

**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 1.30 p.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-corrige

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

2

3 **PRESIDENT:** Please be seated. I give the floor to Mr Dzubenko.

4

5 **Mr DZUBENKO:** Mr President, at this stage I would like to restrict myself to just a
6 few brief remarks.

7

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

13

14 The measures taken by Russia in this respect were, for instance, reported to the
15 Executive Secretary of CCAMLR, Dr Miller, in a letter by the official representative of
16 Russia dated 14 October 2002. The contents of this letter should be known by now
17 to the Australia side. We did not bring the documents regarding this to the attention
18 of the Tribunal for the single reason of utter irrelevance, in our view, of the
19 proceedings, discussions, recommendations and decisions under the auspices of
20 CCAMLR and the present case.

21

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

33

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

41

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

50

1 This company also has an active office established in Moscow and the Australian
2 side can trace the address of this office and check it out. The address is at page 200
3 of our Application.
4

5 Mr President, with your permission I would like to give the floor to the counsel of the
6 Russian side, Mr David and Mr Tetley.
7

8 **THE PRESIDENT:** Thank you, Mr Dzubenko. I now give the floor to Mr Tetley.
9

10 **MR TETLEY:** Mr President, Members of the Tribunal. I will be making a reply on
11 three issues. I will make a short response to Australia's contention that there was
12 some logical difficulty with Russia's calculation of what the current security
13 requirements of Australia are. Secondly, I will deal with the issue raised by Australia
14 with respect to Russia's declaration and the problems of admissibility it is contended
15 that causes to Russia in referring to the circumstances of the vessel's seizure on this
16 application. Finally, I will briefly reply on the hot pursuit issues.
17

18 Taking first the amount of security that Australia is asking for the release of the crew
19 and the vessel, there is no logical problem, as suggested by Australia, when Russia
20 says that the current security required exceeds the value of the maximum possible
21 exposure of the owner and the crew in the criminal proceedings.
22

23 It is very simple to show. You ask a question, how much does the owner have to
24 pay to Australia on the current arrangements today if it wishes to see its crew and its
25 vessel released? The answer is AU\$3,932,500, that is AU\$600,000 of bail and
26 AU\$3,332,500 AFMA security. As was said in the original presentation, Australia
27 holds just in excess of AU\$2,175,000 in respect of catch sale proceeds and bail part
28 paid, the AU\$245,000. If you add those two figures together it is in excess of
29 AU\$6 million.
30

31 The total maximum exposure to fines and confiscation is just under AU\$5 million.
32 The logical problem is with Australia. Australia say that they have accounted for
33 AU\$412,500 in the AFMA security, if I can call it that. The court has also set bail at
34 AU\$845,000. If you want to take Australia's approach of separating out what we do
35 with the crew and what we do with the vessel, that leaves the crew, if you like,
36 accounting for well over AU\$1.1 million which is the maximum fines that they can
37 incur. The analysis is sophistry. The facts are clear. The owner would need to find
38 AU\$3,932,500 today or security in that amount for the release of its crew and vessel
39 and leave over AU\$2 million of its assets in the jurisdiction.
40

41 I turn to the second point, Russia's declaration. While accepting jurisdiction on this
42 application, Australia contends that, by virtue of Russia's declaration made upon
43 signature of the Convention, Russia has in respect of its complaint – and that is the
44 complaint that its vessel has been seized in breach of the freedom of rights of
45 navigation – that it has excluded recourse to the compulsory dispute resolution
46 procedures contained in section 2 of Part XV of the Convention. For that reason
47 Australia contends the Tribunal should not consider the circumstances of the seizure
48 on this application.
49

1 The Russian Federation has made a declaration that it does not accept the
2 procedures provided for in section 2 Part XV of the Convention in respect of disputes
3 concerning, amongst other things, military activities and disputes and law
4 enforcement activities in regard to the exercise of sovereign rights or jurisdiction.
5

6 Members of the Tribunal, you will be very familiar with the relevant applicable articles
7 to do with dispute resolution and relevant to this issue. They are Article 286, the
8 general article on jurisdictional issues with respect to the Tribunal and arbitral
9 panels, Article 297 and Article 298.
10

11 Article 297 sets out limitations and exceptions to the binding dispute resolution
12 procedures. It is divided into three sub-paragraphs. Article 298 sets out the
13 declaration mechanism by which States, Russia in this case, may, in certain
14 circumstances, opt out of binding dispute resolution.
15

16 Australia's position appears to be that, in respect of the dispute between Russia and
17 Australia concerning the seizure of the *Volga*, Russia has excluded recourse to the
18 binding settlement provisions of Section 2 of Part XV of UNCLOS because: either
19 the dispute that we are dealing with here concerns military activities; or alternatively
20 that the dispute concerns law enforcement activities in regard to the exercise of
21 Australia's sovereign rights or jurisdiction.
22

23 Turning briefly to military activities, there is no definition of "military activities" in
24 UNCLOS. However, the meaning can be determined from the context in which it is
25 used and from consideration of the *travaux préparatoires*.
26

27 In terms of Article 298(1)(b), law enforcement activities are not military activities.
28 Under Article 298(1)(b), certain matters of law enforcement may be excluded from
29 the binding settlement procedures under UNCLOS. This is in addition to military
30 activities. The juxtaposition of the exclusion of military activities and certain law
31 enforcement activities makes it clear that they are different matters. A State may
32 exclude one or the other or both.
33

34 I add, for the sake of completeness, that an activity is not a military activity simply
35 because a military vessel or aircraft is involved. Equally, the absence of a military
36 vessel does not mean that the activity is not a military activity. This is clear from the
37 proviso to Article 298(1)(b) relating to military activities.
38

39 Article 298(1)(b) requires the Tribunal to determine whether an activity is a military
40 activity or not, based on the purpose and intent of the activity, not the type of vessel
41 that is involved.
42

43 If further support is necessary for this proposition, one need only consider the
44 relevant *travaux préparatoires*. I would refer the Tribunal to two publications: the
45 UN Convention on the Law of the Sea commentary by Mr Myron Nordquist,
46 paragraph 298.36 to 298.38, and also the Handbook on the New Law of the Sea by
47 Mr René-Jean Dupuys and Daniel Vignes, volume 2, pages 1247 to 1249.
48

