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### Judicial responses to illegal fishing prosecutions in Fiji

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## Judicial responses to illegal fishing prosecutions in Fiji

### Abstract

Illegal fishing deprives a nation of its assets and wealth. Since 2002, seven fishing vessels have been found fishing illegally in Fiji waters. The role of the judiciary in deterring illegal fishing activity is an essential part of fisheries management and enforcement. Good decisions are more likely to attract compliance while lenient decisions are likely to promote unscrupulous fishing activity. In five years, the judiciary has laid out principles for sentencing and the making of forfeiture orders and its latest decision shows the judiciary adopting stern deterrent measures. This paper provides a preliminary analyses of the decisions of the judiciary on illegal fishing and discusses strengths and weaknesses of arguments used in setting penalties, making forfeiture orders and, in using vessel monitoring system data.

### Keywords

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## JUDICIAL RESPONSES TO ILLEGAL FISHING PROSECUTIONS IN FIJI

PIO E. MANOA [\[\\*\]](#)

### ABSTRACT

*Illegal fishing deprives a nation of its assets and wealth. Since 2002, seven fishing vessels have been found fishing illegally in Fiji waters. The role of the judiciary in deterring illegal fishing activity is an essential part of fisheries management and enforcement. Good decisions are more likely to attract compliance while lenient decisions are likely to promote unscrupulous fishing activity. In five years, the judiciary has laid out principles for sentencing and the making of forfeiture orders and its latest decision shows the judiciary adopting stern deterrent measures. This paper provides a preliminary analyses of the decisions of the judiciary on illegal fishing and discusses strengths and weaknesses of arguments used in setting penalties, making forfeiture orders and, in using vessel monitoring system data.*

### INTRODUCTION

With 1.3 million square kilometres of ocean within its jurisdiction, and meagre resources for surveillance and enforcement, the role of Fiji's judiciary in deterring illegal fishing is a vital component in the fight against Illegal, Unreported and Unregulated (IUU) fishing. On 24 February 2006, the High Court of Fiji issued a forfeiture order against the "Lian Chi Sheng", a Belize flagged longliner, for having fished illegally in Fiji's archipelagic waters and territorial sea over three months in 2004. So far, seven fishing vessels found fishing illegally in Fiji's water have been dealt with by the judiciary. [\[1\]](#)

Fiji is situated near the centre of the Western and Central Pacific Ocean and collaborates with neighbouring countries through the Forum Fisheries Agency (FFA) in the monitoring, control and surveillance of fishing activity. Regional cooperation has seen the introduction of a range of initiatives to regulate and monitor fishing activity and has facilitated the detection, arrest and prosecution of illegal fishers. [\[2\]](#) While cooperation is seen clearly in the work of fisheries and enforcement officials, the respective courts of each country are independent and decide cases based on their own national laws.

This paper analyses the judicial decisions and their *ratio decidendi* and postulates their implications for fisheries management. It focuses on the rationale for forfeiture, application of data from the Vessel Monitoring System coordinated by the Forum Fisheries Agency, and the penalties imposed. In addition, it reviews all decisions made for consistency and isolates unique arguments made by members of the judiciary.

### THE NATURE AND REGULATION OF THE FISHERY

The regulation of commercial fisheries in Fiji only began in the 1940s after the enactment of the first fisheries ordinance [\[3\]](#). In its early form, fisheries law was primarily interested in licensing of near shore commercial fishers. International agreement on maritime spaces at the Third

United Nations Conference on the Law of the Sea saw Fiji claim its archipelagic waters, territorial sea, and exclusive economic zone (EEZ) in 1979. Shortly after, Fiji's offshore fishery commenced operation.

The offshore fishery is built on the four major tuna species: albacore, yellowfin, bigeye and skipjack. Compared to other FFA members such as Kiribati, Papua New Guinea and the Federated States of Micronesia, total catches in Fiji are low. Between 1980 and 2000, the total annual catch of bigeye, skipjack and yellowfin ranged from 1,756 to 6,266 metric tonnes.<sup>[4]</sup> A recent study estimates fishing contribution to gross domestic product in 1999 at \$84.6 million.<sup>[5]</sup>

Management of fisheries is governed by the *Fisheries Act* and the *Marine Spaces Act*. While the former provides for the regulation of fisheries resources, the latter is devoted to the licensing and regulation of foreign fishing vessels. Through both pieces of law, the Fisheries Minister has power to make regulations providing, among other things, for the determination of total allowable catch, terms and conditions of access, and conservation and management measures of fisheries resources within Fiji's fisheries waters.<sup>[6]</sup>

According to law, "Fiji fisheries waters" means all waters appertaining to Fiji including all internal waters, archipelagic waters, territorial seas and all waters within the exclusive economic zone.<sup>[7]</sup> The Fiji Fisheries Division of the Ministry of Forestry and Fisheries is responsible for the regulation of fishing. Although established in 1963, the Division has over many years focused only on near shore management and licensing and as Fiji expanded its maritime jurisdiction, offshore fisheries management was created. The Division offers two types of licences for "tuna and tuna-like species": an offshore licence and an EEZ licence.

