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CHAPTER IX

The “*Volga*” Case (Russian Federation v. Australia): Prompt Release and the Right and Interests of Flag and Coastal States

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The “*Volga*” Case (Russian Federation v. Australia): Prompt Release and the Right and Interests of Flag and Coastal States

Donald R. Rothwell* and Tim Stephens†

ABSTRACT

In early December 2002 the Russian Federation commenced proceedings against Australia in the International Tribunal for the Law of the Sea (ITLOS) seeking the release of the *Volga*, a Russian-flagged long-line fishing vessel detained by Australian authorities for illegal fishing in the Exclusive Economic Zone surrounding Australia’s Heard and McDonald Islands in the Southern Ocean. Russia relied on Article 292 of the 1982 United Nations Convention on the Law of the Sea (LOS Convention) which gives ITLOS compulsory jurisdiction over disputes concerning the prompt release of such vessels. On December 23, 2002 ITLOS delivered its decision in the *Volga Case* in which it held that the bond set by Australia for the release of the vessel was not reasonable but nonetheless set the bond at a substantial figure of AU\$1.92 m, equal to the agreed value of the vessel and four times the amount submitted by Russia to be reasonable (AU\$0.5m). With this judgment, ITLOS has now handed down five decisions in prompt release cases. The *Volga Case* provided ITLOS with an opportunity to review its prompt release jurisprudence, which has been the subject of some criticism and controversy. In particular, the case raised significant issues concerning the intersection of the LOS Convention’s obligations to protect and preserve the marine environment (Part XII) and the provisions of the LOS Convention providing for prompt release of vessels arrested in the EEZ (Article 73).

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In early December 2002 the Russian Federation commenced proceedings against Australia in the International Tribunal for the Law of the Sea (ITLOS) seeking the release of the *Volga*, a Russian-flagged long-line fishing vessel detained by Australian authorities for illegal fishing in the Exclusive Economic Zone surrounding Australia's Heard and McDonald Islands ("AEEZ").¹ Russia relied on Article 292 of the 1982 United Nations Convention on the Law of the Sea (LOSC)² which gives ITLOS compulsory jurisdiction over disputes concerning the prompt release of such vessels. On December 23, 2002 ITLOS delivered its decision in the *Volga Case* in which it held that the bond set by Australia for the release of the vessel was not reasonable but nonetheless set the bond at a substantial figure of AU\$1.92, equal to the agreed value of the vessel and four times the amount submitted by Russia to be reasonable (AU\$0.5m).³ This note provides an overview of the parties' arguments and the judgment of ITLOS in the *Volga Case*. It is suggested that although the decision substantially clarifies the tribunal's prompt release jurisprudence, entirely unambiguous and satisfactory criteria for the assessment of the reasonableness of a bond have yet to be settled.

I. BACKGROUND

Illegal, unregulated and unreported (IUU) fishing has become an increasingly serious threat to the sustainability of many fisheries on the high seas and in areas within coastal state jurisdiction.⁴ The problem is pronounced in the Southern Ocean and remote southern areas in the three oceans adjacent to it, where valuable and vulnerable fisheries exist great distances from effective enforcement machinery.⁵ One area of particular interest for IUU fishing operators is the waters surrounding the French Islands of Kerguelen and Crozet and Australia's Heard and McDonald Islands where Patagonian toothfish (*Dissostichus eleginoides*)⁶ have been targeted by organized fleets of so-called

¹ Senator the Hon Ian Macdonald and Senator the Hon Robert Hill, "Navy apprehends second suspected illegal fishing vessel," Media Release, AFFA02/8MJ, Feb. 12, 2002, available at <http://www.affa.gov.au/ministers/macdonald/releases/2002/02008mj.html> (last visited Feb. 20, 2004).

² Law of the Sea Convention (LOSC) 21 I.L.M. 1261, *in force* Nov. 16, 1994.

