

The Necessity of Indonesia's Measures to Sink Vessels for IUU Fishing in the Exclusive Economic Zone

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Abstract

Indonesia has been burning or sinking foreign vessels in its efforts to combat illegal, unreported, and unregulated fishing in its exclusive economic zone. Opinions on how much longer this measure should continue are manifold. While political issues may easily mask the situation, the underlying legal question remains: whether burning or sinking foreign vessels is a legal and necessary enforcement measure for Indonesia. Even though Article 73(1) of the UN Convention on the Law of the Sea does not make any reference to this type of measure, it allows coastal states to take measures that are “necessary to ensure compliance with their laws and regulations”. This paper examines the meaning of the term “necessary” within the ambit of Article 73(1) to evaluate whether Indonesia’s measure to burn or sink foreign vessels is necessary.

As the world’s second-largest seafood producer,¹ Indonesia claims to suffer a massive amount of economic and environmental losses from illegal, unreported, and unregulated fishing [IUU fishing]. Indonesia’s Presidential Task Force to Prevent and Combat Illegal Fishing [Task Force on Illegal Fishing] has cited a study that Indonesia has suffered losses up to 9bn Indonesian Rupiah [IDR] which is about US\$632,000 from 2013 to 2014.² This figure, however, represents losses from only twelve out of Indonesia’s 800 fishing ports in a given year.³ Indonesia’s Minister of Marine Affairs and Fisheries, however, had asserted that the losses suffered by Indonesia

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1. Food and Agriculture Organization of the United Nations, “The State of World Fisheries and Aquaculture 2018: Meeting the Sustainable Development Goals”, online: FAO <<http://www.fao.org/3/i9540en/I9540EN.pdf>>.
2. Mas A. SANTOSA, “Indonesia’s Multi-door Approach in Combating Fisheries Crime: The Fight against Fisheries and Associated Crimes in Indonesia”, online: Fishcrime <http://fishcrime.com/wp-content/uploads/2016/10/Presentation_Mas-Achmad-Santosa.pdf>. The figure came from a study by Arif Satria, advisor for Indonesia’s Ministry of Marine Affairs and Fisheries, for a one-year period between 2013 and 2014.
3. *Ibid.*

had once reached IDR 2,000tn, or about US\$140bn.⁴ Given its generally concealed nature, it is hard to quantify the exact losses resulting from IUU fishing. Thus, an estimate of losses has limited use, beyond the need to say that IUU fishing is a major problem for Indonesia's fisheries.

As a result, for the past four years, Indonesia has intensified its efforts against IUU fishing by employing a more stringent measure in the form of burning or sinking foreign vessels. This so-called "special measure" applies in all of Indonesia's fisheries management zones that includes Indonesia's internal waters, archipelagic waters, territorial sea, and exclusive economic zone [EEZ]. Even though IUU fishing can occur in all of those zones, Indonesia has mostly focused on fisheries violations in the EEZ.

Initially, the practice of burning or sinking foreign vessels was carried out based on Article 69 of the Law No. 45 of 2009 on Fisheries [*Fisheries Law*]. This law authorizes Indonesia's patrol vessels to take "special measures" in the form of burning or sinking foreign fishing vessels based on sufficient preliminary evidence.⁵ On the other hand, Article 76A of the same law allows the destruction of a vessel—as an object of fisheries crime—by prior approval from a court.⁶ Contrary to popular opinion, this paper argues that Indonesia's recent practices of sinking or burning vessels may not invoke either Article 69 or Article 76A of the Fisheries Law, but rather a higher standard by resorting to a final and binding court decision. Even though the Ministry of Marine Affairs and Fisheries [MMAF] has been praised for this measure, this measure should not be understood as an executive order; instead, it is the product of a court ruling by an independent and impartial judiciary.

As a party to the United Nations Convention on the Law of the Sea [UNCLOS], Indonesia is bound to its provisions without reservation. Article 73(1) of UNCLOS addresses a coastal state's enforcement power in the EEZ. It states that:

the coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be *necessary to ensure compliance with the laws and regulations* adopted by it in conformity with this Convention.⁷

Even though Article 73(1) of UNCLOS does not make any reference to burning or sinking or destruction of vessels, Indonesia is not the only state applying this measure aimed at preventing and deterring illegal activities at sea. Despite the absence of a

4. "Susi Akui RI Pernah Rugi Rp 2,000 T Akibat Illegal Fishing" *CNBC Indonesia* (26 June 2018), online: CNBC Indonesia <<https://www.cnbcindonesia.com/news/20180626075822-4-20458/susi-akui-ri-pernah-rugi-rp-2000-t-akibat-illegal-fishing>>.

5. *Law No. 45 of 2009 on the Amendment of the Law No. 31 of 2004 on Fisheries* [Law 45/2009], art. 69(1).

6. *Ibid.*, art. 76A.

7. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397 (entered into force 16 November 1994) [UNCLOS], art. 73(1) (emphasis added).

uniformly recognized standard, Malaysia,⁸ France,⁹ Australia,¹⁰ and the US¹¹ are a few other states implementing vessel sinking or destruction as part of its enforcement measures, particularly for fishing violations in the EEZ.

While many scholars have studied Article 73(1) of UNCLOS, particularly concerning the legality of confiscation of vessels,¹² less attention has been paid to what the decision of the International Tribunal on the Law of the Sea [ITLOS] on the *M/V Virginia G* case entails to the interpretation and application of Article 73(1) of UNCLOS. In the Judgment of the *M/V Virginia G* case, the Tribunal had a lengthy discussion on what constitutes necessary enforcement measures within Article 73(1) of UNCLOS. Even though the case discusses the validity of the confiscation of vessels, it may provide guidance in determining whether the act of burning or sinking foreign vessels is a necessary enforcement mechanism to ensure compliance to a coastal state's fisheries laws and regulations in the EEZ.

This paper argues that Indonesia's practice of burning or sinking foreign vessels as a penalty for IUU fishing activities in its EEZ is necessary within the meaning of Article 73(1) of UNCLOS if such measures meet the proposed necessity test. Part I of this paper will first explore Indonesia's current state of IUU fishing. Then, Part II will examine the meaning of the term "necessary" within Article 73(1) of UNCLOS by employing rules on treaty interpretation; this part will also develop a test to determine the necessity of a coastal state's enforcement measure in the EEZ. Part III will apply the proposed test to Indonesia's measure, concluding that such a measure is necessary and in compliance with UNCLOS subject to several conditions. Part IV concludes.

I. OVERVIEW OF INDONESIA'S CURRENT STATE OF IUU FISHING

IUU fishing could occur both within and beyond a coastal state's jurisdiction—a zone controlled by a Regional Fisheries Management Organization [RFMO]. Even though the term "IUU fishing" is not defined in UNCLOS, it has been defined in the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported,

8. See Nadirah H. RODZI, "Malaysia Turns Up the Heat, Sets Foreign Boat Ablaze for Illegal Fishing" *The Straits Times* (30 August 2017), online: The Straits Times <<http://www.straitstimes.com/asia/se-asia/malaysia-turns-up-the-heat-sets-foreign-boats-ablaze-for-illegal-fishing>>.

9. See *The M/V Virginia G (No. 19) (Panama v. Guinea-Bissau)*, Case No. 19, Judgment of April 14, 2014, [*The M/V Virginia G*], Dissenting Opinion Judge Ndiaye, 14 ITLOS Rep. 1 at para. 205.

10. See Brian WILSON, "Human Rights and Maritime Law Enforcement" (2016) 52 *Stanford Journal of International Law* 243.

11. *Ibid.*

12. Prior to the *M/V Virginia G* case, one of the articles that provide an immense discussion on art. 73(1) of UNCLOS concludes that even though art. 73(1) contains a non-exhaustive list of a coastal state's enforcement measures, such measures must provide access to prompt release actions and domestic recourse. See Laurence BLAKELY, "The End of the Viarsa Saga and the Legality of Australia's Vessel Forfeiture Penalty for Illegal Fishing in Its Exclusive Economic Zone" (2008) 17 *Pacific Rim Law & Policy Journal* 677.

and Unregulated Fishing [IPOA-IUU], which serves as a non-binding voluntary instrument within the framework of the Food and Agricultural Organization [FAO] Code of Conduct for Responsible Fisheries.¹³ The IPOA-IUU differentiates between illegal fishing, unreported fishing, and unregulated fishing.¹⁴ In practice, however, the terms “IUU fishing” and “illegal fishing” are often used interchangeably. Theilen has argued that IUU fishing is illegal fishing because the term “illegal fishing” is considered more precise in many situations.¹⁵ Except for the definitions provided for in paragraph 3, the remainder of the text of the IPOA-IUU does not distinguish between the treatment towards each prong of IUU fishing. If IUU fishing is treated as a single concept, it may be generally understood as an activity of capturing marine living resources without proper permission—either from a coastal state or an RFMO—or in violation of national or international conservation measures.

As a civil law country, Indonesia relies heavily on statutes and ministerial regulations to conduct anti-IUU fishing operations. Despite a strong political will to combat IUU fishing, Indonesian law does not provide any definition of IUU fishing, except for its National Plan of Action to Prevent and to Combat IUU Fishing which adopted the IPOA-IUU definitions.¹⁶ It may also explain why Indonesia names its task force as the “Task Force on Illegal Fishing”, rather than the “Task Force on IUU Fishing”, even though its mandate also includes unreported fishing.¹⁷

Meanwhile, Indonesia’s Fisheries Law makes numerous references to “fisheries crime” even though it neither defines it nor distinguishes it from IUU fishing. On one occasion, Indonesia’s Minister of Marine Affairs and Fisheries even categorized what China considered fishing as a transnational organized crime.¹⁸ The Fisheries Law has, however, differentiated what actions are deemed to be “crimes” and “violations”.¹⁹ Under Indonesia’s criminal law, one of the distinctions between “crimes” and “violations” is that imprisonment is not applicable for “violations”.²⁰ The

13. Food and Agriculture Organization of the United Nations, “International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing” (23 June 2001), online: FAO <<http://www.fao.org/3/a-y1224e.pdf>>.

14. Illegal fishing is defined as fishing activities that are conducted without a coastal state’s permission, or in violation of a coastal state’s law, or any regional or international regulation related to fisheries conservation and management. Unreported fishing, on the other hand, is related to how the catch is documented and reported to the relevant authority. Unregulated fishing refers to fishing activities for which there is an absence of applicable conservation or management measures, either because they are conducted by stateless vessels in the area beyond national jurisdiction or by vessels of a non-party to the RFMO. *Ibid.*

15. Jens T. THEILEN, “What’s in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing” (2013) 28 *International Journal of Marine and Coastal Law* 533 at 543, 546.

16. *Minister of Marine and Fisheries’ Regulation No. Kep.50/MEN/2012 on National Plan of Action to Prevent and to Combat IUU Fishing 2012–2016.*

17. *Presidential Regulation No. 115 of 2015 on Task Force to Combat Illegal Fishing.*

18. David G. ROSE, “‘China Calls It Fishing, Indonesia Calls It Crime’: Pudjiastuti Finds Her Target for Oceans Summit” *South China Morning Post* (18 October 2018), online: South China Morning Post <<https://www.scmp.com/week-asia/geopolitics/article/2169153/china-calls-it-fishing-indonesia-calls-it-crime-pudjiastuti>>.

19. *Law No. 31 of 2004 on Fisheries, as amended by Law 45/2009 [Law 31/2004 as amended by Law 45/2009]*, art. 103.

20. *Memorandum of Understanding Between Chief Supreme Court, Minister of Law and Human Rights, Attorney General, Chief National Police No. 131/KMA/SKB/X/2012, M.HH-07.HM.03.02,*

Fisheries Law further implies that other actions are also administrative issues, such as a failure to meet a minimum percentage of Indonesian crew for foreign vessels fishing in Indonesia's EEZ,²¹ and transshipment of fish in non-designated ports.²² This approach may demonstrate that Indonesia generally perceives illegal fishing or IUU fishing under the fisheries crimes framework, not merely as fisheries management issues.²³ The fact that illegal fishing cases are tried in a criminal court may further confirm this understanding.²⁴ Past cases further reiterate that fisheries courts generally view illegal fishing as “fish theft”.²⁵

In 2014, Indonesia's Minister of Marine Affairs and Fisheries issued a moratorium that prohibited the issuance of fishing licences for all fishing vessels built outside Indonesia.²⁶ The moratorium was mainly targeted at former foreign vessels that had been reflagged as Indonesian vessels—commonly referred to by the MMAF as “ex-foreign vessels”, though they were technically Indonesian vessels by registration due to reflagging. The moratorium, which was initially intended for a period between November 2014 and April 2015,²⁷ was extended for six months and finally lifted in October 2015.²⁸ Then, in 2015, the Task Force on Illegal Fishing investigated 1,132 “ex-foreign” fishing vessels to identify their compliance level and to analyze their IUU fishing activities.²⁹ The investigation found varying degrees of violations, including forgery of vessels' documents, double flagging and double registration, fishing without appropriate licences and documents, deactivation of a vessel's transmitter, illegal transshipment at sea, forgery of logbook records, fishing outside the permitted fishing ground, and use of prohibited fishing gear.³⁰

KEP-06/E/EJP/10/2012, B/39/X/2012 of 2012 on the Implementation of The Limits of Petty Crimes and The Total Fines, Prompt Investigation, and Implementation of Restorative Justice, art. 1(1).

