SEPARATE OPINION OF JUDGE COT

[*Translation*]

1. I subscribe to the findings of the Judgment. However, I consider it necessary to add some observations on the two questions of the context of illegal fishing and the "margin of appreciation" of the coastal State.

The context of illegal fishing

2. The Tribunal understands the international concerns about illegal, unregulated and unreported fishing. It appreciates the objectives behind the measures taken by States, including the States Parties to CCAMLR, to deal with the problem (paragraph 68 of the Judgment). I believe that it is necessary to clarify the difficulties encountered by States in combating illegal, unregulated and unreported fishing in the Southern Ocean and the necessary margin of appreciation they must be acknowledged as having in defining and implementing the means for tackling this problem.

3. In *The "Camouco" Case*, the Tribunal defined the factors that are relevant in an assessment of the reasonableness of bonds. They include the "gravity of the alleged offences". The context of illegal fishing in the region throws light on the gravity of the offence recorded against the *Volga* and its crew by the Australian authorities.

4. And yet Russia has not disputed Australia's allegations or the gravity of the offending conduct.

5. Russia and Australia are both parties to the Convention on the Conservation of Antarctic Marine Living Resources and Members of CCAMLR. They have pledged to take part in the campaign against illegal fishing as part of their responsibilities as a flag State and coastal State respectively. Russia confirmed at the hearing that it intended to play its part fully in that campaign (statement by Mr. Dzubenko, Friday 13 December, p.m., ITLOS/PV.02/04, p. 5).

6. CCAMLR's verdict on the devastation caused by illegal fishing in the region is damning. The proceeds of illegal fishing appear to be greater than those of licensed fishing – at least that was CCAMLR's estimate for the 1997/98 season – and therefore more than double the level of catches regarded as the maximum to ensure the preservation of the species. If the parties to the Convention do not manage to put an end to these practices, stocks of Patagonian toothfish will be completely wiped out within about ten years.

7. It should be added that there is a tidy profit to be made from illegal fishing. Thus the *Volga* achieved an illegal catch of 100 tonnes of Patagonian toothfish in nine weeks, which was sold by the Australian authorities for the sum of AU$ 1,932,579, while the vessel, its fuel oil and its fishing gear were

estimated at AU$ 1,920,000, an estimate not disputed by the Applicant. With a full hold, the fish caught illegally in the course of a fishing season are worth more than twice the price of the vessel. This is a fine return on investment.

8. The faxes seized by the Australian authorities on board the vessel and the data on the on-board computer suggest a concerted international organization engaged in illegal fishing involving a number of vessels flying flags of various nationalities, obeying the same instructions and coordinating their criminal activity (Mr. Bennett, 12 December, p.m., ITLOS/PV.02/02, pp. 25–28).

9. The cost of combating illegal fishing is considerable for the coastal State. Australia estimates the operating cost of a frigate at AU$ 5 million a week. Since Heard Island and the McDonald Islands are 4,000 kilometres from Australia, a naval patrol needs to use such a vessel for about three weeks.

10. International organizations have called upon Member States to take measures against illegal fishing. Thus, at its 120th session the Council of the Food and Agriculture Organization adopted the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Paragraph 24 of this Plan requires States to adopt sufficiently tough punitive measures to deter potential offenders. For its part, CCAMLR has adopted a number of conservation measures, including the installation of a VMS on board fishing vessels.

11. The measures taken by Australia, both in terms of prevention and enforcement, clearly fall within the scope of the efforts made by international organizations to combat illegal, unreported and unregulated fishing. They come under article 56 of the Convention on the Law of the Sea and have been taken in pursuance of the sovereign rights exercised by coastal States for the purpose of exploring, exploiting, conserving and managing the natural resources of the exclusive economic zone. In exercising their enforcement powers coastal States may specify monetary penalties they consider appropriate and establish – within the framework of the Convention or other applicable international agreements – their rules on arrest, detention and release upon the posting of a bond. In particular, the Convention does not set any limit on the fines a coastal State may consider appropriate to impose on offenders.[1]

[1] *The "Camouco" Case*, Dissenting Opinion of Judge Wolfrum, para. 6.

12. The Tribunal has a duty to respect the implementation by the coastal State of its sovereign rights with regard to the conservation of living resources, particularly as these measures should be seen within the context of a concerted effort within the FAO and CCAMLR. In taking these measures, Australia is upholding not only its legitimate right to explore and exploit the resources of its exclusive economic zone. It takes conservation measures within the framework of an international system of authorization in order to protect a common heritage. This is a good example of a plurality of functions. This particular circumstance widens Australia's scope for action. While the coastal State does not have the right to take measures that are arbitrary or would contravene an obligation under international law, it has a considerable margin of appreciation within that framework.

13. From the humanitarian point of view the decision taken by the Australian judicial authorities to release the three crew members upon payment of a lower bail amount than that set by the Supreme Court of Western Australia in a preliminary stage of the proceedings is to be welcomed. However, the level of the bail in this case fell within the margin of appreciation of Australia, which was entitled to set a higher level in order to deter potential criminals.

The question of margin of appreciation

14. The concept of margin of appreciation is well known to international courts. It is found, for instance, in the jurisprudence of the European Court of Human Rights. Thus, in the case of *Mellacher and others*, the Court stated:

> Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way . . . (Judgment of 19 December 1989, *ECHR, Series A, No. 169*, p. 53).

