

2004

Developments in Australian fisheries law: setting the law of the sea convention adrift?

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Gullett, Warwick: Developments in Australian fisheries law: setting the law of the sea convention adrift? 2004, 169-176.
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Developments in Australian fisheries law: setting the law of the sea convention adrift?

Abstract

Significant developments have recently occurred in the ongoing campaign by the Australian Government to combat illegal foreign fishing in Australian waters, particularly against Patagonian toothfish poaching. On 22 March 2004 significant amendments to Australia's fisheries laws were passed by the Commonwealth Parliament to improve regulatory efficiency and combat illegal foreign fishing in the Australian Fishing Zone (AFZ). In addition, on 12 March 2004 the Federal Court of Australia delivered a landmark decision in *Olbers v Commonwealth of Australia (No 4)* [2004] FCA 229 concerning the automatic forfeiture of foreign vessels to the Commonwealth of Australia at the time when a fisheries offence occurs rather than upon apprehension. It is argued that the Federal Court's decision and the amendments increase the disparity between measures Australia has adopted within its domestic legal regime to deter illegal foreign fishing in the AFZ and its responsibilities under the UN Convention on the Law of the Sea (LOSC).

Keywords

convention, adrift, developments, law, australian, sea, setting, fisheries

Disciplines

Law

Publication Details

Gullett, W, *Developments in Australian fisheries law: setting the law of the sea convention adrift?*, *Environmental and Planning Law Journal*, 21(3), 2004, 169-176. Copyright Lawbook Co 2004.

Editorial commentary

DEVELOPMENTS IN AUSTRALIAN FISHERIES LAW: SETTING THE LAW OF THE SEA CONVENTION ADRIFT?

Significant developments have recently occurred in the ongoing campaign by the Australian Government to combat illegal foreign fishing in Australian waters, particularly against Patagonian toothfish poaching. On 22 March 2004 significant amendments to Australia's fisheries laws were passed by the Commonwealth Parliament to improve regulatory efficiency and combat illegal foreign fishing in the Australian Fishing Zone (AFZ).¹ In addition, on 12 March 2004 the Federal Court of Australia delivered a landmark decision in *Olbers v Commonwealth of Australia (No 4)* [2004] FCA 229 concerning the automatic forfeiture of foreign vessels to the Commonwealth of Australia at the time when a fisheries offence occurs rather than upon apprehension. It is argued that the Federal Court's decision and the amendments increase the disparity between measures Australia has adopted within its domestic legal regime to deter illegal foreign fishing in the AFZ and its responsibilities under the *UN Convention on the Law of the Sea (LOSC)*.²

Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Act 2004

The first amendment Act³ is aimed squarely at deterring illegal foreign fishers from operating in the AFZ, particularly those who target the prized Patagonian toothfish in the AFZ surrounding Australia's territory of Heard and MacDonal Islands approximately 2,200 nautical miles southwest of Western Australia. The amending Act increases the maximum penalty available under the *Fisheries Management Act 1991* (Cth) (FM Act) for foreign fishing offences committed in the AFZ with respect to vessels over 24 metres from \$550,000 to \$825,000. For vessels of less than 24 metres (such as the artisanal vessels often arrested in Australia's northern waters), the maximum fine remains at \$550,000. The high prices that can be obtained for Patagonian toothfish and the difficulty of ensuring compliance with domestic fisheries laws in remote areas combine to present a significant challenge for Australia to deter illegal foreign fishing. In recent years Australia has bolstered its surveillance and enforcement capabilities⁴ and has successfully apprehended a number of foreign vessels in the Southern Ocean for alleged illegal fishing in the AFZ, although concern remains that the scale of illegal fishing in the region means that many suspected illegal fishing vessels are not apprehended. The most recent arrest was of the Uruguayan-flagged *Maya V* in January 2004. Australia incurs significant costs to police these waters, especially for arrests that can only be effected after a "hot pursuit". In two recent cases Australia incurred expenses running into millions of dollars after reportedly the longest hot pursuits in history. In 2001 Australia arrested the Togo-flagged *South Tomi*

¹ Australia's fishing laws are a complex mosaic of Commonwealth, State and Territory laws. A good general reference for these laws is Haward M, "The Commonwealth in Australian fisheries management: 1955-1995" (1995) 2 *Australasian Journal of Natural Resources Law and Policy* 313. The *Fisheries Management Act 1991* (Cth) and *Fisheries Administration Act 1991* (Cth) establish the major Commonwealth fisheries laws, which, as a general rule of thumb (but with many exceptions), apply to fisheries outside of the 3 nautical mile limit of State coastal waters and waters around Australia's external territories to the limit of the AFZ.

² *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3; ATS 1994 No 31; ILM 21 p 1261 (entered into force for Australia and generally 16 November 1994). Significantly, the United States has yet to ratify LOSC.

³ Received Royal Assent 1 April 2004; ss 1-3 effective as of 1 April 2004, Sch 1 on Proclamation or after six months.

⁴ In November 2003 Australia signed a treaty with France to improve cooperation in surveillance of suspected illegal fishing vessels ("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 Island and the McDonald Islands"). In December 2003 the Howard Government announced the allocation of additional funding to police remote fisheries including the leasing of an ice-strengthened vessel with a deck-mounted machine gun to patrol areas of the AFZ in which Patagonian toothfish are targeted. See Alexander Downer (Minister for Foreign Affairs) "Maritime agreement sends a strong message to illegal fishing operators" (Press release, 24 November 2003) and Ian MacDonald (Minister for Fisheries) "Permanent armed patrols to toughen border protection in Southern Ocean" (Press release, 17 December 2003).

after a 3,300 nautical mile hot pursuit, and in 2003 Australia arrested the Uruguayan-flagged *Viarsa I* after a hot pursuit of nearly 4,000 nautical miles.⁵

