

# 'Strength through Cooperation': a 21<sup>st</sup> Century Treaty for Multilateral Maritime Enforcement in the Pacific

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## I. Introduction

On 2 November 2012, the seventeen members of the Pacific Islands Forum Fisheries Agency (FFA)<sup>1</sup> adopted a new treaty providing for cooperation in fisheries surveillance and law enforcement activities. The Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region (the Agreement),<sup>2</sup> is clearly underpinned by a common purpose; the creation of a strong but flexible mechanism that actively encourages cooperation between the Parties and maximises the reach and effectiveness of their jurisdiction and assets in the conduct of fisheries surveillance and enforcement. It also reflects a commitment to the use and continuous development of new tools, technologies and laws to combat illegal, unreported and unregulated fishing, and a recognition of the potential benefits of closer cooperation and information-sharing in relation to both fisheries and broader law enforcement activities.

This Agreement is not 'just another fisheries treaty'. As overfishing in a number of the world's oceans makes the rich tuna resources of the Pacific region increasingly attractive to global fishing fleets, this Agreement is a timely mechanism to enhance its members' individual strength through collective cooperation. It is a product of the context and process of its negotiation and adoption; it reflects the high-level political commitment of Pacific Island Leaders to these issues, and the cooperative multilateralism that has been integral to the success of the FFA for more than thirty years. More than that, however, the Agreement introduces a number of modern and innovative concepts intended to provide its Parties with the widest possible range of opportunities for cooperation, consistent with international law and reflecting the practical realities of fisheries enforcement in the Pacific region. Against the backdrop of Pacific fisheries, this

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<sup>1</sup> Australia, Cook Islands, Fiji, the Federated States of Micronesia, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, the Republic of the Marshall Islands, Samoa, Solomon Islands, Tokelau, Tuvalu and Vanuatu.

<sup>2</sup> Adopted and opened for signature in Honiara, Solomon Islands on 2 November 2012 <[http://www.ffa.int/niue\\_treaty](http://www.ffa.int/niue_treaty)>.



article will provide an overview of the Agreement and some of its more unique features, allowing consideration of whether these are 'bespoke' to the FFA and the Pacific region, or whether they might provide a template for use in other contexts.

## II. Painting the picture: policy, law and politics

The Agreement is inherently the product of the Pacific island countries that developed it; it reflects the practical realities of the policy, law and politics that shape Pacific fisheries, and addresses the particular needs of the countries by and for whom it was designed.

### (a) The policy context: Pacific fisheries

The factual backdrop to this issue is well known, but it is worth canvassing a few key issues for context. The western and central Pacific region is the world's largest and most valuable tuna fishery: it covers 30 million km<sup>2</sup> of ocean and produces half of the global tuna catch (largely in the exclusive economic zones of the coastal states).<sup>3</sup> The coastal states are predominantly small, developing Pacific island countries, for which the fishery resources are of vital significance to ensure sustainable development and economic security.<sup>4</sup> However, these resources are also eagerly sought after by distant water fishing nations, which come from around the world to fish for tuna and other highly migratory species in the rich fishing grounds of the western and central Pacific. Under these circumstances, effective domestic and (given the highly migratory nature of these species, which move through numerous areas of national jurisdiction and high seas) regional regulation is essential to ensure the long-term sustainability of the fishery and the successful development of domestic fishing industries. But with enormous maritime zones to police and only limited assets available, the Pacific island countries struggle to undertake the surveillance and enforcement activities necessary to effectively protect these resources.

Fisheries enforcement is an inherently difficult activity, due in no small part to the jurisdictional gaps and overlaps that exist in the law of the sea. In the Exclusive Economic Zone, there is the potential for conflict between the right of foreign vessels to navigate freely and the coastal state's right to regulate fishing activities, while on the high seas it is necessary to appropriately balance the duty to cooperate in the conservation and management of fishery resources with the freedoms of

<sup>3</sup> See: 'Fishery Status Reports 2011', *Fishery Status Reports* (17<sup>th</sup> ed, 2012) Canberra, Australian Government Department of Agriculture, Fisheries and Forestry, 304: <[http://www.daff.gov.au/abares/publications\\_remote\\_content/publication\\_series/fishery\\_status\\_report](http://www.daff.gov.au/abares/publications_remote_content/publication_series/fishery_status_report)>, and 'Review of the state of world marine fishery resources', *FAO Fisheries and Aquaculture Technical Paper 569* (2011) Rome, Food and Agriculture Organization, 163.

<sup>4</sup> See, *inter alia*: Gillett, McCoy, Rodwell and Tamate, *Tuna. A Key Economic Resource in the Pacific Island Countries*. A Report Prepared for the Asian Development Bank and the Forum Fisheries Agency (2001) Honiara; *Valuing Pacific Fish: A Framework for Fisheries-Related Development Assistance in the Pacific*, Australian Government (AusAID), November 2007; Gillet, *Fisheries in the Economies of Pacific Island Countries and Territories*, Asian Development Bank, 2009.



fishing and navigation, and the primacy of flag state jurisdiction.<sup>5</sup> In addition to these legal difficulties, for developing countries, particularly those with such vast maritime zones as the Pacific islands, 'the large area of ocean space relative to the land area, the migratory nature of fleets and fisheries resources, lack of financial and technical resources and skilled manpower compound the problem' of fisheries enforcement.<sup>6</sup>

It is not surprising, then, that cooperation on fisheries issues has been a key focus in this region since the very first meeting of the Pacific Islands Forum (then the South Pacific Forum) in 1971.<sup>7</sup> In 1977, noting the need to establish 200 nautical mile Exclusive Economic Zones, harmonise fisheries policies in the region, and adopt a coordinated approach in relation to distant water fishing countries, Pacific Island leaders adopted the Declaration on the Law of the Sea and the Regional Fisheries Agency.<sup>8</sup> The Declaration recognised the common interests of the Pacific Island Countries with respect to fisheries, and the need for a regional fisheries agency to advise on and coordinate policies and activities (including with respect to surveillance and enforcement) in order to secure the maximum benefits from these resources.

The mandate provided by this Declaration was implemented and realised very quickly, with the adoption and entry into force of the South Pacific Forum Fisheries Agency Convention<sup>9</sup> (the FFA Convention) in 1979. The FFA Convention established the Forum Fisheries Agency, which consists of the Forum Fisheries Committee (comprising representatives of all the member countries) to provide policy and administrative guidance and direction, and a permanent Secretariat (located in Honiara, Solomon Islands) to provide advice and assistance to the

<sup>5</sup> For further discussion on the difficulties of, and limits on, exercising jurisdiction in fisheries enforcement activities see, *inter alia*: Anne Bardin, 'Coastal States' Jurisdiction Over Foreign Vessels', *14 Pace International Law Review* 27 (2002); Rachel Baird, 'Coastal State Fisheries Management: A Review Of Australian Enforcement Action In The Heard And McDonald Islands Australian Fishing Zone' (2004) 9(1) *Deakin Law Review* 91; Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea*, 2007, Martinus Nijhoff Publishers, particularly pp 62–69; and Rosemary Rayfuse, 'The Anthropocene, Autopoiesis and the Disingenuousness of the Genuine Link: Addressing Enforcement Gaps in the Legal Regime for Areas Beyond National Jurisdiction' (March 1, 2009), UNSW Law Research Paper No. 2009–2: <<http://ssrn.com/abstract=1412005>>.

<sup>6</sup> Transform Aqorau, 'Illegal, Unreported and Unregulated Fishing: Considerations for Developing Countries', *Report prepared for the Expert Consultation on Illegal, Unreported and Unregulated Fishing* organized by the Government of Australia in cooperation with FAO, Sydney, Australia, 15–19 May 2000, para 6: <<http://www.fao.org/docrep/005/y3274e/y3274e0k.htm>>.

<sup>7</sup> Joint Final Communiqué of the South Pacific Forum held in Wellington, New Zealand, 5–7 August 1971, 3: <<http://www.forumsec.org>>.

<sup>8</sup> Annexed to the Communiqué of the Eighth South Pacific Forum held in Port Moresby, Papua New Guinea, 29–31 August 1977: <<http://www.forumsec.org>>.

<sup>9</sup> [1979] ATS 16, adopted in Honiara, Solomon Islands on 10 July 1979, entered into force generally on 9 August 1979. Membership of the Agency is open to all members of the Pacific Islands Forum, and to other States and Territories in the region on the recommendation of the Forum Fisheries Committee, and with the approval of the Forum.



members. The FFA has been extremely successful in fulfilling the task assigned it, and has played a key role both in advising members on domestic fisheries issues, and in the development of a number of regional fisheries arrangements, including in particular the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Central and Western Pacific Ocean (WCPFC Convention).<sup>10</sup> This Convention establishes the principal regional fisheries management organisation in the region – the Western and Central Pacific Fisheries Commission (the WCPFC) – to enable multilateral cooperation in the management of the lucrative tuna fishery.

### **(b) The legal framework: UNCLOS and the Niue Treaty**

With the adoption of the United Nations Convention on the Law of the Sea<sup>11</sup> (the UNCLOS) in 1982, and the formal establishment of 200 nautical mile Exclusive Economic Zones, the Pacific Island Countries gained sovereign rights over the valuable fishery resources in an enormous expanse of ocean and, importantly, the necessary jurisdiction to enforce those rights. The legal framework established by the UNCLOS incontrovertibly recognises the right of coastal States to exercise enforcement jurisdiction in relation to the exploitation of living resources in the exclusive economic zone. This is reflected in Article 73(1) of the UNCLOS, which provides that coastal states may take such measures as are necessary to ensure compliance with their laws and regulations for the exploration, exploitation, conservation and management of the living resources in the Exclusive Economic Zone, including boarding, inspection, arrest and judicial proceedings. While the UNCLOS does not specify the extent of the powers that may be exercised in this regard, support for an expansive interpretation can be found in Article 62(4), which provides a lengthy (and non-exhaustive) list of areas that may be regulated and, as a necessary corollary, enforced by coastal states.