³ *The "Volga" Case* (Russian Federation v. Australia) ITLOS Case No. 11, (23 Dec. 2002) [hereinafter *Volga Case*], available at <http://www.itlos.org> (last visited Feb. 20, 2004).

⁴ For a discussion of the problem see FAO, *Stopping Illegal, Unreported and Unregulated Fishing* (FAO, Rome, 2002).

⁵ See generally D.J. Agnew, *The Illegal and Unregulated Fishery for Toothfish in the Southern Ocean and the CCAMLR Catch Documentation Scheme*, 24 MARINE POLICY 361 (2000).

‘pirate’ fishing vessels. These waters fall within the area covered by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).⁷

The *Volga* was arrested by Australian authorities on February 7, 2002.⁸ A total of 131 tons of toothfish were found on board at the time of the arrest.⁹ The *Volga* was escorted along with another Russian vessel, the *Lena*, which had been apprehended a few days earlier,¹⁰ to port at Fremantle in Western Australia, over 4000 km away.¹¹ The *Volga* arrived on February 19, 2002 and was detained along with four of its crew members, one of whom died shortly afterwards.¹²

Australia set a bond of approximately AU\$3.33m for the release of the *Volga*.¹³ This comprised:

- AU\$1.92m (approx) representing the agreed value of the *Volga* together with the fuel, lubricants and fishing equipment on board;¹⁴

⁶ Also known as “Chilean Sea Bass,” “Antarctic Sea Bass,” and “Sea Bass.”

⁷ Established by the Convention for the Conservation of Antarctic Marine Living Resources, (1980) 19 I.L.M. 841, 1329 U.N.T.S. 47, *in force* April 7, 1982; for background *see* E.J. Molenaar, *Southern Ocean Fisheries and the CCAMLR Regime*, in *THE LAW OF THE SEA AND POLAR MARITIME DELIMITATION AND JURISDICTION* 293-315 (A.G. Oude Elferink and D.R. Rothwell eds., 2001).

⁸ Statement in Response of Australia, [hereinafter Australian Statement in Response], 5-6. The Application by the Russian Federation, Memorial of the Russian Federation [hereinafter Russian Memorial] and the Australian Statement in Response, *available at* <http://www.itlos.org> (last visited Feb. 20, 2004).

⁹ *Id.* at 7.

¹⁰ Senator the Hon Ian Macdonald and Senator the Hon Robert Hill, *Navy battles five metre-high seas to apprehend suspected illegal fishing vessel*, Media Release, AFFA02/5MJ (Feb. 6, 2002), *available at* <http://www.affa.gov.au/ministers/macdonald/releases/2002/02005mj.html> (last visited Feb. 20, 2004).

¹¹ The *Lena* was subsequently forfeited and scuttled off the Western Australian coast: Senator the Hon Ian Macdonald, *WA seabed to be final home for pirate fishing boat*, Media Release, AFFA02/258M (Dec. 20, 2002), *available at* <http://www.affa.gov.au/ministers/macdonald/releases/2002/02258m.html> (last visited Feb. 20, 2004).

¹² Australian Statement in Response, *supra* note 8, at 6. The master, a Russian national, died after he consumed a bottle of cleaning fluid in the mistaken belief that it was alcohol. The three other crew members detained were the chief mate, the fishing master and the fishing pilot, all Spanish nationals.

¹³ *Volga Case*, *supra* note 3, paras. 54, 72.

¹⁴ Australian Statement in Response, *supra* note 8, at 13, para. 23.

- AU\$0.42m (approx) representing an amount for potential fines against the three crew members;¹⁵
- AU\$1m for the guarantee of non-repetition of IUU fishing by the *Volga* as monitored by VMS.¹⁶ Effectively this amount represented a ‘good-behaviour bond’ to be refunded on the conclusion of forfeiture proceedings provided that the *Volga* did not enter the Australian Exclusive Economic Zone (AEEZ) without permission in the interim.¹⁷

In addition Australia refused to release the vessel unless information was provided as to:

- the ultimate beneficial owners of the *Volga* (including information as to any parent company to Olbers Co Ltd, the company incorporated in Russia that owns the *Volga*);
- the names and nationalities of directors of Olbers Co Ltd and any parent company;
- the name, nationality and location of the manager(s) of the *Volga*’s operations;
- the insurers of the vessel; and
- the financiers of the vessel (if any).

