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THE PLIGHT OF THE PATAGONIAN TOOTHFISH: LESSONS FROM THE VOLGA CASE

I. INTRODUCTION

Warnings from policy makers, scientists, fishing communities, and environmental groups have recently increased in pitch: the oceans once thought to contain limitless, renewable bounties of fish are, in fact, in a state of crisis.¹ Evidence of the widespread dwindling and collapsing of fish populations is dangerous to ignore.² One source estimates that 70 percent of the world's commercial fisheries have been fully exploited, overexploited, or depleted.³ Although various factors contribute to the depletion of the oceans' fish, such as pollution, climate change, and mistaken understandings of marine ecosystems, overfishing by human beings is a major cause of fish depopulation.⁴ Certain species are dangerously overfished, in

1. See generally William J. Broad & Andrew C. Revkin, *Has the Sea Given Up Its Bounty?: Overfishing Imposes a Heavy Toll*, N.Y. TIMES, July 29, 2003, at F1 (Science Times); SYLVIA A. EARLE, SEA CHANGE: A MESSAGE OF THE OCEANS (1995) 168–97; PEW OCEANS COMM'N, AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE—A REPORT TO THE NATION: RECOMMENDATIONS FOR A NEW OCEAN POLICY, 35–48 (May 2003), available at <http://www.pewoceans.org/>; Ambassador Mary Beth West, Deputy Assistant Secretary of State for Oceans and Fisheries, Statement before the Subcommittee on Fisheries Conservation, Wildlife, and Oceans, House Committee on Resources, U.S. Dep't St., *Promoting Sustainable International Fisheries Worldwide*, May 22, 2003 [hereinafter Dep't St. Oceans and Fisheries], available at <http://www.state.gov/g/oes/rls/rm/2003/20952pf.htm>.

2. See EARLE, *supra* note 1, at 169 (“[T]he ocean cannot sustain the massive removal of wildlife needed to keep Japan and other nations supplied with present levels of food taken from the sea.”); PEW OCEANS COMM'N, *supra* note 1, at 73 (“[D]emand for seafood is rising, yet the total global wild fisheries catch has leveled out since the mid-1990s as fish stocks have become depleted. In the U.S., 30 percent of the known wild fishery stocks are already overfished or in the process of being depleted through overfishing.”); Dep't St. Oceans and Fisheries, *supra* note 1 (“Many of the world's primary fishery resources are under stress. A number of key fish stocks have collapsed from overfishing and environmental degradation . . . while others have become depleted.”).

3. Broad & Revkin, *supra* note 1.

4. Press Release, “*Who Plays by the Fisheries Rules?*”—Commission Launches Public Compliance Scoreboard on the Internet, European Commission Press Room, IP/03/841, at 1 (June 16, 2003) [hereinafter *Who Plays by the*

large part due to illegal, unreported, and unregulated fishing (IUU fishing).⁵ IUU fishing can have a devastating impact on already-fragile fish populations; it can cause the collapse of a fishery, or significantly undermine efforts to rebuild depleted stocks.⁶ Patagonian toothfish (toothfish), commonly known in the United States as Chilean sea bass, are threatened by ram-

Fisheries Rules?], available at http://europa.eu.int/comm/fisheries/news_corner/press/inf03_22_en.htm.

Overfishing occurs when “fish are killed faster than they can reproduce....” Tim Eichenberg & Mitchell Shapson, *The Promise of Johannesburg: Fisheries and the World Summit on Sustainable Development*, 34 GOLDEN GATE U. L. REV. 587, 596 (2004). In the opinion of nineteen prominent scientists, “ecological extinction caused by overfishing preceded all other human disturbance to coastal ecosystems, including pollution, degradation of water quality, and anthropogenic climate change.” *Id.* In 2003, the European Commission observed that 76% of all fisheries-related infringement procedures brought against member states could be attributed to overfishing claims in contravention of fisheries obligations, despite the imminent collapse of certain fish stocks. *Who Plays by the Fisheries Rules?*, *supra*.

5. According to the Food and Agriculture Organization of the United Nations (“FAO”), the term “IUU fishing” describes various activities:

Some IUU fishers operate in areas where fishing is not permitted. Some employ banned technologies, outlawed net types, or flaunt fishing regulations in other ways. Others under-report how big their catches are—or don’t report them at all. In some cases, in fact, catches of commercially-valuable fish species may be surpassing permitted levels by over 300 percent due to IUU fishing . . .

Food and Agriculture Organization of the United Nations, *FAO Calls for Intensified Action to Combat Illegal Fishing*, FAO Newsroom, Dec. 3, 2003 [hereinafter FAO Newsroom], available at <http://www.fao.org/english/newroom/news/2003/25379-en.html>.

6. International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Food and Agriculture Organization of the United Nations, para. 1, June 23, 2001 [hereinafter IPOA-IUU], available at <http://www.fao.org/docrep/003/y1224e/y1224e00.htm>. A recent U.N. General Assembly resolution echoed this concern:

Concerned that illegal, unreported and unregulated fishing threatens seriously to deplete populations of certain fish species and significantly damage marine ecosystems and that illegal, unreported and unregulated fishing has a detrimental impact on sustainable fisheries, including the food security and the economies of many States . . .

G.A. Res. 142, U.N. GAOR, 57th Sess., at 3, U.N. Doc. A/RES/57/142 (2003), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/547/60/PDF/N0254760.pdf?OpenElement>. See also FAO Newsroom, *supra* note 5 (“In some cases, in fact, catches of commercially-valuable fish species may be surpassing permitted levels by over 300 percent due to IUU fishing. . .”).

pant IUU fishing.⁷ Several international and regional organizations regulate IUU fishing in regions where toothfish poaching occurs. Unfortunately, enforcement problems encumber conservation measures established under these instruments, making it difficult to stop IUU fishing.

The primary international instrument governing the law of the sea, including the conservation of living marine resources, is the Third United Nations Convention on the Law of the Sea (UNCLOS or Convention),⁸ which was adopted in 1982 and entered into force in 1994.⁹ UNCLOS is a vital instrument with strong conservationist goals.¹⁰ It is therefore lamentable that the tribunal established under UNCLOS to hear fishing disputes has given insufficient consideration to these fundamental conservationist objectives. In a series of judgments ending with the *Volga* case,¹¹ the International Tribunal of the Law of the Sea (Tribunal or ITLOS)¹² narrowly interpreted key UNCLOS

7. See generally *TRAFFIC Lauds Detention of Suspected 'Pirate' Toothfish Fishing Vessel, but the Chase Must Continue: Greater International Cooperation Needed in Addressing Illegal Fisheries*, TRAFFIC Network, Aug. 28, 2003, available at http://www.traffic.org/news/pirate_toothfish.html ("Patagonian Toothfish is highly valued in restaurants in Japan and the USA . . . , which are the largest consumer markets for Patagonian Toothfish, followed by Canada and the EU . . . TRAFFIC studies revealed that IUU catch may account for half of all Patagonian Toothfish traded internationally . . .").

8. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS], available at http://www.un.org.Depts/los/convention_agreemtns/texts/unclos/unclos_e.pdf. One author describes UNCLOS as the "constitution of the oceans." Montserrat Gorina-Ysern, *World Ocean Public Trust: High Seas Fisheries After Grotius—Towards a New Ocean Ethos?*, 34 GOLDEN GATE U.L. REV. 645, 671 (2004).

9. *The Oceans Are the Very Foundation of Human Life*, UNCLOS website, at http://www.un.org/depts/los/oceans_foundation.htm (last visited Nov. 13, 2004).

10. The Convention's preamble conveys the intention of member states to "promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment. . . ." UNCLOS, *supra* note 8, at 25 (preamble) [hereinafter UNCLOS Preamble].

11. The "*Volga*" Case (Russian Fed'n v. Australia), ITLOS Case No. 11 (2002), available at http://www.itlos.org/start2_en.html (last visited Oct. 10, 2004).

12. ITLOS is "an independent judicial body established by the Convention to adjudicate disputes arising out of the interpretation and application of the Convention." General Information—Overview, International Tribunal for the

enforcement and dispute resolution provisions. This restrictive interpretation created an additional obstacle for coastal states¹³ seeking to deter and punish IUU fishing inside their national waters. The negative impact of these judgments is twofold: first, they diminish an individual state's power to punish and deter IUU fishing within its exclusive economic zone (EEZ).¹⁴ Second, the judgments interfere with regional organizations' efforts to deter IUU fishing in defined areas. The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) is a regional organization that regulates toothfish harvesting in the Antarctic waters.¹⁵ Although UNCLOS strongly encourages regional cooperation among its members to conserve natural resources,¹⁶ the *Volga* line of cases undermines certain CCAMLR toothfish conservation measures.¹⁷

Law of the Sea, ITLOS website [hereinafter Overview ITLOS], at http://www.itlos.org/start2_en.html (last visited Oct. 12, 2004).

13. The term "coastal state" in this Note refers to coastal states that are parties to UNCLOS.

14. UNCLOS delineates the EEZ as follows: "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." UNCLOS, *supra* note 8, art. 57. UNCLOS grants states sovereign rights to regulate fishing within their EEZs. *Id.* arts. 56(1), 61–62.

15. CCAMLR manages the commercial fishing of toothfish in the Antarctic and sub-Antarctic regions. *Patagonian Toothfish: Fact Sheet*, Coalition of Legal Toothfish Operators website [hereinafter COLTO Fact Sheet], available at http://www.colto.org/Background_Toothfish.htm (last visited Oct. 2, 2004). The CCAMLR Convention is an international fisheries instrument that entered into force on April 7, 1982, and has twenty-four members: Argentina, Australia, Belgium, Brazil, Chile, European Community, Namibia, New Zealand, Norway, Poland, Russia, South Africa, France, Germany, India, Italy, Japan, Republic of Korea, Spain, Sweden, Ukraine, United Kingdom, United States, and Uruguay. NAT'L ENVTL. TR., BLACK MARKET FOR WHITE GOLD: ILLEGAL TRADE IN CHILEAN SEA BASS 3 (2004) [hereinafter BLACK MARKET FOR WHITE GOLD], available at http://www.net.org/reports/csb_report.pdf.

