



ARTICLE 73 HANDBOOK

MARITIME ENFORCEMENT UNDER UNCLOS



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Professor Stuart Kaye OAM

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25 June 2024

TABLE OF CASES

1.	<i>Arctic Sunrise</i>	PCA Case No 2014-02
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3.	<i>Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)</i>	ICJ Reports 2022, p.266
4.	<i>I'm Alone</i>	III RIAA 1609
5.	<i>Juno Trader (St Vincent & the Grenadines v Guinea-Bissau)</i>	ITLOS, Case No.13
6.	<i>Medvedyev v France</i>	ECHR, 10/07/2008
7.	<i>M/V Saiga (No.2) (St Vincent & the Grenadines v Guinea-Bissau)</i>	ITLOS, Case No.2
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9.	<i>Red Crusader</i>	XXIX RIAA 521
10.	<i>Rigopoulos v Spain</i>	ECHR, 12/01/1999
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PREFACE

The Pacific Islands Forum Fisheries Agency (FFA) was established as an intergovernmental organisation following the adoption and signature of the South Pacific Forum Fisheries Agency Convention (FFA Convention) in July 1979. The Convention emanated from the Forum Declaration on the Law of the Sea and a Regional Fisheries Agency which had been adopted by the 8th South Pacific Forum Leaders meeting in Port Moresby on 31 August 1977.

The Declaration by Pacific Islands Leaders was visionary and strategic, and among other things, strengthened regional efforts to declare new maritime zones including exclusive economic zones prior to the adoption of the United Nations Convention on the Law of the Sea on 10 December 1982.

More than 40 years later, FFA remains the premier fisheries advisory organisation of the Pacific Islands region, working to ensure the collective vision that our people enjoy the greatest possible social and economic benefits from the sustainable use of offshore fisheries resources.

This publication is intended to support FFA Members in the implementation of Article 73 of the 1982 UN Convention on the Law of the Sea. In summary, Article 73 provides for the compliance and enforcement of coastal State laws and regulations in the exclusive economic zone.

In the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, the coastal State may take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the 1982 UN Convention on the Law of the Sea.

Together with such rights, are responsibilities, including that arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security, and, coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, and, penalties must not include any other form of corporal punishment.

The rights and responsibilities under Article 73 are clearly elaborated in this handbook. This is the first in a series of FFA publications that will focus on rights and responsibilities of States in specific contexts.

As the FFA celebrates 45 years of service to the region, it is an honour to present this Article 73 handbook which serves as the point of reference for FFA Members and the Secretariat, on coastal State enforcement of laws and regulations in the exclusive economic zone.

Dr. Manumatavai Tupou-Rosen

FFA DIRECTOR-GENERAL

GLOSSARY

Archipelagic Waters

Waters under sovereignty between the islands of an archipelagic State, as defined under Part IV of the Law of the Sea Convention. Such waters are enclosed by defined baselines, from which other maritime zones, such as the territorial sea, are measured.

Bond

An amount of money lodged by a vessel owner to secure the release of a fishing vessel under Article 73 of the Law of the Sea Convention. Such moneys are typically paid prior to court proceedings.

Continental Shelf

The seabed beyond the territorial sea that is the natural prolongation of the land territory of the State. The definition of the continental shelf is under Article 76 of the Law of the Sea Convention, and can extend to 200 nautical miles from the State's baselines or coast, and beyond in certain circumstances. It gives jurisdiction over sedentary species.

Exclusive Economic Zone (EEZ)

Waters under the sovereign rights of a State, being outside of the territorial sea of a coastal State, to a maximum distance of 200 nautical miles from a territorial sea or archipelagic baseline. Within the EEZ, the coastal State has exclusive rights over exploration and exploitation of the natural resources of the water column (including fisheries) and seabed and subsoil, as well as over marine scientific research, protection of the marine environment, the construction of artificial islands and installations.

Flag State	The State of registration of a ship. Conditions for registration are set by a State pursuant to Article 91 of the Law of the Sea Convention
Forfeiture	A penalty imposed by a State for illegal fishing that provides that ownership in the illegal fishing vessel, and/or its catch, is transferred to the State.
Hot Pursuit	The pursuit of a vessel beyond the jurisdiction of a coastal State, under Article 111 of the Law of the Sea Convention.
Innocent Passage	The right of a foreign vessel to sail through the territorial sea of a coastal State. The right is subject to specific restrictions on passage, including a prohibition on fishing.
International Tribunal for the Law of the Sea (ITLOS)	An international court established under the Law of the Sea Convention as one mechanism to resolve international disputes under the Convention. It has a primary role in determining the prompt release of a vessel under Article 73.
IUU Fishing	Illegal, unreported and unregulated fishing.
Judicial Proceedings	Court processes associated with maritime enforcement. International law requires “basic considerations of humanity” in enforcement, which includes the right to a court overseeing a trial of a suspected illegal fishing vessel.
Jurisdiction	The right of a State to make, and in certain circumstances enforce, laws. It can be based on geographical location or nationality of a person or ship.

Prompt Release

A mechanism under Article 73 of the Law of the Sea Convention permitting the release of an arrested suspected illegal fishing vessel and its crew prior to a trial. Prompt release should occur on the payment of a reasonable bond. If this does not occur, prompt release can be sought from ITLOS.

Standard Operating Procedures (SOPs)

Procedures for the boarding and securing of a vessel, as well as the collection of evidence. SOPs are set by a State for its own boarding parties conducting activities under its national legislation.

Territorial Sea

Waters under sovereignty around a coastal State. The territorial sea can extend up to 12 nautical miles from the coast, or from straight or archipelagic baselines. The territorial sea is subject to a right of innocent passage for foreign vessels.

CHAPTER ONE

INTRODUCTION

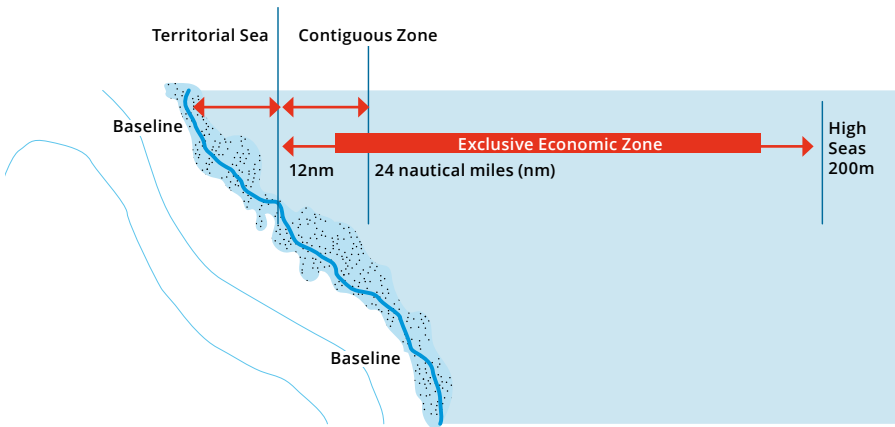
The effective regulation of fisheries is of vital importance to all of the States of the Pacific. With revenue from fishing activities being a significant component of national income, as well as the need to secure food security for many States, fisheries are at the heart of national economies. An essential component in effective regulation is maritime enforcement, as compliance with a coastal State's regulatory measures cannot be assured.

The United Nations Convention on the Law of the Sea establishes regulatory mechanisms with respect to coastal States for their exclusive economic zone (EEZ), and in this gives particular attention to the regulation of fisheries. Beyond the territorial sea, coastal States receive maritime jurisdiction over fisheries out to 200 nautical miles from their territorial sea baseline (which is often the coastline as indicated by lowest tide marked on nautical charts) or their archipelagic baselines. However such jurisdiction comes with a series of obligations with respect to the management of marine living resources. These obligations include an obligation to set a total allowable catch, based on maximum sustainable yield qualified by economic or social factors.

Prior to the advent of the Law of the Sea Convention, States had an unfettered jurisdiction to undertake enforcement in waters under their jurisdiction. This rarely caused concern, as the waters subject to a coastal State's fisheries regulation were typically internal waters and the territorial sea, which was more commonly set by States at a modest 3 nautical miles from the coast. In the few cases it did arise, such as *I'm Alone* and *Red Crusader*, it typically was focused on the level of force used in the apprehension of a vessel, or the legality of a hot pursuit of the vessel, rather than the finer points of an uncontested boarding or inspection of a fishing vessel.

The internal waters, archipelagic waters and territorial sea of a coastal State are waters under sovereignty. Being under sovereignty, aside from certain guarantees of passage, a coastal States possesses the same rights over the ocean as they do over land. This means that fisheries matters were under the complete and unfettered control of the coastal State.

Figure 1: Maritime Zones under the Law of the Convention



With the EEZ came a significantly wider maritime jurisdiction. 3 nautical miles became up to 200 nautical miles, and therefore the impact upon maritime enforcement increased dramatically. What had typically been close inshore patrols, usually directed at smuggling activity, was quickly replaced with fisheries patrols far from coasts. This required new types of vessels, which although small, had long range and good sea-keeping.

The reasons for this change are in hindsight quite obvious. When the territorial sea was the only maritime zone, foreign fishing vessels had vast areas of ocean, including areas close to the coast of a foreign State, in which to fish. With the coming of the EEZ, according to an FAO study in 1985 approximately 90 percent of the world's wild fish catch came under national jurisdiction, and States were quick to either close off these waters to foreign vessels, for the benefit of their own fishing fleets, or moved to licence foreign fishing vessels in return for revenue. Foreign fishing vessels either found the funds to pay for licences or were forced into significantly smaller yielding high seas areas.

The Law of the Sea Convention was negotiated between 1973 and 1982. Although there had been resistance from some developed States to the EEZ as a concept in the 1960s, it was relatively early in the negotiation of the Convention that the EEZ would be adopted as a fundamental concept, and it would extend for up to 200 nautical miles from a coastal State, with a 12 nautical mile territorial sea. States recognised that fisheries enforcement would become a much more substantial part of maritime regulation, and in response framed provisions to deal with fisheries enforcement within the EEZ.

What the States agreed are substantial obligations with respect to regulation and enforcement in the EEZ. They reflect an effort to balance the interests of coastal States, who were eager to secure the most advantageous terms possible with respect to control over fisheries, and the interests of distant water fishing nations (DWFNs), who wanted to maintain their previously favourable access to fisheries. The balance favours the coastal States, which is only to be expected given the creation of the vast EEZ out of the high seas, but it would be wrong to assume that the coastal States have things all their own way. While coastal States secured in the EEZ a vast fisheries zone, there were significant limitations on their control, with respect to management, access and enforcement. Instead of the unfettered and complete control of the zones under sovereignty, in the EEZ coastal States possessed what were described in the Law of the Sea Convention as “sovereign rights”. That is to say, the rights of the coastal State are limited to those set down in Part V of the Convention, including the limitations on enforcement set down in Article 73 which are the focus of this manual.

What the zone was called at this time was the subject of different approaches, and the legacy of these still exists today. Some States referred to the zone as an EEZ, while others described it as an “exclusive fishing zone” or “fisheries waters”. Ultimately, the name in national legislation doesn’t matter, as whatever the name, the State is implementing the rights and obligations of the EEZ as described in the Law of the Sea Convention.

