

**Antarctic and Southern Ocean Law and
Policy Occasional Paper 11**

2007

**Special Edition: Australia and Southern Ocean
IUU Fishing**

Articles

R.J. Baird

*Arrests in a Cold Climate – A Tale of Hot Pursuit and other
adventures on the Southern Ocean* 1

N. Slicer

Learning the Hard Way: Australia v Taruman 39

G.L. Lugten

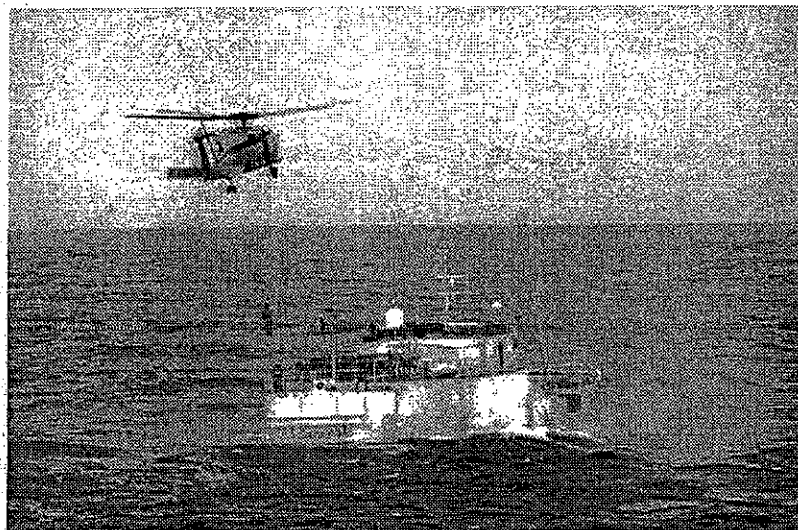
*Future Policies for Australia's Role in Southern Ocean Fishing: End
of the Line or New Era of Net Gain* 51

ISSN 1034 361X

published by UTAS
Hobart.

ARRESTS IN A COLD CLIMATE – A TALE OF HOT PURSUIT AND OTHER ADVENTURES ON THE SOUTHERN OCEAN

By R.J. Baird*



Photograph of a Royal Australian Navy helicopter unloading a boarding party onto the *VOLGA*. Reproduced with the permission of the Australian Fisheries Management Authority, June 2002.

Introduction

Illegal fishing is a significant and actual threat to Australia's maritime resources. Attention is currently focussed on the northern Australian Fishing Zone (AFZ),¹ with apprehensions of illegal foreign fishing vessels being reported in late September 2006, at the rate of one per day.² However, there have been a number of high profile arrests in the Southern Ocean in past years and a study of the conduct of the arrests, and the post arrest proceedings, highlights a number of interesting international and domestic legal issues. The study is made more interesting by a number of geographical factors such as the remoteness of the AFZ in the Southern Ocean,³ the inhospitable weather and the high sea state. The limited resources which Australia has been able to deploy to such a harsh environment and the dogged determination of the illegal fishing crews have also raised the stakes on those occasions when illegal fishing vessels have been detected.

There have been nine arrests to date including the FV *Taruman* apprehended in waters off Macquarie Island. Table 1 provides details of the arrests and charges laid. Before addressing each of the arrests in detail, it is necessary to discuss briefly the legal status of the seas offshore from the Heard and McDonald Islands and relevant aspects of domestic fisheries law. This will be followed by background material on the development of the Patagonian Toothfish fishery and a brief outline of the surveillance program for the Heard and McDonald Islands' fishery. Following the individual review of arrests, the common issues identified in the examination of enforcement action will then be discussed in the context of opportunities for improving international, regional and domestic fisheries management.

* BA, LLB, LLM, PhD, Lecturer in Law and Research Fellow of the Centre for Public International and Comparative Law, University of Queensland.

¹ The term AFZ is used within this paper because fisheries offences are framed with reference in the *Fisheries Management Act 1991* (Cth) to the AFZ not the EEZ (Exclusive Economic Zone).

² Abtez E. Australian Minister for Fisheries, Forestry and Conservation, Nelson B. Australian Minister for Defence, Ellison C. Australian Minister for Justice and Customs, 'Taruman finding welcomed: One illegal fishing vessel; being destroyed per day' 26 September 2006, <www.mffc.gov.au/releases/2006/06116aj.html> (5 October 2006).

³ See Map 1.

Legal Regime for the Heard and McDonald Island Fishery

Heard Island and the McDonald Islands are remote Australian external territories lying roughly 4000 kilometres south west of Perth. The Islands, originally under British sovereignty, were transferred to Australia in 1947.⁴ In that same year, the Australian National Antarctic Research Expedition set up a station at Atlas Cove on the western end of Heard Island. The station was worked year round and closed in 1955.⁵ In 1953 the *Heard and McDonald Islands Act (Cth)* was passed which effectively applied the laws of Australia to the Islands. As they remain uninhabited - in fact there are only two recorded landings on McDonald Island⁶ - law enforcement has only become an issue with the rapid rise of illegal fishing within the adjacent waters. Even then the issue has been enforcement of Australia's rights in the maritime zone rather than on land.

The Government declared an AFZ in 1979. The EEZ was not declared until 1994.⁷ This later declaration did not involve the revocation of the AFZ. Whilst the *Fisheries Management Act (Cth)* 1991 was amended to ensure uniformity between the two maritime zones,⁸ the management of Australian fisheries continues to be couched in terms of the AFZ.

⁴ The transfer on 26 December 1947 was confirmed through an exchange of letters dated 19 December 1950. Heard and McDonald Islands' Marine Reserve Management Plan (2005) 103.

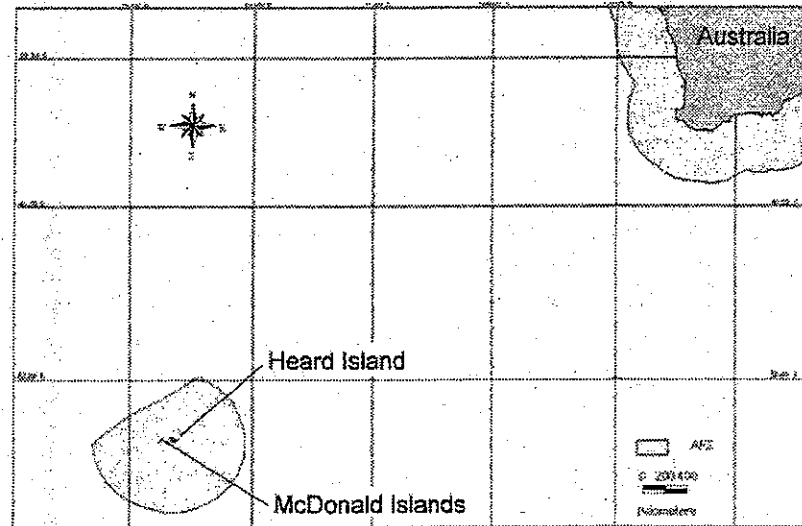
⁵ Munro G. 'Waiting on the Weather - the ANARE Years 1947-1955', in Green K. and Woehler E. (eds) *Heard Island: Southern Ocean Sentinel*, (2006) 228. Carrol P. 'The History and Geography of Heard Islands Southern Indian Ocean' (undated) <www.btinternet.com/~sa_sa/heard_island/heard.html> (23 August 2001, copy on file with author).

⁶ In 1971 and 1980. See Budd G.M. *ANARE 1971 Expedition to Heard Island*, (1972) Antarctic Division Technical Memorandum 17. Australian Antarctic Division, Department of External Affairs, Melbourne and Veenstra C. and Manning I. *Expedition to the Australian Territory of Heard Island and McDonald Islands 1980*. (1982) Technical report 31. Department of National Development and Energy, Division of National Mapping, Canberra. Quoted in Heard and MacDonal Islands' Marine Reserve Management Plan (2005) 103.

⁷ The *Maritime Legislation Amendment Act 1994 (Cth)* amended the *Seas and Submerged Lands Act 1973 (Cth)*. A 200 mile EEZ was declared offshore mainland Australia and all external territories, including the Australian Antarctic Territory. There are some practical differences. For example, the AFZ does not include the Australian Antarctic EEZ.

⁸ *Maritime Legislation Amendment Act 1994*, Schedule 1. The amended definition of AFZ is: "waters adjacent to each external territory within the outer limits of the exclusive economic zone."

Under the *Fisheries Management Act 1991*, persons must not engage in commercial fishing within the AFZ without a licence. Foreign fishing vessels require a foreign fishing licence to commercially harvest fish from within the AFZ. The foreign fisheries provisions in Part 6 of the *Fisheries Management Act* also create the offence of being equipped for fishing without a licence, port permit or approval.



