

CASE NOTE AND COMMENT

PROMPT RELEASE PROCEDURES AND THE CHALLENGE FOR FISHERIES LAW ENFORCEMENT: THE JUDGMENT OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA IN THE 'VOLGA' CASE (RUSSIAN FEDERATION V AUSTRALIA)

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I INTRODUCTION

On 23 December 2002, the International Tribunal for the Law of the Sea (ITLOS) ordered the prompt release of the Russian longline fishing vessel *Volga*, at the time detained by Australian authorities in Fremantle, upon the posting of a bond or other security of A\$1 920 000.¹ The *Volga* was arrested for allegedly fishing without authorisation by a boarding party from the Royal Australian Navy frigate *HMAS Canberra* in the Australian Exclusive Economic Zone ('EEZ') surrounding Heard and McDonald Islands in the Southern Ocean on 7 February 2002. At issue in the ITLOS proceedings was not whether the activities of the *Volga* failed to comply with Australian fisheries law, but rather whether the financial security and other requirements, which Australia set as the conditions for release of the vessel, breached Australia's obligation under the *UN Convention on the Law of the Sea* ('LOSC') to allow the prompt release of detained vessels upon the posting of a 'reasonable bond or other security'.² Although the question of what amounts to a 'reasonable' bond has been considered by ITLOS on previous occasions, in each case the dispute centred on the reasonableness of the methods used by the detaining state to set the required financial security; such as how the detained vessel, catch and gear were valued and how the

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1 *The 'Volga' Case (Russian Federation v Australia) (Prompt Release) (Judgment)* (2002) ITLOS Case No 11 ('The "Volga" Case').

2 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3, art 73(2) (entered into force 16 November 1994) ('LOSC').

maximum possible fines available under domestic law were determined.³ The important aspect of the proceedings in *The 'Volga' Case* was that it was the first time the Tribunal had been asked to consider whether additional non-financial conditions could be set for the release of a detained vessel. It was also the first time Australia had appeared before ITLOS as a respondent.⁴ The decision rendered by ITLOS is instructive not only for Australia's future conduct in handling foreign fishing vessels detained for alleged illegal fishing in Australian waters, but also for other coastal countries which face continual pressure from various forms of illegal foreign fishing.

II BACKGROUND TO THE CASE

Illegal Southern Ocean fishing has been an area of concern for Australia since commercial fishing by Australian operators commenced in the region in 1997. Reported incidents of illegal foreign fishing in Australian waters have increased since 2000, in part because of the increased surveillance coverage given to Australia's northern waters since 2001 to detect incursions by illegal immigrants.⁵ Between June 2001 and June 2002, 98 foreign fishing vessels were apprehended for illegally fishing in Australian waters.⁶ Although most of these cases concerned Indonesian vessels, there were also apprehensions of vessels in remote southern areas of the Australian Fishing Zone ('AFZ') (which encompasses Australia's EEZ). One area where Australia faces significant challenges in enforcing the domestic fisheries laws it has adopted in conformity with *LOSC* is the EEZ surrounding the Australian territory of Heard and McDonald Islands approximately 4 000 km southwest of Western Australia.

The EEZ surrounding the islands extends 200 nautical miles from the baseline drawn around them to the east and the south and shares its northwestern boundary approximately 80 nautical miles from the islands with the French EEZ that surrounds the adjacent Kerguelen Islands. In this area of the AFZ, Australia has international environmental management responsibilities under *LOSC*. Specifically, art 61(2) requires that coastal states 'ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation.'⁷

³ See *The M/V 'SAIGA' Case (Saint Vincent and the Grenadines v Guinea) (Prompt Release) (Judgment) (1997) ITLOS Case No 1; The 'Camouco' Case (Panama v France) (Prompt Release) (Judgment) (2000) ITLOS Case No 5; The 'Monte Confurco' Case (Seychelles v France) (Prompt Release) (Judgment) (2000) ITLOS Case No 6; The 'Grand Prince' Case (Belize v France) (Prompt Release) (Judgment) (2001) ITLOS Case No 8; The 'Chaisiri Reefer 2' Case (Panama v Yemen) (Prompt Release) (Order 2001/4 of 13 July 2001) ITLOS Case No 9).*

⁴ In 1999, Australia appeared before ITLOS with New Zealand in a partially successful action against Japan concerning quota allocations for southern bluefin tuna under the *Convention for the Conservation of Southern Bluefin Tuna*, adopted 10 May 1993, Australia–New Zealand–Japan, [1994] ATS 16 (entered into force 20 May 1994): *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures) (1999) ITLOS Cases Nos 3 and 4*. See, eg, Simon Marr, 'The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources' (2000) 11 *European Journal of International Law* 815.

⁵ Australian Fisheries Management Authority, *Annual Report 2001–2002* (2002) 73.

⁶ *Ibid* x.

