INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
YEAR 2002

23 December 2002

List of cases:
No. 11

THE "VOLGA" CASE

(RUSSIAN FEDERATION *v.* AUSTRALIA)

APPLICATION FOR PROMPT RELEASE

JUDGMENT

TABLE OF CONTENTS

	Paragraphs
Introduction	1 - 29
Factual background	30 - 54
Jurisdiction and admissibility	55 - 59
Non-compliance with article 73, paragraph 2, of the Convention	60 - 89
Amount and form of the bond or other financial security	90 - 93
Costs	94
Operative provisions	95

JUDGMENT

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, BALLAH, COT; *Judge* ad hoc SHEARER; *Registrar* GAUTIER.

In the "Volga" Case

between

the Russian Federation,

represented by

Mr. Pavel Grigorevich Dzubenko, Deputy Director, Legal Department, Ministry of Foreign Affairs,

as Agent;

Mr. Valery Sergeevich Knyazev, Head of Division, Legal Department, Ministry of Foreign Affairs,
Mr. Kamil Abdulovich Bekiashev, Chair for International Law, Moscow State Academy for Law,

as Co-Agents;

and

Mr. Andrew Tetley, Partner, Wilson Harle, Auckland, New Zealand, Barrister and Solicitor of the High Court of New Zealand and Solicitor of the Supreme Court of England and Wales,
Mr. Paul David, Partner, Wilson Harle, Auckland, New Zealand, Barrister and Solicitor of the High Court of New Zealand, Barrister of the Inner Temple, London, England,

as Counsel;

Mr. Ilya Alexandrovich Frolov, Desk Officer, Legal Department, Ministry of Foreign Affairs,

as Adviser,

and

Australia,

represented by

Mr. William McFadyen Campbell, First Assistant Secretary, Office of International Law, Attorney-General's Department,

as Agent and Counsel;

Mr. John Langtry, Minister and Deputy Head of Mission, Embassy of Australia, Berlin, Federal Republic of Germany,

as Co-Agent;

and

Mr. David Bennett AO QC, Solicitor-General of Australia,
Mr. James Crawford SC, Whewell Professor of International Law, University of Cambridge, Cambridge, United Kingdom,
Mr. Henry Burmester QC, Chief General Counsel, Office of the Australian Government Solicitor,

as Counsel;

Mr. Stephen Bouwhuis, Principal Legal Officer, Office of International Law, Attorney-General's Department,
Mr. Gregory Manning, Principal Legal Officer, Office of International Law, Attorney-General's Department,
Mr. Paul Panayi, International Organisations and Legal Division, Department of Foreign Affairs and Trade,
Mr. Glenn Hurry, General Manager, Fisheries and Aquaculture, Agriculture, Fisheries and Forestry Australia,
Mr. Geoffrey Rohan, General Manager Operations, Australian Fisheries Management Authority,
Ms. Uma Jatkar, Third Secretary, Embassy of Australia, Berlin, Federal Republic of Germany,

as Advisers;

Ms. Mandy Williams, Office of International Law, Attorney-General's Department,

as Assistant,

THE TRIBUNAL,

composed as above,

after deliberation,

delivers the following Judgment:

Introduction

1. On 2 December 2002, an Application under article 292 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") was filed by facsimile with the Registry of the Tribunal by the Russian Federation against Australia concerning the release of the *Volga* and members of its crew. On the same day, a letter dated 29 November 2002 from the Deputy Minister of Foreign Affairs of the Russian Federation authorizing Mr. Pavel Grigorevich Dzubenko, Deputy Director, Legal Department, Ministry of Foreign Affairs of the Russian Federation, to act as Agent of the Russian Federation was transmitted by facsimile. A copy of the Application was sent on that date by a letter of the Registrar to the Minister for Foreign Affairs of Australia and also in care of the Ambassador of Australia to Germany.

2. In accordance with article 112, paragraph 3, of the Rules of the Tribunal (hereinafter "the Rules"), the President of the Tribunal, by Order dated 2 December 2002, fixed 12 and 13 December 2002 as the dates for the hearing with respect to the Application. Notice of the Order was communicated forthwith to the parties.

3. By letter from the Registrar dated 2 December 2002, the Minister for Foreign Affairs of Australia was informed that the Statement in Response of Australia, in accordance with article 111, paragraph 4, of the Rules, could be filed with the Registry not later than 96 hours before the opening of the hearing.

4. The Application was entered in the List of cases as Case No. 11 and named the "*Volga*" Case.

5. Pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Secretary-General of the United Nations was notified by the Registrar on 2 December 2002 of the receipt of the Application.

6. On 3 December 2002, the Agent of the Russian Federation transmitted to the Tribunal a correction of the Application. This correction was accepted by leave of the President in accordance with article 65, paragraph 4, of the Rules.

7. In accordance with article 24, paragraph 3, of the Statute of the Tribunal (hereinafter "the Statute"), States Parties to the Convention were notified of the Application by a note verbale from the Registrar dated 3 December 2002.

8. On 4 December 2002, the Registrar was notified of the appointment of Mr. William McFadyen Campbell, First Assistant Secretary, Office of International Law of the Attorney-General's Department of Australia, as Agent of Australia, by a letter transmitted by facsimile

from the Minister for Foreign Affairs of Australia. The original of the letter was transmitted by bearer on 11 December 2002.

9. In accordance with articles 45 and 73 of the Rules, the President held a teleconference with the Agents of the parties on 6 December 2002, during which he ascertained their views regarding the order and duration of the presentation by each party and the evidence to be produced during the oral proceedings.

10. On 7 December 2002, the Agent of the Russian Federation submitted by bearer the original of the Application, which incorporated the correction referred to in paragraph 6. The original of the letter from the Deputy Minister of Foreign Affairs of the Russian Federation referred to in paragraph 1 was transmitted by bearer on 12 December 2002.

11. On 7 December 2002, the Australian Government filed its Statement in Response, a copy of which was transmitted forthwith to the Agent of the Russian Federation.

12. On 11 December 2002, the Agent of the Russian Federation and the Agent of Australia submitted documents in order to complete the documentation, in accordance with article 63, paragraph 1, and article 64, paragraph 3, of the Rules. Copies of the documents presented by each party were forwarded to the other party.

13. On 4 December 2002, Australia notified the Tribunal of its intention to choose Mr. Ivan Shearer AM, Challis Professor of International Law, University of Sydney, Australia, to participate as judge *ad hoc* pursuant to article 17, paragraph 2, of the Statute. By a letter of the Registrar dated 4 December 2002, the Agent of the Russian Federation was informed of the intention of Australia to choose Mr. Shearer as judge *ad hoc* and was invited to furnish any observation by 5 December 2002.

14. Since no objection to the choice of Mr. Shearer as judge *ad hoc* was raised by the Russian Federation and none appeared to the Tribunal itself, Mr. Shearer was admitted to participate in the proceedings, after having made the solemn declaration required under article 9 of the Rules at a public sitting of the Tribunal held on 11 December 2002.

15. After the closure of the written proceedings and prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 11 December 2002 in accordance with article 68 of the Rules.

16. On 11 December 2002, a list of questions which the Tribunal wished to put to the parties was communicated to the Agents.

17. On 12 December 2002, the Agent of the Russian Federation transmitted by bearer a letter dated 5 December 2002 from the Deputy Minister of Foreign Affairs of the Russian Federation confirming the appointment of Mr. Valery Sergeevich Knyazev, Head of Division, Legal Department, Ministry of Foreign Affairs of the Russian Federation, and Mr. Kamil Abdulovich Bekiashev, Chair for International Law, Moscow State Academy for Law, as Co-Agents of the Russian Federation.

18. On 12 December 2002, the Registrar was notified by a letter of the same date from the Ambassador of Australia to the Federal Republic of Germany of the appointment of

Mr. John Langtry, Minister and Deputy Head of Mission, Embassy of Australia, Berlin, Federal Republic of Germany, as Co-Agent of Australia.

19. On 12 and 13 December 2002, the President held consultations with the Agents of the parties in accordance with article 45 of the Rules.

20. Prior to the opening of the oral proceedings, the Agent of the Russian Federation and the Agent of Australia communicated information required under paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal.

21. Pursuant to article 67, paragraph 2, of the Rules, copies of the pleadings and documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings.

22. On 12 December 2002, the Agent of Australia submitted additional documents. In accordance with article 71 of the Rules, copies of these documents were communicated to the other party.

23. On 13 December 2002, pursuant to the consultations referred to in paragraph 19, the Agent of Australia submitted a map showing Australia's exclusive economic zone ("EEZ") around Heard Island and the McDonald Islands, a copy of which was transmitted to the other party.

24. During the hearing on 13 December 2002, Australia submitted an additional document. Pursuant to article 71 of the Rules, a copy of the document was communicated to the other party. By a letter dated 15 December 2002, the Russian Federation raised objections to the submission of the document. Further to a decision by the Tribunal, by a letter of the same date, the Registrar requested the Agent of the Russian Federation to offer any comments on the document by 16 December 2002. Comments were received from the Russian Federation within the time-limit set.

25. Oral statements were presented at four public sittings held on 12 and 13 December 2002 by the following:

On behalf of the Russian Federation:

Mr. Pavel Grigorevich Dzubenko, Agent,
Mr. Andrew Tetley, Counsel,
Mr. Paul David, Counsel.

On behalf of Australia:

Mr. William Campbell, Agent and Counsel,
Mr. Henry Burmester QC, Counsel,
Mr. James Crawford SC, Counsel,
Mr. David Bennett AO QC, Counsel.

26. During the oral proceedings, Counsel for Australia presented a number of maps, charts, tables, photographs and extracts from documents which were displayed on video monitors.

27. At the hearing held on 13 December 2002, Counsel for Australia replied orally to the questions referred to in paragraph 16. These responses were subsequently submitted in writing.

28. In the Application of the Russian Federation and in the Statement in Response of Australia, the following submissions were presented by the parties:

On behalf of the Russian Federation,
in the Application:

> The Applicant applies to the International Tribunal for the Law of the Sea ("**Tribunal**") for the following declarations and orders:
>
> A declaration that the Tribunal has jurisdiction under Article 292 of the United Nations Convention for the Law of the Sea 1982 ("**UNCLOS**") to hear the application.
>
> A declaration that the application is admissible.
>
> A declaration that the Respondent has contravened article 73(2) of UNCLOS in that the conditions set by the Respondent for the release of the *Volga* and three of its officers are not permitted under article 73(2) or are not reasonable in terms of article 73(2).
>
> An order that the Respondent release the *Volga* and the officers and its crew if a bond or security is provided by the owner of the vessel in an amount not exceeding AU$ 500,000 or in such other amount as the Tribunal in all the circumstances considers reasonable.
>
> An order as to the form of the bond or security referred to in paragraph 1 (d).
>
> An order that the Respondent pay the costs of the Applicant in connection with the application.

On behalf of Australia,
in the Statement in Response:

> Australia requests that the Tribunal decline to make the orders sought in paragraph 1 of the Memorial of the Russian Federation. The Respondent requests the Tribunal make the following orders:
>
> (1) that the level and conditions of bond set by Australia for the release of the *Volga* and the level of bail set for the release of the crew are reasonable; and

(2) that each party shall bear its own costs of the proceedings.

29. In accordance with article 75, paragraph 2, of the Rules, the following final submissions were presented by the parties at the end of the hearing:

On behalf of the Russian Federation,

> The Russian Federation asks that the Tribunal make the following orders and declarations:
>
> (a) A declaration that the Tribunal has jurisdiction under Article 292 of the United Nations Convention for the Law of the Sea 1982 ("**UNCLOS**") to hear the application.
>
> (b) A declaration that the application is admissible.
>
> (c) A declaration that the Respondent has contravened article 73(2) of UNCLOS in that the conditions set by the Respondent for the release of the *Volga* and three of its officers are not permitted under article 73(2) or are not reasonable in terms of article 73(2).
>
> (d) An order that the Respondent release the *Volga* and the officers and its crew if a bond or security is provided by the owner of the vessel in an amount not exceeding AU$ 500,000 or in such other amount as the Tribunal in all the circumstances considers reasonable.
>
> (e) An order as to the form of the bond or security referred to in paragraph 1(d).
>
> (f) An order that the Respondent pay the costs of the Applicant in connection with the application.

