

LEGISLATIVE GUIDELINES FOR SUSTAINABLE FISHERIES: SOME FUTURE DIRECTIONS FOR THE DEVELOPMENT OF FISHERIES LEGISLATION IN THE PACIFIC ISLANDS

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Introduction

The purpose of this paper is to provide a basis for setting up a checklist and a template that can be used for gauging the best practices when reviewing fisheries legislation. Some provisions are dealt with in more detail than others, with greater attention being devoted to those aspects of a fisheries law which will need revision in order to bring the law into line with modern conservation and management approaches, as well as looking at novel aspects designed to give effect to UNFSA¹ and WCPFC².

Certain provisions that are often found in a fisheries law, such as those concerning driftnet fishing, and bilateral fisheries agreements, important though they are in their own right, are not included in this document, as they do not raise any novel aspects which a fisheries law needs to address, and which stem from the recent developments in the international regime of fisheries. However, in a comprehensive fisheries law, such matters would obviously be included. Likewise, it is assumed that all countries have already provided for the declaration of their maritime areas (archipelagic waters, territorial sea, EEZ), which may of course be covered in a more generally applicable marine spaces law. Certain aspects such as fish processing and importation of fish are sometimes included in a basic fisheries law, other times not. These aspects are not considered here: although important, these topics are not included in this paper for the same reason that they do not raise novel questions concerning the modern law of the sea. Their importance should not be underestimated, of course, for such topics will have a bearing on how a country is dealing with its obligations under the WTO regime.

Objectives and principles

The starting point is the statement of objectives and principles in Article 5 of the UN Fish Stocks Agreement (UNFSA), accompanied by the objective of long term sustainable use stated in Article 2 and the precautionary approach set out in Article 6. These objectives, along with those found in Agenda 21, the Code of Conduct for Responsible Fisheries, the World Summit on Sustainable Development (WSSD) Johannesburg Plan of Action, and the various international plans of action and ministerial declarations adopted by FAO, are

¹ Its full title is: Agreement for the Implementation of the UN Convention of December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. It is referred to in this paper as UNFSA.

² Its full title is the Convention on Management of Highly Migratory Fish Stocks in the Western and Central Pacific. It is referred to here as WCPFC.

widely accepted as indispensable to modern fisheries conservation and management. Further, they have been incorporated into the provisions of the WCPFC.

The trend today is, therefore, towards having objectives clauses in fisheries legislation, which should refer to these objectives one way or another.

There are several different approaches that can be adopted. A few different examples are set out here. In these, the objectives are spelled out. Another approach, of course, could be to refer to these objectives and principles by a process of incorporation, for example, by simply referring in the legislation to the statements as found in Article 5 of UNFSA or Article 5 of the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific.

An important underlying issue, however, is the extent to which such objectives can be used in judicial and administrative proceedings to measure whether appropriate decisions have been made. In other words, are they justiciable?

The Republic of South Africa has dealt with objectives and principles in the following way:

The Minister and any organ of state shall, in exercising any power under this Act, have regard to the following objectives and principles:

(a) The need to achieve optimum utilization and ecologically sustainable development of marine living resources;

(b) the need to conserve marine living resources for both present and future generations;

(c) the need to apply precautionary approaches in respect of the management and development of marine living resources;

...

(e) the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;

(f) the need to preserve marine bio-diversity;

(g) the need to minimize marine pollution;

(i) any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law; ...

In this approach the principal objectives and principles found in UNFSA are in effect summarized.

In the case of Australia, these principles and objectives have been quite substantially recast. The Australian Fisheries Management Act of 1991 states the following in its section 3 (titled “Objectives”):

(1) The following objectives must be pursued by the Minister in the administration of this Act and by [Australian Fisheries Management Authority] in the performance of its functions:

(b) ensuring that the exploitation of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically sustainable development and the exercise of the precautionary principle, in particular the need to have regard to the impact of fishing activities on non-target species and the long term sustainability of the marine environment;

(2) In addition to the objectives mentioned in subsection (1), or in section 78 of this Act, the Minister, AFMA, and the Joint Authorities are to have regard to the objectives of:

(a) ensuring through proper conservation and management measures, that the living resources of the [Australian Fishing Zone, or AFZ] are not endangered by over-exploitation; and

(b) achieving the optimum utilisation of the living resources of the AFZ...

The following was added to the amendment inserted specifically to give effect to the 1995 UN Fish Stocks Agreement:

(c) ensuring that conservation and management measures in the AFZ and the high seas implement Australia's obligations under international agreements that deal with fish stocks... (Fisheries Legislation Amendment Act, 1999)

In the Cook Islands Marine resources Act, the following approach is followed:

3. Objective, Function and Authority - (1) The principal objective of this Act and the Ministry of Marine Resources is to provide for the sustainable use of the living and non-living marine resources for the benefit of the people of the Cook Islands.

(2) The Ministry of Marine Resources has the principal function of, and authority for the conservation, management, development of the living and non-living resources in the fishery waters in accordance with this Act and the Ministry of Marine Resources Act 1984.

(3) This Act shall be interpreted, and all persons exercising or performing functions, duties, or powers conferred or imposed by or under this Act and the Ministry of Marine Resources Act 1984 shall act, in a manner consistent with the Cook Islands international and regional obligations relating to the conservation and management of living and non-living resources in the fishery waters.

(4) To ensure that the objectives, functions and authority provided under this Act and the Ministry of Marine Resources Act 1984, and Cook Islands obligations under international and regional law are effectively discharged, the provisions of this Act shall prevail in the event of inconsistency or incompatibility with any other Act or instrument having the force of law in the Cook Islands from time to time, except for the Constitution of the Cook Islands.

However, this needs to be read in conjunction with section 4 on principles and measures.

4. Principles and Measures - The Minister, or Secretary, as appropriate, when performing functions or exercising powers under this Act, shall take into account the following

(a) environmental and information principles in relation to achieving the sustainable use of fisheries and the need to adopt measures to ensure the long term sustainability of the fish stocks -

(i) decisions should be based on the best scientific evidence available and be designed to maintain or restore target stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors;

(ii) the precautionary approach should be applied;

(iii) impacts of fishing on non-target species and the marine environment should be minimised;

(iv) biological diversity of the aquatic environment and habitat of particular significance for fisheries management should be protected;

(b) principles and measures for the exploration and exploitation of the non-living resources of the fishery waters, seabed and subsoil -

(i) the orderly, safe and rational management of the nonliving resources, including the efficient conduct of activities, and in accordance with the principles of conservation, the avoidance of unnecessary waste;

- (ii) measures to ensure effective protection for the aquatic environment from harmful effects which may arise from exploration or exploitation of non-living resources, including rules, regulations and procedures for, inter alia -*
- (c) the prevention, reduction and control of pollution and other hazards to the aquatic environment, and of interference with the ecological balance of the marine environment;*
- (d) the protection and conservation of the natural resources of the fishery waters and the prevention of damage to the flora and fauna of the aquatic environment;*
- (e) measures to ensure effective protection of human life.*
- (f) principles and measures for the development and management of aquaculture-*
 - (i) aquaculture development should be ecologically sustainable*
 - (ii) the impacts of aquaculture on aquatic ecosystems and other uses of aquatic resources should be assessed;*
 - (iii) the need to minimise pollution from aquaculture;*
- (g) social, cultural and equity principles –*
 - (i) the maintenance of traditional forms of sustainable fisheries management;*
 - (ii) protection of the interests of artisanal fishers, subsistence fishers and local island communities, including ensuring their participation in the management of fisheries and of aquaculture; and;*
 - (iii) broad participation by Cook Islanders in activities related to the sustainable use of marine resources.*

The approach in the Tongan Fisheries Management Act is to spell out the objectives in full. However, it is of particular interest because of the way it addresses the precautionary approach in paragraph c.

4. In any exercise of powers under this Act, the Minister shall ensure that the following are considered:

- (a) the need to ensure the long term conservation and sustainable use of fishery resources, and to this end adopt management measures which promote the objective of optimum utilisation and to achieve economic growth, human resource development, employment creation and sound ecological balance;*
- (b) the need to ensure that management measures are based on the best scientific evidence available;*
- (c) the application of the precautionary approach at no less standard than set by criteria in the Fish Stocks Agreement or any other fisheries management agreement;*
- (d) the need to conserve aquatic living resources and protect biodiversity in the marine environment for present and future generations;*
- (e) the need to protect the ecosystem as a whole and the general aquatic environment and adopt, where necessary, conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon target stocks;*
- (f) the need to minimise pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species and impacts on associated or dependent species, through measures including, to the extent practicable, the development and use of selective, environmentally safe and cost effective fishing gear and techniques;*
- (g) the need to take measures to prevent or eliminate over-fishing and access fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with sustainable use of fishery resources;*
- (h) the interests of artisanal and subsistence fishers;*

- (i) the need to collect and share in a timely manner and in accordance with fisheries management agreements and international law, complete and accurate data concerning fishing activities on, inter alia, vessel position, catch of target and non target species and fishing effort, as well as information from national and international research programmes;*
- (j) the need to promote and conduct scientific research and develop appropriate technologies in support of fishery conservation and management;*
- (k) the need to implement and enforce conservation and management measures through effective monitoring, control and surveillance;*
- (l) the need to promote, to the extent practicable, broad and accountable participation in the management and conservation of fisheries resources and understanding for the need for conservation and sustainable development of aquatic living resources;*
- (m) any relevant obligations of Tonga under applicable rules of international law and international agreements.*

In the Pacific, given the importance of customary marine tenure and the fact that several coastal fisheries are subject to some form of customary marine tenure, it is important to recognise the role that customary marine tenure plays in fisheries and also the need to protect the source of livelihood of subsistence fishers. An example can be found in Solomon Islands Fisheries Act.

4. *In exercising his powers under this Act, the Minister shall have regard to—*
.....

(g) any customary rights of customary rights holders over or in relation to any area within Solomon Islands waters;

Likewise, some would wish to see recognition of bio prospecting and an endorsement of the ecosystem approach to fisheries as an objective.

It will be noted that, in all of the examples quoted above, “shall” has been used, which would mean in most countries that such provisions would be justiciable. Or, in other words, administrative action could be challenged in the courts on the basis of an alleged non compliance with such objectives. Each country should be judged separately to determine whether that is appropriate, for example, that it could impose too great a strain on limited judicial resources. If that is the case, it may be necessary to insert weaker language, and add a clause to the effect that compliance with such provisions is not subject to judicial review. If it is considered necessary to do this, it would be important to ensure that the law in other ways provides for transparency and accountability. This will be considered further under governance below.

Checklist: does the basic fisheries law in question provide for the application of the objectives and principles found in the UNFSA and the WCPFC?

Broadly speaking, these should include at least:

- *the need to achieve optimum utilization and ecologically sustainable development of marine living resources;*
- *the need to conserve marine living resources for both present and future generations;*
- *the need to apply precautionary approaches in respect of the management and development of marine living resources;*
- *the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;*
- *the need to preserve marine bio-diversity;*
- *the need to minimize marine pollution;*
- *Others could be added: bio prospecting customary fishing rights, the ecosystem approach to fisheries*

Is it appropriate for the particular country in question to make such clauses justiciable in the courts or tribunals?

Ecosystem considerations

A modern fisheries law will need to provide the basis for the inclusion of ecosystem considerations in decision making, and this has been done already by referring to it in the objectives referred to above. It is no longer considered appropriate, for example, to make decisions on the basis of information concerning one stock or species of fish, instead, it is necessary to consider effects of associated and dependent species, as well considering the impact of the activity in question on the marine environment as a whole.

The ecosystem approach is also reflected in the WSSD Plan of Implementation. Thus, in paragraph 30(d), it is stated: *“Encourage the application by 2010 of the ecosystem approach, noting the Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem and decision V/6 of the conference of the Parties to the Convention on Biological Diversity.”*

However, while the basic point is clear, it can often be difficult (and expensive) to obtain the information necessary to make an effective evaluation of the ecosystem considerations. In an important article by J Caddy and K Cochrane, the difficult task ahead for fisheries managers in embracing the ecosystem approach is put into context in their wide ranging review of fisheries management, when they state:

*“Even while fisheries management struggles to get to grips with single species issues, it is increasingly being called on to take a multispecies and ecosystem perspective. However, there are still few case studies with more than few years duration which illustrate how these concepts are to be applied, and the difficulties are already apparent to all.”*³

The following extracts from an FAO study⁴ on the ecosystem approach are also helpful:

³ “A Review of Fisheries Management Past and Present, and some Future Perspectives for the Third Millennium” *Ocean and Coastal Management* 44 (2001) 653 at 666.

⁴ See also *The Ecosystem Approach to Fisheries: Issues Terminology, Institutional Foundations, Implementation and Outlook* FAO Fisheries technical paper no 443. (2003)

“EAF is not well covered in binding international law at present, either explicitly as EAF sensu stricto, or implicitly as sustainable development principles, but is reflected mainly in voluntary instruments such as the Rio Declaration, Agenda 21, the Code of Conduct for Responsible Fisheries and the Reykjavik Declaration. As a result, few regional fisheries organizations and arrangements make explicit recognition of EAF in their instruments. Furthermore, EAF is not frequently an integral part of national fisheries policy and legislation. This leads to many deficiencies in current fishery management regimes, such as (i) weak cross-sectoral consultation and cooperation and (ii) the failure to consider, or a legal inability to act on external influences such as pollution and habitat deterioration. Such problems need to be addressed and corrected where required. Especially in the case of national policies and laws, EAF may require that existing legal instruments and the practices of other sectors that interact with or impact on fisheries need to be considered, and that adjustments to those instruments and practices pertaining to other sectors be made.

