INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2000

7 February 2000

List of cases:
No. 5

THE "CAMOUCO" CASE

(PANAMA *v.* FRANCE)

APPLICATION FOR PROMPT RELEASE

JUDGMENT

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JUDGMENT

Present: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, AKL, ANDERSON, VUKAS, WOLFRUM, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS; *Registrar* CHITTY.

In the "Camouco" Case

between

Panama,

represented by

Mr. Ramón García Gallardo, *Avocat*, Bar of Brussels, Belgium, and Bar of Burgos, Spain,

as Agent;

and

Mr. Jean-Jacques Morel, *Avocat*, Bar of Saint-Denis, Réunion, France,
Mr. Bruno Jean-Etienne, Legal Assistant, S.J. Berwin & Co., Brussels, Belgium,

as Counsel,

and

France,

represented by

Mr. Jean-François Dobelle, Deputy Director of Legal Affairs of the Ministry of Foreign Affairs,

as Agent;

and

Mr. Jean-Pierre Quéneudec, Professor of International Law at the University of Paris I, Paris, France,

Mr. Francis Hurtut, Assistant Director for the Law of the Sea, Fisheries and the Antarctic, Office of Legal Affairs of the Ministry of Foreign Affairs,

Mr. Bernard Botte, *Rédacteur*, Sub-Directorate for the Law of the Sea, Fisheries and the Antarctic, Office of Legal Affairs of the Ministry of Foreign Affairs,

Mr. Vincent Esclapez, Deputy Regional Director for Maritime Affairs, Réunion, France,

Mr. Jacques Belot, *Avocat*, Bar of Saint-Denis, Réunion, France,

as Counsel,

THE TRIBUNAL,

composed as above,

after deliberation,

delivers the following Judgment:

Introduction

1. On 14 January 2000, the Registrar of the Tribunal was notified by a letter dated 28 December 1999 from the Minister for Foreign Affairs of Panama that Mr. Ramón García Gallardo, and Mr. Jean-Jacques Morel, were authorized to make an application to the Tribunal on behalf of Panama under article 292 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"), with respect to the fishing vessel *Camouco*.

2. On 17 January 2000, an Application under article 292 of the Convention was filed in the Registry of the Tribunal on behalf of Panama against France concerning the prompt release of the *Camouco* and its Master. The Application was accompanied by a certificate from the officer in charge of consular affairs in the Embassy of Panama, Brussels, dated 17 January 2000, notifying the appointment of Mr. Ramón García Gallardo, *Avocat*, Brussels and Burgos, as Agent of Panama. A certified copy of the Application was sent on the same day by a note verbale of the Registrar to the Minister for Foreign Affairs of France in Paris and also in care of the Ambassador of France to Germany.

3. On 19 January 2000, the Registrar was notified of the appointment of Mr. Jean-François Dobelle, Deputy Director of Legal Affairs of the Ministry of Foreign Affairs of France, as Agent of France, by a letter from the Director of Legal Affairs, Ministry of Foreign Affairs, Paris, addressed to the Registrar.

4. In accordance with article 112, paragraph 3, of the Rules of the Tribunal (hereinafter "the Rules"), the President of the Tribunal, by Order dated 17 January 2000, fixed 27 and 28 January

2000 as the dates for the hearing. Notice of the Order was communicated forthwith to the parties.

5. By note verbale from the Registrar dated 17 January 2000, the Minister for Foreign Affairs of France was informed that the Statement in Response of France, in accordance with article 111, paragraph 4, of the Rules, could be filed in the Registry not later than 24 hours before the hearing.

6. The Application was entered in the List of cases as Case No. 5 and named: The "Camouco" Case.

7. In accordance with article 24, paragraph 3, of the Statute of the Tribunal, States Parties to the Convention were notified of the Application by a note verbale from the Registrar dated 18 January 2000. Pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Secretary-General of the United Nations was notified by the Deputy Registrar of the Tribunal on 18 January 2000 of the receipt of the Application.

8. In accordance with articles 45 and 73 of the Rules, on 20 January 2000, the President held a teleconference with the Agents of the parties and ascertained their views regarding the order and timing of presentation by each of the parties and the evidence to be produced during the oral proceedings.

9. Pursuant to article 72 of the Rules, information regarding witnesses and experts was submitted by the Agent of Panama to the Tribunal on 18 and 21 January 2000, and by the Agent of France on 24 January 2000.

10. On 25 January 2000, France transmitted by facsimile its Statement in Response, copy of which was transmitted forthwith to the Agent of Panama.

11. On 26 January 2000, the Agent of Panama sent documents in order to complete the documentation in accordance with article 63, paragraphs 1 and 2, and article 64, paragraph 3, of the Rules. Copies of these documents were transmitted to the Agent of France.

12. After the closure of the written proceedings and prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 26 January 2000 in accordance with article 68 of the Rules.

13. On 27 January 2000, the President held consultations with the Agents of the parties in accordance with article 45 of the Rules.

14. Prior to the opening of the oral proceedings, the parties submitted documents required under paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal.

15. Pursuant to article 67, paragraph 2, of the Rules, copies of the pleadings and documents annexed thereto were made accessible to the public from the date of opening of the oral proceedings.

16. Oral statements were presented at four public sittings held on 27 and 28 January 2000 by the following:

On behalf of Panama:	Mr. Ramón García Gallardo, Agent, Mr. Jean-Jacques Morel, Counsel.
On behalf of France:	Mr. Jean-François Dobelle, Agent, Mr. Jean-Pierre Quéneudec, Counsel.

17. The Agent of Panama, in the course of his statement, presented a number of exhibits which were displayed on video monitors, including the following:

- two nautical charts showing areas around the Crozet Islands, a nautical chart showing fishing areas around the Crozet Islands, a nautical chart showing the course said to have been taken by the *Camouco*;

- a slide showing the method of longline bottom fishing;

- a video film showing the method of longline bottom fishing in the southern oceans;

- photographs showing the *Camouco* and the system used for raising the fishing lines.

The original of each exhibit was delivered to the Registrar and duly registered.

18. At a public sitting held on 27 January 2000, Mr. Domingo Cándido Fernández Pérez, Ship-Owner, and Mr. M. Antonio Alonso Pérez, Captain of the Merchant Navy and Marine Surveyor, were called as experts by the Agent of Panama and examined by Mr. García Gallardo. Mr. Fernández Pérez was cross-examined by Mr. Quéneudec. Mr. Fernández Pérez and Mr. Alonso Pérez gave evidence in Spanish. The necessary arrangements were made for the statements of those experts to be interpreted into the official languages of the Tribunal.

19. On 27 January 2000, the Agent of Panama submitted a list of questions to be put to both experts, a curriculum vitae of Mr. Alonso Pérez and a technical report concerning the *Camouco*.

20. On 27 January 2000, a list of issues which the Tribunal would like the parties specially to address was communicated to the Agents.

21. On 28 January 2000, the Agent of Panama submitted a written response to the questions addressed by the Tribunal to the parties. During the hearing, on 28 January 2000, the Agent of France replied orally to those questions.

22. During the hearing on 28 January 2000, the President drew the attention of the parties to article 71 of the Rules, and to additional documents referred to by the parties in the hearing on 27 and 28 January 2000, copies of which were communicated to the other party. Since no objection was raised by the parties, the President stated that those additional documents should be filed with the Registry together with, where necessary, a translation in one of the official languages of the Tribunal.

23. In the Application and in the Statement in Response, the following submissions were presented by the parties:

On behalf of Panama,
in the Application:

[*Translation from French*]

1. To find that the Tribunal is competent under Article 292 of the United Nations Convention on the Law of the Sea to entertain the Application filed this day;

2. To declare that the present Application is *admissible*;

3. To declare that the French Republic has failed to comply with article 73, paragraph 4, by failing promptly to notify the Republic of Panama of the arrest of the *Camouco*.

(A) WITH RESPECT TO THE CAPTAIN OF THE CAMOUCO, MR. HOMBRE SOBRIDO

4. To request, as an interlocutory measure with a view to due process, that the French Republic permit Captain HOMBRE SOBRIDO to attend the hearing which is soon to take place in Hamburg;

5. To find that the French Republic has failed to comply with the provisions of the Convention concerning the prompt release of the Masters of arrested vessels;

6. To order the French Republic promptly to release Captain HOMBRE SOBRIDO without bond;

7. To find that the French Republic has failed to comply with the provisions of Article 73 § 3 in applying to the Captain criminal measures which de facto constitute an unlawful detention.

(B) WITH RESPECT TO THE VESSEL CAMOUCO

8. To find that the French Republic has failed to comply with the provisions of the Convention concerning prompt release of the vessel *Camouco*;

9. To order the French Republic promptly to release the vessel *Camouco*, without bond, in light of the losses and costs already sustained by the owner of the *Camouco*;

10. Subsidiarily, to determine the amount, nature and form of the bond or other financial guarantee to be posted by the Merce-Pesca Company in order to secure the release of the *Camouco* and of Captain HOMBRE SOBRIDO;

In this connection, the Applicant requests the Tribunal to take note of its preference for a bond in the form of a bank guarantee from a leading European bank, rather than a cash payment, and for payment to be made to the International Tribunal for the Law of the Sea, for transmission by appropriate means to the French authorities in exchange for the release of the vessel;

As regards the amount of the bond, and bearing in mind the rules applicable in similar cases, this party proposes that the Tribunal should fix a bond not greater than the sum 100,000 French francs (ONE HUNDRED THOUSAND FRENCH FRANCS, i.e. approximately US$ 15,000), in which the Tribunal will take into account the many expenses already incurred by the Merce-Pesca Company since the boarding of the *Camouco*;

11. To declare that the French Republic will bear the costs of the Applicant arising from the present proceedings.

On behalf of France,
in the Statement in Response:

[*Translation from French*]

On the basis of the foregoing statement of facts and legal grounds, the Government of the French Republic, while reserving the right to add to or amend, if necessary, this conclusion at a later stage in the proceedings, requests the Tribunal, rejecting all arguments to the contrary submitted on behalf of the Republic of Panama, to declare and rule that the application requesting the Tribunal to order the prompt release of the *Camouco* and its Captain is not admissible.

24. In accordance with article 75, paragraph 2, of the Rules, the following final submissions were presented by the parties at the end of the hearing:

On behalf of Panama:

[*Translation from French*]

The Tribunal is requested:

1. To declare that the Tribunal has jurisdiction to entertain the application pursuant to article 292 of the United Nations Convention on the Law of the Sea.

2. To declare that the present application made by the Republic of Panama on 17 January 2000 is admissible.

3. To declare that the French Republic has violated article 73, paragraph 4, by tardy and incomplete notification of the arrest and seizure of the vessel *Camouco* to the Republic of Panama of the measures taken and of those which were to be taken.

4. To find that the French Republic has failed to observe the provisions of the Convention concerning prompt release of the Master of the vessel *Camouco*.

5. To find that the French Republic has failed to observe the provisions of the Convention concerning prompt release of the vessel *Camouco*.

6. To find that the non-observance by the French Republic of the provisions of article 73, paragraph 3 - by applying to the Master of the *Camouco* provisional measures of a penal character - constitutes unlawful detention.

7. To demand that the French Republic promptly release the vessel *Camouco* and, concomitantly, release its Master, against payment of a reasonable bond of one million three hundred thousand francs (1,300,000 FF) before deduction of the price of the cargo seized (350,000 FF), i.e. a final guarantee in a maximum amount of nine hundred and fifty thousand francs (950,000 FF).

8. To order that said amount be paid by means of a bank guarantee of a major European bank, to be entrusted to the care of the International Tribunal for the Law of the Sea in order that it may be duly delivered to the French authorities in exchange for the release of the vessel and of its Master.

9. Pursuant to article 64, paragraph 4, of the rules of procedure, to prepare a Spanish translation of the judgment of the International Tribunal for the Law of the Sea.

On behalf of France:

[*Translation from French*]

The Government of the French Republic requests the Tribunal, while rejecting all submissions to the contrary presented on behalf of the Republic of Panama, to declare and adjudge:

(1) that the application requesting the Tribunal to order the prompt release of the *Camouco* and of its captain is not admissible.

(2) as a subsidiary submission, if it decides that the *Camouco* is to be released upon the deposit of a bond, that the bond shall be not less than the sum of 20,000,000 francs and that this sum shall be posted in the form of a certified cheque or bank draft.

Factual background

25. The *Camouco* is a fishing vessel flying the flag of Panama. Its owner is "Merce-Pesca (S.A.)", a company registered in Panama.

26. On 21 September 1998, the *Camouco* was provisionally registered in Panama. The registration is valid up to 20 September 2002. Panama provided the *Camouco* with a fishing licence for longline bottom fishing of "Patagonian toothfish" in "international waters" in the South Atlantic between 20º and 50º latitude South and between 20º and 80º longitude West.

27. On 16 September 1999, the *Camouco* left the port of Walvis Bay (Namibia) to engage in longline fishing in the Southern seas. Its Master was Mr. José Ramón Hombre Sobrido, a Spanish national.