49 In this case, there is no basis to say that Australia's seizure of the vessel was
50 a military activity. Australia was involved in law enforcement activities directed at its

1 fisheries laws. I therefore turn to that and ask the question: has this particular law
2 enforcement activity been excluded; is it covered; has Russia opted out of the
3 dispute resolution procedures through what has happened here?
4

5 Under Article 298(1)(b), the binding resolution procedures can be excluded by
6 declaration for certain law enforcement activities mentioned in Article 297(2) and (3).
7 The exclusion does not apply to all law enforcement activities. Unless specifically
8 excluded, the binding resolution procedures apply (Article 286).
9

10 Article 297(2) can have no application to the facts of this matter and none of the
11 exclusions under Article 297(3) apply to this case because Russia will not challenge
12 Australia's management of its fisheries rights or the way, for example, that it
13 exercises its discretionary powers for determining allowable catch within its
14 economic zone.
15

16 Russia's complaint will be that the rights of navigation of its vessel on the high seas
17 have been violated because Australia cannot, as it alleges, sustain a claim that it
18 exercised a proper right of hot pursuit. Such a dispute is referable to the binding
19 resolution procedures under UNCLOS as of right (Article 297(1)(a)). This right is
20 unaffected by the declaration of the Russian Federation. Indeed, it is simply not
21 possible for a State in the area of law enforcement to exclude the binding resolution
22 procedures applicable to an allegation that the right of hot pursuit has not been
23 validly exercised. I refer in that regard to the passages from the commentary of Mr
24 Nordquist, previously referred to, and the handbook of René-Jean Dupuys and
25 Daniel Vignes.
26

27 That a State cannot exclude the compulsory resolution procedures applicable to an
28 alleged breach of the right of hot pursuit is unsurprising. The right of hot pursuit is
29 one of the rare exceptions to the general and universally recognised rule that the
30 high seas are freely navigable by vessels of all states (Article 87). If a State could
31 opt out of compulsory dispute resolution procedures applicable to a dispute over the
32 right of hot pursuit because, in that State's view, its act of seizing a vessel on the
33 high seas was connected to its law enforcement activities relating to its fisheries
34 laws, the high seas would become a lawless place, in my submission.
35

36 Where a fundamental right of UNCLOS is at issue, the Tribunal or arbitral tribunal
37 seized of the matter should be slow in finding that it has no jurisdiction. It is
38 submitted, in any event, that Australia's arguments on this jurisdictional aspect are
39 untenable both as a matter of construction of the applicable articles and on a proper
40 approach to the Convention as a whole. Furthermore, even if Australia was right,
41 that does not prevent this Tribunal nevertheless taking notice of the circumstances of
42 the seizure for the purpose of setting a reasonable bond. Its jurisdiction on this
43 application is established.
44

45 I turn briefly to hot pursuit to reply to the points raised by Australia. Australia's
46 contention, as I understand it on this issue, is that because the warship allegedly
47 used all practicable means available and satisfied itself at the time, albeit wrongly,
48 that the *Volga* was inside the Australian EEZ, and because the vessel was, in the
49 warship's view, fleeing the jurisdiction, the requirements under Article 111 that a stop

1 order must be given and that the pursuit must commence inside the EEZ simply do
2 not apply.

3
4 It is submitted that the construction of Article 111 put forward by Australia is
5 fundamentally flawed. Article 111(1) is in clear mandatory terms. A pursuit cannot
6 be lawful if it is commenced outside the EEZ. At best, Australia may be able to rely
7 on Article 111(4) and establish that it took all practicable means available to it at the
8 time to establish the *Volga's* position so that, and provided it can establish all the
9 other conditions of a hot pursuit, it may have a potential defence to part of a
10 damages claim under Article 111(8) because the pursuit at the time was justifiable.
11 However, what Article 111(4) does not do, in my respectful submission, is create a
12 legal fiction that a pursuit commenced outside the zone was in fact commenced
13 inside the zone. Australia should have released the ship, cargo and crew as soon as
14 it realised that the pursuit was not commenced inside the zone.

15
16 With respect to the other relevant conditions of a valid hot pursuit, no construction, in
17 my submission, of Article 111(4) can excuse or justify Australia's failure to comply
18 with the clear mandatory requirement that a pursuit can only be commenced after a
19 visual or auditory signal to stop has been given at a distance which enables it to be
20 seen or heard by the foreign ship.

21
22 In the final analysis, the Russian Federation is still in the dark as to when Australia
23 says the pursuit commenced. Australia says that it can rely on Article 111(4) but its
24 purported challenge to board was given when the helicopter was not in visual contact
25 with the *Volga* and before the warship's navigator had completed his efforts to
26 pinpoint the ship. I refer to the logs and statements in the Russian documents,
27 pages 253 and 232. After the challenge, the warship ordered the helicopter not to
28 pursue. I refer to the logs in the Russian documents, pages 249 and 253.

29
30 So when does Australia say that the pursuit began? Australia has now given three
31 explanations for when the pursuit began. The first explanation was:
32 when the helicopter issued its radio challenge at a time when, in the Australian
33 authorities' mistaken view, the *Volga* was in the Australian EEZ. That is the Attorney
34 General's letter, in the Russian documents at page 73.

35
36 The second explanation for when the pursuit commenced appears in the
37 documentary proceedings in the answers to particulars where Australia says that the
38 pursuit commenced when the warship turned to investigate the *Volga* prior to
39 launching the helicopter.

40
41 What does Australia say now? The third explanation is that the pursuit commenced
42 at some unspecified time after the warship had allegedly exhausted all practicable
43 means available to it to establish the *Volga's* position but when the *Volga* was
44 undisputedly on the high seas. That is in Australia's oral submissions this morning
45 or yesterday.