From as early as 1982, the FFA members worked to develop and implement a legal framework for the regulation of fishing on a regional basis, in order to maximise their ability to effectively exercise these rights in their Exclusive Economic Zones. Key measures (which continue to form the cornerstone of regional fisheries monitoring, control and surveillance) included the application of regional terms and conditions for foreign vessels wishing to access Pacific Island Countries' Exclusive Economic Zones,<sup>12</sup> a regional register of foreign fishing vessels,<sup>13</sup> and a centralised system for the satellite tracking of foreign fishing

<sup>10</sup> [2004] ATS 15, adopted in Honolulu, United States of America on 5 September 2000, entered into force on 19 June 2004.

<sup>11</sup> [1994] ATS 31, adopted in Montego Bay, Jamaica on 21 December 1982, entered into force 16 November 1994.

<sup>12</sup> The *Minimum Terms and Conditions of Fisheries Access* were originally adopted by the South Pacific Forum in 1982 and have been continually revised and updated. They include requirements for vessel identification, catch and position reporting, logsheet reporting, transshipment and observers.

<sup>13</sup> The Regional Register of Foreign Fishing Vessels. This database holds information on vessel owners, operators, masters and the physical characteristics of the vessels.



vessels.<sup>14</sup> However, none of these forms of regulation could address the difficulty of on-water enforcement, which required assets and personnel. Accordingly, at the 20<sup>th</sup> South Pacific Forum meeting in 1989, Pacific Island leaders recognised the urgent need for closer co-operation to protect and preserve fishery and other marine resources, and directed the FFA to investigate the design and development of an integrated program of regional fisheries surveillance.<sup>15</sup> The Forum Fisheries Committee considered that the treaty was a matter of 'utmost' urgency<sup>16</sup> and in April 1992, FFA members adopted the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region<sup>17</sup> (the Niue Treaty).

The objective of the Niue Treaty has been described as promoting 'maximum effectiveness in regional or sub-regional surveillance and enforcement through cooperation between countries on a joint or reciprocal basis'.<sup>18</sup> In order to maximise the potential for cooperation, and the effective use of enforcement assets, Article VI of the Niue Treaty provides for the Parties to establish subsidiary agreements or arrangements, by which they can cooperate in the provision of personnel, vessels and aircraft, and agree to undertake fisheries surveillance and law enforcement activities in each other's waters. It also requires Parties, to the extent permitted by their national laws and regulations, to provide relevant information (including information about the location and movement of foreign fishing vessels, foreign fishing vessel licensing, and fisheries surveillance and enforcement activities) to the FFA or any other Party directly.<sup>19</sup>

However, although the Niue Treaty established a framework for cooperation, and facilitated the sharing of information between the Parties, it did not actually provide a mechanism for Parties to agree on carrying out operations, or include legally binding requirements for the exchange of specific information. Instead, it suggested that Parties could establish 'subsidiary agreements or arrangements', setting out the details and agreement necessary to cooperate in the provision of personnel, vessels and aircraft and undertake fisheries surveillance and law enforcement in each other's waters. And although all 17 of the FFA members are Parties to the Niue Treaty, which has been in force for 20 years, only a very limited number of 'subsidiary agreements' have been negotiated – and many of those

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14 The FFA Vessel Monitoring System. This is a satellite-based system accessible to all FFA members that allows them to track and monitor the position, speed and direction of registered fishing vessels across the region.

15 Forum Communiqué, 20<sup>th</sup> Pacific Islands Forum, Tarawa, Kiribati, 10–11 July 1989 at [12]: <<http://www.forumsec.org>>.

16 F Amoa, 'The Niue Treaty and its Operational and Legal Requirements' (prepared for the Micronesian Maritime Surveillance Cooperation Conference, Koror, Palau, 31 March–3 April 1999): <[http://www.spc.int/DigitalLibrary/Doc/FAME/FFA/Reports/FFA\\_1999\\_004.pdf](http://www.spc.int/DigitalLibrary/Doc/FAME/FFA/Reports/FFA_1999_004.pdf)>.

17 [1993] ATS 31, adopted in Honiara, Solomon Islands on 21 December 1992, entered into force generally on 20 May 1993.

18 M Lodge, 'New Approaches to Fisheries Enforcement', *Review of European Community and International Environmental Law* vol 2(3), 277–84 at 281.

19 Article V.



which have were time bound and have lapsed.<sup>20</sup> Accordingly, the cooperative enforcement has not really materialised to the extent that was envisaged by the members during the negotiation of the Niue Treaty, and it is generally considered to have been under-utilised.<sup>21</sup> In addition, since not all Parties have put in place the necessary arrangements or given permission for information sharing, the benefits of 'shared intelligence' have not been realised to the extent expected.

In the twenty years since the adoption of the Niue Treaty, there have been numerous other additions to the legal landscape governing international fisheries enforcement. These include, notably:

- (i) the 1992 Agreement to Promote Compliance with International Conservation and Management Measures by Vessels Fishing on the High Seas<sup>22</sup> (the Compliance Agreement), which relates principally to the exercise of effective flag State responsibility over fishing vessels and the sharing of information with respect to those vessels through the establishment of a record of fishing vessels
- (ii) the 1995 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<sup>23</sup> (the Fish Stocks Agreement), which not only supplements the fisheries management provisions of UNCLOS with a more detailed set of rights and obligations for the conservation and management of straddling and highly migratory fish stocks, but provides a range of measures designed to improve monitoring, control and surveillance of high seas fisheries (including with respect to high seas boarding and inspection, and port State measures)<sup>24</sup>
- (iii) the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (the IPOA-IUU), which was

<sup>20</sup> Current or previous subsidiary agreements or arrangements include: Agreement between the Government of Tonga and the Government of Tuvalu on Cooperation in Fisheries Surveillance and Law Enforcement, signed 7 May 1993; Agreement among the Governments of the Federated States of Micronesia, the Republic of the Marshall Islands and the Republic of Palau on Cooperation in Fisheries Surveillance and Law Enforcement, signed 7 February 2002; Agreement between the Government of the Cook Islands and the Government of Niue on Cooperation in Fisheries Surveillance and Law Enforcement, signed 17 April 2008; Agreement between the Governments of the Cook Islands and the Independent State of Samoa on Cooperation in Fisheries Surveillance and Law Enforcement, signed 27 June 2008, and Agreement between the Governments of the Republic of Nauru and the Federated States of Micronesia on Cooperation in Fisheries Surveillance and Law Enforcement, signed 12 August 2010 (copies on file with author).

<sup>21</sup> 'Recent trends in monitoring, control and surveillance systems for capture fisheries', *FAO Fisheries Technical Paper 415*, Rome, Food and Agriculture Organization, 2002, 104.

<sup>22</sup> [2004] ATS 26, adopted in Rome, Italy on 24 December 1993, entered into force on 24 April 2003.

<sup>23</sup> [2001] ATS 8, adopted in New York, United States of America on 4 December 1995, entered into force on 11 December 2001.

<sup>24</sup> See, in particular, Articles 18–24.



negotiated under the auspices of the voluntary 1995 FAO Code of Conduct for Responsible Fisheries and which (while also voluntary in nature), establishes the concept of 'illegal, unreported and unregulated fishing' (IUU fishing)<sup>25</sup> and endorses the idea of combating IUU fishing through 'all available jurisdiction in accordance with international law' (including that of flag States, port States, coastal States, market States and States of nationality),<sup>26</sup> and

- (iv) the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (the Port State Measures Agreement)<sup>27</sup> which (while not yet in force) recognizes the potential for effectively using port State jurisdiction to combat IUU fishing, including through denying entry to port and use of port services for IUU fishing vessels, and blocking the landing and entry of IUU-caught fish into international markets.<sup>28</sup>

While all of these instruments provide specific measures intended to enhance cooperation in fisheries enforcement and the exchange of information, none of them provide for the particular types of cooperation envisaged in the Niue Treaty. In part, this is a necessary corollary of their nature as global instruments, designed to provide globally applicable minimum rules or standards, rather than to address the specific issues faced by particular countries (like those of the Pacific islands). In addition, the acceptance and implementation of these global agreements and instruments has been varied. For example while the Fish Stocks Agreement has 80 Parties,<sup>29</sup> the Compliance Agreement (despite being concluded earlier) only has 39 Parties.<sup>30</sup> Although the Port State Measures Agreement was not concluded until 2009, to date only 8 instruments of ratification, approval or acceptance have been deposited with the Depositary (and the Agreement requires 25 such instruments in order to enter into force which, in the case of the Compliance Agreement, took ten years to be achieved).<sup>31</sup> In this regard, the IPOA-IUU has been surprisingly successful: despite its voluntary nature, a number of States have developed and implemented National Plans of Action to combat IUU fishing as called for in the IPOA, and a number of Regional Plans of Action have also been developed.<sup>32</sup> However, while these instruments have contributed to the general development of national and international practice, and to broadening the acceptance of new enforcement concepts such as high seas boarding and inspection and the use of port state jurisdiction, they have not obviated the need for the forms of cooperation

<sup>25</sup> See para 3. The definition of IUU fishing set out in this paragraph is the only one that has so far been elaborated in an international instrument, and is generally referred to in other international instruments.

<sup>26</sup> See para 9.3.

<sup>27</sup> Adopted in Rome, Italy on 22 November 2009 (not yet in force).

