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# THE END OF THE VIARSA SAGA AND THE LEGALITY OF AUSTRALIA'S VESSEL FORFEITURE PENALTY FOR ILLEGAL FISHING IN ITS EXCLUSIVE ECONOMIC ZONE

Laurence Blakely<sup>†</sup>

*Abstract:* The world's fish stocks are suffering from over-utilization. The earth's oceans are subject to exploitation by all nation states and very little preservation. Because of the nature of the international legal regime of the Law of the Sea, enforcement of what conservation and management measures exist is challenging. Boundaries, ephemeral on land, are even more so on water, making rights allocation and management particularly difficult. Nevertheless, as fish stocks continue to decrease and it becomes clearer that oceans require more effective management, coastal states have begun to undertake more significant enforcement procedures corresponding to their rights in their exclusive economic zones established under the 1982 United Nations Convention on the Law of the Sea.

In particular, Australia has recently implemented a series of measures aimed at improving the enforcement of fisheries regulations in its exclusive economic zone. Although the motive behind these measures is to attain more effective conservation and management of its living marine resources, Australia is pushing the boundaries of international law and must endeavor to ensure it acts in conformity with international law. In 1999, Australia amended its Fisheries Management Act to provide for the automatic forfeiture of any foreign vessel caught fishing illegally in its exclusive economic zone. Australia can and should interpret this provision to conform to the United Nations Convention on the Law of the Sea.

## I. INTRODUCTION

In December 2007, the infamous Uruguayan-flagged longline fishing vessel *Viarsa I* finally came to rest on the shores of Mumbai and is presently standing-by to be demolished and sold as scrap in the Indian ship-breaking yards.<sup>1</sup> *Viarsa I* was the object of one of the longest hot pursuits in history,<sup>2</sup> and one so sensational that it was the subject of a widely successful novel by a journalist for the Wall Street Journal.<sup>3</sup> In August 2003, the Australian Fisheries and Customs patrol vessel *Southern Supporter* chased *Viarsa I* for

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<sup>†</sup> The author would like to thank Professor Craig H. Allen at the University of Washington School of Law, the editorial staff at the *Pacific Rim Law and Policy Journal*, and her friends and family.

<sup>1</sup> Australian Fisheries Management Authority Update, Vol. V, Issue 1, Jan. 15, 2008, [http://www.afma.gov.au/information/publications/newsletters/afma\\_update/docs/update\\_0501/TMPfhjsmu05x4.htm](http://www.afma.gov.au/information/publications/newsletters/afma_update/docs/update_0501/TMPfhjsmu05x4.htm) (last visited May 12, 2008) [hereinafter AFMA website].

<sup>2</sup> The doctrine of hot pursuit allows a coastal state to extend its jurisdiction beyond its exclusive economic zone ("EEZ"). It is codified in the United Nations Convention on the Law of the Sea art. 111, Dec. 10, 1982, 1833 U.N.T.S. 396, available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm) [hereinafter LOSC].

<sup>3</sup> G. BRUCE KNECHT, *HOOKED: PIRATES, POACHING, AND THE PERFECT FISH* (Rodale Inc. 2006).

twenty-one days over almost 4,000 nautical miles, through an iceberg-strewn stormy Southern Ocean in the middle of winter.<sup>4</sup> Having detected *Viarsa I* allegedly violating fisheries regulations in Australia's exclusive economic zone ("EEZ"), *Southern Supporter* initiated hot pursuit, finally catching up with *Viarsa I* in the South Atlantic Ocean and escorting her back to Australia.<sup>5</sup> Although the crew was eventually acquitted of all criminal charges by an Australian jury because evidence of the violation was only circumstantial,<sup>6</sup> the Commonwealth still confiscated the vessel as forfeited, pursuant to section 106A of the Fisheries Management Act ("FMA").<sup>7</sup> The owners of the vessel challenged this forfeiture in Australian courts, as allowed by the FMA.<sup>8</sup> Four years later, the Federal Court of Western Australia finally dismissed the *Viarsa I* owner's application challenging this forfeiture,<sup>9</sup> enabling the Australian Fisheries Management Authority ("AFMA") to initiate the dismantling process and bring to a close the *Viarsa* saga.<sup>10</sup>

The saga, however, may yet continue. It remains unclear whether Australia's forfeiture provision, section 106A of the FMA, is consistent with international law. Although the 1982 United Nations Convention on the Law of the Sea ("LOSC")<sup>11</sup> does not specifically address whether forfeiture is an allowable method of enforcement of a coastal state's fisheries regulations, in its most recent case, the *Tomimaru*, the International Tribunal for the Law of the Sea, ("ITLOS"), recognized the issue without resolving

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<sup>4</sup> AFMA website, *supra* note 1; see also COLTO—Coalition of Legal Toothfish Operators website, [http://www.colto.org/Articles\\_Latest\\_Viarsa\\_Photos.htm](http://www.colto.org/Articles_Latest_Viarsa_Photos.htm) (last visited May 12, 2008) (providing photo account of the hot pursuit).

<sup>5</sup> Australia claims an EEZ encompassing the waters 200 nautical miles off its coast pursuant to LOSC. LOSC, *supra* note 2, art. 55 (entitled "Specific legal regime of the exclusive economic zone"). A coastal state has sovereign rights over the natural resources in its EEZ. *Id.* art. 56(1)(a).

<sup>6</sup> See *Ribot-Cabrera & Ors v. The Queen* (2004) WASCA 101 (May 18, 2004); Amanda Banks, *\$30m Claim After Fishers Freed*, THE AUSTRALIAN, Nov. 7, 2005, at local section p. 4.

<sup>7</sup> Fisheries Management Act, 1991, C2007C00487, § 106A (Austl.), available at <http://www.austlii.edu.au/> (search for "fisheries management act"; then follow "FISHERIES MANAGEMENT ACT 1991 - SECT 1 Short title" hyperlink; then follow "Management Act" hyperlink) [hereinafter FMA] (allowing Australia to claim as automatically forfeited vessels found to have violated certain fisheries regulations within Australia's EEZ).

<sup>8</sup> AFMA website, *supra* note 1; Banks, *supra* note 6.

<sup>9</sup> Order Entered in the Fed. Ct. of Austl. W. Dist. No. WAD253/2003 (Feb. 27, 2007) (Gilmour, J.) available at <http://www.fedcourt.gov.au> (dismissing applicant's challenge to the forfeiture).

<sup>10</sup> AFMA website, *supra* note 1.

<sup>11</sup> As of February 1, 2008, 155 states have ratified LOSC. A table recapitulating the status of the Convention and of the related Agreements, as of October 26, 2007, is available at [http://www.un.org/Depts/los/convention\\_agreements/convention\\_agreements.htm](http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm) (last visited Mar. 4, 2008).

it.<sup>12</sup> Presiding ITLOS Judge Rüdiger Wolfrum, in his statement to the Plenary of the United Nations General Assembly in December 2007, described the *Tomimaru* case as raising questions concerning “the confiscation of a vessel and the relation between national and international rules.”<sup>13</sup> Judge Wolfrum noted on behalf of ITLOS that, although the Law of the Sea Convention makes no reference to confiscation provisions, “many States have provided for measures of confiscation of fishing vessels in their legislation with respect to the management and conservation of marine living resources.”<sup>14</sup> As such, ITLOS is primed to hear further cases regarding confiscation<sup>15</sup> measures, rendering Australia’s related enforcement actions susceptible to challenge.

This Comment argues that vessel forfeiture provisions are a valid mechanism for coastal states to enforce their laws and regulations as long as the provisions do not upset the balance between flag and coastal states rights established in Part V of LOSC.<sup>16</sup> In particular, Australia’s forfeiture provision should be interpreted so as to conform with LOSC. Part II of this Comment exposes illegal fishing and depleting fish stocks as a time sensitive worldwide issue and provides an overview of the EEZ, the legal regime through which coastal states effectively manage fisheries. It then introduces the ITLOS cases discussing the confiscation issue and lays out the Australian forfeiture legislation. Part III analyzes LOSC Article 73 and ITLOS case law to establish that forfeiture is an allowable coastal state enforcement measure, as long as it conforms to certain requirements. Part III then proposes a test to determine the legality of forfeiture provisions. Part IV applies this test to the Australian statute, concluding that the statute can, and should, be interpreted to conform with international law.

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<sup>12</sup> The *Tomimaru* Case (Japan v. Rus. Fed.), Judgment, I.T.L.O.S. Case No. 15, ¶¶ 72-76 (Aug. 6, 2007) [hereinafter *Tomimaru*].

<sup>13</sup> Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea (“ITLOS”), Statement to the Plenary of the Sixty-Second Session of the United Nations General Assembly (Dec. 10, 2007), at ¶ 22, available at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (follow “News” hyperlink; then follow “Statements of the President” hyperlink) [hereinafter Wolfrum UN Statement].

<sup>14</sup> *Id.* (quoting *Tomimaru*, *supra* note 12, ¶ 72).

<sup>15</sup> Although confiscation is not a familiar term in admiralty, it is used extensively by ITLOS, and simply changes the acting party. For example, the vessel owner forfeits the vessel, and Australia confiscates the vessel. BLACK’S LAW DICTIONARY 131, 297 (3d pocket ed. 2006).

<sup>16</sup> See LOSC, *supra* note 2, Part V entitled “Exclusive Economic Zone.”