46
47 As outlined in Russia's oral presentation, the Russian Federation does not seek
48 a finding or declaration on the issue of hot pursuit. It asks, however, that Russia's
49 concerns on the pursuit as a flag state be taken into account. If the contentions of
50 Russia and the owner are found to be correct on this issue, that may be a complete

1 defence to Australia's claims to the vessel and catch. Where Australia is apparently
2 urging the Tribunal to assume guilt on the part of the owner and the crew, the
3 circumstances of the seizure and their potential legal effect on proceedings should
4 be a relevant consideration in assessing the amount of a reasonable bond.

5
6 **THE PRESIDENT:** Thank you, Mr Tetley. I call on Mr David.

7
8 **MR DAVID:** Mr President, Members of the Tribunal, I am aware of my time
9 limitation. I say at the outset that we have heard a good deal of what I would
10 describe as rhetoric from Australia concerning its policy considerations, held in good
11 faith, and its general allegations, if I can put it that way, of criminal offending against
12 not only those who it charges but those who it would perhaps like to charge.

13
14 When we made our original presentation, which, with well-intentioned flattery, has been
15 described as advocacy, it was, in our submission, based on the law of this Tribunal
16 and the neutral facts and approach which I submit is so important in a jurisdiction of
17 this nature, where one is considering arrangements to bring about a prompt release
18 in a quick, summary jurisdiction.

19
20 Therefore, my fundamental point is that Australia's emotions over issues have led it
21 to seek to impose terms and conditions that have nothing to do with a reasonable
22 bond, as this Tribunal has understood it to be and as those in the maritime
23 community would understand it to be. We say that the approach urged on the
24 Tribunal by Australia is contrary to the proper approach in prompt release
25 proceedings, involves a disregard of the Convention, the earlier cases heard by the
26 Tribunal and the provisions of Article 73.

27
28 Australia urges on the Tribunal various policy considerations. As I recall it,
29 Professor Crawford's address began with a range of those policy considerations.
30 Australia is prepared to deny the balance represented in this jurisdiction between the
31 interests of sovereign states, the flag state and the coastal state, which balance is
32 underlined in all the decisions of the Tribunal on the prompt release jurisdiction. Its
33 change of approach, because that is what it is, appears to be based on a desire to
34 impose a bond or – I put it this way – a range of conditions which, it seems, are
35 primarily directed at the owner of the vessel, who is not charged, which it says will
36 deter and punish in advance of criminal proceedings, in advance of a decision on the
37 merits of a criminal process.

38
39 Australia makes those wide-ranging allegations in the context of a proceeding in
40 which those who may face those allegations are not here to defend themselves.
41 I shall not make the obvious point about the undermining of due process entailed by
42 that argument, but the approach is wrongly premised to this bond-setting activity. It
43 assumes criminal allegations and a general allegation of criminal conspiracy, which
44 we heard repeated in a way that one might hear repeated in a magistrates' court but
45 would not expect to hear repeated here. It assumes that those allegations will be
46 made out. So Australia's approach to the bond is based on that assumption. It is
47 also based on an assumption that the owner or those who control the vessel will
48 inevitably reoffend, because that is the only basis on which Australia seeks to say,
49 "You should be forced to put up AU\$1 million for a VMS recorder before you get

1 back your vessel". It is also based on a general statement that the flag state is
2 ineffective and will not do anything.

3
4 We submit that that approach by the coastal state is not, in truth, about the obligation
5 under Article 73(2) to release vessels promptly on a reasonable bond being
6 provided, but about its policy goals, I accept held *bona fide*, of ensuring that
7 conditions are imposed on those against whom Australia makes allegations or
8 against whom it would like to make allegations, that those conditions are imposed to
9 an extent that those people will not or cannot get back their property on any
10 reasonable terms.

11
12 In effect, Australia would like to rewrite the law of this Tribunal and the provisions of
13 Article 73(2). That may sound like a surprising submission. However, it is in fact
14 borne out. The policy drivers behind us are borne out when you consider the
15 CCMLAR report that Australia has produced in document 3 of its documents. I refer
16 to paragraphs 21 and 22. Australia submitted that it would like to modify the
17 operation of Article 73(2). It wants to do that because it would like to impose bonds.
18 It states that coastal states were faced with the dilemma over the need to strike a
19 balance between setting a bond high enough to deter illegal fishers – note the
20 assumption – from retrieving their vessels and resuming fishing over the period of
21 legal proceedings, but also avoiding a challenge from the flag state about the level of
22 the bond. Australia wants to rewrite the decisions of this Tribunal and the clear
23 obligation contained in Article 73(2) because of its perceived view of this illegal
24 fishing.

25
26 The reality of the situation for this application is that there is an allegation of illegal
27 fishing, that there is a concern about it, but that there is then a whole host of truly
28 neutral factors which any Tribunal assessing the level of a bond ought to take into
29 account without becoming involved in rubber-stamping, as it seems to us, a speech
30 for the prosecution made by Australia. We say that those policy issues drive an
31 unreasonable approach to bonding, and that would produce a bond that is
32 unreasonable and does not bear any true relationship to the outcome of the
33 proceedings. Take the example of the VMS recorder. At the end of the proceeding,
34 no sentence could impose that AU\$1 million condition.

35
36 In support of the contention that, contrary to the Tribunal's decisions, there should be
37 full security, Australia urges the Tribunal to take into account the French language
38 version. On that, I briefly say that that argument was made in the *Monte Confurco*
39 case and that you, Mr President, concluded in a separate opinion that it added
40 nothing more to the meaning than the word "reasonable".

41
42 An important consequence of the approach put forward by Australia, if it were to be
43 adopted, is that prompt release proceedings would inevitably come to resemble
44 policy debates between states, which I submit is never the intention, or criminal
45 prosecutions against individuals, rather than an efficient, quick and, if I may borrow
46 the words of Judge Laing, relatively routine process for bringing about the release of
47 a vessel.

48
49 The proper forum for some of the matters raised by Australia is CCAMLR, in which
50 the Russian Federation actively participates, or the domestic forum in its criminal or

1 civil courts. In my submission, it is fortunate that the approach now espoused by
2 Australia has not found favour in previous prompt release cases. As I have said, that
3 is a good thing where you have a jurisdiction that is summary in its nature, which is
4 obliged to examine, without prejudice to domestic proceedings, and I say without
5 prejudging them, whether in a practicable, workable sense a bond is reasonable in
6 striking the balance which permeates all the decisions of this Tribunal and which,
7 surprisingly, I heard criticised.