21. Law 45/2009, *supra* note 5, art. 35A.
22. *Ibid.*, art. 41(3).
23. See Law 31/2004 as amended by Law 45/2009, *supra* note 19, arts. 104, 105; Law 45/2009, *supra* note 5, arts. 66C, 76A, 76B, 76C, 83A, and commentary, art. 73.
24. Law 45/2009, *supra* note 5, art. 71; Law 31/2004 as amended by Law 45/2009, *supra* note 19, art. 106. Indonesia has designated five Fisheries Courts in North Jakarta, Medan, Pontianak, Bitung, and Tual to adjudicate fisheries crimes. Crimes occurring outside the territory of these courts remain tried in the respective District Courts.
25. See Decision of High Court of Jayapura No. 70./Pid.Sus-Prk/2015/PT JAP (*Indonesia v. Guo Yunping*); Decision of High Court of Pekanbaru No. 46/Pid.Sus/2016/PT PBR (*Indonesia v. Huynh Duy Phu*).
26. Minister of Marine Affairs and Fisheries' Regulation No. 56/PERMEN-KP/2014 on Fishing Moratorium in Indonesia's Fishing Zones [Minister's Regulation 56/2014], art. 1(2). In addition to the moratorium, the Minister also issued a ban on transshipment and the use of unsustainable fishing gear. See Minister of Marine Affairs and Fisheries' Regulation No. 2 of 2015 on the Prohibition of Trawls and Seine Nets in Indonesia's Fisheries Management Zone.
27. Minister's Regulation 56/2014, art. 3.
28. Minister of Marine Affairs and Fisheries' Regulation No. 10 of 2015 on the Amendment of Minister of Marine and Fisheries' Regulation No. 56/PERMEN-KP/2014 on Fishing Moratorium in Indonesia's Fishing Zones, art. 3.
29. Santosa, *supra* note 2.
30. *Ibid.*

The Task Force on Illegal Fishing further reported that all of those 1,132 “ex-foreign” vessels had breached Indonesian law.³¹ Based on the report, all of those vessels are now blacklisted and deregistered.³² As another follow-up action, the most recent Indonesian negative investment list now includes the prohibition of “ex-foreign” vessels, foreign vessels, and foreign investment in Indonesia’s capture fisheries industries.³³ Thus, even though the moratorium has long ended, “ex-foreign” and foreign vessels are now banned from fishing in Indonesia’s fisheries management zone that includes the EEZ.³⁴ As of 2018, MMAF submitted that there were 488 vessels destroyed from October 2014 to August 2018.³⁵ Vietnamese vessels dominate the number with 276 vessels, followed by ninety Philippine vessels, fifty Thai vessels, forty-one Malaysian vessels, twenty-six Indonesian vessels, two Papua New Guinean vessels, one Chinese vessel, one Belize vessel, and one stateless vessel.³⁶

II. THE SCOPE OF A COASTAL STATE’S ENFORCEMENT MEASURES WITHIN ARTICLE 73 OF UNCLOS

Within an EEZ, a coastal state has sovereign rights to explore, exploit, conserve, and manage living natural resources.³⁷ In the *M/V Virginia G* case, ITLOS found that the term “sovereign rights” includes a coastal state’s right to take the necessary enforcement measures,³⁸ which *include* measures such as “boarding, inspection, arrest, and judicial proceedings” against a vessel and its crew as may be “necessary to ensure compliance with [coastal state’s] laws and regulations”.³⁹ Neither UNCLOS nor the Virginia Commentaries⁴⁰ identify any criteria for determining what measures

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31. Yunus HUSEIN, “Indonesia’s Approach in Tackling Fisheries Crime: Strategy on Combating IUU Fishing and Post Moratorium Policies Plan” (12 October 2015), online: Fishcrime <<http://www.fish-crime.info/assets/Uploads/Yunus-Husein-Indonesian-Approach-To-Tackling-Fisheries-Crime.pdf>>.
 32. The list of the blacklisted vessels is spelled out in the *Letters of the Secretary General of the Ministry of Marine Affairs and Fisheries Number B-195/SJ/11/2016* and *B-755/SJ/VI/2016* which were issued on 11 February 2016 and 16 June 2016, respectively. The letters also identify eighty-one persons and entities that do not make the list, meaning, they have never received administrative sanctions, are not being investigated, and still have tolerable level of compliance to Indonesian fisheries laws and regulations. The country of origin of the blacklisted vessels varies: Australia, Belize, China, Honduras, Japan, Panama, the Philippines, South Korea, Taiwan, Thailand, Vietnam, and the US.
 33. See *Presidential Regulation No. 44 of 2016 on the List of Business Fields Closed and Opened with Conditions to Investment* at 29.
 34. Indonesia’s fisheries management zone includes Indonesian waters, Indonesia’s EEZ, and freshwater areas such as rivers, lakes, reservoirs, swamps, or other potential fishing zones in Indonesia. See *Law No. 31 of 2004 as amended by Law 45/2009, supra* note 19, art. 5(1).
 35. “Hari Kemerdekaan, Pemerintah Tenggelamkan 125 Kapal Pelaku Illegal Fishing” (21 August 2018), online: Kementerian Kelautan dan Perikanan Republik Indonesia <<https://kkp.go.id/artikel/5714-hari-kemerdekaan-pemerintah-tenggelamkan-125-kapal-pelaku-illegal-fishing>>.
 36. *Ibid.*
 37. UNCLOS, *supra* note 7, art. 56(1).
 38. *The M/V Virginia G*, *supra* note 9 at para. 211.
 39. UNCLOS, *supra* note 7, art. 73(1).
 40. Virginia Commentaries refer to the seven-volume commentary to UNCLOS, prepared by Myron Nordquist and others under the auspices of the University of Virginia Center for Oceans Law and Policy. ITLOS has acknowledged the commentaries as the “most authoritative” source on the

are considered “necessary” within the ambit of Article 73(1) of UNCLOS. Nevertheless, the *M/V Virginia G* case may indicate how an international tribunal would examine whether the destruction of vessels to punish and deter IUU fishing in a coastal state’s EEZ is a valid enforcement mechanism under international law.

In this section, to determine the scope and meaning of Article 73(1) of UNCLOS, its terms will be interpreted according to the general rules of treaty interpretation.⁴¹ First, this section will look closely at the ordinary meaning of the term “necessary”. Then, it will examine the context surrounding the term “necessary” in the light of the object and purpose of Article 73. To conclude, it will establish a necessity test based on the findings.

A. *The Ordinary Meaning of the Term “Necessary”*

In the *M/V Virginia G* case, Panama asked ITLOS to decide whether confiscation of *Virginia G*, a Panamanian oil tanker, by Guinea-Bissau, exceeded what is permitted under Article 73(1) of UNCLOS.⁴² *Virginia G* was contracted to supply gas to four Mauritanian fishing vessels—*Amabal I*, *Amabal II*, *Rimbal I*, and *Rimbal II*—in the EEZ of Guinea-Bissau on two different but consecutive days.⁴³ On the day of the arrest, it was supplying gas oil to *Amabal I* and *II*.⁴⁴ It was then arrested together with them.⁴⁵

Guinea-Bissau arrested *Virginia G* because it considered *Virginia G* unauthorized to conduct bunkering of ships fishing in its EEZ.⁴⁶ The owner of *Virginia G* then requested its release, but Guinea-Bissau refused because Guinea-Bissau considered that the time limit to request a release had lapsed.⁴⁷ Accordingly, Guinea-Bissau proceeded to confiscate *Virginia G* and all the cargo on board.⁴⁸ The owner of *Virginia G* then requested interim measures before the Regional Court of Bissau, and the Court ordered the suspension of the confiscation.⁴⁹ However, Guinea-Bissau’s Secretary of State of the Treasury ordered the discharge of *Virginia G*’s gas cargo.⁵⁰ Again, the *Virginia G*’s owner requested interim measures before the Regional Court of

Convention. See *The M/V Saiga (St. Vincent & Grenadines v. Guinea)*, ITLOS Case No. 2, Order of 1 July 1999, at 38.

41. Arts. 31 and 32 of the *Vienna Convention on the Law of Treaties* are the heart of the formulation for treaty interpretation; the ICJ has recognized both norms to bear the status of a customary international law. See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980) [VCLT]; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment of 17 December 2002, I.C.J., at 645.
42. *The M/V Virginia G (No. 19) (Panama v. Guinea-Bissau)*, Case No. 19, Judgment of April 14, 2014, 14 ITLOS Rep. 1, Memorial of the Republic of Panama [*Memorial of the Republic of Panama*], at 55.
43. *The M/V Virginia G*, *supra* note 9 at 58.
44. *Ibid.*, at 61–2.
45. *Ibid.*, at 63.
46. *Ibid.*, at 64.
47. *Ibid.*, at 66, 68, 69.
48. *Ibid.*, at 70.
49. *Ibid.*, at 73.
50. *Ibid.*, at 76.

Bissau, and the Court decided in his favour and ordered the immediate return of the cargo.⁵¹ Eventually, Guinea-Bissau released the vessel and considered the previous confiscation order repealed.⁵²

Before ITLOS, Panama asked the Tribunal whether Guinea-Bissau had violated UNCLOS when it arrested and confiscated *Virginia G.*⁵³ The Tribunal found that, under Guinea-Bissau laws and regulations, fishing vessels that violated Guinea-Bissau fisheries regulations would be confiscated ex-officio, along with their gear, equipment, and fishery products.⁵⁴ It noted that Article 73(1) of UNCLOS makes no reference to the confiscation of vessels, even though many coastal states do confiscate fishing vessels as a sanction for EEZ violations.⁵⁵ It thus recognized the need to interpret Article 73(1) of UNCLOS “in the light of the practice of coastal states on the sanctioning of violations of fishing laws and regulations”.⁵⁶ Even though the main text of the Judgment did not discuss in detail how Article 73(1) should be interpreted and applied, several judges made separate and dissenting opinions addressing the issue of interpretation of Article 73(1).⁵⁷

As a rule of custom, the general rules of treaty interpretation follow the Vienna Convention on the Law of Treaties [VCLT]. The first element of these rules requires looking for the ordinary meaning of the terms of the treaty, which is the meaning that is “regular, normal, or customary”.⁵⁸ International courts often turn to dictionaries to find that kind of meaning.⁵⁹ *Black’s Law Dictionary* defines “necessary” as “that is needed for some purpose or reason; essential; that must exist or happen and cannot be avoided; inevitable”.⁶⁰ It can also mean “needed to be done, achieved, or present; essential”.⁶¹ These meanings are good starting points that give a general idea of the meaning of the word “necessary”.

Meanwhile, other international courts and tribunals have considered a range of meanings to the term “necessary”. In *Korea–Various Measures on Beef*, the World Trade Organisation [WTO] Appellate Body examined whether South Korea’s prohibition of retail sales of both domestic and imported beef products [dual retail system] was justified as general exceptions under Article XX(d) of the General Agreement on Tariffs and Trade 1994 [GATT 1994].⁶² Earlier, the WTO Panel had found that

51. *Ibid.*, at 79.

52. *Ibid.*, at 82.

53. *Ibid.*, at 161.

54. *Ibid.*, at 250.

55. *Ibid.*, at 251–3.

56. *Ibid.*, at 253.

57. See *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik, Dissenting Opinion of Judge Ndiaye, Dissenting Opinion of Judge Jesus, Dissenting Opinion of Judge Servulo Correia, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, James L. Kateka, Zhiguo Gao, and Boualem Bouguetaia.