EAF is, therefore, likely to require more complex sets of rules or regulations that recognize the impacts of fisheries on other sectors and the impact of those sectors on fisheries. It may be desirable to regulate the major and more or less constant inter-sectoral interactions through the primary legislation. This could apply, for example, to laws controlling coastline development and coastal habitat protection, the establishment of permanent MPAs, and the creation of cross-sectoral institutions. However, many interactions between fisheries and other sectors will be dynamic, and in these cases, it may be desirable to strive for a more responsive and flexible mode of interaction than is usually possible through the primary legislation. In these cases, it would be preferable to rely instead on agreed rules. This is consistent with the advice in the FM Guidelines, namely that routine management control measures needing frequent revision should be included in subordinate legislation, rather than in the primary legislation (4.3.1. vi).

The FM Guidelines states that the primary legislation should specify the “functions, powers and responsibilities of government or other institutions involved in fisheries management” (4.3.1 iv). It also states that the jurisdiction should include the geographical area, the interested parties and the institutions involved in fisheries management (4.3.1 v). In addition, EAF requires that (i) the geographical jurisdiction should, as far as practical, coincide with natural ecological boundaries and (ii) that the legislation should specify the appropriate level of consultation and cooperation between the specific fishery agency and those institutions dealing with other fisheries or with other interacting sectors.”

It will be apparent that giving full effect to EAFM is an enormous task, and one that is beyond the reach of most governments. However, steps towards achieving it can be made, for example, by ensuring that EAFM is included in the objectives and principles

clauses discussed above. Also by providing the opportunity for cross sectoral assessments and interactions in the governance regime, the EAFM approach can be given at least some prospects for application.

Marine protected areas. While the ecosystem approach should permeate thinking about all aspects of decision making, one very practical step is to ensure that the fisheries legislation, or otherwise the legislation governing the marine environment, at least provides for setting up marine protected areas. The law should also provide for the establishment of different types of marine protected areas according to the objective to be achieved. Thus, there should be scope for establishing the following: marine parks, marine reserves, and prohibited fishing areas.

By itself, it will not, of course, ensure the application of such an approach. It will however, constitute an important tool in achieving that objective. In any event, the inclusion of the power in legislation to establish marine protected areas will form part of a range of controls available.

Checklist: Does the fisheries law promote consideration of an ecosystem approach to fisheries?

Is that consideration given a practical effect in decision making? For example, do conservation, management and exploitation decisions take into account effects on associated and dependent species, as well as the impact on the ecosystem as a whole?

Does the fisheries law, or another related law such as the environment law, provide for the establishment of marine protected areas, and for different types of protected areas?

Does it provide for the application (if needed) of strong and effective conservation and environmental objectives in such areas?

Precautionary approaches to Fisheries Management

Closely linked to the need for an ecosystem approach is the need to adopt precautionary approaches to fisheries conservation, management and exploitation. This has already been referred to under the objectives above. However, it may be necessary to include in the law provisions requiring the decision maker to apply precautionary reference points. Thus, in the Australian fisheries law, it is stated:

(5C) A plan of management for a fishery affecting straddling fish stocks, highly migratory fish stocks or ecologically related fish stocks (within the meaning of the Fish Stocks Agreement) must set out stock-specific reference points (within the meaning of that Agreement) for the stocks (section 17 5C).

Likewise the Tongan Fisheries Management Act, section 4 (c), quoted above, should be noted here.

Checklist:

Does the fisheries law provide for the incorporation of precautionary approaches into conservation, management and exploitation decisions (for example, in the objectives and purposes already referred to above)?

Does the fisheries law provide for the setting of precautionary reference points as set out in the UNFSA and the WCPFC (Article 6)?

Overall governance framework

This will vary from one country to another. By governance in this context, we refer to the capacity to administer the fisheries legislation, to set policies, to issue authorisations for fishing (however described), to determine conservation and management measures, to declare marine protected areas, to make decisions concerning marine scientific research, to make enforcement decisions, to initiate prosecutions. Many of these matters will be considered under the specific headings later. The critical questions that need to be resolved are:

Which government ministries need to be involved in or consulted when formulating policies or conservation measures? Normally, it would be appropriate to have Fisheries as the lead body, but with Foreign Affairs, Justice/Attorney-General's and Environment also closely involved. It will of course depend on the situation in each country as to which ministries or departments need to be involved. The interaction between the environmental and fisheries interests has often been a source of dispute between government departments. Getting the balance right between the two has often proved to be elusive. To a certain extent, this can be dealt with by indicating in legislation which law is to prevail over the other.

Getting this balance right will also have an important impact on the ability of a particular country to introduce ecosystem approaches, for it is the ability to make judgements across different sectors that is fundamental to the success of an ecosystem approach.

How will the interests of the different stakeholders be taken into account? In particular, how do you obtain a balance between the representation of the small scale and artisanal fishers on the one hand and the larger scale fishing interests on the other. Depending on the country in question, it may be necessary to accommodate the varying interests of the following:

- artisanal,
- small scale,
- customary fishing,
- recreational,
- commercial fishing,
- (possibly) foreign fleet interests.

One approach is to set up a fisheries advisory board on which could be represented a wide range of interests, from government departments to representatives of different parts of the fisheries sector.

There is also the consideration that some sectors might need their own council or advisory body distinct from the main body. In Samoa, for example, there is a body specifically to advise on small scale fisheries.

A further consideration is that there may be a need to separate the role of an advisory body which represents stakeholders from that of a licensing body. The reason for this is the potential for conflict of interest here.

Another aspect is to ensure that there is an appeal or review system which can deal with appeals against decisions of the minister on licensing. Much will depend on the specific characteristics of the country. For example, how much fishing activity is being regulated, and what type of fishing activities are there taking place within the country? Does it merit an appeal or review process? Is there already an effective administrative review process in place? How effective are the local courts in dealing with fisheries and maritime issues?

Underlying issues of governance is the need to ensure transparency in decision making. At the international level, this is stated explicitly in Article 12 UNFSA, and in Article 21 WCPFC. At the national level, it is important to ensure that there is a similar transparency in decision making. One means by which this can be achieved is to require written reasons to be given for decisions on licensing, cancellation or refusal to grant a licence, etc. Other mechanisms can be considered: for example, publication of a list of licence holders will go some way to promoting transparency

Likewise, it is important to ensure that the power to suspend or cancel licences should be done by the same person or body responsible for issuing licences.

Finally, care is needed here, however, that an unduly burdensome structure is not created. Each country will have distinctive governance characteristics, and it is unlikely that one model will fit all.

Underlying this subject is of course a much wider question which is beyond the scope of this study, which is whether there is a need for a reorganization of government departments concerned with marine affairs. For example, setting up a Ministry of the Oceans or something similar, which embraced all the main government departments or ministries involved in the marine sector. Such a body would almost certainly make it easier for a cross sectoral approach to be adopted, especially with respect to the adoption of an ecosystem approach to fisheries management.

Checklist:

Does the law provide for the involvement of relevant government departments (such as Foreign Affairs, Justice/Attorney-General's and Environment) in addition to fisheries in the setting of government policies with respect to the fisheries sector?

Does the law, or some other linked administrative structure, provide for the consideration of a wide range of interests and views in the formulation of policies and in the setting of conservation and management measures?

Does the law provide for a system of judicial or administrative review for decisions made, such as licensing, including cancellation and suspension? Is the system too cumbersome and expensive for most participants in the fisheries sector?

Is a body such as a Fisheries Advisory Council appropriate for the country in question?

Does the governance system provide for an adequate level of transparency?

Record of fishing vessels

Under both UNFSA and the FAO Compliance Agreement, it is necessary to maintain a record of fishing vessels for vessels flying their flag and fishing on the high seas. This is in addition to any national registry or record that the country might have, and additional to the regional register maintained by FFA.

Similarly, the WCPFC imposes in Article 24 the following obligation with respect to the maintenance of a record:

4. Each member of the Commission shall, for the purposes of effective implementation of this Convention, maintain a record of fishing vessels entitled to fly its flag and authorized to be used for fishing in the Convention Area beyond its area of national jurisdiction, and shall ensure that all such fishing vessels are entered in that record.

5. Each member of the Commission shall provide annually to the Commission, in accordance with such procedures as may be agreed by the Commission, the information set out in Annex IV to this Convention with respect to each fishing vessel entered in the record required to be maintained under paragraph 4 and shall promptly notify the Commission of any modifications to such information.

6. Each member of the Commission shall also promptly inform the Commission of:

(a) any additions to the record;

(b) any deletions from the record by reason of:

(i) the voluntary relinquishment or non-renewal of the fishing authorization by the fishing vessel owner or operator;

(ii) the withdrawal of the fishing authorization issued in respect of the fishing vessel under paragraph 2;

(iii) the fact that the fishing vessel concerned is no longer entitled to fly its flag;

(iv) the scrapping, decommissioning or loss of the fishing vessel concerned; and

(v) any other reason, specifying which of the reasons listed above is applicable.

The following provision is taken from the draft OECS Harmonised High Seas Fishing Law, which is intended to give effect to the UNFSA and the FAO Compliance Agreement. It has been adapted to include the WCPFC:

(1) The Managing Director/ Minister shall maintain a record of fishing vessels of [country] in respect of which high seas fishing permits have been issued, including all information required to be submitted under Annex IV of the WCPFC.

(2) The Managing Director/Minister shall:

(a) make available to FAO and to WCPFC information contained in the record maintained under sub-section (1);

(b) promptly notify FAO and WCPFC of changes in such information in respect of high seas fishing vessels;

- (c) *promptly notify FAO and WCPFC of any additions to or deletions from the record, and the reasons for any deletion;*
 - (d) *convey to FAO and WCPFC information relating to any high seas fishing permit granted under section 6(4) of this Act, including the identity of the vessel and its owner, charterer or operator, and factors relevant to the Minister's decision to issue the permit;*
 - (e) *report promptly to FAO and WCPFC all relevant information in his possession regarding any activities of fishing vessels of [country] on the high seas that undermine the effectiveness of international conservation and management measures, including the identity of vessels and any sanctions imposed;*
 - (f) *provide FAO and WCPFC with a summary of evidence in his possession regarding the activities of foreign vessels that undermine the effectiveness of international conservation and management measures; and*
 - (g) *maintain a record of international conservation and management measures and subregional or regional fisheries management organisations which are recognised by [country].*
- (3) *The Managing Director/Minister may make available on request the information maintained under sub-section (1) to any directly interested foreign State which is a party to the Compliance Agreement, the Fish Stocks Agreement, the WCPFC and to any other subregional or regional fisheries management organisation.*
- (4) *The Managing Director/Minister may lay an information before the Court in respect of alleged offences committed under this Act.*

However, clause (3) above may be unnecessary depending on the specific solution adopted for giving effect to conservation and management measures of RFMOs.

There are two other aspects concerning a record, or register. First, a country might wish in any event to have a much more widely based record or register than merely for high seas fishing. It might, for example, wish to register all fishing vessels above a certain size. Second, the role of the FFA regional register needs to be covered in national legislation.

On the establishment of a general register, there are examples found in several of the laws of FFA members. Two examples are set out here.

First, Vanuatu, section 30, Fisheries Act, 2005.

Register of licences and authorization

The Director is to maintain a register of licences and authorizations issued under this Act.

The register is to contain the following information:

- (a) the nature of the activity licensed or authorized; and
- (b) the particulars of the vessel, person or establishment licensed or authorised; and
- (c) the term of each licence or authorisation; and

- (d) any action taken in respect of the licence or authorisation under sections 17 and 27; and
 - (e) the result of any appeal affecting the licence or authorisation considered under section 29; and
- any other matter that is prescribed.

Second, Cook Islands Marine Resources Act:

44. Register of Licences - The Secretary shall cause to be maintained a register of all licences issued pursuant to this Act by the Minister and the Secretary, containing information relating to –

- (a) the nature of the activity licensed;*
- (b) the vessel, person or establishment licensed; and*
- (c) the period of validity of each licence;*

and such additional information relating to the licences as the Secretary thinks appropriate.

As to the regional register of the FFA, this is dealt with in the Cook Islands Marine Resources Act in the following way:

Regional register is defined:

10. "Regional Register" means the Regional Register of Foreign fishing vessels maintained by the South Pacific Forum Fisheries Agency in Honiara,

This has a direct consequence in the national law, as a licence cannot be issued:

(2) No licence shall be issued and no authorisation shall be given pursuant to this Act unless -

- (d) where the fishing vessel in respect of which the application is made does not have good standing on the Regional Register; or*
 - (e) the previous offending history (if any), of the vessel's owner, operator or master;*
 - (f) in accordance with such other grounds as may be prescribed.*
- (4) The Minister or Secretary as appropriate, shall deny any application for a licence where the granting of the licence would conflict or would be inconsistent with the requirements of this Act, an applicable access agreement, fisheries management agreement, fishery plan, or any international conservation and management measure.*

Checklist:

Does the fisheries law provide for a record of fishing vessels undertaking fishing on the high seas (as well as in the waters under the jurisdiction of foreign States)?

Does the information required to be maintained in that record meet the obligations set out in the FAO Compliance Agreement and the WCPFC Article 24?

Is provision made in national law for the requirement that only vessels in good standing under the FFA regional register can be given authorisations to fish?

Setting of conservation and management measures

The law should provide for the setting of conservation and management measures, however, it is essential that the means by which this is done allows for considerable flexibility. Provision should be made for administrations to be able to respond to changes brought about by environmental factors, the human factor and disputes over fishing grounds. There is also a need to be able to introduce urgent conservation and management measures.

In addition, there needs to be provision for

- setting of specific conservation measures, e.g. times, gears, locations
- introducing urgent conservation and management measures
- protection of certain species of fish, including associated and dependent species of targeted fish stocks
- setting of the TAC
- setting total level of fishing effort as one means of allocating fishing rights.

