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Conflicts over Protection of Marine Living Resources: The 'Volga Case' Revisited

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Abstract

Non-traditional maritime security concerns have become more important than ever in the post-Cold War era. Naval forces of most developed countries are more concerned about these threats than conventional war. One of the main maritime security issues for many countries in the world is illegal, unreported and unregulated (IUU) fishing in the marine area. With these burgeoning issues comes the potential for a large number of disputes involving international law. In early 2002, a long-line fishing vessel under a Russian flag – the Volga, was detained by Australian authorities a few hundred meters outside the Exclusive Economic Zone of Australia's Heard and McDonald Islands in the Southern Ocean. The vessel was reportedly engaged in illegal fishing. This incident gave birth to litigation in international and Australian courts. Apart from these cases, Russia also announced separate litigation against Australia for violation of Articles 111 and 87 of the United Nations Convention on the Law of the Sea (UNCLOS). Considering the outcome of these cases, this article critically examines the characteristics of litigation as a strategy for pacific settlement of disputes over marine living resources. Using the Volga Case as an example, this article explores some issues related to the judicial settlement of disputes over marine living resources. This article demonstrates that the legal certainty of winning a case may not be the only factor influencing the strategy for settlement of an international dispute.

A. Introduction

The Asia-Pacific region hosts some of the busiest sea routes in the world. More than half of the global annual merchant fleet tonnage traverses the Asia-Pacific waters.[1] The economy of many countries in the region relies heavily on marine living and non-living resources. Maritime security has emerged as one of the main issues in the discourses of bilateral and multilateral relations of the Asia-Pacific countries. The region is now facing a great number of emerging maritime security threats including *inter alia* piracy, terrorist activities; illegal and unauthorized fishing; human trafficking and migrant smuggling using sea routes; environmental pollution; proliferation of weapons of mass destruction using sea routes; health security, and the testing of nuclear weapons in the areas in and around the sea.

[1] J. F. Bradford, 'The Growing Prospects for Maritime Security Cooperation in Southeast Asia', 58 *Naval War College Review* (2005) 3, 63, 63.

Australia is also facing numerous maritime security threats.[2] One of the main maritime security issues for Australia is the illegal, unreported and unregulated (IUU) fishing in its vast marine area.[3] Consequently the Australian Government has responded to these issues with a very stringent legal framework.

IUU fishing is one of the main threats to the existence of commercially valuable and vulnerable Patagonian Toothfish in the remote areas of Southern Ocean. Although several regional and international organizations are working to stop the poaching of Patagonian Toothfish in the region, enforcement problems make it difficult to stop this illegal practice.[4] The high market value is one of the main contributing factors to IUU fishing of Patagonian Toothfish. Remoteness of the fishing ground makes surveillance and enforcement very difficult. Both of these factors provide ideal circumstances for IUU fishing. This situation makes the work of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), established under the framework of the Convention for the Conservation of Antarctic Marine Living Resources,[5] largely ineffective.[6] It has been estimated that one third of the total catch in the CCAMLR area in the late 1990s was IUU.[7] Within the CCAMLR region,

2 "The Australian Government recognises the following maritime security threats to Australia's national interests: Illegal exploitation of natural resources; Illegal activity in protected areas; Unauthorised maritime arrivals; Prohibited imports/exports; Maritime Terrorism; Piracy; Compromise to Bio-security [and] Marine pollution.", Australian Government – Boarder Protection Command, 'Maritime Security Threats' (2007) available at http://www.bpc.gov.au/site/page5777.asp (last visited 10 March 2011).

3 "Australia's national interests are threatened by the illegal exploitation of natural resources in its maritime domain. This includes: Unauthorised foreign fishing undertaken by foreign fishing vessels in the Exclusive Economic Zone; Operations by vessels in direct support of foreign fishing vessels such as the transfer of catches at sea; illegal or unsustainable practices by domestic fishermen; The removal or destruction of wildlife for illegal purposes [and] Activities that cause unlawful damage to the ecosystem.", *id*.

4 A. J. Oppenheim, 'The Plight of the Patagonian Toothfish: Lessons from the Volga Case', 30 *Brooklyn Journal of International Law* (2004) 1, 293, 295.

5 Convention for the Conservation of Antarctic Marine Living Resources, opened for signature 1 August 1980, 1329 U.N.T.S. 47 (entered into force 7 April 1982).

6 M. Lack & G. San, 'Patagonian Toothfish: Are Conservation and Trade Measures Working?', 19 *The TRAFFIC Bulletin* (2001) 1, 15, 15.

7 *Id*.

the water surrounding Australia's Heard and McDonald Island is facing serious threat of IUU fishing.[8]

In early 2002, a long-line fishing vessel under Russian flag – the *Volga* was detained by the Australian authorities a few hundred meters outside the Exclusive Economic Zone (EEZ) of Australia's Heard and McDonald Islands in the Southern Ocean. The vessel was reportedly engaging in IUU fishing. This incident gave rise to several instances of litigation[9] in international and Australian courts. Moreover, Russia also hinted at separate litigation against Australia for violation of Articles 111 and 87 of UNCLOS.

This article intends to critically examine the different features of litigation as a strategy for settlement of international disputes. It demonstrates that the legal certainty of winning a case may not be the only factor influencing the strategy for settling international disputes. The article submits further that the international legal system, with all its shortcomings, has a modest potential to handle emerging disputes over marine living resources. This article is divided into seven parts. The first part introduces the structure and content of the article. Part 2 of the article gives a brief idea about the jurisdiction of the international and national courts for settlement of disputes over marine living resources. Part 3 describes the facts of the *Volga Case*. Part 4 examines different critical legal issues involved in the settlement of the *Volga Case*. Part 5 explores the issues behind the Russian Federation's decision to not initiate separate proceedings against Australia for violating Articles 111 and 87 of UNCLOS. Part 6 of the article summarizes the lessons learned from the *Volga Case* which may be relevant for understanding the characteristics of settlement of future disputes involving other maritime security issues. The final part concludes the article with some observations.

8 D. J. Agnew, 'The illegal and unregulated fishery for toothfish in the Southern Ocean, and the CCAMLR catch documentation scheme', 24 *Marine Policy* (2000) 5, 361, 362.

9 For this article litigation includes both a case in national and international court or tribunal as well as international arbitration.