The amending Act attempts to recoup the expenses incurred in hot pursuits from the owners of arrested foreign vessels. The Australian Fisheries Management Authority (AFMA), which administers the FM Act, is given the authority to include in any bond amount set for the release of a detained foreign vessel the reasonable costs of pursuit and apprehension of the vessel. The amending Act defines "pursuit costs" as "costs reasonably incurred by or on behalf of the Commonwealth in respect of pursuit activities conducted in respect of the boat".⁶ This is further defined to include costs incurred by governments of foreign countries that assist in the pursuit or apprehension of the vessel.⁷ Section 106L provides that costs will commence from the time the master of a boat fails to stop the boat in accordance with a requirement that it do so and, as a result of that failure, pursuit activities are taken. The debt stops accruing once the boat is brought to a designated "processing place"⁸ in Australia (likely to be the nearest appropriate Australian port). AFMA is also authorised to develop regulations to determine principles for calculating the costs incurred that are directly attributable to the pursuit.⁹ A process is provided for contesting the debt in the Federal Court on the grounds that either the vessel was not used in an offence against the FM Act or that some or all of the costs were not reasonably incurred. The burden of proof is placed on the Commonwealth to establish on the balance of probabilities that pursuit costs are reasonable.¹⁰

The wording of the section to define pursuit costs as those "reasonably" incurred is intended to ensure consistency with Australia's obligation under LOSC to promptly release detained foreign vessels upon the posting of a "reasonable bond or other security".¹¹ In December 2002 Australia received a setback to its efforts to increase its deterrence measures for illegal foreign fishing when the International Tribunal for the Law of the Sea (ITLOS) ruled that Australia had breached its prompt release obligation when it set non-financial conditions for the release of the detained Russian fishing vessel *Volga*.¹² The amending Act is a bold attempt to further deter illegal foreign fishing and cover part of the cost of monitoring, control and surveillance operations by providing a mechanism to increase the sums that can be sought from foreign operators in a manner consistent with LOSC. However, it is a moot point whether the new section is consistent with LOSC (or rather, whether ITLOS would be prepared to consider that it is). The issue of recovering pursuit costs has not been tested in any of the prompt release cases heard by ITLOS and it was not an issue considered during the drafting process of LOSC. If, for example, Australia seeks to recover pursuit costs from the owner of an arrested foreign vessel in the order of A\$4 to \$5 million, as envisaged by the Minister for Fisheries, Senator Ian MacDonald,¹³ this will undoubtedly be tested in ITLOS. ITLOS has not shown itself to be sympathetic to novel interpretations of the bond requirement in LOSC, despite increasing

⁵ See Molenaar EJ, "Multilateral hot pursuit and illegal fishing in the Southern Ocean: the pursuits of the *Viarsa I* and the *South Tomi*" (2004) 19 *International Journal of Marine and Coastal Law* (forthcoming) and Rothwell DR and Stephens T, "Illegal Southern Ocean fishing and prompt release: balancing coastal and flag state rights and interests" (2004) 53 *International and Comparative Law Quarterly* 155.

⁶ *Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Act 2004*, s 106J.

⁷ *Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Act 2004*, s 106J. This is a relatively frequent occurrence. In recent years France, South Africa and the United Kingdom have assisted Australian government vessels to arrest foreign fishing boats suspected of illegal fishing activity in the AFZ.

⁸ *Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Act 2004*, ss 106J and 106L(1)(c).

⁹ *Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Act 2004*, s 106K.

¹⁰ *Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Act 2004*, s 106S.

¹¹ LOSC, Art 73(2).

¹² *The "Volga" Case (Russian Federation v Australia) (Prompt Release) (Judgment)* (2002) ITLOS Case No 11. The non-financial conditions set included the requirements that information be provided about the beneficial owners of the vessel and that the vessel carry a vessel monitoring system. See Gullett W, "Prompt release procedures and the challenge for fisheries law enforcement: the judgment of the International Tribunal for the Law of the Sea in the *Volga Case* (Russian Federation v Australia)" (2003) 31 *FLR* 395.

¹³ Parliament of Australia *Senate Hansard*, 10 February 2004, 19609.

awareness in the fisheries policy community that more rigorous measures are needed to combat the growing problem of illegal, unreported and unregulated (IUU) fishing.¹⁴ As such, it remains to be seen whether ITLOS will allow pursuit costs to fall within the definition of “reasonable bond” in LOSC, and if so, whether the manner in which Australia calculates pursuits costs is also “reasonable”. ITLOS would certainly strike down sums that are excessive, not proportionate to the offence or designed simply to prevent the vessel from ever being released.¹⁵

Aside from doubt about the legality of this provision under present international law, there are practical limitations in enforcing the payment of such debts against owners of foreign vessels. When vessels are arrested, it is their senior crew (and unusually in the case of the *Maya V*, the entire crew),¹⁶ who are charged with fisheries offences under domestic law. However, the measures that can be adopted to deter foreign boat owners from engaging in illegal foreign fishing is effectively limited to depriving them of the use of their vessels. The bond that can now be set is likely in many cases to greatly exceed the value of detained vessels. In these circumstances, foreign boat owners will probably simply abandon their vessels and their crew. They would only contemplate paying such a bond if it were less than the cost associated with lost fishing time and purchasing, equipping and re-crewing a new vessel.

The amending Act also expands AFMA’s ability to use its directional power as the principal tool to introduce new fisheries management measures for fisheries for which a Plan of Management currently does not exist. The current method for introducing management measures for such fisheries is a cumbersome indirect process of licence or permit condition variation. The ability to issue directions for particular fisheries enables management measures to be introduced quickly when exigencies arise. A concern for the fishing industry is that no consequential amendment has been made to s 165 of the FM Act to allow recourse to the Administrative Appeals Tribunal (AAT) for fishing concession holders aggrieved by the effects of direction notices. The majority of AFMA decisions under the FM Act are reviewable by the AAT and in fact AFMA regularly faces challenges to its decisions in the AAT.¹⁷ The significance of the amendment is that it extends the directional power to all fisheries – most of which do not currently have a Plan of Management in place. As such, the ability for fishers to seek merits review of new regulations which affect their fishing operations (such as area conditions or closing or partially closing a fishery) has been reduced significantly. Although direction notices are disallowable instruments and they must pass through parliamentary scrutiny, to date no fisheries direction notices have been disallowed by parliament.

