Frank Stuart Dethridge Memorial Address 2003
The "Volga" Case

Judge Dolliver Nelson *

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The address was presented by the Honourable Justice Richard Cooper, Judge of the Federal Court of Australia.

To my regret I am unable to deliver this address and to participate in the 30th Annual Conference of The Maritime Law Association of Australia and New Zealand. As you may know, the Tribunal is at the present time dealing with the *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures*.

At the outset I should like to give a brief description of the factual background of the *"Volga" Case* – I need hardly say that these remarks are entirely personal.

The long-line fishing vessel – the *Volga* – flying the Russian flag was arrested on 7 February 2002 by the Australian frigate *HMAS Canberra* for engaging in illegal fishing activities in the exclusive economic zone of the Australian Heard and McDonald Islands. At the time of the boarding the ship was outside the exclusive economic zone. The Australian authorities required a security of AU$ 3,332,500 for the release of the Volga. The amount of the security was based on three elements: (i) the assessed value of the vessel, fuel, lubricants and fishing equipment; (ii) potential fines and (iii) 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. The shipowner was not prepared to bond the vessel in the amount sought and did not agree that the "extra conditions" (which may be termed the "good behaviour bond") were reasonable. A bond of AU$ 500,000 was offered.

On 2 December 2002 the Russian Federation filed an application under article 292 of the United Nations Convention on the Law of the Sea with the International Tribunal for the Law of the Sea for the release of the *Volga* and its crew.

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Article 292 reads in part as follows:-

> 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.

This provision gives the Tribunal a residual compulsory jurisdiction with respect to the prompt release of vessels. A State Party is entitled to submit to the Tribunal, in certain circumstances specified in article 292, the question of release from detention of the vessel or its crew on the payment of a reasonable bond.

The "*Volga"* was the sixth case concerning the prompt release of vessels and crews to come before the Tribunal. The others were the *MV "Saiga"* (1997), the *"Camouco"* (2000), the *"Monte Confurco"* (2000), the *"Grand Prince"* (2001) and the *"Chaisiri Reefer 2"* (2001). It is of some interest that three of the prompt release cases before the Tribunal arose from illegal fishing activities in the Southern Ocean.

Reasonable bond

In these prompt release cases the Tribunal has been engaged in clarifying the rule contained in article 292 of the Convention and developing its own jurisprudence especially with regard to the meaning of a reasonable bond. The *locus classicus* of the factors which the Tribunal believes constitute a reasonable bond can be found in the *"Camouco" Case* (paragraph 67) which states:

> The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds and 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.

In the *"Monte Confurco" Case* the Tribunal importantly went on to add that the list outlined above was not closed and further observed that it was not its intention to lay down rigid rules as to the exact weight to be given to any of those factors (paragraph 76) which gives the Tribunal a certain discretion in assessing the reasonableness of the bond and there can be no doubt that it is the Tribunal's task to determine, in case of any dispute, the reasonableness of the bond.

Illegal, uncontrolled and undeclared fishing

An important question which arises in these prompt release cases relates to the problem of illegal, uncontrolled and undeclared fishing in the Southern Ocean – a matter of some international concern. Diplomatic notes were sent to Australia by, for instance, Chile, France, New Zealand and South Africa.[1] To what extent must the Tribunal take this factual background into account? It will be recalled that in the *"Monte Confurco" Case* France stated that "among the circumstances constituting what one might call the 'factual background' of the present case, there is one whose importance is fundamental.

[1] There is a precedent for the submission of such diplomatic correspondence in Annex 4 to the Common Rejoinder of Denmark and The Netherlands in the North Sea Continental Shelf Cases. ICJ Pleadings 1968 vol. , p. 564.

That is the general context of unlawful fishing in the region concerned". The Tribunal declared in response that it took note of this argument. (Judgment, paragraph 79).

In the *"Volga" Case* Australia urged the Tribunal to take full account of the context of illegal, uncontrolled and undeclared fishing in the Southern Ocean and more especially in the Australian Exclusive Economic Zone adjacent to the Territory of Heard Island and McDonald Island.