## II. ITLOS CASES HAVE CENTERED AROUND COASTAL STATES' FISHERIES REGULATIONS ENACTED TO ADDRESS DEPLETING FISH STOCKS

Although many coastal states have adopted forfeiture provisions pursuant to their LOSC EEZ powers, ITLOS cases and LOSC articles demonstrate the importance of the balance between coastal and flag state rights. ITLOS has heard cases related to coastal state forfeiture provisions adopted pursuant to EEZ jurisdiction, but has not ruled on the validity of the provisions. The EEZ regime extends the jurisdiction of coastal states over living marine resources. Growing concerns with illegal fishing, lax flag state enforcement, and depleted fish stocks have contributed to the creation of the EEZ regime in LOSC.

### A. *Illegal Fishing and Depleting Fish Stocks Are Time-Sensitive World-Wide Problems Exacerbated by Lax Flag State Enforcement*

Fish stocks around the world are depleting rapidly. Overfishing is recognized as a major worldwide problem.<sup>17</sup> As of 2005, half of the world's fisheries were deemed fully exploited, one-quarter not quite fully exploited, leaving a full one-quarter of the world's fisheries overexploited, depleted, or recovering (seventeen percent, seven percent, and one percent, respectively).<sup>18</sup> Over the past twenty years, the proportion of depleted and overexploited stocks has remained stable following a steep rise in the 1970s and 1980s.<sup>19</sup> In the mid-1970s, the proportion of overexploited or depleted fisheries was only ten percent, as compared to twenty-five percent today.<sup>20</sup> Illegal fishing, as part of Illegal, Unreported, and Unregulated ("IUU") fishing, is a significant contributor to the issue.<sup>21</sup>

Lax flag state enforcement persists as a significant challenge in curtailing illegal fishing. Flag states have exclusive jurisdiction over their vessels on the high seas, subject to certain exceptions through which other states are specifically granted jurisdiction.<sup>22</sup> Despite the duty of flag states

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<sup>17</sup> U.N. FAO Fisheries and Aquaculture Dep't, *The State of the World Fisheries and Aquaculture 2006*, at 7, U.N. Doc. (2007) [hereinafter SOFIA Report].

<sup>18</sup> *Id.* at 29.

<sup>19</sup> *Id.* at 7.

<sup>20</sup> *Id.* at 17, 29.

<sup>21</sup> See generally U.N. FAO, Committee on Fisheries [COFI], Report of the Twenty-Seventh Session of the Committee on Fisheries, *Combating Illegal, Unreported and Unregulated Fishing Through Monitoring, Control and Surveillance, Port State Measures and Other Means*, U.N. Doc. E/COFI/2007/7 (Mar. 5-9, 2007) (discussing the worldwide problem of IUU fishing and the implementation of port state measures).

<sup>22</sup> LOSC, *supra* note 2, arts. 92, 87; see also R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 208 (3rd ed. 1999) (stating that the EEZ regime grants extensive jurisdiction to the coastal state).

to enforce coastal state regulations and comply with relevant Regional Fisheries Management Organization (“RFMO”) guidelines onboard their vessels, lax enforcement by “flag of convenience”<sup>23</sup> states is a widespread and global issue—the ramifications of which are felt acutely in the context of illegal fishing.<sup>24</sup> Under LOSC, flag states have a duty to “comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal state.”<sup>25</sup> This imposes significant responsibilities on flag states. Nevertheless, the continued widespread use of flags of convenience “exacerbates the extent and scope of IUU fishing.”<sup>26</sup> The fundamental right of flag state jurisdiction,<sup>27</sup> combined with lax flag state enforcement, creates further challenges for coastal states in implementing fisheries conservation and management measures.

To make matters worse, illegal fishers are increasingly sophisticated, well-funded, and able to work around coastal state conservation and management measures. Organized criminal activity in illegal fishing is recognized as a problem around the world.<sup>28</sup> In some cases, RFMO secretariats have received threats when implementing measures to combat IUU fishing, demonstrating the criminal nature of IUU fishing.<sup>29</sup> The increased sophistication of IUU fishing indicates the highly organized nature of the criminal actors and hinders the conservation and management measures undertaken by coastal states and the corresponding RFMOs.<sup>30</sup> To avoid detection, vessel owners create corporate arrangements as a shield

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<sup>23</sup> Flags of convenience, or open registry vessels, refer to vessels flying the flag of a country other than the country of ownership. See U.N. FAO Fisheries and Aquaculture Dep’t, “Flag of Convenience” or Open Registry Fishing Vessels, <http://www.fao.org/fishery/topic/14818> (last visited Apr. 24, 2008). These have been described as “pirates, bad actors and the scourge of the ocean.” *Id.*

<sup>24</sup> See generally MATHEW GIANNI & WALT SIMPSON, THE CHANGING NATURE OF HIGH SEAS FISHING: HOW FLAGS OF CONVENIENCE PROVIDE COVER FOR ILLEGAL, UNREPORTED AND UNREGULATED FISHING (Austl. Dep’t of Agriculture, Fisheries and Forestry, Int’l Transport Workers’ Federation, WWF Int’l, 2005), available at [http://www.daff.gov.au/\\_data/assets/pdf\\_file/0008/5858/iuu\\_flags\\_of\\_convenience.pdf](http://www.daff.gov.au/_data/assets/pdf_file/0008/5858/iuu_flags_of_convenience.pdf) (discussing the role of flags of convenience in Illegal, Unreported, and Unregulated (“IUU”) fishing).

<sup>25</sup> LOSC, *supra* note 2, art. 62(4).

<sup>26</sup> SOFIA Report, *supra* note 17, at 56.

<sup>27</sup> Flag states traditionally have jurisdiction over their vessels, and exclusive jurisdiction over their vessels on the high seas. See LOSC, *supra* note 2, art. 87.

<sup>28</sup> Corporate crime in IUU fishing was a subject of various recent international conferences. For example, the 34th Annual Conference of The Maritime Law Association of Australia and New Zealand (Sept. 2007) held a session on “Organized Crime in Australia’s Fishing Industry: International Connections.” Also, the 18th Annual European Association of Fisheries Economists Conference (July 2007) included a paper entitled: “Non-Compliance in Fisheries: A Corporate Crime Perspective,” by Linda Nostbakken and Frank Jensen. See generally The XVIIIth Annual EAFE Conference Website, <http://www.eafe2007.hi.is/index.html> (last visited Apr. 24 2008).

<sup>29</sup> SOFIA Report, *supra* note 17, at 56.

<sup>30</sup> *Id.*

against investigations and frequently change vessel names, call numbers, and flags.<sup>31</sup> In the fight against IUU fishing, this organized corporate element adds a significant burden on the coastal states in their endeavor to conserve and manage the living resources in their EEZs.

*B. The EEZ Legal Regime Created in LOSC Balances the Interests of the Coastal and Flag States*

Over the past several decades, the Law of the Sea has evolved through the “creeping jurisdiction” of coastal states beyond their territorial seas and into the ocean.<sup>32</sup> Previously, most of the world’s oceans were comprised of “high seas,” on which flag states possessed exclusive jurisdiction over their vessels and all states enjoyed unrestricted access to resources.<sup>33</sup> More and more states began to claim something akin to an EEZ: an area of ocean contiguous to their territorial seas in which they had jurisdiction over natural resources, especially fisheries.<sup>34</sup> The drafting of LOSC evolved to provide management frameworks and enforcement structures beyond the territorial sea, where before flag states exercised exclusive jurisdiction.<sup>35</sup> This paralleled a growing understanding of, and desire to manage, natural resources and marine pollution, as well as a recognition of political theories such as the “tragedy of the commons”<sup>36</sup> and the “race to the bottom.”<sup>37</sup> As a result, coastal states today claim sovereign rights 200 miles offshore,

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<sup>31</sup> See GIANNI & SIMPSON, *supra* note 24, at 12.

<sup>32</sup> See generally Barbara Kwiatkowska, *Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice*, 22 OCEAN DEV. AND INT’L L. 153 (1991) (examining the extensions of coastal state rights and jurisdictions beyond the twelve mile territorial sea); see also David Freestone, *The Effective Conservation and Management of High Seas Living Resources: Towards a New Regime?*, 5 CANTERBURY L. REV. 341, 343 (1995) (examining the impact of the extension of coastal state jurisdiction).

<sup>33</sup> See, e.g., United Nations Convention on the High Seas art. 1, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter CHS] (stating that a coastal state’s jurisdiction beyond internal waters is over a territorial sea of twelve nautical miles). High seas are “all parts of the sea that are not included in the territorial sea or in the internal waters of a state.” *Id.*

<sup>34</sup> For example, the Truman Proclamation stated the policy of the United States regarding the need for conservation zones and protection of fisheries resources, and claimed the right to regulate and control fishing activities in these “conservation zones,” while maintaining the right of “free and unimpeded navigation.” 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY 493 (Myron H. Nordquist ed., 1985) [hereinafter Nordquist vol. II].

<sup>35</sup> See CHS, *supra* note 33.

<sup>36</sup> “Tragedy of the commons” is an expression of the conflict between individual interests and the common good in the management of finite resources. Garret Hardin, *The Tragedy of the Commons*, SCIENCE MAG., Dec. 13, 1968, at 1243.

<sup>37</sup> “Race to the bottom” is a theoretical phenomenon occurring when competition between states leads to a decline in regulatory standards. The term was coined by Justice Brandeis in *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 558-59 (1933). For example, in the case of vessel registries, states with fewer regulations will attract more vessel registrations, and become “flag of convenience” states.

