INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2004

18 December 2004

List of cases:
No. 13

THE "JUNO TRADER" CASE

(SAINT VINCENT AND THE GRENADINES *v*. GUINEA-BISSAU)

APPLICATION FOR PROMPT RELEASE

JUDGMENT

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JUDGMENT

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

In the "Juno Trader" Case

between

Saint Vincent and the Grenadines,

represented by

Mr Werner Gerdts, Managing Director, Döhle Assekuranzkontor GmbH & Co KG, Hamburg, Germany,

as Agent;

Mr Vincent Huens de Brouwer, Lawyer, Eltvedt & O'Sullivan, Marseilles, France,

as Deputy Agent;

and

Mr Syméon Karagiannis, Professor, Faculty of Law, Université Robert Schuman, Strasbourg, France,

as Counsel;

Mr Lance Fleischer, Manager, Juno Management Services, Monaco,
Mr Fernando Tavares, Director, Transmar Services Shipping and Transit Limited, Bissau, Guinea-Bissau,

as Advisers,

and

Guinea-Bissau,

represented by

Mr Christopher Staker, Barrister, Bar of England and Wales, London, United Kingdom,

as Agent, Counsel and Advocate;

Mr Octávio Lopes, *Chef de Cabinet* of the Minister of Fisheries, Ministry of Fisheries, Guinea-Bissau,

as Co-Agent;

Mr Ricardo Alves Silva, Miranda, Correia, Amendoeira & Associados, Lisbon, Portugal,
Mr Ramón García-Gallardo, Partner, S.J. Berwin, Brussels, Belgium,

as Counsel and Advocates;

Ms Dolores Domínguez Pérez, Assistant, S.J. Berwin, Brussels, Belgium,

as Counsel;

Mr Malal Sané, Coordinator, National Service of Surveillance and Control of Fishing Activities, Guinea-Bissau,

as Adviser.

THE TRIBUNAL

composed as above,

after deliberation,

delivers the following Judgment:

Introduction

1. On 18 November 2004, a letter dated 17 November 2004 from the Attorney-General of Saint Vincent and the Grenadines authorizing Ms Najla Dabinovic, Commissioner for Maritime Affairs of Saint Vincent and the Grenadines, to make an application under article 292 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"), on behalf of Saint Vincent and the Grenadines, and a letter dated 18 November 2004 from Ms Dabinovic authorizing Mr Werner Gerdts, Managing Director, Döhle Assekuranzkontor GmbH & Co KG, Hamburg, Germany, to act as Agent of Saint Vincent and the Grenadines, were transmitted by facsimile. On the same day, an Application on behalf of Saint Vincent and the Grenadines under article 292 of the Convention was filed by electronic mail with the Registry of the Tribunal against the Republic of Guinea-Bissau (hereinafter "Guinea-Bissau") concerning the release of the *Juno Trader* and its crew.

2. A certified copy of the Application was sent, by courier, by letter dated 18 November 2004 to the Minister for Foreign Affairs of Guinea-Bissau and a copy delivered by bearer on 19 November 2004 to the Embassy of Guinea-Bissau in Brussels. A copy of the Application was also sent by facsimile on 18 and 19 November 2004 to the Permanent Mission of Guinea-Bissau to the United Nations in New York.

3. By letter from the Registrar dated 18 November 2004, the Minister for Foreign Affairs of Guinea-Bissau was informed that the Statement in Response of Guinea-Bissau, in accordance with article 111, paragraph 4, of the Rules of the Tribunal

(hereinafter “the Rules”), could be filed with the Registry not later than 96 hours before the hearing.

4. In accordance with article 112, paragraph 3, of the Rules, the President of the Tribunal, by Order dated 19 November 2004, fixed 1 and 2 December 2004 as the dates for the hearing with respect to the Application. Notice of the Order was communicated forthwith to the parties.

5. The Application was entered in the List of cases as Case No. 13 and named the *“Juno Trader” Case*.

6. 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 Registrar on 19 November 2004 of the receipt of the Application.

7. On 19 November 2004, the Agent of Saint Vincent and the Grenadines submitted by bearer the original of the Application. The original of the letter from the Attorney-General of Saint Vincent and the Grenadines was transmitted by bearer on 23 November 2004 and the original of the letter from Ms Dabinovic was transmitted by bearer on 22 November 2004.

8. By letter dated 19 November 2004, the Agent of Saint Vincent and the Grenadines requested the incorporation of a new document as part of annex 11 to the Application. A copy of this document was transmitted by the Deputy Registrar to Guinea-Bissau by letter dated 22 November 2004.

9. In accordance with article 24, paragraph 3, of the Statute of the Tribunal (hereinafter “the Statute”), States Parties to the Convention were notified of the Application by a note verbale from the Registrar dated 24 November 2004.

10. On 26 November 2004, the Registrar was notified of the appointment of Mr Christopher Staker, Barrister, Bar of England and Wales, London, United Kingdom, as Agent of Guinea-Bissau, by a letter from the Minister for Foreign Affairs,

International Cooperation and the Communities of Guinea-Bissau, transmitted by facsimile.

11. On 26 November 2004, the Agent of Guinea-Bissau requested a postponement of the hearing. A copy of the letter of the Agent of Guinea-Bissau was transmitted forthwith to the Agent of Saint Vincent and the Grenadines. On 29 November 2004, the Agent of Saint Vincent and the Grenadines transmitted his observations on the request for postponement of the hearing.

12. On 26 November, 29 November, 1 December and 3 December 2004, the Registrar and Deputy Registrar sent letters to the Agent of Saint Vincent and the Grenadines requesting the completion of documentation. On 30 November and 3 December 2004, the Agent of Saint Vincent and the Grenadines submitted documents in order to complete the documentation, in accordance with article 63, paragraph 1, and article 64, paragraph 3, of the Rules. Copies of the documents presented by the Applicant were forwarded to the Respondent.

13. On 29 November 2004, the Agent of Saint Vincent and the Grenadines transmitted by electronic mail an addendum to the Application together with annexes. A copy of the addendum was transmitted forthwith to the Respondent. The original of the addendum was transmitted by bearer on 1 December 2004.

14. On 1 December 2004, the Tribunal opened the oral proceedings at a public sitting. By an Order of the same date, the Tribunal postponed, in accordance with article 69, paragraph 1, of the Rules, the continuance of the hearing until 6 December 2004 and extended to 2 December 2004, 10:00 hours, the time-limit for the filing of a statement by Guinea-Bissau. By the same Order, the time-limit for the filing of any additional documents was extended to 6 December 2004, 10:00 hours. Notice of the Order was communicated to the parties.

15. By letter dated 2 December 2004, the Agent of Guinea-Bissau informed the Tribunal that Guinea-Bissau was not in a position to file a statement within the time-limit fixed by the Tribunal's Order of 1 December 2004.

16. In accordance with articles 45 and 73 of the Rules, the President held a teleconference with the Agents of the parties on 2 December 2004, during which he ascertained their views regarding the order and duration of the presentation by each party and the evidence to be produced during the oral proceedings.

17. On 3 December 2004, Saint Vincent and the Grenadines and Guinea-Bissau submitted information regarding witnesses whom they intended to call before the Tribunal pursuant to article 72 of the Rules.

18. Prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 30 November and 1 December 2004, in accordance with article 68 of the Rules.

19. On 3 and 5 December 2004, the Agent of Saint Vincent and the Grenadines submitted additional documents. Copies of these documents were communicated to the other party.

20. On 6 December 2004, Guinea-Bissau submitted a bundle of documents. Copies of these documents were communicated to the other party.

21. On 6 December 2004, the Registrar was notified by a letter of the same date from the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines of the appointment of Mr Vincent Huens de Brouwer, Lawyer, Eltvedt & O'Sullivan, Marseilles, France, as Deputy Agent of Saint Vincent and the Grenadines.

22. On 6 and 7 December 2004, the President held consultations with the Agents of the parties in accordance with article 45 of the Rules.

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

24. On 7 December 2004, the Registrar was notified of the appointment of Mr Octávio Lopes, *Chef de Cabinet* of the Minister of Fisheries, as Co-Agent of

Guinea-Bissau, by a letter dated 25 November 2004 from the Minister for Foreign Affairs, International Cooperation and the Communities of Guinea-Bissau, transmitted by hand.

25. Oral statements were presented at four public sittings held on 6 and 7 December 2004 by the following:

On behalf of Saint Vincent and the Grenadines:	Mr Werner Gerdts, Agent, Mr Vincent Huens de Brouwer, Deputy Agent, Mr Syméon Karagiannis, Counsel, Mr Fernando Tavares, Adviser, Mr Lance Fleischer, Adviser.
On behalf of Guinea-Bissau:	Mr Christopher Staker, Agent, Mr Octávio Lopes, Co-Agent, Mr Ricardo Alves Silva, Counsel, Mr Ramón García-Gallardo, Counsel.

26. On 6 December 2004, Mr Nikolay Potarykin, Master of the *Juno Trader*, was called as a witness by Saint Vincent and the Grenadines pursuant to article 78 of the Rules, and, after having made the solemn declaration under article 79, sub-paragraph (a), of the Rules, was examined by Mr Karagiannis and cross-examined by Mr Staker and Mr García-Gallardo. Mr Potarykin gave evidence in Russian. The necessary arrangements were made for the testimony of Mr Potarykin to be interpreted into the official languages of the Tribunal.

27. On 6 December 2004, a list of questions which the Tribunal wished the parties to address was communicated to the Agents. At the hearing held on 7 December 2004, Counsel for Saint Vincent and the Grenadines and Counsel for Guinea-Bissau replied orally to the questions. Written responses to these questions were subsequently submitted by both parties to the Tribunal on 8 December 2004.

28. Further to consultations with the parties, on 7 December 2004 the Agent of Saint Vincent and the Grenadines submitted copies of pages from the logbook and

engine log of the *Juno Trader*. Copies of these documents were communicated to the other party.

29. During the hearing on 7 December 2004, Guinea-Bissau submitted two additional documents of the same date, being a declaration by the General Director for Fisheries of Guinea-Bissau concerning the passports of the members of the crew of the *Juno Trader* and a facsimile from the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines acknowledging receipt of a communication concerning the *Juno Trader*. Pursuant to article 71 of the Rules, copies of the documents were communicated to the other party. On 7 December 2004, Saint Vincent and the Grenadines submitted observations on the contents of these documents.

30. In the Application of Saint Vincent and the Grenadines, the following submissions were presented:

On behalf of Saint Vincent and the Grenadines,
in the Application:

[Translation from French]

> Saint Vincent and the Grenadines requests the Tribunal to make the following orders and declarations:
>
> (a) a declaration that the International Tribunal for the Law of the Sea has jurisdiction, pursuant to Article 292 of the United Nations Convention on the Law of the Sea of 1982 (hereinafter the "Convention") to hear the Application
>
> (b) a declaration that the Application is admissible
>
> (c) a declaration that the Respondent has violated Article 73, paragraph 2, of the Convention in that the conditions set by the Respondent for the release from detention of the vessel "Juno Trader" and the release of 19 members of its crew are not authorized pursuant to Article 73, paragraph 2, and are not reasonable in terms of Article 73, paragraph 2
>
> (d) an order requesting the Respondent to release the "Juno Trader" from detention and to release its officers and its crew without posting a bond or any other financial security and, in

that event, requesting the Respondent to return the bond or security posted

(e) alternatively, an order requesting the Respondent to release the "Juno Trader" from detention and to release its officers and its crew as soon as the owner of the vessel posts a bond or other security in an amount determined to be reasonable by the Tribunal in view of the particular circumstances of the present case

(f) an order, in that last event, prescribing the form of the aforementioned bond or other security

(g) an order requesting the Respondent to rescind the confiscation of the cargo of fish found on board the vessel "Juno Trader"

(h) an order requesting the Respondent to pay the Applicant's costs

31. 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 Saint Vincent and the Grenadines,

[Translation from French]

Saint Vincent and the Grenadines requests that it may please the Tribunal to make the following orders and declarations:

(a) a declaration that the International Tribunal for the Law of the Sea has jurisdiction, pursuant to Article 292 of the United Nations Convention on the Law of the Sea of 1982 (hereinafter the "Convention") to hear the Application.

(b) a declaration that the Application is admissible.

(c) a declaration that the Respondent has violated Article 73, paragraph 2, of the Convention in that the conditions set by the Respondent for the release from detention of the vessel "Juno Trader" and the release of all the members of its crew are not authorized pursuant to Article 73, paragraph 2, and are not reasonable in terms of Article 73, paragraph 2.

(d) an order requesting the Respondent to release the "Juno Trader" from detention and to release all the members of its crew without posting a bond or any other financial security and, in that event, requesting the Respondent to return the bond or security posted.

(e) alternatively, an order requesting the Respondent to release the "Juno Trader" from detention and to release all the members of its crew as soon as the owner of the vessel posts a bond or other security in an amount determined to be reasonable by the Tribunal in view of the particular circumstances of the present case.

(f) an order, in that last event, prescribing the form of the aforementioned bond or other security.

(g) an order requesting the Respondent to rescind the confiscation of the cargo of fish found on board the vessel "Juno Trader".

(h) an order requesting the Respondent to pay the Applicant's costs.

On behalf of Guinea-Bissau,

Guinea-Bissau requests the Tribunal:

1. To declare:

(a) that the Tribunal lacks jurisdiction under Article 292 of the United Nations Convention on the Law of the Sea to entertain the Application of St Vincent and the Grenadines in this case;

in the alternative,

(b) that the Application of St Vincent and the Grenadines in this case is inadmissible;

in the further alternative,

(c) that the Application of St Vincent and the Grenadines in this case is not well founded.

2. As a subsidiary submission, if the Tribunal decides that the *Juno Trader* and its cargo are to be released upon the deposit of a bond or other financial guarantee, to order:

(a) that the bond shall be no less than EUR 1,227,214.00 (one million two hundred and twenty seven thousand two hundred and fourteen Euros);

(b) that the bond shall be in the form of a bank guarantee from a bank present in Guinea-Bissau or having corresponding arrangements with bank in Guinea-Bissau;

(c) that the bank guarantee shall state that it is issued in consideration of Guinea-Bissau releasing the *Juno Trader* in

relation to the incidents dealt with in Minute No. 14/CIFM/04 dated 19 October 2004, and that the issuer undertakes to pay on first demand to the State of Guinea-Bissau such sums as may be determined by a final judgment, award or decision of the competent authority of Guinea-Bissau.

3. To decide that St Vincent and the Grenadines shall pay the costs of Guinea-Bissau incurred in connection with these proceedings, less any amount of financial assistance that may be provided to Guinea-Bissau by the Law of the Sea Trust Fund in connection with the case.

32. On 8 December 2004, the Registrar sent a letter to the Agent of Guinea-Bissau requesting information on the legislation of Guinea-Bissau. On 10 December 2004, the Agent of Guinea-Bissau submitted the requested information, a copy of which was forwarded to the Applicant.

Factual background

33. The *Juno Trader* is a refrigerated cargo vessel (hereinafter "reefer vessel") flying the flag of Saint Vincent and the Grenadines. Its owner is Juno Reefers Limited, a company incorporated in the British Virgin Islands and a branch of the South African seafood company Irvin and Johnson Limited, based in Cape Town. The Master of the *Juno Trader* is Mr Nikolay Potarykin, a Russian national.