The offshore licence is restricted to locally owned fishing vessels with lengths up to twenty metres and permits fishing in the archipelagic waters while the EEZ licence can be issued to any fishing vessel that meets the criteria and allows fishing only within that zone. Offshore licensing is carried out in accordance with the *Fisheries Act* while EEZ licensing is done pursuant to the *Marine Spaces Act*.<sup>[8]</sup> Likewise, the relevant offences are provided for and distinguished under the respective Acts. The general offence of taking fish within Fiji fisheries waters without a licence or the approval of the Minister responsible for fisheries is contained in section 10(3) of the *Fisheries Act*. On the other hand, section 16 of the *Marine Spaces Act* states that the owner and the master of an unlicensed foreign fishing vessel fishing within the EEZ are each guilty of an offence. Where a foreign fishing vessel is licensed to fish in the EEZ but contravenes licence conditions, the master and licensee are each guilty of an offence.<sup>[9]</sup>

***Table 1: Summary of illegal fishing cases decided by the Fiji judiciary between 2002 and February 2006***

<i>Vessel</i>	<i>Activity</i>	<i>Penalty</i>
<b>South Star</b> August 2002 FFV s.16 MSA breach	Fishing in Fiji waters without a licence	Captain fined \$13,200. All money held from the sale of fish and bait found on South Star forfeited to the State.
<b>Fu Yuan Yu</b> August 2002 FFV s.16 MSA breach	Fishing in Fiji's EEZ without a licence	Captain fined \$4,000. No orders for forfeiture of boat.
<b>Fu Yuan Yu 388</b> August 2002 FFV s.16 MSA breach	Fishing in Fiji's EEZ without a licence	Captain fined \$4,000. No orders for forfeiture of boat.
<b>Sun 5</b> May 2003 Fiji fishing vessel s.10 FA breach	Fishing in Fiji waters without a licence	Vessel and fishing apparatus forfeited to State but Court of Appeal remitted prosecution's application for forfeiture to Magistrates Court
<b>Lu Rong 1348</b> July 2004 FFV chartered by local company s.16 MSA breach	Fishing in Fiji's EEZ without a licence	Magistrate lenient because it was a local company and imposed a fine of \$2,000, made no order for forfeiture and return of sale proceeds to charterer. High Court quashed earlier fine and substituted a fine of \$4000.
<b>Zhong Shui 607</b> July 2004 FFV China National Fisheries (Group) Corporation s.16 MSA breach	Fishing in Fiji's EEZ without a licence	High Court ordered the forfeiture of vessel, its apparatus, fishing gear, cargo and stores to State. Court of Appeal agreed with High Court.
<b>Lian Chi Sheng</b> May 2004 FFV Local charter	Fishing without a licence in Fiji's archipelagic waters and territorial seas	High Court ordered forfeiture of vessel, its apparatus, catch, provisions to State. Charterer fined \$30,000. Master acquitted.

## FORFEITURE

Section 10(7) of the Fiji *Fisheries Act* applies to all vessels involved in offences under the Act or the regulations and provides that: "The court may order the forfeiture to the Crown of any vessel, apparatus or catch or the proceeds of sale on any catch detained..., employed in the commission of, or derived from, any act proved to be an offence under this Act or any regulation thereunder..."<sup>[10]</sup>

The contemporary provisions for forfeiture are derived from the old common law of deodand. Menzies J of the High Court of Australia in *Cheatley*<sup>[11]</sup> quotes Holmes:

In *Edward the First's* time some of the cases remind us of the barbarian laws at their rudest stage. If a man fell from a tree, the tree was deodand. If he drowned in a well, the well was to be filled up. It did not matter that the forfeited instrument belonged to an innocent person. 'Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner.' That is from a book written in the reign of Henry VIII, about 1530. And it has been repeated from Queen Elizabeth's time to within one hundred years, that if my horse strikes a man, and afterwards I sell my horse, and after that the man dies,

the horse shall be forfeited. Hence it is, that, in all indictments for homicide, until very lately it has been necessary to state the instrument causing the death and its value, as that the stroke was given by a certain penknife, value sixpence, so as to secure the forfeiture. It is said that a steam-engine has been forfeited in this way. [\[12\]](#)

The law of deodand and was used by the Court of Admiralty and now exist in the law of shipping. [\[13\]](#) In *Cheatley*, Menzies J stated that there was nothing in law that permitted representation by the person whose property was deodand, and if mandated, it would impose an “unexpressed limitation” on the Act. [\[14\]](#) In other words, the complicity or innocence of the owner is not relevant. However, knowledge by the owner that a vessel can be forfeited can ensure that the owner will exercise vigilance to prevent the use of the vessel in illegal fishing. [\[15\]](#) Given that the forfeiture provision in *Cheatley* is similar to that used in both the *Fisheries Act* and *Marine Spaces Act*, the case has been relied on by Fiji’s judiciary.