⁷ *LOSC*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

Australia is also required to implement conservation measures adopted by the Commission for the Conservation of Antarctic Marine Living Resources under art IX of the *Convention for the Conservation of Antarctic Marine Living Resources* ('CCAMLR').⁸ Parties to CCAMLR are required to license vessels operating within the convention area, install vessel monitoring systems, ensure compliance with vessel marking requirements and track the landings and trade flows of the principal species, Patagonian toothfish (*Dissostichus eleginoides*). Further, part of the marine area surrounding the islands is protected under the *World Heritage Convention*.⁹ Australia's obligations in relation to the management of fish stocks that straddle the EEZ/high seas boundary were extended on 11 December 2001, when the *UN Fish Stocks Agreement*¹⁰ entered into force. Australia has enacted a number of pieces of legislation, which extend domestic fisheries law arrangements to this area beyond territorial waters, to give effect to its international responsibility to manage marine resources in the EEZ. Key obligations are contained in the *Fisheries Management Act 1991* (Cth) and various parts of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act').

Australia's management challenges in the Heard and McDonald Islands area relate not only to determining the licence conditions for the three Australian vessels authorised to fish for Patagonian toothfish and mackerel icefish (*Champsocephalus gunnari*) in this area and the various scientific reporting requirements under domestic law and CCAMLR, but also to preventing unauthorised foreign fishing. Given the remote location of this portion of the EEZ, the limited enforcement capabilities Australia can deploy in the region, and the significant financial rewards available to longline vessels illegally catching Patagonian toothfish, Australia's management challenges are significant. In recent years, there has been an increase in reported sightings of illegal fishing in this area. France also has noted an increase in reported sightings in its adjacent jurisdiction. Many of the illegal foreign fishing vessels are registered in flag of convenience states which assert little or no control over their conduct. Typically the identity of the beneficial owners of the vessels is hidden behind complex corporate arrangements designed to hinder law enforcement attempts to prosecute those who organise and benefit from illegal fishing. In a matter of a few weeks, illegal fishing can result in catches that exceed a vessel's capital value.¹¹ This provides a strong incentive to operators to engage in illegal plunder of protected stocks within coastal state jurisdiction, particularly in remote areas where surveillance is limited and enforcement is rarely effected.

⁸ Opened for signature 1 August 1980, 1329 UNTS 47 (entered into force 7 April 1982). See CCAMLR Schedule of Conservation Measures in Force 2002/2003 <<http://www.ccamlr.org/pu/e/pubs/cm/02-03/toc.htm>> at 25 April 2003. See also Donald R Rothwell, 'Environmental Regulation of the Southern Ocean' in James Crawford and Donald R Rothwell (eds), *The Law of the Sea in the Asian Pacific Region* (1995) 93, 104.

⁹ *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

¹⁰ *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, [2001] ATS 8 (entered into force 11 December 2001).

¹¹ *The 'Volga' Case (Russian Federation v Australia)* (Prompt Release) (Oral proceedings) (2002) ITLOS Case No 11, ITLOS/PV.02/02 (12 December 2002), 22.

LOSC authorises coastal states to detain foreign vessels engaged in illegal fishing in their EEZ.¹² Further justification to enforce fisheries laws in the EEZ against foreign-flagged vessel is provided in the UN Food and Agricultural Organization's *Code of Conduct for Responsible Fisheries*.¹³ The principal obligation placed on coastal states which arrest vessels in its EEZ, and the issue in dispute in the proceedings under review, is contained in art 73(2) of LOSC. It states: 'Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.'¹⁴

III FACTS OF THE CASE

On 6 February 2002, *HMAS Canberra* apprehended the Russian fishing vessel, *Lena*, inside the EEZ surrounding Heard and McDonald Islands for allegedly fishing without authorisation. Shortly prior to the arrest of the *Lena*, the *Volga* ceased fishing activities and proceeded at its maximum speed by the shortest route to the EEZ boundary. This coincidence in timing suggests that the *Lena* had warned the *Volga* about the presence of Australian naval vessels.¹⁵ The *Volga's* course was consistent with the purpose of trying to reach the safety of the high seas where foreign boarding without flag state or vessel permission is illegal if not executed consistently with the doctrine of 'hot pursuit'.¹⁶ The important point in this regard is that for a lawful hot pursuit to commence the vessel must initially be detected to be within the EEZ¹⁷ and the pursuit 'may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.'¹⁸

On 7 February 2002, a Seahawk helicopter was launched from *HMAS Canberra* and reported that the *Volga* was one nautical mile within the EEZ. According to Australian authorities, a broadcast was made to the vessel from the helicopter without generating a response from the vessel. At this time, officers on board *HMAS Canberra* mistakenly assessed the vessel to be 400 yards within the EEZ. A boarding party arrested the *Volga* 18 minutes later. At this point, the vessel had reached the high seas by a distance of a

¹² LOSC, opened for signature 10 December 1982, 1833 UNTS 3, art 73(1) (entered into force 16 November 1994). This article is given effect in domestic law in s 84 of the *Fisheries Management Act 1991* (Cth).

¹³ Food and Agricultural Organization, *Code of Conduct for Responsible Fisheries* (1995) <<http://www.fao.org/fi/agreem/codecond/ficonde.asp>> at 25 April 2003, art 7.6.2. See also arts 7.1.7, 8.1.1.

