INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD ON 12, 13 AND 23 DECEMBER 2002

The "Volga" Case
(Russian Federation v. *Australia), Prompt Release*

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
DES 12, 13 ET 23 DÉCEMBRE 2002

Affaire du « Volga »
(Fédération de Russie c. Australie), prompte mainlevée

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the uncorrected verbatim records.

En vue de faciliter l'utilisation de l'ouvrage, le présent volume comporte, outre une pagination continue, l'indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux non corrigés.

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Minutes of the Public Sittings
held on 12, 13 and 23 December 2002

Procès-verbal des audiences publiques
des 12, 13 et 23 décembre 2002

PUBLIC SITTING HELD ON 12 DECEMBER 2002, 10.00 A.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, TREVES, MARSIT, NDIAYE, JESUS, BALLAH, COT; *Judge* ad hoc SHEARER; *Registrar* GAUTIER.

The Russian Federation is represented by:

Mr Pavel Grigorevich Dzubenko,
Deputy Director, Legal Department, Ministry of Foreign Affairs,

as Agent;

Mr Valery Sergeevich Knyazev,
Head of Division, Legal Department, Ministry of Foreign Affairs,

Mr Kamil Abdulovich Bekiashev,
Head of International Law Department, Moscow State Law Academy,

as Co-Agents;

and

Mr Andrew Tetley,
Partner, Wilson Harle, Auckland, New Zealand, Barrister and Solicitor of the High Court of New Zealand and Solicitor of the Supreme Court of England and Wales,

Mr Paul David,
Partner, Wilson Harle, Auckland, New Zealand, Barrister and Solicitor of the High Court of New Zealand, Barrister of the Inner Temple, London, England,

as Counsel;

Mr Ilya Alexandrovich Frolov,
Desk Officer, Legal Department, Ministry for Foreign Affairs,

as Adviser;

Australia is represented by:

Mr W.M. Campbell,
First Assistant Secretary, Office of International Law, Attorney-General's Department,

as Agent and Counsel;

"VOLGA"

and

Mr David Bennett AO QC,
Solicitor-General of Australia,

Mr James Crawford SC,
Whewell Professor of International Law, University of Cambridge, Cambridge, United Kingdom,

Mr Henry Burmester QC,
Chief General Counsel, Office of the Australian Government Solicitor,

as Counsel;

Mr Stephen Bouwhuis,
Principal Legal Officer, Office of International Law, Attorney-General's Department,

Mr Gregory Manning,
Principal Legal Officer, Office of International Law, Attorney-General's Department,

Mr Paul Panayi,
International Organisations and Legal Division, Department of Foreign Affairs and Trade,

Mr Glenn Hurry,
General Manager, Fisheries and Aquaculture, Agriculture Fisheries and Forestry Australia,

Mr Geoffrey Rohan,
General Manager Operations, Australian Fisheries Management Authority,

Ms Uma Jatkar,
Third Secretary, Australian Embassy, Berlin, Germany,

as Advisers;

Ms Mandy Williams,
Office of International Law, Attorney-General's Department,

as Assistant.

AUDIENCE PUBLIQUE DU 12 DÉCEMBRE 2002, 10 H 00

Tribunal

Présents : M. NELSON, *Président*; M. VUKAS, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, TREVES, MARSIT, NDIAYE, JESUS, BALLAH, COT, *juges*; M. SHEARER, *juge* ad hoc; M. GAUTIER, *Greffier*.

La Fédération de Russie est représentée par :

M. Pavel Grigorevich Dzubenko,
directeur adjoint, département des affaires juridiques, Ministère des affaires étrangères,

comme agent;

M. Valery Sergeevich Knyazev,
chef de division, département des affaires juridiques, Ministère des affaires étrangères,

M. Kamil Abdulovich Bekiashev,
Chef du service du droit international, Académie de droit d'Etat de Moscou,

comme co-agents;

et

M. Andrew Tetley,
Associé, Wilson Harle, Auckland, Nouvelle-Zélande, Avocat et *Solicitor* de la Haute Cour de Nouvelle-Zélande et *Solicitor* de la Cour Suprême d'Angleterre et du Pays de Galles,

M. Paul David,
Associé, Wilson Harle, Auckland, Nouvelle-Zélande, Avocat et *Solicitor* de la Haute Cour de Nouvelle-Zélande, membre du barreau de l'*Inner Temple*, Londres, Angleterre,

comme conseils;

M. Ilya Alexandrovich Frolov, fonctionnaire, Département des affaires juridiques, Ministère des affaires étrangères,

comme conseiller;

L'Australie est représentée par :

M. W.M. Campbell,
premier Secrétaire adjoint, Département du droit international, Bureau de l'*Attorney General*,

comme agent et conseil;

et

M. David Bennett *AO QC*,
Solicitor-General de l'Australie,

M. James Crawford *SC*,
professeur titulaire de la chaire Whewell de droit international, Université de Cambridge, Cambridge, Royaume Uni,

M. Henry Burmester *QC*,
conseiller principal, bureau du *Solicitor* du Gouvernement australien,

comme conseils;

M. Stephen Bouwhuis,
fonctionnaire juridique principal, Département du droit international, Bureau de l'*Attorney General*,

M. Gregory Manning,
fonctionnaire juridique principal, Département du droit international, Bureau de l'*Attorney General*,

M. Paul Panayi,
Division des organisations internationales et des affaires juridiques, Ministère des affaires étrangères et du commerce,

M. Glenn Hurry,
Directeur général, pêches et aquaculture, agriculture, pêcheries et eaux et forêts (Australie),

M. Geoffrey Rohan,
Directeur général de la gestion, Autorité de gestion des pêcheries de l'Australie,

Mme Uma Jatkar,
Troisième Secrétaire, Ambassade d'Australie, Berlin, Allemagne,

comme conseillers;

Mme Mandy Williams,
Département du droit international, Bureau de l'*Attorney General*,

comme assistante.

Opening of the Oral Proceedings
[PV.02/01, E, p. 5–7]

The Registrar:
On 2 December 2002, an Application was filed by the Russian Federation against Australia for the prompt release of the fishing vessel *Volga* and members of its crew.

The Application was made under article 292 of the United Nations Convention on the Law of the Sea.

The case has been named *The "Volga" Case (Russian Federation* v. *Australia)* and entered in the List of cases as Case No. 11. Today, the Tribunal will take up the hearing in this case.

Agents and Counsel for both the Russian Federation and Australia are present.

Mr President.

The President:
This public sitting is held pursuant to Article 26 of the Statute of the Tribunal to hear the parties present their evidence and arguments in *The "Volga" Case*.

I call on the Registrar to read out the submissions of the Russian Federation as contained in its Application.

Mr Registrar.

The Registrar:
The Applicant requests the Tribunal:

> "The Applicant applies to the International Tribunal for the Law of the Sea ("**Tribunal**") for the following declarations and orders:
>
> (a) A declaration that the Tribunal has jurisdiction under Article 292 of the United Nations Convention for the Law of the Sea 1982 ("**UNCLOS**") to hear the application.
> (b) A declaration that the application is admissible.
> (c) A declaration that the Respondent has contravened article 73(2) of UNCLOS in that the conditions set by the Respondent for the release of the *Volga* and three of its officers are not permitted under article 73(2) or are not reasonable in terms of article 73(2).
> (d) An order that the Respondent release the *Volga* and the officers and its crew if a bond or security is provided by the owner of the vessel in an amount not exceeding AU$ 500,000 or in such other amount as the Tribunal in all the circumstances considers reasonable.
> (e) An order as to the form of the bond or security referred to in paragraph 1(d)
> (f) An order that the Respondent pay the costs of the Applicant in connection with the application."

Mr President.

"VOLGA"

The President:
On 2 December 2002, a copy of the Application was transmitted to the Government of Australia together with the Order of the same date in which the President of the Tribunal fixed 12 and 13 December 2002 as the dates for the hearing of the case.

On 7 December 2002, the Government of Australia filed its Statement in Response.

I now call on the Registrar to read the submission of the Government of Australia in its Statement in Response.

Mr Registrar.

The Registrar:
The Respondent requests the Tribunal:

> "Australia requests that the Tribunal decline to make the orders sought in paragraph 1 of the Memorial of the Russian Federation. [The Respondent] requests the Tribunal make the following orders:
>
> (1) that the level and conditions of bond set by Australia for the release of the *Volga* and the level of bail set for the release of the crew are reasonable;
> and
> (2) that each party shall bear its own costs of the proceedings."

Mr President.

The President:
Copies of the Application and the Statement in Response have been made available to the public.

The Tribunal notes the presence in court of Mr Pavel Grigorevich Dzubenko, Agent of the Russian Federation, and Mr W.M. Campbell, Agent of Australia.

I now call on the Agent of the Applicant to note the representation of the Russian Federation.

Mr Dzubenko:
Mr President, distinguished Members of the International Tribunal for the Law of the Sea, let me introduce the delegation of the Russian Federation for this case. Present are Mr Valery Knyazev, Head of Division, Legal Department, Ministry of Foreign Affairs of the Russian Federation; Professor Kamil Bekiashev, Chair for International Law, Moscow State Academy of Law.

Counsel for the Russian side are Mr Andrew Tetley, Barrister and Solicitor of the High Court of New Zealand and Solicitor of the Supreme Court of England and Wales; Mr Paul David, Barrister and Solicitor of the High Court of New Zealand, Barrister of the Inner Temple, London, England, and admitted to the Bar of New South Wales, Australia.

The assistant of our delegation is Mr Ilya Frolov, Desk Officer, Legal Department, Ministry of Foreign Affairs. Mr President, that is the composition of our delegation.

The President:
Thank you. I now call on the Agent of the Respondent to note the representation of Australia.

Mr Campbell:
Mr President and distinguished Members of the Tribunal, it is an honour to appear before you once more as the Agent for the Government of Australia. It is also a pleasure to appear before you in the Tribunal's new premises.

With your indulgence, Mr President, I will now introduce the Australian delegation.

Appearing as Counsel for Australia are the Solicitor-General of Australia, Dr David Bennett QC; Professor James Crawford SC, Whewell Professor of International Law at the University of Cambridge; and Mr Henry Burmester QC, Chief General Counsel, Office of the Australian Government Solicitor.

The advisers on the delegation are Mr Glenn Hurry, General Manager, Fisheries and Aquaculture, Agriculture Fisheries and Forestry of Australia; Mr Geoffrey Rohan, General Manager (Operations) Australian Fisheries Management Authority; Mr Stephen Bouwhuis, Principal Legal Officer, Office of International Law, Attorney-General's Department; Mr Gregory Manning, Principal Legal Officer, Office of International Law, Attorney-General's Department; Mr Paul Panayi, Executive Officer, International Organisations and Legal Division, Department of Foreign Affairs and Trade; Ms Uma Jatkar, Embassy of Australia, Berlin; Ms Mandy Williams, Office of International Law, Attorney-General's Department.

Mr President, that completes my introduction of the Australian delegation. Thank you, Mr President.

The President:
Thank you. Following consultations with the Agents of the parties, it has been decided that the Applicant, the Russian Federation, will be the first to present its arguments and evidence. Accordingly, the Tribunal will hear the Russian Federation first. In the afternoon, the Tribunal will hear Australia.

I now give the floor to the Agent of the Russian Federation.

"VOLGA"

Argument of the Russian Federation

STATEMENT OF MR DZUBENKO
AGENT OF THE RUSSIAN FEDERATION
[PV.02/01, E, p. 7–9]

Mr Dzubenko:
Thank you, Mr President. Mr President, Excellencies, by way of general introduction – I shall be brief – I would like to outline the following circumstances. On our side, this is a prompt release application under article 292 of the United Nations Convention on the Law of the Sea, in which the Russian Federation claims that the Commonwealth of Australia is in breach of article 73, paragraph 2, of the Convention.

The vessel concerned is a fishing vessel flying a Russian flag, called *Volga*. At this time the ship, with three of her crew, is in Perth, Western Australia. The ship is owned by Olbers Company Limited, is registered in the Russian ship register and is entitled to fly the Russian flag.

The *Volga* was seized by the Australian military personnel on 7 February 2002 in a position on the high seas. The *Volga* is a long-line fishing vessel. At the time of the seizure the vessel was in international waters off the Heard and McDonald Islands, in Australian territories. Those islands are approximately 4,000 kilometres from Perth.

Following the seizure, the vessel was escorted back to Perth. Unfortunately, the Russian Master died in Perth after the seizure of the ship. Three Spanish officers of the Russian vessel were subsequently charged with offences of illegal fishing. The catch of the vessel was sold by the Australian authorities and the vessel and crew remain in Perth at present. According to our information, the criminal trial of the crew is some 12 months away.

Various attempts have been made by the shipowner and by the Russian authorities to enter into bonding arrangements with the Australian authorities, without success. The Russian Federation claims that the bonding arrangements put forward by the Commonwealth of Australia are not reasonable. The Russian Federation asks this Tribunal to fix a reasonable bond so that the crew and the vessel may be released speedily.

Before bringing this Application, considerable time was given to Australia to respond to the Russian Federation and the shipowner with respect to the seizure and detention of the *Volga*. Because Australia did not respond to the shipowner's proposal to bond, the Russian Federation had to make this Application to the Tribunal.

During deliberation of the draft of the 1982 Convention, there was, as is well known, a problem of special concern to quite a number of delegations to the Third Law of the Sea Conference of the United Nations and its preparatory bodies – that is to ensure a balance between the enforcement powers of the coastal State with respect to its laws and regulations in its 200-mile exclusive economic zone and, on the other hand, solid safeguards to the legitimate rights and interests of traditional high seas fishing nations, so-called "flag States". Articles 73 and 292 of the Convention were introduced and agreed upon as a part of this delicate balance. By the way, it is with this balance in mind that in the course of the drafting of the Convention the title of article 292 was changed from "Detention of vessels" to "Prompt release of vessels and crews" that we have now in the Convention.

In its Application, the Russian Federation asks the Tribunal to apply the balance that is captured in article 73, paragraph 2, by the mandatory requirement for prompt release of the vessel and crew against a reasonable bond or other security. The terms of release must not be such as to make the prompt release procedure of no practical worth to the flag State vessels and should safeguard the flag State vessel's interests against disproportionate and arbitrary action by the coastal State.

The Tribunal has decided a number of cases involving a request for the prompt release of a vessel to date. There is now a body of law made by the Tribunal relating to such an application. The Russian Federation has closely examined this body of international law and asks this Tribunal to apply the principles used in previous cases to the present case.

Russia says that the appropriate procedure for Australia in this matter is for it to release the vessel and crew on a reasonable bond and to address its concerns on any global and regional fisheries matters via the appropriate channels, in this case through CCAMLR meetings, that deal with fisheries and Antarctic, and, if needed, Antarctic Treaty Consultative Meetings.

Australia in its Statement in Response appears to make certain allegations that the Russian Federation does not take its responsibilities vis-à-vis fisheries in this area seriously. This is simply not true. It is disappointing that these allegations have been made in this distinguished forum rather than through the proper channels such as CCAMLR and others. As far as we are aware, to date there have been no decisions or recommendations in this respect of any competent international body or organization.

Mr President, with your indulgence and permission, on the details of the legal issues I would like now to ask Mr David and Mr Tetley to address the Tribunal on behalf of the Russian Federation. Thank you.

The President:
Thank you very much. Can we have Mr David?

"VOLGA"

STATEMENT OF MR DAVID
COUNSEL OF THE RUSSIAN FEDERATION
[PV.02/01, E, p. 9–16]

Mr David:

May it please the Tribunal. Mr President and learned Judges of the Tribunal, it is a privilege and honour for Mr Tetley and I to swap the somewhat warmer weather in New Zealand for Hamburg's invigorating cold to appear before this Tribunal as Counsel on behalf of the Russian Federation.

The detailed written argument of the Russian Federation on its Application under article 292 is set out in the Memorial filed by the Federation. Mr Dzubenko has helpfully outlined the essential facts and made general observations on behalf of the Russian Federation in his introduction.

We submit that an application of this nature for prompt release falls to be dealt with in an efficient manner by focusing on the principles established by this Tribunal and applying them to the case in hand. In that manner, applications can be dealt with in a consistent and practical way.

In accordance with the guidelines for this hearing, our oral argument will focus on the essential points which the Russian Federation says support its claim that the Commonwealth of Australia is in breach of article 73, paragraph 2. We have prepared an outline of that oral argument for the Tribunal which should be available now.

I will shortly turn to that but before doing so I would like to emphasize a point that Mr Dzubenko has mentioned, which is that the Russian Federation sees this kind of application as one which should be decided on established principles. Those principles, we submit, seek to achieve a proper balance between the interests of a flag State and the release of its vessels and crew and the interests of the coastal State in taking measures to protect its rights to exploit the EEZ.

The important word which we stress is "balance", and a proper balance. We will submit, on behalf of the Russian Federation, that the bonding arrangements put forward by the coastal State on behalf of Australia failed to respect the essential balance which is struck by the Convention and are in breach of article 73, paragraph 2, of the Convention.

I will now turn to my oral outline. As I understand it, that has been distributed to assist the Tribunal. I will follow that as closely as I can, with some additions on the way.

As I have said, we are relying, of course, upon the written material that has been submitted and that outlines in some detail the factual matters and the points that are made by Russia. I add that there does not seem to be any real dispute about the key factual matters concerning the seizure and the process that has since taken place in the Australian jurisdiction.

What I seek to do in this address is highlight the key principles and points which the Russian Federation says are relevant to its Application under article 292. That comes down, in our submission, to the consideration in dollar value terms of the bonding arrangements that have been put forward by the Commonwealth of Australia.

This address takes the following form: firstly, I will make some initial comments on general procedure on applications under article 292 which I am sure I can keep brief before the Tribunal. Secondly, I will then turn to the principles which are relevant in considering whether the allegation of breach is, in the words of article 113, well founded. Thirdly, I will look at the relevant facts on this Application and then apply the legal principles of the Tribunal's earlier decisions to look at the question of whether the allegation by the Russian Federation is well founded. I will then conclude my observations on what the Russian Federation says is a reasonable bond in this case.

As I have said, the Tribunal has now dealt with a number of cases and Members of the Tribunal will be familiar with those cases where flag States have alleged breaches of article 73, paragraph 2. The Judges of this Tribunal have developed a body of jurisprudence in those cases which deal with the prompt release jurisdiction. This body of law now permits, we say, applications of this nature to be dealt with in an efficient and expedient manner, as they must be in the practical world of international shipping. Such an approach and such principles benefit the international harmony between sovereign States which are parties to UNCLOS.

In its principal submission the Russian Federation says that the bonding arrangements proposed by the Ministry of Fisheries of the Commonwealth of Australia and imposed in respect of bail by the courts in Australia are not reasonable in terms of article 73, paragraph 2. The Russian Federation asks this Tribunal to apply the principles which it has developed to set reasonable bonds and order the release of the *Volga* and her crew members. Those are my introductory comments.

I now make some brief observations on the general approach and to applications such as this. The general approach which emerges from the Convention, the Rules of this Tribunal and the earlier cases is as follows: the Tribunal firstly considers the question of jurisdiction and the admissibility of the Applicant's contentions. Secondly, it considers what will be the central issue in this case. Thirdly, it considers whether the Applicant's claim that the detaining State is in breach of article 73, paragraph 2, is well founded in accordance with Rule 113 of the Tribunal's Rules. If the Applicant's claim is deemed to be well founded, the Tribunal sets what it regards as a reasonable bond.

In this Application the Commonwealth of Australia has accepted jurisdiction – and here you can refer to the summary of argument of Australia, chapter 8, of the Statement in Response – and the admissibility of the allegation in relation to the bond. I say there though that the Commonwealth of Australia does appear to raise an issue of admissibility concerning any reference in this Application to the seizure of the *Volga* and her crew being in breach of article 111.

The Russian Federation – and I should make this clear at this point – does not in this Application seek any declaration on the lawfulness or otherwise of the seizure – it cannot, as I understand the jurisprudence, do that – but says that this Tribunal ought to consider the circumstances of the seizure as part of its general consideration of the background relevant to the Application under article 292. It does not, in our submission, make any sense to leave out that part of what has been described by the Tribunal as the factual matrix.

Mr Tetley, my Co-Counsel, will address the Tribunal on this point for a short period.

A further general observation about the nature of these proceedings: it is important of course to emphasize and accept the general point that these proceedings are independent, free-standing proceedings. This jurisdiction to bring about the prompt release of vessels and crew was created to allow this Tribunal to play a role as an independent international tribunal applying international law in the relations between coastal States, which may have cause to detain vessels in protection of their rights in the EEZs, and flag States, which of course control those vessels as flag States.

The Tribunal does not, of course, sit as a court of appeal from the domestic tribunal of the coastal State and does not adjudicate upon the issues which are before that tribunal. In terms of article 292, this Application is without prejudice to the merits of any case before the domestic forum. This Tribunal simply applies legal principles which it has developed to decide whether the allegation of breach of article 73, paragraph 2, is well founded.

I now turn to the heart of this case and the Application and deal first with the principles in assessing whether the Application is well founded. As I said in my opening comments, there is an important underlying guiding criterion here.

In approaching its task in deciding whether the Application is well founded, the balance of interests between the flag State and the coastal State, which emerges from UNCLOS generally and articles 73 and 298 in particular, has been described as a guiding criterion; see for example paragraphs 70 to 72 of the Judgment in the *"Monte Confurco" Case*, 18 December 2000, a judgment with which I am sure members of this Tribunal will be familiar. The overall approach involves arriving at a fair, proportionate balance between the rights of the coastal State to take measures in its domestic forum to ensure compliance with the laws and regulations which it has enacted in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources of its EEZ with the rights of the flag State to have its vessels and their crews released on reasonable terms.

This exercise ensures that the vessels can continue with commercial operations and the crew can continue with their lives without undue loss and hardship being caused to either the shipowner or the crew concerned.

The fundamental underlying principle or guiding criterion has been restated in each of the Tribunal's prompt release cases, namely the *M/V "SAIGA"*, the *"Camouco"* and the *"Monte Confurco"*. Underpinning everything, we submit, is the need for balance in proportion between flag State and coastal State interests.

What are the further factors that this Tribunal looks at as regards reasonableness of bonding? The relevant considerations are outlined in chapter 4 of the Memorial of the Russian Federation. The question of the "reasonableness" of any bond or bonding arrangements for the vessel or crew is central to the question of whether the allegation of breach is "well founded".

The Tribunal has, in the past, considered a range of factors to decide whether the bonding arrangements are reasonable. The approach and the test, if I can call it that, has been applied in the earlier cases. It represents a principled approach and reflects the need for a proportionate response in the setting of bonding and security arrangements. The application of the principles has resulted in balanced, consistent outcomes.

In assessing any bond proposed, the Tribunal has, in the past, considered the value of the vessel, the value of any gear and catch seized under the domestic legislation, the total level of fines which may be imposed for the alleged offending and the background or factual matrix to the alleged offending. Consistent with its independent role as an arbiter or a decider between State interests, the Tribunal has not sought to try and determine the issues that will be before the domestic tribunal. It has, however, looked, as I have said, at what can be described as the factual matrix, the objective background or the factual framework, within which the Application occurs.