Briefly, *Cheatley* involved illegal fishing by four Taiwanese vessels found fishing in the same area. The circumstances supported the view that the activity was part of an organised plan by the captains or the companies. At first instance, the magistrate decided that the company must bear the burden of the penalty as they would receive the majority of the profits. Apart from a fine, forfeiture of the vessel, its equipment and catch was ordered. The owner of the vessel appealed to the Supreme Court of the Northern Territory which quashed the forfeiture order made by the magistrate. In turn, *Cheatley* on behalf of the Commonwealth appealed to the High Court of Australia against the order of the Supreme Court. The High Court allowed the appeal and set aside the order of the Supreme Court. Here, there was a deliberate breach of the law and the forfeiture order made by the magistrate was upheld.

Forfeiture cannot be ordered if there is an isolated or a one-off breach [\[16\]](#), or where there is a prior civil claim in respect of the vessel [\[17\]](#) or where the catch was small in value [\[18\]](#). But if there is a deliberate breach, forfeiture of the vessel, apparatus, the catch or proceeds from the sale of catch can be ordered. [\[19\]](#) These principles for forfeiture have been applied but may be altered and added to by the judiciary in the exercise of its discretion. Section 10(7) of the *Fiji Fisheries Act* has been correctly interpreted to give the courts discretion in the making of forfeiture orders. [\[20\]](#) Forfeiture is a penalty provision that comes after, and needs to be separate from, sentencing. [\[21\]](#)

In the first illegal fishing case concerning the Belize flagged “South Star”, there were separate civil and criminal cases; the civil case was triggered once the vessel had been detained for illegal fishing. Forfeiture of the vessel could not be made under the criminal action because there was a pre-existing order for the arrest of the vessel made by a creditor company in Korea. Under its civil jurisdiction the High Court ordered forfeiture of the vessel, its equipment and chattels and later sold these. In the second and third cases, the court decided not to order forfeiture of the vessel because they appeared to be isolated incidents and the total value of catch was \$500 and \$850 respectively. [\[22\]](#) One may argue that even though the value of the catch was small, the vessel could still be used by its owners to fish illegally. The culpability of the captain is qualified by the nature of the incident and the value of the catch.

Further, the fact that captains and their crews are first offenders is irrelevant to the question of forfeiture. In *Mitchell v Abas and Others*, [\[23\]](#) the Supreme Court of Western Australia opined that owners could easily continue to escape the consequences of offending by ensuring that the captains of their boats were always first offenders. It was noted that the only way to stop owners exploiting their captains and crews was to take their boats away and send a clear message to the owners that they could not continue to breach fisheries law.

It was not until September 2003 that forfeiture was deliberated at length by the courts of Fiji. The case involved a Fiji registered vessel “Sun 5” fishing without a licence. The magistrate in sentencing the captain did not consider a forfeiture application by the prosecution. On appeal, the High Court considered *Cheatley* and other cases and applied the principles for the order of

forfeiture expounded in *Mitchell*.<sup>[24]</sup> In *Mitchell*, five vessels were caught fishing in a prohibited area and were specifically targeting sharks for the lucrative shark fin trade. While the court considered the considerable hardships that would be caused to the captain and crew, it characterized illegal fishing as a serious offence which needed to attract a fitting penalty and ordered forfeiture of the five vessels to the Crown.

In “Sun 5”, the High Court heard that the vessel was fishing illegally on ten separate occasions and demonstrated a deliberate flouting of the law. The court also considered the size and value of the catch<sup>[25]</sup>, the scale of the operation, and was without doubt that the owners of the vessel benefited from illegal fishing. Although the complicity or innocence of the owners is irrelevant in the making of forfeiture cases, it was taken into account in the order for forfeiture of the vessel and its apparatus.<sup>[26]</sup> The owners of the vessel then appealed for a stay on the forfeiture order. The Court of Appeal allowed the appeal on the grounds of natural justice that the owner and/or charterer had a right to be heard by the magistrate on an application for forfeiture.<sup>[27]</sup> In supporting its decision the court referred to a High Court of New Zealand decision in *Ministry of Agriculture and Fisheries v Schofield*<sup>[28]</sup> where there was a presumption of forfeiture unless the owner shows special reasons otherwise. The court then remitted the State’s application for forfeiture back to the Magistrates’ Court for rehearing.

