

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



2002

Public sitting

held on Friday, 13 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

<i>Present:</i>	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
		Paul Bamela Engo
		Thomas A. Mensah
		P. Chandrasekhara Rao
		Joseph Akl
		David Anderson
		Rüdiger Wolfrum
		Tullio Treves
		Mohamed Mouldi Marsit
		Tafsir Malick Ndiaye
		José Luis Jesus
		Lennox Fitzroy Ballah
		Jean-Pierre Cot
	Judge <i>ad hoc</i>	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.

1 **THE CLERK OF THE TRIBUNAL:** All rise.

2

3 **THE PRESIDENT:** Please be seated. This morning we resume the oral pleadings
4 for hearing, first from the Respondent. Dr Bennett.

5

6 **MR BENNETT:** Mr President, at the end of the proceedings yesterday I was dealing
7 with a number of aspects emphasising the criminality of the owners of the vessel and
8 their contempt for their own flag state, the Russian Federation. I had dealt with the
9 fact that they had a nominal captain, who was Russian but was not the person really
10 in command of the vessel. On that topic, I should also show you what Sr Fraga said
11 in his affidavit at page 110 of our Statement in Reply. In paragraph 4 of his affidavit,
12 he says:

13

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

17

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

27

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

37

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

43

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

49

1 The material through which I have taken the Tribunal is relevant in a number of
2 ways. It is relevant to the penalties likely to be imposed on the crew, but it is also
3 relevant to the concept of balance which was stressed so much in Mr David's very
4 able presentation. Balance between the coastal state and the flag state is an
5 important consideration when one is dealing with a case such as the *Saiga*, which
6 involved a dispute about a tanker that was alleged to have engaged in bunkering
7 operations in an exclusive economic zone in breach of the regulatory requirements
8 of the coastal state, or in cases where there is doubt about whether there has been
9 a breach of the relevant laws. But balance of that kind is much less relevant when
10 one is concerned with the activities of a shadowy gang of international criminals
11 whose operations are sophisticated and who show the contempt shown in this case
12 for their flag state. Those criminals, of course, would benefit from any order
13 requiring release on a lesser bond.

14
15 The fifth of my preliminary general topics concerns the nature and purpose of a bond
16 under Article 73(2). Article 73(2) is silent on the nature of a reasonable bond. We
17 know from the judgment of Vice-President Nelson in the *Monte Confurco* case – he,
18 of course, was the secretary of the drafting committee at the Law of the Sea
19 Conference – that there is a subtle difference in the words used in the different
20 linguistic texts. The French and Chinese texts use words corresponding to
21 “sufficient” rather than “reasonable”. That is useful when considering what was
22 intended. I should say that there is also an article by Professor Franks at tab 5 of
23 our list of authorities, which discusses this issue and refers in particular to the words
24 used in the different languages. Mr President, you will have to forgive my
25 pronunciation. You will see that the Russian word is (*rasamanogo*) and the Chinese
26 word is (*heleday*). Professor Franks says that two of the texts use words meaning
27 “sufficient”.

28
29 The purpose of a bond or guarantee – the French word is *garantie* – is to ensure
30 something, to make it safe or certain. The coastal state, in our submission, should
31 not be in any worse position because it now has a bond instead of the boat or
32 instead of the custody of the crew.

33
34 Putting it a little differently, the function of this Tribunal under Article 73 is not to
35 make some arbitrary estimate of what the owners should pay but rather to fix a sum
36 which will ensure, guarantee – in other words, a bond – that Australia obtains no less
37 than it might have obtained had it retained the boat and crew. If there is a range of
38 values or possibilities, the bond should secure the maximum. That is the
39 significance of the French word *suffisante*, the English word *sufficient*.

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

1
2 The difference in the ways in which a bond that is too high or too low affects the
3 parties is significant. If it is too high, it is still open to the owners to comply with the
4 conditions of the bond and ultimately recover their money. All that will have
5 happened is that they will have been out of their money for a short period, and if they
6 succeed in their domestic litigation, they obtain a refund of the bond. On the other
7 hand, if it is too low, we are irrevocably prejudiced. The same applies to the bond for
8 the crew. If it is too high, it is always open to the owners to ensure that the crew
9 return for their trial and then recover the amount of the bond. If it is too low, it may
10 be all that we get in lieu of convictions and fines.