16. UNCLOS provides:

States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

UNCLOS, *supra* note 8, art. 197.

17. See *infra* Part IV.C–D. for a discussion of the impact of *Volga* on CCAMLR conservation measures.

The disputing states in the *Volga* case, the Russian Federation and Australia, were both parties to UNCLOS and the CCAMLR Convention at the time of the events leading to their dispute.¹⁸ The *Volga*, a Russian-owned fishing vessel flying the Russian Federation's flag, had obtained a commercial license to fish within the Russian Federation's EEZ, in the open sea, and in the coastal zones of foreign states.¹⁹ Australian authorities observed the *Volga* fleeing from Australia's EEZ, boarded it,²⁰ and discovered 131,422 tons of illegally-caught toothfish.²¹ Australian authorities pursued enforcement measures available to them under Australian law; they imposed financial and nonfinancial conditions for the release of the *Volga*²² and brought criminal charges against the master and crew.²³ With regard to the boat, Russia argued that Australia's conditions of release were unreasonable vis-à-vis UNCLOS Article 73(2), which requires the "prompt release" of vessels upon the posting of a "reasonable bond."²⁴ ITLOS, narrowly interpreting Articles

18. The "*Volga*" Case, Separate Opinion of Judge Cot, para. 5; (stating that by April 1997, both countries had ratified UNCLOS), *available at* http://www.itlos.org/start2_en.html (last visited Oct. 10, 2004). The facts of the *Volga* case are provided in greater detail *infra* Part IV.B.

19. The "*Volga*" Case, paras. 30–31. A flag state is "[t]he state in which a fishing vessel is registered." BLACK MARKET FOR WHITE GOLD, *supra* note 15, at 4. A flag state has the power to regulate the fishing activities of a ship flying its flag. See Ian J. Popick, Comment, *Are There Really Plenty of Fish in the Sea? The World Trade Organization's Presence is Effectively Frustrating the International Community's Attempts to Conserve the Chilean Sea Bass*, 50 EMORY L.J. 939, 964 (2001). UNCLOS requires that nationals of other states fishing inside a coastal state's EEZ "comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State." UNCLOS, *supra* note 8, art. 62(4). FAO is concerned with the phenomenon of "flags of convenience," in which states allow vessels from other states to fly their flags, yet fail to ensure that these vessels respect fishing laws. FAO Newsroom, *supra* note 5.

20. The "*Volga*" Case, para. 32.

21. *Id.* para. 51.

22. For details of the conditions of release, see *infra* Part IV.B.

23. The "*Volga*" Case, paras. 40–46.

24. UNCLOS Article 73 provides:

1. 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

73(2) and 292, agreed with Russia that Australia's conditions of release were unreasonable.²⁵

The Tribunal's interpretation of UNCLOS Articles 73(2) and 292 is likely to impede Australia's efforts to deter IUU fishing within its EEZ, and is therefore at odds with the Convention's central conservationist objectives.²⁶ For Australia to deter IUU fishing, it must be allowed to set conditions of release of a vessel that create a financial disincentive to IUU fishers. Foreign poachers reap ample rewards in the marketplace for illegally-caught toothfish.²⁷ If the cost of obtaining the release of a vessel is relatively inconsequential compared to IUU fishing profits, IUU fishing will continue.²⁸

compliance with the laws and regulations adopted by it in conformity with this Convention.

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

3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

UNCLOS, *supra* note 8, art. 73.

25. The "*Volga*" Case, para. 88 ("[T]he Tribunal considers that the bond as sought by Australia is not reasonable within the meaning of article 292 of the Convention."). UNCLOS provides: "Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew." UNCLOS, *supra* note 8, art. 292(4). For the full text of Article 292, which contains the dispute resolution procedures for prompt release cases, see *infra* note 81.

26. UNCLOS Preamble, *supra* note 10.

27. See BLACK MARKET FOR WHITE GOLD, *supra* note 15, at 7 ("With dockside prices ranging as high as \$10.00 to \$12.00 per pound, toothfish has rapidly become one of the most lucrative, illegal fishing target species globally: a good haul can bring \$3 million.").

28. This Note does not ignore the right of foreign vessels accused of IUU fishing to be free from arbitrary or excessive punishment. Rather, it argues that in the *Volga* line of cases, ITLOS unnecessarily tipped the scales in favor of foreign pirate fishers. The tension between a foreign state's right to UNCLOS's procedural remedies and a coastal state's right to punish IUU fishing is aptly characterized as "the complex balance between due process and due deterrence." Gorina-Ysern, *supra* note 8, at 687-88.

Part II of this Note provides the background to the toothfish crisis. Part III surveys UNCLOS enforcement and dispute resolution provisions pertaining to IUU fishing, in particular Articles 73 and 292. It also introduces the CCAMLR Convention, and highlights some of its shortcomings.²⁹ Part IV examines the *Volga* case, the latest in a line of prompt release cases heard by the Tribunal. It focuses on the Tribunal's interpretation of key UNCLOS provisions, Articles 73 and 292, and the impact of its interpretation on coastal states' efforts to combat IUU fishing of toothfish. Part V explores alternative, broader interpretations of Article 73(2) to be applied in future prompt release cases. These interpretations are more consistent with UNCLOS's strong conservationist spirit and with the sovereign rights it confers on coastal states, without favoring the rights of coastal states over those of flag states. Part VI, the conclusion, suggests amending UNCLOS Article 73(2) to cure the incompatibility of the Tribunal's extant interpretation of Article 73(2) and the dire need to prevent toothfish depletion.

II. THE PLIGHT OF THE PATAGONIAN TOOTHFISH

Toothfish are deep-sea fish found in the waters of Antarctica which can live up to fifty years and grow to over two hundred pounds.³⁰ Toothfish are overfished and illegally fished,³¹ to the extent that some believe they are on the "brink of extinction."³²

29. Convention for the Conservation of Antarctic Marine Living Resources, May 20, 1980, 33 U.S.T. 3476, 19 I.L.M. 841 (1980) [hereinafter CCAMLR Convention], available at <http://www.ccamlr.org/pu/e/pubs/bd/toc.htm>.

30. News Release, *Illegal Harvests of Chilean Sea Bass Get Close Review: U.S. Aggressively Monitoring Imports; Issues Consumer Fact Sheet*, National Oceanic and Atmospheric Administration, NOAA 2002-031, Mar. 25, 2002, [hereinafter NOAA News Release], available at <http://www.publicaffairs.noaa.gov/releases2002/mar02/noaa0231.html>. Two kinds of toothfish are sold in the United States under the name Chilean sea bass: Patagonian toothfish (*Dissostichus eleginoides*) and Antarctic toothfish (*Dissostichus mawsoni*), which is similar to Patagonian toothfish, although smaller and found in colder waters. BLACK MARKET FOR WHITE GOLD, *supra* note 15, at 3. CCAMLR regulates both varieties. *Id.* at 10.

31. Joint U.S. Dep't of Commerce/U.S. Dep't of State Fact Sheet: *Chilean Sea Bass Frequently Asked Questions*, Mar. 26, 2002 [hereinafter Fact Sheet: Chilean Sea Bass], available at <http://www.nmfs.noaa.gov/trade/chile.pdf>.

32. Associated Press, *Australia Sends Armed Ship to Protect Patagonian Toothfish*, Dec. 17, 2003, <http://www.flmnh.ufl.edu/fish/innews/armedtooth2003.html>; *Australia Arms Toothfish Patrol*, BBC NEWS WORLD EDITION, Dec.

Illegal fishing, in particular, undermines toothfish conservation efforts.³³ By one estimate, the Australian fishery will be gone in five to fifteen years.³⁴ Although CCAMLR tries to counter IUU fishing by imposing allowable catch levels and other conservation measures, large quantities of toothfish are harvested using banned fishing methods, and in excess of CCAMLR catch quotas.³⁵

IUU fishing of toothfish is rampant for several reasons.³⁶ First, it is easy for illegally-caught fish to saturate the market.³⁷ Unless properly documented, they can be sold on the market by virtue of mere possession, without marketable title conferred by a valid fishing license.³⁸ Over sixteen thousand tons of toothfish were legally harvested in the Antarctic in 2000;³⁹ some estimate that up to twice that amount were illegally harvested.⁴⁰ One group estimates that almost 80 percent of toothfish sold in the

17, 2003, available at <http://news.bbc.co.uk/2/hi/world/asia-pacific/3326851.stm>.

33. *Illegal Fishing Continues to Threaten Patagonian Toothfish*, TRAFFIC Network, Aug. 14, 2001, available at <http://www.traffic.org/toothfish/>.

34. Fishing News International, *Pacific Andes in Toothfish Storm*, Jan. 2003, available at the Coalition of Legal Toothfish Operators, <http://www.colto.org/FishingNewsInt.htm> (last visited Oct. 13, 2004).

35. Illegal, Unregulated and Unreported (IUU) Fishing, CCAMLR website, at <http://www.ccamlr.org/pu/E/sc/fish-monit/iuu-intro.htm> (last visited Oct. 9, 2004) ("Substantial catches of toothfish (*Dissostichus* spp.) have been taken by longline fishing well in excess of allowable catches agreed by the CCAMLR."). Longliners are vessels that lay baited, hooked lines of up to one mile in length for approximately twenty-four hours before retrieving the catch. See *Frequently Asked Questions*, Division of Commercial Fisheries, Alaska Department of Fish and Game website, at http://cf.adfg.state.ak.us/geninfo/about/faq/cf_faq.php (last visited Oct. 9, 2004).

36. This list of factors is not intended to be exhaustive.

37. See Lea Brilmayer & Natalie Klein, *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*, 33 N.Y.U. J. INT'L L. & POL. 703, 752-53 (2001) ("Once the fish are taken to port, it is unlikely that any buyer can determine whether the fish were lawfully taken from a particular maritime area.").