Two years later in the China National Fisheries Corporation (CNFC) case, the Court of Appeal revisited its earlier decision in the Deep Sea Fishing case and expressed two reservations.<sup>[29]</sup> Firstly, the directions made by Fraser J in the *Schofield* case applied to the Magistrates’ Courts and cannot be directed to the High Court because affidavits by the owner had been considered by the High Court judge. Secondly, the High Court of Australia decision in *Cheatley* was not brought to the attention to the Court in the Deep Sea case. As the Australian forfeiture provision at that time was similar to current Fiji law, *Cheatley* should have been considered.<sup>[30]</sup> The Court of Appeal agreed in the CNFC case that the “Zhong Shui 607” was engaged in fishing that was not accidental, and endorsed the grounds of forfeiture made by the High Court.

The February 2006 High Court decision concerning the forfeiture of the “Lian Chi Sheng” followed the Court of Appeal decision in CNFC case and *Cheatley*. Winter J. applied the principles of forfeiture proposed by Shameem J in *Yang Shui Xing* and approved by the Appeal Court in the CNFC case and suggests that there may be other principles. In addition to points raised earlier, the Court said:

The power of forfeiture like the power to confiscate smuggled or contraband goods is a penal law and not within the ambit or purpose of any constitutional protection. *Forfeiture is a necessary aspect of the sovereign right recognised in international law to wisely manage and protect fisheries resources* [my italics].<sup>[31]</sup>

While forfeiture gives the power to confiscate goods as well as vessels and apparatus used in the commission of an offence, it is arguable whether forfeiture is a necessary aspect of the sovereign right recognised in international law.

The 1982 UN Convention on the Law of the Sea (LOSC)<sup>[32]</sup> allows a coastal State to have sovereign rights in its EEZ and provides for the enforcement of its law and regulations.<sup>[33]</sup> Fiji became the first Party to the LOSC after lodging its instruments of ratification on 10 December 1982. Pursuant to the LOSC, penalties for breaches of fisheries laws and regulations in the EEZ may not include imprisonment in the absence of an agreement between the States concerned. Arrested vessels and crew are to be “promptly released upon the posting of reasonable bond or other security”.<sup>[34]</sup> In other jurisdictions, forfeiture orders in national courts have led to legal challenges before the International Tribunal on the Law of the Sea.<sup>[35]</sup> In these cases, the imposition of a reasonable financial bond or other security by the arresting state is required. Under international law, forfeiture cannot be ordered before a reasonable financial bond has been imposed on the owner and has subsequently not been satisfied. However, the requirement to impose a reasonable financial bond or other security is not provided for in Fiji law.

As a result of its absence, the judiciary has consistently considered the question of forfeiture

without imposing a reasonable bond in cases where illegal fishing occurs in the EEZ. In the cases where the Fiji judiciary ordered forfeiture of vessels caught illegally fishing in the EEZ (“Sun 5” and “Zhong Shui 607”), no reasonable bond in accordance with Articles 73 and 292 was imposed. For such cases, forfeiture can only be considered if the reasonable bond imposed is not satisfied. The forfeiture orders made in those cases could therefore be challenged.

The status of national law and the practice of the courts with respect to forfeiture for foreign fishing vessels fishing illegally in Fiji’s EEZ is contrary to Fiji’s obligations under the LOSC and international law. Although it is clear that this divide needs serious attention, a legislative remedy is needed since Fiji follows the dualist system. While Fiji may have binding international commitments under the LOSC, the rights and obligations arising can only become part of national law if given effect in national legislation. Members of the judiciary have the opportunity to comment on the incongruity between Fiji’s international obligations and national practice, but are ultimately constrained by the absence of the specific requirements for the imposition of a reasonable bond and “prompt release” in national law. Nevertheless consistent comments made by the judiciary build Fiji common law and can directly influence national law and practice.

That said, it is submitted that the requirements of the imposition of a reasonable bond and prompt release do not apply where there is a contravention of fisheries law in marine spaces where a coastal state exercises sovereignty.<sup>[36]</sup> In these zones, the EEZ provisions of the LOSC do not apply. Thus, in Fiji’s internal waters, archipelagic waters and territorial sea, forfeiture is an integral part of enforcement necessary to protect the interests of Fiji and its communities. Existing laws are vague in this regard and need to, among other things, distinguish between the extent of enforcement powers in respective marine zones and against Fiji flagged vessels and foreign flagged or other vessels.

#### **APPLICATION OF VESSEL MONITORING SYSTEM DATA**

In 2002, Fiji introduced regulations requiring the use of fishing vessel monitoring system (VMS) to monitor the position and activities of fishing vessels in order to effectively manage fisheries.<sup>[37]</sup> The VMS provides monitoring agencies with accurate locations of the fishing vessel at periodic time intervals which are set from time to time and with information on the vessel’s speed and heading, it is possible for the monitoring agency to draw conclusions about the activities of a vessel. In addition, VMS can convey catch data from the vessel while at sea to the monitoring agency.