34. According to the Certificate of Registry, the *Juno Trader* was registered in Saint Vincent and the Grenadines on 14 February 1994, and is authorized to transport refrigerated dry products. The validity of the Certificate is permanent.

35. The Applicant states that, from 19 to 23 September 2004, the *Juno Trader* received a transhipment in Mauritanian waters of 1,183.8 tonnes of frozen fish in packages and 112 tonnes of fish meal, from its sister ship, *Juno Warrior*, a trawler operating under Mauritanian licence in the exclusive economic zone (hereinafter "EEZ") of Mauritania. The packages were each marked "JW N8607268", being the International Maritime Organization Number of the *Juno Warrior*. Photographic evidence was submitted showing that the packages on board the *Juno Trader* in Bissau were all marked in that way. The transhipment was confirmed by the

authorities of Mauritania by a certificate dated 9 November 2004. After completing the transhipment, the *Juno Trader* left Mauritanian waters bound for Ghana, where it was to discharge its cargo.

36. According to the Application, at approximately 1400 hours on 26 September 2004, the *Juno Trader* crossed into the EEZ of Guinea-Bissau at a distance of about 40 nautical miles from the coast. The logbook of the vessel showed that the voyage was "from Nouadhibou towards Takoradi" and that the average speed was approximately 10 knots.

37. At 1655 hours, according to the Application, the Master of the *Juno Trader* stated that a zodiac approached the *Juno Trader.* The persons on board the zodiac were gesturing with their hands and arms. Approximately five minutes later, it is alleged that shooting commenced from the direction of the zodiac and lasted approximately five to ten minutes. In response to the shooting, during which one crewman on board the *Juno Trader* was injured in the leg, the Master, fearing that the vessel was under pirate attack, ordered that distress signals be sent by the vessel's Radio Operator. A hospital-ship, the *Esperanza del Mar*, which was sailing approximately seven miles from the *Juno Trader,* responded to the distress signals. A launch from the *Esperanza del Mar* arrived at approximately 1800 hours and the injured crew member was taken on board the *Esperanza del Mar*, where he received first aid treatment. The injured crew member remained on board the *Esperanza del Mar* and was evacuated to Las Palmas.

38. According to the Respondent, on 26 September 2004, Guinea-Bissau's navy vessel *Cacine* was performing routine control and surveillance operations in the EEZ of Guinea-Bissau. On the afternoon of 26 September 2004, the inspectors of Guinea-Bissau observed a reefer vessel, whose presence in the EEZ of Guinea-Bissau was unknown and undeclared. According to the notice of serious fishing infraction ("auto de notícia de infracção de pesca grave"), "the vessel was discovered at 16:05, anchored parallel to [the fishing vessel] Flipper [1], which was fishing; the vessel weighed anchor when it spotted the inspection vessel and fled." Given the *Juno Trader's* reaction to the presence of a navy patrol vessel, the Respondent states that the *Cacine* sent out a zodiac to intercept the *Juno Trader.*

The Respondent further asserts that the vessel repeatedly disobeyed the zodiac's signals to cut its engines and permit the boarding of the inspection team.

39. At approximately 1800 hours, the *Juno Trader* was boarded by officers of the Fisheries Inspection Service of Guinea-Bissau. At the time of boarding, the *Juno Trader* was at the approximate position 11°29N, 17°13W, which is a point located within the limits of the EEZ of Guinea-Bissau. According to the notice of serious fishing infraction "there were threatening shots fired, but it was not easy, and after two hours and thirty minutes and intense intimidation, it was stopped and boarded". Upon being boarded, the Master of the *Juno Trader* was invited to sign this notice. The notice recorded that the Master of the *Juno Trader* refused to sign it.

40. After being apprehended, the *Juno Trader* was conducted to the port of Bissau, Guinea-Bissau, where it arrived on 27 September 2004 at approximately 1600 hours. The Applicant alleges that, on the same date, the Master and the crew on board the *Juno Trader* were detained on board under the surveillance of armed personnel.

41. On 5 and 8 October 2004, an inspection team from the Centre for Applied Fisheries Research, formed at the request of the National Fisheries Inspection and Control Service (hereinafter "FISCAP"), inspected the cargo on board the *Juno Trader* and took random samples of fish from the packages found on board for analysis. The inspections were made with the authorization of the Master of the vessel. The report of the inspection and analysis concluded that "the species identified aboard the M/V *Juno Trader* are species that are found in [our] waters, except for the species *Brama brama* of the Bramiidae family, which is occasionally found."

42. On 18 October 2004, the Fisheries Control Technical Committee of Guinea-Bissau (hereinafter "the Committee") met to consider the notice of serious fishing infraction and the inspection reports concerning the arrest of the *Juno Trader*. The Committee found in Minute No. 12/CIFM/04 of 18 October 2004 (hereinafter "Minute No. 12") as follows:

[Translation from Portuguese]

1. On 26 September 2004, inspectors from the Fisheries Inspection Service on board the vessel *Cacine* came across the vessel *Juno Trader* anchored in the fishing zone of Guinea-Bissau at the position of 11° 42' and 017° 09', alongside the vessel *Flipper 1*.
2. As the vessel *Juno Trader* noticed the approach of the inspection vessel, it weighed anchor and fled and was arrested at the position of 11° 29' and 017° 13', after 2 hours and 30 minutes of hot pursuit.
3. During the boarding, the captain of the vessel refused to present the logbook and the engine log, as requested by the inspectors, with a view to determining the reason for the vessel being stopped at the position where it had been found.
4. No documentary or other evidence was found concerning the destination of the vessel and the fishing products on board.
5. According to the report on the inspection of the catch found on board, prepared by the CIPA technicians at the request of FISCAP, the species identified (*sardinela, sareia, carapau, bonito, cavala and dentão*) are similar to those existing in our waters.

Having analysed and discussed all the points referred to above, the Committee proposes that:

1. The vessel *Juno Trader* be found to have violated the provisions of the fishing legislation of Guinea-Bissau, regarding operations related to fishing;
2. A fine in CFA francs corresponding to the amount of 175,398 (one hundred and seventy five thousand, three hundred and ninety-eight) euros be imposed on the vessel *Juno Trader*, on account of what is stated in the previous paragraph and in accordance with article 56 of the General Law on Fisheries;
3. A fine in CFA francs corresponding to the amount of 8,770 (eight thousand, seven hundred and seventy) euros be imposed, in accordance with article 58 of the General Law on Fisheries, on the captain of the vessel *Juno Trader* for lack of cooperation with the inspectors as evidenced by the flight of the vessel;
4. All the products on board the vessel (around 1,183.8 tonnes) be declared reverted to the State of Guinea-Bissau on suspicion of having been transhipped in the waters of Guinea-Bissau without due authorization.

43. On 19 October 2004, the Interministerial Maritime Control Commission (hereinafter “IMCC”), meeting to consider Minute No. 12, adopted the following

decisions as contained in Minute No. 14/CIMF/04 of 19 October 2004 (hereinafter "Minute 14"):

[Translation from Portuguese]

1. To impose a fine of 175,398 (one hundred and seventy five thousand, three hundred and ninety eight) euros on the said vessel which was seized on the 26 September 2004 within the maritime waters of Guinea-Bissau for infractions to our fishing legislation;
2. To impose a fine of 8,770 (eight thousand, seven hundred and seventy) euros on the captain of the *Juno Trader* in accordance with Article 58 of the General Law on Fisheries for lack of cooperation with the inspectors as evidenced by the attempt of the vessel to flee;
3. To declare as reverted to the State of Guinea-Bissau all the catch found on board the arrested vessel, considering it to have been caught and transhipped in the maritime waters of Guinea-Bissau, without proper authorization;
4. To order that the total amount of the fine (184,168 euros) be deposited in the account no. 305.1000.5001.S00 of the Public Treasury of Guinea-Bissau at the main office of the BCEAO in Bissau, within fifteen (15) days counted from the notification of the present deliberation.

44. Article 56 of the Decree-Law No. 6-A/2000 concerning Fisheries Resources and Fishing Rights in the Maritime Waters of Guinea-Bissau (hereinafter "the Decree-Law") provides as follows:

[Translation from Portuguese]

ARTICLE 56
(Other infractions)

1. Infractions of the provisions of the present [Decree-Law] and its implementing regulations not expressly defined by this Decree-Law shall be punishable with a fine of up to twice the amount of the annual licence fee.
2. In setting the amount of the fine, all relevant circumstances shall be taken into account, namely the characteristics of the vessel, the author of the infraction and the type of fishing carried out.

45. Article 58 of the Decree-Law provides as follows:

[Translation from Portuguese]

ARTICLE 58
(Lack of cooperation with inspectors)

> The captain or master of a fishing vessel who fails to cooperate during an inspection shall be punished with a fine of up to 10 per cent of the amount of the annual licence fee.

46. By letter dated 20 October 2004, the Coordinator of FISCAP notified Transmar Services Limited, the local representative of the shipowner, of the decision of the IMCC "for the purpose of the immediate and precise implementation of the decisions made therein."

47. In a letter dated 18 October 2004 addressed to the IMCC, the local representative of the shipowner demanded to be informed of the reasons for the detention of the *Juno Trader*. Having been informed of Minute No. 14, the local representative, in letters dated 20 October, 27 October and 29 October 2004 addressed to the IMCC, affirmed that there was no illegality relating to the cargo on board the vessel, and, in the letter of 29 October 2004, requested the IMCC to reconsider its decision and to release the ship and the cargo "on the basis of a clarification of the facts".

48. On 27 October 2004, the Coordinator of FISCAP notified Transmar Services Limited of the unloading of fish from the vessel, "in compliance with the decision of the IMCC concerning the confiscation of the fish on board". The public sale of approximately 1,200 tonnes of fish from the *Juno Trader* was announced to take place on 29 October 2004. During the hearing on 7 December 2004, the Respondent stated that the fish had not yet been sold at public auction and remained on board the vessel.

49. By letter dated 1 November 2004, the local representative of the shipowner requested an extension of 15 days in which to pay the fine imposed on the vessel.

50. On 3 November 2004, the fine of 8,770 euros that was imposed on the Master of the *Juno Trader* was paid by the shipowner "without any admission of liability on the part of the Master".

51. The Shipowners Protection Limited, acting as the P&I Club of the owners of the *Juno Trader*, in a letter dated 10 November 2004, undertook to pay the Government of Guinea-Bissau, on demand, "any sum not exceeding € 50,000 (fifty thousand Euros)" in return for the release from arrest or detention of the *Juno Trader* and its crew. On 18 November 2004, a security in the amount of 50,000 euros was posted, in the name of the shipowner, with the competent authorities of Guinea-Bissau.

52. On 23 November 2004, the Regional Court of Bissau, upon application by the shipowner, adopted the following decision:

[Translation from Portuguese]

> Decision
>
> (a) For the above-mentioned reasons, I find the present procedure well-founded and consequently I order the immediate suspension of the execution of Minute No. 14/CIFM/04 of the Inter-Ministerial Commission on Maritime Inspections (defendant) of the Government of Guinea-Bissau, pending a definitive settlement of the present case, with all legal consequences, including:
>
> 1. The immediate cancellation or annulment of any procedure aimed at selling the fish and fishmeal which are found on board the vessel of the plaintiff, *Juno Trader*;
>
> 2. The immediate lifting of the prohibition imposed on the members of the crew of the said vessel from leaving the Port of Bissau, and the immediate return of their passports;
>
> 3. The immediate suspension of the payment of the fine imposed on the captain of the said vessel and the non-invocation of the bank guarantee posted to that effect, pending the definitive settlement of the said case.

53. FISCAP, in a letter dated 3 December 2004 addressed to Transmar Services, stated that "pursuant to paragraph 3 of article 60 of Decree-Law No. 6-A/2000 of

22 August, ownership of the ship JUNO TRADER reverted to the State of Guinea-Bissau with effect from 5 November 2004 for failure to pay the fine imposed by the decision of the Interministerial Fisheries Control Committee of 19 October 2004."

54. Article 60 of the Decree-Law provides as follows:

[Translation from Portuguese]

ARTICLE 60
(Period for payment of fines)

1. Fines for infractions of the present [Decree-Law] shall be paid within 15 days from the date upon which no further appeal can be made against the sentence or from the date of its application by the Interministerial Fisheries Commission, as the case may be.

2. The period referred to in the preceding paragraph may be extended for the same period at the request of the shipowner or his representative.

3. In the event of non-payment of all or part of the fine within the period of extension referred to in the preceding paragraph, any assets which may have been apprehended shall revert to the State.

Jurisdiction

55. The Tribunal will, at the outset, examine the question whether it has jurisdiction to entertain the Application.

56. Article 292 of the Convention 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.

57. Saint Vincent and the Grenadines and Guinea-Bissau are both States Parties to the Convention. Saint Vincent and the Grenadines ratified the United Nations Convention on the Law of the Sea on 1 October 1993 and Guinea-Bissau ratified it on 25 August 1986. The Convention entered into force for both States on 16 November 1994. Saint Vincent and the Grenadines and Guinea-Bissau have not agreed to submit the question of release from detention to any court or tribunal within 10 days from the time of detention.

58. In the view of the Applicant, the Tribunal has jurisdiction. The Respondent for its part maintains that the Applicant has not discharged its initial burden of establishing that it was the flag State of the *Juno Trader* at the time of the filing of the Application in these proceedings. The Respondent contends that the Tribunal has no jurisdiction, because, in its opinion, pursuant to article 60, paragraph 3, of the Decree-Law, the ownership of the vessel *Juno Trader* reverted to the State of Guinea-Bissau, with effect from 5 November 2004.

59. The Respondent further maintains, relying upon the Judgment of the Tribunal in the *"Grand Prince" Case*, that "the Tribunal has jurisdiction only if the Applicant state is the flag state of the detained vessel at the time of the filing of the Application.

It is not sufficient that the Applicant was the flag state at the time of the initial arrest or detention".

60. The Applicant maintains that the vessel continues to fly its flag and rejects the Respondent's argument concerning the confiscation of the vessel for non-payment of the fine. The Applicant contends that the execution of the decision of the IMCC contained in Minute No. 14, which includes a fine on the vessel, the non-payment of which led to its confiscation, has been suspended by a decision of the Regional Court of Bissau.

61. The Applicant further maintains that it was only informed of the alleged confiscation of the vessel by letter dated 3 December 2004 and that this issue was not raised when the shipowner posted a bond of 50,000 euros on 18 November 2004 in the form of a P&I letter of guarantee, or when the Regional Court of Bissau adopted its decision on 23 November 2004.

62. In its reply of 8 December 2004 to the question posed by the Tribunal, the Respondent stated that both the fines imposed by the decision of the IMCC and the legal consequences of that decision are subject to challenge in the courts of Guinea-Bissau. The Tribunal notes that the decision of the Regional Court of Bissau, as referred to in paragraph 52, suspended the execution of Minute No. 14 "pending a definitive settlement of the present case". The Tribunal also notes that, by suspending the execution of the fine imposed on the vessel, the decision of the Regional Court of Bissau has therefore rendered inapplicable any sanction for non-payment, including its confiscation.

63. In any case, whatever may be the effect of a definitive change in the ownership of a vessel upon its nationality, the Tribunal considers that there is no legal basis in the particular circumstances of this case for holding that there has been a definitive change in the nationality of the *Juno Trader.*

64. Accordingly, the Tribunal finds that there is no legal basis for the Respondent's claim that Saint Vincent and the Grenadines was not the flag State of

the vessel on 18 November 2004, the date on which the Application for prompt release was submitted.