The argument can be made that in the *"Volga" Case* the Tribunal went somewhat further when it declared:-

> 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 (paragraph 68).

The Tribunal has to a certain extent qualified this observation when it went on to add that:

> 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 (paragraph 69) (Emphasis added).

The use of the word 'however' in the above statement seems to suggest that the "problem of continuing illegal fishing in the Southern Ocean" is a factor which is somewhat alien to the object and purpose of article 292.[2]

The Tribunal's business is to determine a reasonable bond and "what is reasonable and equitable in any given case must depend on the particular circumstances".[3] It may be argued that "reasonableness cannot be assessed in isolation from those circumstances".[4]

Non-financial conditions

A significant question which arose for the first time in these prompt release cases relates to whether the coastal State is entitled to include in a "bond or other security", as provided for in article 73, paragraph 2, conditions which are non-financial in nature. Australia, as was stated earlier, had made the release dependent, *inter alia*, on certain non-financial conditions: the carriage of a fully operational vessel monitoring system and the observance of the CCAMLR (Commission for the Conservation of Antarctic Marine Living Resources) conservation measures until the conclusion of legal proceedings (the so-called "good behaviour bond").

The Russian Federation contended that Australia could not attach "conditions of release which do not relate to the provisions of a bond or other security in terms of article 73(2) of UNCLOS" (Memorial, p. 12). Australia for its part argued that "[T]his element of the bond is designed to ensure that the *Volga* complies with Australian law

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[2] See RGDIP, 107/2003/1, pp. 182-188 on p. 183, and Caroline Laly-Chevalier, "Activité du Tribunal international du droit de la mer (2001-2002), Annuaire français du droit international, 2002, pp. 363-380 on p. 370. See also Michael White and Stephen Knight, ITLOS and the Volga case: the Russian Federation v Australia, The Maritime Law Association of Australia and New Zealand Journal, vol. 17, 2003, pp. 39-53 in particular, pp. 51 and 52.

[3] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980, p. 96, para. 49.

[4] Shearer, The "Volga" case, diss.op. para.7. See also Imena Callala, Revue générale du droit international public, tome 195, 2001. pp. 960-961.

and relevant treaties to which Australia is a party until the completion of the domestic legal proceedings. A State is entitled to eliminate the prospect of illegal fishing contrary to its laws by a vessel it has arrested and released pending the completion of the relevant legal proceedings relating to the past conduct of that vessel. The purpose of the inclusion of this element of the bond is intrinsically linked to the release of the vessel and the level of that inclusion is reasonable".[5]

The Tribunal relied on "the primacy of the text"[6] – the embodiment of article 31 of the Vienna Convention on the Law of Treaties - as the basis for its interpretation of article 73, paragraph 2, of the Convention. The majority held that the term bond or other security "must be seen in its context and in light of its object and purpose" and noted that "[T]he 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)". It pointed out that these provisions use the expressions "bond or other financial security" and "bonding or other appropriate financial security". It further added that "[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. A good behaviour bond to prevent future violations of the laws of a coastal State was not 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" (paragraphs 77 and 80). This interpretation met with criticism. *Ad hoc* Judge Shearer made the point that:

> Such a narrow interpretation of the provisions of articles 73, paragraph 2, and 292 cannot, in my opinion, be supported. In the short period since the conclusion of the Convention in 1982, and in the even shorter period since its entry into force in 1994, there have been catastrophic declines in the stocks of many fish species throughout the world. The words "bond" and "financial security" should be given a liberal and purposive interpretation in order to enable the Tribunal to take full account of the measures - including those made possible by modern technology – found necessary by many coastal States (and mandated by regional and sub-regional fisheries organisations) to deter by way of judicial and administrative orders the plundering of the living resources of the sea (paragraph 17).[7]

It must be acknowledged that the circumstances in which the mechanism for prompt release was meant to operate have, to a certain extent, changed but, as has so often been said, the task of tribunals and courts is to interpret and not to revise or reconstruct the terms of treaties. That is perhaps why the Tribunal adopted a textual approach rather than a more functional or teleological approach.