These latter limitations are contained in Article 73 of the Law of the Sea Convention, which sets out the basic requirements around a coastal State undertaking enforcement action. Article 73 provides:

- 1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.*
- 2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.*
- 3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.*
- 4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.*

Article 73 has remarkable breadth, and needs to be considered piecemeal to appreciate the scheme it creates. Paragraph 1 of Article 73 provides for the core functions necessary to undertake maritime enforcement. It deals with each in the sequence in which they are encountered in reality:

- Boarding*
- Inspection*
- Arrest*
- Prosecution before a court*

Article 73 also provides that the purpose of enforcement is to “ensure compliance with the laws and regulations” adopted by the coastal State. That is to say, there is an obligation upon a coastal State to implement domestic laws to provide a basis for fisheries regulations and maritime enforcement. States need to legislate to protect and manage their fisheries, and similarly need to legislate for the enforcement mechanisms that will assist in that endeavour. This is supported by the fact that a prosecution for a breach of fisheries laws and regulations is described in Article 73(1) as “judicial proceedings”, invoking the use of a court to interpret the legality of the arrested vessel’s actions.

Article 73 also establishes certain ground rules with respect to the dealing with vessels and crews that have been arrested. These explicitly include that both the vessel and its crew must be released on payment of a reasonable bond. This has been one of the most litigated elements under the Law of the Sea Convention, and has been expanded in its scope to take into account the standard of treatment of the crew.

Article 73 also provides that certain penalties are unacceptable. Coastal States cannot impose corporal punishment, which would incorporate penalties such as caning, in any circumstances. More significantly, a coastal State may not imprison individuals for fisheries offences in the EEZ in the absence of agreement with other States. Since such agreements are vanishingly rare, there is an effective prohibition on imprisoning individuals for fisheries offences.

Finally, Article 73 also establishes a duty upon the coastal State to keep the flag State of any arrested vessel up to date as to what steps are being taken with respect to the vessel and crew. The provision is particularly significant, as it must be read with Article 292 of the Law of the Sea Convention, which provides for recourse to a court to seek prompt release of an arrested vessel. An application for prompt release can be made in the wake of the notification, making advising the coastal State a critical element.

SCOPE OF APPLICATION OF ARTICLE 73

It is important to note that Article 73 is applicable to maritime enforcement in the EEZ, and not within other maritime zones. Interestingly, the Law of the Sea Convention says very little about maritime regulation and enforcement in internal waters, archipelagic waters or the territorial sea. This is because these are areas under sovereignty, and are subject only to limited passage rights by foreign ships, most usually innocent passage. Fishing is inconsistent with innocent passage, or indeed also archipelagic sealanes passage or transit passage, and therefore it is within the power of the coastal State. The power to regulate fisheries in these maritime zones is confirmed for innocent passage (Article 21), transit passage through international straits (Article 42) and archipelagic sealanes passage (Article 54, which incorporates Article 42). These are distinct from regulation and enforcement powers of the coastal State in the EEZ, which are more restricted.

Although the regulation of fisheries in maritime zones under sovereignty is derived from other parts of the Law of the Sea Convention, without the limitations of the provisions dealing with the EEZ under Part V, almost every State uses a single piece of legislation to regulate fisheries and provide for enforcement. While this is administratively logical, it does unnecessarily diminish the range of actions available to a State with respect to regulation and enforcement within the territorial sea, internal waters and archipelagic waters.

A similar observation could be made with respect to the regulation of sedentary species on the continental shelf. The Law of the Sea Convention provides a distinct regime for the regulation of the continental shelf. Article 68 of the Convention explicitly removes sedentary species from the EEZ regime. Sedentary species are defined in Article 77(4) as:

...organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.

This definition would cover species such as trochus, bêche-de-mer (sea cucumber or trepang), shellfish, corals and certain species of seaweed. It would not cover species such as crayfish, as these are capable of swimming some of the time, albeit that they spend a large proportion of their adult lives in contact with the sea floor.

As noted above, the regulation of these sedentary creatures can be distinct from that of other marine living resources within the EEZ. Nevertheless, most States do not distinguish between sedentary sea creatures and others, choosing to regulate and enforce under a single piece of legislation.

One response that a coastal State could make to these provisions would be to have specific legislative provisions in place for waters under sovereignty, such as the territorial sea and archipelagic waters, and for sedentary species, to separate them from the regulation of the EEZ. As we shall see, there are limitations on the enforcement powers and penalties for breach for fisheries enforcement in the EEZ which do not exist in the other maritime zones, or for sedentary species. Separate provisions would leave in place the widest latitude for enforcement, and minimize the chances of inadvertently taking action inconsistent with Article 73. However, few States have made this distinction to date.

WHY ARTICLE 73 IMPLEMENTATION MATTERS

Ensuring national compliance with Article 73 of the Law of the Sea Convention is a key issue for States in the Pacific. The implementation of Article 73 consistent legislation and policy is an important part of the objectives of the Pacific Islands Regional Oceanscape Program (PROP). The objectives of PROP are to improve ocean management through:

- *More sustainable fishing practices;*
- *Better surveillance of Pacific Exclusive Economic Zones;*
- *Better enforcement of fishing regulations;*
- *Improved access to regional and international markets;*

Three of these objectives are directly advanced through effective compliance with Article 73. First, compliance with Article 73 can lead to better surveillance and enforcement outcomes. The benefits of the Law of the Sea Convention that Pacific Island Countries have received, particularly control over fisheries within the EEZ, come with obligations. Article 73 is at the heart of those obligations. Support through the PROP may be undermined by poor compliance which would have a very negative impact upon all the Pacific. Practice by States that is inconsistent with Article 73 also serves only to weaken the fabric of the Law of the Sea Convention, and the benefits the Convention brings are very much in the interest of all Pacific States and territories to retain.

Article 73 also represents the most commonly litigated provision within the Law of the Sea Convention under Part XV dispute resolution. International legal litigation can be relatively easily pursued with respect to the arrest and detention of a fishing vessel. International dispute resolution can be extraordinarily expensive, with the cost of cases costing many of millions of dollars to litigate. It is therefore very much in every State's interest to avoid such litigation if at all possible, as national budgets are always tight and funding that will need to support litigation will impact other Government spending.

Finally, breaches of Article 73 are likely to engage other State parties to the Law of the Sea Convention. These States represent markets for fish from the Pacific, and some are also DWFNs. Poor compliance with international law in enforcement will potentially damage market access, and in turn diminish the revenue derived from fisheries and fishery access licensing. This would not be in the interest of Pacific Island Countries.

CHAPTER TWO

REGIME OF THE EXCLUSIVE ECONOMIC ZONE

Before considering the nature of enforcement under Part V of the Law of the Sea Convention with respect to the EEZ, it is useful to look at the nature of the regulatory tools available to a coastal State. These tools give coastal States many options in the manner in which they can seek to regulate a fishery. The nature of the approach to regulation will necessarily inform the manner in which enforcement might take place, or the evidence necessary to ground a prosecution.

The approach to regulation in the EEZ regime is found in Article 62(4) of the Law of the Sea Convention. It provides:

4. *Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State.*

These laws and regulations shall be consistent with this Convention and may relate, inter alia, to the following:

- (a) *licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;*
- (b) *determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;*

- (c) *regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used;*
- (d) *fixing the age and size of fish and other species that may be caught;*
- (e) *specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;*
- (f) *requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;*
- (g) *the placing of observers or trainees on board such vessels by the coastal State;*
- (h) *the landing of all or any part of the catch by such vessels in the ports of the coastal State;*
- (i) *terms and conditions relating to joint ventures or other co-operative arrangements;*
- (j) *requirements for the training of personnel and the transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research;*
- (k) *enforcement procedures.*

This provision contains some obvious elements including the licensing of fishing vessels, and restrictions upon fishing activities, such as:

- Licensing vessels, equipment and fishers to fish
- Quotas on designated stocks
- Catch based on designated areas or seasons
- Limits on age and size

Other regulatory requirements that may be imposed by the coastal State go to activities associated with fishing, but distinct from actual fishing effort. These include:

- Provision of data including the vessel's position, catch and effort statistics
- Participation in a research programme
- Placing observers and trainees aboard
- Participation in joint venture or cooperative arrangements
- Technology transfer
- Enforcement measures.

These measures can cover an extraordinary array of activities. For example, catch limits need not just be directed at a stock which is the focus of the fishing effort, but on bycatch limits of other species. Such measures may be directed at stocks such as shrimp, where the volume of bycatch substantially exceeds that of the target stock.

Given the wide range of regulatory reach, there is a significant question as to what evidence might be necessary to establish compliance or breach of a regulatory provision. Regulations dealing with submission of valid and timely fishing catch and effort data will certainly need not be merely pictures of a hold full of fish as evidence in support of a prosecution, but also written or electronic records showing what was done on board the ship and for how long. This could even include video material on a deck area, where the coastal State has mandated the use of cameras and recording equipment. What is clear, is that States will need to have standard operating procedures (SOPs) in place to ensure that a boarding and inspection will yield all of the evidence necessary across each area of regulatory control, that will be necessary to secure a conviction.

An example of legislation providing such guidance is the *Maritime Powers Act 2013* in Australia. This legislation provides for a comprehensive regime for boarding, and it has detailed provisions with respect to search and seizure of evidence. It provides for powers to:

- Undertake a boarding of a vessel (section 52)
- Question individuals about the vessel's activities (section 57)
- Undertaking searches, including: (section 59)
 - Holds; compartments; receptacles
 - Private quarters
 - Persons (sections 61 and 62)
- Removing objects from the sea (section 60)
- Examining objects and equipment (section 63)
- Make copies of documents or records – physical or electronic records (section 65)
- Securing weapons (section 66)
- Seizing evidentiary material (section 67)

Confidential SOPs are typically issued by maritime enforcement authorities which expand upon these powers, and stress the importance of maintaining a good chain of evidence to ensure data and items seized can be placed before the court in a prosecution.

CHAPTER THREE

BOARDING AND INSPECTION

ARTICLE 73

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

The first element of Article 73 of the Law of the Sea Convention is boarding. Any effective fisheries prosecution will require evidence of illegal fishing activities, and this will rely heavily upon physical and documentary evidence of illegal behaviour. Such evidence will typically only be able to be obtained in the boarding of the suspect vessel.

WHICH VESSELS CAN BE BOARDED?

The first question to consider is a basic one – which vessels can be lawfully boarded to undertake enforcement action? However, the question is more complicated than it first appears, as there are varying approaches to what sorts of vessels might be boarded and in what circumstances.

Logically, a vessel engaged in fishing in the EEZ of a coastal State can be boarded. However, the Law of the Sea Convention does not define what constitutes fishing, and any definition of fishing would need to encompass a range of activities beyond the deployment of lines or nets to physically catch fish.

