

---

## ITLOS and the 'Volga' Case: The Russian Federation v Australia

---



**Michael White\* & Stephen Knight\*\***

### **Introduction**

The arrest of vessels accused of fishing illegally is an important weapon in the armoury of coastal states to prevent overfishing. One of the species most at risk is the Patagonian toothfish, which is mainly to be found in Southern Ocean waters. The Australian and other governments regularly patrol the Southern Ocean and arrest fishing and factory vessels that are apparently fishing illegally and bring them to port to be accused and tried according to law. When the Australian government forces arrested the *Volga* in February 2002 and escorted it to port in Fremantle, Western Australia, one of the legal issues that arose was the amount of the bond for its release.

Russia, the flag state, commenced proceedings in the International Tribunal for the Law of the Sea (ITLOS or the Tribunal), situated in Hamburg, Germany, against Australia for release of the *Volga*. It was the fourth 'bond or other financial security' (bond) case on which ITLOS passed judgment and the first in which Australia was involved. This article is about ITLOS and its proceedings concerning the release of fishing vessels and posting of bonds. It examines the principles used by the Tribunal in determining a 'reasonable' bond for the prompt release of an arrested vessel. There is a New Zealand connection as certain NZ legal practitioners acted for the vessel in the proceedings. The details of the case are set out under. Before discussing the specifics of the '*Volga*' Case it is appropriate to discuss the history and organisation of ITLOS to provide an idea of the legal and procedural background to the proceedings.

---

\* Michael White had a first career in the Royal Australian Navy, serving in ships, submarines and shore establishments in various parts of the world. He resigned in 1969 as a Lieutenant Commander to attend university and study law. He graduated B.Com. (1973) and LLB (1974) from the University of Queensland and, later, in 1994 was awarded his PhD (Law) from Bond University on marine pollution from ships. He practised as a barrister, based in Brisbane, for 24 years, being made Queen's Counsel in 1988. In 1999 he became a full time academic at the T.C. Beirne School of Law, University of Queensland, where he is a Reader in Law and the Executive Director, Centre for Maritime Law.

\*\* Stephen Knight is the Research Assistant to the Centre for Maritime Law, University of Queensland, during 2003. He is also currently studying for a Bachelor of Business (Management) and a Bachelor of Laws at the University of Queensland. He has been selected as a member of the team to represent the University in 2003 at the International Maritime Arbitration Moot Competition. He has a strong interest in international law in general and international maritime law in particular.

### ITLOS – Organisation and Prompt Release Jurisdiction

ITLOS was established in 1996, pursuant to the provisions of the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS).<sup>1</sup> The principal function of the Tribunal is to settle disputes between States Parties to UNCLOS regarding the interpretation or application of its provisions.<sup>2</sup> UNCLOS has compulsory dispute resolution mechanisms written into its terms so that accession to UNCLOS automatically commits the State Parties to the dispute resolution provisions. The Tribunal has a number of different subsidiary organs including a Chamber of Summary Procedures, where five judges can meet quickly to dispose of urgent matters, the Seabed Disputes Chamber,<sup>3</sup> the Chamber on Fisheries Matters and the Chamber on the Marine Environment.<sup>4</sup> Detailed guidelines covering organisation, procedure, the form of judgments and the presentation of cases are contained in the Rules of the Tribunal.<sup>5</sup> The Tribunal has observer status at the sessions of the United Nations General Assembly while members of the Tribunal are also members of the UN Pension Fund.<sup>6</sup> The expenses of the Tribunal are borne by the State Parties to UNCLOS.<sup>7</sup> It is the duty of the Tribunal to apply the rules as laid down in UNCLOS and other compatible rules of international law<sup>8</sup> with the decision of the Tribunal being final.<sup>9</sup> The Russian Federation and Australia have both ratified UNCLOS and are therefore within the jurisdiction of the Tribunal.<sup>10</sup>

The Tribunal is comprised of 21 independent members meant to provide equitable representation for the world's principal legal systems and major geographic regions.<sup>11</sup> Members are elected by a secret ballot of States Parties to UNCLOS for a term of nine years.<sup>12</sup> It is up to the members of the Tribunal to elect a President and Vice-President for a term of three years.<sup>13</sup> While Tribunal members are barred from sitting on matters

<sup>1</sup> See generally 1982 *United Nations Convention on the Law of the Sea*, Part XI, Section 5; Part XV, Section 2, Article 287; and Annex VI (*Statute of the International Tribunal for the Law of the Sea*), Article 1.

<sup>2</sup> Dr Thomas Mensah, 'International Tribunal for the Law of the Sea and the Private Maritime Sector', (1999) *International Business Lawyer* 319. Dr Mensah was the inaugural President of the Tribunal in 1996. On 1 October 2002 Judge Dolliver Nelson was elected to the position of president of ITLOS for the triennial period 2002 to 2005; see ITLOS Press Release 68, dated 1 October 2002, ITLOS website, [http://www.itlos.org/news/press\\_release/2002/press\\_release\\_68\\_en.doc](http://www.itlos.org/news/press_release/2002/press_release_68_en.doc).

<sup>3</sup> The Seabed Disputes Chamber is a distinct judicial body with ITLOS, established in accordance with UNCLOS Part XI, Section 5 and Art.14 of the Statute of the Tribunal. It deals with disputes arising out of the exploration and exploitation of the resources of the seabed and ocean floor beyond national jurisdiction. Note that this Chamber, of 11 judges, can entertain disputes from companies and private individuals, as well as nation States. It can also give advisory opinions at the request of the UN Council or the Assembly of the International Seabed Authority.

<sup>4</sup> ITLOS Press Release No 5, dated 3 March 1997, ITLOS website, [http://www.itlos.org/news/press\\_release/1997/press\\_release\\_5\\_en.doc](http://www.itlos.org/news/press_release/1997/press_release_5_en.doc).

<sup>5</sup> UNCLOS and the *Rules of the Tribunal* may be found collected in the one convenient book: *ITLOS Basic Texts* 1998, Kluwer Law International, 1999. The Rules are amended and updated from time to time.

<sup>6</sup> *Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea*, Articles 3 & 6. The full text of this agreement can be found at [http://www.itlos.org/documents\\_publications/documents/agr\\_coop\\_un\\_en.doc](http://www.itlos.org/documents_publications/documents/agr_coop_un_en.doc).

<sup>7</sup> UNCLOS, Annex VI (*Statute of the International Tribunal for the Law of the Sea*), Article 19.

<sup>8</sup> 1982 *United Nations Convention on the Law of the Sea*, Article 293; 1982 *United Nations Convention on the Law of the Sea*, Annex VI (*Statute of the International Tribunal for the Law of the Sea*), Article 19.

<sup>9</sup> UNCLOS, Article 33.