RFMOs assert authority over vast expanses of ocean, and port states undertake market control measures.<sup>38</sup> Nevertheless, striking a balance between the rights of the flag state and those of the coastal state within what would become the EEZ remained central to the evolving framework.<sup>39</sup>

Ultimately adopting the EEZ as a formal regime, LOSC sought to integrate a comprehensive regulation of coastal states' claims to rights beyond their territorial seas.<sup>40</sup> Although the regime was created by LOSC, it had roots in the earlier conventions.<sup>41</sup> The resulting EEZ was arguably the most complex and multifaceted regime in LOSC: an "intricately designed structuring of rights, jurisdiction, and duties—variously allocated between coastal States and the general community of States."<sup>42</sup> Consequently, balancing conflicting rights and interests within the EEZ has proven to be tremendously difficult.

In considering whether to adopt the EEZ regime, a novel concept at the time, states were concerned with preserving the fundamental rights of the law of the sea: freedom of fishing and of navigation. Reports prepared while drafting LOSC's EEZ section reflect the concern among states that an extension of the jurisdiction of coastal states beyond the territorial sea would "have to be matched by a statement of general rights of the international community in that extended zone."<sup>43</sup>

Once again, conserving a balance between coastal and flag states was a key part of the section of LOSC that created the EEZ.<sup>44</sup> Coastal states, on the one hand, have jurisdiction to prescribe enforcement procedures in their EEZs under LOSC.<sup>45</sup> Prescriptive jurisdiction in the EEZ allows coastal states to establish laws and regulations that relate to fisheries and enforcement procedures for the conservation and utilization of the living resources.<sup>46</sup>

Article 73 of LOSC elaborates on the enforcement procedures that a coastal state may undertake in its EEZ, setting forth coastal state

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<sup>38</sup> See generally Judith Swan, *Port State Measures to Combat IUU Fishing: International and Regional Developments*, 7 SUSTAINABLE DEV. L. & POL'Y 38 (2006) (discussing international and regional port state measures).

<sup>39</sup> See Nordquist vol. II, *supra* note 34, 493-500.

<sup>40</sup> *Id.* at 496.

<sup>41</sup> *Id.* at 493 (citing the 1930 Hague Conference for the Codification of International Law, Report Adopted by the Second Committee, League of Nations, III *Acts of the Conference for the Codification of International Law*, League of Nations Doc. C.351(b).M.145(b) 1930 V., Annex V, at 209).

<sup>42</sup> Nordquist vol. II, *supra* note 34, at 508.

<sup>43</sup> *Id.* at 496-97.

<sup>44</sup> LOSC, *supra* note 2, Part V.

<sup>45</sup> LOSC, *supra* note 2, art. 62(4).

<sup>46</sup> *Id.*

enforcement jurisdiction in respective EEZs while ensuring the flag states' right to "prompt release" actions.<sup>47</sup> Paragraph (1) grants coastal states the right to "take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."<sup>48</sup>

Flag states, on the other hand, received the assurance of "prompt release" to offset this increase in coastal state jurisdiction. Article 73 provides that "[a]rrested vessels shall be promptly released upon the posting of a reasonable bond or security."<sup>49</sup> By cross-referencing Article 292, Article 73 gives the flag state of a vessel the right to bring a "prompt release" action in ITLOS to demand its vessel be released by the coastal state on certain conditions.<sup>50</sup> Article 73 contains additional flag state interest safeguards, including the prohibition of imprisonment and corporal punishment as a penalty for the violation of a fisheries regulation,<sup>51</sup> and a requirement that the coastal state notify the flag state of arrests of vessels and subsequent punitive measures.<sup>52</sup> The notice requirement ensures that the flag state can initiate "prompt release" proceedings.

C. *ITLOS Addressed the Confiscation Issue Within Article 292 "Prompt Release" Proceedings Brought Pursuant to Vessel Forfeiture Actions*

Annex VI of LOSC establishes ITLOS and charges it with interpreting LOSC to resolve disputes between parties to the Convention.<sup>53</sup> ITLOS applies LOSC, as well as "other international law not incompatible with the Convention."<sup>54</sup> The twenty-one elected members of ITLOS must have the highest reputation for "fairness and integrity" and "a recognized competence in the field of the law of the sea."<sup>55</sup> In addition, "equitable geographical distribution" and representation on ITLOS of the world's principal legal

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<sup>47</sup> Prompt release is a "procedure provided by [LOSC], introduced before a court or an international tribunal . . . by the flag State whose vessel is detained by the authorities of a State party to the convention, which alleges a violation of the provisions of the Convention providing for the prompt release." Erik Franckx, "Reasonable Bond" in *the Practice of the International Tribunal for the Law of the Sea*, 32 CAL. W. INT'L L. J. 303, 310, n.40 (2002).

<sup>48</sup> LOSC, *supra* note 2, art. 73(1).

<sup>49</sup> *Id.* art. 73(2).

<sup>50</sup> This procedure is referred to as a "'prompt release' proceeding" throughout this Comment. *See infra* Part II.C.

<sup>51</sup> LOSC, *supra* note 2, art. 73(3).

<sup>52</sup> *Id.* art. 73(4).

<sup>53</sup> *Id.* art. 293, Annex VI, art. 23. ITLOS is one of several available forums for compulsory dispute resolution provided for in LOSC Part XV. *See generally* Franckx, *supra* note 47 (discussing dispute resolution provided for in LOSC).

<sup>54</sup> LOSC, *supra* note 2, Annex VI, art. 23 (referring to LOSC art. 293).

<sup>55</sup> *Id.*

systems are assured,<sup>56</sup> and no two members may be nationals of the same state.<sup>57</sup> As such, ITLOS represents an impartial and significant authority in LOSC interpretation.

ITLOS has heard several “prompt release” proceedings brought because of coastal state actions confiscating foreign vessels pursuant to forfeiture provisions.<sup>58</sup> Article 292 grants ITLOS compulsory jurisdiction to resolve “prompt release” disputes, including ones in which a flag state alleges that a coastal state did not comply with its duty under Article 73(2) (to release a seized vessel upon the posting of a “reasonable bond”), and demands that it do so.<sup>59</sup>

The procedural posture, however, prevented ITLOS from ruling on the merits of any of these cases;<sup>60</sup> thus, the judgments did not directly address the legality of the confiscation provisions. ITLOS jurisdiction in “prompt release” cases is limited to dealing “only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel.”<sup>61</sup> Furthermore, it is in ITLOS’s interest to deliver narrow holdings to increase its credibility among states parties and the international community.<sup>62</sup> Judgments from “prompt release” actions therefore usually do not relate to factual and legal issues involved in a forfeiture proceeding. Instead, the judgments deal solely with the immediate issue of what a “reasonable bond” for the release of a vessel is in a given case.

Nevertheless, because so many “prompt release” cases litigated in ITLOS have stemmed directly from a coastal state claiming a vessel as forfeited pursuant to its fisheries regulations, a discussion of these cases is relevant. In addition, this litigation has produced many separate opinions that discuss the legal and factual specificities of coastal state vessel forfeiture provisions. In their decisions, members of ITLOS take the opportunity to express themselves in separate opinions. For example, the

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<sup>56</sup> *Id.*

<sup>57</sup> LOSC, *supra* note 2, Annex VI, art. 3(1).

<sup>58</sup> See, e.g., *Tomimaru*, *supra* note 12; The *Hoshinmaru* Case (Jap. v. Rus. Fed.), I.T.L.O.S. Case No. 14 (Aug. 6, 2007); The *Juno Trader* Case (St. Vincent & the Grenadines v. Guinea-Bissau), I.T.L.O.S. Case No. 13 (Dec. 18, 2004) [hereinafter *Juno Trader*]; The *Volga* Case (Rus. Fed. v. Austl.), I.T.L.O.S. Case No. 11 (Dec. 23, 2002); The *Grand Prince* Case (Belize v. Fr.), I.T.L.O.S. Case No. 8 (Apr. 20, 2001); available at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (follow “Proceedings and Judgments” hyperlink).

<sup>59</sup> LOSC, *supra* note 2, arts. 73, 292.

<sup>60</sup> *Id.* art. 292.

<sup>61</sup> *Id.* art. 292(3).

<sup>62</sup> See John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT’L L.J. 109, 157 (1998).

*Juno Trader* case produced eight separate opinions signed by ten judges.<sup>63</sup> Unlike ITLOS judgments, which are generally narrow, the separate opinions tend to be a bit more expansive. These separate opinions are also valuable analytical resources as reflections by highly qualified authorities on the law of the sea.<sup>64</sup>

Out of the nine “prompt release” cases heard by ITLOS in the course of its existence,<sup>65</sup> four deserve special attention because they deal specifically with vessels forfeited to a coastal state due to that coastal state’s LOSC enforcement jurisdiction.<sup>66</sup> The *Tomimaru* case, ITLOS’s most recent, involved Japan, the flag state, filing a case against Russia, the coastal state, after Russia confiscated the *Tomimaru* as forfeited pursuant to its fisheries regulations in its EEZ.<sup>67</sup> After boarding the vessel, the Russian authorities assessed that the vessel had caught more fish than its permit allowed.<sup>68</sup> Litigation ensued within the Russian court system, culminating with the Russian Supreme Court’s denial of Japan’s appeal to the lower court’s forfeiture finding.<sup>69</sup> This appeal was pending when Japan instituted proceedings at ITLOS, and was denied by the time ITLOS rendered its judgment.<sup>70</sup> As such, this case provides insight on ITLOS’s treatment of a “prompt release” action due to vessel forfeiture while a proceeding is taking place in a coastal state’s domestic courts.