On behalf of Australia,

> For the reasons set out in the Respondent's written and oral submissions, the Respondent requests that the Tribunal reject the application made by the Applicant.

Factual background

30. The *Volga* is a long-line fishing vessel flying the flag of the Russian Federation. Its owner is Olbers Co. Limited, a company incorporated in Russia. The Master of the *Volga* was Alexander Vasilkov, a Russian national.

31. According to the Certificate of Registration, the *Volga* was entered in the State Ship's Registry of Taganrog Maritime Fishing Port on 6 September 2000. On 24 November 2000, the Russian Federation provided the *Volga* with a fishing licence which reads, *inter alia*, as follows:

[*Translation from Russian*]

> **Permitted types of activity:** Commercial fishing, namely harvesting of fish, other marine animals and plants for commercial purposes, undertaken on the continental shelf and in the exclusive economic zone of the Russian Federation, in the open sea and coastal zones of foreign countries. […]
>
> **Conditions under which the permitted types of activity can be conducted:** Observance of the rules governing the fishing industry, the conditions of international agreements, the rules of safe navigation and supply of standard information on catches.
>
> **Term of validity of licence:** 3 (three) years

32. On 7 February 2002, at approximately 1223 hours (or 0423 hours GMT), the *Volga* was boarded by Australian military personnel from an Australian military helicopter from the Royal Australian Navy frigate *HMAS Canberra*. At the time of boarding, the *Volga* was at the approximate position 51˚35S, 78˚47E, which is a point located beyond the limits of the EEZ of the Australian Territory of Heard Island and the McDonald Islands.

33. The Applicant states that, at no time prior to the boarding, did the helicopter or any Australian ship or aircraft on government service require or order the vessel to stop while the vessel was in the internal waters, the territorial sea, the contiguous zone or the EEZ of Australia and that at no time prior to the boarding did the vessel receive any communication from the helicopter or any Australian ship or aircraft on government service. The Respondent maintains that a broadcast was made from the helicopter to the *Volga*, which was observed to be fleeing from the Australian EEZ, indicating that the vessel was to be boarded; that calculations made at the time on board *HMAS Canberra* indicated that the *Volga* was still in the Australian EEZ; and that, subsequently, more detailed recalculations indicated that at the time of the first communication the vessel was a few hundred metres outside the zone.

34. After the boarding, on 7 February 2002, the Master of the *Volga* was served with a notice of apprehension by the commanding officer of *HMAS Canberra*, in the following terms:

> **NOTICE OF APPREHENSION**
>
> Your vessel was today boarded by the Royal Australian Navy for the purpose of determining if it has been conducting illegal fishing operations in the Australian Heard Island/McDonald Island Exclusive Economic Zone.
>
> Officers of the Royal Australian Navy and the Australian Fisheries Management Authority have now determined that your vessel has in fact been illegally fishing in the EEZ and your vessel has therefore been apprehended under the Australian Fisheries Management Act of 1991. A Naval Steaming Party will be embarked in your vessel with orders to proceed to an Australian port and you are directed to comply with the orders of the Officer in Charge of the Steaming Party.

> You will remain in Command of your vessel, subject to the directives of the OIC Steaming Party. The conduct, compliance and discipline of your crew will remain your responsibility and you should note that you may be called to account for the actions of yourself and your crew in any subsequent proceedings.
>
> You should be in no doubt that it is the Royal Australian Navy's intention that your vessel will be taken to an Australian port. This will be achieved in the safest and most expeditious manner and your co-operation in achieving this is requested.

35. After being apprehended, the *Volga* was escorted to the Western Australian port of Fremantle, where it arrived on 19 February 2002. On the same date, the Master and crew of the *Volga* were detained pursuant to a notice of detention issued under the Fisheries Management Act 1991 for the purposes of determining, during the period of detention, whether or not they would be charged with offences against any one or more of sections 99, 100, 100A, 101, 101A and 101B of the said Act.

36. On 20 February 2002, a notice of seizure was served on the Master, which reads as follows:

> To the Master of the boat VOLGA, I, Thomas J Morris, an officer as defined in Section 4 of the *Fisheries Management Act 1991* (the Act), hereby give notice pursuant to Section 106C of the Act, that the following things have been seized:
>
> 1. the boat VOLGA (including *all* nets, traps and equipment and catch).
>
> The things described above will be condemned as forfeited unless the owner of the things or the person who had possession, custody or control of these things immediately before they/it were/was seized, gives a written claim in English for the things to the Managing Director of AFMA within 30 days of the date of this notice.
>
> A written claim must be given to:
>
> The Managing Director
> Australian Fisheries Management Authority
> …

37. A valuation report dated 27 February 2002, prepared on the instructions of the Australian authorities for bonding purposes, valued the *Volga* at US$ 1 million and fuel**,** lubricants, and equipment at a total of AU$ 147,460.

38. On 6 March 2002, the chief mate, the fishing master and the fishing pilot (hereinafter "the three members of the crew"), all of whom are Spanish nationals, were charged in the Court of Petty Sessions of Western Australia with an indictable offence that:

> On or about the 7th day of February 2002 [the three members of the crew] did at a place in the Australian Fishing Zone use a foreign fishing boat, namely the VOLGA for commercial fishing without there being in force a foreign fishing license authorising the use of the said boat at that place, contrary to section 100(2) of the Fisheries Management Act 1991.

39. Section 100 of the Fisheries Management Act 1991 provides:

> **Using foreign boat for fishing in AFZ — strict liability offence**
> (1) A person must not, at a place in the AFZ, use a foreign boat for commercial fishing unless:
> (a) there is in force a foreign fishing licence authorising the use of the boat at that place; or
> (b) if the boat is a Treaty boat—a Treaty licence is in force in respect of the boat authorising the use of the boat at that place.
> (2) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 2,500 penalty units.
> (2A) Strict liability applies to subsection (2).
> (3) An offence against this section is an indictable offence but may be heard and determined, with the consent of the prosecutor and the defendant, by a court of summary jurisdiction.
> (4) If an offence is dealt with by a court of summary jurisdiction, the penalty that the court may impose is a fine not exceeding 250 penalty units.

40. A penalty unit is defined in Section 4AA of the Australian Crimes Act 1914 as meaning AU$ 110.

41. The three members of the crew were admitted to bail by order of 6 March 2002 on condition that they deposit AU$ 75,000 cash each; that they reside at a place approved by the Supervising Fisheries Officer with the Australian Fisheries Management Authority ("AFMA"); that they surrender all passports and seaman's papers to AFMA; and that they not leave the metropolitan area of Perth, Western Australia. As the other members of the *Volga*'s crew were not charged with any offences, the owner's representatives arranged for the repatriation of the remaining crew members of the *Volga* to their respective countries of origin.

42. The owner of the *Volga* posted bail in the total amount of AU$ 225,000 into court for the three members of the crew on or about 23 March 2002. Prior to this date, on 16 March 2002, the Master of the *Volga* died in an Australian hospital. He was not charged with any offences prior to his death.

43. On 30 May 2002, the three members of the crew obtained a variation of the bail conditions so as to enable them to return to Spain, under certain conditions, pending the hearing of the criminal charges brought against them.

44. On 14 June 2002, the Supreme Court of Western Australia (Wheeler J), on appeal by the Commonwealth Director of Public Prosecutions, ordered a variation of the bail imposed on 30 May 2002, so as to require, in lieu of the existing AU$ 75,000, a deposit of

AU$ 275,000 in respect of each of the three members of the crew. An appeal was lodged against this decision.

45. On 23 August 2002, a further charge was laid against the fishing master under section 100 of the Fisheries Management Act and further bail of AU$ 20,000 was set by the Court of Petty Sessions in respect of this charge. On 27 August 2002 the owner paid this additional amount.

46. After the Tribunal began its deliberations in the present case, it was informed by the Agent of Australia by letter dated 17 December 2002 that, on 16 December 2002, the Full Court of the Supreme Court of Western Australia had upheld the appeal of the three members of the crew of the *Volga* from the decision of Wheeler J in relation to their bail conditions. The Full Court ordered that the three members of the crew be permitted to leave Australia and return to Spain subject to the following conditions of bail:

> 1. Each of the Appellants be granted bail on the condition that they deposit cash by way of a bail deposit in the following amounts:
>   (1) MANUEL PEREZ LIJO $95,000.00; and
>   (2) JOSE MANUEL LOJO EIROA and JUAN MANUEL GONZALEZ FOLGAR, $75,000.00 each.
>
> 2. Within 21 days from the date of these Orders each of the Appellants surrender to the Australian Embassy in Madrid:
>   (1) their passport; and
>   (2) seaman's papers (to include any licence or qualification).
>
> 3. Each Appellant upon return to Spain to report within 21 days to the Australian Embassy in Madrid and thereafter to report monthly to the Australian Embassy in Madrid or a consular official nominated by the Australian Embassy in Madrid.
>
> 4. Upon any default in respect of condition 2 or 3 herein any Appellant in default will forfeit his bail deposit.
>
> 5. Each Appellant to enter into a bail undertaking in the form annexed hereto.
>
> 6. The passports and seaman's papers currently held by the Australian Fishing Management Authority to be returned to the Appellants within 24 hours of each Appellant executing their bail undertaking as annexed hereto to allow each Appellant to travel to Spain.

47. The Registrar, upon instructions of the President, informed the parties on 17 December 2002 that the Tribunal was ready to receive, not later than 18 December 2002, observations or further comments which they might wish to provide regarding this communication. Both parties transmitted communications by 18 December 2002.

48. In his communication, the Agent of the Russian Federation made the following observation:

> The decision of the Court attaches conditions to release the crew not envisaged by article 73(2) of UNCLOS and thus in our view is not permissible or reasonable in terms of the Convention.
>
> In the circumstances, the Russian Federation maintains its submission that Australia has set an unreasonable bond for the release of the vessel and crew and maintains its application for release of the vessel and crew in full.

49. Upon instructions of the Tribunal, the Registrar requested on 18 December 2002 the Agent of Australia to provide further information concerning the current status of the three members of the crew. The Agent of Australia informed the Tribunal by facsimile of 19 December 2002 of the following:

> On 17 December 2002, the crew members each signed a bail undertaking on the terms set down by the Full Court of the Supreme Court of Western Australia on the same date. [...]
>
> On 18 December 2002, an officer of the Australian Fisheries Management Authority returned the passports and seaman's papers of the crew members to their solicitor. The solicitor advised the officer that the crew members were scheduled to depart Australia on 20 December 2002. On 19 December 2002, counsel for the crew members confirmed this advice in the course of proceedings before the Federal Court of Australia.

Copies of the bail undertakings signed by the crew members were attached to that communication. A further communication from the Agent of Australia was received on 21 December 2002, which confirmed "that the three crew members, Messrs. Lijo, Eiroa and Folgar, departed by air from Perth, Australia at 4.00 pm on 20 December 2002 (Perth time) bound for Madrid via Singapore". Copies of both communications were sent forthwith to the Agent of the Russian Federation.

50. Section 106A of the Fisheries Management Act 1991 provides:

> **Forfeiture of things used in certain offences**
> The following things are forfeited to the Commonwealth:
> (a) a foreign boat used in an offence against:
>   (i) subsection 95(2); or
>   (ii) section 99; or
>   (iii) section 100; or
>   (iv) section 100A; or
>   (v) section 101; or
>   (vi) section 101A;
> (b) a boat used in an offence against section 101B as a support boat (as defined in that section);
> (c) a net or trap, or equipment, that:
>   (i) was on a boat described in paragraph (a) or (b) at the time of the offence mentioned in that paragraph; or
>   (ii) was used in the commission of an offence against subsection 95(2) or section 99, 100, 100A, 101, 101A or 101B;

(d) fish:

(i) on a boat described in paragraph (a) or (b) at the time of the offence mentioned in that paragraph; or

(ii) involved in the commission of an offence against subsection 95(2) or section 99, 100, 100A, 101, 101A or 101B.

51. On 20 May 2002, pursuant to the provisions of the Fisheries Management Act 1991, the catch found on board the *Volga* was sold by the Australian authorities for AU$ 1,932,579.28. According to the Respondent, the catch consisted of 131.422 tonnes of Patagonian toothfish (*Dissostichus eleginoides*) and 21.494 tonnes of bait. The proceeds of the sale of the catch are being held in trust by the Australian Government Solicitor pending the outcome of the legal proceedings in the Australian courts.

