14. 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 chapter is to provide an overview of the work underway in the preparation of the Pacific Islands Forum Fisheries Agency (FFA) Legislative Guidelines for Sustainable Fisheries. It proposes to focus on those aspects which involve the implementation into national legislation of recent developments in international fisheries instruments. It contains extracts of a much longer study on the subject.

In particular, the following aspects are considered here: objectives and principles clauses, ecosystem considerations, precautionary approaches to fisheries management, records of fishing vessels, implementation of conservation and management measures of regional fisheries management organisations (RFMOs), authorisations to fish, scientific research, collection of data, port State measures, jurisdiction over nationals, evidentiary provisions, offences, penalties, cancellation, suspension and seizure, compliance and enforcement provisions, alternative mechanisms, “Long Arm” (Lacey Act) Jurisdiction, and bail and bond issues.

It must be stressed at the outset that the objective is not to provide a comprehensive overview of all aspects to be covered in a fisheries law. Certain provisions that are often found in a fisheries law, such as those concerning driftnet fishing, and bilateral fisheries agreements, are not included in this document. Important though they are in their own right, they do not raise any novel aspects which a fisheries law needs to address, nor do they stem from 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 (in particular, archipelagic waters, territorial sea and exclusive economic zone (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 chapter for the same

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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 obligations under the World Trade Organisation (WTO) regime.

Objectives and Principles

The starting point is the statement of objectives and principles in Article 5 of the United Nations 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) the Johannesburg Plan of Action and the various international plans of action and ministerial declarations adopted by Food and Agricultural Organisation (FAO), are widely accepted as indispensable to modern fisheries conservation and management. Further, they have been incorporated into the provisions of the Convention on the Conservation and Management of Highly Migratory Fish Stocks of the Western and Central Pacific Ocean (WCPF Convention).

Thus, Article 5 of the WCPF Convention states:

In order to conserve and manage highly migratory fish stocks in the Convention Area in their entirety, the members of the Commission shall, in giving effect to their duty to cooperate in accordance with the 1982 Convention, the Agreement and this Convention:

(a) adopt measures to ensure long-term sustainability of highly migratory fish stocks in the Convention Area and promote the objective of their optimum utilization;

(b) ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special

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7 Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Honolulu, USA, 5 September 2000.
requirements of developing States in the Convention Area, particularly small island developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;

(c) apply the precautionary approach in accordance with this Convention and all relevant internationally agreed standards and recommended practices and procedures;

(d) assess the impacts of fishing, other human activities and environmental factors on target stocks, non-target species, and species belonging to the same ecosystem or dependent upon or associated with the target stocks;

(e) adopt measures to minimize waste, discards, catch by lost or abandoned gear, pollution originating from fishing vessels, catch of non-target species, both fish and non-fish species, (hereinafter referred to as non-target species) and impacts on associated or dependent species, in particular endangered species and promote the development and use of selective, environmentally safe and cost-effective fishing gear and techniques;

(f) protect biodiversity in the marine environment;

(g) take measures to prevent or eliminate over-fishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources;

(h) take into account the interests of artisanal and subsistence fishers;

(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; and

(j) implement and enforce conservation and management measures through effective monitoring, control and surveillance.\(^{8}\)

This is backed up by the adoption of the precautionary approach in Article 6.

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. For example, the objectives could be 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 WCPF Convention. An important underlying issue, however, is the extent to which such objectives can be used in judicial and administrative

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\(^{8}\) Article 5, WCPF Convention.
proceedings to measure whether appropriate decisions have been made. In other words, are they justiciable?

An important issue to consider is the extent to which such provisions should be justiciable. In many instances in the South Pacific such objectives clauses involve clauses using “shall”; thus, in most instances, 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.

**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 discussed above. It is no longer considered appropriate, for example, to make decisions solely 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 as considering the impact of the activity in question on the marine environment as a whole.

The ecosystem approach is 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.  

9 See Paragraph 30 (d), Chapter IV. Protecting and managing the natural resource base of economic and social development, WSSD Johannesburg Plan of Implementation.

The following extracts from an FAO study\textsuperscript{11} on the ecosystem approach are also helpful:

EAF [ecosystem approach to fisheries] 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 [Marine Protected Areas], 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 [Fisheries Management] 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 EAF 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 EAF 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 EAF approach can be given at least some prospects for application.