The potential range of activities can be seen in the definitions of “fishing” and “fishing vessel” used in the Western and Central Fisheries Convention (WCPF Convention). Parties to the WCPF Convention include all of the member States of the Forum Fisheries Agency, so the definition has wide acceptance across the Pacific and with DWFNs operating in the region. Article 1 of the WCPF Convention provides (in part):

- (d) *“fishing” means:*
 - (i) *searching for, catching, taking or harvesting fish;*
 - (ii) *attempting to search for, catch, take or harvest fish;*
 - (iii) *engaging in any other activity which can reasonably be expected to result in the locating, catching, taking or harvesting of fish for any purpose;*
 - (iv) *placing, searching for or recovering fish aggregating devices or associated electronic equipment such as radio beacons;*
 - (v) *any operations at sea directly in support of, or in preparation for, any activity described in subparagraphs (i) to (iv), including transshipment;*
 - (vi) *use of any other vessel, vehicle, aircraft or hovercraft, for any activity described in subparagraphs (i) to (v) except for emergencies involving the health and safety of the crew or the safety of a vessel;*
- (e) *“fishing vessel” means any vessel used or intended for use for the purpose of fishing, including support ships, carrier vessels and any other vessel directly involved in such fishing operations;*

Several points can be made with respect to the above definitions. Firstly, a vessel engaged in fishing could include a vessel deploying fish aggregating devices, and therefore not be necessarily engaged in the taking of fish in the present, or even in the future. Secondly, the vessel concerned need not be itself engaged in the taking of fish. It is enough the vessel is engaged “directly in support of” catching fish, which could include the transshipment of catch, the resupply or refueling of a fishing vessel, or bringing out a relief crew. This last point is made clear in the definition of “fishing vessel” which includes “support ships, carrier vessels” and other vessels directly in support.

Such a wide definition of fishing is often reflected in national legislation. For example, the Cook Islands Marine Resources Act 2005 provides a similar definition in section 2:

“Fishing” means –

- (a) searching for, catching, taking or harvesting fish;*
- (b) the attempted searching for, catching, taking or harvesting of fish;*
- (c) engaging in any activity which can reasonably be expected to result in the locating, catching, taking or harvesting of fish;*
- (d) placing, searching for or recovering any fish aggregating device or associated equipment including radio beacons;*
- (e) any operation at sea in support of or in preparation for any activity described in this paragraph; or*
- (f) the use of an aircraft in relation to any activity described in this paragraph;*

National legislation that reflects such a wide definition is potentially important. In the first litigation out of the International Tribunal for the Law of the Sea, the *M/V Saiga (No.2)*, the issue of whether a support vessel refueling fishing vessels at sea in Guinea’s EEZ was an activity with Guinea’s competence was raised. Guinea’s national legislation indicated refueling vessels at sea infringed a customs zone it had established under domestic law. ITLOS held that such a customs zone could not apply in the EEZ beyond the contiguous zone. This removed the need to consider whether refueling was a fishing activity for the purposes of Part V of the Law of the Sea Convention, although two judges addressed the question as to whether refueling a fishing vessel qualified. Judge Zhao was of the view bunkering in the EEZ could qualify as a fishing activity, while Judge Vukas thought bunkering was a freedom of navigation issue, and therefore beyond State regulation. This issue was subsequently clarified by ITLOS in the *Virginia G Case*, where it noted that most States and international agreements provided that the bunkering of fishing vessels fell within the scope of the EEZ regime, vindicating Judge Zhao’s approach.

A second issue is the basis for boarding, and the motivation of the boarding vessel. In most situations that lead to an arrest, a law enforcement officer requires a reasonable suspicion that an offence has been committed. This need not be the case with boardings under Article 73 of the Law of the Sea Convention. Article 73(1) refers to boarding and inspection to “ensure compliance”. This is interpreted to mean that a boarding can take place simply to check if a foreign fishing vessel is in compliance with the coastal State’s regulations, without necessarily having a reasonable suspicion that the vessel is in breach of those regulations.

This approach is evidenced in national legislation. For example, section 71(1) of the *Fisheries Management Act 2002* of Tonga provides:

- (1) *Any authorised officer, without a warrant —*
 - (a) *stop, board and search any foreign fishing vessel in the fisheries waters and any locally based foreign vessel or local fishing vessel within or outside the fisheries waters;*
 - (b) *require the master, fishing master or any crew member or other person aboard to inform him of the name, call sign and country of registration of the vessel and the name of the master, owner, charterer, fishing master or any crew member;*
 - (c) *question the master, fishing master or any crew member or other person aboard about the cargo, contents of holds and storage spaces, voyage and activities of the vessel, vehicle or aircraft;*
 - (d) *require to be produced, examine and take copies of any licence, logbook, record or other document required under this Act or concerning the operation of any vessel;*
 - (e) *make an entry dated and signed by him in any vessel’s log;*

- (f) give directions to the master and any crew member of any vessel stopped, boarded or searched as may be necessary or expedient for any purpose specified in this Act or to provide for the compliance of the vessel or master or any crew member with the conditions of any licence;**
- (g) *within the fisheries limits stop, enter and search any vessel, vehicle or aircraft which, on reasonable grounds, he suspects is transporting fish or fish products or is being or has been used or involved in the commission of an offence against this Act or its regulations;*
- (h) *make such inspection and inquiry as may appear necessary to him concerning any place, premises, vessel, vehicle or aircraft in relation to which any of the powers conferred by this subsection have been or may be exercised and take samples of any fish or fish product found therein;*
- (i) *require to be produced and examine any fish, fishing net, fishing gear or explosive or other noxious thing whether on sea or on land;*
- (j) *at all reasonable times enter and inspect any fish processing establishment for which a licence is held or required or any other place or premises where a related activity is authorised or conducted or in respect of which a licence or other authorisation is issued or required under this Act; and*
- (k) *require to be shown or produced and examine any fish, fish product, fish processing device or equipment, or other thing used in fish processing or for or in connection with a related activity or such other activity for which a licence is issued or required under this Act.*

The Tongan legislation takes an approach that is consistent with the tenor of the Law of the Sea Convention, as evidenced in the highlighted sub-section (g), where it is clear that no suspicion of the commission of an offence is required.

A distinct and different issue pertains to whether a fishing vessel can be boarded if merely navigating through another State's EEZ. In such a situation, the vessel claims it is not intending to fish within the coastal State's EEZ, but rather is exercising a right of freedom of navigation through the EEZ to get to fishing grounds elsewhere. The coastal State may view such a claim of merely navigating through the EEZ with some level of skepticism, and therefore may wish to board the vessel to ascertain whether there is any evidence of fishing.

It is clear that fishing vessels, like any other vessels, have certain rights of navigation through various maritime zones. For example, fishing vessels can exercise a right of innocent passage through the territorial sea of a coastal State, although such a right is not compatible with them undertaking fishing during passage, by virtue of Article 19(2)(i) of the Law of the Sea Convention. Similarly, Article 58 of the Law of the Sea Convention provides that certain high seas rights under Article 87 apply in the EEZ, and among these are freedom of navigation and freedom of overflight. As such, the mere presence of a fishing vessel in the coastal State's EEZ is not a breach in itself.

There are differing views as to whether Article 73 will permit the boarding of a fishing vessel which indicates it is transiting through the EEZ. The view preferred by most coastal States is that the mere presence of a fishing vessel in the EEZ would give rise to a right to board and inspect the vessel. Article 73 of the Law of the Sea Convention does not state that only licensed or otherwise authorised vessels may be inspected. Rather, it grants the general right to enforce fisheries laws to the coastal State meaning that *prima facie* all fishing vessels in the relevant zone are legitimate targets for the exercise of this power simply because they are fishing vessels. The argument against is that the fishing vessel is exercising a high seas right of navigation it possesses and it should not be obstructed or interfered with in any way.

The best approach is perhaps one which acknowledges that both are legitimate rights under the Law of the Sea Convention. A boarding and inspection of a transiting fishing vessel should be lawful, lest every IUU fishing vessel claim they are on the way to somewhere else and therefore exempt from inspection. However, the exercise of the right to board should be moderated with a concern for the freedom of navigation of the vessel, by ensuring that any boarding be as expeditious and efficient as possible, to minimize the delay caused to the transiting vessel. Obviously, if such an inspection indicates that IUU fishing in the coastal State's EEZ has taken place, then the inspection and likely arrest of the vessel would take as long as necessary.

INITIATING A BOARDING

While Article 73(1) of the Law of the Sea Convention makes it clear that a coastal State has the right to board vessels in its EEZ with respect to fisheries matters, there is no clarity with respect to how such a boarding should be affected. As such, there is no definitive procedure to provide guidance as to how a boarding should be initiated.

One aspect of the Law of the Sea Convention that assists in describing what should take place to affect a boarding is Article 111 dealing with hot pursuit. While a relatively small number of boardings will give rise to a hot pursuit, it is true that any boarding could conceivably do so, and therefore boarding in a manner consistent with Article 111 is prudent.

First, the vessel to be boarded must be in a relevant maritime zone, which in the case of boardings pursuant to Article 73 of the Law of the Sea Convention, will be the EEZ. If the vessel to be boarded is outside the jurisdiction of the coastal State, it must be part of a team of vessels where one of the team is within the EEZ, by virtue of Article 111(4) of the Law of the Sea Convention. Second, a pursuit must be commenced "after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship." Traditionally this was using flags, lights and loudhailers, but in the Arctic Sunrise Case, it was confirmed that VHF radio messages were sufficient, after rejecting an argument by the Netherlands that radio communication was not satisfactory:

259. *The Tribunal cannot agree with this interpretation of the Convention. The parameters of the right of hot pursuit must be interpreted in the light of their object and purpose, having regard to the modern use of technology. The principal object of the rule regarding signals contained in Article 111(4) is to ensure that the pursued ship is made aware of the pursuit. It is the Tribunal's understanding that VHF messages presently constitute the standard means of communication between ships at sea and can fulfil the function of informing the pursued ship. The 1974 International Convention for the Safety of Life at Sea (SOLAS), as amended in 1988, in fact requires ships to constantly monitor the international VHF distress channel 16. In the present case, it is indisputable that the Arctic Sunrise was actually made aware of the pursuit, as at least some of the radio messages to stop were received and acknowledged.*

This suggests that some notice of a boarding is appropriate, at least where there is the possibility that the vessel might flee, and that any reasonable recognized communication mechanism to convey that request, including VHF Channel 16, will be acceptable.

Third, Article 111 notes that where the vessel has been stopped or arrested as a result of a hot pursuit initiated without circumstances to justify it, there should be compensation paid for any loss or damage. Logically, a similar approach might be inferred for a wrongful arrest within the EEZ, noting of course that a boarding without suspicion in the EEZ is not a wrongful act of itself.

The Law of the Sea Convention does not indicate what level of force should be used to board the vessel. International courts have considered this issue, and it is considered below in the discussion of the Saiga Case.

WHO UNDERTAKES THE BOARDING?

Article 73 does not specify who might undertake a boarding or inspection on behalf of the coastal State, and it is fair to observe that it is rarely an issue that arises. Typically boardings and inspections of fishing vessels would be by designated officers of the coastal State, operating from government vessels, usually warships or police or coast guard vessels.

However, there are circumstances where a boarding might be undertaken by others, and this occurs in the Pacific from time to time. Arrangements under the Niue Treaty, which operates throughout much of the Pacific, empowers one member to undertake fisheries enforcement action on behalf of another member subject to a subsidiary agreement the two States will have entered into. This issue is therefore whether such enforcement by another is permitted under Article 73.

Article 73 itself is silent as to who should undertake enforcement action, but again hot pursuit under the Law of the Sea Convention gives a useful clue as to the correct approach. The critical provision with respect to the question “who can board?” is Article 111(5) of the Law of the Sea Convention:

5. *The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.*

While not directly reflected in Article 73, it is clear that a boarding under hot pursuit must be made from a warship or military aircraft, or a ship or aircraft marked and authorised as being on government service. Since hot pursuit may follow from any attempt at boarding, it is logical that a similar requirement be inferred into boardings under Article 73.