52. On 21 May 2002, the owner of the *Volga* instituted proceedings in the Federal Court of Australia to prevent the forfeiture of the vessel, fish, nets and equipment under the Fisheries Management Act 1991. These proceedings are pending.

53. Following a request by counsel for the owner as to what conditions AFMA would seek to impose upon a release of the *Volga*, AFMA, in a letter dated 26 July 2002, responded as follows:

> AFMA has considered the matter and would require a security to be lodged amounting to AUD$ 3,332,500 for release of the vessel. The security amount is based on what Australia considers reasonable in respect of three elements:
>
> - assessed value of the vessel, fuel, lubricants and fishing equipment
> - potential fines
> - carriage of a fully operational VMS [Vessel Monitoring System] and observance of CCAMLR (Commission for the Conservation of Antarctic Marine Living Resources) conservation measures until the conclusion of legal proceedings.
>
> […]
>
> Accordingly, I ask you to provide the information outlined below in a format that can be independently verified:
>
> - the ultimate beneficial owners of the vessel, including the name(s) of the parent company (or companies) to Olbers;
> - the names and nationalities of the Directors of Olbers and of the parent company (or companies);
> - the name, nationality and location of the manager(s) of the vessel's operations;
> - the insurers of the vessel; and,
> - the financiers, if any, of the vessel.

54. By facsimile of 26 August 2002, counsel for the owner communicated to AFMA the following:

> AFMA seeks AU$ 3,332,500 by way of security for release of the vessel and sets other conditions of release. Our client is not prepared to bond the

vessel in the amount sought by AMFA nor does it agree that the extra conditions that AFMA seeks to attach to the release are reasonable.
[…]
In the circumstances, our client would agree to bond the vessel for AU$ 500,000 by way of a bank deposit or unconditional guarantee.

Jurisdiction and admissibility

55. The Tribunal will, at the outset, examine the question whether it has jurisdiction to entertain the Application and whether the Application is admissible. Article 292 of the Convention reads as follows:

Article 292

Prompt release of vessels and crews

1. 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.

2. The application for release may be made only by or on behalf of the flag State of the vessel.

3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.

4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

56. As far as jurisdiction is concerned, the Tribunal notes that the Respondent does not contest the jurisdiction of the Tribunal. The Russian Federation and Australia are both States Parties to the Convention. The Russian Federation ratified the Convention on 12 March

1997 and the Convention entered into force for the Russian Federation on 11 April 1997. Australia ratified the Convention on 5 October 1994 and the Convention entered into force for Australia on 16 November 1994. The status of the Russian Federation as the flag State of the *Volga* is not disputed. The parties did not agree to submit the question of release from detention to any other court or tribunal within 10 days of the time of detention. The Application has been duly made by the Russian Federation in accordance with article 292, paragraph 2, of the Convention. The Application satisfies the requirements of articles 110 and 111 of the Rules.

57. For the above reasons, the Tribunal finds that it has jurisdiction to adjudicate on the case.

58. As regards admissibility, the Applicant alleges that the Respondent has not complied with the provisions of article 73, paragraph 2, of the Convention for the prompt release of a vessel and its crew because the bond set by the Respondent is in all circumstances unreasonable. The Respondent challenges the allegation of non-compliance with the provisions of article 73, paragraph 2, of the Convention and contends that the bond set by it for the release of the ship and its crew is reasonable. However, the Respondent concedes that the Application is admissible under article 292 of the Convention.

59. The allegation of the Applicant is that the Respondent has not complied with article 73, paragraph 2, of the Convention. This is one of the provisions of the Convention "for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security" to which article 292, paragraph 1, refers. The Tribunal therefore finds that the Application is admissible.

Non-compliance with article 73, paragraph 2, of the Convention

60. The Applicant alleges that the Respondent has not complied with article 73, paragraph 2, of the Convention concerning the prompt release of the three members of the crew and vessel, upon the posting of a reasonable bond or security. In support of the allegation it submits that the Respondent has set conditions for the release of the vessel and three members of the crew which are not permissible under article 73, paragraph 2, or are unreasonable in terms of article 73, paragraph 2, of the Convention.

61. The Respondent maintains that the bond it has set for the release of the *Volga* is reasonable, having regard to the value of the *Volga*, its fuel, lubricants and fishing equipment; the gravity of the offences and potential penalties; the level of international concern over illegal fishing; and the need to secure compliance with Australian laws and international obligations pending the completion of domestic proceedings. The Respondent also contends that the bond set by Australia for the release of the crew members is reasonable.

62. When the Tribunal is called upon, under article 292 of the Convention, to assess whether the bond set by a party is reasonable, it must apply the Convention and other rules of international law not incompatible with the Convention.

63. In its previous judgments, the Tribunal indicated some of the factors that should be taken into account in assessing a reasonable bond for the release of a vessel or its crew under article 292 of the Convention. In the *"Camouco" Case*, the Tribunal indicated factors

relevant in an assessment of the reasonableness of bonds or other financial security, as follows:

> The Tribunal considers that a number of factors are relevant in an 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 the bond imposed by the detaining State and its form.
> (Judgment of 7 February 2000, paragraph 67).

64. In the *"Monte Confurco" Case*, the Tribunal confirmed this statement and added that "[t]his 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" (Judgment of 18 December 2000, paragraph 76).

65. The Tribunal is required to determine whether or not the bond set by the Respondent is reasonable in terms of the Convention. As held in the *"Monte Confurco" Case*:

> [T]he object of article 292 of the Convention is to reconcile the interest of the flag State to have its vessel and its crew released promptly with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties.
>
> The balance of interests emerging from articles 73 and 292 of the Convention provides the guiding criterion for the Tribunal in its assessment of the reasonableness of the bond. […]
> (Judgment of 18 December 2000, paragraphs 71 and 72).

In assessing the reasonableness of the bond or other security, due account must be taken of the terms of the bond or security set by the detaining State, having regard to all the circumstances of the particular case.

66. The Tribunal will now deal with the application of the various factors in the present case.

67. Turning first to the gravity of the offences alleged to have been committed in the present case, it is noted that the offences relate to the conservation of the fishery resources in the exclusive economic zone. The Respondent has submitted that the potential penalties under Australian law indicate the grave nature of the offence and support its contention that the bond set for the release of the vessel and members of its crew is reasonable. The Respondent has pointed out that continuing illegal fishing in the area covered by the Convention for the Conservation of Antarctic Marine Living Resources ("CCAMLR") has resulted in a serious depletion of the stocks of Patagonian toothfish and is a matter of international concern. It has invited the Tribunal to take into account "the serious problem of continuing illegal fishing in the Southern Ocean" and the dangers this poses to the conservation of fisheries resources and the maintenance of the ecological balance of the environment. According to the Respondent, this problem and the international concern that it raises provide ample justification for the measures it has taken, including the penalties

provided in its legislation and the high level of bond that it has set for the release of ships and their crews when charged with violation of its laws.

68. The Tribunal takes note of the submissions of the Respondent. The Tribunal understands the international concerns about illegal, unregulated and unreported fishing and appreciates the objectives behind the measures taken by States, including the States Parties to CCAMLR, to deal with the problem.

69. The Tribunal must, however, emphasize that, in the present proceedings, it is called upon to assess whether the bond set by the Respondent is reasonable in terms of article 292 of the Convention. The purpose of the procedure provided for in article 292 of the Convention is to secure the prompt release of the vessel and crew upon the posting of a reasonable bond, pending completion of the judicial procedures before the courts of the detaining State. Among the factors to be considered in making the assessment are the penalties that may be imposed for the alleged offences under the laws of the Respondent. It is by reference to these penalties that the Tribunal may evaluate the gravity of the alleged offences. The Respondent has pointed out that the penalties provided for under its law in respect of the offences with which the members of the crew are charged indicate that these offences are grave. The Applicant does not deny that the alleged offences are considered to be grave under Australian law.

70. According to the laws of Australia, the maximum total of fines imposable on the three officers of the *Volga* is AU$ 1,100,000 and the vessel, its equipment and fish on board are liable to forfeiture.

71. There is no dispute between the parties as to the value of the vessel and its cargo. The vessel has been valued in the amount of US$ 1 million (approximately AU$ 1.8 million) and the value of fuel, lubricants and equipment amounts to AU$ 147,460. The catch and bait on board were sold by the Australian authorities for AU$ 1,932,579.28.

72. The bond sought by the Respondent is for AU$ 3,332,500. This consists of three components, namely:
- a security to cover the assessed value of the vessel, fuel, lubricants and fishing equipment (AU$ 1,920,000);
- an amount (AU$ 412,500) to secure payment of potential fines imposed in the criminal proceedings that are still pending against members of the crew;
- a security (AU$ 1,000,000) related to the carriage of a fully operational VMS and observance of CCAMLR conservation measures.

73. In the view of the Tribunal, the amount of AU$ 1,920,000 sought by the Respondent for the release of the vessel, which represents the full value of the vessel, fuel, lubricants and fishing equipment and is not in dispute between the parties, is reasonable in terms of article 292 of the Convention.

74. Following the upholding of the appeal of the three members of the crew by the Supreme Court of Western Australia and their departure from Australia, the Tribunal considers that setting a bond in respect of the three members of the crew would serve no practical purpose. The Tribunal has noted the comments of the Applicant regarding the bail conditions set by the Supreme Court of Western Australia for permitting the three members

of the crew to leave Australia. The Tribunal does not consider it necessary, in the present circumstances, to deal with the issues raised by the Applicant.

75. Besides requiring a bond, the Respondent has made the release of the vessel conditional upon the fulfilment of two conditions: that the vessel carry a VMS, and that information concerning particulars about the owner and ultimate beneficial owners of the ship be submitted to its authorities. The Respondent contends that the carrying of the VMS is necessary in order to prevent further illicit fishing once the ship is released. It further states that because the payment of a bond is a significant transaction it is entitled to know with whom the arrangements are to be made. The Applicant argues that such conditions find no basis in article 73, paragraph 2, and in the Convention in general, because only conditions that relate to the provision of a bond or security in the pecuniary sense can be imposed.

76. In the view of the Tribunal, it is not appropriate in the present proceedings to consider whether a coastal State is entitled to impose such conditions in the exercise of its sovereign rights under the Convention. In these proceedings, the question to be decided is whether the “bond or other security” mentioned in article 73, paragraph 2, of the Convention may include such conditions.

77. In interpreting the expression “bond or other security” set out in article 73, paragraph 2, of the Convention, the Tribunal considers that this expression must be seen in its context and in light of its object and purpose. The relevant context includes the provisions of the Convention concerning the prompt release of vessels and crews upon the posting of a bond or security. These provisions are: article 292; article 220, paragraph 7; and article 226, paragraph 1(b). They use the expressions “bond or other financial security” and “bonding or other appropriate financial security”. Seen in this context, the expression “bond or other security” in article 73, paragraph 2, should, in the view of the Tribunal, be interpreted as referring to a bond or security of a financial nature. The Tribunal also observes, in this context, that where the Convention envisages the imposition of conditions additional to a bond or other financial security, it expressly states so. Thus article 226, paragraph 1(c), of the Convention provides that “the release of a vessel may, whenever it would present an unreasonable threat of damage to the marine environment, be refused or made conditional upon proceeding to the nearest appropriate repair yard”. It follows from the above that the non-financial conditions cannot be considered components of a bond or other financial security for the purpose of applying article 292 of the Convention in respect of an alleged violation of article 73, paragraph 2, of the Convention. The object and purpose of article 73, paragraph 2, read in conjunction with article 292 of the Convention, is to provide the flag State with a mechanism for obtaining 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. The inclusion of additional non-financial conditions in such a security would defeat this object and purpose.

78. The Respondent has required, as part of the security for obtaining the release of the *Volga* and its crew, payment by the owner of one million Australian dollars. According to the Respondent, the purpose of this amount is to guarantee the carriage of a fully operational monitoring system and observance of Commission for the Conservation of Antarctic Marine Living Resources conservation measures until the conclusion of legal proceedings. The Respondent explained that this component of the bond was to ensure "that the *Volga* complies with Australian law and relevant treaties to which Australia is a party until the completion of the domestic legal proceedings"; that the ship does not "enter Australian

territorial waters other than with permission or for the purpose of innocent passage prior to the conclusion of the forfeiture proceedings"; and further to ensure that the vessel "will not be used to commit further criminal offences".