Pursuant to Art 292 of the LOSC the Russian Federation on December 2, 2002 filed an application against Australia in ITLOS seeking the release of the *Volga* and the three crew members. Hearings were held before the Tribunal on December 12-13, 2002 with Judgment delivered on December 23, 2002.

II. ITLOS JUDGMENT

ITLOS held by 19 votes to two that:

- (a) Australia did not comply with the provisions of the LOS Convention for the prompt release of the *Volga* or its crew on the posting of a reasonable bond or other financial security;¹⁸ and that,

¹⁵ David Bennett QC, counsel for Australia, *Volga Case*, Verbatim Record of Oral Submissions, at 7, available at <http://www.itlos.org> (last visited Feb. 20, 2004).

¹⁶ Vessel Monitoring System. A VMS is a satellite-based system that may be used to determine the position of a vessel at any time.

¹⁷ Bennett QC, *supra* note 15, at 7.

¹⁸ *Volga Case*, *supra* note 3, para. 95(3) (Judge Anderson and Judge Shearer dissenting).

- (b) Australia must promptly release the *Volga* on the posting of a bank guarantee of AU\$1.92m.¹⁹

As Russia alleged that Australia failed to comply with Art 73(2) by setting a bond that was unreasonable and by imposing impermissible conditions for the release of the *Volga*,²⁰ there were two questions before ITLOS. The first was the reasonableness of the bond set by Australia. That question turned on two issues: (a) the identification of the factors relevant in assessing the reasonableness of the bond; and (b) the weight to be accorded to those factors found relevant. The second question was whether Australia could, consistent with Art 73, set non-financial conditions for release of the *Volga* such as the carriage of a VMS together with the AU\$1m good behaviour bond to be forfeited if VMS data revealed that on release the *Volga* had entered the AEEZ without authorisation.²¹

A. Reasonableness of Bond set by Australia

Russia submitted that in determining whether a bond was reasonable a balance had to be struck between the interests of the coastal State in ensuring compliance with its laws and the interests of the flag State in having the vessels which fly its flag (and their crew) released from detention promptly on the payment of a reasonable bond.²² In response, Australia argued that the purpose of a bond “is to guarantee that in the worst case scenario the detaining State is no worse off by the release of the vessel.”²³ It was agreed that whether a bond is reasonable will depend upon the circumstances of the case. However it was said by Australia that the circumstances should not be viewed narrowly,²⁴ and that in this case relevant factors included the value of the detained vessel and equipment, the gravity of offences as reflected in potential penalties, international concern over IUU fishing for toothfish, and compliance with Australian laws and

¹⁹ *Id.*, para. 95(4)-(6) (Judge Anderson and Judge Shearer dissenting).

²⁰ *Id.*, para. 60.

²¹ Russia also alleged that the *Volga* had been arrested in breach of Art 111 LOSC which provides for hot pursuit, however the Tribunal did not consider this issue holding that the circumstances surrounding the arrest were irrelevant to prompt release proceedings: *Id.*, para. 83.

²² *Memorial of the Russian Federation*, *supra* note 8, at 13.

²³ *Australian Statement in Response*, *supra* note 8, at 10, para. 9.

²⁴ *Id.* at 11, para. 12. In opening for Australia, Agent for Australia, Mr. Bill Campbell said that while Art 292(3) required ITLOS to “deal only with the question of release” this restricted the task of the Tribunal but did not limit the matters that could be taken into account in discharging the task: Oral submissions, at 5 (Dec. 12, 2002, 3 pm), available at <http://www.itlos.org> (last visited Feb. 20, 2004).

international obligations pending the completion of domestic proceedings.²⁵ The approaches of Russia and Australia were diametrically opposed. While on the one hand Russia suggested that ITLOS should follow its previous decisions and take a narrow approach to the question of prompt release, Australia encouraged the tribunal to adopt a broader perspective, taking cognisance of core values of the LOSC such as the conservation and sustainable management of marine living resources.