<sup>10</sup> Australia ratified UNCLOS on 5 October 1994 while the Russian Federation ratified UNCLOS on 12 March 1997. See United Nations Division for Ocean Affairs and the Law of the Sea, *Chronological lists of ratifications of, accessions and successions to UNCLOS and the related Agreements as at 12 November 2001*, [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm).

<sup>11</sup> UNCLOS, Annex VI (*Statute of the International Tribunal for the Law of the Sea*), Article 2.

<sup>12</sup> *Ibid*, Article 5.

<sup>13</sup> *Ibid*, Article 12.

in which they have previously taken part as counsel or sat in judgment in another court<sup>14</sup> they are not barred from sitting on disputes involving parties of the same nationality.<sup>15</sup> Unless they are so barred all available members are expected to sit in judgment on each dispute to come before the Tribunal.<sup>16</sup> If the Tribunal includes a member of the same nationality as one of the parties then the other party to the dispute may appoint another person to sit as a judge *ad hoc* on the Tribunal for the duration of the dispute.<sup>17</sup> If the Tribunal does not include a judge of the nationality of either of the parties then each of opposing parties may appoint one. Judges *ad hoc* participate in the hearing as full and equal members of the Tribunal.<sup>18</sup> For the hearing of the 'Volga' Case the Tribunal comprised President Nelson (Grenada), Vice-President Vukas (Croatia), 18 members<sup>19</sup> and Judge *ad hoc* Shearer. Judge *ad hoc* Shearer was nominated by Australia as the Russian Federation already had an ITLOS representative.<sup>20</sup>

For present purposes, the three relevant provisions of UNCLOS are Articles 72, 73 and 292. Under Article 72(1) a coastal state's powers include to 'explore, exploit, conserve and manage the living resources in [that State's] exclusive economic zone' and to 'take measures, including boarding, inspection and arrest and judicial proceedings' to ensure compliance with its laws.<sup>21</sup> There is no limit on the magnitude of the penalties that a coastal state may impose for non-compliance with its laws. Under Article 73(2) vessels arrested by exercise of the power granted under Article 72(1) 'shall be promptly released upon the posting of a reasonable bond or other security'. Under Article 292(1) the Tribunal has jurisdiction over applications for the prompt release of vessels and their crews arrested in foreign ports unless the parties otherwise agree.<sup>22</sup> The Russian Federation and Australia came to no such agreement so ITLOS was seized of jurisdiction.

The Tribunal only hears sovereign state parties so the application for prompt release could only be made by or on behalf of the flag State of the vessel.<sup>23</sup> Private companies

---

<sup>14</sup> Ibid, Article 8(1).

<sup>15</sup> Ibid, Article 17(1).

<sup>16</sup> Ibid, Article 13(1).

<sup>17</sup> Ibid, Article 17(2).

<sup>18</sup> Ibid, Article 17(3).

<sup>19</sup> Judges Caminos (Argentina), Marotta Rangel (Brazil), Yankov (Bulgaria), Yamamoto (Japan), Kolodkin (Russian Federation), Park (Republic of Korea), Bamela Engo (Cameroon), Mensah (Ghana), Chandrasekhara Rao (India), Akl (Lebanon), Anderson (United Kingdom), Wolfrum (Germany), Treves (Italy), Marsit (Tunisia), Ndiaye (Senegal), Jesus (Cape Verde), Ballah (Trinidad and Tobago), Cot (France). For a list of all past and present members of ITLOS, including details of time served and country of origin, see ITLOS, *General Information – Judges*, [http://www.itlos.org/general\\_information/judges/text\\_en.shtml](http://www.itlos.org/general_information/judges/text_en.shtml).

<sup>20</sup> The representative of the Russian Federation was Judge Kolodkin. For a list of those appointed to the position of judge *ad hoc* for various other ITLOS proceedings see ITLOS, *General Information – Judges Ad Hoc*, [http://www.itlos.org/general\\_information/judges/adhoc\\_en.shtml](http://www.itlos.org/general_information/judges/adhoc_en.shtml). Professor Ivan Shearer AM, is the Challis Professor of International Law at the University of Sydney. Professor Shearer also sat as an ITLOS judge *ad hoc* on behalf of Australia and New Zealand in the *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan), Provisional Measures (1999). More information relating to the *Southern Bluefin Tuna* cases may be found at [http://www.itlos.org/cgi-bin/cases/case\\_detail.pl?id=3&lang=en](http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=3&lang=en).

<sup>21</sup> UNCLOS, Article 73(1).

<sup>22</sup> UNCLOS Art. 292(1) provides: 'Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining state has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining state under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.'

<sup>23</sup> Ibid, Article 292(2).

cannot take action for release of their vessels themselves. For a fishing vessel owner, therefore, to seek the use of the ITLOS powers, it must persuade the government of its flag state to bring the application. The owner may, of course, pay all of the costs and do all of the work so long as it has the authority of the relevant government. It may be an issue whether the state has, in fact, made the application but if the documents are filed on behalf of the state and the state appoints an agent, all in accordance with the Tribunal's Rules, it is not for the opposing party or the judges to go behind that evidence. Contacting the foreign flag government officials will usually determine whether that state has lent its authority to the application.

Once procedural matters have been dealt with the next step for the Tribunal is to determine whether, in accordance with Article 292 of UNCLOS, the detaining state has complied with the provision for the 'prompt release of the vessel or the crew upon the posting of a reasonable bond or other financial security.' If the Tribunal finds the allegation is well founded it shall 'determine the amount, nature and form of the bond or financial security'.<sup>24</sup> It is to these aspects that attention will now be given.

### Prior Prompt Release Cases

The *'Volga' Case* was the sixth application for prompt release to come before the Tribunal. Of the five previous applications that had been made only three had required the Tribunal to rule on the merits of whether or not the bond required for release was 'reasonable' under Article 292(1) of UNCLOS. The two applications on which the Tribunal did not proceed to judgment on the merits were the *'Grand Prince' Case*, where the Applicant failed to establish that the Tribunal had jurisdiction,<sup>25</sup> and the *'Chaisiri Reefer 2' Case*, where the parties settled the matter themselves prior to the commencement of argument before the Tribunal.<sup>26</sup> The three applications in which judgment was passed on the reasonableness of the required bond were the *'Saiga' (No.1) Case*,<sup>27</sup> the *'Camouco' Case*<sup>28</sup> and the *'Monte Confurco' Case*.<sup>29</sup> In these three judgments the Tribunal grappled with the task of formulating principles that it could apply to determine what amounted to a reasonable bond.

### Facts of the 'Volga' Case

The *Volga* was a long-line fishing vessel flying the Russian Federation flag, owned by Olbers Co. Ltd, a company incorporated in Russia. The Master, Alexander Vasilkov,

<sup>24</sup> *Rules of the Tribunal*, Article 113(1),(2).