This means that a valid boarding must come from a warship or government vessel, or their air equivalents. Importantly, there is nothing in Article 111(5) of the Convention that appears to limit a boarding to a vessel or aircraft under the direction of the coastal State. There is nothing that should be inconsistent with a cooperative boarding approach such as is permitted under the *Niue Treaty*.

What would be circumscribed would be the use of private vessels in enforcement. Under Article 111(5) of the Convention, there is no scope for self-help by local fishing vessels to board other foreign fishing vessels in respect of alleged breaches of the coastal State's laws, nor can a NGO take on such a task for itself. Private contractors could be hired by a government to undertake enforcement, but their vessels and aircraft would need appropriate markings, and be authorized at law to undertake such an activity.

BEHAVIOUR WHILE ON BOARD

Article 73 does not indicate what use of force might be employed in order to affect a boarding of a ship, although international provides some guidance in this regard. The most contemporary example is the *Saiga* Case.

M/V SAIGA (NO.2) CASE

M/V Saiga was a small tanker registered in St Vincent and the Grenadines. In October 1997, *Saiga* was operating off the coast of Guinea, in West Africa, providing bunker fuel to fishing vessels operating in the Guinean EEZ. Guinea was of the view these bunkering activities were contrary to its law and decided to board and arrest *Saiga*.



MV Saiga

The events surrounding the boarding and arrest of Saiga by two Guinean patrol boats formed part of an action by St Vincent and the Grenadines for the release of Saiga and compensation. St Vincent and the Grenadines pleaded that the level of force used in boarding the vessel and apprehending the crew was excessive, while Guinea argued it was unreasonable. After finding that indiscriminate fire into the fleeing vessel was unacceptable, ITLOS turned to the legality of the actions of the boarding party:

158. *The Guinean officers also used excessive force on board the Saiga. Having boarded the ship without resistance, and although there is no evidence of the use or threat of force from the crew, they fired indiscriminately while on the deck and used gunfire to stop the engine of the ship. In using firearms in this way, the Guinean officers appeared to have attached little or no importance to the safety of the ship and the persons on board. In the process, considerable damage was done to the ship and to vital equipment in the engine and radio rooms. And, more seriously, the indiscriminate use of gunfire caused severe injuries to two of the persons on board.*

159. *For these reasons, the Tribunal finds that Guinea used excessive force and endangered human life before and after boarding the Saiga, and thereby violated the rights of Saint Vincent and the Grenadines under international law.*

This makes it clear that unnecessary force in dealing with crew members, or the ship itself and its equipment, is inconsistent with Article 73.

CHAPTER FOUR

ARREST, PROMPT RELEASE AND A REASONABLE BOND

ARREST

ARTICLE 73

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

In the event a boarding and inspection identify breaches of the fisheries laws of the coastal State, then the vessel may be detained and arrested. In these circumstances, the onus upon the boarding party will be to have a reasonable belief of the commission of an offence against the coastal State's fishing laws. This is a similar threshold to that required to base an arrest of an individual in a terrestrial context.

It is important to note that a reasonable belief of an offence being committed is not required to provide a basis for a boarding. All that will be required for a boarding is that there is a fishing vessel in the EEZ to inspect, as no suspicion is required. However, in order to arrest the vessel, there needs to be some suspicion that it has engaged in illegal activities against the fisheries laws of the coastal State.

Arrest must also be seen as part of a valid legal process, which must meet basic international standards. This was confirmed by ITLOS in the *Juno Trader Case*:

The Tribunal considers that article 73, paragraph 2, must be read in the context of article 73 as a whole. The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision.

As such, an arrest of a vessel must be conducted with regard to “basic considerations of humanity and due process of law”. This touchstone passes through all of Article 73, and would certainly be applicable to an arrest.

RETURN OF THE VESSEL TO PORT

Another aspect of the arrest of the vessel will be its delivery to a coastal State port. In order to commence the next stage of the legal process, the vessel will have to be brought to a coastal State port. This might be achieved through the direction of the arrested vessel to a designated port, or the vessel might have been placed under the control of a boarding party to direct the ship to its intended destination.

However even this step presents challenges, although these are not obvious from the text of Article 73 of the Law of the Sea Convention. While Article 73 mentions arrest, there is no explicit reference in the provision of any authority needed to bring the vessel to port. That such a power exists is logical, and can be implied out of the power to arrest and commence judicial proceedings, which would typically take place in a court in the State’s territory. Further, in none of the prompt release cases before ITLOS did the Tribunal find the power to bring the offending vessel to port was lacking. This is confirmed in Article 111(7) of the Convention dealing with hot pursuit, which states:

- 7. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely on the ground that the*

ship, in the course of its voyage, was escorted across a portion of the exclusive economic zone or the high seas, if the circumstances rendered this necessary.

The reference here to escorting the arrested vessel to port in the context of hot pursuit also supports a similar authority in circumstances where hot pursuit was not required. It would be strange if the general power to arrest lacked authority to bring a vessel to port for a compliant vessel, while such a power would exist in the event a vessel was running away. The logical approach is there is certainly a power to bring an arrested vessel back to port.

A second issue arises where after the vessel's arrest, a long period of time passes before the master and members of the crew can be arraigned before a court in the coastal State. This may be because the arrest takes place in an area of the ocean, remote from the nearest port. It raises questions of legal process and considerations of humanity, as many States legal systems require that an individual arrested by law enforcement have the opportunity to be brought before a court as soon as possible to test the validity of their arrest and detention.

Such considerations were tested by the European Court of Human Rights in cases dealing with arrests of vessels at sea, with a matter of weeks passing before crew members were brought before a court. In *Medvedyev v France*, and *Rigopoulos v Spain* the relevant arrests were for drug offences, and in both cases in waters weeks' sail from the nearest port of the arresting State. It was held in both cases that the obligation upon a State was to bring individuals before the court as soon as possible, and the State was not acting contrary to an obligation for offenders to be "brought promptly" before judicial authorities even if the voyage back took a number of weeks. Similar considerations could be applied to fisheries cases relying on the considerations of humanity and due process referred to above in the *Juno Trader*.

REASONABLE BOND

One aspect of the Law of the Convention that is unusual is a requirement of the release of a vessel on the posting of a reasonable bond. This provides that a vessel should be released if a sufficient security is deposited with the coastal State. This is most unusual, as most criminal offences in the domestic law of States are not treated in this fashion.

The rationale for the offering of a bond reflects the lack of a right to imprison individuals for fisheries offences. The suggestion to incorporate a provision dealing with a bond was first made in negotiations by the United States, and was then taken up by a larger group of States in the negotiating drafts. It was also incorporated into Article 226 of the Law of the Sea Convention to respond to environmental damage.

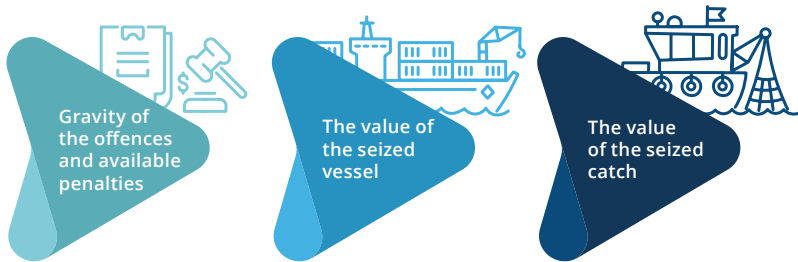
The Law of the Sea Convention does not define what will be a “reasonable bond” for the purposes of the release of a fishing vessel after arrest. Since in the years after the Convention came into force there were a number of cases brought seeking the prompt release of an arrested vessel, what constitutes a reasonable bond has been the subject of consideration by the International Tribunal for the Law of the Sea. These cases have given a lot of guidance as to what will be acceptable.

The basic notion of what will constitute a reasonable bond was considered in the Camouco Case. There the Tribunal stated:

67. *The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or impossible under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form.*

This statement makes it clear there are three elements going to the value of a bond:

Figure 2: Elements of a Reasonable Bond



The gravity of the offences and imposable penalties pertains to the size of a fine that might be imposed upon a vessel for illegal fishing. The bond will typically be offered before court proceedings are concluded, and therefore it cannot usually be based upon what penalty will be imposed by a criminal court. Instead, the bond will be based upon the maximum potential fine that could be imposed, based upon the charges brought against the vessel's master. As such, if the maximum possible fine is US\$1 million for a fisheries offence, the bond can include an amount of US\$1 million, even if the fine never reaches this level at the conclusion of the trial.

The second element of the bond relates to the seizure of a vessel. Under the legislation of many States, a fishing vessel caught fishing illegally in that coastal State's waters may be subject to forfeiture as part of the penalty. Forfeiture of a vessel is not a custodial penalty, so isn't inconsistent with the limitation in Article 73(3) of the Law of the Sea Convention, within certain parameters considered below. It is also popular with many States as it represents a substantial disincentive to engage in IUU fishing. Naturally, this appears to clash with the concept of the release of the vessel upon the payment of a reasonable bond.

The ITLOS dealt with this problem by indicating the coastal State could ascribe a monetary value to the vessel, which could effectively replace the forfeited vessel. Ascribing a monetary value must be done in a reasonable fashion,

as it must be a realistic assessment of the value of the ship, as well as its fuel and lubricants aboard. This could be accomplished through a valuation of a maritime surveyor, and has not been the subject of serious dispute in cases to date. Cases before ITLOS have had the bond in this case set by a court or by an administrative process without a preferred process selected, so the critical element is that the valuation is reasonable.

CONFISCATION OF THE VESSEL AND PROMPT RELEASE

One issue which has arisen with respect to a bond in relation to the vessel itself occurred in the *Tomimaru Case*. In that case, Russian authorities had arrested the Japanese registered *Tomimaru* for allegedly fishing in Russia's EEZ and through an order of a Russian court, ownership of the vessel was transferred to the Russian Government as part of the process of confiscation. This led to an argument by the Russian Federation that there could be no release of the *Tomimaru*, as it was no longer a Japanese vessel, and therefore there could be no payment of a bond to release the vessel.

Not surprisingly, ITLOS was not impressed by this argument. In a unanimous judgment, the Tribunal stated it was not open to a State to frustrate the operation of the Law of the Sea Convention in this fashion, and that no unilateral action taken by Russia, without the application of a properly constituted court process, could defeat the operation of Article 73(3). The Tribunal stated:

76. *A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object. Such a decision should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law. In particular, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention.*

Finally, a coastal State can also attach a penalty based on the value of the catch. Such a penalty is typically implemented as confiscation as legal proceedings might take months, and fish do not keep indefinitely.

Beyond these three elements, the bond cannot include other elements. To do so has been held by ITLOS to be contrary to Article 73, which considered the addition of other non-monetary elements in the bond in the *Volga Case (Russian Federation v Australia)* where Australia unsuccessfully added the installation of a VMS to the value of the bond.

THE VOLGA CASE

In February 2002, a Russian registered vessel, *Volga*, was arrested on the edge of the Australian fishing zone, around the Heard and McDonald Islands Territory in the southern Indian Ocean. *Volga* was brought to the port of Fremantle in Western Australia, and her owners sought to pay a bond to have the vessel released.