65. For these reasons, the Tribunal holds that it has jurisdiction.

Admissibility

66. The Tribunal will now examine the question whether the Application is admissible.

67. The Respondent, in its oral pleading, submits that these prompt release proceedings are inadmissible for the following reasons. In the first place, the Respondent, reiterating the argument raised in relation to jurisdiction, states that the *Juno Trader*, its equipment and cargo were presently the property of Guinea-Bissau and therefore Guinea-Bissau is not detaining the vessel but rather is in possession of the vessel as lawful owner. The Respondent further argues that the Application has become moot because the possibility of proceedings under article 292 of the Convention has now been superseded by developments at the national level in Guinea-Bissau. The Respondent also maintains that "there [was] no serious allegation that the arrest was [made] pursuant to article 73, paragraph 1, [of the Convention and that] there can therefore be no violation of article 73, paragraph 2", of the Convention.

68. The Tribunal notes that the objections to admissibility based on the change of ownership of the vessel are similar to the argument raised by the Respondent in the context of jurisdiction. For the reasons stated in paragraph 63, the Tribunal rejects these objections.

69. Regarding the last objection to admissibility referred to in paragraph 67, the Tribunal notes that, according to the Application, the vessel was detained for alleged infractions of fisheries laws applicable in the EEZ of Guinea-Bissau and that this is not disputed by the Respondent.

70. Accordingly, the Tribunal holds that the Application is admissible.

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

71. The Applicant requests the Tribunal to declare that the Respondent has violated article 73, paragraph 2, of the Convention in that "the conditions set by the Respondent for the release from detention of the vessel *'Juno Trader'* and the release of all the members of its crew are not authorized pursuant to Article 73, paragraph 2, and are not reasonable in terms of Article 73, paragraph 2".

72. Article 73, paragraph 2, reads as follows:

> Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

73. The Applicant, in its Application, alleged that a bond "in the amount of 50,000 euros, was posted, in the name of the shipowner, with the competent authorities of Guinea-Bissau" and that "[to] date, neither the release of the detained vessel nor of its crew has been obtained".

74. The Respondent contends that the vessel cannot be considered as "detained" for the purposes of article 292 of the Convention since the ownership of the vessel has reverted to the State of Guinea-Bissau. The Respondent further challenges the Applicant's allegation of non-compliance with the provision of article 73, paragraph 2, contending that the bond offered in the amount of 50,000 euros was not enough and "does not meet the requirements of the internal law of Guinea-Bissau nor of the Law of the Sea Convention."

75. The Tribunal notes that a bond for the release of the vessel and its crew was not requested by the detaining State and that the detaining State did not react to the posting of the bond referred to in paragraph 51 on behalf of the shipowner and failed to inform the shipowner that the bond, in its opinion, was not reasonable. The Tribunal further notes that the vessel is still detained in the port of Bissau and that the Applicant has not withdrawn its request concerning the release of the crew.

76. In the present case it is not contested that the notification to the flag State, as provided for in article 73, paragraph 4, had not been made. The connection between this paragraph and paragraph 2 of the same article has been noted by the Tribunal in the *"Camouco" Case*. The Tribunal stated:

> [T]here 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.
> (*ITLOS Reports 2000*, pp. 29-30, para. 59).

77. The Tribunal considers that article 73, paragraph 2, must be read in the context of article 73 as a whole. The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision.

78. The parties are in disagreement whether the crew of the *Juno Trader* is being detained. According to the Applicant, while some passports have been returned, as of 7 December 2004 the passports of six crew members have not been returned. The Respondent contended that Guinea-Bissau did not detain any crew members of the *Juno Trader* and returned passports on request. In a letter dated 15 December 2004, received during the Tribunal's deliberations, the Respondent informed the Tribunal that "the Guinea-Bissau authorities (FISCAP) have already delivered the remaining passports and all members of the crew can freely leave Guinea-Bissau". The letter added that "the remaining passports have already been delivered without any formal conditions (such as posting of a bond) and are free to leave Guinea Bissau". On 16 December 2004, the Applicant, whilst confirming the information regarding delivery of passports, did not withdraw its request for an order from the Tribunal concerning the release of the members of the crew.

79. In this respect, the Tribunal notes that the members of the crew are still in Guinea-Bissau and subject to its jurisdiction. The Tribunal places on record the undertaking given by the Respondent in its letter dated 15 December 2004 and

declares that all members of the crew should be free to leave Guinea-Bissau without any conditions.

80. For these reasons, the Tribunal finds that the Respondent has not complied with article 73, paragraph 2, of the Convention, that the Application is well-founded, and that, consequently, Guinea-Bissau must release promptly the *Juno Trader* including its cargo and its crew, in accordance with paragraph 104.

Relevant factors for determining a reasonable bond

81. According to article 113, paragraph 2, of the Rules, when the Tribunal finds that the Application is well-founded, it has to "determine the amount, nature and form of the bond or financial security to be posted for the release of the vessel or the crew." In carrying out this task, it must apply the provisions of the Convention and other rules of international law not incompatible with the Convention.

82. In the *"Camouco" Case*, the Tribunal stated the following:

> 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.
> (*ITLOS Reports 2000*, p. 31, para. 67).

83. In the *"Monte Confurco" Case*, the Tribunal added that:

> This is by no means a complete list of factors. Nor does the Tribunal intend to lay down rigid rules as to the exact weight to be attached to each of them.
> (*ITLOS Reports 2000*, p. 109, para. 76).

84. In the same case, the Tribunal stated that:

> 71. […] the object of article 292 of the Convention is to reconcile the interest of the flag State to have its vessel and its crew released

> promptly with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties.
> 72. The balance of interests emerging from articles 73 and 292 of the Convention provides the guiding criterion for the Tribunal in its assessment of the reasonableness of the bond. […]
> 74. The proceedings under article 292 of the Convention, as clearly provided in paragraph 3 thereof, can 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. Nevertheless, in the proceedings before it, the Tribunal is not precluded from examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond. Reasonableness cannot be determined in isolation from facts. It should, however, be emphasized that a prompt release proceeding….is characterized by the requirement, set out in article 292, paragraph 3, of the Convention, that it must be conducted and concluded "without delay".….This, too, suggests a limitation…on the extent to which the Tribunal could take cognizance of the facts in dispute and seek evidence in support of the allegations made by the parties.
> (*ITLOS Reports 2000*, pp. 108-109, paras. 71, 72 and 74).

85. The assessment of the relevant factors must be an objective one, taking into account all information provided to the Tribunal by the parties.

86. Considering first the question of the gravity of the alleged offences, the Tribunal notes that the IMCC decided that the *Juno Trader* had committed violations of the fishing laws of Guinea-Bissau and that the Master had failed to cooperate with the inspectors as required by article 58 of the Decree-Law. The inspectors found 1,183.8 tonnes of frozen fish in packages and 112 tonnes of fish meal on board the *Juno Trader*. After consulting scientific experts, the Committee found in Minute No. 12 that the species identified on board the *Juno Trader* "are similar to those existing in our waters". The IMCC, in Minute No. 14, considered that the fish on board had "been caught and transhipped in the maritime waters of Guinea-Bissau without proper authorization".

87. The Respondent points out that illegal, unregulated and unreported fishing in the EEZ of Guinea-Bissau has resulted in a serious depletion of its fisheries resources. The Tribunal takes note of this concern. During the hearing on 7 December 2004, the Applicant expressed its understanding regarding the action

taken by coastal States to fight illegal fishing but denied that the *Juno Trader* had been engaged in any illegal activity.

88. The Applicant, relying on the statement of facts contained in paragraphs 35 to 37 denies that any offence was committed by the *Juno Trader* or its Master in the EEZ of Guinea-Bissau. The Applicant points out that the quantity of fish found on board the *Juno Trader* in Guinea-Bissau was the same as the quantity loaded in Mauritania.

89. It is by reference to the penalties imposed or imposable under the law of the detaining State that the Tribunal may evaluate the gravity of the alleged offences, taking into account the circumstances of the case and the need to avoid disproportion between the gravity of the alleged offences and the amount of the bond.

90. With regard to the fines actually imposed, by the decision of the IMCC in Minute No. 14, an administrative fine of 175,398 euros was imposed on the *Juno Trader* and the fish was confiscated on the grounds that it had "been caught and transhipped in the maritime waters of Guinea-Bissau without proper authorization." At the same time, a fine of 8,770 euros was imposed on the Master for failure to cooperate with the inspectors. This fine was paid without admission of guilt, but the fine on the vessel was not paid. The Decree-Law provides that any assets which may have been apprehended shall revert to the State in the event that fines are not paid within 15 days.

91. With regard to the penalties imposable, the Respondent states that “in this case, the authorities [of Guinea-Bissau] decided to spare the vessel from the application of a fine under the ‘serious offence’ article, having resolved to apply a lighter fine under the ‘other offence’ rules. As a result, the *Juno Trader* was fined the equivalent of the annual fees that should be paid for the permit, in the value of 175,398 euros, not the double thereof”.

92. The parties differ on the value of the *Juno Trader*. During the hearing on 7 December 2004, the Applicant stated that “the net book value of the *Juno Trader*

on our account is US$ 460,000" and that the market value of the vessel "could be the subject of considerable debate and [is] affected by the potential doubts over flagging and ownership". The Respondent, relying upon a purchase contract for a similar reefer vessel recently made for a purchase price of US$ 1,600,000 (at the time approximately 1,300,000 euros), argues that the market value of the *Juno Trader*, with minimum depreciation, should be approximately US$ 800,000 or approximately 650,000 euros.

93. Turning now to the value of the cargo, the Applicant states that the cargo of the *Juno Trader* was sold to Unique Concerns Limited, a company incorporated in Ghana, on 23 September 2004 for a total of US$ 459,938.65, of which US$ 63,280 represented the value of 112 tonnes of fish meal. The Applicant further states that the Ministry of Fisheries announced the sale by auction on 29 October 2004 of the "approximately 1,200 tonnes" of frozen fish and informed the owner's representative that it was preparing to discharge the cargo of fish on 27 October 2004. However, the discharge and sale by auction have not taken place and to date the crew has taken care to keep the cargo frozen on board the vessel. The Applicant contends that the *Juno Trader* has been a floating cold storage off Guinea-Bissau since 27 September 2004 and that its running costs are nearly US$ 3,600 per day. The Applicant adds that, "given the frozen fish cargo remains unsold at this late stage, there is a good chance that its market value has been considerably reduced, perhaps even to zero".

94. The Tribunal is of the view that these considerations should be taken into account in determining the amount of a reasonable bond.

95. The relevant factors for determining the reasonableness of the bond have been noted in paragraphs 82 to 94. In this respect, it is the view of the Tribunal that matters relating to the circumstances of the seizure of the *Juno Trader* as described in paragraphs 37 to 39 are not relevant to the present proceedings for prompt release under article 292 of the Convention. The Tribunal therefore cannot take into account the circumstances of the seizure of the *Juno Trader* in assessing the reasonableness of the bond.

96. The Applicant requests the Tribunal to order the release from detention of the vessel *Juno Trader* and the release of the members of its crew without the posting of a bond or other financial security and, in that event, to request the Respondent to return the security already posted.

97. The Tribunal recalls its Judgment in the case of the *M/V "SAIGA"*, in which it stated the following:

> Such release must be effected upon the posting of a reasonable bond or other financial security. The Tribunal cannot accede to the request of Saint Vincent and the Grenadines that no bond or financial security (or only a "symbolic bond") should be posted. The posting of a bond or security seems to the Tribunal necessary in view of the nature of the prompt release proceedings.
> (*ITLOS Reports 1997*, p. 35, para. 81).

The Tribunal reaffirms this finding.

Amount and form of the bond or other financial security

98. For these reasons, the Tribunal finds that the amount of the bond or other financial security should be 300,000 euros and that, unless the parties decide otherwise, the bond or security should take the form of a bank guarantee.

99. The Tribunal also finds that the amount of 8,770 euros previously paid to the Respondent for the fine imposed on the Master should be considered as bond or financial security since the payment of the said fine was suspended by the decision of the Regional Court of Bissau of 23 November 2004. The Tribunal further finds that the letter of guarantee in the amount of 50,000 euros and in a form not acceptable to the Respondent should be returned to the Applicant upon the posting of the bond referred to in paragraph 104.

100. The Respondent argues that to be in an appropriate form the bank guarantee should be issued by a bank present in Guinea-Bissau or by one that has corresponding arrangements with a bank in Guinea-Bissau.

101. The Tribunal finds that the bond or other financial security should be posted in the form of a bank guarantee issued by a bank present in Guinea-Bissau or that has corresponding arrangements with a bank present in Guinea-Bissau, unless the parties decide otherwise.

102. The bank guarantee should, among other things, state that it is issued in consideration of Guinea-Bissau releasing the *Juno Trader* and its cargo, in relation to the incidents that occurred in the exclusive economic zone of Guinea-Bissau on 26 September 2004, and that the issuer undertakes and guarantees to pay to Guinea-Bissau such sum, up to 300,000 euros as may be determined by a final judgment or decision of the appropriate domestic forum in Guinea-Bissau 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 Guinea-Bissau, accompanied by a certified copy of the final judgment or decision or agreement.

Costs

103. The rule in respect of costs in proceedings before the Tribunal, as set out in article 34 of its Statute, is that each party bears its own costs, unless the Tribunal decides otherwise. In the present case, the Tribunal sees no need to depart from the general rule that each party shall bear its own costs.

Operative provisions

104. For these reasons,

THE TRIBUNAL,

(1) Unanimously,

Finds that the Tribunal has jurisdiction under article 292 of the Convention to entertain the Application submitted on behalf of Saint Vincent and the Grenadines on 18 November 2004.

(2) Unanimously,

Finds that the Application with respect to the allegation of non-compliance with article 73, paragraph 2, of the Convention is admissible.

(3) Unanimously,

Finds that the allegation made by the Applicant that the Respondent has not complied with the provisions of article 73, paragraph 2, of the Convention for the prompt release of the *Juno Trader* and its crew upon the posting of a reasonable bond or other financial security is well-founded.

(4) Unanimously,

Decides that Guinea-Bissau shall promptly release the *Juno Trader*, together with its cargo, upon the posting of a bond or other security to be determined by the Tribunal, and that the crew shall be free to leave Guinea-Bissau without any conditions.

(5) Unanimously,

Determines that the bond or other security shall be (a) 8,770 euros already paid to Guinea-Bissau and (b) 300,000 euros to be posted with Guinea-Bissau; and that, in consequence, the letter of guarantee referred to in paragraph 51 shall be returned to the Applicant.

(6) Unanimously,

Determines that the bond of 300,000 euros shall be in the form of a bank guarantee from a bank present in Guinea-Bissau or having corresponding arrangements with such a bank or, if agreed by the parties, in any other form.

(7) Unanimously,

Decides that each party shall bear its own costs.

Done in English and in French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this eighteenth day of December, two thousand and four, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Saint Vincent and the Grenadines and the Government of Guinea-Bissau, respectively.

(Signed)
L. Dolliver M. Nelson,
President.

(Signed)
Philippe Gautier,
Registrar.

Judge KOLODKIN, 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) A.K.

Judges KOLODKIN, ANDERSON and COT, availing themselves of the right conferred on them by article 125, paragraph 2, of the Rules of the Tribunal, append their joint declaration to the Judgment of the Tribunal.