B. Disputes Concerning Protection of the EEZ Fisheries: Jurisdiction of International and National Courts

The EEZ is a *sui generis* regime created by UNCLOS, which extends up to 200 nautical miles from the baseline where the coastal State enjoys sovereign rights over natural resources. UNCLOS provides the coastal State with 'sovereign rights for the purpose of exploring and exploiting, conserving and managing' living resources in the EEZ.[10] These rights come with a bundle of duties. The coastal State is obliged to take proper conservation and management measures to save marine living resources from over exploitation. In doing so, the coastal State is required to take cooperative action in conjunction with competent international and regional organizations.[11]

UNCLOS provides a mixed jurisdiction for settlement of disputes arising from conservation of EEZ fisheries. The primary jurisdiction lies with the national judicial system. The coastal State has the prescriptive and enforcement jurisdiction for conservation of living resources.[12] While exercising this jurisdiction, the coastal State has to adhere to two procedural requirements, namely, the prompt release of vessels and crew upon posting of a reasonable bond or other security[13] and prompt notification to the flag State of arrest, detention, action and penalty of a foreign fishing vessel.[14]

However, international dispute resolution mechanisms may intervene in the process in certain circumstances.[15] Before discussing this matter, it is pertinent to give a brief introduction to the various international dispute settlement mechanisms under UNCLOS. UNCLOS encourages the parties to make peaceful settlement using non-binding means like negotiation and conciliation. In cases where parties fail to settle their dispute by these non-binding procedures, the Convention introduces some compulsory procedures entailing binding decisions. Article 287 of the Convention gives

10 United Nations Convention on Law of the Sea, opened for signature 10 December 1982, 1833 U.N.T.S. 3, Art. 56(1) (entered into force 16 November 1994) [UNCLOS].

11 *Id*., Art. 61(2).

12 "The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.", *id.,* Art. 73(1).

13 *Id*., Art. 73(2).

14 *Id*., Art. 73(4).

15 R. R. Churchill & A. V. Lowe, *The Law of the Sea*, 3rd ed. (1999), 447.

the parties the option to choose any one of the following procedures:[16] the International Tribunal for the Law of the Sea (ITLOS/ the Tribunal),[17] the International Court of Justice (ICJ), an arbitral tribunal constituted in accordance with Annex VII,[18] and a special arbitral tribunal constituted in accordance with Annex VIII.[19]

In many cases, the primary jurisdiction for settlement of disputes falls on the national dispute settlement mechanism, especially disputes which involve one State and natural or legal person from another country. The most important feature that is of relevance to the present study is the prompt release application procedure of UNCLOS. According to Article 292, the flag state of a detained ship is entitled to apply to any of the above mentioned forums or, if there is no agreement, to ITLOS for prompt release of vessel upon posting a 'reasonable bond or other financial security'.[20] Owing to this provision, UNCLOS provides residual jurisdiction to ITLOS while primary jurisdiction remains with national courts. In the *Volga Case,* the Russian Federation invoked the Article 292 procedure.

C. Facts of the *Volga Case*

On 7 February 2002, the Australian naval officials, while conducting naval patrol against IUU fishing of Patagonian Toothfish in the EEZ of the Heard and McDonald islands in the Southern Ocean, boarded a Russian fishing vessel the *Volga* on the basis of a calculation that the vessel was within the EEZ of Australia's Heard and McDonald Island.[21] Later a more accurate calculation revealed that at the time of first detection of the vessel by the aircraft the vessel was 0.7 nautical miles inside the Australian EEZ

16 This binding dispute resolution process is subject to a number of exceptions. UNCLOS, Arts 287, 297, also see J. Collier & V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (2000), 92-93.

17 UNCLOS, Annex vi.

18 UNCLOS, Annex vii; also see Collier &Lowe, *supra* note 16, 90-91.

19 UNCLOS, Annex viii; also see Collier &Lowe, *supra* note 16, 91-92.

20 "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.", UNCLOS, Art. 292.

21 *R v Lijo & Others*, Unreported, District Court of Western Australia in Criminal, Blaxell DCJ, WADC\IND\2004WADC0029.doc, 27 February 2004, paras 16-26.

and at the time of first transmission of message from a military helicopter the vessel was 0.5 nautical miles outside the Australian EEZ. The *Volga* was boarded by Australian navy few hundred meters outside the EEZ.[22] That means Australian authority failed to give the vessel any auditory or visual signal while it was within Australia's EEZ.

After being apprehended, the Russian vessel was escorted to the Western Australian port of Fremantle. The master and three other crew members of the vessel were detained. Subsequently a seizure notice was served on the master stating that the *Volga* with all its nets, traps, equipment and catch would be forfeited if a notice of claim was not submitted to the Australian Fisheries Management Authority by the owner or possessor. Subsequently, three crew members of the ship were charged with the offence of illegal fishing using a foreign boat in the Australian Fisheries Zone (AFZ). After filing the case, the Australian authorities sold the catch of the *Volga* worth of nearly A$2 million and held the money in trust with the Australian Government Solicitor. The owner of the *Volga* then instituted proceedings in the Federal Court of Australia to stop the forfeiture of the vessel. In reply to a request from the owner for the release of the vessel pending the legal action, the Australian Authority set a bond of nearly A$3.33 million[23] which comprised:

1. Value of the vessel including all equipment, fuel and net. (A$1.92 million)[24]

2. Potential fines against the 3 crew members (A$412,500)[25]

3. A 'good-behaviour bond' for carrying a fully operational Vessel Monitoring System (VMS) as a guarantee for the non-repetition of IUU fishing in the Australian EEZ and observing CCAMLR Conservation measures, until the conclusion of legal proceedings in Australia. (A$1 million)[26]

22 *Id*., para. 31.

23 *The Volga Case (Russian Federation v. Australia),* 2002 available at http://www.itlos.org/case_documents/2002/document_en_215.pdf (last visited 24 March 2011), para.49 [The Volga Case].

24 ITLOS, *The Volga Case, Minutes of Public Sitting*, 50 available at http://www.itlos.org/case_documents/2008/document_en_312.pdf (last visited 24 March 2011).

25 *Id*.

26 *Id*., 50, 52.

As a condition of prompt release, the Australian Authority required information from the vessel's owner relating to the ultimate beneficial owners of the vessel, the names and nationalities of the directors of the owning company, the managers of the vessel's operation, the insurers of the vessel and the financers of the vessel.[27] On the other hand the owner of the *Volga* stated that the bond set by Australia was unreasonable and that a reasonable bond should be no more than A$500,000.