The VMS that Fiji uses is part of a regional initiative coordinated and introduced to members by the Forum Fisheries Agency in 1999. The VMS relies on the installation of a device known as the automatic location communicator on the fishing vessel, and, satellites to transmit information back to the FFA and the licensing state. Although the fundamental components of VMS technology are not new, VMS has only been used in fisheries within the last fifteen years.

VMS has been considered by courts in various countries.<sup>[38]</sup> For instance in *Bagnato v Australian Fisheries Management Authority*, the Administrative Appeals Tribunal elaborated at length on the integrity of VMS technology and that the general intelligence offered by information on vessel movements was of assistance in monitoring fishing effort in the fishery.<sup>[39]</sup>

The judiciary in Fiji has not provided strong arguments in support of the reliability and integrity of VMS information or particularly to describe VMS as a “notoriously scientific instrument”. Rather, general statements in support of VMS have been made. In *State v Yang Shui Xing*, Shameem J. stated that “[t]he presence of the Global Positioning System, and the transmitter for the Vessel Monitoring System suggest the existence of accurate and sophisticated navigational equipment.”<sup>[40]</sup> This remark falls short of supporting VMS as a monitoring and tracking device because it places more emphasis on the use of VMS data for navigation rather than tracking.

In *Xing*, VMS information showed that the “Zhong Shui 607” was fishing illegally in Fiji’s EEZ and was fishing along the boundary for some time. The captain argued that the vessel drifted accidentally into Fiji waters but the court said that with sophisticated navigational equipment on

board, there was no excuse. Similarly in *State v Li Shi Gui*, the vessel “Lu Rong 1348” was detected fishing illegally 4.1 nautical miles within Fiji’s EEZ. As in *Xing*, the drifting excuse did not preclude the imposition of a penalty.

The recent High Court decision involving the “Lian Chi Sheng” mentions VMS in passing but does not discuss the accuracy and integrity of the system. Perhaps this is because counsel did not present strong arguments on the accuracy and reliability of information from the system. In any case, Winter J. recognised the ability of the monitoring agency to analyse movement patterns and determine that the vessel was fishing illegally. After stating that any foreign ship is required to carry an automatic location communicator (ALC), he provides that, “the ALC reports on ship activity via satellite through a vessel monitoring system hub to various national operators” and that the “VMS operator in Fiji was able to ascertain that the Lian had been fishing illegally.”<sup>[41]</sup> Recognition of the ability to determine vessel activity is an important contribution and sets a precedent for the use of VMS data to determine illegal fishing activity.

## PENALTIES

The penalties imposed upon illegal fishers are derived from limits set under the *Fisheries Act* and the *Marine Spaces Act*. Section 16 of the *Marine Spaces Act* imposes a maximum fine of \$100,000 each for a master and owner of a foreign fishing vessel fishing without a licence within the EEZ, and where the foreign fishing vessel is licensed and contravenes licence conditions, the master and licensee are liable on conviction to a maximum fine of \$25,000. In contrast section 10(3) the *Fisheries Act* extends liability to a charterer while retaining the maximum fine of \$100,000. Six of the seven fishing vessels convicted of illegal fishing were caught fishing in the EEZ. The High Court has decided on a tariff for illegal fishing in the EEZ between \$2,000 and \$7,000 with a starting point of around \$6,000.<sup>[42]</sup> In situations where there is an inadvertent act of illegal fishing, the lower end of the scale would be applied. This is the case concerning “Fu Yuan Yu” where the captain was fined \$4,000 based on the fact that the illegal catch was worth \$500 and the accused had limited means. On the other hand, flagrant breaches and repetitive illegal fishing will see the tariff for each count start at the higher end of the scale. The obvious example is the Chinese vessel “Zhong Shui 607” where the captain was fined \$5,000 for each of his two offences.

The most recent conviction involved illegal fishing in the territorial sea and archipelagic waters. This time the High Court started at \$10,000, added \$7,000 for aggravating factors, and discounted the total fine by \$4,000 after accommodating mitigating arguments. Although the court did not set a penalty range, tariffs in future cases will likely be between \$10,000 and \$17,000 for each offence. In the end, the charterer, a local fishing company, had to pay a total fine of \$30,000 and the court ordered forfeiture of the vessels, its equipment and provisions.

Despite having the same maximum fine, the High Court over four years has set tariffs at a low level and has also differentiated between the penalty for illegal fishing in the territorial sea and archipelagic waters on the one hand, and, the EEZ on the other. The reasoning employed in increasing penalties for illegal fishing in the territorial sea and archipelagic waters does not hold if seen from a conservation and management or even from a deterrence perspective.

