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

2002

Public sitting

held on Thursday, 12 December 2002, at 10 a.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President L. Dolliver M. Nelson presiding

The “Volga” Case

(Application for prompt release)

(Russian Federation v. *Australia)*

Verbatim Record

Uncorrected
Non-corrigé

Present:	President	L. Dolliver M. Nelson
	Vice-President	Budislav Vukas
	Judges	Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Soji Yamamoto
		Anatoli Lazarevich Kolodkin
		Choon-Ho Park
		Thomas A. Mensah
		P. Chandrasekhara Rao
		Joseph Akl
		David Anderson
		Tullio Treves
		Mohamed Mouldi Marsit
		Tafsir Malick Ndiaye
		José Luis Jesus
		Lennox Fitzroy Ballah
		Jean-Pierre Cot
	Judge *ad hoc*	Ivan Shearer
	Registrar	Philippe 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;

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.

THE CLERK OF THE TRIBUNAL: The International Tribunal for the Law of the Sea is now in session.

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 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 *versus* 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.

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.

THE REGISTRAR: The Applicant requests the Tribunal:
- I quote –
-
"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 of security referred to in paragraph 1 (d)

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

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.

THE REGISTRAR: The Respondent requests the Tribunal:
- I quote-

"Australia requests that the Tribunal decline to make the orders sought in paragraph 1 of the Memorial of the Russian Federation. Australia 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."

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 Sergeevich Knyazev, Head of Division, Legal Department, Ministry of Foreign Affairs of the Russian Federation; Professor Kamil Abdulovich 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 Aexandrovich 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 Acquaculture, Agriculture Fisheries and Forestries 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.

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.

MR DZUBENKO: 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 for the Law of the Sea, in which the Russian Federation claims that the Commonwealth of Australia is in breach of Article 73(2) of the Convention. The vessel concerned is a shipping vessel flying a Russian flag, by the name of *Volga*. At this time the ship, with three of her crew, is in Perth, Western Australia. The ship is owned by Albers 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* vessel. 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 and its preparatory bodies. That is to ensure a balance between the enforcement powers of the 200 miles exclusive economic zone and, on the other hand, solid safeguards to the legitimate rights and interests of traditional high seas fishing nations, 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(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 against the coastal state.

The Tribunal has decided a number of cases involving a request for the prompt release of a vessel up 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, the Fisheries and Antartic, and, if needed, Antartic 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 asked Mr David and Mr Tetley to address the Tribunal on behalf of the Russian Federation.

THE PRESIDENT: Thank you very much. Can we have Mr David?

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 supports its claim that the Commonwealth of Australia is in breach of Article 73(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 which 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(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 take the following form: firstly, I will make some initial comment on general procedure on applications under 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 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(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(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(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 point clear - 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 emphasise 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 relations between coastal states, which may have a cause to detain vessels in protection of their rights in the EEZs, and flag states which of course control those vessels as flag states.

A tribunal does not, of course, act 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 72(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 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 vessel can continue with her 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 *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 principle 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 *Saiga*, the first prompt release case: in that case St 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, St 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 FF20 million, the catch at FF380,000, and said that the maximum fines imposable were in excess of FF30 million if the owner's position was taken into account, with FF5 million of the FF30 million being ascribed to the charges against the Master. The French court set a bond of FF20 million. At the hearing before the Tribunal, the French contended that the bond of FF20 million was reasonable.

The Tribunal found that the value of the vessel was FF3.7 million, accepted the seriousness of the charges as a background factor and set a bond of FF8 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 FF15 million, the value of the catch at FF9 million and the maximum fines imposable at FF79 million. The bond set in the French court was FF56 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 FF9 million, the value of the gear on the ship FF300,000 and the maximum fines imposable FF79 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 FF18 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 FF9 million, that being the monetary equivalent of the catch already held and seized, and a further bond of FF9 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 369-376, 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 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 Vensolvas at pages 96 to 99 of the Australian documents.

The key points of Australia's bonding proposal are 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 a 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 the subject of 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 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 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(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 pages 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 monies 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.

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. I will now deal with those issues.

The vessel was boarded on the high seas. There is no dispute about that. The first attempted challenge issued to the *Volga* by any Australia 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 detail 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 Australia warship believed, wrongly as it transpires, that the *Volga* was in the Australian economic zone.

It was only later that the Australia authorities realised they had made a mistake. The Australia 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 Australia 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 Australia 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 diplomat exchanges between the parties and in the domestic proceedings. I refer the Tribunal in the Russian documents to pages 107 and 373 in 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 us by the Australia warship or helicopter, the requirement under Article 111 that a stop order be issued by the pursuing has not been fulfilled. The Russian Federation, therefore, says that Australia cannot establish that it validly established a 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.

MR DAVID: Mr President, I will be brief in my concluding comments. By its rulings in this area, the Tribunal always provide important balance and proportion between coastal and flag state interests. The importance of this is, if anything, emphasized when you consider 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 Australia 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 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(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 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.

(The hearing adjourned at 11.15 a.m.)