

NOTES ON LEGAL ISSUES AND ENFORCEMENT

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LEGAL INFRASTRUCTURE UNDERPINS MCS

- The operation of any MCS regime is based on the domestic legal arrangements in place in each country.
- Accordingly it is particularly important that those operating a fisheries MCS system understand those legal arrangements. Without that understanding the MCS system will not be fully effective.
- The MCS system is based on the domestic legal structures of each country.
- At the top of the legal infrastructure is the constitution of each country. We will not be dealing with constitutional issues at this workshop.
- While international law considerations dictate the inter-country policies for fisheries outside territorial waters we will assume for the workshop the UNCLOS. However, the laws that are enforced under fisheries are domestic laws.

THREE MAIN LEGAL ISSUES

- Legislation
- The conduct of fisheries investigations
- The preparation for and the conduct of prosecutions

LEGISLATION

We will examine two major pieces of legislation – the Fisheries Acts (howsoever named) and Acts that determine the Maritime Zones for domestic law purposes. These zones include the Territorial Sea, the Contiguous Zone (if such exists) and the Exclusive Economic Zone.

There may also exist specific zones in respect of internal waters each under a different management regime.

There may well also exist specific management arrangements for fish processing establishments.

As a general rule the arrangements for internal waters and for fish processing establishments will be able to be comprehended within the context of our discussions of the external waters regimes.

FISHERIES ACT

While it is important to be familiar with all the detail of the relevant Fisheries Act there are a number of provisions that are critical.

The definitions are important in the context of management and for facilitating proof in prosecutions. In regard to the latter we must also focus on whether evidence is required in order to prove an item falls within the definition – never make assumptions (e.g. local fishing vessel).

DEFINITIONS

These provisions will be set out in a section entitled “interpretation” of “definitions”.

In particular, attention will be focused on such items as:

- “authorised officer” or “fisheries officer”
- “fishing”
- “fish” - for example a scientific definition of fish would not include marine mammals or sharks, but usually the definition of fish will include such species.
- “vessel”, “fishing vessel”, “local fishing vessel”, “foreign fishing vessel”
- “master” – usually based on command issues, but remember we may have to prove such command – do not take it for granted.

Note also that the way in which definitions are specified, e.g. by the use of the terms “means” or “includes”. There may be canons of interpretation that may impact on a court’s interpretation of a defined term.

Investigators **must** be familiar with all definitions – never make assumptions.

POWERS OF OFFICERS

The specific Powers of Officers, howsoever defined, are set out in the relevant Fisheries Act.

It is of fundamental importance that the powers are understood – again make no assumptions.

In particular it is important to note whether there are any conditions precedent to the exercise of powers – e.g. In some Fisheries Acts the power to stop, board and search a vessel or to seize items or vessels is dependent upon the officer having either a reason to believe an offence has been committed or a warrant (which warrant must be based upon the same criterion).

As a general proposition I suggest that, at least in respect of a vessel, the power to stop, board and inspect should not be limited other than by reference to country jurisdiction.

In respect of land based premises those powers may be more restricted.

Rules as to the use of force need also to be carefully noted.

The power to require explanation from a person may be specified. However, its use may need to be considered in light of any constitutional guarantees of the privilege against not answering incriminating questions.

MANAGEMENT REGIMES

The management regimes will be specified in the act or in regulations made under the act. As a general rule inter-country co-operative management regimes will be incorporated into the act or regulations.

OFFENCES

Fisheries acts will set out in detail the variety of conduct that is proscribed. The usual range of offences include:

- Fishing without a licence – foreign vessel
- Fishing without a licence – local vessel
- Fishing with unauthorised gear
- Fishing in closed waters
- Landing catch without a permit
- Tampering with another's fishing gear

It is of fundamental importance that each investigation officer is familiar with the elements of each offence so that the officer is able to focus an investigation to seek out evidence to prove each such element, in the context of a standard of proof beyond reasonable doubt.