8
9 Australia's overall approach drives it to introduce a range of considerations that it
10 says are relevant, but which are not. As I have submitted, the bond has to be related
11 to the sums that the shipowner or crew may have to pay for potential liabilities as
12 a result of the proceeding. If you add in elements of cost or reasons such as the
13 policing of your EEZ, deterrent measures such as the imposition of a AU\$1 million
14 VMS system, to give two examples, you add into the bond wholly irrelevant matters.

15
16 In addition, AFMA apparently seeks to impose the VMS system because it assumes
17 that the flag state does nothing. There is no evidence of that. This completely
18 leaves aside the argument on fundamental principle and is based on the assumption
19 that the vessel will reoffend. There is no evidence of that. That is based on the
20 *Camouco* or another vessel having reoffended. Australia assumes the worst and
21 says that it applies here. In my submission, if you start from the wrong place with
22 this kind of application and this kind of bonding, you arrive at completely the wrong
23 result.

24
25 As to the proper approach, which we say we have outlined in our initial oral
26 presentation, a submission was made about the irrelevance of the catch, and I have
27 noted the dissent on that issue in earlier cases. In my submission, it is right to take
28 into account everything that may or may not fall within the outcome of the
29 proceedings. In my submission, that makes sense. I am, of course, supported by
30 the decision of the Tribunal in the *Monte Confurco* case, at paragraph 86.

31
32 In my submission, Australia is most anxious to invite the Tribunal to prejudge the
33 outcome, while at the same time excluding any consideration in the proceedings and
34 in an international forum which would be well qualified to consider the issue of the
35 circumstances of the vessel's seizure. It suggests that the Tribunal should prejudge
36 the domestic proceedings and leave out any consideration of the circumstances of
37 the seizure. Mr Tetley has dealt with the issue. I simply say that it is contrary to
38 common sense to ignore that and that there is no basis for the technical objections
39 made by Australia.

40
41 What does all that come back to? I say that Australia's approach has three
42 objections of principle. It involves, first, deterrent bonding as a punishment for
43 unproven allegations; secondly, giving complete primacy to the coastal state's law
44 reform policy agendas and complete dominance to the allegations of illegal fishing;
45 and, thirdly, probably arising from the first two, adding as relevant considerations
46 matters that have nothing to do with security for the possible outcome of the
47 proceeding.

48
49 If we were sitting in a vacuum, I would say that those are compelling reasons why
50 Australia's bond is unreasonable. Fortunately, in a jurisdiction such as this we are

1 not in a vacuum. We have addressed the facts of earlier cases. Those cases
2 represent an approach based on international legal principles in deciding what is, on
3 a balanced approach, leaving aside the ultimate outcomes in a national court, a
4 reasonable bond. If I can return to simple advocacy, I say that those cases should
5 be applied to this situation, which, in spite of Australia's pleadings, is not a million
6 miles away from other allegations of illegal toothfish fishing.

7
8 We submit that it is important in this jurisdiction to maintain a consistent approach
9 that focuses primarily on matters directly relevant to the bond, as that concept is
10 properly understood, security for the possible outcome in domestic proceedings, and
11 arrives at a proportionate response based on established principle. If any other
12 approach is adopted, there will be no consistency. Each state will come, as Australia
13 has, with its preoccupations and this procedure will become the vehicle for an
14 expression of an individual state's coastal policy and the imposition of punitive
15 measures in advance of trial, completely contrary to the balance of interests under
16 the Convention. Vessels will simply not be released because the coastal state does
17 not want them to be.

18
19 Unfortunately, the previous cases in which a similar background has been involved
20 have seen this Tribunal adopt a practical, neutral, non-pejorative approach,
21 balancing the two sets of national interests in a fair way against the background of
22 unproved allegations. In accordance with international legal principles relevant to
23 establishing a reasonable bond, the Tribunal has rightly sought to apply a
24 proportionate approach between state interests. Russia says – I repeat what we
25 said in our original oral presentation – that the Tribunal's approach in previous cases
26 should be applied to this case. Mr President, those are my closing observations.

27
28 **THE PRESIDENT:** Thank you, Mr David. We shall resume these oral proceedings
29 at 3.15 this afternoon, when we shall hear Australia's response. I remind the parties
30 that their final submissions have to be submitted in writing.

31
32 **(The hearing adjourned until 15:15)**

33
34
35
36 **THE PRESIDENT:** When we last met, counsel for the Russian Federation had
37 ended his intervention and we spoke of making final submissions. At this time he will
38 do so in accordance with our Rules, Article 78, paragraph (2).

39
40 **MR DZUBENKO:** Mr President, our final submission is that the Russian Federation
41 asks that the Tribunal make the following orders and declarations:

- 42
43 (a) A declaration that the Tribunal has jurisdiction under Article 292 of the United
44 Nations Convention for the Law of the Sea 1982 (UNCLOS) to hear the
45 application.
46
47 (b) A declaration that the application is admissible; thirdly, a declaration that the
48 Respondent has contravened Article 73(2) of UNCLOS in that the conditions set
49 by the Respondent for the release of the *Volga* and three of its officers are not
50 permitted under Article 73(2) or are not reasonable in terms of Article 73(2).

1
2 (c) An order that the Respondent release the *Volga* and the officers and its crew if
3 a bond of security is provided by the owner of the vessel in an amount not
4 exceeding AU\$500,000, or in such other amount as the Tribunal in all the
5 circumstances considers reasonable.

6
7 (d) An order as to the form of the bond or security referred to in paragraph 1(d).

8
9 (e) An order that the Respondent pay the costs of the Applicant in connection with
10 the injunction (*sic*). 13 December 2002. Thank you, Mr President.

11
12 **THE PRESIDENT:** Thank you very much, Mr Dzubenko. I now give the floor to the
13 Respondent and first on my list is Mr Burmester.