28. On 28 September 1999, at 15:29 hours, the *Camouco* was boarded by the French surveillance frigate *Floréal* in the exclusive economic zone of the Crozet Islands, 160 nautical miles from the northern boundary of the zone.

29. According to the procès-verbal of violation (*procès-verbal d'infraction*) No. 1/99, drawn up on 28 September 1999 by the Captain and two other officers of the *Floréal*, the *Camouco* was observed**,** on 28 September 1999 at 13:28 hours, paying out a longline within the exclusive economic zone of the Crozet Islands by the Commander of the helicopter carried on board the *Floréal*. The procès-verbal of violation further recorded that the *Camouco* did not reply to calls from the *Floréal* and the helicopter, and moved away from the *Floréal* while members of the *Camouco*'s crew were engaged in jettisoning 48 bags and documents, before stopping at 14:31 hours, and that one of those bags was later retrieved and found to contain 34 kilograms of fresh toothfish. The procès-verbal of violation also stated that six tonnes of frozen toothfish were found in the holds of the *Camouco* and that the Master of the *Camouco* was in breach of law on account of:

(a) unlawful fishing in the exclusive economic zone of the Crozet Islands under French jurisdiction;

(b) failure to declare entry into the exclusive economic zone of the Crozet Islands, while having six tonnes of frozen Patagonian toothfish on board the vessel;

(c) concealment of vessel's markings, while flying a foreign flag; and

(d) attempted flight to avoid verification by the maritime authority.

The procès-verbal of violation recorded that the Master of the *Camouco* refused to sign it.

30. On 29 September 1999, at 13:05 hours, the *Camouco* was re-routed and escorted under the supervision of the French navy to Port-des-Galets, Réunion, where it arrived on 5 October 1999.

31. A procès-verbal (*procès-verbal d'appréhension*) No. 1/99, drawn up by the *capitaine de corvette* of the *Floréal* on 29 September 1999, at 13:13 hours, recorded the seizure of the *Camouco*, the fish catch, the navigation and communication equipment and documents of the vessel and of the crew. The procès-verbal No. 1/99 recorded that the Master of the *Camouco* refused to sign it.

32. According to the Application, the Master of the *Camouco* stated that he was intending merely to cross the exclusive economic zone of the Crozet Islands in a South-North direction without fishing there; that his fishing licence expressly prohibited him from fishing outside international waters; that he had forgotten to declare the entry of the *Camouco* into the exclusive economic zone of the Crozet Islands to the Crozet authorities; that, however, the entry was declared to the district head of Crozet at 14:17 hours on 28 September 1999; that the six tonnes of toothfish were caught outside the exclusive economic zone of the Crozet Islands and that there was no fresh toothfish on board the *Camouco*. He disputed the claim that the bag of fish, which was claimed to have been retrieved by the French authorities, had been jettisoned by the crew of the *Camouco* and stated that the bags jettisoned by the crew of the *Camouco* had contained only garbage.

33. On 7 October 1999, the Regional and Departmental Directorate of Maritime Affairs drew up a procès-verbal of seizure (*procès-verbal de saisie*) (No. 052/AM/99) which reiterated the charges leveled against the Master of the *Camouco* in the procès-verbal of violation dated 28 September 1999. The procès-verbal of seizure (No. 052/AM/99) declared that the *Camouco* should be seized and estimated its value at 20,000,000 FF. On 7 October 1999, another procès-verbal of seizure (No. 053/AM/99) was drawn up for the seizure of the toothfish on board the vessel. This procès-verbal of seizure estimated the tonnage of the catch at 7,600 kilograms and its value at 380,000 FF.

34. On 7 October 1999, the Master was charged and placed under court supervision (*contrôle judiciaire*) by the examining magistrate (*juge d'instruction*) of the *tribunal de grande instance* at Saint-Denis. His passport was taken away from him by the French authorities. The rest of the crew, except four members who remained on board to see to the maintenance of the *Camouco*, left Réunion on 13 October 1999.

35. On 8 October 1999, the Regional and Departmental Directorate of Maritime Affairs sought confirmation of the arrest of the *Camouco* from the court of first instance (*tribunal d'instance*) at Saint-Paul and requested the Court to authorize its release subject to the prior payment of a bond of no less than 15,000,000 FF plus costs to be paid into the Deposits and Consignments Office (*Caisse des Dépôts et Consignations*).

36. In its order of 8 October 1999, the court of first instance at Saint-Paul, having regard to the facts of the case and the alleged breaches of law as contained in the procès-verbal of violation of 28 September 1999 and the procès-verbal of seizure (No. 052/AM/99) dated 7 October 1999, and "in particular in the light of the value of the vessel and the penalties incurred", confirmed the arrest of the *Camouco* and ordered that the release of the arrested vessel would be subject to the condition that prior payment be made of a bond in the amount of 20,000,000 FF in cash, certified cheque or bank draft, to be paid into the Deposits and Consignments Office.

37. In support of its order, the Court relied upon the following:

(a) Article 3 of Law No. 83-582 of 5 July 1983, as amended, concerning the regime of seizure and supplementing the list of agents authorized to establish offences in matters of sea fishing;

(b) Articles 2 and 4 of Law No. 66-400 of 18 June 1966, as amended by the Law of 18 November 1997, on sea fishing and the exploitation of marine products in the French Southern and Antarctic Territories;

(c) Article 142 of the Code of Criminal Procedure.

38. Article 3 of Law No. 83-582 of 5 July 1983, as amended, reads as follows:

[*Translation from French*]

> The competent authority may seize the vessel or boat that has been used to fish in contravention of laws and regulations, regardless of the manner in which the violation is established.
>
> The competent authority shall conduct or arrange for the conducting of the vessel or boat to a port designated by that authority; it shall prepare a procès-verbal of seizure and the vessel or boat shall be handed over to the Maritime Affairs Department.
>
> Within a time-limit not exceeding seventy-two hours after the seizure, the competent authority shall submit to the judge of first instance of the place of the seizure an application accompanied by the procès-verbal of seizure in order for the judge to confirm, in an order made within seventy-two hours, the seizure of the vessel or boat or to decide on its release.
>
> Whatever the circumstances, the order shall be made within six days of the arrest referred to in article 7 or of the seizure.
>
> The release of the vessel or boat shall be decided by the judge of first instance of the place of the seizure upon the posting of a bond, the amount and arrangements for payment of which he shall decide in accordance with the provisions of article 142 of the Code of Criminal Procedure.

39. Articles 2 and 4 of Law No. 66-400 of 18 June 1966, as amended, read as follows:

[*Translation from French*]

> Article 2
>
> No one may fish and hunt marine animals, or engage in the exploitation of marine products, whether on land or from vessels, without having first obtained authorization.

Any vessel entering the exclusive economic zone of the French Southern and Antarctic Territories shall be obliged to give notification of its presence and to declare the tonnage of fish held on board to the chief district administrator of the nearest archipelago.

Article 4

Any person who fishes, hunts marine animals or exploits marine products on land or on board a vessel, without having first obtained the authorization required under article 2, or fails to give notification of entering the economic zone, or to declare the tonnage of fish held on board, shall be punished with a fine of 1,000,000 francs and six months' imprisonment, or with one only of these two penalties.

Anyone fishing, in prohibited zones or during prohibited periods, in contravention of the provisions of the orders provided for under article 3, shall be subject to the same penalties.

However, the statutory maximum provided for in the first paragraph shall be increased by 500,000 francs for every tonne caught over and above two tonnes without the authorization provided for under article 2 or in breach of the regulations concerning prohibited zones and periods issued pursuant to article 3.

Concealment, within the meaning of article 321-1 of the Penal Code, of products caught without the authorization provided for in article 2 or in breach of the regulations concerning prohibited zones and periods issued pursuant to article 3 shall be subject to the same penalties.

40. Article 142 of the Code of Criminal Procedure reads as follows:

[*Translation from French*]

When the accused is required to furnish security, such security guarantees:
1. the appearance of the accused, whether under charges or not, at all stages of the proceedings and for the execution of judgment, as well as, where appropriate, the execution of other obligations which have been imposed upon him;
2. payment in the following order of:
a) reparation of damages caused by the offence and restitution, as well as alimony debts when the defendant is being prosecuted for failure to pay this debt;
b) fines.
The decision which compels the defendant to furnish security shall determine the sums assigned to each of the two parts of the security.

Article 142-1
The examining magistrate can, with the defendant’s consent, order that the part of the security set to guarantee the rights of the victim or the creditor of an alimony debt be deposited to them as a provisional award, on their request.

This deposit may also be ordered, even without the consent of the defendant, when an enforceable decision of justice has granted the victim or creditor a provisional award in conjunction with facts which are the subject of proceedings.

Article 142-2
The first part of the security is refunded if the accused, whether under charges or not, has appeared at all stages of the proceedings, has satisfied the obligations of court supervision, and has submitted himself to the execution of the judgment.
It is forfeited to the State in contrary cases, except by reason of a legitimate excuse.
It is, nevertheless, refunded in case of dismissal, pardon or acquittal.

Article 142-3
The sum set aside for the second part of security which has not been deposited to the victim of the offence or to the creditor of an alimony debt shall be refunded in the case of dismissal and, unless article 372 is applied, in case of pardon or acquittal.
In case of conviction, the security is used in accordance with the provisions of article 142 (paragraph 1, section 2). Any surplus shall be refunded.
The conditions for application of the present article shall be fixed by a decree in Council of State.

41. On 22 October 1999, Merce-Pesca and the Master of the *Camouco* filed a summons for urgent proceedings before the court of first instance at Saint-Paul, in order to secure prompt release of items seized by virtue of the procès-verbal of seizure (No. 052/AM/99) and the procès-verbal of seizure (No. 053/AM/99) dated 7 October 1999 and to seek a reduction of the amount of the bond. In the summons a complaint was, *inter alia*, made that the obligation to fix a "reasonable" bond, as required by articles 73, paragraph 2, and 292 of the Convention, was not complied with.

42. On 14 December 1999, the court of first instance at Saint-Paul made an order rejecting the request. The Court stated: "... it is for the judge before whom the case is heard to set the bond in application of the rules laid down in article 142 of the Code of Criminal Procedure, and ... he is not required to give an account of the considerations on which he based himself both to secure payment of penalties incurred and to secure the appearance of the accused in legal proceedings, having regard to the nature of the facts." An appeal is pending against this order before the court of appeal (*cour d'appel*) at Saint-Denis.

Jurisdiction

43. The Applicant alleges that the Respondent has not complied with the provisions of the Convention for the prompt release of a vessel or its crew upon the posting of a reasonable bond or other financial security. The Respondent denies the allegation.

44. The Tribunal will, at the outset, examine the question whether it has jurisdiction to entertain the Application. Article 292 of the Convention sets out the requirements to be satisfied to found the jurisdiction of the Tribunal. It reads as follows:

Article 292
Prompt release of vessels and crews

1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

2. The application for release may be made only by or on behalf of the flag State of the vessel.

3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.

4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

45. Panama and France are both States Parties to the Convention. Panama ratified the Convention on 1 July 1996 and the Convention entered into force for Panama on 31 July 1996. France ratified the Convention on 11 April 1996 and the Convention entered into force for France on 11 May 1996.

46. The status of Panama as the flag State of the *Camouco*, both at the time of the incident in question and now, is not disputed. The parties did not agree to submit the question of release from detention to any other court or tribunal within 10 days from the time of detention. The Tribunal notes that the Application has been duly made on behalf of the Applicant in accordance with article 292, paragraph 2, of the Convention and that the Application satisfies the requirements of articles 110 and 111 of the Rules.

47. The Tribunal notes further that the Respondent does not contest the jurisdiction of the Tribunal.

48. For the aforesaid reasons, the Tribunal finds that it has jurisdiction to entertain the Application.

Objections to admissibility

49. The parties disagree on whether the Application is admissible and it is, therefore, to that question that the Tribunal must now turn its attention. Article 292, paragraph 1, of the Convention provides for the making of an application for release based on an allegation that the detaining State has not complied with the provisions of the Convention for the prompt release of a vessel or its crew upon the posting of a reasonable bond or other financial security. Pursuant to article 113, paragraph 2, of the Rules, if the Tribunal decides that the allegation is "well-founded" it will order the release of the vessel and its crew upon the posting of the bond or other financial security as determined by the Tribunal.

50. Before the Tribunal pronounces itself on whether or not the allegation is well-founded, it is necessary to consider certain objections to admissibility by the Respondent.

51. The Respondent states that the Applicant filed the Application more than three months after the detention of the *Camouco*, that the Applicant had been completely inactive during this period, that article 292 speaks in terms of "prompt release", which carries with it the characteristics of dispatch and urgency that are inherent in the notion of "prompt release", that, by failing to act promptly, the Applicant has created, by its conduct, a situation akin to estoppel and that, consequently, the Application is not admissible.