Fisheries Legislation Amendment (High Seas Fishing Activities and Other Matters) Act 2004

The second amending Act¹⁸ provides the necessary amendments to the FM Act and the *Fisheries Administration Act 1991* (Cth) (FA Act) to enable Australia finally to formally accept the 1993 United Nations Food and Agriculture Organization’s *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (the “Compliance Agreement”).¹⁹ In 2003 the Joint Standing Committee on Treaties²⁰ recommended that

¹⁴ See, for example, Bray K, “Illegal, unreported and unregulated (IUU) fishing” in Nordquist MH and Moore JN (eds), *Current fisheries issues and the Food and Agricultural Organization of the United Nations* (Kluwer Law International, 2000) 115.

¹⁵ See *The “Monte Confurco” Case (Seychelles v France) (Prompt Release) (Judgment)* (2000) ITLOS Case No 6, para 73. In this case, ITLOS reduced the bond amount set by France for the release of the Seychelles-flagged vessel by more than two thirds.

¹⁶ AFMA, “Entire crew of *Maya V* charged with illegal fishing” (Press release, 12 February 2004).

¹⁷ See, for example, Gullett W, Paterson C and Fisher E, “Substantive precautionary decision-making: the Australian Fisheries Management Authority’s ‘lawful pursuit’ of the precautionary principle” (2001) 7 *Australasian Journal of Natural Resources Law and Policy* 95.

¹⁸ Received Royal Assent 2 April 2004; ss 1-3 effective as of 2 April 2004; Schs 1 and 2 on Proclamation but not before the Compliance Agreement enters into force for Australia, or after six months.

¹⁹ Entered into force 24 April 2003.

Australia accept the Compliance Agreement and the government has indicated that it will sign the Agreement now that the Act has passed through Parliament.²¹ The amending Act gives effect to obligations under the Compliance Agreement, principally in relation to licensing and supervision of Australian-flagged vessels for high seas fishing and the requirement that a register is maintained of vessels authorised to fish on the high seas. The Compliance Agreement aims to curtail the practice of reflagging vessels that have had their fishing permits cancelled or suspended in their original country for noncompliance with international fisheries conservation measures. Reflagging enables fishing operators to avoid the consequences of fishing permit cancellation by seeking new fishing permits in another country. This is typically undertaken in “flag of convenience” countries (perhaps better termed “flag of noncompliance” countries)²² which either do not cooperate with international conservation measures or are unable to control the high seas fishing activities of their vessels. The amending Act provides that AFMA is precluded from licensing such vessels subject to two exceptions contained in the Compliance Agreement.²³ First, AFMA can grant a person a high seas fishing concession with respect to an Australian-flagged vessel that had previously received a suspension or cancellation of fishing authority in another country if the person satisfies AFMA that the owner or operator of the vessel that received the suspension or cancellation no longer has control of the vessel or a legal or financial interest in it. Second, AFMA can grant a fishing concession if it is satisfied that the grant “will not be likely to undermine international conservation and management measures”.²⁴ Just as in the case of the previous amending Act, no consequential amendment is made to s 165 of the FM Act. As such, appeal to the AAT is unavailable for decisions made under the new provisions. A person who, for example, has sought and been denied a high seas fishing concession due to an allegation that the vessel had previously had its authorisation for high seas fishing from another country suspended will be unable to seek merits review of the decision. However, the lack of recourse to the AAT is unlikely to be a problem in practice because Australia is not a flag of convenience country and it is thus unlikely that operators of such vessels will choose to register them in Australia.

The second amending Act also provides various miscellaneous amendments aimed at improving the operating efficiency of AFMA. Most notable is the increase of powers of officers under the FM Act (including members of the Federal Police, Customs and Defence) to stop and detain vehicles and aircraft in certain circumstances without the consent of the owner or a warrant.²⁵ Senator Ian MacDonald justified this broadening of powers on the increasing use of output controls to manage fisheries resources. The principal output control used – fishing quotas – requires monitoring of the unloading of fish from vessels and the transportation of catch. The power would thus apply where an officer believes a vehicle may be carrying fish landed in contravention of the FM Act or without proper documentation in a location or in circumstances where a delay in obtaining the warrant would frustrate its execution. Nevertheless, the Minister stated that the power “will be used only in very limited circumstances”,²⁶ in part because of the ability in many circumstances to obtain warrants quickly by electronic means.

Another important aspect of the second amending Act is the reclassification of “charter fishing” from commercial to recreational fishing to enable it to be managed generally at the State level rather than at the federal level. This amendment was prompted by the conclusion in the *2003 Review of Commonwealth Fisheries Policy* that the Commonwealth arrange for the day-to-day management of

²⁰ Parliament of Australia, Joint Standing Committee on Treaties, *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, done at Rome on 24 November 1993: National Interest Analysis*.

²¹ Parliament of Australia *Senate Hansard*, 11 February 2004, 19893.

²² Molenaar EJ, “Participation, allocation and unregulated fishing: the practice of regional fisheries management organisations” (2003) 18 *International Journal of Marine and Coastal Law* 457 at 461.

²³ Compliance Agreement, Art III(5)(c)(d).

²⁴ *Fisheries Legislation Amendment (High Seas Fishing Activities and Other Matters) Act 2004*, s 16B(5).

²⁵ *Fisheries Legislation Amendment (High Seas Fishing Activities and Other Matters) Act 2004*, s 84(1AB).