58. Oliver DORR and Kirsten SCHMALENBACH, eds. *Vienna Convention on the Law of Treaties: A Commentary* (New York: Springer, 2012) at 542.

59. *Ibid.*

60. Bryan A. GARNER, ed., *Black’s Law Dictionary*, 10th ed. (St Paul, MN: Thomson Reuters, 2014).

61. Oxford Dictionary Online, online: Oxford Dictionaries <<https://www.oxforddictionaries.com/>>.

62. See *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Appellate Body Report, WTO Doc. WT/DS161/AB/R, WT/DS169/R (11 December 2000) [*Korea–Various Measures on*

South Korea's dual retail system was not necessary to secure compliance with South Korea's Unfair Competition Act concerning imported beef, because South Korea had failed to demonstrate that other reasonably available alternatives were insufficient to achieve such an objective.⁶³

In its evaluation, the WTO Panel examined enforcement measures taken by South Korea for *related products* and found that the dual retail system was not utilized.⁶⁴ Instead, South Korea employed traditional WTO-consistent enforcement measures, such as record-keeping, investigations, policing, and fines, to enforce the same Act.⁶⁵ The Panel concluded that these alternative measures were reasonably available to meet South Korea's desired level of compliance in the beef sector.⁶⁶ South Korea appealed the Panel's conclusion and rebutted that an examination of the consistent application to related products is not required to test the necessity of its measures on beef.⁶⁷

South Korea further submitted that, even though the Panel considered four less trade-restrictive alternatives, the Panel failed to link them to the objective sought.⁶⁸ South Korea insisted that the alternative measures could not achieve its objective to secure compliance with its Unfair Competition Act.⁶⁹ The Respondents and the third-country participants, however, agreed with the Panel's findings.⁷⁰ The US, one of the Respondents, went on to state that the Panel's examination on other imported food products was a relevant factor in determining whether other means were reasonably available to achieve the same result.⁷¹

In addressing Korea's appeal, the Panel first examined the ordinary meaning of the word "necessary." It referred to *Black's Law Dictionary*, which cautions that:

[t]his word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity.⁷²

Here, the Panel took a broad view and considered that the word "necessary" is not limited to measures which are "indispensable" or "of absolute necessity" or

Beef, Appellate Body Report]; *General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (entered into force 1 January 1995) [GATT 1994].

63. *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Panel Report, WTO Doc. WT/DS161/AB/R, WT/DS169/R (31 July 2000) [*Korea—Various Measures on Beef*, Panel Report] at para. 659.
64. *Ibid.*, at paras. 660–4.
65. *Ibid.*, at para. 666.
66. *Ibid.*, at paras. 674–6.
67. *Korea—Various Measures on Beef*, Appellate Body Report, *supra* note 62 at para. 22.
68. *Ibid.*, at para. 23.
69. *Ibid.*, at para. 25.
70. *Ibid.*, at paras. 55, 63, 73.
71. *Ibid.*, at para. 56.
72. *Ibid.*, at para. 160.

“inevitable” to secure compliance, but other measures may also fall within this scope.⁷³ It perceived the term “necessary” in a spectrum between “indispensable” and “making a contribution to”.⁷⁴ In conclusion, it held that:

... determination of whether a measure, which is not “indispensable”, may nevertheless be “necessary” within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.⁷⁵

The Panel deemed that an examination of related product areas was relevant to test the necessity of South Korea’s measure. It, however, rejected the introduction of a “consistency” requirement into the necessary test. It clarified that an examination of enforcement measures taken against the same illegal activity relating to similar products was useful to evaluate the *availability* of alternative measures.⁷⁶ To be necessary, therefore, South Korea had to show that alternative measures were not reasonably available or unreasonably burdensome, financially or technically.⁷⁷ Having found that possible alternative measures existed in other related product areas, the Panel concluded that the dual retail system was a disproportionate measure to the objective sought.⁷⁸

In the *M/V Virginia G* case, Judge Paik gave a separate opinion which examined the term “necessary” within Article 73(1) of UNCLOS.⁷⁹ Similar to *Korea–Various Measures on Beef*, his standard of necessity was that “if there is a choice between several appropriate measures, the least onerous (to other protected interests) and equally effective (in achieving the intended objective) needs to be chosen”.⁸⁰ In *Korea–Various Measures on Beef*, the Panel also considered the extent to which the measure contributes to the realization of the end pursued. It asserted that “the greater the contribution, the more easily a measure might be considered to be necessary”.⁸¹ Judge Paik adopted the same view but with an additional safeguard which suggested that “the greater the contribution and *the less the encroachment*, the more likely the measure will be considered to be necessary”.⁸²

Judge Paik submitted that the objective of an Article 73 measure is to ensure compliance with the coastal state’s domestic law, which can involve the acts of remedying

73. *Ibid.*, at para. 161.

74. *Ibid.*

75. *Ibid.*, at para. 164.

76. *Ibid.*, at para. 170.

77. *Ibid.*, at para. 173. By asking South Korea to demonstrate that there were no reasonably available alternative measures which are consistent with WTO rules, the Panel thus followed the standard in *United States–Section 337 of the Tariff Act of 1930*, Panel Report WTO Doc. L/6439-36S/345 (adopted 7 November 1989), at para. 5.26.

78. *Korea–Various Measures on Beef*, Appellate Body Report, *supra* note 62 at paras. 174, 179, 182.

79. *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik.

80. *Ibid.*, at para. 9.

81. *Korea–Various Measures on Beef*, Appellate Body Report, *supra* note 62 at para. 163.

82. *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik at para. 25 (emphasis added).

past wrongs and deterring future wrongs.⁸³ Interestingly, he referred to the term “necessary” found in Article XX(d) of GATT 1994 which was discussed at length in *Korea–Various Measures on Beef*.⁸⁴ He also took some examples from international human rights instruments to emphasize the accomplishment of the policy objectives enumerated in the provisions.⁸⁵

Judge Paik took a similar approach with the Panel in *Korea–Various Measures on Beef*, in which he treated “necessary” on a scale between “a positive obligation to be imposed on a State taking permissible measures” and “an exceptional condition to justify measures otherwise inconsistent with treaty obligations”.⁸⁶ He classified Article 73(1) of UNCLOS to fall within the ambit of the former, but Article XX(d) of GATT 1994 within the latter.⁸⁷ If the term “necessary” within Article XX(d) of GATT 1994 falls into the box of “an exceptional condition to justify measures otherwise inconsistent with treaty obligations”, it will make it identical to the “state of necessity” under Article 25 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts [ILC Draft Articles on State Responsibility].⁸⁸ It should be noted, however, that the Panel in *Korea–Various Measures on Beef* also interpreted the term “necessary” within Article XX(d) of GATT 1994 in a spectrum between “making a contribution to” and “absolute necessity”. Thus the Panel does not only refer to the term “necessary” as a ground for precluding treaty obligations.

Nonetheless, due to the nature of the term “necessary”, which is fact-intensive and circumstance-dependent, Judge Paik observed that, while international courts or tribunals may be more neutral and impartial, they are “not well positioned to assess the complexities of local conditions, an understanding of which is critical to [a] proper determination of necessity”,⁸⁹ whereas states taking necessary measures generally have more knowledge of their own circumstances, although they may be more biased.⁹⁰ Judge Paik concluded that a certain degree of discretion should be allowed to national authorities on a case by case, and issue by issue basis.⁹¹

B. *The Context of the Term “Necessary”*

Interpreting the terms of a treaty “in their context” requires looking at the treaty as a whole. Therefore, the entire text of a treaty must be considered as a “context”. The

83. *Ibid.*, at para. 7.

84. *Ibid.*, at para. 10.

85. *Ibid.*, at para. 11.

86. *Ibid.*, at para. 15.

87. *Ibid.*

88. Necessity refers to extraordinary situations where the only means by which a state can protect an essential interest of its own is by suspending its performance of an international obligation. See *Article 25 of the Draft Articles on the Responsibilities of States for Internationally Wrongful Acts, with Commentaries* (2001) 2 Yearbook of the International Law Commission 31; UN Doc. A/CN.4/L.602/Rev.1; *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 3 August 2001, UN Doc. A/56/10 (2001) [ILC Draft Articles on State Responsibility], art. 25.

89. *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik, at para. 18.

90. *Ibid.*

91. *Ibid.*, at paras. 19–20.

use of the same term elsewhere in the treaty can also be a consideration.⁹² However, the term “necessary” occurs more than one hundred times within UNCLOS,⁹³ thus, finding the term “necessary” in the other parts of UNCLOS may not offer much help to the interpretation. Broad use of the same term “necessary” across different UNCLOS provisions may indicate that the meaning may differ depending on the context.

As in the *Juno Trader* case, in which the Tribunal held that Article 73(2) of UNCLOS must be read in the context of Article 73 as a whole,⁹⁴ this paper also suggests that interpreting Article 73(1) of UNCLOS requires looking at the remaining paragraphs of Article 73. This paper concurs with Judge Paik’s Separate Opinion in the *M/V Virginia G* case that the context of Article 73(1) is “more flexible and less compulsory” due to the presence of the modal auxiliary verb “may”.⁹⁵ It is also in accord with the ordinary meaning of the term “necessary” as found in *Korea–Various Measures on Beef*, which signifies a spectrum between “indispensable” and “making a contribution to”.

Besides Judge Paik, Judge Jesus also submitted his Separate Opinion in the *M/V Virginia G* case, in which he argued that Article 73(1) of UNCLOS contains a “general policy” of what measures a coastal state may take in exercising its sovereign rights in the EEZ.⁹⁶ While paragraph 2 provides for a flag state’s right of prompt release action, paragraph 3 establishes restrictions to paragraph 1 measures.⁹⁷ By reading paragraphs 1, 2, and 3 together, it can be implied that paragraph 1 is the general rule of a coastal state’s enforcement measures in the EEZ, and paragraph 2 is a safeguard to other states’ protected rights, whereas paragraph 3 is an exception to the paragraph 1 rule. Judge Jesus, Judge Ndiaye, and Judge ad hoc Servulo Correia also shared the same opinion that, if the drafters of UNCLOS desired limitations to the paragraph 1 measures, they would have included them in the text, as they did in paragraph 3.⁹⁸

All in all, Article 73(1) of UNCLOS contains a non-exhaustive list of permitted coastal state’s enforcement measures. The word “including” within Article 73(1) of UNCLOS also signifies that “boarding, inspection, arrest and judicial proceedings” are “part of a particular group”⁹⁹ or “part of the whole being considered”;¹⁰⁰ in

92. Dorr and Schmalenbach, *supra* note 58.

93. For instance, within Part V of UNCLOS, the term “necessary” also occurs in arts. 60(4) and 63(1), in addition to art. 73(1). In art. 60(4), the term “necessary” comes within the purpose of establishing safety zones around artificial islands, installations, and structures which fall under the coastal state’s jurisdiction, whereas in art. 63(1), the term “necessary” arises out of the context of conservation of species occurring within the EEZ of two or more coastal states.

94. *The Juno Trader Case (Prompt Release) (St. Vincent and the Grenadines v. Guinea-Bissau)*, Case No. 13, Judgment of 18 December 2004 [*The Juno Trader Case*] at para. 77.

95. *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik at para. 23.

96. *Ibid.*, Dissenting Opinion of Judge Jesus at para. 15.

97. *Ibid.*, at para. 16.

98. See *ibid.*, Dissenting Opinion of Judge Jesus at para. 17, Dissenting Opinion of Judge Ndiaye at 290, Dissenting Opinion of Judge Servulo Correia at para. 20.

99. Cambridge Dictionary Online, online: Cambridge Dictionary <<https://dictionary.cambridge.org/>>.

100. Oxford Dictionary Online, *supra* note 61.

other words, these measures are merely examples. The Virginia Commentaries also indicate that a coastal state's enforcement measures under Article 73(1) of UNCLOS are a "broad but limited authority", meaning that a coastal state can take enforcement measures needed in the exercise of its sovereign rights in relation to the "living resources" specified in Article 56(1).¹⁰¹ A broad interpretation of a coastal state's enforcement measures would give the coastal state the opportunity to protect its sovereign rights by means other than those expressly provided for in Article 73(1) of UNCLOS. According to Harrison, the coastal state's enforcement measures should only be overruled in extreme circumstances when they are arbitrary or patently unreasonable or exercised in bad faith.¹⁰²

Such a broad interpretation, however, should not be taken in a manner that would harm the guaranteed flag state's rights of prompt release actions. This paper argues that Article 73(2) of UNCLOS also holds a critical consideration to balance such a broad enforcement power on the part of the coastal state. Article 73(2) states that "arrested vessels and their crew shall be promptly released upon the posting of a reasonable bond or other security".¹⁰³ It provides a reminder that, no matter how broad a coastal state's discretion to enforce its laws and regulations, a coastal state must have due regard to the right of other states, including the right to prompt release. By taking into account the ordinary meaning of the term "necessary" in paragraph 1, a coastal state is generally allowed to take any measure as long as it is within the framework of "necessary" enforcement measures with due regard to the flag state's right of prompt release, and does not include imprisonment or corporal punishment—unless otherwise agreed.