11
12 I will come to the elements that make up the proper amount in the second part of my
13 submissions, to which I now turn.

14
15 Our calculation has three elements, totalling AU\$3,332,500. All figures in our
16 submissions are in Australian dollars and both parties have referred to Australian
17 dollars. At present, one Euro is about AU\$1.85, so one can get a very rough view of
18 the amounts involved by dividing by two.

19
20 The first element is AU\$1.92 million for the boat, including fuel and equipment. The
21 valuation is not in dispute. What is in dispute is that Mr David says that we should
22 get 9 to 40 per cent of the value of the boat. No rational reason is given for that
23 submission, other than that is what seems to have happened in some of the cases,
24 although in most of the cases to which he refers there was a dispute about valuation
25 and the reason the figure was a low percentage was that the valuation was not
26 accepted by the Tribunal. Here, of course, the valuation is agreed.

27
28 The second element is the AU\$1 million for the guarantee of non-repetition of
29 offences by the installation of a vessel-monitoring system. I will come to that. That
30 is one of the questions that we have been asked about and it is the last item with
31 which I shall deal this morning.

32
33 The third element is AU\$421,500, which is a little less than half the total bail ordered
34 by the Australian court in relation to the first lot of charges. What was ordered was
35 AU\$275,000 for each of the three crewmen. That figure was calculated taking into
36 account the maximum fine. I will come to a breakdown of those figures in a few
37 minutes.

38
39 There is also a figure of AU\$20,000, being the bail ordered in relation to a further
40 charge against one of the crew. What happened was that after we recovered the
41 data that had been erased from the ship's computers, we realised that there had
42 been some fishing on some earlier dates, so there was an additional charge in
43 relation to that, which required additional bail.

44
45 Of course, the first two items relate to security for the boat. The third relates to the
46 release of the crew. These items are quite separate and should not be dealt with
47 together, or even in the one bond. Article 73(2) refers to the vessels and their crews,
48 and we submit that their bonding is quite independent. If the Tribunal grants relief to
49 the Applicant, it should fix the amounts of the two bonds separately, one for the

1 vessel and one for the crew, so that the owners can elect to provide one, the other or
2 both.

3
4 The Russian Federation has put to you that three additional matters should be taken
5 into account, resulting in three deductions from our claim. The first is the proceeds
6 of the catch and bait, being about AU\$1.9 million, almost exactly the same figure as
7 the value of the boat. Of course, it was not full. As has been said, these boats hold
8 a catch worth more than the capital value of the boats. As we know, this was one of
9 the less valuable boats that was sacrificed to protect the more valuable ones.
10 Secondly, they claim that the bail already paid, AU\$245,000, should be deducted.
11 The third item is the further AU\$600,000 now required by the Australian court to
12 permit the crewmen to leave Australia. I will come to that in a moment.

13
14 The Russian Federation has taken those three items and deducted them from our
15 figures, which brings it to AU\$554,920, and has rounded down that figure to
16 AU\$500,000. Although the differential is fairly small, there is no explanation given as
17 to why a security should be rounded down rather than rounded up, but I leave that
18 aside.

19
20 In relation to their three points, we say, first, that the proceeds of the catch should
21 not be taken into account. The forfeiture of the proceeds of crime is independent of
22 the other components. In any event, if the owners succeed in their litigation in
23 Australia, that sum will be repaid. It is in a trust account at the office of the
24 Australian government's solicitor. This question was considered by the Tribunal in
25 the *Monte Confurco* case, and Professor Crawford has dealt with it. As he said, if
26 a burglar steals my silver, I would be very surprised if he could use that silver as a
27 deposit to get bail for his release pending trial. These fish were illegally taken from
28 our waters. Why should they be given to us as security for the boat, which, if we are
29 right, we are entitled to forfeit? We would submit that there is simply no basis for
30 taking the fish into account.

