) and (12) of the 1995 Fish Stocks Agreement.

[125] To what extent the presence of a Uruguayan government-employed scientific observer on board of the *Viarsa 1* has played a role is also unclear (see the MercoPress Media Release on the Falklands-Malvinas of 14 September 2003 at www.falkland-malvinas.com).

[126] Cf. Art. 32 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (adopted by the ILC in 2001. For text and commentaries see www.un.org/law/ilc).

[127] Based on Doc. CCAMLR-XX, note 7, at p. 136, Doc. CCAMLR XX/MA/??, note 7, at pp. 2–3 and information kindly provided by M. Richardson (United Kingdom Foreign & Commonwealth Office).

It is submitted that it would have been reasonable for Uruguay to argue that it should be treated equally to the United Kingdom if the cases of the *Mila* and the *Viarsa 1* would have been essentially identical. This is clearly not so. The *Austral Leader* was not on governmental service and therefore not authorised to engage in enforcement activities, including hot pursuit, even if it had wanted to do so. The way in which Australia dealt with the *Mila* does therefore not constitute a precedent for a right of flag state pre-emption, whether as between states generally or as between states parties to the CCAMLR Convention.

Conclusions and Observations

The seriousness of the problems posed by IUU fishing to the international community today is well known. In the remote Southern Ocean, where IUU fishing has become a highly organised criminal activity involving significant numbers of vessels fishing simultaneously, coastal states are faced with considerable shortcomings in their enforcement capability. Under such circumstances, multilateral hot pursuit, meaning hot pursuit involving pursuing vessels, aircraft or officials with different nationalities, can contribute to combating IUU fishing.

Multilateral hot pursuit can have many forms. In the cases of the *Viarsa 1* and the *South Tomi*, the multilateral dimension ensued from the fact that while the pursuits were commenced by an Australian vessel, boarding and arrest was clearly enabled by the involvement of vessels from South Africa and the United Kingdom. It is submitted that even though this form of multilateral hot pursuit is not contemplated in Article 111 of the LOS Convention, it is not inconsistent therewith as long as its main substantive and procedural conditions are met. Most importantly, hot pursuit needs to be continuous and cannot amount to an interception, which could lead to abuse and to the wrong vessel being pursued. In the hot pursuits of the *Viarsa 1* and the *South Tomi*, the requirement of continuity was fully satisfied, as the coastal state's authorised vessel that initiated the pursuit remained closely involved until the end. Moreover, the coastal state ensured that one or more of its officials could formally apprehend the vessel.

It is submitted that the pursuits of the *Viarsa 1* and the *South Tomi* are not fundamentally different from 'traditional' hot pursuit under Article 111 of the LOS Convention. The various so-called Shiprider Agreements, both in the sphere of fisheries and drug-trafficking, incorporate forms of multilateral hot pursuit that differ more significantly from traditional hot pursuit. In view of this apparently uncontested state practice, the requirement of continuity under Article 111 would for instance also be satisfied if continuous involvement can be ensured by a vessel or aircraft with a nationality other than that of the coastal State entitled to invoke the right of hot pursuit, provided the coastal State has given its prior authorisation on an *ad hoc* or permanent (treaty) basis

and especially if a government official from the coastal State is on board to formally apprehend or arrest a vessel.

Under these circumstances, multilateral hot pursuit does not erode the freedom of the high seas and leaves the LOS Convention's jurisdictional balance unaffected. Multilateral hot pursuit is also fully consistent with the objectives of the IPOA on IUU Fishing, in particular with its call for a comprehensive and integrated approach and the need to strengthen this by inter-state co-operation. Multilateral hot pursuit can be defined as a multilateral exercise of a coastal State right that involves pursuing vessels, aircraft or officials with different nationalities, that is authorized by the relevant coastal State where necessary and is consistent with the main substantive and procedural conditions in Article 111 of the LOS Convention.