52. The Applicant states that article 292 does not impose any time-limit for making an application and that, in any event, there is no delay on its part, as alleged by the Respondent. It adds that it was only on 14 December 1999, when the court of first instance at Saint-Paul made an order confirming its earlier order, that it came to know, in a definitive manner, that the sum to be secured by a bond was 20 million FF. It states that it was then that it took a decision to approach the Tribunal. It notes that the Respondent cannot complain about delay. In its final submissions, the Applicant stated that the Respondent has failed to notify the Applicant, as required by article 73, paragraph 4, of the Convention, of the "arrest and seizure of the *Camouco* … of the measures taken and of those which were to be taken" in respect of the vessel. The Applicant further states that, even if the communication addressed to the Ministry of Foreign Affairs of Panama by the French Embassy in Panama were to be taken as amounting to notification of the information required under article 73, paragraph 4, of the Convention, it was dated 11 November 1999, long after the date of detention.

53. The Respondent, however, maintains that, as early as 1 October 1999, the Prefect of Réunion informed the Consul-General of Panama in Paris that the Master of the *Camouco* had been the subject of a procès-verbal of violation for violating the regulations governing fishing in the exclusive economic zone of the Crozet Islands and that the *Camouco* was being diverted to Port-des-Galets in Réunion, so that its captain could be tried before the *tribunal de grande instance* at Saint-Denis. The Applicant denies that any such notification was received by the Consulate-General of Panama in Paris and places reliance in this regard on a letter dated 27 January 2000 from the Embassy of Panama in Paris.

54. The Tribunal finds that there is no merit in the arguments of the Respondent regarding delay in the presentation of the Application. In any event, article 292 of the Convention requires

prompt release of the vessel or its crew once the Tribunal finds that an allegation made in the Application is well-founded. It does not require the flag State to file an application at any particular time after the detention of a vessel or its crew. The 10-day period referred to in article 292, paragraph 1, of the Convention is to enable the parties to submit the question of release from detention to an agreed court or tribunal. It does not suggest that an application not made to a court or tribunal within the 10-day period or to the Tribunal immediately after the 10-day period will not be treated as an application for "prompt release" within the meaning of article 292.

55. The other objection to admissibility pleaded by the Respondent is that domestic legal proceedings are currently pending before the court of appeal of Saint-Denis involving an appeal against an order of the court of first instance at Saint Paul, whose purpose is to achieve precisely the same result as that sought by the present proceedings under article 292 of the Convention. The Respondent, therefore, argues that the Applicant is incompetent to invoke the procedure laid down in article 292 as "a second remedy" against a decision of a national court and that the Application clearly points to a "situation of *lis pendens* which casts doubt on its admissibility". The Respondent draws attention in this regard to article 295 of the Convention on exhaustion of local remedies, while observing at the same time that "strict compliance with the rule of the exhaustion of local remedies, set out in article 295 of the Convention, is not considered a necessary prerequisite of the institution of proceedings under article 292".

56. The Applicant rejects the argument of the Respondent and maintains that its taking recourse to local courts in no way prejudices its right to invoke the jurisdiction of the Tribunal under article 292 of the Convention.

57. In the view of the Tribunal, it is not logical to read the requirement of exhaustion of local remedies or any other analogous rule into article 292. Article 292 of the Convention is designed to free a ship and its crew from prolonged detention on account of the imposition of unreasonable bonds in municipal jurisdictions, or the failure of local law to provide for release on posting of a reasonable bond, inflicting thereby avoidable loss on a ship owner or other persons affected by such detention. Equally, it safeguards the interests of the coastal State by providing for release only upon the posting of a reasonable bond or other financial security determined by a court or tribunal referred to in article 292, without prejudice to the merits of the case in the domestic forum against the vessel, its owner or its crew.

58. Article 292 provides for an independent remedy and not an appeal against a decision of a national court. No limitation should be read into article 292 that would have the effect of defeating its very object and purpose. Indeed, article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period.

59. At this stage, the Tribunal wishes to deal with the submissions of the Applicant requesting it to declare that the Respondent has violated article 73, paragraphs 3 and 4, of the Convention. The scope of the jurisdiction of the Tribunal in proceedings under article 292 of the Convention encompasses only cases in which "it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of

a reasonable bond or other financial security". As paragraphs 3 and 4, unlike paragraph 2, of article 73 are not such provisions, the submissions concerning their alleged violation are not admissible. It may, however, be noted, in passing, that there is a connection between paragraphs 2 and 4 of article 73, since absence of prompt notification may have a bearing on the ability of the flag State to invoke article 73, paragraph 2, and article 292 in a timely and efficient manner.

60. The considerations set out in the previous paragraph also apply to the allegations of the Applicant (which are not reiterated in the Applicant's final submissions), that the Respondent has violated the provisions of the Convention on freedom of navigation and that the Respondent's laws are incompatible with the provisions of the Convention.

Non-compliance with article 73, paragraph 2, of the Convention

61. The Tribunal will now deal with the allegation that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel and its Master upon the posting of a reasonable bond or other financial security. For the application for release to succeed, the allegation that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond should be well-founded. In the present case, the Master of the *Camouco* has been accused of violating the French laws concerning fishery resources in the exclusive economic zone of France and it is not disputed that article 73 of the Convention is thereby attracted.

62. The Respondent maintains that, under article 73, paragraph 2, the posting of a bond or other security is a necessary condition to be satisfied before an arrested vessel and its crew can be released, that the Applicant has not posted any bond so far, which it is required to do promptly and immediately after the arrest of the *Camouco* and its Master, and that, consequently, the Application deserves to be dismissed as the allegation contained therein is not well-founded. In reply, the Applicant states that the posting of a bond is not a condition precedent for the submission of an application under article 292.

63. The Tribunal wishes to clarify that the posting of a bond or other security is not necessarily a condition precedent to filing an application under article 292 of the Convention. It is pertinent to recall here the Judgment of 4 December 1997 in the *M/V "SAIGA" Case*, wherein the Tribunal held:

> 76. According to article 292 of the Convention, the posting of the bond or security is a requirement of the provisions of the Convention whose infringement makes the procedure of article 292 applicable, and not a requirement for such applicability. In other words, in order to invoke article 292, the posting of the bond or other security may not have been effected in fact, even when provided for in the provision of the Convention the infringement of which is the basis for the application.

> 77. There may be an infringement of article 73, paragraph 2, of the Convention even when no bond has been posted. The requirement of promptness has a value in itself and may prevail when the posting of the bond has not been possible, has been rejected or is not provided for in the coastal State's laws or when it is alleged that the required bond is unreasonable.

64. In its Application, the Applicant contends that the bond of 20,000,000 FF fixed by the French court is not "reasonable". In its final submissions, the Applicant stated that the amount of a reasonable bond should be fixed at 1,300,000 FF, from which the value of the cargo seized (350,000 FF) should be deducted. The Respondent stated that the maximum total amount of fines which could be imposed on the Master of the *Camouco* and on the owners of Merce-Pesca could be more than 30 million francs and that this figure alone suffices to show the reasonableness of the amount of the bond required by the French court.

65. It is, accordingly, necessary for the Tribunal to determine whether the bond imposed by the French court of 20 million FF is reasonable for the purposes of these proceedings.

66. In the *M/V "SAIGA" Case*, the Tribunal stated that "the criterion of reasonableness encompasses the amount, the nature and the form of the bond or financial security. The overall balance of the amount, form and nature of the bond or financial security must be reasonable." (Judgment of 4 December 1997, paragraph 82).

67. The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form.

68. In the present case, the Tribunal has taken note of the gravity of the alleged offences and also the range of penalties which, under French law, could be imposed for the offences charged. The Agent of France indicated that the maximum penalty which can be imposed on the Master of the *Camouco* is a fine of 5 million FF. The Tribunal notes the statement by the Agent of France that, in conformity with article 73, paragraph 3, of the Convention, the Master of the *Camouco* is not subject to imprisonment. According to the Agent of France, under French law, the company which owns the *Camouco* can also be held criminally liable, as a legal person, for the offences committed by the Master of the *Camouco* acting on its behalf to a fine up to five times that imposed on the Master. The Tribunal, however, notes that no charge has yet been made against the company.

69. Regarding the value of the *Camouco*, article 111, paragraph 2(b), of the Rules requires that the application for the release of a vessel or its crew from detention contain, where appropriate, data relevant to the determination of the value of the vessel. However, 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. In the present case, the parties differ on the value of the *Camouco*. During the oral proceedings, expert testimony was offered by the Applicant and not challenged by the Respondent to the effect that the replacement value of the *Camouco* was 3,717,571 FF. On the

other hand, the value assessed by the French authorities for the purposes of the domestic proceedings is 20 million FF but there is no evidence on record to substantiate this assessment. Attention is drawn to court orders referred to in paragraphs 36 and 42. The Tribunal also notes that the catch on board the *Camouco*, which according to the Respondent is valued at 380,000 FF, has been confiscated and sold by the French authorities.

70. On the basis of the above considerations, and keeping in view the overall circumstances of this case, the Tribunal considers that the bond of 20 million FF imposed by the French court is not "reasonable".

71. That the *Camouco* has been in detention is not disputed. However, the parties are in disagreement whether the Master of the *Camouco* is also in detention. It is admitted that the Master is presently under court supervision, that his passport has also been taken away from him by the French authorities, and that, consequently, he is not in a position to leave Réunion. The Tribunal considers that, in the circumstances of this case, it is appropriate to order the release of the Master in accordance with article 292, paragraph 1, of the Convention.

72. For the above reasons, the Tribunal finds that the Application is admissible, that the allegation made by the Applicant is well-founded for the purposes of these proceedings and that, consequently, France must release promptly the *Camouco* and its Master upon the posting of a bond or other financial security as determined in paragraph 74.

Form and amount of the bond or other financial security

73. The Tribunal then comes to the task of determining the amount, nature and form of the bond or other financial security to be posted, as laid down in article 113, paragraph 2, of the Rules.

74. On the basis of the foregoing considerations, the Tribunal is of the view that a bond or other security should be in the amount of 8 million FF and that, unless the parties otherwise agree, it should be in the form of a bank guarantee.

75. The Applicant has requested that the Tribunal order a bank guarantee "to be entrusted to the care of the Tribunal in order that it may be duly delivered to the French authorities". The provisions of article 114 of the Rules lay down the procedure if a bond or other financial security were to be posted with the Tribunal. Such posting, however, requires the agreement of the parties. The bond or other financial security is to be posted with the detaining State unless the parties agree otherwise (Rules, article 113, paragraph 3). Since the parties have not agreed otherwise, the Tribunal cannot accede to the request of the Applicant.

76. The bank guarantee should, among other things, state that it is issued in consideration of France releasing the *Camouco* and its Master, in relation to the incidents that occurred in the exclusive economic zone of the Crozet Islands on 28 September 1999 and that the issuer undertakes and guarantees to pay to France such sums, up to 8 million FF, as may be determined by a final judgment or decision of the appropriate domestic forum in France or by agreement of the parties. Payment under the guarantee would be due promptly after receipt by the issuer of a

written demand by the competent authority of France accompanied by a certified copy of the final judgment or decision or agreement.

Translation of the Judgment

77. The Applicant has requested, pursuant to article 64, paragraph 4, of the Rules, that the Tribunal prepare a Spanish translation of its Judgment. Article 64, paragraph 4, reads as follows:

> When a language other than one of the official languages is chosen by the parties and that language is an official language of the United Nations, the decision of the Tribunal shall, at the request of any party, be translated into that official language of the United Nations at no cost for the parties.

Article 64, paragraph 4, of the Rules deals with the situation where the parties chose a language other than English or French for their written pleadings, which is not the case in the present proceedings. Accordingly, the Tribunal cannot accede to the request of the Applicant that the Judgment be translated into Spanish pursuant to that provision.

Operative provisions

78. For these reasons,

THE TRIBUNAL,

(1) Unanimously,

Finds that the Tribunal has jurisdiction under article 292 of the Convention to entertain the Application made on behalf of Panama on 17 January 2000.

(2) By 19 votes to 2,

Finds that the Application for release is admissible;

IN FAVOUR: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, AKL, WOLFRUM, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS;

AGAINST: *Judges* ANDERSON, VUKAS.

(3) By 19 votes to 2,

Orders that France shall promptly release the *Camouco* and its Master upon the posting of a bond;

IN FAVOUR: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, AKL, WOLFRUM, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS;

AGAINST: *Judges* ANDERSON, VUKAS.

(4) By 15 votes to 6,

Determines that the bond shall be eight million French Francs (8,000,000 FF) to be posted with France;

IN FAVOUR: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, PARK, BAMELA ENGO, MENSAH, AKL, LAING, MARSIT, EIRIKSSON, JESUS;

AGAINST: *Judges* KOLODKIN, ANDERSON, VUKAS, WOLFRUM, TREVES, NDIAYE.

(5) By 19 votes to 2,

Determines that the bond shall be in the form of a bank guarantee or, if agreed to by the parties, in any other form;

IN FAVOUR: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, AKL, WOLFRUM, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS;

AGAINST: *Judges* ANDERSON, VUKAS.

Done in English and in French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this seventh day of February, two thousand, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of the Republic of Panama and the Government of the French Republic, respectively.