¹⁴ LOSC, opened for signature 10 December 1982, 1833 UNTS 3, art 73(2) (entered into force 16 November 1994).

¹⁵ *The 'Volga' Case (Russian Federation v Australia) (Prompt Release) (Written proceedings)* (2002) ITLOS Case No 11, Statement in Response of Australia, 5.

¹⁶ LOSC, opened for signature 10 December 1982, 1833 UNTS 3, art 111 (entered into force 16 November 1994); cf Canada's actions in 1995 when it seized a Spanish fishing vessel on the high seas adjacent to Canada's fishing zone. See, eg, Jamison Colburn, 'Turbot Wars: Straddling Stocks, Regime Theory, and a New U.N. Agreement' (1996) 6 *Journal of Transnational Law and Policy* 323; David Teece, 'Global Overfishing and the Spanish-Canadian Turbot War: Can International Law Protect the High-Seas Environment?' (1997) 8 *Colorado Journal of International Environmental Law and Policy* 89.

¹⁷ LOSC, opened for signature 10 December 1982, 1833 UNTS 3, art 111(1) (entered into force 16 November 1994).

¹⁸ *Ibid* art 111(4); see also art 73(1). Note that the right of 'hot pursuit' was recognised under customary international law in the case of *I'm Alone (Canada v USA)* (1935) III RIAA 1609.

few hundred metres. The vessel was escorted to Fremantle where it arrived on 19 February 2002. With the exception of the officers, the crew was released and repatriated to their countries of origin (mainly Indonesia and China). The detained officers were later released on bail.¹⁹ At the time of the arrest, the *Volga* had on board 131.422 tonnes of Patagonian toothfish and 21.494 tonnes of bait. Australian authorities sold the catch and bait for a total of A\$1 932 579.28.²⁰

On 6 March 2002, the fishing master, fishing pilot and chief mate were charged with using a foreign fishing boat in the AFZ for commercial fishing without a foreign fishing licence.²¹ The vessel and catch are liable to forfeiture in the event that the officers are found guilty.²² A number of court proceedings ensued in Western Australia concerning the bail conditions. This litigation culminated on 16 December 2002, concurrent with the present ITLOS proceedings, when the Full Court of the Supreme Court of Western Australia²³ upheld the appeal of the three officers from the 14 June 2002 decision of Wheeler J²⁴ of the Supreme Court of Western Australia in relation to bail conditions set in that decision. The new bail conditions were subsequently met and the officers departed Australia on 20 December 2002. ITLOS refrained from making any order in relation to the detention of these officers because they had departed Australia three days before the Tribunal delivered its judgment.

The owners of the vessel and Russian authorities made a number of requests to various Australian authorities for the unconditional release of the vessel. Separate legal proceedings were instituted in the Federal Court of Australia in May 2002 when the vessel's owner sought a declaration that the seizure and detention of the vessel was illegal and orders that the vessel, the equipment and proceeds of the catch be released to the owner. The vessel owners also sought a stay of the civil proceedings pending the completion of criminal proceedings against the vessel officers. Both applications were dismissed.²⁵

On 26 July 2002, Australia, in purported exercise of its rights and responsibilities under the prompt release provisions of *LOSC*, set forth the conditions for the release of the *Volga*. The Australian Fisheries Management Authority ('AFMA')

- (a) requested information that can be independently verified of:
 - (i) the ultimate beneficial owners of the vessel, including the name(s) of the parent company or companies to the owner;
 - (ii) the names and nationalities of the directors of the owner and of the parent company (or companies);

¹⁹ On 26 February 2002, the master of the *Volga* died after he consumed on the vessel a large quantity of cleaning liquid containing methanol apparently in the belief that it was alcohol. See *The 'Volga' Case (Russian Federation v Australia) (Prompt Release) (Written proceedings)* (2002) ITLOS Case No 11, Statement in Response of Australia, 6.

²⁰ *Ibid* 7.

²¹ *Ibid*; the fishing master faces two charges, and the fishing pilot and chief mate both face one charge under s 100(1) of the *Fisheries Management Act 1991* (Cth).

²² *Fisheries Management Act 1991* (Cth) s 106A. The criminal trial will most likely take place in the first half of 2004.

²³ *Lijo v Director of Public Prosecutions (Cth)* [2003] WASCA 4 (Unreported, Anderson, Templeman JJ and Olsson AUJ, 16 December 2002).

²⁴ *Director of Public Prosecutions (Cth) v Lijo* [2002] WASC 154 (Unreported, Wheeler J, 14 June 2002).

²⁵ *Olbers Co Ltd v Commonwealth (No 2)* [2003] FCA 177 (Unreported, French J, 11 March 2003).