79. The Tribunal cannot, in the framework of proceedings under article 292 of the Convention, take a position as to whether the imposition of a condition such as what the Respondent referred to as a "good behaviour bond" is a legitimate exercise of the coastal State's sovereign rights in its exclusive economic zone. The point to be determined is whether a "good behaviour bond" is a bond or security within the meaning of these terms in articles 73, paragraph 2, and 292 of the Convention.

80. The Tribunal notes that article 73, paragraph 2, of the Convention concerns a bond or a security for the release of an "arrested" vessel which is alleged to have violated the laws of the detaining State. A perusal of article 73 as a whole indicates that it envisages enforcement measures in respect of violations of the coastal State's laws and regulations alleged to have been committed. In the view of the Tribunal, a "good behaviour bond" to prevent future violations of the laws of a coastal State cannot be considered as a bond or security within the meaning of article 73, paragraph 2, of the Convention read in conjunction with article 292 of the Convention.

81. The Applicant submits that, in assessing the reasonableness of any bond, the Tribunal should take into account the circumstances of the seizure of the vessel on the high seas, although it made it clear that it did not invite the Tribunal to consider the merits of the case.

82. The Respondent contends that this is not a matter for consideration by the Tribunal because, in its view, the Applicant is "clearly inviting the Tribunal to pre-judge the merits of any proceedings threatened by the Applicant in relation to the seizure of the *Volga*".

83. In the view of the Tribunal, matters relating to the circumstances of the seizure of the *Volga* as described in paragraphs 32 to 33 are not relevant to the present proceedings for prompt release under article 292 of the Convention. The Tribunal therefore cannot take into account the circumstances of the seizure of the *Volga* in assessing the reasonableness of the bond.

84. The fish and bait that were on board the *Volga* at the time of its arrest have been sold by the Australian authorities. According to the Respondent, the proceeds are being held in trust, pending the final outcome of the proceedings against the members of the crew. The Applicant has invited the Tribunal to treat the proceeds of the sale of the catch as security given by the owner for the release of the vessel and its crew. The Respondent, however, contends that neither the fish nor the proceeds of their sale should be treated as security given by the owner, since the fish are subject to forfeiture under the laws of Australia.

85. Under the laws of Australia the fish on board the *Volga* are subject to confiscation, if the domestic courts find that they were illegally caught within the EEZ of the Respondent. However, the Respondent may be obliged to return the proceeds of the sale to the owner of the ship if the domestic courts conclude that the fish were not caught within the EEZ of Australia. In effect, the catch and the vessel, the fuel, lubricants and the equipment on board, all form part of the guarantee that the Respondent needs to ensure that the final decisions of the domestic courts can be fully enforced. However, a bond or other financial security for the purposes of article 292 of the Convention is needed only to ensure full protection of

Australia's potential right in the vessel and possible fines against the members of the crew. No such bond is necessary in respect of the catch since Australia holds the proceeds of the sale.

86. Although the proceeds of the sale of the catch represent a guarantee to the Respondent, they have no relevance to the bond to be set for the release of the vessel and the members of the crew. Accordingly, the question of their inclusion or exclusion from the bond does not arise in this case.

87. The Tribunal must, however, emphasize that the proceeds of the sale of the catch are included in the overall amount that will be retained by the Respondent or returned to the Applicant, as the case may be, depending on the final decisions on the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew.

88. On the basis of the above considerations, and keeping in view the overall circumstances of this case, the Tribunal considers that the bond as sought by Australia is not reasonable within the meaning of article 292 of the Convention.

89. For the above reasons, the Tribunal finds that the Application with respect to the allegation of non-compliance with article 73, paragraph 2, of the Convention is well-founded for the purposes of these proceedings and that, consequently, Australia must release promptly the *Volga* upon the posting of a bond or other financial security to be determined by the Tribunal.

Amount and form of the bond or other financial security

90. On the basis of the foregoing considerations, the Tribunal is of the view that a bond for the release of the *Volga*, the fuel, lubricants and fishing equipment should be in the amount of AU$ 1,920,000.

91. With respect to the form of any bond or financial security that the Tribunal may order, the Applicant submits that a bank undertaking would be an appropriate form of security for the Tribunal to order in accordance with its powers to do so pursuant to article 113, paragraph 2, of the Rules.

92. The Respondent submits that an appropriate form of security would be a cash payment to be held in trust by the Australian authorities or a bank guarantee from an Australian bank.

93. The Tribunal is of the view that the bond or other security should be, unless the parties otherwise agree, in the form of a bank guarantee from a bank present in Australia or having corresponding arrangements with an Australian bank.

Costs

94. The rule in respect of costs in proceedings before the Tribunal, as set out in article 34 of its Statute, is that each party shall bear its own costs, unless the Tribunal decides otherwise. In the present case, the Tribunal sees no need to depart from the general rule that each party shall bear its own costs.

Operative provisions

95. For these reasons,

THE TRIBUNAL,

(1) Unanimously,

Finds that the Tribunal has jurisdiction under article 292 of the Convention to entertain the Application made by the Russian Federation on 2 December 2002.

(2) Unanimously,

Finds that the Application with respect to the allegation of non-compliance with article 73, paragraph 2, of the Convention is admissible.

(3) By 19 votes to 2,

Finds that the allegation made by the Applicant that the Respondent has not complied with the provisions of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security is well-founded;

FOR: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, BALLAH, COT;

AGAINST: *Judge* ANDERSON; *Judge* ad hoc SHEARER.

(4) By 19 votes to 2,

Decides that Australia shall promptly release the *Volga* upon the posting of a bond or other security to be determined by the Tribunal;

FOR: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, BALLAH, COT;

AGAINST: *Judge* ANDERSON; *Judge* ad hoc SHEARER.

(5) By 19 votes to 2,

Determines that the bond or other security shall be AU$ 1,920,000, to be posted with Australia;

FOR: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, BALLAH, COT;

AGAINST: *Judge* ANDERSON; *Judge* ad hoc SHEARER.

(6) Unanimously,

Determines that the bond shall be in the form of a bank guarantee from a bank present in Australia or having corresponding arrangements with an Australian bank or, if agreed to by the parties, in any other form.

(7) Unanimously,

Decides that each party shall bear its own costs.

Done in English and in French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this twenty-third day of December, two thousand and two, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of the Russian Federation and the Government of Australia, respectively.

(Signed) L. Dolliver M. NELSON,
President.

(Signed) Philippe GAUTIER,
Registrar.

Vice-President VUKAS, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(Initialled) B.V.

Judge MARSIT, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(Initialled) M.M.M.

Judge COT, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) J.-P.C.

Judge ANDERSON, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(Initialled) D.H.A.

Judge ad hoc SHEARER, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(Initialled) I.S.

DECLARATION OF VICE-PRESIDENT VUKAS

1. I voted in favour of the Tribunal's findings contained in paragraph 95 of the Judgment since I agree with these findings with regard to their main objective, that is the release of the *Volga*.

2. However, I dissociate myself from all statements or conclusions in the Judgment which are based on the proclaimed exclusive economic zone around Heard Island and the McDonald Islands.

I took the same position in the *"Monte Confurco" Case*, questioning on the basis of international law the appropriateness of the establishment of the exclusive economic zone around the Kerguelen Islands.[1] I expressed serious doubts as to whether the establishment of the exclusive economic zone off the shores of those "uninhabitable and uninhabited" islands[2] was in accordance with the reasons which prompted the Third United Nations Conference on the Law of the Sea (UNCLOS III) to create that specific legal régime and with the letter and spirit of the provisions on the exclusive economic zone contained in the United Nations Convention on the Law of the Sea (LOS Convention).

In the present case, an exclusive economic zone has been proclaimed by Australia off the coasts of two uninhabited islands which are much smaller than the Kerguelen Islands. As I did not do so in my Declaration attached to the Judgment in the *"Monte Confurco" Case*, I feel obliged to explain my position concerning the appropriation of vast areas of the oceans by some States which possess tiny uninhabited islands thousands of miles from their own coasts.

The reasons for the establishment of the exclusive economic zone régime

3. Many coastal States have considered it just and equitable to secure for their coastal population some priority in the fisheries even beyond the outer limits of their territorial sea. As a consequence of such a tendency, a resolution adopted at the 1958 United Nations Conference on the Law of the Sea considered the special situation of countries whose coastal population depended "upon coastal fisheries for their livelihood or economic development in an area of the high seas adjacent to the territorial sea of the coastal State …".[3]

At the Second United Nations Conference on the Law of the Sea (Geneva, 1960) a proposal claiming preferential rights for the fisheries of the coastal State in the high seas adjacent to its waters if "the exploitation of the living resources of the high seas in that area [was] of fundamental importance to the economic development of the coastal State or the feeding of its population" was widely supported.[4]

---

[1] "*Monte Confurco*" (*Seychelles* v. *France*)*, Prompt Release, Judgment*, *ITLOS Reports 2000,* Declaration of Judge Vukas*,* p. 122.

[2] These were the words used to describe the Kerguelen Islands by Captain Yves de Kerguelen-Trémarec, who discovered them: The Kerguelen Islands, Southern Indian Ocean, www.btinternet.com/~sa_sa/kerguelen_islands.html.

[3] Resolution VI, "Special situations relating to coastal fisheries", *First United Nations Conference on the Law of the Sea, Official Records,* Vol. II (Doc. A/CONF.13/38), p. 144.

[4] Doc. A/CONF.19/L.12, "Brazil, Cuba, and Uruguay: amendments to the second proposal in document A/CONF.19/L.4", *Second United Nations Conference on the Law of the Sea*, *Official Records*, Vol. I (Doc. A/CONF.19/8), p. 173.

4. “[T]he concept of preferential rights of fishing in adjacent waters in favour of the coastal State in a situation of special dependence on its coastal fisheries” was in 1974 confirmed by the International Court of Justice as being a concept crystallized as customary international law.[5]

5. The insistence of developing coastal States that the preferential fishing rights of their population be recognized in an area beyond their territorial waters – already confirmed by the domestic legislation of some of those States – resulted at UNCLOS III in the adoption of the régime of the exclusive economic zone.

The scope of the creation of this new international régime at sea is clearly stated by René-Jean Dupuy:

> The notion of an economic zone, in the view of the developing coastal States, has the purpose of helping them gain access to the resources they previously could not claim; it therefore has unquestionable merit from the standpoint of promoting their interests.[6]

Thus, the protection of the economic interests of the coastal States, and in particular of their population in the coastal areas, has been the essential factor in establishing this new régime at sea. This is clear not only from the name of the new legal régime itself, but also from the main provisions on the exclusive economic zone in the LOS Convention. The basic rule (article 56, paragraph 1(a)) proclaims the sovereign rights of coastal States “for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living”. The conservation and management measures undertaken for the maintenance of the living resources in the zone have to take into account, *inter alia*, “the economic needs of coastal fishing communities” (article 61, paragraph 3).

The characteristics of Heard Island and the McDonald Islands

6. All these economic interests and concerns do not exist in respect of uninhabited islands such as Heard Island and the McDonald Islands. There can be no “coastal fishing communities”, as “[t]here is no permanent habitation”.[7] According to the same source (UNEP – Protected Areas Programme), “Heard Island is visited infrequently, and the McDonald Islands very rarely.”

According to *Encyclopaedia Britannica* “[m]uch of its [Heard Island’s] surface is covered with snow and ice … The McDonalds are a group of uninhabited rocky islets 25 miles (40 km) west of Heard Island”.[8]

---

[5] *Fisheries Jurisdiction* (*United Kingdom* v. *Iceland), Merits, Judgment*, *I.C.J. Reports 1974,* p. 23.
[6] René-Jean Dupuy, “The Sea under National Competence”, René-Jean Dupuy and Daniel Vignes (eds), *A Handbook on the New Law of the Sea,* 1, Martinus Nijhoff Publishers, Dordrecht/Boston/Lancaster, 1991, p. 281.
[7] Protected Areas Programme, World Heritage Sites, Commonwealth of Australia, Heard Island and McDonald Islands (HIMI), <http://www.wcmc.org.uk/protected_areas/data/sample/0399w.htm>.
[8] “Heard and McDonald Islands” *Encyclopaedia Britannica* <http://search.eb.com/eb/article?eu=40541>.