(Initialled) A.K.

(Initialled) D.H.A.

(Initialled) J.-P.C.

Judge PARK, 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) C.-H.P.

Judges MENSAH and WOLFRUM, availing themselves of the right conferred on them by article 30, paragraph 3, of the Statute of the Tribunal, append their joint separate opinion to the Judgment of the Tribunal.

(Initialled) T.A.M.

(Initialled) R.W.

Judge CHANDRASEKHARA RAO, 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) P.C.R.

Judge TREVES, 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) T.T.

Judge NDIAYE, 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) T.M.N.

Judge LUCKY, 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) A.L.

DECLARATION OF JUDGE KOLODKIN

1. Every year, the United Nations General Assembly in its annual resolutions on the oceans and the law of the sea appeals to all States to harmonize their legislation to bring it into in compliance with the United Nations Convention on the Law of the Sea.

2. Unfortunately, not all Member States of the United Nations that are parties to the United Nations Convention on the Law of the Sea have heeded those appeals. In the "*Juno Trader*" *Case* it has been found that a coastal State, the Respondent, has used the expression "the maritime waters of Guinea-Bissau" to mean not only the territorial sea of Guinea-Bissau, but also its exclusive economic zone.

3. On 19 October 2004, the Interministerial Maritime Inspection Commission adopted the Minute in which was stated that the *Juno Trader* "… was seized… within the maritime waters of Guinea-Bissau …". However, it is known that the *Juno Trader* was arrested in the exclusive economic zone of Guinea-Bissau and, under the United Nations Convention on the Law of the Sea, exclusive economic zones do not form part of the territorial sea or "maritime waters" of any State.

4. There is another trend in the application of the United Nations Convention on the Law of the Sea: some coastal States are demanding, in their domestic legislation, prior notification by vessels intending to enter their exclusive economic zones even if only for the purpose of transiting them in application of the freedom of navigation which is guaranteed by article 58, paragraph 1, of the United Nations Convention on the Law of the Sea.

(Signed)
Anatoly Kolodkin

JOINT DECLARATION OF JUDGES KOLODKIN, ANDERSON AND COT

1. We agree with the reasoning in the Judgment and would add only a brief comment.

2. As the Judgment makes clear, in making its objective evaluation of the concept of "the gravity of the alleged offences," the Tribunal takes into account all relevant factors. These include the available information provided by the parties concerning the details of the incident giving rise to a particular case; the charges and the penalties imposed or imposable; and the value of any assets subject to forfeiture under the fisheries laws of the coastal State. In the final analysis, an alleged offence is less likely to be found to be "grave" if it is not supported by evidence. In many countries, including in particular common law jurisdictions[1], when a magistrate or similar judicial officer is releasing from custody an accused person pending trial on a criminal charge (a situation not dissimilar to the Tribunal's task under article 292), the amount of the bond or bail is determined after taking into account (among other factors) the nature and strength of the evidence adduced in support of the charges and the likelihood of conviction.[2] In our opinion, the Tribunal is equally entitled, in assessing the reasonableness of the amount of a bond or other financial security, to take into account the nature and strength of the evidence supporting the charges. This assessment is entirely "without prejudice to the merits of any case before the appropriate domestic forum" as indicated in paragraph 3 of article 292.

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[1] In this context, it may be recalled that the procedure of prompt release was first put forward by the delegation of the United States, a common law country.

[2] See A. Samuels, "Bail Principles", *New Law Journal*, 8 September 1966, quoted by Mr Justice Hibbert, Judges' Seminar, Jamaica, March 2001 at www.sc.gov.jm/seminars. To give some typical examples of legislative provisions laying down matters to be taken into account by courts when considering release on bond or bail pending further legal proceedings in another court, the following may be noted:

(1) The Bail Act 2000 of Jamaica, section 4(2), provides that the court shall take into account *inter alia* "the nature and seriousness of the offence" and "the strength of the evidence of (the accused's) having committed the offence…"

(2) The Bail Act 1997 of Ireland, section 2(2) provides that the court shall take into account *inter alia* "the nature and seriousness of the offence charged" and "the nature and strength of the evidence in support of the charge…"

(3) The United States Code, Title 18, Chapter 207, section 3142 (g) provides that the judicial officer shall take into account *inter alia* of "the nature and circumstances of the offense" and "the weight of the evidence against the person…"

(4) The Bail Act 1976 of England and Wales, Schedule I, provides that the court must have regard *inter alia* to the nature and seriousness of the offence and the strength of the evidence.

3. Turning to the present case, on the above basis, we could have supported a lower amount for the bond determined in paragraph 98 of the Judgment.

(Signed)
Anatoly Kolodkin

(Signed)
David Anderson

(Signed)
Jean-Pierre Cot

SEPARATE OPINION OF JUDGE PARK

I. Introduction

In the present Judgment, I have voted in favour without reservation. On a point of basic importance in prompt-release cases, however, the Applicant's interpretation of the Tribunal's view appears to be undoubtedly arbitrary, if not prejudicial, as it relates to the reasonableness of bonds or other financial security required for the release of vessels and crews detained. In this Separate Opinion, I wish to address the issue specifically with reference to that part of the Tribunal's Judgment from which the Applicant's interpretation at issue here was prompted.

The Applicant recapitulates the point at issue as the Tribunal articulated it in its previous prompt-release judgments, to present its own interpretation on it, including a semantic analysis (Application, paragraph 124). In the process, the Applicant appears to err on the side of arbitrariness by interpreting the Tribunal's view beyond what it was actually intended to mean and, in the precise understanding of the point in question, it was not the case at all.

Obviously, the Applicant realizes the importance of this particular issue, as may be seen from the amount of commendable preparatory work it did in its Application (paragraphs 109-133), and this is indeed what few other applicants or respondents did in other prompt-release proceedings. As a matter of fact, this was one of the main points of contention in the Application.

As noted above, the point at issue here relates to the prompt release of vessels and crews, as provided for in articles 73 and 292 of the Convention and, specifically, to the factors which the Tribunal would take into account to determine the reasonableness in the amount of bonds or other financial security as required in prompt-release cases.

While, in its entirety, the jurisprudence of the young Tribunal should be said to be still at a formative stage, that part of it which relates to the prompt release of vessels and crews has begun to assume a status of its own, and this is by virtue of

the experience which it has acquired cumulatively since 1997, when it was first seized with a prompt-release case. In this connection, the fact is significant that, of the 13 cases on the List of cases of the Tribunal to date, the present "*Juno Trader*" *Case* is the 7th on prompt release, as listed below:

1. Case No. 1: *The M/V "Saiga" Case (Saint Vincent and the Grenadines* v. *Guinea)*, 13 November 1997
2. Case No. 5: *The "Camouco" Case (Panama* v. *France),* 17 January 2000
3. Case No. 6: *The "Monte Confurco" Case (Seychelles* v. *France)*, 27 November 2000
4. Case No. 8: *The "Grand Prince" Case (Belize* v. *France)*, 21 March 2001 (On 20 April 2001, the Tribunal ruled that it had no jurisdiction to entertain the Application.)
5. Case No. 9: *The "Chaisiri Reefer 2" Case (Panama* v. *Yemen)*, 3 July 2001 (Following an agreement between the parties, the case was removed from the Tribunal's List of cases on 13 July 2001.)
6. Case No. 11: *The "Volga" Case (Russian Federation* v. *Australia)*, 2 December 2002
7. Case No. 13: *The "Juno Trader" Case (Saint Vincent and the Grenadines* v. *Guinea-Bissau)*, 18 November 2004

II. The Formative Process of the Reasonableness Criteria

In the judgments of the Tribunal on prompt-release cases, reference to the factors to be taken into account relative to reasonable bonds or other financial security appears only in the following five instances, because, as noted above, Cases No. 8 (*The "Grand Prince" Case*) and 9 (*The "Chaisiri Reefer 2" Case*) required no judgment as such:

1. The formative process of the Tribunal's jurisprudence as it relates to prompt release begins with the Judgment in its Case No. 1, the *M/V "SAIGA" Case* of 4 December 1997, in which the relevant paragraph reads in part as follows:

> Paragraph 82: In the view of the Tribunal, 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. (*ITLOS Reports 1997*, p. 35)

2. In the Judgment in its Case No. 5, the "*Camouco*" *Case* of 7 February 2000, the Tribunal substantiates the above framework with what is likely to evolve eventually into a set of standard formula applicable to subsequent prompt-release cases, as is shown below:

> Paragraph 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. (*ITLOS Reports 2000*, p. 31)

3. In the Judgment in its Case No. 6, the *"Monte Confurco" Case* of 27 November 2000, the Tribunal modifies the status and nature of its earlier Judgment above, as follows:

> Paragraph 76 (the 1st part, subparagraph 2): This is by no means a complete list of factors. Nor does the Tribunal intend to lay down rigid rules as to the exact weight to be attached to each of them. (*ITLOS Reports 2000*, p. 109)

4. In the Judgment in its Case No. 11, the *"Volga" Case* of 2 December 2002, the Tribunal refers to what it said in its earlier Judgment in the *"Monte Confurco" Case* of 27 November 2000, to conclude in general terms, as follows:

> Paragraph 65 (last subparagraph): In assessing the reasonableness of the bond or other security, due account must be taken of the terms of the bond or other security set by the detaining State, having regard to all the circumstances of the particular case. (*ITLOS Reports 2002*, p. 32)

5. In the Judgment of the present Case No. 13, the *"Juno Trader" Case* of 18 November 2004, the Tribunal recalls, but does not reach beyond, most of the major points it rendered in its previous judgments in prompt-release cases, and examines them with reference to the factual background presented by the Applicant in its Application and pleadings.

Prompted partly by the Applicant's earnest assertions on this particular issue, the Tribunal's response to it is noticeably more extensive in the present Judgment than in any previous instances, as may be seen in its two sections, **Relevant factors for determining a reasonable bond** (paragraphs 81-97) and **Amount and form of the bond or other financial security** (paragraphs 98-102).

III. Internal Commentaries

To each judgment on the five prompt-release cases above, some members of the Tribunal appended their observations on this issue in the form of declarations, dissenting and separate opinions, some of them in passing and others in substantive terms, as follows:

1. (1) To the *"Camouco" Case* Judgment: Judge Laing in his Declaration; Judge Nelson in his Separate Opinion; Judge Anderson in his Dissenting Opinion; Judge Wolfrum in his Dissenting Opinion; and Judge Treves in his Dissenting Opinion.

(2) To the *"Monte Confurco" Case* Judgment: Judge Nelson in his Dissenting Opinion, Judge Laing in his Dissenting Opinion, and Judge Jesus in his Dissenting Opinion.

(3) To the "*Volga*" *Case* Judgment: Judge Marsit in his Declaration, Judge Cot in his Separate Opinion, Judge Anderson in his Dissenting Opinion, and Judge *ad hoc* Shearer in his Dissenting Opinion.

Two of these 11 declarations and opinions deserve to be noted for what they relate to the use of language in law and treaties, i.e., Judge

Nelson's Separate Opinion appended to the *"Monte Confurco" Case* (*ITLOS Reports 2000*, p. 125) and Judge Cot's Separate Opinion appended to the *"Volga" Case* (*ITLOS Reports 2002*, p. 54). They point at the fact that, in the French text of articles 73, paragraph 2, and 292, paragraph 1, of the Convention, the word equivalent to "reasonable" in the English text is not identical, but that, if the meaning is juridically identical, such a lexical divergence will give rise to no cause for concern. This divergence is also found in the Chinese text, whereas in the four other official languages of the United Nations, i.e., Arabic, English, Russian and Spanish, it is concordant.

In the final analysis, therefore, it would be possible to assert that, unless such a divergence created an obvious contextual departure in meaning, lexical concordance in bilingual or multilingual international documents would not be a necessary condition in all circumstances, desirable as it might be.

2. In the context of this Separate Opinion, which concerns the Applicant's interpretation of the Tribunal's view on the reasonableness of bonds or other security in prompt-release cases, what Judge Anderson said in his dissenting opinion appended to the *"Camouco" Case* may also be noted with interest. It reads in part:

> **The question of the gravity of the charges in this case** … In my opinion, greater weight should have been attached to this factor. (*ITLOS Reports 2000*, p. 57)

IV. The Applicant's Interpretation of the Judgments

The first of the two relevant passages which the Applicant quotes (Application, paragraphs 118-119) in support of its argument is from the Judgment in the *"Camouco" Case* of 7 February 2000 (paragraph 67: full text in Chapter II, 2 above); and the second from the Judgment in the *"Monte Confurco" Case* of 18 December 2000.

With regard to the four factors given in the *"Camouco"* Judgment of 7 February 2000 above, the Applicant extends the meaning of the passage to

assume that "[the] Tribunal was right about the importance of those [first] two criteria when of its own accord it put them on the top of the list …" (Application, paragraph 124).

Certainly, the order in which the above four factors were listed appears to be logical, but it is not necessarily sequential or significant as an indication of the weight to be attached to each of them. Had the Tribunal intended to ascribe any particular significance to the two of them, as the Applicant appears to have assumed, the Tribunal would and should have so indicated in the interest of clarity and preciseness of the Judgment. But there is no indication that the Tribunal placed them "on the top of the list" on account of their importance relative to the other two.

On the contrary, the Tribunal clarified in its Judgment in the *"Monte Confurco" Case* above (Chapter II, 3) that it did not "intend to lay down rigid rules as to the exact weight to be attached to each of them." (*ITLOS Reports 2000*, p. 109, paragraph 76)

V. Concluding Remarks

The problem of reasonable bonds or other financial security is a recurrent issue that will continue to figure prominently in future prompt-release cases, as it did in the past ones. For this reason alone, the decisions of the Tribunal on this particular issue are relatively more liable to divergent interpretations.

With regard to problems arising from arbitrary interpretations of international judicial decisions, it may be noted with interest that, on its record, the International Court of Justice lists 12 "interpretation" cases to date (*I.C.J. Yearbook 2001-2002*, No. 56). On a broad basis, these instances can also be traced to problems of linguistic origin. Something similar can also be said of the municipal law, as may be seen from the problems of misinterpretation or statutory misinterpretation in the United States of America, for example. In a sense, therefore, it may be fortunate that, at the current stage of its jurisprudence, the Tribunal has yet to be seized with similar problems.

In the present case, the Applicant rightly points out that “everybody is watching the Tribunal’s proceedings with a keen eye and an anxious heart” (Application, paragraph 127). Thus, once made public, the decisions of the Tribunal and, for that matter, those of other international judicial organs, are subjected to intensive public scrutiny by professional and other commentators. It would be thus incumbent on the Tribunal and on the parties to disputes as well to be dutifully precautious to leave no stone unturned and no turn unstoned in their deliberations, if for no other reason than to do justice to the saying that the language of law is intended not only to be understood but also not to be misunderstood.

(Signed)

Choon-Ho Park

JOINT SEPARATE OPINION OF JUDGES MENSAH AND WOLFRUM

1. The central argument advanced by the Respondent is that the property in the vessel *Juno Trader* "reverted to" the State of Guinea-Bissau as of 5 November 2004 as a result of the failure of the owner to pay the fines imposed by the decision of the Interministerial Maritime Control Commission ("Interministerial Commission"). On that basis the Respondent contends that the Tribunal lacks jurisdiction to adjudicate on the case; that the Application is inadmissible; and that the allegation of non-compliance with article 73 of the Convention is not well founded. We appreciate why the Tribunal had to deal only briefly with this argument. We endorse the respective findings of the Judgment (in paragraphs 63, 68). However, in view of the prominence that the Respondent appears to attach to this argument, we consider it appropriate to give a more detailed consideration to it in a Separate Opinion.