One strong instance of a law permitting the introduction of urgent conservation measures is to be found in the PNG Fisheries Management Act 1998.

30. FISHING AND RELATED ACTIVITIES SUBJECT TO PROHIBITION.

(1) For the purposes of this section, "specified" means specified in a notice under Subsection (3).

(2) Notwithstanding Section 3(2), this section applies to all persons, all vessels and all fishing and related activities.

(3) Subject to this Act, the Board may by notice in the National Gazette, following a recommendation by the Managing Director -

(a) notwithstanding anything in any notice under Section 2(3), declare that organisms of a specified kind are not sedentary organisms in respect of specified part of fisheries waters; and

(b) prohibit at all times, or during a specified period, the taking, from any specified area of fisheries waters of -

(i) fish or fish included in a specified class of fish; and

(ii) in the case of a specified class of crustaceans, females having eggs or spawn attached to them, and the processing of such fish on a vessel in the specified area; and

(c) prohibit the taking, from any fisheries waters, of fish included in a specified class of fish that -

(i) are less or greater than a specified size; or

(ii) have dimension less or greater than a specified dimension; or

(iii) have a part with dimension less or greater than a specified dimension in relation to that part; and

(d) prohibit the taking, from any fisheries waters, of fish, or of fish included in a specified class of fish -

(i) by a specified method or gear; or

(ii) by persons other than a specified class of persons; or

(iii) by vessels other than a specified class of vessels; and

(e) prohibit the buying, selling, landing, sale, receiving, possession or export of fish or of fish included in a specified class of fish; and

(f) prohibit a person from having in his possession or in his charge in a vessel, in any area of waters, gear of a specified kind for taking fish unless the gear is

stowed and secured; and
(g) prohibit a person from using, or having in his possession or in his charge in a vessel, in any fisheries waters, a quantity of equipment of a specified kind for taking fish that is in excess of a quantity specified in, or ascertainable as provided in, the notice; and
(h) prohibit a person from using or having in his possession or in his charge a vessel or a class of vessels, in any fisheries waters to which a notice under Paragraph (f) applies, equipment of a kind to which the notice applies, unless there is a licence in respect of the equipment; and
(i) prohibit the conduct of a specified type of related activity -
(i) absolutely; or
(ii) by persons other than a specified class of persons; or
(iii) in a specified manner; and
(j) prohibit the taking of protected or endangered species of fish; and
(k) prohibit such other activities as may be prescribed from time to time.
(4) A notice under this section may provide for exemptions from the prohibition in the notice.
(5) A declaration under Subsection (3)(a) or an exemption under Subsection (4) shall be made for a period not exceeding three months.

It should be noted that this provision has certain time limits built into it. See para 5 above.

Another consideration is that it can be useful to provide for a number of different methods of introducing conservation and management measures. Thus, it may be useful to do it in certain circumstance by generally applicable regulations, or even by notice in the government gazette; in other contexts, it may be preferable to impose the conservation measures by means of a condition to a licence.

Checklist: does the law provide for flexibility in the setting and changing of conservation and management measures, including the ability to introduce changes in situations requiring urgent action?

Does it provide for the setting of TACs, or, alternatively, total levels of fishing effort, or both?

How are the diverse interests of the fisheries sector taken into account in the setting of these measures? (Thus will also relate to governance issues considered above)

Fisheries Management plans

For many countries in the region, fisheries management plans are an important element of their planning process and for regulating fisheries. However, giving these plans legal effect has not always been a success.

There is a need to strike a balance between retaining a measure of flexibility in these plans so that they can be altered from time to time to meet changing conditions but nonetheless ensuring that they have legal effect without the unintended consequence of their having arbitrary effects on the fisheries themselves. Also, because they are, or can be made by legislation to be, a species of subordinate legislation, it is important to ensure that they are consistent with the Act to avoid problems of *ultra vires*. Likewise, any penalty for breach of a management plan needs to be carefully considered.

One solution is found in the Cook Islands Marine Resources Act:

- 6. Designated fisheries – (1) The Queen’s Representative may by Order in Executive Council declare a fishery as a designated fishery where, having regard to scientific, social, economic, environmental and other relevant considerations, it is determined that such fishery -*
- (a) is important to the national interest; and*
 - (b) requires management measures for ensuring sustainable use of the fishery resource.*
- (2) Except for subsection (4), a fishery plan for the management of each designated fishery in the fishery waters shall be prepared by the Secretary, and kept under review.*
- (3) Each fishery plan shall -*
- (a) identify the fishery;*
 - (b) describe the status of the fishery;*
 - (c) specify management measures to be applied to the fishery;*
 - (d) specify the process for the allocation of any fishing rights provided for in the fishery plan;*
 - (e) make provision in relation to any other matter necessary for sustainable use of fishery resources.*
- (4) A local authority may prepare a fishery plan for the management of a designated fishery of local interest within its area of authority. Such a plan shall -*
- (a) be prepared in consultation with the Ministry of Marine Resources;*
 - (b) be consistent with the principles and measures in section 4 of this Act; and;*
 - (c) be submitted for approval to the Secretary.*
- (5) The Secretary shall approve any fishery plan prepared by a local authority in accordance with subsection (4), but shall not do so if it is inconsistent with the objectives, functions or authority in section 3 or the principles and measures in Section 4 of this Act. In the event of inconsistency, the Secretary shall promptly notify the local authority of the reasons for disapproval, and the fishery plan may be amended and resubmitted to the Secretary for approval.*
- (6) A fishery plan for a designated fishery shall enter into force on a date specified by Order in Executive Council made by the Queen’s Representative.*
- (7) The management measures in such plan shall have the full force and effect of regulations promulgated under this Act in accordance with section 92;*
- (8) After such consultation as the Secretary considers appropriate in the circumstances, the Queen’s Representative may by Order in Executive Council, amend or revoke a fishery plan.*
- (9) All activities subject to a fishery plan shall remain subject to other applicable provisions of all Acts and regulations of the Cook Islands.*
- (10) A fishery plan has no effect to the extent it is inconsistent with the provisions of this Act.*
- (11) The terms and phrases defined in this Act shall be given the same meaning in the fishery plan unless the context otherwise requires.*
- (12) A fishery plan may contain provisions enabling the Secretary by notice in writing to give directives providing for such matters as are contemplated by or necessary for giving full effect to the provisions of that fishery plan.*

This provision makes it clear that the plan must be consistent with the Act, even though that requirement might be presumed. Also, under section 92, the regulation making power, it is possible to prescribe penalties in respect of breaches of the regulations.

Section 92 (2) z states:

(z) prescribing offences against the regulations and penalties for such offences, not exceeding a fine of \$250,000 and, where the offence is a continuing one, a further fine not exceeding \$5000 for every day that the offence has continued;

Implementation of conservation and management measures of regional fisheries bodies

Under the UNFSA in general, and specifically under WCPFC, it will be necessary for parties to regional fisheries management organizations to give effect in their national laws to international conservation and management measures. Art 23.1 of the WCPFC states:

Each member of the Commission shall promptly implement the provisions of this Convention and any conservation, management and other measures or matters which may be agreed pursuant to this Convention from time to time and shall cooperate in furthering the objective of this Convention.

The means by which a treaty is given effect in national law can vary from one country to another, hence what follows might not work for all countries. Further, several environmental treaties either overlap with, or will have the potential to do so, with fisheries, and this needs to be monitored.

One example of how measures adopted by WCPFC can be incorporated into national law is found in the Namibian fisheries law:

Giving effect to fisheries and international agreements

37. (1) *The Minister may, for the purpose of any fisheries agreement entered into under section 35 or any international agreement to which Namibia is a party, make such regulations as the Minister may consider necessary or expedient for the carrying out and for giving effect to the provisions of any such agreement or any amendment of such agreement.*

(2) *The Minister shall publish in the Gazette the texts of all conservation and management measures adopted under any international agreement to which Namibia is a party and any measure so published shall be deemed to be a regulation prescribed under section 61.*

(3) *For the purposes of—*

(a) *subsection (2), “conservation and management measures” means measures to conserve and manage one or more species of living marine resources that are adopted and applied consistent with the relevant rules of international law as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982, and the Implementation Agreement [i.e., the 1995 UN Fish Stocks Agreement]*

It would be useful to add specifically to this a reference to the WCPFC Convention.

Another approach would be to have such measures laid before the Parliament for a number of days, and if not objected to, they would then acquire legal effect.

The techniques referred to above require action by the country in question to give effect to such measures. A more radical approach would be to make conservation and management measures of an RFMO such as the WCPFC immediately applicable in

national law, unless specifically disallowed. Provisions dealing with this need to be drafted with special care if the violation of one of these measures constitute an offence.

A possible draft provision, which does not go quite so far as to give immediate application, is set out here:

Giving effect to fisheries and international agreements

(1) *The Minister shall publish in the Gazette the texts of all conservation and management measures adopted under the [WCPF Convention] and any other such measures adopted by a regional fisheries management organization to which is a party.*

(2) *The Minister may, for the purpose of giving effect to [WCPF Convention] as amended from time to time make such regulations or give notice in the Gazette or attach such conditions to a licence as the Minister may consider necessary or expedient for this purpose.*

(3) *The Minister may, for the purpose of giving effect to any fisheries agreement entered into under section ??? or any international agreement or arrangement to which is a party, make such regulations or give notice in the Gazette or attach such conditions to a licence as the Minister may consider necessary or expedient for this purpose.*

(4) *For the purposes of this section, “conservation and management measures” means measures to conserve and manage one or more species of living marine resources that are adopted and applied by global, regional or subregional fisheries organisations, including in particular those adopted by WCPFC, consistent with the relevant rules of international law as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982, and [the 1995 UN Fish Stocks Agreement]⁵*

The penalty to be imposed needs also to be considered. The provision quoted above in respect of the fisheries management plans could be adapted as follows:

“The Minister may by regulation prescribe offences in respect of non compliance with conservation and management measures and penalties for such offences, not exceeding a fine of \$250,000 and, where the offence is a continuing one, a further fine not exceeding \$5000 for every day that the offence has continued.”

Consistency in penalty levels across WCPFC members would be desirable.

Checklist: does the law permit the implementation into national law of the conservation and management measures of WCPFC? Does it permit implementation of the measures of other RFMOs?

Does the law provide for adequate penalties for non compliance with such measures?

Authorisations to fish

⁵ This definition may be unnecessary if the term has already been defined in the Act as a whole.

The type of authorisation adopted by a particular country will almost certainly raise important policy issues that go well beyond legal drafting considerations. No attempt here is made to promote one system over another.

1. Licensing (not including foreign fishing)

It will be necessary to distinguish broadly between those countries which need or want a licensing regime, and those which want additionally a rights based regime. In a straightforward licensing regime, the duration of a license has become a contentious issue for certain sectors. Thus, one year for recreational fishing by individuals might be fine; however, where there are significant investments involved, usually longer periods are required. It will be necessary to look at the laws in order to assess how effective they are in terms of granting security to the participants.

It will also be necessary to consider which categories are needed for each country. Local, locally based, foreign. For some, the middle category might be dispensed with. For others, the category may have become too deeply entrenched to be easily dispensed with.

The arrangements for subsistence fishers and the role of customary fishing rights will also need to be considered in many countries. It will be recalled that there may be a need to refer specifically to such fishing in the objectives clauses considered above.

Checklist: does the law provide for a licensing regime which distinguishes between the different types of licenses needed?

- ***Local fishing vessel licence.***
- ***Sport fishing licence***
- ***Locally based foreign vessel licence (if appropriate)***
- ***Foreign fishing permit or licence***
- ***Test fishing operations***

How does the law deal with subsistence fishers and customary fishing rights?

Does the law provide for different periods of time depending on the level of investment involved in order to encourage continuity and security of investment?

2. Rights based fisheries

If a system of rights based transferable quota is introduced, then a more elaborate authorization regime is required. The legal provisions governing the setting up of a rights based regime can be very complex. Indeed, the laws of some countries (e.g. New Zealand) are highly involved. They need to be as in effect property rights are being established, and issues such as security of title to the right need to be carefully spelled out. Another consideration is that such systems have tended to involve significant burdens for the administration.

Ideally the law dealing with rights based fishing should provide for at least the following:

- the method of applying for a right of access or quota share
- the identification of any criteria governing those eligible to apply (including for example, the important question whether foreigners are eligible to apply and compete on equal terms with local applicants)
- the duration of any right
- the method of dealing with fluctuations in the quota from one year or fishing season to another
- the character of the right granted (is it to be inheritable, leasable, saleable, divisible or inheritable)
- the amount of quota any person or company may hold at any one time
- the calculation of the quota (usually as part of the TAC or the TAC for a particular species)
- the circumstances in which a right may lapse, be reduced, be suspended, or cancelled.

An example could be the Cook Islands Marine Resources Act 2005 which states as follows:

11. Nature of a fishing right - (1) For the purposes of section 6 of this Act, any fishery plan may provide for the allocation by the Secretary of fishing rights within the following class of rights -

- (a) a right to take a particular quantity of fish, or to take a particular quantity of fish of a particular species or type, or a proportion of fishing capacity, from, or from a particular area in, a designated fishery;*
- (b) a right to engage in fishing in a designated fishery at a particular time or times, on a particular number of days, during a particular number of weeks or months, or in accordance with any combination of the above, during a particular period or periods;*

.....

(2) For the purpose of section 6 of this Act, any fishery plan may provide for the Secretary to reallocate in accordance with this Act and the fishery plan, any fishing right that remains unfished by the holder of that right for any specified period.