Against this backdrop, the Russian Federation commenced proceedings against Australia in ITLOS for prompt release of the *Volga* and its crew pursuant to Article 292 of UNCLOS. In the prompt release proceedings, the Tribunal determined whether the bond set by Australia was unreasonable and hence in violation of Article 73(2) of UNCLOS. This main issue gave rise to two other issues: (1) whether non-financial conditions can be imposed as part of the bond; and (2) whether a good behavior bond is justifiable.[28] The Tribunal decided that the additional non-financial conditions and the good behavior bond would defeat the object and purpose of Article 73(2) of UNCLOS.[29] But the Tribunal rejected the Russian view that the proceeds from the catch, which was held by Australian authority in trust, had to be included in the bond. Finally, the Tribunal decided that the bond should be A$1,920,000 which was equal to the value of the vessel including all equipment, fuel and net. This bond was still nearly four times higher than the bond that Russia claimed was reasonable.

The Tribunal's decision on the non-financial conditions attracted serious reservations from the academic community. Many experts are of the view that this decision is not in conformity with the objective of conserving the marine living resources.[30] I will discuss this matter further in part 4.1 of this study.

27 *Id., 53-55.*

28 *Id*., 75.

29 The Volga Case, *supra* note 23, paras 85-89.

30 D. R. Rothwell & T. Stephens, 'Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Right and Interest', 53 *International and Comparative Law Quarterly* (2004) 1, 171; C. Brown, ''Reasonableness' in the Law of the Sea: The Prompt Release of the Volga', 16 *Leiden Journal of International Law* (2003) 3, 621; A. J. Oppenheim, 'The Plight of Patagonian Toothfish: Lessons from the Volga Case', 30 *Brooklyn Journal of International Law* (2004) 1, 293; W. Gullett, 'Prompt Release Procedures and the Challenge for Fisheries Law Enforcement: The Judgment of the International Tribunal for the Law of the Sea in the 'Volga' Case (Russian Federation v Australia)', 31 *Federal Law Review* (2003) 2, 395.

There were several decisions regarding the *Volga* in the Australian domestic courts. In these cases, the Australian courts did not implement UNCLOS in its totality, partly because of the conflict between UNCLOS and Australian domestic law. A very important issue arising in the decisions of the Australian courts is the probable violation of the provisions related to 'hot pursuit' in UNCLOS. This issue has been elaborated in part D.II.

D. The Issues of Effective Dispute Resolution and Compliance with International Law

This part briefly examines how far relevant provisions of UNCLOS are implemented in the decisions of the national and international judicial bodies which adjudicated the *Volga Case*. The characteristics of legally sound settlement of disputes in the international law context may be defined by three aspects, namely: obligation, precision, and delegation.[31] *Obligation* denotes that states and non-state actors are obliged by a concrete set of international rules or commitments.[32] *Precision* denotes that the rules are capable to define the conduct of the parties precisely.[33] *Delegation* denotes that third parties have been granted power to intervene in the implementation and dispute resolution process.[34]

This conceptual lens is immensely important for the examination of the role of national and international courts in ensuring compliance with international law and effective settlement of international disputes. I will try to evaluate how far the test of *obligation*, *precision* and *delegation* has been met by the international and Australian courts in the *Volga Case*. The main aim of this part is to assess how far the *obligation* established in UNCLOS is *precisely* enforced through the court's (*third party*) intervention. In examining the issue, this part surveys two critical legal issues evolved in the *Volga Case* which I have indicated in the previous part: the issue of 'reasonableness of the bond' and the issue of 'legality of hot pursuit'.

31 K. W. Abbott *et al.*, 'The Concept of Legalisation', 54 *International Organisation* (2000) 3, 401, 401.
32 *Id.*
33 *Id.*
34 *Id.*

I. Reasonableness of the Bond and Ensuring the Protection of Marine Living Resources

One of the main stated objectives of UNCLOS is conservation of the marine environment and living resources.[35] In this part I examine how far ITLOS has been successful in implementing this objective of the convention precisely.

In its decision, ITLOS observed that imposing a 'good-behaviour bond' for carrying a Vessel Monitoring System (VMS) as a guarantee for the non-repetition of IUU fishing in the EEZ and observing the CCAMLR Conservation measures until the conclusion of legal proceedings in Australia is not reasonable within the framework of Article 73(2).[36] The Tribunal declined to consider the issues in light of the whole of the Convention but rather used a narrow approach of textual interpretation when interpreting the term 'reasonable bond or other security'.

Australia argued in the Tribunal that depletion of Patagonian Toothfish is an international environmental concern.[37] Australia also presented the Tribunal with the report of the CCAMLR meeting which noted that illegal fishing had seriously depleted the stock of Patagonian Toothfish.[38] It was proved by Australia that the *Volga* was illegally fishing in the Australian EEZ and CCAMLR conservation area without a required license. The vessel has violated not only Australia's national laws enacted in exercise of the country's sovereign rights under UNCLOS, but also regional conservation measures adopted under the auspices of the CCAMLR.

Unlike its previous decision in the *Monte Confurco* Case,[39] the Tribunal has noted the concerns of the global community about the depletion of Patagonian Toothfish in the CCAMLR region. The Tribunal observed:

35 UNCLOS, *supra* note 10, Preamble para. 4.

36 The Volga Case, *supra* note 23, 80.

37 ITLOS – Australia, *Statement in Response of Australia*, available at http://www.itlos.org/case_documents/2002/document_en_210.pdf (last visited 24 March 2011), chapter IX.

38 Commission for the Conservation of Antarctic Marine Living Resources, Report of the Twenty-First Meeting of the Commission, CCAMLR-XXI, 4 November 2002, 38, cited in *id*..

39 ITLOS, *The Monte Confurco Case* (Seychelles v. France) (2000) available at http://www.itlos.org/start2_en.html (last visited 24 March 2011), para.93 [*The Monte Confurco Case*].