Map 1 – Australian Fishing Zone, Heard and McDonald Islands

(reproduced from AFMA website with the general permission of Australian Fisheries Management Agency)

History of the Heard and McDonald Islands' Fishery

The Fishery is a recent addition to the suite of Commonwealth managed fisheries. Exploratory fishing commenced in 1996 under the Heard and McDonald Islands' Exploratory Interim Management Plan and commercial fishing by Australian registered vessels commenced in March 1997. As mentioned above, access to the fishing ground has been tightly controlled by AFMA and strict quotas reflecting CCAMLR Conservation Measures, have been enforced.⁹ As with the majority of marine capture fisheries, the management of this particular

⁹ AFMA Fact Sheet, 'Commonwealth Fisheries Heard Island and McDonald Island' undated.

fishery has been undermined by illegal fishers harvesting catches far in excess of the legal quotas.¹⁰

The principal commercial fish species targeted in the Heard Island and McDonald Islands' AFZ is the Patagonian Toothfish (*Dissostichus eleginoides*). There are actually two species of Toothfish in the sub-Antarctic oceans. Both are similar in appearance and habit, however the Antarctic Toothfish (*Dissostichus mawsoni*) is found closer to the Antarctic continent where sea ice forms and has not been subject to harvesting in the same quantities.¹¹

The Patagonian Toothfish is a demersal, or sea-floor dwelling species. However at some stages of life it is pelagic (meaning living at or near the ocean surface).¹² It is a large fish reaching up to 2.2 metres in length and up to 100 kilograms in weight.¹³ They can be found in waters from 300 to 2,500 metres deep though the depths do not protect them. Longline systems have been developed to target the bigger fish dwelling at 2,500 metres.¹⁴ The species is vulnerable to over fishing for two principal reasons. First, it matures very slowly and takes 10-12 years to reach spawning age. Hence individual fish are being caught before they have had an opportunity to reproduce. Scientific knowledge on its maximum age is uncertain, although the maximum recorded age is 45 years.¹⁵ Secondly, due to the recent discovery and remote location of the fishery, there have been difficulties in obtaining reliable scientific data about the dispersal of stock and population groupings, which in turn hampers stock management.¹⁶

Management of the Toothfish within the Southern Ocean has tended to be reactive. The pattern which emerges is one of coastal States playing 'catch-up' with a roaming cluster of illegal fishing vessels. The fishery came to international notice in 1991 when harvesting commenced in

¹⁰ For example in 1998 it was estimated that up to 50-70 illegal vessels were working within the Heard and McDonald Islands' AFZ. Only two vessels are actually licensed to fish there. Woolford D. 'Toothfish Entrepot' AAP 1998. Other reports throughout 1997-1999 estimated up to 90% of the catch taken was illegally caught, ie outside the quotas system established by CCAMLR.

¹¹ Australian Antarctic Data Centre, 'Toothfish: 10 Facts' undated.

¹² AFMA Fact Sheet, 'Commonwealth Fisheries, Heard and McDonald Islands - Principal Commercial Fish Species' undated.

¹³ Ibid.

¹⁴ ISOFISH, *The Involvement of Mauritius in the trade in Patagonian Toothfish from Illegal and Unregulated Longline Fishing in the Southern Ocean* Occasional Report No1. (3rd edition) August 1998 Part 4.2.

¹⁵ Note 11.

¹⁶ Note 12.

the south-west Atlantic Ocean around South Georgia Island. After exhausting the fisheries there, the vessels moved eastward via Bouvet Island, Prince Edward and Marion Island, Crozet and Kerguelen Islands, before reaching Heard, McDonald and Macquarie Islands.¹⁷ Concerns that the fish stocks were being over-harvested were supported by reports that fish landed from waters around Prince Edward Island in 1997 had dropped to 60cm in length, below the estimated spawning length.¹⁸

It is not within the scope of this paper to discuss the many Conservation Measures adopted by CCAMLR specifically aimed at decreasing the illegal fishing industry for Patagonian Toothfish within the Convention Area.¹⁹ Nor is it the author's intention to discuss in detail the international, regional and domestic responses to illegal fishing in the Southern Ocean.²⁰ This paper examines some of the more interesting issues which flow from the arrest by Australia of foreign flagged vessels operating in the Heard and McDonald Islands' AFZ.

¹⁷ ISOFISH, 'Patagonian Toothfish Profile' (undated). CCAMLR Conservation Measures 24IX (1991) 55XI (1992) 69XII (1993) 80XIII (1994) which set TACs for South Georgia Island.

¹⁸ Ibid.

¹⁹ For a review of the CCAMLR response to illegal fishing for Toothfish see Bederman D.J. 'CCAMLR in Crises: A Case Study of marine management in the Southern Ocean' in Scheiber H.N. (ed) *Law of the Sea - The Common Heritage and Emerging Challenges* 2000, 169-196; Miller D., Sabourenkov E. and Slicer N. 'Unregulated Fishing-The Toothfish Experience' in Richardson M. and Vidas D. *The Antarctic Treaty System for the Twenty First Century* and Miller D. Sabourenkov E. and Ramm D. 'Managing Antarctic Marine Living Resources: The CCAMLR Approach' (2004) 19 (3) *The International Journal of Marine and Coastal Law* 319-365.

²⁰ For a recent coverage of the issues see Baird R. *Aspects of Illegal, Unreported and Unregulated Fishing in the Southern Ocean*, (2006).

Table 1: Arrests in the Southern Ocean

Vessel	Flag State/Owner	Date of arrest	ADF involvement	Charges
<i>Salvora</i>	Belize; Clayton Trading Co.	16/10/97	Boarding party from HMAS <i>Anzac</i> .	Captain Jose Manuel Costa Santome and Fishing Master Jose Rey Paz pleaded guilty to charges under ss100 & 101 of FM Act. Fined \$25,000 for each offence, totalling \$50,000 each individual fine.
<i>Aliza Glacial</i>	Panama	17/10/97	Boarding party from HMAS <i>Anzac</i> .	On 6 July 1998, Captain Andrias Andreassen and Fishing Master Fernando Gabriel Miranda failed to appear to answer charges in the W.A. Court of Petty Sessions. Both charged under ss 100 & 101 of FM Act. Warrants still outstanding.
<i>Big Star</i>	Seychelles. Big Star International Corporation	21/01/98	Boarded by Naval personnel on HMAS <i>Newcastle</i>	Master Perez convicted of six charges under ss 100(1) & 100A of FM Act. Fined \$100,000 although this was reduced on appeal to \$24,000.
<i>South Tomi</i>	Togo. Owner undisclosed	12/04/01	Vessel boarded 320 miles south of Cape Town, South Africa by ADF	Master Avilles pleaded guilty to charges under ss100A & 101A FM Act. Fined \$68,000 on each charge. Total \$136,000 Acquitted on charge under s.108(c).

			personnel flown across to South Africa and launched from South African Naval vessel.	
<i>Lena</i>	Russia. Alitas	6/01/02	Boarded by Naval personnel on HMAS <i>Canberra</i> . Supported by HMAS <i>Westralia</i> . Sighted previously within HIMI AFZ in December 2001. CCV chased and pursued vessel for 14 days. Hot pursuit ended without arrest at that time	Captain Jose Franco Rivas pleaded guilty to offences under ss: 100(2), (\$10,000) 100A, (\$10,000) 101(2), (\$15,000) 101A, (\$15,000) Summary charge under s108 FM Act taken into account in sentencing. Total fine \$50,000 First Officer Jose Fraga Sanchez and Officer Jesus Quelle Marina both pleaded guilty to offences under ss: 100(2), (\$10,000) and 100A, (\$15,000) Total \$25,000 fine for each defendant.
<i>Volga</i>	Russia.	7/02/02	Boarded by Naval personnel on HMAS <i>Canberra</i> . Supported by HMAS <i>Westralia</i>	Captain Alexander Vasilkov was charged, however charges were withdrawn on his death (self-inflicted alcohol poisoning) shortly after arrest. Fishing Master Manuel Perez Lijo, Fishing pilot Jose Manuel Eiroa and Chief Mate Jaun Manuel

				Folgar charged under s. 100(1). Subsequently pleaded guilty. The fishing master was fined a total of \$30,000 and the two senior crew members were each fined \$10,000.
<i>Viarsa</i>	Uruguay	28/08/03	South African and UK assistance to end hot pursuit across 3,900 n miles.	5 crew members charged. Jury discharged December 2004 after being unable to reach a verdict. Retrial October 2005, acquitted December 2005.
<i>Maya</i>	Uruguay	23/01/04	Intercepted and boarded by HMAS <i>Warramunga</i>	All crew charged with fishing illegally. 32 pleaded guilty and fined \$1000 each, five year good behaviour bond and deported. Captain, Charles Pena and First Mate, Manuel Torres Regueira pleaded guilty to charges under s. 100A and s101. Fined \$30,000 in total each. Three junior crew members convicted and fined \$1,000 each (with order to pay \$500 costs). \$4,000 good behaviour bond for four years. Conviction of all 40 crew members leading to fines totalling \$99,500, the forfeiture of the boat, and forfeiture of catch worth \$2,300,000.

<i>Taruman</i>	Cambodia	6/09/05	Apprehended by the <i>Oceanic Viking</i> (Macquarie Island)	Jury conviction of Master and Fishing Master. Total fines of \$118,000 awarded.
----------------	----------	---------	---	---

The Salvora

Arrest and Prosecution

The *Salvora* was apprehended on 16 October 1997 by a boarding party from HMAS *Anzac*. Even allowing for a small error in navigational positioning by the *Salvora's* crew, the vessel's location when boarded, some 174 nautical miles inside the AFZ and just 25 miles from Heard Island, is damning evidence of an intention to fish illegally within Australian waters.²¹ Fishing is prohibited within 12 nautical miles of the Island.²²

On inspection, Australian Naval personnel found 20 boxes of frozen Patagonian Toothfish and 43 boxes of unfrozen headed, tailed and gutted Toothfish. The fish was still fresh and recently cut.²³ The vessel had been boarded in the late afternoon. Later that night a line of floats became visible on the *Salvora's* heading. The Captain was ordered to recover his long line and approximately 100-150 Toothfish were recovered before the lines were cut.²⁴

Both the Captain, Jose Manuel Costa Santome and Master Jose Rey Paz were Spanish nationals. They were both charged with offences under sections 100 and 101 of the *Fisheries Management Act*. Defence counsel informed the District Court that the defendants were equally culpable for the charges as laid.²⁵ Guilty pleas were entered for both in respect of the two individual charges. On 14 October 1998, O'Sullivan J, awarded a fine of AUD\$50,000 to each defendant, to be apportioned

²¹ The vessel's position was obtained from the transcript of proceedings against the Captain and Fishing Master, *The Queen v Jose Rey Paz and Jose Manuel Costa Santome*, District Court of Western Australia, unreported sentencing hearing, 14 October 1998.

