

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

**THE VOLGA - APPLICATION FOR RELEASE OF VESSEL AND  
CREW**

**THE RUSSIAN FEDERATION v THE COMMONWEALTH OF AUSTRALIA**  
**(Applicant) (Respondent)**

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NOVEMBER 2002

**WILSON & HARLE**

Counsel:  
Andrew Tetley/Paul David  
Phone+64-9-915 5700  
Fax +64-9-915 5701  
64 Fort Street  
Auckland  
Email: [andrew.tetley@wilsonharle.com](mailto:andrew.tetley@wilsonharle.com)

Agent of the Russian Federation:  
Pavel Grigorevich Dzubenko

Address for service:  
Consular General of the Russian  
Federation, 220185 Hamburg, Am  
Feenteich, 20

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PART I

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**WILSON & HARLE**

Counsel:  
Andrew Tetley/Paul David  
Phone +64-9-915 5700  
Fax +64-9-9155701  
64 Fort Street  
Auckland  
Email: [andrew.tetley@wilsonharle.com](mailto:andrew.tetley@wilsonharle.com)

Agent of the Russian Federation:  
Pavel Grigorevich Dzubenko

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MEMORIAL OF THE RUSSIAN FEDERATION

NOVEMBER 2002

## MEMORIAL OF THE RUSSIAN FEDERATION

### CHAPTER 1

#### INTRODUCTION

1. The Applicant applies to the International Tribunal for the Law of the Sea (“**Tribunal**”) for the following declarations and orders:
  - (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.
2. The Respondent makes this application in reliance on articles 73 and 292 of UNCLOS, on rules 54 and 110-114 of the Rules of the Tribunal (“**Rules**”) and on the grounds as appearing in the statement of facts and law and supporting documents which follow.
3. The Applicant requests that copies of any communications from the Tribunal to the agent of Russia in this matter be transmitted by facsimile to counsel whose names and details appear on the intituling of this memorial as well as to the agent at the Ministry of Foreign Affairs in Moscow. The Applicant also requests that for the purposes of any conferences that may take place prior to the hearing of this matter, counsel as well as the agent be given the opportunity to attend by telephone.

## CHAPTER 2

### STATEMENT OF FACTS

#### I. Introduction

1. The Commonwealth of Australia and the Russian Federation are both sovereign nations and parties to UNCLOS.
2. The *Volga* ("vessel") is registered in the ship registry of the Russian Federation at the port of Taganrog and is entitled to fly the Russian flag.
3. The vessel is a long liner fishing vessel constructed in 1985 in Japan with registered length 44.2m, breadth 8.2m and depth 3.6m, GRT 297.51 tons, NRT 153.75 tons.
4. The owner of the vessel is Olbers Co Limited ("owner").
5. The owner is a company incorporated in Russia with its registered office in Moscow, 153 Dimitrovskoe Shosse, Bldg 3.

#### II. Seizure of the vessel

6. On 7 February 2002, the vessel was boarded by Australian military personnel from an Australian military helicopter ("helicopter") in the Southern Ocean ("boarding").
7. At the time of the boarding from the helicopter, the vessel was on the high seas.
8. The approximate position of the vessel at the time of boarding was 51° 35S, 78° 47E.
9. 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 exclusive economic zone of the Respondent.
10. 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.
11. On 7 February 2002, after the boarding, the Master of the vessel was served with a notice of apprehension by the Australian authorities and the vessel and crew were detained by the Australian military.
12. The vessel was subsequently directed by an Australian warship to steam to Perth and arrived in Perth under escort on or about 19 February 2002.

13. The crew of the vessel, with the exception of the Master, the chief mate (Juan Manuel Gonzalez Folgar), the fishing master (Manuel Perez Lijo) and the fishing pilot (Jose Manuel Lojo Eiroa), who remain in Perth under Court orders, were later released from detention and repatriated to their respective homelands.

