



UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982 ON FISHERIES PERSPECTIVE

*“Enforcement of International and Domestic Fisheries
Laws- Case Studies”*

6 – 9 NOVEMBER 2023

SEAFDEC – TD

THAILAND

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OBJECTIVES OF THE PRESENTATION

- ▶ Basic understanding of Public International Law in relation to fisheries law.
- ▶ Basic understanding on the application of Public International Law through Domestic Laws; and
- ▶ To provide the importance of local and global judicial decisions in the enforcement of fisheries law.

QUOTES FOR THE DAY

- ▶ **“Law Without Force is impotent” – Pascal**
 - Dormant domestic law and poor political will
- ▶ **“Tragedy of the commons” – Garrett Hardin**
 - High Seas – “Open access”
 - Co-operative action is the only solution.

PUBLIC INTERNATIONAL LAW (PIL) AND PRIVATE INTERNATIONAL LAW (CL)

- ▶ Private International Law or Conflict of laws (CL).
 - “Foreign elements”- merely part of domestic law. Breach of contract bet’ persons.
- ▶ Public International Law (PIL).
 - Law of nations, law among nations or inter-State law.
 - The law that governs States in their relationship with one another on Int’ plane; example public Int’ Orgs, NGOs, Transnational corporations and even private individuals are subjects of PIL.
 - ‘ ... a body of principles, customs and rules recognized as effectively binding obligation by sovereign States and such other entities as have been granted int’ personality’
 - *Pacta sunt servanda.*

DISTINCTION BETWEEN INT' LAW AND NATIONAL LEGAL SYSTEM

- ▶ States have three (3) sovereign functions as law making (legislative), law determination (courts and tribunals), and law enforcement (administrative, police, maritime enforcement agencies etc)
- ▶ Whereas in Int' law, legal regulations of international intercourse of States which consider themselves as “sovereign “and “equal”.
- UNGA- Not a world legislature.
- ICJ - Consent of States to its jurisdiction. Art. 36(1) of SICJ
- UNSC – Legally and politically limited. Veto power, Art. 27(3) of UNC. BUT,
- ▶ In practice, there is no controversy. It is constantly recognized by States as law. i.e. Montreal Conventions 1971- safety of civil aviation; LOSC 82, even USA accepts it as customary Int' law.

DISTINCTION BETWEEN INT' LAW AND NATIONAL LEGAL SYSTEM

- ▶ States conduct everyday int' relation on the basis of Int' law.
- ▶ Modern national constitution usually contains references to Int' law. i.e Art. 74(1) of Malaysian Federal Constitution (MFC), Art. 25 of German constitution and Art.178 of The Thailand Constitution 2017.

INTRODUCTION OF INTERNATIONAL LAW INTO DOMESTIC LAW

- ▶ Sources of Int' Law, Art. 38 (1) of SICJ 1945. Int' conventions, Int' customs and general principles Law. However, decision of the Int' Court has no binding force, except between parties consented.
- ▶ Two methods/practices by States (Monism & Dualism)
 - **Doctrine of Transformation** – Int' law through legislative process, parliament. i.e. Malaysian EEZ Act 1984, Malaysia- Thailand JDA Act 1997 (bilateral treaty) and The Philippines Archipelagic Sea Lane Act 2022.
 - Case ***Public Prosecutor v Narongne Sookpavit & Ors*** [1987] 2MLJ (100). Claim of innocent passage under customary Int' law.
 - **Doctrine of incorporation** – direct application of Int' law into domestic law. The US Consti', Art VI,cl2.

STATE JURISDICTION

- ▶ Jurisdiction is a part of State sovereignty to:
 - Prescribe rules (prescriptive jurisdiction)/ legislative power.
 - Power to enforce (enforcement jurisdiction) (Executive and judicial power of enforcement)
- ▶ Five general principles of criminal jurisdiction
 - **Territorial Principle:** determining jurisdiction by reference to the place where the offence was committed. Exercise jurisdiction within State's territory over person, property, action or events. In the case of *SS. Cristina (1938)* (State owned ship- Spain).
 - **Subjective Territorial Principle:** Occur within the State BUT completes in other territory.
 - **Objective Territorial Principle:** Starts in other States BUT completes in its territory.