²⁶ Parliament of Australia *Senate Hansard*, 11 February 2004, 19901.

charter fisheries to be undertaken by the States and the Northern Territory.²⁷ Two matters of concern are that there is no requirement for charter boat operators to provide catch data to AFMA and a number of States do not presently have laws regulating charter fishing.²⁸ Charter fishing has emerged as another area in fisheries management that shows that the Offshore Constitutional Settlement (1979-1980) (OCS) has not provided the final resolution to all fisheries jurisdiction issues. Another area of difficulty is the Commonwealth's authority to manage some targeted species (such as gummy and school shark) to the high water mark. This overlaps with State jurisdiction, most notably within areas proclaimed under State law as marine protected areas in which commercial fishing is prohibited. The three nautical mile limit of State jurisdiction granted by the OCS continues to present a challenge to drafters of marine resource management legislation.

Olbers v Commonwealth of Australia (No 4) [2004] FCA 229

Olbers v Commonwealth of Australia (No 4) [2004] FCA 229 is the latest in a series of court cases concerning Australia's arrest of the Russian vessel *Volga* in the area adjacent to the AFZ surrounding Heard and MacDonal Islands on 7 February 2002 for alleged illegal fishing within the AFZ. Previous cases included applications by members of its crew charged with fisheries offences to vary bail conditions²⁹ and an unsuccessful application by Olbers, the Russian company which owned the *Volga*, for a stay of civil proceedings pending completion of criminal proceedings against the crew.³⁰ In the present case, Olbers sought a declaration that Australia's seizure and detention of the vessel was unlawful and an order for the vessel and its equipment to be returned. Specifically, it was submitted by Olbers that the pursuit and seizure of the vessel was not conducted in a manner consistent with either the FM Act or LOSC.

The case centred on the operation of s 106A of the FM Act which provides for the automatic forfeiture to the Commonwealth of foreign vessels used in various fisheries offences within the AFZ. Section 106 of the FM Act provides for forfeiture of a vessel following a court order. Section 106A was introduced to the FM Act by the *Fisheries Legislation Amendment Act (No 1) 1999*. Prior to its enactment there was no provision for automatic forfeiture in the FM Act.

The alleged offences concerned ss 100 (using a foreign boat for fishing in the AFZ – strict liability offence) and 101 (having foreign boat equipped with nets, etc – strict liability offence) of the FM Act. The *Volga* had not been issued with an Australian foreign fishing licence or port permit and Olbers did not argue that the vessel had been passing innocently through the AFZ. French J found that the *Volga* had engaged in unlawful fishing in the AFZ between 12-20 January 2002 even though Australian authorities had not seen the vessel fishing in the AFZ. His determination was based on the presence of fresh Patagonian toothfish onboard the vessel at the time of its arrest slightly outside the AFZ on 7 February 2002, navigation tracks recovered from the vessel's computer and evidence that not all fishing gear had been stowed. French J found that the proper interpretation of s 106A, aided by the title of the subdivision under which it is located ("Automatic forfeiture of things used in offences"), was that it operates to transfer title from the owner of a foreign vessel to the Commonwealth at the time it is used in a relevant fisheries offence. French J found that title to the *Volga* transferred from Olbers to the Commonwealth in January 2002, when the vessel was used for commercial fishing within the AFZ in breach of ss 100 and 101 of the FM Act, although the vessel was not apprehended until 7 February 2002.³¹

The effect of the decision was that Olbers had no legal right to challenge the manner in which the *Volga* was pursued or seized. This was because Olbers had ceased being its owner by the time the

²⁷ Commonwealth Department of Agriculture, Fisheries and Forestry, *Looking to the future: a review of Commonwealth fisheries policy* (June 2003) p 27.

²⁸ Parliament of Australia *Senate Hansard*, 11 February 2004, 19896-19897, 19988-19989.

²⁹ *Lijo v Director of Public Prosecutions (Cth)* [2003] WASCA 4 (Unreported, Anderson, Templeman JJ and Olsson AUJ, 16 December 2002).

³⁰ *Olbers v Commonwealth of Australia (No 2)* [2003] FCA 177 (decision 11 March 2003).

³¹ *Olbers v Commonwealth of Australia (No 4)* [2004] FCA 229 at [62], [63] and [80].

pursuit was commenced on 7 February 2002. By operation of Australian law, the vessel had become an Australian vessel and thus Australia had simply seized its own vessel.

After rejecting submissions that s 106A was unconstitutional on the basis that it provides for forfeiture of property in the absence of judicial determination of the commission of an offence or that it amounts to compulsory acquisition of property other than on just terms, French J noted that it:

creates a real risk for any fishing vessel owner whose boat enters the AFZ. The risk to the owner is that, even if not apprehended at the time of any illegal fishing ... or presence ... in the AFZ, the boat will leave the AFZ, with an insecure title. While apprehension may not be immediate ... the Commonwealth may be in a position to assert that, under Australian law, it has become the legal owner of the boat. Escape to the high seas will not shed that status under Australian law or in any jurisdiction in which Australian title will be recognised.³²

The Federal Court decision delighted Senator Macdonald who immediately issued a press release stating that the decision “supports the Government’s view that if a foreign fishing is sighted illegally fishing in Australian waters then that vessel, its equipment and catch is automatically forfeited to the Commonwealth and becomes the property of the Commonwealth”.³³ He stated further that he will be:

seeking further legal advice on whether a number of other foreign fishing vessels sighted in the AFZ over recent years, but not apprehended, might be able to be seized anywhere on the globe on the basis that they are now actually Australian property having been automatically forfeited to Australia on the actual date of the fishing in the AFZ.³⁴