I would now like to look at those factors in action briefly in relation to the earlier cases decided by the Tribunal. The Russian Federation says that in the previous cases of the Tribunal the reasoning and outcomes show a consistent approach to the question of bonding and prompt release, which should be followed in this case. The cases show the Tribunal setting bonds at a percentage – and we are not saying this is some kind of mathematical formula – of the total potential exposure to fines and confiscation varying in amounts between 9 per cent and 25 per cent (see, for example, the discussion in the Declaration of Judge Laing in the *"Camouco" Case*).

I would like briefly to refer to the earlier decisions and look at the bonds that were held to be reasonable in those cases. The well-known case of the *M/V "SAIGA"*, the first prompt release case: in that case Saint Vincent and the Grenadines applied for the prompt release of an oil tanker which had been arrested outside the EEZ of Guinea. There were allegations of offences under the customs legislation of Guinea. It was alleged by Guinea that the vessel had been stopped and seized in international waters under article 111. The value of the vessel was US$ 1.5 million and the value of the cargo approximately US$ 1.5 million.

There is no information in the prompt release judgment on the amount of the fines, but if you look at the Declaration of Judge Laing in the *"Camouco" Case*, he records the value of the bond being set at about 9.3 per cent of the total maximum exposure.

No bond in that case was apparently set by the Guinean authorities or courts. Before the Tribunal, Saint Vincent and the Grenadines sought to argue that no bond should be set. While there was wide exposure under the laws of Guinea, presumably, given the Declaration of Judge Laing in the later *"Camouco" Case*, the Tribunal set a bond of US$ 400,000 taking into account that Guinea had already as security the value of the gasoil which had been discharged.

In the *"Camouco" Case*, the Tribunal considered an application made by the flag State, Panama, for the release of its vessel, the *Camouco*, and her Master. The context was, as it is here, alleged illegal fishing in the Crozet Islands, which I believe are in Antarctic waters. The French authorities seized the vessel and valued the vessel at FF 20 million, the catch at FF 380,000, and said that the maximum fines imposable were in excess of FF 30 million if the owner's position was taken into account, with FF 5 million of the FF 30 million being ascribed to the charges against the Master. The French court set a bond of FF 20 million. At the hearing before the Tribunal, the French contended that the bond of FF 20 million was reasonable.

The Tribunal found that the value of the vessel was FF 3.7 million, accepted the seriousness of the charges as a background factor and set a bond of FF 8 million.

The third in this trilogy of cases is the *"Monte Confurco" Case*, where an application was made by the flag State, the Seychelles, against France for the release of the *Monte Confurco* and the Master of that vessel, again made in the context of illegal fishing. The vessel had a catch of 158 tonnes of toothfish on board when seized. Under French legislation, fines and the confiscation of the catch and vessel were imposable, as they are in this case. The French court noted the value of the vessel at FF 15 million, the value of the catch at FF 9 million and the maximum fines imposable at FF 79 million. The bond set in the French court was FF 56 million.

Before the Tribunal on the prompt release application, the value of the vessel was found, after contested valuation evidence, to be US$ 345,000, the value of the catch FF 9 million, the value of the gear on the ship FF 300,000 and the maximum fines imposable FF 79 million. The Tribunal took into account the value of the ship, the value of the catch seized and the value of the vessel, and set a bond for the release of the vessel and Master at FF 18 million. Again, we say that is a proportionate approach and comes out at around 25 per cent of the total exposure of the shipowner. The Tribunal directed that the bond should consist of FF 9 million, that being the monetary equivalent of the catch already held and seized, and a further bond of FF 9 million.

May I say that those cases are examples of the principles in action which the Russian Federation says should be applied to this case when you look at the proposal of the bonding arrangements and the dollar values of the bonding arrangements in this case.

I now turn to the application of the principles to this case. The salient and important facts in the case are set out in chapter 2 of the Russian Federation's Memorial, and they do not appear to be disputed by Australia, except for the opinion on the likely level of fines in the Australian courts. The diplomatic exchanges between the Russian Federation and Australia are contained in the supporting documents to the Application, in the Russian documents at pages 369 to 376, and in Australia's documents at pages 48 and 49.

The detailed correspondence on behalf of the shipowner with the Australian authorities concerning the seizure of the vessel and bonding is annexed to the affidavit of Mr Sizov, which is annexed to the Russian Federation's Memorial at pages 181 to 196.

Suffice it to say that repeated requests were made for the release of the ship and crew, commencing on the day of the seizure of this vessel. The responses from the Commonwealth of Australia were slow and did not, the Russian Federation says, answer the reasonable requests of the shipowner and the Russian Federation. After initial exchanges, on 26 August 2002, quite a few months after the seizure in February, a proposal was made by the shipowner to bond the vessel for AU$ 500,000 on the basis that Australia would continue to hold the catch proceeds and moneys lodged by the owner with respect to bail for the crew.

Almost two months later, AFMA, the authority responsible for the administration of Australian fisheries, responded, enclosing its valuation of the ship, that it would reply to the issues raised by the shipowner in the near future. No substantive reply was ever received to the shipowner's proposal to bond. Throughout that period, the vessel and three crew members remained in Perth, Western Australia, with the consequent costs and hardship that flow from that.

We submit that it is important to look at the Australian position on the bond for the release of this vessel. I appreciate that that is also set out in Australia's documentation, but, in our submission, it is vital to look at the key elements of the bonding arrangements, compare them with the concept of reasonableness and ask whether those arrangements can ever be said to be reasonable. We submit that if the proper approach is adopted, they cannot.

Australia's position on the bond for the release of the vessel has remained as outlined in a letter from AFMA of 26 July 2002, which is at pages 190 to 191 of the Russian documents. In that letter, AFMA sets out the terms for a bond. There has been a further recent disclosure of the details of how that calculation is made up, which is now set out in the affidavit of Peter Venslovas at pages 96 to 99 of the Australian documents.

The key points of Australia's bonding proposal are and were that security of AU$ 3,332,500 is sought. Of the security sought, it has now been explained – see page 97 of the Australian documents – that AU$ 1 million relates to the requirement, which will be imposed by Australia if the vessel is to be released, that the *Volga* carry a VMS system until the conclusion of legal proceedings as a condition of release. Further conditions involved the provision of various pieces of information relating to the owner, its finances, the beneficial ownership of the owning company and the nationality of directors. In reaching its bonding calculation, Australia assessed the total amount of likely fines as not exceeding AU$ 412,500, referred to on page 97 of the Australian documents. In reaching the bonding proposal, no account was taken of the value of the catch that had been seized and sold. The security sought from the owner would be in addition to the sale proceeds of the catch held by Australia, which amount to just under AU$ 2 million. The security sought was in addition to the bail required by the Australian courts of the three crew members facing trial. Bail for the three crew members, which is subject to an appeal in the Australian courts, has been set at AU$ 845,000.

For the purposes of assessing that proposal, the relevant values with which the Tribunal would be concerned, about which there is no dispute, as there has been in earlier cases, are as follows: first, the vessel is valued at AU$ 1.8 million on an exchange rate calculation; fishing equipment and machinery spares at AU$ 77,000; fuel and lubricants at AU$ 70,460; the catch at AU$ 1,932,579; giving a total value of AU$ 3,880,039. As I have said, there is no significant difference between the parties on those values. The valuation of the vessel has been the subject of a valuation report, which is in the Russian documents between pages 196 and 213.

The total maximum fines under the statute are AU$ 1.1 million. There is no dispute about what the statute says could be imposed. However, there is a dispute about what the likely fines might be in the court. The Russian Federation, on the advice of the Australian lawyer representing the crew, says that the likely fines will not exceed AU$ 210,000. That is

to be found in the affidavit of Mr Percy QC at pages 256 to 269 of the Russian documents, at page 259. The Australian position is somewhat different, in that it provides for a maximum of AU$ 412,500 for fines in its proposed bond. Therefore, there is a difference of about AU$ 200,000.

The total potential exposure for the owner and the crew of the flag State vessel is just under AU$ 5 million. The Australian Government already holds AU$ 1,932,579 from the sale of the catch and already has AU$ 245,000 as bail for the crew. On our calculation, the Commonwealth of Australia currently holds cash in the amount of 44 per cent of the total maximum potential exposure.

I now turn to the next part of the submission, which asks the question why that bond is unreasonable. If you look at the effect of Australia's requested bond and take into account the value of the catch, as we submit this Tribunal should, given that that is part of the exposure in the Australian proceedings, which approach accords with the Tribunal's earlier decisions, the effect of the request is to seek security in excess of the total potential exposure of the ship and crew.

Taking into account the proceeds of the sale of the catch and bail for the crew, which is set by the Australian courts at AU$ 845,000, the request in the bonding letter for AU$ 3,332,500 brings the total security sought to something over AU$ 6 million, as against an overall exposure considerably less than that. By my calculation, if you add in the catch and the bail position, the total security sought is AU$ 6,110,079. In the submission of the Russian Federation, such a request flies completely in the face of the guiding criterion of balancing the rights of the coastal State and its concerns and the flag State, which is fundamental to the setting of a reasonable bond.

Australia refers to the seriousness of the allegations. Regrettably, this kind of allegation has previously been in front of the Tribunal in its earlier cases. It is, no doubt, a relevant consideration that has been noted in the earlier decisions. However, in our submission, it cannot support the level of security sought here, which wholly disregards the balance struck in the Convention and the principles developed by this Tribunal in the area.

Further illustration of what the Russian Federation says is Australia's disregard of the guiding criterion of balance and the other fundamental principles in the Convention is provided in the conditions that Australia seeks to set for the bond. Australia requires the installation of a VMS system to allow for the monitoring of the vessel. Australia is effectively providing for a AU$ 1 million potential sanction, which is not endorsed directly by its own legislature and which usurps the function of the flag State to monitor and police its own vessels. In requiring the owner to provide details of its finances, ownership and other matters, Australia again assumes the flag State role and extends the ambit of the proposed bond into areas that are simply not contemplated by article 73, paragraph 2.

A further background factor that Australia simply chooses to disregard is the effect on the crew of prolonged detention in Australia. Members of the Tribunal can refer to the affidavits of the crew, at pages 270 to 345 of the Russian documents, and medical reports on the well-being of two of the crew, at pages 299 to 302 and 324 to 329 of the Russian documents. The crew are men of modest means who have effectively been trapped in Western Australia for almost a year, and it seems that their trial is now something over a year away.

The Russian Federation does not and cannot ask for any finding in respect of matters that are beyond the scope of this Application, but says that the fact of the crew's detention is a relevant matter for consideration. Of course, the same applies to the effect on the shipowner of the vessel's detention for over 10 months. In addition, the shipowner has supported the crew for over those 10 months since the seizure of the vessel.

In summary, the Russian Federation submits that the proposed bonding arrangements are wholly unreasonable. The Application under article 292 is well founded. On the basis of the factors outlined above and the established principles of the Tribunal, the Russian Federation says that, on a balanced approach, the Commonwealth of Australia, or AFMA, is more than adequately secured if it retains the value of the catch in dollar terms, nearly AU$ 2 million, and the bail already in court in respect of the crew.

In that situation a nominal bond, the Russian Federation submits, is appropriate to safeguard Australia's position. The offer of the shipowner to bond the vessel for AU$ 500,000 leaving the catch and bail moneys with the Commonwealth of Australia was, in our submission, more than reasonable if the applicable principles relevant to the setting of a reasonable bond are properly applied in a manner which is consistent with the earlier decisions of the Tribunal.

At this point I will leave Mr Tetley to address you briefly on this hot pursuit issue and then return, again briefly, to make some concluding comments with your leave, Mr President.

The President:
Thank you, Mr David. I now give the floor to Mr Tetley.

STATEMENT OF MR TETLEY
COUNSEL OF THE RUSSIAN FEDERATION
[PV.02/01, E, p. 16–18]

Mr Tetley:
May it please you, Mr President and Members of the Tribunal. I would like to address you very briefly on this issue of hot pursuit.

Australia's approach in this matter focuses almost entirely on the seriousness of the alleged offending, the general problem of illegal fishing and an assumed verdict of guilty in the criminal proceedings. Australia says, on the other hand, that the circumstances of the seizure of the vessel and the argument that there was no proper seizure in terms of article 111, or indeed its domestic law, simply cannot be referred to in weighing up what is a reasonable bond in this Application. The Russian Federation says that the circumstances of the seizure should be taken into account as part of the factual matrix in which this Application is being decided.

There are a number of matters of fact that are not disputed between the parties as to the circumstances of the seizure. In a sense, this Application is less than prompt coming some ten months from the seizure. Benefit of time has allowed facts to be distilled and ascertained so that today there is no dispute on a number of central issues. Those issues are the following.

The vessel was boarded on the high seas. There is no dispute about that. The first attempted challenge issued to the *Volga* by any Australian warship or aircraft was made from a helicopter by radio at a time when the *Volga* was in international waters. Finally, the Commonwealth of Australia has admitted in the domestic proceedings that it did not issue a stop order.

Further details of the circumstances of the challenge are contained in the warship's logs and statements of the officers. Those are contained in the Russian documents at pages 215 to 222 and 231 to 254. It seems, and this is now possible to describe, ten months after the events, at the time of the challenge issued by the helicopter the Australian warship believed, wrongly as it transpires, that the *Volga* was in the Australian economic zone.

It was only later that the Australian authorities realized that they had made a mistake. The Australian authorities were aware of that mistake by, at the latest, 1 May of this year. We know that because of a statement given by Mr Colin French in the criminal proceedings, and it is contained in the Russian documents at pages 223 to 230.

Australia asserts that it was entitled to seize the vessel on the high seas because it validly exercised a right of hot pursuit in accordance with article 111. The only explanation given by Australia as to how it says it complied with article 111 is contained in a letter dated 26 March 2002. That letter was from the Attorney General's office to the shipowner's solicitors. In that letter, the Attorney General's office said that the *Volga* was advised that it would be boarded from a helicopter and that this information was given to the *Volga* before it left the Australian fishing zone. The letter goes on to say that in the opinion of the Attorney General's office, the requirements of article 111 were, therefore, satisfied.

The Australian position presumably was that the pursuit commenced on or shortly after the challenge issued by the helicopter. However, as we know, and as later transpired, the factual account relied upon in the Attorney General's letter was wrong. When the helicopter issued its challenge the *Volga* was, in fact, in international waters. This fact has now been acknowledged by Australia both in diplomatic exchanges between the parties and in the domestic proceedings. I refer the Tribunal in the Russian documents to pages 107 and 373, the exchange of letters between the States and the Statement of Defence in the domestic proceedings.

Given that the vessel was in international waters before any attempt was made to contact it by the Australian warship or helicopter, the requirement under article 111 that a stop order be issued by the pursuing vessel has not been fulfilled. The Russian Federation, therefore, says that Australia cannot establish that it validly exercised the right of hot pursuit. It should perhaps be noted that in the domestic proceedings Australia now alleges that the pursuit was commenced by the warship before the helicopter was launched and not after the helicopter issued the challenge. I refer the Tribunal to the Russian documents, page 121, final paragraph.

As my Co-Counsel has emphasized, the Russian Federation does not seek a ruling or a declaration on article 111 today. However, it does say that it would be unreasonable in the circumstances of this matter that where the key relevant facts are not in dispute and where Australia is making allegations of illegal fishing and stressing those, it would be unreasonable to completely disregard the circumstances of the seizure in assessing the bond.

Mr President, unless there are any questions, I will allow Mr David to make his concluding comments.

The President:
Thank you, Mr Tetley. Mr David.

STATEMENT OF MR DAVID
COUNSEL OF THE RUSSIAN FEDERATION
[PV.02/01, E, p. 18–19]

Mr David:
Mr President, I will be brief in my concluding comments. By its rulings in this area, the Tribunal always provides important balance and proportion between coastal and flag State interests. The importance of this is, if anything, emphasized when you consider that under the Australian legislation bonding arrangements in respect of the vessel and catch, both of which are the subject of potential forfeiture, and the fines are entirely within the discretion of the Australian Fisheries Management Authority.

AFMA, as it is called, is given power to set conditions of release as it sees fit. There is no statutory provision in the Fisheries Act 1991 in Australia for court-based supervision of this discretion. In our submission, this increases the importance of the role of the Tribunal in assessing the reasonableness of bonding arrangements by reference to the principles which it has developed and, if it finds that bonding arrangements are not reasonable, in setting a reasonable bond.

Bonds of the kind which the Commonwealth of Australia would seek to impose would disregard all balance between the flag and coastal State interests. Such a bond, of course, would mean that a flag State owner would abandon the assets and crew and in the Russian Federation's submission the important flag State interests protected by article 73, paragraph 2, would be completely undermined if that was the approach.

The Russian Federation, in conclusion, says that the shipowner offered a more than reasonable bonding arrangement given the principles which I have referred to which have been adopted and applied by the Tribunal in its earlier decisions. The Russian Federation asks that the Tribunal apply this established approach to this case. The continued application of consistent principles is vital to the proper function of the prompt release provisions of UNCLOS.

The Russian Federation seeks orders in terms of its Application and seeks that the Tribunal set a bond in a nominal amount with the proceeds of the catch and bail in court standing as further security. In the particular circumstances of this matter, where Australia has not responded at all to a more than reasonable offer to bond the vessel made by the shipowner on 26 August 2002, the Russian Federation submits that this should be one of those rare cases where costs should be awarded in its favour.

That is the end of the legal argument that I present on behalf of the Russian Federation and I trust, Mr President, that a copy of my oral outline has been made available to the Members of the Tribunal. I am obliged, Mr President.

The President:
Thank you very much, Mr David. We expect to resume these oral hearings at three o'clock this afternoon when we shall hear the pleadings of the Respondent. The hearing is adjourned.

Adjournment at 11.15 a.m.

"VOLGA"

PUBLIC SITTING HELD ON 12 DECEMBER 2002, 3.00 P.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, TREVES, MARSIT, NDIAYE, JESUS, BALLAH, COT; *Judge* ad hoc SHEARER; *Registrar* GAUTIER.

For the Russian Federation: [See sitting of 12 December 2002, 10.00 a.m.]

For Australia: [See sitting of 12 December 2002, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 12 DÉCEMBRE 2002, 15 H 00

Tribunal

Présents : M. NELSON, *Président*; M. VUKAS, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, TREVES, MARSIT, NDIAYE, JESUS, BALLAH, COT, *juges*; M. SHEARER, *juge* ad hoc; M. GAUTIER, *Greffier*.

Pour la Fédération de Russie : [Voir l'audience du 12 décembre 2002, 10 h 00]

Pour l'Australie : [Voir l'audience du 12 décembre 2002, 10 h 00]

The President:
We will resume the oral pleadings. I give the floor to Mr Campbell, Agent for the Government of Australia.

STATEMENT OF MR CAMPBELL – 12 December 2002, p.m.

Argument of Australia

STATEMENT OF MR CAMPBELL
AGENT OF AUSTRALIA
[PV.02/02, E, p. 5–8]

Mr Campbell:
Thank you, Mr President. Mr President and Members of the Tribunal, this case has been brought pursuant to article 292 of the 1982 Convention on the Law of the Sea. An action is available under that article to enforce the obligations under a number of other articles to release arrested vessels and crews upon the posting of a reasonable bond or other security.

In the current case, the relevant obligation is to be found in article 73, paragraph 2, of the Convention. That obligation is consequential to the right of a coastal State to take measures to ensure compliance with its laws and regulations as an exercise of its sovereign rights to conserve and manage the living resources of its EEZ.

Mr President, in considering this case, the Convention requires the Tribunal to deal "only with the question of release" This seemingly is a narrow task. However, the purpose of the word "only" is to define the nature of the task. It does not qualify the matters that may, and should, be taken into account by the Tribunal in completing that task.

All of the powers and duties of States relating to the exclusive economic zone – including those of the relevant coastal State and those of the relevant flag States –should be exercised having regard to the fundamental purposes of EEZ jurisdiction. Those fundamental purposes, as reflected in article 56 of the 1982 Convention, include the exploitation and proper conservation and management of the marine living resources and the protection of the marine environment. The marine environment and resources pertinent to this case are those of the Southern Ocean and, particularly, those in the exclusive economic zone surrounding the Australian Territory of Heard Island and the McDonald Islands.

Heard Island and the McDonald Islands are part of Australia. They contain Australia's highest mountain and its only active volcano, and they both form part of the nature reserve that covers the whole of the Territory. The islands and parts of the surrounding marine areas are a declared World Heritage Area under the World Heritage Convention. The maritime zones successively declared by Australia have always included the marine areas adjacent to the Territory. The 200 nautical mile Australian fishing zone, of which the waters around the Territory form part, was first declared in 1979. The exclusive economic zone, including that part of the EEZ around the Territory, was declared in 1994. The Territory of Heard Island and McDonald Islands is not just a remote appendage of Australia; it is an integral part of Australia and the marine areas surrounding it are of great importance to our country.

That said, the Territory and its surrounding EEZ are in a remote area of the world. That very remoteness is both the source of its importance and the point of its vulnerability. Its principal importance, both in ecological and economic terms, lies in the marine species that inhabit the waters surrounding the islands, including the Patagonian toothfish *[slide 1]*, and the fact that the island, and its surrounding waters, form a key part of the Southern Ocean ecosystem. Unfortunately, the Territory's remoteness also has made its surrounding waters vulnerable to the systematic and organized pillage of those marine species, contrary to both Australian law and the treaties to which the Applicant and Australia are parties.

The principal international regime specific to that area for the conservation and management of marine species is the Convention for the Conservation of Antarctic Marine Living Resources (known as "CCAMLR") *[slide 2]*. Both Australia and the Russian Federation are parties to CCAMLR. However, the companies and individuals involved in the plunder of the resources of the Southern Ocean, including the Patagonian toothfish, pay no

regard to these internationally agreed conservation measures. They take advantage of the fact that international obligations, including those under the 1982 Convention and CCAMLR, do not bind individuals or corporations directly.

Instead, reliance is placed on the Contracting States and, in particular, flag States to ensure that those individuals and corporations under their jurisdiction give effect to and take account of these international obligations. Had the Applicant, the Russian Federation, acted to ensure that the *Volga* and its crew abided by international law, including the 1982 Convention and CCAMLR, the *Volga* would not have been arrested and this case would not have made its way to this Tribunal *[slide 3]*.

As will be submitted by Dr Bennett, the connections between the *Volga* and the Applicant are tenuous and there was little, if any, control exercised by the Applicant over the *Volga*. But whether or not the Russian Federation can exercise control over the *Volga* and its accompanying fleet, Australia is entitled to do so in relation to the EEZ surrounding its Southern Ocean islands.

A fundamental fact of the present case is Australia's justified concern that, upon release, the *Volga* will resume its role, perhaps under a different flag, perhaps under a different name, in the plunder of the resources of the Southern Ocean. This prospect is not fanciful. In that respect, I draw the attention of the Members of the Tribunal to paragraphs 23 and 24 of the affidavit of Mr Geoffrey Rohan. Those paragraphs are to be found at pages 71 and 72 of the Annexes to the Australian Statement in Response. He refers to the fact that on 3 July 2002, the *Arvisa 1*, renamed the *Eternal*, was apprehended by French authorities for illegal fishing in the French EEZ around Kerguelen Island. Let me quote paragraph 24 of his affidavit in full:

> "The *Arvisa 1* was previously named the *Camouco* and had been apprehended by France for fishing illegally in the French EEZ as the *Camouco*. The owners of the vessel were successful in an ITLOS action in having the vessel released on a reduced bond."