> "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."[40]

However, the end result remained the same. As mentioned earlier, Australia required the owner of the vessel to provide certain information regarding the beneficial ownership of the vessel. Australia in its oral presentation showed an international gang was engaged in organized crime involving illegal fishing in the CCAMLR area under the veil of flags of convenience.[41] But the Tribunal held that:

> "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."[42]

The main reason behind the Tribunal's decision was that the term 'bond or other security' does not include within its ambit any non-financial condition. The Tribunal even rejected some non-financial conditions which were translated into a financial term. Through a narrow interpretation of the term 'bond or other security' the Tribunal rejected the respondent's proposal for a 'good behaviour' bond for observation of the CCAMLR conservation measures and carrying a fully operational VMS system to prevent future violations of Australian law and regional conservation measures. The Tribunal was of the view that:

> "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."[43]

40 The Volga Case, *supra* note 23, para. 68.
41 ITLOS, *supra* note 24, 45.
42 The Volga Case, *supra* note 23, para. 77.
43 The Volga Case, *supra* note 23, para. 80.

This interpretation is mainly based on Articles 73(2), 292 , 220(7) and 226(1)(b) of the Convention which use the expressions 'bond or other security', 'bond or other financial security' and 'bonding or other appropriate financial security'.44 In determining the reasonableness of the bond, the Tribunal did not consider other articles of the convention which refer to the coastal State's obligation to protect marine living resources. The non-financial conditions and 'good behaviour bond' imposed by Australia were necessary for the conservation of the Patagonian Toothfish. It is an obligation of all coastal States under Article 61(2) to ensure the conservation and management of marine living recourses. While taking conservation measures, the coastal State is also required to cooperate with sub-regional, regional and global competent organizations. Australia imposed the 'good behaviour bond' in exercise of its duty under UNCLOS and as a member of the CCAMLR. Although the Tribunal did not reject the coastal State's right to impose such conditions outright, it considered these conditions to be unreasonable under Article 73(2) of the Convention.

It is very difficult to understand how a condition that has been imposed in the discharge of a duty of the coastal state under the Convention can be an unreasonable condition for 'prompt release' of vessel. This approach is contrary to the objective of the Convention to conserve marine living resources. A treaty must be interpreted in its entirety. Article 72(3) or Article 292 cannot be interpreted in isolation from the other provisions of the convention. While interpreting these articles, other articles of substantive nature i.e. Article 56(1), 61(2), 117 and the preamble of the Convention cannot be ignored.

According to Article 31(1) of the Vienna Convention on the Law of Treaties, 1969 "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"45.

As observed by the Permanent Court of Arbitration in Island of Timor Case "[h]ere again, as always, we must look for the actual and harmonious intention of the Parties at the time when they bound themselves"46.

44 The Volga Case, *supra* note 23, para. 77.

45 Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331, Art. 31(1) (entered into force 27 January 1980).

46 *Affaire de l'île de Timor (Pays-Bas, Portugal)* (1914) 11 RIAA 48. *Boundaries in the Island of Timor (Netherlands v. Portugal) (Unofficial English Translation)*, Permanent Court of Arbitration available at http://www.pca-cpa.org/upload/files/

However, the Tribunal considered the ordinary meaning of the phrase 'bond or other security'. According to the International Court of Justice the rule of 'natural and ordinary meaning' "is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it"47.

Judge Anderson in his dissenting opinion explained how non-financial conditions can be included even within the ordinary meaning of the word 'bond'. Article 292 of the Convention was based on a draft submitted by the USA. The term 'bond', in Article 292 actually means a 'bail bond' not a bond in financial sense. This is not an investment dispute.48 The case in the Australian domestic court was a criminal case. Imposing non-financial conditions as part of the bail bond is very common in criminal cases. Even restricted interpretation of the term 'bond' may allow the coastal State to impose non-financial conditions as part of a reasonable bond. Obviously the Tribunal has the jurisdiction to examine the reasonableness of non-financial conditions, as with the financial conditions. Nevertheless, outright rejection of non-financial conditions is not in conformity with the objectives and purposes of UNCLOS.

II. Hot Pursuit and Compliance with UNCLOS

According to Article 111(4) of UNCLOS, in the case of violation of the coastal State's law in the EEZ, hot pursuit must start from the EEZ of the pursing State and commence after a visual or auditory signal. As described in Part-2 of this paper, the first message from the Australian authority was transmitted while the vessel was on the high sea. The Russian Federation in its prompt release application stated that Australia "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"[49]. The Russian Federation requested the Tribunal to take this fact into consideration when

English%20Timor%20Sentence%20edited.pdf (last visited 25 March 2011), vi, para. 3.

47 *South West Africa Cases (Ethiopia v South Africa, Libya v South Africa)*, Preliminary Objections, Judgment ICJ Reports 1962, 319, 336.

48 D. Anderson, 'Dissenting Opinion of Judge Anderson' (2002) available at http://www.itlos.org/case_documents/2002/document_en_219.pdf (last visited 25 March 2011).

49 ITLOS – Russian Federation, 'The Volga - Application for release of vessel and crew of the Russian Federation' (2002) available at http://www.itlos.org/case_documents/2002/document_en_209.pdf (last visited 25 March 2011), part II, para. 4(b)(vi)(bb).

determining the reasonableness of the bond. However, Australia argued that the Russian Federation "is clearly inviting the Tribunal to pre-judge the merits of any proceedings threatened by the Respondent in relation to the seizure of the *Volga*"[50]. The Tribunal was of the opinion that "matters relating to the circumstances of the seizure of the *Volga* […] 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"[51].

The Russian Federation announced that it will initiate a separate proceeding against Australia for violating Article 87(1)(a) and 111 of UNCLOS in the prompt release application. However, Russia did not initiate any such separate proceeding against Australia under the compulsory dispute resolution mechanisms of UNCLOS. Part E of this paper will be dedicated to this issue.