STATE JURISDICTION

- **Nationality Principle:** determining jurisdiction by reference to the nationality of the person committing the offence.
- On its nationals committing crime in any part of the world BUT action only upon returning to the State of Nationality. i.e. Flag State responsibility
- **Protective Principle:** determining jurisdiction by reference to the national interest injured by the offence. Also new “effect doctrine”- US anti-trust legislations (anti-competition laws). How about, US “Maritime Security and Fisheries Enforcement Act” or “Maritime Safe Act”
- Act committed against the security of one State by whoever and wherever. i.e Art.33 of LOSC 82. To prevent infringement and to punish infringement. UK Hovering Act in the 18th century. i.e, *Araunah (UK v Russia) International Arbitration 1888*

STATE JURISDICTION

- **Universality Principle:** determining jurisdiction by reference to the custody of the person committing the offence and;
- Concept of “International Crime”
- Piracy- Art. 101 of LOSC 82. *Piracy Jure Gentium, In Re (1934) AC 586.*
- **Passive Personality Principle:** determining jurisdiction by reference to the nationality of the person injured by the offence. Active Nationality Principle.
- States may try and punish foreigners for crimes committed abroad affecting its nationals. US Foreign Relation Law, on terrorism and other serious crimes.

THE MARITIME ZONES

- ▶ **Baseline-** Art.5 and 7 of LOSC 82. *Anglo-Norwegian Fisheries Case (UK v Norway)* ICJ 1951, State practice due to indented coast, persistent objector (1869-1933) and economic interest. Appurtenant to the land.
- ▶ **Territorial Sea (territorial waters???)** Art. 3 LOSC 82. Adjoining the coast. League of Nations on Conference for the codification of Int' Law 1930. However, eventually many coastal States acted as subsequent objectors. From 3Nm to 12 Nm
- ▶ **Contiguous Zone-** Art. 33 LOSC 82. State practice. i.e 18th century UK Hovering Act and US Customs Water of 1797, 12Nm from the shore. *I'm Alone case, (Canada v United States) (1935)29 AJIL 326*

THE MARITIME ZONES

- ▶ **Exclusive Economic Zone-** Art. 55 and 57 of LOSC 82. Concept mooted in 1945 and started crystallizing in 1976. However, its origin is from EFZ was recognised by ICJ in *Fisheries Jurisdiction cases (UK v Iceland) ICJ 1973*- Issues of State Practice, must be common. “**Cod War**”. The proposed extension of Iceland’s fisheries jurisdiction from 16Nm to 50Nm is breach of an agreement between them- **Exchange of Notes in 1961**. Iceland’s argument against the UK not to extend the fisheries jurisdiction was no longer binding due to a fundamental change of circumstances since that agreement.

THE MARITIME ZONES

- ▶ EEZ has to be legally established by coastal State. Issues of extended jurisdiction and creeping jurisdiction.
- ▶ **Safety Zones:** Art. 60(2), 60(5) and 80 of LOSC 82. Coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regards to customs, fiscal, health, safety and immigration laws and regulations.....shall not exceed a distance of 500 meters around them. Fishing allowed???
- ▶ *The “Arctic Sunrise” case (Netherlands v Russia)2013 ITLOS (provisional measures) and PCA,*
- ▶ **High seas:** Art.86 LOSC 82 – ABNJ.... All parts of the sea that are not included in the exclusive EZ, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. BBNJ, conservation of marine BioD, sustainable use and promoting ocean governance.

ENFORCEMENT OF LAWS AND REGULATIONS OF COASTAL STATE, ART. 73 OF LOSC 82

- ▶ Fisheries Enforcement in Zones under Sovereignty
 - International law does not regulate fisheries enforcement in internal waters, territorial sea and archipelagic waters. They are subject to full sovereignty of coastal State.
 - Int' law only regulates prescriptive and enforcement powers in EEZ.
 - Implication for domestic fisheries legislation
- ▶ **Article 73(1):** The coastal State **may**, in the exercise of its **sovereign rights** to explore, exploit, conserve and manage the **living resources** in the **EEZ**, take such measures, including boarding, inspection, arrest and judicial proceeding, as may be necessary to **ensure compliance with the laws** and regulations adopted by it **in conformity with this Convention**.