C. *The Object and Purpose of Article 73*

The ordinary meaning of the term "necessary" is not to be determined in the abstract but in the context of the treaty and its object and purpose. Object and purpose are a unitary concept that refers to "the goals that the drafters of the treaty hoped to achieve".¹⁰⁴ It is generally understood that the preamble of a treaty reflects the treaty's object and purpose. This paper suggests that the object and purpose of Article 73(1) can be found in the preamble of UNCLOS and within the provision itself.

Pursuant to the preamble, the drafters of UNCLOS desired "a legal order for the seas and oceans" which will promote "peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment".¹⁰⁵

101. Myron H. NORDQUIST, *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. II (The Hague: Martinus Nijhoff, 1993) at 794.

102. James HARRISON, "Safeguards against Excessive Enforcement Measures in the Exclusive Economic Zone—Law and Practice" in Henrik RINGBOM, ed., *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Leiden: Brill Nijhoff, 2015), at 221.

103. UNCLOS, *supra* note 7, art. 73(2).

104. David S. JONAS and Thomas N. SAUNDERS, "The Object and Purpose of a Treaty: Three Interpretive Methods" (2010) 43 *Vanderbilt Journal of Transnational Law* 565 at 578.

105. UNCLOS, *supra* note 7, preamble.

This indicates that the drafters not only hoped to benefit economically from the ocean but also to conserve it. No single purpose is above the other since UNCLOS is a compromise between competing interests.¹⁰⁶ That is to say that UNCLOS is aiming for sustainable use of the ocean that reflects a balance between economic and environmental interests.

It is also worth noting that the preamble also takes consideration of the “special interests and needs of developing countries”.¹⁰⁷ This special consideration indicates that the drafters may have tolerated some degree of flexibility to accommodate those special interests and needs. Based on this notion, Article 73(1) of UNCLOS, which authorizes enforcement of a coastal state’s laws and regulations to what is “necessary to ensure compliance”,¹⁰⁸ could be interpreted with the same degree of flexibility in harmony with the treaty’s object and purpose. This degree of flexibility is consistent with the ordinary meaning of the term “necessary”, as discussed in the previous section, which indicates a margin of appreciation to the coastal state’s enforcement measure.

In the *Monte Confurco* case, ITLOS suggested that the goal of Article 73 of UNCLOS is to strike a fair balance between the interests of coastal states and flag states,¹⁰⁹ whereas in the *M/V Virginia G* case, Judge Paik also saw this need to balance conflicting interests as the heart of Article 73.¹¹⁰ This paper is of the opinion that UNCLOS always rests on the balancing requirement between relevant interests, either to harmonize the interests between economic uses of the ocean and environmental conservation, the interests between developed and developing states, the interests between coastal and land-locked and geographically disadvantaged states, or the interests between coastal and flag states. The inclusion of a prompt release provision in Article 73(2) of UNCLOS also provides a stronger suggestion that a balance of interests is of relevant importance and should always be maintained to attain an international legal order for the oceans.

D. A Test to Determine the Necessity of Indonesia’s Measures

In the *M/V Virginia G* case, the Tribunal applied a two-tiered test in determining the necessity of Guinea-Bissau’s measure. It first took into account “the practice of coastal states on the sanctioning of violations of fishing laws and regulations”.¹¹¹ Second, it considered some “mitigating factors” in a particular case.¹¹² Harrison has pointed out that the Tribunal’s necessity test was too prescriptive, thus giving little discretion

106. Roman DREMLIUGA, “A Note on the Application of Article 234 of the Law of the Sea Convention in Light of Climate Change: Views from Russia” (2017) 48 *Ocean Development and International Law* 128 at 130.

107. UNCLOS, *supra* note 7.

108. *Ibid.*, art. 73(1).

109. *The Monte Confurco (Prompt Release) (Seychelles v. France)*, Judgment of 18 December 2000, at para. 70.

110. *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik at para. 24.

111. *The M/V Virginia G*, *supra* note 9 at para. 253.

112. *Ibid.*, at para. 268.

to the coastal state.¹¹³ Several judges also criticized the approach taken by the Tribunal. Vice President Hoffman and Judges Rangel, Rao, Kateka, Gao, and Bouguetaia stressed the importance of the margin of appreciation to the coastal state's enforcement measures, and noted that the Tribunal's power of review was limited to those measures taken arbitrarily or based on non-existence and patently erroneous facts.¹¹⁴

In his Separate Opinion, Judge Paik proposed a different standard to evaluate whether a coastal state's measure could be considered "necessary" within the ambit of Article 73(1) of UNCLOS. In the spirit of leaving some degrees of discretion to the coastal states, he proposed considering:

the availability of other measures (equally effective and less onerous); the importance to Guinea-Bissau of the objective sought in taking the confiscation measure (*i.e.*, protection of living resources in the EEZ); the impact of that measure on protected rights of Panama (the *M/V Virginia G*) and other states; and the circumstances and manner in which the confiscation measure was taken.¹¹⁵

The critical determination to the necessity of a coastal state's enforcement measure according to Judge Paik is, therefore, whether there are "available alternatives" that the coastal state could employ to ensure compliance with its laws and regulations. Alternatives exist when they are "equally effective" to reach the same end, and "less onerous" of other states' protected rights. Meanwhile, the WTO Appellate Body in *Korea-Various Measures on Beef* considered alternatives to be available when they were capable of achieving the same result and not "unreasonably burdensome" to perform, either financially or technically. Both agreed, however, that the contribution of a measure to the objectives sought is of paramount importance to the availability consideration. In *Korea-Various Measures on Beef*, the Panel asserted that:

a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account *the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect*. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.¹¹⁶

It also took into account the consistency of measures taken against a similar violation as a vital element of availability. Even though Judge Paik's separate opinion suggested an "effectivity" test, the Tribunal in the *M/V Virginia G* case seemed to follow a similar "consistency test" in *Korea-Various Measures on Beef*.¹¹⁷ The Tribunal noted

113. Harrison, *supra* note 102 at 244.

114. *The M/V Virginia G*, *supra* note 9, Dissenting Opinion of Vice President Hoffman and Judges Marotta Rangel, Chandrasekhara Rao, James L. Kateka, Zhiguo Gao, and Boualem Bouguetaia. at paras. 54-5.

115. *Ibid.*, Separate Opinion of Judge Paik at para. 29.

116. *Korea-Various Measures on Beef*, Appellate Body Report, *supra* note 62 at para. 162 (emphasis added).

117. *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik at para. 36.

that the first two fishing vessels (*Amabal I* and *Amabal II*), which were arrested together with the *Virginia G* for “a violation of similar gravity”, were only fined and not confiscated, whereas the other two fishing vessels (*Rimbal I* and *Rimbal II*) were neither arrested nor fined.¹¹⁸ This inconsistency may indicate that Guinea-Bissau had less intrusive alternatives to either sanction the offence or deter future offences.

Judge Paik and the Panel in *Korea–Various Measures on Beef* also showed different approaches concerning the “impact of a measure” to evaluate the availability of an alternative. Judge Paik’s model is more outward-looking in that it requires a careful examination of the impact of a measure on the protected rights of the flag state and other states. The measure taken must therefore not deny the guaranteed flag state’s rights for prompt release actions and other states’ high seas freedom that are compatible with the EEZ regime. On the other hand, the Panel in *Korea–Various Measures on Beef* is more inward-looking by way of examining the burden borne by the coastal state to carry out a measure. Although the test proposed by Judge Paik did not explicitly mention any consideration of the financial and technical burdens that a coastal state may have, he did devote a section to Guinea-Bissau’s economy. He further suggested that Guinea-Bissau’s challenges as a developing country in policing its vast EEZ, the severe problem of IUU fishing it faces, and the importance of protecting its EEZ resources, should all be taken into account in assessing the necessity of the enforcement measure taken by Guinea-Bissau.¹¹⁹

Although the ordinary meaning of the term “necessary” indicates a spectrum between absolute necessity and reasonable contribution, this paper suggests that necessity within Article 73(1) of UNCLOS does not rise to the level of “necessity” within Article 25 of the ILC Draft Articles on State Responsibility.¹²⁰ In other words, the term “necessary” within Article 73(1) is not used to justify an act that otherwise breached the Convention. Employing all the elements of necessity under Article 25 of the ILC Draft Articles on State Responsibility to determine a coastal state’s enforcement measures in its EEZ would set a higher bar that goes beyond the meaning of Article 73(1) of UNCLOS. The coastal state is likely to have a broad margin of appreciation because, if the bar were too high, it would hamper the coastal state’s conservation and management measures in the EEZ.¹²¹ In the

118. Harrison, *supra* note 102 at 244.

119. *The M/V Virginia G*, *supra* note 9, Separate Opinion of Judge Paik at paras. 31–3.

120. The International Law Commission has codified the concept of “state of necessity” in art. 25 of the *ILC Draft Articles on State Responsibility*. A state seeking to invoke the necessity defence must meet several conditions: (1) the state’s “essential interest” must have been threatened by a “grave and imminent peril”; (2) the act must be the “only means” to safeguard that essential interest; and (3) the state must not have “contributed to the occurrence of the state of necessity”. See *Article 25 of the Draft Articles on the Responsibilities of States for Internationally Wrongful Acts, with Commentaries*, *supra* note 88; *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, *supra* note 88.

121. James HARRISON, “Article 73: Enforcement of Laws and Regulations of the Coastal State” in Alexander PROELSS, ed., *United Nations Convention on the Law of the Sea: A Commentary* (Oxford: Hart Publishing, 2017), at 558.

light of modern technology, options of innovative measures could be wide open as long as the margin of appreciation is preserved.¹²²

An analysis of the Tribunal's decision in the *M/V Virginia G* case, including the judges' separate and dissenting opinions, and the WTO Appellate Body's finding in the *Korea–Various Measures on Beef*, presents a possible two-part necessity test to determine whether a non-listed enforcement measure is necessary within the meaning of Article 73(1) of UNCLOS. This test would weigh whether alternative measures exist to render Indonesia's measure of burning or sinking vessels as unnecessary. The first part of the test will examine the contribution of a measure to the objective sought by Indonesia. The second part of the test will take into account the impact of a measure to both Indonesia and other states, including the flag states.

III. APPLYING THE NECESSITY TEST TO INDONESIA'S MEASURES

Even though burning or sinking a vessel is not expressly permitted under Article 73(1) of UNCLOS, it should be permissible if it meets the necessity test. To be necessary within the meaning of Article 73(1) of UNCLOS, Indonesia must demonstrate that other means are unable to ensure compliance with its laws and regulations, and that the impact of the preferred measure is less onerous upon other states' rights and not unreasonably burdensome for itself. If less severe measures are later found to be adequate to achieve the same level of compliance, the measure to burn or sink a vessel may not be necessary any more.

Moreover, Indonesia must show that such a measure is applied on a case-by-case and issue-by-issue basis in the light of the particular circumstances of the case and the gravity of the violation. Accordingly, this part will examine all measures taken by Indonesia against illegal fishing in its EEZ, namely, fines, expropriation, and burning or sinking vessels (vessel destruction). The first part of the necessity test will investigate the contribution of each measure to the objective sought by Indonesia—to ensure compliance with Indonesia's Fisheries Law. The second part of the necessity test will examine the impact of each measure on both Indonesia and other states, including the flag states. Each of the measures will then be examined to determine whether Indonesia's measures to burn or sink foreign vessels are within the scope and meaning of Article 73(1) of UNCLOS.