- (iii) the name, nationality and location of the managers of the vessel's operations;
 - (iv) the insurers of the vessel; and
 - (v) the financiers, if any, of the vessel.
- (b) requested that security ... of AU\$3 332 500 be provided for the release of the *Volga*.
- (c) stated that the security amount incorporated an amount [A\$1 000 000] for what Australia considered to be reasonable in respect of carriage of a fully operational vessel monitoring system ... on board the vessel and observing the conservation measures established by [CCAMLR] ... until the conclusion of legal proceedings in Australia.²⁶

On 2 December 2002, the Russian Federation commenced proceedings in ITLOS as provided by art 292(1) of *LOSC*. In 'prompt release' cases ITLOS is instructed to proceed with matters 'without delay' and 'shall deal only with the question of release'.²⁷ Russia sought a declaration either that the conditions Australia set for the release of the *Volga* and the officers were not permitted under art 73(2) or that the conditions were not reasonable in terms of art 73(2). The arguments for the release of the officers were later to become unnecessary given that they were released subject to the bail conditions set on 16 December 2002.

IV CONTENTIONS OF THE PARTIES

The only issue in dispute was whether the setting of the conditions by Australia for the release of the vessel breached its obligation to release a vessel detained under art 73(1) 'upon the posting of reasonable bond or other security'.²⁸

A The Russian Federation

Russia submitted that conditions for release of vessels must be financial due to the pecuniary meaning of 'bond' and 'security'. As such, Russia submitted that the non-financial conditions Australia set for the release of the vessel were in breach of art 73(2) and unlawful. In setting these conditions, Russia argued that Australia failed to respect the essential 'balance' that *LOSC* envisages must be struck between the rights of coastal states to enforce laws they have enacted in the exercise of their sovereign rights in the EEZ and the expectation of flag states that their detained vessels will be promptly

²⁶ *The 'Volga' Case (Russian Federation v Australia) (Prompt Release) (Written proceedings)* (2002) ITLOS Case No 11, Statement in Response of Australia, 8.

²⁷ *LOSC*, opened for signature 10 December 1982, 1833 UNTS 3, art 292(3) (entered into force 16 November 1994). The issue of whether the special prompt release procedures contained in *LOSC* also apply to a vessel detained pursuant to the *UN Fish Stocks Agreement*, which does not include a prompt release provision, is unsettled. See Tullio Treves, 'The Settlement of Disputes According to the *Straddling Stocks Agreement* of 1995' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 253, 268. See, also, Tim Stephens, 'A Paper Umbrella Which Dissolves in the Rain? Implications of the *Southern Bluefin Tuna* Case for the Compulsory Resolution of Disputes Concerning the Marine Environment Under the 1982 *LOS Convention*' (2001) 6 *Asia Pacific Journal of Environmental Law* 297; Jacqueline Peel, 'A Paper Umbrella Which Dissolves in the Rain? The Future for Resolving Fisheries Disputes Under *UNCLOS* in the Aftermath of the *Southern Bluefin Tuna Arbitration*' (2002) 3 *Melbourne Journal of International Law* 53.

²⁸ *LOSC*, opened for signature 10 December 1982, 1833 UNTS 3, art 73(2) (entered into force 16 November 1994).

released on reasonable terms.²⁹ Russia described Australia's setting of a bond of A\$1 000 000 for the installation of an operational vessel monitoring system ('VMS') as a potential sanction 'which usurps the function of the flag state to monitor and police its own vessels.'³⁰ In requiring the provision of information concerning particulars about the owner and ultimate beneficial owners of the vessel, Russia argued that Australia assumed the flag state role and extended the ambit of the proposed bond 'into areas that are simply not contemplated by art 73(2).'³¹ If the Australian approach were to prevail, then, according to the Russian counsel, vessels 'will simply not be released because the coastal state does not want them to be'.³²

B The Commonwealth of Australia

Australia's response was that the setting of non-financial conditions for the release of the vessel was reasonable taking into account two principal concerns. First, that Australia needs to ensure compliance by foreign vessels with Australian laws and international obligations pending the completion of domestic proceedings; and second, that there is a high level of international concern regarding illegal fishing and its effect of undermining regional and domestic regimes aimed at securing the sustainable management of marine resources. Australia argued that in determining the reasonableness of the bond, 'the circumstances of the case cannot be viewed narrowly' and the continuing problem of illegal fishing should be considered.³³

In relation to Australia setting the requirement that the vessel's owner post a bond to guarantee the carriage of an operational VMS and the observance of CCAMLR conservation measures, Australia argued that it is entitled to include in the bond practical measures to ensure compliance with Australian laws.³⁴ Australia characterised this condition as a 'good behaviour' bond to be refunded if the vessel does not engage in any criminal conduct prior to the completion of domestic legal proceedings.³⁵ The VMS would allow Australia to monitor the location of the vessel and thereby determine if it unlawfully enters the AFZ or another CCAMLR area. The rationale put forward for this measure was that VMS use is mandated for all fishing vessels licensed pursuant to CCAMLR to fish for Patagonian toothfish. Further, there is considerable recent experience of flag of convenience vessels being continually reflagged and renamed in order to hinder attempts to identify them when they resume illegal fishing activity.³⁶

²⁹ *The 'Volga' Case (Russian Federation v Australia) (Prompt Release) (Oral proceedings)* (2002) ITLOS Case No 11, ITLOS/PV.02/01 (12 December 2002), 9.

³⁰ *Ibid* 16.