### **III. Criminal proceedings – bail payments**

14. On or about 5 March 2002, the fishing master, fishing pilot and chief mate (“**officers**”) were charged with offences under Australian law in connection with the activities of the vessel in the Southern Ocean (“**criminal proceedings**”) and the officers were remanded in custody.
15. On or about 16 March 2002, the Master died in hospital while in the care and custody of the Australian authorities.
16. On or about 16 March 2002, the Australian Court ordered the release of the officers from custody, conditional on them remaining in Perth, on payment of bail into court in the amount of AU\$225,000.
17. On or about 21 March 2002, the owner made AU\$225,000 available to meet the bail conditions set by the Court. AU\$225,000 was posted into court and the officers were released from custody.
18. On or about 14 June 2002 the Australian Court ordered a variation of bail to allow the officers to leave Australia upon posting bail moneys of AU\$825,000.
19. On 6 August 2002, a further charge was laid against the fishing master and further bail set by the Australian Court of AU\$20,000.
20. On or about 27 August 2002, the owner provided AU\$20,000 to meet the further bail conditions for the fishing master, which sum was paid into court on behalf of the fishing master.

### **IV. Proceeds of catch**

21. On or about 20 May 2002, the Australian authorities sold the catch that had been on board the vessel at the time of boarding.
22. The Australian authorities have retained the sale proceeds of the catch in the amount of AU\$1,932,579.28.

### **V. Forfeiture proceedings**

23. On or about 21 May 2002, the owner issued proceedings in Australia for a declaration that the seizure and detention of the vessel and the catch was illegal and for orders that the vessel, the equipment and proceeds of the catch be released to the owner (“**forfeiture proceedings**”).

24. The Respondent in the forfeiture proceedings applied for security for its costs from the owner in the amount of AU\$40,000. The Australian Court dismissed the Respondent's application.

#### **VI. Request for release of vessel and crew**

25. From the outset on 7 February 2002, various requests have been made on behalf of the owner and the Applicant to the Australian authorities for the unconditional release of the vessel and crew. All the requests have been refused by the Australian authorities.
26. Between 19 June 2002 and 26 August 2002, the Australian Fisheries Management Authority ("**AFMA**") sought to impose various conditions for the release of the vessel.
27. By letter dated 26 July 2002, AFMA stated that the release of the vessel was conditional on the owner:
- (a) Providing information in a format that can be independently verified of:
    - (i) The ultimate beneficial owners of the vessel, including the name(s) of the parent company or companies to the owner;
    - (ii) The names and nationalities of the directors of the owner and of the parent company (or companies);
    - (iii) The name, nationality and location of the manager(s) of the vessel's operations;
    - (iv) The insurers of the vessel; and
    - (v) The financiers, if any, of the vessel.
  - (b) Providing security in the form of a cash deposit or an unconditional bank guarantee in the amount of AU\$3,332,500.00.
  - (c) Agreeing to carry a fully operational VMS on board the vessel and observing Commission for the Conservation of Antarctic Marine Living Resources conservation measures until the conclusion of legal proceedings in Australia.
28. The conditions set out in paragraph 27 for release of the vessel were in addition to a total bail requirement of AU\$845,000 set by the Australian Court for the release of the crew from Australia and which has been met, in part, by Olbers in the amount of AU\$245,000.

**VII. Value of the vessel and fines**

29. The value of the vessel (hull, machinery and outfit) is in the order of US\$1,000,000.
30. The maximum possible fines in respect of the charges laid against the officers is AU\$1,100,000.
31. The total maximum likely fines against the officers, if found guilty at trial, is in the order of AU\$150,000-AU\$210,000.

**CHAPTER 3**  
**STATEMENT OF LEGAL GROUNDS**

**I. Jurisdiction and admissibility**

1. Article 292 of UNCLOS provides as follows:

Prompt release of vessel and crew

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 Party 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 Party 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.
2. The Applicant meets the conditions of article 292(1)-(2). It is submitted that the jurisdiction of the Tribunal is established and that the application for release of the vessel and crew is admissible.