(Signed) P. CHANDRASEKHARA RAO,
President.

(Signed) Gritakumar E. CHITTY,
Registrar.

Judge MENSAH, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(Initialled) T.A.M.

Judge LAING, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(Initialled) E.A.L.

Judge NDIAYE, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(Initialled) T.M.N.

Vice-President NELSON, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) L.D.M.N.

Judge ANDERSON, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(Initialled) D.H.A.

Judge VUKAS, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(Initialled) B.V.

Judge WOLFRUM, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(Initialled) R.W.

Judge TREVES, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(Initialled) T.T.

DECLARATION OF JUDGE MENSAH

1. I agree with the Tribunal's decision that it has jurisdiction over the dispute giving rise to the Application and the finding that the Application submitted by Panama is admissible, as reflected in paragraphs 1 and 2, respectively, of the *dispositif*. I also support the statement in paragraph 61 of the Judgment that "[f]or the application for release to succeed, the allegation that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel … upon the posting of a reasonable bond should be well-founded". I further agree with the finding of the Tribunal, in paragraph 72, that "the allegation made by the Applicant is well-founded for the purposes of these proceedings".

2. Having decided formally to record its findings in respect of jurisdiction and admissibility in the operative parts of the Judgment, the Tribunal should, in my view, have followed the logic of that decision by also recording its conclusion that the allegation of Panama that France has failed to comply with the provisions of article 73, paragraph 2, of the Convention requiring release of the ship and its Master upon the posting of a reasonable bond is well-founded.

3. In this connection, I wish to reiterate my endorsement of the view of the Tribunal that an application under article 292 of the Convention for the release of a detained ship or crew will only succeed if it is satisfied that the allegation of non-compliance with a provision of the Convention for the prompt release of the ship or crew upon the posting of a reasonable bond or other financial security is well-founded. That statement corresponds to the provisions of article 113, paragraphs 1 and 2, of the Rules of the Tribunal. These provisions reflect the well-considered understanding of the Tribunal regarding what is expected of it when dealing with disputes regarding the interpretation or application of article 292 of the Convention. Article 113 of the Rules is one of the "rules for carrying out its functions", and it has been formally adopted by the Tribunal in accordance with article 16 of its Statute. As such, it is binding on the Tribunal and on parties that appear before it, except and to the extent that it is shown to be contrary to any provisions of the Convention – whether expressly or by necessary implication.

4. No suggestion has been made that article 113 of the Rules remotely contradicts the letter or spirit of any provision of the Convention. The only question raised concerning it is that the requirement that an allegation should be "well founded" is not expressly provided for in article 292. But the absence, in express terms, of this requirement in the article of the Convention cannot suffice to invalidate article 113 of the Rules. The Tribunal (as also the other courts and tribunals designated in article 287 of the Convention) is required to perform a judicial function when it deals with a dispute concerning the interpretation or application of the Convention. In the discharge of that mandate, it is neither reasonable nor possible for the Tribunal to confine itself in every case to the bare language of the Convention's provisions. It is permitted, indeed required, to "flesh out" the bones of the provisions to the extent necessary in the circumstances of a particular case in order to attain the objects and purposes of the provisions in question. This "fleshing out" can be done in the context of a particular dispute; but it can also be done, as in article 113 of the Rules, by way of a general statement of the approach the Tribunal considers necessary for dealing with any specific provision or provisions. There is, however, a limit to the freedom of the Tribunal in this regard: a statement or approach adopted by it must not be incompatible with any provisions of the Convention.

5. In my view article 113 of the Rules is not incompatible with article 292 of the Convention or any other provision of the Convention, for that matter. It is no more than a statement of what is expected of a court or judicial body when it is invited to deal with a dispute arising under that article. Like other disputes under the Convention, as enumerated in article 297, a dispute under article 292 involves an "allegation" that there has been non-compliance with a provision or provisions of the Convention; and a court or tribunal to which such a dispute is submitted for settlement cannot avoid dealing with the question whether or not there is substance in the "allegation". In other words, the court or tribunal must satisfy itself that the allegation against the Respondent has been "substantiated", ("proved", "shown to be grounded", "made out" etc.). There may be different "standards of proof" (standards of appreciation) for determining whether or not allegations have been made out in particular cases, but there is always the need to determine that the applicable standard of proof has been met. A court or tribunal dealing with a dispute cannot find for an applicant if it is not satisfied that the allegation on which the applicant bases its claim or request has been substantiated. Article 113 of the Convention merely articulates this principle in relation to disputes under article 292 of the Convention. It is worth noting, in this regard, that article 294 of the Convention applies the same principle to applications made in respect of a dispute referred to in article 297 of the Convention. Paragraph 1 of article 294 provides that the court or tribunal dealing with the case "shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall take no further action in the case".

6. In providing that the Tribunal shall apply to allegations under article 292 of the Convention the principle laid down in article 294, article 113 of the Rules does not run counter to anything in the Convention. On the contrary, it represents an accurate and necessary statement of what the Tribunal needs to do to discharge the function assigned to it under this important and innovative provision of the Convention. Accordingly, the Tribunal should not hesitate to base itself on article 113 of the Rules when it is relevant in a dispute before it.

7. I regret that the clear finding of the Tribunal that "the allegation of non-compliance with article 73, paragraph 2, of the Convention is well-founded" is not formally recorded in the *dispositif* of the Judgment. Nevertheless, I have voted in favour of the Judgment because it includes a statement to that effect in paragraph 72; and, particularly, because it clearly states that an application for release can only succeed if the Tribunal finds that the allegation that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel upon the posting of a reasonable bond is well-founded (paragraph 61).

(*Signed*) Thomas A. Mensah

DECLARATION OF JUDGE LAING

There is no doubt that this new institution of prompt release is designed to do precisely what is stated in article 292 of the Convention – to ensure the prompt release of vessels and their crews from detention (by coastal or port States). Such release is an important objective, given the necessity of ensuring that legitimate maritime transportation and marine exploitation should not be stymied and that the global economy and human welfare should be as uninhibited as is reasonably feasible and proper.

Given the importance of prompt release, article 292 exhibits no diffidence about describing in prompt release proceedings the action of a respondent State by its proper name – detention. In fact, the word "detain" and words based on that word are unequivocally used seven times in article 292. It is thereby made abundantly clear that the issue for decision is related to detention.

Nothing pejorative about or even critical of detaining States is implied in article 292. It simply deals with whether, from the perspective of international law, there is a detention in a particular sense, depending on the circumstances, including an arrest, or a hindrance, holding, keeping in custody or a retardation or restraint from proceeding – synonyms mentioned in *Black's Law Dictionary*. In applying article 292, the Tribunal should not be unduly concerned with a detaining State's categorization of its actions under its law. Therefore, formulations of domestic law which, in good faith, deny the apparent objective international reality of arrest or detention or are based on particular domestic concepts are of limited consequence.

The Tribunal is obliged to come to its conclusions about detention and to order prompt release without distraction or equivocation if, given the standard of appreciation that the Tribunal applies in prompt release proceedings (see paragraph 51 of this Tribunal's Judgment of 4 December 1997 in the *M/V "SAIGA" Case*), it concludes that the allegation of detention is well-founded. It bears repeating that, at this stage of a possible dispute, the Tribunal is concerned about the fact of detention and about a fairly broad allegation of the sort specified in such other provisions of the Convention as subparagraphs (a), (b) and (c) of paragraph 1 of article 297 and subparagraphs (b) of paragraph 2 and (b) of paragraph 3 of the same article. Thus, paragraph 3 of article 292 states that the Tribunal

> shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum ...

the authorities of which, the paragraph states, remain competent to release the vessel or its crew at any time.

It is my view that, while the commercial importance of maritime transportation and marine exploitation are the primary motivating forces, the prompt release institution is undergirded somewhat by the venerable freedom of the high seas including, *inter alia*, the freedom of navigation. These are eminently counterbalanced and reinforced by various other legal institutions favouring coastal States, including that concerning the exclusive economic

zone. It seems to me, too, that there cannot be any gainsaying that prompt release is also reinforced by its significant humanitarian underpinnings, ranging from the economic rights or concerns of ship owners to the civil rights or concerns of detained crews. These considerations underscore what I have said about the unequivocal nature of the institution of prompt release, the importance of effectuating releases that are prompt and not being preoccupied with domestic law notions of whether or not there has been detention, in the sense of article 292, or imprisonment or corporal punishment – expressions used in a portion of article 73 (paragraph 3) that is not directly the subject of the Tribunal's decision-making in article 292 proceedings.

It is therefore regrettable that the Tribunal has not made a categorical finding that there has been a detention. Without casting any aspersion whatever, this would have contributed to better understanding of article 292 and the development of the procedures for prompt release from detention.

Nevertheless, I venture to predict that prompt release proceedings will become relatively routine, as far as concerns the points that I have mentioned so far.

I suspect that somewhat more difficult will be the Tribunal's task of evaluating the reasonableness of bonds or other financial security required by detaining States as a condition for release and the further task of determining whatever (presumptively reasonable) bond or other financial security, if any, the Tribunal decides to order.

I must first repeat that, even in this connection, the points that I earlier made are crucial. Secondly, I must note that every day judicial bodies everywhere must objectively and impartially determine whether or not actions are reasonable, which is a neutral and unpejorative expression. According to *Black's*, it carries the connotation of proportionality, balance, fairness, propriety, moderateness, suitability, tolerableness and or inexcessiveness. Among the synonyms which one can add is consistency. In the case of prompt release proceedings, the appropriate perspective is that of an international standard determined to be proper by the Tribunal. Generally, this will be on a plane and have a content that differs from those of domestic law. Certainly, in making determinations of reasonableness in prompt release cases, the Tribunal should never seek or appear to enforce the domestic laws of the detaining State or even substantive aspects of the Convention. I believe that the Judgment satisfies these tests. Equally and importantly, in determining reasonableness, the Tribunal must not and does not normally imply criticism of the domestic law or institutions of either litigant State. For one thing – prompt release proceedings are in no way akin to situations in which the international minimum standard is applied in substantive proceedings involving assertions of State delictual responsibility.

In view of what I have just said, it must be noted that the required bond of 8,000,000 FF represents 26% of the aggregate potential liability under domestic law of 30,000,000 FF – assuming that potential charges against the ship owners, not yet brought, are included. Alternately, 8,000,000 FF represents 40% of the 20,000,000 FF bond required by the French court. On the other hand, in the *M/V "SAIGA" Case*, the aggregate financial security (the discharged gasoil worth some US$ 1,000,000 plus the US$ 400,000 guarantee) represented 9% of the potential liability of over US$ 15,000,000. There therefore appears to be a significant difference in approach between the two cases that is not fully explained in the Judgment in terms

of: the criterion of reasonableness adumbrated in paragraph 82 of the Judgment in the *M/V "SAIGA"*, the gravity of and possible penalties for the alleged offences or the value of the cargo seized. Furthermore, some of the evidence in these proceedings is consistent with the possibility that the value of the *Camouco* apparently was less than that of the *Saiga* and, perhaps, of the amount of an 8,000,000 FF bond.

It is important that the Tribunal should carefully develop its jurisprudence on the issue of reasonableness. In so doing, the values of consistency and proportionality, among the other attributes of reasonableness, will loom large. In all probability, this latest phase of the Tribunal's jurisprudence on reasonableness represents a fine-tuning. This will be revealed in the fullness of time.

It should be added that peculiar aspects of such other proceedings as provisional measures and preliminary proceedings have no relevance in prompt release proceedings, an independent and autonomous institution which is unique in international adjudication. Thus, there is no requirement to preserve or balance the respective rights of the parties (as in provisional measures proceedings) or to determine whether a claim constitutes an abuse of process or whether it is *prima facie* unfounded (as in preliminary proceedings).

In conclusion, the Judgment and this Declaration reveal that prompt release proceedings evidently concern several aspects of the interpenetration of international and domestic law and institutions. As long as each is held to apply within its own sphere, the potential for the appearance of conflict between the two will be diminished and the conditions for a harmonious balance will be strengthened.

(*Signed*) Edward A. Laing

DECLARATION OF JUDGE NDIAYE

[Translation]

I wish to place on record that I do not share the views of the majority with regard to the determination of the amount of the bond.

In my view, the provisions of the Convention providing for prompt release of vessels and crews upon the posting of a reasonable bond or other financial security pertain to the application of laws and regulations of the coastal State. It is therefore to those laws and regulations that one must turn in order to determine the bond or financial security in the most realistic manner, absent prescribed standards of determination.

It is domestic legislation which can supply information regarding fines incurred in respect of charges lodged against the captain or legal persons, or regarding appearance in court. Moreover, the administrative authority in charge of maritime fisheries and aquaculture is equipped to determine the value of a fishing vessel or that of an illegal catch. It is on the basis of those elements that one can arrive at objective criteria for determining the amount of the reasonable bond or other financial security, without venturing into extra-legal considerations.