Mr President, one can see a cycle developing that is inimical to the proper management and conservation of the marine living resources of the Southern Ocean. Unfortunately, flag States have been pressured to take actions which promote this cycle. Also, prompt release cases under article 292 have been used as a means of evading and undermining coastal State enforcement measures that are consistent with the relevant international conventions.

Australia's concerns are shared by other sovereign States with a stake in the conservation and management of the resources of the Southern Ocean. In this respect, let me refer to the representations made by France and New Zealand as recently as last week. The New Zealand diplomatic note of 6 December 2002, which is to be found at pages 50 to 56 of the Annexes to the Australian Statement in Response, states in part:

> "New Zealand notes that a significant proportion of the Tribunal's case load to date arises from applications for prompt release of vessels detained *on charges of illegal fishing activity in the Southern Ocean.* In New Zealand's view, the Tribunal ought to be cognisant of the serious and growing problem of IUU fishing [illegal, uncontrolled and undeclared fishing] in these waters, a result of enforcement difficulties and the very high value of the fishery. These factors mean that the incentive for vessel owners and operators to engage in IUU fishing is significant. Similarly, high rewards are available to vessels released from detention upon posting

> of a financial security following detention for suspected earlier IUU fishing. Coastal States, and States Parties to UNCLOS and regional fisheries management organisations, including CCAMLR, must take steps to compel and encourage better observance with the provisions of these instruments. It is clear that the Tribunal also has a role to play."

The New Zealand note also makes clear that "the Russian Federation, as flag State, does not appear to have exercised enforcement capability in the Southern Indian Ocean in recent years".

France, in its note of 6 December 2002, at page 56A of the Annexes to the Australian Statement in Response, notes that:

> "The French authorities are particularly concerned by the fact that frequent recourse to article 292 of the Convention on the Law of the Sea may hamper efforts to combat unlawful fishing."

Similar representations have been received more recently from a number of other countries.

Mr President, in your Separate Opinion in the *"Camouco" Case*, you mentioned that the Tribunal should take account of:

> "... what, in the introduction to the Statement in Response of the French Republic, was referred to as 'the context of illegal, uncontrolled and undeclared fishing in the Antarctic Ocean and more especially in the exclusive economic zone of the Crozet Islands where the facts of the case occurred'."

And in the same case Judge Wolfrum referred to the need to protect the fishing regime established in the CCAMLR, and the conservation measures taken thereunder. Professor Crawford will analyze this concern in a little more detail shortly: all I need to say is that Australia respectfully agrees, and strongly agrees, with Judge Wolfrum's remarks.

In the subsequent *"Monte Confurco" Case*, the Tribunal considered an argument of the Respondent in that case that "the general context of unlawful fishing in the region should also constitute one of the factors which should be taken into account in assessing the reasonableness of the bond". The Tribunal took note of this argument. In this case, we urge the Tribunal to more than note the argument. We urge the Tribunal to take full account of the context of illegal, uncontrolled and undeclared fishing in the Southern Ocean and more especially in the Australian EEZ adjacent to its Territory of Heard Island and the McDonald Islands.

In what follows, counsel for Australia will set out relevant facts and considerations, will distinguish those that are not relevant, and will show that, having regard to the Tribunal's role under the 1982 Convention and to the facts of the case, the Australian conditions for the release of the vessel and crew are reasonable and should not be interfered with.

First, Mr Burmester will describe the events leading to the arrest of the vessel. He will show that the substantial amount of fish found on board was in all probability caught within the Australian EEZ. He will show that the allegation of an unlawful hot pursuit of the vessel is irrelevant for the purposes of the present proceedings. In any event, and without prejudice to this fundamental point, he will show that the arrest was lawful under article 111 of the Convention.

Mr Burmester will be followed by Professor Crawford, who will analyze the factors which are relevant for the purposes of your prompt release jurisdiction, in the light of your

jurisprudence and having regard to the provisions of the 1982 Convention as a whole and the balance struck by the Convention between the various interests in the EEZ.

Then, the Australian Solicitor-General, Dr Bennett, will demonstrate that applying the provisions of the Convention to the facts of the case, the Tribunal should make no order for prompt release, nor should it reduce the amount of the bond.

Mr President, Members of the Tribunal, thank you for your careful consideration. Mr President, I would ask you to call on Mr Burmester to continue the Australian presentation. Thank you.

The President:
Thank you, Mr Campbell. I give the floor to Mr Burmester.

STATEMENT OF MR BURMESTER
COUNSEL OF AUSTRALIA
[PV.02/02, E, p. 8–15]

Mr Burmester:
Mr President, Members of the Tribunal, it is an honour once again to appear before this Tribunal, in this new building. As explained by the Australian Agent, Mr Campbell, it is my task to deal with the arrest of the vessel, a matter which Australia says is not relevant in these proceedings. The principal issue raised is whether the arrest of the vessel took place in accordance with international law. This raises issues concerning the provision on hot pursuit in article 111 of the Law of the Sea Convention.

The Russian Federation has made a point of emphasizing that at the time of boarding the vessel was on the high seas and received no order prior to that to stop or any other communication while in areas under Australian jurisdiction – see the Memorial, for instance in paragraphs 25 to 31, where it deals with this issue under the heading "Circumstances of the seizure in breach of Article 111".

It is therefore necessary, in light of those submissions, which were repeated again this morning in oral submissions, to respond. In summary, Australia says that the alleged breach of article 111 is irrelevant. It is irrelevant to jurisdiction and admissibility. It is also irrelevant, and notice should not be taken of it, when assessing a reasonable bond.

The Russian Federation this morning indicated that it accepts that the Tribunal, in these proceedings, can make no declaration as to the lawfulness of the seizure. Despite this, it asks the Tribunal to draw adverse inferences based on the one fact which it says is agreed – that the boarding and communication of the vessel took place outside Australia's EEZ.

In case the Tribunal considers this issue to be relevant, as urged by Russia, it is therefore necessary to provide the Tribunal with a more complete picture of what actually occurred. Australia contends that its action in arresting the ship was not in breach of article 111.

Why, then, is article 111 irrelevant? Article 292 makes clear that the only matter before the Tribunal under that provision is the question of release. Therefore, the Tribunal has to be satisfied that the circumstances of detention are such that there is an obligation to release.

As is made clear in paragraphs 2 to 7 of the Australian Response, Australia accepts that this is a case of a vessel arrested for alleged breach of Australian fisheries law which attracts the obligation in article 73. It is therefore quite unlike the *M/V "SAIGA" Case*, where issues arose about whether the arrest of a bunkering vessel for breach of customs laws fell within article 73, to which the jurisdiction conferred by article 292 attached. Also, in that case the Tribunal concluded that there were no applicable laws or regulations of Guinea that the vessel which apprehended the *Saiga* could be said to be trying to enforce. That is not the case here, where the crew of the vessel have been charged with violations of the Australian Fisheries Management Act.

Here there is no suggestion by Australia or anyone else that the vessel was arrested for anything other than clear breaches of Australian fisheries laws. An examination of whether article 111 was complied with is, therefore, unnecessary for jurisdiction or admissibility reasons. Australia does not contest the jurisdiction or the admissibility of the Russian claim. It defends this action on the merits of whether the bond sought is reasonable.

As regards the reasonableness of the bond, the Russian Federation asserts that the circumstances of the seizure are relevant. However, it cites no authority in its Memorial and provided little elucidation this morning of why the circumstances of seizure are in fact relevant. It insists that it is an important aspect of the factual matrix which the Tribunal

should consider. Australia submits that this assertion is misconceived. Let me seek to explain why.

In a prompt release proceeding, there is a fundamental difference between an allegation that may support some separate international action concerning the lawfulness of the arrest of a vessel, an action foreshadowed by Russia, and issues that relate to the circumstances in which the alleged fisheries offences occurred, for which the ship was arrested and is detained. In other words, the *way* in which the ship was arrested is quite separate from *why* the ship was arrested. The "why" is relevant to setting the bond; the "way" is not.

It is true, for instance, that in the *"Monte Confurco" Case*, at paragraph 74, the Tribunal spoke of examining "the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond". However, this simply highlights the need to focus on facts relevant to the circumstances of the fishing, not the legality of the arrest. Similarly, Mr President, in your Separate Opinion in the *"Camouco" Case*, you referred to the need to have regard to "relevant circumstances" and a "factual matrix". But you referred to circumstances surrounding the fishing operations, not issues concerning the way in which the ship was arrested.

There is no suggestion in any of the cases that the way in which the arrest was effected is relevant. In the only case where article 111 was relevant or was an issue, namely the *M/V "SAIGA" Case*, the Tribunal emphasized that it is not called upon in prompt release proceedings to decide whether the arrest was legitimate, but whether the detention consequent to the arrest is in violation of a provision of the Convention for prompt release upon posting of a reasonable bond. It is precisely because this is the sole issue in article 292 proceedings, the reasonableness of the bond, that the circumstances of the arrest are irrelevant.

Domestic proceedings following the arrest are concerned with breaches of domestic law alleged to have occurred while the vessel was in the exclusive economic zone. Hence, the bond demanded as a condition of release pending resolution of those domestic proceedings again has no relation to some potential international law issue that may arise between the flag and coastal State.

Mr President, having outlined why we say article 111 is irrelevant, let us examine what happened in any event, in case this Tribunal considers that it may have some relevance. At the time of the communication from the helicopter telling the vessel that it was about to be boarded, it was calculated that the vessel was in Australia's exclusive economic zone, although seeking to escape from it. Following recalculations that have been done after the event, Australia now concedes that at the time of that first communication the vessel was just outside the Australian exclusive economic zone. However, in our submission, this is not fatal to either the domestic forfeiture proceedings or the legality of the seizure at international law.

The domestic forfeiture proceedings depend on the vessel being used in illegal fishing. This is clear from Section 106A of the Fisheries Management Act, set out at page 13 of the Annexes to the Australian Response. Olbers, the owner of the vessel, has raised in those forfeiture proceedings the circumstances of the arrest of the vessel, as is indicated on page 101 of the Memorial. It will be for an Australian court to determine whether the way in which the powers of officers were exercised under the Fisheries Management Act affects the automatic forfeiture of the vessel if it is otherwise found to have engaged in illegal fishing. The Australian Government certainly contends that the circumstances of the arrest do not affect the liability of the vessel to forfeiture. It should also be noted that conviction of the crew does not have to occur for forfeiture to take place.

As to the international law position, let us look at the facts:

STATEMENT OF MR BURMESTER – 12 December 2002, p.m.

The vessel was first detected some considerable distance (32 km) inside the Australian exclusive economic zone by an Australian Air Force Hercules aircraft, which occurred on 7 February 2002 at approximately 10:15 local time, as set out at page 231 of the Russian Memorial.

It was at that stage heading in a direct line out of the zone, no doubt alerted by the other vessel, the *Lena*, which had been arrested the previous day. In other words, it is quite clear that at the time it was detected the *Volga* was fleeing.

Once detected by the aircraft, the naval vessel that had apprehended the other vessel, and was located some distance away, immediately altered course towards the *Volga* with the aim of intercepting it. In other words, it was chasing it.

When the naval vessel was in range, a helicopter was despatched and reported the position of the *Volga,* which was calculated as still being within the exclusive economic zone. That is clear from the statement of Mr Aulmann at page [2]32 of the Memorial. The first broadcast from the helicopter to the vessel at 12:05 is set out at page 218 of the Russian Memorial. That broadcast indicated that the vessel was to be boarded. Calculations at the time, based on mercatorial plotting, on the navy vessel indicated that the vessel was then still in the zone. That detail is set out at pages 232 to 234 of the Russian Memorial, in the statement of Christopher Aulmann.

There was at the time of the boarding, as I shall develop further, a well-founded basis to believe that the *Volga* had engaged in illegal fishing in Australia's exclusive economic zone.

Subsequent more detailed recalculations have indicated that at the time of the first communication, the vessel was a few hundred metres outside the zone. This was explained to the Russian Federation in a diplomatic note dated 20 May 2002, set out at page 373 of the Russian Memorial, and the recalculation is explained in a statement by Colin French, again at page 223 of the Russian Memorial. I need not detain the Tribunal in these proceedings with a detailed explanation as to why this recalculation led to different results but one can understand that a calculation by a naval vessel at sea done in a hurry and one done on land at leisure may not coincide.

This concession by Australian authorities as to the location of the vessel is seen by the Russian authorities as somehow significant. Mr President, it does not, however, overcome the clearly demonstrated illegal fishing within Australia's zone contrary to Australian law and to the CCAMLR regulations to which Russia is a party.

The area of fishing activity is clearly demonstrated in the diagrams at pages 106 and 107 of the Australian Response. The maps of those pages clearly show the *Volga* fishing in the Australian fishing zone. Additionally, the affidavit of the Master of the other vessel, the *Lena*, which was apprehended whilst fishing alongside with the *Volga*, clearly states that both vessels were fishing illegally within the Australian fishing zone. That affidavit is attached at page 110 of the Australian Response. There is a clear inference from the material that the *Volga* fled because the *Lena* was arrested and they were engaged in a common illegal enterprise. Given this evidence, it is not clear, therefore, how Russia thinks possible communication and arrest a few metres outside the EEZ excuses this significant illegal conduct.

In any event, as I shall now explain, Australia's actions did not breach article 111.

Why was article 111 not breached?

The Russian Federation set out part of that article at paragraph 28 of their Memorial. One might have expected the whole of the provision to be quoted rather than only selected sentences. Mr President and Members of the Tribunal, I ask you to look at article 111, the full text of which can be found in the folders provided to you and which will also be on the screen.

The principal statement of the right of hot pursuit is at paragraph 1 of the article. It requires that the coastal State "have good reason to believe" the ship has violated the laws of that State.

When it was apprehended, the vessel was observed to be fleeing away from the Australian exclusive economic zone. It was identified as similar to a Japanese long liner, carrying sophisticated fishing equipment consistent with the type used for fishing for toothfish. This is set out in the statement of Mr Ferris at page 128 of the Australian Annexes. There is also a long history of illegal fishing in this area, which is set out again in the affidavits and CCAMLR Report annexed to the Australian Statement.

The CCAMLR regime provides that no legal fishing can occur in the CCAMLR Convention Area – the Heard and Mc Donald Islands exclusive economic zone is within the CCAMLR Area – unless a licence has been issued in accordance with CCAMLR requirements. Australia had no information which suggested any vessel meeting the CCAMLR requirements had been licensed to be in the area. The vessel *Volga* had been detected earlier on 5 January 2002 by the Australian Civil Patrol vessel *Southern Supporter*, very close to the Australia exclusive economic zone and near to the area where it was subsequently apprehended on 7 February. This can be seen in the affidavit of Mr Rohan at page 72. At the time of that sighting the vessel was warned not to enter the Australian exclusive economic zone.

In these circumstances, the Australian authorities, certainly had "good reason to believe" when they found the vessel fleeing the Australian exclusive economic zone on 7 February that the ship had violated Australian fisheries laws, thereby satisfying this first requirement of article 111. It was certainly the case here, based on the vessel's location in the zone when first detected, and the fact that it was also suspected as being part of a group of illegal fishing vessels.

The second aspect of my submission, Mr President, on why article 111 is not breached relates to the issue that the "pursuit" must then be commenced when the vessel is within the exclusive economic zone. Paragraph 1 of article 111 in its second sentence, read with the extension in paragraph 2, says such pursuit must be commenced when the foreign ship is within the exclusive economic zone. Paragraph 4 says that hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself "by such practicable means as may be available that the ship .... is within the .... exclusive economic zone". This is clearly a subjective test. Mr President, we have a statement in paragraph 1 that appears to be objective and a statement in paragraph 4 which appears to be subjective. I will return to that.

The evidence I have previously discussed shows that the helicopter, when it first communicated with the vessel, had satisfied itself by information plotted by the navigating officer on the arresting naval vessel, *HMAS Canberra*, that the ship was in the exclusive economic zone. Paragraph 4 of article 111 does not require that the vessel – as a matter of objectively provable fact – be within the exclusive economic zone when pursuit commences – only that using practicable means available the vessel is considered to be within the zone as a matter of subjective determination by the pursuing ship. That was clearly the case here.

As outlined at paragraph 12 of Australia's Statement of the Facts in its Response, the navigating officer on *HMAS Canberra* determined the position of the *Volga* using the eastern extremity of Spit Point – a sand spit on Heard Island. As indicated in the affidavit of the navigating officer, which is attached at page 232 of the Russian Memorial, this calculation was based on the best information available at the time. Subsequent analysis, as outlined in the affidavit of Colin John French, which is attached at pages 223 to 225 of the Russian Memorial, using more accurate mapping data, showed that the vessel was actually just outside the Australian fishing zone at the time of the first communication.

STATEMENT OF MR BURMESTER – 12 December 2002, p.m.

The fact that subsequently it transpires that at the time of the first communication the ship was outside the zone does not, in Australia's submission, affect the legality of the hot pursuit and arrest. At the time, using reasonably practicable methods, it was thought to be within the zone.

The Russian Federation, however, appears to argue that paragraph 1 of article 111 imposes an objective requirement that the ship be actually within the zone when the pursuit is commenced and that the subjective requirement of paragraph 4 is irrelevant.

Mr President, it cannot be seriously contemplated that paragraph 4 is intended to be an additional requirement to paragraph 1. If the ship is within the zone, paragraph 4 would add nothing. Rather, the only sensible interpretation is that paragraph 4 is quasi-definitional. It gives content to paragraph 1 by defining when, for the purposes of paragraph 1, pursuit is commenced.

Mr President, in our submission article 111, paragraph 1, cannot be read as imposing an additional objective requirement that the vessel be actually in the relevant zone. If it were read in this way, hot pursuit might be deemed to have commenced although it was not in fact occurring, since its commencement under paragraph 4 depends on a subjective test, while its existence under paragraph 1 would depend on an objective test. It can hardly have been the intention of article 111, paragraph 4, to impose an additional subjective requirement in cases where the objective requirement was satisfied because the vessel was in fact within the relevant zone. If it is actually within the zone, the subjective views of the pursuer cannot be relevant.

The conclusion must be that if, using practicable means, the coastal State considers the vessel to be within the zone, then that is sufficient for a valid pursuit to commence.

That the pursuit in fact commenced outside the zone when the ship has just escaped from it was not seen as a problem by earlier commentators, particularly Hall, who is cited by Professor Brownlie in the 5th edition of *Principles of [Public] International Law* at page 242. Hall explains the rationale for hot pursuit as follows:

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

Article 111 reflects the previous 1958 Convention provision, which itself reflected the previous law as expounded by commentators like Hall. On that basis, Mr President, Australia concludes that the location of the vessel outside the zone is not fatal in the circumstances in which that was the case.

The fact that a stop order was not given to the vessel has also been raised by the Russian Federation No stop message was given to the ship separate from the message that it was about to be boarded, but to suggest that, therefore, article 111 was not met would be to elevate form over substance. A message that you are about to be boarded implies a requirement to stop and cooperate. The practicalities of boarding from a helicopter in rough Antarctic waters make it extremely dangerous to board a stationary vessel, and therefore it is preferable that the vessel is moving and not stopped in order to increase the vessel's stability.

The Russian Federation, in its Memorial, referred to the Tribunal's earlier decision in the *M/V "SAIGA" (No. 2) Case*, and the statement in paragraph 146 of that Judgment that each of the conditions for the exercise of the right of hot pursuit is cumulative. That case, of course, concerned a situation where none of the requirements of article 111 were met. There

was no good reason to believe there had been a violation of coastal State law, no visual or auditory signals were given, and the pursuit was interrupted. Little reliance can be placed on that case in the current situation.

In the present case, as outlined, the pursuit was immediate once visual contact was made by the helicopter. This occurred in the knowledge that the *Volga* was likely to be an unlicensed fishing vessel that had been engaged in illegal fishing in Australian waters. The prior activity of the *Volga* in the area and the Australian authorities' basis for being reasonably satisfied, at the time pursuit commenced, has already been mentioned by me.

The real question, if it ever arises, for determination on the merits, is whether the pursuit commenced when the vessel was reasonably suspected of being in Australia's zone. For the reasons given, this can be demonstrated.

Mr President, this short excursion into the operation of article 111 is designed to counter the Russian suggestion that Australia's arrest actions are somehow illegitimate and lacking in integrity and that this should enter into the Tribunal's consideration of the reasonableness of the bond. We have shown, it is submitted, there is no basis for such a contention.

Furthermore, any regard to the situation of the arrest is inappropriate where Russia has excluded the jurisdiction of any body from examining the matter. Paragraph 58 of the Australian Response sets out the Russian declaration made under article 298 of the Law of the Sea Convention. It excludes from the disputes settlement provisions disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction.

Having made such a reservation, the Russian Federation cannot properly raise with the Tribunal in any form Australia's behaviour in relation to the arrest of the vessel, and in particular it ought not to be able to raise that issue in these particular proceedings.

The Russian Federation cannot blow cold when it comes to allowing a tribunal to examine law enforcement activities in regard to sovereign rights by making a reservation, yet blow hot when it encourages this Tribunal to take into account alleged Australian deficiencies in this area when it is considering the setting of a reasonable bond.

No legal system, including the international legal system, allows a litigant to seek to gain advantage from conduct or position directly inconsistent with other conduct or position it has adopted for purposes of protecting itself from legal action.

Mr President, for all the reasons that I have given, Australia contends that the circumstances of the arrest of the vessel are not relevant and should not be taken into account when this Tribunal considers whether the bond required by Australia is reasonable.

That concludes my presentation, Mr President. I would now ask you to call Professor Crawford.

The President:
Thank you very much, Mr Burmester. I now give the floor to Professor Crawford.

STATEMENT OF MR CRAWFORD
COUNSEL OF AUSTRALIA
[PV.02/02, E, p. 15–23]

Mr Crawford:
Mr President, Members of the Tribunal, it is an honour once again to appear before you, in yet another important case concerning the conservation of valuable and depleted fish stocks. The last occasion Australia was a party to proceedings before this Tribunal concerned the *Southern Bluefin Tuna Cases*. There, the Tribunal's intervention at the stage of provisional measures played a very significant role in bringing the parties – Australia, New Zealand and Japan – back to negotiations with each other. Despite the adverse jurisdictional finding of the Annex VII Tribunal, the eventual result was that the Southern Bluefin Tuna Commission was revitalized. It is now functioning well. It has an active and independent scientific committee, which has reached agreement on appropriate measures. The membership of the Commission has been expanded to include Korea, and there is a prospect of further members. From a situation when I last addressed you where the Commission was in danger of breaking down, it has been restored to health. I believe that your robust and precautionary intervention at the stage of provisional measures was a significant factor in this, combined – I must say – with the constructive attitude of the Japanese Government in the period since.

Now Australia seeks from you, this time as Respondent, another robust and precautionary step in the interests of the conservation of an endangered fish stock. This time it is Patagonian toothfish, not southern bluefin tuna, a smaller fish but also long-lived and one again about which we do not know much. This time, however, the step we seek from you is not intervention; it is non-intervention – or rather the indication that in the context of the conservation and management of this species within the EEZ, strong enforcement measures and high bonds can be justified to prevent the repetition of flagrantly unlawful fishing. So we ask not for intervention but for non-intervention. We hope the result will be equally beneficial.