(3) Except as otherwise provided in any fishery plan, a fishing right or fishing right option shall not be transferable or capable of having any charge or other interest registered against that right or option in any register established in accordance with section

12. Secretary to establish system for administration of fishing rights - (1) Where a fishery plan for a designated fishery provides for the management by means of a system of fishing rights, the Secretary shall establish and administer such a system (including the establishment of a register of fishing rights and fishing right options), in accordance with the requirements of the relevant fishery plan.

(2) The Secretary shall give, as soon as is reasonably practicable after a fishery plan comes into force, but not later than 30 working days thereafter, to a person who is eligible to receive a fishing right a certificate evidencing the grant by the Secretary of the fishing right in accordance with the criteria set out in the relevant fishery plan.

(3) A fishing right is granted subject to the following conditions -

- (a) *the holder of the fishing right must comply with any obligations imposed by the fishery plan or imposed by the Secretary in accordance with that fishery plan;*
 - (b) *the fishing right will cease to have effect if the fishery plan for the fishery to which the fishing right relates is revoked under section 6(8) of this Act;*
 - (c) *no compensation is payable because the fishing right ceases to have effect or ceases to apply to a fishery;*
 - (d) *the holder of the fishing right complies with the requirements of this Act that pertain to the holding of the fishing right itself and the fishing or the possession or sale of any fish taken under any fishing right;*
 - (e) *the fishing right may only be exercised from or in respect of a in respect of a Cook Islands fishing vessel.*
- (4) *A fishing right -*
- (a) *is subject to such other conditions as are specified in the certificate, including conditions relating to the suspension of the fishing right, term of the fishing right; concentration of ownership of fishing rights, transferability or otherwise of the fishing right, and transferability of share-holding in any body corporate holding the fishing right or holding any interest in the fishing right; and*
 - (b) *comes into force on the day specified for the purpose in the certificate, or, if no day is so specified, on the day on which it is granted; and*
 - (c) *subject to this Act, remains in force until revoked or surrendered in accordance with this Act or it otherwise ceases to have effect under this Act.*
- (5) *The Secretary may, by written notice given to the holder of a fishing right, whether or not at the request of the holder, vary or revoke a condition of the fishing right (not being a condition mentioned in subsection (3)) or specify a condition or a further condition to which the fishing right is to be subject.*
- (6) *Any condition imposed by the Secretary in respect of any fishing right may be additional to or more restrictive than the provisions of any relevant fishery plan, but shall not be inconsistent with any such fishery plan.*
- (7) *A fishing right ceases to be in force if the holder of the fishing right surrenders it by written notice given to the Secretary.*

This provision is that it leaves a lot of detail to be worked out at some future date. This can be advantageous where the basic decision has been made to introduce a rights based regime, but the details of the scheme still have to be worked out. It also distinguishes clearly between the nature of the right in Section 11, and its administration, which is dealt with in section 12. However, it must always be remembered that a rights based system can have long term consequences. In particular, it might give rise to claims for compensation if the property right is withdrawn or is rendered worthless in certain circumstances.

More elaborate versions can be found in the NZ and Australian provisions. However, these both assume a considerable administrative backup, as well as the need for an appeal process. It may not therefore be appropriate in all instances. Much will depend also on how many participants will be eligible for a rights based system.

Checklist:

***Is a rights based fisheries regime considered to be suitable for the country in question?
Does the rights based regime address all or most of the above issues?***

3. Authorisation of fishing vessels on the high seas

Both the UNFSA and the Compliance Agreement have imposed certain obligations on States which have vessels registered with them, in particular to control their activities on

the high seas. This requires the establishment of a licensing or authorization system for such vessels to cover their activities while fishing on the high seas. It also applies to placing controls on their activities fishing in the EEZs of other States. See Article 18.3 (b) (iv) UNFSA. This is linked to the need for the State to provide for a boarding and inspection scheme on the high seas both in respect of its vessels as well as its power to board and inspect vessels pursuant to measures adopted by RFMOs.

The licensing regime will need to provide both for obtaining information on the fishing vessel and the proposed fishing activity at the application stage, and for the setting of conditions on high seas fishing.

The New Zealand law provides for a range of conditions that may be imposed in respect of the issuance of a high seas fishing permit.

113K. Conditions of high seas fishing permit—

(1) A high seas fishing permit may be subject to such conditions as the chief executive considers appropriate, including conditions relating to the following matters:

- (a) The areas in which fishing or transportation is authorised;*
- (b) The seasons, times, and particular voyages during which fishing or transportation is authorized;*
- (c) The species, size, age, and quantities of fish, aquatic life, or seaweed that may be taken or transported;*
- (d) The methods by which fish, aquatic life, or seaweed may be taken;*
- (e) The types, size, and amount of fishing gear or equipment that may be used or carried, and the modes of storage of that gear or equipment when not in use;*
- (f) The use, transfer, transshipment, landing, receiving, and processing of fish, aquatic life, or seaweed taken;*
- (g) Procedures or requirements, or both, enabling the verification of fish, aquatic life, or seaweed taken or being taken by the vessel, including procedures or restrictions relating to the species of, quantities of, or areas from which, fish, aquatic life, or seaweed are being or have been taken by the vessel;*
- (h) Entry by the vessel to New Zealand or foreign ports, whether for the inspection of its catch or for other purposes;*
- (i) Reports and information required to be given to the chief executive by the permit holder, and records required to be kept by the permit holder;*
- (j) Management controls regarding fishing-related mortality of fish, aquatic life, or seaweed;*
- (k) The conduct of specified programmes of fisheries research;*
- (l) The marking of the vessel and other means for its identification;*
- (m) The placing of observers on the vessel and the payment of any associated prescribed fees and charges by the permit holder;*
- (n) The installation and maintenance of equipment to monitor fishing or transportation under the permit and the payment of any associated prescribed fees and charges by the permit holder;*
- (o) The installation on the vessel and the maintenance of any automatic location communicator or other equipment for the identification and location of the vessel, and of adequate navigational equipment to enable the vessel to fix its*

position, and the payment of any associated prescribed fees and charges by the permit holder;

(p) The carriage on board the vessel of specified charts, publications, and instruments;

(q) The disposal of fish, aquatic life, and seaweed;

(r) Measures to give effect to international conservation and management measures.

The Cook Islands Marine Resources Act 2005 provides as follows for high seas fishing:

21. Requirements for Cook Islands fishing vessels outside the fishery waters – (1)

No person may use a Cook Islands fishing vessel for fishing or related activities -

(a) in areas under national jurisdiction of a foreign country except in accordance with the laws of that country;

(b) in an area subject to a multilateral access agreement or related agreement except in accordance with that agreement;

(c) on the high seas except in accordance with a licence issued in accordance with section 35 of this Act;

(d) in an area subject to international conservation and management measures, as defined in section 2 of this Act, except in accordance with those measures.

(2) Where any vessel is used in contravention of subsection (1), the operator and master of such vessel each commits an offence, and shall be liable on conviction to a fine not less than \$100,000 and not exceeding \$1,000,000.

23. Compliance with Cook Islands Laws - (1) The operator, master, and each member of the crew of any fishing vessel or other vessel that may be used for fishing, a related activity or other activity in the fishery waters provided for in this Act, whether or not it holds a licence or other authorisation, shall comply with all applicable laws of the Cook Islands.

(2) The operator and master of any fishing vessel required to hold a licence for fishing outside the fishery waters under section 21 of this Act or who is subject to the requirements of section 22 of this Act, shall comply with all applicable laws of the Cook Islands.

(3) Where any vessel is used in contravention of subsections (1) or (2), the operator and master of such vessel, each commits an offence, and shall be liable on conviction to a fine not less than \$100,000 and not exceeding \$1,000,000.

These provisions now need to be augmented as there are additional specific obligations arising under the WCPFC.

In particular Article 24 of WCPFC states:

Flag State duties

1. Each member of the Commission shall take such measures as may be necessary to ensure that:

(a) fishing vessels flying its flag comply with the provisions of this Convention and the conservation and management measures adopted pursuant hereto and that such vessels do not engage in any activity which undermine the effectiveness of such measures; and

(b) fishing vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of any Contracting Party.

2. No member of the Commission shall allow any fishing vessel entitled to fly its flag to be used for fishing for highly migratory fish stocks in the Convention Area beyond areas of national jurisdiction unless it has been authorized to do so by the appropriate authority or authorities of that member. A member of the Commission shall authorize the use of vessels flying its flag for fishing in the Convention Area beyond areas of national jurisdiction only where it is able to exercise effectively its responsibilities in respect of such vessels under the 1982 Convention, the Agreement and this Convention.

3. It shall be a condition of every authorization issued by a member of the Commission that the fishing vessel in respect of which the authorization is issued:

(a) conducts fishing within areas under the national jurisdiction of other States only where the fishing vessel holds any licence, permit or authorization that may be required by such other State; and

(b) is operated on the high seas in the Convention Area in accordance with the requirements of Annex III, the requirements of which shall also be established as a general obligation of all vessels operating pursuant to this Convention.

Thus, in addition to the extensive controls already provided for, it is necessary to ensure that the requirements of Annex III of WCPFC are complied with by members of the Commission.

Thus, it is important to add to the fisheries laws a provision along the following lines:

“In addition to any conditions governing the authorisation to fish in the area covered by the WCPFC, as defined in that Convention, it shall be a condition of every such authorization that the requirements of Annex III of the WCPFC are complied with.”

A penalty for failure to do so should be added.

Checklist: does the law in question provide for the authorization of fishing on the high seas?

Does it provide for the setting of a comprehensive range of conditions or regulations governing such activities, including in particular conservation and management conditions, and conditions relating to MCS?

Does the Law incorporate the provisions of Annex III WCPFC?

Scientific research

The law should provide for the regulation of marine scientific research in the EEZ, the territorial sea, the archipelagic waters, and internal waters. However, it is only in the EEZ that a coastal State has an obligation to permit marine scientific research in certain circumstances.

Bio prospecting is one aspect of scientific research which is becoming a topic of increasing concern, and it would be important to ensure that it is covered in the regulation making power. It could in the alternative be covered in the environment law, or in the laws governing biodiversity.

The law should therefore set out clear procedures to be followed for those who wish to undertake marine scientific research, and to allow the government to impose certain controls on such research. These controls might be imposed directly as conditions governing the permission to undertake such research, or they could be imposed more generally through regulations.

The following example is from the Tongan Fisheries Management Act, 2002:

- 32. (1) The Minister may, on the submission of an application accompanied by a satisfactory research or test fishing operations or survey plan as the case may be, and subject to such other requirements as may be prescribed, authorise any vessel or person to undertake;*
- (a) fishery scientific research; or*
 - (b) test fishing operations or surveys, in the fisheries waters.*
- (2) The Minister may impose such conditions as he deems fit to any authorisation granted under subsection (1).*
- (3) Any person who undertakes or assists in any fishery scientific research or test fishing operations or surveys in the fisheries waters:*
- (a) without authorisation under subsection (1); or*
 - (b) in contravention of any requirements or any conditions or conditions attached to the authorisation under subsection (2), shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$500,000.*
- (4) Any authorisation granted under this section shall be in writing and shall state all the terms and conditions of the authorisation.*

The Marshall Islands in its Marine resources Act, 1997 provides in section 75 as follows for scientific research:

scientific research.

- (1) No person shall, without a license issued by the Director:*
- (a) undertake marine scientific research in the Fishery Waters;*
 - (b) take samples from the Fishery Waters for the purposes of marine scientific research.*
- (2) A license for purposes described in subsection (1) shall only be issued to a person or persons engaged in bona fide scientific research as demonstrated by their employment by, affiliation with or sponsorship by a duly constituted governmental agency, an accredited educational organization or other recognized scientific research institution.*
- (3) Any person or entity undertaking marine scientific research in the Fishery Waters shall:*
- (a) submit such information to the Director or his designee as may be requested or as may be prescribed by regulation, including a copy of all records and reports of activities of the vessel in the Fishery Waters, and a final report including full conclusions upon completion of the research;*
 - (b) be accompanied by and train such observer, fisheries officer or other person or persons the Director may assign during the research at no expense to the Government.*
- (4) The harvest of any marine life from the Fishery Waters not required for further research purposes shall be donated to the Authority for distribution to government institutions or charitable organizations or otherwise disposed of pursuant to the terms of the license.*
- (5) Any person who contravenes subsections (1), (3) or (4) commits an offense and upon conviction shall be fined not more than \$250,000.*

This provision is preceded by a reference to the granting of a licence for the purpose of marine scientific research, as well as collecting a fee for the activity.

Checklist: Does the law provide for a system of regulating marine scientific research? Does it distinguish between the exclusive economic zone on the one hand and the other zones under national jurisdiction on the other?

Do the regulations specifically refer to bio prospecting?

Collection of data

The law should provide for the collection of fisheries data, which is now recognised as being of “fundamental” importance in Annex I of UNFSA.

This broad obligation also finds reflection in WCPFC: thus, one of the principles and measures for conservation and management is stated (in article 5) to be:

- (i) *collect and share, in a timely manner, complete and accurate data concerning fishing activities on, inter alia, vessel position, catch of target and non-target species and fishing effort, as well as information from national and international research programmes;*

This mirrors the provisions of UNFSA Article 5 (j)

Likewise, under the precautionary approach (Article 6 WCPFC) it is stated:

- (a) *develop data collection and research programmes to assess the impact of fishing on non-target and associated or dependent species and their environment, and adopt plans where necessary to ensure the conservation of such species and to protect habitats of special concern.*

The functions of the Commission also refer (in Article 10) to:

(d) adopt standards for collection, verification and for the timely exchange and reporting of data on fisheries for highly migratory fish stocks in the Convention Area in accordance with Annex I of the Agreement, which shall form an integral part of this Convention;

(e) compile and disseminate accurate and complete statistical data to ensure that the best scientific information is available, while maintaining confidentiality, where appropriate;

(j) obtain and evaluate economic and other fisheries-related data and information relevant to the work of the Commission;

Data will also be crucial to the work of the Scientific Committee established under Article 12.