Taking into account all these data, one should not ignore article 121, paragraph 3, of the LOS Convention, where we find many of the elements obviously present in this group of Australian islands/isles/islets/rocks: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

Although the terminology used in article 121, paragraph 3, is vague, and the relationships between the components of this rule are rather unclear, taking into account the legislative history of this provision, we must agree with the conclusions arrived at by Barbara Kwiatkowska and Alfred H. A. Soons:

> As the term "rocks" should be construed as not implying any specific geological features, the essential element of the definition is the second one …, namely that it covers only rocks (islands) "which cannot sustain human habitation or economic life of their own".[9]

The exclusive economic zone and the preservation of marine resources in the Southern Ocean

7. In view of the above-mentioned absence of permanent habitation and the geographical and climatic characteristics of Heard Island and the McDonald Islands, it comes as no surprise that some interests and/or concerns other than economic ones are pointed to as the reason for establishing the exclusive economic zone around these islands. Thus, Dr David Bennett, Solicitor-General of the Respondent, said that the establishment of the exclusive economic zone was useful for the more effective preservation of the marine resources in the rather shallow waters surrounding these islands.[10]

Notwithstanding the importance of preservation of marine resources, the argument advanced by Dr Bennett does not sound very convincing, particularly in relation to the sea area in question.

8. There are two sets of international treaty rules generally applicable to the conservation of the living resources of the high seas: the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, and Part VII, section 2, of the LOS Convention, entitled "Conservation and Management of the Living Resources of the High Seas". Both Conventions call for cooperation between States whose nationals exploit the same marine areas. One of the best examples of such cooperation is the conclusion of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR - Canberra, 20 May 1980). The Commission for the Conservation of Antarctic Marine Living Resources established under the Convention (article VII) has been entrusted with the adoption of conservation measures and the establishment and implementation of a system of observation and inspection (article IX, paragraph 1(f) and (g)). This system includes, *inter alia*,

> procedures for boarding and inspection by observers and inspectors designated by the Members of the Commission and procedures for flag

[9] Barbara Kwiatkowska and Alfred H. A. Soons, "Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own", XXI, *Netherlands Yearbook of International Law*, 1990, p. 153.
[10] ITLOS/PV.02/02, p. 24.

> state prosecution and sanctions on the basis of evidence resulting from such boarding and inspections … (article XXIV, paragraph 2(a)).

It is therefore unnecessary and confusing if individual States adopt and apply their own measures in the exclusive economic zone they have proclaimed inside the area of application of the CCAMLR. In this sense, referring to the French exclusive economic zone, Bruce W. Davis remarked that "consistency has had to give way to the requirements for internal acceptance".[11]

9. The Report of the Meeting of the Standing Committee on Observation and Inspection (SCOI) of the Commission for the Conservation of Antarctic Marine Living Resources held from 21 to 24 October 2002 provides information about an Australian proposal based on the existence of its exclusive economic zone in the CCAMLR area.[12] Australia proposed that article 73, paragraph 2, of the LOS Convention be modified to allow the coastal States to "set a bond for the release of an apprehended vessel at a level that was sufficient to deter further illegal fishing", instead of determining a "reasonable bond". This modification

> would apply primarily in the case of fishing vessels that are arrested by the authorities of CCAMLR Member States that exercise jurisdiction and control over maritime areas that are located within the CCAMLR Convention area.

While one might have some sympathy for the Australian proposal as it did not concern the crew ("the requirement for a detaining State to promptly release detained crew would continue to apply"), what is unforgivable is the "specific" interpretation of the text of the LOS Convention:

> Australia said that in its view Article 311(3) of UNCLOS allows that two or more States may conclude agreements modifying or suspending the operation of provisions of UNCLOS.

It comes as no surprise that the Australian proposal, including the interpretation of article 311, paragraph 3, of the LOS Convention, was not supported by other members of the Commission. Three States (Chile, the United Kingdom and New Zealand) politely indicated that the Australian proposal "went beyond the mandate of SCOI" and that it should be discussed directly by the Commission. The Committee endorsed this view.

Final remark

10. The purpose of this brief text is to explain my belief that the establishment of exclusive economic zones around rocks and other small islands serves no useful purpose and that it is contrary to international law.

It is interesting to note that Ambassador Arvid Pardo – the main architect of the contemporary law of the sea – warned the international community of the danger of such a development back in 1971. In the United Nations Seabed Committee he stated:

---

[11] Bruce W. Davis, "The legitimacy of CCAMLR", Olav Schram Stokke and Davor Vidas (eds), *Governing the Antarctic*, Cambridge University Press, 1996, p. 244.

[12] Doc. CCAMLR – XXI/26, 27 October 2002 (pp. 21-22, paras. 5.100-5.106), contained in the Respondent's list of authorities (as document No. 3) submitted to the Tribunal on 11 December 2002.

> If a 200 mile limit of jurisdiction could be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean space beyond national jurisdiction would be gravely impaired.[13]

The annexed map showing Australia's exclusive economic zone around Heard Island and the McDonald Islands, provided by the Agent of the Respondent, confirms that Ambassador Pardo's fear has been borne out.

(Signed) Budislav Vukas

[13] UN Sea-Bed Committee, Doc. A/AC.138/SR.57, p. 167.

DECLARATION OF JUDGE MARSIT

[Translation]

1. I have voted in favour of this Judgment but I should nevertheless like to give my view on certain aspects of this case or any similar case that might give cause for concern not only to developed countries but in particular the young States which are endeavouring to achieve a higher level of development, especially from the economic point of view.

2. The new law of the sea acknowledges coastal States' exclusive sovereign rights to take advantage of the resources of the maritime areas over which they have sovereignty or jurisdiction. However, this particular case demonstrates, if the charges complained of by the Respondent prove to be true, that it is far from easy to protect those resources from any serious, repeated attack. If a country such as Australia or France is not always able to provide such protection, what about new developing countries, regardless of whether they open onto oceans or smaller seas?

3. It should be noted that a number of people have seen fit to voice their firm support for the right of the coastal State to defend itself in order to preserve its resources from any illegal, unregulated and unreported exploitation having ruinous consequences. Such an attitude reflects the concern of the international community to safeguard the maritime waters within the domestic jurisdiction from reckless action of this kind and seeks to protect the marine environment from an imbalance that will sooner or later prove harmful and may be seriously detrimental to the rights of future generations. It is to be hoped that, on the basis of such an approach, the conduct of fishermen will no longer be guided solely by material interests and a desire for quick profits regardless of the rights of others.

4. Furthermore, it would be desirable for the Tribunal to pronounce clearly and explicitly at some stage or other on the meaning and significance of the expression "reasonable bond"; it must, in my humble opinion, invariably take into account not only the interests of the parties involved in a case but also the impact or effect of the jurisprudence of this universal court on any future cases that may affect one or more developing countries. This means that a reasonable sum must be reasonable for all parties concerned, irrespective of whether they are developed or developing countries.

(Signed) Mohamed Mouldi Marsit

SEPARATE OPINION OF JUDGE COT

[Translation]

1. I subscribe to the findings of the Judgment. However, I consider it necessary to add some observations on the two questions of the context of illegal fishing and the "margin of appreciation" of the coastal State.

The context of illegal fishing

2. The Tribunal understands the international concerns about illegal, unregulated and unreported fishing. It appreciates the objectives behind the measures taken by States, including the States Parties to CCAMLR, to deal with the problem (paragraph 68 of the Judgment). I believe that it is necessary to clarify the difficulties encountered by States in combating illegal, unregulated and unreported fishing in the Southern Ocean and the necessary margin of appreciation they must be acknowledged as having in defining and implementing the means for tackling this problem.

3. In *The "Camouco" Case*, the Tribunal defined the factors that are relevant in an assessment of the reasonableness of bonds. They include the "gravity of the alleged offences". The context of illegal fishing in the region throws light on the gravity of the offence recorded against the *Volga* and its crew by the Australian authorities.

4. And yet Russia has not disputed Australia's allegations or the gravity of the offending conduct.

5. Russia and Australia are both parties to the Convention on the Conservation of Antarctic Marine Living Resources and Members of CCAMLR. They have pledged to take part in the campaign against illegal fishing as part of their responsibilities as a flag State and coastal State respectively. Russia confirmed at the hearing that it intended to play its part fully in that campaign (statement by Mr. Dzubenko, Friday 13 December, p.m., ITLOS/PV.02/04, p. 5).

6. CCAMLR's verdict on the devastation caused by illegal fishing in the region is damning. The proceeds of illegal fishing appear to be greater than those of licensed fishing – at least that was CCAMLR's estimate for the 1997/98 season – and therefore more than double the level of catches regarded as the maximum to ensure the preservation of the species. If the parties to the Convention do not manage to put an end to these practices, stocks of Patagonian toothfish will be completely wiped out within about ten years.

7. It should be added that there is a tidy profit to be made from illegal fishing. Thus the *Volga* achieved an illegal catch of 100 tonnes of Patagonian toothfish in nine weeks, which was sold by the Australian authorities for the sum of AU$ 1,932,579, while the vessel, its fuel oil and its fishing gear were estimated at AU$ 1,920,000, an estimate not disputed by the Applicant. With a full hold, the fish caught illegally in the course of a fishing season are worth more than twice the price of the vessel. This is a fine return on investment.

8. The faxes seized by the Australian authorities on board the vessel and the data on the on-board computer suggest a concerted international organization engaged in illegal fishing involving a number of vessels flying flags of various nationalities, obeying the same

instructions and coordinating their criminal activity (Mr. Bennett, 12 December, p.m., ITLOS/PV.02/02, pp. 25-28).

9. The cost of combating illegal fishing is considerable for the coastal State. Australia estimates the operating cost of a frigate at AU$ 5 million a week. Since Heard Island and the McDonald Islands are 4,000 kilometres from Australia, a naval patrol needs to use such a vessel for about three weeks.

10. International organizations have called upon Member States to take measures against illegal fishing. Thus, at its 120th session the Council of the Food and Agriculture Organization adopted the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Paragraph 24 of this Plan requires States to adopt sufficiently tough punitive measures to deter potential offenders. For its part, CCAMLR has adopted a number of conservation measures, including the installation of a VMS on board fishing vessels.

11. The measures taken by Australia, both in terms of prevention and enforcement, clearly fall within the scope of the efforts made by international organizations to combat illegal, unreported and unregulated fishing. They come under article 56 of the Convention on the Law of the Sea and have been taken in pursuance of the sovereign rights exercised by coastal States for the purpose of exploring, exploiting, conserving and managing the natural resources of the exclusive economic zone. In exercising their enforcement powers coastal States may specify monetary penalties they consider appropriate and establish – within the framework of the Convention or other applicable international agreements – their rules on arrest, detention and release upon the posting of a bond. In particular, the Convention does not set any limit on the fines a coastal State may consider appropriate to impose on offenders.[1]

12. The Tribunal has a duty to respect the implementation by the coastal State of its sovereign rights with regard to the conservation of living resources, particularly as these measures should be seen within the context of a concerted effort within the FAO and CCAMLR. In taking these measures, Australia is upholding not only its legitimate right to explore and exploit the resources of its exclusive economic zone. It takes conservation measures within the framework of an international system of authorization in order to protect a common heritage. This is a good example of a plurality of functions. This particular circumstance widens Australia's scope for action. While the coastal State does not have the right to take measures that are arbitrary or would contravene an obligation under international law, it has a considerable margin of appreciation within that framework.

13. From the humanitarian point of view the decision taken by the Australian judicial authorities to release the three crew members upon payment of a lower bail amount than that set by the Supreme Court of Western Australia in a preliminary stage of the proceedings is to be welcomed. However, the level of the bail in this case fell within the margin of appreciation of Australia, which was entitled to set a higher level in order to deter potential criminals.

[1] *The "Camouco" Case*, Dissenting Opinion of Judge Wolfrum, para. 6.