²² A wilderness reserve managed by the Australian Antarctic Division (AAD) has been declared on HIMI and fishing within the 12 mile territorial sea is prohibited.

²³ *The Queen v Paz and Santome*, above n.21 at 13.

²⁴ *Ibid.* at 15.

²⁵ *Ibid.*

equally for the two offences.²⁶ The maximum fine open to the court was AUD\$275,000.

The Court also made an order for the forfeiture of the vessel (AUD\$855,504) fishing equipment (AUD\$43,403) and catch (AUD\$178,571). The vessel had been released subject to a Vessel Monitoring System bond of AUD\$ 100,000 and a total vessel bond of AUD\$1.47 million. Notwithstanding that the Vessel Monitoring System had become inoperative shortly after the *Salvora* exited Australian waters, that bond was not automatically forfeited.²⁷ The vessel was not returned to Australia following conviction of Messrs Santome and Paz, thus the vessel bond was forfeited.

Defence Submissions

A defence that is often raised by persons charged with fishing illegally within the AFZ, under the *Fisheries Management Act*, is that they were fishing in that location under explicit directions from the ship's owners. In other words they were unaware they were fishing within Australian waters. This was raised by Santome and Paz in this case. Their Defence Counsel informed the court:

[t]hey simply fished where they were directed to do so on the basis that had they been reluctant to do so or refused to do so, they simply would have been terminated(sic).²⁸

Defence Counsel further stated that the defendants came from a place where everyone was involved in the fishing industry. Combined with an over capacity in the European fishing fleet and lack of local fishing grounds, employment opportunities were hard to come by.²⁹ It is relevant that fleet over-capacity and over-fishing in the northern hemisphere (which the defendants asked to be taken into account as a mitigating factor for their illegal fishing in Australian waters) has resulted from inadequate fisheries management measures, a lack of cooperation and agreement on regional fisheries and the traditional

²⁶ *The Queen v Paz and Santome* above n.21.

²⁷ This is because the terms of the Vessel Bond did not state that failure of the VMS for any reason resulted in forfeiture of the Bond. As drafted, the terms of the Bond allowed the crew room to argue the VMS was inoperable through no fault of their own and hence the terms of the Bond were not breached. This shortcoming has been addressed in subsequent bond documentation.

²⁸ *The Queen v Paz and Santome*, above n.21 at 18.

²⁹ *Ibid.* at 18-19.

approach towards the freedom of fishing the high seas. That is, the very same issues that threaten Southern Ocean fisheries.

The Defence counsel pressed further and informed the court that the same men who lived in a fishing village located in a nation with a long fishing industry, had no knowledge of the seriousness with which Australia treated fishing vessels found illegally fishing in her waters.³⁰ Finally, the Defence submitted that, "There is no need...for specific deterrence in this case." The Defence added, "Nor is it the case...that the Patagonian Toothfish is a particularly endangered species..."³¹

Barely ten weeks earlier, a joint press release by the Ministers for Resources and Energy and Foreign Affairs warned:

If illegal and unregulated fishing continues at the current level the population of Patagonian Toothfish will be so severely decimated that within the next two to three years the species will be commercially extinct. Some areas are already showing signs of this.³²

The Aliza Glacial

Arrest and Prosecution

The *Aliza Glacial*, was boarded on 17 October 1997 by ADF personnel onboard HMAS *Anzac*, an Anzac class frigate, when sighted fishing illegally within the Heard and McDonald Islands' AFZ. Prosecution of the ship's Master and Skipper and seizure of the vessel, under the *Fisheries Management Act*, has been described as less than successful.³³ This is because the vessel was lost to a Norwegian mortgagee during an Admiralty claim in the Federal Court and the two individuals arrested failed to attend the Court of Petty Sessions in Perth to answer the charges laid.

Captain Jakup Andrias Andreassen and Fishing Master Fernando Gabriel Miranda appeared initially in the Court of Petty Sessions on 21 November 1997 to face identical charges under section 101(1) of the

³⁰ Ibid. at 19.

³¹ Ibid. at 21.

³² Parer W. Minister for Resources and Energy, and Downer A. Minister for Foreign Affairs and Trade, 'Australia Welcomes Norwegian Government Action On Illegal Fishing' 22 July 1998,

<http://www.dfat.gov.au/media/releases/foreign/1998/fa098_98.html> (23 May 2000).

³³ Australian Parliament Senate Hansard 8 July 1998, 5229 per Senator Murphy.

Fisheries Management Act. The matters were adjourned with both defendants granted bail 'without condition'. On 5 February 1998, both defendants entered a plea of not guilty to the charges and bail was extended. The matters were then adjourned to 6 July 1998 for a three day hearing. Both defendants failed to appear on the first day of the trial and the warrants remain outstanding.³⁴

Admiralty Action

With respect to the vessel, the Australian Government's claim to forfeiture was defeated by an action for the recovery of the vessel by boat's mortgagee. On 24 November 1997, an officer authorised under sub-sections 84(1)(g) (i) and (ii) of the *Fisheries Management Act*, gave notice of the seizure of the *Aliza Glacial*, its fishing gear, bait and catch. The vessel's mortgagee, Bergensbanken, made an application under the *Admiralty Act* 1988 (Cth) for the sale of the vessel due the owner's default in loan repayments. On 20 March 1998, Justice Ryan made an order for the sale of the vessel under the *Admiralty Act*.³⁵ Although the vessel had been seized under section 84 of the *Fisheries Management Act*, no rights of forfeiture accrued to the Commonwealth until such time as an order was made under section 106 of the same Act. At the time of judgement,³⁶ the section specified that where a court convicts a person of an offence against, inter alia, sections 100 or 101, the court may order the forfeiture of the boat, equipment, fish and the proceeds of the sale of any fish.

On 17 December 1998, Justice Ryan found it was "no more than a remote likelihood" that one of the defendants, Captain Miranda would take advantage of the offer made by AFMA to fund his travel to Perth to answer charges. Further, it was even less likely that Captain Miranda would be advised to plead guilty. Justice Ryan found:

In the unlikely event that Captain Miranda did agree, with no apparent benefit to himself, to expose himself to that penalty, it would not be before the end of January 1999 that the District

³⁴ Email communication with Manager Listings and Judicial Support, Court of Petty Sessions. 1 June 2001.

³⁵ *Bergensbanken ASA v The Ship Aliza Glacial* Federal Court unreported decision of Justice Ryan, 20 March 1998.

³⁶ Section 106 was substantially amended by the *Fisheries Legislation Amendment Act (No.1)* 1999. A discussion of the amendments appears below.

Court would be in a position to consider whether or not to order forfeiture of the vessel.³⁷

In making the order for the sale of the vessel, Justice Ryan referred to a deficiency in the *Fisheries Management Act*.³⁸ He stated:

However the legislature may be taken to have been aware in 1991 when it enacted the *Fisheries Management Act*, of the wide-ranging powers, including a power of sale, possessed by the Courts of Admiralty and recently confirmed by the *Admiralty Act*. It is significant that it did not provide for that power of sale to be suspended whilst a vessel is detained pursuant to s.84³⁹

The Government enacted amending legislation to close this loophole. The *Fisheries Legislation Amendment Act (No 1) 1999* inserted a number of new provisions including section 106A which provides for the automatic forfeiture of the foreign boat, equipment (including nets and traps) and fish to the Commonwealth if the foreign boat was used in an offence against sections 95(2), 99, 100, 100A, 101 or 101A. Section 106A further provides that any support boat used in support of a foreign boat engaged in fishing in contravention of sections 100, 100A, 101 or 101A; is automatically forfeited.⁴⁰ The operation of the forfeiture provisions is discussed further below.

The Big Star

Arrest and Prosecution

On 21 February 1998, Australian authorities apprehended the *Big Star* which was boarded by crew from HMAS *Newcastle*, approximately 114 nautical miles from Heard Island and 8 miles inside the AFZ.⁴¹ The vessel's Master, Juan Antonio Argibay Perez, a Spanish national,

³⁷ *Bergensbanken ASA v. The Ship Aliza Glacial Federal Court* [1998] 1642 FCA (17 December 1998) per Ryan J. at 4.

³⁸ *Redhead and Ors v. Admiralty Marshal, Western Australia District Registry and Ors* (1998) 87 FCR 229, 246.

³⁹ *Ibid.*

⁴⁰ Section 101B was inserted into the *Fisheries Management Act* by the *Fisheries Legislation Amendment Act (No1) 1999* as a new offence entitled 'using boat outside AFZ to support illegal fishing in AFZ'. It is aimed at the growing concern that illegal fishing is an increasingly sophisticated undertaking with the fishing vessels being supported by motherships sitting in the high seas. These motherships provide logistical support and can tranship the illegal catch, which makes tracing the catch more difficult.

⁴¹ *Perez v The Queen*. (1999) 21 WAR 470, 476 per Owen J.

t
e
t
v
t
o

P
n
O
B
ec
A
G

D

Iss
Sa
wa
ob
ple

42 H
43 H
44 N
to S
45 T
equi

was charged with a total of six offences under sections 100 and 101 of the *Fisheries Management Act*. These charges reflected three distinct periods of fishing within the Heard and McDonald Islands' AFZ, evidence of which was discernible from an examination of the vessel's log books.⁴² At the time of boarding, the *Big Star* had on board Patagonian Toothfish valued at AUD\$612,556.⁴³

The vessel, fishing equipment, catch and crew were released on the posting of a security bond in May 1998, a few months after the arrest. The Bond Deed stated that in the event that (a) the defendant was convicted of an offence under section 100 and/or 101 of the *Fisheries Management Act*, and (b) an order was made under section 106⁴⁴ for the forfeiture of the vessel, equipment or catch; the Commonwealth was entitled to retain allotted amounts specified in Schedule B to the Bond Deed.⁴⁵ The Deed further stated that should the defendant fail to appear (as was the case with Messrs Andreassen and Miranda from the *Aliza Glacial*) the Commonwealth had the right to retain the full amount of the security bond. It is relevant here to note that the bond totalled AUD\$1.35 million, comprising of AUD\$1.15 million for the vessel, equipment and catch and AUD\$200,000 to be paid into court towards the imposition of any fine. A Vessel Monitoring System bond of AUD\$100,000 was also imposed.