There is no doubt the need is just as great. You may not be able to see this very clearly, although on your screens it will be more evident, but this is another stock chart. Commercial exploitation of Patagonian toothfish is a recent phenomenon; it has only been commercially exploited for about a decade. If IUU fishing – illegal, unreported and unregulated fishing – is permitted to continue, the stock will reach a crisis level within the next few years. You can see this from the graphic on the screen, which is at page 93 of our Response. The line along the top, gradually descending, represents the projected state of the stock if IUU fishing is kept under tight control. You can see that it still shows a slight decline over time, but it is perhaps manageable.

Assume, however, that for every tonne of authorized catch, vessels such as the *Volga* catch another tonne, then you see that the stock level plummets. By 2015 there will be commercial collapse. Catch quotas will have to be slashed to prevent that happening, probably to zero. That is the effect of IUU fishing of this species.

Now let us look at this document. This is page 118 of the Australian Response, which sets out one of a number of weekly catch reports from the *Volga*. This is the week beginning 19 January 2002. You will see from that catch report that this one ship among seven ships in this particular pirate fleet caught 27 tonnes of Patagonian toothfish in one week. That is, in one week, for one ship, 1 per cent of the annual lawful quota. We cannot tell what the fleet as a whole caught in that one week but it could have been 7 per cent of the annual lawful quota, and this was only one group of illegal vessels; there are others, some of which you have released under article 292. There is every indication that the surplus fishing capacity in the northern hemisphere is being redirected to the southern hemisphere, to the Southern Ocean.

That data was reconstructed. It had been deleted from the computer prior to the arrest of the ship. It was reconstructed from the computer.

This fishery cannot stand this level of illegal exploitation, quite apart from the fact that it is a direct contradiction of Australia's authority over the fishery within its EEZ and of CCAMLR conservation rules.

Incidentally, the Russian Agent said this morning that there had been no criticism of Russia's performance under CCAMLR. I say in parentheses that it is a joy to welcome Russian to the podium of international litigants. This is the very first case since the Russian Revolution of 1917 in which Russia has commenced proceedings before an international court. But I am afraid when one commences proceedings, one lays oneself open to criticism. So here we go.

I am afraid it is not true, Russia *has* been criticized before CCAMLR, by name. I refer you, for example, to the passages cited at page 103 of the Response. That comes from a CCAMLR scientific committee report of October this year. It cites criticism of the United Kingdom, but the United Kingdom is not the only State which has criticized Russia. Australia has made the point that Russia has a licence, that it authorized fish to go on the market as caught in accordance with CCAMLR that could not possibly have been so caught. These are the facts, and the criticism has been made.

Members of the Tribunal may perhaps think this introduction a bit extravagant. After all, the *Southern Bluefin Tuna Cases* involved your general jurisdiction under Part XV of the Convention and not your special jurisdiction under article 292 over prompt release. But even in prompt release cases, you are the Law of the Sea Tribunal still; and although your role under article 292 is a specific one and is subject – as Mr Burmester has shown – to certain constraints, nonetheless you are entitled, and we say bound, to act in the interests of the core values embodied in the Convention. Among these, the conservation and orderly management of high seas resources and the special authority of coastal States to manage those resources are central.

There has been a tendency to consider prompt release in terms of an open-ended and discretionary balance to be struck between coastal States and flag States, and to assume that "reasonableness", that protean term, dictates that strong coastal State measures have to be watered down so as to allow flag State vessels to get back to work. This was precisely how Russia portrayed the situation this morning. It was all about "balance"; you have to balance the rights of the shipowner and the rights of the coastal State. But – quite apart from the fact that the word "balance" does not appear in article 292 – there are two fundamental difficulties with this.

The first difficulty is that it gives you no actual guidance in the exercise of this so-called balancing act. If issues of proportionality arise, they have to be addressed having regard to the importance of the rights concerned. As the International Court said and showed in the *Gabčíkovo-Nagymaros* case, issues of proportionality have to be decided "taking account of the rights in question" (*I.C.J. Reports 1997* at para. 85). Yet Russia's argument takes no account of the rights in question: it places the illegal fishing vessel on the same level as the coastal State which is seeking to enforce its laws. It asks you to strike a balance between two interests that are not equal: the interests of the unlawful exploiter and the lawful conservator.

That is the second problem with Russia's approach of balance. A bond to release a ship under article 292 is not a vehicle to impose a tax at a marginal rate of 9 to 25 per cent on lawful activity. It is not a revenue-raising matter. It is there to assist in the enforcement of the law of the coastal State, imposed consistently with international law and with the relevant fisheries convention. Thus, the Tribunal should take into account the legitimate and recognized interests of the coastal State in ensuring the enforcement of its laws, enacted in

conformity with UNCLOS and thereby ensuring the effective – which is, above all, the enforceable – management of EEZ resources.

Thus, to talk blithely about "balancing" assumes that the interests are equal. But they are not equal and they are certainly not equal in this case. It is true that prompt release cases can arise in a variety of ways. They may arise in situations in which the balance of interests is very different from that in this case. For example, there may be a genuine dispute over the extent of coastal State rights, as there was in the *M/V "SAIGA" Case* in respect of the bunkering issue. There may be genuine assertions of the right of innocent transit through the EEZ, as you may perhaps have supposed was the case in the *"Camouco"*. None of that is at stake here. What is at stake here is systematic, unlawful exploitation of an EEZ fishery by financial interests which have given the Russian authorities a false address.

I refer you in particular to the map at page 107 of the Australian Response, which is also on your screens. On 5 January 2002 the Master of the *Volga*, then outside the EEZ, was warned by the Australian ship *Southern Supporter* not to enter the EEZ. You can see from the map how effective that warning was. The lines that you can see – they are difficult to see on the big screen; I hope that you can see them more clearly on the small screen – are the long lines that were set by the *Volga*, as recorded in its computer. The information was deleted and retrieved. The lines that you can see are those that were set from 12 January, a week after the warning, until 20 January, every day, deep inside the zone. We do not know exactly where the lines were subsequently. There is absolutely no reason to believe that they were not equally inside the zone. The *Volga* was no doubt engaged in exactly the same activity when, on 6 February, the *Lena* told it to flee. We are therefore dealing with a very specific case, and we argue that it requires a specific response from this Tribunal under article 292.

Mr President, Members of the Tribunal, I will now briefly review the prompt release cases that you have so far decided. In doing so, I will argue for the following five propositions: first, the 1982 Convention sets a careful balance between coastal States and distant water fishing fleets in relation to the management of resources; secondly, there is a serious risk that the prompt release jurisdiction, narrowly conceived as it was by the majority in the *"Camouco" Case*, will upset that balance and in effect make the Tribunal an unwitting accomplice to criminal activity; thirdly, that the Tribunal has a systematic role in support of national courts in enforcing EEZ catch limitations; fourthly, that the constraints on the Tribunal's powers vis-à-vis national courts do not prevent it taking into account relevant considerations at the request of the coastal State, nor performing its own role of ensuring the balance struck in relation to the EEZ, favouring, as it does, the conservatory powers of the coastal State; and, fifthly, in particular, that to take the catch value into account in setting the bond is wholly unacceptable in principle.

Of course, the Tribunal has decided more prompt release cases than any other cases so far. I hope that you will forgive the observation that the decisions so far have not established a *jurisprudence constante*. Of course, these are summary proceedings and there is an irreducible element of discretion in determining what is reasonable. However, some classification of the different kinds of cases is called for, as well as careful regard for the legal interests established by the Convention.

The legal interests established by the Convention are so well known that there is very little I need to say, and I will try to avoid giving you a lecture. The coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of the EEZ, and no one else has those rights. Unlicensed vessels have no right to fish in the EEZ. If licensed, they must comply with coastal State conservation requirements; if unlicensed, they have no right to be there *qua* fishing vessels. High seas freedoms of navigation are qualified in the EEZ by reference to Part V, so vessels engaged in illegal fishing have no freedom of navigation in the EEZ. Article 297 and the automatic

exclusions from jurisdiction for coastal State activity in the EEZ are also relevant. There is no trace in the Convention of a doctrine of equality between the coastal State and unlicensed fishing vessels in the zone. Therefore, there is no basis to justify a simple balancing of their respective rights and interests.

Turning to the cases, the *M/V "SAIGA" Case* was a special case in which the coastal State's law was unclear and non-transparent, its consistency with the Convention doubtful and the circumstances of the arrest patently questionable. Indeed, those circumstances raised a series of doubts and difficulties that surfaced at the time of the *M/V "SAIGA" (No. 2) Case*. Nonetheless, in the *M/V "SAIGA" Case* you laid down a series of general guidelines. In particular, you established principles of deference vis-à-vis national courts and also vis-à-vis any eventual merits tribunal under Part XV, possibly including yourselves. All that is helpful so far as it goes, but the factual circumstances of that case were so different from the present case that they do not give us much specific guidance.

Then there was the series of three cases much more directly concerned with illegal fishing. They are, in chronological order, the *"Camouco"*, the *"Monte Confurco"* and the *"Grand Prince"*. The third, the *"Grand Prince" Case*, was, of course, dismissed on jurisdictional grounds and thus does not provide guidance on the substantive issues relating to prompt release cases. However, it constitutes part of a factual pattern, which is highly significant. All these cases involved reflagged fishing vessels, whose ultimate beneficial ownership was in doubt. In every case the vessel had been reflagged many times. Sometimes that reflagging was of doubtful effectiveness or validity. All three cases involved credible, substantiated allegations of illegal fishing in the Southern Ocean. In all three, the targeted species was Patagonian toothfish. With the *"Volga"*, we now have the fourth case in the sequence, and no doubt there may be more. The Tribunal should not think that these are isolated instances of illegal conduct or that there is no general law enforcement problem in these waters.

In the *"Camouco" Case*, the ship was arrested for unlawful fishing a year after its provisional registration in Panama. The Master gave what we may now call the transit alibi, namely, that he was not fishing in French waters but was merely transiting from one part of the high seas to another, and he said that he had no illegal fish on board; that is the transit alibi. This Tribunal repeated the list of relevant factors that it had set out in the *M/V "SAIGA" Case* and added several more. You reaffirmed that these were not exhaustive. You helpfully said in paragraph 69 that "the value of the vessel alone may not be the controlling factor in the determination of the amount of the bond or other financial security". Without stating very much more by way of reasons, you determined that a bond of FF 8 million, about 40 per cent of the value sought by France, was reasonable. You seem to have taken into account a certain lack of transparency in the French court's assessment of the value of the ship. It was assessed by the French court at FF 20 million, but its actual value was less than FF 4 million.

For the purposes of the present case, there was an important rider to your decision in the *"Camouco" Case*. I hasten to say that I do not criticize the decision at the time that it occurred. We learn as we go. As Mr Campbell has told you, after its release the *Camouco* was reflagged and renamed the *Arvisa 1*. In January 2002 it was apprehended while illegally fishing in CCAMLR waters off Antarctica for Patagonian toothfish, but it was not able to be arrested. It was then reflagged and renamed once more. This time it was called, hopefully, the *Eternal*. On 3 July 2002 it was arrested by French authorities while fishing in the EEZ around Kerguelen Island and was finally forfeited. Its criminal career, which had seen it placed on what I may call reduced probation by this Tribunal in February 2000, was finally brought to an end. The name *Eternal* was a short-lived name. I refer you to Mr Rohan's affidavit at page 71 of the Australian Response.

STATEMENT OF MR CRAWFORD – 12 December 2002, p.m.

I turn to the second of the cases, the *"Monte Confurco" Case*. The factual pattern is, of course, the same – the unauthorized presence of a reflagged fishing vessel in the EEZ of a State in the Southern Ocean, with an unlicensed amount of toothfish on board. To be fair, in the *"Monte Confurco" Case* there was at least some indication that the Master's alibi that he was transiting the French EEZ and not fishing there was credible. At paragraph 88 of the judgment, the majority assessed the position in the following terms:

> "The Tribunal does not, however, consider the assumption of the court of first instance at Saint-Paul as being entirely consistent with the information before this Tribunal. Such information does not give an adequate basis to assume that the entire catch on board, or a substantial part of it, was taken in the exclusive economic zone of the Kerguelen Islands; nor does it provide clear indications as to the period of time the vessel was in the exclusive economic zone before its interception."

It was on the basis of those considerations that the Tribunal, in the very next paragraph of its judgment, reduced the bond sought from FF56 million to FF18 million, including in that amount FF 9 million for the value of the fish on board. In effect, therefore, the monetary bond representing the ship was reduced from FF 56 million to FF 9 million, about 20 per cent of the bond demanded.

I am mindful of the comment made by Judge Jesus in his Dissenting [Opinion], namely, that the Tribunal in the passage that I have read was usurping the role of the national courts in determining the facts of the case. That was said in paragraph 28. All I would say here is that Australia has been transparent, has produced substantial evidence of the situation and of the facts, and calls on the Tribunal to take these into account in assessing the adequacy of the bond. At least the problem of potential usurpation of national jurisdiction is reduced when the coastal State calls on the Tribunal to assist it and to take these matters into account. It is not a case in which we seek deference; it is a case in which we seek cooperation.

Against the background of those three cases, let me state certain basic principles that we submit ought to be applied by the Tribunal in prompt release cases. First, there are the humanitarian concerns expressed by the late and lamented Judge Laing in his Declaration in the *"Camouco" Case*. It is true that there may be humanitarian considerations – there often are – associated with the liberty of crew members, especially the ordinary members of a crew, whose own conditions of life and wages on board these ships, including this one, seem to be miserable. However, the same does not apply to the ringleaders – those actually in control, those who have separate cabins. There is no humanitarian issue at all in relation to the ship itself. Counsel for Russia this morning seemed to argue from the humanitarian needs of the three crew members remaining in Australia to the release of the *Volga* on a nominal bond – a kind of shift from humanitarianism in aid of the crew to humanitarianism in aid of the ship. They are completely separate issues.

Secondly, the Tribunal should be alert to use the prompt release jurisdiction to protect genuine values of freedom of transit and freedom of navigation. I again refer to Judge Laing's remarks in the *"Camouco" Case*. These interests may have been at stake in the *M/V "SAIGA" Case*; they may conceivably have been at stake in the *"Camouco" Case*; they are not at stake here. In this case there is no question of mere transit, no question of innocent passage, no question of good faith. Apparently, by article 300 of the Convention, Australia is required to act in good faith, but the owners of fleets of vessels such as the *Camouco*, the *Monte Confurco*, the *Grand Prince*, the *Lena* and the *Volga* can do what they like. Indeed, we do not know who the owners are. This is not a case in which there is any trace of an international interest in freedom of navigation or in any genuine high seas freedom.

Thirdly, the Tribunal should at all times seek to act in aid of regional fisheries arrangements which are the only way, now and in the long term, of preserving the world's fish stocks. You did it in the *Southern Bluefin Tuna Cases*. We call on you to do it again here. The relevant regional fisheries organization here is that established by CCAMLR, and important States Parties to CCAMLR have intervened in these proceedings informally by writing to Australia or to the Tribunal to express their position. In this respect, Australia strongly endorses the remarks made by Judge Wolfrum in the *"Camouco" Case* at page 17. You will find the CCAMLR report on the present problem at item 3 of the Australian authorities. We urge you to act in aid of the enforcement system of CCAMLR.

The fourth point is that the value of the boat itself and its tackle is only one factor. In certain cases, it may be that the value of the vessel is the limiting factor of a reasonable bond, but in cases of the present kind, cases of criminal conspiracy, there is no basis for thinking so. The concept of a bond is that it allows the ship and its crew to go about their lawful occasions while the underlying legal issues are pending before the courts of the relevant State, here the coastal State. But where, as here, there is strong evidence of organized criminality, the interests of the coastal State extend beyond the vessel as such. They extend to what are in effect provisional measures of protection.

A significant element of the coastal State's interest here is obtaining securities of non-repetition as that term is used in Article 30 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to General Assembly resolution 56/83 of 12 December 2001.

In this case the security is sought against the shipowner, not the State, but the principle is the same. The coastal State should not be required to let a vessel go without some security that it does not reoffend. It is unreasonable, in terms of article 292, not to provide such security. These vessels can catch their own value in endangered fish in a remarkably short period of time. The value of the vessel is a minor consideration. They are, so to speak, weapons of mass destruction of fish. We hope there will be no repetition of the *"Camouco"* saga where the same vessel is released and immediately reoffends.

Finally, let me say a word about the catch value. The catch value is, of course, extremely high in the present case because the *Volga* had been fishing in the Australian fisheries zone for about six weeks. The amount of money held on trust, if the crew are acquitted and the cargo is not forfeited, will simply be returned to the owners and that amount, pending the outcome of the Australian proceedings, is nearly AU$2 million. It is safely held. It has not been confiscated. These ships can catch more than their capital value, as I have said, in a few weeks.

Russia argues, and the owners have argued, that the value of the catch should be set off against the value of the ship. Indeed, it is surprising that they have not asked for some return of part of the catch because the catch is worth more than the ship. The logic of their argument might have called for that.

No doubt where the cargo on board the ship belongs to the shipowner or the crew, or where its liability to confiscation is in serious doubt, which was true, for example, of the bunkers in the *M/V "SAIGA" Case*, the position is different. This Tribunal in the *M/V "SAIGA" Case* rightly took the value of the bunkers into account but here there is not the slightest indication – perhaps there was in the *"Camouco" Case* – that any part of the catch was lawfully caught, i.e., that any part of it rightfully belongs to the owners of the *Volga*. All the evidence suggests that every bit of it was unlawfully caught and that the remaining tackle and bait on board were the tools of an unlawful trade.

Frankly, Mr President, if I came home late one night and discovered a burglar escaping with the family silver, I would be unimpressed with the argument in subsequent

legal proceedings that the burglar was entitled to deposit the silver as part of his bond. It is not his silver. Nor, we must presume, is it the *Volga*'s fish. It is stolen fish.

Thus Australia is in complete agreement with what was said by Judge Jesus in the *"Monte Confurco" Case*:

> "32. In my view the majority decision was unwise to have taken the value of the fish seized as part of the bond, when the domestic legislation makes it subject to confiscation. One important aspect of legitimate penalties normally imposed by coastal States legislation ... in such cases, is the confiscation of the product of illegal fishing.
> 33. It is conceptually wrong, in a case where the Tribunal has no competence on the merits, to consider as part of the bond or security any seized asset that, in the end, might be confiscated, by the decision of the appropriate domestic court, as part of the penalties imposable by the national legislation.
> Indeed, it is beyond my understanding to grasp the rationale of such a decision of the majority in considering as part of the bond or security the very product of a claimed illegal activity."

I emphasize that last sentence and, with respect, it is beyond my understanding as well.

We submit that at least as concerns the facts of the present case that reasoning is incontrovertible. You cannot count, as a bond, in relation to a ship, property which is not rightfully yours, and in the Australian proceedings the fish are independently liable to confiscation. There is no basis for counting their value to the credit of the owners in relation either to the value of the ship or to the good behaviour bond which is sought in the form of a vessel monitoring system. The fish were not, to put it mildly, the product of good behaviour.

Mr President, before asking you to call on the Australian Solicitor-General, Dr Bennett, to deal with the precise facts and *consideranda* of the present case, let me make two closing remarks. The first is precautionary. I have assumed and Australia has assumed, for the purposes of this discussion that Russia is the flag State. For the purposes of your summary jurisdiction in this prompt release case, Australia formally accepts that. But, although we do not question Russia's standing to bring a prompt release Application, a special form of Application, we reserve the right to argue in any subsequent international proceedings on the merits, that Russia's status as flag State is not opposable to Australia because there is no genuine link between the *Volga* and Russia as required by article 91, paragraph 1, of the Convention. I use the words "not opposable" advisedly following the use of that language in the *Nottebohm* case.

The second point is that Australia is accountable internationally for its action in the field of the law of the sea. Australia places this Tribunal at the centre of this system of international accountability in this field. If the Tribunal has no jurisdiction over the merits of this case, it will be because of Russia's reservation, not Australia's. But now we are concerned with prompt release and, as Mr Burmester has already noted, you have no jurisdiction in this case to consider the technicalities of the law of hot pursuit. Indeed, you did not consider that even in the *M/V "SAIGA" Case*, when the hot pursuit was clearly unlawful, discontinuous, and carried out with violence.

In the present case there was continuous, uninterrupted, successful pursuit of an unlawful fishing vessel from deep within the EEZ. It was finally caught outside the EEZ but a matter of metres outside and not miles. There is nothing substantial here to set, even subliminally, against the strong conservation and law enforcement interests of the coastal

State in relation to its EEZ, interests clearly and expressly recognized by the 1982 Convention.

Mr President, I would ask you now to call upon Dr Bennett to continue the Australian presentation.

The President:
Thank you very much, Professor Crawford. I now give the floor to Dr Bennett.

STATEMENT OF MR BENNETT
COUNSEL OF AUSTRALIA
[PV.02/02, E, p. 23–29]

Mr Bennett:

Mr President and Members of the Tribunal, it is a great privilege for me as Solicitor-General of Australia to address this Tribunal for the first time. Like our colleagues appearing for the Russian Federation, we have come from a long way away and to a colder climate. Sydney had a temperature of 40° C two weeks ago, and we are noticing the difference. I would not, however, be so unkind to our hosts as to compare the climate of Hamburg with the Antarctic climate of the zone around our territory of the Heard and McDonald Islands.

I propose to deal with five general matters and then some specific aspects about the quantum of the bond and finally the issue of the VMS and the proposed security for its operation.

The five general matters are these: first, the general importance of conservation measures in the Antarctic area and its relationship to the Convention on the Law of the Sea; secondly, the extent of illegal fishing in the exclusive economic zone around Heard and McDonald Islands and the damage done by it; thirdly, the cost and difficulty of detection and law enforcement; fourthly, the degree of criminality of the owners in the present case and; fifthly, the nature and purpose of a bond under article 73, paragraph 2.

Firstly, with regard to the general importance of the conservation measures, it is a topic about which I do not need to say very much. You, Judge Vukas, in the *"Monte Confurco" Case* questioned the establishment of an exclusive economic zone around uninhabited and uninhabitable islands. This, of course, was not a majority view but in any event such a zone is justified on the basis of sovereignty. It has a consequential advantage, which is the desirability of there being a coastal State which is responsible for the maintenance and conservation of the environment, including the preservation of marine resources which, of course, tend to congregate around islands rather than the open sea because of the lesser depth. In fact, Heard Island is not uninhabitable. People have lived there in the past, and there is no doubt that under article 121 it has an exclusive economic zone. Article 121, paragraph 3, does not exclude it.

Under article 61, Australia has obligations with respect to conservation and management to ensure that the living resources of the exclusive economic zone are not endangered by over-exploitation.

Article 61 imposes a number of obligations on the coastal State. Specifically it has to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations shall cooperate to this end and the measures shall be designed to maintain or restore populations of harvested species at maximum levels and so on.

That is what we are concerned with here and that is what we were concerned with when we sent a naval vessel with helicopters and planes to the southern ocean and succeeded in arresting the *Volga*.