Although the Federal Court has upheld the validity of s 106A under Australian law, its validity under international law is an entirely different matter. The Federal Court decision means, for example, that any foreign vessel which otherwise is merely exercising rights or freedoms of navigation through Australia’s maritime zones would automatically become owned by the Commonwealth as soon as it enters the AFZ if, for example, it had onboard commercial fishing nets, traps or equipment that were not stowed or secured,³⁵ or at a time when a member of its crew engages in recreational fishing from the vessel in the AFZ.³⁶ This would be the case irrespective of whether Australia attempted to effect an arrest of the vessel or even detected the commission of an offence, although, in practice, the forfeiture provision cannot be enforced unless the vessel has been seized. Further, a vessel can only be seized if there are reasonable grounds to believe that it has been used in a fisheries offence,³⁷ and it is likely to be more difficult to gain evidence of the offence to the relevant standard of proof after the event and it is also unlikely that Australia would seek to apply the automatic forfeiture provision with respect to technical or minor infringements of the FM Act. Nevertheless, where a foreign vessel has been lawfully seized by Australia any remedies or rights held by its owners under LOSC (such as, for example, with respect to its release upon the posting of a reasonable bond or other security³⁸ or payment of compensation for any loss or damage sustained during its arrest in circumstances which do not justify the exercise of the right of hot pursuit)³⁹ are now apparently unavailable if they do not successfully contest a purported forfeiture of their vessel.⁴⁰ It would thus be imperative for pre-forfeiture owners of such vessels to use the forfeiture contest procedure to establish on the balance of probabilities that a relevant fisheries offence had not occurred. It is to be noted that the defence of mistake of fact is available for the relevant fisheries offences.⁴¹ However, even if it were established

³² *Olbers v Commonwealth of Australia (No 4)* [2004] FCA 229 at [77].

³³ Ian MacDonald (Minister for Fisheries) “New chapter in maritime law: attempt to claim back the *Volga* rejected” (Press release, 13 March 2004).

³⁴ MacDonald, n 33.

³⁵ *Fisheries Management Act 1991*, s 101(1)(d).

³⁶ *Fisheries Management Act 1991*, s 99.

³⁷ *Fisheries Management Act 1991*, s 84(1)(g)(ii).

³⁸ LOSC, Art 73(2).

³⁹ LOSC, Art 111(8).

⁴⁰ *Fisheries Management Act 1991*, ss 106B – 106G.

⁴¹ The offences in the FM Act are subject to Chapter 2 of the *Criminal Code* (s 6A FM Act). They are stated to be offences of strict liability (s 6.1 of the Code). Therefore, the Commonwealth does not need to prove a fault element of intention,

that a fisheries offence had occurred (thus operating to forfeit the vessel), a significant disparity would exist between the operation of Australian law and LOSC. It is unlikely that ITLOS would allow LOSC to be interpreted in a manner that would allow Australian domestic law to operate in a way that runs counter to the balance struck in LOSC between the rights of coastal states and the rights of fishing nations and have the effect of rendering some LOSC provisions inoperable.

Although it was unnecessary for French J to determine whether the arrest of the *Volga* was conducted in a manner consistent with the FM Act or LOSC, his Honour made a significant comment by way of *obiter dicta* concerning the operation of the pursuit provisions in the FM Act. He noted the apparent incompatibility of s 87 of the FM Act with the hot pursuit provisions in LOSC.⁴² Art 111 of the LOSC provides, among other things, that pursuit of a vessel to the high seas may only be continued “if the pursuit has not been interrupted”.⁴³ Although s 87 of the FM Act also provides that a pursuit may only be continued if “the pursuit was not terminated or interrupted”, this is further qualified such that pursuit is not to be taken as having been terminated or interrupted only because the pursuing officer loses sight of the boat⁴⁴ or loses “output from a radar or other sensing device”.⁴⁵ LOSC does not provide such a qualification and not only is there reason to doubt that such a qualification could be read into Art 111, it would also seem that it is inconsistent with customary international law requirements concerning hot pursuit.⁴⁶ French J noted, but did not conclude, that the interpretation of s 87 “must have regard to the practical exigencies of the circumstances in which pursuit might have to be undertaken”.⁴⁷ While this proposition may be supportable in terms of the legal requirements for a hot pursuit under Australian law, it has not been specifically tested in ITLOS with respect to the interpretation of LOSC.

An ironic and possibly unforeseen effect of the Federal Court’s decision is that it casts doubt on the ability of Australia to enforce payments for pursuit costs from owners of foreign vessels provided in the new *Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Act 2004*. The new s 106L(2) provides that pursuit costs incurred by Australia are a debt payable by the “owner of a foreign boat” to the Commonwealth. Following the *Olbers case*, by definition pursuit costs can only commence from the time a stop order is issued and only accrue with respect to vessels that have been used in relevant fisheries offences. As such, pursuit costs can only be accrued when the Commonwealth owns the vessel and thus the Commonwealth would be liable to pay itself any pursuit costs incurred.

The new process for recovering pursuit costs from owners of foreign fishing vessels and the Federal Court’s decision to uphold the validity of a domestic law provision which operates to automatically forfeit foreign vessels used in fisheries offences in the AFZ to the Commonwealth show that Australian fisheries law is drifting further away from provisions in LOSC which protect various rights of foreign owners of such vessels. However, Australia remains bound to its obligations under LOSC (a matter that concerns both domestic legislation and judicial rulings). This is because Australia’s sovereign rights in the areas of the AFZ that overlap with the Exclusive Economic Zone (EEZ) (between 12 nautical miles and a maximum of 200 nautical miles from the baseline) are those derived from LOSC itself and Australia’s ability to take enforcement action in the EEZ against foreign vessels are limited to measures that conform with LOSC.⁴⁸ This divide between Australian and international fisheries law is only likely to be narrowed if ITLOS declares valid an exercise by

knowledge, recklessness or negligence (ss 5.1-5.6 of the Code), but the defence of mistake of fact (s 9.2 of the Code) is available. To establish a mistake of fact a person must prove on the balance of probabilities that the person considered whether or not facts existed, and was under a mistaken but reasonable belief about those facts.

⁴² *Olbers v Commonwealth of Australia (No 4)* [2004] FCA 229 at [97].

⁴³ LOSC, Art 111(1).

⁴⁴ *Fisheries Management Act 1991*, s 87(2).

⁴⁵ *Fisheries Management Act 1991*, s 87(3).

⁴⁶ See *I’m Alone (Canada v USA)* (1935) 3 UN RIAA 1609 and Barrett W, “Illegal fishing in zones subject to national jurisdiction” (1998) 5 *James Cook University LR* 1 at 18.

⁴⁷ *Olbers v Commonwealth of Australia (No 4)* [2004] FCA 229 at [96].