Australia was concerned that *Volga* would quickly return to the waters around Heard Island, which were extremely difficult to patrol due to their remote location. With that in mind, Australia sought a bond which was extremely high, in order to diminish the chance that *Volga's* owners would be able to pay it.



Arrest of Volga

The bond sought by Australia consisted of a number of elements:

- The value of *Volga* in the event of her confiscation
- The value of her suspected illegal catch
- The maximum fines that could be obtained from charges against the master and all of the members of *Volga's* crew
- A requirement that *Volga* install a tamper-proof VMS aboard, or in the absence of doing so, to pay an addition AUD \$1 million as part of the bond

Russia, in an action funded and run by the *Volga's* owners, sought to challenge the reasonableness of the bond before the International Tribunal for the Law of the Sea – particularly the final two elements listed above.

ITLOS held that the bond sought by Australia was not reasonable. Firstly, it was not reasonable to levy a bond based upon all of the fines that could be paid by every member of the crew. States rarely charge an entire fishing vessel's crew, as many of the crew are usually unaware of the ship's location, or if the ship is engaged in illegal fishing. Charges are typically laid against the Master of a fishing vessel, and possibly some of the ship's officers. ITLOS noted that Australia had already allowed most of the crew to leave the country and return home, and therefore was not genuine in pursuing these individuals for prosecution. Accordingly, this portion of the bond was limited to the maximum fine opposable to the members of the crew actually being prosecuted.

Secondly, ITLOS indicated that a requirement for the installation of a VMS, or in the alternative an additional AUD \$1 million to the bond was also unacceptable. The requirement to install a VMS was not financial in nature, and this was inconsistent with Article 73(2) of the Law of the Sea Convention:

77. The object and purpose of article 73, paragraph 2, read in conjunction with article 292 of the Convention, is to provide the flag State with mechanism for obtaining the prompt release of a vessel and crew arrested for alleged fisheries violations by posting a security of a financial nature whose reasonableness can be assessed in financial terms. The inclusion of additional non-financial conditions in such a security would defeat this object and purpose.

Since a VMS installation was not quantifiable financially, it was inconsistent with Article 73(2) and therefore was not a legitimate element in the calculation of a bond.

It is important to note that the money paid to the coastal State is a bond. It is not intended to be a fine or a punishment in itself. If the vessel and crew are released after payment of the bond, but no one returns for the trial, then it is clear that the bond is forfeit. If the trial goes ahead, and the penalties imposed by the court are less than the maximum possible, as calculated in the bond, then the coastal State will need to refund those portions of the bond which fall beyond the imposed fines and forfeitures.

Responsibility for the calculation of the exact bond, assuming it to be reasonable, is a matter for the coastal State. In the *M/V Virginia G* Case, ITLOS noted that the mechanism for setting the precise bond was a matter most appropriately left to the domestic law of the coastal State. It was equally acceptable for the figure to be set by a domestic court, or set by the executive branch of Government. Each State could approach this question in its own fashion, so long as the bond imposed was reasonable, and therefore calculated using the elements discussed above. Below are examples of national legislation setting bonds in use in parts of the Pacific.

EXAMPLES OF A BOND IN NATIONAL LEGISLATION

Nauru - Fisheries Act 1997 – Section 38

APPLICATION OF BOND, SECURITY AND PROCEEDS OF SALE

- (1) Any bond, security or net proceeds of sale held in respect of any boat, vehicle or aircraft or other thing sold under this Act shall be applied in the following descending order -
 - (a) the discharge of any forfeiture ordered under section 33;
 - (b) the payment of all fines for offences against this Act or penalties imposed under this Act arising out of the use of or in connection with the boat, vehicle, aircraft or other item;
 - (c) the discharge of all orders for costs in proceedings under this Act arising out of the use of or in connection with the boat, vehicle, aircraft or other thing;
 - (d) its return as provided in section 37.

Tonga - Fisheries Management Act 2002 – Section 80

Release of seized vessel

- (1) Subject to subsection (3) the court may, and in the case of a foreign vessel, vehicle or aircraft shall, on application order the release of any fishing vessel together with its fishing gear, equipment, stores and cargo, and any vehicle, aircraft or other item or items seized under this Act on receipt of a bond or other form of security acceptable to the court from the owner or other person claiming such property for the aggregate value of the property to be released, the total maximum fine or fines provided for the offences charged or likely to be charged and the costs the prosecution would be likely to recover if a conviction were entered.

Tuvalu – Marine Resources Act 2006 – Section 87

Release of Seized Goods

- (1) The court may, on application, order the release of any fishing vessel, vehicle, aircraft or other items seized under this Act on receipt of such bond or other form of security as it may determine.
- (2) In determining the value of the bond or other form of security, the court shall have regard to the aggregate amount of the value of the property to be released, an estimated total fine or other penalty provided for the offences charged or likely to be charged and the costs the prosecution would be likely to recover if a conviction were entered, and may set the value at such aggregate amount.
- (3) Notwithstanding the provisions of subsection (2), the amount determined by the court under this section shall be not be less than the fair market value of the property to be released or the aggregate minimum fine or penalty for each offence charged, whichever is greater.

- (4) Where a vessel, vehicle, aircraft or other item seized is released upon the lodging of a bond or other form of security under subsection (1), the court shall in the order state separately the sums which are attributable to the property to be released, the total fine or fines and the likely costs.
- (5) The release of a bond or other form of security under this section shall be conditional upon:
 - (a) a finding by the court that the vessel, vehicle, aircraft or other item has not been used in or connected with in the commission of an offence under this Act; or
 - (b) where the court finds that the vessel, vehicle, aircraft or other item has been used in or connected with the commission of an offence

under this Act:

- (i) payment in full within 30 days of the judgment of the court of any fine imposed by the court and any costs ordered to be paid by the court; and
 - (ii) where the court so orders, delivery to the court of the vessel, including its fishing gear, furniture, appurtenances, stores and cargo, and of any fish ordered to be forfeited without any impairment of their value, or payment of the monetary value thereof as determined by the court.
- (6) Nothing in subsection (1) shall require the court to release any vessel, vehicle, aircraft or other item if it might be required as an exhibit in court proceedings or is reasonably required for any further investigations of offences against this Act.

PROMPT RELEASE

ARTICLE 292

- 1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.*
- 2. The application for release may be made only by or on behalf of the flag State of the vessel.*
- 3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.*
- 4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.*

The efficacy of the release of a vessel upon the posting of a bond is dependent upon the coastal State honouring the obligation to release. Clearly if the flag State (or the flag State on behalf of the vessel's owner) and coastal State are in dispute as to the quantum of the bond, the vessel is unlikely to be released at all.

To address this problem, Article 292 of the Law of the Sea Convention provides for a mechanism to bring a request for prompt release before an international court. While in theory this could be another court, the reality only ITLOS is readily able to deal with a prompt release order in the timeframe envisaged under Article 292. To date, around a third of all the cases brought to ITLOS have been prompt release cases.

Prompt release under Article 292 has a number of elements:

- Prompt release can be sought by the flag State or “on behalf” of the flag State
- Reference to a court can be by agreement between the flag State and the coastal State or failing agreement within 10 days of the time of detention

The reference to ten days here is notable, as it highlights the “prompt” aspect of a prompt release action. It means that an action can be brought on quite quickly, meaning that States may need to have plans in place to respond to potential litigation that could quickly arise following the arrest of a foreign vessel. That said, exceeding the ten day period does not act as a bar to an action being brought, as was considered by ITLOS in the *Camouco Case*:

54. The Tribunal finds that there is no merit in the arguments of the Respondent regarding delay in the presentation of the Application. In any event, article 292 of the Convention requires prompt release of the vessel or its crew once the Tribunal finds that an allegation made in the Application is well-founded. It does not require the flag State to file an application at any particular time after the detention of a vessel or its crew. The 10-day period referred to in article 292,

paragraph 1, of the Convention is to enable the parties to submit the question of release from detention to an agreed court or tribunal. It does not suggest that an application not made to a court or tribunal within the 10-day period or to the Tribunal immediately after the 10-day period will not be treated as an application for “prompt release” within the meaning of article 292.

The action is simply to secure the prompt release of the vessel, upon the payment of a reasonable bond. As Article 292(3) of the Law of the Sea Convention makes clear, the action proceeds regardless of any domestic litigation or prosecution. The merits of the case, including whether a prosecution is likely to succeed or otherwise, are not relevant. Similarly, the prompt release decision is not subject to override or appeal by or to the domestic courts of the coastal State.

The Law of the Sea Convention does not define what will be encompassed by the term “prompt”. In the *Monte Confurco Case*, ITLOS stressed the preliminary nature of prompt release proceedings, in that they are not to prejudice the final result in a dispute. As such, they are to be brought on without delay. In the *Tomimaru Case*, ITLOS stated:

77. In this context, the Tribunal emphasizes that, considering the objective of article 292 of the Convention, it is incumbent upon the flag State to act in a timely manner. This objective can only be achieved if the shipowner and the flag State take action within reasonable time either to have recourse to the national judicial system of the detaining State or to initiate the prompt release procedure under article 292 of the Convention.

In summary, all parties will need to take action to do their part in a reasonable time, from the perspective of an applicant seeking the release of the vessel, and the coastal State in responding to the application. Obviously what is reasonable is impacted upon by the particular circumstances of the dispute.

One unusual aspect of Article 292 is the reference to the application for prompt release being made only “by or on behalf of the flag State of the vessel”. This reflects the importance of private interests in the prompt release and bond process. A flag State can be involved in its own right, or can effectively delegate its role to a legal team representing the owner of the vessel. This has been the case in many of the prompt release actions brought before ITLOS to date. It is important to note that the ship’s owner does not have an independent right of action, but many flag States, particularly those which possess open ship registries, may be comfortable leaving the carriage of a prompt release case to the owner’s representatives, at the owner’s cost.

This potential role for a vessel’s owner is logical, as it is likely that any bond payable will come from the owner and not from the flag State. It also may mean that a prompt release action is more likely than traditional international litigation between States, as the motivation to bring on the case can come from the vessel owner, who may be highly motivated financially to obtain the release of their vessel.

Another aspect of prompt release which differs from other types of international litigation in that it isn’t impacted by any domestic litigation that might be undertaken. Normally cases before international courts require any domestic legal proceedings to be complete, but this is not the case under Article 292. The prompt release process under the Law of the Sea Convention operates independently of any proceedings in any domestic court.

Prompt release and confiscation have also been raised in one of the cases before ITLOS. As noted earlier, in the *Tomimaru Case*, a Japanese registered fishing vessel was arrested by Russian authorities. Under Russian domestic law, the *Tomimaru* was forfeit to the Russian Government, and this raised the question whether Japan could still seek the release of the vessel, given the domestic change of legal ownership.

ITLOS held that Russian domestic law could not defeat the object and purpose of the Convention, and could therefore not prevent the operation of the prompt release provisions. The Tribunal stated:

75. *It is the view of the Tribunal that confiscation of a fishing vessel must not be used in such a manner as to upset the balance of the interests of the flag State and of the coastal State established in the Convention.*
76. *A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object. Such a decision should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law. In particular, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention.*

This means that a coastal State cannot use its domestic law to subvert the operation of the prompt release provisions. Even if the domestic law of the coastal provides for immediate forfeiture upon arrest, the vessel's flag State is still entitled to seek prompt release of the vessel and to have it set free upon the lodgment of the bond.