ENFORCEMENT OF LAWS AND REGULATIONS OF COASTAL STATE, ART. 73 OF LOSC 82

- The question of non-living resources.
- **Art.77(1)**- continental shelf, **natural resources** include living organism, sedentary species.
- However, Sec. 15(1) (a) (b) of Malaysia Fisheries Act 1983 (MFA 85) includes Fishing and Techno-economic survey or survey of any fishery.
- Sec.54 of Malaysian Exclusive Economic Zone Act 1984 (MEEZA 84) states ...no person shall in the EEZ or continental shelf, explore or exploit any natural resources whether living or non-living etc
- Enforcement powers similar to **Art.73(1)** are in Sec. 24 MEEZA 84 and Sec. 46,47 etc in MFA 85

ENFORCEMENT OF LAWS AND REGULATIONS OF COASTAL STATE, ART. 73 OF LOSC 82

- ▶ **Art. 73(2):** Arrested vessels and their crews **shall be promptly released** upon posting of **reasonable bond or other security. To be read with Art.292**
- The fundamental question of “**What is reasonable bond**”. The Convention is silent.
- Sec.50 of MFA 85 states aggregate value, by the DG of Fisheries Malaysia.
- Whereas Sec. 32(1) of MEEZ Act 84 states “bond or other security **to the satisfaction of the authorised officer or the court**”. Sec.413(2) of Malaysian Criminal Procedure Code (MCPC)

ENFORCEMENT OF LAWS AND REGULATIONS OF COASTAL STATE, ART. 73 OF LOSC 82

- ▶ **Art. 73(3):** Coastal State penalties for **violation of fisheries laws** and regulation in the EEZ **may not include imprisonment**, in the absence of agreement to the contrary by the States concerned, or any other form of **corporal punishment**
- Whether imprisonment in default /detention while on remand/detention during trial/ constitutes a violation of **Art. 73**
- Sec. 25(a) of MFA 85- only a fine for FFV master and crews. In default, imprisonment Sec. 283(1)(c)(iv) MCPC.
- Sec. 47D of MFA 85 – Remand
- Sec. 26 MEEZA 84 – Without delay to produce to the court; no long custody; journey from the location of detention not included.
- Sec. 27 of MEEZA 84- Nearest port