Perez subsequently pleaded guilty to the six individual charges mentioned above, and was fined a total of AUD\$100,000 by Justice O'Sullivan, the same judge who sentenced Paz and Santome from the *Big Star*. The Court also made an order for the forfeiture of the vessel, equipment and catch under s106. As the vessel was not returned to Australia, the vessel bond was retained by the Commonwealth Government.

Defence and Appeal

Issues similar to those raised by the defence counsel for Paz and Santome in the *Salvora* case, were mentioned by counsel for Perez. It was argued by way of mitigation that the defendant was effectively obliged to fish where he was directed by the vessel owners, he had pleaded guilty and cooperated with the Fisheries officer and had no

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Note this case was heard prior to the 1999 amendments which included amendments to section 106. Hence a court order was required to make the forfeiture operative.

⁴⁵ These amounts were AUD\$494,334 for the vessel, AUD\$43,100 for the fishing equipment and bait, and AUD\$612,566 for the catch.

knowledge of the seriousness of the offences being committed. Further it was suggested that the Patagonian Toothfish was not in the same category of other "more endangered species of marine life."⁴⁶ Justice O'Sullivan expressed reservations in accepting some of these defence submissions.⁴⁷

Perez was by his own submissions, a man of dire financial circumstances⁴⁸ yet he gathered the funds to appeal his sentence to the Western Australian Supreme Court. On appeal the fine was reduced to \$24,000. The majority based their decision on the fact that the trial judge failed to properly take into account the personal and financial circumstances of the defendant, and improperly took into consideration the monies made available by the vessel's owner in the event of the imposition of a fine. Section 88 of the *Fisheries Management Act* states that conditions may be placed on the release of property that has been seized by an authorised officer, including giving security for the payment of any fines that may be imposed under the Act. However, the Supreme Court found there was no legislative intent in section 88 to depart from the common law principle that requires a court to take into account the financial circumstances of the accused when imposing a fine.⁴⁹ This common law principle has been codified in section 16C(1) of the *Crimes Act 1914 (Cth)*.

The Court was prepared to accept that the fines totalling AUD\$100,000 "were appropriate to reflect the gravity and criminality of the applicant's conduct."⁵⁰ However the Court wished to guard against the temptation of approaching the question of the imposition of fines in such cases in light of what the owner of the fishing vessel (a person outside the Australian legal system) could afford to pay. This is not to say that where a defendant has no means, the Court should forgo the imposition of a fine.⁵¹

⁴⁶ *Ibid.* at 479.

⁴⁷ *Ibid.* at 480.

⁴⁸ *Ibid.* at 479.

⁴⁹ *Ibid.* at 485 per Owen J.

⁵⁰ *Ibid.* at 486.

⁵¹ See *Aruli v Mitchell* (1999) WASCA 1042. Kennedy J stated:

[I]t has been recognised for some years that the difficulty of enforcing compliance with fisheries legislation along the length of the Australian coastline calls for a stern deterrent if the legislative restrictions are to be enforced... a fine must reflect the gravity of the offence and must be imposed even though it is known that the offender will inevitably serve a default term of imprisonment. Kennedy J was referring to *Cheatley v The Queen* (1972) CLR 291, 296 per Barwick CJ.

In this regard, Pidgeon J in *Arifin v Ostle*,⁵² stated that:

a fine ought 'not ordinarily be imposed unless the offender has the means to pay because otherwise to impose the fine is in truth to imprison through the back door.

However Pidgeon J went on to state that:

where the only option open is a fine...then the fine must reflect the gravity of the offence and must be imposed even though it is known that the defendant will serve a default term.

Pidgeon J delivered the minority judgement in Perez's appeal. He formed the view that section 88 of the *Fisheries Management Act*, makes clear the intention of the legislature is to punish the owners of vessels, who are "almost invariably out of the jurisdiction" through "the medium of those found within the jurisdiction carrying out the offences."⁵³ Justice Pidgeon further stated that it would defeat the purpose and object of the Act to allow those outside the jurisdiction to hide behind the impoverished circumstances of their employees.

It may be appropriate in circumstances such as these for the legislature to consider amending the sentencing principles, a view supported by Justice Pidgeon. Such circumstances might be where illegal fishing is known to be supported by global corporations, operating at arms length outside the reach of coastal State jurisdiction, yet with the means to hire defence Counsel for their employees. In such cases the assets of these global corporations should be taken into account in sentencing.

The South Tomi

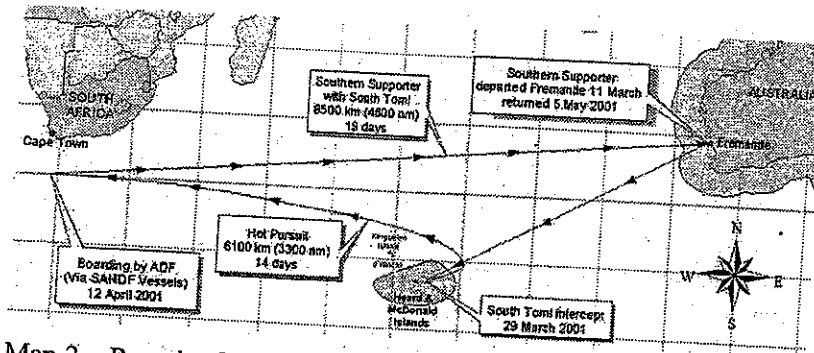
Introduction

News of the arrest of the *South Tomi* was broadcast via a dramatic front page coverage of a 6,100 km 'hot pursuit' across the Southern and South Indian Oceans. On April 12 2001, the *South Tomi* was arrested 8,500 km from Australia, having been chased for 14 days by Australian authorities on board the civilian patrol vessel, the *Southern*

⁵² Unreported decision of the Full Court of the Supreme Court of West Australia, 18 June 1991.

⁵³ *Ibid.* at 473.

Supporter.⁵⁴ The arrest is particularly significant for the development of international fisheries law, as it represents the first instance of direct international cooperation in the pursuit and arrest of an illegal foreign fishing vessel. The arrest of the *Viarsa* covered below, represents the second instance.



Map 2 – Pursuit of the *South Tomi*

(reproduced from AFMA website with the general permission of Australian Fisheries Management Agency)

The Discovery and Hot Pursuit

On 29 March 2001, Fisheries Officers on board charter vessel, the *Southern Supporter*, sighted a foreign fishing vessel (the *South Tomi*) fishing illegally within the AFZ. To their surprise, the vessel initially complied with an order to make for the port of Fremantle, Western Australia. However, once the boundary of the AFZ was in sight, the *South Tomi* made a turn to the west, away from Australia, and relayed a message to the effect that they had 'done nothing wrong' to the *Southern Supporter*.⁵⁵

So commenced a 15 day hot pursuit. The right of hot pursuit is granted to coastal states under Article 111 of the *LOSC*.⁵⁶ There are a number of requirements to be satisfied in order for the pursuit to be valid under international law. First, the coastal State must have good reason to believe that a foreign ship has violated its laws and regulations. Once satisfied of this, the pursuit must be commenced when the foreign vessel is within coastal State waters.

⁵⁴ AFMA News, 'Operation Cosmo - Hot Pursuit and Apprehension of Suspected illegal fishing vessel' undated.

⁵⁵ Discussion with Mr John Davis, AFMA, 4 June 2001.

⁵⁶ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 21 ILM 1261. Entry into force 16 November 1994. (*LOSC*)

Once the pursuit commenced, every day at 0900 hours, the *Southern Supporter* called⁵⁷ the *South Tomi* on the telephone and requested they 'put to' as they had been intercepted on suspicion of fishing illegally in Australian waters. Every day the reply came back from the *South Tomi* that the vessel had done 'nothing wrong'.⁵⁸

The immediate concern for Australian authorities once the pursuit had commenced, was that the *South Tomi* might enter French waters off the Kerguelen Isles. Under Article 111(3), the "right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State." The 2003 Treaty between France and Australia on joint surveillance goes some way to addressing this issue.⁵⁹ Under the terms of the treaty, each party has prior authorisation to continue the hot pursuit through the territorial sea of the other State, provided the other party is informed and no physical law enforcement or other coercive action against the vessel pursued is taken whilst in territorial waters.⁶⁰

Seeking Assistance, Closing Ports and Offers of Cooperation

Whilst Article 111 of the *LOSC* is silent on the possibility of third party assistance to bring a hot pursuit to an end, it is clear that hot pursuit ends once the pursued vessel enters the territorial sea of a third State. Notwithstanding the large expanse of Indian Ocean in which the pursuit was being played out, the possibility of the *South Tomi* heading for or entering the waters of an uncooperative State, was a real possibility. The other concern of course was that the *South Tomi* might simply run the *Southern Supporter* out of fuel and thus sever the link in the pursuit.⁶¹

In this particular instance, Australian officials were successful in closing the ports of Mauritius and Reunion to the north and Pretoria and Capetown to the west. The main concern however was

⁵⁷ Information available suggests they were telephoned. Discussions with John Davis, above n.55.

⁵⁸ Ibid.

⁵⁹ *Treaty between the Government of Australia and the Government of the French Republic on cooperation in the maritime areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard and McDonald Islands* [2003] ATNIF 20.

⁶⁰ Ibid. Article 4.

⁶¹ Indeed, when the *South Tomi* was arrested it was discovered the vessel had more than enough fuel to steam up the west coast of South Africa. If she had not been arrested, she would have run the *Southern Supporter* out of fuel. Per Discussions with John Davis, above n.55.

