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

2002

Public sitting

held on Thursday, 12 December 2002, at 3 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-corrigé

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

The Russian Federation is represented by:

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

as Agent;

Mr. Valery Sergeevich Knyazev, Head of Division, Legal Department, Ministry of Foreign Affairs,
Mr. Kamil Abdulovich Bekiashev, Head of International Law Department, Moscow State Law Academy,

as Co-Agents;

and

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

as Counsel;

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

as Adviser;

Australia is represented by:

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

as Agent and Counsel;

and

Mr. David Bennett AO QC, Solicitor-General of Australia,
Mr. James Crawford SC, Whewell Professor of International Law, University of Cambridge, Cambridge, United Kingdom,
Mr. Henry Burmester QC, Chief General Counsel, Office of the Australian Government Solicitor,

as Counsel;

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

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

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

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

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

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

as Advisers;

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

as Assistant.

CLERK OF THE TRIBUNAL: All rise.

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

MR CAMPBELL: This case has been brought pursuant to Article 292 of the 1982 United Nations Convention on the Law of the Sea. An action is available under that article to enforce the obligations under a number of other articles to release arrested vessels and crews upon the posting of a reasonable bond or other security.

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

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

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

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

That said, the territory and its surrounding EEZ are in a remote area of the world. That very remoteness is both the source of its importance and the point of its vulnerability. Its principal importance, both in ecological and economic terms, lies in the marine species that inhabit the waters surrounding the islands, including the Patagonian toothfish **[SLIDE 1]**, and the fact that the island, and its surrounding waters, form a key part of the Southern Ocean ecosystem. Unfortunately, its

remoteness also has made its surrounding waters vulnerable to the systematic and organised pillage of those marine species, contrary to both Australian law and treaties to which both the Applicant and Australia are parties.

The principal international regime specific to that area for the conservation and management of marine species is the Convention for the Conservation of Antarctic Marine Living Resources (known as 'CCAMLR')**[SLIDE 2].** (On this slide showing the CCAMLR area, Heard Island is to be found just to the left of the top in area 58.5.2.) Both Australia and the Russian Federation are parties to CCAMLR. However, the companies and individuals involved in the illegal plunder of the resources of the Southern Ocean, including the Patagonian toothfish, pay no regard to these internationally agreed conservation measures. They take advantage of the fact that international obligations, including those under the 1982 Convention and CCAMLR, do not bind individuals or corporations directly.

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

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

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

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

One can see a cycle developing that is inimical to the proper management and conservation of the marine living resources of the Southern Ocean. Unfortunately, flag States have been pressured to take actions which promote this cycle. Also, prompt release cases under Article 292 have been used as a means of evading and

undermining coastal State enforcement measures that are consistent with the relevant international conventions.

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

> "New Zealand notes that a significant proportion of the Tribunal's caseload to date arises from applications for prompt release of vessels detained *on charges of illegal fishing activity in the Southern Ocean*. In New Zealand's view, the Tribunal ought to be cognisant of the serious and growing problem of IUU fishing [illegal, uncontrolled and undeclared fishing] in these waters, a result of enforcement difficulties and the very high value of the fishery. These factors mean that the incentive for vessel owners and operators to engage in IUU fishing is significant. Similarly, high rewards are available to vessels released from detention upon the posting of a financial security following detention for suspected earlier IUU fishing. Coastal States, and States Parties to UNCLOS and regional fisheries management organizations, including CCAMLR, must take steps to compel and encourage better observance with the provision of these instruments. It is clear that the Tribunal also has a role to play."

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

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

> "The French authorities are deeply concerned by the fact that the frequent resorting to Article 292 of the Convention on the Law of the Sea may be an obstacle to sustained efforts aimed at combating illegal fishing."

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

Mr President, in your separate opinion in the 'Camouco' case that I mentioned earlier, you mentioned that the Tribunal should take account of:

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

And in the same case Judge Wolfrum referred to the need to protect the fishing regime established in the CCAMLR, and the conservation measures taken thereunder. Professor Crawford will analyse this concern in a little more detail

shortly: all I need to say is that Australia respectfully agrees, and strongly agrees, with Judge Wolfrum's remarks.

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

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

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

Mr Burmester will be followed by Professor Crawford, who will analyse the factors which are relevant for the purposes of your prompt release jurisdiction, in the light of your jurisprudence and having regard to the provisions of the 1982 Convention as a whole and the balance struck by the Convention between the various interests in the EEZ.