31
32 Incidentally, there was another complaint about the fact that although the bail for the
33 crew is fixed by a court, the forfeiture of the boat and the security in relation to the
34 fish and so on is dealt with administratively by an Australian government agency
35 called AFMA, the Australian Fisheries Management Authority. The only point that
36 I want to make about that is that although it is an administrative decision, its
37 decisions, like any other administrative decisions, are subject to review by the courts.

38
39 In order to explain the deduction which is sought in relation to the bail for the crew,
40 I have to explain what occurred in relation to bail and it is a little complicated. Initially
41 bail for the three crew members for release from jail was set at AU\$75,000 each.
42 The owners then provided AU\$225,000, three times AU\$75,000, and they were
43 released. They are free within Australia but not free to leave Australia. They were
44 obliged to lodge their passports.

45
46 Some time later, the fishing master – and this is the one who had his own cabin who
47 was really in charge of the boat – was charged with a further offence relating to
48 a different period. I mentioned that earlier. Bail for that was set at a further
49 AU\$20,000. That was also paid by the owners. So the owners have now paid
50 AU\$245,000.

1
2 The “master” (and I have used inverted commas for obvious reasons) died
3 unfortunately before he could be charged and so he was never charged. None of
4 the other 42 members of the crew were charged. All were allowed to return to their
5 respective homes, mainly Indonesia and China. We have only kept and charged the
6 three ringleaders who are all Spanish citizens.
7

8 One of the original bail conditions, as I say, was surrender of passports. The three
9 crewmen then applied to have their passports back and their bail conditions varied
10 so that they could return to Spain before the trial. A magistrate granted this on
11 condition that the passports were lodged with the Australian Embassy in Madrid,
12 which you may think is not very good security. The prosecution appealed against
13 that successfully and the Supreme Court of Western Australia ordered instead that
14 the passports would only be returned if the bail was increased for each of them from
15 AU\$75,000 to AU\$275,000. So there was an additional AU\$200,000 required; an
16 additional AU\$600,000. That has not been paid by the owners.
17

18 The owners who are complaining so bitterly about the crew being kept in Australia
19 have it within their power to deposit that sum and they would be permitted to return
20 to Spain. Of course, if they come back to face trial, for which they cannot be
21 imprisoned, only fined, they would get that bail back. It should be noted that
22 Australia does not have trials in *absente* for indictable offences and so if they do not
23 come back the trials cannot go ahead. All we can do is forfeit the bail. The effect of
24 the crew being permitted to go is that one needs a deposit of the maximum amount.
25 It is what I said earlier about being sufficient. It is just not good enough to have
26 something which may turn out to be less than the amount of the fines.
27

28 Since what is sought by the Russian Federation is their release from Australia, it is
29 the further AU\$200,000 each which is relevant. That would make the amount of
30 security for their release AU\$600,000. We have only sought in the total we have
31 required AU\$412,500. We have reduced it significantly for the purposes of our
32 demand. The Russian argument, therefore, involves deducting what has not been
33 counted. They are trying to subtract something which is not there in the first place.
34

35 The third item they seek to deduct is even worse. They want to deduct the
36 AU\$600,000 that has not been paid. If the bond is provided and the crew and the
37 boat are released, it would never have to be paid. So they are deducting part of our
38 claim for which there is simply no logical reason. It is an error of logic in the
39 calculations.
40

41 There is one other aspect of the bail calculations. I mentioned that the figure of
42 AU\$200,000 was fixed by the judge taking into account the maximum fines. The
43 judge also took into the cost of the trial, that being relevant to the motivation of the
44 crewmen to return. As the judge said, “If I look at it from the point of a crewman
45 sitting in Spain saying, ‘Will I return to face a trial?’, the crewman would be looking
46 not only at the fine but at the cost of defending the proceedings”.
47

48 What I said earlier about the degree of criminality is very relevant here and we
49 submit that the maximum might well be imposed when one has a criminal enterprise
50 of this magnitude, whatever may be said about the meagre personal resources of the

1 crewmen. The maximum for each offence is AU\$275,000 and there were four
2 offences. There are three crewmen, one offence each, plus the additional charge
3 against the fishing master. We have a total of four times AU\$275,000 which is
4 AU\$1.1 million.