**II. Respondent in breach of article 73(2)**

3. Article 73(2) of UNCLOS provides as follows:

Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

4. The Respondent is in breach of Article 73(2) in that:

- (a) It has set conditions of release for the vessel, as listed in subparagraphs 27(a) and (b) of the Statement of Facts, which are not permitted under article 73(2); and
- (b) The amount of the security set for the release of the crew and vessel in the total amount of AU\$4,177,500 (AU\$3,332,500 for the vessel and AU\$845,000 for the crew) is in all the circumstances unreasonable:
  - (i) The value of the vessel (hull, machinery and outfit) is US\$1m (approximately AU\$1.8m)
  - (ii) The Respondent has seized, sold and retained the proceeds of the catch on board the vessel in the amount of AU\$1,932,579.28. There is sundry equipment and fuel on board the vessel valued at AU\$147,460
  - (iii) The owner has made payments in relation to the bail ordered to be provided by the officers in the criminal proceedings in the amount of AU\$245,000.
  - (iv) In the event that the officers of the vessel are convicted in Australia, the total of the fines is unlikely to exceed AU\$210,000.
  - (v) The crew, or some of them, are suffering from depression and other psychological disorders as a result of their prolonged detention in Australia.
  - (vi) The Respondent has admitted in writing by letter dated 20 May 2002 to the Russian Embassy in Canberra and in the forfeiture proceedings that:
    - (aa) its first attempt to contact the vessel occurred by radio when the vessel was on the high seas; and
    - (bb) it did not issue any order to stop the vessel.

Accordingly the Respondent was in breach of article 111 of UNCLOS when it boarded the vessel and accordingly apprehended the vessel on the high seas in a manner that was unlawful and contrary to article 87(1)(a) of UNCLOS.

## CHAPTER 4

### SUBMISSIONS

#### I. Jurisdiction and admissibility

1. It is submitted that based on Article 292 of UNCLOS and Rule 110 of the Rules, the Tribunal has jurisdiction to hear the application for release and the application is properly brought:
  - (a) The authorities of the Respondent have detained the vessel and officers since 7 February 2002 in purported exercise of powers under the Respondent's laws in relation to fisheries, and in particular under the Fisheries Management Act 1991;
  - (b) The parties have not agreed on a Court or a Tribunal to decide on the question of release within 10 days of the vessel's detention;
  - (c) The application is brought by Pavel Grigorevich Dzubenko on proper authority of the Applicant; and
  - (d) The Applicant alleges that the Respondent has not complied with Article 73(2) of the provisions of UNCLOS for the prompt release of the officers and vessel upon the posting of reasonable bond or security.

#### II. Breach of article 73(2)

2. Article 73(2) provides that the "arrested vessels and their crew shall be promptly released upon the posting of reasonable bond or other security".
3. In setting conditions for the release of the vessel, the Respondent has relied on the following provision of its domestic legislation:

#### **Fisheries Management Act 1991**

#### **88 Release of seized property**

- (1) Where any property is under the control of an officer because of the exercise by an officer of powers under section 84, AFMA may direct that the property be released:
  - (a) in the case of a boat – to the owner or the master of the boat; and

- (b) in any other case – to the owner of the property or to the person from whose possession the property was seized, or from whose control the property was removed;

*on such conditions (if any) as AFMA thinks fit, including conditions as to the giving of security for payment of the value of the property if it is forfeited and for the payment of any fines that may be imposed under this Act in respect of offences that AFMA has reason to believe have been committed with the use of, or in relation to, that property. ...*  
(Emphasis added)

- 4. The primary issue for decision of the Tribunal is whether or not the terms and conditions for release of the vessel and crew set by the Respondent in this matter comply with article 73(2).