38. See *id.*

39. Fact Sheet: Chilean Sea Bass, *supra* note 31. Generally, legal fishing occurs when a coastal state licenses fishing rights in its to foreign fishers, granting them legal title to catch removed in compliance with the license. See Brilmayer & Klein, *supra* note 37, at 752.

40. Fact Sheet: Chilean Sea Bass, *supra* note 31.

world is illegally obtained.⁴¹ This can happen because buyers cannot distinguish between lawfully and unlawfully harvested fish.⁴² It is, moreover, unrealistic to expect restaurants and their patrons to enquire whether their dinner was legally caught.⁴³

Another cause of rampant IUU fishing is the strong market demand for toothfish. The major markets for toothfish are the United States, Japan, and the European Union,⁴⁴ with the United States importing 15 to 20 percent of the world market.⁴⁵ Market prices are high, earning toothfish the nickname “white

41. Jack Williams, *Australians Nab Suspected Illegal Fishing Boat After 4,000-mile Chase*, USATODAY.COM, Aug. 30, 2003, available at http://www.usatoday.com/weather/resources/coldscience/2003-08-30-toothfish-caught_x.htm (citing figures provided by the National Environmental Trust in Washington). See also *Australia Arms Toothfish Patrol*, BBC NEWS, *supra* note 32 (“[P]oachers are thought to take more than four times the amount of toothfish caught legally.”).

42. Brilmayer & Klein, *supra* note 37, at 752–53.

43. BLACK MARKET FOR WHITE GOLD, *supra* note 15, at 8 (“[I]t is virtually impossible for a consumer in the U.S. to know if the Chilean Sea Bass they [sic] purchase in a restaurant or grocery store is legal or illegal.”). The following excerpt from an interview presents one chef’s perspective on the overfishing crisis:

[Question:] There are concerns these days about fish, too, for example about certain species that have been depleted.

[Answer:] As a chef, it’s tough to go into that war. Don’t eat swordfish tomorrow, but do you eat cod? It changes. Where I’m from, cod is now overfished. It’s senseless for us to take a hard line on it. It’s tough to be a Greenpeace man and a chef at the same time. In my head, I would like to support all that, but we also have a restaurant where we serve people to make them happy, and that’s the reality.

Hugo Lindgren, *Questions for Marcus Samuelsson: Big Fish Story: The Ethiopian-born Swedish Chef is Going Japanese*, N.Y. TIMES MAGAZINE, Oct. 26, 2003, at 25.

44. Fact Sheet: Chilean Sea Bass, *supra* note 31.

45. NOAA News Release, *supra* note 30. This figure pertains to legal imports only. *Id.* In general, U.S. seafood consumption is on the rise, with per capita consumption reaching 15.6 per person in 2002, almost one pound more from the 2001 level. *Americans Ate More Seafood in 2002*, Press Release No. NOAA03-105, Sept. 10, 2003, NOAA website, available at <http://www.nmfs.noaa.gov/docs/2002consumption.pdf>. According to the National Environmental Trust, the United States imported 85 percent of legally-caught CCAMLR toothfish in 2003. BLACK MARKET FOR WHITE GOLD, *supra* note 15, at 11.

gold.⁴⁶ On the docks, prices are as high as \$10.00 to \$12.00 per pound.⁴⁷ Clearly, there is financial incentive for pirate fishers to ignore the risks involved with illegal activities.⁴⁸ A dramatic example of such risk-taking occurred in 2003, when Australian authorities pursued a pirate fishing boat for twenty-one days through 4,000 miles of the stormy, icy Southern Ocean.⁴⁹ Australian authorities captured the boat, which contained illegally-caught toothfish,⁵⁰ the estimated value of which was as high as one million U.S. dollars.⁵¹

Finally, some states are simply unable to patrol their EEZs, leaving the door wide open to poachers.⁵² Developing countries, in particular, lack the financial and technological resources necessary to deter IUU fishing. The Food and Agriculture Organization of the United Nations (FAO) encourages states to assist developing countries in meeting their obligations under international and regional instruments.⁵³

46. M. Lack & G. Sant, *Patagonian Toothfish: Are Conservation and Trade Measures Working?*, TRAFFIC Network, at <http://www.traffic.org/news/displayPR.cfm?prID=32> (last visited Oct. 9, 2004); *Swashbuckling Customs Officials Land a Big Catch: Pirate Vessel Nabbed in High Seas Chase*, World Wildlife Fund Newsroom, Aug. 28, 2003 [hereinafter *Swashbuckling Customs*], available at <http://worldwildlife.org/news/displayPR.cfm?prID=32> (last visited Nov. 18, 2004). See also Media Alert: *Another Toothfish Pirate Caught Red Handed in Australian Waters—Spanish and Ghanian Governments Urged to Take Immediate Action*, Oct. 6, 2003, available at http://www.colto.org/COLTO_MA_6_October03.htm (last visited Nov. 18, 2004) [hereinafter COLTO Media Alert] (“[I]t has been estimated that over 20,350 tonnes of toothfish was taken illegally from Australian waters between 1995/96 and 2001/2002. At a value of \$US 10 per kilo for processed fish, this means that around \$AUS 300, million [sic] of Australian fish has been stolen by these pirates.”).

47. BLACK MARKET FOR WHITE GOLD, *supra* note 15, at 7.

48. Chris Masters, Reporter, *The Toothfish Pirates* (transcript of television broadcast by the Australian Broadcasting Corporation, Sept. 9, 2002), ABC Online, at http://www.abc.net.au/4corners/archives/2002b_Monday30September2002.htm (“The pirates calculate the risks and know the returns far outweigh the chances of getting caught.”).

49. Williams, *supra* note 41.

50. *Id.*

51. BLACK MARKET FOR WHITE GOLD, *supra* note 15, at 7.

52. See Brilmayer & Klein, *supra* note 37, at 754.

53. IPOA-IUU, *supra* note 6, §. V.

III. UNCLOS PROVISIONS RELEVANT TO IUU FISHING; CCAMLR CONVENTION

A. UNCLOS *Delineation of Ocean Zones*

UNCLOS delineates three main ocean zones and their relevant jurisdictions: the territorial sea, the EEZ, and the high seas.⁵⁴ Every coastal state has a territorial sea with a breadth of twelve nautical miles⁵⁵ over which that state is sovereign.⁵⁶ The EEZ, extending two hundred nautical miles from the coastline,⁵⁷ is the area in which a coastal state has sovereign rights over the management of its natural resources,⁵⁸ including jurisdiction over “the protection and preservation of the marine environment.”⁵⁹

The high seas are defined as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.”⁶⁰ States are prohibited from claiming sovereign rights to any part of the high seas.⁶¹ Their nationals, however, may fish on the high seas to the extent permissible under international and regional treaties governing the conservation of the living resources on the high seas.⁶² Treaties may,

54. See UNCLOS, *supra* note 8.

55. *Id.* art. 3 (“Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.”).

56. *Id.* art. 2(1) (“The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.”). However, a state’s sovereignty over its territorial sea is subject to the Convention and to other international laws. *Id.* art 2(3).

57. *Id.* art. 57.

58. *Id.* art. 56(1). Although oceans cover approximately 71 percent of the earth’s surface, 95 percent of the world’s fish are caught within 200 miles of the coast. LAWRENCE JUDA, INTERNATIONAL LAW AND OCEAN USE MANAGEMENT: THE EVOLUTION OF OCEAN GOVERNANCE 5 (1996) (citing FAO’s figures). This fact underscores the importance of controlling overfishing and IUU fishing within coastal states’ EEZs.

59. UNCLOS, *supra* note 8, art. 56(1)(b)(iii).

60. *Id.* art. 86.

61. *Id.* art. 89.

62. *Id.* arts. 116–18 (Article 116 provides that “[a]ll States have the right for their nationals to engage in fishing on the high seas subject to: (a) their treaty obligations. . .”).

for example, impose allowable catch limits on certain species.⁶³ It is sometimes difficult to distinguish between IUU fishing occurring inside a state's EEZ and permissible fishing on the high seas. For example, a foreign vessel may hover just outside a coastal state's EEZ to capture fish as they swim from within the EEZ to the high seas.⁶⁴

B. UNCLOS Dispute Settlement Provisions

UNCLOS dispute resolution mechanisms, found in Part XV of the Convention, are divided into three basic sections:⁶⁵ Section One (General Provisions) authorizes disputing parties to choose any "peaceful means"⁶⁶ of dispute resolution, either independently or under a general, regional or bilateral agreement, provided that the resulting decision is binding.⁶⁷ If the states fail to peacefully resolve their dispute, they are subject to the options set forth in Section Two (Compulsory Procedures Entailing Binding Decisions).⁶⁸ Under Section Two, states may choose to bring their dispute before ITLOS, the International Court of Justice (ICJ), or one of two arbitration tribunals.⁶⁹ Under UNCLOS, both the ICJ and ITLOS have jurisdiction to hear cases requiring the interpretation or application of UNCLOS, however, parties may not submit the same case to both courts, nor is forum-shopping permitted.⁷⁰ However, applications for prompt release, such as the *Volga* case, have been heard by the

63. *See id.* art. 119(1).

64. Brilmayer & Klein, *supra* note 37, at 752. This may be illegal under UNCLOS. *Id.*

65. For a summary of these three sections, see Jonathan L. Hafetz, *Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention*, 15 AM. U. INT'L L. REV. 583, 632-33 (2000).

66. UNCLOS, *supra* note 8, art. 279.

67. *Id.* art. 282.

68. *Id.* art. 286.

69. *Id.* art. 287(1). However, "unless the parties otherwise agree, the jurisdiction of the Tribunal is mandatory in cases relating to the prompt release of vessels and crews under article 292 of the Convention and to provisional measures pending the constitution of an arbitral tribunal under article 290, paragraph 5, of the Convention." Overview ITLOS, *supra* note 12.

70. *See* Tullio Treves, *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 809, 811 (1999).

