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DISSENTING OPINION OF JUDGE *AD HOC* SHEARER

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

The facts of the case

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

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

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

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Vitae at the position 53 degrees 30 minutes South and 80 degrees 00 minutes East. The instructions included the following significant passage:

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

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

5. The *Volga* was not alone. A sister vessel, the *Lena*, was also operating in the same area. It was arrested on the day before the arrest of the *Volga* while fishing without a permit inside the Australian EEZ. According to a sworn statement made by the Master of the *Lena*, the two vessels were both operating within the same area of the zone and taking toothfish. After the arrest of the *Lena* the *Volga* was detected by radar from a Royal Australian Air Force Hercules aircraft some 32 kilometres within the exclusive economic zone and heading at its maximum speed in a direct line towards the high seas. There is a clear inference that the *Volga*'s hasty departure from the area was prompted by a warning given to it by its sister vessel.

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

Consideration and substantiation of facts in prompt release cases

7. The Tribunal in its Judgment has been reluctant to state or enter into an evaluation of the facts other than those directly concerned with the reasonableness of the bond for prompt release. Reference should also be made to the provisions of article 292, paragraph 3, of the Convention, which prohibits the Tribunal from prejudicing the merits of any case before the appropriate domestic forum against the vessel, its owner, or its crew. In my opinion the Tribunal erred too much on the side of reticence. In the "*Monte Confurco*" *Case*, the

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Tribunal stated that, although a consideration of facts appertaining to the merits was not permitted in proceedings for prompt release, the Tribunal was "not precluded from examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond" (Judgment, paragraph 74). The present case related to grave allegations of illegal fishing in a context of the protection of endangered fish stocks in a remote and inhospitable part of the seas. In such a case, reasonableness cannot be assessed in isolation from those circumstances. In his Separate Opinion in the *"Monte Confurco" Case*, Vice-President (as he then was) Nelson indicated a degree of willingness to consider such matters as part of "the factual matrix" in prompt release cases.

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

The relevance of the surrounding circumstances

9. The Respondent laid prime emphasis in the present proceedings, as relevant to the bond, on the problem of illegal, unreported and unregulated (IUU) fishing worldwide, and particularly in relation to the Patagonian toothfish in the Southern Ocean. Reference was made not only to the provisions of article 61, paragraph 2, of the Convention, which require States Parties to conserve and manage the living resources of their exclusive economic zones so that they are not endangered through over-exploitation, but also to the Convention for the Conservation of Antarctic Marine Living Resources, 1980 (CCAMLR). Both Australia and the Russian Federation are parties to CCAMLR. The EEZ of Australia generated by Heard Island and the McDonald Islands is within the

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area covered by CCAMLR. That Convention requires parties to take appropriate measures within its competence to ensure compliance with the Convention and with the conservation measures adopted by the Commission for the Conservation of Antarctic Marine Living Resources. The Commission has set catch limits and restrictions on fishing seasons. The most recent meeting of the Commission (4 November 2002) noted that illegal fishing had seriously depleted the stocks of Patagonian toothfish, and pointed to the potentially catastrophic effects of the continuation of such fishing.

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

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

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

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

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Reasonableness of the bond

14. Article 73, paragraph 2, of the Convention provides that "[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security." The French text refers to "*une caution ou autre garantie suffisante*". Although counsel for the Respondent argued that the word "*suffisante*" in the equally authentic French text of article 73, paragraph 2, imported a wider margin of appreciation for the setting of bonds by national authorities than that imported by the word "reasonable", it would appear now to be accepted by the Tribunal that there is no difference in the meaning of those texts. It is to be noted also that in the French text of article 292, paragraph 1, the expression "*caution raisonnable*" is used.

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

16. Where I respectfully disagree with the Tribunal is with its rejection of that part of the bond imposed by Australia which required that the owners of the *Volga* agree to "the carriage of a fully operational VMS [vessel monitoring system] device and observance of CCAMLR conservation measures until the

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conclusion of legal proceedings." Even though the Respondent quantified this requirement in monetary terms at AU$ 1,000,000, it has nevertheless been regarded by the Tribunal as a non-financial security since it is essentially in the nature of a "good behaviour bond" for the future, and, moreover, before there has been any final determination of guilt in respect of the vessel's past activities.

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

18. Moreover, it may not be necessary even on a narrow interpretation of the words of the Convention to exclude from a bond associated conditions that are not of themselves financial in nature. As Judge Anderson points out in the present case, such conditions are commonplace in the practice of many national courts. A person bailed on a charge of a crime involving the use of alcohol may be prohibited, as part of the terms of release, from consuming alcohol during the period of bail. A person might be similarly prohibited from going within a certain distance of a particular place, or of a particular person, as part of a bond pending the trial of the offence. Courts frequently demand that travel documents be surrendered during the period of bail. The object of conditions of this sort is to deter the accused from committing further offences. Breach of such conditions is punished with the monetary penalty of forfeiture of the bond. It is the same in the present case with the requirement of the installation of the VMS device.

19. Many have observed that the provisions of articles 73 and 292 of the Convention were designed to achieve a balance between the interests of flag States (and especially flag States of fishing vessels) and coastal States in their rights of management and conservation of their EEZs. The Tribunal itself has

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referred to this balance in its Judgment in the *"Monte Confurco" Case*, at paragraphs 70–72. It is still thought by some that this balance should be preserved exactly as it was conceived at the time of the Third United Nations Conference on the Law of the Sea, 1973–1982. But it should be recognised that circumstances have now changed. Few fishing vessels are state-owned. The problems today arise from privately owned fishing vessels, often operating in fleets, pursuing rich rewards in illegal fishing and in places where detection is often difficult. Fishing companies are highly capitalised and efficient, and some of them are unscrupulous. The flag State is bound to exercise effective control of its vessels, but this is often made difficult by frequent changes of name and flag by those vessels. It is notable that in recent cases before the Tribunal, including the present case, although the flag State has been represented by a State agent, the main burden of presentation of the case has been borne by private lawyers retained by the vessel's owners. A new "balance" has to be struck between vessel owners, operators and fishing companies on the one hand, and coastal States on the other.

(Signed) Ivan Shearer