<sup>25</sup> The *'Grand Prince' Case* (Belize v. France), Prompt Release (2001). See judgment at [93]-[94], ITLOS website, [http://www.itlos.org/case\\_documents/2001/document\\_en\\_88.doc](http://www.itlos.org/case_documents/2001/document_en_88.doc).

<sup>26</sup> The *'Chaisiri Reefer 2' Case* (Panama v. Yemen), Prompt Release (2001) See ITLOS Press Release 52, dated 16 July 2001, ITLOS website, [http://www.itlos.org/news/press\\_release/2001/press\\_release\\_52\\_en.doc](http://www.itlos.org/news/press_release/2001/press_release_52_en.doc).

<sup>27</sup> The *M/V 'Saiga' (No.1) Case* (Saint Vincent and the Grenadines v. Guinea), Prompt Release (1997). The judgment of the Tribunal in this case can be found at [http://www.itlos.org/case\\_documents/1997/document\\_en\\_60.doc](http://www.itlos.org/case_documents/1997/document_en_60.doc). More analysis of this application can be found in 'The New International Tribunal for the Law of the Sea' (1999) *Maritime Studies* March-April 1999 Issue, 1; 'ITLOS: The First Two Cases', 1999, *International Law News*. In the second *Saiga* case, *M/V 'Saiga' (No.2) Case* (Saint Vincent and the Grenadines v. Guinea) (1999), the Tribunal determined the penalty to apply for the wrongful arrest of the *Saiga*. The judgment of the Tribunal in this case can be found at [http://www.itlos.org/case\\_documents/2001/document\\_en\\_68.doc](http://www.itlos.org/case_documents/2001/document_en_68.doc).

<sup>28</sup> The *'Camouco' Case* (Panama v. France), Prompt Release (2000). The judgment of the Tribunal in this case can be found at [http://www.itlos.org/case\\_documents/2001/document\\_en\\_129.doc](http://www.itlos.org/case_documents/2001/document_en_129.doc).

<sup>29</sup> The *'Monte Confurco' Case* (Seychelles v. France), Prompt Release (2000). The judgment of the Tribunal in this case can be found at [http://www.itlos.org/case\\_documents/2001/document\\_en\\_115.doc](http://www.itlos.org/case_documents/2001/document_en_115.doc).

was a Russian national.<sup>30</sup> The fishing licence carried by the *Volga* entitled it to fish commercially in the Russian EEZ and the 'open sea and coastal zones of foreign countries'. A condition was observance of the rules governing the fishing industry, the conditions of international agreements.

Australian military personnel operating from HMAS *Canberra* boarded the *Volga* on 7 February 2002, when the vessel was on the high seas just beyond the Australian EEZ and between Heard and McDonald Islands in the Southern Ocean. Australia's case was that the *Volga* had been observed fishing illegally in the EEZ and fled into international waters when made aware of the Australian Navy's presence. Russia's case was that the boarding was unlawful as it had taken place on the high seas and there was no hot pursuit to justify it. The details of the boarding are for the substantive hearing, the issue here is about the bond. It suffices for present purposes, therefore, to state that the *Volga* was escorted to the port of Fremantle, where it arrived on 19 February. Some further facts are set out, under, in discussion of the dissenting judgment by Judge *ad hoc* Shearer.

The Master and crew were detained under powers in the *Fisheries Management Act* 1991 (Cth) and the vessel and catch were seized. On 6 March the Chief Mate, the fishing Master and the fishing Pilot, all of whom are Spanish nationals, were charged for unlawful fishing in the Australian Fishing Zone (AFZ)<sup>31</sup> while the remainder of the crew were released (and later repatriated to Spain). The three members who were charged were allowed bail by order of the Magistrates court on posting bail of A\$75,000 each. Charges laid against the fishing Master required an additional A\$20,000 to be provided as bail. On 16 March the Russian Master died in an Australian hospital (not having been charged due to his illness). The amount of bail was increased by order of the Supreme Court of Western Australia on an appeal from the Commonwealth DPP.<sup>32</sup> A further appeal to the Full Court set aside the judgment of the primary judge and restored the Magistrate's orders while putting in place several conditions.<sup>33</sup> As the owner had posted the bail monies, and satisfied the conditions imposed by the Court, all three bailed crew members were allowed to return to Spain pending trial.<sup>34</sup>

Under the *Fisheries Management Act* 1991 (Cth) the catch (value), vessel, nets and equipment of the *Volga* were all liable to forfeiture by order of a court.<sup>35</sup> The catch, some 131 tonnes of Patagonian toothfish and 21 tonnes of bait, was sold for A\$1,932,579.28 and the monies held in trust by the Australian government pending a final court order. It is normal to sell the catch and bait of an arrested vessel because they are perishable. The owner of the *Volga*, Olbers Co Ltd ("Olbers"), instigated proceedings in the Federal Court of Australia seeking to prevent the forfeiture of the vessel and its catch to the Australian government. The forfeiture would have taken place

---

<sup>30</sup> The facts are taken mainly from the judgment recorded as the '*Volga*' Case (Russian Federation v. Australia), Prompt Release (2002) from [30] onwards. This judgment may be found at [http://www.itlos.org/case\\_documents/2002/document\\_en\\_215.doc](http://www.itlos.org/case_documents/2002/document_en_215.doc).

<sup>31</sup> The AFZ is coterminous with the Australian EEZ. See s.4 *Fisheries Management Act* 1991 (Cth).

<sup>32</sup> Director of Public Prosecutions, who has charge of prosecutions under Commonwealth laws.

<sup>33</sup> See *The Commonwealth Director of Public Prosecutions v Lijo & Ors* [2002] WASC 154, Supreme Court of Western Australia, MCS 30 of 2002, judgment delivered 14.06.02, Wheeler J and *Lijo & Ors v The Commonwealth Director of Public Prosecutions* [2003] WASCA 4, The Full Court of the Supreme Court of Western Australia, FUL 105 of 2002, judgment delivered 16.12.02, Anderson and Templeman JJ with Ollson A/J.

<sup>34</sup> The '*Volga*' Case (Russian Federation v. Australia), Prompt Release (2002) at [37]-[49].

<sup>35</sup> S.106A *Fisheries Management Act* 1991.

automatically had the proceedings not been commenced.<sup>36</sup> The Australian government later brought an application for security for costs of the Federal Court proceedings.<sup>37</sup> The application for security for costs was dismissed as the owner had been placed in the position of a defendant in the matter and security for costs is not usually awarded against a defendant.<sup>38</sup> The day before judgment was handed down in the costs matter Olbers filed a motion of its own seeking a stay of the proceedings pending the outcome of the criminal charges against the *Volga's* crew. It was held that there was nothing to suggest that the outcome of Olbers' action against the Australian government would prejudice the criminal proceedings and Olbers' motion was dismissed.<sup>39</sup>

The parties were unable to agree on the amount and terms of a bond or other financial security so the vessel was not released. On 2 December 2002 Russia filed an application in ITLOS (Hamburg court registry) seeking release of the three officers, vessel, catch (value) etc on posting a reasonable bond. Australia appeared to defend and subsequently Statements (pleadings) and other documents were exchanged in compliance with the Rules of the Tribunal and directions of the Court. Oral hearings were held in Hamburg over 12-13 December 2002. Judgment was delivered on 23 December.