MARITIME ZONES PROVISIONS

There exist legislative provisions developed in accordance with the UNCLOS, which allow for the specification of the baselines for the calculation of the Territorial Sea, the Contiguous Zone and the Exclusive Economic Zone and internal waters.

Within each zone applicable laws are specified.

In the conduct of prosecutions it is necessary to prove such zone boundaries. Unless there are legislative provisions to facilitate such proof it may be necessary to call a great deal of evidence. It is recommended that such provisions be enacted so that charts marked with the proclaimed boundaries are admissible to prove those boundaries.

INVESTIGATIONS

In the conduct of an investigation the circumstances in which it is conducted determine to a large extent the likely success of it.

Ashore we have a controlled environment enabling investigators to readily go about their business. In addition the courts to which prosecutions are brought will more readily understand that environment.

However, at sea the conditions are more likely to be difficult, even hazardous. Moreover the courts may not have any experience of such matters as GPS, fishing techniques and the difficulties of compiling materials. Investigators need to bear these issues in mind when conducting such investigations. Time must be taken. Do not rush. The crime scene cannot be revisited!!

EVIDENCE ADMISSIBILITY REQUIREMENTS

DOCUMENTARY

- Usually requires the original;
- Must be able to prove author e.g. for logbooks markings on charts;
- Authenticity of official charts;
- Zone boundary markings;
- Cross-examination on non-authored documents;
- Interrogation record;
- Statements not usually admissible; evidence to be given orally.

CONTINUITY OF EXHIBITS

We must be able to produce in court the exhibits seized during an investigation in the same condition in which they were found or be able to account for any changes e.g. identification marks.

Accordingly we must be able to account for the exhibits from the time of seizure to the time of tendering to the court. Such accounting is done by allowing the exhibits to be handled by as few persons as possible and keeping a record of all those who handle them and the circumstances in which they are handled.

If we seize exhibits we need to log the time and exact place of seizure and to give to each exhibit a unique identifier. In that log we need to record the person who seized the exhibits and the person to whom the exhibits are delivered. Such log needs to be prepared at the time of seizure and also doubles as a receipt for the seized items

RULE AGAINST HEARSAY

Although this rule of evidence is not necessarily applied in the courts of all countries, it is usually so done. The rule states that evidence of an out of court assertion by a person who heard or read the assertion is not admissible to prove the truth of that which has been asserted.

Accordingly to prove events and activities we need to call to give evidence those persons who actually witnessed the events or activities.

Therefore each person who makes an observation that needs to be proved must be called to give evidence of the observation. Thus all potential witnesses need to make notes and statements.

NOTES

It is particularly important for investigators to make notes during the course of an investigation when the events witnessed are still fresh in their memories. The notes can be in point form but need to contain dates and times of the witnessed events e.g. position fixes, gear check data, weather conditions, set and drift, fishing activity, weights of product, items seized etc. From these notes statements for submission to prosecutors are prepared.

The decision to prosecute will be based on an analysis of these statements.

ILLEGALLY OR IMPROPERLY OBTAINED EVIDENCE

We need to be familiar with any rules that prohibit the use of illegally or improperly obtained evidence. In some jurisdictions it may be that such evidence is absolutely inadmissible or it may be admissible in the discretion of the court. For example, a search conducted of a vessel without power may render all evidence thereon obtained to be inadmissible!

Where it is inadmissible, evidence derivatively obtained may also be inadmissible.

The easiest way of avoiding problems in this regard is to ensure that the evidence is properly obtained in the first place.

EVIDENCE GATHERING FOR SPECIFIC PROOFS

NAVIGATION

Navigation evidence will be relied upon in prosecutions for proving the location at which a particular activity has taken place. That activity may be, for example, use of a vessel for fishing in a closed area or use of particular gear that in an area may not be permitted.

The location of the activity at sea will be proved by reference to navigation evidence.