Because the facts of the *Volga* case involved the application of Australia’s forfeiture provision discussed in this Comment, the *Volga* opinions are relevant. Even though the Australian forfeiture statute was implicated in the *Volga* case, ITLOS did not rule on its legality.<sup>71</sup> Instead, the case centered on the nature of the bond Australia demanded as a

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<sup>63</sup> *Juno Trader*, *supra* note 58. Judges Kolodin, Anderson, Cot, Part, Meshaw, Wolfrum, Chandrasekhara Rao, Treves, Ndiaye, and Lucky all filed declarations or separate opinions.

<sup>64</sup> See *supra* note 55 and accompanying text.

<sup>65</sup> ITLOS heard its first case in 1997 (The *Saiga* Case (St. Vincent v. Guinea), I.T.L.O.S. Case No. 1 (Dec. 4 1997), also a “prompt release” case) and has heard fifteen cases total. See ITLOS website, [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (follow “Proceedings and Judgments” hyperlink) (last visited May 12, 2008).

<sup>66</sup> *Tomimaru*, *supra* note 12; *Juno Trader*, *supra* note 58; *Volga*, *supra* note 58; *Grand Prince*, *supra* note 58.

<sup>67</sup> *Tomimaru*, *supra* note 12, Judgment ¶¶ 26, 44.

<sup>68</sup> *Id.* Judgment ¶ 25.

<sup>69</sup> *Id.* Judgment ¶¶ 37-46.

<sup>70</sup> *Id.* Judgment ¶ 62.

<sup>71</sup> See *Volga*, *supra* note 58, Judgment ¶¶ 50, 76 (citing the Australian statute applied in the case and stating: “it is not appropriate in the present proceedings to consider whether a coastal State is entitled to impose such conditions in the exercise of its sovereign rights under the Convention.”); *but see id.* Separate Opinion of Judge Cot, ¶¶ 11-13 (stating that Australia’s enforcement and prevention measures fall within LOSC and international organizations’ efforts to combat IUU fishing).

condition on the release of the vessel.<sup>72</sup> Russia, this time acting as the flag state, brought the action to ITLOS.<sup>73</sup> The *Volga* had been forfeited pursuant to FMA section 106A for a violation of Australia's fisheries regulations, and the owners contested the forfeiture in Australian courts while the flag state brought the ITLOS case.<sup>74</sup> Because the forfeiture case was still pending in Australia when ITLOS rendered its decision, the *Volga* facts substantially differ from the *Tomimaru* facts.<sup>75</sup> However, like in the *Tomimaru* case, ITLOS had to deal with possible complementarity issues due the ongoing domestic court proceeding.<sup>76</sup> This relationship between ITLOS and domestic proceedings is key when analyzing the legality of a forfeiture provision.

The *Grand Prince* similarly involved a coastal state's forfeiture provision, this time France's.<sup>77</sup> Unlike the *Volga* and the *Tomimaru* cases, where the judgments were unanimous, this case prompted a significant dissent. Nine of the twenty-one judges disagreed with the tribunal's finding that Belize was not the flag state of the vessel.<sup>78</sup> They expressed regret that such a finding prevented the tribunal from considering, as a legal question, the relationship between "prompt release" proceedings under Article 292 and "the merits of cases before the domestic forum of the detaining State,"<sup>79</sup> indicating their interest in resolving the issue under ITLOS jurisdiction.

In the *Juno Trader*, ITLOS touched on notions of international due process standards. Saint Vincent and the Grenadines brought the action against Guinea-Bissau for the release of the *Juno Trader*, which Guinea-Bissau had seized pursuant to a fisheries regulation infraction.<sup>80</sup> ITLOS unanimously found that Guinea-Bissau had not complied with LOSC Article 73(2) and ordered Guinea-Bissau to release the seized vessel.<sup>81</sup> Several of the separate opinions also expressed concern over the lack of due process in

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<sup>72</sup> *Id.* Judgment ¶ 76.

<sup>73</sup> *Id.* Judgment ¶ 1.

<sup>74</sup> *Olbers Co. Ltd. v. Commonwealth of Austl. & Ors.* (No. 4) (2004) 205 A.L.R. 432 (Austl.), *aff'd*, 212 A.L.R. 325 (2004) (Austl.) [hereinafter *Olbers*].

<sup>75</sup> *Volga*, *supra* note 58, Judgment ¶ 52.

<sup>76</sup> Complementarity is the concept of ceding jurisdiction to a national court over an international tribunal. *See, e.g.*, Int'l Crim. Ct., Rome Statute art. 17(a), July 1, 2002, U.N. Doc. A/CONF.183/9\* (making inadmissible in the International Court cases already being investigated or prosecuted by a state with jurisdiction).

<sup>77</sup> *Grand Prince*, *supra* note 58, Judgment ¶ 59.

<sup>78</sup> It's unclear what the flag state was at the time of seizure because the vessel had documentation from Belize providing conflicting information. *Id.* Judgment ¶¶ 76, 93.

<sup>79</sup> *Grand Prince*, *supra* note 58, Dissenting Opinion of Judges Caminos, Rangel, Yankov, Yamamoto, Akl, Vukas, Marsit, Eiriksson, Jesus, ¶ 17.

<sup>80</sup> *Juno Trader*, *supra* note 58, Judgment ¶ 69.

<sup>81</sup> *Juno Trader*, *supra* note 58, Judgment ¶ 80.

the Guinean proceedings.<sup>82</sup> Significant to the decision was that Guinea-Bissau did not provide notice of the seizure to the flag state.<sup>83</sup> The *Juno Trader* provides an example of a possibly illegal forfeiture provision.

Although ITLOS has heard litigation due to forfeiture provisions, it has not actually held that they are allowed or what type is allowed. However, the separate and dissenting opinions provide some guidance for determining the legality of a coastal state's forfeiture provision. The *Juno Trader*, the *Grand Prince*, the *Volga*, and the *Tomimaru* were all brought to ITLOS due to a coastal state's forfeiture proceedings. These cases present various possible factual scenarios relating to forfeiture provisions and provide reference points for a possible legal test.<sup>84</sup>

D. *Australia Has Enacted a Confiscation Provision Pursuant to Its Sovereign Right to Conserve and Manage the Living Resources in Its EEZ*

In accordance with the LOSC article granting coastal states the power to prescribe enforcement measures in their EEZs, Australia sets forth enforcement mechanisms against illegal fishing in the Fisheries Management Act.<sup>85</sup> Administrators of the Act are charged with ensuring that the conservation and management measures in Australia's EEZ and on the high seas "implement Australia's obligations under international agreements that deal with fish stocks."<sup>86</sup> This language indicates a link between Australia's domestic law and the international agreements it is party to, including LOSC. Section 106A of the FMA provides for automatic "forfeiture of things used in certain offences," including vessels used for IUU fishing in the EEZ, and their catch.<sup>87</sup> The Australian legislature added the "automatic" nature of the forfeiture provision when it amended the FMA in 1999.<sup>88</sup>

The FMA sets forth procedures in confiscating a foreign vessel fishing illegally. Section 106C of the Act requires the enforcement officer to give written notice of the seizure.<sup>89</sup> The notice must contain information on how

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<sup>82</sup> *Id.* at Separate Opinion of Judges Mensah and Wolfrum ¶¶ 5-6; *id.* at Separate Opinion of Judge Chandrasekhara Rao ¶ 8.

<sup>83</sup> *Id.* at Judgment ¶ 76.

<sup>84</sup> See *infra* Part III.B.

<sup>85</sup> LOSC, *supra* note 2, art. 62(4)(k); FMA, *supra* note 7.

<sup>86</sup> FMA, *supra* note 7, Part 1(3)(2)(c).

<sup>87</sup> *Id.* § 106A. Section 106 of the FMA is also a forfeiture provision, but its functioning is not automatic and the section is not discussed in this Comment.

<sup>88</sup> *Fisheries Legislation Amendment Act* (No. 1), 1999.

<sup>89</sup> FMA, *supra* note 7, § 106C.

to challenge the forfeiture of the seized vessel and include the address of the Managing Director of the Australian Fisheries Management Authority, ("AFMA"), to whom a claim challenging the forfeiture must be made.<sup>90</sup> Once the claim is made, the claimant has two months to institute proceedings in Australian courts to enforce it.<sup>91</sup> If the claimant does not obtain a court order, the seized vessel is forfeited to the Commonwealth.<sup>92</sup>

The AFMA is charged with implementing the FMA. As such, it is the body responsible for instituting forfeiture proceedings, or in the case of an automatic forfeiture, responding to a flag state or owner's challenge to the forfeiture. Once the vessel is forfeited, the AFMA must dispose of it. The AFMA has various mechanisms for managing the confiscation proceedings.<sup>93</sup>

In sum, LOSC created a regime, the EEZ, which allocates sovereign rights over natural resources in the EEZ to coastal states, while protecting flag states' rights through "prompt release" actions. A coastal state's right to implement a forfeiture provision specifically is not established as legal, but ITLOS has heard litigation related to such clauses.<sup>94</sup> Although many states have implemented forfeiture provisions, Australia's is unique because it is "automatic."

### III. CONFISCATION IS A VALID EXERCISE OF A COASTAL STATE'S SOVEREIGN RIGHTS, PROVIDED IT PRESERVES FLAG STATES' RIGHTS

Although the confiscation of vessels is not specifically provided for in Article 73, it is also not prohibited.<sup>95</sup> Because it is not prohibited by LOSC, the confiscation of fishing vessels as a penalty for illegal fishing within an EEZ is consistent with Article 73.<sup>96</sup> In its most recent case, ITLOS recognized that many states do have forfeiture provisions aimed at prevention and deterrence of illegal fishing activities.<sup>97</sup> Undisputed state practice supports this,<sup>98</sup> as many states other than Australia also have

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<sup>90</sup> *Id.* § 106D.