### Representation and Submissions

Russia's agent was Mr Pavel Dzubenko, Deputy Director of the Legal Department, at the Russian Ministry of Foreign Affairs and its counsel were Messrs Andrew Tetley and Paul David, both partners in the firm of Wilson Harle, Auckland, New Zealand with another Russian officer from the Ministry acting as an advisor.<sup>40</sup> Paul David made the major submissions for Russia on the issue of reasonable bond while Andrew Tetley addressed the issue of whether the Australian government had established any right to arrest the *Volga* in the first place given, it was submitted, that the vessel had been boarded, without proper notice, on the high seas and there had been no hot pursuit.

Australia's agent was Mr William Campbell, First Assistant Secretary, Office of International Law in the Attorney-General's department, with a significant number of advisers and an assistant. Australia's counsel were Mr David Bennett, QC, Solicitor-General of Australia, Mr Henry Burmester QC, Chief General Counsel in the office of the Australian Government Solicitor and Professor James Crawford SC, the Whewell Professor of International Law, Cambridge.<sup>41</sup>

It may be observed that there was a significant ANZAC involvement in the '*Volga*' Case. The two counsel for Russia are New Zealanders and the agent, co-agent and counsel for Australia were Australians. Professor Crawford, SC, from Adelaide, was a prominent scholar and academic in Australia, and was Commissioner in charge of the reference on Admiralty Law in the Australian Law Reform Commission, before taking up his chair at Cambridge.

Australia sought three separately defined amounts as security for release of the *Volga*. The first amount was A\$1,920,000 as security to cover the assessed value of the

<sup>36</sup> *Fisheries Management Act 1991* (Cth), s.106A and following.

<sup>37</sup> *Olbers Co Ltd v Commonwealth of Australia and Australian Fisheries Management Authority*, [2002] FCA 1269, Federal Court of Australia, WA Registry, W 151 of 2002, judgment delivered 16.10.02, French J.

<sup>38</sup> *Ibid*, at [13] and [19].

<sup>39</sup> *Olbers Co Ltd v Commonwealth of Australia and Australian Fisheries Management Authority (No 2)* [2003] FCA 177, Federal Court of Australia, West Australian Registry, W 151 of 2002, judgment delivered 11.03.03, French J.

<sup>40</sup> See the ITLOS report of the case on its web site, *supra*.

<sup>41</sup> *Ibid*. Mr Campbell has since been granted the title of Commonwealth Senior Counsel (SC).

vessel including its fuel, lubricants and fishing equipment.<sup>42</sup> The second amount was A\$412,500 as security for the payment of potential fines that might be imposed under pending criminal proceedings against the three crew.<sup>43</sup> The third amount was A\$1,000,000 to be paid as a guarantee that the *Volga* would carry a vessel monitoring system, which would allow the vessel's position to be checked at any time electronically, and observe the directives of the Commission for Conservation of Antarctic Marine Living Resources until the conclusion of legal proceedings.<sup>44</sup> The total amount of security sought amounted to A\$3,332,500. Australian authorities already held the monies in trust from the sale of the catch, so this was not an issue in this case. It also had the bail monies for the three Spanish officers (A\$245,000). Russia, for its part, advanced that a further A\$500,000 plus the monies from the catch and the bail monies was a reasonable bond.

During argument before the Tribunal counsel for Australia submitted that the Tribunal should deal with each of these amounts separately and not treat them all as elements of the same bond for the purposes of Article 292 of UNCLOS.<sup>45</sup> From the tenor of the Tribunal's judgment it would appear that this submission was disregarded. While this made no difference to the final decision reached by the Tribunal, as will be discussed below, it remains a matter of importance to flag the fact that the Tribunal will apparently treat all amounts of money and conditions claimed by a detaining state as amounting to one bond rather than a number of separate bonds. An explanation for this approach is found in the Tribunal's earlier statement that 'the overall balance of the amount, form and nature of the bond [implying all demands of the detaining state will be seen as part of the overall balance]...must be reasonable'.<sup>46</sup>

#### **The Tribunal's Judgment on the Issue of a 'Reasonable' Bond**

The factors that the Tribunal in the *'Volga' Case* considered relevant in determining whether or not the bond was reasonable were drawn from its previous judgment in the *'Camouco' Case* where it had stated:

'The Tribunal considers that a number of factors are relevant in the assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining state, the value of the detained vessel and of the cargo seized, the amount of bond imposed by the detaining state and its form.'<sup>47</sup>

The Tribunal was careful to note that that 'this is by no means a complete list of factors. Nor does the Tribunal intend to lay down rigid rules as to the exact weight to be attached to each of them.'<sup>48</sup> These factors were all confirmed in the subsequent *'Monte*

<sup>42</sup> The *'Volga' Case* (Russian Federation v. Australia), Prompt Release (2002) at [72].

<sup>43</sup> Ibid.

<sup>44</sup> Ibid, see also [78].

<sup>45</sup> ITLOS, *Public Sitting held on Friday, 13 December 2002, at 10 a.m., at the International Tribunal for the Law of the Sea, Hamburg, President L. Dolliver M. Nelson presiding - The 'Volga' Case (Application for prompt release)* (Russian Federation v. Australia) *Verbatim Record* at p.7, lines 45-47. The transcript may be found at [http://www.itlos.org/case\\_documents/2002/document\\_en\\_213.doc](http://www.itlos.org/case_documents/2002/document_en_213.doc). The counsel making this submission on behalf of the Respondent was Mr. David Bennett QC, Solicitor-General for the Commonwealth of Australia.

<sup>46</sup> The *'Camouco' Case* (Panama v. France), Prompt Release (2000) at [66] quoting the *M/V 'Saiga' (No.1) Case* (Saint Vincent and the Grenadines v. Guinea), Prompt Release (1997) at [82].

<sup>47</sup> The *'Volga' Case* (Russian Federation v. Australia), Prompt Release (2002) at [63] quoting the *'Camouco' Case* (Panama v. France), Prompt Release (2000) at [67].

<sup>48</sup> Ibid at [64] quoting the *'Monte Confurco' Case* (Seychelles v. France), Prompt Release (2000) at [76].

*Confurco*' Case so the test for assessing a reasonable bond has a firm jurisprudential base having been upheld in three cases, one after the other.