³¹ *Ibid*.

³² *The 'Volga' Case (Russian Federation v Australia) (Prompt Release) (Oral proceedings)* (2002) ITLOS Case No 11, ITLOS/PV.02/04 (13 December 2002), 13.

³³ *The 'Volga' Case (Russian Federation v Australia) (Prompt Release) (Written proceedings)* (2002) ITLOS Case No 11, Statement in Response of Australia, 11.

³⁴ *Ibid*.

³⁵ *The 'Volga' Case (Russian Federation v Australia) (Prompt Release) (Oral proceedings)* (2002) ITLOS Case No 11, ITLOS/PV.02/03 (13 December 2002), 10.

³⁶ See, eg, Kevin Bray, 'Illegal, Unreported and Unregulated (IUU) Fishing' in Myron H Nordquist and John Norton Moore (eds), *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (2000) 115. In fact, ITLOS itself has had experience in this regard. In the case of the vessel *Camouco*, which was the subject of an

In relation to the requirement that details be provided of the beneficial owners, Australia argued that it has obligations to manage the area that should not be undermined by the use of prompt release procedures. It reported that its ability to assert diplomatic pressure on Russia to fulfil its flag state responsibility to ensure that its nationals do not act inconsistently with agreed international conservation principles and measures was undermined because the vessel owner had given false addresses.³⁷

Although the question of whether Australia had breached the hot pursuit provisions in art 111 by failing to correctly issue a stop order prior to the vessel leaving the EEZ could not be resolved by ITLOS in the present proceedings, an earlier ITLOS judgment had determined that the 'factual matrix' of the circumstances of the case could be taken into account in determining the reasonableness of the bond.³⁸ Russia submitted that the questionable legality of the arrest should be considered. Australia contended that this issue fell outside any such factual matrix and, in any event, Australia would contend in any possible future legal action that the hot pursuit was lawfully conducted because at the time of the first communication the *Volga* was believed to be within Australia's EEZ.³⁹

V DECISION OF ITLOS

On 23 December 2002, ITLOS delivered its decision, finding by 19 votes to 2 that the allegation that Australia had not complied with the prompt release provisions of LOSC was well founded. It also decided by 19 votes to 2 that Australia shall promptly release the *Volga* upon the posting of what it considered to be a reasonable bond or other security of A\$1 920 000, a sum equivalent to the assessed value of the vessel, fuel, lubricants and fishing equipment.⁴⁰ Two judges (V-P Vukas and Judge Marsit) appended declarations to the judgment. Vice-President Vukas's declaration supported

earlier ITLOS prompt release decision, it was renamed and reflagged twice following its release by the Tribunal only to be arrested once more by French authorities for fishing unlawfully for Patagonian toothfish: *The 'Camouco' Case (Panama v France) (Prompt Release) (Judgment)* (2000) ITLOS Case No 5.

³⁷ *The 'Volga' Case (Russian Federation v Australia) (Prompt Release) (Oral proceedings)* (2002) ITLOS Case No 11, ITLOS/PV.02/03 (13 December 2002), 15.

³⁸ *The 'Camouco' Case (Panama v France) (Prompt Release) (Judgment)* (2000) ITLOS Case No 5, Separate Opinion of V-P Nelson, 3.

³⁹ LOSC, opened for signature 10 December 1982, 1833 UNTS 3, art 111(4) (entered into force 16 November 1994) provides that a hot pursuit is commenced where the pursuing ship has satisfied itself 'by such practicable means as may be available' that the vessel is within the EEZ. Australia's position is that this subjective test is not undermined if subsequent, more accurate land-based calculations determine that there had been an error in determining the precise location of the vessel at the time of the first communication and that the vessel was in fact outside the EEZ at the relevant time. To hold otherwise, this argument proceeds, would be to defeat the rationale of the hot pursuit doctrine by invalidating an otherwise lawful action to enforce a coastal state's laws in its EEZ due to a mistaken – but reasonable – determination of the location of the vessel. It is also Australia's position that the requirement in art 111(4) for the pursuing vessel to give a stop order might be satisfied by the necessary implication that a vessel is required to stop if a message is given that the vessel will be boarded from a helicopter: *The 'Volga' Case (Russian Federation v Australia) (Prompt Release) (Oral proceedings)* (2002) ITLOS Case No 11, ITLOS/PV.02/02 (12 December 2002), 13.

⁴⁰ *The 'Volga' Case (Judgment)* (2002) ITLOS Case No 11, 24.

the judgment but reiterated his position in earlier cases that, under LOSC art 121(3), EEZs cannot be claimed around uninhabited islands, such as his characterisation of Heard and McDonald Islands. One judge, Judge Cot, appended a separate opinion. Two judges, Judge Anderson and Judge ad hoc Shearer (the United Kingdom judge and the Australian judge ad hoc,⁴¹ respectively), delivered dissents.