Value of the vessel

The *Volga* had been valued at US$ 1 million (approximately AU$ 1.8 million) and the value of fuel, lubricants and equipment amounted to AU$ 147,460. In contradistinction to the *"Camouco" Case* where the parties differed on the value of the *Camouco* (the *"Camouco" Case*, paragraph 69) there was no dispute between the parties as to the value of the vessel and its cargo.

The Tribunal therefore concluded that the amount of AU$ 1,920,000 sought by the Respondent for the release of the vessel, which represented the full value of the vessel,

[5] Statement in Response, p. 19, paragraph 55.
[6] Yearbook of the International Law Commission, 1966, vol. II, p. 218.
[7] See also the dissenting opinion of Judge Anderson.

fuel, lubricants and fishing equipment (paragraph 73) was reasonable in accordance with article 292 of the Convention.

Proceeds of the sale of catch

The catch of Patagonian Toothfish and the bait found on board the *Volga* were seized by the Australian authorities and sold for a total of AU$ 1,932,579.28 and the proceeds of the sale were held in trust, pending the final outcome of the domestic proceedings against members of the crew.

The Russian Federation argued that the proceeds of the sale of the catch should be treated as security given by the owner. It relied, it claimed, on the jurisprudence of the Tribunal, especially the findings on this matter in the *"Monte Confurco" Case*. (Memorial, p. 15, paragraph 18).

It will be recalled in that case the Tribunal considered the value of the fish and of the fishing gear seized was also to be taken into account as a factor relevant in the assessment of the reasonableness of the bond (Judgment, paragraph 86) and as a result it held that the proceeds from the sale of the fish on board the *Monte Confurco* were to be treated as part of the security (Judgment, paragraph 93). It will be remembered here that there was some uncertainty as to the location and amount of the catch caught in the exclusive economic zone.

This finding in that Judgment has been the object of some criticism. Judge Jesus in his dissent stated: "It is conceptually wrong, in a case where the Tribunal has no competence on the merits, to consider as part of the bond or security any seized asset that, in the end, might be confiscated, by the decision of the appropriate domestic court, as part of the penalties imposable by the national legislation".[8] Professor Crawford in the oral pleadings in the *"Volga" Case* has put such criticism in a graphic form: "If I came home late one night and discovered a burglar escaping with the family silver, I would be unimpressed with the argument in subsequent legal proceedings that the burglar was entitled to deposit the silver as part of his bond. It is not his silver."[9]

The Tribunal held that "[A]lthough 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" (paragraph 86). The proceeds of the sale consequently did not form part of the bond determined by the Tribunal. It is fair to state that the Tribunal has moved away or, in the words of Judge *ad hoc* Shearer, "distanced itself" from the findings on this question in the *"Monte Confurco" Case*.

Matters relating to the circumstances of the seizure (article 111)

The Russian Federation submitted that in assessing the reasonableness of the bond the Tribunal should take into account the circumstances of the seizure of the *Volga*, that is, that the vessel was boarded on the high seas and that it had received no prior order to stop, in breach of article 111 of the Convention on the Law of the Sea. (Application, p. 17, paragraph 26).

It stated that it was not requesting the Tribunal to consider the merits of any case under consideration in Australia's domestic forum. However, it invited the Tribunal to

[8] Jesus, The "Monte Confurco" case, diss.op. para. 33.
[9] ITLOS/PV.02/02.

take notice of the lawfulness under international law of Australia's actions in seizing the vessel on the high seas.[10]

Australia for its part argued that these are not matters relevant to assessing the reasonableness of a bond. In its view, to take into account the circumstances of the seizure of the vessel was "to prejudge the merits of any proceedings threatened by it in relation to the seizure of the *Volga*".