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

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

MR BURMESTER: As explained by the Australian Agent, Mr Campbell, it is my task to deal with the arrest of the vessel, a matter which Australia says is not relevant in these proceedings. The principal issue raised is whether the arrest of the vessel took place in accordance with international law. This raises issues concerning the provision on hot pursuit in Article 111 of the Law of the Sea Convention.

The Russian Federation make a point of emphasizing that at the time of boarding the vessel was on the high seas and received no order prior to that to stop or other communication while in areas under Australian jurisdiction - see the Memorial,

paragraphs 7, 9, and 10. The Memorial devotes a number of paragraphs to what is entitled "Circumstances of the seizure in breach of Article 111". (See the Memorial, paragraphs 25-31).

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

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

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

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

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

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

As regards the reasonableness of the bond, the Russian Federation asserts that the circumstances of the seizure are relevant. However, it cites no authority in its Memorial and provided little elucidation this morning of why the circumstances of seizure are in fact relevant. It insists that it is an important aspect of the factual matrix which the Tribunal should consider. Australia submits that this assertion is misconceived. Let me seek to explain why.

In a prompt release proceeding, there is a fundamental difference between an allegation that may support some separate international action concerning the

lawfulness of the arrest of a vessel, an action foreshadowed by Russia, and issues that relate to the circumstances in which the alleged fisheries offences occurred, for which the ship was arrested and is detained. In other words, the *way* in which the ship was arrested is quite separate from *why* the ship was arrested. The "why" is relevant to setting the bond; the "way" is not.

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

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

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

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

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

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

- The vessel was first detected some considerable distance (32 kms) inside the Australian EEZ by an Australian Air Force Hercules aircraft, which occurred on 7 February 2001 at approximately 10:15 local time, as set out at page 231 of the Russian Memorial.

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

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

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

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

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

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

The area of fishing activity is clearly demonstrated in the diagrams at pages 106 and 107 of the Australian Response. The maps of those pages clearly show the *Volga* fishing in the Australian fishing zone. Additionally, the affidavit of the master of the fishing vessel, the *Lena*, which was apprehended whilst fishing along with the *Volga*, clearly states that both vessels were fishing illegally within the Australian Fishing Zone. That affidavit is attached at page 110 of the Australian response. There is

a clear inference that the *Volga* fled because the *Lena* was arrested and they were engaged in a common illegal enterprise. Given this evidence, it is not clear, therefore, how Russia thinks possible communication and arrest a few metres outside the EEZ excuses this significant illegal conduct.

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

Why was Article 111 not breached?

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

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

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

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

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

The second aspect of my submission, Mr President, on why Article 111 is not breached relates to the issue that the 'pursuit' must then be commenced when the vessel is within the exclusive economic zone. Paragraph 1 of Article 111 in its second sentence, read with the extension in paragraph 2, says such pursuit must be commenced when the foreign ship is within the exclusive economic zone.

Paragraph 4 says that hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself 'by such practicable means as may be available that the ship is within the exclusive economic zone'. This is clearly a subjective test. Mr President, we a statement in paragraph 1 that appears to be objective and a statement in paragraph 4 which appears to be subjective. I will return to that.

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

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

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

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

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

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

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

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

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

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

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

Russia has referred the Tribunal to its earlier decision in the *Saiga* (No.2) case, and the statement in paragraph 146 that each of the conditions for the exercise of the right of hot pursuit is cumulative. That case, of course, concerned a situation where none of the requirements were met. There was no good reason to believe there had been a violation of coastal state law, no visual or auditory signals were given, and the pursuit was interrupted. Little reliance can be placed on that case in the current situation.

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

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

Mr President, this short excursion into the operation of Article 111 is designed to counter the Russian suggestion that Australia's arrest actions are somehow

illegitimate and lacking in integrity and that this should enter into the Tribunal's consideration of the reasonableness of the bond. We have shown, it is submitted, there is no basis for such a contention.

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

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

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

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

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

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

THE PRESIDENT: Thank you, Mr Burmester. I now give the floor to Professor Crawford.

MR CRAWFORD: Mr President, Members of the Tribunal:

It is an honour once again to appear before you, in yet another important case concerning the conservation of valuable and depleted fish stocks. The last occasion Australia was a party to proceedings before this Tribunal concerned the *Southern Blue-fin Tuna* case. There, the Tribunal's intervention at the stage of provisional measures played a very significant role in bringing the parties – Australia, New Zealand and Japan – back to negotiations with each other. Despite the adverse jurisdictional finding of the Annex 7 Tribunal, the eventual result was that the Southern Blue-fin Tuna Commission was revitalised. It is now functioning well. It has an active and independent scientific committee, which has reached agreement on appropriate measures. The membership of the Commission has been expanded to include Korea, and there is a prospect of further members. From a situation when I last addressed you where the Commission was in danger of breaking down, it has been restored to health. I believe that your robust and precautionary intervention at

the stage of provisional measures was a significant factor in this, combined – I must say – with the constructive approach of the Japanese Government in the period since.