Might I take you briefly to some material in our Statement in Response in the affidavit of Mark Andrew Zanker, appearing at page 100 of our volume? There he sets out a number of features of the Heard and McDonald Islands area.

On page 100 he says that they are external territories of Australia, about 4,000 kilometres south-west of Perth in the Antarctic Convergence. The area falls within the area covered by CCAMLR, of which Australia is a member. CCAMLR of course is charged with the conservation of various species.

> "Heard Island and McDonald Islands are the only unmodified example of a sub-Antarctic island ecosystem in the world. They provide valuable breeding and feeding areas for many species of marine mammals and birds, while supporting a vast array of endemic invertebrates. They are included on the register of the National Estate and the World Heritage List."

Patagonian toothfish is one of the principal species.

The climate, as you see, is a maximum average temperature of 3.0° C, minimum average temperature of –3.6° C, 256 days of snow a year, 278 cloudy days a year, 210 km/h average maximum wind gusts and 1.4 hours average of sunshine per day. It may not be likely to become a holiday paradise!

Commercial fishing by Australian operators has been limited to a maximum of three Australian boats and is subject to very stringent management arrangements.

The Patagonian toothfish, he goes on to say, is widely distributed in areas of the sub-Antarctic oceans. It is a demersal, so it is found at or near the sea bottom at depths of up to 2,500 metres, although it is reported to be pelagic for some periods of its life.

It is one of the two largest species of fish occurring in the Antarctic, reaching up to 2.2. metres in length and up to 100 kg in weight. You saw a picture a few minutes ago of the Patagonian toothfish. It lives for up to 47 years. It grows slowly and reaches spawning age after 10 to 12 years. Its diet is squid and prawns.

Fishing for the Patagonian toothfish began in 1994 off Argentina and the Falkland Islands. That has moved further eastwards and Patagonian toothfish are fished in the exclusive economic zones of several countries in areas managed by CCAMLR, but stocks in several of these areas have been decimated by illegal fishing.

You have been shown that graph indicating what is likely to happen to the Patagonian toothfish if illegal fishing continues at a substantial rate.

That is the first issue. There is in this case a very important conservation issue in stamping out this illegal fishing.

The second aspect is the extent of that illegal fishing. That is referred to at pages 102 to 104 of our Statement in Response, where Mr Zanker goes on to describe how, during 1997, a number of fishing boats were detected fishing illegally and, over a four-year period, it is estimated that illegal fishing activity has taken as much as 21,500 tonnes of Patagonian toothfish from the fishery. That is higher than the legal catch of about 14,000 tonnes during the same period.

In response, we have initiated patrols to the region which have resulted in the arrest and prosecution of four vessels, including the *South Tomi*, in March 2001.

Surveillance operations may not have significantly reduced the illegal activity. CCAMLR estimates that 12,500 tonnes of illegally caught toothfish have been taken from areas adjacent to the fishery in the period from July 2000 to June 2001.

He sets out matters reported on the CCAMLR website about the incidence of unreported and unregulated fishing, its dangers and the result. He points out, for example the enormous loss of sea birds – albatrosses, giant petrels and white-chinned petrels – and that that will affect juvenile as well as other birds and will continue to be evident for a decade because of the long-delayed sexual maturity of these species. So this affects sea birds as well as fish.

There is then a passage quoting from a CCAMLR Standing Committee report about criticism of fishing by some vessels in that area in the absence of control, specifically by the Russian Federation.

The third matter is the cost and difficulty of detection and law enforcement. In a sense, that is obvious when one looks at the remoteness of the region and the high seas there, the bad climate and the distance from Australia. It is discussed in paragraphs 44 to 48 of Mr Rohan's affidavit at page 75 of our Statement in Response. I will not read those paragraphs as you all have them. The main point that is made is that to have a naval frigate there with support services costs us around AU$5 million a week. It is a very expensive operation. Naval patrols involving apprehensions involve around three weeks of vessel time, sailing out and back and so on; that is AU$ 15 million. The cost of enforcement to us is enormous. The bond we are seeking in this case is just over AU$3 million, a fraction of these sums. We would submit that is a relevant consideration in looking at the reasonableness of not taking away the meagre fruits of these very expensive military patrols, which are necessary.

Fourthly, may I come to the degree of criminality in this case? What we have demonstrated to the Tribunal is that we are not dealing with an isolated or accidental incursion by a single boat. We know that the *Volga* was one of a fleet of at least seven boats, and I will show you the evidence in a moment, operated as part of a substantial trans-national criminal enterprise designed to plunder the protected and endangered resources of the Southern Ocean. It is an enterprise which uses deceit and the domestic and international legal resources available to it to continue its criminal trade. Australia respectfully submits to the Tribunal that it should do everything in its power to assist in the stamping out of this criminality rather than allowing the Convention to be used to assist it to continue.

Without being exhaustive, let me show you some of the evidence about the activity. First, we have a fax which we found on board at page 116 of our Statement in Reply; it is in Spanish. The translation is at page 115.

It says that the name of the oil tanker is *Aqua Vitae*. It gives the position and the time for bunkering. It states:

> "If possible follow order for transhipment as below:
> 1. *Boston* 40 tons 1.5 hours
> 2. *Lena* 120 tons 4.5 hours
> 3. *Darwin* 100 tons 4 hours
> 4. *Volga* 170 tons 5 hours"

And so on through the seven boats.

> "I decided on this order because the first three ships must tranship from one to the other, if you wish you may change the order for the others as long as all of you are in agreement.
>
> I have been asked that you stick to the amount that was assigned to each one of you because the oil tanker will be left with 940 tons and it has other jobs to do."

Then we have this paragraph:

> "Once completed you can return to the same fishing zone, that is the same rock where you are at the moment."

That is their rather rude description of Heard Island.

> "It seems to be safe until the seventh or the eighth."

They are very accurate. Our naval vessel got there on 7th.

> "I think everything is clear but if you have any doubts you all know you can contact me."

Note the word "safe". These are criminals seeking to avoid detection. This is not commercial communications with people who have legitimate commercial activities that they are carrying on. It is a different sort of activity completely. The two earlier faxes at pages 111 and 113 show the extent of the operation. I will not take you through those. Let there be no doubt about it. This is highly sophisticated and organized criminal activity.

Secondly, we have data we reconstructed from a computer on board. It is an indication of their criminality that these files were deleted, but modern police techniques, as you know, enable these things to be recovered from computers, and we have done that and restored them.

You will see at page 104 of the book a reference in paragraph 19 to the erasing of the data and it is being restored. The reconstructed maps appear at pages 106 and 107. The clearest one is the one at page 107. That is the one you were shown earlier with the lines on it showing the lines where they were fishing.

So we have evidence which they tried to destroy from their own computers showing that they were clearly fishing very, very close to Heard Island, right in the middle of our zone, not just on the edge of it.

Thirdly, the Master of the other fleet vessel we apprehended, the *Lena*, has given evidence against his confederates. That is the affidavit of Jose Sanchez Fraga at page 110 of the Statement in Reply. You will see that he says:

> "I was employed as the master of the fishing vessel known as 'Lena', which was apprehended by Australian authorities on 6 February"

– the day before the *Volga*.

> "The Lena was involved in illegal fishing in the Australian Exclusive Economic Zone near Heard and the McDonald Islands in the Southern Ocean.
>
> The Lena was one of several vessels present in the Southern Ocean which operated on instruction by satellite phone from the vessel owners in Jakarta. The fishing vessel known as the 'Volga' was a part of this fleet and, as Master of the Lena, when I was fishing illegally in the Australian Exclusive Economic Zone, I was doing so in close concert with the master of the Volga, which was also fishing illegally inside the Australian Exclusive Zone at that time.
>
> The Volga also undertook illegal fishing in the Australian Exclusive Zone near Heard and the McDonald Islands in the period before it was apprehended by Australian authorities on 7 February 2002. I was in radio contact with the master of the Volga and other members of the fleet in the period before the apprehensions. It is my belief that once it was clear that the Australian authorities were aware of the illegal activity, the Volga and the Lena, as the oldest vessels in the fleet, were 'sacrificed' by the owners so that the other vessels could escape apprehension."

That is a very relevant matter in fixing the bond for these vessels. There were much more valuable vessels involved and they escaped and they sacrificed these cheaper vessels so as to let the more valuable ones get away .

He goes on:

> "It is my belief that the Lena, the Volga and other members of the illegal fleet operating in the Southern Ocean are beneficially owned by Ng Joo Thieng and his family, who own Pacific Andes International Holdings and are shareholders and Directors of its Jakarta-based subsidiary Sun Hope Investments."

That is his belief about ownership. We of course do not know who owns Olbers.

It is interesting that there has been no challenge by the Russian Federation, or indeed the owners, to the forfeiture of the *Lena*. The only difference is that, as Mr Burmester has explained, the *Volga* was apprehended a few metres outside the zone. Senior Fraga admits that the fleet was knowingly fishing illegally and, as I said, that the oldest vessels were sacrificed to allow the others to escape.

A more serious incident is described in the volume at page 72 where an emergency beacon was misused – it was deliberately set off – in order to interfere with the hot pursuit of the *Lena*, the *Volga*'s sister ship and partner in crime.

Members of the Tribunal and Mr President, these are serious criminal activities. This is not just someone breaching some minor regulatory law where there is some doubt as to whether an offence is being committed. This is serious international crime that we are talking about by the owners of the ship for whose benefit these proceedings are brought.

The absence of any real relationship with the flag State, the Russian Federation, is shown by the device of having dummy Russian masters who are not the real commanders of the vessels. The late nominal Master of the *Volga*, Alexander Vasilkov, asserted the same thing to the commander of the boarding party at page 139 of our Response, where what is said is this:

> "At approximately 1255, I began to search the cabins behind the bridge area. Each cabin was searched with the occupants of the cabins. They assisted by opening drawers and identifying personal belongings. The first cabin searched was that of Vasilkov which was located on the port side of the vessel. I was surprised at first because this was a twin cabin and usually masters have their own cabins. .... It was during this search that Vasilkov started to try and explain that he was not the captain. I stopped him and using a set of Russian language cards showed Vasilkov question forty-two (42) which when translated is the caution. He glanced at the cards and said, 'Yes, yes, I understand'. Although I do not remember his exact words, he went on to say that he was only the master on paper and pointed to a crew list stuck to the wall above a small desk in his cabin.
>
> He also said, 'the fishing master is the boss of everything, I am nothing more than crew' or words to that effect."

He then goes to the fishing master, who has his own cabin. There was no doubt who was really in charge of this ship.

I will go on with the other factors that indicate criminality in the morning. Thank you, Mr President.

"VOLGA"

The President:
Thank you very much, Dr Bennett. These proceedings will resume at 10 o'clock tomorrow.

Adjournment at 4.45 p.m.

PUBLIC SITTING HELD ON 13 DECEMBER 2002, 10.00 A.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, BALLAH, COT; *Judge* ad hoc SHEARER; *Registrar* GAUTIER.

For the Russian Federation: [See sitting of 12 December 2002, 10.00 a.m.]

For Australia: [See sitting of 12 December 2002, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 13 DÉCEMBRE 2002, 10 H 00

Tribunal

Présents : M. NELSON, *Président*; M. VUKAS, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, BALLAH, COT, *juges*; M. SHEARER, *juge* ad hoc; M. GAUTIER, *Greffier*.

Pour la Fédération de Russie : [Voir l'audience du 12 décembre 2002, 10 h 00]

Pour l'Australie : [Voir l'audience du 12 décembre 2002, 10 h 00]

The President:
This morning we resume the oral pleadings for hearing, first from the Respondent. Dr Bennett.

"VOLGA"

Argument of Australia (continued)

STATEMENT OF MR BENNETT
COUNSEL OF AUSTRALIA
[PV.02/03, E, p. 5–18]

Mr Bennett:
Thank you, Mr President. At the end of the proceedings yesterday I was dealing with a number of aspects emphasizing the criminality of the owners of the vessel and their contempt for their own flag State, the Russian Federation. I had dealt with the fact that they had a nominal captain, who was Russian but was not the person really in command of the vessel. On that topic, I should also show you what Senior Fraga said in his affidavit at page 110 of our Statement in Reply. In paragraph 4 of his affidavit, he says:

> "The Russian captains, who were listed as captains of the Volga and Lena, were simply listed so they could sign the vessels out of the Russian port. They played no other part in the daily operation of the vessels."

Fourthly, it is also interesting that even the connections of the true owners with the Russian Federation seem to be fairly shadowy. The Memorial of the Russian Federation, in its Statement of Facts at page 4, gives an address in Moscow for the owner. We know from the affidavit of Justine Nina Braithwaite, at page 66 of our Statement in Response, that the address they gave is a false address. It is a building that does not exist. She visited the address and found that there was no such building. The Russian fishing licence, at page 14 of the Memorial of the Russian Federation, gives the same false address. There has been no attempt to rebut that evidence or show that it is some kind of mistake or accident.

We submit that it appears that although the owners have treated the Russian Federation with such contempt, the Russian Federation, to its credit, has responded only with kindness by bringing this Application for the benefit of the owner. In our submission, it is obvious that the Russian Federation is unable, unwilling, or both, to exercise any effective control over fishing vessels flagged to it in the Southern Ocean. There is some material at page 103 of our Statement in Response, referring to a report of the CCAMLR Standing Committee on Observation and Inspection, in which some criticism was expressed of the control that it failed to exercise over its fleets.

There is a useful summary of some of that material in paragraph 49 of the affidavit of Geoffrey Vincent Rohan, at page 76 of our Statement in Response, where there is a summary of some of the problems in relation to IUU fishing. There is also a transcript of an interesting piece of investigative journalism, exposing what are called "the toothfish pirates". That appears at page 77 and following of our Reply.

Finally, I ask the Tribunal to read at an appropriate time the New Zealand diplomatic note at pages 50 to 56 our of Reply, the French diplomatic note at page 56A, the transcript of the investigative report, and some other diplomatic notes that I understand the Tribunal has received from the Governments of Italy, Chile and South Africa.

The material through which I have taken the Tribunal is relevant in a number of ways. It is relevant to the penalties likely to be imposed on the crew, but it is also relevant to the concept of balance which was stressed so much in Mr David's very able presentation. Balance between the coastal State and the flag State is an important consideration when one is dealing with a case such as the *M/V "SAIGA" Case*, which involved a dispute about a tanker that was alleged to have engaged in bunkering operations in an exclusive economic zone in breach of the regulatory requirements of the coastal State, or in cases where there is

doubt about whether there has been a breach of the relevant laws. But balance of that kind is much less relevant when one is concerned with the activities of a shadowy gang of international criminals whose operations are sophisticated and who show the contempt shown in this case for their flag State. Those criminals, of course, would benefit from any order requiring release on a lesser bond.

The fifth of my preliminary general topics concerns the nature and purpose of a bond under article 73, paragraph 2. Article 73, paragraph 2, is silent on the nature of a reasonable bond. We know from the Separate Opinion of Vice-President Nelson in the *"Monte Confurco" Case* – he, of course, was the secretary of the drafting committee at the Law of the Sea Conference – that there is a subtle difference in the words used in the different linguistic texts. The French and Chinese texts use words corresponding to "sufficient" rather than "reasonable". That is useful when considering what was intended. I should say that there is also an article by Professor Franks at tab 5 of our list of authorities, which discusses this issue and refers in particular to the words used in the different languages. Mr President, you will have to forgive my pronunciation. You will see that the Russian word is (razumnogo) and the Chinese word is (he-li-de). Professor Franks says that two of the texts use words meaning "sufficient".

The purpose of a bond or guarantee – the French word is *garantie* – is to ensure something, to make it safe or certain. The coastal State, in our submission, should not be in any worse position because it now has a bond instead of the boat or instead of the custody of the crew.

Putting it a little differently, the function of this Tribunal under article 73 is not to make some arbitrary estimate of what the owners should pay but rather to fix a sum which will ensure, which will guarantee – in other words, a bond – that Australia obtains no less than it might have obtained had it retained the boat and crew. If there is a range of values or possibilities, the bond should secure the maximum. That is the significance of the French word "*suffisante*", the English word "sufficient".

In many ways, it is analogous to an intending mortgagee fixing the amount of security that it requires. The bank does not say, "I am lending $1 million, so I want security worth $1 million". Rather, it says "I want such security as will guarantee to me that I will get my loan back in the worst possible situation". That is why most mortgagees lend up to about 60 or 70 per cent of the value of security. Land worth exactly $1 million is not a sufficient or reasonable security for a loan of $1 million, at least not at any bank that I have ever been to. How much more does this apply to Mr David's submissions about a bond between 9 and 40 per cent of the value of the vessel? It should be sufficient to ensure that we get at least the value that we would get when and if the vessel is forfeited.

The difference in the ways in which a bond that is too high or too low affects the parties is significant. If it is too high, it is still open to the owners to comply with the conditions of the bond and ultimately recover their money. All that will have happened is that they will have been out of their money for a short period, and if they succeed in their domestic litigation, they obtain a refund of the bond. On the other hand, if it is too low, we are irrevocably prejudiced. The same applies to the bond for the crew. If it is too high, it is always open to the owners to ensure that the crew return for their trial and then recover the amount of the bond. If it is too low, it may be all that we get in lieu of convictions and fines.

I will come to the elements that make up the proper amount in the second part of my submissions, to which I now turn.

Our calculation has three elements, totalling AU$ 3,332,500. All figures in our submissions are in Australian dollars and both parties have referred to Australian dollars. At present, one euro is about AU$ 1.85, so one can get a very rough view of the amounts involved by dividing by two.

The first element is AU$ 1.92 million for the boat, including fuel and equipment. The valuation is not in dispute. What is in dispute is that Mr David says that we should get 9 to 40 per cent of the value of the boat. No rational reason is given for that submission, other than that is what seems to have happened in some of the cases, although in most of the cases to which he refers there was a dispute about valuation and the reason the figure was a low percentage was that the valuation was not accepted by the Tribunal. Here, of course, the valuation is agreed.

The second element is the AU$ 1 million for the guarantee of non-repetition of offences by the installation of a vessel monitoring system. I will come to that. That is one of the questions that we have been asked about and it is the last item with which I shall deal this morning.

The third element is AU$ 412,500, which is a little less than half the total bail ordered by the Australian court in relation to the first lot of charges. What was ordered was AU$ 275,000 for each of the three crewmen. That figure was calculated taking into account the maximum fine. I will come to a breakdown of those figures in a few minutes.

There is also a figure of AU$ 20,000, being the bail ordered in relation to a further charge against one of the crew. What happened was that after we recovered the data that had been erased from the ship's computers, we realized that there had been some fishing on some earlier dates, so there was an additional charge in relation to that, which required additional bail.

Of course, the first two items relate to security for the boat. The third relates to the release of the crew. These items are quite separate and should not be dealt with together, or even in the one bond. Article 73, paragraph 2, refers to the vessels and their crews, and we submit that their bonding is quite independent. If the Tribunal grants relief to the Applicant, it should fix the amounts of the two bonds separately, one for the vessel and one for the crew, so that the owners can elect to provide one, the other or both.

The Russian Federation has put to you that three additional matters should be taken into account, resulting in three deductions from our claim. The first is the proceeds of the catch and bait, being about AU$ 1.9 million, almost exactly the same figure as the value of the boat. Of course, it was not full. As has been said, these boats hold a catch worth more than the capital value of the boats. As we know, this was one of the less valuable boats that was sacrificed to protect the more valuable ones. Secondly, they claim that the bail already paid, AU$ 245,000, should be deducted. The third item is the further AU$ 600,000 now required by the Australian court to permit the crewmen to leave Australia. I will come to that in a moment.

The Russian Federation has taken those three items and deducted them from our figures, which brings it to AU$ 554,920, and has rounded down that figure to AU$ 500,000. Although the differential is fairly small, there is no explanation given as to why a security should be rounded down rather than rounded up, but I leave that aside.

In relation to their three points, we say, first, that the proceeds of the catch should not be taken into account. The forfeiture of the proceeds of crime is independent of the other components. In any event, if the owners succeed in their litigation in Australia, that sum will be repaid. It is in a trust account at the Office of the Australian Government's Solicitor. This question was considered by the Tribunal in the *"Monte Confurco" Case*, and Professor Crawford has dealt with it. As he said, if a burglar steals my silver, I would be very surprised if he could use that silver as a deposit to get bail pending trial. These fish were illegally taken from our waters. Why should they be given to us as security for the boat, which, if we are right, we are entitled to forfeit? We would submit that there is simply no basis for taking the fish into account.

Incidentally, there was another complaint about the fact that although the bail for the crew is fixed by a court, the forfeiture of the boat and the security in relation to the fish and so on is dealt with administratively by an Australian government agency called AFMA, the Australian Fisheries Management Authority. The only point that I want to make about that is that although it is an administrative decision, its decisions, like any other administrative decisions, are subject to review by the courts.

In order to explain the deduction which is sought in relation to the bail for the crew, I have to explain what occurred in relation to bail and it is a little complicated. Initially, bail for the three crew members for release from jail was set at AU$ 75,000 each. The owners then provided AU$ 225,000, three times AU$ 75,000, and they were released. They are free within Australia but not free to leave Australia. They were obliged to lodge their passports.

Some time later, the fishing master – and this is the one who had his own cabin who was really in charge of the boat – was charged with a further offence relating to a different period. I mentioned that earlier. Bail for that was set at a further AU$ 20,000. That was also paid by the owners. So the owners have now paid AU$ 245,000.

The "master" – and I have used inverted commas for obvious reasons – died unfortunately before he could be charged and so he was never charged. None of the other 42 members of the crew were charged. All were allowed to return to their respective homes, mainly Indonesia and China. We have only kept and charged the three ringleaders, who are all Spanish citizens.

One of the original bail conditions, as I say, was surrender of passports. The three crewmen then applied to have their passports back and their bail conditions varied so that they could return to Spain before the trial. A magistrate granted this on condition that the passports be lodged with the Australian Embassy in Madrid, which you may think is not very good security. The prosecution appealed against that successfully and the Supreme Court of Western Australia ordered instead that the passports would only be returned if the bail was increased for each of them from AU$ 75,000 to AU$ 275,000. So there was an additional AU$ 200,000 each required; an additional AU$ 600,000. That has not been paid by the owners.

The owners who are complaining so bitterly about the crew being kept in Australia have it within their power to deposit that sum and they would be permitted to return to Spain. Of course, if they come back to face trial, for which they cannot be imprisoned, only fined, they would get that bail back. It should be noted that Australia does not have trials *in absentia* for indictable offences and so if they do not come back the trials cannot go ahead. All we can do is forfeit the bail. The effect of the crew being permitted to go is that one needs a deposit of the maximum amount. It is what I said earlier about being sufficient. It is just not good enough to have something which may turn out to be less than the amount of the fines.

Since what is sought by the Russian Federation is their release from Australia, it is the further AU$ 200,000 each which is relevant. That would make the amount of security for their release AU$ 600,000. We have only sought in the total we have required AU$ 412,500. We have reduced it significantly for the purposes of our demand. The Russian argument, therefore, involves deducting what has not been counted. They are trying to subtract something which is not there in the first place.

The third item they seek to deduct is even worse. They want to deduct the AU$ 600,000 that has not been paid. If the bond is provided and the crew and the boat are released, it would never have to be paid. So they are deducting part of our claim for which there is simply no logical reason. It is an error of logic in the calculations.