In terms of the gravity of the alleged offences, the Tribunal was asked by Australia to consider both the high penalties that applied to illegal fishing in the Southern Ocean under Australian domestic law<sup>49</sup> and the high level of international concern about 'illegal, unregulated and unreported' fishing.<sup>50</sup> The Tribunal concluded that, because Article 292 refers only to the imposition of a reasonable bond to ensure the appearance of a Master in the courts of the detaining country and the payment of penalties, it was only by reference to the penalties applicable under domestic law that the Tribunal should make its determination on the amount of a reasonable bond.<sup>51</sup> It made clear that it would not impose a sanction in the form of a higher bond simply because the offences for which the vessel had been arrested related to acts that were the subject of international concern. Judgment on the moral nature of illegal fishing was thus neatly avoided. The Tribunal did accept, however, that the offences allegedly committed by the *Volga* are considered grave under Australian law given the high maximum penalties.

Turning to consider these penalties further the Tribunal accepted that the crew of the *Volga* were liable for fines up to A\$1,100,000 and that the vessel, its equipment and catch were liable to forfeiture.<sup>52</sup> Focusing specifically on the value of vessel and its equipment the Tribunal noted that the parties had agreed that fair value was A\$1,800,000 for the vessel itself and A\$147,460 for the vessel's fuel, lubricants and equipment.<sup>53</sup> So the total value of the vessel and its equipment as agreed was A\$1,947,460. The Tribunal found, therefore, that the amount of A\$1,920,000 sought by the Respondent as security for the release of the vessel was reasonable.<sup>54</sup>

The '*Volga*' Case was the first application for prompt release to come before the Tribunal in which the value of the vessel concerned had been agreed between the parties. In previous cases the Tribunal had been faced with the task of either arriving at a value itself<sup>55</sup> or finding a value somewhere between two extremes, each argued for by one of the opposing parties.<sup>56</sup>

<sup>49</sup> Ibid at [67]. Under s106A of the *Fisheries Management Act* 1991 (Cth) any vessel found to have been engaged in illegal fishing is liable to be forfeited to the Commonwealth of Australia.

<sup>50</sup> Ibid at [68].

<sup>51</sup> Ibid at [69].

<sup>52</sup> Ibid at [70]. UNCLOS does not give any guidance or set any limits on the financial penalties that a coastal state may impose on vessels caught participating in illegal fishing within their fishing zones. Financial penalties are the only penalties able to be imposed for illegal fishing under UNCLOS because Article 73(3) prohibits imprisonment and corporal punishment.

<sup>53</sup> Ibid at [71].

<sup>54</sup> Ibid at [73].

<sup>55</sup> The *M/V 'Saiga' (No.1) Case* (Saint Vincent and the Grenadines v. Guinea), Prompt Release (1997) at [82]

<sup>56</sup> This occurred in both the '*Camouco*' Case and the '*Monte Confurco*' Case. In the '*Camouco*' Case the Respondent, France, valued the arrested vessel at FF 20,000,000 for the purposes of a bond while the Applicant, Panama, valued the arrested vessel at only FF 3,717,571. France presented no evidence to the Tribunal to substantiate its submission as to the value of the vessel while Panama supported its arguments with expert evidence. See the '*Camouco*' Case (Panama v. France), Prompt Release (2000) at [64]-[70] & [74]. The Tribunal ended up imposing a bond of FF 8,000,000 francs. Given that this also took into account security for a possible FF 5,000,000 fine payable by the master of the arrested vessel it appears the Tribunal accepted Panama's valuation over that of France. In the '*Monte Confurco*' Case the Respondent, again France, submitted expert testimony in support of the submission that the arrested vessel was worth US\$1,500,000. Against this the Applicant, Seychelles, led the evidence of two independent experts in support of the submission that, at most, the arrested vessel was not worth more than US\$500,000. The Tribunal considered the valuation arrived at by the Applicant to be more reasonable. See The '*Monte Confurco*' Case (Seychelles v. France), Prompt Release (2000) at [84].

In the '*Camouco*' Case the Tribunal stated, 'the value of the vessel alone may not be the controlling factor in the determination of the amount of bond or other financial security'.<sup>57</sup> It is true that the Tribunal has always felt itself under an obligation to consider whether issues such as crew liability for fines, value of any seized cargo or delay in complying with the procedure set down by UNCLOS having a bearing on the amount of bond that will be deemed 'reasonable'. However, it can be seen that the value of the arrested vessel always plays some part in the setting of the final bond amount. What the Tribunal's judgment in the '*Volga*' Case indicates is that if the parties agree on a particular value for the arrested vessel, and the vessel would be forfeit under the laws of the detaining state if found guilty of the offences for which it was arrested, then this amount will constitute the minimum bond that will be set by the Tribunal for that vessel's release.

In deciding the reasonableness of the amount of A\$412,500 as security for the release of the vessel's crew the Tribunal concluded it was unnecessary for such a bond to be set because bail had already been obtained from the Supreme Court of Western Australia allowing the crew to leave Australia.<sup>58</sup> It is important to note that the Tribunal did not state that asking for additional security for the release of a vessel's crew, on top of whatever security might be provided for the vessel in question, was itself unreasonable for the purposes of Article 292 of UNCLOS. The Tribunal simply concluded that such additional security was unnecessary in these particular circumstances. As noted above,<sup>59</sup> the Tribunal had previously accepted in the '*Camacou*' Case that a reasonable bond could contain a component consisting of security for penalties that might be faced by the crew of an arrested vessel.

The next, and important, issue was whether or not the additional conditions sought by Australia, such as requiring installation of a vessel monitoring system and the disclosure of particulars about the owners of the *Volga*, were capable of inclusion in the phrase 'bond or other security' as used in Art 73(2) of UNCLOS.<sup>60</sup> The Tribunal referred to the other provisions of UNCLOS<sup>61</sup> that deal with the prompt release of vessels and crews and found that the word 'bond' was always used to describe a type of financial security and nothing more.<sup>62</sup> Reading the provisions of Art 73(2) and Art 292(1) together in this light the majority of judges in the Tribunal found that the mechanism exists solely to 'obtain the prompt release of a vessel and crew arrested for alleged fisheries violations by posting a security of a financial nature whose reasonableness can be assessed in financial terms'<sup>63</sup> and does not encompass a 'good behaviour bond to prevent future violations of the laws of a coastal State' or any other kind of non-financial conditions.<sup>64</sup> The Tribunal was again making the point that it is not concerned with helping States to enforce domestic laws. In this regard the Tribunal paid no heed to Australia's submission that the real owners of the arrested vessel were

<sup>57</sup> The '*Camouco*' Case (Panama v. France), Prompt Release (2000) at [69].

<sup>58</sup> The '*Volga*' Case (Russian Federation v. Australia), Prompt Release (2002) at [74].

<sup>59</sup> See footnote 44.

<sup>60</sup> Ibid at [75]-[76].

<sup>61</sup> The Tribunal referred to Art. 292(1), which contains the phrase 'bond or other financial security', Art. 220(7), which contains the phrase 'bonding or other appropriate financial security' and Art. 226(1)(b), which contains the phrase 'bonding or other appropriate financial security'.