The question of margin of appreciation

14. The concept of margin of appreciation is well known to international courts. It is found, for instance, in the jurisprudence of the European Court of Human Rights. Thus, in the case of *Mellacher and others*, the Court stated:

> Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way ... (Judgment of 19 December 1989, *ECHR, Series A, No. 169*, p. 53).

15. The Court of Justice of the European Communities shows comparable caution in overseeing the discretionary power of the institutions. With regard to economic matters, it punishes only flagrant violations, such as misuse of powers, glaring errors in exercising discretion, clear overstepping of the limits of the discretionary power, obvious inappropriateness of the measure for the objective pursued and gross disproportion in relation to the desired outcome.

16. International courts constantly use the concept of margin of appreciation, often implicitly or unwittingly. Thus in the case of *Rights of Nationals of the United States of America in Morocco*, the International Court of Justice noted:

> The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith (*Judgment, I.C.J. Reports 1952*, p. 212).

17. Or again, in the *Fisheries* cases, the Court noted, with regard to the power of the coastal State to draw the base-lines:

> … the base-lines must be drawn in such a way as to respect the general direction of the coast and … they must be drawn in a reasonable manner (*I.C.J. Reports 1951*, pp. 140-141. See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 51-52, para. 97).

18. The concept of "margin of appreciation" is closely related to that of "reasonableness". The concept of "reasonableness" implies the existence of a discretionary power that must be curbed. As has been observed, "*[l]a notion de raisonnable est souvent invoquée dans le souci de limiter les compétences discrétionnaires que les Etats possèdent dans certains domaines*"[2] [the concept of "reasonableness" is often invoked with a view to limiting the discretionary powers possessed by States in certain areas]. Reasonableness thus appears to be both an instrument for preserving the margin of appreciation of States and an instrument for courts to control the exercising of the discretionary power of the State.

19. In the *Dispute Concerning Filleting within the Gulf of St. Lawrence* between Canada and France,[3] the Arbitration Tribunal noted:

---

[2] Jean J. A. Salmon, "Le concept de raisonnable en droit international public", *Mélanges offerts à Paul Reuter*, p. 459. On the overall question, see O. Corten, *L'utilisation du raisonnable par le juge international*, Brussels, 1997, 696 pages.

[3] Arbitral award of 17 July 1986, *ILR*, Vol. 82, p. 631.

> 54. The Tribunal finally points out that, like the exercise of any authority, the exercise of a regulatory authority is always subject to the rule of reasonableness invoked by the International Court of Justice in the *Barcelona Traction* case, as follows: "The Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably" (*ICJ Reports, 1970,* p. 48, para. 93 …). That rule requires State behaviour to be proportional to the aim legally pursued, with due regard to the rights and freedoms granted to another State.

20. And, after examining the way in which the concept of reasonableness had been applied by the Permanent Court of Arbitration in the *North Atlantic Coast Fisheries Case*[4], the Arbitration Tribunal concluded on this point:

> In the present case, the Tribunal therefore holds that Canada can only use its regulatory authority concerning the French trawlers referred to in Article 4(b) of the 1972 Agreement in a reasonable manner, i.e. without subjecting the exercise of the right to fish enjoyed by such trawlers under the Agreement to requirements which in effect make that exercise impossible.[5]

21. It will be noted that the aspects considered in the definition of reasonableness include the concept of proportionality and the obligation for the State to ensure that its conduct is proportional to the aim being legally pursued, account being taken of the rights and freedoms granted to others or acknowledged under international law. In the case of the *Volga* – as Australia noted (Mr. Crawford, 12 December, p.m., ITLOS/PV.02/02, p. 21) – no freedom was at issue. The *Volga* was not exercising its freedom to fish on the high seas and its passage within the exclusive economic zone was anything but innocent. It could not therefore rely on special protection on the grounds that a freedom was being threatened.

22. The margin of appreciation applies both to the measures taken by the coastal State under article 73, paragraph 1, of the Convention and to the amount of the bond referred to in paragraph 2 of that article. Provided that the bond is not "unreasonable", the Tribunal does not have to substitute its discretion for that of the coastal State. It has no intention of being an appellate forum against a decision of a national court ("*Monte Confurco*", para. 72); nor is it the hierarchical superior of an administrative or government authority.

23. Australia relied in its defence on the difference between the French and English texts of article 73, paragraph 2, of the Convention. The former refers to a "*caution ... suffisante*", whereas the latter speaks of a "reasonable bond". If Australia's Counsel is to be believed, "[i]f there is a range of values or possibilities, the bond should secure the maximum. That is the significance of the French word *suffisante*, the English word *sufficient*" (Mr. Bennett, 13 December 2002, a.m., ITLOS/PV.02/03, p. 6). Such an interpretation of the concept of a "reasonable" bond is, in my view, to be eschewed. I consider it to be contrary to the object and purpose of the release procedure and to find no support in the *travaux préparatoires*, as it would render the procedure utterly meaningless. It would be hard to imagine a flag State bringing an action on the grounds that the bond set by the coastal State is not "reasonable". The interpretation put forward here would lead "to a result which is manifestly absurd or

[4] Award of 7 September 1910, *RIAA*, Vol. XI, p. 189.
[5] *ILR*, Vol. 82, p. 631.

unreasonable" (Vienna Convention on the Law of Treaties, article 32 (b)). Like Vice-President Nelson in *The "Monte Confurco" Case* (Separate Opinion, *ITLOS Reports 2000*, pp. 124-126), I believe that the terms "reasonable" and "*suffisant*" must be presumed to have the same meaning in the different language versions of article 73, paragraph 2.

24. The court's control over what constitutes a "reasonable bond" comes under what may be referred to as "minimum control" in certain legal systems. In his Dissenting Opinion in *The "Camouco" Case*, Judge Wolfrum noted, with regard to the criteria applied by courts dealing with human rights cases:

> They restrict themselves, generally speaking, to ascertaining whether such a decision or measure was unlawful under international law, or was arbitrary, or constituted an abuse of authority, or was made in bad faith, or was disproportionate … (*ITLOS Reports 2000*, p. 71, para. 14).

25. This control of legality is exercised in particular with regard to errors in law. In deciding to combine release of the vessel with a bond imbued with a penal overtone, intended to ensure the good behaviour of the vessel during the period pending the decision of the Australian courts, the Australian authorities committed an error of law with regard to the lawful nature of the reasonable bond as provided for in articles 73, paragraph 2, and 292 of the Convention.

26. The bond or financial security provided for in articles 73, paragraph 2, and 292 is in fact a provision of a purely financial nature. It cannot be converted into a measure of court supervision. The analogy with bail under criminal law which may accompany release under court supervision pending trial does not hold water, since the English text speaks of "bond" and not "bail"; it uses the commercial law or even maritime law term and not the criminal law term. This interpretation is borne out by the context, the object and purpose of the Convention, and also by the *travaux préparatoires*. The provision was inserted in the Convention in order to ensure prompt release of the vessel and crew. It could not be combined with other conditions without having the effect of extending the coercive power of the coastal State to the detriment of the power of the flag State in the exclusive economic zone. Yet there is nothing in the Convention to suggest that the balance of the powers exercised in the exclusive economic zone has been modified in this way.

27. Above all, attaching conditions to the bond would transform the very nature of the procedure established by article 292 of the Convention. This provides for *prompt* release of the vessel and *prompt* release of the crew, not the conditional release of either of them. Attaching conditions to the bond or financial security would inevitably have the effect of complicating and slowing down the procedure, which would lose its *prompt* character. This would be tantamount to deflecting the article 292 procedure from its purpose and distorting its meaning.

28. For these reasons I consider that Australia was not entitled to include a "good behaviour bond" totalling AU$ 1,000,000 in the amount of the reasonable bond leading to the prompt release of the vessel and crew.

(Signed) Jean-Pierre Cot

DISSENTING OPINION OF JUDGE ANDERSON

1. To my regret, I have felt obliged to cast negative votes on the main operative paragraphs of the Judgment. However, my difficulty concerns a single issue, namely the validity of non-financial conditions in bail bonds. I am pleased to have been able to concur with the terms of the Judgment on the remaining issues, including issues of the kind which led me to dissent in both the *"Camouco"* and *"Monte Confurco"* cases. In short, apart from the one issue which has divided the Tribunal, I see positive trends in the development of the Tribunal's jurisprudence in prompt release cases. Before explaining the reasons for taking a different view from the majority on the one issue, I should like to identify these positive trends.

2. In **paragraph 68**, the Tribunal has gone further than it did in the *"Monte Confurco" Case*. Two years ago, the Tribunal simply took note of concerns of the Respondent about the serious situation caused by IUU fishing in the CCAMLR Area without drawing any conclusions. I fully concur, therefore, with the expressions of understanding and appreciation of the international concerns over IUU fishing in the CCAMLR Area. In this connection, I would note that the Respondent submitted to the Tribunal some relevant extracts from the Report of the recent meeting of CCAMLR,[1] as well as diplomatic notes addressed to Australia by several Contracting Parties, including Chile, France (Kerguelen), New Zealand and South Africa from the southern hemisphere, all expressing concern about the conservation and management of the living resources of the CCAMLR Area.[2] Other documentation submitted by the Respondent and not challenged by the Applicant indicates clearly that the *Volga* had been fishing in the Statistical Division 58.5.2 of the CCAMLR Area (including the EEZ around Heard Island[3]) during the greater part of the 2001-2002 Austral summer as part of a large fleet of Russian and other vessels. In my opinion, the duty of the coastal State to ensure the conservation of the living resources of the EEZ contained in article 61 of the Convention, as well as the obligations of Contracting Parties to CCAMLR to protect the Antarctic ecosystem, are relevant factors when determining in a case under article 292 whether or not the amount of the bail money demanded for the release of a vessel such as the *Volga* is "reasonable."

3. In **paragraph 73,** the Tribunal has held that the full value of the vessel, including its gear and stores, represents reasonable financial security for the release of the vessel. I fully share the finding. The material available to the Tribunal disclosed no grounds for departing from the standard of full value. The Respondent has submitted a great deal of factual material which was not contested. The information consisted of affidavits from Australian and Spanish witnesses as to the fishing by the *Volga* in the 2001-2002 Austral summer; certain documents found on board the *Volga*; and data recovered from the hard disk of the vessel's computer. There was no dispute that when arrested in sub-area 58.5.2 of the

[1] Statement in Response, Annexes 4 and 5.

[2] Ibid., Annex 3 and attachments to the letter of the Agent for the Respondent dated 10 December 2002. There is a precedent for the submission of such diplomatic correspondence in Annex 4 to the Common Rejoinder of Denmark and the Netherlands in the *North Sea Continental Shelf* cases: *I.C.J. Pleadings*, etc., 1968, Vol. I, p. 546.

[3] Heard Island is clearly an island and not a rock. As such, an EEZ can be validly established.

CCAMLR Area the vessel was not carrying a VMS[4] but did have on board over 131 tonnes of Patagonian toothfish, worth almost AU$ 2m, caught by longlines.[5]

4. In **paragraphs 81 to 83**, the Tribunal concludes that the circumstances surrounding the arrest of the *Volga* are not relevant in assessing the reasonableness of the security sought by Australia for the vessel's release. Again, I share this approach since the Tribunal is not in possession of all the facts and its task under article 292 is to deal with "the question of *release*" [emphasis added], not *arrest*, and to do so "without prejudice" to the merits of any case before the domestic forum. The same principle of non-prejudice must apply equally to any other wider issues outstanding between the parties.

5. In **paragraphs 84 to 87**, the Tribunal concludes that the proceeds of the sale of the catch have no relevance to the bond to be set for the release of the vessel and that the question of including those proceeds in the bond does not arise, whilst emphasising the consideration that the final destination of the proceeds depends upon the outcome of domestic legal proceedings. In regard to this same issue in the *"Monte Confurco" Case*, I dissented along with Judge Jesus for reasons which he was able to explain most persuasively in his declaration. I added in my own that the proceeds of sale could be taken into account in a general way, but without purporting to make them part of the bond. Accordingly, I consider the approach now adopted in paragraphs 86 and 87 to be a positive development and I fully concur in those findings.