(*Signed*) Tafsir Malick Ndiaye

SEPARATE OPINION OF VICE-PRESIDENT NELSON

The unique procedure embodied in article 292 of the Convention has for its object a single purpose – that is – to ensure that "if a ship or vessel is arrested because of a violation of coastal state regulations and if the Convention provides for its release on the posting of a bond or other security, then there should be an assurance that the release could be effected promptly", thus avoiding the substantial expenses that the vessel, owner or charterer would incur while the vessel was being kept idle in detention.[1]

The first proposal on this matter submitted in 1973 in the Seabed Committee by the United States brought this simple purpose out quite clearly:

> The owner or operator of any vessel detained by any State shall have the right to bring the question of the detention of the vessel before the Tribunal in order to secure its prompt release in accordance with the applicable provisions of this Convention, without prejudice to the merits of any case against the vessel.[2]

Article 292, paragraph 1, reflects this intent. A State Party is granted the power to submit to this Tribunal, in certain specific circumstances, the question of release from detention of a vessel flying its flag where the authorities of another State Party have detained the vessel and "it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security"[3] ("qu'il est allégué que l'Etat qui a immobilisé le navire n'a pas observé les dispositions de la Convention *prévoyant* la prompte mainlevée de l'immobilisation du navire ou la mise en liberté de son équipage dès le dépôt d'une caution raisonnable ou d'une autre garantie financière". Emphasis added).

There is no doubt in this case that article 73 is the relevant provision. It states expressly that "[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security". In short it is an article which, in accordance with the terms of article 292, makes provisions "for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security". The link between article 73 and article 292 is established by the fact that article 73 is one of the articles which provides for the prompt release of vessels upon the posting of a bond and, in my opinion, gives meaning to the expression "and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security".

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[1] Explanatory Statement by the Secretary on Supplement to the Draft Rules of the Tribunal on the Prompt Release of Vessels and Crews (LOS/PCN/SCN.4/WP.2/Add.1) (1985) in LOS/PCN/152, Vol. III, 1 May 1995, p. 389.

[2] UN Document A/AC.138/97. Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, Vol. II (1973), p. 23.

[3] On which see paragraphs 23-25 of the Dissenting Opinion of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye in the *M/V "SAIGA" Case* (Prompt Release) (1997).

Article 292, paragraph 3

The mechanism for prompt release of vessels is designed to isolate the proceedings from those taking place in the domestic forum and this must be a logical consequence arising from the very nature of the proceedings. "The court or tribunal shall deal … with the application for release and shall deal *only* with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew ..." (article 292, paragraph 3. Emphasis added).

In the oral pleadings France stated that the Tribunal should "... take great care not to interfere with the functions of the French courts seized of the same question" as the one before the Tribunal (oral pleadings of France, ITLOS/PV.00/2, p. 19). In other words the Tribunal may have to refrain from giving a judgment on the prompt release of the vessel while the same matter is before the local courts. To my mind such an approach would fly in the face of the very object and purpose of article 292. That is why it is also difficult to accept that the local remedies rule (article 295) has any relevance with respect to the operation of article 292. (See oral pleadings of France, ITLOS/PV.00/2, p. 16.)

The Tribunal is likewise debarred from dealing with matters such as the freedom of navigation and the incompatibility of French law with the 1982 Convention on the Law of the Sea, as raised by Panama. These matters are alien to the question of release of the vessel.

The reasonable bond

The expression "reasonable bond" appears in both articles 292 and 73. In particular, article 73 declares that "[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security". The Tribunal has in a previous decision held, correctly in my view, that the most important guidance in the determination of the bond or other financial security is that the bond must be reasonable.[4]

In the first place there can be no doubt that it is the Tribunal's task to determine, in case of any dispute, what is reasonable. As was stated so many years ago:

> It is not now for either of the Parties to the Treaty to determine the reasonableness of any regulation made by Great Britain, Canada or Newfoundland, the reasonableness of any such regulation, if contested, must be decided not by either of the Parties, but by an impartial authority.[5]

Secondly, the bond must be reasonable in the sense of being fair and equitable and "what is reasonable and equitable in any given case must depend on its particular circumstances".[6]

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[4] *The M/V "Saiga" Case*, Prompt Release (1997), p. 23, para. 82.
[5] *North Atlantic Coast Fisheries Case*, Great Britain *v.* United States, Award of 7 September 1910, *Reports of International Arbitral Awards*, Vol. XI, p. 189.
[6] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 96, para. 49.

The particular circumstances of the case determine the reasonableness of the bond. The process is not at all dissimilar to that utilized by international tribunals in the quest for an equitable result in maritime boundary delimitations.[7] In that domain also, international tribunals have to take into consideration the relevant circumstances in order to reach an equitable result. That is why, in my opinion, this Tribunal is not only obliged to look at factors such as those mentioned in paragraph 67 of the Judgment but it should also take account of what, in the introduction to the Statement in Response of the French Republic, was referred to as "the context of illegal, uncontrolled and undeclared fishing in the Antarctic Ocean and more especially in the exclusive economic zone of the Crozet Islands where the facts of the case occurred".[8]

This material constitutes part of the "factual matrix" of the present case[9]– the factual background surrounding the case. In my view this factor ought to have played some part, not by any means a dominant part, but a part nevertheless in the determination of a reasonable bond. However, my difference with the Judgment of the Tribunal on this matter was not sufficient to impel me to dissent.

(*Signed*) L. Dolliver M. Nelson

[7] See Olivier Corten, "L'interprétation du 'raisonnable' par les juridictions internationales : au-delà du positivisme juridique ?" *Revue Générale de Droit International Public, Tome CII – 1998*, pp. 5–43 on p. 12.

[8] Statement in Response of the French Republic, p. 2. France has developed this theme both in the Statement in Response and in its oral pleadings.

[9] See Jiménez de Aréchaga, Separate Opinion in the *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 106, para. 24.

DISSENTING OPINION OF JUDGE ANDERSON

Admissibility and Merits

The Judgment considers the questions of the admissibility of the Application and its merits together, reaching its conclusions in paragraph 72. The same approach will be followed here.

I have voted against operative paragraphs 2, 3 and 4 of the Judgment for the following reasons. Article 292 aims to protect certain economic and humanitarian values: ships and crews should be released from detention upon posting "reasonable" security pending trial on fishery or pollution charges. At the same time, Part V of the Convention protects other values, including the conservation of the living resources of the sea and the effective enforcement of national fisheries laws and regulations. In my opinion, greater significance should have been accorded to these latter values in deciding the question of the reasonableness of the security in this case.

The present proceedings and the proceedings in the national courts

The proceedings under article 292 are not an appeal against the decisions of the French courts, nor even the equivalent of a judicial review. Rather, they are independent proceedings based on the interpretation and application of the Convention. The work of the national court, however, is an indispensable part of the factual background and there is a need for judicial restraint at the international level. It should be recognised that the local courts are best placed to appreciate all the relevant considerations of fact and law in the State concerned. In a matter such as this, concerning as it does procedure in a current criminal case, the local court should be accorded a wide discretion in fixing the amount of the security for release pending trial. In other words, national courts should be accorded a broad “margin of appreciation”, a concept applied by the European Court of Human Rights, e.g. in the *Handyside Case*. In my view, it follows that an Applicant has to show very strong grounds for reducing the amount of the security fixed by a national court under local law in order to succeed under article 292.

The competent court in Réunion appears to have acted promptly to fix the amount of the *caution.* The amount was fixed at 20 million FF, well below the maximum penalties put at more than 30 million FF. The purposes were to secure the payment of any penalties which might be incurred and to secure the appearance of the accused at the trial. Had that sum of money been deposited, the *Camouco* could have sailed away. The owners of the vessel, however, considered the amount was too high and exercised their right of appeal. The appeal court considered the question afresh and upheld the decision by the lower court. To my mind, this is a further significant factor in deciding whether or not France has complied with the provisions of the Convention concerning prompt release.

Moreover, the owners have subsequently exercised a second right of appeal to another court in Réunion. No decision on this second appeal has been reported to the Tribunal. In other words, shortly after the appeal was filed and whilst it was still under consideration, an application was made to this Tribunal on the same point. It must be unprecedented for the same issue to be submitted in quick succession first to a national court of appeal and then to an

international tribunal, and for the issue to be actually pending before the two instances at the same time. This situation is surely undesirable and not to be encouraged. It smacks of "forum hopping" and hardly makes for the efficient administration of justice. An international tribunal can best adjudicate when the national legal system has been used not partially, as here, but completely and exhaustively.

This is the principle behind the “exhaustion of local remedies” rule, contained in article 295. Whilst article 292 does not use the word "dispute", it nevertheless speaks of an allegation that a State Party "has not complied with the provisions of this Convention …", which gives a strong impression that some dispute must in fact exist between the two sides, particularly given the wide scope accorded to the term "dispute" in the jurisprudence. Article 295 provides that "*Any* dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the *procedures provided for in this section* only after local remedies have been exhausted …" (emphases added). Article 292 clearly constitutes a procedure provided for in the same section as article 295, namely section 2 of Part XV. The question arises whether there may not exist at present an international dispute between Panama (espousing the claim of a Panamanian corporation, albeit one stated to be beneficially owned by Spanish nationals) and France over an exceedingly narrow issue, namely *the amount of the security ordered so far by the French courts in Réunion in the case brought against the* Camouco.

Without expressing a firm opinion on the question whether or not article 295 is directly applicable in a case brought under article 292, to my mind the existence of this outstanding domestic remedy is a relevant factor in deciding whether to grant relief. It reinforces the need for judicial caution, lest the merits of the appeal be prejudged. The Court of Appeal, were it to find that the inferior court had fallen into error, could itself give relief. To the extent to which the Tribunal has a discretion in cases under article 292, it should take full account of the non-exhaustion of local remedies. I do not share the logic expressed in paragraph 57 of the Judgment, nor the reasoning in the second sentence of its paragraph 58. When an applicant has actually invoked a domestic remedy, seeking a reduction in the amount of the security prescribed, and has done so just a few days before seeking from the Tribunal a reduction in the same security, I fail to see how waiting for the result of the appeal would defeat the "very object and purpose" of article 292, which, after all, contains a “without prejudice” clause for the domestic proceedings in its paragraph 3.

Before leaving the question of the relationship between these proceedings under article 292 and those under the national jurisdiction, I would add a further point. The procedures followed in criminal cases vary from one legal system to another. Common law jurisdictions rely greatly upon oral testimony given by sea fisheries officers at a trial in open court. This enables the court to hold the trial shortly after the arrival of the detained vessel in port, thereby reducing the need to consider the question of release of the vessel and its crew against financial security pending the trial. Civil law systems of criminal procedure rely much more on written evidence and judicially-directed investigations, which may take more time. Both systems are, of course, fully compatible with internationally agreed standards for the protection of human rights. (It is worth noting that France is a party to the European Convention on Human Rights, which protects the right to a fair trial within a reasonable time and the right not to be subjected to cruel

and unusual punishments.) At the same time, article 292 may, in effect, put a premium upon holding trials of detained ships in fisheries and pollution cases without delay.

The Question of Compliance with article 73, paragraph 2

The principal issue in the present proceedings is whether or not the *caution* of 20 million FF is "reasonable", within the meaning of article 73, paragraph 2. Reasonableness is a difficult concept to apply in the absence of detailed criteria. The Convention does not contain any express provisions for determining the reasonableness of the amount of the security ordered by a national court. The test put forward in the *M/V "SAIGA" Case* (recalled in paragraph 66 of the Judgment) does not advance matters beyond adding the elements of the form and nature of the security. The crucial matter is its amount. In my opinion, the question has to be approached in its factual and legal context, including not only article 292 itself but also the scheme of the Convention as a whole.

(a) The Factual Context

Taking first the term "reasonable" in isolation, there could not exist a single standard of a "reasonable" amount for all persons and companies charged with fisheries offences applicable in all circumstances. It suffices to note that the ranks of the possible accused range all the way from the artisanal or indigent fisherman, at one extreme, to the industrial fishing enterprise, such as that to which the *Camouco* belongs, at the other. The accused include both foreign fishermen established in the coastal State and ones who have travelled from afar and who never intended to set foot on the territory of the coastal State, again such as the *Camouco*. Accordingly, the meaning of the term "reasonable" has to been determined on a case by case basis, taking into account the relevant facts and circumstances.

(b) Article 292

This novel provision is headed "*Prompt release of vessels and crews*", but there is no presumption in my view that release will be ordered by the Tribunal in every case. There is no automaticity about ordering release. Some applicants may succeed, but others may not. Such an order, for example, would be devoid of purpose on the eve of the trial before the local court. Release should not be ordered where the amount fixed by the local court is reasonable. The Tribunal still has to decide, on the facts of each case submitted to it, whether or not the allegation has been established or, in other words, whether or not there has been a failure to comply with article 73, paragraph 2. It is only if the Tribunal so finds, that it should proceed to determine the appropriate security. It should perform these tasks on the basis of the Convention as a whole and not on the basis of article 292 considered in near isolation from the wider context. The latter includes not only the whole of that article but also article 73, paragraph 2, and the other directly related provisions of Part V, to which I now turn.