<sup>28</sup> See, in particular, Articles 9 and 11.

<sup>29</sup> As at 7 August 2013: <[http://www.un.org/depts/los/reference\\_files/status\\_2010.pdf](http://www.un.org/depts/los/reference_files/status_2010.pdf)>.

<sup>30</sup> As at 7 September 2013: <<http://www.fao.org/legal/treaties/en/>>.

<sup>31</sup> As at 7 September 2013: <<http://www.fao.org/legal/treaties/en/>>.

<sup>32</sup> See: <<http://www.fao.org/fishery/ipoa-iuu/npoa/en>>. Although there is a 'model plan for a Pacific Island Country', to date no Pacific Island Country appears to have submitted a national plan for publication on the FAO website.



envisaged by the Niue Treaty to address the particular requirements of the Pacific Island Countries.

### (c) The political impetus: 'Our Fish; Our Future'

In October 2007, the Leaders of the Pacific Islands Forum adopted the Vava'u Declaration on Pacific Fisheries Resources *Our Fish; Our Future*,<sup>33</sup> in which Leaders reaffirmed the importance of fisheries to the economies of all Pacific Forum countries, and committed to action on a number of key issues, including:

Supporting and endorsing efforts by the Forum Fisheries Agency, supported by the Forum Secretariat, to take forward as a matter of urgency work to examine the potential for new multilateral Pacific regional arrangements patterned on the Niue Treaty Subsidiary Agreement model for exchange of fisheries law enforcement data, cross-vesting of enforcement powers, and use of fisheries data for other law enforcement activities.

Forum Leaders reiterated this commitment in the *Pacific Plan* in 2008,<sup>34</sup> and again in the Communiqué issued by the 40<sup>th</sup> Forum Leaders Meeting in 2009. Noting the 'hiatus' in implementing this aspect of the Vava'u Declaration, Leaders specifically directed that Australia host a meeting of Ministers responsible for both fisheries and law enforcement/justice in 2010 and directed that, at that meeting:

agreement is to be reached both on the form of new legal arrangements to be negotiated and on a roadmap for the negotiation process, which should conclude no later than the end of 2012. Leaders further instructed that Ministers report back to Leaders on progress at the 2010 Leaders meeting, in the expectation that, at that time, Leaders will be able to endorse proposals put forward by Ministers on the form of arrangements to be negotiated and the details of what areas are to be covered by those arrangements, thereby allowing formal negotiations on the details to begin.<sup>35</sup>

With the direction and timetable clearly prescribed by Leaders, the Ministers responsible for fisheries and law enforcement/justice met in Canberra in July 2010, and agreed that officials should negotiate a 'multilateral Niue Treaty Subsidiary Agreement', to strengthen fisheries management in the region and provide a robust legal framework for more integrated, cost-effective and efficient maritime surveillance.<sup>36</sup> Ministers directed that the work be undertaken by a Drafting Group under the auspices of the Parties to the Niue Treaty and that a draft text be completed by the end of 2012 for consideration and appropriate endorsement by ministers,<sup>37</sup> giving officials notice that they wanted this done, and done quickly. In

<sup>33</sup> Annex B to the Communiqué of the 38<sup>th</sup> Pacific Islands Forum meeting, Vava'u, Tonga, 16–17 October 2007: <<http://www.forumsec.org/pages.cfm/documents/forum-communications/>>.

<sup>34</sup> Annex A to the Communiqué of the 39<sup>th</sup> Pacific Islands Forum meeting, Alofi, Niue, 19–20 August 2009: <<http://www.forumsec.org/pages.cfm/documents/forum-communications/>>, pp 10–11.

<sup>35</sup> 40<sup>th</sup> Pacific Islands Forum, Cairns, Australia, 5–6 August 2009 at [18] – [19]: <<http://www.forumsec.org/pages.cfm/documents/forum-communications/>>.

<sup>36</sup> 'Outcome Statement', Joint Pacific Fisheries and Law Enforcement/Justice Ministers Meeting, 12–23 July 2010, Canberra, [10] (copy on file with author).

<sup>37</sup> Ibid [11] and [12].



addition, Australia announced that it had allocated AUD \$2.4 million over three years to support the negotiation of the Agreement.<sup>38</sup>

Accordingly, the FFA convened the first meeting of the Niue Treaty Drafting Group in Honiara, Solomon Islands in August 2010. Consistent with Ministers' directions (and eight Drafting Group meetings and one table-top exercise later), the draft text produced by the Drafting Group was adopted by the Parties to the Niue Treaty on 2 November 2012, and the Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region was opened for signature.

### **III. Substance of the Agreement**

The Agreement provides a flexible mechanism for cooperation in two key areas: conducting fisheries surveillance and law enforcement activities, and sharing fisheries data and intelligence for both fisheries and broader law enforcement purposes.

First, it establishes a legal framework for the conduct of a wide range of cooperative surveillance and enforcement activities. The underlying premise is the establishment of a comprehensive, self-contained system that will enable the Parties to implement the Agreement and conduct cooperative activities directly, without the need for any further detailed bilateral or multilateral arrangements. In order to give effect to this concept, the Agreement establishes an information management system (the Niue Treaty Information System), which will be maintained by the Administrator (the FFA). Parties will provide the authority and information necessary to engage in cooperative surveillance and enforcement activities to the Administrator, through a range of 'notifications'. This authority and information will be recorded in the Niue Treaty Information System, where the Parties will be able to access it electronically.

Second, the Agreement establishes a minimum standard for the exchange of fisheries data and intelligence, which will be stored and made available to all Parties in a fisheries information management system by the Administrator. It also enables the Parties to share fisheries data and intelligence for broader law enforcement purposes (including with non-fisheries agencies and broader law enforcement organisations) and to receive relevant information from broader law enforcement agencies or organisations.

The Agreement is structured in four Parts, followed by four Annexes. In accordance with usual treaty practice, Parts I and IV address the general treaty law and administrative issues, while Parts II and III contain most of the substantive rights and obligations. The Annexes cover minimum requirements for information exchange (Annex A), the role of the Administrator (Annex B), the notifications to be used in providing information and authority under the Agreement (Annex C),

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<sup>38</sup> Hon Tony Burke MP, Minister for Agriculture, Fisheries and Forestry, 'Outcomes of the Pacific Ministers Meeting on Fisheries and Law Enforcement' (media release), 13 July 2010: <[http://www.maff.gov.au/media\\_office/media\\_releases/Burke-media-releases/2010/june2/outcomes\\_of\\_the\\_pacific\\_ministers\\_meeting\\_on\\_fisheries\\_and\\_law\\_enforcement](http://www.maff.gov.au/media_office/media_releases/Burke-media-releases/2010/june2/outcomes_of_the_pacific_ministers_meeting_on_fisheries_and_law_enforcement)>.



and the flag that is to be flown during the conduct of operations under the Agreement (Annex D).

### **(a) Part I – General provisions**

As is clear from its title and preamble, the Agreement is generally intended to strengthen the implementation of the Niue Treaty. More than this, however, it is designed to be a modern, innovative treaty through which the Parties can actively cooperate to enhance the reach and effectiveness of their resources, utilise current and emerging tools and technologies, and continuously develop and implement national and international law.<sup>39</sup> This is reflected in the general introductory provisions in Part I, which include a number of new ideas and concepts unique to this Agreement.

The central concept of a 'cooperative surveillance and enforcement activity' is defined in a broad and flexible manner, in order to facilitate cooperation in the widest possible range of activities.<sup>40</sup> To ensure clarity about the role and authority of each Party in the conduct of these activities, the Agreement also provides definitions for 'Assisting Party' and 'Requesting Party', as well as the term 'cross-vesting'.<sup>41</sup> Although Leaders directed that the Agreement provide for the 'cross-vesting' of enforcement powers,<sup>42</sup> this is not a commonly used term with an established meaning in international law.<sup>43</sup> In this Agreement, however, it is used to describe personnel from an Assisting Party being appointed under the national law of a Requesting Party as a person authorised to exercise fisheries surveillance and law enforcement functions on behalf of the Requesting Party. Since information exchange is also central to the Agreement, separate terms have been coined to describe the two specific categories of information that will be provided or exchanged under the Agreement. All the authority and information necessary to conduct cooperative surveillance and enforcement activities under Part II will be provided through 'notifications',<sup>44</sup> as distinct from the raw or analysed data relating to fisheries provided under Part III of the Agreement, which is captured by the term 'fisheries data and intelligence'.<sup>45</sup>

The objective and application of the Agreement are broad and policy-oriented, reflecting the regional and operational context in which it was negotiated, and the shared interests of the FFA members in designing a legal framework that will achieve practical outcomes. The objective is both ambitious and purposive: to enhance active participation in cooperative surveillance and enforcement activities, with the ultimate purpose of continuously improving fisheries management and

<sup>39</sup> See preambular paras 4–6.

<sup>40</sup> Article 1(c).

<sup>41</sup> Article 1(a), (o) and (d), respectively.

<sup>42</sup> See the Vava'u Declaration, above n 19.

<sup>43</sup> The term 'cross-vesting' is most commonly used in domestic law with respect to the jurisdiction of courts. For example, the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) (together with the complementary State legislation) provides for State courts to be vested with federal jurisdiction and for federal courts to be vested with State jurisdiction.

<sup>44</sup> Article 1(l).