5
6 The court, of course, always has a discretion to impose a lesser penalty and the
7 Russian Federation has filed an affidavit by an Australian lawyer suggesting that on
8 the basis of previous cases there may well be a lesser penalty. We say a number of
9 things about that and I will deal with that in detail when I answer the four questions at
10 the end of my submissions.

11
12 May I just say at this stage that when one is talking about security, one is not talking
13 about a likely amount. One is talking about a maximum amount. It is a different sort
14 of calculation. It has to be *suffisante*. It has to be sufficient and reasonable.
15 Reasonable is not something halfway which is a rough estimate of what the Tribunal
16 thinks the fines will be. That would be to usurp the role of the national court. It
17 should be the maximum and we, as I say, have offered to take less than that
18 although we are said to have acted unreasonably.

19
20 Mr David, using his advocacy skills to the full, puts it this way; he says to you that the
21 total security demanded is over AU\$6 million for a boat worth AU\$1.9 million but let
22 us just look at how he gets to those figures because the figures are not right. He
23 gets the AU\$6 million by adding the proceeds of sale of the catch, and I have dealt
24 with that, the family silver, the stolen property. He adds that to the bail already paid
25 of AU\$245,000 and the further bail of AU\$600,000 and then he adds to that to the
26 security we are seeking of AU\$3.32 million which, of course, includes those items.
27 He adds it altogether and gets to a figure of AU\$6 million. It is almost the three card
28 trick, but the numbers are just not right for the reasons I have given.

29
30 There are fallacies in the figures, four of them at least, and they confuse the crew
31 with the boat. The bond sought for the crew, as I have said, is AU\$412,500, which is
32 less than half the maximum fines and only half the bail the court has ordered in
33 Australia. Secondly, he deducted the AU\$600,000 which has not been paid and
34 would not have to be paid if the bond we ask for is provided. Thirdly, it ignores the
35 fact that the AU\$1 million for the VMS system is in effect a "good behaviour" bond
36 which will be refunded if there is good behaviour, if the boat is not used for further
37 criminal conduct and I will come to that later. It is quite different to bonds in other
38 cases. Finally he counts the proceeds of sale of the illegal catch.

39
40 When those matters are taken into account it becomes apparent that what we are
41 really doing is seeking for the boat itself just its value. We are seeking for the crew
42 less than the bail and less than the maximum amount of the fines as a separate
43 matter, and we are seeking the additional security for good behaviour of the boat
44 which I again will come to. I would submit that bearing these matters in mind our
45 figure is very generous indeed. It is less than a figure which is reasonable or
46 *suffisante*. It would not have been unreasonable for Australia, like an intending
47 mortgagee, to say, "I want more than 100% to secure my position". We have not
48 said that.

1 The third and last major section of my submissions concerns the VMS. VMS stands
2 for vessel monitoring system. It is a device, familiar to aficionados of James Bond
3 movies, which is fixed to the vessel and reports back to the Australian authorities the
4 geographical situation of the vessel. It also has the ability to report back if it is
5 disabled, interfered with or detached from the vessel. If there is any attempt to stop
6 it operating and reporting where the vessel is, we can find out.

7
8 If there was no sanction obviously such a device could easily be disabled or
9 removed. What we seek is a sum of money which is like a good behaviour bond,
10 a guarantee that the boat will not enter Australian territorial waters other than with
11 permission or for the purpose of innocent passage prior to the conclusion of the
12 forfeiture proceedings. If it does not offend, the AU\$1 million would be refunded or
13 the bond cancelled even if the boat does not return. We have set out the technical
14 aspects of the system at pages 94 and 95, and the issues discussed at page 98 of
15 our Statement in Reply.

16
17 There are two further aspects of this claim with which I need to deal. The first is the
18 legal basis for it and the second is the justification for the sum of AU\$1 million. I will
19 deal with both those.

20
21 First, as to the legal basis one of the purposes of forfeiture under domestic law is to
22 prevent the instruments of crime being reused for further crimes. Under the old
23 common law it derived from the doctrine of deodand under which objects which
24 caused death or serious injury were forfeited to the victim or his family. That doctrine
25 was abolished in England when people were being injured by railway trains and the
26 victims would claim the trains.