2. Two issues need to be discussed with regard to the alleged change of ownership of the *Juno Trader.* These are, first, the process by which the change of ownership occurred, as outlined by the Respondent during the hearing and, secondly, the relevance, if any, of the alleged change of ownership to the nationality of the ship.

3. We wish to stress at the outset that we do not question the right of a coastal State to provide in its laws that fishing vessels, including their fishing gear and cargo, may be confiscated if it is proved that they have engaged in illegal fishing within the jurisdiction of the State. There are provisions to this effect in the laws of many coastal States, and, as a report from FAO indicates, different procedures are adopted for implementing these laws. However, this right of the coastal State must be exercised within the limits of the United Nations Convention on the Law of the Sea ("the Convention") and other relevant rules of international law, including in particular relevant provisions contained in international instruments on the protection of human rights, such as those providing for the protection of fair trial and due process.

4. We fully recognize and accept that it is not for the Tribunal, in the context of an application for prompt release under article 292 of the Convention, to deal with

the question of the legality or illegality of the actions taken by a coastal State against a ship found or suspected to have engaged in illegal fishing activities. Pursuant to article 292, paragraph 3, of the Convention, decisions taken by the Tribunal in a prompt-release case must not prejudice the merits of any case before the appropriate domestic forum of the detaining State against the vessel, its owner or its crew. Equally, a judgment of the Tribunal under article 292 of the Convention should not in any way appear to prejudice the merits of any case that may be brought before an international court or tribunal concerning the compatibility with international law of any national laws or of measures taken by national authorities on the basis of such laws against a ship, its cargo or fishing gear, including arrest, detention or judicial proceedings. This does not mean that the procedure applied by the coastal State in taking enforcement measures against a fishing vessel is of no relevance to the Tribunal in a prompt-release procedure under article 292 of the Convention. On the contrary, as can be seen in this case, it may be of relevance for the establishment of jurisdiction and admissibility. For that reason we endorse paragraph 77 of the Judgment which states that the obligation of prompt release includes elementary considerations of humanity and due process of law.

5. We turn now to the procedures which, according to the Respondent, led to the confiscation of the *Juno Trader.* In its presentation on the first day of the hearing, the Respondent appeared to be maintaining that, pursuant to the provisions of article 60 of the Decree-Law No.6-A/2000 (“Fisheries Act of Guinea-Bissau”), the property of an alien shipowner automatically (“by operation of law”) reverts to the State of Guinea-Bissau when the owner fails to pay the fines imposed by the Interministerial Commission within a period of 15 days, or after such extension of time as may be granted by the Interministerial Commission. It further appeared from that statement that the shipowner does not have any legal recourse (administrative or judicial) for challenging the legal or factual basis of the administrative decision of the Interministerial Commission. From the responses of the Respondent to the questions posed by the Tribunal (as given in the oral presentations of the Respondent on the second day of the hearing and in the written documents submitted subsequently) it seems that the Respondent had modified its views regarding the effect of the non-payment of the fines imposed by Minute 14 of the Interministerial Commission. In particular, the response of the Respondent seems to suggest that the “reversion of

ownership" in the *Juno Trader* to the State of Guinea-Bissau is not legally irreversible. Furthermore, the Respondent appears to accept that the decision of the Regional Court of Bissau suspending the implementation of Minute 14 of the Interministerial Commission remains in force unless and until it is invalidated by a superior court in Guinea-Bissau.

6. According to the jurisprudence of the Tribunal, the content and consequences of the law of a State applicable in proceedings before the Tribunal is a question of fact. Given the difference between the statements concerning the law of Guinea-Bissau, as given by the Respondent before the Tribunal, and the view of the law as it emerges from the decision of the Regional Court of Bissau, it is necessary for the Tribunal to make a choice as to which of these views it should base itself on in considering the status of the vessel. In making such a choice the Tribunal must operate on the basis that the obligation of States, including the State of Guinea-Bissau, under the Convention and under general international law, includes the obligation not to deny justice or due process of law, especially in respect of legal and judicial procedures that involve interference with the property rights of aliens. This general approach has been confirmed in the jurisprudence of the Tribunal. In the Judgment in the *M/V "SAIGA" Case*, the Tribunal stated that: "It is the opinion of the Tribunal that given the choice between a legal classification that implies a violation of international law and one that avoids such implication it must opt for the latter" (paragraph 72). We believe that this general principle is applicable in the present case. This means that the Tribunal must base itself on the view of the law as given in the Order of the Regional Court of Bissau. As a consequence of that Order, the confiscation of the *Juno Trader,* or to use the terminology of article 60 Decree-Law No. 6 A of Guinea-Bissau the reversal of property to the Government of Guinea-Bissau, cannot be considered as final and legally irreversible, as the Respondent appeared at one time to be contending. This conclusion is fully in accord with the Order of the Regional Court of Bissau. That Order clearly implies that the decision of the Interministerial Commission is subject to judicial review, and that this judicial review has effectively been exercised through the Order of the Regional Court which suspended the implementation of Minute 14 of the Interministerial Commission and all consequences flowing from that Minute until a final award on the merits of the case. In this regard, we are concerned to note that this decision of the court

appeared to be the subject of some criticism by counsel for the Respondent on the first day of the hearing. If the Tribunal has to choose between, on the one hand, the characterization of the law of Guinea-Bissau as given by the Respondent in its pleadings and, on the other, the meaning and effects of the law as given in the judgment of the Regional Court of Bissau, the Tribunal must choose the view of the law as indicated in the judgment of the Regional Court. It appears axiomatic that the Tribunal should rely on a formal pronouncement of a competent court of a State regarding the meaning and effects of a law of the State rather than on a statement made by counsel in the course of pleading a contentious case. On that basis we concur with the Judgment that the administrative decision on the penalties against the *Juno Trader* and its captain are not yet final under the law of Guinea-Bissau and, as the consequence thereof, that the change of ownership of the vessel by operation of the law cannot be considered as being final.

7. We now turn to the possible impact that the alleged change of ownership would have on the nationality of the *Juno Trader,* leaving aside the question whether that change in ownership can be considered as final. According to article 292, paragraph 2, of the Convention, an application for prompt release may only be made by or on behalf of the flag State of the ship. In the *"Grand Prince" Case* the Tribunal has stated that the Applicant has to be the flag State at the time of the arrest as well as at the time when the application is filed (Judgment, paras. 77 and 93, see also the Declarations of Vice-President Nelson, Judge Wolfrum, Judge *ad hoc* Cot and the Separate Opinion of Judge Treves).

8. The Respondent argues in essence that the alleged change of ownership results in an automatic change in nationality of the ship, or even loss of the nationality altogether. Actually the position of the Respondent on this point is not entirely clear. At one point in his presentation, the Agent of the Respondent stated:

> I confess that I do not have an answer to the question of what normally happens in respect of the flag of a vessel when the vessel is confiscated by another state for violations of its fisheries regulations or other laws. … My understanding is that it may be the case that … it is thereupon regarded as ceasing to fly any flag at all and to have become an ordinary chattel until such time as the state that has confiscated it has sold the ship and it is reflagged by a new owner. …

> In any event although I cannot provide the Tribunal with a clear answer, … the burden is on the Applicant to establish its case. (ITLOS/PV.04/03, p. 47)

9. But whatever may be the view of the Respondent on this issue, it is our view that there is no legal basis for asserting that there is an automatic change of the flag of a ship as a consequence solely of a change in its ownership. In this context we consider it important to emphasize the special importance of the nationality of a vessel, particularly in regard to the implementation and enforcement of the rules of international law pertaining to the rights and responsibilities of States in respect of the ship. According to article 91 of the Convention, it is for each State to establish the conditions for the granting of its nationality to ships and for the registration of ships. The term “nationality”, when used in connection with ships, is merely shorthand for the jurisdictional connection between a ship and a State. The State of nationality of the ship is the flag State or the State whose flag the ship is entitled to fly; and the law of the flag State is the law that governs the ship. The jurisdictional connection between a State and a ship that is entitled to fly its flag results in a network of mutual rights and obligations, as indicated in part in article 94 of the Convention. For example, granting the right to a ship to fly its flag imposes on the flag State the obligation to effectively exercise its jurisdiction and control in administrative, technical and social matters. In turn, the ship is obliged to fully implement the relevant national laws of the State whose flag it is entitled to fly. All States which have established ships’ registers provide for specific procedural and factual requirements to be met before a ship is entered on their registers or is granted the right to fly the flag of the particular State. Ships receive respective documents to prove that they are entitled to fly a particular flag. Similarly, the laws of these States establish clear procedures to be followed for ships to leave the register, including the conditions under which a ship may lose the right to remain on the register.

10. In view of the important functions of the flag State as referred to in article 94 of the Convention and also the pivotal role of the flag State in the initiation of the procedure for the prompt release of a ship under article 292 of the Convention, a procedure which may be compared to diplomatic protection of persons, it cannot easily be assumed that a change in ownership automatically leads to a change of the

flag. The obligations and rights of the flag State in respect of the ship cannot be transferred automatically, particularly since the flag State has obligations and enjoys corresponding rights *vis-à-vis* other States. For this reason it is both necessary and appropriate that a change in flag should be in accordance with procedures established by the flag State for that purpose and it is also necessary that these procedures are consistent with the fundamental objectives of international law relating to the nationality of ships. In the present case, there is no evidence that the alleged loss of the flag of the *Juno Trader* had any basis in the law of the flag State or the relevant provisions of the Convention.

11. Equally, it is not tenable to argue that the *Juno Trader* has lost its flag in consequence of its alleged confiscation. Vessels without flags are the exception and, therefore, loss of flag of a ship cannot be assumed lightly. Further, and more importantly, a vessel that loses its flag also loses the protection of the flag State. In the context of the regime of prompt release of ships under article 292 of the Convention, ships are particularly dependent upon the protection of the flag State. A procedure that purports to result in the loss of flag of ships with little or no legal process would result in the absence of any effective protection for ships detained in foreign ports. This would undermine the delicate balance between the interests of the coastal State and the interests of the flag State that was intended to be established by the provisions of articles 73 and 292 of the Convention.

12. Finally, we consider as wholly untenable the argument of the Respondent that the case is moot because, following its confiscation by the State of Guinea-Bissau, the *Juno Trader* cannot any longer be considered as detained. In our view, the objective of the prompt-release procedure under article 292 of the Convention is to provide for the release of a vessel pending the final conclusion of the legal proceedings in the domestic fora of the coastal State. We accept that when these national legal proceedings have been completed, the prompt-release procedure does not serve any further purpose. However, this cannot mean that the application of the article 292 procedure can be set aside by mere administrative action, particularly when, as in the present case, judicial procedures available under the laws of the State are still in progress. Such a proposition would deprive the prompt-release procedure under article 292 of the Convention of all its meaning. In our view,

a vessel continues to be a detained ship, within the meaning of article 292 of the Convention, until after the completion of national procedures that meet the standard of due process as developed in international law.

13. We also note that there are a number of factors that undermine the contention of the Respondent that there has been a change in the flag of the *Juno Trader* in consequence of the alleged change in ownership. The Respondent has given no evidence that it made any attempt to register the vessel on the ships' register of Guinea-Bissau or on the register of another State. On the contrary, during the hearing of December 7, 2004, the Respondent referred to a letter of the Government of Guinea-Bissau to the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines informing the Commissioner of the alleged change in ownership. No reference was made to a possible change or loss of the flag of the *Juno Trader*. It would have been more pertinent in this context for the Commissioner for Maritime Affairs, the competent agency of the flag State, to be informed of the very significant event of the change or loss of nationality of the *Juno Trader,* rather than the mere change of ownership. Indeed, the fact that a communication on the change of ownership was addressed to the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines, instead of the agent of the owner, would suggest that the authorities of Guinea-Bissau considered that Saint Vincent and the Grenadines still had competence in respect of the ship on the date of the communication.

14. In this regard, we consider it appropriate to emphasize that there is also a duty on flag States and shipowners to act promptly. In our view, the prompt-release procedure under article 292 of the Convention is designed as an expeditious procedure whose sole objective is to ensure that an arrested vessel is not tied up in port for a long period while awaiting the finalization of the national administrative or criminal procedures. This objective can only be achieved if the shipowner and the flag State take speedy action either to exhaust the possibilities provided under the national judicial system of the detaining State or to initiate the prompt-release procedure under article 292 of the Convention sufficiently in time before the criminal or administrative procedures against the vessel in the domestic forum are completed. The procedure under article 292 of the Convention cannot be used either as an appellate procedure against decisions of the competent domestic fora or as a

remedy against a procedural default in domestic judicial procedures on the merits of the case against the ship, its owner or crew. Where a shipowner of the flag State waits until the completion of the domestic procedures, the Tribunal will have neither the competence nor the possibility to apply the prompt-release procedure of article 292 of the Convention. In the present case, the Tribunal has concluded that this is not the case, and that the proceedings in the domestic forum have not been completed to displace its jurisdiction. We fully agree with that conclusion.

(Signed)
Thomas A. Mensah

(Signed)
Rüdiger Wolfrum

SEPARATE OPINION OF JUDGE CHANDRASEKHARA RAO

1. I have voted in favour of the Judgment. Nevertheless, certain procedural aspects of this case have prompted me to append this separate opinion to the Judgment.

Equality of opportunity

2. It is an elementary principle of judicial administration, whether national or international, that the parties to a dispute are given equal opportunities to present their respective cases in a court of law. It follows from this principle that the procedural rules of a court may not be designed to serve, or be allowed to serve, as an instrument to confer undue advantage in favour of one party *vis-à-vis* another party, lest the impartiality of the judicial mind be called into question. Has there been an erosion of the principle of equality of opportunity in the present case? Saint Vincent and the Grenadines, the Applicant, has put on record that it is an aggrieved party in this regard and has invited the Tribunal to review the Rules of the Tribunal (hereinafter "the Rules").[1] How has this come about?

3. Proceedings under article 292 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") for *prompt* release of vessels and crews are special. While preparing the Rules of the Tribunal for carrying out its functions under article 292 of the Convention, the Tribunal had no precedents to rely upon in comparable situations, if any, in the jurisprudence of other courts.

4. Nevertheless, the Convention gives sufficient guidelines about the philosophy underlying article 292 of the Convention. Article 292 is designed to free ships and their crews from prolonged detention resulting from the imposition of unreasonable bonds in municipal jurisdictions which inflict deleterious effects on the owner of the vessel and also on international commercial transactions. The article therefore requires that, once a reasonable bond or other security has been assured to the detaining State, prompt release of the vessel and its crew should ensue. Consistent

[1] See ITLOS/PV.04/04, p. 14.

with this, the basic principle enshrined in the Rules is that applications for release must be dealt with "without delay".[2] The Resolution on the Internal Judicial Practice of the Tribunal (hereinafter "the Resolution") also requires deliberations of the Tribunal concerning prompt-release applications to be conducted in accordance with the principles and procedures set forth therein, taking into account "the nature and urgency of the case".[3] The emphasis on the "without delay" and "urgency" requirements in that regard are the inevitable corollary of the concept of *prompt* release enshrined in article 292 of the Convention. How do the Rules go about giving effect to those requirements?