The Australian authority charged three crew members of the vessel with indictable offence under section 100(2) of the *Fisheries Management Act 1991*. The crew members initially submitted an application for a permanent stay of the proceedings in the District Court of Western Australia. The main argument of the petitioners was that the *Volga* was boarded on the high seas, which is illegal under international law and also beyond the powers conferred by the *Fisheries Management Act 1991*. The petitioners contended that as the accused had been unlawfully brought into the jurisdiction it would be an abuse of the Court's process if the prosecution were allowed to continue the case.[52]

Section 100 of the said Act makes it an offence for a person to use a foreign boat for commercial fishing without a foreign fishing license within the Australian Fisheries Zone (AFZ). Section 87 of the Act grants power for 'surveillance and enforcement' and empowers the authority to pursue persons and boats from a place within the AFZ to place outside the AFZ (high seas). The 'Hot Pursuit' provision is not fully consistent with relevant provisions of UNCLOS. Unlike Article 111(4) of UNCLOS, Australian law does not impose any condition that the pursuit cannot be commenced without a visual or auditory signal to stop. Moreover, Australian law also permits pursuit by radar, which obviously may be conducted without a

50 ITLOS – Australia, *supra* note 37, para. 57.
51 The Volga Case, *supra* note 23, para. 83.
52 R v Lijo & Others, *supra* note 21, para. 2.

visual or auditory signal. Furthermore, under Australian law the officer conducting 'hot pursuit' need not have a prior belief before commencement of pursuit that the vessel violated Australia's law. However, the Australian court held that as 'hot pursuit' was valid under Australian law, the petition for permanent stay of the case was not sustainable. As Blaxell DCJ observed:

> "UNCLOS is not part of the municipal Law of Australia […] and it is self-evident that Parliament did not intend to fully replicate its terms in the Act. There does not appear to be any ambiguity in the relevant provisions of the Act, and it follows that s 87 cannot be construed in a manner which imports any of the requirements of UNCLOS that are not already there. In this regard, the provisions of UNCLOS cannot be used to contradict the unambiguous language of the Act."[53]

As mentioned earlier, the owner of the *Volga* initiated a proceeding in the Federal Court of Australia against the forfeiture of the vessel. The petitioner alleged *inter alia* that the boarding and seizure of the vessel was unlawful both under Australian and international law as it was outside the AFZ. But the Court decided that the "offences were committed against the Fisheries Management Act which involved the use and presence of the *Volga* in the AFZ and that by reason of those offences the boat was automatically forfeited to the Commonwealth together with its equipment and catch. The provisions under which that forfeiture was effected are valid. The vessel having become the property of the Commonwealth there was no basis for any relief arising out of the boarding and seizure of it"[54]. The vessel was automatically forfeited when it engaged in illegal fishing in the AFZ, so there was no 'hot pursuit' at all. The court contended that it did not need to take a conclusive decision on whether the 'hot pursuit' was legal in accordance with UNCLOS.[55]

53 R v Lijo & Others, *supra* note 21, para. 37.

54 *Olbers Co Ltd v Commonwealth of Australia,* 205 Australian Law Reports (2004), 432, 433.

55 *Id*., 457, 458. See generally: R. Baird, 'Australia's Response to Illegal Foreign Fishing: A Case of winning the Battle but losing the Law?',, 23 *International Journal of Marine and Coastal Law* (2008) 1, 95; L. Blakely, 'End of the Viarsa Saga and the Legality of Australia's Vessel Forfeiture Penalty for Illegal Fishing in Its Exclusive Economic Zone', 17 *Pacific Rim Law & Policy Journal* (2008) 3, 677.

E. Why Russia did not sue Australia for Violation of Article 111

As mentioned earlier, the Russian Federation announced separate proceedings for violation of Article 111 and Article 87(1)(a) of the Convention. A ship is entitled to compensation if it "has been stopped or arrested […] in circumstances which do not justify the exercise of the right of hot pursuit"[56].

In its prompt release application, the Russian Federation stated that it intended to invite Australia to accept ITLOS's jurisdiction for a separate proceeding for violation Article 111 of the convention. ITLOS is Australia's preferred forum pursuant to its declaration under Article 287.[57] Otherwise, the Russian Federation will refer the dispute to Annex VII arbitration.[58] However, Russia did not initiate such arbitration. An in-depth discussion of the reasons behind the Russian Federation's reluctance to take recourse of the UNCLOS dispute settlement mechanism may be important in determining the role of international litigation in settlement of international disputes.

It is rare to use litigation for the settlement of a dispute in international affairs.[59] What is the motivation of a State behind initiating international litigation is a very important area to focus on. On the other hand it is equally important to know why/when a State makes a decision not to initiate international litigation.[60] Why Russia did not invoke the compulsory dispute settlement procedure under UNCLOS Part XV is a difficult question to answer. Nevertheless, I will examine two probable factors behind Russian decision including the issue of legal uncertainty and the issue of national reputation.

56 UNCLOS, *supra* note 10, Art. 111(8).
57 See generally Collier & Lowe, *supra* note 16, 92-93.
58 ITLOS – Russian Federation, *supra* note 49, chapter II, para. 25.
59 T. D. Gill, *Litigation Strategy at the International Court: A Case Study of the Nicaragua v. United States Dispute* (1989), 47.
60 D. D. Fischer, 'Decisions to Use the International Court of Justice: Four Recent Cases', 26 *International Studies Quarterly* (1982) 2, 251, 252.

I. Legal Uncertainty

If there is any legal uncertainty, a State may be reluctant to have recourse to international litigation. As observed by one commentator litigation is "at best a zero-sum game and often the outcome is lose-lose"[61]. Even in the prompt release application the Russian Federation and the owner of the vessel spent a large amount of money and energy but failed to reduce the bond to an amount which they were prepared to pay.[62] Ultimately they failed to have the vessel released.[63]

There were three legal uncertainties regarding the alleged violation of Article 111 of the Convention. First, whether there was any violation of Article 111 at all? Secondly, even if there was a violation, whether the Russian claim would pass the jurisdiction test? This issue arose because of a Russian declaration made under Article 298 of the Convention. Finally, Russia's standing as a flag State. I will discuss these three issues separately.

1. Legality of Hot Pursuit

Russia alleged that as the first audible signal from the Australian Navy Helicopter was transmitted while the vessel was on the high seas, the ensuing 'hot pursuit' was illegal under Article 111(4) of the Convention and hence that Australia violated Russia's freedom of navigation on the high seas under Article 87(1)(a).[64]

On the other hand, Australia contended that the legality of the 'hot pursuit' should be determined in accordance with the whole Article 111, not only on the basis of paragraph 4. It is a requirement for the coastal State to 'have good reason' to believe that the vessel had violated its laws. If there is a subjective satisfaction of the 'pursuing ship/aircraft' by such practicable means that the vessel is in fact in the EEZ, there is no need for the vessel to actually be within the EEZ. Henry Burmester QC appearing for Australia concluded that "[if] using practicable means, the coastal state considers the vessel to be within the zone, then that is sufficient for a valid pursuit to

61 A. Serdy, 'Paradoxical Success of UNCLOS Part XV: A Half-Hearted Reply to Rosemary Rayfuse', 36 *Victoria University Wellington Law Review* (2005) 4, 713, 715.