A. Conditions for release of vessel must relate to a bond or security

- 5. It is submitted that the Respondent cannot attach conditions of release which do not relate to the provision of a bond or other security in terms of Article 73(2) of UNCLOS. The language of article 73(2) is clear.
- 6. The Concise Oxford English dictionary (10<sup>th</sup> edition, 1999) defines “bond” and “security” relevantly as follows:

**Bond**

3. a binding agreement, especially one which commits someone to make a payment to another.

**Security**

4. a thing deposited or pledged as a guarantee of the fulfilment of an undertaking or the re-payment of a loan, to be forfeited in case of default.

- 7. Whatever the position under the Respondent's domestic law, it is submitted that as a matter of international law the Respondent can only impose conditions for release of the vessel that relate to the provision of a bond or security in the pecuniary sense. There is no basis under Article 73(2) or UNCLOS generally for the Respondent to impose conditions that relate other than to the amount and form of the bond or security required.
- 8. It is accordingly submitted that a number of the conditions set by the Respondent for release of the vessel are unlawful and in breach of article 73(2):
  - (a) The provision by the owner of information relating to the owner's identity, governance, insurance and finance; and

(b) The requirement to carry particular equipment on board the vessel.

B. Bond or security must be reasonable

9. In setting an amount and terms of the bond or security required for the release of the vessel and crew, a balance must be struck between the interests of the Respondent as the coastal state seeking to ensure compliance with its local laws and the flag state whose interest is to ensure the prompt release of the vessel and crew from detention. The release from detention can be subject only to a "reasonable" bond<sup>1</sup>.
10. The concept "reasonable" denotes connotations of proportionality, balance, fairness, propriety, moderateness, suitability, tolerableness and in excessiveness<sup>2</sup>.
11. What is reasonable will depend upon all the circumstances of the case. The Tribunal has given some guidance in earlier jurisprudence on relevant factors in assessing the reasonableness or otherwise of a bond:
- 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 offence, the penalties imposed or imposable under the law 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<sup>3</sup>.
12. However, the above list of factors is not exhaustive. In the "*Monte Confurco*" case, the Tribunal considered the factors listed above and commented that "this is by no means a complete list of the factors. Nor does the Tribunal intend to lay down rigid rules as to the exact weight to be attached to each of them."<sup>4</sup>

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<sup>1</sup> International Tribunal for the Law of the Sea, the "*Monte Confurco*" case, 18 December 2000, judgment, paragraph 70

<sup>2</sup> See, for example, International Tribunal for the Law of the Sea, the "*Camouco*" case, 17 February 2002, declaration of Judge Laing, paragraph 10

<sup>3</sup> International Tribunal for the Law of the Sea, the "*Camouco*" case, 7 February 2000, judgment, paragraph 67

<sup>4</sup> International Tribunal for the Law of the Sea, the "*Monte Confurco*" case, 18 December 2000, judgment, paragraph 76

13. It is necessary for the Tribunal to have an appreciation of the facts of the matter in assessing the reasonableness or otherwise of the bond. While an application for release under Article 292 of UNCLOS gives rise to independent proceedings which are not incidental to proceedings on the merits, the Tribunal is entitled to consider and, it is submitted, should in this case give weight to the facts of the matter:

These proceedings are thus not incidental to proceedings on the merits as are the proceedings for interim measures set out in Article 290 which in the Rules are dealt with in Section C of Part III, on “incidental proceedings”. They are separate, independent proceedings. It cannot, however, be excluded that a case concerning the merits of the situation that lead to the arrest of the M/V *Saiga* could later be submitted for a decision on the merits to the Tribunal or to another Court or tribunal competent according to Article 87 of the Convention. In the view of the Tribunal, *this circumstance does not preclude it from considering the aspects of the merits it deems necessary in order to reach its decision on the question of release*, but it does require that the Tribunal do so with restraint (emphasis added)<sup>5</sup>.

14. In the same vein, the Tribunal in the “*Monte Confurco*” case said as follows:

The proceedings under Article 292 of the Convention, as clearly provided in paragraph 3 thereof, can 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. Nevertheless, in the proceedings before it, *the Tribunal is 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* (emphasis added)<sup>6</sup>.