(c) Part V

The starting point for considering the question of reasonableness is **Part V** concerning the EEZ. Several articles are relevant to greater or lesser degree. Taking them in the order in which they appear, they are as follows:

(1) **Article 61** imposes the duty on the coastal State 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".

This is an important duty: it is an obligation imposed in the general interest of all concerned.

(2) Under **article 62, paragraph 4**, "[n]ationals of other States fishing in the exclusive economic zone shall comply with the conservation measures … established in the laws and regulations of the coastal State".

(3) **Article 63, paragraph 2, and article 64** look beyond the outer limits of the EEZ and provide for degrees of cooperation between coastal States and fishing States through appropriate subregional and regional organisations in the matter of conserving straddling fish stocks and highly migratory fish stocks. The Applicant's evidence in this case was that in September 1999 *Camouco* set off from Walvis Bay to fish for Patagonian Toothfish and that 6 tonnes were caught just to the Southwest of the EEZ around the *Iles Crozet* during that month. It is a matter of public record that the *Iles Crozet* lie within the vast area to which there applies the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR), the regional fisheries management organisation for the waters of the high seas south of the Antarctic Convergence (see the texts and maps at <www.ccamlr.org>). As I understand it, the Convention applies to the high seas around the outer limit of the *Crozet* EEZ south of 45 degrees south latitude (subarea 58.6). The parties to CCAMLR are listed on the website, as follows: Argentina, Australia, Belgium, Brazil, Chile, the European Community, France, Germany, India, Italy, Japan, Republic of Korea, New Zealand, Poland, Russian Federation, South Africa, Spain, Sweden, Ukraine, UK, USA, Uruguay, Bulgaria, Canada, Finland, Greece, Netherlands and Peru. The Convention is based on an ecosystem approach to conservation and management. The CCAMLR Commission has adopted many conservation measures, including catch limits and closed seasons for Patagonian Toothfish in subarea 58.6. If the Applicant's evidence in this case concerning the catching of 6 tonnes of Patagonian Toothfish just outside the EEZ were to be proved to be correct, then new questions would arise in my opinion. The Report of the Secretary-General of the United Nations on Oceans and Law of the Sea for 1999 refers to “the prevalence of illegal, unregulated and unreported (IUU) fishing on the high seas, in contravention of conservation and management measures adopted by subregional and regional fisheries management organizations”, describing it as “one of the most severe problems currently affecting world fisheries” and citing the specific example of CCAMLR (UN Doc. A/54/429, paragraphs 249 and 250).

(4) **Article 73** provides for the enforcement of fisheries laws and regulations of the coastal State "adopted by it in conformity with this Convention". In particular, according to article 73, paragraph 1, "[t]he coastal State may, in the exercise of its sovereign rights

to … conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."

The *Camouco* was clearly arrested and is now the subject of judicial proceedings within the ambit of this provision of the Convention.

(d) **Enforcement of Legislation by the Coastal State**

There is a need for effective enforcement of applicable conservation and management measures. Several aspects are relevant in this connection.

(1) **Penalties for fishery offences** The Convention does not lay down a scale of maximum financial penalties upon conviction for fishery offences, although exclusions are made in regard to imprisonment and corporal punishment by article 73, paragraph 3. (I would observe in passing that these exclusions, by limiting the range of available penalties, may indirectly have led to increases in monetary penalties in order to allow for the repression of serious offences.) In other words, article 73, paragraph 1, of the Convention leaves to the national legislator both the definition of fisheries offences and the maximum levels of fines and similar penalties for the different offences which may be charged. It is then for the national judge, upon finding guilt, to fix the penalty in the light of the applicable legal provisions, the evidence and the surrounding circumstances. The maximum penalties depend on the terms of the legislation. In determining the exact amount, the judge is not limited to the total of the values of the catch, the gear and the vessel. At the initial stage of considering requests for release from detention pending trial, the determination of the amount of the security is linked to the amount of the possible penalties which could be imposed upon eventual conviction, especially in a case involving a foreign vessel and accused persons who, being non-residents, have no assets within the jurisdiction apart from the one vessel and its contents. This interpretation of the concept of the "reasonable" security is borne out by the French text of article 73, paragraph 2, which uses the term "une caution … suffisante". What is "reasonable" is an amount *suffisant/sufficient* to cover penalties which could be imposed upon conviction. There exists the danger of fixing the security under article 292 at a level which, being too low, could in practice "prejudice … the merits of [the] case before the appropriate domestic forum against the vessel, its owner or its crew", contrary to paragraph 3 of article 292. In a criminal case, the processes of determining and then exacting the penalties upon conviction form integral parts of the merits.

(2) **The question of the gravity of the charges in this case** In paragraph 29 of the Judgment, the charges are listed and in paragraph 68 simple note is taken of "the gravity of the alleged offences", without more. In my opinion, greater weight should have been attached to this factor. The Report of the UN Secretary General mentioned above refers to the problems caused by illegal fishing in zones under national jurisdiction. In recent years, courts in different coastal States, especially jurisdictions in huge and remote EEZs, have imposed heavy penalties upon industrial freezer vessels with large fishing capacity

found after due process of law to have been fishing illegally. Apart from the gravest offence of fishing without authorisation, other types of conduct by fishing vessels have been criminalised by legislators and courts. Examples of obstructing the work of duly authorised inspectors, masking a vessel's name and port of registry, keeping false logbooks, fleeing when detected in the EEZ, and throwing incriminating documents and illegally caught fish overboard before the inspectors arrive are all well-known to fisheries enforcement officers. Also in recent years, attempts have been made to disguise beneficial ownership through the formation of single ship companies in remote jurisdictions and through flying what are sometimes called "flags of convenience". The States concerned are often not members of the regional or subregional organisation for the conservation and management of fisheries in a particular area visited by a vessel, even though in some cases the national State of both the captain and the beneficial owner is a full member of that organisation. This situation raises many questions over and above those considered by the Tribunal in paragraphs 75 to 88 of its Judgment of 1 July 1999 on the merits of the *M/V "SAIGA" Case*.

(3) **The question of charging both the Master and the shipowners with fishery offences** In recent years, it has become the practice in many coastal jurisdictions to charge with fishery offences not only the Master of the fishing vessel but also its owners and operators where they can be identified. This is recognised in article 292, paragraph 3, where it refers to "any case before the appropriate domestic forum against the vessel***,*** *its owner* or its crew" (emphasis added). Upon conviction, high penalties (in the way of fines and confiscations of the catch and means of fishing) are often requested by prosecutors and imposed by judges because they serve to deter law-breaking by other masters and fishing companies. In these cases, the Master is not fishing on his own account but rather that of the company, with the result that the Master, upon conviction, has insufficient assets to pay fines fixed at a level commensurate with the gravity of the offences.

(4) **Special problems of ensuring effective law enforcement in extensive and remote EEZs** As indicated above, coastal States have duties under article 61 to ensure the effective conservation of the stocks. Poaching on a large scale makes this difficult to achieve. In remote insular territories surrounded by large EEZs, coastal States are often unable to maintain frequent patrols. Large factory/freezer vessels which remain undetected can soon decimate stocks. Effective enforcement of conservation measures is in the general public interest, but patrolling is very expensive. The problems of ensuring effective enforcement and effective conservation are acute in small island jurisdictions, including small island developing States. Thus, when a vessel is arrested, prosecuted and convicted, the fishery enforcement officers tend to seek and the courts tend to impose swingeing penalties in an effort to deter others from breaking the law in a similar way. At the prior stage of considering the question of release pending trial, the judge is aware that if the security is fixed at a level below the amount of the penalties which may be imposed on conviction, the excess could well prove in practice to be irrecoverable.

Overall conclusion on the admissibility and merits of this Application

To sum up, the amount of the security ordered by the national courts in this case does not exceed their margin of appreciation. Considering the facts and applying the terms of the Convention as a whole, it has not been established, in my opinion, that the amount lies beyond the range of what is reasonable. I would dismiss the application.

Operative paragraph 5 of the Judgment

Finally, I do not consider it unreasonable for the French court to have ordered that the security be provided in cash or by banker's draft payable to the court. This appears to be nothing other than normal practice. Accordingly, I have voted against operative paragraph 5 of the Judgment.

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I have had the opportunity to read the Declaration of Judge Mensah and wish to endorse his comments about article 113 of the Rules and the absence of any clear finding of well-foundedness or otherwise in the operative paragraphs of the Judgment. I also agree with the broad thrust of Judge Vukas' Dissenting Opinion about litispendence, the broad thrust of Judge Wolfrum's Dissenting Opinion and the comments of Judge Treves about the distinction between questions of jurisdiction, admissibility and merits.

(*Signed*) David H. Anderson

DISSENTING OPINION OF JUDGE VUKAS

1. I concur with the considerations of the Tribunal concerning its jurisdiction in this case (paragraphs 45 to 48 of the Judgment), and therefore, I voted in favour of the first operative provision in paragraph 78 of the Judgment. However, as I do not share the opinion of the Tribunal that the Application of Panama was admissible, I voted against the second operative provision in paragraph 78 of the Judgment. As a consequence thereof, I had to vote also against the remaining operative provisions.

2. Before explaining the arguments for my Dissenting Opinion, I would like to express the fundamental reason for my decision to deny the admissibility of the Application of Panama. The Application is based on article 292 of the Convention concerning the "prompt release of vessels and crews". Yet, Panama has invoked the provisions on the prompt release in a manner which is not in accordance with the provisions of the Convention, and which was not envisaged by the Third United Nations Conference on the Law of the Sea (hereinafter "UNCLOS III"), which introduced this innovation into the international law of the sea.

3. The reason for the introduction of the procedure for prompt release at UNCLOS III was the idea that in some cases of detention, vessels and crews could be promptly released "without prejudice to the merits of the case, and without in any way ousting the jurisdiction of the detaining State".[1]

As the need for promptness of the release is the main purpose of this new procedure, there are several essential components which contribute to this goal:

(a) It is not only the flag State of the vessel that may make the application for release; the application may be made also on behalf of the flag State (article 292, paragraph 2). Thus, a State can give an authorization to make the application to one of its officials, to the captain or to the owner of the vessel.[2]

(b) Although article 292, paragraph 1, recognizes the equality of the procedures contained therein, and the right of the parties to agree on the choice of a court or tribunal, one of them – the International Tribunal for the Law of the Sea – has been selected for the situation when the parties cannot agree.

(c) A third element contributing to promptness is the short period in which all the subjects concerned (the detaining State, the flag State and all those concerned with the treatment of the detained vessel and the crew, the competent courts and tribunals) should act. Within 10 days from the time of detention, the detaining State should arrange for the release of the vessel or its crew, upon the posting of a reasonable bond or other financial security. The situation, in case the

[1] A.O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea, A Drafting History and a Commentary*, Martinus Nijhoff Publishers, Dordrecht/Boston/Lancaster, 1987, p. 161.
[2] Center for Oceans Law and Policy, University of Virginia, *United Nations Convention on the Law of the Sea 1982, A Commentary*, Vol. V, M.H. Nordquist, Editor-in-Chief, S. Rosenne and L. B. Sohn, Volume Editors, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1989, pp. 70–71.

vessel and the crew are not released in this initial period, is best described by Shabtai Rosenne and Louis Sohn:

> If the local tribunal rejects the request for a release on bond, or the bond is considered by the party concerned to be unreasonable, that party should try to obtain a reversal of the decision if there is still time in the 10-day period. If there is no possibility of appeal, however, or no chance for that appeal to be decided before the expiration of the 10-day period, the parties should try to agree on the court or tribunal to which the question of release should be referred. If no agreement on such a court or tribunal can be reached before the expiration of the 10-day period, then the Convention's provisions on the selection of the tribunal apply.[3]

(d) If the ship and the crew are not released, and the question of release from detention is submitted to a court or tribunal in accordance with article 292, paragraph 1, it is provided that "[t]he court or tribunal shall deal without delay with the application for release" (paragraph 3). In conformity with this provision, the Rules of the Tribunal contain provisions ensuring that an application for the release of a vessel and its crew from detention is dealt with without delay (Rules, articles 110 to 114).

(e) Finally, upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State must "comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew" (Convention, article 292, paragraph 4).

4. Taking into account all the above, it is clear that the prompt release procedure was conceived by UNCLOS III in order to permit the flag State, or somebody on its behalf, to submit the question to an international court or tribunal as soon as all the conditions under article 292, paragraph 1, are satisfied. This does not mean that in every case when the vessel and/or the crew are not released, the case should be submitted to an international procedure immediately after the expiry of the 10-day time limit. There may be valid reasons for a postponement, such as a promise from the detaining State that the vessel will be released soon, with or without the posting of a bond, or the existence of a lengthy procedure for obtaining the authorization to act on behalf of the flag State, etc.

Thus, the flag State can institute proceedings under article 292 when it deems appropriate for the benefit of its detained vessel and/or its crew, or it can make use of the local remedies. Of course, the purpose of the provisions on prompt release in article 292 does not require the exhaustion of local remedies (article 295) as a condition for the submission of a request for prompt release to an international court or tribunal.[4]

Yet, there may be shipowners and/or flag States which would prefer to bring the case of detention of their vessel and its crew to a local court or other authority competent under the

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[3] *Ibid.*, pp. 69–70.