62 *Id.*

63 *Id.*

64 ITLOS – Russian Federation, *supra* note 49, paras 25-31.

commence"[65]. Australian counsel also contended that a pursuit that starts on the high seas just after the vessel escapes from the jurisdiction is legally sound. He came to this conclusion relying on following observation of Hall:

> "The reason for the permission [hot pursuit] seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised."[66]

This opinion is based on customary international law which as claimed by Australian counsel is replicated in the 1958 High Seas Convention and 1958 Convention provisions then also replicated in UNCLOS. Liberal interpretation of Article 111(4) of the convention is supported by post UNCLOS writing as well, as observed by Churchill and Lowe:

> "Developing technology is making it possible to detect and track offending vessels using radar, sea-bed sensors and transponders, and satellite surveillance. It seems both inevitable and desirable that the conditions for the exercise of the right of hot pursuit be given a flexible interpretation in order to permit the effective exercise of police powers on the high seas."[67]

However, these calls for liberal interpretation do not necessarily support the Australian position regarding the legality of arresting the vessel on the high seas. If we consider the opinion of Churchill and Lowe, we can come to this conclusion that at best a signal may be given using modern technology while the vessel is within the jurisdiction of the coastal State.

Article 111(1) probably does not allow a legal fiction that a pursuit commenced outside the EEZ was in fact commenced inside the EEZ.[68] The condition of 'visual or auditory signal' in Article 111(4) is a very clear obligation. If it becomes subject to a subjective satisfaction by the coastal State, there is a chance of misuse of the provision. There should be an

65 ITLOS, *supra* note 24, 31.
66 W. E. Hall, *A Treatise on International Law*, 8th ed. (1924), 309.
67 Churchill & Lowe, *supra* note 15, 216.
68 The Volga Case, *supra* note 23, para. 64.

objective satisfaction that the vessel is within EZZ. This view is supported by Momtaz:

> "Pursuit may only be commenced by a ship or aircraft on government service after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the ship situated in one of the areas of national jurisdiction.
>
> Pursuit must also be commenced immediately following the violation, *before the foreign ship reached the high* seas. The right to hot pursuit is in fact the continuation of a legal act initially entered upon within the limits of the coastal State's sphere of jurisdiction."[69]

If the coastal State is allowed to detain a ship on the high seas on the basis of its own subjective satisfaction that the vessel is within EEZ, it may severely undermine the delicate balance established by UNCLOS between the rights of the costal state and that of the flag state.

2. Jurisdiction

The second legal uncertainty is the question of jurisdiction. Australia stated in its statement in the prompt release proceedings that it would challenge the jurisdiction of Russia, if Russia initiates any substantive proceedings. The Australian argument is mainly based on the Russian deceleration under Article 298(1)(b) of the Convention which gives an option to the States to make exception for any "disputes concerning military activities … and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, paragraph 2 or 3". There is a link between this Article and paragraph 3(a) of the Article 297 which relates disputes regarding sovereign rights of coastal State with respect to living resources in the EEZ.

Article 298(1) deals with law enforcement activities pertaining to fishing in the EZZ which may not be extended to the high seas.[70] The Russian application for Annex VII arbitration is not related to the sovereign rights over the living recourses in the EEZ or their exercise by Australia, rather it is related to the Russia's right on the high seas. No country has sovereign rights over the high seas.

[69] D. Momtaz, 'The High Seas', in R.-J. Dupuy & D. Vignes (eds), *A Handbook on the New Law of the Sea*, *Volume 1* (1991), 383, 411 (emphasis added).

[70] N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005), 313.

The next question is whether Australian hot pursuit for the apprehension and seizure of the vessel can be treated as a military activity. Pursuant to the Russian declaration under Article 298(1), military activities are excluded from compulsory dispute settlement processes. Australia's counsel stated in the oral presentation that Australia retain the right to raise this question in the future if there are any substantive proceedings. According to Natalie Klein:

> "It is difficult to assert that the right of hot pursuit and right of visit are not law enforcement activities rather than military activities as both acts involve the enforcement of specific laws. The mere fact that these rights are exercised by military and government vessels does not justify a characterization of 'military activities' for the purpose of Article 298."[71]

As mentioned earlier, Australia stated that it would challenge the jurisdiction of Russia, if Russia initiated any substantive proceedings. However, it can be predicted from the above discussion that the jurisdiction would not have been a serious obstacle for Russia had it initiated substantive proceeding for violation of Article 111(4) and Article 87(1)(a).

3. Russia's Standing as Flag State

The last legal uncertainty is Russia's standing as a flag State. Australia proved that Russia did not have actual control on the *Volga*. As observed by Professor James Crawford, appearing as counsel for Australia:

> "I have assumed and Australia has assumed, for the purposes of this discussion that Russia is the flag state. For the purposes of your summary jurisdiction in this prompt release case, Australia formally accepts that. But, although we do not question Russia's standing to bring a prompt release application, a special form of application, we reserve the right to argue in any subsequent international proceedings on the merits, that Russia's status as flag state is not opposable to Australia because there is no genuine link between the *Volga* and Russia as required by Article 91(1) of the Convention."[72]

[71] *Id*., 312-313.
[72] ITLOS, *supra* note 24, 39.

Under international law, an owner has full liberty to choose the flag for his ship, provided he satisfies the registration requirements of the flag state. Consequently, every State has the right to set its own regulation and standards for registration of ships. Nationality of a ship is determined by the flag it flies. UNCLOS imposed a condition of 'genuine link' between the ship and the flag State, without precisely defining the term.[73] This seems to be an incomplete provision which has created more problems than it solves. This ambiguous provision has led scholars to interpret the term in their own ways with divergent results. Most scholars have concluded that a mere administrative act such as registration is sufficient to fulfill the condition of 'genuine link'.[74] Moreover, there is strong support for the opinion that lack of 'genuine link' is not sufficient to refuse nationality of a ship. As observed by ITLOS:

> "There is nothing in article 94 to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognize the right of the ship to fly the flag of the flag State. […] The conclusion of the Tribunal is that the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States"[75].

Russian standing as the flag state may not be a problem for Russia in any future substantive proceedings.

Perhaps the main reason behind Russia's decision is not the legal uncertainty, but lies elsewhere. There was no real national interest of Russia in this dispute and the issue may impose a bad impact on the national image of Russia. These issues are discussed in the following parts.