Such navigation evidence may be derived by reference to radar ranging, inertial systems or GPS. It may be obtained from a surface vessel or from an aircraft.

In either event it is necessary to be able to prove not just a particular position fix, but the whole of the navigation of the platform used.

We need to cross check all systems when we are able so to do.

Before leaving port we will initialise our navigation systems and check each against the other. We will use self-test programmes where available. We will record fixes derived from various navigation aids and record them in our proper records.

Until we are satisfied as to the acceptance by our courts of fixes derived from our various aids we will continue to be able to prove the accuracy of one against one we know to be accepted. In due course GPS will be accepted as notoriously accurate but until then we will cross check against radar and any other aids.

Pay close regard to the time zone being used.

VESSEL IDENTIFICATION

In areas where there a large number of similarly structured vessels it is important to identify with as much precision as possible – colour, name, markings, licence number, call sign, engine type and number and owner and operator. Where, for the purpose of confusing investigation, identical vessels are believed to be operating, it may become necessary to make such conduct an offence.

When conducting sea or air surveillance, particularly in respect of unauthorised operations, identification of a suspect vessel becomes imperative, especially if hot, or any other pursuit is necessary.

Continuous records of all observations, including radar observations, must be made and recorded by the person making the observations. Where course and speed of a target vessel may be determined, a record of them should be made.

A record of the prevailing weather conditions and the set and drift should also be made.

VESSEL ACTIVITY

From the time of first sighting (including radar sighting) of a potentially target vessel a detailed record of its movements should be recorded. After visual sighting the record will include also changes in speed and direction. Particular note will be made of a sudden increase in speed or in a sudden increase in exhaust emission.

When the vessel is close any gear in the water will be noted, together with the position of that gear. When in even closer proximity to the vessel, observations will be made of activity on the decks of the vessel and of the gear type and its disposition.

When a vessel is to be boarded, the boarding operation will be conducted in accordance with standard operating procedures.

The observations made upon boarding will be detailed and will be recorded by the person making the observations.

Such observations will include:

- Vessel layout – a sketch can be particularly useful;
- Gear type and location and its condition;
- Catch (including species identification) on board, its location and its condition;
- Navigation aids, if any and their display – if not operating they should be touched to determine prior use and, if possible, they should be turned on and their displays noted, including any memory displays;
- Charts on board, their location and markings;
- Logbooks and any other ship records on board and their location;
- Holds or other storage system and their contents;

- A record (taken in the first person) of any conversation (which may contain admissions) with the captain and crew. Remember that proof of conversations taken with the use of a crewmember as interpreter will not likely be able to be used.

CREW IDENTIFICATION

The crew number and any formal identification should be noted.

An individual photograph of the captain and all crew may prove useful in any later court proceedings. Such photographs will need to be recorded by reference to the vessel and the date and time of taking.

PARTICULAR EVIDENTIARY ISSUES

CHARTS

In respect of charts we need to bear in mind a number of important issues:

- Chart datum as opposed to GPS datum;
- Year of publication and any updates;
- Publisher;
- Scale – be wary of cross-examination based on the “width of a marking”;
- Markings on charts of target vessels;
- Proof of charts – mark seized charts for later identification.

PHOTOGRAPHS

The use of photographs in court proceedings is extremely useful but only if they can be understood. Accordingly a list of the photographs, the time of their taking and what they show needs to be made. In these days of digital cameras with time/date displays, we may become overly relaxed about making such lists.

Aerial photographs may also be useful, if available.

VIDEOS

Videos can provide dramatic evidence, but we need to guard against certain potential problems. Accordingly there are a number of practical rules for their use:

- Always use a clean unused tape for each specific operation;
- No ham acting by boarding party members;
- Beware of the sound recording capacity – we do not want any unguarded language on the tape;
- Use the date/time function but be sure to check that it is set properly.