<sup>91</sup> *Id.* § 106F.

<sup>92</sup> *Id.* § 106G(2). This section allows claimants to challenge legal or factual findings in the Australian courts. However, the section does not set a legal test for obtaining a court order. *Id.*

<sup>93</sup> See AFMA website, *supra* note 1.

<sup>94</sup> See *supra* Part II.C.

<sup>95</sup> LOSC, *supra* note 2, art. 73(4).

<sup>96</sup> *Tomimaru*, *supra* note 12, Separate Opinion of Judge Jesus ¶ 6.

<sup>97</sup> *Id.* at Judgment ¶ 72.

<sup>98</sup> *Id.* at Separate Opinion of Judge Jesus ¶ 6 (stating that the confiscation measures "seem to be supported by undisputed state practice").

confiscation provisions.<sup>99</sup> An analysis of pertinent LOSC articles and past ITLOS litigation presents a possible two-part test for determining the legality of a forfeiture provision: it may not deny a flag state access to a “prompt release” action, and it must grant access to a domestic forum in which the flag state can effectively challenge the forfeiture. These two prongs encompass the overarching goals of conserving the balance between coastal and flag states’ rights and ensuring some level of due process.

A. *A Textual Analysis of Article 73 Indicates That Confiscation Is a Valid Enforcement Measure*

Article 73 allows a coastal state to “take such measures, including boarding, inspection, arrest, and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention,” in the exercise of its sovereign rights over the living resources in the EEZ.<sup>100</sup>

1. *The List of Enforcement Measures in Article 73(1) Is Non-Exhaustive*

Article 73(1) is a non-exhaustive list of allowable coastal state enforcement measures. Although the acting phrase “boarding, inspection, arrest, and judicial proceedings” is not preceded by the words *inter alia* or the like, interpreting the list as non-exhaustive is consistent with the language in Article 73.<sup>101</sup> That the drafting committee included *inter alia* in its list of allowable coastal state laws and regulations in Article 62(4)<sup>102</sup> does not necessarily mean that the absence of these words in Article 73(1) indicates the list is exhaustive. The list in Article 62(4) is much longer than the one in Article 73(1) and relates to a more general allowance of prescriptive jurisdiction, which allocates the right to enact laws and regulations, as opposed to enforcement jurisdiction, which allocates the right to enforce laws and regulations. The different nature of the two articles explains the different language. The subsections of Article 73 also suggest that the omission of the specific term was not intended to limit enforcement actions to those enumerated in the article.<sup>103</sup> This is further supported by the fact that several ITLOS judges believe that the list is non-exhaustive. In

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<sup>99</sup> For example, the Federated States of Micronesia, France, United States, United Kingdom, and Marshall Islands all have vessel forfeiture provisions.

<sup>100</sup> LOSC, *supra* note 2, art. 73(1).

<sup>101</sup> *Id.* art. 73.

<sup>102</sup> *Id.* art. 62(4).

<sup>103</sup> *Id.* art. 73.

fact, some have even stated specifically that vessel confiscation is allowed.<sup>104</sup>

Article 73(3) specifically enumerates prohibited coastal state enforcement measures, further indicating that the list in paragraph 1 is non-exhaustive. Coastal state penalties for violations of their fisheries regulations “may not include imprisonment . . . or any other form of corporal punishment.”<sup>105</sup> As such, one can reason that what is not prohibited is allowed.

2. *The Language in Article 73 Allocates Broader Enforcement Power to Coastal States Regarding Living Resources than Other LOSC Articles Relating to the Enforcement Jurisdiction of Coastal States*

LOSC grants enforcement jurisdiction to coastal states in several different contexts. In particular, LOSC Articles 220 and 230 address enforcement of marine environment pollution and protection in the EEZ.<sup>106</sup> As compared to these enforcement articles in LOSC, Article 73 grants more expansive rights and discretion to the coastal state. The language is considerably stronger than that of other articles in LOSC that relate to enforcement measures, indicating the drafting committee’s desire to grant the broadest enforcement powers in the case of living resources. This resonates with conservation concerns driving the creation of the EEZ.<sup>107</sup> Enforcement measures relating to protection of the marine environment in the EEZ are restricted to “monetary penalties.”<sup>108</sup> Similarly, enforcement jurisdiction of coastal states for the “protection and preservation of the marine environment” only allows for the detention of vessels, as opposed to the arrest allowed in Article 73.<sup>109</sup>

Article 73 grants discretion to the coastal state to determine the limits of its enforcement jurisdiction pursuant to its sovereign rights over living resources in its EEZ. Unlike Article 220, which requires that there be “clear grounds for believing that a foreign vessel while navigating in the EEZ has committed a violation,”<sup>110</sup> Article 73 allows the state to take measures “as

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<sup>104</sup> See, e.g., *Juno Trader*, *supra* note 58, Separate Opinion of Judges Menshaw and Wolfrum ¶ 3 (“we do not question the right of a coastal State to provide in its laws that fishing vessels . . . may be confiscated”); *Tomimaru*, *supra* note 12, Separate Opinion of Judge Jesus ¶¶ 5-6 (stating that confiscation is allowed by Article 73(1)).

<sup>105</sup> LOSC, *supra* note 2, art. 73(3).

<sup>106</sup> *Id.* arts. 220, 230, in Part XII, “Protection and Preservation of the Marine Environment.”

<sup>107</sup> See *supra* Part II.B.

<sup>108</sup> LOSC, *supra* note 2, art. 230.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* art. 220.

may be necessary” to ensure compliance with its laws and regulations relating to living resources.<sup>111</sup> Indeed, this “as may be necessary” limit to enforcement procedures grants discretion to determine what may be necessary to the coastal state, resulting in a broad grant of power to that state.

The drafting committee repeatedly opted to allow for broader enforcement jurisdiction in Article 73, as compared to those in other LOSC articles providing for enforcement jurisdiction.<sup>112</sup> The term “boarding” implies going on board a ship for enforcement purposes, including the use of armed forces.<sup>113</sup> Article 73 also specifically allows for “arrest” of vessels, rather than limiting state action to “detention.” This is significant because it marks a deliberate permission of *in rem* actions against the ship or vessel under Article 73, which the committee declined to provide in Article 220.<sup>114</sup> The limitation of “inspection” to the examination of certain documents in Article 220 is similarly not present in Article 73, once again indicating broader allowance to the coastal state under the latter article. In sum, when given an option between broad language and limiting language, the committee chose to use broad, power-conferring language in Article 73. It is nevertheless important to note that Article 73 was drafted by a different committee than Articles 220 and 230.<sup>115</sup>

### 3. *The Lotus Case Principle Further Supports This Interpretation of Article 73*

Finally, the *Lotus* case stands for the international law principle that what is not prohibited by international law is allowed, supporting the non-exhaustive interpretation of Article 73(1). In *S.S. Lotus*, the Permanent Court of International Justice (predecessor to the International Court of Justice) held that the burden was on the moving party to establish a positive restraint on the other state’s sovereignty.<sup>116</sup> This has been interpreted to mean that restrictions upon the independence of a state cannot be presumed; rather, the international legal system is permissive—where states may act

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<sup>111</sup> *Id.* art. 73.

<sup>112</sup> See Nordquist vol. II, *supra* note 34, at 792-95.

<sup>113</sup> *Id.* at 794.

<sup>114</sup> *Id.* at 795; LOSC, *supra* note 2, arts. 73, 220.

<sup>115</sup> See Nordquist vol. II, *supra* note 34, at 15 (stating that the second committee was responsible for drafting Articles 2-132, which includes Part V on the EEZ and sections of Articles 297 and 298, which pertain to conflict resolution).

<sup>116</sup> The *S.S. Lotus* Case (Fr. v. Tur.), 1927 P.C.I.J. (ser. A) No. 10, at 15 (Sept. 7 1926).

when not prohibited to do so.<sup>117</sup> In applying this principle to a coastal state's enforcement jurisdiction in its EEZ, one could conclude that the list of prohibited actions in paragraph four indicates that what is not on the list is permitted.

*B. ITLOS Litigation Suggests the Validity of Confiscation Provisions by Allowing Them to Continue Functioning*

In the *Tomimaru* case, ITLOS dealt specifically with confiscation provisions and the relationship between national and international rules.<sup>118</sup> In observing that the confiscation of a vessel must not upset the balance between coastal and flag states' rights, ITLOS implied that confiscation provisions are allowable under LOSC.<sup>119</sup> This implication is further supported by the final judgment: in *Tomimaru*, the domestic court of the coastal state's final decision regarding the confiscation of the vessel rendered the flag state's application for "prompt release" without object.<sup>120</sup> Thus, the Russian Supreme Court's judgment was final.

Unlike the *Tomimaru* case, in which the domestic proceedings were final before ITLOS rendered its judgment, the *Volga* proceedings were pending in Australian federal court at the time of judgment.<sup>121</sup> Ostensibly, this is why the "prompt release" action was not deemed rendered without object by the finality of the confiscation action as in the *Tomimaru* case.<sup>122</sup> ITLOS is preserving its own discretion in this regard, relying on the balancing of the coastal and flag states' rights on a case-by-case basis instead of establishing a bright line rule.

Still, the *Tomimaru* judgment suggests some limitations on coastal state forfeiture provisions. Even though vessel forfeiture appears to be lawful according to ITLOS, there are limitations imposed on this type of measure. Most importantly, the confiscation measure must not upset the balance between coastal and flag states' rights.<sup>123</sup> This view, espoused by ITLOS, is consistent as one of the guiding principles in the EEZ regime established in LOSC.<sup>124</sup> Although no legal instrument provides specific

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<sup>117</sup> Daniel Erasmus Kahn, *Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations*, 18 EUR. J. INT'L L. 145, 157, n.62 (Feb. 2007).