<sup>62</sup> The '*Volga*' Case (Russian Federation v. Australia), Prompt Release (2002) at [77].

<sup>63</sup> Ibid at [77].

<sup>64</sup> Ibid at [80].

in all likelihood a 'shadowy gang of international criminals' who 'show contempt ... for their flag state' and 'would benefit from any order requiring release on a lesser bond'.<sup>65</sup>

Judge *ad hoc* Shearer dissented on this point of the interpretation of the bond. He opined that a broader interpretation of Articles 73(2) and 292 allows for the seriousness of the offence, the risk to the species, contumelious disregard of catch restrictions and similar matters to be taken into account. His opinion was, therefore, that the conditions of release include that the *Volga* be fitted with a vessel monitoring system and that a further bond of A\$1 million be paid to ensure the vessel's compliance with these conditions were allowable.<sup>66</sup> Judge Shearer discussed the seriousness of the fact that the vessel's records showed it had been fishing illegally in the Australian EEZ for quite some time, that in January it had been expressly warned not to do so, that its sister vessel, the *Lena*, had been detected and arrested nearby for unlawful fishing and he drew the inference that the *Lena* warned the *Volga* to leave the Australian EEZ just before it was arrested.<sup>67</sup> For these reasons he dissented and would have held that the further conditions were allowable in law and should be left intact. Judge *ad hoc* Shearer had support in his dissent on this point.<sup>68</sup>

Judge *ad hoc* Shearer emphasised the 'balance' aspect between the coastal states and the privately owned fishing vessels, mentioning that state owned fishing vessels were less common than when UNCLOS was conceived. He wrote:

'The problems today arise from privately owned fishing vessels, often operating in fleets, pursuing rich rewards in illegal fishing and in places where detection is often difficult. Fishing companies are highly capitalised and efficient, and some of them are unscrupulous. ... It is notable that in recent cases ... the main burden of presentation of the case has been borne by private lawyers retained by the vessel's owners. A new "balance" has to be struck between vessel owners, operators and fishing companies on the one hand, and coastal States on the other.'<sup>69</sup>

In addition, the Tribunal did not consider the circumstances of the *Volga's* seizure were relevant to determining the amount of the bond.<sup>70</sup> This position is consistent with the Tribunal's earlier ruling in the '*Saiga*' (*No.1*) *Case* that it was not the proper purpose of the Tribunal to rule on whether or not the arrest itself was legitimate but whether the bond asked in return for release was reasonable.<sup>71</sup> The same case also saw

<sup>65</sup> ITLOS, *Public Sitting held on Friday, 13 December 2002, at 10 a.m., at the International Tribunal for the Law of the Sea, Hamburg, President L. Dolliver M. Nelson presiding - The 'Volga' Case (Application for prompt release) (Russian Federation v. Australia) Verbatim Record* at p.6, lines 9-13. The transcript for the hearing may be found at [http://www.itlos.org/case\\_documents/2002/document\\_en\\_213.doc](http://www.itlos.org/case_documents/2002/document_en_213.doc). Counsel making this submission on behalf of the Respondent was Mr. David Bennett QC, Solicitor-General for the Commonwealth of Australia.

<sup>66</sup> The '*Volga*' *Case* (Russian Federation v. Australia), Prompt Release (2002), *Dissenting Opinion of Judge ad hoc Shearer* at [16]-[17]. The dissenting opinions of Judges Shearer and Anderson were well set out in a note by Piotrowicz, Rysard 'International Focus: The Song of the Volga Boatmen', (2003) 77 ALJ 160-163.

<sup>67</sup> *Ibid* at [4]-[5]

<sup>68</sup> Judge Anderson was of a similar, dissenting, opinion. The text of Judge Anderson's dissenting opinion may be found at [http://www.itlos.org/case\\_documents/2002/document\\_en\\_219.doc](http://www.itlos.org/case_documents/2002/document_en_219.doc). Judge Cot gave a separate opinion, in which he agreed with the majority but discussed the 'margin of appreciation'. This expression really relates to the discretion, to use the Common Law term, which lies with a court and beyond which that court must go before another court or Tribunal will interfere with its exercise. The text of Judge Cot's separate opinion may be found at [http://www.itlos.org/case\\_documents/2002/document\\_en\\_218.doc](http://www.itlos.org/case_documents/2002/document_en_218.doc).

<sup>69</sup> The '*Volga*' *Case* (Russian Federation v. Australia), Prompt Release (2002), *Dissenting Opinion of Judge ad hoc Shearer* at [19].

<sup>70</sup> The '*Volga*' *Case* (Russian Federation v. Australia), Prompt Release (2002) at [83].

<sup>71</sup> The *M/V 'Saiga' (No.1) Case* (Saint Vincent and the Grenadines v. Guinea), Prompt Release (1997) at [62].

the Tribunal reject the idea that a 'reasonable bond' could ever be reduced to only a symbolic amount because the arrest of the vessel by the detaining state was arguably immoral or unlawful.<sup>72</sup> It seems clear that the Tribunal majority will not involve itself in determining the merits, whether moral or legal, of the activities that resulted in the arrest of a vessel beyond considering the likely fines that may result.

The fact that Australian authorities had already confiscated and sold the *Volga's* catch, was also considered immaterial to the question of what further bond should be set for the release of the *Volga* and crew.<sup>73</sup> It was noted, however, that the amount realised by the sale and now held on trust by the Australian authorities would have to be returned to the owners of the *Volga* in the event that the prosecution for illegal fishing was unsuccessful.<sup>74</sup> There is a similarity in that in the *'Saiga' (No.1) Case* the ship's cargo and fuel had been sold and the monies held. In that case the Tribunal had referred to the value of the ship's cargo and fuel etc as an element of the bond.<sup>75</sup>

In the result the Tribunal determined, by 19 votes to 2, that a reasonable bond for the release of the *Volga* would be A\$1,920,000.<sup>76</sup> This amount is, of course, the value of vessel and its fittings. In relation to how the bond or security was to be provided Russia submitted that a bank undertaking would be sufficient<sup>77</sup> while Australia argued for a cash payment to be held in trust by the Australian authorities or a bank guarantee from an Australian bank.<sup>78</sup> The Tribunal decided that a guarantee from a bank present in Australia or having corresponding arrangements with an Australian bank would suffice.<sup>79</sup> Each of the State parties was to bear its own costs.<sup>80</sup> Neither party had achieved precisely what it had sought.

### A Comparative Analysis

It is instructive to compare the approach of the Tribunal with that taken by some selected national courts, including those in Australia and New Zealand, when determining the amount of a reasonable bond for the release of an arrested vessel.