A. Fines

1. *The contribution of the measure to the objective sought*

Fines are a common type of sanction imposed against fisheries violations under Indonesia's Fisheries Law. They are applied in several instances, such as the use of

122. Camille GOODMAN, "Striking the Right Balance? Applying the Jurisprudence of International Tribunals to Coastal State Innovations in International Fisheries Governance" (2017) 84 *Marine Policy* 293 at 298.

unsustainable fishing practices or fishing gear, fishing without permits, destruction of the marine environment, forgery of fishing permits, absence of port clearance, and unlicensed fisheries research.¹²³ In most illegal fishing cases occurring after 2014, Indonesian courts charged vessels' captains with fines in a range between IDR1bn (around US\$70,000) and IDR6bn (about US\$425,000).¹²⁴ One might argue that the fines imposed by the courts are relatively low compared to the value of resources fished. However, this amount is more than ten times the amount of those charged in 2006, as captured by the OECD High Seas Task Force.¹²⁵ Despite a significant increase in fines, Indonesia still suffers from IUU fishing. Even worse, Indonesia is unable to recover payment of such fines from the offenders due to their inability to pay.

2. Impact on Indonesia and other states

The problem of such inability to pay may arise from the fact that the actual owners of IUU fishing vessels are often not exposed, and one must look behind the corporate structure of the IUU fishing vessels to possibly compel payment of such fines or to confiscate assets as deemed necessary. The remaining problem would be how Indonesia could obtain information regarding who provides the capital and planning for IUU fishing activities and take legal action against them. In the *Volga* case, which involved an arrest of a Russian vessel by Australia for illegally fishing in Australia's EEZ,¹²⁶ ITLOS refused Australia's request to disclose the owner and ultimate beneficial owners of the vessel as a condition of the vessel's release.¹²⁷ This case illustrates one of the difficulties of obtaining information regarding the beneficial owners of the IUU fishing vessels. Even though Indonesian courts have attempted to summon the owners of the IUU fishing vessels, these efforts have proven futile because Indonesia does not have sufficient access to information and resources to find them.¹²⁸

123. See *Law 31/2004 as amended by Law 45/2009*, *supra* note 19, arts. 84, 86, 87, 88, 89, 90, 91, 92, 94, 95, 96, 97, 99; *Law 45/2009*, *supra* note 5, arts. 85, 93, 94A, 98.

124. See Supreme Court Decision No. 1355 K/Pid.Sus/2014 (*Indonesia v. Dao Van Tuan*); Supreme Court Decision No. 131 K/Pid.Sus/2014 (*Indonesia v. Nguyen Phan Sy*); Supreme Court Decision No. 168 K/Pid.Sus/2014 (*Indonesia v. Nguyen Van Be*); Supreme Court Decision No. 170 K/Pid.Sus/2014 (*Indonesia v. Le Van Vuong*); Supreme Court Decision No. 174 K/Pid.Sus/2014 (*Indonesia v. Bui Han Hanh*); Supreme Court Decision No. 618 K/Pid.Sus/2014 (*Indonesia v. Tran Ngoc Quang*); Decision of High Court of Pekanbaru No. 46/Pid.Sus/2016/PT PBR (*Indonesia v. Huynh Duy Phu*); Decision of District Court of Medan No. 2/Pid.Sus.PRK/2016/PN MDN (*Indonesia v. Khin Maung Win*); Decision of High Court of Langsa No. 79/Pid.Sus/2016/PN LGS (*Indonesia v. Montree Sama-Ae*); Decision of High Court of Jayapura No. 70./Pid.Sus-Prk/2015/PT JAP (*Indonesia v. Guo Yunping*); Supreme Court Decision No. 2563 K/Pid.Sus/2015 (*Indonesia v. Chen Xiangqi*); Decision of District Court of Tanjungpinang No. 23/Pid.Sus.Prkn/2015/PN.TPg (*Indonesia v. Dang Ngoc Quy*).

125. See High Seas Task Force, *Closing the Net: Stopping Illegal Fishing on the High Seas*, Governments of Australia, Canada, Chile, Namibia, New Zealand, and the UK, WWF, IUCN, and the Earth Institute at Columbia University (Bellegarde: Sadag, 2006) at 34.

126. *The Volga Case (Prompt Release) (Russia v. Australia)*, Case No. 11, Order of 23 December 2002, 42 I.L.M. 159 at para. 34.

127. *Ibid.*, at paras. 75, 88.

128. Interview with the District Court of Ranai (author's personal communication, 2016).

Under Article 30(2) of Indonesia's Penal Code, in cases where fines are not paid, a "subsidiary punishment" in the form of confinement or jail¹²⁹ shall substitute for the fines.¹³⁰ However, Article 102 of the Fisheries Law prohibits "imprisonment"¹³¹ for fishing violations occurring in the EEZ unless there is a prior agreement between Indonesia and the other country.¹³² The relationship between Article 30(2) of Indonesia's Criminal Code and Article 102 of the Fisheries Law has been the central debate in many of Indonesia's Supreme Court decisions on illegal fishing in the EEZ.

Since Indonesia does not follow the *stare decisis* rule, decisions in prior cases are not binding in future cases. Consequently, there are two different views on the relationship between Article 30(2) of Indonesia's Penal Code and Article 102 of the Fisheries Law. The majority of court opinions found that imprisonment cannot be applied as a secondary punishment for illegal fishing conducted by foreign nationals in the EEZ.¹³³ On the other hand, the minority opinions held that imprisonment as a substitute for fines does not contradict Article 73(3) of UNCLOS.¹³⁴ They asserted that a second-layer punishment in the form of imprisonment should be allowed to give the law some teeth. Without this option, accused persons will go unpunished, and Indonesia would have to seek legal or diplomatic efforts to compel them to pay fines.¹³⁵ Even if the accused persons attempt to leave the country, Indonesian immigration will not allow them to leave the country and eventually they will be detained for an indeterminate period which may cost Indonesia a lot more money than to put them in jail for a specified period.¹³⁶

The fact that there are many unpaid fines may explain why there is no uniformity in the courts' decisions. On the one hand, courts are bound to interpret the law by international treaties to which Indonesia is a party. On the other hand, if implemented consistently by Indonesia's treaty obligations, the treaty's provisions may not be effective in providing an appropriate response to fisheries violations in the EEZ.

Even if imprisonment is permissible, some of the Indonesian district courts are located in remote islands and are not equipped with adequate confinement facilities

129. Under Indonesian law, confinement/jail or *pidana kurungan* only lasts for a minimum of one day and maximum of one year but can be extended up to one year and four months. See *Penal Code of Indonesia*, arts. 18(1), 18(3).

130. *Penal Code of Indonesia*, art. 30(2).

131. The exact wording of art. 102 of the *Law 31/2004 (as amended)* is *pidana penjara* or "imprisonment" which, under Indonesia's criminal law, can last for a lifetime. See *Penal Code of Indonesia*, art. 12.

132. *Law 31/2004 as amended by Law 45/2009*, *supra* note 19, art. 102.

133. See Supreme Court Decision No. 471 K/Pid.Sus/2013 (*Indonesia v. Nguyen Van Hai*); Supreme Court Decision No. 168 K/Pid.Sus/2014 (*Indonesia v. Nguyen Van Be*); Supreme Court Decision No. 99 K/Pid.Sus/2014 (*Indonesia v. Duong Van Tien*); Supreme Court Decision No. 170 K/Pid.Sus/2014 (*Indonesia v. Le Van Vuong*); Supreme Court Decision No. 131 K/Pid.Sus/2014 (*Indonesia v. Nguyen Phan Sy*); Supreme Court Decision No. 618 K/Pid.Sus/2014 (*Indonesia v. Tran Ngoc Quang*); Supreme Court Decision No. 1355 K/Pid.Sus/2014 (*Indonesia v. Dao Van Tuan*).

134. The Court used the term "substitute punishment" and "subsidiary punishment" interchangeably. See Supreme Court Decision No. 174 K/Pid.Sus/2014 (*Indonesia v. Bui Han Hanh*) at 11, 12; Supreme Court Decision No. 608 K/Pid.Sus/2013 (*Indonesia v. Tran Van Se*) at 7, 12, 13, 16.

135. Supreme Court Decision No. 174 K/Pid.Sus/2014 (*Indonesia v. Bui Han Hanh*) at 12.

136. *Ibid.*, at 13.

—having neither jails nor even minimum immigration detention facilities. The District Court of Ranai in the Islands of Natuna¹³⁷ is one example of Indonesia’s fisheries courts without such proper confinement facilities. The closest detention facility is in the city of Tanjung Pinang—about 1.5 hours by plane—and in Pontianak on the island of Borneo where there is no direct flight available. This illustrates the financial and technical difficulty that Indonesia may have to face to impose this measure.

B. Expropriation

1. *The contribution of the measure to the objective sought*

Under Article 104(2) of the Fisheries Law, objects or tools used in or produced from a fisheries crime can be expropriated.¹³⁸ These may include fishing gear, catches, and the vessels used to capture or to transport fish.¹³⁹ This expropriation clause is also reiterated in Article 76A of the Fisheries Law, while Article 76C of the Fisheries Law suggests that an auction could follow an expropriation.¹⁴⁰ Though Article 76A signifies that expropriation requires approval from the Head of the District Court,¹⁴¹ the Supreme Court has clarified that such approval is only required to demolish or auction a vessel before trial.¹⁴² If a trial has commenced, the approval is issued by the Head of the respective District Court or other judges.¹⁴³

If not auctioned,¹⁴⁴ an object or tool of fisheries crime could be delegated to a business group of fishers or a fisheries co-operative.¹⁴⁵ However, donating vessels to a group of small fishers may be ineffective partly because some of them do not have adequate financial capacity to cover the high operational cost of the vessels.¹⁴⁶ Going beyond what the law designates, the vessels have also been given away to selected local governments and educational institutions, but they ended up being unused and eventually broke down.¹⁴⁷

Indonesia’s criminal procedural law also permits “confiscation” when investigation or trial is still underway, depending on the safety and durability of the objects or tools, or financial considerations to store them safely.¹⁴⁸ If a vessel is sold in a public auction

137. The Natuna Islands consist of about 272 islands that are located in the South China Sea, off the northwest coast of Borneo. Natuna is bordering Vietnam and Cambodia in the north, Singapore in the west, and Malaysia in the east. See “Natuna Archipelago”, online: Indonesia Tourism <<http://www.indonesia-tourism.com/triau-archipelago/natuna.html>>.

138. *Law 31/2004 as amended by Law 45/2009*, *supra* note 19, art. 104(2).

139. *Ibid.*, commentary, art. 104(2).

140. *Law 45/2009*, *supra* note 5, arts. 76A, 76C(1).

141. *Ibid.*, art. 76A.

142. *Supreme Court’s Directive No. 1 of 2015* on the evidence in the form of vessel in fisheries cases [*Supreme Court’s Directive 1/2015*], at para. b.

143. *Ibid.*, at para. c.

144. *Law 45/2009*, *supra* note 5, art. 76C(1).

145. *Ibid.*, art. 76C(5).

146. Interview with the MMAF Civil Servant Investigator of Ranai (author’s personal communication, 2016).

147. Interview with the MMAF Civil Servant Investigator of Bitung (author’s personal communication, 2017).

148. *Law No. 8 of 1981 on the Code of Criminal Procedures*, art. 45(1).

during a trial, the revenue from the auction is held by the court as evidence,¹⁴⁹ pending a final court order. In practice, if the accused is found innocent, the revenue will be returned to him. In contrast, if the court finds the accused to be guilty, the revenue will be expropriated for the state.

This measure, however, results in little deterrence because it opens the possibility for a vessel to find its way back to sea or, worse, to the same owner or other IUU fishing operators. The price for an auctioned vessel is generally less than the market price, ranging from IDR8m (about US\$550) to IDR48m (about US\$3,400).¹⁵⁰ The owner of the vessel—who is not necessarily the accused vessel captain—often buys back the vessel through an agent.¹⁵¹ Thus, sometimes the same vessel would get caught again for the same violation.¹⁵² In short, this measure will be less likely to affect the owners of the IUU vessels who remain anonymous and untouchable.

For this reason, Indonesia's Minister of Marine Affairs and Fisheries has strongly urged the fisheries courts not to allow illegal fishing vessels to be auctioned.¹⁵³ Even though this statement may seem to interfere with judicial independence, it points out the Ministry's preferred measure, which favours vessel destruction over other measures. In some cases, courts have used the public policy argument to justify their decisions. In the *Huynh Duy Phu* case, the High Court of Pekanbaru stated that to support the government programme and in the light of an alarming rate of "fish theft" in Indonesia's EEZ, all evidence—including vessels—must be expropriated for demolition.¹⁵⁴ In the *Guo Yunping* case, the High Court of Jayapura also took the position that all stakeholders, including the courts, must actively take a role to deter "fish theft" in Indonesia's EEZ.¹⁵⁵

2. Impact on Indonesia and other states

In the EEZ, other states enjoy the right to high-seas freedom as referred to in Article 87 of UNCLOS as long as it is compatible with the EEZ regime under Part V.¹⁵⁶ Where there is incompatibility or conflict, the EEZ provisions will prevail.¹⁵⁷ Freedoms other than those exclusively reserved for the coastal state are still available

149. *Ibid.*, art. 45(2).