There is one other aspect of the bail calculations. I mentioned that the figure of AU$ 200,000 was fixed by the judge taking into account the maximum fines. The judge also took into account the cost of the trial, that being relevant to the motivation of the crewmen to

return. As the judge said, "If I look at it from the point of view of a crewman sitting in Spain saying, 'Will I return to face a trial?', the crewman would be looking not only at the fine but at the cost of defending the proceedings".

What I said earlier about the degree of criminality is very relevant here and we submit that the maximum might well be imposed when one has a criminal enterprise of this magnitude, whatever may be said about the meagre personal resources of the crewmen. The maximum for each offence is AU$ 275,000 and there were four offences. There are three crewmen, one offence each, plus the additional charge against the fishing master. We have a total of four times AU$ 275,000 which is AU$ 1.1 million.

The court, of course, always has a discretion to impose a lesser penalty and the Russian Federation has filed an affidavit by an Australian lawyer suggesting that on the basis of previous cases there may well be a lesser penalty. We say a number of things about that and I will deal with that in detail when I answer the four questions at the end of my submissions.

May I just say at this stage that when one is talking about security, one is not talking about a likely amount. One is talking about a maximum amount. It is a different sort of calculation. It has to be *suffisante*. It has to be sufficient and reasonable. Reasonable is not something halfway which is a rough estimate of what the Tribunal thinks the fines will be. That would be to usurp the role of the national court. It should be the maximum and we, as I say, have offered to take less than that although we are said to have acted unreasonably.

Mr David, using his advocacy skills to the full, puts it this way; he says to you that the total security demanded is over AU$ 6 million for a boat worth AU$ 1.9 million but let us just look at how he gets to those figures because the figures are not right. He gets the AU$ 6 million by adding the proceeds of sale of the catch, and I have dealt with that, the family silver, the stolen property. He adds that to the bail already paid of AU$ 245,000 and the further bail of AU$ 600,000 and then he adds to that the security we are seeking of AU$ 3.32 million, which, of course, includes those items. He adds it altogether and gets to a figure of AU$ 6 million. It is almost the three card trick, but the numbers are just not right for the reasons I have given.

There are fallacies in the figures, four of them at least, and they confuse the crew with the boat. The bond sought for the crew, as I have said, is AU$ 412,500, which is less than half the maximum fines and only half the bail the court has ordered in Australia. Secondly, he deducted the AU$ 600,000 which has not been paid and would not have to be paid if the bond we ask for is provided. Thirdly, it ignores the fact that the AU$ 1 million for the VMS system is in effect a good behaviour bond, which will be refunded if there is good behaviour, if the boat is not used for further criminal conduct and I will come to that. It is quite different to bonds in other cases. Finally, he counts the proceeds of sale of the illegal catch.

When those matters are taken into account it becomes apparent that what we are really doing is seeking for the boat itself just its value. We are seeking for the crew less than the bail and less than the maximum amount of the fines as a separate matter, and we are seeking the additional security for good behaviour of the boat which I again will come to. I would submit that bearing these matters in mind our figure is very generous indeed. It is less than a figure which is reasonable or *suffisante*. It would not have been unreasonable for Australia, like an intending mortgagee, to say, "I want more than 100 per cent to secure my position". We have not said that.

The third and last major section of my submissions concerns the VMS. VMS stands for vessel monitoring system. It is a device, familiar to aficionados of James Bond movies, which is fixed to the vessel and reports back to the Australian authorities the geographical situation of the vessel. It also has the ability to report back if it is disabled, interfered with or

detached from the vessel. If there is any attempt to stop it operating and reporting where the vessel is, we can find out.

If there was no sanction, obviously such a device could easily be disabled or removed. What we seek is a sum of money which is like a good behaviour bond, a guarantee that the boat will not enter Australian territorial waters other than with permission or for the purpose of innocent passage prior to the conclusion of the forfeiture proceedings. If it does not offend, the AU$ 1 million would be refunded or the bond cancelled, even if the boat does not return. We have set out the technical aspects of the system at pages 94 and 95, and the issues discussed at page 98 of our Statement in Reply.

There are two further aspects of this claim with which I need to deal. The first is the legal basis for it and the second is the justification for the sum of AU$ 1 million. I will deal with both of those.

First, as to the legal basis, one of the purposes of forfeiture under domestic law is to prevent the instruments of crime being reused for further crimes. The old common law derived from the doctrine of deodand, under which objects which caused death or serious injury were forfeited to the victim or his family. That doctrine was abolished in England when people were being injured by railway trains and the victims would claim the trains.

It survived in the civil law and common law jurisdictions in relation to vessels and other vehicles, including taxis, used in customs offences and fishing offences. The purpose of preventing the criminal using the same vehicle to commit the same offence has been referred to in both American and Australian courts. I have given you the reference to *Calero-Toledo v Pearson Yacht Leasing Company* [1974] *416 US 663*, and page 687 is the passage. It was a case where a privately leased yacht had been used without the owner's knowledge by the lessee to smuggle drugs and its forfeiture was upheld against the innocent owner. It was said in the Supreme Court decision that one purpose is to prevent that vessel being used again for criminal conduct. The same thing has been said by the High Court of Australia in *Re Director of Public Prosecutions; ex parte Lawler* [1993-4] *179 CLR* at 279, an illegal fishing case.

That is the first analogy. Part of the purpose of forfeiture which, under Australian law, may take place in this case is to stop the boat doing it again. We know, from what has been said earlier today, about how boats are used again and again and in one case a boat was used after it was released by this Tribunal.

Another analogy is bail in criminal proceedings. One of the matters a domestic court takes into account when deciding whether to grant bail to a person charged with an offence is the likelihood of the person committing further offences of the same kind whilst on bail. One of the first questions a judge or magistrate asks in a bail application is: how can we ensure that this person will not go out and commit other offences while on bail?

If the boat is to be released on something analogous to bail, we should be entitled to be assured that it will not be used to commit further criminal offences. The likelihood of the vessel being used in this way follows from the matters we have already referred to.

The statute is silent in relation to what the elements are of a reasonable bond. We would submit that one of the elements which is more than reasonable is something to guarantee that it is not used for further offences, at least during the period before it is forfeited.

The modesty of the claim of AU$ 1 million is demonstrated by calculations which appear at page 75 of our Statement in Response. The weekly catch reports of this vessel showed very substantial weekly catches. You were shown one of those. In nine separate weeks 100 tonnes of Patagonian toothfish was taken. The boat's capacity is 275.6 tonnes. At AU$ 14.5 per kilo, this comes to just under AU$ 4 million. So AU$ 4 million is what the boat can hold; that is its capacity. We know that it was able to get something slightly less than half

of that in nine weeks. It can of course stay at sea for much longer than nine weeks. We know about the capacity to refuel it and the owners sending tankers down to refuel their fleet.

If it can earn AU$ 4 million in a season, AU$ 1 million is a very modest security to discourage the owners from offending further. We could easily have justified AU$ 4 million; we have not sought that. We have been, if I can use the word appearing in the document, reasonable.

Of course, if the Tribunal accepts our arguments, the result is that we have not demanded an unreasonable bond. Therefore, either the proceedings should be dismissed or possibly the Tribunal could make an order confirming that the level and conditions of the bond set by Australia and the level of bail set for the release of the crewmen are reasonable.

There are a number of minor matters I need to deal with. There is a minor matter concerning the reasonableness of our conduct. Mr David has criticized us for the delay in relation to the owner's requests for a reasonable bond. The correspondence does not bear out that criticism. If one looks at the Memorial of the Russian Federation, we see that the first letter about the bond is a letter from Wilson & Harle dated 19 June at page 181. The apprehension took place on 7 February. The first time they write to us about the bond – and you will see the letter at page 181 – saying the vessel has been seized, we write without prejudice to the owner's contention. Incidentally, it begins "We act for Olbers Co Limited". So the letter is written on behalf of the owners, not the Russian Federation. It seeks details about the bond. We replied two days later and gave a more detailed reply a week later in the next few pages (183 and 184). In the letter, we sought details about the owner, which not surprisingly still have not been provided.

There is further correspondence in July and on 26 July we offered to release, on payment of the sum presently sought, AU$ 3.332 million, and again seeking information about the owners.

They reply on 26 August (page 193) offering AU$ 500,000, a pitiful offer, we would submit. That matter then had to be considered, investigations had to be conducted and so on. At that stage, the parties were at issue and they remain at issue. I would submit there has never been any unreasonable delay on our part.

So far as the trial is concerned, there have of course been various interlocutory steps and appeals concerning bail. The trials in any jurisdiction take some time to come on. The fact that the crew are being held in Australia is a factor which would enable them, if they wished, to seek expedition of the trial, to seek that the trial jump other cases in the queue and come on more quickly. That would, very likely, be granted but the crew has not sought that. At the moment, the matter is in the lists and it may be up to a year before it comes on, but it lies in their hands to speed up the process if they wish to do so.

In relation to costs, may I just say that the usual practice of this Tribunal has always been that each party bears its own costs. We do not seek costs if we are successful. We take the view that the usual practice is appropriate, except perhaps in the most extreme case.

What is put against us is: if you have demanded an unreasonable bond, you have acted unreasonably and therefore should pay the costs. But that is not the type of consideration the Tribunal has taken into account, particularly bearing in mind the subjectivity of the calculations of the amounts. I have given you reasons why, in any event, we have acted quite reasonably. We have certainly acted in good faith and, in my submission, there should be no serious suggestion contemplated by the Tribunal of making an order against us for costs.

There were four questions addressed to us by the Tribunal. I have time to deal with them this morning, Mr President, and so I will do so. We have filed our responses.

The first question was:

> "Could the Respondent provide the Tribunal with some recent examples of fines and penalties against vessels and/or members of their crew for fishing offences comparable to the offences for which the *Volga* and its crew are currently charged?"

We have provided a schedule setting out four other recent matters, and giving some of the details, but only a small amount of them. The amounts you will see there are: in the first case, the fine of AU$ 100,000; in the second case, a fine of AU$ 100,000 that was reduced to AU$ 24,000; a third of AU$ 136,000; and a fourth where the master was fined AU$ 50,000 and the two crew members AU$ 25,000. In all of them there were pleas of guilty. In this case the pleas are not guilty.

In all systems of law of which I am aware one gets some sort of credit on sentence by pleading guilty. The degree of credit one gets of course varies from system to system but these are penalties on people who pleaded guilty and saved the Government the cost and inconvenience of a trial.

In considering those figures, we ask the Tribunal to bear in mind a number of matters. The first is that sentences in criminal cases depend very much on their individual facts. The mere listing of the amounts of fines in the few other cases we found in a short time is not very helpful in a case of the severity of this one. Our Crimes Act emphasizes that a court "must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence". That, of course, takes into account both factors in mitigation and factors in aggravation.

Justice Wheeler of the Supreme Court of Western Australia in the prosecution of the fishing master said in the bail application that "a fine of the order of $100,000 or perhaps somewhat more, would be a starting point". So she was talking about the possibility of something much higher.

The opinion of a senior member of the Western Australian judiciary, independent of either party, we submit, should be preferred over that contained in the affidavit of the Australian barrister who, of course, is engaged and who represents the accused.

The third matter is that the fact that a crime is becoming more prevalent is a reason for imposing a heavier sentence. In many systems of law, one starts when a crime starts being committed, when there is a new offence, by imposing comparatively small penalties. If they do not work and the crime is becoming more prevalent, then the penalties may increase. That is the case here.

The prosecution will argue in this case to the domestic court that the facts justify a much higher sentence than the earlier cases, and that the increasing prevalence of the offence, among other things, justifies that course. It will also argue that some of the earlier fines were too low. This Tribunal should not pre-empt the ability of the prosecution to put those arguments or the ability of the domestic courts to accept them. One pre-empts it if one permits a bond which is lower than the maximum. The maximum enables the court to exercise its discretion properly and the prosecution to put the arguments it wishes to put.

As I have said, all the fines in the table relate to pleas of guilty.

The second question we were asked was:

> "Could the points made in paragraphs 54 and 55 of the Statement in Response be further developed?"

That was the material concerning the VMS, the vessel monitoring system. I have dealt with that and I have explained to the Tribunal why it should impose in effect a guarantee of good behaviour on the vessel as one of the conditions of the bond.

It is said of course by the Russian Federation that this usurps the role of the flag State, but if the flag State is not doing anything about it, someone has to, and in this case it is the coastal State which has the responsibility for protection of these scarce resources, which are being plundered by these criminals.

The third matter we were asked is:

> "Why does the Respondent request information relating to the owner's identity, governance, insurance and finance?"

Australia submits that the obligation promptly to release a vessel upon the payment of a reasonable bond must not undermine other measures taken in accordance with the 1982 Convention and subsidiary agreements.

The common theme of that Convention is that States have a responsibility in relation to the activities of their nationals – not only the flag States of the vessels.

Article 117 provides that:

> "All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas."

We need to know who these nationals are and what countries they come from so that we can make representations to those countries through diplomatic channels to deal with the people and stop them engaging in these activities. We need to know who they are. We have some ideas, but we do not know.

It is not an unreasonable request when the Russian Federation comes here seeking something which will benefit the owners, owners who have given the Russian Federation itself a false address, that they should try and give us those details, and we have asked for that as part of the bond.

Article 118 requires States to cooperate with each other in the conservation and management of living resources in the high seas. States are obliged, for this purpose, to enter into negotiations with a view to taking measures necessary to conserve the living resources of the high seas.

In relation to the exclusive economic zone, article 62, paragraph 4, establishes an obligation on nationals of other States to comply with the conservation measures and other terms and conditions.

These requirements are reflected in agreements subsidiary to the 1982 Convention, such as the United Nations Food and Agriculture Organization's International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, paragraph 18 of which imposes on all States an obligation to cooperate to identify those nationals who are the operators or beneficial owners of the vessels involved in IUU fishing. Paragraph 24 obliges States to ensure that sanctions for IUU fishing by vessels and nationals under its jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing.

Paragraphs 34, 35 and 42 of the IPOA oblige a flag State to exercise adequate control over fishing vessels entitled to fly its flag to ensure that they do not engage in IUU fishing and maintain adequate records, and so on. The flag State is required to keep a record of the names and addresses of those persons in whose name the vessel is registered, those who are responsible for managing the operations and the natural or legal persons who have beneficial ownership interest in the vessel.

In addition, paragraph 74 of the IPOA states:

STATEMENT OF MR BENNETT – 13 December 2002, a.m.

> "States should take measures to ensure that their fishers are aware of the detrimental effects of doing business with importers, transshippers, buyers, consumers, equipment suppliers, bankers, insurers and other service suppliers identified as doing business with vessels engaged in IUU fishing."

Of course we want to know who their financial backers and insurers are. We want to be able to deal with everyone through appropriate diplomatic pressure. That is exactly what these conventions are directed to ensuring. It is not unreasonable that it be a condition of the bond that these matters be disclosed to us by people who so far have hidden behind a name and a false address. There are similar provisions in the FAO Code of Conduct for Responsible Fisheries.

Australia's ability to prosecute the land-based managers and beneficial owners of IUU fishing vessels is limited because they have to be in Australia to be served with a summons and formally charged. As a result, prosecution action has been, and continues to be, directed at the persons who we find on the vessels. The larger corporate interests controlling the activities of these vessels are essentially beyond the reach of Australian law.

Consequently, we have a real and strong interest in pursuing diplomatic and other action in relation to those States whose nationals can be identified as either the controlling or downstream beneficial interests associated with IUU fishing. In the light of measures taken by them to obscure their identities, such as the false address given to the Russian Federation, it is reasonable that Australia obtain the information about the controlling interests that would enable the action to be pursued.

Seeking that information is consistent with our obligation under article 73, paragraph 2. We are merely seeking to bring a greater degree of transparency and accountability to the issue, to ensure that the purpose of the bond is met and that action can be taken in accordance with the 1982 Convention and subsidiary agreements and codes.

The President:
Dr Bennett, it is a bit too fast for the interpreters.

Mr Bennett:
I am sorry, Mr President.

There is one other advantage in our approach. CCAMLR has established documentation for the monitoring of the catching, landing and marketing of toothfish. Consistent with the IPOA, the information sought by Australia can be shared, where appropriate, with those States willing to exercise third party State discretion in relation to the landing and trade in toothfish. So the information sought by us may help us and may assist third party States in deciding whether or not toothfish products from certain sources should be permitted into their marketing chain. Putting that more simply, if we get this information, we can help other States to find out where toothfish comes from via these criminals and stop it at the stage of marketing. That is another way in which this trade can be stamped out. This can provide a potentially powerful commercial disincentive against IUU fishing. The exercise of such a discretion by third party States is a well-recognized entitlement in the IPOA and in the United Nations Fish Stocks Agreement.

You may notice that in a number of my submissions, including the last one, I have talked a lot about the criminal law and have used the word "criminal" many times. It is important for the Tribunal to realize that this is not a case about commercial activity. This is a case about an organized, international gang of criminals, and the Tribunal must deal with it

on that basis. It is a criminal case, not a commercial case. That is the most important feature of what has occurred here.

Finally, the fourth question that I was asked was: what is the status of current proceedings before Australian courts with respect to the crew members and the vessel? I will first deal with bail for crew members. I have already taken you through most of it. They have been bailed in Australia on a deposit of AU$ 75,000 each, plus a further charge of AU$ 20,000 in relation to one of them. That has been paid.

They also had to surrender their passports and seaman's papers and are not allowed to leave the Perth metropolitan area. As a result of the further application by them and the appeal, there is now a further condition under which, if a deposit of AU$ 275,000 is made in respect of each crew member, they would be allowed to leave Australia.

An appeal against that decision by the crew members will be heard on 16 December this year. The proceedings in Perth are therefore advancing at the same time as these proceedings.

I have dealt with the further charge against the fishing master and the fact that the bail of AU$ 20,000 was provided.

The crew members have each entered pleas of not guilty in relation to the charges laid against them. The next date on which the matter will come before the court for mention is 5 February. The District Court of Western Australia has indicated that if the defendants were to successfully apply for an expedited hearing, trial dates could be set within one or two months of that. So far, they have not made such an application. It is, of course, a matter for the defence to decide whether they want an expedited trial. If they make that application, the trial could take place much earlier than the 12 months referred to in the submissions of the Russian Federation.

So far as the forfeiture proceedings are concerned, on 19 December the Federal Court will consider an application made by the vessel owner for a stay of the proceedings commenced by it in relation to forfeiture and catch pending the prosecution. That means that the owners are saying that they want the forfeiture proceedings to be delayed until after the criminal proceedings against the crew. That application by the owners has not yet been heard, but it is an application to delay the hearing of the forfeiture proceedings.

Mr President, I trust that I have answered the four questions addressed to us by the Tribunal. Of course, if there are any others, we shall endeavour to answer them as soon as we possibly can.

I conclude by saying that this is a landmark case. This case provides an opportunity for the Tribunal to strike a blow for one of its primary purposes. Considerations of balance of the kind talked about in the earlier cases do not apply when one is dealing with the sort of considerations with which we are dealing now. This is a very different case from the earlier cases that the Tribunal has considered.

Thank you, Mr President.

The President:

Thank you very much, Dr Bennett. We shall resume these oral proceedings at 1.30.

Adjournment until 1.30 p.m.

PUBLIC SITTING HELD ON 13 DECEMBER 2002, 1.30 P.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, BALLAH, COT; *Judge* ad hoc SHEARER; *Registrar* GAUTIER.

For the Russian Federation: [See sitting of 12 December 2002, 10.00 a.m.]

For Australia: [See sitting of 12 December 2002, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 13 DÉCEMBRE 2002, 13 H 30

Tribunal

Présents : M. NELSON, *Président*; M. VUKAS, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, BALLAH, COT, *juges*; M. SHEARER, *juge* ad hoc; M. GAUTIER, *Greffier*.

Pour la Fédération de Russie : [Voir l'audience du 12 décembre 2002, 10 h 00]

Pour l'Australie : [Voir l'audience du 12 décembre 2002, 10 h 00]

The President:
Now we will resume our oral proceedings and I give the floor to the Agent of the Applicant. Mr Dzubenko, you have the floor.

Reply of the Russian Federation

STATEMENT OF MR DZUBENKO
AGENT OF THE RUSSIAN FEDERATION
[PV.02/04, E, p. 5–6]

Mr Dzubenko:
Mr President, at this stage I would like to restrict myself to just a few brief remarks.

Firstly, on the compliance with the rules and recommendations discussed under the auspices of CCAMLR. A question which was raised several times by the Respondent. As was already mentioned Russia is actively participating in this organization and taking the necessary measures in accordance with CCAMLR recommendations, including those that concern the Patagonian toothfish.

The measures taken by Russia in this respect were, for instance, reported to the Executive Secretary of CCAMLR, Dr Miller, in a letter by the official representative of Russia in the CCAMLR, D. Kholod, dated 14 October 2002. The contents of this letter should be known by now to the Australian side. We did not bring the documents regarding this to the attention of the Tribunal for the single reason of utter irrelevance, in our view, of the activities going on rather constructively and effectively under the auspices of CCAMLR to the present case.

Secondly, time and time again we have heard allegations from the Respondent's side of the lack of a genuine link between Russia and the *Volga*. Of course, my colleagues and counsel of our delegation will probably put it in more detail, but at this stage I would like to say we could present before the Tribunal the proof that the *Volga* did pass through the necessary inspection by the Russian State Register of Ships before being included in the official list of ships entitled to fly the Russian flag. We think it would be unnecessary since, by accepting this case for consideration and by consenting to this procedure, the Tribunal and the Respondent accordingly have, in our view, already recognized such a genuine link between Russia and the ship. The case can be brought, as is very well known, before this Tribunal only by the real flag State of the ship.

In conclusion, I would like to emphasize that, despite all allegations, the Russian Federation takes its responsibilities as a flag State very seriously, a fact that was recently underlined by our new legislation on shipping. There is a new Shipping Code of the Russian Federation, and I can assure you that our obligations as a flag State and the provision and assurance of the genuine link between the ships flying the Russian flag and the Russian authorities is one of the main principles of our newest legislation in this respect.

Before concluding, Mr President, I would like to just briefly mention that what was said about the legitimacy of the ship flying the Russian flag could also be said about the owner of the ship. I can inform you at this stage, despite what is alleged here, that the owner of the ship does exist. It is a company properly registered in accordance with the Russian legislation and has both a legal address in Moscow which, if you look at Russian legislation closely, does not necessarily have to be in a large or separate building. The legal address can be just the address of living quarters somewhere.

This company does have an active office established in Moscow and the Australian side can trace the address of this office and check it out. The address is at page 200 of our Application.

Mr President, with your permission I would like to give the floor to Counsel for the Russian side, Mr David and Mr Tetley.

STATEMENT OF MR DZUBENKO – 13 December 2002, p.m.

The President:
Thank you very much, Mr Dzubenko. I now give the floor to Mr Tetley.