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

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

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

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

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

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

Members of the Tribunal may perhaps think this introduction a bit extravagant. After all, the *Southern Blue-Fin Tuna* case involved your general jurisdiction under Part XV

of the Convention and not your special jurisdiction under Article 292 over prompt release. But even in prompt release cases, you are the Law of the Sea Tribunal still; and although your role under Article 292 is a specific one and is subject (as Mr Burmester has shown) to certain constraints, nonetheless you are entitled, and we say bound, to act in the interests of the core values embodied in the Convention. Among these, the conservation and orderly management of high seas resources and the special authority of coastal States to manage those resources are central.

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

The first difficulty is that it gives you no actual guidance in the exercise of this so-called balancing act. If issues of proportionality arise, they have to be addressed having regard to the importance of the rights concerned. As the International Court said and showed in the *Gabcíkovo-Nagymaros* case, issues of proportionality have to be decided "taking account of the rights in question" (ICJ Reports 1997 at p. 7 (para. 85)). Yet Russia's argument takes no account of the rights in question: it places the illegal fishing vessel on the same level as the coastal state which is seeking to enforce its laws. It asks you to strike a balance between two interests that are not equal: the interests of the unlawful exploiter and the lawful conservator.

That is the second problem with Russia's approach to balance. A bond to release a ship under Article 292 is not a vehicle to impose a tax at a marginal rate of 9 to 25 per cent on lawful activity. It is not a revenue raising matter. It is there to assist in the enforcement of the law of the coastal state imposed consistently with international law and with the relevant fisheries convention. Thus, the Tribunal should take into account the legitimate and recognised interests of the coastal state in ensuring the enforcement of its laws, enacted in conformity with UNCLOS and thereby ensuring the effective (which is, above all, the enforceable) management of EEZ resources.

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

I refer you in particular to the map at page 107 of the Australian Response, which is also on your screens. On 5 January 2002 the Master of the *Volga*, then outside the

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

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

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

The legal interests established by the Convention are so well known that there is very little I need to say, and I will try to avoid giving you a lecture. The coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of the EEZ, and no one else has those rights. Unlicensed vessels have no right to fish in the EEZ. If licensed, they must comply with coastal state conservation requirements; if unlicensed, they have no right to be there *qua* fishing vessels. High seas freedoms of navigation are qualified in the EEZ by reference to Part V, so vessels engaged in illegal fishing have no freedom of navigation in the EEZ. Article 297 and the automatic exclusions from jurisdiction for coastal state activity in the EEZ are also relevant. There is no trace in the Convention of a doctrine of equality between the coastal state and unlicensed fishing vessels in the zone. Therefore, there is no basis to justify a simple balancing of their respective rights and interests.

Turning to the cases, *Saiga (No. 1)* was a special case in which the coastal state's law was unclear and non-transparent, its consistency with the Convention doubtful and the circumstances of the arrest patently questionable. Indeed, those circumstances raised a series of doubts and difficulties that surfaced at the time of *Saiga (No. 2)*. Nonetheless, in *Saiga (No. 1)* you laid down a series of general guidelines. In particular, you established principles of deference vis-à-vis national courts and also vis-à-vis any eventual merits tribunal under Part XV, possibly including yourselves. All that is helpful so far as it goes, but the factual circumstances of that case were so different from the present case that they do not give us much specific guidance.

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

In the case of the *Camouco*, the ship was arrested for unlawful fishing a year after its provisional registration in Panama. The Master gave what we may now call the transit alibi, namely, that he was not fishing in French waters but was merely transiting from one part of the high seas to another, and he said that he had no illegal fish on board; that is the transit alibi. This Tribunal repeated the list of relevant factors that it had set out in the *Saiga (No. 1)* case and added several more. You reaffirmed that these were not exhaustive. You helpfully said in paragraph 69 that "the value of the vessel alone may not be the controlling factor in the determination of the amount of the bond or other financial security". Without stating very much more by way of reasons, you determined that a bond of FF 8 million, about 40 per cent of the value of that sought by France, was reasonable. You seem to have taken into account a certain lack of transparency in the French court's assessment of the value of the ship. It was assessed by the French court at FF 20 million, but its actual value was less than FF 4 million.