Further, members of the Commission have inter alia the following obligations under Article 23:

2. *Each member of the Commission shall:*

(a) provide annually to the Commission statistical, biological and other data and information in accordance with Annex I of the Agreement and, in addition, such data and information as the Commission may require;

(b) provide to the Commission in the manner and at such intervals as may be required by the Commission, information concerning its fishing activities in the Convention Area, including fishing areas and fishing vessels in order to facilitate the compilation of reliable catch and effort statistics;

It will be apparent that data will need to be collected for a number of reasons, and not only to meet obligations under international instruments. The following extract will indicate how varied these reasons could be.

Both the 1982 UN Convention and the UN Fish Stocks Agreement make it clear that the purpose of collecting fisheries data is to underpin decisions with respect to conservation and management of the resources, in the case of the 1995 UN Fish Stocks Agreement, with respect to straddling fish stocks and highly migratory fish stocks. That said, it is unlikely that these statistics, having been collected, will be used only for that purpose. Thus, the data might be used, for example, directly or indirectly, to assist in identifying the origin of a catch for the purposes of trade rules concerning the origin of a particular item in trade (subject to any applicable confidentiality restrictions). However, it is important to keep in mind the basic purpose of the data collected, and that same information might only partly serve another purpose in another context. For example, in the area of fish processing, sales, and trade in the product, the data will have to be adapted to meet that purpose.

Fisheries data will also play an important role in determining the financial contributions to certain management organizations, as for example is the case with the Indian Ocean Tuna Commission. Thus, Article XIII of the Agreement for the Establishment of the Indian Ocean Tuna Commission, which deals with finances, states, that a scheme for contributions shall be adopted by the Commission, which shall involve an equal basic fee and a variable fee, which shall be based "inter alia on the total catch and landing of species covered by the Agreement in the area," and the per capita income of each Member. However, it will be apparent that simply answering this question by reference to the flag of the vessel making the catch will not be sufficient information.

Fisheries data will also of course be useful in negotiations concerning access to exclusive economic zones where one of the issues is catch history. Indeed, Article 62(3) of the 1982 UN Convention requires the coastal State to take into account a number of factors, including the need to "minimise economic dislocation in States whose nationals have habitually fished in the [EEZ]".

Another area where the data might also play a role is in determining the parties to a negotiation on the management of a particular straddling fish stock or highly migratory fish stock. Here, the information would need to be looked at more closely in order to determine if, in fact, the stock in question was actually found in the EEZ of a particular coastal State. It would not be enough merely to work from data made by the flag State (unless of course, it was provided in enough detail to permit such a more detailed analysis). Related to this is the question of using fisheries data to determine the "catch history" of a particular country in a particular region (both within and beyond the EEZ), which will often be a major issue in negotiations.

Another instance where the catch data can be used is to cross check the accuracy of the statistics provided in respect of landings.

There are no doubt numerous other instances where such data can (or does) serve another purpose.⁶

With the introduction of trade measures as one of the weapons used in combating IUU fishing, fisheries data will have a part to play there too.

From a legal perspective, the collection of such data can be secured most often in one of two ways: by the power of the fisheries administration to impose conditions on fishing activity to collect certain data, including for example, the form and content of fishing log books, or by enacting regulations applicable in general to the collection of data. An important consideration, however, is that in some countries, especially for small scale fishing activities or subsistence fishing, it may be impractical to make the collection of data unduly onerous in relation to the activity itself, and, depending on particular circumstances, it is useful to ensure that there is also a power to exempt or vary this requirement.

The PNG Fisheries Management Act 1998, is one instance of a provision governing data collection.

29. RECORDS, RETURNS AND OTHER INFORMATION.

(1) In order to assess and recommend appropriate management, development and conservation measures for any fishery, and to prepare any Fishery Management Plan, and for carrying out his responsibilities under this Act, the Managing Director may require any of the persons referred to in Subsection (2) to maintain and furnish in such manner and form as he may specify -

(a) all relevant data and information, including fishing time and effort, landing, processing, sales and other related transactions; and

(b) accounts, records, returns, documents and other information additional to that specified under this Act.

(2) The following persons shall keep such accounts and records, and furnish such returns and information, as may be required by or under this Act:-

(a) holders of licences, or other authorities or approvals issued or granted under this Act;

(b) owners, operators, representatives, boat agents, and masters of vessels licensed under this Act;

(c) owners and persons in charge of any premises where fish are received, purchased, stored, transported, processed, sold, or otherwise disposed of;

(d) persons engaged in the receiving, purchasing, transporting, processing, storage, sale, or disposal of fish;

(e) fish farmers;

(f) persons who provide vessels for hire for the purpose of enabling persons to take fish;

(g) persons who take fish otherwise than for the purpose of sale;

(h) such other persons who may be required to do so by the Board, or as may be prescribed, from time to time.

⁶ W Edeson, Legal Aspects of the Collection of Fisheries Data FAO Fisheries Circular 953. Rome 2000

Sharing of data with RFMOs is also something which needs to be provided for, though subject to ensuring that certain confidentiality requirements are met with respect to unaggregated data, and the above provision addresses this. It will be recalled that, under WCPFC, confidentiality of data needs to be respected. See, for example, Article 10 (c) quoted above.

The PNG Fisheries Management Act deals with confidentiality in the following terms:

74. DUTY OF CONFIDENTIALITY.

(1) Any person carrying out duties or responsibilities in the National Fisheries Authority or otherwise under this Act, including the Minister and members of the Board shall not, unless authorized in accordance with this Act, reveal information or other data of a confidential nature acquired by virtue of their said authority, duties and responsibilities to any person not having such authority or carrying out such duties and responsibilities.

(2) The Managing Director may designate any information as confidential, and in doing so may also exempt general summaries of aggregated information from confidentiality requirements.

(3) The Managing Director may authorize in writing any person to -

(a) receive or access confidential information; or

(b) access or restrict access to such premises holding confidential information as he may designate.

(4) Notwithstanding Subsection (2), the following information shall be confidential:-

(a) any information or data of a commercial nature provided in records, returns, or other documents required under this Act;

(b) any information or other data supplied by a vessel monitoring system in accordance with this Act;

(c) such other information or data as may be prescribed from time to time.

(5) Information may be disclosed to the extent -

(a) that disclosure is authorized or required under this Act or any other law; or

(b) that the person providing the information authorized its disclosure; or

(c) necessary to enable the Managing Director to publish statistical information relating to the fisheries sector; or

(d) necessary to enable advice to be given to the Minister.

(5) The Managing Director may authorize the release of any information supplied by a vessel monitoring system relating to the position of any vessel, upon request, to the responsible authority for purposes including surveillance, search and rescue and other emergency, and may authorize the release of such other confidential information for such purposes as may be prescribed.

(7) Any person who violates the requirements this section commits an offence and, in addition to any penalty, his appointment or other authority under this Act may be reviewed and terminated by the appropriate authority.

It will be useful to state specifically that there is authority to transmit data to WCPFC and other RFMOs in accordance with the obligations incurred under such agreements.

Thus, a clause could be added to the provisions above (or similar provisions in other laws) as follows:

“The [Minister/Managing Director] may transmit any data which is necessary to be transmitted to WCPFC and to any other regional or subregional fisheries management organization in order to fulfil any obligations of [State] under the treaties establishing such bodies.”

There should also be a penalty imposed for failure to collect data as required. It should be noted that failure to provide data constitutes a “serious violation” under Article 21.8 of UNFSA (as well as under WCPFC), which in effect adopts the UNFSA definition). It would be useful to check if the level of penalty imposed is adequately high.

Checklist: does the law provide for the imposition of conditions concerning the provision of data?

Does the law also provide for giving that data to RFMOs, subject to confidentiality requirements?

Are confidentiality issues in general adequately addressed?

Are the conditions concerning data provision too onerous for small and artisanal fishers?

Port State measures.

Both the FAO Compliance Agreement and UNFSA authorize the taking of certain measures in ports in order to promote the effectiveness of applicable conservation and management measures, including the prohibition of landing and transshipment. See in particular, Article 23 UNFSA. In the case of the 1995 UN Fish Stocks Agreement, it speaks of the right and the “duty” to take measures. These will need to be put into effect into national legislation to give inspectors the necessary powers to take action. The WCPFC also mirrors the provisions of UNFSA. In particular, Article 27 of WCPFC states:

3. Members of the Commission may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of conservation and management measures adopted by the Commission.

The model scheme on Port Measures to combat IUU Fishing adopted by an FAO Technical Consultation in 2004 sets out elements that could be adopted by a regional fisheries body. It therefore gives a good indication of the kind of issues likely to be adopted by a regional body such as WCPFC, even if it is not followed to the letter. Many of its elements need to be reflected in national legislation in order to give the port State an effective basis for taking port state measures. Because this is a new development in the international regime of fisheries, it is unlikely that many countries will have comprehensive legislation to deal with this.

There is another reason for addressing port measures with some care. There is evolving a perception that the older approach, which focuses on the power of a State to exclude foreign fishing vessels from its ports, needs to be reconsidered in the light of the WTO framework, and in particular, how it interacts with other global regimes such as the law of the sea, and international environmental law, especially multilateral environmental agreements. How much the situation has changed is still not clear, and discussions are taking place at the global level to work out a solution to these issues. Very simply, this is not a static area of international law.

The model scheme referred to has detailed provisions on port measures which include:

- the designation of ports into which foreign fishing vessels may enter, and have the capacity to conduct inspections
- requiring those vessels to provide information, with due regard to confidentiality requirements, of information about the vessel, authorisations, its VMS, and quantities of catch
- prohibition on landing, transshipment or processing by vessels whose flag states are not parties to, or not cooperating non contracting parties with, regional fisheries management organizations, unless the vessel can establish that the catch was taken consistent with applicable conservation and management measures
- refusing to allow the vessel to use its ports for refuelling etc where there are clear grounds for believing that the vessel has engaged in or supported IUU fishing
- obtain certain specified information set out in annex to the model scheme.

The model also has detailed information on inspections, the actions which may be taken, and requirements for reporting of the results of inspections to the flag State, other relevant States, and relevant RFMOs.

Further, there are some important savings clauses, for example, that vessels shall nonetheless be able to enter ports for reasons of *force majeure*, that nothing in the model scheme will affect sovereignty over ports in accordance with international law, that all measures are to be taken in accordance with international law, and that all measures are to be implemented in a fair, transparent and non discriminatory manner.

Because port state jurisdiction is still very much in a process of evolution, a separate annex is attached with examples of legislative regimes in several countries.

A draft port measures scheme is set out here for consideration.

DRAFT PORT MEASURES REGIME

(1) For the purpose of promoting the effectiveness of conservation and management measures including those adopted by sub regional, regional or global fisheries management organizations or arrangements, including those adopted pursuant to the WCPF Convention, the [Minister/Secretary] may make regulations concerning the following matters:

(a) the designation and publicisation of ports to which foreign fishing vessels may be permitted access;

(b) the designation of port inspectors

(c) requiring, prior to allowing port access to a foreign fishing vessel, that such vessel provides such notice as may be prescribed prior to entering its port or its EEZ for the purpose of port access, including vessel identification, any authorization to fish, information on its fishing trip and vessel monitoring

systems, quantities of fish on board and such other documentation as may prescribed;

(d) regulating or prohibiting the landing, transshipment or processing of fish, or refuelling or resupplying the vessel, including the prohibition of port access of a vessel which has been identified as having been engaged in or supporting fishing activities in contravention with sub regional or regional conservation measures, or in contravention of the laws of a particular country, or where there are reasonable grounds for presuming that a vessel has been engaged in such activity;

(e) establishing the procedures, the contents of and the results to be obtained from an inspection regime, including the adoption of port measures adopted by a regional or sub regional fisheries organization.

(f) prescribing the powers of inspectors, including the power to inspect any area of the fishing vessel, the catch (whether processed or not), any fishing gear, equipment or other gear and document which the inspector deems necessary to verify compliance with relevant conservation and management measures.

(g) requiring the provision of such assistance and information as may be needed in order to undertake inspections.

(h) authorising the cooperation and exchange of information with other States and regional or sub regional fisheries organizations.

2. The [Minister/Secretary] may prohibit from entering a port of country X a vessel which has been sighted as being engaged in or supporting fishing in contravention of the conservation and management measures of a regional or sub regional fisheries organization and it is not a member of nor is it a cooperating non contracting party to that sub regional or regional fisheries organization, unless it can establish the catch on board has been taken in a manner consistent with the relevant conservation and management measures. Such a prohibition may apply to an individual vessel or to a category of vessels.⁷

⁷ This provision is aimed at giving effect to the following paragraph of the IPOA-IUU: *IUU text 63. States should consider developing within relevant regional fisheries management organizations port State measures building on the presumption that fishing vessels entitled to fly the flag of States not parties to a regional fisheries management organization and which have not agreed to cooperate with that regional fisheries management organization, which are identified as being engaged in fishing activities in the area of that particular organization, may be engaging in IUU fishing. Such port State measures may prohibit landings and transshipment of catch unless the identified vessel can establish that the catch was taken in a manner consistent with those conservation and management measures. The identification of the vessels by the regional fisheries management organization should be made through agreed procedures in a fair, transparent and non-discriminatory manner.*

3. Such measures shall not discriminate in form or in fact against the fishing vessel of any State.

4. References to ports in this part include offshore terminals and other installations for landing, transshipping, refuelling or resupplying vessels.

Penalties for breach of port state measures should be set reasonably high.