73 UNCLOS, *supra* note 10, Arts 91 and 94.

74 A. Khee Jin Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation* (2006), 47-57.

75 *The M/V "SAIGA" (No.2) Case (St. Vincent and Grenadines v Guinea),* Judgment, 38 ILM (1999) 5, 1323, 1343, para. 82-83; also see decision of the International Court of Justice in the Constitution of the Maritime Safety Committee of *IMCO Case*, ICJ Reports 1960, 150.

II. National Interest and Reputation

An important issue to determine is whether or not Russia had any real national interest behind the *Volga* affairs. As stated by Judge *ad hoc* Shearer in his dissenting opinion in the *Volga Case*:

> "It is notable that in recent cases before the Tribunal, including the present case, although the flag State has been represented by a State agent, the main burden of presentation of the case has been borne by private lawyers retained by the vessel's owners."[76]

In many prompt release cases the flag State is in fact a 'flag of convenience'. Where real national interest is involved, the approach of the parties in the proceedings may be totally different. This can be seen by comparing the situation in the *Volga Case* with the *Hoshinmaru Case*.[77]

In the *Hoshinmaru Case,* Japan initiated a 'prompt release' proceeding against Russia for release of its vessel *Hoshinmaru*. The Russian authorities detained the vessel in Russia's EEZ where it was licensed to fish. Although the vessel possessed a fishing license, Russia alleged that one type of fish was substituted for another, in breach of the licensee. This case differs from *Volga* because the vessel was fishing legally in the Russian EEZ but infringed the conditions of its license.

Unlike the *Volga*, all the crew members of the *Hoshinmaru* including the Master were of Japanese nationality and the vessel was legally and beneficially owned by a Japanese company.[78] The national interest of Japan was seriously at stake in this case because 19 Japanese crew members of the vessel were imprisoned by the Russian Federation. The interest of Japan in this case was so high that a member of the Japanese legal team was later bestowed with a national honor for "playing an indispensable role in the maintenance of Japan's *national interests* as an ocean state"[79].

[76] I. Shearer, 'Dissenting Opinion of Judge ad hoc Shearer' (2002) available at http://www.itlos.org/case_documents/2002/document_en_220.pdf (last visited 25 March 2011), para. 19.

[77] ITLOS, *The Hoshinmaru Case (Japan v. Russian Federation)* (2007) available at http://www.itlos.org/case_documents/2007/document_en_295.pdf (last visited 25 March 2011), paras 27-35.

[78] *Id*., para. 27.

[79] Embassy of Japan in the UK, 'Japanese Government honours Professor Alan Vaughan Lowe', (18 December 2008) available at http://www.uk.emb-japan.go.jp/en/japanUK/decoration/081212lowe.html (last visited 11 March 2011) (emphasis added).

In this case, as there was serious national interest involved, Japan was represented by a very strong legal team including legal luminaries like Professor Vaughan Lowe. Russia was also represented by a similar legal team including Professor Vladimir Golitsyn, who later became a judge of the Tribunal. As both Japan and Russia had real national interest behind the case both the countries were represented by lawyers retained by the State not private lawyers retained by the shipowner. The situation was totally different in the *Volga* if we compare the oral presentation of Russia with the Australian one. As Australia's national interest was at stake, the country was represented by the senior most government lawyers as well as globally renowned public international law expert Professor James Crawford. On the other hand presentation for Russia was mainly given by private lawyers retain by the shipowner.[80] The agent of Russia said very little about the prompt release of the *Volga*. Although he gave a brief introduction to the issue in his first presentation, in his second presentation he mainly replied to Australian allegation of Russian inaction as a member of the CCAMLR and as a flag State in conservation of Patagonian Toothfish. His presentation was mainly focused on the Russian future interest not on the *Volga*.

It was quite clearly and convincingly explained in the *Volga Case* that Russia actually had no real control in the *Volga* except providing the flag. The vessel was beneficially own by someone who was not a resident in Russia. The vessel was operated by a Jakarta-based group that was engaged in IUU fishing in the CCAMLR area.[81] This assertion was supported by an affidavit of the Master of the *Volga's* sister ship the Lena, which was detained by the Australian authority just before the *Volga*.[82] Considering the bilateral relations between Australia and Russia, it was very difficult for Russia to start another proceeding against Australia when Russia had no real national interest in the vessel.

In the proceedings for prompt release, counsel for Russia was silent on one issue. They never claimed that the *Volga* was not engaged in IUU fishing in the Australian EEZ. They mainly emphasized the technical issue of the legality of hot pursuit.[83] Another interesting point is that no action was taken to challenge the forfeiture of the *Volga's* sister ship the *Lena.* The only difference between the *Volga* and the *Lena* was that the *Volga* was

80 Shearer, *supra* note 76.
81 ITLOS, *supra* note 24, 44-45.
82 ITLOS, *supra* note 24, 45.
83 ITLOS, *supra* note 24, 74.

arrested a few hundred meters outside the Australian EEZ. Both vessels were engaged in the same type of activities. As observed by Professor Crawford:

> "It seems, with respect, that the shipowner would have nothing to say if there was no doubt about the Article 111 issue, but why should the shipowner be able to rely on Article 111? What virtue is it to the shipowner that it was arrested in one place or another when the substance of the issue against the shipowner is flagrant, repeated, unlawful depredations against an endangered species?"[84]

On the other hand, from the very beginning of the proceedings, Australia presented a substantial amount of evidence in support of its allegation of IUU fishing by the vessel. There was very little moral basis for Russia to initiate proceedings for violation by Australia of Article 111 of the Convention.

Even if the Russian Federation would win the case, its image may be tainted by this case. Russia is not widely regarded as a 'flag of convenience' country. But, unfortunately in case of the *Volga*, the Russian relationship with the vessel was no more than a relation of 'flag of convenience.' Had Russia initiated new proceedings, Australia would have seriously raised this issue. As a member of the CCAMLR it would have been embarrassing for Russia if unlawful activities of the vessel carrying its flag were revealed and circulated more widely. As mentioned by Professor Crawford "when one commences proceedings, one lays oneself open to criticism"[85]. Even in the *Volga Case* Russia's performance as a member of the CCAMLR was convincingly questioned by Australia.[86] Australia's very comprehensive presentation in the prompt release proceedings warned Russia of the danger of initiating further proceedings on the same issue. Engaging further proceedings on the same issue would have jeopardized Russia's reputation and image as a member of the CCAMLR and a permanent member of the United Nations Security Council. Perhaps these were the main factors behind Russia's decision not to sue Australia again on the *Volga* issue.