<sup>45</sup> Article 1(e).



development, ensuring sustainable development of the region's fishery resources, and maximizing the social and economic benefits.<sup>46</sup> To achieve this, the Agreement can be applied as widely as its Parties desire; for such cooperative surveillance and enforcement activities as the Parties decide to conduct, and for the provision of such information and fisheries data and intelligence as the Parties decide to share.<sup>47</sup> It is not geographically limited; cooperative surveillance and enforcement activities may be conducted both within the waters of a Party,<sup>48</sup> or on the high seas. Nonetheless, should a Party wish to specifically exclude the possibility of such activities taking place in certain of its maritime zones or defined areas, it can elect not to apply the Agreement with respect to those zones or areas by notification to the Administrator.<sup>49</sup>

Finally, Part I also establishes the basic mechanisms necessary for the operation of the Agreement: the National Authority, the Administrator, and the Niue Treaty Information System. The concepts of a 'national authority' and an Administrator are not unprecedented. However, in this Agreement these roles have been specifically designed in order to establish a 'self-contained' framework within which the Parties can cooperate without the need to enter into further legal arrangements. Accordingly, in addition to the usual roles performed by a central authority as a central contact for administering the Agreement,<sup>50</sup> the National Authority has a number of functions pertaining to legal obligations under the Agreement, including submitting and updating the notifications which will provide the information and authority necessary for the conduct of cooperative surveillance and enforcement activities.<sup>51</sup> Similarly, the role of the Administrator will be crucial to the effective operation and implementation of the Agreement, as reflected in the specific direction that the Administrator play an 'active' role in assisting the Parties to achieve the objective of the Agreement.<sup>52</sup> In particular, the Administrator will be responsible for establishing and maintaining the Niue Treaty Information System, in which the authority and information provided through notifications will be recorded and made available as the basis for the conduct of cooperative surveillance and enforcement activities.<sup>53</sup>

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46 Article 2.

47 Article 3(1).

48 The term 'waters of a Party' is defined in Article 1(p) to mean the Exclusive Economic Zone, territorial sea, archipelagic waters and internal waters.

49 Article 3(2). This provision could be used, eg, to exclude areas of overlapping or joint jurisdiction, or areas where the relevant coastal states already have alternative arrangements in place for surveillance and enforcement (such as the Torres Strait Protected Zone).

50 See the list in Article 5(4).

51 See the list of functions in Article 5(3).

52 Article 6(2).

53 See the further discussion on the 'self-contained' nature of the system and the operation of the Niue Treaty Information System in Part IV(a) below.



## (b) Part II — Cooperation in conducting cooperative surveillance and law enforcement activities

Part II establishes the framework for Parties to conduct cooperative surveillance and enforcement activities under the Agreement, including the means for requesting and providing assistance and agreeing on the parameters for the conduct of activities. Since a 'cooperative surveillance and enforcement activity' is defined as an activity undertaken 'pursuant to Part II of this Agreement', the possibilities for cooperation are really limited only by the needs and imagination of the Parties (and consistency with domestic and international law). Accordingly, the principles and procedures set out in Article 8 to govern cooperative surveillance and enforcement activities have to be flexible enough to apply to the entire spectrum of potential activities, ranging from on-water enforcement operations involving patrol boats, officers and aircraft, to in-port inspections or transshipment monitoring, provision of mutual legal assistance, and investigation or prosecution of a fisheries offence. The overriding requirements are that all cooperative surveillance and enforcement activities must be: consistent with the provisions of the Agreement itself; consistent with any applicable laws, policies or procedures notified or agreed by the relevant Parties; and based on the consent of each Party to the activity.<sup>54</sup>

In practice, each Party will provide information through an 'operational requirements notification'<sup>55</sup> about:

- (i) the applicable laws, policies and procedures for the conduct of cooperative surveillance and enforcement activities in their waters, or using their resources (including operational procedures, use of force procedures, and policies for cost recovery and sharing of fines); and
- (ii) the assistance that the Party may be willing to make available for cooperative surveillance and enforcement activities (such as assets, personnel, particular expertise or other assistance).

This information will be provided on a standing basis (and updated as necessary),<sup>56</sup> and stored in the Niue Treaty Information System, so that Parties can access it (including on a real-time basis) to plan and conduct cooperative surveillance and enforcement activities.

Having accessed the information in the Niue Treaty Information System to undertake their planning, Parties will record their consent to a cooperative surveillance and enforcement activity in an 'activity notification'.<sup>57</sup> This must include any particular conditions on the conduct of the activity and be deposited with the Administrator in advance of its commencement. Notably, consent to a cooperative surveillance and enforcement activity can be provided on a standing basis (such as on-going agreement to cooperate in port inspections or the routine inclusion of cross-vested officers on all maritime surveillance operations), for a specific period of time (such as six months or two years from the date of

<sup>54</sup> Article 8(1).

<sup>55</sup> Article 8(2) and Annex C(1).

<sup>56</sup> Article 3(3)(a) requires the National Authority to submit *and update* notifications in a timely manner [emphasis added].

<sup>57</sup> Article 8(3) and Annex C(3).



notification), or for a specific activity (such as one particular maritime surveillance operation or port inspection).<sup>58</sup>

There are also specific requirements for the actual *conduct* of cooperative surveillance and enforcement activities, relating to authority, identification, use of force and hot pursuit. Prior to engaging in a cooperative surveillance and enforcement activity, Parties must ensure that all personnel and assets are appropriately authorised, and confirm this through notifications.<sup>59</sup> The Assisting Party must ensure that personnel participating in the activity are appropriately authorised under its national law and inform the Administrator through an 'authorised resources notification',<sup>60</sup> and the Requesting Party must ensure that they are cross-vested with relevant powers under its national law and inform the Administrator through a 'cross-vesting notification'.<sup>61</sup>

Once *authorised*, personnel engaged in cooperative surveillance and enforcement activities must be appropriately *identified*, to ensure compliance with national and international law. In addition to the relatively standard requirement of a national identification card, personnel conducting surveillance and enforcement activities on behalf of another Party must, if requested, produce an extract from the Niue Treaty Information System setting out the extent of their cross-vested authority under the laws of the Receiving Party.<sup>62</sup> This extract would be based on the information provided by the Requesting Party in its cross-vesting notification describing the authority that may be exercised by authorised personnel on its behalf. This concept uses technology to provide maximum flexibility in the conduct of cooperative surveillance and enforcement activities, while ensuring that all authorised personnel are appropriately identifiable. For example, the extract could be printed out from the Niue Treaty Information System in advance of an activity, printed out on board a patrol vessel during the course of an activity, emailed to a patrol vessel or a fishing vessel by the National Authority or the Administrator, or even shown to a vessel master on an electronic device as an electronic document.

There is a clear legal framework for the use of force during cooperative surveillance and enforcement activities under the Agreement:

- (i) force may only be used in the waters of a Requesting Party with that Party's consent
- (ii) any use of force must be consistent with the national laws, policies or procedures agreed in advance,<sup>63</sup> and
- (iii) any use of force must be consistent with international law.<sup>64</sup>

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58 Article 8(4).

59 Article 10(2) and (3).

60 Annex C(6).

61 Annex C(5).

62 Article 11(1)(a).

63 Since the requirements for use of force during a cooperative surveillance and enforcement activity are likely to differ between Parties, Parties must include information about this in the operational requirements notification submitted to the Administrator pursuant to Article 8(2). In addition, use of force must be agreed between the Parties in advance of any cooperative surveillance and enforcement activity using the 'activity notification'.



In addition, Parties must seek to cooperate in the hot pursuit of fishing vessels, to the extent consistent with their own national law and in accordance with international law.<sup>65</sup> The Agreement describes the conditions and requirements for conducting hot pursuit, and addresses the possibility for hot pursuit to be continued into the territorial sea of another Party with the consent of that Party in a way that is clearly designed to maximise the reach and effectiveness of jurisdiction and resources, and to use current and emerging tools and technologies in innovative ways.<sup>66</sup>

As previously noted, the legal framework established by the Agreement is designed to enable the Parties to engage in an incredibly broad range of cooperative activities, extending well beyond the traditionally understood 'at-sea' enforcement activities. However, it specifically addresses two additional areas in which Parties may cooperate: investigation, enforcement and follow-up actions;<sup>67</sup> and in-port activities, including port inspections.<sup>68</sup> The types of cooperation envisaged in relation to investigation and follow-up actions include collecting, managing and using evidence, conducting investigations, and providing mutual legal assistance. Such cooperation may be sought with respect to fisheries offences under national law, violations of conservation and management measures of a Regional Fisheries Management Organisation (RFMO), or any fisheries-related aspects of broader transnational crime investigation and enforcement activities. Notably, the Parties are also required to cooperate, where appropriate, to enable the listing of fishing vessels on the Illegal, Unreported and Unregulated (IUU) vessel lists of RFMOs.<sup>69</sup> This does not require the Parties to *support* the listing of a vessel sought by another Party in all circumstances, but is intended to encourage and facilitate cooperation between the Parties as coastal states.

While the international legal framework for the law of the sea has always given primary jurisdiction over governance and enforcement to the flag state,<sup>70</sup> the difficulties of a system that relies primarily on flag state enforcement have become increasingly apparent.<sup>71</sup> The rights accorded flag states by virtue of exclusive jurisdiction have not always been accompanied by adequate fulfillment by flag states of the corresponding duty to exercise effective control over flagged vessels.<sup>72</sup> Factors such as the use of flags of non-compliance, and the difficulties of undertaking high seas enforcement activities have made it necessary for states to consider alternative methods to combat IUU fishing. In this regard, potentially one of the most effective tools that have been suggested to combat inadequate flag state

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64 Article 12.

65 Article 13(1).

66 Article 13(2), (4) and (5). See further discussion on hot pursuit in Part IV(b) and (c) below.

67 Article 15.

68 Article 16.

69 Article 15(6).

70 UNCLOS Article 92(1).

71 For a helpful overview of this problem see R Rayfuse, 'The Anthropocene, Autopoiesis and the Disingenuousness of the Genuine Link', above n 6.