150. In *Dao Van Tuan* and in *Nguyen Van Be*, the vessels were sold at auction for IDR 8.910.000 (approximately US\$650) and IDR 48m (approximately US\$3,400), respectively. See Supreme Court Decision No. 1355 K/Pid.Sus/2014 (*Indonesia v. Dao Van Tuan*) and Supreme Court Decision No. 168 K/Pid.Sus/2014 (*Indonesia v. Nguyen Van Be*).

151. Interview with the District Court of Ranai, *supra* note 128.

152. In *Dao Van Tuan*, the Supreme Court considered Tuan's prior and prolonged acts of illegal fishing. The Court specifically stated that Tuan had been illegally fishing in Indonesia's EEZ for "a long period" and "dozens of times". See Supreme Court Decision No. 1355 K/Pid.Sus/2014 (*Indonesia v. Dao Van Tuan*) at 14.

153. "Menteri Susi Kecewa Kapal Asing yang Disita Malah Dilelang" *CNN Indonesia*, (5 January 2015), online: CNN Indonesia <<http://www.cnnindonesia.com/ekonomi/20150105163430-92-22497/menteri-susi-kecewa-kapal-asing-yang-disita-malah-dilelang/>>.

154. Decision of High Court of Pekanbaru No. 46/Pid.Sus/2016/PT PBR (*Indonesia v. Huynh Duy Phu*).

155. Decision of High Court of Jayapura No. 70./Pid.Sus-Prk/2015/PT JAP (*Indonesia v. Guo Yunping*).

156. UNCLOS, *supra* note 7, arts. 58(1), (2).

157. *Ibid.*, art. 58(2).

for other states, such as rights to navigation and other non-economic uses of the EEZ. In addition to a guarantee of exemption from imprisonment or any form of corporal punishment, other states also have the avenue to request the prompt release of their vessel and crew.¹⁵⁸

The prompt release of vessel or crew is a guaranteed right that strikes a balance between the interests of the coastal state in carrying out its measures against those of the flag state in preventing excessive measures by the coastal state.¹⁵⁹ Article 292 of UNCLOS lists certain conditions for other states to invoke prompt release actions.¹⁶⁰ In the event of an arrest or detention of foreign vessel, a combined reading of Articles 73(2), 73(4), and 292 of UNCLOS shows that there is a condition for both coastal and flag states to act promptly. First, the coastal state shall promptly notify the flag state of the action taken and of any penalties that may be imposed to the flag state's vessel and crew.¹⁶¹ After being notified, the flag state must promptly apply for a release within ten days from the time of the detention.¹⁶² Upon the posting of a reasonable bond by the flag state, the coastal state shall promptly release the detained vessels and crew.¹⁶³

To this day, ITLOS has decided nine prompt release requests. Some cases may even provide some hints on the application of an unlisted enforcement measure. In the *Grand Prince* case,¹⁶⁴ the *Juno Trader* case,¹⁶⁵ and the *Tomimaru* case,¹⁶⁶ the detaining states asserted that confiscation of a vessel renders an application for its release without object. In *Tomimaru*, the Tribunal held that, even though the confiscation of vessels is not expressly permitted in UNCLOS, it must not upset the balance of the interests of the flag state and the coastal state.¹⁶⁷ The Tribunal went on to say that:

[a] decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object. Such a decision should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag state from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law.¹⁶⁸

158. *Ibid.*, art. 73(3).

159. See Heiki LINDPERE, "Prompt Release of Detained Foreign Vessels and Crews in Matters of Marine Environment Protection" (2005) 33 *International Journal of Legal Information* 240 at 240-1.

160. UNCLOS, *supra* note 7, art. 292(1).

161. *Ibid.*, art. 73(4).

162. *Ibid.*, art. 292(1).

163. *Ibid.*, art. 73(2).

164. *The Grand Prince Case (Prompt Release) (Belize v. France)*, Case No. 8, Judgment of 20 April 2001 at para. 61.

165. *The Juno Trader Case*, *supra* note 94 at paras. 52, 53, 58.

166. *The Tomimaru Case (Prompt Release) (Japan v. Russia)*, Case No. 15, Judgment of 6 August 2007 [*The Tomimaru Case*] at para. 59.

167. *Ibid.*, at paras. 72, 75.

168. *Ibid.*, at para. 76. Similarly, in the *Juno Trader* case, the Tribunal also recognized that humanity and due process of law considerations are pivotal in exercising the duty of prompt release. See *The Juno Trader Case*, *supra* note 94 at para. 77.

The Tribunal further found that, while a decision is still under review by the domestic court of the detaining state, the Tribunal is still competent to consider the application to release a vessel or crew.¹⁶⁹ Consequently, until the decision is final and binding, the flag state still preserves the right to request a release of its vessel or crew upon the posting of a bond, and the coastal state still bears an obligation to release them promptly. Arguably, even when a decision is already final and binding, a flag state may still be able to bring a claim of release on the ground of inconsistency with international standards of due process of law and obstruction of possible recourse to national or international remedies.¹⁷⁰ Despite the absence of a requirement of exhaustion of local remedies,¹⁷¹ by not acting promptly once being notified of any action taken to its vessel and crew, the flag state faces the risk of measures that could render its prompt release application without object.¹⁷² In conclusion, even though coastal states may determine other necessary measures that are not explicitly referred to in Article 73 (1) of UNCLOS, such measures should be carried out when its duty of prompt release is no longer incumbent upon them or in a manner that does not interfere with the flag state's right to release its vessel and crew upon the posting of a bond.

Indonesia's fisheries law has incorporated the system of prompt release of a vessel or crew who commits a fisheries crime in Indonesia's fisheries management zone. Any proposal to release a vessel or crew must be submitted at any time before a court's decision.¹⁷³ The court will decide the amount of the "reasonable bond" that the parties must post to release the detained vessel or crew,¹⁷⁴ which may vary based on the value of the vessel, its equipment, catches, and the maximum applicable fine.¹⁷⁵

Despite the guaranteed right to prompt release action under Indonesian law, the reason that most accused persons have not utilized this avenue might be because, once the accused persons and their vessels are detained, the actual owners of the vessels will abandon the vessels and their crew.¹⁷⁶ In other words, Indonesia's obligation to promptly release detained vessels and crew is contingent on the accused or its flag state to post a bond or other financial security promptly. By not posting such a bond, the flag state waives its right to request a release of the vessels and crew.

Even though the purpose of a bond or other security for a release is only as a guarantee of any penalties that may be imposed by the coastal state, one might argue that the bond required as a condition for a release should be significantly heavy to provide adequate deterrence against IUU fishing. The case of *Camuoco* illustrates that full compliance with the UNCLOS prompt release provision does not necessarily deter IUU fishing. *Camuoco* was a vessel flying the flag of Panama that was arrested by

169. *The Tomimaru Case*, *supra* note 166 at para. 78.

170. *Ibid.*, at para. 79.

171. See *The Camuoco Case (No. 5) (Panama v. France)*, Case No. 5, Order of 7 February 2000, 39 I.L.M. 666 [*The Camuoco Case*] at para. 57.

172. Bernard H. OXMAN, "The 'Tomimaru' (*Japan v. Russian Federation*). Judgment. ITLOS Case No. 15" (2008) 102 *American Journal of International Law* 316 at 321.

173. *Law 31/2004 as amended by Law 45/2009*, *supra* note 19, art. 104(1).

174. *Ibid.*

175. *Ibid.*, commentary, art. 104(1).

176. Interview with the District Court of Ranai, *supra* note 128.

France in 1999 for illegally fishing in the French EEZ around the Crozet Islands.¹⁷⁷ ITLOS granted Panama's request for a prompt release after posting a reasonable bond of 8m French francs (about €1.2m).¹⁷⁸ However, after its release, *Camuoco* was back at sea and fishing under a new flag of Uruguay, with a new name of *Arvisa I* but operating under the name *Eternal*.¹⁷⁹ In 2002, the French authorities eventually arrested *Arvisa I* for illegal fishing in the French EEZ around Kerguelen Island.

All in all, even if a bond is posted, it will not necessarily guarantee that the vessel will refrain from continuing its IUU fishing activity. This would provoke a question as to whether these circumstances could preclude Indonesia's duty of prompt release on bond. Necessity within this spectrum is beyond the scope of "necessary" within Article 73(1) of UNCLOS. To justify non-compliance with an international obligation to release a vessel or crew upon the posting of a bond, Indonesia would have to demonstrate that it meets a much stricter standard of necessity under Article 25 of the ILC Draft Articles on State Responsibility.¹⁸⁰

C. Burning or Sinking Vessels

1. *The contribution of the measure to the objective sought*

Article 69 of Indonesia's Fisheries Law authorizes Indonesia's patrol vessels to stop, inspect, bring, and detain any vessel suspected of conducting a "fisheries crime" in Indonesia's fisheries management zone.¹⁸¹ It also grants them the power to take "special measures" by burning or sinking foreign fishing vessels based on "sufficient preliminary evidence".¹⁸² The phrase "sufficient preliminary evidence" is defined as any preliminary evidence to suspect a fisheries crime by foreign vessel,¹⁸³ which can include a vessel that is caught red-handed fishing or transporting fish in Indonesia's fisheries zone without the required permits.¹⁸⁴ The commentary to Article 69 further explains that Indonesia cannot burn or sink a foreign vessel unless such vessel is "plainly committing a fisheries crime" even though it opens another question as to what standards used to determine whether a vessel is "plainly committing a fisheries crime".¹⁸⁵

Based on the wording of Article 69, these so-called "special measures" are specifically intended for foreign vessels, not domestic vessels. Even though the law explicitly discriminates foreign vessels, in practice, Indonesian vessels are not exempted.¹⁸⁶

177. *The Camuoco Case*, *supra* note 171 at para. 29.

178. *Ibid.*, at para. 78.

179. High Seas Task Force, *supra* note 125 at 33.

180. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 3 August 2001, UN Doc. A/56/10 (2001), art. 25.

181. *Law 45/2009*, *supra* note 5, art. 69(3).

182. *Ibid.*, art. 69(4).

183. *Ibid.*, commentary, art. 69(4).

184. *Ibid.*

185. *Ibid.*

186. See Supreme Court Decision No. 2563 K/Pid.Sus/2015 (*Indonesia v. Chen Xiangqi*).

Article 69 also does not specify what it considers as a fisheries crime worthy of burning or sinking. It can be implied that Article 69 may apply to all crimes under the Fisheries Law.

Even though Indonesia has several maritime law enforcement authorities, including a coast guard established in 2014,¹⁸⁷ only the Navy and MMAF Civil Servant Investigator [MMAF Investigator] possess the power to investigate a fisheries crime occurring in Indonesia's EEZ.¹⁸⁸ Therefore, in the context of enforcement measures in the EEZ, the terms "patrol vessels" within Article 69 refer to vessels operated by the Navy and MMAF Investigator. The Supreme Court underlined that the court has no authority to approve the implementation of Article 69, which suggests that Article 69's special measures may fall within the discretion of the Navy and MMAF Investigator.¹⁸⁹ Earlier in 2014, MMAF had issued a technical directive for its investigators to implement Article 69's special measures. The Navy may not necessarily follow this Directive; thus, different practices may occur.

The MMAF Directive indicates that the initial instruction for the "special measures" was "deliberate" and "direct" destruction of vessels at sea based on safety considerations. It prescribes subjective and objective requirements to implement such extraordinary measures. The subjective requirements can be met:

- (a) if a vessel's Captain or crew resist or engage in manoeuvres that could endanger a patrol vessel;
- (b) if weather conditions make it impossible to bring the vessel to port; or
- (c) if the foreign vessel is so severely damaged that it could endanger the life of the accused and the patrol vessel.¹⁹⁰

On the other hand, the objective requirements consist of cumulative *and/or* alternative requirements.¹⁹¹ The cumulative requirements are met if a vessel:

- (a) has no valid permit,
- (b) manifestly carries out illegal fishing or illegal transporting of fish in Indonesia's fisheries management zone, and
- (c) is a foreign vessel with all foreign nationals' crew.¹⁹²

187. *Presidential Regulation No. 178 of 2014 on Maritime Security Agency*. The current coast guard [Maritime Security Agency] is a modification from a previous institution of a similar function called Maritime Security Coordination Agency which was established in 2005. See *Presidential Regulation No. 81 of 2005 on Maritime Security Coordination Agency*. Nevertheless, the Indonesian coast guard is only authorized to conduct hot pursuit, stopping, inspecting, arresting, bringing, and delivering a vessel to the relevant authority which has the power to conduct further maritime law enforcement. See *Presidential Regulation No. 178 of 2014 on Maritime Security Agency*, art. 4, para. 1.