English courts currently apply the principle that adequate security for the release of a vessel is a sum sufficient to meet the plaintiff's 'reasonably arguable best case'.<sup>81</sup> The approach of Australian,<sup>82</sup> New Zealand<sup>83</sup> and Canadian<sup>84</sup> courts is the same. The steps

<sup>72</sup> Ibid at [81].

<sup>73</sup> The *'Volga' Case* (Russian Federation v. Australia), Prompt Release (2002) at [86].

<sup>74</sup> Ibid at [89].

<sup>75</sup> For example in the *'Saiga' (No.1) Case* the cargo of oil carried by the vessel was drained off by the detaining state. The Tribunal ordered that a similar quantity of oil or its cash equivalent should be held for return to the owners of the vessel if they received judgment in their favor from the domestic courts of the detaining state. See The *M/V 'Saiga' (No.1) Case* (Saint Vincent and the Grenadines v. Guinea), Prompt Release (1997) at [83]-[84].

<sup>76</sup> The *'Volga' Case* (Russian Federation v. Australia), Prompt Release (2002) at [90].

<sup>77</sup> Ibid at [91].

<sup>78</sup> Ibid at [92].

<sup>79</sup> Ibid at [93].

<sup>80</sup> Ibid at [94].

<sup>81</sup> E.g. cases such as *The 'Bazios 3'* (1993) 1 Lloyd's Rep. 101 and *The Moschanthy* [1971] 1 Lloyd's Rep 37.

<sup>82</sup> Examples of the application of these principles include *The Owners of the Ship 'Carina' v The Owners or Demise Charterers of the Ship 'MSC Samia'* [1997] 1115 FCA (24 October 1997, unreported, Tamberlin J); *Morlines Maritime Agency Ltd v Skulptor Vuchetich* [1997] 858 FCA (29 August 1997, unreported, Tamberlin J) *Freshpac Machinery Pty Ltd and Lacteos de Poblet S.A. v The Ship 'Joana Bonita'* No. NG594 of 1994, FED No. 661/94 (16 September 1994, unreported, Sheppard J)

<sup>83</sup> An example of a recent New Zealand case in which this principle has been endorsed is *The "Clarabelle"* [2002] 2 Lloyd's Law Rep 479 (N.Z.C.A.).

involved are to value the vessel, fittings, cargo/catch along with any other accoutrements and add any interest or costs likely to be awarded with the total sum amounting to the bond. On payment of the required bond a vessel can be released to go about its lawful business. The parties litigate over the value of the bond with the vessel safe from further arrest for the same claim.<sup>85</sup> In summary, the 'reasonably arguable best case' test is widely used in Commonwealth countries and results in the setting of a sufficient bond to "cover the amount of the claim, the amount of any interest that might be recoverable and the amount of any costs".<sup>86</sup>

In Belgium if the parties cannot reach an agreement on the appropriate amount of security then the court will fix the amount as being the amount of the claim plus interest and costs.<sup>87</sup> In Denmark the security offered must be sufficient to cover the amount claimed, interest due and payable as well as probable costs of the arrest, validation proceedings and the legal proceedings for recovery.<sup>88</sup> In Germany the general rule is that the amount of security is to be equal to the amount of the claim plus costs.<sup>89</sup> No assessment is made of the merits of the claim or of the financial resources of the defendant. The court simply looks at the penalties in the event that the claim against the owners and crew of the vessel is made out, however likely or unlikely that may appear to be, and orders that a commensurate amount be lodged as bond for release of the vessel. It may be accepted, therefore, that the 'reasonably arguable best case' test is widely accepted in commercial maritime law as the amount for a reasonable bond or other financial security. It will usually be the amount of the upper level of the reasonable claim, interest and costs. This applies whether it is the ship and/or the cargo that is arrested.

Interestingly, the United Kingdom and the other European nations are all signatories to the 1952 *Brussels Convention on the Arrest of Sea-Going Ships* ('the *Brussels Convention*').<sup>90</sup> Australian and New Zealand are not, but they give effect to most of its provisions. Under the *Brussels Convention* a ship is entitled to release on the provision of 'sufficient bail or other security'.<sup>91</sup> The 1999 *International Convention on the Arrest of Ships* ('the 1999 Arrest Convention') has the phrase 'sufficient security'<sup>92</sup> but has provided a guide to its interpretation by specifying that it is not to exceed the value of the arrested ship.<sup>93</sup> (It is dealing with arrest of ships, not cargo or detention of crew.). Only two countries have ratified or acceded to the 1999 Arrest Convention thus far and so it may be some years before it enters into force.<sup>94</sup>

<sup>84</sup> An example of a recent Canadian case in which the principle has been endorsed is *Mr and Mrs Stephen Striebal v Sovereign Yachts (Canada) Inc and 'The Chairman'* [2002] FCT 925 (30 August 2002) (unreported, per Hargrave P).

<sup>85</sup> Meeson, N., *Admiralty Jurisdiction and Practice* (2<sup>nd</sup> ed), LLP, London, 2000 at 146.

<sup>86</sup> *The "Polo II"* (1977) 2 Lloyd's Rep. 115 at 119; See also *The "Gulf Venture"* (1984) 2 Lloyd's Rep. 445 at 449

<sup>87</sup> Berlingieri, F., *Berlingieri on Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Conventions* (3<sup>rd</sup> ed), LLP, London, 2000 at 176.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid* at 177.

<sup>90</sup> The Brussels Convention came into force on 24 February 1956 and has since been the subject of either ratification or accession by 70 different countries. A list of current State Parties may be found at the website of the Comité Maritime International, <http://www.comitemaritime.org/ratific/brus/bru12.html>.

<sup>91</sup> 1952 *Brussels Convention on the Arrest of Sea-Going Ships*, Article 5.

<sup>92</sup> 1999 *International Convention on the Arrest of Ships*, Article 4(1).

<sup>93</sup> *Ibid*, Article 4(2).

<sup>94</sup> See the list of States to have ratified or acceded to the 1999 Arrest Convention at the website of the Comité Maritime International, <http://www.comitemaritime.org/ratific/uninat/uni08.html>.

The differences between the approach of ITLOS to establishing a reasonable bond and the domestic courts of various countries are small. ITLOS takes into account the seriousness of the charges. In this regard there is a little confusion in some of the judgments between issues going to penalty, and issues going to fix the amount of the bond. However, the two issues do overlap as the court cannot decide on the seriousness of the charges, and therefore to fix a likely maximum fine, without looking at the same matters. The likely amount of the fine is a proper matter to take into account in establishing the amount of the bond. No mention of interest is made in the Tribunal's judgment in the '*Volga*' Case, but it is an issue and ITLOS can award interest in appropriate cases.<sup>95</sup>

### Conclusions and Recommendations

In describing the work of the Tribunal before the General Assembly of the United Nations the current President of the Tribunal, Judge Dolliver Nelson, noted that the key concern of the Tribunal in deciding such cases was to 'preserve a balance between the interests of the flag State and those of the coastal State' with this idea of balance being seen as the 'key to the determination of a reasonable bond' for a vessel's prompt release.<sup>96</sup> That the Tribunal has made this idea of 'balance' the foundation of its approach to what constitutes a 'reasonable bond or other financial security', given the frequency to which the concept is referred to in the course of its judgments, is indisputable.