Tribunal.⁷¹ Finally, Section Three indicates certain types of disputes that are exempt from Section Two's compulsory dispute settlement scheme, which includes disputes over maritime boundaries, issues before the U.N. Security Council, military matters, and certain fisheries and marine scientific research conflicts.⁷²

C. Enforcement Problems

When IUU fishing occurs inside a coastal state's EEZ, the state may impose its national laws rather than submit the dispute to UNCLOS's binding settlement procedures.⁷³ This may be preferable in instances where a coastal state's domestic fishing laws are stricter, hence more protective, than those permissible under UNCLOS.⁷⁴ Some states, however, are unable to enforce their national fishing laws for lack of financial or technical resources. Others simply choose not to enforce their own laws. In such situations, IUU fishing goes unchecked, in direct opposition to the spirit of UNCLOS.⁷⁵

Another, perhaps obvious, enforcement problem is that states fail to ratify or implement UNCLOS and other fisheries man-

71. The UNCLOS drafters bestowed on ITLOS the compulsory residual jurisdiction to interpret prompt release cases, therefore relevant case law will mostly be found with ITLOS. Erik Franckx, "Reasonable Bond" in the *Practice of the International Tribunal for the Law of the Sea*, 32 CAL. W. INT'L L.J. 303, 309 (2002).

72. UNCLOS, *supra* note 8, arts. 297-99. See also LEE A. KIMBALL, INTERNATIONAL OCEAN GOVERNANCE: USING INTERNATIONAL LAW AND ORGANIZATIONS TO MANAGE MARINE RESOURCES SUSTAINABLY 9 (2003).

73. KIMBALL, *supra* note 72, at 9. UNCLOS provides that:

Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity . . . and the terms and conditions established in its conservation and management law and regulations.

UNCLOS, *supra* note 8, art. 297(3)(a).

74. See Eichenberg & Shapson, *supra* note 4, at 607.

75. See Brilmayer & Klein, *supra* note 37, at 754.

agement treaties.⁷⁶ Following the Round Table on the Sustainable Development of Global Fisheries, with Particular Reference to Enforcement against IUU Fishing on the on the High Seas in June, 2003, the Secretary-General on Oceans and the Law of the Sea reported that “few States had ratified and implemented these instruments.”⁷⁷ International instruments that regulate IUU fishing have, thus, been ineffective “due to a lack of political will, priority, capacity and resources to ratify or accede to and implement them.”⁷⁸

Therefore, although dispute resolution mechanisms are available under UNCLOS and other instruments, enforcement problems weaken their effectiveness in the battle to end IUU fishing.

D. UNCLOS Enforcement and Dispute Resolution in Prompt Release Cases: Article 73(2)

If a coastal state believes a foreign vessel has violated its EEZ, as Australia did in the *Volga* case, UNCLOS Article 73(1) authorizes the coastal state to seize the offending vessel.⁷⁹ A coastal state is authorized to board and inspect a vessel, arrest

76. The Pew Oceans Commission urges the United States to ratify UNCLOS. PEW OCEANS COMM'N, *supra* note 1, at 80–81. The United States, however, has taken steps toward enforcing import regulations on toothfish, and is a CCAMLR member. Journal Staff, *Recent Development: A Review of Developments in Ocean and Coastal Law 2001-2002*, 7 OCEAN & COASTAL L.J. 367, 373 (2002). NOAA recently rejected improperly documented toothfish shipments, in an effort to support international conservation measures. *U.S. Turns Away Improper Patagonian Toothfish Shipments: Clarifies Intent to Enforce International Conservation Provisions*, Press Release No. NOAA04-093, NOAA website, Sept. 28, 2004, available at http://www.nmfs.noaa.gov/docs/04-093_toothfish.pdf. See also Sabrina Tavernise, *3 Are Sentenced for Smuggling Chilean Sea Bass and Rock Lobster*, N.Y. TIMES, May 29, 2004, at B6 (reporting that a federal judge sentenced two people to prison for smuggling large quantities of Chilean sea bass and rock lobster).

77. U.N. GAOR, 58th Sess., Agenda Item 53(a) para. 65, U.N. Doc. A/58/65/Add.1 (2003), available at http://www.un.org/Depts/los/general_assembly/general_assembly_reports.htm (The obstacle to managing global fisheries in a sustainable way is the “difficulty of enforcing good practice and legal instruments relating to fisheries management on the high seas, especially in relation to the intractable issue of IUU fishing.”).

78. IPOA-IUU, *supra* note 6, para. 1.

79. UNCLOS, *supra* note 8, art. 73(1). For the full text of Article 73, see *supra* note 24.

the crew, and implement judicial proceedings against a foreign party that violates its national fisheries laws.⁸⁰ If, however, the coastal state fails to promptly release the vessel once the foreign state has posted a reasonable bond, UNCLOS Article 292 authorizes the foreign state to file an application for prompt release with the competent court or tribunal.⁸¹ This is what happened in the *Volga* case; when Russia and Australia failed to agree on the conditions of release of the *Volga* and its crew, Russia filed an application for prompt release with ITLOS.⁸²

80. *Id.*

81. Article 292 describes the procedures that apply in prompt release disputes:

1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties, or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.
2. The application for release may be made only by or on behalf of the flag State of the vessel.
3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.
4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

Id. art. 292.

82. Conversely, if the disputing states resolve their conflict within ten days, perhaps under the enforcement provisions of bilateral agreement or regional convention, UNCLOS prompt release mechanisms do not come into play. Some disputes end at this stage because the flag state simply prefers to pay the bond to avoid protracted proceedings.

E. The CCAMLR Convention

The CCAMLR Convention is a regional treaty that came into force in 1982 with the purpose of conserving marine life in the Southern Ocean, while permitting the rational harvesting of living resources.⁸³ CCAMLR uses scientific advice as a basis for its conservation measures.⁸⁴ Its approach is ecosystem-based, meaning it does not limit its focus to individual species, but “take[s] into account ecological links between species.”⁸⁵ Parties to the CCAMLR Convention agree to conduct their harvesting activities in the Southern Ocean in accordance with the “prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment.”⁸⁶ To that end, the CCAMLR Convention designates the quantity of a given species that may be harvested inside the Convention area.⁸⁷ With regard to toothfish, it imposes annual catch limits, prohibits harvesting in certain ocean areas, requires compliance with its Catch Documentation Scheme,⁸⁸ and requires vessels flagged by CCAMLR member states to use a Vessel Monitoring System (VMS).⁸⁹

Unfortunately, CCAMLR’s conservation scheme is impeded in several ways. First, it is very difficult for member states to police the Southern Ocean, which is vast and inhospitable.⁹⁰ Sec-

83. General Introduction, CCAMLR website, at <http://www.ccamlr.org/pu/e/gen-intro.htm> (last visited Oct. 2, 2004).

The Southern Ocean surrounds the continent of Antarctica and is clearly delimited by the Antarctic Convergence (or Polar Front), which is formed where cold Antarctic waters meet warmer waters to the north. The Antarctic Convergence acts as an effective biological barrier, and the Southern Ocean is therefore substantially a closed ecosystem.

Id. Patagonian toothfish are found primarily in the Southern Ocean and adjacent waters. COLTO Fact Sheet, *supra* note 15.

84. General Introduction, CCAMLR website, *supra* note 83.

85. *Id.* For example, one of the Convention’s early concerns was the effect of excessive krill catches on other marine life that fed on krill, as well as its effect on krill populations themselves. *Id.*

86. CCAMLR Convention, *supra* note 29, art. II(3)(a).

87. *Id.* art. IX(2)(a).

88. BLACK MARKET FOR WHITE GOLD, *supra* note 15, at 8.

89. *Id.* at 17–18. VMS devices monitor the location of fishing vessels in order to determine where their catches are made. *Id.*

90. COLTO Fact Sheet, *supra* note 15.

ond, some experts believe CCAMLR's estimates of the decline in toothfish populations are conservative, and that some populations are in fact commercially extinct.⁹¹ If this is true, CCAMLR's current conservation efforts would be insufficient in light of the actual level of toothfish depopulation. Another obstacle to CCAMLR's conservation measures is its overall lack of enforcement capabilities; it cannot punish member states that violate CCAMLR Convention rules.⁹² CCAMLR members rely on "public pressure" to encourage offending nations to comply with the rules.⁹³ Some members simply fail to enforce the convention's requirements.⁹⁴ For example, a flag state may fail to observe CCAMLR's toothfish catch limits.⁹⁵ Finally, other treaties, such as UNCLOS, may restrict the scope of CCAMLR's effectiveness. ITLOS's narrow interpretation of the term "reasonable bond" in prompt release cases limits CCAMLR's ability

91. BLACK MARKET FOR WHITE GOLD, *supra* note 15, at 11. Australia nominated toothfish to be listed in Appendix II of the Convention for the International Trade in Endangered Species of Wild Fauna and Flora (CITES). Commission for the Conservation of Antarctic Marine Living Resources, Report of the Twenty-First Meeting of the Commission (2002), paras. 10.1–.75 [hereinafter CCAMLR-XXI Meeting], available at <http://www.ccamlr.org/pu/e/pubs/cr/02/all.pdf>. Appendix II includes:

(a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and

(b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control.

Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243, art. II(2), available at <http://www.cites.org/eng/disc/text.shtml#I> (appendices available at <http://www.cites.org/eng/append/appendices.shtml>).

Very recently, CCAMLR indicated that pirate fishing of toothfish in its convention region significantly declined in 2004. *Toothfish Pirates Reducing the Plunder, Figures Show*, N.Z. HERALD, Nov. 12, 2004, available at <http://www.nzherald.co.nz/storydisplay.cfm?storyID=3609369&thesection=news&thesubsection=general>. However, the report of CCAMLR's 23rd annual meeting, which will presumably provide relevant data, is not available at the time of this Note's publication.