Mozambique located on the south east coast of Africa. If the *South Tomi* had headed for this port the pursuit would have been lost.

During the pursuit it seemed likely that the *South Tomi* might head either towards the Kerguelen Isles or north towards the French port of Reunion. French authorities were contacted though there seemed little the French could do. Although they had a naval presence in the area, no French laws had been breached, hence an arrest by the French was not possible. The possibility of arresting the *South Tomi* for failing to fly a flag was discussed under Article 92 of *LOSC*, however this would mean letting them 'off the hook' for a major breach of Australia's domestic law. The final option discussed was in fact similar to the ultimate arrangement made with South Africa. The French were prepared to make a French *floreal* class frigate available to Australia for the purposes of manning it with ADF personnel, who would conduct the arrest.⁶² As events played out, the French offer of assistance was not required. This is because the *South Tomi* continued to sail west, making a passage south of Cape Horn.

The Arrest and Prosecution

On 13 April, the *Southern Supporter* telephoned the *South Tomi* and repeated the advice that it was in breach of Australian fishing laws and asked them to stand by for boarding. The vessel refused, however once an Australian Defence Force boarding party, launched from a South African military vessel, appeared armed with guns, the crew of the *South Tomi* quickly complied. The vessel was stopped about 320 nautical miles south of Cape Town and then escorted back to Australia.

Mr Leonardo Segarde Avilles, the Master of the *South Tomi*, was charged with three separate offences under the *Fisheries Management Act*. He pleaded guilty to charges under sections 100A and 101A and was fined \$68,000 in respect of each charge. It is interesting to note that these two charges (in relation to intentionally fishing illegally and intentionally having a boat equipped for fishing) were laid under sections introduced by the *Fisheries Legislation Amendment Act* (No.1) 1999.

Avilles was acquitted of the third charge which was laid under section 108(c). The Court of Petty Sessions found in September 2001 that the notice given to Avilles under section 84(k) was not properly given to

⁶² Note 55.

the vessel's Master. Section 84(k) states that an officer⁶³ having reasonable grounds for believing a boat has been used, is being used, or is intended to be used, in contravention of the *Fisheries Management Act*, may require the Master of that boat to "bring the boat to such a place, or to a place at sea, specified by the officer and to remain in control of the boat at that place." Section 84(6) states that where an officer (other than a member of the ADF in uniform) makes a requirement of a person (such as the vessel's Master) the officer must produce for inspection written evidence of the fact that the officer is appointed under s.83 or produce for inspection the officer's identity card.

During the hearing the defence produced a tape recording of directions being given by the Fisheries Officer directing the ship's Master to go 'to port'. Whilst oral evidence suggested that the Fisheries Officers did specifically direct the Master to the port of Fremantle on several occasions, the existence of the tape cast doubt on whether such directions were actually made.⁶⁴ Accordingly, the charge was dismissed. Whilst disappointing, the outcome has put authorities on notice that illegal fishing prosecutions will be contested and that the prosecution case will be put to the test. Hence evidence gathering and presentation is of great importance.

Other Comments on the *South Tomi* Case

The vessel, equipment and catch were automatically forfeited under section 106A by virtue of the fact that Perez pleaded guilty to offences under sections 100A and 101A. Lawyers acting for the owners of the *South Tomi* initially initiated proceedings under sections 106F and 106G of *Fisheries Management Act*, challenging the forfeiture. The application was subsequently withdrawn.

With respect to the issue of the release of the vessel on posting of a reasonable bond under Article 73 of the *LOSC*, a bond was never actually posted. This was based on the fact that despite a number of requests over five months, the identity of the owners was never revealed to Australian authorities. It is arguable that this interpretation of the *LOSC* by Australia is not in accordance with the spirit of Article

⁶³ Section 83 defines 'officer' as a person appointed by instrument by AFMA. Eligible persons include an officer or employee of AFMA, the Commonwealth, the Administration of a Territory or an authority of the Commonwealth. See also s.83(b).

⁶⁴ This information was obtained from Mr John Davis, AFMA Enforcement Officer on 14 February 2002.

73, however there are two responses in support of the Australian action. First, as a matter of practicality, a bond cannot be set and paid without knowledge of the vessel owner's details to place on the bond deed. Secondly, the owners did have a right through the flag State, to make an application to the International Tribunal for the Law of the Sea (ITLOS) under article 292 of the *LOSC* on the grounds that a reasonable bond was not set. The fact that no such application was brought might be explained by the fact that the vessel owners were reluctant to reveal their identities and or that they were unsuccessful in persuading the flag state to initiate the 292 application.

The interpretation and application of Article 73 by the Australian Government remains untested.⁶⁵ It also identifies the shortcomings of Article 73 in its application to current fishing practices. Flag of convenience registers have surged in popularity in the last decade. Owners' identities are hidden behind elaborate corporate webs. Whilst in the past a vessel's flag might have revealed a great deal about the identity of its owners, today it just about guarantees that the owners are of a different nationality and the only connection with the flag State is the registration paper.

The *Lena*

Arrest and Prosecution

Following unsuccessful attempts by an unarmed civilian patrol vessel to apprehend the *Lena* in December 2001, the ADF was called in to secure an arrest on 6 February 2002.⁶⁶ Two Navy vessels, HMAS *Canberra* and HMAS *Westralia*, were involved in the operation which is reported to have commenced in late January 2002.⁶⁷ The vessel, alleged to have been 225 kilometres into the AFZ, was finally apprehended by a boarding party dropped from an ADF helicopter in five metre seas.

⁶⁵ However the International Tribunal for the Law of the Sea in *Saint Vincent and the Grenadines v Guinea M/V Saiga* 4 December 1997 (Case no.1) commented at para 75-78 that there may be an infringement of Article 73(2) by the coastal State in circumstances where no bond has been posted. That is, article 73 creates an obligation to post a reasonable bond and thus an application under article 292 for prompt release cannot be denied on the basis that no bond or security had been set.

⁶⁶ AFAM News *Operation Sutton - Apprehension of suspected illegal fishing vessel* March/April 2002. The *Lena* was pursued for 14 days in late December 2001/early January 2002 before the pursuit was discontinued on the basis that the unarmed patrol vessel was unable to apprehend the vessel.

⁶⁷ *The Australian 'Navy's big haul... pirate ship with prize catch'*, 8 February 2002, 6. See references to statements by Australian Defence Minister Senator Hill.

Following its arrival at the port of Fremantle, the Master was served with a notice under section 106C of the *Fisheries Management Act* that the vessel was condemned as forfeited. No written claim under section 106E was received within the required time. The Captain, Jose Franco Rivas was charged with a number of offences relating to fishing within the AFZ. Rivas pleaded guilty and was sentenced on 10 June 2002. He was fined a total of AUD\$50,000. Both the First Officer, Jose Fraga Sanchez and Officer Jesus Quelle Marina were charged and pleaded guilty to offences under sections 100 and 100A of the *Fisheries Management Act*. At sentencing, combined fines of AUD\$25,000 were awarded to each individual. All persons charged were Spanish nationals.

Flag State is a CCAMLR Member

The *Lena* was Russian flagged and owned by a company registered in Moscow, Russia.⁶⁸ Russia is a member of CCAMLR. Only a small sliver of the AFZ falls outside the CCAMLR area of application. In failing to control the fishing activities of a Russian flagged vessel, Russia is also in breach of its obligations under CCAMLR. The *Lena* was apprehended with between 70 to 80 tonnes of Toothfish on board. This illegal catch undermines the efforts of the CCAMLR Commission to set precautionary catch limits via Conservation Measures. Though 80 tonnes may represent just 2.7% of the Total Allowable Catch for the 200-2001 fishing season (ending 31 December 2001) it is just the tip of the iceberg. There is no way of knowing the quantity of the catch the *Lena* may have transhipped in January 2002 when it evaded the Australian civilian patrol vessel. Further, there are unconfirmed reports that there were up to 10 to 12 vessels fishing illegally within or just outside the Heard and McDonald Islands AFZ. To put this into perspective, if you allowed an average catch of 80 tonnes for 10 vessels, that equates to 800 tonnes or 27% of the Total Allowable Catch harvested illegally within a few short weeks.

The Volga

Arrest and Prosecution

The *Volga* was apprehended on 7 February 2002 and was something of a bonus to authorities who were pursuing the *Lena*.⁶⁹ The *Volga* was arrested as it was exiting the AFZ. The Ship's Captain was initially

⁶⁸ Note 66.

⁶⁹ The *Lena* was arrested on 6 February 2002 after previously evading arrest in December 2001.

charged, however following his death shortly after arrest, the charges were withdrawn.⁷⁰ Three other crew members were charged under section 100(1) of the *Fisheries Management Act* for fishing within the AFZ without a licence. Fishing Master Perez, Pilot Eiroa and Chief Mate Folga, all Spanish nationals, pleaded guilty and were fined AUD\$10,000 each.

Forfeiture Litigation

The owners of the *Volga*, Olbers Co. Ltd commenced proceedings in the Federal Court on 21 May 2002 challenging the validity of the forfeiture provisions under sections 106A-106H of the *Fisheries Management Act*. The main thrust of their argument was that before section 106A could operate to effect a forfeiture of the vessel, the gear and catch on board; it was necessary that there be a conviction for one or more of the offences upon which such forfeiture was said to be based. This line of argument is similar to the reasoning of Ryan J in the *Aliza Glacial* litigation, however in the former case the legislation supported such an argument. The post 1999 legislation does not require either a conviction for fisheries offences or a court order to make the forfeiture effective.⁷¹

The parties to the *Volga* case appeared before Justice French on three occasions prior to his determination of the substantive issues.⁷² In *Olbers* (No 4) French J referred to the opportunity for the owners of forfeited vessels to contest the forfeiture under section 106F, and concluded:

Absent the institution of such proceedings within thirty days of a notice of seizure under s 106C the asserted forfeiture will be put beyond question by operation of s 106E. That process requires no conviction to have been recorded. I reject the

⁷⁰ Captain Alexander Vasilkov, a Russian national, reportedly died from alcohol poisoning caused from voluntarily drinking alcohol on board the *Volga*.