Before addressing these questions, the Tribunal stated some guiding principles which it derived from two of its prompt release cases. ITLOS noted that in the *Camouco Case* it had set out a number of factors relevant to assessing the reasonableness of bonds, including the gravity of alleged offences, possible penalties under the domestic law of the detaining State, the value of the vessel detained and the cargo seized, and the amount and form of bond imposed by the detaining State.²⁶ It also noted that in the *Monte Confurco Case* it had found that this list was not exhaustive and that it did not intend to identify “rigid rules as to the exact weight to be attached to each of them.”²⁷ Most critically ITLOS then quoted an earlier passage from the *Monte Confurco Case* where it had held that Arts 292 and 73 of the LOS Convention are designed to balance the interests of flag States in having their vessels and crews released promptly with the interests of coastal States detaining such vessels in securing the appearance of the Master in its court and the payment of fines.²⁸ This balancing act, which focused narrowly on specific coastal and flag State interests, formed the framework of ITLOS’ decision in the *Volga Case*.

Accordingly, when the Tribunal considered the first relevant factor, the alleged offences against Australian law, the Tribunal held that no direct weight was to be placed on the serious problem of IUU fishing in the CCAMLR area. While ITLOS said that it “understands the international concerns about [IUU] fishing and appreciates the objectives behind the measures taken by States, including the States Parties to CCAMLR”²⁹ it noted that the task set for the Tribunal under Art 292 was to decide whether the bond set by Australia was reasonable and that it was only by reference to possible penalties for the alleged

²⁵ Australian Statement in Response, *supra* note 8, at 13, para. 22, 26, at 17, para. 42, at 19, para. 54.

²⁶ *Volga Case*, *supra* note 3, para. 63. See *Camouco Case (Panama v. France)*, ITLOS Case No 5, para. 67 (7 Feb. 2000) [hereinafter *Camouco Case*].

²⁷ *Volga Case*, *supra* note 3, para. 64. See *Monte Confurco Case, (Seychelles v. France)*, ITLOS Case No 6, para. 76 (18 Dec. 2000) [hereinafter *Monte Confurco Case*].

²⁸ *Volga Case*, *supra* note 3, para. 65. See *Monte Confurco Case*, *supra* note 27, paras. 71 & 72.

²⁹ *Volga Case*, *supra* note 3, para. 68.

penalties that ITLOS could determine their gravity.³⁰ The Tribunal therefore appears to have accorded very little weight to the very serious problem of IUU fishing, together with the uncontested evidence that the *Volga* was part of a fleet of vessels systematically violating Australian fisheries laws and CCAMLR conservation measures.

In his dissenting opinion Judge Anderson noted that while he dissented on one issue (namely the permissibility of detaining States imposing non-financial conditions when setting a bond), the willingness of the Tribunal to express understanding and appreciation of international concerns over IUU fishing in the CCAMLR area marked a positive development in the Tribunal's prompt release jurisprudence.³¹ Nonetheless Judge Anderson did conclude that coastal State duties to conserve the marine living resources of its EEZ together with the obligations of States Parties to CCAMLR to protect and preserve the Antarctic environment were relevant factors to determining the reasonableness of bond under Art 292. This clearly sits at odds with the Tribunal's narrow approach according to which no notice was taken of these matters.