In distinguishing illegal fishing in waters close to land, Winter J. in the “Lian Chi Sheng” case said:

However, it is not as critical as the need to manage fish stocks closer to home in the seas just off our reefs and island shores...The sheer greed of striping out fish stocks that would otherwise be directly available for the livelihood and sustenance of island communities and indigenous fishing concerns must elevate the tariff range for these offences. The closer you fish to shore, the more culpable you are and the more you pay sums up the principle.<sup>[43]</sup>

While the emphasis on the livelihoods and aspirations of indigenous communities is important, there is a need to consider broader conservation and management issues. To support his reasoning, Winter J. referred to a statement by Justice Coventry in *Regina v Finete & CNF*

*Fishing Ltd*<sup>[44]</sup> likening illegal fishing in national waters to removing a nation's assets and wealth. In *Cheatley*, Barwick CJ likened the protection of fish stocks from foreign exploitation to smuggling.<sup>[45]</sup> Illegal fishing deprives Fiji from benefiting from resources within its waters. Penalties for illegal fishing in the EEZ need to be consistent with that imposed in marine spaces closer to land. The EEZ is part of Fiji's fisheries waters and deserves the same treatment. Fiji is obliged to ensure conservation and long term sustainable fisheries. Also, the reasoning does not take into account the highly migratory nature of the stocks and that they travel throughout zones within national jurisdiction and beyond. It is critical that penalties imposed in all Fiji's fisheries waters need to be consistent to avoid abuse. In setting lower tariffs for illegal fishing in the EEZ and high tariffs for zones landward, the courts are being too lenient and may effectively promote illegal fishing in the EEZ rather than the territorial sea and archipelagic waters.

The obligation to conserve and manage fisheries within national jurisdiction also arises out of Fiji's regional undertakings.<sup>[46]</sup> Measures implemented in Fiji waters need to be compatible with measures adopted by other Pacific island neighbours and the Western and Central Pacific Fisheries Commission.<sup>[47]</sup> The impetus is therefore on fisheries managers and decision-makers to ensure compatibility, and it may be argued that compatibility extends to the imposition of penalties across the region.

In addition, tariffs for illegal fishing need to accommodate the vulnerability of fish stocks to over exploitation. The latest assessment of bigeye and yellowfin tuna stocks in the region indicate that current exploitation levels are not sustainable and are likely to result in the stocks moving to an overfished status.<sup>[48]</sup> With this recent development in mind, it is submitted that the judiciary needs to factor into its decision-making, the status of stocks and increase tariffs in all zones.

Furthermore, the judiciary appears to be less lenient towards foreign fishing operators compared to local fishing operators. The reputation of a local operator that has chartered a vessel has mitigated fines imposed. In the "Lian Chi Sheng" case, the High Court took into account the company's good record, its modest size, and the personal circumstances of the shareholders, and discounted the total fine payable. Besides this, the magistrate in the case concerning "Lu Rong 1348" ordered that proceeds from the sale of illegal catch be paid to the local charterer because it was a local company.<sup>[49]</sup> The philanthropic activity of a local director has also been considered.<sup>[50]</sup> Based on decided cases, the protection of fish stocks from foreign exploitation alone is not adequate as many foreign fishing vessels are now localised and based in Fiji or are exclusively chartered by local companies. Deterrence has to apply to any fishing vessel regardless of whether it is foreign or locally owned, or locally chartered.

## CONCLUSION

Illegal fishing deprives a nation of its national assets and wealth. The critical role of Fiji's judiciary in deterring illegal fishing began in 2002 after the arrest of the "South Star". Since then the courts have set tariffs for illegal fishing in the EEZ, on the one hand, and, the territorial sea and archipelagic waters, on the other. A consistent tariff needs to be set for all marine spaces that constitute Fiji's fisheries waters. Consistent penalties will deter potential illegal fishing activity and should not discriminate between local and foreign operators. The courts have also developed the law on forfeiture and have enunciated principles to be followed. While the High Court decisions on forfeiture have been consistent, the two Court of Appeal decisions have not been so. The first decision followed the New Zealand case of *Schofield* and supported the requirement of a presumption to be displaced with a "special reason", while the second chose to follow the Australian case of *Cheatley*. The latter decision of the Court of Appeal in the CNFC case represents the current position. However, it is clear that in two previous cases of illegal fishing in the EEZ, forfeiture was ordered contrary to the provisions of the LOSC. A reasonable financial bond or security must be imposed and failing satisfaction, forfeiture can then be ordered. Finally, the use and reliance by the courts of VMS data is progressing positively. In earlier decisions, the judiciary has noted the sophisticated nature of the technology as a navigational tool but in the latest case, there is recognition that from VMS data, a monitoring agency is able to determine whether a vessel has been fishing illegally. From VMS data, the