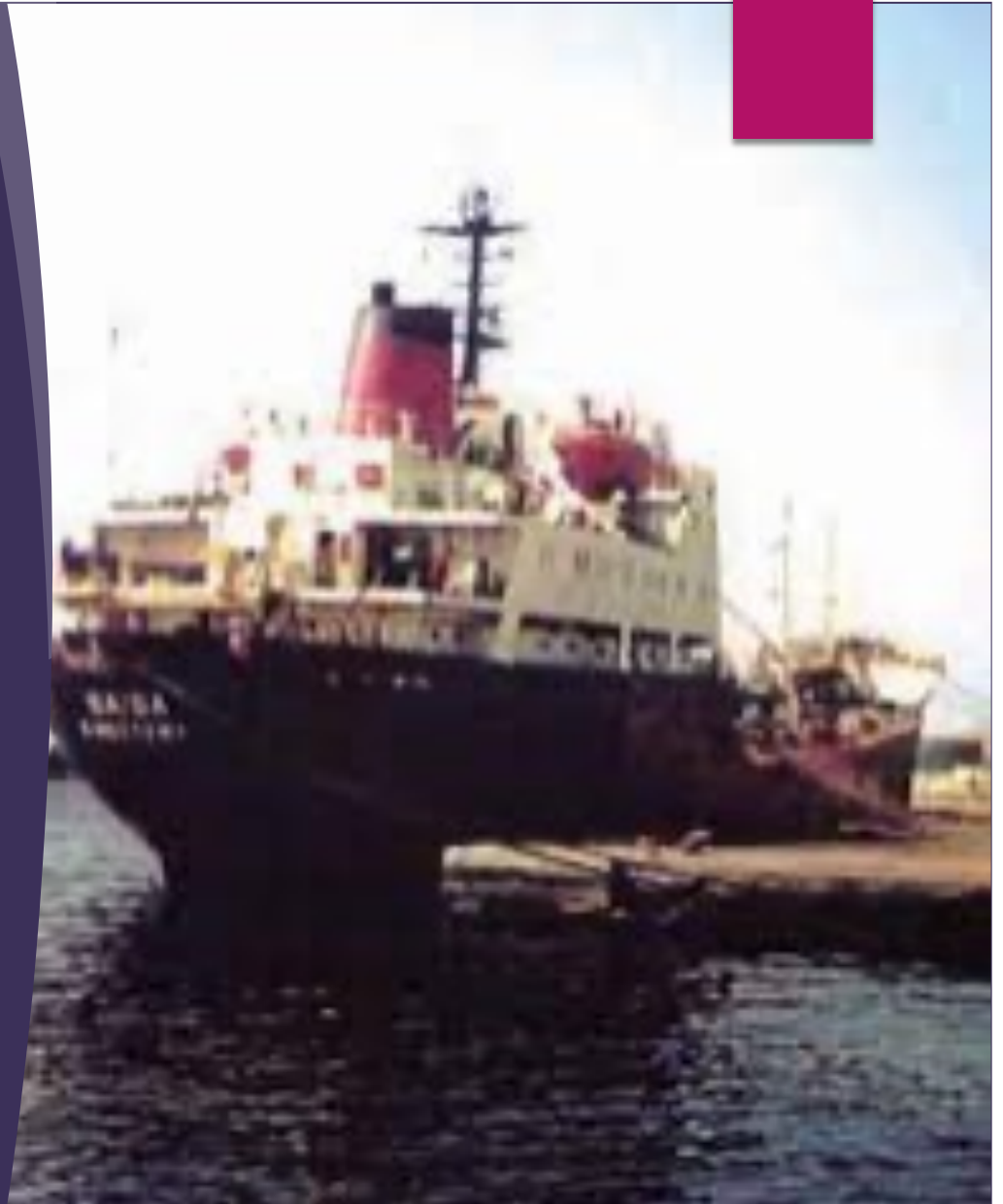
ENFORCEMENT OF LAWS AND REGULATIONS OF COASTAL STATE, ART. 73 OF LOSC 82

- ▶ **Art.73(4):** In cases of arrest or detention of foreign vessels, the coastal State shall promptly **notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently**
- Sec. 32(2) of MEEZA 84 “.....if the article, vessel is foreign owned, the authorised officer SHALL cause the diplomatic representative in Malaysia of the flag State of the vessel concerned through the Ministry of Foreign Affairs”.