The Tribunal considered that the expression 'bond or other security' in art 73(2) should be interpreted 'as referring to a bond or security of a financial nature'.⁴² It noted, 'where the Convention envisages the imposition of conditions additional to a bond or other financial security, it expressly states so'.⁴³ It thus followed, according to the Tribunal, that non-financial conditions 'cannot be considered components of a bond or other financial security'.⁴⁴ In relation to the bond requirement attached to the VMS use condition, the Tribunal needed to determine if such a 'good behaviour bond' was a bond or security within the meaning of art 73(2). It decided this question in the negative.⁴⁵ With respect to the VMS requirement and the financial details requirement, the Tribunal decided that the bond sought by Australia was not reasonable within the meaning of art 292.⁴⁶

A Judge Anderson's dissent

Judge Anderson considered that any prohibition in LOSC on the setting of non-financial bond conditions may only be implied because of the absence of an express prohibition in art 73(2). He opined that while the expression 'the posting of reasonable bond' was 'somewhat unusual',⁴⁷ it was to be ascribed a legal meaning rather than a financial or commercial meaning.⁴⁸ As such, art 73(2), read with art 292, 'is cast in terms sufficiently wide to allow for the possibility of imposing conditions in a bond designed to protect from possible prejudice any on-going legal proceedings in the appropriate domestic forum'.⁴⁹ In such a case, a 'good behaviour bond' represents a type of bond within the meaning of art 73(2) because it is relevant to the coastal state's duty under LOSC to conserve living resources in the EEZ. As such, Judge Anderson opted to dismiss Russia's application.⁵⁰

⁴¹ On 4 December 2002, Australia, pursuant to art 17(2) of the *Statute of the International Tribunal for the Law of the Sea*, Annex VI to LOSC, and without objection from Russia, notified the Tribunal of its intention to choose Mr Ivan Shearer AM, Challis Professor of International Law, University of Sydney, to participate as judge ad hoc. The sitting judge on ITLOS from the Russian Federation is Judge Kolodkin.

⁴² *The 'Volga' Case (Judgment)* (2002) ITLOS Case No 11, 25.

⁴³ *Ibid.* See, eg, LOSC, opened for signature 10 December 1982, 1833 UNTS 3, art 226(1)(c) (entered into force 16 November 1994).

⁴⁴ *The 'Volga' Case (Judgment)* (2002) ITLOS Case No 11, 25.

⁴⁵ *Ibid.* 26.

⁴⁶ *Ibid.* 28.

⁴⁷ *The 'Volga' Case (Judgment)* (2002) ITLOS Case No 11, Dissenting Opinion of Judge Anderson, 3.

⁴⁸ *Ibid.* 4.

⁴⁹ *Ibid.* 7.

⁵⁰ *Ibid.* 9.

B Judge ad hoc Shearer's dissent

According to Judge ad hoc Shearer, the Tribunal should have accorded greater weight to the facts and surrounding circumstances of the case, including the gravity of the offences, in assessing the reasonableness of the bond.⁵¹ He noted the problem of illegal fishing for Patagonian toothfish and the impact this has had on stock levels, as well as 'the difficulty of enforcement of fisheries laws in the inhospitable environment of the Southern Ocean.'⁵² In his opinion, the 'narrow interpretation' that art 73(2) does not allow the setting of non-financial security conditions could not be supported:

The words ... should be given a liberal and purposive interpretation in order to enable the Tribunal to take full account of the measures ... found necessary by many coastal States ... to deter by way of judicial and administrative orders the plundering of the living resources of the sea.⁵³

As such, Judge ad hoc Shearer opined that '[a] new "balance" has to be struck between vessel owners, operators and fishing companies on the one hand, and coastal States on the other.'⁵⁴ He stated that he would have preferred an order in terms of that requested by Australia, namely that the amount and the terms of the bond imposed by Australia should be upheld.⁵⁵

VI COMMENTARY

The decision in *The 'Volga' Case* adds to the existing body of international jurisprudence concerning LOSC's 'prompt release' requirements.⁵⁶ ITLOS had heard five prompt release cases prior to the decision.⁵⁷ Three of them concerned vessels detained for illegal Patagonian toothfish fishing in the Southern Ocean, indicating a pattern of law

⁵¹ *The 'Volga' Case (Judgment)* (2002) ITLOS Case No 11, Dissenting Opinion of Judge ad hoc Shearer, 3.

⁵² *Ibid* 4.

⁵³ *Ibid* 6–7.

⁵⁴ *Ibid* 8.

⁵⁵ *Ibid* 1.

⁵⁶ For reviews see Rainer Lagoni, 'The Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea: A Preparatory Report' (1996) 11 *International Journal of Marine and Coastal Law* 147; David Anderson, 'Investigation, Detention and Release of Foreign Vessels under the UN Convention on the Law of the Sea of 1982 and Other International Agreements' (1996) 11 *International Journal of Marine and Coastal Law* 165; Tullio Treves, 'The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea' (1996) 11 *International Journal of Marine and Coastal Law* 179; E D Brown, 'The *M/V Saiga* Case on Prompt Release of Detained Vessels: The First Judgment of the International Tribunal for the Law of the Sea' (1998) 22 *Marine Policy* 307; Bernard Oxman and Vincent Bantz, 'The "Grand Prince"' (2002) 96 *American Journal of International Law* 219.