6. I turn now to **the question of non-financial conditions under article 73, paragraph 2**, on which I part company with the majority. This question arose for the first time in this case. The question is whether or not a coastal State is entitled to include in a bond or other security for the release of a vessel and its crew conditions which are non-financial in nature. This is an important question of interpretation, possibly with wide implications, and it had to be considered under time pressure, allowing limited opportunity for research and reflection. Having - to my regret - come to a different conclusion from the majority, I will first set out my interpretation before reviewing the alternative interpretation contained in paragraphs 75 to 80 of the Judgment.

7. My reading of the plain words of article 73 in their context and in the light of the object and purpose[6] shows that the article contains no explicit restriction upon the imposition of non-financial conditions for release of arrested vessels. Where the Convention does limit the rights of coastal States in the matter of enforcement, it does so in express terms: article 73, paragraph 3, prohibits imprisonment and corporal punishment. In my view, further limitations upon the rights of States Parties in what are important matters of domestic criminal procedure, are not to be easily implied. The implication must be a necessary one.

8. I agree that in its context the reference to "other security" is probably confined to financial security, but it is not necessary to express a final view on this point. The expression "the posting of reasonable bond" is somewhat unusual to my mind. The issue turns on the true meaning of this phrase.

---

[4] As required for vessels flying the flag of a Contracting Party by Conservation Measure 148/XX, with effect from 31 December 2000 at the latest. Such vessels are also required by Conservation Measure 119/XX to hold a special licence to fish in the CCAMLR Area.
[5] Conservation Measure 222/XX specifies that in that area during the 2001-2002 season fishing should be "conducted by vessels using trawls only."
[6] Following the approach set out in article 31 of the Vienna Convention on the Law of Treaties, read as a whole.

9. Now, in *Webster's Dictionary*,[7] the term "bond" as a noun has no fewer than 12 different meanings. In particular, the word can mean either a deed by which one person binds himself or herself to pay another without any further conditions, or alternatively a security for a released person's return for trial in the future. This distinction between the two meanings of "bond" is brought out clearly in the tenth and eleventh definitions contained in that dictionary:

> 10 *Finance* an interest-bearing certificate issued by a government or business, promising to pay the holder a specified sum on a specified date …
> 11 *Law b)* an amount paid as surety or bail.

10. In the context of article 73, the relevant meaning of the word "bond" is the legal one, not the financial or commercial one. We are not dealing with investment matters. Nor are we concerned with the release of a ship pending the resolution of some maritime claim, as that term is defined in the Convention on the Arrest of Ships of 1952.[8] Rather, the word "bond" in this provision speaks the language of criminal procedure.

11. This interpretation is consistent also with the French text. The term "*caution*" refers to the equivalent in French criminal procedure of bail in England and bond in the USA. As is well known, article 292 was based on a proposal first submitted by the delegation of the USA.[9] The American influence probably explains why the American term "bond" was included (and without the benefit of the indefinite article) in the English version of article 292 and the related article 73, paragraph 2, rather than the English term "bail."

12. A leading American legal dictionary contains the following:

> *Bail bond.* … A written undertaking, executed by the defendant … that the defendant … will, while at liberty as a result of an order fixing bail and of the execution of a bail bond in satisfaction thereof, appear in a designated criminal action or proceeding when his attendance is required … .[10]

The US Code provides for release "upon execution of an unsecured appearance bond" or "on a condition or combination of conditions" designed to ensure the appearance of the accused for trial and the safety of the community.[11] In English law too, bail may be made conditional: the Bail Act 1976 authorises courts to impose such requirements as appear to the court to be necessary to secure that released persons surrender back into custody at the time

---

[7] *Webster's New World College Dictionary*, 3rd ed. (1997). There are as many as 14 different meanings in the *Shorter Oxford Dictionary*, including the name of the type of special paper used for the originals of the Judgment in this case.
[8] International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships, in Berlingieri's *Arrest of Ships*, 3rd ed. (2000), at p. 215.
[9] The legislative history is set out in the commentary by Rosenne and Sohn in volume V of the *Virginia Commentary*.
[10] *Black's Law Dictionary*, 6th ed., 1990.
[11] Title 18, Part II, Chapter 207, Section 3142 (Release or detention of a defendant pending trial), subsection (c) (Release on Conditions). Available on the internet at http://www4.law.cornell.edu/uscode/18/3142.html.

of the trial and do not commit an offence whilst on bail.[12] Australian legislation appears to be similar.

13. To recapitulate, the ordinary meaning of the word "bond" depends upon its context. In article 73, paragraph 2, the context is clearly not the financial meaning of "bond" as a simple deed. Rather, the context is legal and precisely that of release of an accused person against a bail bond which may, and often does, contain non-pecuniary conditions. Conditions may be temporal, financial or non-financial. All conditions form integral parts of a bail bond and are valid *prima facie*. No particular type of condition should be excluded *a priori*. The transaction consists of the release of the vessel, pending the resolution of legal proceedings, in exchange for the provision of financial security and the observance of appropriate conditions designed to ensure that those proceedings are not prejudiced or frustrated. The legitimacy of this aim in the context of article 73, paragraph 2, is confirmed by article 292, paragraph 3, which provides for release "without prejudice to the merits" of the case before the domestic forum.

14. The correct question to ask is whether or not the bond sought for the release of the vessel is "reasonable" in each and every respect. There are several elements: the amount, the form and the conditions of the bond. The legislation of many States empowers courts to impose conditions of bail upon persons who are released from detention pending trial. The conditions as to the deposit of passports with the Australian Embassy in Spain are typical examples of bail conditions, designed to ensure the return of the accused to face trial and to prevent illegal fishing in Australian waters in the meantime. In my opinion, it would require clear words in the Convention to exclude all non-financial bail conditions. Such words are not there. All that the Convention requires is that every term of the agreement represented by the bond or other security, including the amount of money, the conditions and the form of the security, be reasonable in the circumstances of the case.

15. Having thus set out my interpretation, I turn to that advanced in **paragraphs 76 to 80** of the Judgment.

16. First of all, I would have been prepared to have made a finding in **paragraph 76** to the effect that a coastal State is entitled by article 73 to impose non-financial conditions in bail bonds in exercise of its sovereign rights. The power is contained notably in article 73, paragraph 1, where reference is made to judicial proceedings and measures to ensure compliance with the coastal State's legislation adopted in conformity with the Convention.

17. I have several difficulties with the process of reasoning contained in **paragraph 77.** The argument based on the inclusion in the Convention of article 226, paragraph 1(c), rather overlooks the historical background. During the 1970s there was concern about sub-standard oil tankers, often flying flags of convenience, just as there is today. The reaction of the international community then was to draw up the MARPOL Convention and to make two special provisions for sub-standard vessels in articles 219 and 226. As regards fisheries, the situation was different. The new maximum limit of 200 nm was just being introduced in many States and there were far less obvious problems with fishing vessels flying flags of convenience than there are today. It goes too far, in my respectful submission, to conclude that the inclusion of special provisions to deal with sub-standard tankers implicitly excluded non-financial conditions from bonds in the case of fishing vessels.

---

[12] *Halsbury's Laws of England*, 4th ed. (1990), Vol. 11(2), paragraph 884.

18. Next, the description in paragraph 77 of the "object and purpose" of article 73, paragraph 2, read in conjunction with article 292, is cast in terms which refer only to one side – the flag State. This description strikes me, with respect, as too narrowly stated. An additional element in the object and purpose is to provide the safeguard for the coastal State contained in the phrase "without prejudice to the merits of any case before the appropriate domestic forum" in article 292, paragraph 3. Protecting the merits of the case and the domestic legal proceedings from prejudice or actual frustration is a legitimate interest of the arresting State which the exclusion of non-financial conditions would make more difficult to achieve. To the extent to which there is some sort of a balance in these provisions between the interests of the two States concerned, that balanced treatment should not be tilted in favour of one or the other.

19. Turning to **paragraph 80** of the Judgment, it is true that article 73 "envisages enforcement measures in respect of violations of the coastal State's laws and regulations alleged to have been committed." However, in my opinion, the wording of that article, read together with article 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 ongoing legal proceedings in the appropriate domestic forum.

20. In my view, a so-called "good behaviour bond" represents a type of "bond" within the meaning of article 73, paragraph 2. It is financial and the non-financial condition about good behaviour serves a legitimate purpose (deterring further poaching in the EEZ pending the determination of the legal proceedings). It balances the undoubted benefit that the owner of the vessel gains from its release – renewed access to fishing grounds.

21. I do not go so far as to contend that a good behaviour bond will necessarily be justified in all cases. The reasonableness of the demand has to be assessed against the facts of each case, as appreciated by the Tribunal in what are summary proceedings without full proof of facts. If we turn, therefore, to the question of reasonableness in this particular instance, the bond of AU$ 1m has been demanded in pursuance of a legitimate aim: it is precisely intended "to ensure compliance with the laws and regulations adopted by [Australia] in conformity with this Convention," within the meaning of article 73, paragraph 1, during the period between release of the vessel and the conclusion of the domestic legal proceedings. This concern is directly linked to the reasons for both the arrest and the outstanding charges. This element of the Australian bond would represent financial security which has to do with the duty of the coastal State to ensure the conservation of the living resources of the EEZ, in accordance with articles 61 and 64 of the Convention. Equally, it serves the legitimate aims of articles 116 to 120 in regard to CCAMLR.

22. The next question to address, following my approach, is whether or not the amount of the security and the condition requiring "good behaviour" are proportionate to the risk of re-offending. Australia says there is a risk of further fishing in the Australian EEZ during the period between the time of release of the *Volga* and the conclusion of the outstanding legal proceedings. In assessing this question, there are several relevant factors:

(a) The *Volga* had been sighted on the high seas and warned not to enter the Australian EEZ by the *Southern Supporter*, an Australian patrol vessel, on 5 January 2002. The *Volga*

clearly ignored this warning.[13] The *Volga* appears from the documentation to have spent much of the period between its warning and its arrest fishing in the CCAMLR Area, including the EEZ.

(b) The Annexes to the Statement in Response, including documents found on board the *Volga*, contain several indications that the *Volga* was not fishing alone, but rather it was fishing in concert with a fleet of other vessels which gave it logistic support (bunkers and transhipment of catch, for example); and that the entire fleet was coordinated from offices in Indonesia and Las Palmas. Other vessels in the fleet could be still be fishing in the area during the current Austral summer fishing season. There appears to be a clear risk of the *Volga* rejoining this fleet immediately or shortly after its release.

(c) The documentation contains indications that Olbers Co Ltd may be no more than the nominal owners of the *Volga* and that the true owners have taken care not to identify themselves and they have still not been charged.

(d) A recent example of what the Respondent fears, namely a released vessel returning to fish in the Antarctic and reoffending, is provided by the case of the *Camouco*.

(e) Once released, it may well be nigh impossible to keep track of the *Volga* in Antarctic waters, including the Australian EEZ, especially if it is not carrying a VMS.

23. In the light of these factors, the risks of reoffending seem real. The good behaviour bond and the conditions sought by the Respondent are not, in my opinion, unreasonable within the terms of article 73, paragraph 2. The amount may be on the high side, but it does not exceed the "margin of appreciation" to be accorded to domestic courts and domestic authorities.

24. My conclusions are, first, that the Applicant's argument to the effect that non-pecuniary conditions cannot count for the purposes of article 73, paragraph 2, and are thus "unlawful" is not well-founded. It is based on an overly narrow, even legalistic, interpretation of article 73, paragraph 2, which takes insufficient account of the context of domestic criminal law and procedure in many States Parties, the overall balance between the interests of the owners of the vessel and the coastal State, and the "without prejudice" clause in article 292, paragraph 3. Secondly, in the light of the uncontested factual material before the Tribunal, the non-financial conditions are not unreasonable. For these reasons, I would dismiss the Application as not "well-founded" (Rules, article 113). In these circumstances, I voted against paragraphs 3, 4 and 5 of the operative part of the Judgment, notwithstanding my support for the Judgment's finding on other points of substance. I would have voted for the latter had the opportunity been provided in the *Dispositif*.

25. To conclude, I would only add that I agree fully with and endorse the Opinion of Judge *ad hoc* Shearer.

(Signed) David Anderson

[13] Annexes to the Statement in Response, Affidavit of G.V. Rohan, paragraph 29.