92. BLACK MARKET FOR WHITE GOLD, *supra* note 15, at 18.

93. Eichenberg & Shapson, *supra* note 4, at 615–16.

94. BLACK MARKET FOR WHITE GOLD, *supra* note 15, at 18.

95. Eichenberg & Shapson, *supra* note 4, at 615.

to enforce CCAMLR Convention conservation measures. In *Volga*, for example, ITLOS concluded that Australia could not, as a condition of release, require the *Volga* to carry a VMS device and comply with other CCAMLR requirements.⁹⁶

IV. THE VOLGA CASE

A. Pre-Volga Prompt Release Cases

Since it began hearing cases in 1996,⁹⁷ six of the Tribunal's twelve judgments involved prompt release disputes.⁹⁸ *Volga* was the sixth application for prompt release heard by ITLOS.⁹⁹ In four of the six cases, a coastal state seized a foreign vessel containing large quantities of illegally-caught toothfish.¹⁰⁰ These cases illustrate the Tribunal's approach to prompt release disputes, specifically its balancing approach, with which it weighs the interests of the flag state, which seeks release of its vessel, against those of the coastal state, which seeks to punish and deter IUU fishing.

This balancing approach at first appears consistent with the goal of UNCLOS Article 292, namely to balance the interests of coastal and flag states.¹⁰¹ This Note argues, however, that the Tribunal's balancing approach is flawed. Despite its stated objective to balance the interests of the disputing parties, the Tribunal has invariably undervalued or ignored factors favoring a

96. See *infra* Part IV.C–D. for an analysis of the Tribunal's interpretation of the term "reasonable bond" and the impact of this interpretation on deterring IUU fishing.

97. Frequently Asked Questions (Q & A), ITLOS website, available at http://www.itlos.org/start2_en.html (last visited Oct. 14, 2004).

98. See Proceedings and Judgments—List of Cases, ITLOS website, available at http://www.itlos.org/start2_en.html (last visited Oct. 14, 2004).

99. Sarah Derrington & Michael White, *Australian Maritime Law Update: 2002*, 34 J. MAR. L. & COM. 363, 364 (2003). For a thorough explanation of how UNCLOS prompt release procedures work, and an analysis of ITLOS's interpretation of the term "reasonable bond," see generally Franckx, *supra* note 71.

100. See *id.* at 311–22. In addition to the *Volga* case, the prompt release cases are: The "*Camouco*" Case (Panama v. France), ITLOS Case No. 5 (2000); The "*Monte Confurco*" Case (Seychelles v. France), ITLOS Case No. 6 (2000); and The "*Grand Prince*" Case (Belize v. France), ITLOS Case No. 8 (2001). *Id.* at 311. These judgments are available at http://www.itlos.org/start2_en.html (last visited Oct. 10, 2004).

101. See Franckx, *supra* note 71, at 305.

coastal state's sovereign right to punish IUU fishing within its EEZ. The balancing approach, moreover, is ill-defined, mutable, and applied inconsistently from case to case to serve the desired outcome of obtaining the release of a seized vessel.¹⁰² Although the Tribunal is in its relative infancy and has heard only a handful of prompt release cases, these judgments could hamper the ability of individual states and regional organizations to deter IUU fishing.¹⁰³ The balancing test is therefore flawed because it gives insufficient weight to marine life conservation, an essential UNCLOS value, and because it lacks the specificity needed to provide sufficient notice to states.

B. Facts of the Volga Case and the Dispute over the Conditions of Release

The *Volga* was owned by a Russian company, and its master was a Russian national.¹⁰⁴ After Australian authorities boarded the vessel on February 7, 2002, they informed the master that the *Volga* had been apprehended under Australia's Fisheries Management Act of 1991 because it had been fishing illegally inside Australia's EEZ.¹⁰⁵ The master and crew were detained pursuant to the Act.¹⁰⁶ On February 20, 2002, Australia notified the master that the boat, nets, traps, equipment, and catch had been seized.¹⁰⁷ Three crew members, all Spanish nationals, were charged with the indictable, strict liability offense of commercial fishing without a license within Australia's EEZ.¹⁰⁸

Russia contended that Australian authorities had violated UNCLOS Article 72(3) when they set what Russia considered unreasonable conditions for the release of the *Volga* and crew. The conditions for release of the crew, approved by the Full

102. See *infra* Part IV(C)(3) for more on the inherent inconsistencies in the Tribunal's balancing approach.

103. For an analysis of the Tribunal's balancing approach in *Volga*, see *infra* Part IV.C.

104. The "*Volga*" Case, para. 2. The *Volga*'s fishing license required that its activities comply with fishing industry rules and international agreements. Derrington & White, *supra* note 99, at 364.

105. The "*Volga*" Case, paras. 33–34.

106. *Id.* para. 35. The master died in an Australian hospital without being charged with any offense. *Id.* para. 42.

107. *Id.* para. 36.

108. *Id.* paras. 38–39.

Court of the Supreme Court of Western Australia, were: AU\$75,000¹⁰⁹ cash for each crew member, the surrender of all passports and seaman's papers, and the requirement that the crew remain in Perth.¹¹⁰ The *Volga's* owner posted bail for the crew.¹¹¹ The crux of the *Volga* case, however, was the dispute over the terms of release of the vessel, which were twofold: Australia demanded a security in the amount of AU\$3,332,500 and imposed additional, non-financial conditions.¹¹² As non-financial conditions of release, Australia required the *Volga* to carry a VMS during the course of the legal proceedings, and to observe CCAMLR conservation rules.¹¹³ The boat's owner rejected Australia's conditions of release as unreasonable, and agreed only to post the considerably lower amount of AU\$500,000.¹¹⁴ The Tribunal ultimately held that the bond for release of the *Volga* should be AU\$1,920,000,¹¹⁵ representing the value of the vessel,

109. On February 1, 2002, one Australian dollar equaled .51 U.S. dollars. Currency Converter, Bank of Canada, at <http://www.bank-banque-canada.ca/en/exchform.htm> (last visited Oct. 25, 2004).

110. The "*Volga*" Case, para. 41.

111. *Id.* para. 42. Russia, however, maintained that the terms of release of the crew were "not envisaged by article 73(2)" and thus "not permissible or reasonable in terms of the Convention." *Id.* para. 48.

112. Australia set the following conditions of release for the *Volga*:

[A] security to be lodged amounting to AU\$ 3,332,500, for release of the vessel. The security amount is based on what Australia considers reasonable in respect of three elements:

-assessed value of the vessel, fuel, lubricants and fishing equipment

-potential fines

-carriage of a fully operational VMS [Vessel Monitoring System] and observance of CCAMLR . . . conservation measures until the conclusion of legal proceedings.

Id. para. 53. The AU\$3,332,500 security consisted of the value of the vessel, fuel, and lubricants (AU\$1,920,000); potential fines imposed on crew members pending criminal proceedings (AU\$412,500); and security for the VMS system and observance of CCAMLR rules (AU\$1,000,000). *Id.* para. 72. Australian authorities sold the 131,422 tons of toothfish found on the *Volga* for nearly two million Australian dollars, which they held in trust pending the outcome of legal proceedings. *Id.* para. 51.

113. *Id.* Recall that both Russia and Australia were CCAMLR members and were therefore required to carry VMS equipment. *See supra* text accompanying note 17.

114. The "*Volga*" Case, para. 54.

115. *Id.* para. 90.

fuel, and lubricants, and rejected Australia's additional, non-financial conditions.

C. The Tribunal's Balancing Approach: The Question of Reasonableness

In *Volga*, the Tribunal had to determine whether the bond and conditions set by Australia were reasonable under UNCLOS Article 73(2).¹¹⁶ UNCLOS does not define the term "reasonable."¹¹⁷ The Tribunal characterizes its task in prompt release cases as to determine whether a prompt release claim against a detaining state is "well-founded."¹¹⁸ To that end, the Tribunal developed its balancing approach.

In *Volga*, the Tribunal had to balance the Russian Federation's contention that the conditions of release of the vessel and crew were unreasonable¹¹⁹ against Australia's position that the bond was reasonable based on "the value of the *Volga*, its fuel, lubricants and fishing equipment; the gravity of the offences and potential penalties; the level of international concern over illegal fishing; and the need to secure compliance with Australian laws and international obligations pending the completion of domestic proceedings."¹²⁰ To determine the reasonableness of the requested AU\$3,332,500 security, the Tribunal considered factors it had deemed relevant in prior prompt release cases, in particular: "the gravity of the alleged offences, the penalties imposed or imposable under laws of the detaining State, the value of the detained vessel and of the cargo seized, [and] the amount of bond imposed by the detaining State and its form."¹²¹ The Tribunal did not intend this list of factors to be exhaus-

116. *Id.* paras. 58–61.

117. See Franckx, *supra* note 71, at 306–09. ITLOS's Rules of the Tribunal provide that the Tribunal's task in prompt release cases is to determine whether a claim that a detaining state has not complied with prompt release provisions is "well-founded," and if well-founded, the "amount, nature and form of the bond or financial security." *Id.* at 308.

118. *Id.* (citing the Tribunal's Rules).

119. The "*Volga*" Case, para. 60.

120. *Id.* para. 61.

121. *Id.* para. 63 (citing the judgment in the "*Camouco*" case (2000)). Because Article 292 disputes are subject to obligatory third-party settlement, usually by ITLOS, case law on the reasonableness criterion will tend to be consistent. See Franckx, *supra* 71, at 325–26.

tive.¹²² Rather, the assessment of reasonableness was to be made on a case-by-case basis.¹²³

1. Gravity of the Offense

The Tribunal failed to allocate sufficient weight to the gravity of the Russian Federation's offense, namely IUU fishing of a fragile species. Moreover, it did not articulate a clear basis for rejecting the two indications of gravity asserted by Australia: first, the potential penalties for IUU fishing within Australia's EEZ, which constituted evidence that Australia considered IUU fishing a serious matter, and, second, that IUU fishing was a problem of significant international concern, particularly in the CCAMLR Convention region, where there was a "serious depletion of the stocks of Patagonian toothfish"¹²⁴

After conceding that the offenses were grave¹²⁵ and that international fishing concerns were a factor in its balancing test, the Tribunal nevertheless suggested that these concerns were neither dispositive nor necessary to the balancing equation.¹²⁶ Gravity was, rather, an ancillary or optional factor that the Tribunal "may" consider when evaluating the reasonableness of penalties.¹²⁷ The Tribunal implied that it deemed itself precluded from considering the gravity of the offense in a meaningful way because it perceived its primary "purpose" to be securing the prompt release of the *Volga*.¹²⁸ To secure prompt release of the vessel, then, the Tribunal would need to downplay factors supporting Australia's position. This approach invariably favors the foreign state's interests over those of the detaining state: the imposition of any bond or condition of release that

122. The "*Volga*" Case, para. 64 (citing the judgment in the "*Monte Confurco*" Case (2000)). The Tribunal emphasized in *Monte Confurco* that it did not wish to "lay down rigid rules as to the exact weight to be attached to each of them." *Id.*

123. *See id.* para. 65 (citing the *Monte Confurco* case).