⁴⁸ See LOSC, Art 62(4) and Art 73(1).

Australia of the recovery of pursuits costs provision or the automatic forfeiture provision. However, this is unlikely – especially with regard to the automatic forfeiture provision. Australia could reduce the prospect of a challenge before ITLOS of a purported forfeiture of a foreign vessel if it chooses to rely on s 106 of the FM Act because it has less potential to be inconsistent with LOSC than the (perhaps unnecessary) s 106A. This would also mean that owners of foreign vessels would have the same legal rights under Australian law to challenge forfeiture as owners of seized Australian vessels.

It is understandable that Australia is seeking innovative ways to increase measures to deter illegal foreign fishing to provide for more effective management and protection of its fisheries. The management responsibilities given to coastal states in LOSC are insufficiently detailed to address the array of issues associated with the growing problem of IUU fishing and it is logical for Australia to develop state practice in the interpretation of the provisions in LOSC in light of the challenges presented by IUU fishing and strengthening international resolve to eliminate it. However, the measures that can be adopted remain constrained by various provisions of LOSC intended to safeguard rights of owners of foreign vessels. The restrictive text of LOSC (which was drafted long before the emergence of large scale IUU fishing) and ITLOS's tendency to interpret its provisions in a legalistic manner,⁴⁹ continue to present a significant challenge to coastal states seeking ways to combat the problem of illegal foreign fishing, especially in remote areas of their EEZs.

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HOW DO YOU LIKE THEM APPLES?: THE WTO AND QUARANTINE RESTRICTIONS

In November 2003, the WTO Appellate Body (AB) ruled that Japan's apple import restrictions to prevent the spread of fire-blight were inconsistent with the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPSA).¹ The decision in *Japan-Apples* confirms the SPSA's strong focus on science as the basis for national plant protection and quarantine measures, and raises new questions about the trade regime's willingness to permit precautionary approaches to quarantine. It is a portent for Australia's strict quarantine regime which the WTO will scrutinise later this year in a complaint brought by the EU.

Japan's fire-blight measures

Since 1994, Japan has maintained strict controls on the importation of apple fruit from the United States, on the stated basis of preventing the spread of fire-blight or its disease-causing organism, *Erwinia amylovora* (*e. amylovora*). Fire-blight affects apples, pears, quince and loquat, and has spread widely across North and South America, Europe and elsewhere. To date, Japan has been fire-blight free.²

⁴⁹ Gullett, n 12, at 407.

* I thank Chris McGrath, Erik Molenaar and Joanna Vince for comments on previous versions of this commentary. Any errors or omissions remain my own.

¹ *Japan – Measures affecting the importation of apples*, Appellate Body Report, WT/DS245/AB/R, 15 July 2003 (*Japan-Apples*, AB).

² *Japan – Measures affecting the importation of apples*, Panel Report, WT/DS245/R, 26 November 2003, ¶2.6 (*Japan-Apples*, Panel).

The bulk of scientific evidence indicates that mature healthy apples cannot carry *e.amylovora*, but that immature or infected apples can. Imports of mature, symptomless fruit do not, on current evidence, pose a likelihood of fire-blight entry. But Japan's restrictions went much further than simply limiting imports to these products. The disputed measures, deriving from a series of laws, regulations and policies,³ required:

- importation only from designated fire-blight free orchards that were free of any infected fruit or any other plant that hosts *e.amolyvora*, and which were protected by a 500 metre buffer zone;
- that the orchard and buffer zone be inspected three times per year, at critical points on the fruiting and harvesting cycle, with additional inspections after strong storms;
- that the harvest inspection be conducted jointly by US and Japanese inspectors;
- that apples be soaked in a surface disinfectant solution and the containers for packing and shipments be treated with a chlorine solution; and
- that apples destined for Japan be kept separate from other harvested fruit, and be certified as disease-free by US officials, with this certification confirmed by Japanese inspectors.⁴

These measures limited imports to fruit from selected orchards in Washington and Oregon States. Japan argued that its measures guarded against an as yet undetermined risk of mature, symptomless apples developing and spreading fire-blight *and* from the accidental introduction of infected or infested apples within a shipment of healthy apples.⁵

The SPSA's rules on phytosanitary measures

The SPSA was introduced in 1995 as part of the suite of WTO Agreements establishing a rules-based framework for the liberalisation of trade in goods. It aims to control the use of food safety, plant protection and animal health requirements as new non-tariff barriers to trade. It permits WTO Members to observe high quarantine and food, plant and animal safety standards, but imposes disciplines on how those standards are to be developed and implemented. The SPSA reveals an overall preference for the adoption of international standards, with a view to harmonising standards over time. The Agreement preserves Members' rights to develop their own measures where no international standard exists, or where the international standard is insufficient to achieve the level of protection sought by the Member. In such cases, the measures must comply with a range of obligations. In the *Japan-Apples* dispute, the obligations in question required that Japan base its measure on sufficient scientific evidence (Art 2.2) and undertake a risk assessment (Art 5.1). Japan argued that it had complied with these requirements. It argued in the alternative that the restrictions were a provisional measure, which the SPSA permits where relevant scientific evidence is insufficient, provided additional evidence is obtained within a reasonable period (Art 5.7).

Sufficiency of scientific evidence

Earlier SPSA disputes have established that a trade-restrictive food safety, plant or animal health measure is based upon sufficient scientific evidence if there is a "rational or objective relationship" between the measure and the evidence.⁶ This is to be determined on a case-by-case basis, and depends on such factors as the characteristics of the measure in question and the quality and quantity of the scientific evidence.⁷ In *Japan-Apples*, the WTO Panel determining the US complaint examined the scientific evidence adduced by the parties and three fire-blight experts. It concluded that:

³ The measures derived from the Plant Protection Law (Law No. 151; enacted 4 May 1950), as amended; the Plant Protection Regulations (Ministry of Agriculture, Forestry, and Fisheries Ordinance No. 73, enacted 30 June 1950), as amended; Ministry of Agriculture, Forestry and Fisheries Notification No. 354 (dated 10 March 1997); detailed rules and regulations, including Ministry of Agriculture, Forestry, and Fisheries Circular 8103. (*Japan-Apples, Panel*, n 2, para. 8.7)

⁴ *Japan-Apples, AB*, n 1, para 15.