84 ITLOS, *supra* note 24, 76.
85 ITLOS, *supra* note 24, 34.
86 ITLOS, *supra* note 24.

F. Lessons Learned from the *Volga Case*

There are two remarkable aspects of this case. This case gives us an idea about the role of reputation in framing disputes settlement strategy. Moreover, this case is a good example for examining the effectiveness of the international and national judicial institutions as well as their role in ensuring compliance with international law.

Why the Russian Federation did not initiate a separate case for violation of Article 111 and 87 of UNCLOS against Australia is an important issue to examine for the study of ligation strategy of states in settlement of international disputes. The *Volga Case* showed that whether a country has a strong probability to win a case is not the only factor behind the decision of initiating a case in an international judicial forum. The next question is how this experience may be relevant in other types of maritime security issues? The *Volga* experience may give us some clue as to the reaction of the flag state if a vessel or its crew members are detained for other types of maritime security issues.

For example, we can consider a hypothetical case of suspected terrorism. Under the existing international law it will be very difficult to take action against a foreign vessel on the high seas if a state suspects that the vessel may be used for terrorist activities. A ship which is legally registered in a country may be used for terrorist activities. Only the flag state can take action if there is any suspicion that the vessel may be used for terrorist activities on the high seas. Nevertheless, it is interesting to know that what will be the reaction of the flag state if another country's warship visit and arrest its vessel on the high seas suspecting that the vessel may engage in terrorist activities and in subsequent investigation it reveals that the vessel was in fact preparing for terrorist activities. From a strict legal point of view the arresting state violated the international law. Suspected terrorism is not one of the reasons included in Article 110 of UNCLOS that empowers a warship to visit a foreign ship.[87] From the experience of the *Volga*, we can assume that it will be very difficult for the flag state to initiate proceedings against the arresting state under the compulsory dispute settlement mechanisms of UNCLOS. Although in the strict legal sense there is every possibility of winning the case, the main influencing factors for the

[87] See generally: S. Kaye, 'Interdiction and Boarding of Vessels at Sea: New Developments and Old Problems', in R. Herbert-Burns, S. Bateman & P. Lehr (eds), *Lloyd's MIU Handbook of Maritime Security* (2009), 201.

decision of litigation will be political pressure. Like the *Volga Case*, it will be very difficult for the flag State to initiate proceedings against the arresting state if allegations of terrorism against its vessel and crew are proved beyond reasonable doubt. If, in this hypothetical case, the flag state is a flag of convenience, it is more unlikely that the flag state will initiate proceedings against the arresting state under the compulsory disputes settlement procedure of UNCLOS for compensation.

One of the main objectives of resorting to an international institution is attracting the global public opinion to have leverage at the bargaining table.[88] In a case like the *Volga* or the above mentioned hypothetical case, where serious allegation of illegal fishing or terrorism against a vessel were proved conclusively, international litigation may not be an attractive way for the flag state to gain favorable international public opinion.

G. Concluding Remarks

Although ITLOS may be criticized for not allowing non-financial conditions and the 'good behavior bond', there were some positive developments in the 'prompt release' jurisprudence. Unlike its previous decision in the *Monte Confurco Case*,[89] the Tribunal did not include the proceeds of catch in the bond. The bond that was set by the Tribunal was far higher than the amount the shipowner was willing to pay. Consequently, the owner failed to obtain the release of the vessel.

On the domestic front, the highest court of Australia confirmed the forfeiture of the vessel[90] and three crew members also pleaded guilty.[91] However, the problematic aspect of this case is the outright rejection by Australia's domestic courts of the application of UNCLOS as there is a conflict between UNCLOS and domestic law. This is a very important issue which warrants a serious consideration because the sovereign rights in the

88 S. Fang, 'The Strategic Use of International Institutions in Dispute Settlement' (2008) available at http://www.princeton.edu/~pcglobal/conferences/beijing08/papers/Fang.pdf (last visited 11 March 2011).

89 The Monte Confurco Case, *supra* note 39.

90 The decision of the primary Judge of the Federal Court was confirmed in appeal, *Olbers Co Ltd v Commonwealth of Australia,* 212 Australian Law Reports (2005), 325. An application for Special Leave for appeal to the High Court of Australia was refused, Transcripts of Proceedings, *Olbers Co. Ltd. v. Commonwealth of Australia*, High Court of Australia, Hayne and Callinan JJ, 22 April 2005.

91 Australian Fisheries Management Authority, 'Illegal Foreign Fishing', 2 *The Fishing Future* (2004) 3, 20, 21.

EEZ provided by UNCLOS to the coastal state is a result of a delicate compromise between the coastal states and the flag states. If domestic courts reject the application of UNLCOS outright whenever there is a conflict between UNCLOS and the domestic law, it will undermine the very spirit of the Convention. However, this approach is not very uncommon in national courts. It should also be noted that, it has been revealed in these cases that some Australian laws are inconsistent with UNCLOS and the Australian domestic court applied its national law.

In the domestic context, implementation of international law in the domestic arena is within the discretion of the executive and the legislature. National courts in a dualist country have very little to do if the executive specifically intends not to implement certain law in the domestic arena. However, non-implementation of an international convention even after becoming a party to the convention is a clear violation of international law.

Nevertheless, this case is an example of internal morality and force of the international legal system. This case indicates that the UNCLOS dispute settlement system, with all its shortcomings, has a potential to handle disputes over conservation marine living resources effectively.[92] It may seem that there are some technical violations of international law. Nevertheless, the right in question, right of the coastal State to conserve its living resources, was finally upheld. As in the view of the ICJ, "an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question"[93]. The forfeiture of the vessel and failure of its owner to release the vessel because of the higher amount of bond is arguably justified if we take account of the rights in question, the coastal State's rights to conservation of a highly vulnerable species. However, that does not mean that Australia's noncompliance of its international obligations should be taken lightly.

92 As observed by Brunnée and Toope, "[t]he primary test for the existence of law is not in hierarchy or in sources, but in fidelity to internal values and rhetorical practices and thick acceptances of reasons that make law – and respect for law – possible", J. Brunnée & S. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law', 39 *Columbia Journal of Transnational Law* (2000) 1, 19, 69.

93 *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, 7, 56, para. 85.