14
15 **MR BURMESTER:** Mr President, it falls to me to commence the Australian reply.
16 I will deal with two issues addressed by Mr Tetley this afternoon, that is the Russian
17 declaration, and secondly the illegality of the hot pursuit.

18
19 As to the declaration, it is certainly not for this Tribunal in these proceedings to reach
20 any determination on whether jurisdiction would exist in any substantive proceedings
21 that might be brought in relation to which the Russian declaration would be called
22 and invoked. However, in our submission, this Tribunal should not ignore the real
23 possibility that there may be no jurisdiction in proceedings concerning the hot pursuit
24 of the *Volga* if it considers that that circumstance has any bearing on the
25 determination of a reasonable bond. Of course, Mr President, you will recall our
26 principal submission is that the circumstances of arrest have no bearing whatsoever
27 on the determination of the reasonableness of the bond.

28
29 Mr Tetley made reference to the military activities exception contained in the
30 declaration. I note that Australia did not yesterday seek to place any reliance on the
31 military activities exception and we do not ask this Tribunal to consider its possible
32 application although, of course, Australia reserves its position in this regard in
33 relation to any future substantive proceedings that might be brought.

34
35 As to the law enforcement activities exception, that refers to law enforcement
36 activities in regard to exercise of sovereign rights or jurisdiction excluded under
37 Article 297(3). Article 297(3)(a) refers to any dispute relating to sovereign rights with
38 respect to living resources in the exclusive economic zone or their exercise.

39
40 Mr President, we say that where hot pursuit issues arise that are directly connected
41 with law enforcement activities designed to enforce coastal state fisheries laws, then
42 the exception in Article 299(1)(b), and hence the declaration made under that
43 paragraph, extends to hot pursuit activities connected with fisheries enforcement
44 activities.

45
46 It does not follow from this contention that every hot pursuit dispute case will
47 necessarily be excluded where there is a law enforcement activities exception but it
48 is our contention that a hot pursuit case that relates to enforcement of exclusive
49 economic zone fisheries laws falls clearly within the exception in Article 298. On that
50 basis we maintain our submission that the Russian declaration would exclude any

1 dispute concerning arrest in the circumstances of this case and that declaration
2 ought to be taken into account if this Tribunal were to consider there was any
3 relevance in the circumstances of the arrest.

4
5 That brings me to the second issue raised by Mr Tetley, the circumstances
6 concerning the arrest. This, as I outlined yesterday in our submissions, involves the
7 construction of Article 111 of the Law of the Sea Convention. The arguments that
8 we made yesterday were arguments of construction as to how that Article ought
9 properly to be interpreted and applied.

10
11 We do not seek to read the Article so as to create a legal fiction as Mr Tetley
12 suggested this afternoon. In our submission, what we invite the Tribunal to do if it
13 considers it relevant, is to construe the Article in accordance with its evident
14 purpose. The Vienna Convention on Treaties makes clear that an interpretation that
15 avoids a result which is manifestly absurd or unreasonable is one to be avoided, and
16 an interpretation which focuses solely on the simple objective fact of where the ship
17 happened to be can, we say, in circumstances such as arose in this particular case,
18 be to give the section or the Article a manifestly absurd and unreasonable operation.

19
20 The Russian interpretation would require that, despite the best efforts of the arresting
21 ship at calculating the location of the offending vessel and where the coastal state
22 authorities acted in complete good faith, the only thing that matters is where the
23 vessel actually was at the time. In some way, if a vessel happens to be outside the
24 zone by only a few metres, that this then has direct consequences that will prevent
25 any conviction for the fisheries illegalities or any forfeiture of the vessel.

26
27 As we argued yesterday, to give paragraph (4) of Article 111 no work to do would be
28 a very strange construction of Article 111 and yet that is, it seems, the position still
29 contended for by the Russian Federation. We continue to reject that construction.

30
31 We also emphasized yesterday that the possible breach of Article 111 has, in any
32 event, no direct application in the domestic proceedings, either the criminal offence
33 proceedings or the forfeiture proceedings and so again, Mr President, it is not
34 entirely clear that there is any real basis to consider the circumstances and the
35 application of Article 111 when determining the issues of reasonable bond. But, as
36 I indicated yesterday, in case the Tribunal does consider it relevant, we have made
37 the submissions about its interpretation and I need to say just a little bit more.

38
39 Mr Tetley again raised the issue of where the pursuit was, in fact, commenced for
40 the purposes of Article 111. In our submissions yesterday we focused on the first
41 radio communication from the helicopter. The fact that at the time the vessel may
42 not have been in visual sight does not, in our submission, matter. The requirements
43 of Article 111(4) are that the visual or auditory signal has been given, and there is no
44 evidence that at the time of the signal from the helicopter the vessel was not in
45 auditory range.

46
47 There was also a suggestion that we were inconsistent as to when the pursuit
48 commenced. The suggestion in the domestic forfeiture proceedings that pursuit
49 commenced when the naval vessel first changed direction and directly headed for

1 the *Volga* is made for the purposes of those domestic forfeiture proceedings and
2 reflects the provisions of the Fisheries Management Act.

3
4 As I indicated yesterday, it is the contention of the Australian Government that in
5 those forfeiture proceedings the circumstances of the arrest of the vessel do not
6 affect the lawfulness of its seizure and the fact that it has already been successfully
7 forfeited to the Australian Government, but that remains to be tested in Australian
8 domestic proceedings.

9
10 The reference in the particulars and the pleadings in that domestic case which
11 indicate the vessel was pursued from the time when the naval vessel changed
12 direction and went towards the *Volga* is made for the purposes of those domestic
13 proceedings and reflects the particular provisions of the domestic legislation which
14 do not in any way directly pick up or require the domestic tribunal to make
15 determinations about whether Article 111 was complied with. Compliance with
16 Article 111 and its intricacies is, if it is a matter for anyone, a matter for an
17 international tribunal and not an Australian domestic court. Mr President, we submit
18 there is no inconsistency in the allegations or assertions made by Australia as to
19 when the pursuit commenced.