5. Article 292 does not require the flag State to file a prompt-release application within any time limit after the detention of a vessel or its crew.[4] However, once an application has been filed, the Rules bring into force a time limit for the submission of a statement in response, and also for the dates for hearings, for adoption of the judgment and notification of the date on which it will be read.[5] Articles 111 and 112 of the Rules – the applicable provisions in this respect – were amended on 15 March 2002. Before they were amended, the Rules called upon the Tribunal (or the President, if the Tribunal is not sitting) to fix the earliest possible time, but not exceeding ten days from the date of receipt of the application, for a hearing.[6] They provided that the detaining State "may submit a statement in response with supporting documents annexed, to be filed no later than 24 hours before the hearing".[7] They also provided that the judgment should be read "not later than 10 days after the closure of the hearing".[8]

6. Articles 111 and 112 were amended in the light of the experience gained in the cases submitted to the Tribunal. The hearing is now required to take place within a period of 15 days commencing with the first working day following the date on which the application is received; the statement in response, if any, must be

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[2] See article 112, paragraph 1, of the Rules.
[3] See article 11, paragraph 2, of the Resolution.
[4] See *"Camouco" (Panama* v. *France), Prompt Release, Judgment, ITLOS Reports 2000*, pp. 10, 28. See also P. Chandrasekhara Rao, "ITLOS: The First Six Years", *Max Planck Yearbook of United Nations Law*, Vol. 6, 2002, pp. 183, 230-231.
[5] See articles 111 and 112 of the Rules.
[6] Article 112, paragraph 3, of the Rules.
[7] Article 111, paragraph 4, of the Rules. Emphasis supplied.
[8] Article 112, paragraph 4, of the Rules.

submitted not later than 96 hours before the commencement of the hearing; and the Tribunal is given a maximum of 14 days after the closure of the hearing to deliver its judgment. The amended provisions thus give more time to the Respondent to prepare its statement in response and to the Applicant to examine the statement in response before commencing its arguments in the oral proceedings. These provisions have worked satisfactorily so far and have given no room for complaint. There has been no prompt-release case so far in which the Respondent failed to submit its statement in response.

7. In the instant case, the prompt-release application was filed on behalf of the Applicant on 18 November 2004. Pursuant to article 112, paragraph 3, of the Rules, by Order of 19 November 2004 the President of the Tribunal fixed 1 and 2 December 2004 as the dates for the hearing. Under article 111, paragraph 4, the Republic of Guinea-Bissau, the Respondent, was to give its statement in response, if any, not later than 96 hours before the hearing.

8. On 26 November 2004, the Registrar of the Tribunal was informed that the Government of Guinea-Bissau was not able to prepare sufficiently for the hearing before the Tribunal in the available time. The Respondent requested the postponement of the hearing by one week and a corresponding postponement of the time limit for filing the statement in response.

9. It may at once be noted that no valid justification was given for failure to comply with the President's Order. The argument that the time allowed under article 112 of the Rules was not sufficient to prepare for the hearing exposes the Rule itself to a charge of arbitrariness. In any event, the case in question involves prompt-release proceedings and undue delay in the disposal of such proceedings could undermine the object of the proceedings, resulting in heavy financial losses to the shipowner from the detention of the vessel and continued deprivation of freedom for the crew members. It may not be out of context to recall here that the Regional Court of Bissau (Civil Division) thought it appropriate to order the prompt stay of execution of Minute No. 14/CIFM/04 of the Interministerial Maritime Control Commission of the Government of Guinea-Bissau, without even putting the Government on notice, in view of the urgent nature of the case. In a letter dated

29 November 2004, the Applicant conveyed its opposition to the Tribunal's granting the Respondent's request for postponement.

10. With a view to avoiding any departure from the Rules, the Tribunal held a hearing on 1 December 2004[9] and decided to postpone the continuation of the hearing to 6 December 2004 and to extend to 2 December 2004 at 1000 hours the time limit for the Respondent to file a statement. Also, the time limit for filing any additional documents was also extended to 6 December 2004 at 1000 hours.

11. Although the Tribunal would have been well within its competence to turn down the Respondent's request, it made every effort to take it on board lest the Respondent's case go unrepresented. The applicable provisions on time limits have been stretched by using the concept of postponement of the continuation of the hearing.[10] In short, whereas in the normal course of events the hearings would have been completed by 2 December 2004, they were instead completed on 7 December 2004. But for the extension, the Tribunal would have delivered the judgment a couple of days before 18 December 2004, the date on which the judgment is now scheduled to be delivered.

12. Notwithstanding the extension given, in a letter dated 1 December 2004 the Respondent stated that it would not be possible for its representative to attend the public sitting scheduled for that date, that its inability to attend was attributable to resource considerations and that no disrespect to the Tribunal was in any way intended. In a further letter, dated 2 December 2004, the Respondent stated that it was not in a position to file a statement in response even within the extended time limit and added that, under article 111, paragraph 4, of the Rules of the Tribunal, the filing of a statement in response was *not mandatory*. The Respondent added that it nevertheless considered a statement in response to be *desirable, including in order to give notice to the Applicant of the nature of the case to be presented by Guinea-Bissau*, and requested an extension of the time limit for filing its statements in response.

[9] This was the first sitting in the cases heard by the Tribunal so far at which neither party was present.
[10] See article 69, paragraph 1, of the Rules.

13. Although no further extension could be given for filing a statement in response, following consultations with the parties, there were indications that the Respondent might wish to submit a short statement sometime before the commencement of the hearing on 6 December 2004 and that the Applicant would not object to the submission of such a statement. However, the public sittings had to be held without any statement from the Respondent and the Applicant had to open its case without knowing the nature of the Respondent's case.

14. The Respondent disclosed its case for the first time in the statement that it made following the opening statement of the Applicant on 6 December 2004. The Respondent took the whole of the afternoon of 6 December and a part of the morning on 7 December 2004 to complete its statement. Following a 40-minute break, the Applicant began its reply, wherein it stated:

> One thing I have observed since yesterday which I had not expected. As the Tribunal will know, the Republic of Guinea-Bissau, the Respondent State, did not submit a counter-memorial to our Application for prompt release. That is their right according to the Statute and Rules of the Tribunal. However, I have noted the following, which is peculiar. The Republic of Guinea-Bissau has had an opportunity to study our arguments in depth from 18 November, the date of submission of our Application, until 6 December, which was yesterday. To study their arguments we had last night. The whole night spent on that had the infelicitous consequence upon yours truly of losing some of my natural freshness. The Tribunal might perhaps want to grasp this opportunity to review the rules of procedure so that greater or more straightforward equity may be established between the parties.

15. I have given a rather detailed account of what has happened in the case in respect of the submission of a statement in response, for it has significant implications for the future conduct of prompt-release cases. The main question is whether the detaining State is obliged to submit a statement in response. The Respondent considered that the filing of a statement was not mandatory,[11] since article 111, paragraph 4, of the Rules uses the expression "may".

[11] See letter dated 2 December 2004 from the Respondent to the Registrar of the Tribunal and Applicant's statement in ITLOS/PV.04/04, p. 14.

16. Of course, there is no doubt that a party cannot be compelled to submit a statement, but the matter cannot be dismissed without saying more. As admitted by the Respondent itself, the need for submission of a statement in response is not an empty formality, and such a statement is required to give notice to the applicant of the nature of the case to be presented by the detaining State. It is for this reason that article 111, paragraph 4, states that, if a statement in response is to be filed, it ought to be filed not later than 96 hours before the hearing. The 96-hour period is considered essential for the applicant to understand the case of the detaining State and to express its considered and final position at the hearing.

17. The Rules do not envisage submission of a statement in response after the commencement of the hearing; nor do they state that, where the detaining State fails to submit a statement in response, it must be denied the opportunity to participate in the oral proceedings. However, it may be relevant to note here that, after the closure of the written proceedings, not even documents may be submitted to the Tribunal by either party except with the consent of the other party, and, in the event of objection, it is left to the Tribunal to decide whether or not to authorize production of the document.[12] Thus, whereas the detaining State is entitled to present its statement and supporting documents prior to the commencement of the hearing, it loses this entitlement thereafter. There is, therefore, a legitimate expectation built into article 111, paragraph 4, of the Rules that the detaining State would not miss the opportunity to present its case with supporting documents as provided for in that article.

18. In any event, it is inherent in the Rules of the Tribunal and the general principles of procedural law that each party must enjoy equal rights for the submission of its case to the Tribunal.[13] Where a party fails to submit a statement in response and where the opposite party does not have sufficient time to respond to the statement made by the former during the oral proceedings, it may be difficult to maintain that the former has not obtained an unfair advantage over the other. The fact that both parties are given equal speaking time does not alter this position. The

[12] See article 71, paragraphs 1 and 2, of the Rules of the Tribunal.
[13] See also Shabtai Rosenne, *The Law and Practice of the International Court,* 1920–1996, Vol. III, p. 1092.

permissive provision in article 111, paragraph 4, of the Rules must not be used by a party to gain an unfair advantage over the other party.

19. Aggrieved by the disadvantaged position in which it was placed, the Applicant invited the Tribunal to review its Rules so that greater equity may be established between the parties. There is force in this request and the Tribunal should attend to it as soon as possible with a view to ensuring that neither side obtains any unfair advantage over the other. There are several ways whereby the principle of equal opportunities for the parties may be allowed full play, not all of which may entail amendment of the Rules.

20. Before leaving this topic, I wish to state that, having regard to the nature of prompt-release proceedings, the time given by the Rules to the detaining State to submit its statement in response cannot be said to be inadequate or too short. It is worth stating also that prompt-release proceedings are not proceedings on the merits of a case; they are concerned only with the question of the prompt release of a vessel and its crew upon the posting of a reasonable bond or other financial security.[14]

21. In the several cases decided by it, the Tribunal has indicated the factors relevant in assessing the reasonableness of bonds or other financial security.[15] Nevertheless, the parties are seen devoting more time to the merits of their cases rather than to the determination of reasonable bond. If the parties were to focus their attention on the question of bond and the evidence bearing on it, the time limits specified by the Rules would prove workable.

(Signed)

P. Chandrasekhara Rao

[14] See article 292, paragraph 3, of the Convention.

[15] See, for example, *"Camouco" (Panama* v. *France), Prompt Release, Judgment, ITLOS Reports 2000*, p. 31, para. 67.

SEPARATE OPINION OF JUDGE TREVES

1. I voted in favour of all points of the operative part of the Judgment. I wish, nevertheless, to make some observations on one aspect of the reasons that I consider important. In my view, the statement in the Judgment that considerations of humanity, of due process of law and of fairness are aspects of article 73, paragraph 2, of the Convention, marks a very relevant and welcome new development in the jurisprudence of the Tribunal. The reasons given are, however, too elliptical in my view and require further development. I will also deal with the consequences that may be drawn from this statement. The Judgment draws such consequences only implicitly in considering the question whether the claim is "well founded" according to article 113, paragraph 2, of the Rules of the Tribunal, while, in establishing the reasonableness of the bond, it does not give any indication that the statement is relevant.

2. Article 73, paragraph 2, of the Convention, is to be read, as the Judgment states, in the context of the article as a whole. As the Tribunal stated in the *"Monte Confurco"* Judgment, article 73 "strikes a fair balance" between "the interest of the coastal State to take appropriate measures as may be necessary to ensure compliance with the laws and regulations adopted by it on the one hand and the interest of the flag State in securing prompt release of its vessels and their crews from detention on the other" (*ITLOS Reports 2000*, p. 108, para. 70). Looking more deeply into the way this balance is obtained, it appears that article 73 sets out rights of the coastal State in paragraph 1 and rights of flag States in paragraphs 2, 3 and 4. While paragraph 1 includes a broad and non-exhaustive list of measures the coastal State may take to ensure compliance with its laws and regulations, the three paragraphs that follow have the purpose to ensure that these measures will not have the effect of limiting the freedom of the persons involved (prompt release of the crew, prohibition of imprisonment as a penalty) and of unduly jeopardizing the rights of shipowners and of the flag State (prompt release of the vessel), while ensuring timely protective action by the flag State (obligation to notify in case of arrest and of the imposing of penalties).

3. Seen together in light of paragraph 1, paragraphs 2, 3 and 4 show clear concern for what has been called "the human rights consequences of expanding the bases of jurisdiction"[1]. As the Judgment correctly states, the requirement that the guarantees must be reasonable is a further indication that a concern for fairness is one of the purposes of these provisions. Paragraph 2 stands at the centre of this group of provisions: prompt release is more likely if the flag State is informed promptly under paragraph 4 and the conditions of the crew are more bearable while waiting for release if no imprisonment is involved under paragraph 3. The obligation of prompt release that emerges from examining paragraph 2 in light of paragraphs 3 and 4 is an obligation of result and at the same time, at least in part, of means: prompt release of the vessel and crew is the result that must be obtained, but the means to obtain it are not without importance. Prompt release must be obtained, and the bond or other financial security must be fixed, through a procedure that respects due process.

4. The reminder, set out in the Judgment, of the close connection between paragraph 2 and paragraph 4 of article 73 of the Convention, already mentioned "in passing" by the Tribunal in the *"Camouco"* Judgment (*ITLOS Reports 2000*, p. 29, para. 59), is significant in a case as the present one in which it is not contested that the notification to the flag State provided for in paragraph 4 has not been effected. This is particularly so as this reminder appears in the part of the reasoning supporting the conclusion that the Respondent has not complied with article 73, paragraph 2, of the Convention. Claims of non-compliance with paragraph 4 (as well as 3) of article 73 remain in my view inadmissible as independent claims in prompt-release proceedings, as the Tribunal has stated (in the *"Camouco"* and in the *"Monte Confurco"* Judgments, *ITLOS Reports 2000*, p. 29, para. 59 and p. 106, para. 63). They are nevertheless relevant as aspects of non-compliance with paragraph 2, in light of the common human rights and due process dimension.

[1] B.H. Oxman, "Human Rights and the United Nations Convention on the Law of the Sea", in J.I. Charney, D.K. Anton, M.E. O'Connell, *Politics, Values and Functions: International Law in the 21st Century, Essays in Honor of Professor Louis Henkin,* Nijhoff, The Hague, 1997, pp. 377-404, at p. 398; similar observations in B. Vukas, "Droit de la mer et droits de l'homme" in Vukas, *The Law of the Sea, Selected Writings,* Nijhoff, Leiden-Boston, 2004, pp. 71-79 at pp. 75-77.

5. In a prompt-release case unnecessary use of force and violations of due process and of human rights in general may be relevant in various ways. In particular, lack of due process, when it consists in late communication of charges, in delay and uncertainty as to the procedure followed by the authorities, in lack of action by the authorities, may justify a claim that the obligation of prompt release has been violated even when the time elapsed might not be seen as excessive had it been employed in orderly proceedings with full respect of due process requirements. The same may apply when lack of due process is used to reach quickly the conclusion of domestic proceedings without seriously affording a possibility to consider arguments in favour of the detained vessel and crew. In both cases unnecessary use of force and violations of human rights and due process of law are elements that must also be taken into consideration in fixing a bond or guarantee that can be considered as reasonable. The idea of abuse of rights is very close to that of lack of reasonableness and consideration of article 300 of the Convention should not be outside the scope of the complex process that brings the Tribunal to fixing a guarantee it considers reasonable. In a similar vein, Vice-President (as he then was) Nelson, in his Separate Opinion to the *"Monte Confurco"* Judgment, observed that in article 292 "the notion of reasonableness is ... used to curb the arbitrary exercise of the discretionary power granted to coastal States" (*ITLOS Reports 2000*, p. 124).