⁷¹ This is the finding of French J in *Olbers Co Ltd v The Commonwealth of Australia* (No 4) 205 ALR 440 and the Full Federal Court in *Olbers Co Ltd v The Commonwealth of Australia* [2004] FCAFC 262 (unreported judgement of Black CJ, Emmett and Selway JJ).

⁷² *Olbers Co Ltd v Commonwealth of Australia* [2002] FCA 1269, 16 October 2002. This matter involved a request for security for costs by the Commonwealth which was not granted. *Olbers Co Ltd v Commonwealth of Australia* (No 2) [2003] FCA 177, 11 March 2003 involved a request by Olbers for a stay of proceedings pending the disposition of criminal charges against crew members of the *Volga*. The stay was refused. *Olbers v Commonwealth of Australia* (No 3) [2003] FCA 651, 26 June 2003 involved a motion by Olbers for a separate trial on four issues of law. Justice French determined that it was not appropriate to have a separate trial, see paras 30-38.

ne charges
ged under
within the
and Chief
ere fined

contention that s 106A depends for its application upon a conviction for one or more of the offences mentioned in it.⁷³

The applicants appealed the decision of Justice French. In September 2004 the Full Federal Court upheld the lower court decision.⁷⁴ In essence, the appeal judges concurred with the view of French J, that the vessel was forfeited to the Commonwealth upon commission of the offence. Officers boarding the vessel were therefore acting as agents of the Commonwealth, the new owners of the vessel.⁷⁵ Special leave to appeal to the High Court of Australia was refused in April 2005.⁷⁶

The Viarsa

Detection and Hot Pursuit

The *Viarsa* was sighted on 7 August 2003, allegedly fishing within the Heard and McDonald Islands' Fishing Zone. 21 days and 3,900 nautical miles later the vessel was boarded south west of Cape Town, South Africa. The Vessel was arrested 2000 nautical miles SW of Cape Town on 28 August 2003. The pursuit was played out in international newspapers and at times it seemed the *Viarsa's* Captain would be willing to do anything to avoid apprehension.⁷⁷ Eventually the vessel was boarded by Australian Fisheries Officers with the support of armed South African security guards on the South African tug *John Ross* and UK fisheries patrol vessel *Dorada*.

The pursuit raises interesting questions about compliance with international law. For example, was the pursuit interrupted by the fact that the *Southern Supporter* lost sight of the *Viarsa* when she entered the ice packs? What was the effect of multilateral support in bringing the pursuit to an end? These issues are addressed further below.

Prosecutions

Five crew on board the *Viarsa* were charged with offences related to illegal fishing under the *Fisheries Management Act*. After two lengthy

⁷³ Ibid.

⁷⁴ *Olbers Co Ltd v Commonwealth of Australia* [2004] FCAFC 262.

⁷⁵ Ibid. paragraph 22.

⁷⁶ Special Leave Application, *Olbers Co Ltd v Commonwealth of Australia* [2005] HCA Transcript 228 (HCA Hayne and Callinan JJ, 22 April 2005).

⁷⁷ For several days the *Viarsa* moved through ice packs in the south Atlantic ocean in an attempt to evade the pursuing *Southern Supporter*. See Molenaar E. 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuit of the *Viarsa* 1 and the *South Tomi*' (2004) 19(1) *International Journal of Marine and Coastal Law* 19, 20-22.

edings in
ity of the
Fisheries
at before
l, the gear
n for one
to ed.
the *Aliza*
supported
e either a
forfeiture

on three
sues.⁷² In
owners of
06F, and

irty days
iture will
t process
eject the

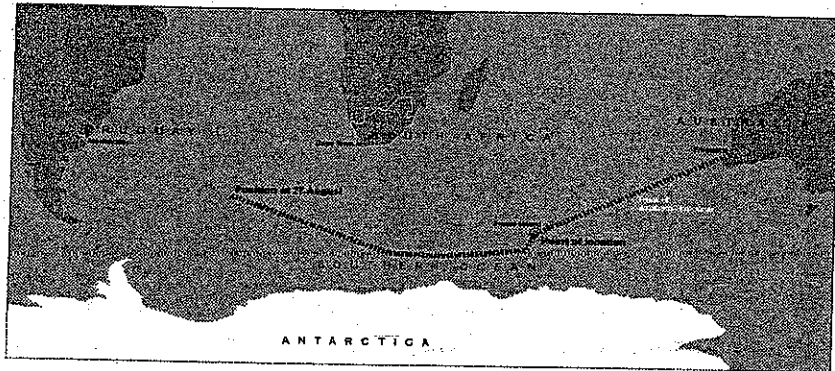
hol

ustralia
monwealth
and

r 2002.
hich was
A 177, 11
re
was
re 2003
French

jury trials, the first of which was a mistrial by reason of a hung jury, the crew were acquitted in 2005.⁷⁸

Map 3 - Hot Pursuit of the *Viarsa*



The Maya

Detection and Prosecution

The *Maya* was arrested on 23 January 2004. On board were 191 tonnes of Toothfish worth over AUD\$2.4 million.⁷⁹ Like the *Viarsa*, the *Maya* was flagged to Uruguay, a member state of CCAMLR. To make matters worse for Uruguay, an official observer was on board the *Maya* at the time of her detection within the Heard and McDonald Islands' AFZ and that observer is reported to have thrown the vessel's computer and some papers overboard before the vessel was boarded.⁸⁰

The entire crew were charged with illegal fishing and appeared before the West Australian Court of Petty Sessions. They were fined AUD\$1000 each and put on five year good behaviour bonds. The vessel was forfeited under section 106 of the *Fisheries Management Act* and is now being used as a training facility to conduct simulated boarding training in Western Australia.⁸¹

⁷⁸ Macdonald I. 'Viarsa 1 verdict' 5 November 2005, <www.mffc.gov.au/releases/2005> (18 May 2007).

⁷⁹ AFMA Media Release, 'For sale: 191 tonnes of Patagonian Toothfish' 26 March 2004, (22 March 2007).

⁸⁰ MERCOPRESS, South Atlantic New Agency, 'Maya V Observer dumped computer into the sea' 17 March 2004, <www.mercopress.com/Detail.asp> (5 May 2004).

⁸¹ Ellison C. Minister for Justice and Customs, Macdonald I. Minister for Fisheries, Forestry and Conservation, 'New role for Toothfish pirate' 21 May 2004, <www.customs.gov.au/site/page.cfm?content_id> (28 May 2004).

hung jury,

The Taruman

Arrest and Prosecution

In September 2005 the FV *Taruman*, a Cambodian-flagged vessel, was detained by the Australian fisheries vessel the *Oceanic Viking*. Although the vessel was suspected of having fished illegally within the Macquarie Island AFZ, it was boarded on the high seas with flag State consent. A New South Wales District Court jury convicted the Master and Fishing Master of the charges relating to illegal fishing.⁸² They were fined a total of AUD\$118,000, the vessel was forfeited, valued at AUD\$2 million, and so was the catch, valued at AUD\$1.5 million.⁸³

The FV *Taruman* was also the subject of litigation on whether a claim for the value of the bunkers by an unpaid creditor could succeed once the vessel had been detained by the government for fisheries offences.⁸⁴ The amended *Fisheries Management Act* 1991 forfeiture provisions allow for forfeiture based upon a belief of unlawful fishing by a government official. In this case the plaintiff, Scandinavian Bunkering AS was unpaid for fuel bunkers it had supplied and it argued that the bunkers were not forfeited under Australian law and could be sold to pay the debt. Unpaid creditors do have rights to a vessel, under the *Admiralty Act* 1988. The Full Federal Court had to consider two issues. First, whether the forfeiture provisions of the *Fisheries Management Act* 1991 included the bunkers and, second, whether the provisions over-rode the rights arising under the *Admiralty Act* 1988.

As discussed above, the government had been unsuccessful in its claim to the *Aliza Glacial* in priority to the vessel's mortgagee. In this case the decision went in the government's favour.

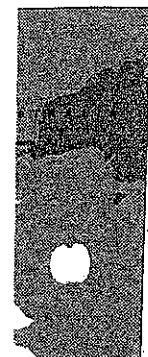
Issues Arising from the Arrests

A number of legal, economic and political issues arise from the arrests. These include the difficulties in enforcing fisheries laws against absent

⁸² Ellison C. Minister for Justice and Customs and Abetz E. Minister for Fisheries, Forestry and Agriculture, 'Toothfish poachers found guilty' 23 September 2006, <www.mffc.gov.au/releases/2006/06113ae.html> (17 March 2007).

⁸³ Ellison C. Minister for Justice and Customs and Abetz E. Minister for Fisheries, Forestry and Agriculture, 'Taruman finding welcomed: One illegal fishing vessel being destroyed per day', 26 September 2006, <www.mffc.gov.au/releases/2006/06113ac.html> (17 March 2007).

⁸⁴ *Scandinavian Bunkering AS v The Bunkers on Board The Ship FV Taruman* [2006] FCAFC 75 (24 May 2006).



91 tonnes
the *Maya*
To make
board the
McDonald
vessel's
warded.⁸⁰

ed before
re fined
nds. The
agement
simulated

March

eries,

vessel owners, difficulties with providing effective policing of Australia's southern AFZ, legal considerations of the defendant's means to pay fines, the loss of the *Big Star* through an admiralty action to recover the vessel by the mortgagee, hot pursuit and the high cost of enforcement. These issues have been discussed where they arose on the facts. This next section examines some of the difficulties in more depth. First, the high cost of unilateral enforcement and the merits of regional cooperation. Second, the way in which the law of hot pursuit may, arguably, have moved slightly forward in terms of applying a rule first codified in 1958.⁸⁵ Third, the modification of Australian domestic law to address the issue of vessel forfeiture and finally the issue of flag State consent and responsibility.