⁵ *Japan-Apples, Panel*, n 2, para 8.28(b).

⁶ *Japan – Measures Affecting Agricultural Products*, Appellate Body Report, WT/DS76/AB/R, adopted 19 March 1999, paras 73–74, 82, and 84.

⁷ *Japan – Measures Affecting Agricultural Products*, n 6, para 84.

- the scientific evidence indicated that mature apples are unlikely to harbour *e.amylovora* if they show no symptoms of infection;
- the scientific evidence did not support the conclusion that infected or infested crates could serve as a vector for fire-blight; and
- even if infected or infested apples were exported to Japan and populations of bacteria survived, the risks of spread to host plants could only occur “through an additional sequence of events that is deemed unlikely, and that has not been experimentally established to date”.⁸

Based on these findings, the Panel concluded that the risk of transmission via apple fruit was negligible, and that available scientific evidence did not indicate that apples were a likely pathway for the entry, establishment or spread of fire-blight in Japan.⁹ It then compared this evidence of risk with the elements of the Japanese regime for fire-blight prevention, and concluded that the measures were disproportionate to the evidence of risk, and thus lacked a rational or objective relationship.¹⁰

Japan argued that the Panel should have accorded it a “certain degree of discretion” in the way it chose, weighed, and evaluated scientific evidence.¹¹ The AB rejected this contention on the basis that according deference to the respondent’s own findings would prevent a Panel from making an objective assessment of the facts, as required by Art 11 of the WTO *Dispute Settlement Understanding*.¹² Accordingly, the AB upheld the Panel’s finding that Japan’s measures were not based on sufficient scientific evidence.¹³

Not a provisional measure

Japan relied, in the alternative, on Art 5.7 of the SPSA, which permits Members to introduce provisional measures where relevant scientific evidence is insufficient. It is the only “exception” to the Art 2.2 requirement that measures be based on sufficient scientific evidence, and is seen by many as the SPSA’s principal articulation of the precautionary principle. The language of Art 5.7 requires that:

- (a) the measure is imposed where “relevant scientific evidence is insufficient”;
- (b) the measure is adopted “on the basis of available pertinent information”;
- (c) the Member “seek[s] to obtain the additional information necessary for a more objective assessment of risk”; and
- (d) that Member “review[s] the ... measure accordingly within a reasonable period of time”.¹⁴

All four requirements must be satisfied in order to rely on Art 5.7. The first two set conditions for introducing a measure. The third and fourth requirements highlight the provisional nature of the exception, by limiting the maintenance of measures to the “reasonable period” during which additional information is sought in order to make a more objective assessment of risk.

Japan failed the first requirement of Art 5.7. The AB agreed with the Panel’s conclusion that Japan’s restriction on apple imports was not a situation where “relevant scientific evidence was insufficient” to permit the evaluation of the likelihood of entry, establishment or spread of fire-blight in Japan.¹⁵ The Panel found that there was a large quantity of high quality scientific evidence on the risk of transmission of fire-blight through apple fruit. The experts expressed strong confidence in the reliability of this evidence¹⁶ and Japan provided no evidence to refute its credibility or

⁸ *Japan-Apples Panel*, n 2, paras 8.168 and 8.171.

⁹ *Japan-Apples Panel*, n 2, paras 8.169, 8.176.

¹⁰ *Japan-Apples Panel*, n 2, paras 8.198-8.199.

¹¹ *Japan-Apples AB*, n 1, para 163, citing Japan’s appellant submission, paras 75-76.

¹² Applying *EC Measures Concerning Meat and Meat Products*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, ¶117.

¹³ *Japan-Apples AB*, n 1, para 168.

¹⁴ *Japan – Agricultural Products*, above n 6, para 89.

¹⁵ *Japan-Apples AB*, n 1, para 179.

¹⁶ *Japan-Apples Panel*, n 2, paras 8.216–8.219.

persuasiveness.¹⁷ The AB upheld the Panel's conclusion that there was in fact sufficient science upon which to conduct a risk assessment and to conclude that the risk was negligible.¹⁸

The AB also rejected Japan's claim that the Panel had taken an unnecessarily restrictive approach to the scope of Art 5.7. The Panel had said that Art 5.7 is intended to address only "situations where little, or no, reliable evidence was available on the subject matter at issue".¹⁹ Japan argued that this approach emphasised new risks that create new uncertainty, but did not encompass situations of on-going or "unresolved uncertainty" where accumulated evidence fails to provide conclusive proof.²⁰ The AB rejected this criticism, emphasising that Art 5.7 is triggered by the insufficiency of scientific evidence upon which to base a risk assessment, not by scientific uncertainty.²¹ It noted that the two concepts were not interchangeable, but went no further in elaborating the difference between them. It said that Art 5.7 is broad enough to be invoked where there is a substantial *quantity* of evidence, if its *quality* is unreliable, thus covering the scenario posited by Japan.²²

No risk assessment

Japan also failed to comply with the requirement that its measures be based on a risk assessment. The risk assessment obligation in Art 5.1 amplifies and implements the requirement that SPS measures not be maintained without sufficient scientific evidence. The 1999 document that Japan relied on as its risk assessment was ruled to be deficient because it failed to address the specific risk arising from apple imports, rather than the general risks of fruit-borne fire-blight.²³ Moreover, it had only assessed the possibility, not the probability, of entry or spread of *e.amylovora*, as the SPSA requires.²⁴ Finally, it failed to evaluate the risk by reference to the effectiveness of mitigating measures that might be applied.²⁵ The 1999 assessment attempted to justify the maintenance each of the measures already in place, rather than to evaluate the need for all measures cumulatively.²⁶

Implications of the decision for precautionary policies

Never has the adage that "bad facts make bad law" been truer than in relation to WTO disputes under the SPSA. In all of the disputes heard to date (the European ban on growth hormone beef, Australia's ban on fresh Canadian salmon, Japan's varietals testing policy for fruit imports), the measures complained of had at least some element that rendered their *bona fides* questionable. It is therefore unsurprising that every complaint has succeeded. In *Japan-Apples*, the Panel was probably justified in concluding that the risks of fire-blight spreading from apple imports was negligible. This conclusion may have been strengthened by an awareness of Japan's practice of using SPS measures as a means of protecting local horticulturalists from international competition.