"VOLGA"

STATEMENT OF MR TETLEY
COUNSEL OF THE RUSSIAN FEDERATION
[PV.02/04, E, p. 6–10]

Mr Tetley:
Mr President, Members of the Tribunal. I will be making a reply on three issues. I will make a short response to Australia's contention that there was some logical difficulty with Russia's calculation of what the current security requirements of Australia are. Secondly, I will deal with the issue raised by Australia with respect to Russia's declaration and the problems of admissibility it is contended that causes to Russia in referring to the circumstances of the vessel's seizure on this Application. Finally, I will briefly reply on the hot pursuit issues.

Taking first the amount of security that Australia is asking for the release of the crew and the vessel, there is no logical problem, as suggested by Australia, when Russia says that the current security required exceeds the value of the maximum possible exposure of the owner and the crew in the criminal proceedings.

It is very simple to show. You ask a question, how much does the owner have to pay to Australia on the current arrangements today if it wishes to see its crew and its vessel released? The answer is AU$ 3,932,500, that is AU$ 600,000 of bail and AU$ 3,332,500 AFMA security. As was said in the original presentation, Australia holds just in excess of AU$ 2,175,000 in respect of catch sale proceeds and bail part paid, the AU$ 245,000. If you add those two figures together it is in excess of AU$ 6 million.

The total maximum exposure to fines and confiscation is just under AU$ 5 million. The logical problem is with Australia. Australia say that they have accounted for AU$ 412,500 in the AFMA security, if I can call it that. The court has also set bail at AU$ 845,000. If you want to take Australia's approach of separating out what we do with the crew and what we do with the vessel, that leaves the crew, if you like, accounting for well over AU$ 1.1 million which is the maximum fines that they can incur. The analysis is sophistry. The facts are clear. The owner would need to find AU$ 3,932,500 today or security in that amount for the release of its crew and vessel and leave over AU$ 2 million of its assets in the jurisdiction.

I turn to the second point, Russia's declaration. While accepting jurisdiction on this Application, Australia contends that, by virtue of Russia's declaration made upon signature of the Convention, Russia has in respect of its complaint – and that is the complaint that its vessel has been seized in breach of the freedom of rights of navigation – that it has excluded recourse to the compulsory dispute resolution procedures contained in section 2 of Part XV of the Convention. For that reason Australia contends the Tribunal should not consider the circumstances of the seizure on this Application.

The Russian Federation has made a declaration that it does not accept the procedures provided for in section 2 Part XV of the Convention in respect of disputes concerning, amongst other things, military activities and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction.

Members of the Tribunal, you will be very familiar with the relevant applicable articles to do with dispute resolution and relevant to this issue. They are article 286, the general article on jurisdictional issues with respect to the Tribunal and arbitral panels, article 297 and article 298.

Article 297 sets out limitations and exceptions to the binding dispute resolution procedures. It is divided into three sub-paragraphs. Article 298 sets out the declaration mechanism by which States, Russia in this case, may, in certain circumstances, opt out of binding dispute resolution.

STATEMENT OF MR TETLEY – 13 December 2002, p.m.

Australia's position appears to be that, in respect of the dispute between Russia and Australia concerning the seizure of the *Volga,* Russia has excluded recourse to the binding settlement provisions of section 2 of Part XV of UNCLOS because: either the dispute that we are dealing with here concerns military activities; or alternatively that the dispute concerns law enforcement activities in regard to the exercise of Australia's sovereign rights or jurisdiction.

Turning briefly to military activities, there is no definition of "military activities" in UNCLOS. However, the meaning can be determined from the context in which it is used and from consideration of the *travaux préparatoires*.

In terms of article 298, paragraph 1(b), law enforcement activities are not military activities. Under article 298, paragraph 1(b), certain matters of law enforcement may be excluded from the binding settlement procedures under UNCLOS. This is in addition to military activities. The juxtaposition of the exclusion of military activities and certain law enforcement activities makes it clear that they are different matters. A State may exclude one or the other or both.

I add, for the sake of completeness, that an activity is not a military activity simply because a military vessel or aircraft is involved. Equally, the absence of a military vessel does not mean that the activity is not a military activity. This is clear from the proviso to article 298, paragraph 1(b), relating to military activities.

Article 298, paragraph 1(b), requires the Tribunal to determine whether an activity is a military activity or not, based on the purpose and intent of the activity, not the type of vessel that is involved.

If further support is necessary for this proposition, one need only consider the relevant *travaux préparatoires*. I would refer the Tribunal to two publications: the *United Nations Convention on the Law of the Sea, 1982: a commentary*, by Mr Nordquist, paragraphs 298.36 to 298.38, and also *A Handbook on the new law of the sea* by René Jean Dupuy and Daniel Vignes, volume 2, pages 1247 to 1249.

In this case, there is no basis to say that Australia's seizure of the vessel was a military activity. Australia was involved in law enforcement activities directed at its fisheries laws. I therefore turn to that and ask the question: has this particular law enforcement activity been excluded; is it covered; has Russia opted out of the dispute resolution procedures through what has happened here?

Under article 298, paragraph 1(b), the binding resolution procedures can be excluded by declaration for certain law enforcement activities mentioned in article 297, paragraphs 2 and 3. The exclusion does not apply to all law enforcement activities. Unless specifically excluded, the binding resolution procedures apply (article 286).

Article 297, paragraph 2, can have no application to the facts of this matter and none of the exclusions under article 297, paragraph 3, apply to this case because Russia will not challenge Australia's management of its fisheries rights or the way, for example, that it exercises its discretionary powers for determining allowable catch within its economic zone.

Russia's complaint will be that the rights of navigation of its vessel on the high seas have been violated because Australia cannot, as it alleges, sustain a claim that it exercised a proper right of hot pursuit. Such a dispute is referable to the binding resolution procedures under UNCLOS as of right (article 297, paragraph 1(a)). This right is unaffected by the declaration of the Russian Federation. Indeed, it is simply not possible for a State in the area of law enforcement to exclude the binding resolution procedures applicable to an allegation that the right of hot pursuit has not been validly exercised. I refer in that regard to the passages from the *Commentary* of Mr Nordquist, previously referred to, and the *Handbook* of René Jean Dupuy and Daniel Vignes.

That a State cannot exclude the compulsory resolution procedures applicable to an alleged breach of the right of hot pursuit is unsurprising. The right of hot pursuit is one of the rare exceptions to the general and universally recognized rule that the high seas are freely navigable by vessels of all States (article 87). If a State could opt out of compulsory dispute resolution procedures applicable to a dispute over the right of hot pursuit because, in that State's view, its act of seizing a vessel on the high seas was connected to its law enforcement activities relating to fisheries laws, the high seas would become a lawless place, in my submission.

Where a fundamental right of UNCLOS is at issue, the Tribunal or arbitral tribunal seized of the matter should be slow in finding that it has no jurisdiction. It is submitted, in any event, that Australia's arguments on this jurisdictional aspect are untenable both as a matter of construction of the applicable articles and on a proper approach to the Convention as a whole. Furthermore, even if Australia was right, that does not prevent this Tribunal nevertheless taking notice of the circumstances of the seizure for the purpose of setting a reasonable bond. Its jurisdiction on this Application is established.

I turn briefly to hot pursuit to reply to the points raised by Australia. Australia's contention, as I understand it on this issue, is that because the warship allegedly used all practicable means available and satisfied itself at the time, albeit wrongly, that the *Volga* was inside the Australian EEZ, and because the vessel was, in the warship's view, fleeing the jurisdiction, the requirements under article 111 that a stop order must be given and that the pursuit must commence inside the EEZ simply do not apply.

It is submitted that the construction of article 111 put forward by Australia is fundamentally flawed. Article 111, paragraph 1, is in clear mandatory terms. A pursuit cannot be lawful if it is commenced outside the EEZ. At best, Australia may be able to rely on article 111, paragraph 4, and establish that it took all practicable measures available to it at the time to establish the *Volga*'s position so that, and provided it can establish all the other conditions of a hot pursuit, it may have a potential defence to part of a damages claim under article 111, paragraph 8, because the pursuit at the time was justifiable. However, what article 111, paragraph 4, does not do, in my respectful submission, is create a legal fiction that a pursuit commenced outside the zone was in fact commenced inside the zone. Australia should have released the ship, the cargo and the crew as soon as it realized that the pursuit was not commenced inside the zone.

With respect to the other relevant conditions of hot pursuit, no construction, in my submission, of article 111, paragraph 4, can excuse or justify Australia's failure to comply with the clear mandatory requirement that a pursuit can only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

The President:
I think, Mr Tetley, you are going abit fast for the interpreters.

Mr Tetley:
Thank you, Sir, I will slow down.

In the final analysis, the Russian Federation is still in the dark as to when Australia says the pursuit commenced. Australia says that it can rely on article 111, paragraph 4, but its purported challenge to board was given when the helicopter was not in visual contact with the *Volga* and before the warship's navigator had completed his efforts to pinpoint the ship. I refer to the logs and statements in the Russian documents, pages 253 and 232. After the challenge, the warship ordered the helicopter not to pursue. This appears in the logs in the Russian documents, pages 249 and 253.

STATEMENT OF MR TETLEY – 13 December 2002, p.m.

So when does Australia say that the pursuit began? Australia has now given three explanations for when the pursuit began. The first explanation was: when the helicopter issued its radio challenge at a time when, in the Australian authorities' mistaken view, the *Volga* was in the Australian EEZ. That is the Attorney General's letter, in the Russian documents at page 73.

The second explanation for when the pursuit commenced appears in the domestic proceedings in the answers to particulars, where Australia says that the pursuit commenced when the warship turned to investigate the *Volga* prior to launching the helicopter.

What does Australia say now? The third explanation is that the pursuit commenced at some unspecified time after the warship had allegedly exhausted all practicable means available to it to establish the *Volga*'s position but at a time when the *Volga* was undisputedly on the high seas. That is in Australia's oral submissions this morning or yesterday.

As outlined in Russia's oral presentation, the Russian Federation does not seek a finding or declaration on the issue of hot pursuit. It asks, however, that Russia's concerns on the pursuit as a flag State be taken into account. If the contentions of Russia and the owner are found to be correct on this issue, that may be a complete defence to Australia's claims to the vessel and catch. Where Australia is apparently urging the Tribunal to assume guilt on the part of the owner and the crew, the circumstances of the seizure and their potential legal effect on proceedings should be a relevant consideration in assessing the amount of a reasonable bond.

Mr President, that is the end of my submission. Mr David, with your permission.

The President:
Thank you, Mr Tetley. Now I give the floor to Mr David.

"VOLGA"

STATEMENT OF MR DAVID
COUNSEL OF THE RUSSIAN FEDERATION
[PV.02/04, E, p. 10–13]

Mr David:
Thank you, Mr President, Members of the Tribunal, I am aware of my time limits. I say at the outset that we have heard a good deal of what I would describe as rhetoric from Australia concerning its policy considerations, held in good faith, and its general allegations, if I can put it that way, of criminal offending against not only those who it charges but those who it would perhaps like to charge.

When we made our original presentation, which, with well-intentioned flattery, has been described as advocacy, it was, in our submission, based on the law of this Tribunal and the neutral facts and approach which I submit is so important in a jurisdiction of this nature, where one is considering arrangements to bring about a prompt release in a quick, summary jurisdiction.

Therefore, my fundamental point is that Australia's emotions over issues have led it to seek to impose terms and conditions that have nothing to do with a reasonable bond, as this Tribunal has understood it to be and as those in the maritime community would understand it to be. We say that the approach urged on this Tribunal by Australia is contrary to the proper approach in prompt release proceedings, involves a disregard of the Convention, the earlier cases heard by the Tribunal and the provisions of article 73.

Australia urges on the Tribunal various policy considerations. As I recall it, Professor Crawford's address began with a range of those policy considerations. Australia is prepared to deny the balance represented in this jurisdiction between the interests of sovereign States, the flag State and the coastal State, which balance is underlined in all the decisions of the Tribunal on the prompt release jurisdiction. Its change of approach, because that is what it is, appears to be based on a desire to impose a bond or – I should put it this way – a range of conditions which, it seems, are primarily directed at the owner of the vessel, who is not charged, which it says will deter and punish in advance of criminal proceedings, in advance of a decision on the merits of a criminal process.

Australia makes those wide-ranging allegations in the context of a proceeding in which those who may face those allegations are not here to defend themselves. I shall not make the obvious point about the undermining of due process entailed by that argument, but the approach is wrongly premised to this bond-setting activity. It assumes criminal allegations and a general allegation of criminal conspiracy, which we heard repeated in a way that one might hear repeated in a magistrates' court but would not expect to hear repeated here. It assumes that those allegations will be made out. So Australia's approach to the bond is based on that assumption. It is also based on an assumption that the owner or those who control the vessel will inevitably reoffend, because that is the only basis on which Australia seeks to say, "You should be forced to put up AU$ 1 million for a VMS recorder before you get back your vessel". It is also based on a general statement that the flag State is ineffective and will not do anything.

We submit that that approach by the coastal State is not, in truth, about the obligation under article 73, paragraph 2, to release vessels promptly on a reasonable bond being provided, but about its policy goals, I accept held *bona fide*, of ensuring that conditions are imposed on those against whom Australia makes allegations or against whom it would like to make allegations, that those conditions are imposed to an extent that those people will not or cannot get back their property on any reasonable terms.

In effect, Australia would like to rewrite the law of this Tribunal and the provisions of article 73, paragraph 2. That may sound like a surprising submission. However, it is in fact

borne out. The policy drivers behind us are borne out when you consider the CCAMLR report that Australia has produced in document 3 of its documents. I refer to paragraphs 21 and 22. Australia submitted that it would like to modify the operation of article 73, paragraph 2. It wants to do that because it would like to impose bonds. It states that coastal States were faced with the dilemma over the need to strike a balance between setting a bond high enough to deter illegal fishers – note the assumption – from retrieving their vessels and resuming fishing over the period of legal proceedings, but also avoiding a challenge from the flag State about the level of the bond. Australia wants to rewrite the decisions of this Tribunal and the clear obligation contained in article 73, paragraph 2, because of its perceived view of this illegal fishing.

The reality of the situation for this Application is that there is an allegation of illegal fishing, that there is a concern about it, but that there is then a whole host of truly neutral factors which any tribunal assessing the level of a bond ought to take into account without becoming involved in rubber-stamping, as it seems to us, a speech for the prosecution made by Australia. We say that those policy issues drive an unreasonable approach to bonding, and that would produce a bond that is unreasonable and does not bear any true relationship to the outcome of the proceedings. Take the example of the VMS recorder. At the end of the proceeding, no sentence could impose that AU$ 1 million condition.

In support of the contention that, contrary to the Tribunal's decisions, there should be full security, Australia urges the Tribunal to take into account the French language version. On that, I briefly say that that argument was made in the *"Monte Confurco" Case* and that you, Mr President, concluded in a Separate Opinion that it added nothing more to the meaning than the word "reasonable".

An important consequence of the approach put forward by Australia, if it were to be adopted, is that prompt release proceedings would inevitably come to resemble policy debates between States, which I submit is never the intention, or criminal prosecutions against individuals, rather than an efficient, quick and, if I may borrow the words of Judge Laing, relatively routine process for bringing about the release of a vessel.

The proper forum for some of the matters raised by Australia is CCAMLR, in which the Russian Federation actively participates, or the domestic forum in its criminal or civil courts. In my submission, it is fortunate that the approach now espoused by Australia has not found favour in previous prompt release cases. As I have said, that is a good thing where you have a jurisdiction that is summary in its nature, which is obliged to examine, without prejudice to domestic proceedings, and I say without prejudging them, whether in a practicable, workable sense a bond is reasonable in striking the balance which permeates all the decisions of this Tribunal and which, surprisingly, I heard criticized.

Australia's overall approach drives it to introduce a range of considerations that it says are relevant, but which are not. As I have submitted, the bond has to be related to the sums that the shipowner or crew may have to pay for potential liabilities as a result of the proceedings. If you add in elements of cost or reasons such as the policing of your EEZ, deterrent measures such as the imposition of a AU$ 1 million VMS system, to give two examples, you add into the bond wholly irrelevant matters.

In addition, AFMA apparently seeks to impose the VMS system because it assumes that the flag State does nothing. There is no evidence of that. This completely leaves aside the argument on fundamental principle and is based on the assumption that the vessel will reoffend. There is no evidence of that. That is based on the *Camouco* or another vessel having reoffended. Australia assumes the worst and says that it applies here. In my submission, if you start from the wrong place with this kind of application and this kind of bonding, you arrive at completely the wrong result.

As to the proper approach, which we say we have outlined in our initial oral presentation, a submission was made about the irrelevance of the catch, and I have noted the dissent on that issue in earlier cases. In my submission, it is right to take into account everything that may or may not fall out of the outcome of the proceedings. In my submission, that makes common sense. I am, of course, supported by the decision of this Tribunal in the *"Monte Confurco" Case*, at paragraph 86.

In my submission, Australia is most anxious to invite the Tribunal to prejudge the outcome, while at the same time excluding any consideration in the proceedings and in an international forum which would be well qualified to consider the issue of the circumstances of the vessel's seizure. It suggests that the Tribunal should prejudge the domestic proceedings and leave out any consideration of the circumstances of the seizure. Mr Tetley has dealt with the issue. I simply say that it is contrary to common sense to ignore that and that there is no basis for the technical objections made by Australia.

What does all that come back to? I say that Australia's approach has three objections of principle. It involves, first, deterrent bonding as a punishment for unproven allegations; secondly, giving complete primacy to the coastal State's law reform policy agendas and complete dominance to the allegations of illegal fishing; and, thirdly, probably arising from the first two, adding as relevant considerations matters that have nothing to do with security for the possible outcome of the proceeding.

If we were sitting in a vacuum, I would say that those are compelling reasons why Australia's bond is unreasonable. Fortunately, in a jurisdiction such as this we are not in a vacuum. We have addressed the facts of earlier cases. Those cases represent an approach based on international legal principles in deciding what is, on a balanced approach, leaving aside the ultimate outcomes in a national court, a reasonable bond. If I can return to simple advocacy, I say that those cases should be applied to this situation, which, in spite of Australia's pleadings, is not a million miles away from other allegations of illegal toothfish fishing.

We submit that it is important in this jurisdiction to maintain a consistent approach that focuses primarily on matters directly relevant to the bond, as that concept is properly understood, security for the possible outcome in domestic proceedings, and arrives at a proportionate response based on established principle. If any other approach is adopted, there will be no consistency. Each State will come, as Australia has, with its preoccupations and this procedure will become the vehicle for an expression of an individual State's coastal policy and the imposition of punitive measures in advance of trial, completely contrary to the balance of interests under the Convention. Vessels will simply not be released because the coastal State does not want them to be.

Fortunately, the previous cases in which a similar background has been involved have seen this Tribunal adopt a practical, neutral, non-pejorative approach, balancing the two sets of national interests in a fair way against the background of unproved allegations. In accordance with international legal principles relevant to establishing a reasonable bond, the Tribunal has rightly sought to apply a proportionate approach between State interests. Russia says – I repeat what we said in our original oral presentation – that the Tribunal's approach in previous cases should be applied to this case. Mr President, those are my closing observations.

The President:
Thank you, Mr David. We shall resume these oral proceedings at 3:15 this afternoon, when we shall hear Australia's response. I remind the parties that their final submissions have to be submitted in writing. Thank you.

STATEMENT OF MR DAVID – 13 December 2002, p.m.

Adjournment until 3.15 p.m.

The President:
When we last met, Counsel for the Russian Federation had ended his intervention and we spoke of making final submissions. At this time he will do so in accordance with our Rules, Article 78, paragraph 2.

"VOLGA"

STATEMENT OF MR DZUBENKO
AGENT OF THE RUSSIAN FEDERATION
[PV.02/04, E, p. 13–14]

Mr Dzubenko:
Mr President, our final submission is that the Russian Federation asks that the Tribunal make the following orders and declarations:

(a) A declaration that the Tribunal has jurisdiction under Article 292 of the United Nations Convention for the Law of the Sea 1982 ("**UNCLOS**") to hear the application.

(b) A declaration that the application is admissible.

(c) A declaration that the Respondent has contravened article 73(2) of UNCLOS in that the conditions set by the Respondent for the release of the *Volga* and three of its officers are not permitted under article 73(2) or are not reasonable in terms of article 73(2).

(d) An order that the Respondent release the *Volga* and the officers and its crew if a bond or security is provided by the owner of the vessel in an amount not exceeding AU$ 500,000 or in such other amount as the Tribunal in all the circumstances considers reasonable.

(e) An order as to the form of the bond or security referred to in paragraph 1(d).

(f) An order that the Respondent pay the costs of the Applicant in connection with the application.

Thank you, Mr President.

The President:
Thank you very much, Mr Dzubenko. I now give the floor to the Respondent and first on my list is Mr Burmester.

STATEMENT OF MR BURMESTER – 13 December 2002, p.m.

Reply of Australia

STATEMENT OF MR BURMESTER
COUNSEL OF AUSTRALIA
[PV.04/02, E, p. 14–16]

Mr Burmester:
Mr President, it falls to me to commence the Australian reply. I will deal with two issues addressed by Mr Tetley this afternoon, that is the Russian declaration, and secondly the illegality of the hot pursuit.

As to the declaration, it is certainly not for this Tribunal in these proceedings to reach any determination on whether jurisdiction would exist in any substantive proceedings that might be brought in relation to which the Russian declaration would be called and invoked. However, in our submission, this Tribunal should not ignore the real possibility that there may be no jurisdiction in proceedings concerning the hot pursuit of the *Volga* if it considers that that circumstance has any bearing on the determination of a reasonable bond. Of course, Mr President, you will recall our principal submission is that the circumstances of arrest have no bearing whatsoever on the determination of the reasonableness of the bond.

Mr Tetley made reference to the military activities exception contained in the declaration. I note that Australia did not yesterday seek to place any reliance on the military activities exception and we do not ask this Tribunal to consider its possible application although, of course, Australia reserves its position in this regard in relation to any future substantive proceedings that might be brought.

As to the law enforcement activities exception, that refers to law enforcement activities in regard to exercise of sovereign rights or jurisdiction excluded under article 297, paragraph 3. Article 297, paragraph 3(a), refers to "any dispute relating to [...] sovereign rights with respect to the living resources in the exclusive economic zone or their exercise".

Mr President, we say that where hot pursuit issues arise that are directly connected with law enforcement activities designed to enforce coastal State fisheries laws, then the exception in article 298, paragraph 1(b), and hence the declaration made under that paragraph, extends to hot pursuit activities connected with fisheries enforcement activities.

It does not follow from this contention that every hot pursuit case will necessarily be excluded where there is a law enforcement activities exception, but it is our contention that a hot pursuit case that relates to enforcement of exclusive economic zone fisheries laws falls clearly within the exception in article 298. On that basis we maintain our submission that the Russian declaration would exclude any dispute concerning arrest in the circumstances of this case and that declaration ought to be taken into account if this Tribunal were to consider there was any relevance in the circumstances of the arrest.

That brings me to the second issue raised by Mr Tetley, the circumstances concerning the arrest. This, as I outlined yesterday in our submissions, involves the construction of article 111 of the Law of the Sea Convention. The arguments that we made yesterday were arguments of construction as to how that article ought properly to be interpreted and applied.