6. In the present case, the essential fact seems to me to be that between the time of the arrest of the ship and the time of the application to the Tribunal (and also up to the hearing before the Tribunal) all domestic procedures held in the case (whatever other possibilities might have been open under the local law) have been *inaudita altera parte* (namely, without giving the accused party the possibility of being heard). In light of the above-mentioned due-process component of article 73, paragraph 2, this aspect is relevant not only in reaching the conclusion that indeed this provision has not been complied with, but also as regards the two consequences that follow the determination of such lack of compliance in the framework of proceedings under article 292. These are: the order of release and the fixing of the reasonable bond or other financial security. In the present case, the Tribunal has reached the conclusion – that I do not dispute – that confiscation has been suspended. Considering, nevertheless, the question in more general terms, confiscation obtained in violation of due process would seem to me abusive so that it

cannot preclude an order for release. Fines imposed without procedural guarantees might also be seen as abusive and should not be taken as an automatic component of the bond or security. To my regret, this aspect appears not to have been considered as relevant by the Tribunal in the admittedly brief reasons given for the determination of the amount of the bond.

(Signed)

Tullio Treves

SEPARATE OPINION OF JUDGE NDIAYE

1. I would like to add a few brief remarks about the exercise of the Tribunal's jurisdiction in these proceedings concerning the prompt release of the arrested vessel and its crew brought by Saint Vincent and the Grenadines (the Applicant) against the Government of Guinea-Bissau (the Respondent), after setting out the facts.

2. In accordance with its owner/operator's instructions, the *Juno Trader* lay off Nouadhibou, Mauritania, on 18 September 2004 at 10 p.m. for the purpose of transferring a cargo of fish caught within the Exclusive Economic Zone of Mauritania by the fishing vessel *Juno Warrior*, which was duly licensed to fish by the Government of Mauritania.

3. Transfer of the cargo, 1,183.83 tonnes of several species of fresh frozen fish, from the *Juno Warrior* to the *Juno Trader* (a “reefer”) began on 19 September 2004 at 10.40 p.m. The fish were packed in 39,461 boxes, each weighing 30 kilos. This operation was completed on 22 September 2004 at 6 p.m, and was followed by a second transfer; this time of 2,800 bags of fishmeal, each weighing 40 kilos. This operation began on 22 September 2004 at 7 p.m. and was completed the next day, 23 September 2004, at 3.30 a.m.

4. Loaded with frozen fish and fishmeal and after taking on fuel from the supply ship *Amursk* (operation completed on 24 September 2004 around 8 p.m.), the *Juno Trader* left the territorial waters of Mauritania for Ghana to off-load its cargo for Unique Concerns Limited, which in the meantime had become the owner of the cargo on the basis of several bills of lading dated 23 September 2004. It was when the *Juno Trader* passed through the Exclusive Economic Zone of Guinea-Bissau that the events leading up to this case occurred. Boarded on 26 September 2004 around 5 p.m. by members of the Guinea-Bissau navy, the *Juno Trader* was escorted into the port of Bissau the following day, 27 September 2004, around 4 p.m. and placed under the control of the Government of Guinea-Bissau. The official documents regarding the reasons for detaining the vessel and its crew were served later.

5. On 18 October 2004, the Interministerial Maritime Control Commission made the following observations:

> 1. On 26 September 2004, inspectors from the Fisheries Inspection Service on board the vessel *Cacine* came across the vessel *Juno Trader* anchored in the fishing zone of Guinea-Bissau at the position of 11° 42' and 017° 09', alongside the vessel *Flipper 1*.
>
> 2. As the vessel *Juno Trader* noticed the approach of the inspection vessel, it weighed anchor and fled and was arrested at the position of 11° 29' and 017° 13', after 2 hours and 30 minutes of hot pursuit.
>
> […]
>
> 5. According to the report on the inspection of the catch found on board, prepared by the CIPA technicians at the request of FISCAP, the species identified (*sardinela, sareia, carapau, bonito, cavala and dentão*) are similar to those existing in our waters. (Minute No. 12/CIFM/04 of 18 October 2004)

6. On 19 October 2004, the Interministerial Maritime Control Commission decided the following:

> 1. To impose a fine of 175,398 (one hundred and seventy five thousand, three hundred and ninety eight) euros on the said vessel which was seized on the 26 September 2004 within the maritime waters of Guinea-Bissau for infractions to our fishing legislation;
>
> 2. To impose a fine of 8,770 (eight thousand, seven hundred and seventy) euros on the captain of the *Juno Trader* in accordance with Article 58 of the General Law on Fisheries for lack of cooperation with the inspectors as evidenced by the attempt of the vessel to flee;
>
> 3. To declare as reverted to the State of Guinea-Bissau all the catch found on board the arrested vessel, considering it to have been caught and transhipped in the maritime waters of Guinea-Bissau, without proper authorization;
>
> 4. To order that the total amount of the fine (184,168 euros) be deposited in the account no. 305.1000.5001.S00 of the Public Treasury of Guinea-Bissau at the main office of the BCEAO in Bissau, within fifteen (15) days counted from the notification of the present deliberation. (Minute No. 14/CIFM/04 of 19 October 2004)

7. On 3 November 2004, the fine of 8,770 euros levied on the captain was paid by the shipowner.

8. On 5 November 2004, the *Juno Trader*, its gear and cargo automatically reverted to the State of Guinea-Bissau because of non-payment of the fine.

9. On 18 November 2004, 50,000 euros were deposited on behalf of the shipowner with the competent authorities of Guinea-Bissau.

10. On 23 November 2004, the Regional Court of Bissau called for the following measures at the request of the Applicant, while awaiting a decision on the case:

> (a) For the above-mentioned reasons, I find the present procedure well-founded and consequently I order the immediate suspension of the execution of Minute No. 14/CIFM/04 of the Inter-Ministerial Commission on Maritime Inspections (defendant) of the Government of Guinea-Bissau, pending a definitive settlement of the present case, with all legal consequences, including:
>
> 1. The immediate cancellation or annulment of any procedure aimed at selling the fish and fishmeal which are found on board the vessel of the plaintiff, *Juno Trader*;
>
> 2. The immediate lifting of the prohibition imposed on the members of the crew of the said vessel from leaving the Port of Bissau, and the immediate return of their passports;
>
> 3. The immediate suspension of the payment of the fine imposed on the captain of the said vessel and the non-invocation of the bank guarantee posted to that effect, pending the definitive settlement of the said case.

11. The International Tribunal for the Law of the Sea confirmed that it is competent to hear the application and that the application is admissible. Article 292 of the Convention lays out the conditions required for the Tribunal to be competent to hear an application for prompt release. It stipulates the following:

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.

12. The two States in this case are parties to the United Nations Convention on the Law of the Sea, which was ratified by Saint Vincent and the Grenadines on 1 October 1993 and by Guinea-Bissau on 25 August 1986. The Convention entered into force for the two countries on 16 November 1994. It is to be noted that no agreement had been reached between the parties concerning recourse to another tribunal within ten days from the date of the arrest of the *Juno Trader*.

13. The problem facing the Tribunal concerns the status of Saint Vincent and the Grenadines as the country of registry of the *Juno Trader*. The Respondent has asserted that the *Juno Trader* reverted to the Government of Guinea-Bissau since 5 November 2004 the *Juno Trader* has been the property of the State of Guinea-Bissau, that title having been transferred to the state by operation of a municipal law of Guinea-Bissau at a time while the vessel was physically situated within the

territory of that state (ITLOS/04/03, p. 45, lines 11 to 14). The Respondent maintains that a confiscated ship ceases to fly any flag at all. The Applicant did not discharge its obligation to prove that it was the country of registry of the *Juno Trader* at the time of submission of its request in this case (ITLOS/PV.04/03, p. 47, lines 16 to 20).

14. It must be recalled that the first paragraph of article 73 of the United Nations Convention of the Law of the Sea refers to "Enforcement of laws and regulations of the coastal State" and provides that:

> The coastal State may, in the exercise of its sovereign rights to explore, exploit, 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.

15. National legislatures have the prerogative of establishing fishing rights in the form of laws and regulations. Very detailed legislation can be found on fishing violations and systems of applicable sanctions. A national judge applies regulations on the basis of evidence submitted while hearing a specific case.

16. Thus, whenever a vessel is boarded, the administrative authority in charge of maritime affairs orders the seizure or conservatory arrest of a vessel, which will in all probability be confirmed by an order of the tribunal hearing that question and which must also determine the amount of the security to post for the vessel's release (*The M/V "SAIGA" Case*, Judgment of 4 December 1997; *The "Camouco" Case*, Judgment of 7 February 2000; and *The "Monte Confurco" Case*, Judgment of 18 December 2000; all heard before the International Tribunal for the Law of the Sea).

17. In the case of Guinea-Bissau, the situation is slightly different. Article 46, paragraph 3, of Decree-Law No. 6 A/2000 of 22 August 2000 indicates that:

> In all cases, the Ministry responsible for Fisheries must submit the report of the boarding within 24 hours to the Attorney General or to the representative of the Public Prosecutor attached to the court with territorial jurisdiction or decide, if appropriate, to impose the fine provided for in article 53 of this Decree-Law.

18. It seems, therefore, that recourse to the Attorney General is in no way an obligation because an alternative is provided for: the fisheries administration can itself levy the fine provided for in article 53. That is what the Interministerial Maritime Control Commission did (see Minute 14/CTFM/04 of 19 October 2004). And that is why no legal proceedings were initiated and no action was brought by the administration against the owners of the *Juno Trader* and its crew. Likewise, the Respondent did not set a bond for the release of the *Juno Trader* and did not express an opinion whether the security posted by the shipowner's representative was reasonable or not.

19. Curiously, the judgment says absolutely nothing about the basic legislative provisions which throw light on the implementation of the laws and regulations of the respondent State.

20. It should be recalled that article 60 of that Decree-Law provides that:

> 1. Fines for infractions of the present [Decree-Law] shall be paid within 15 days from the date upon which no further appeal can be made against the sentence or from the date of its application by the Interministerial Fisheries Commission, as the case may be.
> 2. The period referred to in the preceding paragraph may be extended for the same period at the request of the shipowner or his representative.
> 3. In the event of non-payment of all or part of the fine within the period of extension referred to in the preceding paragraph, any assets which may have been apprehended shall revert to the State.

21. The Respondent claims that title was transferred by implementation of the applicable provisions of domestic law referred to above because the shipowner's request that the timelimit for payment of the fine be extended by 15 days was not accepted and the fine was not paid.

22. On 23 November 2004, the Regional Court of Bissau ordered interim measures, "pending a definitive settlement of the present case", which are basically tantamount to suspending execution of the decision of the Interministerial Maritime

Control Commission. The problem is that this conservatory injunction which hardly carries the authority of a judicial decision and which was made while awaiting a final decision in the case, **is voided by application of the legislative provisions in force**. These legislative provisions apply *ope legis* as a direct result of the law without taking into account any administrative or judicial decision. In addition, those provisions became effective on 5 November 2004, before deposit of the document instituting the proceedings, which occurred on 18 November 2004.

23. Moreover, the Applicant is well aware of this when it declares:

> In a document signed by Mr Malal Sane, coordinator of FISCAP, but undated, the author recognizes that the representative of the shipowner requested an extension of the timelimit of 15 days for payment of the fine, adding that this extension was not granted. The administration of Guinea-Bissau is free, under the provisions of that statute, if I understand correctly, to grant or not this extension. The most basic concepts of fairness and integrity require that the administration take the trouble of replying to the shipowner, who was waiting for this reply to his request for extension; if only because it involves a sanction that threatens the shipowner with nothing less than seizure of the vessel. No step was taken by the Guinea-Bissau fisheries administration to inform any one. Confiscation and change of ownership were supposed to have occurred on 5 November (ITLOS/PV.04/04, p. 22, lines 23-34 [retranslation on the basis of the interpretation]).

24. In the circumstances, the final decision in this case was actually that of the Interministerial Commission that led to confiscation by law. The question that then arises is whether the appeal against the act of the Interministerial Commission, sought by the Applicant, can suspend the act's effects. What is certain is that whatever the recourse open to the owners of the *Juno Trader* in appealing the decision of the Interministerial Commission in Guinea-Bissau, the Applicant cannot easily advance its claim on the basis of article 292.

25. Domestic legal proceedings handed down a verdict of legal seizure of the vessel, on the grounds that the shipowner did not discharge the penalties imposed on it within 15 days as required by the Guinea-Bissau fisheries law. That means that recourse to the procedure of prompt release becomes meaningless, because confiscation definitively transfers the *Juno Trader* to the Government of Guinea-

Bissau. The specific nature of the procedure in no way allows the Tribunal to judge the actions of a coastal State in the exercise of its sovereign rights. Paragraph 3 of article 292 leaves no doubt about this. The procedure of prompt release is aimed – very modestly – at ensuring the prompt release of a vessel as soon as a bond is posted while awaiting conclusion of domestic procedures, whether judicial or administrative.

26. Hence, it is not for the Tribunal to judge the validity of the acts of the public authority of the coastal State, not really having solid criteria for this and being limited by this specific procedure. The Tribunal must accept the public acts of the coastal State without going into their merits.

27. After studying the question of its competence to hear the Application, the Tribunal arrived at the following conclusion (Judgment, paras. 63 and 64):

> In any case, whatever may be the effect of a definitive change in the ownership of a vessel upon its nationality, the Tribunal considers that there is no legal basis in the particular circumstances of this case for holding that there has been a definitive change in the nationality of the *Juno Trader.*
>
> Accordingly, the Tribunal finds that there is no legal basis for the Respondent's claim that Saint Vincent and the Grenadines was not the flag State of the vessel on 18 November 2004, the date on which the Application for prompt release was submitted.

28. If the Tribunal has found itself competent in this case it is simply on the basis of formal, even formalistic, criteria, making the subtle and slightly artificial distinction between title of ownership and flag. Transfer of ownership does not automatically lead to transfer of flag. There are formalities to be completed that clearly were not carried out at the time of submission of the document instituting proceedings.

29. Thus, the Respondent did not show the Tribunal any measure that it has taken that would prove that it had decommissioned the *Juno Trader*, that it exercises its jurisdiction – in accordance with its domestic law – over the vessel, the captain, the officers and the crew for administrative, technical and social reasons. The Respondent has also failed to provide evidence of any measures taken to register

the vessel in the ship registry of Guinea-Bissau or even of an offer of sale. The only formality carried out by the Respondent has been to notify the Applicant about the confiscation with the decision dated 3 December 2004.

30. Clearly, with this type of solution there is great risk of ending up with a phantom flag.

(Signed)
Tafsir Malick Ndiaye

SEPARATE OPINION OF JUDGE LUCKY

1. I support the decision of the Tribunal. However, I would like to make some additional comments regarding these proceedings.

2. The facts are set forth in the introduction to the Judgment and I shall not repeat them. It is necessary, however, to refer to the principal arguments of the parties as an introduction to my comments.

3. The Applicant alleges that on 26 September 2004, the *Juno Trader*, a reefer vessel, was passing through the exclusive economic zone of the detaining State, Guinea-Bissau (the Respondent), with a cargo of frozen fish and fish meal, when it was boarded and escorted to the port of Bissau where it is presently detained with its crew, whose passports have been seized. Since 27 September, the ship, cargo and crew have been detained in Bissau. On 18 November, proceedings for the prompt release of the ship, crew and cargo were filed in accordance with article 292 of the United Nations Convention on the Law of the Sea ("the Convention"). The Applicant contends that the vessel was arrested without justification.