15. This aspect of the fact finding task of the Tribunal was emphasised in a separate opinion of Vice-President Nelson:

The sole task of the Tribunal is to determine a reasonable bond. It is hard to imagine that the Tribunal can make such an assessment without looking into and indeed examining to the extent possible “facts and circumstances of the case”<sup>7</sup>

<sup>5</sup> International Tribunal for the Law of the Sea, the M/V “*Saiga*” case, 4 December 1997, judgment, paragraph 50

<sup>6</sup> International Tribunal for the Law of the Sea, the “*Monte Confurco*” case, 18 December 2000, judgment, paragraph 74

<sup>7</sup> International Tribunal for the Law of the Sea, the “*Monte Confurco*” case, separate opinion of vice-president Nelson, paragraph 3

16. It is further submitted that, in assessing the reasonableness of any bond, the Tribunal should have regard to humanitarian matters:

It seems to me, too, that there can not be any gainsaying that prompt release is also reinforced by its significant humanitarian underpinnings, ranging from the economic rights or concerns of ship owners to the civil rights or concerns of detained crews<sup>8</sup>.

17. In this case, The Respondent has set a bond of AU\$3,332,500 for the release of the ship and AU\$845,000 bail has been set for the release of the officers. It is submitted that these amounts are clearly unreasonable in the circumstances.

*1. Proceeds of sale of the catch and other sums paid and the value of the vessel*

18. The amount of AU\$1,932,579.32 is held by the Respondent as the proceeds of sale of the catch<sup>9</sup>. It is submitted that this amount should be treated as security given by the owner. To the extent that the Tribunal finds that a reasonable bond would, if at all, exceed the amount of AU\$1,932,579.32, the amount of security to be posted should be reduced by the amount of the sale proceeds of the catch. This has been the approach of the Tribunal in the past<sup>10</sup>. It is submitted that the same approach should apply in this case.
19. It is submitted further that the AU\$245,000 provided by the owner by way of bail should be accounted for in the same way as for the proceeds of sale of the catch in setting any further bond or security, if any.
20. With respect to the value of the vessel, the evidence is that the value of the vessel's hull, machinery and outfit is US\$1,000,000 and that sundry other equipment on board has a value of AU\$77,000<sup>11</sup>. The amount of the sale proceeds of the catch accordingly exceeds the value of the vessel.

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<sup>8</sup> International Tribunal for the Law of the Sea, the "*Camouco*" case, 17 February 2002, declaration of Judge Laing, paragraph 5

<sup>9</sup> Amended statement of defence in forfeiture proceedings, paragraph 15, annex 1, page 108

<sup>10</sup> International Tribunal for the Law of the Sea, the "*Monte Confurco*" case, 18 December 2002, judgment, paragraphs 86 and 93

<sup>11</sup> Valuation dated 27 February 2002 commissioned by AFMA, annex 1, page 212

*2. Gravity of the offences alleged and penalties imposable*

21. The offences alleged against the officers are serious offences. However, it is submitted that this must be balanced against the fact that:
- (a) The Applicant has made a clear allegation against the Respondent of a serious breach of the international obligations owed to the Applicant as outlined above. The Respondent has offered no reparation or tenable justification for its actions; and
  - (b) The vessel and crew have been detained for a period of over ten months causing significant loss and stress to the owner and the officers; and
  - (c) The owner has not been charged with any offence under Australian law.
22. With respect to the penalties imposable, the maximum total of fines that may be set for the offences charged is AU\$1,100,000<sup>12</sup>. The vessel and catch are also liable to forfeiture in the event that the officers are found guilty of the offences with which they are charged<sup>13</sup>.
23. It is submitted, however, that it is unreasonable to set a bond which takes into account the maximum fines payable when it is unlikely that fines at that level will be imposed. It is submitted that a more realistic and reasonable sum to take into account is the fines that are likely to be imposed if the officers are found guilty at trial. The Applicant's evidence suggests that this would be in the order of AU\$150,000 – AU\$210,000<sup>14</sup>.