In the context of the FFA, important and novel work is underway in the form of stakeholder consultations and workshops to provide the initial basis for the adoption of ecosystem approaches to fisheries management.

**Marine Protected Areas (MPAs)**

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 (MPAs). The legislation should also provide for the establishment of different types of MPAs 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, the power to establish such areas will not, of course, ensure the application of an ecosystem approach. It will however, constitute an important tool in achieving that objective. In any event, the inclusion of the power in legislation to establish MPAs will form an important part of a range of controls available.

**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 in formulating fisheries management decisions.
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 intended to give effect to the UNFSA and the FAO Compliance Agreement, as well as 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

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13 Article 24, WCPFC Convention.
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.

**Implementation of Conservation and Management Measures of Regional Fisheries Bodies**

Under the UNFSA in general, and specifically under the WCPF Convention, it will be necessary for parties to RFMOs to give effect in their national laws to international conservation and management measures. Article 23.1 of the WCPF Convention 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.\(^{14}\)

The means by which a treaty is given effect in national law can vary from one country to another (and may even be subject to constitutional requirements), 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 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. Such an approach requires 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

\(^{14}\) Article 23.1, WCPF Convention.
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].

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.

Authorisations to Fish

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 suitable; 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.

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15 This definition may be unnecessary if the term has already been defined in the Act as a whole.
It will also be necessary to consider which categories are needed for each country: for example, 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.

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 (NZ)) 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 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 total allowable catch (TAC) or the TAC for a particular species); and
- the circumstances in which a right may lapse, be reduced, be suspended, or cancelled.

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 for FFA members. Much will depend also on how many participants will be eligible for a rights based system.
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 while 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.

There are additional specific obligations arising under the WCPFC. In particular Article 24 of WCPF Convention 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.16

Thus, in addition to the extensive controls already provided for, it is necessary to ensure that the requirements of Annex III of WCPF Convention (Terms and Conditions for Fishing) are complied with by members of the Commission. Therefore, 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.

Scientific Research

National legislation 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. A related question however, is whether it is better to have a general provision dealing with all marine scientific research or whether it is better to have a provision in the fisheries legislation that deals with fisheries research activities.

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 specifically covered in the law itself and referred to in the regulation making power. As an alternative, it could 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, including bio prospecting 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.

16 Article 24, WCPF Convention.
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;\(^{17}\)

This mirrors the provisions of UNFSA Article 5 (j).

Likewise, under the precautionary approach (Article 6 WCPF Convention) 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.\(^{18}\)

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;\(^ {19}\)

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;

\(^{17}\) Article 5, WCPF Convention.

\(^{18}\) Article 6, WCPF Convention.

\(^{19}\) Article 10, WCPF Convention.
(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;20

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

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20 Article 23, WCPF Convention.
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.21

With the introduction of trade measures as one of the weapons used in combating illegal, unreported and unregulated (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: firstly, 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 secondly, by enacting regulations applicable in general to the collection of data. An important consideration 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.

It will also 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.

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 transhipment. See in particular, Article 23 UNFSA. In the case of the 1995 UNFSA, it speaks of the right and the “duty” to take measures. These will need to be put into effect in 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 Convention states:

3. Members of the Commission may adopt regulations empowering the relevant national authorities to prohibit landings and transhipments 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 FAO 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 kinds 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

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22 Article 23, UNFSA.
23 Article 27, WCPF Convention.
24 FAO, Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, Rome, 2006.
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, transhipment or processing by vessels whose flag
  states are not parties to, or not cooperating non-contracting parties with,
  regional fisheries management organisations, 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; and
- obtain certain specified information set out in annex to the model scheme.25

The model also has detailed information on inspections, the actions which may be
taken, and requirements for reporting 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.

The model scheme has now been taken a few stages further as FAO is developing
a global treaty on port State measures to prevent, deter, and eliminate IUU fishing.
This has been considered at an expert consultation held in Washington in
September 2007. However, it is useful to note that the text as it stands contains the
following provisions.

25 Ibid.
In the first place the preamble draws on the International Plan of Action for Illegal, 
Unreported and Unregulated Fishing (IPOA-IUU), the Code of Conduct for 
Responsible Fisheries, and is intended to be consistent with the 1982 UN 
Convention, the FAO Compliance Agreement and the 1995 UNFSA.