One aspect of port state provisions is that they need to mesh in with a wide range of other laws. For example, in many countries, ports are the subject of quite precise definitions as there are different powers to be exercised in ports. This is particularly the case with customs and excise laws, and the issue of “in bond” shipments. There is also a potential problem should any FFA member decide to introduce a Freeport, as Mauritius has done. This will be important if, for example, fish are transhipped through freeports. Thus, the introduction of a port States regime along the lines proposed above will require a review of several related laws, such as customs laws and laws governing the operation of ports.

Checklist: does the law provide for a comprehensive port control system which would enable the State in question to give effect to any regionally agreed port measures (such as by WCPFC) in respect of fishing vessels?

Does it set out clearly the powers that may be exercised in respect of foreign vessels that are believed to have engaged in IUU fishing?

Jurisdiction over nationals.

Some States are now including in their basic fisheries laws provisions which enable them to exercise control over their nationals. As the point is put in the International Plan of Action for Illegal, Unreported and Unregulated Fishing:

17. In the light of relevant provisions of the 1982 UN Convention, and without prejudice to the primary responsibility of the flag State on the high seas, each State should, to the greatest extent possible, take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing. All States should cooperate to identify those nationals who are the operators or beneficial owners of vessels involved in IUU fishing.

A strong instance of the exercise of this kind of jurisdiction is found in section 133E of the New Zealand Fisheries Act giving effect to the 1995 Agreement:

No New Zealand national may use a vessel that is not registered under the Ship Registration Act 1992, or a tender of that vessel, to take (by any method) on the high seas any fish, aquatic life, or seaweed for sale, or to transport any fish, aquatic life, or seaweed taken on the high seas, except in accordance with an authorization issued by a state specified in subsection (2).

The Cook Islands Marine Resources Act has the following provision:

22. Use of Vessels of other Flags by Cook Islanders on the High Seas – (1) No person, being a Cook Islander, or a body corporate established under the laws of Cook

Islands may use a vessel registered in another country for fishing or related activities on the high seas except in accordance with a qualifying authorisation issued by the flag State.

(2) A qualifying authorisation may be issued -

(a) by a State that is a party to the Fish Stocks Agreement; or

(b) by a State that is a party to the FAO Compliance Agreement; or

(c) by a State that is a party to, or has accepted the obligations of, a global, regional, or sub-regional fisheries organisation or arrangement to which the authorisation relates; or

(d) by a State that -

(i) is a signatory to the Fish Stocks Agreement; and

(ii) has legislative and administrative mechanisms to control its vessels on the high seas in accordance with that agreement.

(3) For the purpose of subsection (1) any notice given by the Minister in the Gazette, specifying any State or category of States as States that may issue a qualifying authorization shall be conclusive of its contents.

(4) Any person who contravenes subsection (1) commits an offence, and shall be liable on conviction to a fine not less than \$50,000 and not exceeding \$100,000.

The authorizations referred to may be issued by a party to either the 1995 UN Fish Stocks Agreement or the 1993 FAO Compliance Agreement, or by a State that is party to or has accepted the obligations of a global regional or subregional organization or arrangement to which the authorization relates. However, it would be useful to include a specific reference to WCPFC in such a provision.

Role of the Attorney General

One important safeguard is written into this Act, namely that the consent of the Attorney General is required before proceedings can be instituted under these provisions. This is a device that is intended to ensure that the primacy of the jurisdiction of the flag State is protected, as well as providing a means of avoiding the risk of double jeopardy, jurisdictional conflicts, and other legal and policy difficulties that might arise. Although especially important in the context of proceedings against nationals, this safeguard is of more general value in fisheries laws where actions against foreign fishing interests are concerned.

Thus, in Tonga there is the following provision (section 64 (3-7)) which concerns proceedings against vessels of parties to UNFSA (“participating states”)

(3) Where an information or charge against a person under this Part relates to an offence involving a boat that bears the nationality of a participating state, such information or charge shall not proceed to hearing or determination without the written consent of the Attorney General.

(4) Before granting consent under subsection (3), the Attorney-General shall seek the views of the government of the participating state.

(5) The consent of the Attorney-General shall not be required for:

(a) the arrest of a suspected offender or proceedings relating to that arrest;

(b) the laying of a charge against the suspected offender;

(c) proceedings for the extradition to Tonga of the suspected offender, or

(d) proceedings for remanding the suspected offender in custody or on bail.

(6) *If the Attorney-General declines to grant consent, the relevant court shall stay proceedings on the charge.*

(7) *A certified copy of the written consent granted by the Attorney-General, in the absence of proof to the contrary, shall be proof of such consent.*

Here, the definition of participating State should be amended to include members of WCPFC.

Checklist: does the law provide for control over nationals even when on board foreign fishing vessels?

Does the law provide for controls on the exercise of that jurisdiction, for example, by requiring the consent of the Attorney General?

Extra territoriality

In countries with a common law tradition, there is a presumption against the extraterritorial operation of legislation. Although it can be argued that fisheries laws are clearly intended to operate extraterritorially, and that it is unnecessary to say so, it is usually considered advisable to include in legislation a clause giving the law extra territorial operation to put the point completely beyond doubt. This can be very important with respect to the definition of offences and the imposition of penalties where courts tend to construe such provisions narrowly.

In the NZ law, extraterritoriality is addressed at the outset by the inclusion of the following clause:

198A. To avoid doubt, the powers of a fishery officer conferred by or under this Part may be exercised in relation to any conduct, whether or not the conduct occurred in New Zealand fisheries waters.

A similar provision can be found in the Tongan fisheries law.

Checklist: does the law ensure that it has both territorial and extraterritorial operation?

Evidentiary provisions.

In countries which have inherited the Anglo Saxon or common law system, there are important issues of proof which need to be addressed. Further, in many countries of the region there are fundamental human rights provisions which prohibit the reversal of the burden of proof.

In order to facilitate the task of proving a case before the court, many laws have special provisions which make the proving of certain facts easier. One method is to allow the government to put before the court certain certificates which are *prima facie* evidence of the matters before the court. These usually relate to whether a fishing vessel was a local or a foreign fishing vessel, whether a person or vessel had been issued with an authorization, whether certain areas had been closed off or restricted for fishing purposes, whether a chart showed certain marine boundaries, and whether a report had been issued in respect of a person or vessel. Certain limited presumptions can also be used, for

example, that the presence on board a vessel of explosives or poisons shall be presumed to be there unlawfully unless the contrary is proved. These solutions are usually not seen as reversing the burden of proof.

One example of reliance on certificate evidence is found in the PNG Marine Fisheries Act:

67. CERTIFICATE EVIDENCE.

The Managing Director or any person designated in writing by him may give a certificate stating that -

(a) a specified vessel was or was not on a specified date or dates a Papua New Guinea fishing vessel, a locally based foreign fishing vessel or a foreign fishing vessel; or

(b) a specified vessel or person was or was not in a specified date or dates the holder of any specified license, authorization or certificate of registration; or

(c) an appended document is a true copy of the license or certificate of registration for a specified vessel or person and that specified conditions were attached to such document; or

(d) a particular location or area of water was on a specified date or dates within the fishery waters, or within a closed, limited, restricted or in any other way controlled area of the fisheries waters, or an area of the fisheries waters subject to specified conditions; or

(e) an appended chart shows the boundaries on a specified date or dates of the fisheries waters, territorial sea, closed or limited areas or other areas or zones delineated for any specified purpose; or

(f) a particular item or piece of equipment is fishing gear; or

(g) the cause and manner of death of or injury to any fish; or

(h) an appended document is a true copy of an approved charter agreement, an access agreement of fisheries management agreement; or

(i) a call sign, name or number is that of or allotted under any system of naming or numbering of vessels to a particular vessel; or

(j) an appended position or catch report was given in respect of a specified vessel; or

(k) a specified fishing vessel does or does not have good standing as declared in an appended copy of a statement signed by the Director of the South Pacific Forum Fisheries Agency; or

(l) a certification as to the condition of fish given under this Act was made in accordance with this Act and was made by the person who is signatory to the certificate.

68. VALIDITY AND PROCEDURES FOR CERTIFICATES.

(1) A document purporting to be a certificate given under Section 67 shall be deemed to be such a certificate and to have been duly given.

(2) Where a certificate issued under Section 67 is served upon a defendant seven or more days before its production in court in any proceedings under this Act, the certificate shall be prima facie evidence, unless the contrary is proved, of all the facts averred in it.

(3) Where a certificate issued under Section 67 is served upon a defendant 14 or more days before its production in court and the defendant does not, within seven days of the date of service, serve notice of objection in writing upon the prosecutor, then the certificate shall, unless the court finds the defendant is unduly prejudiced by any failure to object, be conclusive proof of all the facts averred in it.

(4) Where any objection is notified under Subsection (3) the certificate shall be prima facie evidence, unless the contrary is proved, of all the facts averred in it.

(5) Any certificate issued under Section 67 shall be titled "Certificate Made Under Section 67, Fisheries Management Act 1998".

(6) Any omission from a mistake made in any certificate issued under Section 67, shall not render it invalid unless the Court considers such omission or mistake is material to any

issue in the proceedings concerned, or the defendant is unduly prejudiced thereby.

(7) Where in any proceedings a certificate made under Section 67 is produced to the Court, the prosecution shall not be obliged to call the maker of the certificate unless otherwise ordered and the Court shall, where material, rely on the facts therein unless the contrary is proved.

69. CERTIFICATE AS TO THE LOCATION OF A VESSEL.

(1) Where in any proceedings under this Act the place or area in which a vessel is alleged to have been at a particular date and time or during a particular period of time is material to an offence charged, then a place or area stated in a certificate given by a Fishery Officer or observer shall be prima facie evidence, unless the contrary is proved, of the place or area in which the vessel was at the date and time or during the period of time stated.

(2) The Fishery Officer shall in any certificate made under Subsection (1) state -

(a) his name, address, official position, country of appointment and provision under which he is appointed; and

(b) the name and, if known, call sign of the fishing vessel concerned; and

(c) the date and time or period of time the vessel was in the place or area; and

(d) the place or area in which it is alleged the vessel was located; and

(e) the position fixing instruments used to fix the place or area stated in Paragraph (d) and their accuracy within specified limits; and

(f) a declaration that he checked the position fixing instruments a reasonable time before and after they were used to fix the position and they appeared to be working correctly; and

(g) if a position fixing instrument which is not judicially recognised as notoriously accurate or a designated machine is used, a declaration that he checked the instrument as soon as possible after the time concerned against such instrument.

(3) Section 68 shall apply to a certificate given under this section as if it has been a certificate given under Section 67 and any reference therein to Section 67 shall be read as reference to this section.

(4) For the purposes of this Part "Fishery Officer" shall include surveillance officers and those charged with similar responsibilities in other States.

It is important, however, to ascertain in each instance what is the accepted practice in each country on the use of such certificate evidence, and what attitudes have been adopted by the judiciary. Both attitudes and practice can vary considerably from one country to another and oscillate over time.

There is also the need to ensure that evidence by foreign enforcement officials can be relied on in the local courts. The following example is taken from the Marshall Islands, and it could be adapted to cover the WCPFC context:

(3) Standing in the High Court of the Republic of the Marshall Islands shall be afforded to any authorized officer or authorized observer designated under a fisheries management agreement entered into pursuant to subsection (1)(b) or (c) of this section to bring action against any person or fishing vessel for any act or offense that is actionable under the law of the Republic of the Marshall Islands is a violation of an access agreement or fisheries management agreement pursuant to which the officer or observer was authorized which has occurred in the Fishery Waters or the high seas, notwithstanding the nationality of the authorized officer or authorized observer.

Photographic, electronic and digital evidence is also an important issue. In some countries, the basic laws of evidence do not permit the use of so called hearsay evidence, of which such evidence is a part. With increased reliance on vessel monitoring systems

in the fisheries sector, it is important to ensure that such evidence can be relied on in court. It should be noted here that the IPOA IUU stated in paragraph 17:

National legislation should address, inter alia, evidentiary standards and admissibility including, as appropriate, the use of electronic evidence and new technologies.

In the Cook Islands Marine Resources Act, the following clause is found:

70. Photograph evidence - (1) Where a photograph is taken of any fishing or related activity and simultaneously the date and time on which and position from which the photograph is taken are superimposed upon the photograph then it shall be presumed unless the contrary is proved that the photograph was taken on the date at the time and in the position so appearing.

(2) The presumption set out in subsection (1) above shall only arise if -

(a) the camera taking the photograph is connected directly to the

instruments which provide the date, time and position concerned; and

(b) the instruments which provide the date, time and position are judicially recognised as being notoriously accurate or are designated machines or were checked as soon as possible after the taking of the photograph against such instruments.

(3) Any authorised officer who takes a photograph of the kind described in subsection (1) may give a certificate appending the photograph stating -

(a) his or her name, address, official position, country of appointment, and provision under which he is appointed;

(b) the name and call sign, if known, of any fishing vessel appearing in the photograph;

(c) the names of the camera, watch or clock or other instruments supplying the date and time and the position fixing instrument and a declaration that he checked those instruments a reasonable time before and after the taking of the photograph

and, if necessary, in accordance with subsection (2)(b) and that they all appeared to be working correctly;

(d) the matters set out in subsection (2)(a);

(e) the accuracy of the fixing instrument used within specified limits; and

(f) the maximum possible distance and the direction of the subject of the photograph away from the camera at the time the photograph was taken.

(4) Section 68 shall apply to a certificate given under this section as if it had been a certificate given under section 67 and any reference therein to section 67 shall be read as a reference to this section.

(5) For the purposes of this section "authorised officer" shall include fisheries enforcement officers, surveillance officers and those charged with similar responsibilities in other countries, and high seas inspectors duly authorised under a multilateral legal instrument to which Cook Islands is party.