CHAPTER FIVE

PENALTIES

ARTICLE 73

- 3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.*

Provisions for penalties for fisheries offences under Article 73(3) of the Law of the Sea Convention are among the most misapplied by coastal States around the world. It is important to note that the Convention places a clear limitation on the types of punishment that may be imposed for violations of the fisheries law of the coastal State.

There are two prohibitions on penalties in Article 73(3) of the Law of the Sea Convention:

- The offender cannot be subjected to corporal punishment; and
- The offender cannot be imprisoned, unless there is an agreement between the coastal State and the flag State permitting imprisonment.

Corporal punishment is not defined in the Law of the Sea Convention, nor has it been the subject of consideration by ITLOS or other courts. The most common definition is that corporal punishment involves the infliction of physical pain upon the subject, as a deterrence to further offences. As a form of punishment, its incorporation into the criminal law of most States is relatively rare today, and therefore its imposition in a fisheries context is unlikely. Nevertheless, judicial caning of individuals is still within the criminal law of Brunei, Malaysia, Maldives and Singapore, although not for fisheries offences.

Imprisonment involves the handing down of a custodial sentence for a penalty. Article 73(3) clearly makes imprisonment is not permitted unless there is an agreement permitting imprisonment. Since most States do not have such agreements in place, imprisonment for fisheries offences in the EEZ by foreign nationals is effectively prohibited.

For many States, national fisheries legislation still provides for imprisonment as an option for fisheries offences. This means these States are in breach of Article 73(3) of the Law of the Sea Convention, and may be vulnerable to an action being brought by a flag State, acting in its own right or on behalf of a shipowner. Based on the International Court of Justice's decision in the Maritime Violations Case (Nicaragua v Colombia), the existence of legislation contrary to the Law of the Sea Convention, even if unenforced, is a breach of international law.

States can take preventative action to ensure there is no breach of Article 73(3) of the Law of the Sea Convention. First, all fisheries offences applicable to activities in the EEZ need to have references to imprisonment removed. This does not need to be the case with respect to offences in the territorial sea, internal waters or archipelagic waters, as waters are not subject to Article 73(3). The easiest way to accomplish this would be a single amending paragraph stating:

In the absence of an agreement with a foreign State, authorizing the imprisonment of the master and crew for a breach of fisheries offences, there shall be no imposition of a custodial sentence as a penalty for any fisheries offences taking place in the exclusive economic zone.

Second, to reflect the greater level of deterrence that a custodial sentence creates, it may be advisable to increase the level of fines to be imposed for fisheries offences, and to ensure robust forfeiture provisions are in place for the vessel and its cargo. The Law of the Sea Convention does not proscribe a limit upon the level of fines that might be imposed for illegal fishing, so fines into the millions of dollars equivalent can be perfectly legitimate.

Finally, Article 73(3) of the Law of the Sea Convention is only applicable to foreign-flagged vessels. A coastal State may impose any penalty for fisheries offences it wishes upon its own flagged vessels. This would be true, regardless of the nationality of the vessel's owner, or of the master or crew members.

This does not mean imprisonment is completely unknown in the context of fisheries. For example, where a fishing vessel is engaged in IUU fishing in the EEZ of a coastal State, the coastal State has a legitimate right and jurisdiction to board the vessel to inspect it. Were the Master to resist the boarding, and in the process injure or assault members of the boarding party, such an action could give rise to a custodial sentence, depending on the level of violence employed. To suggest otherwise would allow violent resistance to a boarding to be effectively without any remedy except for a fine, which in the case of a serious assault or murder would be entirely inappropriate. The better view is that the resisting the boarding still falls within the jurisdiction of the coastal State, as it is preventing a legitimate exercise of that State's laws. On the other hand, it is not a fisheries offence, because it is not directly concerned with fishing, so a custodial sentence is possible. Given there have been incidents where individuals have received custodial offences for resisting arrest over a fisheries offence in a number of jurisdictions, it is reasonable to assume that the international community is largely comfortable with this representing the state of international law. Relying upon legislation applicable to police or boarding officers outside fisheries laws may serve to strengthen this position.

One issue that arises is whether an individual may voluntarily choose imprisonment in lieu of paying a fine, or having been unable to pay the fine. There is certainly State practice in this regard, and arguably it may be preferred by some offenders, who lack the financial capacity to pay. Were

this not the case, every offender would simply cry poor, and state they were unable to pay their fines, and thereby avoid any penalty at all. What is important is that a custodial sentence cannot be imposed if the offender is willing and able to pay a fine.

DETENTION VERSUS IMPRISONMENT

Another issue that may arise is whether an individual may be detained by the coastal State, but not imprisoned. This situation can arise where an individual is obliged to remain in the coastal State pending a trial, and there is a risk that the accused might flee the jurisdiction and not return. This is a legitimate concern for domestic courts, and is usually dealt with strict bail conditions, the seizing of a passport, or holding the individual on remand. This issue was considered by ITLOS in the *M/V Virginia G Case*.

M/V VIRGINIA G CASE

In this case Guinea had held members of the crew aboard ship, and retained their passports prior to the trial. ITLOS considered whether this amounted to imprisonment:

307. *Article 42, paragraph 4, of Decree-Law 6-A/2000 on preventive measures provides that “[i]f it is absolutely necessary to ensure the execution of sentences that can be pronounced” in cases where it is plausible that an offence has been committed, any fishing vessel seized for that reason and its crew “may be conducted to the most convenient port of Guinea-Bissau and be held there until the end of the procedures and processes legally established”.*

Article 65, paragraph 1, of the Decree-Law, however, states that the crew members, as noted above, “will be immediately released, upon request of the shipowner, the captain or the master of the vessel or craft or of its local representative, before the trial, provided that the payment of sufficient security deposit is made”.



ITLOS Proceedings

308. *The Tribunal is of the view that measures of confinement taken by Guinea-Bissau with regard to the crew members during a short period of initial detention of the M/V Virginia G at sea and the subsequent stay of the vessel in the port of Bissau, cannot be interpreted as imprisonment since, in particular in the latter case, the crew members were free to leave the ship.*
309. *The Parties provide conflicting information regarding the reasons for which the crew members were unable to leave Guinea-Bissau immediately. Panama states that it was due to “the confiscation of their passports for more than four months” while Guinea-Bissau argues that “the only reason the crew did not leave Guinea-Bissau immediately was precisely that the ship owner had no funds to pay for tickets for them to leave”.*

310. *Whatever the reasons which prevented the crew members from leaving Guinea-Bissau during a certain period of time after the arrest of the M/V Virginia G, the Tribunal is of the view that the temporary holding of their passports cannot be considered imprisonment within the meaning of article 73, paragraph 3, of the Convention.*

311. *For the reasons stated above the Tribunal finds that in the present case there was no penalty of imprisonment imposed on members of the crew of the M/V Virginia G and that Guinea-Bissau therefore did not violate article 73, paragraph 3, of the Convention.*

This indicates that a short period of detention will not amount to imprisonment, at least until a reasonable bond is paid. Similarly, the temporary confiscation of passports will not amount to imprisonment.

Other penalties also occur in a fisheries context, and have been upheld as valid by ITLOS. Most notable is the concept of forfeiture, or the catch and/or the fishing vessel. The Law of the Sea Convention doesn't deal with forfeiture at all, and the loss of property is not a custodial offence in nature. ITLOS has made it clear that forfeiture is a valid penalty, provided it is applied in a manner consistent with the prompt release provisions of the Convention. It is clear from the *Tomimaru Case* that forfeiture cannot be used to try to circumvent the operation of Article 292.

Although there is no direct mention of forfeiture as a penalty, it is clearly valid. In addition to a large quantity of State practice in support, the calculation of a reasonable bond can include the value of a seized vessel and catch. It would be bizarre if the bond included a calculation for forfeiture, but it was not a valid penalty to be imposed.

CHAPTER SIX

NOTIFICATION

ARTICLE 73

4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

The final element of Article 73 of the Law of the Sea Convention is notification. When a vessel is arrested or detained, there is an explicit obligation to notify the flag State of what action has been taken, and ultimately what penalties might be imposed. The rationale for notification is obvious, in that the provisions for prompt release would be rendered without purpose if the flag State was unaware the vessel had been detained.

Article 73(4) doesn't specify exactly who should be notified, and merely notes the notification should be made to the flag State "through appropriate channels". This may present a challenge for the coastal State, as it may not have diplomatic representation in or from the fishing vessel's flag State, or even diplomatic relations with it. The use of the phrase "appropriate channels" is to address this problem, as it implicitly recognises that direct communication between the two States may be impossible.

What will suffice to discharge the obligation is a mechanism has not been considered in detail. It was held in the *Camouco Case* that the notification requirement in Article 73(4) was a matter outside the requirements of prompt release for the purposes of the Convention, and therefore did not need to be considered. In that case, the two parties, Panama and France, disputed

whether sufficient notification was given. France alleged communication from the Prefect of Réunion to the Panamanian Consulate-General in Paris of the arrest, while Panama alleged that no such notification was ever received. It appeared to be common ground that had the communication been received, Article 73(4) would have been satisfied. Unfortunately, ITLOS did not deal with notification directly, only noting its importance in permitting prompt release to be initiated.

In the *Saiga Case*, Guinea arrested the *Saiga* and brought the tanker into Conakry. However after the arrest there was no communication with St Vincent and the Grenadines that could be construed as notification. ITLOS found that the lack of communication by Guinea, and its refusal to set a bond for *Saiga's* release were breaches of Article 73(4) of the Law of the Sea Convention. Similarly, a much delayed letter advising the flag state of confiscation did not amount to satisfactory notification in the *Juno Trader Case*.

The concept of such notification has been adopted in other fisheries instruments, including the *United Nations Fish Stocks Agreement*. In Article 21 of the *Fish Stocks Agreement* there is a provision that looks to facilitate high seas boarding and inspection of fishing vessels by authorised ships and aircraft of third States. The provision was included because on the high seas the usual position in international law is that only warships and authorised government vessels of the flag State of the fishing vessels would have jurisdiction to board and inspect. Since many flag States would lack such capacity, it was thought desirable that the fish stocks agreement include a provision to facilitate third State boardings. However, in order to reach agreement to allow third State vessels undertake boarding and inspection of fishing vessels on the high seas, there had to be notification to the flag State of the fishing vessel, and the cooperation of the flag State in any subsequent prosecution.