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

The name *Eternal* was a short-lived name. I refer you to Mr Rohan's affidavit at page 71 of the Australian Response.

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

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

It was on the basis of those considerations that the Tribunal, in the very next paragraph of its judgment, reduced the bond sought from FF56 million to FF18 million, including in that amount FF 9 million for the value of the fish on board. In effect, therefore, the monetary bond representing the ship was reduced to FF9 million, about 20 per cent of the bond demanded.

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

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

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

Thirdly, the Tribunal should at all times seek to act in aid of regional fisheries arrangements which are the only way, now and in the long term, of preserving the world's fish stocks. You did it in the *Blue-fin Tuna* case. We call on you to do it again here. The relevant regional fisheries organization here is that established by CCAMLR and important state parties to CCAMLR have intervened in these proceedings informally by writing to Australia or to the Tribunal to express their position. In this respect, Australia strongly endorses the remarks made by Judge Wolfrum in the *Camouco* case at page 17 but since he is not present I will not read them. You will find the CCAMLR Report on the present problem at item 3 of the Australia authorities. We urge you to act in aid of the enforcement system of CCAMLR.

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

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

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

Finally, let me say a word about the catch value. The catch value is, of course, extremely high in the present case because the *Volga* had been fishing in the Australia fisheries zone for about six weeks. The amount of money held on trust, if the crew are acquitted and the cargo is not forfeited, will simply be returned to the

owners and that amount, pending the outcome of the Australian proceedings, is nearly AU$2 million. It is safely held. It has not been confiscated. These ships can catch more than their capital value, as I have said, in a few weeks.

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

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

Frankly, Mr President, if I came home late one night and discovered a burglar escaping with the family silver, I would be unimpressed with the argument in subsequent legal proceedings that the burglar was entitled to deposit the silver as part of his bond. It is not his silver. Nor, we must presume, is it the *Volga's* fish. It is stolen fish.

Thus Australia is in complete agreement with what was said by Judge Jesus in the *Monte Confurco* case and I quote as he is present:

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

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

We submit that at least as concerns the facts of the present case that reasoning is incontrovertible. You cannot count, as a bond, in relation to a ship, property which is not rightfully yours and in the Australia proceedings the fish are independently liable to confiscation. There is no basis for counting their value to the credit of the owners in relation either to the value of the ship or to the good behaviour bond which is

sought in the form of a vessel monitoring system. The fish were not, to put it mildly, the product of good behaviour.

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

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

In the present case there was continuous, uninterrupted, successful pursuit of an unlawful fishing vessel from deep within the EEZ. It was finally caught outside the EEZ but a matter of metres outside and not miles. There is nothing substantial here to set, even subliminally, against the strong conservation and law enforcement interests of the coastal state in relation to its EEZ, interests clearly and expressly recognized by the 1982 Convention.

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

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

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

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

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

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

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

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

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

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

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

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

Patagonian toothfish is one of the principal species.

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

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

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

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

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

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

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

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

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

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

He sets out matters reported on the CCAMLR website about the incidence of unreported and unregulated fishing, its dangers and the result.

He points out, for example the enormous loss of sea birds, albatrosses, giant petrels and white chinned petrels and that that will affect juvenile as well as other birds and

will continue to be evident for a decade because of the long delayed sexual maturity of these species. So this affects three birds as well as fish.

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

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

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

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

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

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

And so on through the seven boats.

> "I decided on this order because the first three ships must tranship from one to the other, if you wish you may change the order for the others as long as all of you are in agreement.

> "I have been asked that you stick to the amount that was assigned to each one of you because the oil tanker will be left with 940 tons and it has other jobs to do."

Then we have this paragraph:

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

That is their rather rude description of Heard Island.

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

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

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

Note the word "safe". These are criminals seeking to avoid detection. This is not commercial communications with people who have legitimate commercial activities that they are carrying on. It is a different sort of activity completely.

The two earlier faxes at pages 11 and 113 show the extent of the operation. I will not take you through those.

Let there be no doubt about it. This is highly sophisticated and organised criminal activity.

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

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

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

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

> "I was employed as the master of the fishing vessel known as '*Lena*', which was apprehended by Australian authorities on 6 February" – the day before the *Volga*.

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

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

He goes on:

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

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

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

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

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

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

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

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

I will go on with the other factors that indicate criminality in the morning.

THE PRESIDENT: Thank you, Dr Bennett. These proceedings will resume at 10 o'clock tomorrow.

(The hearing adjourned at 16.45)