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

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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.