The objective of the agreement is stated to be:

to ensure the long-term conservation and sustainable use of living marine 
resources through strengthened and harmonized port State measures to 
prevent, deter and eliminate illegal, unreported and unregulated fishing.

Likewise, the application of the agreement is stated to be:

1. Except as provided in paragraph 2 of this Article, each Party shall, in its 
capacity as a port State, apply this Agreement in respect of vessels that 
are not flying its flag that are seeking access to its port(s) or are in one of 
its ports.

2. Each Party shall take all necessary measures to ensure effective 
jurisdiction and control over the fishing and fishing related activities of 
vessels flying its flag. To the greatest extent possible, such measures shall 
include mutatis mutandis the port State measures set forth in this 
Agreement in respect of such vessels.

3. This Agreement shall be applied and implemented in a fair, transparent 
and non-discriminatory manner, consistent with international law.

In addition to definitions of specific terms, it has general provisions (set out in Part 
1) concerning the relationship with international law and other international 
instruments, integration and coordination, cooperation and exchange of 
information. Part 2 concerns the requirements prior to entry into port, and it has 
specific provisions concerning designation of ports, and advance notification. Part 
3 concerns the use of ports. It has provisions concerning denial of the use of a port, 
in certain circumstances, and withdrawal of the denial of the use of a port. Part 4 
concerns inspections and follow up actions. It has provisions on levels and 
priorities for inspection, conduct of inspections, results of inspections, transmittal 
of results by a party, electronic exchange of information, training of inspectors, 
port State actions following inspection, appeals concerning actions by the port 
State compensation, and force majeure or distress. Part 5 deals with the role of 
flag States. Part 6 deals with the requirements of developing States. Part 7 deals

26 FAO, International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing, adopted at the Twenty-fourth Session of COFI, Rome, Italy, 2 March 2001. Hereinafter referred to as IPOA-IUU.
27 Ibid.
28 Ibid.
with dispute settlement, Part 8 with non-Parties to the Agreement, Part 9 with monitoring and review, and Part 10 with final provisions. The agreement has some detailed annexes. Annex A concerns information to be provided in advance by vessels, Annex B with port State inspection Procedures by vessels, Annex C concerns the results of port State inspections, Annex D the information system on port State inspections, Annex E with the training of inspectors. This draft agreement is still subject to further negotiation.

A draft port measures scheme for possible inclusion in national legislation is set out here for preliminary consideration. However, this must still be considered as tentative in view of negotiations at the global level.

_Draft Port Measures Regime_

(1) For the purpose of promoting the effectiveness of conservation and management measures adopted by sub regional, regional or global fisheries management organisations 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 be prescribed;

(d) regulating or prohibiting the landing, transhipment 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 global, regional or sub regional fisheries organisation;

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

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 whose flag State is not a member of nor is it a cooperating non contracting Party to that sub regional or regional fisheries organisation, unless it can be established that 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.29

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, transhipping, 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 though freeports. Thus, the introduction of a port States

29 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 organisations 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 organisation, which are identified as being engaged in fishing activities in the area of that particular organisation, 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 organisation should be made through agreed procedures in a fair, transparent and non-discriminatory manner.
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.

**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 IPOA-IUU:

18. 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.\(^{30}\)

A strong instance of the exercise of this kind of jurisdiction is found in section 133E of the 1996 *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).\(^{31}\)

The 1990 *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

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\(^{30}\) Paragraph 18, IPOA-IUU.

\(^{31}\) Section 113E, *New Zealand Fisheries Act 1996* No. 88 (as at 01 October 2008), Public Act.
(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 $100,000.32

The authorisations 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 authorisation 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.

**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 place restrictions on 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 authorisation, whether certain areas had been

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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 in a manner likely to contravene the basic proscription against
reversal of proof.

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 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.\footnote{33}

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
states in paragraph 17 “National legislation should address, inter alia, evidentiary
standards and admissibility including, as appropriate, the use of electronic
evidence and new technologies.”\footnote{34}

**Offences**

Virtually all of the recently drafted fisheries laws will already have comprehensive
provisions setting out offences, and imposing heavy penalties, and it is therefore
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.