The Tribunal refused to take into account the circumstances of the seizure of the *Volga* in assessing the reasonableness of the bond because they were "not relevant to the present proceedings for prompt release under article 292 of the Convention". It should be pointed out that in these prompt release cases the Tribunal has always been mindful of its role to "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" (article 292, paragraph 3) and thus has avoided dealing with matters which were alien to the question of release.

Bond for the release of the crew

Initially the three crew members were admitted to bail on the condition that they deposit AU$ 75,000 each, that they reside at an approved place, that they surrender all passports and seaman's papers and that they do not leave the Perth metropolitan area. On 30 May 2002, the crew members applied successfully to have their bail conditions varied to allow them to obtain their passports and seaman's papers and return to Spain on condition that they deposit their documents and seaman's papers with the Australian embassy in Madrid.

In 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.

It is of some significance that Wheeler J had expressly raised the point that the purpose of bail was not only to ensure the payment of fines that may be imposed but also to ensure the "vindication of the law in the deterrent effect which such proceedings may have on others" (Emphasis added).

The appeal against the decision of Wheeler J. by the Full Court of the Supreme Court of Western Australia was upheld and the three crew members were allowed to return to Spain. 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 considered that setting a bond in respect of the three members of the crew would serve no practical purpose (paragraph 74).

It may here be suggested that what municipal courts do may have to be taken into account as an element in determining a "reasonable bond" with respect to the release of members of the crew.

"Reasonable" and "suffisante"

Dr. Bennett (Australia) in his oral submissions raised the question of the difference between the English text and the French text of article 73, paragraph 2, of the Convention. The English text speaks of "the posting of a *reasonable* bond or other security" whereas the French text uses the expression "Lorsqu'une caution ou autre

[10] Memorial of the Russian Federation, p. 17, para. 26.

garantie *suffisante* est fournie…". He interpreted the difference between the two language versions as meaning that "[I]f there is a range of values or possibilities, the bond should secure the maximum". That in his view was the significance of the French word "*suffisante*", the English word "*sufficient*".[11]

It may be noted that the French version of the text uses the expression "caution raisonable" and so do the other authentic versions of the text (Arabic, Chinese, English and Spanish) in article 292, paragraph 1 and that the majority of the language versions (Arabic, English, Russian and Spanish) utilise "reasonable" or its equivalent in article 73, paragraph 2. It must here be recalled the pertinent observation of the International Law Commission that it needs "to be stressed that in law there is only one treaty – one set of terms accepted by the parties and one common intention with respect to those terms – even when two authentic texts appear to diverge".[12]

This matter had been raised in earlier prompt release cases – the "*Camouco"* and the "*Monte Confurco"*. In the latter France contended that "this difference between the two language versions certainly does not indicate a difference in meaning between them but does, however, provide an indication of the meaning that may be attached to the concept of reasonableness.[13]

Although this matter has been raised in the separate and dissenting opinions of certain judges the Tribunal itself has not pronounced on it. The dominant view among those who have addressed this linguistic divergence seems to be that the term "reasonable" and the term "suffisante" are presumed to have the same meaning. I have stated in a separate opinion that the use of the word "suffisante" adds nothing more.[14]

Some concluding observations

The Tribunal in these prompt release cases has been engaged in clarifying and refining the notion of what is meant by a reasonable bond as referred to in the relevant provisions of the Convention. It is essentially a process related to the interpretation and application of the Convention on the Law of the Sea, which is the central task of this specialised international tribunal. The "*Volga" Case* can be considered a mile-stone in the development of the jurisprudence of the Tribunal concerning the interpretation and application of the provisions of the Convention regarding the prompt release of vessels.

[11] ITLOS/PV.02/03.
[12] In its commentary on the draft article, which became article 33 in the Vienna Convention on the Law of Treaties (1969); Yearbook of the International Law Commission, 1966, vol. II, p. 225.
[13] Statement in Response of the French Government, paragraph 11.
[14] Nelson, sep. op. The *"Monte Confurco" Case*, pp. 125-126.