27
28 It survived in the civil law and common law jurisdictions in relation to vessels and
29 other vehicles, including taxis, used in customs offences and fishing offences. The
30 purpose of preventing the criminal using the same vehicle to commit the same
31 offence has been referred to in both American and Australian courts. I have given
32 you the reference to *Calero-Toledo v Pearson Yacht Leasing Company* (1974) 416
33 US 663, and page 687 is the specific passage. It was a case where a privately
34 leased yacht had been used without the owner's knowledge by the lessee to
35 smuggle drugs and its forfeiture was upheld against the innocent owner. It was said
36 in the Supreme Court decision that one purpose is to prevent that vessel being used
37 again for criminal conduct. The same thing has been said by the High Court of
38 Australia in *re Director of Public Prosecutions; ex parte Lawler* (1993-4) 179 CLR at
39 279, an illegal fishing case.

40
41 That is the first analogy. Part of the purpose of forfeiture which, under Australian
42 law, may take place in this case is to stop the boat doing it again.

43
44 We know, from what has been said earlier today, about how boats are used again
45 and again and in one case a boat was used after it was released by this Tribunal.

46
47 Another analogy is bail in criminal proceedings. One of the matters a domestic court
48 takes into account when deciding whether to grant bail to a person charged with an
49 offence is the likelihood of the person committing further offences of the same kind
50 whilst on bail. One of the first questions a judge or magistrate asks in a bail

1 application is: how can we ensure that this person will not go out and commit other
2 offences while on bail?

3
4 If the boat is released on something analogous to bail, we should be entitled to be
5 assured that it will not be used to commit further criminal offences. The likelihood of
6 the vessel being used in this way follows from the matters we have already referred
7 to.

8
9 The statute is silent in relation to what the elements are of a reasonable bond. We
10 would submit that one of the elements which is more than reasonable is something
11 to guarantee that it is not used for further offences, at least during the period before it
12 was forfeited.

13
14 The modesty of the claim of AU\$1 million is demonstrated by calculations which
15 appear at page 75 of our Statement in Response. The weekly catch reports on this
16 vessel showed very substantial weekly catches. You were shown one of those. In
17 nine separate weeks 100 tonnes of Patagonian toothfish was taken. The boat's
18 capacity is 275.6 tonnes. At AU\$14.5 per kilo, this comes to just under
19 AU\$4 million. So AU\$ 4 million is what the boat can hold; that is its capacity. We
20 know that it was able to get something slightly less than half of that in nine weeks. It
21 can of course stay at sea for much longer than nine weeks. We know about the
22 capacity to refuel it and the owners sending tankers down to refuel their fleet.

23
24 If it can earn AU\$4 million in a season, AU\$1 million is a very modest security to
25 discourage the owners from offending further. We could easily have justified
26 AU\$4 million; we have not sought that. We have been, if I can use the word
27 appearing in the document, reasonable.

28
29 Of course, if the Tribunal accepts our arguments, the result is that we have not
30 demanded an unreasonable bond. Therefore, either the proceedings should be
31 dismissed or possibly the Tribunal could make an order confirming that the level and
32 conditions of the bond set by Australia and the level of bail set for the release of the
33 crewmen is reasonable.

34
35 There are a number of minor matters I need to deal with. There is a minor matter
36 concerning the reasonableness of our conduct. Mr David has criticised us for the
37 delay in relation to the owner's requests for a reasonable bond. The
38 correspondence does not bear out that criticism. If one looks at the Memorial of the
39 Russian Federation, we see that the first letter about the bond is a letter from Wilson
40 & Harle dated 19 June at page 181. The apprehension took place on 7 February.
41 The first time they write to us about the bond – and you will see the letter at page
42 181 – saying the vessel has been seized, we write without prejudice to the owner's
43 contention. Incidentally, it begins "We act for Albers Co. Ltd." So the letter is written
44 on behalf of the owners, not the Russian Federation. It seeks details about the
45 bond. We replied two days later and gave a more detailed reply a week later in the
46 next few pages (183 and 184). In the letter, we sought details about the owner,
47 which not surprisingly still have not been provided.