20
21 Mr President, all these intricacies about Article 111 can, of course, be avoided if the
22 Tribunal accepts the first Australian submission which is that Article 111 and the
23 circumstances of the arrest of the vessel have no bearing whatsoever on the
24 reasonableness of the bond.

25
26 If the circumstances are relevant, then in our submission what has been presented
27 to you in the Australian submissions shows that the issues concerning Article 111
28 are complex and difficult and one simply cannot accept the bare assertion by the
29 Russian Federation that there has been a breach of Article 111 and that that should
30 be taken into account. The situation is far more complex than that.

31
32 Mr President, that concludes my portion of the reply. I now invite you to call
33 Professor Crawford.

34
35 **MR CRAWFORD:** Mr President, members of the Tribunal, in listening to arguments
36 in this case, one is reminded that Article 292(2) refers to applications made by or on
37 behalf of a State and you will be aware of the background to that rather unusual
38 language.

39
40 Mr David has complained that the shipowner is not here. It is certainly true that his
41 address is not here. Mr Bennett will show you that the second address is untrue, like
42 the first one, but of course Mr David and Mr Tetley have been representing the
43 shipowner, if not formally in these proceedings, certainly in earlier proceedings, and
44 indeed the Tribunal has seen this phenomenon before. It was a major factor in the
45 *Saiga* case.

46
47 In any event, I want to address separately the points made by the Agent for Russia
48 and the points made by the counsel for Russia, the latter being objectively in relation
49 to the shipowner.

1
2 Dealing with the comments made by the distinguished Agent for Russia, Australia
3 welcomes his statement that the Russian Federation takes seriously its obligations
4 under CCAMLR. The Russian Agent did not file their letter but you will find in the
5 document tabled by Australia at tab 3 of the authorities at pages 11 to 12 a
6 statement of Russia's concerns in respect of enforcement issues under CCAMLR.
7 I have to say that this marks a step forward in the assertion of effective jurisdiction by
8 Russia over ships in relation to the CCAMLR region. It includes, for example, a
9 commitment to increase the coverage of VMS on ships fishing in that region, and
10 I will come back to that.

11
12 If Russia carries through with these commitments, then any suspicion of lack of
13 effectiveness of Russia's control over its ships in this region will disappear. We can
14 hope that fisheries relations between Russia and Australia in future will be
15 significantly improved, as they have been significantly improved in the aftermath of
16 the decision of this Tribunal between Australia and Japan. Nothing I say is intended
17 in any sense to cast doubt upon the possibility of that improvement. We welcome
18 the statements made by the Russian Agent in that respect.

19
20 Let me turn now to the comments made by Mr David, which were, if I may say so, of
21 a somewhat different calibre. It is a bit difficult to rebut silence in a reply but you
22 should notice his complete silence on two points: first of all, about whether the
23 shipowners had any defence to these claims. If the shipowners had an argument
24 with the defence to these claims, we do not ask to try the defence but you might be
25 told what it is. They stand up here and present themselves as potential innocents;
26 they seem to be innocent of any explanation of their situation. Secondly, there is
27 complete silence about the issue of illegal, unreported and unregulated fishing of
28 Patagonian toothfish. There was not a word in his statement on either point. It is
29 true that Mr David said, in a form of self-assessment, that a complete vacuum – and
30 I emphasise the word “vacuum” – his submission would be persuasive, and that is
31 what they want: a complete vacuum. They want a factual vacuum and a legal
32 vacuum.

33
34 Let me deal first with the factual vacuum. At least in the *Camouco* case there were
35 arguments made that the *Camouco* may not have been particularly guilty, or guilty at
36 all, of illegal fishing. There was at least some grounds for the majority to believe that
37 not all the fish on board were illegally fished. There is not a word of explanation from
38 Mr David and not a word of explanation from Mr Tetley that would rebut the
39 enormous bulk of evidence that we have put forward.

40
41 I made the point in my first round, in response to the remark of Judge Jesus, that it is
42 true that in certain circumstances a State may stand up and say, “We do not ask you
43 to form any view about the case; leave it to the national courts”. That is not
44 Australia's position. Australia gives you the evidence. Obviously the obvious
45 questions of guilt or innocence will be decided in the Australian court if the three
46 charged persons appear to their bond, but in the meantime you are allowed to take it
47 into account, we say, in any event but certainly in the event where Australia wishes
48 you to do so, and we do. It is of great significance that there was not a word of
49 defence, not a word, a complete factual vacuum.

50

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

10
11 What do Mr David's clients – I am sorry, Mr David's previous clients – need to have
12 to fish in the CCAMLR region? They fish in a vacuum; they need none of these
13 things. You can see how they resist VMS, even for a short period of time. Why do
14 they resist it? What inference might one draw from their resistance? That they are
15 going to go back there?

16
17 The vacuum which Mr David seeks is a vacuum in which his previous clients vacuum
18 up Patagonian toothfish to the point of commercial and perhaps biological extinction.

19
20 Mr David says that our concern, as expressed in my first round intervention, is with
21 policy considerations. By my account, he used the word "policy" 15 times. Indeed, it
22 seems to be a pejorative phrase. But this is the policy of the law; it is the policy of
23 international law. It is the obligation contained in Article 61 of the Convention, which
24 it is your mission to enforce and progressively to ensure. The coastal state, taking
25 into account the best scientific evidence available to it, shall ensure, through the
26 proper conservation and management measures, that the maintenance of the living
27 resources of the exclusive economic zone is not endangered by over-exploitation.
28 That is not a pure question of policy; that is a legal obligation.

29
30 In the situation in which it is faced, Australia is obliged by existing scientific
31 information to ensure that Patagonian toothfish do not become extinct, and there is
32 a serious danger of that.

33
34 Mr David referred to the discussions at the CCAMLR meeting in October of this year,
35 at which Australia's representatives called for changes to Article 73(2) or to its
36 application. The document was, of course, put in by Australia. That is tab 3 of our
37 authorities, and I commend it to you. It represents the present state of the political
38 debate on the situation. It is entirely consistent with the legal position we have taken
39 that this Tribunal, faced with clear and uncontroverted, unanswered evidence of
40 flagrant breaches of coastal state law enforced in accordance with the Convention
41 and in accordance with CCAMLR, should take that factor as the dominant factor.
42 That, in a word, is our position. It is not a question of policy.