124. *Id.* para. 67.

125. *Id.* para. 68 ("The Tribunal takes note of the the submissions of the Respondent. The Tribunal understands the international concerns about illegal, unregulated and unreported fishing and appreciates the objective taken by States, including the States Parties to CCAMLR, to deal with the problem."). *Id.*

126. *See id.* para. 69.

127. *Id.*

128. *See id.*

interferes with prompt release will be given insufficient weight.¹²⁹ It would seem, therefore, that the Tribunal's balancing test is flexible to the point of being illusory. One is left to wonder whether the Tribunal is giving mere lip service coastal states' sovereign rights under UNCLOS to manage marine resources within their EEZs.

2. Non-financial Conditions of Release

The Tribunal construed the term "bond or other security" in Article 73(2) to exclude non-financial conditions.¹³⁰ It pointed to the text of Article 292 and other UNCLOS provisions in which appears the term "bond or other financial security" for the "context" and concluded that the "object and purpose" of this language in Article 73(2) dictated nothing more than purely financial conditions.¹³¹ To support this conclusion, the Tribunal observed that, had the UNCLOS drafters intended to permit non-financial conditions of release, they would have written them into the Convention.¹³² The Tribunal, thus, restricted its inquiry to a plain meaning textual analysis. It declined to consider whether a coastal state is "entitled" to impose non-financial conditions under the Convention "in the exercise of its sovereign rights."¹³³ Perhaps the task of reconciling Australia's sovereign rights under UNCLOS with the mandates of Articles 73(2) and

129. The Tribunal was equally dismissive of the gravity of the offense factor in pre-Volga prompt release cases:

[W]ith respect to the other relevant factors, namely the gravity of the offences and the range of penalties applicable, the Tribunal usually simply states that it "takes note" of the submissions made, without any further indication of the weight given to the evidence or elements. Especially in the Monte Confurco Case this technique sharply contrasted with the considerable efforts of France to develop the argument regarding gravity of the offense [sic] before the Tribunal.

Franckx, *supra* note 71, at 336–37.

130. The "Volga" Case, para. 76. ("In these proceedings, the question to be decided is whether the 'bond or other security' mentioned in article 73 paragraph 2 of the Convention may include such conditions.").

131. *Id.* para. 77. Article 73(2) does not contain the qualifying word "financial" where it refers to the "other security," whereas Article 292(1) contains the term "other financial security." For the full text of these provisions, see, respectively, *supra* notes 24 and 81.

132. The "Volga" Case, para. 77.

133. *Id.* para. 76.

292 was too daunting. Instead, the Tribunal narrowly construed Articles 73(2) and 292.

3. The Balancing Approach Offers Poor Guidance to UNCLOS Member States

The balancing test, as articulated and applied by the Tribunal in the *Volga* line of cases, offers poor guidance to national judges who set the amount of bond on a seized vessel.¹³⁴ Similarly, the test is a poor guide for national legislatures charged with setting the guidelines for their courts. The risk is that, despite the dire need to deter IUU fishing, judges and legislatures will act cautiously by setting low bonds, in order to avoid the inconvenience of prompt release disputes, in anticipation of losing such disputes, or simply out of confusion with regard to the meaning of the term “reasonable bond.” In this sense, the effect of the Tribunal’s standard of reasonableness in prompt release disputes, to the extent one can be defined, is contrary to the conservationist spirit of UNCLOS with respect to IUU fishing.¹³⁵

134. In the prompt release cases that preceded *Volga*, the balancing test lacked cohesiveness, and thus was a poor guide to states:

The interaction among the different relevant factors, the fact that the list of factors is said to be non-exhaustive, and the Tribunal’s manifest refusal to clarify the interrelation of the factors, have made a horizontal analysis of the different cases, in order to try to discern some predictability for future cases, a very difficult, if not impossible, exercise.

Franckx, *supra* note 71, at 337. Consequently, there is a danger that the Tribunal’s loose guidance will make it easier for national courts to manipulate the factors in its balancing test to come up with their desired result:

The lack of precision, caused by the unwillingness of the Tribunal to narrow further the general contours set thus far, could have a negative influence on national judges who might try to “misuse” the broad framework created by the Tribunal. Members of the Tribunal have noted that “national adjudication bodies welcome this guidance”....

Franckx, *supra* note 71, at 338. A national judge must apply domestic fishing laws and also comply with the standard expressed in international instruments. See Bernard H. Oxman & Vincent P. Bantz, *International Decision: The “Camouco” (Panama v. France) (Judgment). ITLOS Case No. 5*, 94 A.J.I.L. 713, 720 (2000) (criticizing a French judge’s failure to invoke UNCLOS in his reasoning when determining the amount bond in the *Camouco* case, when under French law treaties trump statutes).

135. In his Separate Opinion, Judge Cot explained:

D. Separate and Dissenting Opinions to the Volga Case

It is reassuring that several members of the *Volga* Tribunal acknowledge that illegal fishing of toothfish is a grave offense, and that the majority's holding will likely impede coastal states' efforts to combat it. In his Separate Opinion, Judge Jean-Pierre Cot emphasized the need to "clarify the difficulties encountered by States in combating [IUU fishing] in the Southern Ocean."¹³⁶ He articulated a specific concern for the plight of toothfish, and an awareness that the majority's ruling may frustrate CCAMLR's efforts to protect toothfish.¹³⁷ Judge Cot's reference to the financial lure of toothfish poaching¹³⁸ underscored the need for stinging financial penalties, in the form of hefty bonds. Unlike the majority, Judge Cot emphasized Australia's legitimate sovereign rights under UNCLOS to take necessary enforcement and deterrence measures to combat IUU fishing inside its EEZ.¹³⁹ These rights include the right to determine ap-

CCAMLR's verdict on the devastation caused by illegal fishing in the region is damning. The proceeds of illegal fishing appear to be greater than those of licensed fishing—at least that was CCAMLR's estimate for the 1997/98 season—and therefore more than double the level of catches regarded as the maximum to ensure the preservation of the species. If the parties to the Convention do not manage to put an end to these practices, stocks of Patagonian toothfish will be completely wiped out within about ten years.

The "*Volga*" Case, Separate Opinion of Judge Cot, para. 6 (2002), *available at* http://www.itlos.org/start2_en.html (last visited Oct. 10, 2004).

136. *Id.* para. 2.

137. *See supra* note 135.

138. The *Volga*

achieved an illegal catch of 100 tonnes of Patagonian toothfish in nine weeks, which was sold by the Australian authorities for the sum of AU\$ 1,932,579, while the vessel, its fuel oil and its fishing gear were estimated at AU\$ 1,920,000. . . . With a full hold, the fish caught illegally in the course of a fishing season are worth more than twice the price of the vessel.

Id. para. 7.

139. According to Judge Cot:

The measures taken by Australia, both in terms of prevention and enforcement, clearly fall within the scope of the efforts made by international organizations to combat [IUU fishing]. They come under article 56 of [UNCLOS] and have been taken in pursuance of the sovereign rights exercised by coastal States for the purpose of exploring,

appropriate monetary penalties, the amount of which UNCLOS neither limits nor defines.¹⁴⁰ The Tribunal, Judge Cot points out, should not interfere with these sovereign rights.¹⁴¹

Judge Cot, however, drew the line at the form of bond a state may impose, agreeing with the majority's conclusion that UNCLOS Articles 73(2) and 292 authorize a coastal state to set a bond or security that is strictly financial in nature, but not non-financial conditions.¹⁴² The effect of such non-financial conditions, he reasoned, might upset the tension between the rights of coastal and flag states, by giving the coastal state additional "coercive power."¹⁴³

Judge *Ad Hoc* Ivan Shearer, in his dissenting opinion, agreed with the opinions expressed by Judge Cot,¹⁴⁴ but went one step further.¹⁴⁵ With regard to the monetary amount of a bond or security permissible under UNCLOS, Judge Shearer concluded that "illegal fishing must be punished with a high and deterrent level of monetary penalty."¹⁴⁶ To support this conclusion, he emphasized that the *Volga* had the capacity to hold 275.6 tons of fish, so that its potential illegal catch greatly exceeded the

exploiting, conserving and managing the natural resources of the [EEZ].

Id. para. 11.

140. *Id.*

141. *Id.* para. 12 ("The Tribunal has a duty to respect the implementation by the coastal State of its sovereign rights with regard to the conservation of living resources, particularly as these measures should be seen within the context of a concerted effort within the FAO and CCAMLR."). However, a state may not take arbitrary actions within the scope of its sovereign rights. *Id.*

142. The "*Volga*" Case, Separate Opinion of Judge Cot, para. 26. Australia required that the *Volga* be equipped with a VMS device and respect CCAMLR regulations. See *supra* note 112, and accompanying text.

143. *Id.*

144. The "*Volga*" Case, Dissenting Opinion of Judge *Ad Hoc* Ivan Shearer, para. 12.

145. It is worth noting the significance of there being more than one dissent in the *Volga* case: "This was not a lone dissent (so often the fate of the *ad hoc* judge), and that makes it more difficult, however large the majority, to dismiss the merits of the opinion. Judge Anderson dissented too, and for largely similar reasons." Ryszard Piotrowicz, *The Song of the Volga Boatmen—Please Release Me*, AUSTRALIAN L. J., 160, 162 (2003).