*3. Humanitarian considerations*

24. The crew are suffering from the effects of their prolonged detention in a foreign country whose customs and language are unfamiliar to them. They are receiving medical attention for psychological disorders and are reliant on the owner to meet the costs of treatment<sup>15</sup>. The Respondent has not provided for the necessary medical care. Trial of the offences charged is likely to be a year away<sup>16</sup>. In the circumstances, any bond should be set at a level that is reasonable and which will allow the officers the opportunity to return to their home countries. The offences with which they are charged do not carry any possible custodial sentence. The amount of bail posted is in excess of the likely fines.

<sup>12</sup> Four charges each attracting a maximum penalty of AU\$275,000; Affidavit of Mr Tom Percy QC, paragraph 7, annex 2, page 257

<sup>13</sup> Section 106A Fisheries Management Act 1991, annex 3, page 359

<sup>14</sup> Affidavit of Mr Tom Percy QC, paragraph 22, annex 2, page 259

<sup>15</sup> Medical reports dated 25 September 2002 and 6 November 2002, annex 3, pages 299-302, 324-329

<sup>16</sup> Affidavit of Mr Tom Percy QC, paragraph 20, annex 2, page 258



4. *Circumstances of the seizure in breach of article 111*

25. The Applicant claims that the seizure of its vessel in international waters was in breach of article 111 of UNCLOS. The Respondent disputes the Applicant's claim. The Applicant intends to invite the Respondent to agree to submit the dispute to the Tribunal. The Tribunal is the Respondent's preferred forum pursuant to its declaration under Article 287. If the Respondent declines, the dispute will be referred to arbitration in accordance with the applicable provisions of part XV of the Convention.
26. It is submitted that, in assessing the reasonableness of any bond, the Tribunal should take into account the circumstances of the seizure. The lawfulness of the seizure will be a matter for determination by the Tribunal or in arbitration under UNCLOS. The Applicant does not invite the Tribunal to consider the merits of any case under consideration in the Respondent's domestic forum but does invite the Tribunal to take notice of the lawfulness under international law of the Respondent's actions in seizing the vessel on the high seas.
27. It is undisputed that the vessel was apprehended on the high seas. Only in very limited circumstances would the Respondent be entitled to apprehend a foreign flagged vessel on the high seas. In this case, the Respondent relies on the right contained in Article 111<sup>17</sup>.
28. Article 111 provides as follows:

*Right of hot pursuit*

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. ...
2. The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone ... of the laws and regulations of the coastal State applicable in accordance with the Convention to the exclusive economic zone ...
4. ... The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

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<sup>17</sup> Australian Attorney General's letter dated 26 March 2002, annex 1, page 73

6. Where hot pursuit is effected by an aircraft:
- (a) the provisions of paragraphs 1-4 shall apply *mutatis mutandis*;
  - (b) the aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest outside the territorial sea that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not *both* ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

29. It appears not to be in dispute that:

- (a) The Respondent did not issue a stop order<sup>18</sup>; and
- (b) The first attempt by the Respondent to contact the vessel by radio from a helicopter was made when the vessel was on the high seas<sup>19</sup>

30. These undisputed facts are, it is submitted, crucial in assessing the strength of the Applicant's claim that the seizure of its vessel was in breach of international law. Article 111 is clear. A stop order must be issued to the pursued vessel for there to be a valid pursuit. The Respondent cannot rely on having complied with some but not all of the conditions of article 111:

The Tribunal notes that the conditions for the exercise of the right of hot pursuit under article 111 of the Convention are cumulative; Each of them has to be satisfied for the pursuit to be legitimate under the Convention<sup>20</sup>.

31. It is submitted that the Respondent cannot establish a valid hot pursuit given its admitted omission to communicate a stop order to the vessel while the vessel was in the Respondent's EEZ. It is submitted that this should be taken into consideration in assessing the level of bond that is reasonable in this case.