A Case for International Co-operation

With respect to the cost of enforcement in the Southern Ocean AFZ, a single patrol is estimated to cost approximately AUD\$2 million.⁸⁶ No official figures were provided by the Australian Government as to the apprehension of the *Salvora*.⁸⁷ However, the prosecution in the *Salvora* case did inform the Court that 'the cost of enforcement was high.' It was stated that:

Two large vessels HMAS *Anzac* and *Westralia* were required to travel a significant distance and handle some rough sea conditions to arrive at about 4000 kilometres south-west of Fremantle where the *Salvora* was boarded. The cost of running the two ships is significant and the HMAS *Anzac* carried a helicopter which was used in the boarding. In addition, two RAAF aircraft undertook forward surveillance at a significant cost.⁸⁸

Following the success of the cooperative efforts of the South African and Australian Defence Forces in apprehending the *South Tomi*, the then Australian Minister for Fisheries observed:

⁸⁵ See 1958 *Convention on the High Seas*, Article 23. Adopted 29 April 1958. 450 UNTS 11. Entry into force 30 September 1962.

⁸⁶ *The Australian*, 'Cold pursuit finally reels in Toothfish poachers' 29 August 2003 at 3.

⁸⁷ *Ibid.* at 16. Presumably this was for security reasons. Several large defence assets were employed in the arrest, including two RAN ships and a helicopter.

⁸⁸ *The Queen v Paz and Santome*, above n 21.

olicing of
 defendant's
 ally action
 igh cost of
 ' arose on
 s in more
 merits of
 ot pursuit
 pplying a
 Australian
 inally the

It indicates the sort of national and international action required if we are going to prevent, deter and eliminate the scourge of illegal, unreported and unregulated fishing.⁸⁹

The benefits of international cooperation were once again made evident with the successful arrest of the *Viarsa* in August 2003. The Australian Government acknowledged:

The assistance of these cooperating international vessels has been invaluable. Without them the operation would never have been as successful as it has been.⁹⁰

in A, a
 ion.⁸⁶ No
 as to the
 e *Salvora*
 high.' It

The 'sting' in the benefit of international co-operation is that the States rendering assistance may request recompense for their costs. After the successful pursuit of the *Viarsa*, it was reported that Australia was expecting a request to meet the costs incurred by South Africa and the United Kingdom in coming to her assistance.⁹¹

In another instance of regional cooperation, the New Zealand Defence Force was able to provide Australian authorities with photos of the *Taruman* fishing inside Australian waters.⁹²

required
 ough sea
 t-west of
 f running
 carried a
 ion, two
 gnificant

As mentioned above in the discussion of the arrest of the *South Tomi*, France and Australia have signed a bilateral treaty for joint surveillance in the Heard and McDonald Islands' AFZ. This form of bilateral treaty is therefore one way in which coastal States might gain a tactical advantage over IUU fishers, however the question is raised as to the status of the hot pursuit in the event that the pursued vessel re-enters the high seas. If the intention of Article 111(3) was to acknowledge the sovereign rights of the coastal State in the territorial sea and this right has been modified via a bilateral treaty (to allow a pursuit to continue through the territorial sea) then the better view would be that the pursuit has met the procedural requirements of Article 111 even if the vessel re-enters the high seas. In any case, even without the benefit of such a bilateral treaty, it has been suggested that a short stay or passage by a pursued vessel through the territorial waters of a State taken with the intention of avoiding arrest, does not

A can
 om., the

450

2003 at

issues

⁸⁹ *Saturday Mercury*, 'SAS hook fish pirates' 14 April 2001 at 3.

⁹⁰ Macdonald I. Minister for Fisheries, Forestry and Conservation, *Bringing back the Viarsa* AFFA03/173MJ, dated 30 August 2003 (4 September 2003).

⁹¹ *The Australian*, 'Customs closes in on poachers' 28 August 2003 at 3 and 'Cold pursuit finally reels in Toothfish poachers' above n.86.

⁹² Note 82.

preclude the resumption of the pursuit once that vessel leaves the territorial waters.⁹³

Hot Pursuit – Remote Areas and Vast Distances

As mentioned above with reference to the arrests of the *South Tomi* and the *Viarsa*, the difficulties of maintaining a long distance hot pursuit of a well resourced and dedicated 'pirate of the sea' means the illegal vessel stands a good chance of outrunning a civilian patrol vessel. The evidence has shown that the incursions into Australia's Southern Ocean EEZ are highly organised and vessels operate under strict instructions not to surrender unless absolutely necessary.⁹⁴ High value catches are at stake. The demonstrated resistance to surrender unless and until coastal State vessels demonstrate an ability to force a surrender, creates practical problems for States commencing hot pursuit.

Table 2 – Hot pursuits by Australian patrol vessels in the Southern Ocean⁹⁵

Vessel	Date	Length of pursuit	Outcome	Nature of any assistance
<i>South Tomi</i>	April 2001	15 days (3,300 nautical miles)	Vessel arrested 320 nautical miles south of Cape Town on 12 April 2001 and escorted to Fremantle, Western Australia.	South African Defence Force assets and personnel utilised to make arrest.

⁹³ Poulantzas N.M. *The Right of Hot Pursuit in International Law* Kluwer Law, 2002, at 231. The basis for this proposition is that the pursued vessel is seeking to "take advantage unjustifiably of a situation laid down in law" and the activity should be "deprived of its legal consequences."

⁹⁴ Anecdotal evidence from discussions with AFMA Officers suggests that the crew aboard the *South Tomi* were told not to stop running until there was a show of force/guns by the Australian authorities.

⁹⁵ The information in the Table was compiled from a number of sources including governmental Media Reports, Press Releases, Member's Reports to CCAMLR and interviews with Government Officers.

leaves the

ances

South Tomi
 stance hot
 means the
 lian patrol
 Australia's
 rate under
 ry.⁹⁴ High
 surrender
 to be a
 acing hot

them

any

Defence
 s and
 ised to

, 2002, at

l be

crew

ing
 and

<i>Lena</i>	February 2002	14 days	Vessel escaped arrest in December 2001 when civil patrol vessel the <i>Southern Supporter</i> ran low on fuel.	
<i>Viarsa</i>	August 2003	21 days (3,900 nautical miles)	Vessel arrested 2000 nautical miles south west of Cape Town on 28 August 2003.	Support provided by armed South African enforcement officers on board the South African tug, <i>John Ross</i> and United Kingdom fisheries patrol vessel, <i>Dorada</i> during the arrest.

The law of hot pursuit has remained unaltered since its codification in 1952.⁹⁶ Fishing practices however, have not remained static. The cost of patrolling EEZs is high and States cannot afford to run blanket border protection patrols. Joint surveillance will solve some problems but raises others in terms of the ability of one State to enforce the laws of another. Often illegal fishing vessels operate in an openly aggressive manner opting to outrun unarmed civilian patrol vessels, it is appropriate that consideration is given to adapting the law on hot pursuit.

In accordance with Article 111(5), the right of hot pursuit may only be exercised by warships, or military aircraft or other ships or aircraft clearly marked as being on government service and authorised to that effect. The article is silent on 'changing the baton' from a civilian government vessel such as the *Southern Supporter* to a military vessel.⁹⁷ It does provide for hot pursuit to be transferred from an

⁹⁶ Article 23, Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas 1958.

⁹⁷ Further discussion of the law of hot pursuit appears below.

aircraft actively pursuing the foreign vessel to another vessel or aircraft of the coastal State.⁹⁸

Given that aircraft have been specifically identified in this manner, there is support for the argument that the State parties to the Conference on the Convention on the Law of the Sea (UNCLOS) did not intend that vessels could hand over the pursuit to another vessel. However the Australian authorities did just this with the arrest of the *South Tomi*. Unable to make the crew of the *South Tomi* pull to, the civilian patrol vessel the *Southern Supporter* asked for assistance. Whilst contact with the *South Tomi* was maintained and daily calls were made asking the vessel to stop, members of the ADF were flown to South Africa. From Cape Town they boarded a South African Naval ship to affect the arrest.

The fact that conclusion of this hot pursuit was not challenged by Togo, flag-State of the *South Tomi*, does not mean the interpretation of the law on hot pursuit by Australian authorities is correct in law. At best one could argue that it is evidence of State practice which might over time, with repeated acts of State practice, support an expansion of the law of hot pursuit under customary international law.

One possible amendment would be to allow any government vessel or aircraft initiating the pursuit, to be relieved by another vessel or aircraft of the same government. This would cover situations where the pursuing government charters another vessel and transports units of enforcement officers (not necessarily military) to that vessel to perform the actual arrest. The emphasis in Article 111 is on continuing the hot pursuit without interruption. This requirement could be observed whilst at the same time allowing the coastal States some degree of flexibility in the manner a pursuit is conducted.

Section 87 of the *Fisheries Management Act* seeks to clarify the position on 'interrupted' by stating:

For the purposes of subsection (1), a pursuit of a boat is not interrupted merely because some or all of the officers pursuing

⁹⁸ Article 111(6) The pursuing aircraft must give the order to stop and pursue the vessel until relieved by another aircraft or vessel from the coastal state. The article specifically excludes situation where the foreign vessel is simply sighted by the aircraft and then pursued by a relieving aircraft or vessel.

el or aircraft

the boat lose sight of it or trace of it on a radar or other sensing device.”

his manner,
ties to the
(CLOS) did
ther vessel.
rrest of the
pull to, the
assistance.
daily calls
were flown
ican Naval

In the case of the *Viarsa* the *Southern Supporter* did lose visual sight of the vessel when it entered the ice packs but maintained contact on the radar. In such circumstances it should be arguable that the pursuit was not interrupted simply because the line of sight was lost.