146. The "*Volga*" Case, Dissenting Opinion of Judge *Ad Hoc* Ivan Shearer, para. 11.

actual catch found on board, or 131 tons of toothfish;¹⁴⁷ that, as parties to UNCLOS and the CCAMLR Convention, Australia and Russia were required to conserve living resources; and that it is difficult for states to patrol the Southern Ocean, where weather is “bleak and cold, with high winds and heavy seas.”¹⁴⁸

On the question of the permissibility of non-financial conditions of release, Judge Shearer faulted the majority for its “narrow interpretation” of the provisions of Articles 73(2) and 292.¹⁴⁹ He pointed out that Russia had, in fact, quantified in monetary terms the requirement that the *Volga* carry a VMS.¹⁵⁰ There is, then, a financial component to this condition, which could be considered a form of bond.¹⁵¹ Judge Shearer further observed that even a narrow interpretation of the terms “bond” and “financial security”¹⁵² does not necessarily preclude non-financial

147. *Id.* para. 6.

148. *Id.* paras. 9–10.

149. *Id.* para. 17.

150. *Id.* para. 16. Note, too, that the majority’s characterization of the bond imposed by Australia accords financial values to each of the non-financial conditions of release:

-a security to cover the assessed value of the vessel, fuel, lubricants and fishing equipment (AU\$ 1,920,000);

-an amount (AU\$ 412, 500) to secure payment of potential fines imposed in the criminal proceedings that are still pending against members of the crew;

-a security (AU\$ 1,000,000) related to the carriage of a fully operational VMS and observance of CCAMLR conservation measures.

The “*Volga*” Case, para. 72.

151. The “*Volga*” Case, Dissenting Opinion of Judge Ad Hoc Ivan Shearer, para. 16. (“Even though [Australia] 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. . .”).

152. Judge Shearer criticizes the majority’s narrow interpretation of Articles 73(2) and 292:

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

“associated conditions that are not of themselves financial in nature.”¹⁵³ He analogized that requiring a vessel to carry a VMS device is similar to the practice of national criminal courts that set bail conditions in an effort to deter recidivism.¹⁵⁴ For example, an individual released on bail might be prohibited from certain conduct as a condition of release.¹⁵⁵ It is unclear whether Judge Shearer found support for this analogy implicit in the text of UNCLOS, or as an extension of customary national practice or international customary law, or simply as a matter of common sense.

Finally, Judge Shearer compared the authentic French text of Article 73(2) to the English language version, observing that the literal meaning of the French version “imported a wider margin of appreciation for the setting of bonds by national authorities than that imported by the word ‘reasonable’....”¹⁵⁶

Judge David H. Anderson, in his dissenting opinion, concluded that a literal reading of Article 73(2) does, in fact, permit non-financial conditions of release of the *Volga*.¹⁵⁷ First, he found that Article 73 “contains no explicit restriction upon the imposition of non-financial conditions for release of arrested vessels.”¹⁵⁸ He further found that, although the term “other se-

organisations) to deter by way of judicial and administrative orders the plundering of the living resources of the sea.

Id. para. 17.

153. *Id.* para. 18 (in which Judge Shearer refers to and concurs with Judge David H. Anderson’s analogy to national criminal procedure). *See also* The “*Volga*” Case, Dissenting Opinion of Judge David H. Anderson, para. 13.

154. The “*Volga*” Case, Dissenting Opinion of Judge Ad Hoc Ivan Shearer, para. 18.

155. *Id.*

156. *Id.* The French version of 73(2) refers to “*une caution ou une garantie suffisante*.” *Id.* One translation of this phrase is “an adequate bond or security” (author’s translation). This Note does not offer a comprehensive statutory analysis of Articles 73 and 292. For such an analysis, including how the meaning of “reasonable bond” may differ according to the six authentic language versions of UNCLOS, see Franckx, *supra* note 71, at 326–30. *See also* Oxman & Bantz, *supra* note 134, at 716–17. *Cf.* The “*Volga*” Case (including dissenting opinions of Judges Anderson and Shearer, and the Separate Opinion of Judge Cot).

157. The “*Volga*” Case, Dissenting Opinion of Judge David H. Anderson, para. 7.

158. *Id.* (“Where the Convention does limit the rights of coastal States in the matter of enforcement, it does so in express terms: article 73, paragraph 3, prohibits imprisonment and corporal punishment.”).

curity” probably refers to a financial security,¹⁵⁹ the term “bond” has both a financial and legal meaning.¹⁶⁰ Where Article 73 is concerned, “bond” has the legal meaning associated with criminal procedure, as opposed to a purely financial meaning associated with investment matters.¹⁶¹ Judge Anderson illustrated his point by analogy to the setting of bail bonds under U.S. States and English domestic law; both allow the inclusion of conditions.¹⁶² Thus, when the Tribunal assesses the reasonableness of a given bond, it should examine the reasonableness of three elements: the amount, form and conditions of the bond.¹⁶³ A non-financial, “good behaviour bond” with the legitimate purpose of deterring additional poaching by a released vessel would therefore constitute a bond within the literal meaning of Article 73(2).¹⁶⁴

V. ARGUMENTS FAVORING A BROADER INTERPRETATION OF ARTICLE 73(2)

It is too soon to predict the impact the opinions of judges Cot, Shearer, and Anderson on future ITLOS prompt release cases.¹⁶⁵ Judge Anderson optimistically suggested that, with the *Volga* case, the Tribunal had “gone further than it did in the *Monte*

159. *Id.* para. 8.

160. *Id.* para. 9.

161. *Id.* para. 10.

162. *Id.* paras. 12–13.

163. *Id.* para. 14.

164. *Id.* para. 20. Judge Anderson indicates that the use of a “good behaviour bond” would be justifiable in the *Volga* case because the *Volga* appeared likely to re-offend; it apparently ignored warnings issued by Australian authorities and “spent much of the period between its warning and its arrest fishing in the CCAMLR Area, including the EEZ.” *Id.* para. 22(a). Moreover, were the *Volga* released, “it may well be nigh impossible to keep track of the *Volga* in Antarctic waters, including the Australian EEZ, especially if it is not carrying VMS.” *Id.* para. 22(e).

165. Ryszard Piotrowicz concludes:

This is an important decision. It shows the potential for a clear division in the tribunal with regard to the meaning of reasonable bonds. Until now a majority, six out of 11, of the cases before the tribunal, have concerned prompt release. It is therefore very likely that the issue will arise again and soon. Judges Shearer and Anderson have given their colleagues plenty of food . . . for thought.

Piotrowicz, *supra* note 145, at 163.

Confurco case two years earlier.”¹⁶⁶ Whereas in the earlier case the Tribunal “simply took note”¹⁶⁷ of the detaining state’s concerns over the serious situation caused by IUU fishing, in *Volga*: “[t]he Tribunal understands the international concerns about [IUU Fishing] and appreciates the objectives behind the measures taken by States, including the States Parties to CCAMLR, to handle the problem.”¹⁶⁸ But, no matter how understanding and appreciative the Tribunal may be, the majority’s narrow reasoning does not imply a change of course. To the contrary, the *Volga* case stalls the creation of a judicial precedent under which coastal states may impose high, deterrent penalties and additional, non-financial conditions of release.¹⁶⁹

A. The Impact of Volga on the IUU Fishing of Toothfish

As the *Volga* case demonstrates, the Tribunal’s focus is predominantly procedural with regard to reasonable bond disputes, to the detriment of the overall spirit and substance of UNCLOS. This undermines coastal states’ ability to deter IUU fishing by imposing meaningful financial penalties.¹⁷⁰ In the case of toothfish, poachers clearly find it worthwhile to risk typical penal-

166. The “*Volga*” Case, Dissenting Opinion of Judge David H. Anderson, at para. 2.

167. *Id.*

168. The “*Volga*” Case, para. 68. In the *Camouco* judgment, which preceded the *Monte Confurco* case by several months, the Tribunal likewise simply “[took] note of the gravity of the alleged offences,” without acknowledging IUU fishing and efforts to prevent toothfish poaching. The “*Camouco*” Case (Panama v. France), ITLOS case No. 5, para. 68 (2000). Moreover, the Tribunal “failed to reveal precisely how the amount of the bond was determined, [although] the Tribunal did identify the factors it took into account.” Oxman & Bantz, *supra* note 134, at 720. In the *Grand Prince* case, the Tribunal never reached a discussion of the gravity of the offense, finding on a separate issue that it did not have jurisdiction to hear the application. The “*Grand Prince*” Case (Belize v. France) ITLOS Case No. 8, para. 93 (2001).

169. See Gorina-Ysern, *supra* note 8, at 676–77.

170. The risk of excessive, arbitrary, or discriminatory penalties is offset by certain UNCLOS provisions. For example, UNCLOS prohibits discrimination when setting allowable catch rates and other conservation measures for the high seas: “States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.” UNCLOS, *supra* note 8, art. 119(3).

ties.¹⁷¹ Moreover, after the *Volga* case, Australia and other coastal states might be inclined to refrain from imposing higher bonds if the amount, if contested before ITLOS, is likely to be struck down. Finally, if the Tribunal continues to interpret Article 73 in a way that disfavors national and regional conservation regulations, such as Australian laws and CCAMLR Convention rules, efforts to sustain toothfish populations are likely to fail.

B. Defending the Tribunal's Approach

The Tribunal is relatively new. UNCLOS entered into force in November, 1994, and the ITLOS bench was elected in 1996.¹⁷² It handed down its first prompt release decision in 1997, the *M/V Saiga* case.¹⁷³ In *M/V Saiga*, the Tribunal set a “low burden” standard for the flag state to meet in order to prevail in its application for release.¹⁷⁴ This legal standard arguably “does violence to the balance the Convention strikes concerning the scope of permissible third-party oversight of coastal state activities in their EEZs, making it too easy to subject coast state detentions of foreign flag vessels to international judicial review.”¹⁷⁵ However, the Tribunal may have been justified in playing it safe. Perhaps it is unreasonable to expect a fairly new court to “assert bold and innovative interpretations of the Convention”; it is understandable that it would “exert its authority only incrementally.”¹⁷⁶ Even CCAMLR members have expressed deference to ITLOS, despite its rulings on the prompt release cases.¹⁷⁷ Some scholars, placing a high value on consis-

171. See *Swashbuckling Customs*, *supra* note 46; COLTO Media Alert, *supra* note 46.

172. John E. Noyes, *Law of the Sea Dispute Settlement: Past, Present, and Future*, 5 ILSA J. INT'L & COMP. L. 301, 303 (1999).