High Court agreed that the vessel was fishing illegally during the months of March, April and May of 2004. Cases decided thus far provide a good platform to develop the interpretation and application of fisheries law and to deter illegal fishing. The stand of the judiciary is best summarised in the warning issued to captains, charterers and owners in the “Lian Chi Sheng” case:

Captains, charters and owners must conduct themselves with care and prudence when harvesting our Pacific ocean. They are well warned. They are deemed to know the law. The burden of compliance is on them and not on poor states that cannot police the pirates. There is a legitimate expectation that those engaged in foreign fleet fishing should take care to comply with the rules. There is a legitimate expectation that non-compliance with result in high penalties and forfeiture.<sup>[51]</sup>

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[1] See table 1. The cases are: *State v Jang Dong Myeong* (Unreported, High Court of Fiji HAC 019 of 2002S, 28 April 2003, per Shameem J); *State v Meong Yeong Kim* (Unreported, High Court of Fiji HAA 024 of 2003S, 24 June 2003, per Shameem J); *State v Chen Chaolin* (Unreported, High Court of Fiji HAC 010 of 2003S, 26 June 2003, per Shameem J); *State v Zhang Jian Chuan* (Unreported, High Court of Fiji HAC 009 of 2003S, 26 June 2003, per Shameem J); *State v Paek Kyeong* (Unreported, High Court of Fiji HAA026 of 2003S, 12 September 2003, per Shameem J); *Deep Sea Fishing Corporation Limited v State* (Unreported, Fiji Court of Appeal Criminal Appeal No. AAU30 of 2003S, 26 November 2003, per Barker JA, Tompkins JA, and Pathik JA); *State v Li Shi Gui* (Unreported, High Court of Fiji HAA 124 of 2004S, 5 November 2004, per Shameem J); *State v Yang Shui Xing* (Unreported, High Court of Fiji HAC41 of 2004S, 29 November 2004, per Shameem J); *China National Fisheries Corporation & China Fisheries (Fiji) Holdings Co. Ltd & Yang Shui Xing v State* (Unreported, Fiji Court of Appeal Criminal Appeal No. AAU0027 of 2005, 25 November 2005, per Ward, President, Smellie JA, Penlington JA.); *State v Hung Kuo Hui & Waikava Marine Industries Limited* (Unreported, High Court of Fiji HAC40 of 2004, 24 February 2006, per Winter J).

[2] Aqorau, T. ‘Illegal fishing and Fisheries Law Enforcement in Small Island Developing States: The Pacific Islands Experience’ 15(1) *International Journal of Marine and Coastal Law*, 37 – 63.

[3] Ordinance No. 41 of 1941 (entered into force on 1 January 1942).

[4] Lawson, T. A. 2002. *Secretariat of the Pacific Community Tuna Fishery Yearbook 2001*. Noumea: SPC. 161.

[5] Gillett, R. & Lightfoot, C. 2001. *The Contribution of Fisheries to Pacific Island Economies*. Manila: ADB. 86.

[6] See s.9 *Fisheries Act* (FA) and s.22 *Marine Spaces Act* (MSA).

[7] S.2 FA and s.2 MSA.

[8] See s.5 FA and s.14 MSA.

[9] S.16(2) MSA.

[10] *State v Pak Kyeong* above n.1 at 11.

[\[11\]](#) *Cheatley v The Queen* (1972) 127 CLR 291 at 305.

[\[12\]](#) *The Common Law* p.24, 25.

[\[13\]](#) *Cheatley* at 305 per Menzies J.

[\[14\]](#) *Ibid* at 306.

[\[15\]](#) *Re Director Public Prosecutions; Ex Parte Lawler and Ano.* (1994) 179 CLR 270 per McHugh J at 295.

[\[16\]](#) *Zhang Jian Chuan* HAC9 Of 2003S.

[\[17\]](#) “South Star” case.

[\[18\]](#) *Chen Chaolin*, above n.1.

[\[19\]](#) See s.10(7) FA and s. 18 MSA.

[\[20\]](#) The same interpretation has been accorded to s.18 MSA.

[\[21\]](#) *China National Fisheries Corporation*, above n.1 per Shameem J at para. 41, followed by Winter J in *State v Hung Kuo Hui & Waikava Marine Industries Limited*, above n.1 at 9.

[\[22\]](#) See *State v Chen Chaolin*, and *State v Zhang Jian Chuan* both at above n.1.

[\[23\]](#) (1998) 100A Crim. R. 103, per Wallwork J.

[\[24\]](#) Wallwork J. referred to: *R v Kakura and Sato* (Unreported, Supreme Court of NSW Criminal Division; 70178/90, 21 September 1990, per Wood J) at 27; *Hwang Ming Heui & Anor v Mellon* (1980) 4 NTR, per Muirhead J at 14/15; *Cheatley*, above n. 11 per Barwick CJ at 296; and *Chiou Yaou Fa v Morris* (1987) 87 FLR 36 per Asche J at 63/64.