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<sup>18</sup> Amended statement of defence in forfeiture proceedings, paragraph 8, annex 1, page 107

<sup>19</sup> Diplomatic note from the Australian Department of Foreign Affairs to the Russian Embassy dated 20 May 2002, annex 3, pages 373-374; Amended statement of defence, paragraph 8, annex 1, page 107

<sup>20</sup> International Tribunal for the Law of the Sea, the M/V "Saiga" (no. 2) case, 1 July 1999, judgment, paragraph 146

### III. Form and amount of bond or security

32. The Respondent holds AU\$2,177,579.32 being the value of the catch and the bail moneys paid by the owner. The Respondent also has possession of the owner's fuel and lubricants on board the vessel valued at AU\$70,460. The value of the vessel and its equipment and the likely fines if the officers are found guilty, total between AU\$2,027,000 – AU\$2,087,000 (exchange rate US\$1:1.8AU\$). It is submitted that in the circumstances the Respondent is adequately secured for its claim so that the amount of the bond or financial security should be set at a nominal level. It is submitted alternatively that the bond or financial security should be set in an amount not exceeding AU\$500,000.
33. With respect to the form of any bond or financial security that the Tribunal may order, the Applicant submits that a bank undertaking substantially in the form annexed<sup>21</sup> would be an appropriate form of security for the Tribunal to order in accordance with its powers to do so pursuant to article 113(2) of the Rules.

### IV. Costs

34. Article 34 of the statute of the Tribunal provides that unless otherwise decided by the Tribunal, each party shall bear its costs.
35. It is submitted that it is appropriate in this case for the Tribunal to order that the Respondent indemnify the Applicant for its costs:
- (a) the Respondent has ignored a reasonable proposal to bond the vessel offered on behalf of the owner and insisted on unreasonable terms;
  - (b) the Respondent has ignored the request by the Applicant for the unconditional release of the vessel; and
  - (c) the Respondent has acted unreasonably throughout and detained the vessel and crew for over ten months

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<sup>21</sup> Draft undertaking, annex 3, pages 347-348

**CHAPTER 5**  
**SUMMARY OF ARGUMENT**

1. Pursuant to article 292 of UNCLOS, the Applicant applies to the Tribunal for the release of the *Volga*, and the three officers detained in Australia.
2. The Tribunal has jurisdiction to hear and determine the application and the application is admissible (page 11).
3. The Respondent has set conditions for the release of the vessel and officers, which are:
  - (a) not permissible under article 73(2) (page 12); and
  - (b) unreasonable in terms of article 73(2) (pages 13-18).
4. In all the circumstances, a bond or security for the release of the vessel and officers should be set by the Tribunal at a nominal level or in any event at a level not exceeding AU\$500,000 (page 19).
5. The Respondent should indemnify the Applicant for its costs of the application (page 19).

Dated 29 November 2002

**Signed by the appointed agent for the Russian Federation**



**Pavel Grigorevich Dzubenko**  
Deputy Director, Legal Department,  
Ministry of Foreign Affairs of the  
Russian Federation