4. The Respondent did not file a statement in response but at the oral hearings raised several issues, arguing:

(a) that the allegations in the Application were inaccurate and irrelevant in proceedings for prompt release because they relate to the merits of the case and go beyond the ambit of article 292 of the Convention. Based on what is set out in the Application, the Tribunal could not consider the merits of the case against the vessel since that was a matter for the domestic forum (article 292, paragraph 3, of the Convention);

(b) that the Tribunal could determine only whether the Respondent was in breach of the Convention for the prompt release of a vessel (article 73, paragraph 2, of the Convention);

(c) that the Tribunal could not determine whether the arrest of the vessel was legitimate;

(d) that the Tribunal could not interfere with or impede the ability of the detaining State to deal with the case in accordance with its national law; and

(e) that the Tribunal is limited in its ability to determine matters of fact.

5. The Respondent also argues that the Tribunal does not have the jurisdiction to deal with the matter; that the case is therefore inadmissible and the Application is *prima facie* unfounded.

6. The platform from which counsel for the Respondent launched its arguments was on the premise that the Application was moot or flawed because the vessel had been confiscated for non-payment of a fine and, since 5 November, the *Juno Trader* and its cargo had been the property of the State of Guinea-Bissau. How then, he asked, could the Tribunal order the release of a ship and cargo which were the property of the Respondent? It follows, he submitted, that the Tribunal has no jurisdiction to deal with the matter, on grounds of inadmissibility, and that in the light of the foregoing the Application was not well founded.

Jurisdiction

7. As I mentioned in paragraphs 4, 5 and 6 above, the central point from which counsel's arguments developed was the question of jurisdiction, the basis being that the subject matter of the Application – the vessel and cargo – had been confiscated by the State and, in accordance with the fisheries legislation of Guinea-Bissau, was now the property of that State.

8. It is my opinion that such actions by the relevant authority of a State are administrative actions and are therefore subject to judicial review. After hearing an application by the shipowner and reviewing the documentary evidence, a judge in a domestic court made the following order:

> (a) for the reasons given above, the proceedings being held as admissible and approved, consequently, the immediate suspension of enforcement of decision No. 14/CIFM/04 by the Interministerial Maritime Control Commission (the defendant) of the Government of

Guinea-Bissau is ordered, pending a final decision in the present case, with all the following consequences, namely:

1. the immediate cancellation or annulment of any arrangements for the sale of the fish and fish meal on board the ship, Juno Trader;
2. the immediate lifting of the prohibition of the crew of the said ship from leaving the port of Bissau, and immediate return of their passports;
3. the immediate suspension of the payment of the fines imposed on the Master of the said ship and non-invocation of the bank guarantee already provided for that purpose pending a final decision in the case.

Costs to be borne by the appellant subject to repayment.

9. This was drawn to the Tribunal's attention only after the Application had been filed and after the time limit for the submission of a statement in response had been fixed.

10. The Order is self-explanatory and in my view negates the submission of counsel that the decision of the Interministerial Maritime Control Commission is still valid. As I understand it, in the domestic court the Applicant sought judicial review of an administrative action, which it was entitled to do, thereby causing the ship, crew and cargo to revert to their original status, *pending a final decision in the case*. The ship, cargo and crew therefore can be and are subject to an Application for prompt release under article 292 of the Convention. I agree with the reasons set forth in the Judgment of the Tribunal and have nothing further to add on that issue.

Procedure in prompt-release cases

11. Articles 110 to 114 of the Rules of the Tribunal ("the Rules") set forth the procedure in prompt-release cases.

12. As I understand it, the true purpose of the relevant articles in the Convention and in the Rules of the Tribunal is to ensure that the proceedings before the Tribunal take place and are completed in the relatively short and specified time prescribed in articles 292 and 73 of the Convention.

13. Those provisions of the Rules were adhered to by the Applicant. However, in my view it must be noted also that the Application contained several irrelevant matters regarding the issues and the Applicant appears to make statements of fact and allegations which ought to be addressed at a hearing on the merits of the case.

14. Also, the Applicant submitted its Application almost two months after the ship was detained, albeit because, it is alleged, the Respondent did not comply with the provisions of article 73, paragraph 4, of the Convention in that it did not promptly notify the flag State of the arrest and detention of the vessel and the penalties imposed.

15. The respondent State did not submit a statement in response under article 111, paragraph 4, of the Rules, which reads:

> A certified copy of the application shall forthwith be transmitted by the Registrar to the detaining State which *may* submit a statement in response with supporting documents annexed, to be filed as soon as possible but not later than 96 hours before the hearing referred to in article 112, paragraph 3 (emphasis added).

16. In previous correspondence, counsel for the Respondent had sought more time to prepare the statement in response, and this was granted in the Tribunal's Order of 1 December 2004, which set forth a schedule for the submission of a statement in response by the Respondent and the dates for the hearing.

17. On 2 December 2004, the agent/counsel of the Respondent wrote to the Registrar stating that he was not in a position to file a statement in response within the stipulated time limit.

18. Counsel for the Respondent then informed the Tribunal that the Respondent was not obliged to submit a statement in response because the article does not make it mandatory to do so. Obviously, counsel for the detaining State gave a literal interpretation to the word "may" in article 111, paragraph 4. Whereas I agree with counsel that the Respondent is not required by the Rules to submit a statement in response, non-submission in the instant case could appear to be a strategy to gain advantage.

19. With due respect to counsel and in the awareness of the difficulties he may have experienced in obtaining instructions and documentary evidence from his client, prime consideration should have been given to the fact that this is an *urgent matter* of prompt release of a vessel, its crew and cargo. This is no doubt the reason for the requirement that a suitable and reasonable bond must be posted if vessels are to be released. If the bond that is posted is not accepted by the detaining State, then the flag State may institute proceedings under article 292 of the Convention for the prompt release of the vessel. Time is of the essence in these matters, as in this case, where the vessel, crew and cargo have been detained since 26 September 2004 until the time of writing, in December 2004.

20. Considering the manner in which the Respondent managed its presentation of its case, I feel compelled to make the following comments.

21. The fact that counsel exercised the right not to submit a statement in response placed the Tribunal in the invidious position of having to conform to the provisions of article 68 of the Rules, which requires the judges to exchange views concerning the written pleadings, in the absence of a statement in response from Guinea-Bissau. Article 68 reads as follows:

> After the closure of the written proceedings and prior to the opening of the oral proceedings, the Tribunal shall meet in private to enable judges to exchange views concerning the written pleadings and the conduct of the case.

22. Article 112, paragraph 3, of the Rules provides as follows: "… each of the parties shall be accorded, unless otherwise decided, one day to present its evidence and arguments". Since in the present proceedings one party was not bound by written pleadings, it could still produce oral and documentary evidence at the hearing because the word "evidence" in article 112, paragraph 3, of the Rules is in my opinion all-encompassing.

23. The Tribunal has not been asked to express an opinion on whether respondents should be obliged to submit statements in response, but I think that to

ensure the smooth and effective conduct of such matters parties should be so obliged. While it may be argued that there are many difficulties in preparing a statement in response, these are urgent matters and, if given an extension of time, as in the instant case, the detaining State should submit a statement in response even if that statement is confined to matters relating to whether or not the ship should be released on the posting of a bond or other financial security.

24. It is well known that justice must not only be done but must appear manifestly to be done, and that fairness is paramount in every case. In other words, one party must not be placed at a disadvantage in a matter before the court. Because there was no written response from the respondent State, the Applicant's counsel complained that it was difficult to plead the cause while unaware of what Guinea-Bissau had to say in reply. Also, during his oral submission learned counsel for the Applicant said, "I cannot understand … what it is that is claimed of the *Juno Trader*. Is it illegal fishing, transhipping or something else?" Even at that stage of the proceedings counsel for the Applicant was in a quandary.

25. In any proceedings, it is not equitable to fail to disclose one's defence to the other party. It seems to me that the Respondent appeared to respond to the Application on an *ad hoc* basis, providing answers and documentary evidence during the oral proceedings. In prompt-release proceedings it would be helpful if agents could make a concerted effort to file documents within the prescribed time, as this would be of assistance both to the parties and to the Tribunal.

26. In the light of the foregoing, it is now necessary and urgent for the Tribunal to amend articles 111, paragraph 4, and 112, paragraph 3, with respect to pleadings and the requirements for filing them so as to specify that in prompt-release proceedings a statement in response must be submitted by the Respondent before the prescribed deadline of 96 hours before the hearing.

Evaluation of evidence in prompt-release cases

27. I am aware that the evaluation of evidence is the subject of considerable debate. There are two views: first, that article 292, paragraph 3, of the Convention

must be construed strictly and that the words “without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew” could mean only that the Tribunal may not consider the merits cases, or evaluate evidence; it may decide only whether the bond or financial security is reasonable. In my view, that interpretation is too narrow.

28. The second view is that the Tribunal may evaluate evidence if the circumstances so warrant. I propose that the issue of evaluating evidence in prompt-release cases should be considered in general terms, and, more specifically, in the light of the present Application, in which both written and oral allegations have been made and both documentary and oral evidence have been adduced.

29. The following questions arise: how should the Tribunal determine whether there has been a breach of the provisions of article 73 of the Convention? Is the Tribunal limited in its ability to determine matters of fact? And, in instances where it is alleged that an offence has been committed and a vessel has been detained by a State for allegedly violating its laws, may the Tribunal consider whether an offence has indeed been committed, and whether the offence is so grave that a reasonable bond should be posted?

30. Whereas article 292, paragraph 3, of the Convention may seem to limit the Tribunal’s jurisdiction, I do not think that the article should be construed narrowly, because there may be instances where an evaluation of the evidence may be necessary for the Tribunal to arrive at an equitable decision.

31. Before the gravity of an offence can be determined, the Tribunal must decide whether an offence has in fact been committed; then, the question of the gravity of that offence arises. It is accepted that the Tribunal should not question the action of the detaining State in detaining a vessel and its crew because the actions of a State may not be questioned, the more so when the action is found to be justified by a domestic court.

32. The Interministerial Commission imposed a fine on the Master and on the vessel. Under the fisheries legislation of Guinea-Bissau, the ship was subsequently

confiscated for non-payment of the fine within the prescribed time. On an application by the shipowner, the administrative decision of the Interministerial Maritime Control Commission was stayed by a domestic court pending a final resolution of the case by that court.

33. The decisions of domestic courts must be respected, as is apparent in the instant case. Also, the decision of the domestic court is of assistance in determining whether an offence has been committed and whether it was grave enough to allow the State authorities to take the action which they did.

Criteria for determining the reasonableness of a bond

34. Unlike in the *"Monte Confurco" Case*, where a bond had been fixed, in the instant matter a bond was not fixed. The shipowner posted a bond of €50,000 which, by the action of the State, was not accepted, because the ship, crew and cargo are still detained pending a final decision by the domestic court on the administrative decision by the Interministerial Commission.

35. What, then, would be a reasonable bond? In order to arrive at a decision in that regard there are several factors to be considered, bearing in mind what is prescribed in law: articles 292 and 73, paragraph 2, of the Convention and the jurisprudence of the Tribunal in the relevant case law.

36. Article 292, paragraph 3, provides as follows:

> 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.

37. The wording of the article is that the Tribunal "shall deal only with the question of release"; i.e., it has mandatory force. The article then goes on to prescribe that the Tribunal, in carrying out its function, must do so "without prejudice to the merits of any case before the appropriate domestic forum". Applying the well-known rules of

interpretation and construction of statutes, the literal rule and plain-language meaning, that provision does not prevent the Tribunal from considering evidence if it deems it necessary to do so bearing in mind the particular circumstances of the case. In my opinion, if the Tribunal chooses to make a finding on the facts when considering the question of release, that finding will not bind the domestic court. There may be instances where the Tribunal may have to consider evidence in order to determine the value of a bond, and, if so, in my respectful view it may do so, bearing in mind the injunctive effect of article 292 of the Convention.

38. In paragraph 67 of the Judgment in the *"Camouco" Case* (Panama *v*. France) (reported in *ITLOS Reports 2000*, vol. 4, p. 31), the Tribunal set forth criteria for determining the reasonableness of a bond or security as follows:

> 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. (Emphasis added.)

39. In paragraph 76 of the *Monte Confurco* Judgment (p. 109 of the aforementioned *Report*), the Tribunal reiterated that paragraph of the Judgment in the *"Camouco" Case* and added:

> … This is by no means a complete list of factors. Nor does the Tribunal intend to lay down rigid rules as to the exact weight to be attached to each of them. …

40. It appears to me that in order to consider the gravity of the alleged offence the Tribunal would have to weigh that gravity in the same manner as a national judge determining urgent applications, for example in injunctive proceedings, and find whether a *prima facie* case has been made. In carrying out that exercise, the Tribunal will not be making any finding on the merits *per se* but will be determining whether or not the detaining State violated the provisions of article 73 of the Convention or whether the vessel of the applicant State violated the fisheries legislation of the detaining State.

41. I am cognizant of the caution set forth in article 292 of the Convention and of the views expressed that the Tribunal may not consider the merits in a case for prompt release, but in the light of a growing and necessary jurisprudence and given that the law is dynamic, there is a school of thought, to which I belong, that courts, by giving a broad interpretation to a statute – or, in this case, an article – can "make" law. Law is dynamic, not static, and, as such, the law or statute should be given a broad interpretation to suit changing circumstances. The law must advance as technology advances. I do not think a court or tribunal should be constrained by "tabulated legalism" and strict and narrow interpretation. Therefore, in my view, article 292 should be given a broad interpretation, the more so in the light of the jurisprudence in previous decisions of the Tribunal.

42. I mention this because, in the instant case, the Applicant led oral evidence of a witness who was cross-examined. It is well known that the purpose of cross-examination is to test the witness's veracity so that a judge or judges can determine whether the witness is a witness of truth or not. Therefore, in my opinion, the Tribunal must consider the testimony of the witness Mr Nikolay Potarykin, and determine whether he is telling the truth. I do not think his testimony can be overlooked or simply noted. No evidence was adduced by the Respondent to contradict the witness, and in such circumstances, the Tribunal must give credence to his testimony.

43. In the instant case, there are allegations and denials. In the light of those allegations and denials, of the submissions, of the oral testimony of the Master of the vessel and of the documentary evidence in support provided by each party, an evaluation of evidence is crucial. For example, was the *Juno Trader* involved in the transshipment of fish from the *Juno Warrior*? Or was it simply passing through the exclusive economic zone of Guinea-Bissau on its way to Ghana? Was the *Juno Trader* at anchor or not? Those questions will be considered at the hearing on the merits in the domestic court.

44. In my opinion, in arriving at a reasonable bond the following factors are relevant:

(a) a bond must not be punitive or convey the idea that the amount of the bond was determined on the basis of any finding of culpability;

(b) the purpose of the bond is to ensure that the Applicant returns to the court in Guinea-Bissau to defend the charge and that the Respondent, if successful, does not lose financially;

(c) the gravity of the offence;

(d) where necessary, an evaluation of evidence.

45. It is my hope that the above comments will provide clarification to certain issues which arose in the instant matter.

(Signed)

Anthony Lucky