[\[25\]](#) The prosecution estimated the value of the unlawful catch to be \$20,671 while the defence estimated it to be \$17,900.

[\[26\]](#) *State v Pak Kyeong*, above n.1 at 14.

[\[27\]](#) *Deep Sea Fishing Corporation Limited v State*, above n.1 at 6.

[\[28\]](#) [1990] 1 NZLR 210.

[\[29\]](#) *China National Fisheries Corporation & China Fisheries (Fiji) Holdings Co. Ltd & Yang Shui Xing v State*, n.1 at para. 22.

[\[30\]](#) See s.13AA *Fisheries Act 1952 – 1970* (Commonwealth of Australia).

[\[31\]](#) *State v Hung Kuo Hui & Waikava Marine Industries Ltd*, above n.1 at 9.

[\[32\]](#) 10 December 1982, 21 ILM 1245. Entered into force 16 November 1994.

[\[33\]](#) Articles 73 and 292, LOSC.

[\[34\]](#) Article 73(2) LOSC.

[\[35\]](#) See particularly: The “Juno Trader” case (*St Vincent and the Grenadines v Guinea-Bissau*), The “Volga” case (*Russian Federation v Australia*), The “Chaisiri Reef 2” case (*Panama v Yemen*), and The “Grand Prince” case (*Belize v France*). See also *Olbers Co Ltd v Commonwealth of Australia (No 2)* [2003] FCA 177; and Treves, T. 2004. *Flags of Convenience before the Law of the Sea Tribunal*. In: Scheiber, H. N & Mengerink, K. J. (eds). *Multilateralism & International Ocean Resources Law*. Berkeley: Law of the Sea Institute, University of California. XIII-1 – XIII-12.

[\[36\]](#) For examples of the types of detention to which Article 292 LOSC (prompt release of vessels and crews) does not apply, see Brown, E. D. 1998. *The M/V Saiga Case on prompt release of detained vessels: the first judgment of the International Tribunal for the Law of the Sea*. *Marine Policy* 22(4 – 5), 307 – 326, at 316 – 318.

[\[37\]](#) *Marine Spaces (Foreign Fishing Vessels) (Amendment) Regulations 2002*. Legal Notice No. 21, Fiji Islands Government Gazette Supplement No. 9, 22 March 2002.

[\[38\]](#) For example, *Donohue v Australian Fisheries Management Authority* [2000] FCA 901;

*Bagnato v Australian Fisheries Management Authority* (Administrative Appeals Tribunal) Decision No. 12568, 30 January 1998; Cf *Ministry of Agriculture & Fisheries v Thomas* [1994] DCR 486.

[\[\[39\]\]](#) *Bagnato*, above n. 38 at para. 51.

[\[\[40\]\]](#) At 4 – 5.

[\[\[41\]\]](#) *State v Hung Kuo Hui & Waikava Marine Industries Ltd*, above n.1 at 3.

[\[\[42\]\]](#) *Yang Shui Xing, Zhang Zian Chuan, and Chen Chaolin*, all above at n.1. Shameem J. referred to *Public Prosecutor v Baek* (1995) VUSC9 Crim. Case No. 44 of 1995 (Vanuatu Supreme Court), *Xuegiang v The Republic and Shan v The Republic* (1997) KICA 16 (Kiribati Court of Appeal), *Munin v Chen Sung Chizu and Hung Shang Yi* (undated), Gillies S. M. (Magistrates Court of Northern Territories), *Public Prosecutor v Lin Shiow Her* (1993) (Vanuatu Supreme Court), and *Ministry of Agriculture and Fisheries v Dubchak and Ors* (1994).

[\[\[43\]\]](#) At 5.

[\[\[44\]\]](#) Decision of the High Court of the Solomon Islands of 30 July 1984.

[\[\[45\]\]](#) At 296.

[\[\[46\]\]](#) Fiji is party to the *South Pacific Forum Fisheries Agency Convention* [1979] PITS 2 (10 July 1979); the [Treaty of Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America](#) [1987] PITS 2 (2 April 1987); the *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region* [1992] PITS 8 (9 July 1992); the *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* [2000] PITS 4 (5 September 2000) (WCPFC).

[\[\[47\]\]](#) See Article 8, WCPFC.

[\[\[48\]\]](#) Report of the First Regular Session of the Scientific Committee of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Noumea, New Caledonia, 8 – 19 August 2005, WCPFC/Comm.2/22, at 33, 34.

[\[\[49\]\]](#) In the High Court, Shameem J. doubled the “manifestly lenient fine” imposed by the magistrate.

[\[\[50\]\]](#) *State v Paek Kyeong*, above n.1.

[\[\[51\]\]](#) Per Winter J., at 10.

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