<sup>118</sup> Wolfrum UN Statement, *supra* note 13, ¶ 23.

<sup>119</sup> *Tomimaru*, *supra* note 12, Judgment ¶ 75.

<sup>120</sup> *Id.* Judgment ¶ 79.

<sup>121</sup> *Volga*, *supra* note 58, Judgment ¶ 52.

<sup>122</sup> *Tomimaru*, *supra* note 12, Judgment ¶¶ 78, 82.

<sup>123</sup> *See id.* Judgment ¶ 75.

<sup>124</sup> *See generally supra* Part II.B.

rules to follow to conserve this balance within a confiscation proceeding,<sup>125</sup> ITLOS judgments and separate opinions offer some guidance as to what to look for in ensuring adequate protection of the flag state's rights. These documents, along with a careful reading of Article 73, provide a framework within which to formulate a test for determining the validity of a forfeiture provision.

C. *A Suggested Test for Determining the Validity of a Forfeiture Provision*

Recent ITLOS decisions, undisputed state practice, and the language in Article 73 demonstrate that the confiscation of vessels as an enforcement measure within a coastal state's EEZ conforms with international law. An analysis of these same sources provides a possible test for determining the legality of such a provision.

1. *A Confiscation Provision May Not Have the Effect of Denying a Flag State Access to a "Prompt Release" Action*

Although the effect of confiscation may vary, such a provision would certainly be invalid if it had the effect of preventing the flag state from invoking its right to a "prompt release" action before ITLOS. By prohibiting certain enforcement measures and ensuring a flag state's right to a "prompt release" action, Article 73 safeguards the balance of interest between coastal and flag states.<sup>126</sup> It is logical that a coastal state measure undertaken pursuant to its enforcement jurisdiction granted by Article 73 may not undermine a flag state's access to a "prompt release" action. ITLOS stated that the forfeiture provision must not simply be a means to prevent the flag state from bringing a "prompt release" action.<sup>127</sup> The language in this dicta introduces an element of intent, pointing to the reasoning behind forfeiture legislation as helpful in the analysis of legality. The forfeiture proceeding, therefore, must not interfere with the function of Article 292, nor must it intend to.<sup>128</sup> This is not to say that a law that unintentionally short-circuited "prompt release" would be valid; rather, the intention of a law can assist in determining the effect it may have.

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<sup>125</sup> See *supra* Parts II.B, II.C.

<sup>126</sup> LOSC, *supra* note 2, art. 73; see *supra* Part II.C.

<sup>127</sup> *Tomimaru*, *supra* note 12, Judgment ¶ 76.

<sup>128</sup> See *id.* Judgment ¶¶ 75-76.

According to ITLOS, a final confiscation action in a domestic forum renders a “prompt release” action without object.<sup>129</sup> This conforms with ITLOS’s previous assertion that it is not “an appellate forum against a decision of a national court,”<sup>130</sup> and with international tribunals’ treatment of complementarity: a traditional policy of non-interference with domestic adjudication.<sup>131</sup> In contrast, ITLOS declined to hold that it could not hear “prompt release” actions related to cases pending in domestic fora, albeit amid dissent.<sup>132</sup> This necessarily follows from the requirement that a forfeiture provision not impede an Article 292 action. If a case pending in a domestic forum estopped ITLOS’s ability to hear a related “prompt release” claim, the forfeiture action would necessarily affect the operation of Article 292.

Similarly, Russia’s contention in *Tomimaru* that the nationality of a vessel is affected by a confiscation measure cannot stand to the requirement that a forfeiture provision not affect the operation of Article 292.<sup>133</sup> Russia argued that the flag state of the vessel was no longer Japan because the vessel had been forfeited to Russia.<sup>134</sup> Because this would effectively prevent the original flag state from bringing a “prompt release” action, upsetting the balance between coastal and flag states’ rights, ITLOS rejected this argument.<sup>135</sup> Article 92 states that a vessel may not change its flag in the course of a voyage, except in the case of a “real transfer of ownership or change of registry.”<sup>136</sup> Even though this seems to indicate a connection between ownership and nationality, it does not prescribe such a connection. Because the nationality of a vessel does not depend on the nationality of the owner,<sup>137</sup> a coastal state can claim a vessel as forfeited without changing its nationality. Even if the coastal state is the new owner of the vessel, it does not automatically become the flag state. To the contrary, interpreting a forfeiture provision to affect the nationality of a vessel would be inconsistent

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<sup>129</sup> *Id.* Judgment ¶¶ 76, 81.

<sup>130</sup> The *Monte Confurco* Case (Seychelles v. Fr.), I.T.L.O.S. Case No. 6 (Dec. 18 2000), Judgment ¶ 72.

<sup>131</sup> See *supra* note 76 and accompanying text.

<sup>132</sup> See *Tomimaru*, *supra* note 12, Separate Opinion of Judge Lucky at 10, 13 (stating that he would hold that a forfeiture claim pending before a domestic forum renders a prompt release action without object).

<sup>133</sup> See *Tomimaru*, *supra* note 12, Argument ¶ 42.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* Judgment ¶ 80.

<sup>136</sup> LOSC, *supra* note 2, art. 92(1).

<sup>137</sup> See *id.* art. 92 (setting forth requirements for establishing the nationality of a vessel without making mention of ownership).

with LOSC. Because nationality and ownership of vessels are distinct, it is possible to conclude that forfeiture does not affect a vessel's nationality.

2. *The Forfeiture Procedure Must Grant Effective Access to a Domestic Forum in Which to Challenge the Forfeiture, Ensuring Some Due Process*

ITLOS has indicated that a confiscation measure that frustrates the possibility of recourse to domestic remedies would violate international standards of due process.<sup>138</sup> Accordingly, a forfeiture provision must provide concerned parties recourse to available domestic remedies. Giving the flag state notice and time to respond to the action, in conformity with international standards for due process of law, will help ensure that this recourse is effective.

Article 73(4) requires coastal states to provide notice to the flag state in case of arrest or detention, and of any further punitive measures it takes.<sup>139</sup> The notification must take place via "appropriate channels."<sup>140</sup> As such, a notice requirement should figure into the due process analysis.

Like all enforcement measures, a forfeiture provision must not deny due process of law. ITLOS noted in the *Tomimaru* case that Japan did not claim that the Russian proceedings were inconsistent with international standards of due process of law, implying that had the argument been made, ITLOS would have considered the issue.<sup>141</sup> In his separate opinion, Judge Lucky reasoned that Russia's proceedings *were* consistent with international standards of due process and recommended that ITLOS adopt a presumption in favor of a state's domestic proceedings.<sup>142</sup> In contrast, separate opinions in the *Juno Trader* case suggested that the Guinean proceedings did not provide due process of law.<sup>143</sup> Because ITLOS dismissed that action on procedural grounds, the issue was not litigated. Still, ITLOS seems to conflate a due process analysis with the availability of a domestic forum in which to challenge the forfeiture, and the adequacy of that forum.

Although there is no test for the effectiveness of the access to the domestic courts, ITLOS suggests that the Russian proceedings in the *Tomimaru* were sufficient, whereas those in the *Juno Trader* were not. This spectrum, combined with a notice requirement, provides a framework within

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<sup>138</sup> See *Tomimaru*, *supra* note 12, Judgment ¶ 79.

<sup>139</sup> LOSC, *supra* note 2, art. 73(4).

<sup>140</sup> *Id.*

<sup>141</sup> *Tomimaru*, *supra* note 12, Judgment ¶ 79.

<sup>142</sup> *Id.* Separate Opinion of Judge Lucky at 7.

<sup>143</sup> *Juno Trader*, *supra* note 58.

which to analyze the effectiveness of the domestic courts as a forum in which to challenge a vessel forfeiture.

The fact that Russia allowed Japan to contest the forfeiture in its court system aided ITLOS in ruling that the “prompt release” was without object. In fact, ITLOS found it significant that Japan had waited so long before bringing the application to ITLOS.<sup>144</sup> A flag state’s prolonged delay defeats the purpose behind a “prompt release” action—“prompt release” is meant to ensure timeliness of process. Several separate opinions also suggested that the access to the Russian courts aided the determination that there was no due process violation.<sup>145</sup>

In sum, a vessel forfeiture provision, to be legal, must not deny a flag state’s right to an Article 292 “prompt release” action and must grant effective access to a domestic forum in which to contest the forfeiture of the vessel. Although these elements overlap, response to litigation brought before ITLOS suggests that they should factor into the analysis separately. As the “effectiveness” test of the access to the domestic forum helps to ensure compliance with international due process standards, the right to a “prompt release” action similarly helps to balance coastal and flag states’ rights.

#### IV. AUSTRALIA’S FORFEITURE PROVISION CAN AND SHOULD BE INTERPRETED IN CONFORMITY WITH THIS TEST

FMA section 106A provides for the automatic forfeiture of vessels fishing illegally.<sup>146</sup> Part IV of this Comment applies the test established in Part III to Australia’s statute, and argues that section 106A does not deny a flag state access to an Article 292 “prompt release” action and that it provides a domestic forum in which an interested party may effectively contest the forfeiture. Because the automatic nature of the Australian statute deserves special attention, a separate analysis of the effect of this feature is appropriate prior to the application of the test.

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<sup>144</sup> See *Tomimaru*, *supra* note 12, Judgment ¶ 77.