In view of the cost-effectiveness benefits of multilateral hot pursuit, it is likely that it will be more frequently used in regions of the world with geographical and political circumstances conducive thereto. The Southern Ocean may witness a growing network of bilateral agreements on multilateral enforcement, allowing *inter alia* for multilateral hot pursuit which, similar to the Shiprider Agreements against drugs-trafficking in the Caribbean area, may eventually be complemented or replaced by a regional agreement. Such agreements would indicate a belief that multilateral enforcement, including multilateral hot pursuit, is needed to address abuse of flag State primacy. Eventually, this may lead to sufficient support for more extensive non-flag State enforcement powers than those incorporated in the 1995 Fish Stocks Agreement and to their subsequent usage pursuant to customary or treaty law.

As RFMOs are by now generally accepted as the vehicles for fisheries governance at the regional level, the establishment of bilateral or regional agreements on multilateral enforcement may have implications for both the role, legitimacy and effectiveness of RFMOs and for the development of non-flag State enforcement powers under international law. Care should among other things be taken to ensure that these enforcement agreements do not undermine the effectiveness of RFMOs, for instance by avoiding counterproductive bi-polarization into camps of coastal and flag States or otherwise. These considerations are also relevant in the context of CCAMLR. The CCAMLR System of Inspection only allows for inspection and boarding by non-flag States, but reserves more intrusive enforcement action to flag States.[128] As the sub-Antarctic island coastal States within CCAMLR can rely on the Chairman's Statement[129] for far more extensive enforcement powers than under the System, it would be unreasonable for them to await a fundamental revision of the System. But it is to be hoped that counterproductive bi-polarization can be avoided.

[128] See note 51 above.
[129] See note 14 above.

The hot pursuit of the *Viarsa 1* also illustrates once again that the problem of IUU fishing is not just confined to non-members of RFMOs. The CCAMLR Commission is certainly aware of this. The overarching term in the title of CCAMLR Resolution 19/XXI (2002), "Flags of Non-Compliance", already acknowledges that IUU fishing is also carried out by vessels flying the flag of contracting parties to the CCAMLR Convention.[130] Continued and large-scale non-compliance by contracting parties to the CCAMLR Convention undermines the CCAMLR Commission's credibility, authority and effectiveness. One of the implications is that an increasingly tougher stand towards non-contracting parties will be more difficult to justify. Another serious risk is that a weakened credibility, authority and effectiveness of the CCAMLR Commission will spill over to the ATS. This may eventually trigger a re-opening of the debate on the legitimacy of the ATS. While a better alternative to the ATS is not readily available, a debate like this would cost time and effort that would be better spent if all states were to take responsibility in the CCAMLR Commission now.

Unfortunately, CCAMLR generally lacks the teeth to give contracting parties an incentive to improve their compliance records. Neither the CCAMLR Convention nor existing CCAMLR conservation measures provide for effective corrective mechanisms.[131] Even if such mechanisms were to be adopted, CCAMLR's consensus decision-making[132] would often render such mechanisms ineffective. This was painfully illustrated at the 22nd Annual CCAMLR Meeting (2003), when the Russian Federation blocked consensus to ensure that none of its vessels would appear on CCAMLR's IUU Vessel List.[133] When even this cannot be achieved, it is illusory that CCAMLR will be able to take effective action against those vessels' flag states.[134] Under such circumstances, the co-operative framework of CCAMLR leaves members with little else than expressing their discontent in the reports of Annual CCAMLR Meetings.[135] Beyond the framework of CCAMLR, however, its members may be able to exert pressure on other members in a variety of ways, including within the framework of other RFMOs.

[130] See also Conservation Measures 10–06 (2002) and 10–07 (2002). Although they are virtually identical, one deals with contracting parties and their vessels and the other with non-contracting parties and their vessels.

[131] As allocating fishing opportunities beyond the maritime zones of sub-Antarctic islands is predominantly based on an Olympic fishery (based on a TAC and the closure of the fishery after a race for fish), this would not allow reduced allocations as envisaged by Art. 11(c) of the 1995 Fish Stocks Agreement.

[132] Art. XII(1) of the CCAMLR Convention.

[133] Doc. CCAMLR-XXII, note 19 above, paras. 8.21–8.22 and 8.29–8.59.

[134] Such action is contemplated in vague terms in CCAMLR Conservation Measure 10–06 (2002), para. 17.

[135] See, for instance, the statements in note 124 above, para. 10.19.