\footnote{33}{See §408. Implementation of multilateral access agreements, fisheries management agreements, *Fishing
Access and Licensing Act* [51 MIRC Ch 4], Marshall Islands Revised Code 2004.}
\footnote{34}{Paragraph 17, IPOA-IUU.}
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.\footnote{35 Article 21.8, UNFSA.}
Article 25.4 of WCPF Convention 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 UNFSA. 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.”36 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 2005 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;37

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

36 Section 113B, New Zealand Fisheries Act 1996 No 88 (as at 01 October 2008), Public Act.
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.

Penalties

There is also a need to review the level of penalties imposed to ensure that they continue to be effective. One solution is to use a system of points, usually as part of scheme that applies to all financial penalties. This enables penalties to be increased very easily without the need to amend the Act from time to time.

Cancellation, Suspension and Seizure

There already exist several good models in the region for provisions relating to cancellation, suspension and seizure which, with only minor adaptation, can be used as effective templates for such provisions. This subject, though important, is not considered here, except to note that the seizure, or confiscation, of foreign fishing vessels has been considered in some recent decisions of the International Tribunal for Law of the Sea (ITLOS). These cases are discussed at the end of this chapter under “Bail, Bond and Confiscation”. These cases might necessitate a more detailed review of policies to be adopted with respect to confiscation of foreign fishing vessels.

Compliance and Enforcement Provisions

The provisions of both UNFSA and WCPF Convention will present a significant challenge, as they require 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 considerable 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 foreign and 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; and
• 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 national vessels and foreign vessels;
• inspection and enforcement measures for vessels voluntarily in port; and
• immunity of authorised officers in good faith execution of their duties.

Therefore, the most important needs are, firstly, to check that all of the above aspects are covered, and secondly, to ensure that there are references to the power of authorised officers to enforce measures of the WCPFC, and other regional fisheries bodies. 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.

Alternative Mechanisms

The judicial process has often been criticised 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, that is, usually 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. 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 make 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, Kuemlangan gave as a model of such a provision the following:

(1a) on his own account, or as partner, agent or employee of another person, lands, imports, exports, transports, sells, receives, acquires or purchases; or

(1b) 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.38

**Bail, Bond and Confiscation Issues**

One matter which is worth reconsidering in possibly all of the laws of the members States is the provision of bond and bail issues. Article 73 of the United Nations Convention on the Law of the Sea (LOSC) states: “Arrested vessels and their crews shall be promptly released upon the posting of a reasonable bond or other security.”39 The meaning of this provision has been subject to interpretation in cases before ITLOS. The most important to date is the Volga case.40 In this case, Australia sought, *inter alia*, to impose as a condition for the release of the vessel an obligation to carry certain vessel monitoring scheme (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,

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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.

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.41

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 is 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 posting 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 posting of a reasonable bond ...

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

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.

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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.

In its more recent judgments it is possible to detect also a tendency toward adopting a human rights perspective towards the provisions of Article 73, as the following comments in the 2004 Juno Trader case reveal:

The Tribunal considers that article 73, paragraph 2, must be read in the context of article 73 as a whole. The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law.\textsuperscript{44}

This was also expressed very firmly by Judges Mensah and Wolfrum in their separate opinion in the Juno Trader case, where as well as endorsing the above paragraph\textsuperscript{45}, they added:

[T]he tribunal must operate on the basis that the obligation of States … under the convention and general international law, includes the obligation not to deny justice or due process of law, especially in respect of legal and judicial procedures that involve interference with the property rights of aliens.\textsuperscript{46}

This position has been reiterated in the latest case with particular reference to confiscation of a foreign fishing vessel.\textsuperscript{47} The Tribunal in the Tomimaru case stated:

A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object. Such a decision should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law. In particular, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention.\textsuperscript{48}

\textsuperscript{44} ITLOS, \textit{Juno Trader (Saint Vincent and the Grenadines v. Guinea Bissau)}, Case No. 13, 18 December 2004, para. 77.
\textsuperscript{46} \textit{Ibid.}, para. 6.
\textsuperscript{47} ITLOS, \textit{The Tomimaru Case (Russian Federation v. Japan)}, Case No. 15, 6 August 2007.
\textsuperscript{48} \textit{Ibid.}, para. 76.
It should be noted that some of the judges in the Tomimaru case appended separate opinions disagreeing with the above proposition.\textsuperscript{49}

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.

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