We do not seek to read the article so as to create a legal fiction as Mr Tetley suggested this afternoon. In our submission, what we invite the Tribunal to do if it considers it relevant, is to construe the article in accordance with its evident purpose. The Vienna Convention on Treaties makes clear that an interpretation that leads to a result which is manifestly absurd or unreasonable is one to be avoided, and an interpretation which focuses solely on the simple objective fact of where the ship happened to be can, we say, in circumstances such as arose in this particular case, be to give the section or the article a manifestly absurd and unreasonable operation.

The Russian interpretation would require that, despite the best efforts of the arresting ship at calculating the location of the offending vessel and where the coastal State authorities acted in complete good faith, the only thing that matters is where the vessel actually was at the time. In some way, if a vessel happens to be outside the zone by only a few metres, that this then has direct consequences that will prevent any conviction for the fisheries illegalities or any forfeiture of the vessel.

As we argued yesterday, to give paragraph 4 of article 111 no work to do would be a very strange construction of article 111 and yet that is, it seems, the position still contended for by the Russian Federation. We continue to reject that construction.

We also emphasized yesterday that the possible breach of article 111 has, in any event, no direct application in the domestic proceedings, either the criminal offence proceedings or the forfeiture proceedings, and so again, Mr President, it is not entirely clear that there is any real basis to consider the circumstances and the application of article 111 when determining the issues of reasonable bond. But, as I indicated yesterday, in case the Tribunal does consider it relevant, we have made the submissions about its interpretation and I need to say just a little bit more.

Mr Tetley again raised the issue of where the pursuit was, in fact, commenced for the purposes of article 111. In our submissions yesterday we focused on the first radio communication from the helicopter. The fact that at the time the vessel may not have been in visual sight does not, in our submission, matter. The requirements of article 111, paragraph 4, are that the visual or auditory signal has been given, and there is no evidence that at the time of the signal from the helicopter the vessel was not in auditory range.

There was also a suggestion that we were inconsistent as to when the pursuit commenced. The suggestion in the domestic forfeiture proceedings that pursuit commenced when the naval vessel first changed direction and directly headed for the *Volga* is made for the purposes of those domestic forfeiture proceedings and reflects the provisions of the Fisheries Management Act.

As I indicated yesterday, it is the contention of the Australian Government that in those forfeiture proceedings the circumstances of the arrest of the vessel do not affect the lawfulness of its seizure and the fact that it has already been successfully forfeited to the Australian Government, but that remains to be tested in Australian domestic proceedings.

The reference in the particulars and the pleadings in that domestic case which indicate the vessel was pursued from the time when the naval vessel changed direction and went towards the *Volga* is made for the purposes of those domestic proceedings and reflects the particular provisions of the domestic legislation, which do not in any way directly pick up or require the domestic tribunal to make determinations about whether article 111 was complied with. Compliance with article 111 and its intricacies is, if it is a matter for anyone, a matter for an international tribunal and not an Australian domestic court. Mr President, we submit there is no inconsistency in the allegations or assertions made by Australia as to when the pursuit commenced.

Mr President, all these intricacies about article 111 can, of course, be avoided if the Tribunal accepts the first Australian submission which is that article 111 and the circumstances of the arrest of the vessel have no bearing whatsoever on the reasonableness of the bond.

If the circumstances are relevant, then in our submission what has been presented to you in the Australian submissions shows that the issues concerning article 111 are complex and difficult and one simply cannot accept the bare assertion by the Russian Federation that there has been a breach of article 111 and that that should be taken into account. The situation is far more complex than that.

STATEMENT OF MR BURMESTER – 13 December 2002, p.m.

Mr President, that concludes my portion of the reply. I now invite you to call Professor Crawford.

The President:
Thank you very much, Mr Burmester. I now call on Professor Crawford.

"VOLGA"

STATEMENT OF MR CRAWFORD
COUNSEL OF AUSTRALIA
[PV.04/02, E, p. 16–20]

Mr Crawford:
Mr President, Members of the Tribunal, in listening to the arguments in this case, one is reminded that article 292, paragraph 2, refers to applications made by or on behalf of a State and you will be aware of the background to that rather unusual language.

Mr David has complained that the shipowner is not here. It is certainly true that his address is not here. Mr Bennett will show you that the second address is untrue, like the first one, but of course Mr David and Mr Tetley have been representing the shipowner, if not formally in these proceedings, certainly in earlier proceedings, and indeed the Tribunal has seen this phenomenon before. It was a major factor in the *M/V "SAIGA" Case*.

In any event, I want to address separately the points made by the Agent for Russia and the points made by the Counsel for Russia, the latter being objectively in relation to the shipowner.

Dealing with the comments made by the distinguished Agent for Russia, Australia welcomes his statement that the Russian Federation takes seriously its obligations under CCAMLR. The Russian Agent did not file their letter but you will find in the documents tabled by Australia at tab 3 of the authorities at pages 11 to 12 a statement of Russia's concerns in respect of enforcement issues under CCAMLR. I have to say that this marks a step forward in the assertion of effective jurisdiction by Russia over ships in relation to the CCAMLR region. It includes, for example, a commitment to increase the coverage of VMS on ships fishing in that region, and I will come back to that.

If Russia carries through with these commitments, then any suspicion of lack of effectiveness of Russia's control over its ships in this region will disappear. We can hope that fisheries relations between Russia and Australia in future will be significantly improved, as they have been significantly improved in the aftermath of the decision of this Tribunal between Australia and Japan. Nothing I say is intended in any sense to cast doubt upon the possibility of that improvement. We welcome the statements made by the Russian Agent in that respect.

Let me turn now to the comments made by Mr David, which were, if I may say so, of a somewhat different calibre. It is a bit difficult to rebut silence in a reply but you should notice his complete silence on two points: first of all, about whether the shipowners had any defence to these claims. If the shipowners had put forward an argument in defence to these claims, we do not ask to try the defence but you might be told what it is. They stand up here and present themselves as potential innocents; they seem to be innocent of any explanation of their situation. Secondly, there is complete silence about the issue of illegal, unreported and unregulated fishing of Patagonian toothfish. There was not a word in his statement on either point. It is true that Mr David said, in a form of self-assessment, that in a complete vacuum – and I emphasize the word "vacuum" – his submission would be persuasive, and that is what they want: a complete vacuum. They want a factual vacuum and a legal vacuum.

Let me deal first with the factual vacuum. At least in the *"Camouco" Case* there were arguments made that the *Camouco* may not have been particularly guilty, or guilty at all, of illegal fishing. There were at least some grounds for the majority to believe that not all the fish on board were illegally fished. There is not a word of explanation from Mr David and not a word of explanation from Mr Tetley that would rebut the enormous bulk of evidence that we have put forward.

I made the point in my first round, in response to a remark of Judge Jesus, that it is true that in certain circumstances a State may stand up and say, "We do not ask you to form

any view about the case; leave it to the national courts". That is not Australia's position. Australia gives you the evidence. Obviously the ultimate questions of guilt or innocence will be decided in the Australian court if the three charged persons appear to their bond, but in the meantime you are allowed to take it into account, we say, in any event but certainly in the event where Australia wishes you to do so, and we do. It is of great significance that there was not a word of defence, not a word, a complete factual vacuum.

Let me turn to the legal vacuum. To fish lawfully for Patagonian toothfish in the CCAMLR region under the CCAMLR Convention, which Russia, I am pleased to say, has pledged to observe, a ship has to have four things. First of all, it has to have an observer at its own cost. It is a cost of operation; there has to be an observer there. Secondly, it has to have VMS. Every ship fishing for Patagonian toothfish has to have VMS, at its own expense. Thirdly, it has to have proper catch documentation so that the train of what happens to the fish subsequently can be traced. Fourthly, it has to have a CCAMLR-approved licence to take the fish. Those are the four requirements.

What do Mr David's clients – I am sorry, Mr David's previous clients – need to have to fish in the CCAMLR region? They fish in a vacuum; they need none of these things. You can see how they resist VMS, even for a short period of time. Why do they resist it? What inference might one draw from their resistance? That they are going to go back there? The vacuum which Mr David seeks is a vacuum in which his previous clients vacuum up Patagonian toothfish to the point of commercial and perhaps biological extinction.

Mr David says that our concern, as expressed in my first round intervention, is with policy considerations. By my account, he used the word "policy" 15 times. Indeed, it seems to be a pejorative phrase. But this is the policy of the law; it is the policy of international law. It is the obligation contained in article 61 of the Convention, which it is your mission to enforce and progressively to ensure: "The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation". That is not a pure question of policy; that is a legal obligation.

In the situation with which it is faced, Australia is obliged by existing scientific information to ensure that Patagonian toothfish do not become extinct, and there is a serious danger of that.

Mr David referred to the discussions at the CCAMLR meeting in October of this year, at which Australia's representatives called for changes to article 73, paragraph 2, or to its application. The document was, of course, put in by Australia. That is tab 3 of our authorities, and I commend it to you. It represents the present state of the political debate on the situation. It is entirely consistent with the legal position we have taken that this Tribunal, faced with clear and uncontroverted, unanswered evidence of flagrant breaches of coastal State law enforced in accordance with the Convention and in accordance with CCAMLR, should take that factor as the dominant factor. That, in a word, is our position. It is not a question of policy.

There are two fundamental questions of policy underlining that legal argument. We all know about the tragedy of the commons. It is much cheaper to fish for Patagonian toothfish if you do not have an observer, if you do not have VMS and if you do not need a quota. The reasonable or sufficient bond for the release of a ship caught fishing in these circumstances must take into account the circumstances.

Let us take the case of a truck driver who, while under the influence of alcohol, kills someone and is brought before a magistrate pending trial. The truck driver says, "I stand innocent. I plead not guilty. This is my livelihood. Do not take it away from me, it will cause ruin". It is perfectly reasonable in the period prior to the trial to put a governor on the truck to make sure that the truck driver does not exceed the speed limit, or to impose other conditions.

That would be described as a bond or other financial security. It would be a financial security imposed on the driver to ensure good behaviour pending trial. That is precisely what we ask with the VMS. We ask that this particular ship, presumed innocent in law but with no answer in fact, at least none that has been presented to you, shall be placed in the same position as all other CCAMLR-licensed vessels if it is to be released. That is not an unreasonable request.

There is a further issue of policy by which, if I may say so, in this field this Tribunal will be judged. We face a period of about another five to ten years in which there has to be a reversal of the present chronic state of most of the world's fish stocks. The judges living in Europe will need no reminding of the situation as a result of the drastic quota cuts of last week. There is about to be a dramatic shift of fishing power from the northern to the southern hemisphere and the States of the southern hemisphere need to be in a position to respond. At a fundamental level, that is a question of policy; it is a question of policy of which this Tribunal can take account.

If I were you, I would have a nagging concern about the hot pursuit issue. We have presented a legal argument which, in another forum, might have to be tested, but there is a high seas problem about hot pursuit, and one cannot hide that. There is a serious legal issue and one can imagine the concern of the Russian Federation to ensure that its ships, whatever they may have done, are not arrested on the high seas. That is an issue which might arise in appropriate proceedings between Australia and the Russian Federation, or it may be resolved by them in accordance with appropriate diplomatic procedures. In these proceedings, in substance it is the shipowners who seek to take advantage of that, in proceedings that relate to a completely different issue.

If it was true that there was more than a technical breach of article 111, if there had been a serious breach of article 111, the remedy would be the complete release of the vessel and the catch. That would be a remedy which only the Russian Federation could seek but it could seek it if there had been a serious breach. We say that if there was a breach here, it was a technical breach and that any link between the issue of forfeiture and the issue of the remedy for a technical breach of hot pursuit is severed.

In any event, that is not the issue which comes before you under article 292. Under article 292, you are concerned with a completely different issue. It seems, with respect, that the shipowner could have nothing to say if there was no doubt about the article 111 issue, but why should the shipowner be able to rely on article 111? What virtue is it to the shipowner that it was arrested in one place or another when the substance of the issue against the shipowner is flagrant, repeated, unlawful depredations against an endangered species?

In those circumstances, there is no link between the article 111 issue and the article 292 issue, and the Tribunal said as much on much more questionable facts in the *M/V "SAIGA" Case*.

For all these reasons, Mr President and Members of the Tribunal, and of course the Agent will deal with this shortly, we will say that the dominant consideration here is the consideration of the conservation of these species. The dominant thing you have heard this afternoon is what you have not heard: the silence from the other side either as to the existence of the slightest trace of a defence on their part or the existence of the slightest concern about the species which their activities imperil.

Mr President, Members of the Tribunal, I thank you for your attention.

The President:
Thank you, Professor Crawford. I now give the floor to Dr Bennett.

STATEMENT OF MR BENNETT
COUNSEL OF AUSTRALIA
[PV.04/02, E, p. 20–22]

Mr Bennett:

Mr President, Members of the Tribunal, there are three matters that I shall deal with very briefly in these concluding moments of the oral submissions. The first is our application under article 71 to introduce further evidence; the second is the calculation of the bond amounts; and the third is the submission that the VMS bond involves, in Mr David's words, an assumption of guilt, an assumption that there will be further illegal fishing and the imposition of punishment without a determination of guilt.

First, under article 71, we seek to produce a new document. It is a very short document, which arises because of what was said by the respected Agent of the Russian Federation in his submissions. We came here prepared to show that the address given for the owner in the Russian Memorial and in the Fishing Licence was false. Another address was given in the small craft survey, but that did not seem so important. We investigated it and found that it was false. We did not burden the Tribunal with that detail because the other address did not seem so relevant, but now that the Russian Agent has for the first time raised that address to try to show that the company has a genuine address, we seek to use our evidence on that as well. It is the affidavit of Victoria Ivanova, which we have given to you, in which she in effect says that she went to that address and found no Olbers there either, you will not be surprised to learn. What has occurred is that the owners of the *Volga* have again misled their flag State.

The second matter concerns the calculations. Mr Tetley has repeated the Applicant's erroneous view of the figures. Having accused me of sophistry, he has again submitted to you that we are asking for AU$ 6 million for a boat that is worth AU$ 1.9 million. However, he arrives at his figure of AU$ 6 million by adding the bond of AU$ 3.32 million that we seek to the catch and to the further bail that is sought. I have dealt with the matter of the further bail. If the AU$ 3.32 million were provided, the crew would be free to go. They would not need to pay the extra AU$ 600,000. I have said that a number of times. That is the position. Therefore, you cannot add the AU$ 600,000.

Secondly, you cannot include the catch. I do not want to repeat all my submissions about the catch. It was described by Mr David as "the owner's property". We cannot make that assumption. We are talking about security for the possibility that the Australian courts will determine guilt and that the boat will be forfeited. In that event, the fish was not their lawfully obtained property. So why should they be entitled to count it as security for the possibility that they lose the litigation? It is simply not logical. Of course, if they succeed, they will get it all back and their bond will be released, but the purpose of the bond is to secure the position against that. I have dealt with the importance of the words "sufficient" and "reasonable" and the function of a bond in that area.

Similarly, the final sum that makes up the amount used by Mr David to arrive at his figure of AU$ 6 million. If the boat does not reoffend, the AU$ 1 million will be refunded. It is security to prevent the boat from reoffending in the intervening period while it is released under an order of this Tribunal or under the bond that we seek. That is all it is. When looked at in that way, we submit that our demand for AU$ 3.32 million is clearly reasonable and certainly well within the margin of appreciation. If you were to say that the bond ought to be a little less, the AU$ 3.32 million would still be within the margin of appreciation and would not be unreasonable. "Unreasonable" does not mean "larger than the Tribunal would order if it were fixing the bond". As I have already indicated, it means a figure that is unreasonable and not sufficient.

The last of the three matters that I need to address is the VMS. Mr David has described it as involving an assumption of guilt, an assumption that there will be further illegal fishing and the imposition of punishment without determination of guilt. It is none of those. It does not assume guilt; it assumes the possibility of guilt, as in the example of the truck driver referred to by Professor Crawford. One puts the governor on his truck because there is a possibility that he is guilty and a possibility that he will reoffend while on bail or while allowed to drive his truck pending the trial. It does not assume guilt. Without punishing him, it simply assumes that there is a possibility of guilt, and it protects the other party against that possibility, the other party in that case being the community, the other party in this case being the world community. It does not punish, because it is returned if there is no reoffending. It is an interlocutory protection for the coastal State. If it is not provided, we can suffer millions of dollars-worth of depredations of a scarce resource which, as has been shown, faces extinction. That is the downside for us. The downside for them is a little interest for a short period, and that is all.

Professor Crawford also dealt with the absence of any submission suggesting that there is no guilt. You have seen the overwhelming and incontrovertible evidence from Senior Sanchez, who has told you exactly what they were doing. He was the person in charge of the other ship, though not technically the captain; we have seen the restored computer files, which show us exactly where they were fishing and on what days; and we have seen the fax saying, "You are safe until the 7th" – not much doubt about what they were safe from – and, of course, they were fleeing from the zone when they were intercepted. This is not a case in which there will ever be any serious doubt about guilt. It will be one of the easiest cases for some lucky prosecutor in Australia.

Mr David says that we have not prosecuted the owners. We cannot prosecute them. They are not within our jurisdiction. Of course, we would love to get our hands on them but we cannot. He then complains about my making allegations against them when they are not here to answer them. That point has been dealt with. Their former lawyers are here, and the Russian Federation is in practice – I do not suggest improperly – acting in their interests and well able to deal with allegations against them. Of course, if the owners were prosecuted, they could be put on good behaviour bonds after conviction. Mr David says, "Even if they were convicted, how could you put the VMS on the boat?" The answer is that you could make it a condition of a bond. That could certainly be done under Australian law and under the law of most other legal systems. One can impose a condition on a bond.

Mr President, Members of the Tribunal, this is a landmark case for the Tribunal. It is a case in which the Tribunal has to determine whether to permit the provisions of article [2]92 to be used for the benefit of gangs of international criminals who should be suppressed rather than assisted. That is the issue in this case. We have set up a bond which, for all the reasons that I have given the Tribunal, is reasonable. It is not a matter of holding a balance between a coastal State and a flag State. It is a matter of asking, "Who is to prevail, the good guys or the bad guys?" Mr President, Members of the Tribunal, that is the issue facing the Tribunal in this case. Thank you.

The President:
Thank you, Dr Bennett. I now give the floor to the Agent of Australia, Mr Campbell.

STATEMENT OF MR CAMPBELL
AGENT OF AUSTRALIA
[PV.04/02, E, p. 22]

Mr Campbell:
Mr President, Members of the Tribunal, that concludes the oral argument for Australia. I should like to repeat that it has been an honour and a privilege for Australia again to appear before this Tribunal.

I will now formally read the order sought by Australia: For the reasons set out in the Respondent's written and oral submissions, the Respondent requests that the Tribunal reject the application made by the Applicant.

Thank you, Mr President and Members of the Tribunal.

Closure of the Oral Proceedings
[PV.02/04, E, p. 22–23]

The President:
Thank you, Mr Campbell. I thank the Agent of Australia, and that brings us to the end of the oral proceedings in the *"Volga" Case*.

I would like to take this opportunity to thank the Agents and Counsel of both parties for their excellent presentations made before the Tribunal over the past two days. In particular, the Tribunal appreciates the professional competence and personal courtesies exhibited so consistently by Agents and Counsel on both sides and, I may add, the spirit of cooperation that prevailed in my consultation with the parties.

The Registrar will now address questions in relation to documentation.

Mr Registrar.

The Registrar:
Mr President, in conformity with Article 86, paragraph 4, of the Rules of the Tribunal, the parties have the right to correct the transcripts in the original language of their presentations and statements made by them in the oral proceedings. Any such corrections should be submitted as soon as possible but in any case no later than 12 noon Hamburg time on 16 December 2002.

In addition, the parties are requested to certify that all the documents that they have submitted but which are not originals are true and accurate copies of the original documents. For that purpose, they will be provided with a list of the documents concerned. Thank you, Mr President.

The President:
The Tribunal will now withdraw to deliberate on the case. The judgment will be read on a date to be notified to the Agents. The Tribunal has tentatively set a date for the delivery of the judgment. That date is 23 December 2002. The Agents will be informed reasonably in advance if there is any change to the schedule.

In accordance with the usual practice, I request the Agents kindly to remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberation of the case prior to the delivery of the judgment.

This hearing is now closed.

The sitting closes at 4.00 p.m.

READING OF THE JUDGMENT – 23 December 2002, a.m.

PUBLIC SITTING HELD ON 23 DECEMBER 2002, 10.30 A.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, COT; *Judge* ad hoc SHEARER; *Registrar* GAUTIER.

For the Russian Federation:
Mr Evgeny Butovt, Consul,
Consulate General of the Russian Federation, Hamburg, Germany;

Mr Sergey L. Romanov,
Consul, Consulate General of the Russian Federation, Hamburg, Germany;

For Australia:
Mr John Langtry,
Minister and Deputy Head of Mission, Embassy of Australia, Berlin, Germany,
as Co-Agent;

Mr James Crawford SC,
Whewell Professor of International Law, University of Cambridge, Cambridge, United Kingdom,
as Counsel.

AUDIENCE PUBLIQUE DU 23 DÉCEMBRE 2002, 10 H 30

Tribunal

Présents : M. NELSON, *Président*; M. VUKAS, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, COT, *juges*; M. SHEARER, *juge* ad hoc; M. GAUTIER, *Greffier*.

Pour la Fédération de Russie :
M. Evgeny Butovt,
consul, Consulat général de la Fédération de Russie, Hambourg, Allemagne;

M. Sergey L. Romanov,
consul, Consulat général de la Fédération de Russie, Hambourg, Allemagne;

Pour l'Australie :
M. John Langtry,
ministre et chef de mission adjoint, ambassade d'Australie, Berlin, Allemagne,
comme co-agent;

"VOLGA"

M. James Crawford *SC*,
professeur titulaire de la chaire Whewell de droit international, Université de Cambridge, Cambridge, Royaume Uni,
comme conseil.

READING OF THE JUDGMENT – 23 December 2002, a.m.

Reading of the Judgment
[PV.01/5, E, p. 4–7, F, p. 1–4]

The Registrar:
The Tribunal will today deliver its Judgment in the *"Volga" Case*, Application for prompt release, Case No. 11 on the List of cases, the Russian Federation, Applicant, and Australia, Respondent. The Tribunal heard oral arguments from the parties at four public sittings on 12 and 13 December 2002.

Mr President.

The President:
I now call on Mr Evgeny Butovt, Consul, Consulate General of the Russian Federation, Hamburg, Germany, who is representing the Agent of the Russian Federation, Mr Pavel Grigorevich Dzubenko, to note the representation of the Russian Federation.

Mr Butovt:
[*notes representation*]

The President:
Thank you. I now call on Mr John Langtry, Co-Agent for Australia, who is representing the Agent of Australia, Mr William Campbell, to note the representation of Australia.

Mr Langtry :
[*notes representation*]

The President:
Thank you. I will now read relevant extracts from the Judgment in the *"Volga" Case*. [*The President reads the extracts.*]

The sitting is now closed.

The Tribunal rises.

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in *The "Volga" Case (Russian Federation* v. *Australia), Prompt Release*.

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques de l'*Affaire du « Volga » (Fédération de Russie c. Australie), prompte mainlevée*.

Le 11 septembre 2008
11 September 2008

Le Président
Rüdiger Wolfrum
President

Le Greffier
Philippe Gautier
Registrar