Landmark Cases at International and Domestic Courts

MV SAIGA case (St. Vincent and Grenadines V Guinea) (1999) ITLOS

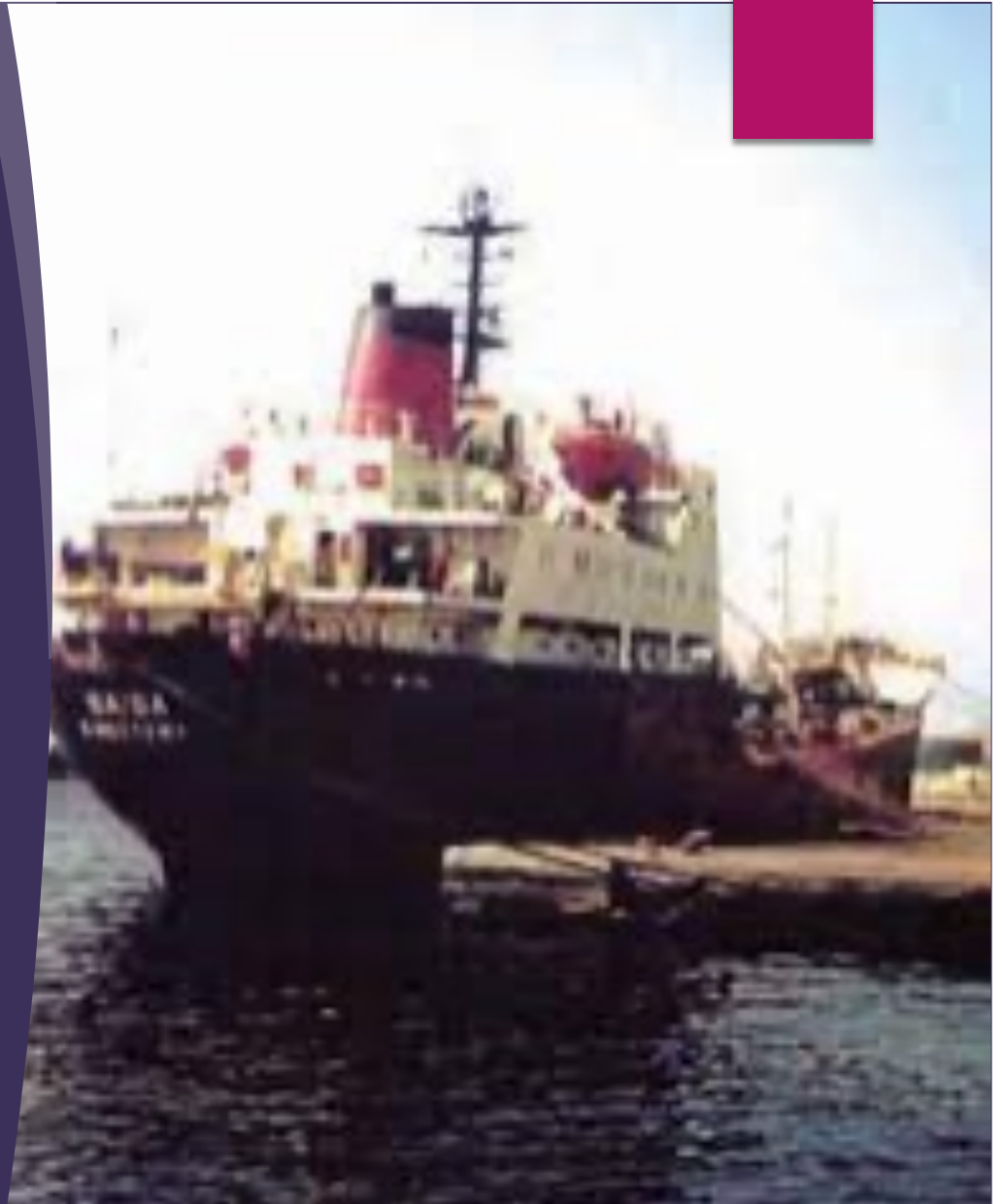
MV. Saiga was an oil tanker flying the flag of St. V & G. On the 27th Oct 1997, it had supplied fuel oil, water and rations to 3 fishing vessels which were licensed to fish in Guinea EEZ at a location about 22 Nm from the island of Alcatraz which belongs to Guinea. The next day Guinea Customs boats chased (hot pursuit???) to detain the vessel and crews. 2 seriously injured. Hence the legal action by St. V & G against Guinea @ ITLOS.



Landmark Cases at International and Domestic Courts

The case involves a number of pertinent issues related to LOSC 82 and customary international law.

- Prompt release of vessels and crews under Art. 292 of LOSC 82;
- Genuine link/flag State.
- Exhaustion of local remedies.
- Application of customs & excise laws and freedom of navigation in EEZ.
- The rights of hot pursuit.
- Use of force
- Compensation.



USE OF FORCE



I'm Alone (Canada v US) 1935

- ▶ She was 10 Nm off the Louisiana coast (according to USCG). Ordered to stop by USCG for smuggling liquor/rum through shore-based speedboats. Hot pursuit covering 200Nm. Bad weather, failed to stop, fired upon, one crew died due to drowning, I'm Alone sunk with the cargo.
- ▶ Territorial sea 3Nm but US Customs jurisdiction 12 Nm , contiguous zone.
- ▶ Speed boats involved to smuggle to the US shores. Doctrine of constructive presence.
- ▶ Excessive force, intentional sinking, owner USA citizen, compensation USD50k to crews and apology to Canada.