## CHAPTER 6

### CHRONOLOGY

- 7 February 2002 *M/V Volga* (“vessel”) boarded by Australian military.
- 7 February 2002 Facsimile on behalf of the owner protesting Australia’s boarding of the vessel to Australian Department of Foreign Affairs and Trade (“DFAT”)
- 12 February 2002 Facsimile on behalf of the owner requesting an immediate response to its protest. Request made to DFAT, Ministers of Foreign Affairs and Trade, Defence and Agriculture, Forestry and Fisheries
- 15 February 2002 DFAT response that the vessel was apprehended under Australian law in accordance with international law
- 19 February 2002 The vessel arrives in Fremantle under escort by the Australian military and a notice of detention is served on the Master.
- 20 February 2002 Notice of seizure of the vessel served on the Master
- 22 February 2002 Australian Fisheries Management Authority (“AFMA”) officers interview the Master, chief mate, fishing master and fishing pilot
- 22 February 2002 Master of vessel makes written protest against the seizure of the vessel in international waters to Russian Embassy in Australia
- 25 February 2002 Letter on behalf of the owner to DFAT, Commonwealth Department of Public Prosecutions (“DPP”) and the Ministers of Foreign Affairs and Trade, Defence and Agriculture, Forestry and Fisheries requesting release of the vessel on the basis that the vessel’s seizure was in breach of international law
- 28 February 2002 Facsimile on behalf of the owner to DPP requesting release of the vessel on the basis that the vessel’s seizure was in breach of international law
- 1 March 2002 Facsimile on behalf of the owner challenging the legality of the detention of the crew

- 6 March 2002 The fishing master, fishing pilot and chief mate of the Volga (“**officers**”) are charged in court with illegal fishing inside the exclusive economic zone surrounding the Heard and McDonald islands and detained in custody
- 6 March 2002 Facsimile on behalf of the owner to the Australian Attorney-General’s Department requesting a response to the letter dated 25 February 2002
- 16 March 2002 The Russian master of the vessel dies in hospital
- 18 March 2002 Russian Embassy note to DFAT requesting evidence that the vessel was apprehended in accordance with international law
- 21 March 2002 The officers are released from custody on conditional bail of AU\$75,000 each
- 21 March 2002 Facsimile on behalf of the owner to AFMA claiming that the vessel and equipment should not be condemned as forfeit under Australian law
- 21 March 2002 Notice from AFMA that the vessel will be condemned as forfeit unless proceedings are commenced against the Commonwealth within two months
- 26 March 2002 Letter from Attorney-General’s Department re-stating that the vessel was apprehended under Australian law in accordance with international law
- 6 May 2002 Note from Russian Embassy to DFAT requesting a response on the legality of the seizure of the vessel
- 20 May 2002 Note from DFAT to Russian Embassy in response to the Russian Embassy’s notes of 18 March 2002 and 6 May 2002.
- 21 May 2002 Application for declaration against forfeiture filed on behalf of the owner in Federal Court of Australia (“**forfeiture proceedings**”)
- 19 June 2002 Directions hearing in forfeiture proceedings
- 19 June 2002 Facsimile on behalf of the owner to AFMA enquiring what conditions AFMA would seek in order to release the vessel
- 28 June 2002 Letter from AFMA requesting the owner’s company information

4 July 2002	Amended statement of claim filed on behalf of the owner in forfeiture proceedings.
8 July 2002	Facsimile on behalf of the owner to AFMA requesting to be promptly advised of the amount of bond required for the release of the vessel
26 July 2002	Letter from AFMA repeating request for company information and requiring security of AU\$3,332,500
7 August 2002	Notice of motion for security for costs filed by Commonwealth of Australia in forfeiture proceedings
13 August 2002	Directions hearing in forfeiture proceedings
23 August 2002	Fishing master charged with additional count of illegal fishing. Bail granted upon payment of additional AU\$20,000
26 August 2002	Letter on behalf of the owner to AFMA disputing the amount and conditions of the bond proposed by AFMA. Owner counter-proposes a AU\$500,000 bond
26 August 2002	Commonwealth of Australia files defence in forfeiture proceedings
September 2002	Owner requests further particulars of Commonwealth of Australia's defence in forfeiture proceedings.
10 October 2002	Russian Embassy note to DFAT seeking release of the vessel and officers and compensation for the losses suffered by the owner
16 October 2002	Commonwealth of Australia's motion for security for costs dismissed
18 October 2001	AFMA responds to letter of 26 August 2002 indicating a reply will be given in the near future
23 October 2002	Commonwealth of Australia files answers to owner's request for particulars in forfeiture proceedings
6 November 2002	Commonwealth of Australia files amended statement of defence in forfeiture proceedings