⁵⁷ *The M/V 'SAIGA' Case (Saint Vincent and the Grenadines v Guinea) (Prompt Release) (Judgment)* (1997) ITLOS Case No 1; *The 'Camouco' Case (Panama v France) (Prompt Release) (Judgment)* (2000) ITLOS Case No 5; *The 'Monte Confurco' Case (Seychelles v France) (Prompt Release) (Judgment)* (2000) ITLOS Case No 6; *The 'Grand Prince' Case (Belize v France) (Prompt Release) (Judgment)* (2001) ITLOS Case No 8; *The 'Chaisiri Reefer 2' Case (Panama v Yemen) (Prompt Release)* (Order 2001/4 of 13 July 2001) ITLOS Case No 9.

enforcement problems in this area.⁵⁸ An opportunity was presented to the Tribunal in *The 'Volga' Case* to provide a new broad interpretation of art 73(2). As a majority of the Tribunal did not interpret the expression 'reasonable bond' as allowing the setting of non-financial conditions, the jurisprudential significance of the decision therefore lies largely in its further support for earlier ITLOS prompt release decisions. That is, vessel release conditions are restricted to a financial security of a level not exceeding the value of the vessel and sundry items. The Tribunal also confirmed that the security could not be met by the value of any confiscated fish where no evidence is led that the catch, or a portion of it, was caught on the high seas or was lawfully caught within the coastal state's EEZ.

The rejection of Australia's argument for the imposition of non-financial bond conditions is a result of ITLOS's textualist, or literalist, interpretation of art 73(2). Although the Tribunal stated that it took note of Australia's concern about illegal, unreported and unregulated ('IUU') fishing, it offered no elucidation of the extent of the problem and the legal measures necessary to combat it. Nevertheless, Australia's justification for interpreting art 73(2) in the broad manner requested is problematic given that the article is unhelpfully silent regarding the nature of a reasonable bond and that the words 'bond' and 'security' as used in *LOSC* are normally ascribed a pecuniary meaning.⁵⁹ However, earlier reasoning of the Tribunal indicated the possibility for a broad interpretation. In *The 'Monte Confurco' Case*⁶⁰ ITLOS stated that the list of factors (including the gravity of the alleged offences) that should be taken into account in assessing the reasonableness of a bond for the release of a vessel, as expressed in the earlier *'Camouco' Case*,⁶¹ was not exhaustive.⁶² Arguably, the 'factual matrix' of the circumstances of the case could extend to the challenges presented by IUU fishing in remote areas, thus justifying the imposition of more stringent non-financial bond conditions aimed at ensuring compliance with EEZ fisheries laws in the period prior to the culmination of domestic litigation.

The ambit of 'reasonable bond or other security'⁶³ would have been broadened considerably had ITLOS allowed the setting of non-financial bond conditions. It would

⁵⁸ *The 'Camouco' Case (Panama v France) (Prompt Release) (Judgment)* (2000) ITLOS Case No 5; *The 'Monte Confurco' Case (Seychelles v France) (Prompt Release) (Judgment)* (2000) ITLOS Case No 6; *The 'Grand Prince' Case (Belize v France) (Prompt Release) (Judgment)* (2001) ITLOS Case No 8. See, also, Donald R Rothwell, 'The Law of the Sea and the Antarctic Treaty System: Rougher Seas Ahead for the Southern Ocean?' in Julia Jabour-Green and Marcus Haward (eds), *The Antarctic: Past, Present and Future* (2002) 113, 122-3; Stuart Kaye, *International Fisheries Management* (2001) 468-9; Sam Bateman and Eric Grove, 'Maritime Enforcement in the Southern Ocean: Some Operational and Policy Considerations' in Sam Bateman and Donald R Rothwell (eds) *Southern Ocean Fishing: Policy Challenges for Australia* (1998) 115, 117.

⁵⁹ See *LOSC*, opened for signature 10 December 1982, 1833 UNTS 3, arts 218(4), 220(7), 226(1)(b), 228(1), 292(1) and (4) (entered into force 16 November 1994).

⁶⁰ *The 'Monte Confurco' Case (Seychelles v France) (Prompt Release) (Judgment)* (2000) ITLOS Case No 6.

⁶¹ *The 'Camouco' Case (Panama v France) (Prompt Release) (Judgment)* (2000) ITLOS Case No 5, [67].

⁶² *The 'Monte Confurco' Case (Seychelles v France) (Prompt Release) (Judgment)* (2000) ITLOS Case No 6, [76].