The weak basis for many disputed measures has contributed to a narrow reading of SPSA provisions. Since no Member has successfully defended an SPS complaint to date, neither Panels nor the AB have been able to highlight those parts of the SPSA that preserve national SPS autonomy. *Japan-Apples* fleshes out this existing SPSA jurisprudence, and highlights the power of WTO panels to substitute their own judgments on science for those of the responding Member. The Panel's reliance on the evidence of experts in this dispute suggests that Members wishing to introduce or maintain SPS measures must engage with international scientific opinion, and not rely upon a limited range of views. No deference will be given to the choices of methodology or emphasis made by national governments. The Panel's assessment is essentially a *de novo* review of the need for an SPS measure, albeit with the complaining party bearing the onus of proof. The AB makes clear that the sufficiency

¹⁷ *Japan-Apples Panel*, n 2, para 7.9.

¹⁸ *Japan-Apples AB*, n 1, para 182.

¹⁹ *Japan-Apples Panel*, n 2, para 8.219.

²⁰ *Japan-Apples AB*, n 1, para 180.

²¹ *Japan-Apples AB*, n 1, para 184.

²² *Japan-Apples AB*, n 1, para 185.

²³ *Japan-Apples AB*, n 1, paras 203-206.

²⁴ *Japan-Apples AB*, n 1, para ¶191, citing *Japan-Apples Panel*, n 2, para 8.271.

²⁵ *Japan-Apples AB*, n 1, paras 193, 209.

²⁶ *Japan-Apples AB*, n 1, para 209.

of scientific evidence is a case-by-case determination. It recognises that a large volume of evidence may nonetheless be insufficient if it lacks rigour or credibility, or presumably, if its conclusions point in different directions. Until a panel and the AB actually uphold a SPS measure as having a sufficient scientific basis, the scope of these “leeways” remain unclear.

Perhaps the most concerning aspect of the dispute for advocates of a precautionary approach to SPS risks is the AB’s attitude towards Art 5.7, dealing with provisional measures. This is the second dispute in which Japan has failed to make a case under Art 5.7. In the first, *Japan-Agricultural Products*, the Panel was not satisfied that Japan had attempted to gather additional evidence within a reasonable period of time.²⁷ The *Japan-Apples AB* considered the threshold requirement that there be insufficient scientific evidence upon which to formulate a concluded position. It is frustrating that the AB distinguished scientific “insufficiency” from scientific “uncertainty” with no further exploration of this distinction. One can imagine cases where there may exist sufficient scientific evidence upon which to arrive at opposing conclusions, depending upon which data one prefers. “Sufficiency” may require less than “certainty”. A focus away from uncertainty could therefore limit Art 5.7’s precautionary potential, and thereby prioritise the SPSA’s trade facilitation role over the reservation of national regulatory choices.

Finally, *Japan-Apples* is another example of how demanding the SPSA’s risk assessment requirements are. Australia failed this requirement in Canada’s complaint against Australia’s restrictions on fresh salmon imports.²⁸ The need to assess the *probability* (rather than possibility) of entry, spread or establishment, and to evaluate this risk by reference to the full range of possible SPS measures that could be employed is extremely demanding. A reading of *Japan-Apples* suggests that Japan fell well short of these requirements, so it is hard to predict just how exacting they will be in future cases. It is not surprising, though, that the two highly publicised Biosecurity Australia import risk analyses recently released for public comment both recommend a relaxation of Australia’s import restrictions on apples (in relation to fire-blight risks) and bananas (in relation to a range of pests and diseases).²⁹ The restriction on bananas is already the subject of a complaint against Australia brought by the Philippines, and the removal of restrictions is currently the subject of a Senate inquiry. Similarly, Australia’s position on fire-blight and apples has been a long-term source of trade tension with New Zealand. No doubt New Zealand will view the *Japan-Apples* decision as vindication of its insistence upon the safety of its products.

Despite these concerns, there is one aspect of the AB decision that should be welcomed by Members seeking to impose broad-ranging SPS measures. The United States had argued that Japan’s restrictions should be examined for their effect on US exports of *mature, symptomless apples* on the basis that this was what the United States exported. This would have made Japan’s measures even harder to justify. Japan, on the other hand, argued that a key aspect of its fire-blight prevention strategy was to avoid the inadvertent importation of immature, diseased fruit, caused by human or technical errors or illegal actions.³⁰ The AB ruled that Japan was not limited to the facts and arguments claimed in the US complaint in responding to that complaint, provided its response was relevant to the dispute.³¹ This ruling makes it easier to justify measures aimed at preventing the risk of system failures or illegal actions, that are broader than necessary to address the risk of importing healthy or “uncontaminated” products.

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²⁷ *Japan-Agricultural Products*, n 6.

²⁸ *Australia – Measures Affecting Importation of Salmon*, Appellate Body Report, WT/DS18/AB/R.

²⁹ The Bananas IRA may require further revision, however, because scrutiny of the data during the public comment period revealed an error in the conversion of data in an excel spreadsheet which could have resulted in an underestimating of the potential risks. AFFA, *Plant Biosecurity Policy Memorandum 2004/7, Addendum to Revised Draft IRA Report – Bananas from the Philippines*, 17 March 2004, available at www.affa.gov.au.

³⁰ *Japan-Apples Panel*, n 2, para 8.28.

³¹ *Japan-Apples AB*, n 1, para 136.