[4] See R. Lagoni, "The Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea: A Preparatory Report", *The International Journal of Marine and Coastal Law*, Vol. 11, No. 2, 1996, p. 152.

national laws of the State which has detained the vessel. This was exactly the attitude of the shipowners of *Camouco* and its flag State, Panama.

5. The "Factual background" in the Judgment (paragraphs 25 to 42) clearly shows that on 8 October 1999, shortly after the seizure of the vessel (29 September 1999), the *tribunal d'instance* at Saint-Paul ordered that the release of the arrested vessel shall be subject to the payment "of a bond in the amount of 20,000,000 FF in cash, certified cheque or bank draft" (paragraph 36 of the Judgment).

Although the owner of *Camouco*, the company Merce-Pesca, considered the fixed bond as not being "reasonable", neither the shipowner nor the flag State did anything to institute the proceedings envisaged in article 292, paragraph 1. Instead, Merce-Pesca and the Master of the vessel filed a summons for urgent proceedings before the *tribunal d'instance* at Saint-Paul, in order to challenge the previous decision and to secure prompt release on the basis of a "reasonable bond" (22 October 1999).

Even when the *tribunal d'instance* at Saint-Paul issued an order rejecting the request (14 December 1999), Merce-Pesca lodged an appeal against this order before the *cour d'appel* at Saint-Denis. The appeal was lodged on 27 December 1999, and it is not surprising that it is still pending before the *cour d'appel* at Saint-Denis.

What comes as a real surprise is the fact that just before exhausting all French local remedies, the shipowner and the flag State "discovered" the procedure for prompt release in article 292 of the Convention. Namely, it was only on 7 January 2000 that the Applicant addressed a letter to the French Ministry of Foreign Affairs inviting it to release *Camouco,* and mentioning the proceedings under article 292.

6. Such behaviour of Panama (i.e. the use of the prompt release procedure under article 292 not immediately after the lapse of 10 days from the time of detention, but more than three months after that event), caused France to claim that "by its conduct, Panama allowed a situation of estoppel to arise and also that its Application is inadmissible".[5]

The possibility that because of its initial inaction, the flag State would be estopped from instituting the proceedings under article 292, has been commented upon by scholars. Although he does not support such an interpretation, Rainer Lagoni suggests that the flag State may be well advised to reserve its right to submit the question of release in due time to the Tribunal.[6]

7. In my view, the inadmissibility of the Application of Panama is not based on estoppel, but on a misinterpretation by Panama of the general concept of prompt release in the Convention and of the main provisions of article 292.[7] Namely, by addressing in January 2000 the Government of the French Republic and the Tribunal, the Republic of Panama *did not initiate a*

[5] Statement in Response of the French Government, 25 January 2000, paragraph 10 of the section relating to the law (English translation of the Statement in Response).
[6] Lagoni, *op.cit.*, p. 150.
[7] As to how the Applicant interprets the 10-day limit, see the Application of Panama, paragraph 4 (English translation of the Application).

prompt release procedure. Such a procedure, according to the Application of Panama itself, was initiated in a French domestic forum – the *tribunal d'instance* at Saint-Paul:

> On 22 October 1999, *in order to secure the prompt release of the vessel and the crew,* counsel for the owner, Merce-Pesca, filed a summons for urgent proceedings … .[8]

As established in paragraph 5 above, over the following two months, Merce-Pesca continued to address the French domestic fora. Then, for an unknown reason, before the decision of the *cour d'appel* at Saint-Denis, Merce-Pesca, with the assistance of Panama, decided to submit the case to an international court or tribunal. By doing so, Panama acted against the doctrine of litispendence, according to which two courts should not exercise concurrent jurisdiction in respect of the same case (i.e. same parties, same issue).

Naturally, litispendence does not prevent parallel action in absolutely every case. Such action may be permitted on the basis of a treaty, or the parties may have some vital reason for resorting to one jurisdiction before exhausting the remedies available in the other jurisdiction. However, in the present case, I do not see any reason for addressing the Tribunal 100 days from the time of detention of *Camouco*. There were no new circumstances in respect of either the vessel or the Master at the time of the action by Panama in January 2000. Moreover, it is logical to expect that the appeal pending before the *cour d'appel* at Saint-Denis should be resolved soon, and that the decision of the French court will contain different conclusions from those in the Judgment of the Tribunal, relating to the release of the vessel and the Master and to the amount and form of the bond or other financial security. It is impossible to foresee all the complications resulting from two different judgments, notwithstanding the appealing conclusion that the international judgment prevails over the national judgment.

8. As already mentioned at the very beginning, the procedure for the prompt release of vessels and crews is an innovation in the international law of the sea, created by UNLCOS III. The concise provisions of article 292, and the fact that to date the Tribunal has decided only one case, may result in misinterpretations in respect of the details of this procedure. However, the main scope of article 292 is clear: it should be used only in order to ensure promptness of release of detained vessels and crews in the situations provided for by the Convention.

Taking into account all the above-mentioned facts, the Application of Panama should have been declared inadmissible. Its interpretation of the prompt release provisions of the Convention is not in accordance with their "object and purpose" (article 31, paragraph 1, of the Vienna Convention on the Law of Treaties).

(*Signed*) Budislav Vukas

[8] Application of Panama, paragraph 40 (English translation of the Application). See also paragraph 42 of the Judgment.

DISSENTING OPINION OF JUDGE WOLFRUM

1. I have voted in favour of operative paragraphs 1 to 3 and in favour of paragraph 5 but against operative paragraph 4 of the Judgment. I consider the bond of 8,000,000 FF to be far too low to be reasonable within the terms of article 292 of the Convention on the Law of the Sea (hereinafter "the Convention"). Furthermore, I disagree with the Judgment on two points: firstly, its reasoning on the unreasonableness of the bond set by French courts and, secondly, regarding the powers the Tribunal has to set aside national measures concerning the enforcement of laws and regulations on the management of marine living resources in the exclusive economic zone. Both issues are closely interrelated.

2. First I will address the question of how to establish whether a bond set by national authorities is reasonable. A literal reading of article 292, paragraph 1, of the Convention and the provisions to which it refers gives no explicit guidance on how to determine the amount of the bond. Some indications on that matter are to be found in the Rules of the Tribunal (hereinafter "the Rules"). Article 111, paragraph 2, of the Rules requires the Applicant to provide information about the value of the ship and on the bond requested by the detaining State. Article 111, paragraph 2(c), of the Rules qualifies both those amounts as being relevant to the determination of the amount of a reasonable bond and not solely or predominantly the value of the ship.

3. The Judgment does not give appropriate guidance on what basis it assesses a bond set by national authorities, on what are the possible reasons to declare a national bond to be unreasonable and on what are the criteria it uses to determine the amount of the bond set by the Tribunal. It satisfies itself (paragraph 66) with reiterating a statement from the *M/V "SAIGA" Case* which emphasizes that the criterion of reasonableness encompasses not only the amount but also the form of the bond. This can hardly be disputed, but it touches only on a side aspect of this case. In paragraph 67 the Judgment mentions several factors without, however, indicating how they are to be implemented. The particularity in this case is that the fines the Master of the *Camouco* and its owners may face are significantly higher than the alleged value of the vessel. Although the Judgment states in paragraph 69 that the bond may be higher than the value of the vessel it does not say why and to what extent. What the Judgment, in essence, is lacking is an objective analysis of what is required to attain the aims which lie, in this case, behind the system requiring the posting of financial security. Only on that very basis would the Judgment have been able to assess the reasonableness of the bond determined by French judicial authorities and to determine the Tribunal's bond in a manner which does not face the criticism of bordering on subjective justice.

4. The assessment whether a measure taken, such as the determination of a bond under article 73, paragraph 2, of the Convention, requires the weighing of the rights and interests of the affected States involved, namely Panama and France, while taking into consideration the context in which the respective decision is to be made. On the basis of the foregoing, it is pertinent, as indicated above, to have recourse to the object and purpose of the procedure under article 292 of the Convention or – in other words, which rights and interests are to be protected thereunder – and to establish what guidance is to be gained therefrom for the determination of which bond can be considered reasonable.

5. It is commonly held that it is the object and purpose of the procedure under article 292 of the Convention to provide a mechanism for the prompt release of a vessel and crew from prolonged detention on account of the imposition of unreasonable bonds (paragraph 57 of the Judgment). This description just paraphrases article 292, paragraph 1, of the Convention but adds nothing to its interpretation. In particular it does not reflect that the procedure of article 292, paragraph 1, of the Convention may be applied in different contexts. Account has to be taken that in the present case the procedure has been initiated on the basis of the allegation that France had violated article 73, paragraph 2, of the Convention. In consequence thereof the rights and interests which coastal States enjoy in respect of the marine living resources form the background for this case before the Tribunal since the right to detain ships derives from the sovereign rights coastal States have in that zone.

6. According to article 56 of the Convention, coastal States enjoy sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of the exclusive economic zone. A coastal State may, in accordance with article 73, paragraph 1, of the Convention, take enforcement measures necessary to ensure compliance by foreign vessels with its laws and regulations adopted in conformity with the Convention. These measures may include boarding, inspection, arrest and the institution of judicial proceedings. The Convention imposes certain limitations upon coastal States in respect of enforcement. This nevertheless broad authority of coastal States is limited, however, to actions needed by the coastal State in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in its exclusive economic zone as specified in article 56, paragraph 1, of the Convention. It goes without saying that in the exercise of their enforcement powers coastal States may specify monetary penalties they consider appropriate and establish – within the framework of the Convention or other applicable international agreements – their rules on arrest, detention and release upon bonding. In particular, the Convention does not put a limit on the amount of fines against violators a coastal State may consider appropriate.

7. In defining the object and purpose of the procedure under article 292, paragraph 1, of the Convention and, in particular, which rights and interests it is meant to preserve, it is also necessary to take into account the point that article 292, paragraph 1, of the Convention constitutes a procedural safeguard for vessels for the exercise of their rights they enjoy in accordance with article 58, paragraph 1, of the Convention in foreign exclusive economic zones. The Third U.N. Conference on the Law of the Sea did not consider it adequate to merely protect flag States by obliging coastal States to respect the rights of the former but it was felt necessary to reinforce such obligations *vis-à-vis* flag States through the procedure of article 292, paragraph 1, of the Convention.

8. On the basis of the foregoing, I consider that when taking a decision on the prompt release of a vessel under article 292, paragraph 1, in connection with article 73, paragraph 2, of the Convention the Tribunal should properly balance the interests of both States involved. In particular, the Tribunal must not unnecessarily impinge upon the enforcement rights of the coastal State concerned in accordance with article 73, paragraph 1, of the Convention. This reading of article 292, paragraph 1, is confirmed by article 292, paragraph 3, of the Convention, according to which a judgment of the Tribunal has to be "... without prejudice to the merits of

any case before the appropriate domestic forum against the vessel, its owner or its crew ...". This means that it is first and foremost the right of the coastal State to enforce its laws. Hence, no decision of the Tribunal shall be taken under article 292, paragraph 1, of the Convention which renders the right of the coastal State to prosecute violations of its laws an empty shell. This should have been taken into consideration by the Judgment when it set the bond at a level which is not even half of what the French courts considered appropriate.

9. I will now turn to the second aspect on which I differ from the Judgment namely the limitations for the Tribunal to pronounce itself on measures under national law.

10. The procedure under article 292 of the Convention may be invoked in different cases such as: the detaining State does not provide for the release of a vessel upon bonding, the local courts reject the release of a vessel even if a bond has been offered, local authorities take no decision even if the release of the vessel has been requested, and, as in this case, a bond has been requested but it is considered unreasonable by the Applicant. It is only in the latter case where in accordance with article 113, paragraph 2, of the Rules the Tribunal has to declare a decision of a national institution, namely on the amount of the bond requested for release, to be unreasonable before it may proceed to its own decision on the amount of a bond and the release of the vessel and crew. I have had the opportunity to read the Declaration of Judge Mensah and I agree with his assessment of article 113, paragraph 2, of the Rules.

11. Without prejudice to the international limitations referred to above, coastal States enjoy considerable discretion in laying down the content of laws concerning the conservation and management of marine living resources in their exclusive economic zone and of the corresponding laws on enforcement. The Judgment has made no reference to these discretionary powers of the coastal States. They do not seem to play a role in the Judgment as a factor determining the power of the Tribunal *vis-à-vis* a coastal State. These discretionary powers or margin of appreciation on the side of the coastal State limit the powers of the Tribunal on deciding whether a bond set by national authorities was reasonable or not. It is not for the Tribunal to establish a system of its own which does not take into account the enforcement policy by the coastal State in question.