A further difficulty with the current wording of Article 111 is the limitations placed on how an order to stop may be given to a foreign ship. Paragraph 4 states:

The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

llenged by
retation of
in law. At
rich might
pansion of

This may not provide for modern communication methods such as email, fax, or even radio messages.⁹⁹ A reconsideration of how the order to stop under article 111(6) is to be given is also well overdue. Modern communication methods should be acknowledged and the wording ‘visual or auditory signal’ requires amendment to include such methods.

Modifying Domestic Law

As discussed above, sections 106C-106H of the *Fisheries Management Act* outline an automatic forfeiture regime for vessel, fish and gear. The legislation also addresses the possibility of a mortgagee suing for possession of a seized foreign fishing vessel, as occurred with the *Aliza Glacial*. Section 108A states very precisely that the seizure, detention or forfeiture of a boat under the *Fisheries Management Act* prevails over a number of eventualities, including the arrest of the boat under the *Admiralty Act*, and the making of an order for the sale of the boat by a court under the *Admiralty Act*. The new section applies to all boats arrested or ordered to be sold after 3 May 2000, the date Part 6 of the amending Act commenced.¹⁰⁰ This section was put to the test in the *Taruman* litigation discussed above.

vessel or
vessel or
where the
s units of
o perform
ig the hot
observed
legree of

arify the

at is not
pursuing

he vessel
ecifically
d then

⁹⁹ *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, 1 July 1999, paragraphs 145-152. The issue was not discussed in detail so the Tribunal lost an opportunity to elaborate upon and possibly expand upon the law on hot pursuit.

¹⁰⁰ *Fisheries Legislation Amendment Act 1999* section 2(2).

Upon forfeiture, the scuttling of the foreign fishing vessels is proving to be an effective method of removing them from the illegal fishing industry. Past evidence has shown that released vessels are quickly re-equipped and sent back to the Southern Ocean fishing grounds by their corporate owners.¹⁰¹ Notices under section 106C of the seizure of the vessel, equipment and fish, have been made in relation to the arrest of the *South Tomi*, *Lena*, *Volga*, *Viarsa* and *Maya V*. The owners of the *South Tomi* instituted proceedings in the Federal Court to challenge the forfeiture order, however the application was withdrawn and the vessel, equipment and fish were condemned as forfeited.¹⁰² The *South Tomi* was sunk off the Western Australian coast at Geraldton in late 2004 and will be used as an underwater diving attraction.¹⁰³ The *Lena* was sunk off Bunbury in 2003 to be used for similar purposes.¹⁰⁴ The owners of the *Maya V* did not challenge the forfeiture order within the statutory time frame and the vessel has been condemned as forfeited. It will be used for simulated boarding training in Western Australia.¹⁰⁵

The confirmation of the validity of the forfeiture regime in the *Fisheries Management Act* by the Full Federal Court in the *Volga* litigation does raise several issues under international law. Whilst coastal States may 'in the exercise of sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ, take such measures, including boarding, inspection, arrest and judicial proceedings'¹⁰⁶ it may not do so without observing the rule of law.

A system under which ownership in a vessel can vest in a coastal State upon the commission of a fisheries offence when the fact of the commission is not determined by the judicial system is open to abuse. The decision of Justice French does not elaborate on the mechanism whereby the 'fact' of commission is determined, that is the 'use' of the vessel in the offence. Possibly this is because the legislation provides no guidance on the matter. This is a significant weakness in the legislation. Section 106A states that any fishing vessel used in an offence (as listed) is forfeited to the Commonwealth yet, it is silent as to how that 'use' is determined. This leaves a significant discretionary

¹⁰¹ ABC News Online, 'Court dismisses poachers' vessel appeal' 13 March 2004, <www.abc.net.au>.

¹⁰² Per email conversation with AFMA Officer, Mr John Davis 14 February 2002.

¹⁰³ 'Fishing Future' Newsletter of the Australian Fisheries Management Authority, Vol 2, Issue 4, December 2004, at 16.

¹⁰⁴ *Ibid.* at 13.

¹⁰⁵ Ellison C. Minister for Justice and Customs and Macdonald I. Minister for Fisheries, Forestry and Conservation, 'New role for Toothfish Pirate' 21 May 2004, <www.mffc.gov.au> (25 May 2004).

¹⁰⁶ LOSC, Article 73(1).

power in the hands of the fisheries officers onboard patrol vessels to determine that the vessel has been used in an offence.¹⁰⁷

Table 3: Fate of vessel after apprehension

Vessel Name and date of arrest	Fate of vessel after apprehension
<i>Salvora</i> -16 October 1997	Released under bond with Vessel Monitoring System condition attached, Continued to fish illegally
<i>Aliza Glacial</i> -17 October 1997	Released to Mortgagee under Federal Court order
<i>Big Star</i> -21 February 1998	Court order for forfeiture under section 106 (before 1999 amendments) following conviction of crew member. Vessel had already been released on payment of bond with Vessel Monitoring System condition attached and failed to return.
<i>South Tomi</i> - 12 April 2001	Forfeited under s.106A <i>Fisheries Management Act</i> and sunk.
<i>Lena</i> - 6 February 2002	Forfeited under s.106A <i>Fisheries Management Act</i> and sunk.
<i>Volga</i> -7 February 2002	Appeal to Full Federal Court challenging the validity and effect of sections 106A-106H of the <i>Fisheries Management Act</i> dismissed in September 2004. Special Leave to appeal to the High Court dismissed.
<i>Viarsa</i> -28 August 2003	Owners filed application to challenge the notice of forfeiture under section 106C.
<i>Maya V</i> -22 January 2004	Forfeited under s.106A <i>Fisheries Management Act</i> and sunk.

Flag State Authority and Consent

The interesting fact about the boarding of the *Taruman* is that it occurred on the high seas with flag State consent. The authority of the

¹⁰⁷ The issues raised in the applications of Section 106A of the *Fisheries Management Act* are under study by the author and are the subject of a separate paper to be published later in 2007.

flag State and the principle of the freedom of the high seas are two pillars of the international law of the sea.

With respect to the freedom of fishing, whilst the exercise of that freedom has become more restricted through both a reduction in the area of high seas via the extension of coastal State jurisdiction over marine resources EEZs¹⁰⁸ and the adoption of Articles governing the conservation and management of the living resources of the high seas,¹⁰⁹ it is unlikely that the freedom of fishing in the high seas will be surrendered absolutely.

The need for order on the high seas was acknowledged by Colombos in 1967 when he stated, 'There need to be some rules governing the acts of those who go down to the sea in ships and occupy their business in great waters.'¹¹⁰ Further, it has been observed that '[t]he denial to any particular State of authority over the high seas made the authority exercised by flag States over its vessels the linchpin of public order on the high seas.'¹¹¹

The *Taruman* was boarded approximately 720 nautical miles north, north west of Macquarie Island in an area of high seas.¹¹² This was possible with the consent of the flag State, Cambodia which gave its permission to board and inspect the vessel.¹¹³ It would be speculative to argue that this sets a precedent for flag State cooperation. Many IUU vessels are flagged to flag of convenience States. Some like Togo (the flag State of the *South Tomi*) may not have the capacity to consider and respond to requests to board one of their flagged vessels. Others like Russia (*Volga* and *Lena*) and Uruguay (*Viarsa* and *Maya*) would be very unlikely to allow another State the right to board one of its vessels on the high seas.

¹⁰⁸ LOSC, Part V.

¹⁰⁹ LOSC, Articles 116-119.

¹¹⁰ Colombos C.J. *The International Law of the Sea* (6th ed 1967) at 62.

¹¹¹ Caron, 'Ships, Nationality and Status' at 400. See also, McDougal M.S. and Burke W.T. *The Public Order of the Oceans: A Contemporary International Law of the Sea* (1962) at 794.

¹¹² Macdonald I. Minister for Fisheries, Forestry and Conservation and Ellison C. Minister for Justice and Customs, 'Australia boards suspected illegal foreign fishing boat south of Tasmania.' 12 September 2005,

<www.mffc.gov.au/releases/2005/05178mj.html> (25 September 2006).

¹¹³ Ibid.

seas are two
cise of that
ction in the
fiction over
verning the
f the high
seas will be

Colombos
erning the
copy their
haf the
mk the
of public

as north,
This was
gave its
culative
my IUU
ogo (the
der and
ers like
ould be
vessels

The case of the *Taruman* highlights the fragility of coastal State authority¹¹⁴ and the deepening of tension between the rights to regulate marine resources in the EEZ and right to fish the high seas. The flag State is poised to address this tension by acting in a responsible way, overseeing the activities of its flagged fishing fleet and through communicating and cooperating with coastal States. Identifying ways to either entice, induce or coerce flag states to take up the mantle of responsibility is the challenge for today's fisheries managers.

Conclusion

Though the attention of the Australian government is currently on the presence of foreign fishing vessels in the northern AFZ, the nine arrests in the Southern Ocean have raised substantive legal and practical issues. Questions on the extent (if any) to which the law of hot pursuit may have been modified by Australia's practice, issues of regional cooperation with coastal States and co-operation with flag States and the validity of the forfeiture regime under international law, are worthy matters to be further studied in the pursuit of effective strategies against IUU fishing. In this regard although the arrests in a cold climate were costly and the prosecutions were at times mired by legal obstacles, the contribution to the campaign against IUU fishing is indeed useful.

¹¹⁴ By this I mean that it is easily severed and simply knowing an offence occurred in your EEZ does not give the a coastal State the right to arrest outside the EEZ unless there has been a hot pursuit. In reality the coastal State has to 'hide in the bushes and await the thief'.

urke
Sea

rg