72 UNCLOS Article 91.



enforcement is that of port state controls – requiring port states to prevent IUU fishing vessels from using their ports to land, transship or process fish, and to deny such vessels access to other port services. Port state jurisdiction is grounded in the generally accepted principle of international law that a state exercises full sovereignty over its ports because they lie wholly within its territory.<sup>73</sup>

Reflecting this growing international recognition that the presence of fishing vessels in port provides significant opportunities for fisheries surveillance and enforcement,<sup>74</sup> the Agreement includes a provision on port inspections. Parties may carry out in-port activities at the request of another Party, or permit personnel from another Party to conduct Monitoring, Control and Surveillance (MCS) activities in their port. This could include monitoring landing or transshipment operations, inspecting a fishing vessel, or taking enforcement action such as seizing catch or holding a vessel in port while an investigation is undertaken. Such port inspections and other port-based MCS activities are yet another tool the Parties can draw upon to maximise the operational reach and effectiveness of the jurisdiction and resources available to them.

The final articles of Part II address the financial issues associated with surveillance and enforcement activities, which are particularly important to Small Island Developing States with limited resources to support costly at-sea operations. The Agreement establishes the rules to be applied in relation to payment terms and cost recovery for the involvement of resources in cooperative surveillance and enforcement activities,<sup>75</sup> as well as the sharing of fines and monies recovered from fisheries offences detected or investigated through cooperation under the Agreement.<sup>76</sup> In both cases, Parties must try resolving these issues through agreement, but there is a default procedure that is to be followed if agreement can not be reached. This is designed to provide as much certainty as possible about the costs that Parties are likely to incur in undertaking a cooperative surveillance and enforcement activity, and minimise the potential for disagreement over these issues.

### **(c) Part III – Cooperation in sharing fisheries data and intelligence**

Part III addresses cooperation in sharing fisheries data and intelligence, giving effect to the direction from Leaders that the Agreement should enhance cooperation in this area.<sup>77</sup> As noted above, ‘fisheries data and intelligence’ is a distinct category of information under the Agreement; it encompasses any data or intelligence relating to fisheries that is provided or made available pursuant to Part III, which

<sup>73</sup> UNCLOS Article 25(2).

<sup>74</sup> Even prior to the conclusion of the Port State Measures Agreement (see above n 2 and accompanying text), specific provisions with respect to port state measures were included in the Compliance Agreement, the Fish Stocks Agreement and the IPOA-IUU. Such measures have also been put in place by a number of regional fisheries management organisations (see, *inter alia*: Indian Ocean Tuna Commission Resolution 10/11; Inter-American Tropical Tuna Commission Resolution C-04-04 and Resolution C-05-07; and the Commission for the Conservation of Antarctic Marine Living Resources CM-10-06 and CM-10-07).

<sup>75</sup> Article 17.

<sup>76</sup> Article 18.

<sup>77</sup> See above nn 33–35.



addresses two distinct types of data sharing: (i) sharing of data for fisheries purposes; and (ii) exchange of data for broader law enforcement purposes.

Although Parties are already required to exchange some data under Article V of the Niue Treaty, and various FFA members exchange data with some or all other members pursuant to existing arrangements, there are a number of gaps and inconsistencies in the current framework. The Agreement addresses this by establishing a comprehensive framework requiring all Parties to exchange a minimum standard of fisheries data and intelligence (listed in Annex A) with respect to foreign fishing vessels, domestic fishing vessels authorised to fish on the high seas, and the activities of natural or legal persons relating to those fishing vessels.<sup>78</sup> All fisheries data and intelligence thus provided will be managed by the Administrator using the information management facility and made available to all Parties for fisheries purposes, in accordance with security standards and data sharing protocols adopted by the Forum Fisheries Committee or such other standards and protocols as the Parties to the Agreement may adopt.

The fisheries data and intelligence listed in Annex A were selected on the basis of their importance to support MCS activities, specifically: vessel license lists; location, activities and movement of fishing vessels (including vessel monitoring system data, observer data, boarding reports, port inspection reports and vessel sighting reports); operational catch and effort data; vessels and persons of interest, and prosecutions, violations and settlements relating to fisheries. Specific requirements are also included with respect to the timing and formats for providing the various types of fisheries data and intelligence. Of interest, Annex A specifies geographic limits so that fisheries data and intelligence need only be provided where it is with respect to, or relevant to, the Party's Exclusive Economic Zone or the high seas in the Western and Central Pacific Ocean. This limit is necessary to ensure that only the fisheries data and intelligence most relevant to the Parties is provided, and that the extent of data and intelligence that must be provided under the Agreement is manageable and not without limit.

In addition, the Agreement establishes a mechanism for Parties to share fisheries data and intelligence with each other for use in broader law enforcement contexts – such as transnational crime or immigration investigations.<sup>79</sup> This gives effect to the mandate from Leaders (which is also reflected in the objective) that the Agreement should provide for the use of fisheries data for other law enforcement activities.<sup>80</sup> Finally, the Administrator may also receive information from broader law enforcement organisations (such as the Pacific Islands Chiefs of Policy, or the Transnational Crime Centre) and share it with the Parties for use in a fisheries context,<sup>81</sup> reflecting the statement by Ministers that information generated through

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78 Article 19.

79 Article 20(1).

80 See the Vava'u Declaration, above n 33.

81 Article 20(4).



law enforcement channels and shared with fisheries agencies could strengthen fisheries protection.<sup>82</sup>

#### (d) Part IV – Final provisions

Part IV includes all the final clauses usually found in a treaty and (as with Part I) includes a number of new ideas designed to suite the unique circumstances of this Agreement, particularly with respect to cooperation with non-Parties, taking decisions by electronic means, and a simplified procedure for amending the Annexes.

Consistent with the idea of enhancing active cooperation, the Parties must seek to cooperate with non-Parties to advance the objective of the Agreement, particularly non-Parties that are surveillance and enforcement partners or coastal states and territories in the region.<sup>83</sup> Key surveillance and enforcement partners are likely to include the United States and France, who regularly participate in cooperative surveillance and enforcement activities with the FFA members.<sup>84</sup> The form and nature of cooperation with non-Parties is not limited, and may occur however the Parties see fit (including on an individual or collective basis). The Administrator may facilitate the sharing of information provided, collected or made available under the Agreement with both non-Parties and inter-governmental organisations, provided that the relevant Parties consent.<sup>85</sup> This would enable information to be shared not only with surveillance and enforcement partners, but potentially with regional law enforcement agencies or other relevant inter-governmental organisations (ranging, for example, from the Pacific Islands Chiefs of Police to the WCPFC).

Although the Agreement provides a mechanism for the Parties to meet,<sup>86</sup> in light of the numerous existing fora in which FFA members already meet

<sup>82</sup> 'Outcome Statement' above n 22, [17]. Ministers also noted that the Pacific Islands Forum Regional Security Committee should 'continue to work on a parallel process to determine how law enforcement agencies best utilize fisheries information and share maritime security information within our region' (at [16]).

<sup>83</sup> Article 21.

<sup>84</sup> For example, both the US and France participated in the regional surveillance and enforcement operation *Kurukuru* in November 2012, including through the provision of two patrol boats, a frigate and two surveillance aircraft by the French Government, and a Coast Guard vessel and two surveillance aircraft by the US Government (see FFA Circular 12/112, 20 November 2012: <[http://www.tongafish.gov.to/documents/Home/press%20release%20FFA/Circular%20Ref%2012\\_112%20Press%20Release%20pdf%20version.pdf](http://www.tongafish.gov.to/documents/Home/press%20release%20FFA/Circular%20Ref%2012_112%20Press%20Release%20pdf%20version.pdf)>). The US also has a number of bilateral 'ship-rider' agreements with Pacific Island Countries, see Cmdr Andrew Norris, 'Bilateral Agreements: They're not just for drugs anymore' in *Proceedings of the Marine Safety & Security Council, the Coast Guard Journal of Safety at Sea*, Summer 2009, pp 70–73: <[www.uscg.mil/proceedings](http://www.uscg.mil/proceedings)>.

<sup>85</sup> Consent must be provided by the Party providing the information, the Party on whose behalf the information was collected and any Party to whose waters the information relates (Article 21(3)).

<sup>86</sup> Article 22.



regularly,<sup>87</sup> the Parties are encouraged to use electronic means as much as possible for the implementation and operation of the Agreement, including through the distribution of circulars by the Administrator, and the taking of decisions by electronic means. To facilitate this, the Agreement establishes a specific method for taking a decision electronically, whereby if no Party has objected to a proposed decision within a thirty-day period, it is deemed to have been adopted.<sup>88</sup> However, if one or more objections are notified during that period, the proposed decision is not deemed to be either accepted or rejected, but will be considered at the next meeting of the Parties. This process has the benefit of enabling simple and efficient electronic agreement if possible, while providing flexibility for a proposed decision to be referred for discussion at a meeting of the Parties if necessary.

Since the Annexes form an integral part of the Agreement, the requirements detailed in the Annexes (such as the fisheries data and intelligence to be provided under Part III, listed in Annex A, and the information and authority to be provided in notifications, listed in Annex C) have the same legally binding status as the text within the Articles of the Agreement.<sup>89</sup> Nonetheless, since they may need to be amended or updated more regularly than other provisions of the Agreement (to reflect changing operational needs or technological developments, and ensure that the Agreement operates as effectively as possible) there is a simplified amendment procedure for the Annexes.<sup>90</sup> Once again, this procedure, which is a combination of electronic decision-making and 'tacit acceptance', is designed to enable simple and efficient electronic agreement if possible, while providing flexibility for the Parties to meet and discuss a proposed amendment if necessary.