Judge ad hoc Shearer³² went further. He considered that the Tribunal had been overly cautious in evaluating the evidence presented.³³ Judge Shearer noted that while Art 292(3) requires ITLOS to deal with an application for prompt release without in any way prejudicing the merits of any case in the detaining State's courts against the vessel, owner, or crew, the question of reasonableness in the *Volga Case* could not be assessed in isolation from the "grave allegations of illegal fishing in a context of the protection of endangered fish stocks in a remote and inhospitable part of the seas."³⁴ Judge Shearer also pointed out that in the *Monte Confurco Case* the Tribunal had indicated that the limitation in Art 292(3) did not prevent it from examining the facts so as to consider properly the reasonableness of the bond.³⁵ It is certainly correct, as Judge Shearer noted, that the Tribunal made virtually no mention of the "grave allegations" made by Australia. However ITLOS did not explain this vacuum by reference to Art 292(3). Rather the Tribunal simply appears to have discounted this broader factual matrix through adopting the narrow interpretation of the task set by Art 292. In any event, Judge Shearer very helpfully set out principles that could be

³⁰ *Id.*, para. 69.

³¹ *Id.*, Dissenting Opinion of Judge Anderson, para. 2.

³² Professor Ivan Shearer AM was chosen by Australia to participate as judge ad hoc pursuant to Art 17(2) of the Statute of ITLOS.

³³ The *Volga Case*, *supra* note 3, Dissenting Opinion of Judge Shearer, para. 7.

³⁴ *Id.*, Dissenting Opinion of Judge Shearer, para. 7.

³⁵ *Id.*

applied in future prompt release cases for considering the extent to which ITLOS may assess facts which may bear upon the merits of any domestic proceedings.³⁶

B. Possible Penalties, Value of the Vessel, Amount and Nature of the Bond

After considering the gravity of the offences, ITLOS considered the bond sought by Australia and noted its tripartite nature (representing sums for the vessel, for the potential fines against the crew, and for the ‘good behaviour bond’).³⁷ In relation to the vessel the Tribunal held that the amount of AU\$1.92m, representing the agreed value of the vessel (including fuel, lubricants and gear) was reasonable for the purposes of Art 292 of the LOS Convention.³⁸ This marked a substantial upholding of the bond sought by Australia and a rejection of the amount of AU\$0.5m suggested by Russia to be reasonable.

In relation to the potential fines against the crew, the Tribunal noted that it was unnecessary to consider the issue given the crew’s release.³⁹ The remaining component of the bond (the issue of VMS, other non-financial conditions, and the ‘good behaviour bond’ of AU\$1m to guarantee non-repetition of future illegal fishing) was then addressed. The majority held that whether or not non-financial conditions could be imposed hinged on whether or not they could be described as a “bond or other security” as that phrase is used Art 73(2) of the LOS Convention.⁴⁰ It was held that in light of the object and purpose of Art 73(2), the phrase must be taken to refer to a bond or security “of a financial nature.”⁴¹ The majority concluded that the whole purpose of Art 73(2) (when read together with Art 292) was to enable flag States to secure the release of detained vessels and their crew “by posting a security of a financial nature whose reasonableness can be assessed in financial terms.”⁴²

In relation to the security of AU\$1m (the so-called good behaviour bond) required by Australia in connection with the VMS, the Tribunal held that such a security could not come within Art 73(2) because the bond or other security referred to is for the release of “arrested” vessels alleged to have committed

³⁶ *Id.*, Dissenting Opinion of Judge Shearer, para. 8.

³⁷ The *Volga Case*, *supra* note 3, paras. 71, 72.

³⁸ *Id.*, para. 73.

³⁹ *Id.*, para. 74.

⁴⁰ *Id.*, para. 76.

⁴¹ *Id.*, para. 77.

⁴² *Id.*

offences.⁴³ A bond to prevent future illegal activity, it was held, was not encompassed by Art 73(2).