USE OF FORCE



Red Crusader (1962) 35 ILR 485 (UK v Denmark)

- ▶ Red Crusader was a Scottish trawler detained for fishing close to the Faroes Island. The skipper locked up the boarding party and escaped to Scotland. Without warning, fired upon with solid shots. Danish patrol vessel exceeded legitimate use of heavy weapon on two counts. (i.) Firing without warning with solid shots; (ii)Creating danger to human life on board the RC without proved necessity.
- ▶ Similarly, in **MV Saiga** case ITLOS adopted **Red Crusader** and **I'm Alone** cases to conclude the use of force was unjustified,
 - Consideration to humanity approach.
 - Internationally recognized SOP. Radio call, Signals, pennants (fisheries patrol, stop, will fire etc), logbooks etc
 - **Art.300**, Good faith and abuse of rights.
 - **Art.304**, Responsibilities and liability for damage.

USE OF FORCE



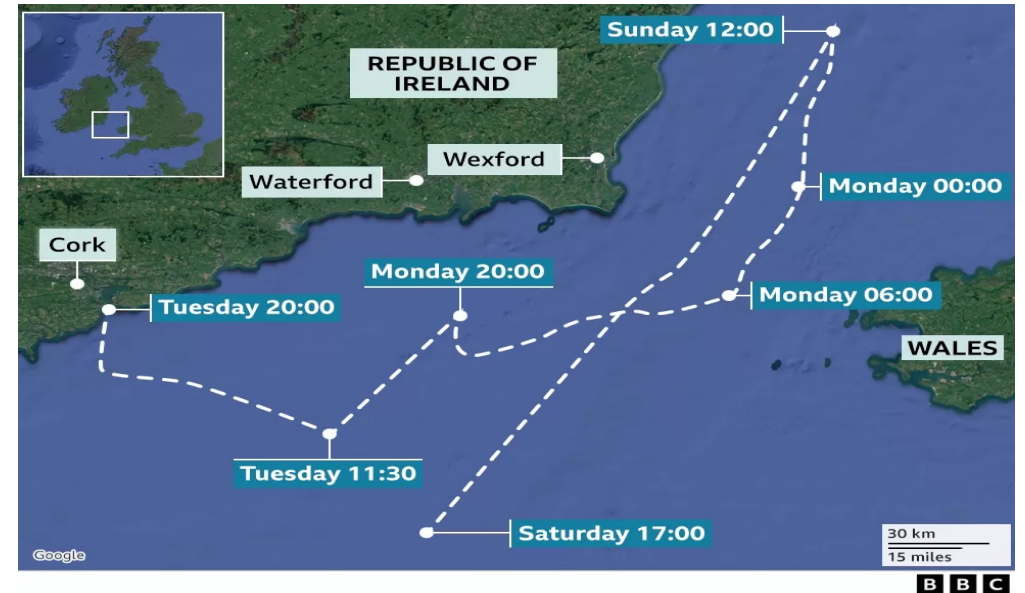
KM SEMESTA PAHALA SAKTI IV. Irwan Bin Abdullah v PP [2002] 2 MLJ 577 HC (Alor Setar)

- 1st Feb 2001 around 2300H, Malaysian Naval vessel spotted her 54 Nm, west of Langkawi Island with high intensity lights. Identified itself through VHF and morse signal with no response.
- Upon reaching, loud heater, refused to allow boarding (hostile reception). Hot pursuit. Damage to the port side of patrol vessel. After one hour of hot pursuit, tracer with solid shots were fired across the bow of Pahala Sakti. Some shots were fired on the superstructure of the vessel. The skipper was badly injured due to bullet wounds and died while taken to Langkawi for medical treatment. Excessive force??
- Internal enquiry and the CO reassigned to very light duty.
- Vessel released on financial bond, Sec 50 of MFA 85. The skipper and 38 crews offered a bail of RM10K and RM5K respectively but could not afford. Question of reasonable??
- Found guilty of attempted fishing, fined RM200K and RM10K. In default 2 months imprisonment.
- Issue of remand-13 months. To trade off with the sentence. The Judge said, *“I am inclined to agree with the learned DPP that taking into consideration the interest of the public and for the protection of national resources....”*