188. *Law 45/2009*, *supra* note 5, art. 73(2).

189. *Supreme Court's Directive 1/2015* at para. a.

190. *Regulation of the Director General of Surveillance for Marine and Fisheries Resources No. 11/Per-DJDSKP/2014 on the Technical Guidance in Enforcing Special Measure to Foreign Fishing Vessel [Director's Regulation 11/2014]*, art. 7.

191. *Ibid.*, art. 8(1).

192. *Ibid.*, art. 8(2).

In addition or alternative to cumulative requirements, the foreign vessel must have no high economic value, and/or is impossible to be brought to the nearest port because:

- (a) it endangers the safety of navigation or quarantine purposes;
- (b) it carries communicable disease or hazardous substance;
- (c) the number of the vessel caught is impossible to be brought to the nearest port;
and/or
- (d) the high cost to pull or to bring the vessel.¹⁹³

For the MMAF Investigator, the approval to burn or sink a foreign vessel lies in the hands of the MMAF Director General of Surveillance for Marine and Fisheries Resources.¹⁹⁴ To obtain such approval, the MMAF patrol vessel must give a verbal or written report¹⁹⁵ stating (1) the name of the vessel, (2) the vessel's location and co-ordinates, (3) the vessel's origin and nationality, (4) the nationality of the crew, (5) the alleged violation, and (6) the evidence.¹⁹⁶ After gaining approval, but before sinking the fishing vessel, the patrol vessel must warn the fishing vessel's crew:

- (a) to abandon the vessel,
- (b) to save all the crew,
- (c) to make efforts to remove the vessel's flag,
- (d) to document the action, *and*
- (e) to take note in the logbook of the position where the vessel is burnt or sunk.¹⁹⁷

During the discharge, another safety consideration is also ensured. The patrol vessel must determine a safe range for a shot by taking into account the wind, current, and any safety considerations; use explosives; and/or direct the shot towards the engine room to ensure a quick result.¹⁹⁸ It implies that means other than explosives are permissible, as MMAF has done some evaluations to require prior environmental impact assessment and to avoid the use of explosives in order to minimize environmental harm.¹⁹⁹

Despite these extensive requirements on the burning or sinking of a vessel, recent practices have significantly deviated from the initial directions. This paper observes that the implementation of Article 69 has seen a declining trend as patrol vessels have avoided direct destruction at sea and resorted to judicial recourse as the basis of the measure. In other words, the Navy and MMAF Investigator have opted for Article 76A, which provides a legal basis for the destruction of an object or tool of

193. *Ibid.*, art. 8(3).

194. *Ibid.*

195. *Ibid.*, art. 9(2).

196. *Ibid.*, art. 9(1).

197. *Ibid.*, art. 10.

198. *Ibid.*, art. 11.

199. Interview with the MMAF Civil Servant Investigator of Ranai, *supra* note 146.

fisheries crimes, including vessels.²⁰⁰ Some cases have mentioned Article 69, but judges treated its application very loosely as a matter of fact, without reviewing the legality on a case-by-case basis. The courts seem to assert a pre-judgment sinking to be legal so long as there was proof of correspondence between the patrol vessel authorities and the Head of a relevant District Court to approve such measures.²⁰¹

The application of Article 69 is often confused with Article 76A. Even though Article 76A uses a more general term of “destroy”, its implementation usually involves the act of burning or sinking. Similarly, measures under Article 69 and 76A are generally carried out before a final and binding court decision. Contrary to the popular opinion, however, Indonesia’s more recent practices may not invoke either Article 69 or Article 76A, but rather a higher standard by resorting to a final and binding court decision.²⁰² Regardless, the technicalities of vessel destruction, based either on Article 76A or a final and binding decision, are inspired by Article 69, which is by burning or sinking.

The number of foreign vessels in Indonesian waters has dropped significantly from 1,128 units in the early 2014 to 164 units by the end of 2014.²⁰³ A report based on an analysis of the automatic identification system [AIS] data indicated that there had been a decline of foreign fishing vessels’ activities in Indonesian waters by more than ninety percent since 2014, with most of the decline from China, Thailand, Taiwan, and South Korea.²⁰⁴ Even though the moratorium of foreign and ex-foreign vessels issued by MMAF may have contributed to the decline, one might argue that vessel destruction is not the “only means” available to effectively deter IUU fishing in Indonesia’s EEZ. However, the two measures are different: vessels moratorium is an executive policy targeted at all foreign and ex-foreign vessels, whereas burning or sinking a vessel is an enforcement measure against a particular vessel for a specific offence. Interpretation of Article 73(1) of UNCLOS entails a condition that the measure taken should be the only “enforcement measure” capable of ensuring compliance to a coastal state’s laws and regulations.

2. *Impact on Indonesia and other states*

Even though Indonesia has a margin of appreciation to determine its preferred measures against infringement to its laws and regulations in the EEZ, Indonesia must not employ any measure that would hinder the flag state’s right to release its vessel or

200. *Law 45/2009*, *supra* note 5, art. 76A.

201. Decision of District Court of Medan No. 2/Pid.Sus.PRK/2016/PN MDN (*Indonesia v. Khin Maung Win*).

202. “Hari Kemerdekaan, Pemerintah Tenggelamkan 125 Kapal Pelaku Illegal Fishing”, *supra* note 35; “Lanal Ranai Laksanakan Penenggelaman Kapal Ikan Asing Pelaku Tindak Pidana Illegal Fishing di Perairan Natuna” (22 August 2018), online: KoArmada I <<https://koarmada1.tnial.mil.id/BERITA/Beritamiliter/tabid/71/articleType/ArticleView/articleId/8506/Default.aspx>>.

203. “Susi Gets Angry Over Illegal Fishing Vessel Auction—Rakyat Merdeka” (6 January 2015) online: Atlas Information Monitors <<http://aim-services.co.id/susi-angry-illegal-fishing-vessel-auction-rakyat-merdeka/>>.

204. Reniel B. CABRAL et al., “Rapid and Lasting Gains from Solving Illegal Fishing” (2018) 2 *Nature Ecology and Evolution* 650 at 653.

crew upon the posting of a bond. As ITLOS has confirmed in the *Tomimaru* case, as long as the domestic court has not reached its final judgment on the merits, the flag state may request a release.²⁰⁵ Thus, the execution of a decision to burn or sink a vessel must wait until the decision is no longer under appeal. If the flag state has not submitted an appeal or petitioned for review within the time limit provided for under Indonesian law, the decision is then final and binding, and the vessel can be expropriated for further measures, including destruction by burning or sinking.

Sinking or burning a vessel before investigation or even with a court's approval is still problematic to some extent. In a case where a vessel is auctioned off while the trial is still in progress, and the court later decides that the accused is not guilty, the accused will receive monetary compensation for the vessel in the amount corresponding to the auction. However, if the vessel is burned or sunk before the investigation or during the judicial proceedings, the remedy for the accused if he is later found innocent will be questionable. Moreover, the accused is also at risk of lodging a prompt release application without objection.

Even though burning or sinking a vessel is currently the only effective means to deter IUU fishing, it should only be necessary where it has less severe impact on other states and the coastal state. As the world's largest archipelago,²⁰⁶ Indonesia shares maritime boundaries with ten countries. Most of Indonesia's territorial sea boundaries have been settled and ratified in national legislation, such as some parts of the territorial sea boundaries between Indonesia and Malaysia,²⁰⁷ and between Indonesia and Singapore,²⁰⁸ as well as between Indonesia and Papua New Guinea.²⁰⁹ Contrary to territorial sea boundaries, most of Indonesia's EEZ boundaries are unresolved. The only settled EEZ boundaries are between Indonesia and Papua New Guinea,²¹⁰

205. *The Tomimaru Case*, *supra* note 166 at para. 78.

206. Even though Indonesia submitted 13,466 names of its islands at the 10th United Nations Conference on the Standardization of Geographical Names, and an additional 875 islands in 2017, it has claimed that the total number of its islands is 17,504 islands, pending official names to be submitted to the United Nations. See *E/Conf.101/119 on the National Report of the Republic of Indonesia*, submitted by Indonesia, 30 May 2012; *E/Conf.105/86/Crp.86 on the Report of the Government of the Republic of Indonesia*, submitted by Indonesia, 23 June 2017; *E/Conf.105/115/Crp.115 on the Identification of Islands and Standardization of Their Names*, submitted by Indonesia, 30 June 2017.

207. See *Treaty Relating to the Delimitation of the Territorial Seas of the Two Countries in the Straits of Malacca, Indonesia-Malaysia*, 17 March 1970, online: <<https://treaty.kemlu.go.id/apisearch/pdf?filename=MYS-1970-0010.pdf>>.

208. See *Treaty Relating to the Territorial Seas of the Two Countries in the Strait of Singapore, Indonesia-Singapore*, 25 May 1973, online: <<https://treaty.kemlu.go.id/apisearch/pdf?filename=SGP-1973-0007.pdf>>; *Treaty Relating to the Delimitation of the Territorial Seas of the Two Countries in the Western Part of the Strait of Singapore, Indonesia-Singapore*, 10 March 2009, online: <<https://treaty.kemlu.go.id/apisearch/pdf?filename=SGP-2009-0035.pdf>>; and *Treaty relating to the Delimitation of the Territorial Seas in the Eastern part of the Strait of Singapore, Indonesia-Singapore*, 3 September 2014, online: <<https://treaty.kemlu.go.id/apisearch/pdf?filename=SGP-2014-0047.pdf>>.

209. See *Agreement Concerning Certain Boundaries Between Indonesia and Papua New Guinea, Indonesia-Australia*, 12 February 1973, online: <<https://treaty.kemlu.go.id/apisearch/pdf?filename=AUS-1973-0010.pdf>>.

210. *Agreement Concerning Maritime Boundaries Between the Republic of Indonesia and Papua New Guinea and Cooperation on Related Matters, Indonesia-Papua New Guinea*, 13 December 1980, <<http://treaty.kemlu.go.id/apisearch/pdf?filename=PNG-1980-0003.pdf>>, art. 4.

and Indonesia and Australia,²¹¹ as well as between Indonesia and the Philippines,²¹² in 1980, 1997, and 2014, respectively. It should be noted that the 1997 boundary agreement between Indonesia and Australia has not entered into force and is currently being reviewed. From this vantage point, a potential clash against Indonesia's enforcement measures in its undelimited EEZs is very likely.

The absence of a precise EEZ boundary between Indonesia and Vietnam, for example, has generated several tensions. Indonesia and Vietnam concluded their continental shelf boundary in 2003,²¹³ but they have not reached an agreement on the EEZ because they agreed not to use a single boundary line. In 2017, the Vietnamese Coast Guard intercepted an Indonesian patrol vessel while it arrested five Vietnamese fishing boats in waters near the Natuna Islands.²¹⁴ A similar incident occurred in 2019, when two Vietnam Fisheries Resources Surveillance [VFRS] patrol vessels interrupted the Indonesian Navy's efforts to capture four Vietnamese fishing boats, which were claimed to be illegally fishing in Indonesian waters, in the northern part of the Natuna Islands.²¹⁵ To date, Indonesia still maintains its position to arrest and prosecute Vietnamese fishing boats, despite the ongoing delimitation talks.

Of all unresolved EEZ boundaries with six neighbouring states, Indonesia has an agreement only with Malaysia on common guidelines on the treatment of fishers in all areas of their pending maritime boundaries.²¹⁶ In the event of an encroachment incident involving their fishing boats, they agree to limit their maritime law enforcement activities to "inspection and request to leave", except for those fishing boats using illegal fishing gear, such as explosives, electrical, and chemical fishing gear.²¹⁷ In practice, an Indonesian court would take into account such an arrangement when deciding a case involving a Malaysian fishing boat, but it would still impose fines and sink the boat for the use of unlawful fishing gear—which is exempted from the guidelines.²¹⁸

211. *Treaty Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, Indonesia-Australia*, 14 March 1997.