The same Act also has a provision dealing with Automatic Location Communicators:

62. Automatic Location Communicators – Evidence - (1) All information or data obtained or ascertained by the use of an ALC shall be presumed, unless the contrary is proved, to -

(a) come from the vessel so identified;

(b) be accurately relayed or transferred;

(c) be given by the master, owner and charterer of the vessel; and

evidence may be given of information and data so obtained or ascertained whether from a printout or visual display unit.

(2) The presumption in subsection (1) shall apply whether or not the information was stored before or after any transmission or transfer.

(3) An ALC installed and operated in accordance with this Act shall be judicially recognised as notoriously accurate.

(4) The presumption set out in subsection (3) shall apply whether or not

the information was stored before or after any transmission or transfer.

(5) Any person may give a certificate stating –

(a) his or her name, address and official position;

(b) he or she is competent to read the printout or visual display unit of any machine capable of obtaining or ascertaining information from an ALC;

(c) the date and time the information was obtained or ascertained from the ALC and the details thereof;

(d) the name and call sign of the vessel on which the ALC is or was located as known to him or her, or as ascertained from any official register, record or other document; and

(e) a declaration that there appeared to be no malfunction in the ALC, its transmissions, or other machines used in obtaining or ascertaining the information.

(6) Section 68 of this Act shall apply to a certificate given under this section as if it had been a certificate given under section 67 of this Act and any reference therein to section 67 of this Act shall be read as a reference to this section.

Another example can be found in the following provision which deals with observation devices. It is from the Republic of South Africa Marine Living Resources Act:

Definition: section 1 (xl) “observation device” means any device or machine placed on a fishing vessel in terms of this Act as a condition of its licence which transmits, whether in conjunction with other machines elsewhere or not, information or data concerning the position and fishing activities of the vessel; (lxiii)

Observation devices

76. (1) The Minister may, by notice published in the *Gazette*, designate any device or machine or class of device or machine as an observation device.

(2) The information or data concerning the vessel’s position and fishing activities referred to in subsection (3) may be fed or captured manually into the observation device or automatically from machines aboard the vessel or ascertained by the use of the observation device’s transmissions in conjunction with other machines.

(3) All information or data obtained or ascertained by the use of an observation device, shall be *prima facie* evidence that such information—

(a) came from the vessel so identified;

(b) was accurately relayed or transferred; and

(c) was given by the master, owner and charterer of the fishing vessel, and evidence may be given of information and data so obtained or ascertained whether from a printout or visual display unit.

(4) Subsection (3) applies irrespective of whether or not the information was stored before or after any transmission or transfer.

(5) Any fishery control officer or observer may issue a certificate stating the following:

(a) His or her name, address, official position, place of appointment and provision in terms of which he or she is appointed;

(b) that he or she is competent to read the printout or visual display unit of any machine capable of obtaining or ascertaining information from an observation device;

(c) the date and time the information was obtained or ascertained from the observation device and the details thereof;

(d) the name and call sign of the vessel on which the observation device is or was located as known to him or her or as ascertained from any official register, record or other document; and

(e) that there appeared to be no malfunction in the observation device, its

transmissions or other machines used in obtaining or ascertaining the information.

(6) Section 71 shall, with the necessary changes, apply to a certificate issued in terms of this section.

(7) No person shall destroy, damage, render inoperative or otherwise interfere with an observation device or machine aboard a vessel, vehicle or aircraft which automatically feeds or inputs information or data into an observation device.

(8) No person shall intentionally feed or capture information or data into an observation device which is not officially required in terms of this Act, or is false or inaccurate.

Checklist: Does the law contain effective evidentiary provisions to facilitate proving certain aspects incidental to the principal charge? For example, does it permit the use of evidentiary certificates, or the limited use of presumptions?

Does the law permit the use of photographic digital and electronic evidence to overcome the problems associated with the hearsay rule of the common law world?

Offences

Virtually all of the recently drafted fisheries laws will already have comprehensive provisions setting out offences, and imposing heavy penalties, and it is probably unnecessary to address that subject fully here. It will however be necessary to check whether the laws provide for offences on the high seas, and that adequate penalties are set in order to be an effective deterrent.

Definition of serious violations

One aspect of the subject of offences does need attention, however. Article 21.8 UNFSA (Subregional and regional cooperation in enforcement) which provides:

8. Where, following boarding and inspection, there are clear grounds for believing that a vessel has committed a serious violation, and the flag State has either failed to respond or failed to take action as required under paragraphs 6 or 7, the inspectors may remain on board and secure evidence and may require the master to assist in further investigation including, where appropriate, by bringing the vessel without delay to the nearest appropriate port, or to such other port as may be specified in procedures established in accordance with paragraph 2. The inspecting State shall immediately inform the flag State of the name of the port to which the vessel is to proceed. The inspecting State and the flag State and, as appropriate, the port State shall take all necessary steps to ensure the well-being of the crew regardless of their nationality.

11. For the purposes of this article, a serious violation means:

(a) fishing without a valid licence, authorization or permit issued by the flag State in accordance with article 18, paragraph 3 (a);

(b) failing to maintain accurate records of catch and catch-related data, as required by the relevant subregional or regional fisheries management organization or arrangement, or serious misreporting of catch, contrary to the catch reporting requirements of such organization or arrangement;

(c) fishing in a closed area, fishing during a closed season or fishing without, or after attainment of, a quota established by the relevant subregional or regional fisheries management organization or arrangement;

(d) directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited;

(e) using prohibited fishing gear;

(f) falsifying or concealing the markings, identity or registration of a fishing vessel;

(g) concealing, tampering with or disposing of evidence relating to an investigation;

(h) multiple violations which together constitute a serious disregard of conservation and management measures; or

(i) such other violations as may be specified in procedures established by the relevant subregional or regional fisheries management organization or arrangement.

Article 25.4 of WCPFC has also essentially adopted the definition of serious violation found in Article 21.8 UNFSA.

The New Zealand and Australian laws also provide contrasting approaches to defining the term “serious violation” as that term is used in article 21 of the 1995 UN Fish Stocks Agreement.

The New Zealand Amendment of 1999 states simply that “‘Serious violation’ has the meaning given to it by Article 21.11 of the Fish Stocks Agreement.” The Australian law, on the other hand, transforms the definition of serious violation into its own version of what the term means.

On the other hand, the Cook Islands Marine Resources Act defines serious violation:

“Serious violation” means -

(a) fishing without a valid licence, authorisation, fishing right or permit as required under this Act;

(b) failing to maintain accurate records of catch and catch-related data, as required by this Act or a licence issued pursuant to this Act, or serious misreporting of catch contrary to this Act or a licence issued pursuant to this Act;

(c) fishing in a closed area, fishing during a closed season or fishing without, or after attainment of, a quota established in the fishery waters or by an applicable subregional or regional fisheries management organization or arrangement;

(d) directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited;

(e) using prohibited fishing gear;

(f) falsifying or concealing the markings, identity or registration of a fishing vessel;

(g) concealing, tampering with or disposing of evidence relating to an investigation or anticipated investigation;

(h) multiple violations which together constitute a serious disregard of conservation and management measures; or

(i) such other violations as may be specified in this Act;

The Cook Islands approach is preferred inasmuch as it spells out what amounts to a serious violation while the NZ law merely refers to UNFSA.

Where a serious violation is established, certain consequences follow: first, under Article 19.1(e) of UNFSA, if it is established that a vessel has been involved in the commission of a serious violation, the vessel does not engage in

fishing on the high seas until such time as all outstanding sanctions imposed by the flag State in respect of the violation have been complied with. Second, under Article 21.6, where there are clear grounds for believing that a vessel has committed a serious violation, and the flag State has failed to take action or to respond, the inspectors can remain on board and secure evidence, and bring the vessel without delay to the nearest appropriate port.

Checklist: Does the law provide for a definition of “serious violations” to accord with the provisions of UNFSA? Is it given effective application in the compliance and enforcement provisions?

Penalties

There is also a need to review the level of penalties imposed to ensure that they continue to be effective.

Cancellation, suspension and seizure

There already exist several good models in the region for these provisions which, with only minor adaptation, can be used as effective templates for such provisions. This subject, though important, is not considered here.

Compliance and Enforcement provisions.

The provisions of both UNFSA and WCPFC will present a significant challenge, as it requires the legislator to envisage situations in which its flag vessels are the offenders subject to inspection and others in which it is the inspecting State. These provisions need to be drafted with care as courts have traditionally interpreted and applied these provisions narrowly in order to provide basic protections to individuals.

Fortunately, there is already some experience in the drafting of legislation on such matters in the South Pacific. The most recent laws include provisions which address the following:

For the high seas

- Powers of inspectors on (a) foreign (b) local vessels
- Boarding and inspection procedures for foreign vessels
- Investigation of “serious violations” (as defined in Article 21 of UNFSA)
- Cooperation of persons on local fishing vessels with high seas inspectors
- Powers of high seas inspectors

General provisions

- Appointment and designation of authorised officers
- Powers of authorised officers

- Identification of authorised officers
- Obligation to comply with instructions of authorised officers
- Powers of authorised officers beyond the EEZ
- Offences committed against an authorised officer
- Destruction of evidence and avoidance of seizure
- Release, sale and forfeiture of detained property
- Inspection and enforcement measures regarding (a) national vessels (b) foreign vessels
- Inspection and enforcement measures for vessels voluntarily in port
- Immunity of authorised officers in good faith execution of their duties

The most important need, therefore, is first, to check that all of the above aspects are covered, and second to ensure that there are references to the power of authorised officers to enforce measures of the WCPFC. This latter point could be achieved by the inclusion of a general clause along the following lines:

“The powers of an authorised officer under this Act shall extend to actions taken by an authorised officer with respect to measures adopted by WCPFC or other regional or subregional fisheries bodies, and to actions taken by such officers in support of compliance with or enforcement of such measures”

Checklist: Does the law contain the above listed provisions?

Alternative mechanisms

The judicial process has often been criticized as being unduly lengthy, and that its strict insistence of high standards of proof can lead to too few successful prosecutions for illegal fishing. In many instances, the situation has been ameliorated to a limited extent by providing that fisheries offences are triable summarily, i.e. before a magistrate and without a jury.

One solution has been the introduction of a system of administrative penalties for dealing with fisheries offences. This was specifically referred to in the IPOA-IUU as one possible approach that could be adopted. See paragraph 21, quoted above.

The main advantage of this approach is that it enables the tribunal to apply a lower standard of proof than is possible in a full criminal trial (usually accepting proof on the civil standard of balance of possibilities rather than on the criminal standard of beyond reasonable doubt), it makes possible expedited hearings, and it can also include the possibility of a negotiated settlement of the case.

This method has been adopted in the United States and in a number of the island States of the South Pacific. Despite the fact that it involves a possible diminution of their legal rights, it is often popular with fishers as it enables a speedy resolution of their case.

This approach may not work in all countries as there may be constitutional or legal reasons why such a system cannot be introduced.

In some countries, a system of “compounding” of offences is used. This is also an alternative to the use of administrative or civil penalties, but compounding usually lacks the safeguards built into the more formally structured administrative or civil penalty system.

“Long Arm” (Lacey Act) Jurisdiction

One method to promote compliance that has been adopted in a number of laws is the so called long arm or Lacey Act laws. Such laws typically makes it unlawful to import fish that has been taken contrary to the laws of another country.

In a study of national legislative options to combat IUU fishing, B Kuemlangan gave as a model of such a provision the following:

(a) on his own account, or as partner, agent or employee of another person, lands, imports, exports, transports, sells, receives, acquires or purchases; or

(b) causes or permits a person acting on his behalf, or uses a fishing vessel, to land, import, export, transport, sell, receive, acquire or purchase,

any fish taken, possessed, transported or sold contrary to the law of another State shall be guilty of an offence and shall be liable to a fine not exceeding (insert monetary value).

(2) This section does not apply to fish taken on the high seas contrary to the laws of another State where (insert name of country) does not recognise the right of that State to make laws in respect of those fish.

(3) Where there is an agreement with another State relating to an offence referred to in subsection (1) (b), the penalty provided by subsection (1), or any portion of it according to the terms of the agreement, shall, after all the costs and expenses have been deducted, be remitted to that State according to the terms of the agreement.⁸

Bail and bond issues

⁸ See generally Blaise Kuemlangan National Legislative Options to Combat IUU Fishing AUS:IUU/2000/9 <http://www.affa.gov.au/ecoiuuf/papers.html> This scheme is discussed in detail at p 13.

One matter which is worth reconsidering in most possibly all of the laws of the members states is the provision of bond and bail issues. Art 73 LOSC states: “Arrested vessels and their crews shall be promptly released upon the posting of a reasonable bond or other security”

The meaning of this provision has been subject to interpretation in cases before ITLOS. The most important to date is the Volga Case⁹. In this case, Australia sought, inter alia, to impose as a condition for the release of the vessel obligation to carry certain VMS equipment.

The Tribunal commented generally about Article 73.2 in the following terms:

73. In interpreting the expression “bond or other security” set out in article 73, paragraph 2, of the Convention, the Tribunal considers that this expression must be seen in its context and in light of its object and purpose. The relevant context includes the provisions of the Convention concerning the prompt release of vessels and crews upon the posting of a bond or security. These provisions are: article 292; article 220, paragraph 7; and article 226, paragraph 1(b). They use the expressions “bond or other financial security” and “bonding or other appropriate financial security”. Seen in this context, the expression “bond or other security” in article 73, paragraph 2, should, in the view of the Tribunal, be interpreted as referring to a bond or security of a financial nature. The Tribunal also observes, in this context, that where the Convention envisages the imposition of conditions additional to a bond or other financial security, it expressly states so. Thus article 226, paragraph 1(c), of the Convention provides that “the release of a vessel may, whenever it would present an unreasonable threat of damage to the marine environment, be refused or made conditional upon proceeding to the nearest appropriate repair yard”. It follows from the above that the non-financial conditions cannot be considered components of a bond or other financial security for the purpose of applying article 292 of the Convention in respect of an alleged violation of article 73, paragraph 2, of the Convention. 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 a 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.