<sup>145</sup> See *id.* Judgment ¶ 76 (suggesting that ITLOS may engage in a due process analysis when there have been domestic proceedings); *but see id.*, Declaration of Judge Nelson and Separate Opinion of Judge Jesus ¶ 9(b) (reasoning that complementarity issues bar ITLOS from making these types of “value judgments”).

<sup>146</sup> See *supra* Part II.D.

A. *The Automatic Nature of the Provision, Albeit Untraditional, Is Not Dispositive of Legality*

Although the automatic nature of Australia's forfeiture provision could seem too extreme to meet international standards for due process, both the motivation behind the amendment and the subsequent application of the provision mitigate such concerns. The motivation behind this legislation is significant in that, according to ITLOS dicta, the reason for its existence cannot be to prevent "prompt release" actions.<sup>147</sup> Circumstances indicate that the FMA amendment was prompted by one specific case, the *Aliza Glacial* litigation.<sup>148</sup> In *Aliza Glacial*, because Australia's interest in the vessel was merely a potential interest dependent on the conviction of a crew member, the Australian courts found it subject to the interest of the mortgage holder, a Norwegian bank.<sup>149</sup> As such, the purpose of the automatic nature of the forfeiture provision is to ensure that Australian conservation and management enforcement measures, such as investigations and judicial action, are not frustrated by third parties such as foreign mortgagees,<sup>150</sup> and not to frustrate flag state actions for "prompt release."<sup>151</sup>

Similarly, the effect of the automatic nature of the provision is not to prevent owners or flag states from contesting forfeiture. Indeed, the AFMA, charged with applying forfeitures, has explicitly stated its understanding that Australia must comply with LOSC.<sup>152</sup> In the same vein, the AFMA lays out procedures for challenging forfeiture within Australia, if the owner or another interested party wishes to do so, demonstrating conformity with at least basic notions of due process.<sup>153</sup>

B. *The Australian Legislation Does Not Deny a Flag State Access to a "Prompt Release" Action*

The FMA amendment providing for automatic vessel forfeiture was intended to hold illegal fishing beneficiaries responsible, not to prevent

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<sup>147</sup> See *supra* Part III.C.

<sup>148</sup> *Bergensbanken ASA v. The Ship "Aliza Glacial,"* Fed. Ct. of Austl., (unreported decision Mar. 20 1998, Ryan, J.); *Bergensbanken ASA v. The Ship "Aliza Glacial"* (1998) 1642 F.C.A. 4 [hereinafter *Aliza Glacial*]; Rachel Baird, *Coastal State Fisheries Management: A Review of Australian Enforcement Action in the Heard and MacDonal Islands Australian Fishing Zone*, 9 DEAKIN L. REV. 91, 104 (2004).

<sup>149</sup> *Aliza Glacial*, *supra* note 148.

<sup>150</sup> *Id.* ¶ 48 (citing Explanatory Memorandum to the Fisheries Legislation Amendment Bill (No. 1) 1999, 2006 FCAFC 75).

<sup>151</sup> Maritime law recognizes a variety of contract and tort liens on vessels. Protecting these third party interests could be an issue in this legislation; however, it is beyond the scope of this Comment.

<sup>152</sup> See *infra* note 164 and accompanying text.

<sup>153</sup> See *infra* Part IV.C.

“prompt release” actions.<sup>154</sup> Indeed, successful “prompt release” actions continued to be brought after the 1999 amendment to the FMA. In particular, the *Volga* case litigated in ITLOS demonstrates that Australia does not intend to deprive flag states of their right to “prompt release” actions. When the *Volga* was seized and forfeited, Russia, the flag state, instituted “prompt release” proceedings in ITLOS.<sup>155</sup> In simply arguing that the bond it was requesting was reasonable, Australia did not in any way attempt to challenge Russia’s ability to bring the action.<sup>156</sup> In addition, Australia released the crew on bail, in compliance with Article 73(3).<sup>157</sup> This could be recognized as a demonstration of good faith.

Australian courts have also suggested that the automatic nature of the confiscation provision is not intended to disable a flag state’s “prompt release” action.<sup>158</sup> Instead, it gives Australia the ability to seek recognition of its title to the vessel in other jurisdictions through foreign legal processes.<sup>159</sup> The court further proposed that this could offset the problem of IUU fishers fleeing to the high seas by making the title to the vessel “insecure” in any jurisdiction that would recognize Australia’s title, helping to close the accountability gap in IUU fishing.<sup>160</sup> This view has been espoused by Australian politicians and fisheries administrators.<sup>161</sup> Senator Ian MacDonald, Australian Fisheries Minister from 2002 until 2006, suggested that seizing vessels in foreign ports as forfeited would be a desirable method of upholding the automatic forfeitures.<sup>162</sup> Importantly, he also indicated that this could and would be done with international cooperation.<sup>163</sup>

Although the AFMA’s position on the issue of vessel nationality is unclear, it has stated that Australia is subject to LOSC, which provides obligations consistent with only certain interpretations of nationality rules. In its 2006-2007 yearly report, the AFMA referred to “the *previously* Uruguayan flagged *Viarsa I.*”<sup>164</sup> This could suggest, somewhat

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<sup>154</sup> See *supra* Part IV.A.

<sup>155</sup> *Volga*, *supra* note 58, Factual Background, Judgment ¶¶ 30-54.

<sup>156</sup> *Id.* Judgment ¶ 28.

<sup>157</sup> *Id.* Judgment ¶ 46; LOSC *supra* note 2, art. 73.

<sup>158</sup> See *Olbers*, *supra* note 74, ¶ 77.

<sup>159</sup> *Id.* ¶ 76.

<sup>160</sup> *Id.*

<sup>161</sup> See Sean Cowan, *Australian Bid to Seize Fish Pirates*, THE WEST AUSTRALIAN, Mar. 15, 2004, at 10.

<sup>162</sup> *Id.* See also Torrance Mendez, *Court Clears Toothfish Ship Forfeit*, THE WEST AUSTRALIAN, Mar. 13, 2004, at 61.

<sup>163</sup> Mendez, *supra* note 162.

<sup>164</sup> AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY, ANNUAL REPORT 2006-07 107 (2007) (emphasis added).

problematically, that the administration is claiming that the nationality of the vessel *has* changed as a result of the forfeiture. However, this same administrative body also asserted that “[u]nder [LOSC], Australia is obliged to return vessels to owners on payment of a bond,”<sup>165</sup> indicating the AFMA’s understanding that Australia is bound to allow “prompt release” actions by the flag states of vessels seized by Australia as automatically forfeited. It also means that Australia is not claiming that a change in ownership results in a change in nationality. In the *Viarsa I* case, Australia may have changed the registry of the vessel once the court dismissed the owner’s challenge to the automatic forfeiture. This way Australia’s title to the vessel, although valid pending a decision on the challenge, is still subject to certain rights possessed by the previous owner and flag state. As such, a coastal state could legitimately change the nationality of a forfeited vessel once the forfeiture is in fact final. It seems that the AFMA is making a distinction between its rights after an automatic forfeiture but prior to a final ruling and its rights after a final ruling on the forfeiture, thus conserving the original flag state’s rights to a “prompt release” action.

Section 106A of the FMA, providing for the automatic forfeiture of a vessel and its catch upon the commission of the listed infractions in the EEZ, can be interpreted to conform to the standards set by ITLOS, but Australia must do this.

*C. Australia’s Forfeiture Provision Establishes Procedures to Ensure That the Access to Its Domestic Courts Is Effective*

The FMA provides for effective notice, response time, and sets out specific procedures through which to challenge the forfeiture of a vessel, ensuring a minimum standard of due process in the Australian automatic vessel forfeiture provision. Furthermore, a vessel may only be seized if there are reasonable grounds to believe that it has indeed been used in committing a fisheries offense.<sup>166</sup>

The Australian forfeiture provision requires officials to provide “effective notice” to the owner of the forfeited vessel upon seizure.<sup>167</sup> Because Article 73(4) requires the notice to be given to the flag state through “appropriate channels,” notice to the owners of the vessel is arguably sufficient. Owners are aware of the “prompt release” proceedings and the necessary role of the flag state, and will therefore notify the flag state of the

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<sup>165</sup> *Id.* at 175.

<sup>166</sup> FMA, *supra* note 7, § 84(1)(g)(ii).

<sup>167</sup> *Id.* § 106C.

coastal state action.<sup>168</sup> Although the statute would certainly be stronger if it required notice to be given to the flag state specifically, notice to the owner is certainly effective, and arguably an “appropriate channel.” As such, the notice Section 106C of the Act prescribes complies with Article 73(4).

This notification method is especially appropriate in light of the option for a party to bring a “prompt release” action *on behalf* of the flag state of a vessel that exists in Article 292.<sup>169</sup> This grants private parties access to a forum which is traditionally reserved for states. Many “prompt release” actions have been brought pursuant to this quasi-private right to act on behalf of the flag state. In fact, all but one of the Patagonian toothfish “prompt release” cases were brought “on behalf” of the flag state, and not by the flag state itself.<sup>170</sup> This supports the claim that notifying the owner of a vessel will result in effective notification of the flag state because the owner and flag state must work together.

In addition, the FMA gives owners thirty days to file a claim contesting the forfeiture,<sup>171</sup> effectively giving the owner the time to respond (which is suggested as a requirement in ITLOS dicta).<sup>172</sup> Once a claim is filed, the owner must institute proceedings in Australian courts within two months.<sup>173</sup> The two months response time provided by FMA Section 106F allows the owner, the flag state, or other interested parties time to seek enforcement of their claim contesting vessel forfeiture in Australian courts.