173. The “*M/V Saiga*” Case (Saint Vincent & the Grenadines v. Guinea), ITLOS Case. No. 1 (1997), available at http://www.itlos.org/start2_en.html (last visited Oct. 10, 2004).

174. See Noyes, *supra* note 172, at 307.

175. *Id.*

176. *Id.* at 307–08.

177. CCAMLR-XXI Meeting, *supra* note 91, para. 8.67. Sweden stated that:

ITLOS has just begun its work, but it has dealt with several cases concerning prompt release of vessels. If there is a legal development within the praxis of the Tribunal in respect of what is to be consid-

tency and efficiency in jurisprudence, praise the Tribunal's work in prompt release cases for having those attributes.¹⁷⁸ Finally, the Tribunal faces a difficult task. UNCLOS is difficult to interpret and apply because it is "built upon the compromise and accommodation of the different interests at stake, and is therefore deliberately ambiguous in many respects."¹⁷⁹

C. Arguments For and Against Amending Article 73(2) of UNCLOS

If we accept the *Volga* court's view that the Tribunal is constrained from liberally construing the term "reasonable bond,"¹⁸⁰ then perhaps the focus should shift from interpreting the Convention to amending it.

It is possible that the Convention's drafters foresaw neither the vast collapse of fish populations nor the extent to which IUU fishing would increase. During the Third United Nations Conference on the Law of the Sea between 1974 and 1982,¹⁸¹ non-coastal states raised the issue of fishing rights to surplus populations living inside the coastal states' EEZs. Because they debated what to do with surplus fish populations, it appears that, at the time, states did not seriously contemplate the potential extinction of these resources.¹⁸² Perhaps they did not

ered as a "reasonable bond," and which praxis is considered to be detrimental to efforts to combat illegal fishing, this is something that has to be dealt with in the context of ITLOS' own jurisprudence. It is the view of Sweden that it is important to have confidence [in] the UNCLOS system and in the work of the Tribunal.

Id.

178. See Tim Stephens & Donald R. Rothwell, Case Note, *The Volga (Russian Fed'n v. Australia)*, *I.T.L.O.S. No. 11 (Dec. 23, 2002)*, 35 J. MAR. L. & COM. 283, 291 (2004) ("The speed and efficiency with which the Tribunal handled this case demonstrates its effectiveness in such cases. This can only lead to further confidence in its ability to address prompt release matters."). Stephens and Rothwell, nevertheless, acknowledge that the Tribunal appeared to ignore the serious and widespread problem of IUU fishing in Australia's EEZ, in violation of Australian fisheries laws and CCAMLR conservation efforts. *Id.* at 288.

179. Marcos A. Orellana, *The Law on Highly Migratory Fish Stocks: ITLOS Jurisprudence in Context*, 34 GOLDEN GATE U. L. REV. 459, 462 (2004).

180. The "*Volga*" Case, para. 76.

181. JUDA, *supra* note 58, at 213.

182. *Id.* at 217 ("Should the emphasis of the EEZ regime be on some concept of full utilization of resources, requiring that others be allowed to fish in those

envisage advances in fishing technology that would facilitate IUU fishing.¹⁸³ Had they foreseen today's decline in some living marine resources, the UNCLOS drafters might have modified Article 73 to unambiguously allow coastal states greater discretion to deter IUU Fishing within their EEZs. Perhaps, too, the drafters did not anticipate the high cost to coastal states of monitoring and patrolling EEZs,¹⁸⁴ which now justifies demanding high bonds in exchange for the release of rogue vessels.

UNCLOS provides procedures for amending the Convention.¹⁸⁵ At the Twenty-First Meeting of CCAMLR in 2002, members debated the pros and cons of amending Article 73(2).¹⁸⁶ Australia submitted a proposal to amend Article 73(2) to exempt vessels that were detained for IUU fishing in the CCAMLR Convention Area.¹⁸⁷ This would prevent such vessels from re-offending after posting bond¹⁸⁸ pending the resolution of litigation on the merits.

The response to Australia's proposal was decidedly lukewarm. Several participating countries expressed concern that the amendment procedure would be protracted and complicated.¹⁸⁹ France worried that it might entail the inconvenience of "having to appear before the tribunal in Hamburg, Germany."¹⁹⁰ The United Kingdom tempered its sympathy for the Australian initiative with doubts that the proposed amendment

instances in which the coastal state could not utilize all of the available catch....").

183. According to Earle,

In the decade since the 1982 convention, advances in fishing technology, from the deployment of thousands of miles of lightweight, inexpensive drift nets to the use of sophisticated sonar and even satellite observation techniques to locate populations of fish and squid, have led to swift and devastating reductions in what once seemed to be "limitless" populations.

EARLE, *supra* note 1, at 162.

184. The "Volga" Case, Separate Opinion of Judge Cot, at para. 9.

185. UNCLOS, *supra* note 8, arts. 311-16. Prior to submitting a proposed amendment, a period of ten years from the date of entry into force must expire. UNCLOS entered into force in November, 1994, therefore this ten-year period has recently expired.

186. CCAMLR-XXI Meeting, *supra* note 91, paras. 8.62-.73.

187. *Id.* para. 8.62.

188. *Id.*

189. *Id.* paras. 8.63, 8.66, 8.71.

190. *Id.* para. 8.71.

would fix the problem.¹⁹¹ If Article 73(2) were eliminated, a coastal state would no longer be obligated to release a vessel on bond, which could have consequences for the detaining state if the Tribunal later determined that the vessel was not guilty of IUU fishing; the detaining state might have to pay considerable compensation for keeping the boat in port.¹⁹² The United Kingdom was also concerned that such an amendment might be contrary to the object and purpose of the Convention, namely to “stri[k]e a very careful balance between the rights of Coastal States and the rights of fishing states, and Article 72(3) is part of that balance.”¹⁹³

Other states endorsed the United Kingdom’s “cautious” approach,¹⁹⁴ articulating conservative or passive positions. Sweden, commenting that UNCLOS “is a package deal,”¹⁹⁵ which balances the rights of flag states and coastal states, concluded that there is too great a risk of disturbing the balance by amending Article 73.¹⁹⁶ Neither Sweden nor the United Kingdom wished to second-guess or offend ITLOS.¹⁹⁷ Chile suggested that, rather than amend UNCLOS, “if ITLOS decisions continued to constitute a cause for concern, the matter could be raised in other forums, such as the U.N. Oceans Consultation, UNCLOS Parties Meeting, or as intervening States at ITLOS proceedings.”¹⁹⁸ France found the proposed amendment “disproportionate in relation to the problem” without further explanation.¹⁹⁹

191. *Id.* para. 8.64.

192. *Id.*

193. *Id.*

194. *Id.* paras. 8.62–.73.

195. *Id.* para. 8.67.

196. *Id.*

197. *Id.* para. 8.64 (“We also think it may send the wrong message as to our faith in [ITLOS], an institution set up by UNCLOS. If States think ITLOS is taking the wrong approach, the correct place to raise that issue is within the tribunal.”). *See also id.* para. 8.67 (“It is the view of Sweden that it is important to have confidence in the UNCLOS system and in the work of the Tribunal.”).

198. *Id.* para. 8.65.

199. *Id.* para. 8.71.

VI. CONCLUSION

The Tribunal and CCAMLR should revisit the idea of amending Article 73(2) in greater depth and provide coastal states with specific, alternative solutions before Patagonian toothfish are both off our dinner plates and gone from the oceans.²⁰⁰ At the very least, an in-depth assessment of Australia's proposed amendment is in order. Perhaps there is a way to amend Article 73(2) without completely abolishing it. This Note proposes a less drastic revision. For example, Article 73(2) could be amended to unambiguously permit additional, non-financial conditions of release, provided they are reasonable under the facts of a given conflict. Further, the amendment could permit higher financial bonds or securities in the case of repeat offenders or large-scale IUU fishing operators.

CCAMLR should, at the very least, investigate Chile's alternative suggestions, or devise others. Pending an amendment or other international solutions, Australia has increased domestic fines for illegal foreign fishers²⁰¹ and taken the bold step of sending an armed ship to patrol its waters to deter toothfish poachers.²⁰² Meanwhile, it remains to be seen how ITLOS will app-

200. It is not the purpose of this Note to assess CCAMLR's efficacy. However, for criticism of this organization, see generally BLACK MARKET WHITE GOLD, *supra* note 15; Media Release, Australian Toothfish Industry Slam International Meeting Outcomes, COLTO, Nov. 13, 2004, available at http://www.colto.org/TFIndustry_MR_13_November03.htm (last visited Nov. 18, 2004); Popick, *supra* note 19, at 961–85; CCAMLR: *The Convention for the Conservation of Antarctic Marine Living Resources*, Greenpeace International, at http://archive.greenpeace.org/oceans/southern_oceans/expedition2000/moreinfo/bg_ccamlr.html (last visited Nov. 13, 2004).

201. *Australia Boosts Fines for Illegal Foreign Fishers*, AlertNet, REUTERS FOUNDATION, Nov. 26, 2003, available at <http://www.alertnet.org/thenews/newsdesk/SYD68601.htm> (“The proposed new laws would also allow the Australian government to recover the cost of pursuit and apprehension of foreign illegal fishing vessels.”).

202. Australia Arms Toothfish Patrol, BBC News, *supra* note 14.

roach its next prompt release judgment. By then, sadly, it may be too late for the toothfish.

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