However, the assessment of the bond is a more mechanical exercise than that. The steps in determining the value of vessel and catch, the likely fines, and other issues are much the same as for any national court or tribunal. The function of ITLOS under Articles 292 and 73 is to determine the amount of the 'reasonable bond or other financial security'. It is suggested that the Tribunal is correct in sticking to these mechanical steps and not going down the more emotive path of looking to penalise the vessel and its owners through the posting of a higher bond than is otherwise suitable. After all, the bond is merely security to meet possible fines and forfeitures. This position has some respectable legal antiquity.

The dissenting opinions of Judge *ad hoc* Shearer and Judge Anderson read as a compelling argument for the imposition of stiff penalties on the owners of vessels apprehended whilst fishing illegally but, with respect, their shared conclusion<sup>97</sup> that ITLOS may impose conditions on the release of vessels allegedly involved in illegal fishing to ensure lawful conduct in the future cannot be supported. Commendable as the idea of such a role for ITLOS may be and even though the imposition of conditions is admittedly a very common practise in domestic courts both in civil and criminal jurisdictions, authorisation for such an approach is not contained within the present wording of Articles 73 and 292. In addition, the Rules of the Tribunal refer only to "bond or other financial security" in relation to the procedure to be followed in disposing of prompt release cases.<sup>98</sup> Illegal fishing is morally reprehensible and

<sup>95</sup> See the *M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea) (1999) at [172].

<sup>96</sup> ITLOS, *Statement by Mr L. Dolliver M. Nelson, President of the International Tribunal of the Law of the Sea, on the 20<sup>th</sup> Anniversary of the Opening for Signature of the 1982 United Nations Convention of the Law of the Sea at the Plenary of the fifty-seventh session of the United Nations General Assembly* (9 December 2002), [http://www.itlos.org/news/statements/president\\_2002\\_12\\_09\\_en.doc](http://www.itlos.org/news/statements/president_2002_12_09_en.doc).

<sup>97</sup> The '*Volga*' Case (Russian Federation v. Australia), Prompt Release (2002), *Dissenting Opinion of Judge ad hoc Shearer* at [19]; *Dissenting Opinion of Judge Anderson* at [24].

<sup>98</sup> ITLOS, *Rules of the Tribunal* (as amended 21 September 2001), Articles 110-114. The full text of the amended rules may be found at [http://www.itlos.org/documents\\_publications/documents/rules\\_en.doc](http://www.itlos.org/documents_publications/documents/rules_en.doc).

environmentally destructive but the Tribunal has made it clear that these considerations are not relevant to what amounts to a reasonable bond except for deciding the likely penalties for the alleged conduct that may be imposed by a domestic court.

The wording of UNCLOS Articles 73 and 292 and ITLOS' Rules<sup>99</sup> could, perhaps, be revised in the future to accommodate a more enforcement-orientated role. If such a revision were undertaken then certain additional issues would need to be considered. One difficulty would be whether it would be part of ITLOS' jurisdiction to determine whether there was a subsequent breach and if so what orders were to flow from it. There are difficulties about this as such a hearing would go beyond the immediate purpose of an Article 292 application. Alternatively, it could be part of the domestic court's jurisdiction, but this could leave a domestic court to enforce an ITLOS order about the conditions, with the attendant difficulty that, in general, it is for a court to enforce its own orders and other courts usually do not have jurisdiction to do so. So, revision of Articles 73 and 292 and/or the ITLOS Rules is possible, but could be complicated.

It is suggested that the value-neutral approach of the Tribunal need not be construed as a handicap for coastal states. If coastal states wish to deter illegal fishing then increasing the patrols and increasing the financial penalties imposed on persons participating in illegal fishing is the proper course to steer. The Tribunal has shown that its deliberations are not concerned with determining whether or not the penalties of the coastal state appear exorbitant. UNCLOS itself imposes no restriction on the level of the penalties that coastal states may choose to impose.

ITLOS has taken some time to find its sea-legs in this area and to articulate the basic principles that will provide the foundation for the future development of the Tribunal's prompt release jurisprudence. The *'Volga' Case* is the fourth ITLOS case involving determining a bond or other financial security. The principles underpinning the reasoning of the Tribunal were drawn from previous cases (the *'Saiga' (No.1)*, the *'Camouco'* and the *'Monte Confurco' Cases*) and it can now be said that the jurisprudence of the Tribunal's approach is fairly well settled. It appears to be moving towards acceptance of the 'reasonably arguable best case' test.

If this test is adopted then the decision for ITLOS would be simplified. In most cases the Tribunal would only have to determine the following:

1. The amount of the claim made against the applicant for prompt release. This would be made up of:
  - i. the likely fines to be imposed on the crew of the vessel;<sup>100</sup>
  - ii. the value of the vessel if it is liable to forfeiture;
  - iii. the value of the vessel's catch if it is liable to forfeiture
  - iv. any likely award of costs;
  - v. any likely interest to be awarded.
2. What deductions should be made from this amount to reflect any bond or financial security already held such as:
  - i. monies from sale of catch;
  - ii. monies from fuel discharged and sold;
  - iii. monies already held as bail monies for release of ship's crew;
  - iv. such other amounts as the Tribunal may deem relevant.
3. The terms of the bond or other financial security.

<sup>99</sup> Part III (Procedure), Section E (Prompt release of vessels and crews).

<sup>100</sup> Fines are the only available penalty as UNCLOS Article 73(3) expressly excludes imprisonment and corporal punishment.

It is suggested that it would be a positive development were the Tribunal to expressly adopt the 'reasonably arguable best case' approach. There is nothing in Articles 73 and 292 that would conflict with such an approach and it would further clarify the jurisprudence of the Tribunal and enhance the level of comity between ITLOS and the general shipping law. Parties to a prompt release application before ITLOS would also benefit by having the criteria for the Tribunal's decision clearly defined.

One lesson to be learned from the arrest cases before ITLOS is that a well equipped maritime lawyer should not only be skilled in the traditional areas of shipping and admiralty law but should also be aware of the relevant law of the sea and international law. Further, having some knowledge of the Rules for ITLOS, and even for the ICJ,<sup>101</sup> should now be part of the skills of every maritime lawyer as prompt release applications to the Tribunal are likely to continue. Maritime practitioners, regulators and judges *ad hoc* should keep their bags packed for a quick trip to Hamburg.

---

<sup>101</sup> The International Court of Justice is established under Article 7 of the 1945 *Charter of the United Nations* and sits in The Hague, Netherlands. Information on the ICJ may be found at the Court's website (<http://www.icj-cij.org>).