43
44 There are two fundamental questions of policy underlining that legal argument. We
45 all know about the tragedy of the commons. It is much cheaper to fish for
46 Patagonian toothfish if you do not have an observer, if you do not have VMS and if
47 you do not need a quota. The reasonable or sufficient bond for the release of a ship
48 caught fishing in these circumstances must take into account the circumstances.

49

1 Let us take the case of a truck driver who, while under the influence of alcohol, kills
2 someone and is brought before a magistrate pending trial. The truck driver says,
3 "I stand innocent. I plead not guilty. This is my livelihood. Do not take it away from
4 me, it will cause ruin". It is perfectly reasonable in the period prior to the trial to put
5 a governor on the truck to make sure that the truck driver does not exceed the speed
6 limit, or to impose other conditions. That would be described as a bond or other
7 financial security. It would be a financial security imposed on the driver to ensure
8 good behaviour pending trial. That is precisely what we ask with the VMS. We ask
9 that this particular ship, presumed innocent in law but with no answer in fact, at least
10 none that has been presented to you, shall be placed in the same position as all
11 other CCAMLR-licensed vessels if it is to be released. That is not an unreasonable
12 request.

13
14 There is a further issue of policy by which, if I may say so, in this field this Tribunal
15 will be judged. We face a period of about another five to ten years in which there
16 has to be a reversal of the present chronic state of most of the world's fish stocks.
17 The judges living in Europe will need no reminding of the situation as a result of the
18 drastic cuts of last week. There is about to be a dramatic shift of fishing power from
19 the northern to the southern hemisphere and the States of the southern hemisphere
20 need to be in a position to respond. That, at a fundamental level, if you like, is a
21 question of policy; it is a question of policy of which this Tribunal can take account.

22
23 If I were you, I would have a nagging concern about the hot pursuit issue. We have
24 presented a legal argument which, in another forum, might have to be tested, but
25 there is a high seas problem about hot pursuit, and one cannot hide that. There is
26 a serious legal issue and one can imagine the concern of the Russian Federation to
27 ensure that its ships, whatever they may have done, are not arrested on the high
28 seas. That is an issue which might arise in appropriate proceedings between
29 Australia and the Russian Federation, or it may be resolved by them in accordance
30 with appropriate diplomatic procedures. In these proceedings, in substance it is the
31 shipowners who seek to take advantage of that, in proceedings that relate to a
32 completely different issue.

33
34 If it was true that there was more than a technical breach of Article 111, if there had
35 been a serious breach of Article 111, the remedy would be the complete release of
36 the vessel and the catch. That would be a remedy which only the Russian
37 Federation would seek but it could seek it if there had been a serious breach. We
38 say that if there was a breach here, it was a technical breach and that any link
39 between the issue of forfeiture and the issue of the remedy for a technical breach of
40 hot pursuit is severed.

41
42 In any event, that is not the issue which comes before you under Article 292. Under
43 Article 292, you are concerned with a completely different issue. It seems, with
44 respect, that the shipowner would have nothing to say if there was no doubt about
45 the Article 111 issue, but why should the shipowner be able to rely on Article 111?
46 What virtue is it to the shipowner that it was arrested in one place or another when
47 the substance of the issue against the shipowner is flagrant, repeated, unlawful
48 depredations against an endangered species?

49

1 In those circumstances, there is no link between the Article 111 issue and the
2 Article 292 issue, and the Tribunal said as much on much more questionable facts in
3 the *Saiga* case.
4

5 For all these reasons, Mr President and members of the Tribunal, and of course the
6 Agent will deal with this in future, we will say that the dominant consideration here is
7 the consideration of the conservation of these species. The dominant thing you have
8 heard this afternoon is what you have not heard: the silence from the other side
9 either as to the existence of the slightest trace of a defence on their part or the
10 existence of the slightest concern about the species which their activities imperil.
11

12 Mr President, members of the Tribunal, thank you for your attention.
13

14 **THE PRESIDENT:** Thank you, Professor Crawford. I now give the floor to
15 Dr Bennett.
16

17 **MR BENNETT:** Mr President, Members of the Tribunal, there are three matters that
18 I shall deal with very briefly in these concluding moments of the oral submissions.
19 The first is our application under Article 71 to introduce further evidence; the second
20 is the calculation of the bond amounts; and the third is the submission that the VMS
21 bond involves, in Mr David's words, an assumption of guilt, an assumption that there
22 will be further illegal fishing and the imposition of punishment without a determination
23 of guilt.
24

25 First, under Article 71, we seek to produce a new document. It is a very short
26 document, which arises because of what was said by the respected Agent of the
27 Russian Federation in his submissions. We came here prepared to show that the
28 address given for the owner in the Russian Memorial and in the Fishing Licence was
29 false. Another address was given in the small craft survey, but that did not seem so
30 important. We investigated it and found that it was false. We did not burden the
31 Tribunal with that detail because the other address did not seem so relevant, but
32 now that the Russian Agent has for the first time raised that address to try to show
33 that the company has a genuine address, we seek to use our evidence on that as
34 well. It is the affidavit of Victoria Ivanova, which we have given to you, in which she
35 in effect says that she went to that address and found no Albers there either, you will
36 not be surprised to learn. What has occurred is that the owners of the *Volga* have
37 again misled their flag state.
38

39 The second matter concerns the calculations. Mr Tetley has repeated the
40 Applicant's erroneous view of the figures. Having accused me of sophistry, he has
41 again submitted to you that we are asking for AU\$6 million for a boat that is worth
42 AU\$1.9 million. However, he arrives at his figure of AU\$6 million by adding the bond
43 of AU\$3.32 million that we seek to the catch and to the further bail that is sought.
44 I have dealt with the matter of the further bail. If the AU\$3.32 million were provided,
45 the crew would be free to go. They would not need to pay the extra AU\$600,000.
46 I have said that a number of times. That is the position. Therefore, you cannot add
47 the AU\$600,000.
48

49 Secondly, you cannot include the catch. I do not want to repeat all my submissions
50 about the catch. It was described by Mr David as "the owner's property". We cannot

1 make that assumption. We are talking about security for the possibility that the
2 Australian courts will determine guilt and that the boat will be forfeited. In that event,
3 the fish was not their lawfully obtained property. So why should they be entitled to
4 count it as security for the possibility that they lose the litigation? It is simply not
5 logical. Of course, if they succeed, they will get it all back and their bond will be
6 released, but the purpose of the bond is to secure the position against that. I have
7 dealt with the importance of the words “sufficient” and “reasonable” and the function
8 of a bond in that area.