212. *Agreement Concerning the Delimitation of the Exclusive Economic Zone Boundary, Indonesia-Philippines*, 23 May 2014.

213. *Agreement Concerning the Delimitation of the Continental Shelf Boundary, Indonesia-Vietnam*, 26 June 2003, online: <<http://treaty.kemlu.go.id/apisearch/pdf?filename=VNM-2003-0021.pdf>>.

214. "Vietnamese Coast Guard Prevented Indonesia from Arresting Poachers" *The Straits Times* (23 May 2017), online: The Straits Times <<https://www.straitstimes.com/asia/se-asia/vietnamese-coast-guard-prevented-indonesia-from-arresting-poachers>>.

215. See Arya DIPA and Agnes ANYA, "Indonesia Slams Vietnam for Disrupting Arrests" *The Jakarta Post* (27 February 2019), online: The Jakarta Post <<https://www.thejakartapost.com/seasia/2019/02/27/ri-slams-vietnam-for-disrupting-arrests.html>>; Aloysius UNDIRU, "Sinking Captured Fishing Boats is Deterrent, Not Retaliation, Indonesia Says After South China Sea Clash with Vietnam" *South China Morning Post* (2 May 2019), online: South China Morning Post <<https://www.scmp.com/news/asia/southeast-asia/article/3008485/sinking-captured-fishing-boats-deterrent-not-retaliation>>.

216. *Memorandum of Understanding in Respect of the Common Guidelines Concerning Treatment of Fishermen by Maritime Law Enforcement Agencies of Malaysia and the Republic of Indonesia, Indonesia-Malaysia*, 27 January 2012, online: <<http://treaty.kemlu.go.id/apisearch/pdf?filename=MYS-2011-0127.pdf>>, art. 5.

217. *Ibid.*, art. 3.

218. See Decision of District Court of Medan No. 2/Pid.Sus.PRK/2016/PN MDN (*Indonesia v. Khin Maung Win*) at 18; *Directive of the Head of Coordinating Body of Maritime Security No.1/Ketua*

Given its strong political will to take active measures to eliminate IUU fishing, resolving its undelimited EEZ boundaries should be a pressing priority for Indonesia. Without rigid EEZ boundaries, Indonesia and its neighbours cannot know for sure the extent of their respective EEZs, and thereby cannot enforce laws and regulations based on a clear jurisdictional area. In other words, unresolved boundaries would hinder enforcement of Indonesia's laws and regulations. Excessive enforcement actions in undelimited areas may also disrupt the negotiation process between Indonesia and its counterparts in reaching a final delimitation line.

The extent to which Indonesia could employ enforcement measures in its undelimited EEZs is therefore limited by Article 74(3) of UNCLOS, which obliges states to enter into provisional arrangements of a practical nature and to not jeopardize or hamper the reaching of the final delimitation agreement.²¹⁹ In practice, there are several varieties of provisional arrangements, such as mutually agreed moratoriums on all activities in overlapping areas, joint development or co-operation on fisheries, agreements on environmental co-operation, and agreements on the allocation of criminal and civil jurisdiction.²²⁰ The phrase "not to jeopardize or hamper the reaching of the final agreement" within Article 74(3) does not mean that the states concerned are entirely barred from conducting any activity in the disputed area. Some activities are permissible so long as they would not have the effect of prejudicing the final agreement, as confirmed by the Arbitral Tribunal in the *Guyana v. Suriname* case.²²¹ The Arbitral Tribunal established that activities that are prejudicial to the reaching of a final delimitation are those "unilateral acts that cause a physical change to the marine environment".²²² However, the ITLOS Special Chamber in the *Ghana v. Côte d'Ivoire* case had declined to grant provisional measures which required Ghana to cease its ongoing unilateral drilling in an area in dispute with Côte d'Ivoire because the Special Chamber considered that a halt would cause financial loss to Ghana and damage to the marine environment.²²³ This finding was despite the fact that the Special Chamber found that there is a risk that Ghana's unilateral activities would significantly and permanently modify the physical characteristics of the disputed areas.²²⁴ The Special Chamber also did not spell out how the suspension of drilling activities, particularly from deterioration of equipment, would result in danger to the marine environment.²²⁵ This case has, unfortunately, given greater

Bakorkamla/III/2013 on the Technical Guidance on the Treatment of Fishers by Maritime Law Enforcement Agencies of Indonesia in Unresolved Maritime Boundaries of Indonesia-Malaysia.

219. UNCLOS, *supra* note 7, art. 74(3).

220. Tara DAVENPORT, "Southeast Asian Approaches to Maritime Boundaries" (2014) 4 Asian Journal of International Law 309 at 333.

221. *Guyana v. Suriname*, Award of 17 September 2007, PCA Case No. 2004-04 [*Guyana v. Suriname*] at para. 465.

222. *Ibid.*, at para. 480.

223. *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean* (No. 23) (*Ghana v. Côte d'Ivoire*), Case No. 23, Provisional Measures Order of 25 April 2015 at para. 99.

224. *Ibid.*, at para. 89.

225. Yoshifumi TANAKA, "Article 74: Delimitation of the Exclusive Economic Zone Between States with Opposite or Adjacent Coasts" in Proelss, *supra* note 121 at 581.

discretion for states to carry out unilateral activities in an undelimited maritime area.²²⁶

In *Guyana v. Suriname*, Guyana also asserted that Suriname's actions of sending its navy and air force to expel Guyana's oilrig and drillship from a disputed maritime area were not law enforcement activities.²²⁷ Suriname responded that its measures were "reasonable and proportionate law enforcement measures to preclude unauthorised drilling in a disputed area".²²⁸ The Arbitral Tribunal accepted that force may be used in law enforcement activities provided that it is unavoidable, reasonable, and necessary.²²⁹ It found that Surinamese actions were closer to a threat of military action than a law enforcement activity; thus it declared such actions as a threat of use of force.²³⁰ The findings in *Guyana v. Suriname* signal that an exercise of law enforcement activity in a disputed area may be permissible so long as it does not amount to military action and only if it is unavoidable, reasonable, and necessary. The distinction between "law enforcement activity" and "military activity" is therefore crucial in understanding whether a coastal state could apply its measures in a disputed EEZ, either against vessels flying the flag of the other party to the unsolved EEZ or other foreign flag vessels. However, an enforcement action against third party states' vessels should not be an issue, as the sovereign rights over the undelimited EEZ are exclusive for the disputing parties.²³¹

Law enforcement activity is always linked to states' ability to prescribe laws and regulations, as it is the underlying basis for exercising enforcement jurisdiction. It is lawful when it rests on a well-founded jurisdictional basis under international law.²³² In unresolved boundaries, past cases have seen states referring to naval patrols and enforcement activities as proofs of effective control, as well as a basis for compensation claims against forcible expulsion of their licensed vessels in an area in dispute.²³³ It may indicate that, despite questionable jurisdiction due to unresolved boundaries, it is a common state practice to undertake law enforcement activities in disputed areas. Kwast has cautioned, however, that there is a fine line between "law enforcement" and "use of force" in that context.²³⁴ She suggests using three criteria to distinguish them: the functional objective of the action, the status of the subjected vessel, and the location of the incident.²³⁵

226. Millicent MCCREATH and Zoe SCANLON, "The Dispute Concerning the Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire: Implications for the Law of the Sea" (2019) 50 *Ocean Development and International Law* 1 at 15.

227. *Guyana v Suriname*, *supra* note 221 at paras. 202, 274.

228. *Ibid.*, at para. 441.

229. *Ibid.*, at para. 445.

230. *Ibid.*

231. Irini PAPANICOLOPULU, *Enforcement Action in Contested Waters: The Legal Regime*, online: International Hydrographic Organization <https://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf6/S7P2-P.pdf>.

232. Patricia Jimenez KWAST, "Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award" (2008) 13 *Journal of Conflict and Security Law* 49 at 55, 86.

233. *Ibid.*, at 70.

234. *Ibid.*, at 89.

235. *Ibid.*, at 49.

In the light of Indonesia's intensified efforts against IUU fishing, as well as the existence of an adjacent South China Sea dispute which might have a spill-over effect, Indonesia must make every effort to enter into any conflict-management type of provisional arrangement with the states concerned until they reach an agreement on a delimitation line. In the absence of such arrangements, Indonesia and the other party to the undelimited EEZ should refrain from doing anything that may spark any conflict or hamper the reaching of a final agreement, including fishing or arresting each other's fishers in the overlapping area. Indonesia must carefully evaluate its choice of measures in its unresolved EEZs to avoid those that could give rise to military activities akin to the use of force.

In practice, states have protested arrests of fishers for alleged fishing in disputed zones.²³⁶ Burning or sinking vessels of another party of the contested zone for fishing without permits will likely cause contention by the other party, given that the rights to issue fishing permits are pertinent to the sovereign rights over the EEZ in dispute. Thus, in an undelimited EEZ, measures to burn or sink vessels of the other party are only necessary within the spectrum of indispensable or absolute necessity. The practice of unsustainable fishing practices could be an example of when such measures may be applied in good faith, as they may cause a physical change to the marine environment of the unresolved EEZ, which could be prejudicial to the final settlement of the boundary. This practice has been a reality between Indonesia and Malaysia, where they have agreed to arrest fishing vessels of the other party only when such vessels employ unlawful fishing gear. A mere act of fishing would only warrant an expulsion from the unresolved area, not an arrest or further enforcement measures, such as burning or sinking vessels.

In an ideal world, coastal states patrol their EEZ while flag states exercise control over their vessels. In reality, many coastal states face significant challenges to ensure compliance with their laws and regulations mainly because they lack the resources to cover a vast 200nm of EEZ throughout their coastline. Therefore, the role of flag states is also crucial to ensure that their vessels and crew conform to the coastal states' laws and regulations.

Flag states have a due diligence obligation to ensure that their vessels comply with the coastal state's laws and regulations. In the ITLOS Advisory Opinion on IUU Fishing, the Tribunal held that flag states should apply sanctions "sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities".²³⁷ The Tribunal further held that the action taken by the flag states in this regard is without prejudice to the rights of the coastal state to take measures

236. See Khanh LYNH, "Vietnam Opposes Indonesia's Use of Force on Fishers" *VN Express International* (2 May 2019), online: VN Express International <<https://e.vnexpress.net/news/news/vietnam-opposes-indonesia-s-use-of-force-on-fishers-3917475.html>>; "China Detains Vietnamese Fishermen in Disputed Water" *Reuters* (22 March 2012), online: Reuters <<https://www.reuters.com/article/china-vietnam/china-detains-vietnamese-fishermen-in-disputed-water-idUSL3E8EM3YJ20120322>>.

237. *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, ITLOS Case No. 21, 2 April 2015, at para. 138.

under Article 73 of UNCLOS.²³⁸ Accordingly, along with sinking/burning IUU fishing vessels, Indonesia may also bring actions against flag states, not for the IUU fishing activities per se, but for their failure to meet their due diligence obligation to take all necessary and appropriate measures to ensure that their vessels do not engage in IUU fishing activities in Indonesia's EEZ.

IV. CONCLUSION

IUU fishing threatens Indonesia's interest in conserving its EEZ for sustainable use of its resources, and causes substantial losses to the Indonesian economy and environment. Lack of political will, capacity, and resources of both coastal and flag states to implement relevant international instruments on IUU fishing also contribute to the ineffectiveness of the available sanctioning measures under existing international instruments. An interpretation of the term "necessary" within Article 73(1) of UNCLOS indicates that, in order for a coastal state's enforcement measures to be "necessary", it must be the only available means capable of ensuring effective compliance with the coastal state's laws and regulations. Moreover, this "only means" must be less onerous on other states' protected rights and must not be unreasonably burdensome for the coastal state to undertake. Indonesia's measures to sink or burn a foreign vessel engaged in IUU fishing activities in its EEZ will remain necessary until lesser measures are adequate to punish and deter IUU fishing activities. Such measures should be applied on a case-by-case basis in the light of the particular circumstances of the case and the gravity of the violation. Even then, consistency of the measures is also important to demonstrate that less intrusive alternatives are not capable of reaching the same end. The nature of IUU fishing as an increasingly cross-border activity requires co-operation and political will between Indonesia and the relevant flag states whose vessels are engaged in IUU fishing activities in Indonesia's EEZ. Until the relevant flag states are committed to co-operate with Indonesia's efforts to punish and deter IUU fishing, Indonesia may have no other means than to take more stringent enforcement measures by burning or sinking IUU vessels.

238. *Ibid.*, at para. 139.

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