12. In principle, and without prejudice to its power to examine the compatibility of the national decisions with article 73, paragraph 2, of the Convention, it is not the Tribunal's role to challenge the decisions of French courts in a way that would make the Tribunal a court of third or fourth instance, something which it is not. This, however, is not the only point of relevance. The assessment by the Tribunal whether the bond set by the French authorities was reasonable or not has to take into account the fact that the French authorities have considerable discretionary power in this matter. This discretionary power on the side of France comes into play on two levels. First, France had, within the framework of article 73, paragraph 2, of the Convention, discretionary power to establish its system on the release of ships and crew upon bonding and, secondly, the French authorities had discretionary powers in its implementation.

13. According to the French system as expressed in the order of the *tribunal d'instance* at Saint-Paul of 14 December 1999, it is the objective of bonding to secure payment of penalties incurred and to secure the appearance of the accused in the legal proceedings before the court.

Also the Agent of France emphasized the fines the Master of the *Camouco* and the owner may incur; and he used these figures to justify the amount of the bond ("*caution*") of 20,000,000 FF. This above-mentioned objective of the French system on "*caution*" is not in contradiction with article 73, paragraph 2, of the Convention. The attempt of France to safeguard its enforcement rights, including its right to fine violators of its laws on the conservation and management of marine living resources in its exclusive economic zone is, as already said, part and parcel of the sovereign rights of France in this respect. Unless the Tribunal has considered this approach *ab initio* to be in violation of article 73, paragraph 2, of the Convention it should have made this approach the basis for its calculation of the bond. It was not for the Tribunal to substitute its own decision for the discretionary power of the coastal States in that respect. The Tribunal should have taken into consideration that the Convention restricts challenging the exercise of discretionary powers of coastal States and of the International Seabed Authority. The respective provisions may be taken to reflect a general approach which is relevant also for the implementation of article 292 of the Convention. It would be, in fact, illogical if the Tribunal could set aside essential elements of national enforcement systems concerning the conservation and management of the resources of the exclusive economic zones, such as on bonding, by developing its own system when its jurisdiction is restricted in respect of disputes concerning the interpretation or application of the provisions of the Convention under article 297, paragraph 3(a), of the Convention.

14. Moreover, as already indicated, in implementing the national system on arrest and bonding, the French authorities had a considerable margin of appreciation. Here again, the power of the Tribunal to challenge decisions taken, namely the decision on the amount of the bond, is restricted. The Tribunal is in a situation which is not dissimilar to that faced by international human rights courts which, in general, have to verify whether national decisions or measures are in conformity with an international human rights agreement. They restrict themselves, generally speaking, to ascertaining whether such a decision or measure was unlawful under international law, or was arbitrary, or constituted an abuse of authority, or was made in bad faith, or was disproportionate (see, in particular, the Judgment of the European Human Rights Court in the case *Barthold*; on the development of the jurisprudence see Frowein/Peukert, *Europäische MenschenRechtsKonvention*, 2nd ed., 1996, at p. 335 *et seq.*). The Tribunal should have allowed itself to be inspired by this jurisprudence in defining its functions under article 292, paragraph 1, of the Convention.

15. The Judgment does not really reveal which approach has been followed or whether the amount of the bond it has determined reflects predominantly the value of the ship or the fines faced by the Master of the *Camouco* and its owners. This, however, is a crucial issue. If the bond set by the Tribunal is lower than the fines against the Master and the owners the French authorities will find it more difficult, if not impossible, to collect them. This means, in essence, that setting a bond which is too low – which is the case here – means that the enforcement rights of coastal State concerning its laws on the management of marine living resources in the exclusive economic zone have been curtailed.

16. Although I share some of the criticism indicated by the Judgment (paragraph 69) on the lack of coherency and transparency in how the amount of the bond has been determined for the release of the *Camouco*, in my view, the amount as determined by the Tribunal is too low by far.

It does not constitute a safeguard for the French authorities to enforce French law if the allegations that French law had been violated are well founded. It just covers the maximum fines the Master faces but the bond, as set by the Judgment, does not provide for the satisfaction of any possible charges against the owner of the *Camouco*. Although no charges have been brought yet against the owner the Agent of France has made it quite clear that such charges are a possibility under French law. The implications thereof should have been taken into consideration although perhaps not to the maximum of the fines possible.

17. Finally, the Tribunal should have taken notice of the commonly known fact that the fishing activities such as those allegedly undertaken by the *Camouco* undermine the fishing regime established under the Convention on the Conservation of Antarctic Marine Living Resources and the conservation measures taken thereunder. This fishing regime, generally considered to belong to the more advanced ones, is the result of a cooperative effort undertaken by more than thirty States Parties. This effort reflects one of the most important structural principles of the Convention namely that conservation and management of marine living resources is a task in which all States involved shall cooperate. Curtailing the enforcement rights of one of the States Parties involved may be regarded as undermining the cooperative efforts and the obligation of all States exploiting particular stocks or fishing in particular areas to join in the cooperative management of those stocks and areas.

(*Signed*) Rüdiger Wolfrum

DISSENTING OPINION OF JUDGE TREVES

1. I voted against point 4 of the operative part of the Judgment which fixes the amount of the bond to be posted for the release of the *Camouco* from detention and of captain Hombre Sobrido from the situation of "court supervision" (*contrôle judiciaire)* in which he finds himself. I am of the opinion that the amount indicated therein is too low in order to be "reasonable" within the terms of article 292, paragraph 2, of the Convention.

2. Preliminarily, I would like to express my regret that the operative part does not reflect precisely enough the structure of the Judgment and that the Tribunal has thus missed an opportunity to clarify the different tasks to be discharged by the Tribunal in the proceedings set out in article 292 of the Convention. As is shown by the headings that divide the Judgment into sections, the Tribunal had, however, in mind the distinction between questions of jurisdiction, questions of admissibility and questions concerning the merits.

In particular, two questions must be distinguished which are not distinguished clearly enough in the Judgment. The first is the question whether the allegation mentioned in article 292, paragraph 1, concerns non-compliance by the State detaining the ship with one of the provisions of the Convention "for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security". The second is the question whether that allegation is "well-founded" (as said in article 113 of the Rules), or, in other words, whether the detaining State has not in fact complied with that provision. The first question can be classified as concerning admissibility, the second as concerning the merits, albeit within the limited meaning of "merits" in the proceedings for prompt release, in light of the narrow powers of the Tribunal in these proceedings. As the two questions are distinct, it becomes possible, in principle, to give a negative answer to the second while having answered the first in the affirmative.

Even though, in its reasoning, the Judgment finds, in paragraph 72, "that the Application is admissible" and that "the allegation made by the Applicant is well-founded for the purposes of the present proceedings", the operative part jumps directly from the point in which the Tribunal finds that "the Application for release is admissible" to the point in which it orders that France promptly release the ship and its Master. In order to ensure the transparency of the operative part, it would have been preferable, in my view, to have included in it a point concerning non-compliance of article 73, paragraph 2, by the detaining State.

3. Coming to the question of what should be the reasonable amount of the bond to be posted in the present case, it seems to me that the same notion of "reasonable bond" should be used to determine whether the bond fixed by the French judicial authorities is reasonable and to determine the amount of the bond to be fixed, if need be, by the Tribunal. This is the approach followed by the Tribunal in paragraph 74 of the Judgment, even though I would have preferred that it had expressed it more explicitly.

4. The notion of "reasonable bond" to be determined by the Tribunal must be an international notion, based on the Convention. It does not necessarily have to coincide with what can be considered as reasonable from a domestic point of view.

In order to determine a bond which is reasonable from the point of view of the Tribunal, the starting point should be, in my opinion, to examine, first, the function the bond performs for the State that has detained the ship and, second, the function the bond performs for the flag State and the private interests acting on its behalf before the Tribunal.

5. For France, the State that has detained the ship, as emphasised in its pleadings, under article 142 of its Code of Criminal Procedure, in the present case the function of the bond or financial security is to guarantee the presence in court of the Master and the payment of the fines.

For Panama, the flag State, and for the private interests acting on its behalf, the function of the bond is, evidently, to enable the ship and its Master to go back to sea and to their profit-producing activities.

6. For the Tribunal, the task to be undertaken is to determine an amount for the bond which can reconcile the need of the State which has detained the ship to have a guarantee with the need of the flag State to obtain the release of the ship and its Master. The Tribunal should not give preference to one or the other of these two points of view. Both find their legitimacy in the Convention. In fact, on the one side, to provide for a bond in order to facilitate good administration of justice and the effectiveness of the decisions of courts complements the power to arrest and to institute judicial proceedings which article 73, paragraph 1, accords to the coastal State in order to ensure compliance with its laws and regulations concerning fisheries in its exclusive economic zone. On the other side, returning ships and their crew promptly to their productive activities, notwithstanding detention and the institution of legal proceedings, is a need that the Third United Nations Conference on the Law of the Sea considered so important that it introduced in the Convention the procedure of article 292. Therefore, a combined reading of articles 292 and 73 is required. In such reading, paragraph 2 of article 73, which is the provision to which article 292 refers, must be seen in the context of the other provisions of the same article and, in particular, of paragraph 1.

7. Coming to the application of these concepts to the case at hand, and beginning with the fines whose payment to France should be guaranteed by the bond, it would seem that the fines which could be imposed on the Master correspond to current practice in a number of States. Moreover, certain circumstances which Panama has not denied persuasively, namely, in particular, that the logbook has been thrown into the sea and that the markings identifying the vessel have been covered, indicate that the French claim to obtain conviction and punishment is at least plausible. It seems, therefore, reasonable to take into account the maximum fine which might be inflicted on the Master.

The possibility to establish also criminal responsibility of the juridical person owner of the ship set out in the French law applicable to the case and to impose on such person fines which can reach a measure five times as high as those provided for the Master, corresponds to the logic, which one finds also in other legal systems, to impose monetary penalties on juridical persons which are entrepreneurs and to provide for such persons fines higher than those set out for natural persons, as it is presumed that their ability to pay is stronger. Consequently, the fines, set out by law, which could be imposed on Merce-Pesca, the company owner of the ship, should not be ignored.

However, it does not seem reasonable, in the circumstances of the present case, to take into account these fines to their maximum amount. No criminal action has been started for the time being against Merce-Pesca. Moreover, in the file one finds clear indications of the will of that company to avoid any violation of the sovereign rights of France over the living resources of its economic zone. One can mention the clause in the contract of employment concluded between Merce-Pesca and the Master which requires the latter "not to engage in any type of fishing activity in the exclusive economic zone of any country" and the letter of 1st October 1999 sent by Merce-Pesca to the French authorities in Réunion emphasizing that by entering French waters the Master had infringed its instructions. These elements suggest that the requirements that must be satisfied according to French law in order to establish the criminal responsibility of the juridical person (including, in particular, that the natural person has acted "on behalf" of the juridical person) might not be easy to ascertain. The possibility of the establishment of the criminal responsibility of Merce-Pesca and its sentencing to the maximum penalty thus becomes plausible only to a limited extent. This justifies taking such possibility into account only to that limited extent.

8. As regards the amount of the bond that might be envisaged from the point of view of the need that the ship and its Master return promptly to their activities, the value of the ship must be considered at the outset. The expert of Panama has assessed such value before the Tribunal as approximately 3,717,000 French Francs, without France raising objections. It cannot be overlooked, however, that the ship had been bought in 1996 for an amount equivalent to 8,250,000 French Francs and, above all, that Merce-Pesca and Master Hombre Sobrido, in their *assignation en référé* before the President of the *tribunal d'instance* of Saint-Paul (Réunion) stated that the value of the ship "could not be more than 5,750,000 French Francs". While the value of 20,000,000 French Francs mentioned in the judicial decisions of Réunion seems unsubstantiated and largely exaggerated, it does not seem unreasonable to consider the value that the Panamanian interested parties have indicated before a French judicial authority.

From the same point of view, a bond higher than the value of the ship should be envisaged in the circumstances of the present case. It must be stressed that the purpose of the bond is not only that of releasing the ship but also that of freeing the Master. Moreover, it appears clearly from the file that a result which the Panamanian side may reasonably be considered to be seeking, and which would justify for it depositing a security in an amount greater than the value of the ship, is to maintain good relations with France with a view to obtain, as in the past, licences to exploit the living resources of the French economic zone. The letter by Merce-Pesca to the maritime authorities of Réunion of 1st October 1999 is explicit: "The agreement signed with the French charterers has been very fruitful and we did maintain very good relations with them, in view to re-establish co-operation in the future".

9. In light of the above considerations I am able to share the view adopted in the Judgment that the bond of 20 million French francs fixed by the French judges is not a "reasonable bond". Such a bond can, in my view, be justified only by an exaggerated assessment of the value of the ship, as done by the French courts, or by an excessive reliance in the possibility of establishing criminal liability of the juridical person owner of the ship, as did the French pleadings.

I cannot, however, follow the Judgment when it holds that the reasonable amount of the bond should be eight million French Francs. The amount fixed by the Tribunal is considerably lower than the amount which would have permitted to take into consideration a reasonable value of the ship, as well as the reasons, which exist in the circumstances of the present case, for fixing a bond higher than such value, and to take, at the same time, into account, within reasonable measure, that the criminal responsibility of the company owner of the ship might be established.

(*Signed*) Tullio Treves