In their dissenting judgments, both Judge Anderson and Judge Shearer rejected the Tribunal's interpretation of Art 73(2) both with respect to the non-financial conditions and the AU\$1m 'good behaviour bond'. Judge Anderson held that the plain and ordinary reading of Art 73(2), with due reference to object and purpose, disclosed no explicit prohibition on the setting of non-financial conditions for the release of vessels.⁴⁴ Moreover, it was insisted, the word "bond" should be read consistently with the context of the term which is (as revealed by the drafting history) "legal and precisely that of release of an accused person against a bail bond which may, and often does, contain non-pecuniary conditions."⁴⁵ For Judge Anderson the overriding question is simply whether the bond, in the broad sense including its amount, form and attendant conditions, is "reasonable."⁴⁶ Neither the non-financial conditions nor the 'good behaviour bond' were excluded from being considered as "bond" within the meaning of Art 73(2) and so it remained to be determined whether they were reasonable. Judge Anderson held that they were, given the real risk that the *Volga*, on release, would re-offend.⁴⁷

Judge ad hoc Shearer held that the amount and terms of the bond set by Australia were reasonable. Noting that since the LOS Convention has entered into force there have been dramatic declines in the stocks of many fish species, Judge Shearer held that the words "bond" and "financial security" as they are used in Arts 73(2) and 292 "should be given a liberal and purposive interpretation in order to enable the Tribunal to take full account of the measures—including those made possible by modern technology—found necessary by many coastal states (and mandated by regional and sub-regional fisheries organisations) to deter by way of judicial and administrative orders the plundering of the living resources of the sea".⁴⁸ In any event, according to Judge Shearer a narrow interpretation of Art 73(2) could, as demonstrated by Judge Anderson, include non-financial conditions within the meaning of the word "bond" as used in that Article and in Art 292.⁴⁹

⁴³ *Id.* at para. 80.

⁴⁴ The *Volga Case*, *supra* note 7, Dissenting Opinion of Judge Anderson, para. 7.

⁴⁵ *Id.*, Dissenting Opinion of Judge Anderson, para. 13.

⁴⁶ *Id.*, para. 14.

⁴⁷ *Id.*, para. 23.

⁴⁸ The *Volga Case*, *supra* note 3, Dissenting Opinion of Judge Shearer, at para. 17.

⁴⁹ *Id.*, para. 18.

C. Proceeds of the Catch

Finally the Tribunal turned to the issue of the proceeds of the catch, an issue that has proven to be one of the most controversial in its prompt release jurisprudence. In the *Monte Confurco Case* the majority held that the value of the catch seized by French authorities was to be deducted from the total bond. In the *Volga Case* the majority appears to have reversed that curious precedent (which had suggested that illegal fishers are entitled to keep the fruits of their illegal enterprise) by holding that “although the proceeds of the sale represent a guarantee to [Australia], they have no relevance to the bond to be set for the release of the vessel and the members of the crew.”⁵⁰

III. ITLOS AND PROMPT RELEASE CASES

The *Volga Case* is the fifth ITLOS decision to date dealing with prompt release.⁵¹ The decision shows a developing consistency in the Tribunal’s jurisprudence in the area, albeit one which takes a particularly narrow view of some aspects of the relevant law. The reasonableness of the bond and the relevant factors which a coastal State can take into account when setting that bond still remains an area of contention which given the variety in state practice is inevitable. The Tribunal handed down its Judgement within 21 days of Russia filing its application for prompt release. The speed and efficiency with which the Tribunal handled this case demonstrates its effectiveness. This can only lead to further confidence in its ability to address these types of cases. The *Volga Case* was also remarkable for the level of agreement between the parties on issues such as jurisdiction and the value of the vessel. The matters in dispute ultimately went to the legality of innovative Australian measures to control and combat IUU fishing in the Southern Ocean. On this occasion Australia’s initiatives were unsuccessful, which may prompt a reassessment of the need for greater regional cooperation to deal with an endangered fishery.

⁵⁰ The *Volga Case*, *supra* note 3, para 86.

⁵¹ For a review of the decisions prior to *Volga*, see Erik Franckx, ‘Reasonable Bond’ in the *Practice of the International Tribunal for the Law of the Sea*, 32 CAL. W. INT’L L. J. 303 (2002).