While directed at a different issue, the requirement for notification in Article 21 of the *Fish Stocks Agreement* is the same as Article 73(4) of the Law of the Sea Convention, although there is more detail with respect to how notification might take place. It is therefore worth considering the mechanism for notification used in the *Fish Stocks Agreement*. Article 21 of the *Fish Stocks Agreement* provides in part:

4. *Prior to taking action under this article, inspecting States shall, either directly or through the relevant subregional or regional fisheries management organization or arrangement, inform all States whose vessels fish on the high seas in the subregion or region of the form of identification issued to their duly authorized inspectors. The vessels used for boarding and inspection shall be clearly marked and identifiable as being on government service. At the time of becoming a Party to this Agreement, a State shall designate an appropriate authority to receive notifications pursuant to this article and shall give due publicity of such designation through the relevant subregional or regional fisheries management organization or arrangement.*

5. *Where, following a boarding and inspection, there are clear grounds for believing that a vessel has engaged in any activity contrary to the conservation and management measures referred to in paragraph 1, the inspecting State shall, where appropriate, secure evidence and shall promptly notify the flag State of the alleged violation.*

The approach in the Fish Stocks Agreement is for each State party to designate an appropriate point of contact for the purpose of notification. This greatly simplifies the notification process, by providing a single point of contact that serves for notification purposes. Certainly, if the flag State has made such a designation under the Fish Stocks Agreement, this would certainly be satisfactory as a point of contact for the purposes of Article 73(4) of the Law of the Sea Convention.

CHAPTER SEVEN

CONCLUSION

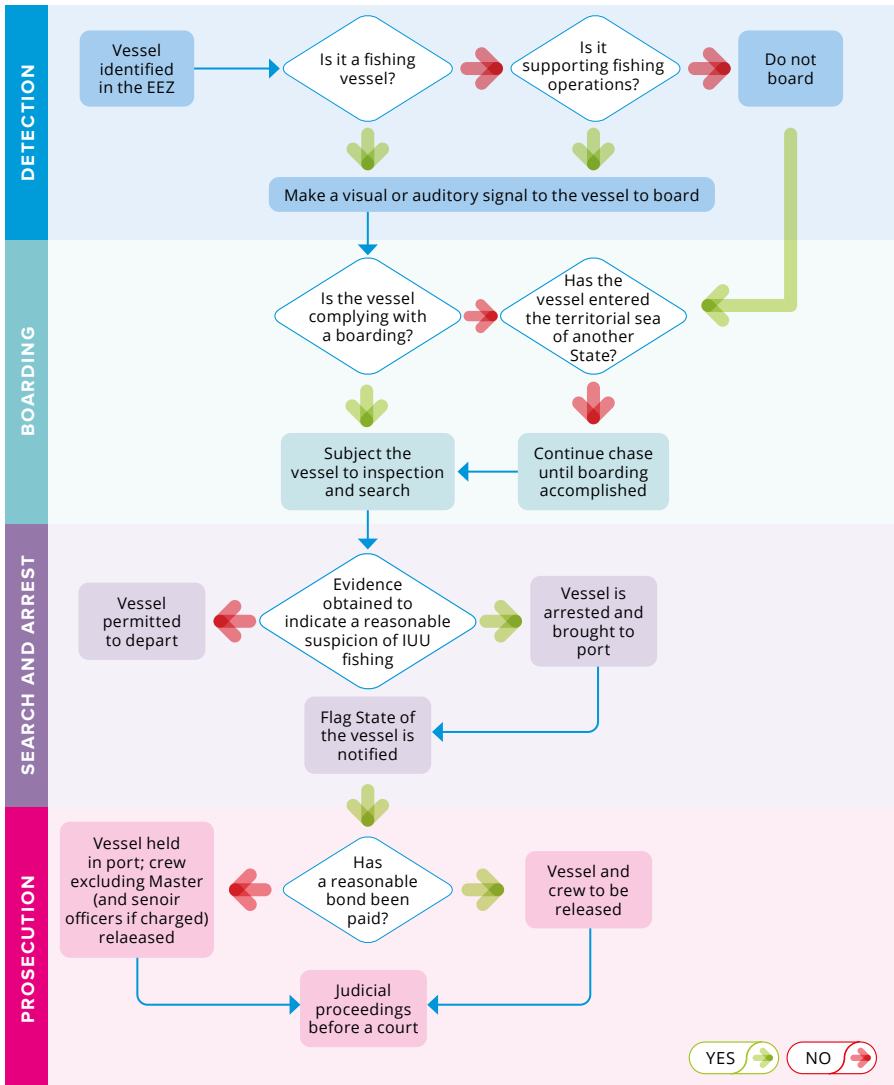
Article 73 is an extremely important part of the United Nations Convention on the Law of the Sea. It provides the heart of maritime enforcement for States in the EEZ. It is essential in the fight against IUU fishing, as it is basis for the regulation of fisheries and the imposition of action against those who breach the laws of the coastal State.

However, it is important to note that Article 73 does not give a coastal State an unfettered ability to take action against vessels engaged in IUU fishing. It imposes significant limitations on how a suspect vessel is to be treated and gives the flag State the right to test the bases for vessel's detention in the event a reasonable bond is offered.

Article 73 provides a template for a State to exercise its powers for fisheries enforcement in the EEZ. If a coastal State's activities fall outside that template, there are potential consequences that can occur at international level. Given the real possibility of international litigation that could arise, these consequences could be considerable and therefore compliance with Article 73 should be seen as a priority.

APPENDICES

ARTICLE 73 FLOWCHART



NATIONAL LEGISLATION SUMMARY

STATE	LEGISLATION	FISHING DEFINITION	FORFEITURE		BOND
			Vessel	Catch	
Cook Islands	Marine Resources Act 2005	Yes (s.2)	Yes	Yes	Yes (s.55)
Fiji	Offshore Fisheries Management Act 2012, Part 6	Yes (s.2)	Yes	Yes	Yes (s.100)
Kiribati	Fisheries Act 2010	Yes (s.2)	Yes	Yes	Yes (s.29)
Marshall Islands	51 MIRC Ch.2, Fisheries Act and Fisheries Management Act	No	No	No	No
Federated States of Micronesia	Title 24, Marine Resources Act 2002	Yes (s.102)	Yes	Yes	Yes (s.75)
Nauru	Fisheries Act 1997	Yes (s.2)	Yes	Yes	Yes (s.18)
Niue	Territorial Sea and Exclusive Economic Zone Act 1996	Yes (s.2)	Yes	Yes	Yes (s.48)
Papua New Guinea	Fisheries Management Act 1988	Yes (s.2)	Yes	Yes	Yes (s.61)
Palau	Title 27, Fishery Zone and Regulation of Foreign Fishing, §181-§190	No	Yes	Yes	No
Samoa	Fisheries Management Act 2016	Yes (s.2)	Yes	Yes	Yes (s.62)

STATE	LEGISLATION	FISHING DEFINITION	FORFEITURE		BOND
			Vessel	Catch	
Solomon Islands	Fisheries Management Act 2015	Yes (s.2)	Yes	Yes	Yes (s.92)
Tokelau	Tokelau (Exclusive Economic Zone) Fishing Regulations 2012	Yes (s.2 Fisheries Act 1996 (NZ))	Yes	Yes	Yes (s.41)
Tonga	Fisheries Management Act 2002	Yes (s.2)	Yes	Yes	Yes (s.80)
Tuvalu	Marine Resources Act 2006	Yes (s.2)	Yes	Yes	Yes (s.81)
Vanuatu	Fisheries Act (No.10 of 2014)	Yes (s.1)	Yes	Yes	Yes (s.125)

MODEL LEGISLATIVE PROVISIONS

IMPLEMENTING ARTICLE 73

Article 73 of the Law of the Sea Convention is a key provision for coastal States to enforce fisheries law within the EEZ. For a coastal State to have an effective mechanism for maritime enforcement, it must implement each of the elements of Article 73 in national legislation and policy.

There are different ways in which this can be done. Firstly, it can be through statutes passed by a national legislature. This will be necessary for essential concerns such as the definition of fishing, or the penalties attaching to fisheries offences, to ensure that corporal punishment and/or imprisonment are not part of what may be imposed by the courts. Secondly, delegated legislation or regulations might be appropriate for parts of the enforcement picture more susceptible to change, such as issues around evidence collection or boarding procedures. Delegated legislation is still binding law, but can be more easily changed than statutory laws passed by a parliament or congress. Thirdly, some enforcement elements are appropriate to be expressed in policy documents, such as the notification requirements upon a coastal State to advise a flag State of an arrest. While a legislative solution is possible, in reality the key aspect is that a communication in some official form takes place.

Nothing ultimately requires a coastal State to implement these obligations in a particular way, so long as obligations are met, however one matter that will inform the decision on how to implement in a fundamental way. It is clear that international law requires there to be minimum standards of justice in any prosecution of a fisheries offence. This will by implication typically require national legislation, passed by a legislature, to make it explicitly clear to national courts that minimum standards of justice are to be met.

DEFINITION OF FISHING

If a coastal State is to take maximum advantage of the regulatory powers available to it under the Law of the Sea Convention, then a wide definition of what constitutes fishing is important. A wide definition will enable the coastal State to regulate not merely the act of catching fish, but also a range of supporting activities including bunkering, transshipment, and the deployment of fish aggregating devices. This approach can be seen in the text of the *Western and Central Pacific Fisheries Convention* and in national legislation in a number of States in the Pacific. The example below is that employed by Tonga in its national legislation.

Fisheries Management Act 2002, section 2, Tonga

“Fishing” means —

- (a) searching for, catching, taking or harvesting fish;*
- (b) attempting to search for, catch, take or harvest fish;*
- (c) engaging in any other activity which can reasonably be expected to result in the locating, catching, taking or harvesting fish;*
- (d) placing, searching for or recovering fish aggregating device or associated electronic equipment including radio beacons;*
- (e) any operations at sea directly in support of, or in preparation for any activity described in this paragraph; or*
- (f) the use of any other vehicle, air or sea borne, including aircraft or helicopter use, in relation to any activity described in this paragraph except for emergencies involving the health or safety of crew members or the safety of the vessel;*

POWERS OF FISHERIES OFFICERS

Consistency with international law in the boarding, search and arrest of a vessel is a significant concern. It is therefore important that fisheries officers have appropriate powers to board, collect and potentially secure evidence and make an arrest. If these powers are lacking, then there may be difficulty in securing a successful prosecution or a possible international legal challenge could result.

The Nauruan legislation below is an example of a succinct and thorough statement of a boarding officer's powers. Note the references to "documents" in the legislation. Importantly "document" is defined as follows:

"document", in relation to a boat, includes any ship's charts, logbooks, certificate of registry or registration, licence, permit, official paper, article of agreement and other documents or records, including electronically stored records, which are used in the operation of the boat or for the purpose of fishing by the boat, or which relate to the boat and to the crew or to any person on board the boat;

This allows the collection of electronic materials, which may be very valuable in securing a conviction in certain circumstances given they may electronically store the ship's position over time, which can be correlated with fishing catch data to demonstrate illegal fishing.