⁶³ *LOSC*, opened for signature 10 December 1982, 1833 UNTS 3, art 73(2) (entered into force 16 November 1994).

have included the introduction of further subjective elements in the determination by a coastal state of what non-financial conditions are reasonable to impose. Nevertheless, affording coastal states broader discretionary powers may be necessary for them to ensure compliance by foreign fishing vessels with EEZ fisheries laws. However, it appears that such an outcome will not be provided by ITLOS interpreting *LOSC* in this manner but rather awaits revision of the text of *LOSC*. In the October 2002 CCAMLR meeting in Hobart, Australia advocated that art 73(2) should not be applied to vessels apprehended for illegal fishing within areas covered by CCAMLR so that such vessels would be unable to resume fishing activities after forfeiture of a posted bond.⁶⁴ This proposal did not receive support from other members of the Commission, largely because of the lengthy and complex procedure required to amend *LOSC* and the disruption that may be caused to the 'balance' of interests between coastal states and flag states reflected throughout the convention.⁶⁵

ITLOS's construction of art 73(2) in *The 'Volga' Case* exposes an inconsistency between Australia's domestic fisheries legislation and *LOSC*. In relation to setting conditions for detained vessels, s 88(1) of the *Fisheries Management Act 1991* (Cth) provides that AFMA may release vessels 'on such conditions (if any) as AFMA thinks fit'. Such a broad discretionary power is valid under domestic law notwithstanding that its use is subject to appeal by aggrieved persons on ultra vires grounds.⁶⁶ However, *The 'Volga' Case* shows that the wide ranging conditions AFMA may set under s 88, such as strict non-financial conditions, may be inconsistent with Australia's international responsibility to release detained foreign fishing vessels upon the posting of a reasonable bond. Article 73(2), as confirmed in *The 'Volga' Case*, limits conditions to a reasonable financial security. As a result, the conditions that AFMA may think are necessary in a given situation must be more constrained in their application to foreign vessels detained for illegal fishing than for detained Australian vessels.

As a result of *The 'Volga' Case*, the only way for Australia and other coastal states to set more onerous bond conditions is for them to significantly increase the penalties that can be ordered against those who violate domestic fisheries laws. Australia may choose to charge arrested foreign fishers with additional civil or criminal offences under the *EPBC Act*. Although Australia must comply with art 73(3) and not ask domestic courts to impose custodial sentences, Australia could choose to utilise some of the *EPBC Act* offences and seek the imposition of the significant penalties available.⁶⁷ However, such penalties could only be applied to bond conditions for detained crew,

⁶⁴ Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Twenty-first Meeting of the Commission*, Report No XXI (2002) 39.

⁶⁵ Ibid 39–41. See, also, arguments that the *LOSC* regime needs 'modernising': Kevin Bray, 'Fish or Foul: Can the Law of the Sea and International Fisheries Co-Exist?' *International Law Downunder: Antipodean Contributions and Challenges* (Paper presented at the 9th Annual Conference of the Australian and New Zealand Society of International Law, Canberra, Australia, 13–14 June 2001) 113, 114 <<http://law.anu.edu.au/anzsil/Conferences/2001proceedings.pdf>> at 25 April 2003.

⁶⁶ See, generally, Warwick Gullett, Chris Paterson and Elizabeth Fisher, 'Substantive Precautionary Decision-Making: The Australian Fisheries Management Authority's "Lawful Pursuit" of the Precautionary Principle' (2001) 7 *Australasian Journal of Natural Resources Law and Policy* 95.

⁶⁷ See, for example, offences with regard to threatened species (ss 18A, 196) and migratory and marine species (ss 20A, 211, 254).

rather than with respect to detained vessels. Additional disincentives that can be lawfully imposed by coastal states for the elusive beneficial owners of vessels engaged in IUU fishing similarly remain elusive.

VII CONCLUSION

The 'Volga' Case confirms that coastal states are limited to setting financial conditions for the release of detained foreign fishing vessels. This is a significant constraint on countries that possess large EEZs in which foreign fishing vessels illegally target species. The decision may increase the prospect of owners of detained foreign vessels requesting their national authorities to utilise the prompt release procedures as a means to evade strict coastal state fisheries laws, thus undermining national or regional fisheries management measures. Further, the relatively modest sums that can be secured against beneficial owners may place pressure on domestic authorities to justify costly fisheries law enforcement action. As such, one unintended effect of the ITLOS decision may be a decrease in the surveillance and enforcement measures undertaken by coastal states to combat IUU fishing.

Although the decision of ITLOS in *The 'Volga' Case* may provide only a limited contribution to prompt release jurisprudence, the non-jurisprudential effect of the decision is likely to be significant. ITLOS's refusal to rule in favour of Australia in relation to the most substantial issue at dispute — the lawfulness of imposing non-financial bond conditions — confirms that the prompt release rules severely constrain coastal states in their enforcement of fisheries laws within their EEZs. ITLOS adopted a legalistic interpretation of a document that was drafted more than twenty years ago, before the emergence of large scale IUU fishing in remote areas. ITLOS's reluctance to adopt an expansive interpretation of the expression 'reasonable bond or other security'⁶⁸ may add to the case that Australia first articulated in October 2002 that there is a need to modify art 73 to take into account the increase in IUU fishing and modern fisheries management and law enforcement exigencies. The development of international fisheries law is likely to continue to take place largely by piecemeal diplomatic efforts to adopt or redraft treaties rather than by the appearance of new judicial interpretations of existing laws.

⁶⁸ LOSC, opened for signature 10 December 1982, 1833 UNTS 3, art 73(2) (entered into force 16 November 1994).