The *Viarsa I* case exposes the difference in evidentiary standards between criminal and civil cases. In that case, the difference in the standard required to prove the alleged violation was dispositive of the outcomes of the civil and criminal proceedings. In fact, the legality of this forfeiture could depend on the judge's reasoning in his dismissal of the claim. This case is interesting because evidence of the violation was not sufficient to convict the crew on criminal charges, supporting the owner's claim that the forfeiture was unlawful. Because the claim was dismissed, the standard of proof applied by the judge in the civil forfeiture proceeding must have been lower than for the criminal proceeding. While there was no judgment on the dismissal of the claim, there is a paper trail of hearings and orders entered, demonstrating the owner's recourse to the domestic courts in which to

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<sup>168</sup> LOSC, *supra* note 2, art. 292(2). “The application for release may be made only by or on behalf of the flag State of the vessel.” *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Tullio Treves, *Flags of Convenience Before the Law of the Sea Tribunal*, 6 SAN DIEGO INT'L L. J. 179, 184 (2004) (former ITLOS Judge finding this right of action somewhat problematic).

<sup>171</sup> FMA, *supra* note 7, § 106F.

<sup>172</sup> *Tomimaru*, *supra* note 12, Judgment ¶ 76.

<sup>173</sup> FMA, *supra* note 7, § 106F; *see supra* Part II.D.

challenge the forfeiture.<sup>174</sup> Still, it would be interesting to know whether the dismissal was based on a finding that a violation did in fact occur. The FMA does require a finding of reasonable belief that a violation did occur prior to seizing a vessel, mitigating these concerns.<sup>175</sup>

Still, unlike Guinea-Bissau's confiscation procedures at issue in *Juno Trader*, the Australian forfeiture provision establishes procedures through which ship owners, flag states, and other interested parties can challenge the legal or factual bases for the administrative decision giving rise to forfeiture. As such, it is unlikely that ITLOS would find Australia's notice procedures inadequate or its domestic proceedings not in conformity with international standards of due process.

*D. Australian Case Law Demonstrates That the Forfeiture Legislation Grants Effective Access to a Domestic Forum in Which to Challenge the Confiscation*

The FMA sets forth the procedures through which to resolve a dispute over a forfeiture action.<sup>176</sup> Not only does it provide an avenue for contesting forfeiture,<sup>177</sup> but case law amply demonstrates that Australia grants owners of confiscated vessels and other interested parties access to a domestic forum. Parties may challenge the forfeiture on legal grounds as well as factual grounds. They may either use the forfeiture contest procedure to establish that the relevant fisheries offense did not occur or use the Australian domestic courts to challenge a legal aspect of the statute. Indeed, several cases have been litigated in this manner in the Australian federal courts, contesting both legal and factual determinations.<sup>178</sup>

In *Scandinavian Bunkering AS v. Bunkers on Board the Ship SV Taruman and Others*,<sup>179</sup> the plaintiffs questioned the operation of FMA Section 106A. The issue in that case was whether the fuel bunkers on board the confiscated vessel were legally confiscated as part of "the boat" as the

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<sup>174</sup> *Navalmar SA v. The Commonwealth of Austl.*, No. (P)WAD253/2003 (2007) (order dismissing application and ordering applicant to pay costs), available at <http://esearch.fedcourt.gov.au/Esearch> (follow "Search by File Number" hyperlink).

<sup>175</sup> FMA, *supra* note 7, § 84(1)(ga) (allowing officers to seize things they have reasonable grounds to believe are forfeited).

<sup>176</sup> *See supra* Part II.D.

<sup>177</sup> *Id.*

<sup>178</sup> *See, e.g., Aliza Glacial, supra* note 148; *Olbers, supra* note 74; *Scandinavian Bunkering AS v. Bunkers on Board the Ship FV "Taruman" and Others* (2006) 231 A.L.R. 605.

<sup>179</sup> *Scandinavian Bunkering AS*, 231 A.L.R. at 605.

term is used in the governing statute.<sup>180</sup> The court determined that they were part of the boat and as such legally forfeited along with the vessel.<sup>181</sup>

The corporate owners of the *Volga*, Olbers, also brought several suits in Australian Federal Court, culminating in the dismissal of Olbers' appeal to the full federal court.<sup>182</sup> The Olbers proceedings in Australian courts were similar to the Russian proceedings in *Tomimaru*, which were impliedly upheld by the entire ITLOS, and explicitly by Judge Lucky.<sup>183</sup> Like the Russian plaintiffs, Olbers chose to litigate in the domestic forum. Olbers advanced multiple arguments ranging from the constitutionality of Section 106A to contesting the factual determination that the *Volga* had been fishing in the Australian EEZ.<sup>184</sup> As demonstrated, foreign owners and other interested parties are granted access to the Australian domestic courts to challenge legal and factual issues related to vessel forfeiture.

*E. Australia Should Ensure That Interpretation of FMA Section 106A Accords with International Law*

Although issues relating to hot pursuit as defined by Article 111 are among those presented by commentators, these are not detrimental to the legality of the forfeiture provision. It is in Australia's interest to make certain that its forfeiture provision is interpreted consistently with LOSC, as this will promote international cooperation in effective fisheries conservation and management.<sup>185</sup>

Some have claimed that the *Olbers* decisions suggest a departure from LOSC compliance on the part of Australia, especially its conformity with Article 111, relating to hot pursuit.<sup>186</sup> In *Olbers*, the owners submitted that at the time of the boarding, Australia had not complied with all the elements of hot pursuit. Although Australia responded in kind, factually arguing that it had satisfied these elements, Judge French reasoned that it did not matter because Australia was the owner of the boat when the officers boarded it. Expanding this reasoning to claim that Australia may board vessels on the

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See *Olbers*, *supra* note 74.

<sup>183</sup> See *supra* Part II.C.

<sup>184</sup> See *Olbers*, *supra* note 74.

<sup>185</sup> See Australian Fisheries Management Authority, Policy and Planning, <http://www.afma.gov.au/management/policy/default.htm> (last visited on Apr. 15, 2008) (enumerating AFMA's goals).

<sup>186</sup> See, e.g., Warwick Gullett, *Developments in Australian Fisheries Law: Setting the Law of the Sea Convention Adrift?*, 21 E.P.L.J. 169 (2004); Warwick Gullett, *Smooth Sailing for Australia's Automatic Forfeiture of Foreign Fishing Vessels*, 22 E.P.L.J. 169 (2005).

high seas it has reason to believe were violating its fisheries laws within its EEZ would not conform with international law, and should be avoided. Significantly, Australia did not argue for this interpretation in *Olbers*, and the statements on hot pursuit were not part of the holding of the case.<sup>187</sup>

Australia's reputation for overly strict enforcement of fisheries laws may have played a role in the jury's decision to acquit the crew in the *Viarsa I* criminal proceedings. The crew asserted that their flight from Australia's EEZ stemmed from their concern that Australia would undertake illegal enforcement action. Evidence of extreme enforcement measures not in compliance with LOSC would continue to undermine Australia's reputation and discourage international cooperation.

The Federal Court's dismissal of the owner of the *Viarsa I*'s challenge to the forfeiture of that vessel could be problematic. In fact, the legality of Australia's actions could depend on the reasoning in the dismissal of that claim. Although the FMA requires that there be reasonable grounds for suspicion of the alleged offense for officials to seize a vessel, thus ensuring some minimum factual showing for this procedure, given the high profile of the case, it would be beneficial to publish some sort of reasoning on the merits of the case. News reports have claimed that the Australia forfeiture clause is uncontestable.<sup>188</sup> This is not the intent or the effect of the legislation,<sup>189</sup> and there is no reason not to allay these allegations. The *Viarsa* plaintiffs filed several motions and there were multiple hearings.<sup>190</sup> Accordingly, the Australian court should make clear the reasons behind its dismissal of the challenge by issuing an opinion rather than a simple order.

## V. CONCLUSION

Given the choice, Australia should interpret its automatic forfeiture provision to conform to international law in order to maintain international credibility and reciprocal treatment. Such an interpretation would further Australia's goal of attaining a level of sustainable fisheries management worldwide. In general, vessel forfeiture is a valid coastal state enforcement measure to effectively deter illegal fishing in its EEZ. Although the automatic nature of Australia's forfeiture provision raises due process

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<sup>187</sup> See *Olbers*, *supra* note 74.

<sup>188</sup> See, e.g., *Aussie Forfeited Rogue Longliner Viarsa Broken Up in India*, MERCOPRESS, Jan. 16, 2008, <http://www.mercopress.com/vernoticia.do?id=12441&formato=pdf> (last visited May 12, 2008) (stating "AFMA annually disposes a number of foreign vessels forfeited to the Australian government on a non-contestable basis").

<sup>189</sup> See *supra* Part IV.A.

<sup>190</sup> See *supra* note 174 and accompanying text.

concerns, the procedures established by the statute effectively safeguard the rights of the owners and flag states. Likewise, the AFMA's assertion that Australia remains bound by "prompt release" requirements protects the rights of a seized vessel's flag state. Finally, Australia's domestic courts are open to foreign vessel owners or states wishing to challenge the forfeiture of a vessel. As such, Section 106A of the FMA satisfies the proposed test for legality.

Although the dismissals without published judgments of the appeals of vessel owners such as *Olbers (Volga)* and *Navalmar (Viarsa)* leave open questions about the legality of the Australian forfeiture provision, interpretation in conformity with international law is possible. It is in Australia's interest to clarify the reasoning applied in these final decisions regarding vessel forfeiture in order to maintain the international legitimacy of its maritime regulations.