Accordingly, amendments to the Annexes may be proposed at any time in writing to the Administrator,<sup>91</sup> and must be adopted by consensus.<sup>92</sup> There is a sixty-day period within which, if any Party notifies an objection to the proposed amendment, it will be deemed to have been rejected. However, if two or more Parties so request in writing, the proposed amendment will neither be considered to be adopted nor rejected, but will be considered at the next meeting of the Parties. In practice, the electronic process is likely to apply principally for simple amendments, while any more complex or technical proposals might require discussion at a meeting of the Parties. For example, rather than simply accepting or rejecting an amendment as proposed, a Party may wish to propose slightly different amendments. This might be most effectively achieved through discussion at a meeting of the Parties, rather than repeated circulation of alternative electronic

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87 Including: the Forum Fisheries Committee (which meets multiple times each year), the meetings of the Parties to the Niue Treaty, and the meetings of the WCPFC (of which there are three each year, including the Commission, the Scientific Committee, and the Technical and Compliance Committee).

88 Article 23.

89 Article 25(1).

90 Article 26.

91 Article 26(1).

92 Article 26(2).



proposals. Once adopted, an amendment to an Annex enters into force sixty days following adoption (without the need for ratification, acceptance or approval).<sup>93</sup>

The Agreement is subject to ratification, approval or acceptance by the signatories,<sup>94</sup> and will enter into force following the fourth ratification, acceptance or approval.<sup>95</sup> However, only states that are Party to the Niue Treaty (or a territory of a state which is Party to the Niue Treaty which has been so authorised by the Government of the state which is internationally responsible for it)<sup>96</sup> may become Party to the Agreement, unless all the Parties to the Agreement otherwise agree.<sup>97</sup>

#### IV. 'Innovative features' of the Agreement

The Agreement has been described as having 'innovative features that reflect and promote key developments in international law in the fight against illegal, unreported and unregulated fishing',<sup>98</sup> and a number of themes emerge from the overview of the Agreement above which give strength to this observation. First, the Agreement establishes a self-contained system, which goes beyond simply describing a legal 'framework' and provides a detailed, prescriptive mechanism that the Parties can use to 'operationalise' the cooperative activities that it envisages. Second, it makes a wide range of flexible and innovative types of cooperation available to the Parties, on an 'opt-in' basis that seeks to actively facilitate cooperation, but does not mandate it. And third, it makes practical use of current and emerging tools and technologies to maximise the effectiveness of the Parties' limited resources and their jurisdiction under international law.

##### (a) A self-contained system for cooperation

The idea of cooperative surveillance and enforcement is not new – it was a key element of the Niue Treaty over twenty years ago. However, providing a legal framework allowing Parties to enter into cooperative activities is not enough; consideration must also be given to how the Parties will actually *implement* the framework and give it operational effect. At the most basic level, this is a question

<sup>93</sup> Article 26(3). In contrast, amendments to the Agreement itself *do* require ratification, acceptance or approval, and do not enter into force until the Administrator has received such instruments from all Parties (see Article 27(3)). However, Article 27(5) provides that the Parties will, to the extent possible, apply the amendment provisionally. This will enable Parties to benefit from amended or updated provisions as soon as possible, while acknowledging that it may take some time for all Parties to finalise the domestic procedures necessary to ratify, approve or accept an amendment to the Agreement.

<sup>94</sup> Article 28(2).

<sup>95</sup> Article 29(1).

<sup>96</sup> This provision applies with respect to Tokelau, which is a non-self-governing territory of New Zealand and does not have an international legal personality separate from that of New Zealand. However, Tokelau participates fully and in its own right in a range of regional organizations including the FFA e: <<http://www.mfat.govt.nz/Countries/Pacific/Tokelau.php>>.

<sup>97</sup> Article 28(1), (3) and (4).

<sup>98</sup> Senator the Hon Bob Carr, Minister for Foreign Affairs, 'Strengthening protection of Pacific fisheries' (joint media release with the Hon Sid Sidebottom MP, Parliamentary Secretary for Agriculture, Fisheries and Forestry), 8 November 2012, <<http://www.psmaff.gov.au/media-releases/2012/november/strengthening-protection-pacific-fisheries>>. Accessed on 25 April 2013.



of how the legal authority required to carry out a cooperative activity will be given and recorded (for example, how one Party will formally authorise another Party to carry out enforcement activities and exercise jurisdiction in its waters or on its behalf). Beyond this, there are a myriad of other issues on which the Parties to a cooperative activity will need to agree, ranging from the procedures for the use of force, and the command and control of assets, to the authority that is exercisable by cross-vested personnel and the procedures that must be followed to carry out a boarding and inspection operation.

In the Niue Treaty, actual cooperation is dependent on the Parties entering into further subsidiary agreements in order to provide the requisite consent and agree on these other issues.<sup>99</sup> This leaves a great deal of uncertainty with respect to a wide range of operational issues including command and control, the extent of authority, the use of force and the conduct of hot pursuit, all of which need to be resolved before any active cooperation can take place. In practice, this level of legal uncertainty is likely to be outside the comfort zone of the fisheries officers usually responsible for organizing cooperative surveillance and enforcement activities, which is reflected in the small number of subsidiary agreements which have been concluded.<sup>100</sup> As a result, the lack of prescription in the Niue Treaty itself has reduced its use and effectiveness, and led to the majority of regional surveillance and enforcement operations being managed outside the Niue Treaty framework.<sup>101</sup> In contrast, this Agreement is intended to establish a comprehensive self-contained system for cooperation in fisheries surveillance and law enforcement, which will enable the Parties to implement this Agreement directly, without the need for any further detailed bilateral or multilateral arrangements.

To do this, the Agreement establishes two key concepts: the system of notifications which Parties will use to provide the authority and information necessary to conduct cooperative surveillance and enforcement activities, and the Niue Treaty Information System in which this information and authority will be stored and made available. These two concepts are designed to ensure that authority and information required under the Agreement is properly given, recorded in a clear and consistent form, stored securely, kept up to date, and made accessible to authorised personnel from each Party.

Notifications serve two key purposes. First, they provide “information” about the resources or other forms of assistance that a Party may be willing to provide under the Agreement, any conditions on the use of those resources, and any laws, policies and procedures relevant to their participation in a cooperative surveillance and enforcement activity. The bulk of this information will only need to be provided once, and then updated as necessary. This will include things like: what

<sup>99</sup> See Michael Lodge, above n 18, 281.

<sup>100</sup> See above n 20.

<sup>101</sup> For example, the only Niue Treaty subsidiary agreement used as a basis for cooperative surveillance and enforcement activity during Operation *KuruKuru* in November 2012 (which covered the Exclusive Economic Zones of almost all FFA members, and resulted in 323 vessels being sighted and 206 vessels boarded) was the trilateral agreement between the Federated States of Micronesia, Palau and Republic of the Marshall Islands (see FFA Circular 12/112, 20 November 2012, above n 84).



vessels, aircraft, systems or personnel a Party is willing to make available for cooperative activities, under what conditions, and any relevant laws, policies or procedures that are applicable; what rules of command and control would apply; and what expertise or training a Party may be able to provide.<sup>102</sup>

Second, notifications provide the “authority” that will constitute the legal basis for the conduct of such activities (such as permission to exercise enforcement jurisdiction in the waters of another Party, or to continue hot pursuit into the territorial sea of another Party).<sup>103</sup> Accordingly, the form and content of the notifications is very important. In order to ensure that the extent of the authority provided through any notification is clear, and that the information is provided to a consistent standard, Annex C prescribes the form in which the various notifications required under the Agreement must be submitted.<sup>104</sup> The Agreement is drafted broadly enough to provide for notifications to be submitted in either paper or electronic form, but over time it is likely that this process will be integrated into the Niue Treaty Information System, so that information can be provided through online submission or direct electronic entry.

The information and authority provided in notifications will be stored and made available in the Niue Treaty Information System, which will be a secure, searchable online information management system, accessible by the Parties in real-time.<sup>105</sup> Parties will be able to access the information in this System to make plans for, request assistance with, or consent to engage in cooperative surveillance and enforcement activities. In addition, authorised personnel will be able to use the System in the course of a cooperative surveillance and enforcement activity (including to verify relevant laws, policies and procedures, seek additional authority, or print out extracts confirming the cross-vested authority of authorised officers).

How will this operate in practice? A Requesting Party will search the information in the System to see what assistance might be available from potential Assisting Parties to meet their particular needs, and any applicable conditions or laws, policies and procedures of the Assisting Party. Having ascertained what assistance it needs, the Requesting Party can discuss and agree on the parameters of the activity with the relevant Assisting Party, record this in an activity notification and submit it to the Administrator for inclusion in the Niue Treaty Information System. The legal authority for the Parties to conduct the activity is then provided by the Agreement itself, as stated in Article 7(4): ‘the authority provided by each Party through notifications to the Administrator shall constitute a legal basis for the conduct of the activities authorised, requested or approved therein’. By providing a sufficient level of prescription, supported by a central repository of information and authority, this self-contained system aims to overcome the problems of the past, and establish a legal and practical framework within which Parties will be able to actively cooperate with ease and confidence.

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102 See Annex C(1).