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

4
5 They reply on 28 August (page 193) offering AU\$500,000, a pitiful offer, we would
6 submit. That matter then had to be considered, investigations had to be conducted
7 and so on. At that stage, the parties were at issue and they remain at issue. I would
8 submit there has never been any unreasonable delay on our part.

9
10 So far as the trial is concerned, there have of course been various interlocutory steps
11 and appeals concerning bail. The trials in any jurisdiction take some time to come
12 on. The fact that the crew are being held in Australia is a factor which would enable
13 them, if they wished, to seek expedition of the trial, to seek that the trial jump other
14 cases in the queue and come on more quickly. That would, very likely, be granted
15 but the crew has not sought that. At the moment, the matter is in the lists and it may
16 be up to a year before it comes on, but it lies in their hands to speed up the process
17 if they wish to do so.

18
19 In relation to costs, may I just say that the usual practice of the Tribunal has always
20 been that each party bears its own costs. We do not seek costs if we are successful.
21 We take the view that the usual practice is appropriate, except perhaps in the most
22 extreme cases.

23
24 What is put against us is: if you have demanded an unreasonable bond, you have
25 acted unreasonably and therefore should pay the costs. But that is not the type of
26 consideration the Tribunal has taken into account, particularly bearing in mind the
27 subjectivity of the calculation of the amounts. I have given you reasons why, in any
28 event, we have acted quite reasonably. We have certainly acted in good faith and, in
29 my submission, there should be no serious suggestion contemplated by the Tribunal
30 of making an order against us for costs.

31
32 There were four questions addressed to us by the Tribunal. I have time to deal with
33 them this morning, Mr President, and so I will do so. We have filed our responses.

34
35 The first question was:

36
37 “Could the Respondent provide the Tribunal with some recent examples of
38 fines and penalties against vessels and/or members of their crew for fishing
39 offences comparable to the offences for which the *Volga* and its crew are
40 currently charged?”

41
42 We have provided a schedule setting out four other recent matters, and giving
43 some of the details, but only a small amount of them. The amounts you will see
44 there are: in the first case, the fine of \$100,000; in the second case, a fine of
45 \$100,000 that was reduced to \$24,000; a third of \$136,000; and a fourth where the
46 master was fined \$50,000 and the two crew members \$25,000. In all of them there
47 were pleas of guilty. In this case the pleas are not guilty.

48
49 In all systems of law of which I am aware one gets some sort of credit on sentence
50 by pleading guilty. The degree of credit one gets of course varies from system to

1 system but these are penalties on people who pleaded guilty and saved the
2 government the cost and inconvenience of a trial.

3
4 In considering those figures, we ask the Tribunal to bear in mind a number of
5 matters. The first is that sentences in criminal cases depend very much on their
6 individual facts. The mere listing of the amounts of fines in the few other cases we
7 found in a short time is not very helpful in a case of the severity of this one. Our
8 Crimes Act emphasises that a court “must impose a sentence or make an order that
9 is of a severity appropriate in all the circumstances of the offence”. That, of course,
10 takes into account both factors in mitigating and factors in aggravation.

11
12 Wheeler J of the Supreme Court of Western Australia in the prosecution of the
13 fishing master said in the bail application that “a fine of the order of \$100,000 or
14 perhaps somewhat more, would be a starting point”. So she was talking about the
15 possibility of something much higher.

16
17 The opinion of a senior member of the Western Australian judiciary, independent of
18 either party, we submit should be preferred over that contained in the affidavit of the
19 Australian barrister who, of course, is engaged and who represents the accused.

20
21 The third matter is that the fact that a crime is becoming more prevalent is a reason
22 for imposing a heavier sentence. In many systems of law, one starts when a crime
23 starts being committed, when there is a new offence, by imposing comparatively
24 small penalties. If they do not work and the crime is becoming more prevalent, then
25 the penalties may increase. That is the case here.