HOT PURSUIT

- Doctrine of constructive presence: Simple and extended.
- Art. 111(1): The flag ship or one of its boats.
- Art. 111(4): The flag ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship.
- ▶ **Araunah (1888) Moore, International Arbitration, 824 (UK v Russia)**
 - Russia seized a Canadian vessel outside the territorial sea because its crew were using canoes for illegal sealing within the Russian TS. UK admitted responsibility.
- ▶ **R v Millis & Ors (1995) 44 ICLQ @ UK**
 - ▶ The *Poseidon* was registered in St. V & G. The *Delvan* was a British registered fishing vessel. The *Poseidon* transferred to the *Delvan* a cargo of cannabis valued at 24 million pound on the high seas, some 100 miles west of UK, to be landed in UK shore. *HMS Avenger*, constant surveillance by radar tracking. Upon detaining *Delvan*, directed to detain *Poseidon*. Issue high sea, flag State, all crews non-UK citizen and breach of Int' law.

HOT PURSUIT



► MV Matthew (September 2023)

- *MV Matthew*, a Panama flagged cargo vessel, planned to unload 2.2 tonnes of pure cocaine with a street value of nearly 150 million Euro through UK registered fishing vessel, *Castlemore* within UK maritime waters. Highly coordinated operation by many countries. *MV Matthew* tried to escape but intercepted by the Irish Navy.

HOT PURSUIT

- ▶ Malaysian cases involving PRC Fishing vessels.



HOT PURSUIT

- ▶ **Have all the 6 requirements of hot pursuit has been fulfilled by the above cases?**
- Have good reason to believe, violation of law, in any of its maritime zones.
- Mother ship and crafts working as a team.
- Amble warnings, visual, auditory etc before hot pursuit.
- Continuous and uninterrupted.
- Only by government vessels and clearly marked.
- Ceases once the vessel enters other coastal States maritime zones. However, international cooperation in surveillance and enforcement can overcome that.
- BUT Art. 111(8)- compensation for any loss or damages.

PROMPT RELEASE, EXHAUSTION OF LOCAL REMEDIES AND GENUINE LINK

- ▶ (pictures of FV Camouco, Tomimaru and Arctic Sunrise)



PROMPT RELEASE, EXHAUSTION OF LOCAL REMEDIES AND GENUINE LINK

- Art.73(2) ->Art. 292-10 days -> Art.287, by or on behalf of flag State. In the case of **MV Saiga**, as it was unregistered between 12th Sep 1997 and 28th Nov 1997, the question of genuine- link. Detention was on 28th Oct 1997.
- Safeguard the interest of shipping nations.
- **“Reasonable Bond”** as decided by The **Camouco** case (Panama v France) (2000) ITLOS.
- i) the gravity of the alleged offence.
- ii) the penalties imposed or imposable under the laws of the detaining State.
- iii) the value of the detained vessel and the cargo seized.
- iv) the amount of the bond imposed by the detaining State and its form.
- Based on the above factors, The Tribunal decided, 20 million FF not reasonable and reduced it to 8 million FF. (value of the vessel not a determining factor)
- As in the case of The **Volga (Russia V Australia)**, installation of VMS and other monitoring system at a cost of AU1 million, not reasonable. Also refer to **Olbers v Commonwealth of Australia (#4) (2004) FCA 229**.