Fisheries Act 1997, Nauru

17. (1) For the purposes of enforcing this Act, an authorised officer may, without a warrant –
 - (a) stop any foreign fishing boat or small boat in fisheries waters and any national boat in or beyond fisheries waters; and
 - (b) require the master of the boat to stop fishing and take the fishing equipment of the boat back on board; and
 - (c) require the master to facilitate the boarding of the boat by all appropriate means; and

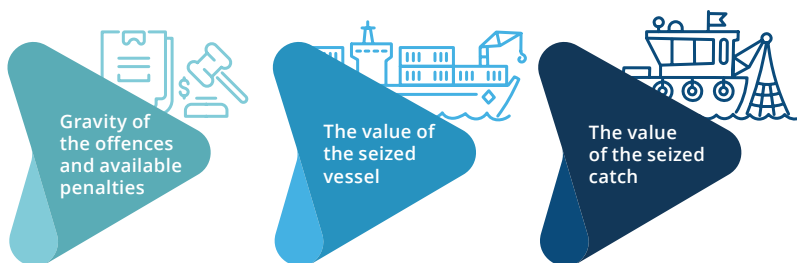
- (d) *board the boat and take with him such other persons as he may require to assist him in the exercise of his powers; and*
- (e) *muster the crew of the boat; and*
- (f) *require to be produced, examine and take copies of any document on board the boat which is required under this Act or relates to the boat, to fishing by the boat, to the crew or to any person on board the boat; and*
- (g) *require the master to appear and give an explanation concerning the boat, fishing by the boat, any crew member or any person on board the boat and any document referred to in paragraph (f); and*
- (h) *while on board, make any search, examination or enquiry which he considers necessary to find out whether any provision of this Act has been contravened; and*
- (i) *make an entry dated and signed by him in a boat's log; and*
- (j) *take or require the master to take the boat to any place in Nauru or in fisheries waters for the purpose of carrying out any search, examination or enquiry; and*
- (k) *following hot pursuit carried out in accordance with international law and commenced within fisheries waters, stop, board and search outside fisheries waters any foreign fishing boat which he has reasonable grounds to believe has been used in the commission of an offence against this Act and bring the boat and all persons and things on board the boat within fisheries waters; and*
- (l) *stop, enter and search any vehicle or aircraft which he has reasonable grounds to believe is being used or is involved in the commission of an offence against this Act; and*
- (m) *take samples of any fish found in a boat, vehicle or aircraft searched under this section; and*

- (n) *give such directions to the master and a crew member of any boat, or the driver or pilot of a vehicle or aircraft stopped, boarded or searched as may be necessary or reasonably expedient for any purpose under this Act or to provide for the compliance by the boat, the vehicle, the aircraft, the master or crew member or the driver or pilot with the conditions of a licence; and.*
 - (o) *arrest any person whom he has reasonable grounds to believe has committed an offence under this Act.*
- (2) *Where, following the commission of an offence under this Act by a foreign boat, the boat is pursued beyond the limits of fisheries waters in circumstances and to the extent recognised by international law, the powers conferred on an authorised officer under this Act are exercisable beyond the limits of national jurisdiction in accordance with international law.*
- (3) *An authorised officer who has reasonable grounds to believe that an offence under this Act has been or is being committed, may, without a warrant, seize -*
 - (a) *any boat (together with its catch on board, fishing equipment, other equipment, stores and cargo), vehicle or aircraft which he has reasonable grounds to believe has been or is being used in the commission of an offence under this Act or which he knows has been forfeited in accordance with any provision of this Act; and*
 - (b) *any fish which he has reasonable grounds to believe have been taken in the commission of the offence or which are possessed in contravention of this Act; and*
 - (c) *any equipment which he has reasonable grounds to believe has been or is being used in the commission of an offence under this Act; and*
 - (d) *any explosive, poison or noxious substance which he has reasonable grounds to believe has been or is being used or is possessed or controlled in contravention of this Act; and*

- (e) *any documents required to be maintained by this Act or in accordance with the conditions of any licence or which he has reasonable grounds to believe show or tend to show, with or without other evidence, the commission of an offence under this Act; and*
 - (f) *any thing which he has reasonable grounds to believe may be used as evidence in any proceedings under this Act.*
- (4) *An authorised officer has such other powers as are prescribed for the purposes of enforcing this Act. (5) In exercising powers under this Act, an authorised officer may use such force as is reasonably necessary.*

CALCULATION OF A BOND

Much international litigation in the law of the sea in the past thirty years has been concerned with the arrest of vessels and the calculation of a reasonable bond. As noted above there are three elements to the bond:



These can be arrived out through an administrative process – that is set by a public official – or through a judicial process. Critically, each element must reflect a reasonable assessment of the appropriate amount or risk legal challenge before ITLOS under the prompt release provisions. Vanuatu has a detailed provision with respect to the calculation of the bond which deals with each element in a careful fashion to ensure compliance with international law.

Fisheries Act No.10 of 2014, Vanuatu

125 Release of seized property

- (1) *The Supreme Court may, on application, order the release of a fishing vessel (together with its fishing gear, equipment, stores and cargo), vehicle, aircraft or other items seized under this Act, upon payment of a bond or other form of security as determined by the Court.*
- (2) *If a foreign fishing vessel is seized, the Court must order the release of the vessel (together with its fishing gear, equipment, stores and cargo) on application and on the payment of a bond or other security as determined by the Court.*
- (3) *In determining the value of a bond or other form of security under this section, the Court:*
 - (a) *is to take into consideration:*
 - (i) *the value of the property to be released; and*
 - (ii) *the total maximum fines provided for in relation to the alleged offence; and*
 - (iii) *the costs that the prosecution may recover on conviction; and*
 - (b) *may set the bond or security at the aggregate of those amounts.*
- (4) *If a vessel, vehicle, aircraft or other item is released on the payment of a bond or other security, the Court must state in the Order, the separate sums attributable to the property to be released, the total fine or fines and the likely award of costs.*
- (5) *The Director may seize any vessel if he or she is satisfied that the vessel has committed a serious violation under this Act.*
- (6) *Upon seizure of the vessel under subsection (5), the agent*

or master of the vessel located in Vanuatu may apply to the Supreme Court for the release of that vessel.

- (7) If the agent or master of a vessel seized under subsection (5) fails to comply with this section, the vessel and all fishing gears, catchers or any other fishery product onboard carried by the vessel would be forfeited to the State.*
- (8) This section does not require the Court to release a vessel, vehicle, aircraft or other item if it might be required as an exhibit in the proceedings, or if it might reasonably be required for further investigation of the alleged offences.*

126 Sale of perishable goods

- (1) Any fish or other perishable goods that has been seized under this Act and the proceeds of sale of the fish or other perishable goods are to be held and dealt with in accordance with the provisions of this Act.*
- (2) The Director may arrange for the sale of fish or other perishable goods.*
- (3) However, if, after making reasonable efforts, the Director is unable to sell the fish or perishable goods, or if the fish or other items are unfit for sale, he or she may dispose of them in such manner as he or she thinks fit.*

127 Holding of seized property

A vessel, vehicle, aircraft or other item seized under this Act, and any bond or other security is to be held in safe custody at the discretion of the Director, and at the cost of the defendant, pending the outcome of the proceedings, or the satisfactory resolution of the matter.

128 Court's power of forfeiture

- (1) *If a person is convicted of an offence under this Act, the Supreme Court, in addition to any other penalty:*
 - (a) *may order that the vessel (together with its fishing gear, equipment, stores and cargo) or any vehicle or aircraft used or involved in the commission of that offence be forfeited to the Government; and*
 - (b) *must order that any fish caught unlawfully, or the proceeds of sale of such fish or other perishables, be forfeited to the Government; and*
 - (c) *must order that any explosive, poison or other noxious substance used or involved in the commission of the offence be forfeited and used or disposed of in such manner as the Court may determine.*
- (2) *If a property seized under this Act is not forfeited, and any bond, security or proceeds of sale are not forfeited or applied in the discharge of any fine or other order, the property, bond, security or proceeds of sale are to be made available for collection by the registered owner or his or her agent.*
- (3) *If a property seized under this Act has been released on the lodging of a bond or other security, an order for forfeiture, unless the Court for special reasons fixes a smaller sum, operates as an order for the forfeiture of the bond or security.*
- (4) *If a property seized under this Act has been released on the lodging of a bond or other security, the Court may order a convicted defendant and the owner of the seized property, whether or not he or she is a defendant, to pay the difference between the bond or security lodged and the aggregate value of the property ordered forfeited.*

129 Application of bond

A bond, security or net proceeds of the sale of any property is to be applied in the following manner:

- (a) *the discharge of any forfeiture ordered under section 128; and*
- (b) *the payment of all fines for offences against this Act or any other Act or penalties imposed under this Act or any other Act arising out of the use of or in connection with the property; and*
- (c) *the payment of all orders for costs related to the proceedings; and*
- (d) *the balance is to be returned in accordance with subsection 128(2).*

130 Removal of seized property

If a property held or forfeited under this Act has been unlawfully removed from the custody of the Government, it is liable for seizure at any time while it remains in Vanuatu or Vanuatu waters.

131 Disposal of forfeited property

- (1) *A property ordered to be forfeited under this Act may, at the expiry of any time limit for an appeal and if no appeal is filed, be disposed of in such manner as the Director may direct.*
- (2) *A property seized under this Act, but not forfeited in any legal proceedings, may:*
 - (a) *be held by the Government until all fines, costs and penalties imposed under this Act have been paid; or*
 - (b) *if payment is not made within the time allowed, may be sold and the balance of the proceeds returned in accordance with subsection 128(2) after deduction of all fines, costs and penalties, and any costs incurred in the sale of the property.*

IMPRISONMENT

The common breach of Article 73 of the Law of the Sea Convention by States is in the context of potential (or actual) imprisonment of offenders for fisheries offences in the EEZ. Unless there is an agreement with a foreign State authorising such imprisonment, and such agreements are extraordinarily rare, then it is simply not lawful to incarcerate an individual as a penalty for a fisheries offence. Consequently, provisions in national legislation that purport to include imprisonment as an option for fisheries offences are inconsistent with international law.

The Solomon Islands Parliament has dealt with this situation with the inclusion of a catch-all penalty provision making it clear that fisheries offences in the EEZ by foreign nationals will not attract a custodial sentence in the absence of an agreement with the national's foreign State. This leaves imprisonment available for fisheries offences by foreign ships in the archipelagic waters and territorial sea of the Solomon Islands, as well as for other offences such as resisting arrest that might be drawn from other legislation where appropriate. Similar legislation should be viewed by States throughout the Pacific as a matter of some importance to ensure compliance with international law.

Fisheries Act 2016 Solomon Islands

103. *Where an offence under this Act has been committed in the exclusive economic zone by a person who is a national of another State, that person may not be sentenced to a term of imprisonment in the absence of any agreement to the contrary between Solomon Islands and the State of which that person is a national.*

NOTIFICATION

Most States do not have specific legislative provisions to provide for the notification of foreign States of an arrest or prosecution of a vessel flying their flag. Such provisions are not strictly needed in legislation, but in their absence there must be clear procedures in place to ensure that notification does take place. This will typically need to involve the Foreign Ministry where the flag State is one where communication with the coastal State is relatively rare. A rare example of a legislated requirement of notification is found in Thailand and extracted below.

Royal Ordinance on Fisheries BE 2558, 2015, Thailand

Section 104. Subject to international law, and in fulfillment of all obligations or agreements which the Kingdom of Thailand has concluded with international organisations at all levels, the competent official shall, upon the request of the government official of a relevant State having jurisdiction or of an international organisation having control over fishing operation in an area concerned, have the power and enjoy immunity in order to get on board any stateless vessel or a fishing vessel found to be undertaking IUU fishing outside Thai waters for inspection and for the execution of his/her duties. When boarding a fishing vessel for inspection pursuant to paragraph one, the competent official shall observe the rules prescribed by the Minister. Such rules shall take into account rules accepted as international guidelines and recognized by the United Nations. In this regard, the provision under section 105(1) shall apply mutatis mutandis, and the flag state or international organisations concerned shall be notified accordingly.



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