9
10 Similarly, with regard to the VMS, the final sum that makes up the amount used by
11 Mr David to arrive at his figure of AU\$6 million, if the boat does not reoffend, the
12 AU\$1 million will be refunded. It is security to prevent the boat from reoffending in
13 the intervening period while it is released under an order of this Tribunal or under the
14 bond that we seek. That is all it is. When looked at in that way, we submit that our
15 demand for AU\$3.32 million is clearly reasonable and certainly well within the margin
16 of appreciation. If you were to say that the bond ought to be a little less, the
17 AU\$3.32 million would still be within the margin of appreciation and would not be
18 unreasonable. “Unreasonable” does not mean “larger than the Tribunal would order
19 if it were fixing the bond”. As I have already indicated, it means a figure that is
20 unreasonable and not sufficient.

21
22 The last of the three matters that I address is the VMS. Mr David has described it as
23 involving an assumption of guilt, an assumption that there will be further illegal
24 fishing and the imposition of punishment without determination of guilt. It is none of
25 those. It does not assume guilt; it assumes the possibility of guilt, as in the example
26 of the truck driver referred to by Professor Crawford. One puts the governor on his
27 truck because there is a possibility that he is guilty and a possibility that he will
28 reoffend while on bail or while allowed to drive his truck pending the trial. It does not
29 assume guilt. Without punishing him, it simply assumes that there is a possibility of
30 guilt, and it protects the other party against that possibility, the other party in that
31 case being the community, the other party in this case being the world community. It
32 does not punish, because it is returned if there is no reoffending. It is an
33 interlocutory protection for the coastal state. If it is not provided, we can suffer
34 millions of dollars-worth of depredations of a scarce resource which, as has been
35 shown, faces extinction. That is the downside for us. The downside for them is a
36 little interest for a short period, and that is all.

37
38 Professor Crawford also dealt with the absence of any submission suggesting that
39 there is no guilt. You have seen the overwhelming and incontrovertible evidence
40 from Sr Sanchez, who has told you exactly what they were doing. He was the
41 person in charge of the other ship, though not technically the captain; we have seen
42 the restored computer files, which show us exactly where they were fishing and on
43 what days; and we have seen the fax saying, “You are safe until the 7th” – not much
44 doubt about what they were safe from – and, of course, they were fleeing from the
45 zone when they were intercepted. This is not a case in which there will ever be any
46 serious doubt about guilt. It will be one of the easiest cases for some lucky
47 prosecutor in Australia.

48
49 Mr David says that we have not prosecuted the owners. We cannot prosecute them.
50 They are not within our jurisdiction. Of course, we would love to get our hands on

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

10
11 Mr President, Members of the Tribunal, this is a landmark case for the Tribunal. It is
12 a case in which the Tribunal has to determine whether to permit the provisions of
13 Article 192 to be used for the benefit of gangs of international criminals who should
14 be suppressed rather than assisted. That is the issue in this case. We have set up
15 a bond which, for all the reasons that I have given the Tribunal, is reasonable. It is
16 not a matter of holding a balance between a coastal state and a flag state. It is a
17 matter of asking, “Who is to prevail, the good guys or the bad guys?” Mr President,
18 Members of the Tribunal, that is the issue facing the Tribunal in this case. Thank
19 you.

20
21 **THE PRESIDENT:** Thank you, Dr Bennett. I now give the floor to the Agent of
22 Australia, Mr Campbell.

23
24 **MR CAMPBELL:** Mr President, Members of the Tribunal, that concludes the oral
25 argument for Australia. I should like to repeat that it has been an honour and a
26 privilege for Australia again to appear before the Tribunal.

27
28 I will now formally read the Order sought by Australia: For the purposes set out in
29 the Respondent’s written and oral submissions, the Respondent requests that the
30 Tribunal reject the Application made by the Applicant.

31
32 Thank you, Mr President and Members of the Tribunal.

33
34 **THE PRESIDENT:** I thank the Agent of Australia, and that brings us to the end of
35 the oral proceedings in the *Volga* case.

36
37 I would like to take this opportunity to thank the Agents and Counsel of both parties
38 for their excellent presentations made before the Tribunal over the past two days. In
39 particular, the Tribunal appreciates the professional competence and personal
40 courtesies exhibited so consistently by Agents and Counsel on both sides and, I add,
41 the spirit of co-operation that prevailed in my consultation with the parties.

42
43 The Registrar will now address questions in relation to documentation.

44
45 **THE REGISTRAR:** Mr President, in conformity with Article 86(4) of the Rules of the
46 Tribunal, the parties have the right to correct the transcripts in the original language
47 of their presentations and statements made by them in the oral proceedings. Any
48 such corrections should be submitted as soon as possible but in any case no later
49 than 12 noon Hamburg time on 16 December 2002.

50

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

5
6 **THE PRESIDENT:** The Tribunal will now withdraw to deliberate on the case. The
7 judgment will be read on a date to be notified to the Agents. The Tribunal has
8 tentatively set a date for the delivery of the judgment. That date is 23 December
9 2002. The Agents will be informed reasonably in advance if there is any change to
10 the schedule.

11
12 In accordance with the usual practice, I request the Agents kindly to remain at the
13 disposal of the Tribunal in order to provide any further assistance and information
14 that it may need in its deliberation of the case prior to the delivery of the judgment.

15
16 This hearing is now closed.

17
18 **(The hearing concluded at 16:00 hours)**

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21
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23
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25