PROMPT RELEASE, EXHAUSTION OF LOCAL REMEDIES AND GENUINE LINK

- The case of **Tomimaru** (Japan v Russia) (2007) ITLOS
- Factory trawler, licensed to fish in Russian EEZ. Caught an excess of 5.5 tonnes of fish against the allowable limit. A simple case of breach of license condition.
- First instant accused pleaded guilty. Vessel confiscated. Issue, belongs to whom? What are the legal interpretations of arrest, detain, seize, confiscate and forfeiture.
- Confusing interpretation on release on bond at the Russian domestic court and local authority. Damage to environment was included.
- Question of exhaustion of local remedy. Act immediately after the 10 days period for prompt release.
- The Tribunal's considerations of Humanity, *"A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object"*.
- The Supreme court of Russia upheld the decision of municipal court to confiscate **Tomimaru**, just before the submission of the case by the Japanese representatives. Case, without object.
- Moral of the story. Study your opponent well and prepare the case well.

WHAT CONSTITUTES A FISHING OFFENCE

- ▶ UNCLOS 1982 has no definition on “**fishing**” and “**fishing vessel**”. Only mentions “**violations of fisheries laws and regulation**” and “**engage in fishing on the high seas**.”
- ▶ While FFV on innocent passage, constitute attempted fishing? Sec. 16 of MFA 85, France, Maldives, Australia etc
- ▶ **1995 UN Fish stock agreement: (the latest amendment?)**
- ▶ **1993 FAO Compliance Agreement:** defines “**fishing vessel**” means any vessel used or intended for the purpose of the commercial exploitation of living marine resources, including mother ships and any other vessels **directly engaged** in such operation. Issue. Does bunkering constitute fishing? The Tribunal in MV Saiga case, silent on this.

WHAT CONSTITUTES A FISHING OFFENCE

- ▶ **2008 FAO Port State Measures Agreement (PSMA):** Provides detailed interpretations on “fish”, “fishing”, “**fishing related activities**” and “vessel”.
- ▶ **Sec.15(2) of MFA 85:** No foreign fishing vessel SHALL load or unload any fish, fuel or supplies or tranship any fish in MFW without the written approval of the DG.
- ▶ “**fishing vessel**” means...(b)”any activity related to fishing”.

WHAT CONSTITUTES A FISHING OFFENCE

- ▶ **MV CHOR SANGPAIBOON**, Thai registered cargo vessel involved in illegal transshipment of fish and supplies off Miri, Sarawak. (pictures)



OTHER EMERGING ENFORCEMENT MEASURES TO COMBAT IUU FISHING

- ▶ Asia's losses due to IUU fishing, estimated value at USD6.7 billion annually.
- ▶ Anti-money laundering laws an effective way to curb IUU fishing by the forfeiture of illicit gains.
- ▶ Malaysian AMLA identifies 5 "serious offence" under MFA 85, Sec. 8, 11,15,16 and 20.
- ▶ Fast track deterrence, through Intelligent Based Investigation and Deferred Prosecution Agreement and balance of probabilities.

OTHER EMERGING ENFORCEMENT MEASURES TO COMBAT IUU FISHING

► Cases;

1. The case of **Tran Thi Mai @ Dato' Maimunah**, involved in offering bribes to MMEA officers and to an undercover MACC officer to release detained Vietnamese fishing vessels. Forfeiture of money and properties.
2. The case of **FV Perlon and Asia Link**, a IUU fishing blacklisted Nigerian flagged fishing vessel for illegal Patagonia toothfish and transshipment in Malaysian Fisheries waters. Charged under Sec. 15(2) and Sec.20 MFA 85, pleaded guilty. Vessels released. Should have invoked AMLA law to forfeit the vessel.

OTHER EMERGING ENFORCEMENT MEASURES TO COMBAT IUU FISHING

- ▶ Pictures of FV Perlon and Asia Link.



APPLICATION OF ADVANCED TECHNOLOGY TO COMBAT IUU FISHING

1. Canada to provide satellite services on “**Dark Vessel Detection Program**” to the Philippines. Current issues, VMS for commercial fishing vessels not to be enforced. Implication?
2. Indonesia will launch 20 Nano satellites in 2024 for maritime surveillance and enforcement.
3. Main issue, expert evidence in the court of law. As in the **Case of FV Independence-Lobster Inc. Lawrence M. Yacobian v NOAA and Ministry of Agriculture and Fisheries v Wallance (1998) Auckland NZ.**



THANK YOU