103 Article 7(4).

104 Article 7(2).

105 Article 7(3) and (5).



### (b) Flexible forms of assistance and an 'opt-in'

The Agreement is intentionally structured to be very flexible, so that Parties can cooperate as much or as little as they like, and in the broadest possible range of activities. While this may seem counter-intuitive in light of the self-contained, prescriptive nature of the system just described, this actually *facilitates* flexibility, by enabling Parties to select the specific assistance they will offer or seek and the conditions, laws, policies or procedures which will apply, and to access this information to plan and conduct cooperative activities. This 'opt-in' system is also likely to make it easier for countries to ratify or accede to the Agreement, since the only direct obligation that they would assume on becoming Party is to provide the minimum standard of fisheries data and intelligence required under Article 19. It also allows the Agreement to include a range of additional features, which Parties may choose whether or not to use, depending on their individual needs, interests, laws, policies and procedures.

The first of these is the possibility for Parties to request a wide range of assistance under the Agreement, extending well beyond the traditional realm of 'joint patrols' involving vessels, aircraft and personnel. The 'operational requirements notification'<sup>106</sup> requires each Party to list the types of assistance that it may make available as part of a cooperative surveillance and enforcement activity, within the categories of 'monitoring', 'control' and 'surveillance'. In addition to the standard areas such as aerial and at-sea patrols, Parties could offer assistance in the form of training, such as how to analyse compliance data, conduct boarding and inspection operations, or collect and manage evidence. Alternatively, Parties may be able to provide personnel with relevant expertise, such as MCS analysts or trained observers, or to help with the establishment of a vessel monitoring system or vessel registry and licensing system. Since the types of assistance which may be offered or requested are not limited, this flexible framework will also be able to evolve over time to meet the needs and priorities of its Parties, and the ever-changing tools and technologies required for effective fisheries MCS.

In addition to seeking assistance from other Parties, the Agreement also enables Parties to authorise or request support from FFA personnel in implementing the Agreement.<sup>107</sup> This could range from authorizing personnel in the FFA Regional Fisheries Surveillance Centre to identify, monitor and track vessels when requested (such as during hot pursuit), to assistance with port inspections or the monitoring of transshipment operations. Alternatively, it could be used to request FFA personnel to provide training on how to carry out cooperative surveillance and enforcement activities under the Agreement (such as training officers from an Assisting Party in the practices and procedures of a Requesting Party, so that they can be cross-vested and exercise authority under the laws of the Requesting Party). This may prove to be a useful avenue for capacity building in relevant areas, and enhance the Parties' overall ability to participate in cooperative surveillance and enforcement activities under the Agreement.

<sup>106</sup> Annex C(1).

<sup>107</sup> See Article 10(6).



Beyond the concept of 'assistance', the Agreement also establishes the possibility for one Party (as a flag state) to give consent for another Party (or Parties) to board and inspect its flagged vessels on the high seas (subject to any conditions or requirements the flag state wishes to impose).<sup>108</sup> This provision builds on the high seas boarding and inspection regime established in the Fish Stocks Agreement and the high seas boarding and inspection procedures in which FFA members already participate through the WCPFC.<sup>109</sup> Once again, since this is an 'opt-in' mechanism, it does not impose an obligation on the Parties. Rather, it simply provides an option that Parties may make use of if they choose, and is another practical way in which the Agreement seeks to encourage active cooperation between the Parties.

In the same way, the Agreement provides a mechanism for one Party (as a coastal state) to provide consent for another Party (or Parties) to continue hot pursuit into its territorial sea (subject to any conditions the coastal state Party may wish to impose).<sup>110</sup> This mechanism relates to the provision in Article 111(3) of the UNCLOS that the right of hot pursuit ceases when the ship pursued enters the territorial sea of its own or a third state. A strict interpretation of this requirement provides for a rather large loophole in the effectiveness of hot pursuit, since any vessel subject to hot pursuit can take refuge in the territorial sea of a third state and effectively end the pursuit. The use of this loophole to undermine the effectiveness of the right of hot pursuit has been clearly demonstrated in the Southern Ocean, where vessels pursued by Australian authorities in relation to violations committed in the Exclusive Economic Zone around Heard and McDonald Islands have sought to end the pursuit by entering the French territorial sea.<sup>111</sup> There is evidence that instructions were provided to these vessels during the course of the hot pursuit, which allowed them to deliberately take action to avoid apprehension by entering the French territorial sea.<sup>112</sup>

To address this loophole, the Agreement enables coastal states to provide consent for other Parties to continue hot pursuit in their territorial sea. This is designed to prevent vessels escaping or undermining a legitimate hot pursuit by taking refuge in the territorial sea of another Party. Similar provisions are found in several existing fisheries surveillance and enforcement agreements, including some existing subsidiary agreements under the Niue Treaty,<sup>113</sup> a bilateral agreement

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<sup>108</sup> Article 10(7).

<sup>109</sup> See Article 26 of the WCPFC Convention and CMM 2006–08, 'Western and Central Pacific Fisheries Commission Boarding and Inspection Procedures' adopted 15 December 2006: <<http://www.wcpfc.int/>>.

<sup>110</sup> Article 13(2).

<sup>111</sup> For example, the arrest of the *Lena* in 2002 and the *South Tomi* in 2001. See R Baird, 'Arrests in a Cold Climate (Part 2) — Shaping Hot Pursuit through State Practice' (2009) *Antarctic and Southern Ocean Law and Policy Occasional Papers*, 13, pp 1–21 at 13.

<sup>112</sup> *Ibid.*

<sup>113</sup> See the trilateral agreement between the Federated States of Micronesia, the Republic of the Marshall Islands and Palau, and the bilateral agreements between the Cook Islands and Niue, and the Cook Islands and Samoa, above n 17.



between Australia and France,<sup>114</sup> and a multilateral agreement between several West African States.<sup>115</sup> While some commentators agree that is a practical solution not inconsistent with Article 111 of the UNCLOS,<sup>116</sup> this issue is not free from debate.<sup>117</sup>

The inclusion of this provision in the Agreement reflects its modern, progressive approach to fisheries enforcement, and commitment to maximizing the reach and effectiveness of jurisdiction and resources.<sup>118</sup> While there is support for this approach to hot pursuit in academic commentary, and in the provisions of bilateral and regional agreements, the practical use of this provision will provide the most concrete evidence of the status of this interpretation of Article 111 of the UNCLOS. In any case, for now, since Parties may choose whether or not to 'opt-in' to this aspect of the Agreement, each Party may interpret and use this provision in a manner consistent with its national laws, policies and procedures, and its views on the interpretation and state of development of international law.

### (c) Use and development of current and emerging tools and technologies

The Agreement specifically recognises the Parties' intention to 'continuously develop and use current and emerging tools and technologies to combat illegal, unreported and unregulated fishing, including through the progressive development and implementation of national and international laws'.<sup>119</sup> The focus on 'future-proofing' is evident throughout the text,<sup>120</sup> and it is clear that a range of features

<sup>114</sup> Treaty between the Government of Australia and the Government of the French Republic on Cooperation in Maritime Areas Adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands [2005] ATS 6, adopted in Canberra, Australia, 24 November 2003, entered into force 1 February 2005 (Article 4).

<sup>115</sup> Convention on Sub-Regional Cooperation in the Exercise of Maritime Hot Pursuit, between Cape Verde, The Gambia, Guinea, Guinea-Bissau, Mauritania and Senegal done in Conakry, Republic of Guinea, 1 September 1993: <<http://www.itlos.org/index.php?id=252>>.

<sup>116</sup> See, inter alia: R R Churchill and A V Lowe, *The Law of the Sea* (3<sup>rd</sup> ed, 1999, Manchester University Press) 215; C H Allen, 'Doctrine of Hot Pursuit: a Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices', (1989) 20 *Ocean Dev. & Int'l L.* 309–41 at 320; D Guilfoyle, *Shipping Interdiction and the Law of the Sea*, (2009, Cambridge University Press) at 145; R Baird, 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence', (2004) 5 *Melbourne Journal of International Law* 299 at 329.

<sup>117</sup> See, eg, T Aqorau, 'Analysis of the responses of the Pacific Island States to the fisheries provisions of the Law of the Sea Convention' (1998) Doctor of Philosophy thesis, Centre for Natural Resources Law and Policy, University of Wollongong, at 238–39: <<http://ro.uow.edu.au/theses/993>>.

<sup>118</sup> See preambular paras 4 and 5 and Article 2(a)

<sup>119</sup> Preambular para 4.

<sup>120</sup> Examples include: the use of electronic information management systems to record and share information; the ability to use those systems in real-time to facilitate cooperative surveillance and enforcement activities (including by producing electronic evidence of authorisation); the requirement that the Annexes be continuously developed and updated; and the simplified amendment procedure for the Annexes



have consciously been included which will enable the Agreement to be adapted over time to incorporate and reflect new tools and technologies.

One of the best examples of the way in which the Agreement gives effect to this commitment is the provision on hot pursuit.<sup>121</sup> As noted by one commentator:

aspects of the traditional doctrine of hot pursuit are largely founded on assumptions better suited to the era of local fisheries, three-mile territorial seas, and observation by long glass than to the current era characterized by distant-water fleets of factory trawlers, 200-mile exclusive economic zones, and observation by radar, aerial photography, underwater sensors and satellites.<sup>122</sup>

In this regard, the Agreement seeks to give a good faith interpretation to the requirements of the 'traditional doctrine' encapsulated in Article 111 of the UNCLOS, while enabling Parties to make full use of modern tools and technology.

Article 13(4) of the Agreement provides that hot pursuit commences when the appropriate authorities have good reason to believe that a vessel has violated the laws of the Party within whose waters the vessel is detected (either based upon direct visual contact, or evidence obtained by 'reliable technical means'), and a clear signal to stop has been given to the vessel. Similarly, Article 13(5) provides that hot pursuit shall be deemed to have continued without interruption, provided that continual positive identification and tracking of the pursued vessel is maintained by resources authorised under this Agreement by the Party in whose waters the vessel was detected, including by either direct visual contact, or 'reliable technical means'.