26
27 The prosecution will argue in this case to the domestic court that the facts justify
28 a much higher sentence than the earlier cases, and that the increasing prevalence of
29 the offence, among other things, justifies that course. It will also argue that some of
30 the earlier fines were too low. This Tribunal should not pre-empt the ability of the
31 prosecution to put those arguments or the ability of the domestic courts to accept
32 them. One pre-empts it if one permits a bond which is lower than the maximum.
33 The maximum enables the court to exercise its discretion properly, and the
34 prosecution to put the arguments it wishes to put.

35
36 As I have said, all the fines in the table relate to pleas of guilty.

37
38 The second question we were asked was:

39
40 “Could the points made in paragraphs 54 and 55 of the Statement in
41 Response be further developed?”

42
43 That was the material concerning the VMS, the vessel monitoring system. I have
44 dealt with that and I have explained to the Tribunal why it should impose in effect
45 a guarantee of good behaviour on the vessel as one of the conditions of the bond.

46
47 It is said of course by the Russian Federation that this usurps the role of the flag
48 State, but if the flag State is not doing anything about it, someone has to do so, and
49 in this case it is the coastal State which has the responsibility for protection of these
50 scarce resources, which are being plundered by these criminals.

1
2 The third matter we were asked is:

3
4 “Why does the Respondent request information relating to the owner’s
5 identity, governance, insurance and finance?”
6

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

10
11 The common theme of that Convention is that States have a responsibility in relation
12 to the activities of their nationals – not only the flag States of the vessels.

13
14 Article 117 provides that:

15
16 “All States have a duty to take, or to co-operate with other States in taking,
17 such measures for their respective nationals as may be necessary for the
18 conservation of the living resources of the high seas.”
19

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

24
25 It is not an unreasonable request when the Russian Federation comes here seeking
26 something which will benefit the owners, owners who have given the Russian
27 Federation itself a false address, that they should try and give us those details, and
28 we have asked for that as part of the bond.

29
30 Article 118 requires States to co-operate with each other in the conservation and
31 management of living resources in the high seas. States are obliged, for this
32 purpose, to enter into negotiations with a view to taking measures necessary to
33 conserve the living resources of the high seas.

34
35 In relation to the exclusive economic zone of a coastal State, Article 62(4)
36 establishes an obligation on nationals of other States to comply with the
37 conservation measures and other terms and conditions.

38
39 These requirements are reflected in agreements subsidiary to the 1982 Convention
40 such as the United Nations Food and Agriculture Organisation’s International Plan of
41 Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing,
42 paragraph 18 of which imposes on all states an obligation to co-operate to identify
43 those nationals who are the operators or beneficial owners of the vessels involved in
44 IUU fishing. Paragraph 24 obliges states to ensure that sanctions for IUU fishing by
45 vessels and nationals under its jurisdiction are of sufficient severity to effectively
46 prevent, deter and eliminate IUU fishing.

47
48 Paragraphs 34, 35 and 42 of the IPOA oblige a flag state to exercise adequate
49 control over fishing vessels entitled to fly its flag to ensure that it does not engage in
50 IUU fishing and maintains adequate records, and so on. The flag state is required to

1 keep a record of the names and addresses of those persons in whose name the
2 vessel is registered, those who are responsible for managing the operations and the
3 natural or legal persons who have beneficial ownership interest in the vessel.
4

5 In addition, paragraph 74 of the IPOA states:
6

7 “States should take measures to ensure that their fishers are aware of the
8 detrimental effects of doing business with importers, transhippers, buyers,
9 consumers, equipment suppliers, bankers, insurers and other service
10 suppliers identified as doing business with vessels identified as engaged in
11 IUU fishing.”
12

13 Of course, we want to know who their financial backers and insurers are. We want
14 to be able to deal with everyone through appropriate diplomatic pressure. That is
15 exactly what these conventions are directed to ensuring. It is not unreasonable that
16 it be a condition of the bond that these matters be disclosed to us by people who so
17 far have hidden behind a name and a false address. There are similar provisions in
18 the FAO Code of Conduct for Responsible Fisheries.
19