INTERROGATIONS

My experience suggests that interrogations are not only useful to obtain admissions about the status of people, e.g. the captain, but that they are also useful to pin a potential defendant down to demonstrable lies.

Investigators must comply with any rules about obtaining records of interrogations.

PROSECUTIONS

PREPARATION OF BRIEF/FILE

After an investigation is complete it will be necessary to prepare a brief or a file of materials for submission to those who are responsible for making the decision whether court or other appropriate proceedings will be commenced.

That brief/file will include:

- Name(s) of potential defendants;
- Statements of potential witnesses;
- List of witnesses and exhibits to be tendered by each;
- List of exhibits;
- Copy of exhibits (or originals if that is your local practice);
- Any comments for the assistance of prosecutors.

In submitting vessel logbooks the vessel movement entries should have been checked to see whether they represent reality. I have seen entries that when plotted reveal that a fishing vessel is capable of a speed of 45 knots!

SECURITY OF EXHIBITS

It is essential that exhibits be kept secure at all times.

The examination of exhibits must be done in circumstances that do not result in markings being made upon them. For example, additional plotting on seized charts may destroy part of their evidentiary value.

If not a local requirement, I recommend that original exhibits not be given to the Prosecution until just before a trial is to take place.

If they need to be viewed by the Prosecution before trial a record of the delivery to the Prosecutor needs to be kept.

PRESENTATION MATERIAL – NAVIGATION EVIDENCE

Apart from exhibits there may be a need to show baselines, fishery waters or detailed vessel navigation to a court. Accordingly it may be necessary to have clean charts or routeing charts available for use in giving demonstrations to a court.

PROOFING OF WITNESSES

I recommend that the Prosecution speak to each witness prior to trial to understand clearly the evidence that each witness can give. It is not to be used to put words into the mouth of a witness.

If experts, in navigation, fishing methods, for example, are to be called, their statements will have contained detail of their qualifications and experience, but a session with the Prosecutor will always prove valuable.

Proofing should be done with only one witness present at a time to prevent accusations of collusion.

INTERPRETERS

Prosecutors will need to be informed whether interpreters are required for court proceedings. It may take time to have available independent interpreters, so early notice is essential.

GIVING EVIDENCE

TAKE TIME

There is no need to rush through the giving of evidence. A trial cannot take place without witnesses giving their testimony. Despite what lawyers may like to think, a trial result is based upon the evidence given by witnesses. You are not taking place in a race. For those who have not given evidence often, the court can be an intimidating place. If you have the opportunity, familiarize yourself with the courtroom. Make sure you know where to go and how the process works – usually examination-in-chief (also called direct examination), cross-examination and re-examination (also called redirect examination).

MAKE SURE QUESTION IS UNDERSTOOD

Whether the question is asked by a prosecutor or by a defendant lawyer you must be satisfied that you understand the question before answering. If you are not so satisfied ask for the question to be repeated until you do understand it.

Answer only the question asked – do not volunteer answers.

Speak up clearly so that the judge can hear you and direct your answers to the judge not to then questioner.

If you do not know the answer to a question, say so – do not guess.

CREDIBILITY IS IMPORTANT

You will be involved in more than one matter. You must therefore be able to maintain in all your matters your credibility. Do not lose it for the sake of one possible result.

AFTER PROSECUTION

APPEAL

If the result of any prosecution is, in your mind, unfavourable you ought to consult the prosecutor about the question of an appeal. Decisions are not always made in a manner we consider appropriate and such decisions may lead others engaging in the same activity. If an appeal produces a result more favourable it may deter others to engage in similar conduct.

DEBRIEFING

A debriefing after a prosecution is a valuable tool for emphasising the good and an opportunity for identifying aspects requiring correction.

Not all matters will require such a debriefing but in the more significant cases it should be organised.

If there are inter-agency issues to be resolved, this provides an ideal opportunity.

The debriefing session should not be used as a forum for personal criticism but should be used to provide the basis for future training.