Consistent with Article 111(1) of the UNCLOS, these provisions require that: (i) the vessel be located within the relevant Party's waters; (ii) the Party have a 'good reason to believe' the vessel has violated relevant laws; (iii) a clear signal to stop is given; and (iv) the pursuit be continued without interruption. However, the Agreement provides for the authorities to base their belief that a vessel has violated the laws of the coastal state, and to maintain positive identification and tracking, on the basis of 'reliable technical means'. While this term is not defined, it would presumably include vessel monitoring systems, satellite images or radar, or any other forms of reliable technology that may be developed – such as unmanned aerial vehicles, for example. This functional approach,<sup>123</sup> which is similar to a provision in a bilateral Australia-France fisheries enforcement treaty,<sup>124</sup> arguably strikes a workable balance between the strict textual requirements of the UNCLOS, and the practical reality of fisheries surveillance and enforcement in the 21<sup>st</sup> century.

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which will enable notifications to be updated as required to reflect new tools and technologies.

121 See preambular para 5.

122 C H Allen, above n 116, 310.

123 Ibid 322.

124 Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and McDonald Islands, [2011] ATS 1, adopted in Paris, France, 1 August 2007, entered into force 1 July 2011 (Article 4).



In addition, the Agreement requires that positive tracking and identification be maintained by resources 'authorized under this Agreement by the Party in whose waters the vessel was detected'.<sup>125</sup> In light of the flexible options for cooperative surveillance and enforcement provided in the Agreement, this could potentially include not only the resources of that Party, but personnel from an Assisting Party or FFA personnel located in the Regional Fisheries and Surveillance Centre, provided they are appropriately authorised by the relevant coastal state pursuant to Article 10. Combined with the ability to harness 'reliable technical means', this approach could have enormous practical benefits, in a region of vast maritime zones containing valuable natural resources belonging to countries with very limited enforcement assets. For example, it has recently been reported that Palau (which has an exclusive economic zone of around 630,000 km<sup>2</sup> and only one patrol boat) plans to use drones to monitor its commercial fishing ban – a development which allows further food for thought regarding the potential use to which this provision could be put.<sup>126</sup>

### **V. Process of negotiating the Agreement**

Finally, it is useful to briefly describe the process that was used to develop the Agreement because, although commonly understood in a domestic context, it was rather unusual in an international treaty negotiation (and may provide a useful template for others to consider).

#### **(a) The circumstances: commitment, common interest and costs**

It is important to begin by noting some of the key 'enabling' circumstances for these negotiations. First, as discussed above, there was a clear political commitment at the most senior level of all the Governments involved, in the form of specific instructions from both Ministers and Leaders. Since Ministers had also endorsed a set of 'principles and key elements' to be included in the Agreement, officials were able to get directly to work on the substance of the Agreement, without the need for lengthy negotiations on its scope, object or purpose.

Second, the countries involved share common interests and already have close working relationships, particularly between their fisheries agencies, whose officials meet frequently in a variety of fora. This enabled meetings to be scheduled without too much difficulty (other than the usual Pacific fisheries dilemma of fitting additional meetings into an already overcrowded calendar without keeping people away from home for too long).

Third, specific funding was made available for the negotiations, through a commitment of \$2.4 million from the Australian Government to develop and implement the Agreement. This meant that meetings and workshops were able to be held as and when necessary, funding was available to cover the travel costs of participants from all the countries involved, and the Chair was provided with an assistant to undertake inter-sessional work. This not only made it easier to secure the necessary input and expertise from officials, but ensured general equity and

<sup>125</sup> Article 13(5).

<sup>126</sup> See: <<http://www.radioaustralia.net.au/international/radio/program/pacific-beat/palau-enlists-drones-to-enforce-commercial-fishing-ban/1150268>>.



transparency in the negotiations, since all FFA members were able and encouraged to attend without needing to worry about costs. It has also enabled the FFA to hire an additional Legal Adviser to assist FFA members with the implementation of the Agreement at the domestic level.

**(b) The process: draft policy, drafting instructions, draft text**

Against this backdrop, as directed by Ministers, in August 2010 the Parties to the Niue Treaty formed the Niue Treaty Drafting Group, led by an independent Chair, supported by a Chair's Assistant and the FFA Secretariat.<sup>127</sup> In order to develop a comprehensive and sensible Agreement within the two-year timeframe set by Ministers, which would cover all the issues required and operate effectively in a practical context, the Drafting Group decided to draw on a practice familiar in domestic contexts – the development of policy and drafting instructions. Over the course of four meetings, the Drafting Group developed a policy concept, turned that into a set of drafting instructions, and then asked the Chair to produce a draft text based on the drafting instructions.

Once the Chair produced a draft text, the Drafting Group had a further four meetings to review and revise it, and, to develop the detail to be included in the Annexes (particularly the detail to be set out in the notifications in Annex C). To test the effectiveness and operation of the draft text, the FFA also convened a tabletop exercise, at which participants trialed the draft Agreement using a range of bilateral and multilateral practical scenarios. In addition, over the course of developing the Agreement, the Drafting Group sought input from the FFA Monitoring, Control and Surveillance Working Group on practical and operational issues, to ensure that the policy elements were appropriate and reflected relevant national and regional practice.

This turned out to be a very efficient process and contributed greatly to the successful conclusion of the Agreement within the two-year timeframe. There are several reasons for this. First, it enabled officials with relevant policy and operational expertise to be involved, which ensured that the Agreement was underpinned and informed by practical objectives and designed to meet operational requirements. Second, it alleviated the problem of attachment to particular words and phrases, which can impede both good policy and good drafting, and hold up progress. Third, it enabled the Agreement to be developed in a holistic fashion, and reduced the opportunity for adverse unintended consequences to arise when various parts of the text were amended as drafting progressed. Finally, and importantly, it enabled the Drafting Group to consider how every aspect of the text would work in practice, which means that not only is the Agreement thoroughly thought through at a practical level, but that a good deal of the work and thinking that will be required to implement the Agreement domestically has already been done by officials.

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<sup>127</sup> See Final Act of the Parties to the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region on the adoption of the Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, adopted at the eighth meeting of the Parties to the Niue Treaty, Honiara, Solomon Islands, 2 November 2012 [8]: <[http://www.ffa.int/niue\\_treaty](http://www.ffa.int/niue_treaty)>.



Clearly, the process that was used to develop this Agreement will not be appropriate for the negotiation of all international agreements. However, there are a number of elements that might usefully be drawn on in other contexts; in particular, the ideas of developing the policy before drafting the law, ensuring the opportunity for meaningful review and input from policy experts, and the potential to test-run the practical operation of draft provisions before they are set in stone. If we are to ensure that international law is an effective vehicle for achieving practical outcomes, such a collaborative, cross-disciplinary approach will surely aid our endeavours.

## VI. Conclusion

At its eighth and final meeting in Honiara, Solomon Islands, on 26 October 2012, the Drafting Group approved the final version of the draft text, and reported on the outcomes of its work to the Meeting of the Parties to the Niue Treaty on 2 November 2012, at which the Agreement was unanimously adopted and opened for signature.<sup>128</sup> Palau became the first country to sign the Agreement on 9 November 2012.<sup>129</sup> Since then, a further seven countries have signed the Agreement (the Cook Islands, the Federated States of Micronesia, Nauru, Papua New Guinea, the Republic of the Marshall Islands, Samoa and Tuvalu),<sup>130</sup> and a number of other countries have advised that they are undertaking the domestic processes necessary to do so. It is to be hoped that the four ratifications required for entry into force will follow rapidly thereafter. However, like its predecessor (the Niue Treaty), the ultimate success or failure of this Agreement will depend on the extent to which it is actually *used*. What, then, is the actual prognosis for this '21<sup>st</sup> century' treaty? Will it prove to be an effective vehicle for active cooperation in the fight against IUU fishing, languish in the statute books as a 'good idea', or gather dust with the Depositary as 'just another fisheries treaty'?

This Agreement contains all the tools that its Parties need to cooperate effectively in fisheries enforcement, at all stages of the process - from intelligence sharing to on-water enforcement, in-port inspections, and follow-up investigations. It provides a comprehensive framework for easy cooperation, by building a flexible 'opt-in' approach into a self-contained and prescriptive system in which information is readily accessible and Parties can agree to conduct cooperative activities simply by filling out the required information in the relevant notifications. And since a good deal of the work that will be needed to give effect to the Agreement domestically has already been thought through as part of the 'policy' process that was undertaken prior to drafting the text, cooperation should not be held up by lengthy implementation processes. Accordingly, the Agreement should be ready to use as soon as the fourth instrument of ratification is received.

However, there are a few issues that will be fundamental to the Agreement's success. The first is the provision of adequate support to develop and maintain the

<sup>128</sup> Ibid at [15] and [16].

<sup>129</sup> FFA Press Release, 'Palau signs Niue Treaty Subsidiary Agreement', 9 November 2012: <<http://www.ffa.int/node/691>>.

<sup>130</sup> As at 13 September 2013.



information management systems necessary for the effective operation of the Agreement, and to ensure that the information and fisheries data and intelligence submitted by the Parties is stored securely and made available subject to the relevant security standards and data sharing protocol. This will be vital to secure and maintain the confidence of all Parties in the systems, processes and operation of the Agreement. Second, the Parties may need legal and operational support to assist with submission of the initial information and authority required for the Niue Treaty Information System, and to put in place mechanisms for the provision of fisheries data and intelligence. Finally, ongoing political commitment from Leaders, Ministers and senior officials will be required, to put words into action and help support the active cooperation envisaged in the Agreement, until such cooperation becomes the norm and we really do have 'strength through cooperation'.