DISSENTING OPINION OF JUDGE *AD HOC* SHEARER

1. It is with regret that I find myself unable to concur in the decision of the Tribunal to lower the amount of the bond set by the Australian authorities in the present case. For myself I would have preferred an order in terms of that requested by the Respondent, namely that the Application by the Russian Federation be dismissed. In other words, I consider that the amount and the terms of the bond imposed by Australia should have been upheld.

The facts of the case

2. For the reasons given below, in my view the facts and surrounding circumstances of the case should have been accorded greater weight by the Tribunal in assessing the reasonableness of the bond under the provisions of articles 73, paragraph 2, and 292, paragraph 1, of the United Nations Convention on the Law of the Sea, 1982 (hereinafter "the Convention").

3. The *Volga*, a fishing vessel registered in the Russian Federation and flying the Russian flag, and owned by a company named Olbers Co. Ltd., was arrested by the Royal Australian Navy on 7 February 2002 a few hundred metres outside the Australian exclusive economic zone (EEZ) appurtenant to Heard Island and the McDonald Islands in the Southern Ocean. It was brought to the port of Fremantle in Western Australia on 19 February, where it and the crew were detained in the circumstances set out in the Judgment of the Tribunal.

4. Evidence presented to the Tribunal by the Respondent showed that the *Volga* had set out on its voyage from Jakarta, Indonesia, on 6 November 2001 to fish in the Southern Ocean for a period of some three months. The target species was Patagonian toothfish. On 5 January 2002 the *Volga* was encountered by the Australian fisheries protection vessel *Southern Supporter* outside the Australian EEZ. It was warned not to enter the zone. However, that it did so shortly afterwards is evidenced by the fishing records of the *Volga* for the period 12-20 January 2002 stored in the vessel's computer. The records were erased by the crew but reconstructed from the computer after the vessel arrived in Fremantle. Those records showed where the fishing longlines had been set during this period, deep within the Australian EEZ. The Respondent also produced a copy of a facsimile message sent to the *Volga* by an entity named "Sun hope" from Jakarta, in the Spanish language, dated 28 January 2002. It notified bunkering arrangements for the *Volga* and six other vessels by the oiler *Aqua Vitae* at the position 53 degrees 30 minutes South and 80 degrees 00 minutes East. The instructions included the following significant passage:

> Once [bunkering] completed you can return to the same fishing zone, that is the same rock where you are at the moment. It seems to be safe until the seventh or the eighth.

The clear implication of this message is that the *Volga* was operating within the Australian EEZ but was advised that it should be ready to depart the zone by 7 or 8 February in order to avoid arrest. Indeed that warning turned out to be accurate.

5. The *Volga* was not alone. A sister vessel, the *Lena*, was also operating in the same area. It was arrested on the day before the arrest of the *Volga* while fishing without a permit inside the Australian EEZ. According to a sworn statement made by the Master of the *Lena,*

the two vessels were both operating within the same area of the zone and taking toothfish. After the arrest of the *Lena* the *Volga* was detected by radar from a Royal Australian Air Force Hercules aircraft some 32 kilometres within the exclusive economic zone and heading at its maximum speed in a direct line towards the high seas. There is a clear inference that the *Volga*'s hasty departure from the area was prompted by a warning given to it by its sister vessel.

6. After the *Volga* was brought to Fremantle the catch on board was seized under the provisions of the Fisheries Management Act of Australia. The catch consisted of 131 tonnes of Patagonian toothfish and 21 tonnes of bait. It was sold by tender for AU$ 1,932,579. The total catch capacity of the *Volga* is 275.6 tonnes. It is thus evident that the actual catch matched the value of the vessel and the potential catch would have greatly exceeded that value. The proceeds of the sale of the catch are being held in trust pending the trial of the accused.

Consideration and substantiation of facts in prompt release cases

7. The Tribunal in its Judgment has been reluctant to state or enter into an evaluation of the facts other than those directly concerned with the reasonableness of the bond for prompt release. Reference should also be made to the provisions of article 292, paragraph 3, of the Convention, which prohibits the Tribunal from prejudicing the merits of any case before the appropriate domestic forum against the vessel, its owner, or its crew. In my opinion the Tribunal erred too much on the side of reticence. In the *"Monte Confurco" Case*, the Tribunal stated that, although a consideration of facts appertaining to the merits was not permitted in proceedings for prompt release, the Tribunal was "not precluded from examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond" (Judgment, paragraph 74). The present case related to grave allegations of illegal fishing in a context of the protection of endangered fish stocks in a remote and inhospitable part of the seas. In such a case, reasonableness cannot be assessed in isolation from those circumstances. In his Separate Opinion in the *"Monte Confurco" Case*, Vice-President (as he then was) Nelson indicated a degree of willingness to consider such matters as part of "the factual matrix" in prompt release cases.

8. I therefore find it necessary to consider to what extent the Tribunal should have regard to facts which nevertheless belong ultimately to the merits of the case, and which might not be substantiated in a hearing on the merits. In my opinion, for the limited purpose of proceedings for prompt release of vessels and crews, facts should be cognisable, and regarded as substantiated, if they are not contested by the opposing party. None of the facts set out above were contested by the Applicant in the present case. The Tribunal should also take into account the obligations of the parties under related international agreements and facts which are public knowledge, such as agreed statistics relating to fish stocks, the findings of respected scientific bodies, and the resolutions of competent international organizations. All of these are in my view examples of relevant surrounding circumstances.

The relevance of the surrounding circumstances

9. The Respondent laid prime emphasis in the present proceedings, as relevant to the bond, on the problem of illegal, unreported and unregulated (IUU) fishing worldwide, and particularly in relation to the Patagonian toothfish in the Southern Ocean. Reference was made not only to the provisions of article 61, paragraph 2, of the Convention, which require

States Parties to conserve and manage the living resources of their exclusive economic zones so that they are not endangered through over-exploitation, but also to the Convention for the Conservation of Antarctic Marine Living Resources, 1980 (CCAMLR). Both Australia and the Russian Federation are parties to CCAMLR. The EEZ of Australia generated by Heard Island and the McDonald Islands is within the area covered by CCAMLR. That Convention requires parties to take appropriate measures within its competence to ensure compliance with the Convention and with the conservation measures adopted by the Commission for the Conservation of Antarctic Marine Living Resources. The Commission has set catch limits and restrictions on fishing seasons. The most recent meeting of the Commission (4 November 2002) noted that illegal fishing had seriously depleted the stocks of Patagonian toothfish, and pointed to the potentially catastrophic effects of the continuation of such fishing.

10. Another important circumstance, pointed out by the Respondent, is the difficulty of enforcement of fisheries laws in the inhospitable environment of the Southern Ocean. The weather is constantly bleak and cold, with high winds and heavy seas. The distances to be covered by fisheries enforcement vessels and aircraft are great. Unlicensed fishing vessels are encouraged to believe that the chances of their detection are small enough, and the potential rewards high enough, to justify taking the risk.

11. A logical conclusion to be drawn from these circumstances is that illegal fishing must be punished with a high and deterrent level of monetary penalty. (Other forms of penalty are precluded by article 73, paragraph 3, of the United Nations Convention on the Law of the Sea.) The necessity of deterrence as an element of the penalty is specifically recognised in the Agreement for the Implementation of the United Nations Convention on the Law of the Sea, 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Species, 1995, article 19, paragraph 2. If deterrence is to be achieved, national courts must take into account the gravity not only of the particular offence but also of the effects of offences generally on the conservation efforts of the international community. This indicates that the penalty should be so set by national courts as to deter further illegal activity. The Tribunal, and other international courts and tribunals, should be fully aware, and supportive, of these aims.

12. I have had the advantage of reading in draft the Separate Opinion of Judge Cot in the present case. I agree fully with the views he has expressed regarding the context of illegal fishing.

13. In the present case, if highly deterrent penalties are required by the circumstances of IUU fishing in areas where fish stocks are endangered, such as in the Southern Ocean, the bond for the release of the vessel and of the crew (or at least of the leading crew members) must reflect the gravity of those offences.

Reasonableness of the bond

14. Article 73, paragraph 2, of the Convention provides that "[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security." The French text refers to "*une caution ou autre garantie suffisante*". Although counsel for the Respondent argued that the word "*suffisante*" in the equally authentic French text of article 73, paragraph 2, imported a wider margin of appreciation for the setting of bonds by national authorities than that imported by the word "reasonable", it would appear now to be

accepted by the Tribunal that there is no difference in the meaning of those texts. It is to be noted also that in the French text of article 292, paragraph 1, the expression "*caution raisonnable*" is used.

15. The Tribunal has held in its Judgment in the present case that the bond or security must be of an exclusively financial character. There is no doubt that the posting of a bond based on the value of the vessel is a financial security. The Tribunal has held in favour of the bond imposed by the Respondent representing the full value of the vessel. Had it been necessary to consider that part of the bond referable to the bail of the three crew members charged with offences (which became moot after their release on reduced bail following shortly after the oral hearing before the Tribunal), the Tribunal would no doubt have upheld a high level of bond consistent with the potential fines to be imposed as reasonable in view of the gravity of the offences. The Tribunal did not accede to the Applicant's request that the value of the catch seized and sold by Australia should offset the bond amount for the vessel. As counsel for the Respondent put it, to do so would be like allowing a burglar to put up the stolen goods as security for bail. However, the Tribunal has noted that the amount held in trust attributable to the sale of the catch should be regarded as part of the overall security held by Australia. While in that respect not departing from its previous decisions in the *"Camouco"* and *"Monte Confurco"* cases to regard the value of the catch as a factor relevant to the reasonableness of the bond, it might be thought that the Tribunal has gently distanced itself from this view by holding that the issue does not arise in the present case. On this point I agree with the Dissenting Opinion of Judge Jesus in the *"Monte Confurco" Case*, at paragraphs 32-33.

16. Where I respectfully disagree with the Tribunal is with its rejection of that part of the bond imposed by Australia which required that the owners of the *Volga* agree to "the carriage of a fully operational VMS [vessel monitoring system] device and observance of CCAMLR conservation measures until the conclusion of legal proceedings." Even though the Respondent quantified this requirement in monetary terms at AU$ 1,000,000, it has nevertheless been regarded by the Tribunal as a non-financial security since it is essentially in the nature of a "good behaviour bond" for the future, and, moreover, before there has been any final determination of guilt in respect of the vessel's past activities.

17. Such a narrow interpretation of the provisions of articles 73, paragraph 2, and 292 cannot, in my opinion, be supported. In the short period since the conclusion of the Convention in 1982, and in the even shorter period since its entry into force in 1994, there have been catastrophic declines in the stocks of many fish species throughout the world. The words "bond" and "financial security" 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 organizations) to deter by way of judicial and administrative orders the plundering of the living resources of the sea.

18. Moreover, it may not be necessary even on a narrow interpretation of the words of the Convention to exclude from a bond associated conditions that are not of themselves financial in nature. As Judge Anderson points out in the present case, such conditions are commonplace in the practice of many national courts. A person bailed on a charge of a crime involving the use of alcohol may be prohibited, as part of the terms of release, from consuming alcohol during the period of bail. A person might be similarly prohibited from going within a certain distance of a particular place, or of a particular person, as part of a

bond pending the trial of the offence. Courts frequently demand that travel documents be surrendered during the period of bail. The object of conditions of this sort is to deter the accused from committing further offences. Breach of such conditions is punished with the monetary penalty of forfeiture of the bond. It is the same in the present case with the requirement of the installation of the VMS device.

19. Many have observed that the provisions of articles 73 and 292 of the Convention were designed to achieve a balance between the interests of flag States (and especially flag States of fishing vessels) and coastal States in their rights of management and conservation of their EEZs. The Tribunal itself has referred to this balance in its Judgment in the *"Monte Confurco" Case*, at paragraphs 70-72. It is still thought by some that this balance should be preserved exactly as it was conceived at the time of the Third United Nations Conference on the Law of the Sea, 1973-1982. But it should be recognised that circumstances have now changed. Few fishing vessels are state-owned. 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. The flag State is bound to exercise effective control of its vessels, but this is often made difficult by frequent changes of name and flag by those vessels. It is notable that in recent cases before the Tribunal, including the present case, although the flag State has been represented by a State agent, 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.

(Signed) Ivan Shearer