20 Australia’s ability to prosecute the land-based managers and beneficial owners of
21 IUU fishing vessels is limited because they have to be in Australia to be served with
22 a summons and formally charged. As a result, prosecution action has been, and
23 continues to be, directed at the persons who we find on the vessels. The larger
24 corporate interests controlling the activities of these vessels are essentially beyond
25 the reach of Australian law.
26

27 Consequently, we have a real and strong interest in pursuing diplomatic and other
28 action in relation to those states whose nationals can be identified as either the
29 controlling or downstream beneficial interests associated with IUU fishing. In the
30 light of measures taken by them to obscure their identities, such as the false address
31 given to the Russian Federation, it is reasonable that Australia obtain the information
32 about the controlling interests that would enable the action to be pursued.
33

34 Seeking that information is consistent with our obligation under Article 73(2). We are
35 merely seeking to bring a greater degree of transparency and accountability to the
36 issue, to ensure that the purpose of the bond is met and that action can be taken in
37 accordance with the 1982 Convention and its subsidiary agreements and codes.
38

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

1 third party states is a well recognised entitlement in the IPOA and in the United
2 Nations Fish Stocks Agreement.

3
4 You may notice that in a number of my submissions, including the last one, I have
5 talked a lot about the criminal law and have used the word “criminal” many times. It
6 is important for the Tribunal to realise that this is not a case about commercial
7 activity. This is a case about an organised, international gang of criminals, and the
8 Tribunal must deal with it on that basis. It is a criminal case, not a commercial case.
9 That is the most important feature of what has occurred here.

10
11 Finally, the fourth question that I was asked was: what is the status of current
12 proceedings before Australian courts with respect to the crew members and the
13 vessel? I will first deal with bail for crew members. I have already taken you through
14 most of it. They have been bailed in Australia on a deposit of AU\$75,000 each, plus
15 a further charge of AU\$20,000 in relation to one of them. That has been paid.

16
17 They also had to surrender their passports and seaman’s papers and are not
18 allowed to leave the Perth metropolitan area. As a result of the further application by
19 them and the appeal, there is now a further condition under which, if a deposit of
20 AU\$275,000 is made in respect of each crew member, they would be allowed to
21 leave Australia.

22
23 An appeal against that decision by the crew members will be heard on 16 December
24 this year. The proceedings in Perth are therefore advancing at the same time as
25 these proceedings.

26
27 I have dealt with the further charge against the fishing master and the fact that the
28 bail of AU\$20,000 was provided.

29
30 The crew members have each entered pleas of not guilty in relation to the charges
31 laid against them. The next date on which the matter will come before the court for
32 mention is 5 February. The District Court of Western Australia has indicated that if
33 the defendants were to successfully apply for an expedited hearing, trial dates could
34 be set within one or two months of that. So far, they have not made such an
35 application. It is, of course, a matter for the defence to decide whether they want an
36 expedited trial. If they make that application, the trial could take place much earlier
37 than the 12 months referred to in the submissions of the Russian Federation.

38
39 So far as the forfeiture proceedings are concerned, on 19 December the Federal
40 Court will consider an application by the vessel owner for a stay of the proceedings
41 commenced by it in relation to forfeiture and catch pending the prosecution. That
42 means that the owners are saying that they want the forfeiture proceedings to be
43 delayed until after the criminal proceedings against the crew. That application has
44 not yet been heard, but it is an application by the owners to delay the hearing of the
45 forfeiture proceedings.

46
47 Mr President, I trust that I have answered the four questions addressed to us by the
48 Tribunal. Of course, if there are any others, we shall endeavour to answer them as
49 soon as we possibly can.

50

1 I conclude by saying that this is a landmark case. This case provides an opportunity
2 for the Tribunal to strike a blow for one of its primary purposes. Considerations of
3 balance of the kind referred to in the earlier cases do not apply when one is dealing
4 with the sort of considerations with which we are dealing now. This is a very
5 different case from the earlier cases that the Tribunal has considered. Thank you,
6 Mr President.

7

8 **THE PRESIDENT:** Thank you, Dr Bennett. We shall resume these oral
9 proceedings at 1.30.

10

11 **(The hearing adjourned until 13:30)**

12

13

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