73. The Respondent has required, as part of the security for obtaining the release of the Volga and its crew, payment by the owner of one million Australian dollars. According to the Respondent, the purpose of this amount is to guarantee the carriage of a fully operational monitoring system and observance of Commission for the Conservation of Antarctic Marine Living Resources conservation measures until the conclusion of legal proceedings. The Respondent explained that this component of the bond was to ensure “that the Volga complies with Australian law and relevant treaties to which Australia is a party until the completion of the domestic legal proceedings”; that the ship does not “enter Australian territorial waters other than with permission or for the purpose of innocent passage prior to the conclusion of the forfeiture proceedings”; and further to ensure that the vessel “will not be used to commit further criminal offences”.

74. The Tribunal cannot, in the framework of proceedings under article 292 of the Convention, take a position as to whether the imposition of a condition such as what the Respondent referred to as a “good behaviour bond” is a legitimate exercise of the coastal State’s sovereign rights in its exclusive economic zone. The point to be determined is whether a “good behaviour bond” is a bond or security within the meaning of these terms in articles 73, paragraph 2, and 292 of the Convention.

⁹ Case No 11 Russian Federation v. Australia 2002.

75. *The Tribunal notes that article 73, paragraph 2, of the Convention concerns a bond or a security for the release of an "arrested" vessel which is alleged to have violated the laws of the detaining State. A perusal of article 73 as a whole indicates that it envisages enforcement measures in respect of violations of the coastal State's laws and regulations alleged to have been committed. In the view of the Tribunal, a "good behaviour bond" to prevent future violations of the laws of a coastal State cannot be considered as a bond or security within the meaning of article 73, paragraph 2, of the Convention read in conjunction with article 292 of the Convention.*

Australia had argued in support of a very wide interpretation of the provisions of Article 73.2, which, it can be seen above, was not accepted by the Tribunal. It should also be noted that Australia in its submissions had also explained Australian law in the following terms (which are probably also broadly relevant to the legal systems of many FFA members):

16. Article 73(2) provides: "Arrested vessels and their crews shall be promptly released upon the positing of a reasonable bond or other security." That is, the right to prompt release exists in relation to both vessels and their crews. However, in relation to an action alleging non-compliance with Article 73(2), Article 292(1) provides:

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 positing of a reasonable bond...(emphasis added).

17. When used in this context, the word "or" is: a "particle co-ordinating two or more words ..., between which there is an alternative."¹⁰

18. This indicates that the prompt release of each of the vessel and the crew are separate issues. An assessment of what is "reasonable" will depend upon the circumstances of the case. However, the facts that are relevant to an assessment of what is reasonable in relation to the release of the vessel will be different from the facts that are relevant to an assessment of what is reasonable in relation to the release of the crew. This difference is reflected in domestic law. Under Australian law, the setting of a bond for the vessel is an administrative matter and the setting of bail or sureties for the crew is a matter of criminal law. Australian law is not unusual in this respect.

It would be useful to review the bail and bond processes in each country to ascertain if the problems encountered in the Volga case could arise. It may be necessary to put into fisheries laws a specific provision addressing bail and bond issues (alongside forfeiture of vessel, gear and catch) in order to achieve compliance with the provisions of Article 73.

An alternative approach, though a more risky one, is to leave the matter as it is, namely with the courts having very wide powers on bail in criminal cases concerning the master and crew and bond issues with respect to the vessel gear, and catch, but arguing in each case for the exercise of judicial or administrative discretion in favour of conforming with the provisions of Article 73 as interpreted by ITLOS.

¹⁰ *The Oxford English Dictionary*, Second Edition, Clarendon Press, Oxford, 1989, Volume X, p. 882.

Because this raises issues wider than the fisheries law, it would be useful in the first instance to study this matter separately, for example, by reviewing the laws of individual countries on the subject of bond ,bail, forfeiture (of vessel gear and catch). Against that background, it might be possible to formulate a common regional approach to these matters.

Annex

Some legislative models relating to port state measures.

Legislative models in other countries provide only limited guidance. What follows is a brief introduction to this matter. Because some of the legislative provisions are lengthy, I have covered only the essential features.

New Zealand chose to adopt an open port access regime as part of its economic liberalization regime. Thus, it has no general prohibition on entry to its ports for foreign fishing vessels. It does, under section 113 of the Fisheries Act require foreign vessels to obtain the consent of the Ministry of Fisheries before any fish caught on the high seas can be landed in NZ.

Where a fishing vessel has been issued with a high seas fishing licence, its entry into port may be regulated in accordance with conditions attached to that permit.

113K. Conditions of high seas fishing permit---(1) A high seas fishing permit may be subject to such conditions as the chief executive considers appropriate, including conditions relating to the following matters:

- (a) The areas in which fishing or transportation is authorised:
- (b) The seasons, times, and particular voyages during which fishing or transportation is authorised:
- (f) The use, transfer, transhipment, landing, receiving, and processing of fish, aquatic life, or seaweed taken:
- (g) Procedures or requirements, or both, enabling the verification of fish, aquatic life, or seaweed taken or being taken by the vessel, including procedures or restrictions relating to the species of, quantities of, or areas from which, fish, aquatic life, or seaweed are being or have been taken by the vessel:
- (h) Entry by the vessel to New Zealand or foreign ports, whether for the inspection of its catch or for other purposes:

Section 113 of the Fisheries Act does,

More recently, New Zealand has enacted section 113ZD, which provides an important tool in combating IUU fishing.

113ZD. Visits by foreign ships---(1) The master of a fishing vessel or fish carrier that is not a New Zealand ship, a New Zealand fishing vessel, or a registered fish carrier, who intends to bring the vessel into the internal waters of New Zealand, must give the chief executive at least 72 hours' notice, in the approved manner, of his or her intention to do so.

(2) If the chief executive is satisfied that a vessel has undermined international conservation and management measures, the chief executive may, by notice to the master of a vessel to which subsection (1) applies, direct the vessel---

(a) Not to enter the internal waters of New Zealand; or (b) If it has entered the internal waters of New Zealand, to leave those waters.

(3) If the Minister is satisfied on reasonable grounds that it is necessary for the purpose of the conservation and management of fish, aquatic life, or seaweed, the Minister may, by notice in the Gazette, direct any class or classes of fishing vessel or fish carrier not to enter the internal waters of New Zealand.

(4) The master of a vessel to which a notice under subsection (2) or subsection (3) applies, who brings the vessel into the internal waters of New Zealand knowing that the notice applies to the vessel, commits an offence and is liable to the penalty set out in section 252 (5).

(5) This section does not prevent a vessel from entering or remaining in the internal waters of New Zealand for such period as is necessary for the purposes of obtaining the food, fuel, and other goods and services necessary to enable the vessel to proceed safely and directly to a port outside New Zealand.

Canada has provided for a regime which requires permission to land or tranship catch in Canada. This is set out in section 4 of the Coastal Fisheries Protection Act.

4. (1) No person, being aboard a foreign fishing vessel or being a member of the crew of or attached to or employed on a foreign fishing vessel, shall in Canada or in Canadian fisheries waters

(a) fish or prepare to fish,

(b) unload, land or tranship any fish, outfit or supplies,

(c) ship or discharge any crew member or other person,

(d) purchase or obtain bait or any supplies or outfits, or

(e) take or prepare to take marine plants,

unless authorized by this Act or the regulations, any other law of Canada or a treaty.

Further, section 6 of the Canadian Coastal Fisheries Protection Act reads as follows:

The Governor in council may make regulations for carrying out the purposes and provisions of this Act including, but not limited to, regulations...

(e) for the implementation of the [Fish Stocks] Agreement, including regulations

(i) incorporating by reference any conservation or management measures of a regional fisheries management organization or arrangement established by two or more States, or by one or more States and an organization of States, for the purpose of the conservation or management of a straddling fish stock or highly migratory fish stock...

Norway: Norway has also the power to deny the use of port facilities in certain circumstances. In the “Regulations relating to a Prohibition on Landing Fish caught in waters Outside Norwegian jurisdiction”, there are prohibitions placed on the landing of certain catches. Thus in section 1 of the regulation,

“It is prohibited to land catches of fish from fish stocks of mutual interest to Norway and other states which are not subject to agreed stock regulation measures or which are subject to Norwegian regulatory measures.

Likewise in section 2,

“it is prohibited to land catches taken in contravention of a desired harvesting pattern or which may result in reasonable total quotas of the fish species in question being exceeded.”

This is explained in the regulation as referring to catch from fish stocks that are subject to Norwegian regulatory measures and have not been taken pursuant to a fisheries agreement between Norway and the flag State, or by a vessel registered in a country with which Norway does not have a fisheries agreement.

Section 3 prohibits the landing of

“catches consisting of fish caught in contravention of provisions laid down by regional or sub-regional fishery management organizations or arrangements, including catches taken by citizens of States that are not members of or parties to such organizations or arrangements.”

These provisions are stated to apply irrespective of whether the fish has been caught in an area under the jurisdiction of a particular state or in international waters.¹¹

In addition, there exists a more drastic power to deny access to vessels that have engaged in unregulated fishing on the high seas. This is described by Loebach in the following terms:

¹¹ section 4

“Norwegian authorities have denied access to port by foreign fishing vessels that have taken part in an unregulated fishery on the high seas. A regulation concerning the entry into and passage through Norwegian territorial waters in peacetime of foreign non-military vessels stipulates that such vessels may be refused admission to Norwegian internal waters when special grounds make that necessary. [Amendment of 25 March 1994 of the regulation of 13 May 1977 relating to fishing and hunting operations by foreign nationals in the Exclusive Economic Zone of Norway.] Such special grounds exist, inter alia, when fishing vessels plan to enter these waters in connection with fishing, or bringing ashore a catch that implies that appropriate total quotas for the fish are being exceeded.”¹²

Namibia has a direct control over transshipment and landings. This is set out in section 50:

50. (1) No vessel in the territorial sea or internal waters of Namibia, no vessel licensed under section 40 and no Namibian flag vessel shall tranship, land, attempt to tranship or land, or assist any other vessel to tranship or land any marine resources, unless such transshipment or landing -

- (a) is authorized by a licence or other authorization obtained from the Minister; and
- (b) is executed in accordance with any conditions contained in the licence or authorization in question.

(2) Notwithstanding subsection (1), marine resources may be transhipped between and landed in the territorial sea or internal waters of Namibia by vessels that are not fishing vessels.

The European Community: the European Community set out in Council Regulation No 2847/93 has a comprehensive policy which has been revised from time to time. The preamble is unusually informative and it refers inter alia to:

Whereas, to ensure that all catches and landings are kept Under surveillance, Member States must monitor in all Maritime waters the activities of Community vessels and all related activities allowing verification of the implementation of the rules concerning the common fisheries policy;

Whereas it is necessary for the Member State of landing to be able to monitor landings on its territory, and to this end it is appropriate for fishing vessels registered in other Member States to notify the Member State of landing of their intention to land on its territory;

Whereas it is essential to clarify and confirm at the time of landing the information contained in the logbooks; whereas, to this end, it is necessary that those involved in the landing and marketing of catches should declare the quantities landed, transshipped, offered for sale of purchased;

Whereas limitations on catches must be managed at both Member State and Community level; whereas Member States should register landings and notify them to the Commission by computer transmission; whereas therefore it is necessary to provide for exceptions from this obligation for small quantities landed, the computer transmission of which would constitute a disproportionate administrative and financial burden for the authorities of the Member States;

¹² Loebach, Fisheries Directorate, Bergen. Section 3 of the Regulations relating to a prohibition on landing fish caught in Waters outside Norwegian jurisdiction states:

Whereas, in order to ensure the conservation and management of all the resources used, the provisions relating to the logbook, the landing and sales declarations and the information concerning transshipments and registration of catches may be extended to stocks which are not subject to a TAC or quota;

TITLE I

Inspection and monitoring of fishing vessels and their activities

Article 2

1. In order to ensure compliance with all the rules in force concerning conservation and control measures, each Member State shall, within its territory and within maritime waters subject to its sovereignty or jurisdiction, monitor fishing activity and related activities. It shall inspect fishing vessels and investigate all activities thus enabling verification of the implementation of this Regulation, including the activities of landing, selling, transporting and storing fish and recording landings and sales.

(b) Each Member State shall ensure that the master of a fishing vessel flying the flag of, or registered in, a third country, or his representative, shall on landing submit to the authorities of the Member State whose landing facilities he wishes to use at least 72 hours in advance of his time of arrival at the port of landing.

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(c) The master of a fishing vessel flying the flag of, or registered in, a third country must notify the competent authorities of the Member State whose landing facilities he wishes to use at least 72 hours in advance of his time of arrival at the port of landing. The master may not carry out any landing operation if the competent authorities of the Member State have not confirmed the receipt of the advance notification. Member States shall establish detailed rules of implementation of this subparagraph to be notified to the Commission.

Article 17

1. Member States shall take the necessary measures to ensure monitoring of the catches of species made by their vessels operating in waters subject to the sovereignty or jurisdiction of third countries and on the high seas, and to ensure verification and recording of transshipments and landings of such catches.

3. The provisions of paragraphs 1 and 2 shall apply without prejudice to the provisions of the fisheries agreements concluded between the Community and third countries and International Conventions to which the Community is a party.