15. The Court of Justice of the European Communities shows comparable caution in overseeing the discretionary power of the institutions. With regard to economic matters, it punishes only flagrant violations, such as misuse of powers, glaring errors in exercising discretion, clear overstepping of the limits of the discretionary power, obvious inappropriateness of the measure for the objective pursued and gross disproportion in relation to the desired outcome.

16. International courts constantly use the concept of margin of appreciation, often implicitly or unwittingly. Thus in the case of *Rights of Nationals of the United States of America in Morocco*, the International Court of Justice noted:

> The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith (*Judgment, I.C.J. Reports 1952*, p. 212).

17. Or again, in the *Fisheries* cases, the Court noted, with regard to the power of the coastal State to draw the base-lines:

> . . . the base-lines must be drawn in such a way as to respect the general direction of the coast and . . . they must be drawn in a reasonable manner (*I.C.J. Reports 1951*, pp. 140–141. See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 51–52, para. 97).

18. The concept of "margin of appreciation" is closely related to that of "reasonableness". The concept of "reasonableness" implies the existence of a discretionary power that must be curbed. As has been observed, "*[l]a notion de raisonnable est souvent invoquée dans le souci de limiter les compétences discrétionnaires que les Etats possèdent dans certains domaines*"[2] [the concept of "reasonableness" is often invoked with a view to limiting the discretionary powers possessed by States in certain areas]. Reasonableness thus appears to be both an instrument for preserving the margin of appreciation of States and an instrument for courts to control the exercising of the discretionary power of the State.

19. In the *Dispute Concerning Filleting within the Gulf of St. Lawrence* between Canada and France,[3] the Arbitration Tribunal noted:

> 54. The Tribunal finally points out that, like the exercise of any authority, the exercise of a regulatory authority is always subject to the rule of reasonableness invoked by the International Court of Justice in the *Barcelona Traction* case, as follows: "The Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably" (*I.C.J. Reports, 1970*, p. 48, para. 93 . . .). That rule requires State behaviour to be proportional to the aim legally pursued, with due regard to the rights and freedoms granted to another State.

20. And, after examining the way in which the concept of reasonableness had been applied by the Permanent Court of Arbitration in the *North Atlantic Coast Fisheries Case*,[4] the Arbitration Tribunal concluded on this point:

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[2] Jean J. A. Salmon, "Le concept de raisonnable en droit international public", *Mélanges offerts à Paul Reuter*, p. 459. On the overall question, see O. Corten, *L'utilisation du raisonnable par le juge international*, Brussels, 1997, 696 pages.

[3] Arbitral award of 17 July 1986, *ILR*, Vol. 82, p. 631.

[4] Award of 7 September 1910, *RIAA*, Vol. XI, p. 189.

> In the present case, the Tribunal therefore holds that Canada can only use its regulatory authority concerning the French trawlers referred to in Article 4(b) of the 1972 Agreement in a reasonable manner, i.e. without subjecting the exercise of the right to fish enjoyed by such trawlers under the Agreement to requirements which in effect make that exercise impossible.[5]

21. It will be noted that the aspects considered in the definition of reasonableness include the concept of proportionality and the obligation for the State to ensure that its conduct is proportional to the aim being legally pursued, account being taken of the rights and freedoms granted to others or acknowledged under international law. In the case of the *Volga* – as Australia noted (Mr. Crawford, 12 December, p.m., ITLOS/PV.02/02, p. 21) – no freedom was at issue. The *Volga* was not exercising its freedom to fish on the high seas and its passage within the exclusive economic zone was anything but innocent. It could not therefore rely on special protection on the grounds that a freedom was being threatened.

22. The margin of appreciation applies both to the measures taken by the coastal State under article 73, paragraph 1, of the Convention and to the amount of the bond referred to in paragraph 2 of that article. Provided that the bond is not "unreasonable", the Tribunal does not have to substitute its discretion for that of the coastal State. It has no intention of being an appellate forum against a decision of a national court ("*Monte Confurco*", para. 72); nor is it the hierarchical superior of an administrative or government authority.

23. Australia relied in its defence on the difference between the French and English texts of article 73, paragraph 2, of the Convention. The former refers to a "*caution . . . suffisante*", whereas the latter speaks of a "reasonable bond". If Australia's Counsel is to be believed, "[i]f there is a range of values or possibilities, the bond should secure the maximum. That is the significance of the French word *suffisante*, the English word *sufficient*" (Mr. Bennett, 13 December 2002, a.m., ITLOS/PV.02/03, p. 6). Such an interpretation of the concept of a "reasonable" bond is, in my view, to be eschewed. I consider it to be contrary to the object and purpose of the release procedure and to find no support in the *travaux préparatoires*, as it would render the procedure utterly meaningless. It would be hard to imagine a flag State bringing an action on the grounds that the bond set by the coastal State is not "reasonable". The interpretation put forward here would lead "to a result which is manifestly absurd or unreasonable" (Vienna Convention on the Law of Treaties, article 32 (b)). Like Vice-President Nelson in *The "Monte Confurco" Case* (Separate Opinion, *ITLOS Reports*

[5] *ILR*, Vol. 82, p. 631.

2000, pp. 124–126), I believe that the terms "reasonable" and "*suffisant*" must be presumed to have the same meaning in the different language versions of article 73, paragraph 2.

24. The court's control over what constitutes a "reasonable bond" comes under what may be referred to as "minimum control" in certain legal systems. In his Dissenting Opinion in *The "Camouco" Case*, Judge Wolfrum noted, with regard to the criteria applied by courts dealing with human rights cases:

> They restrict themselves, generally speaking, to ascertaining whether such a decision or measure was unlawful under international law, or was arbitrary, or constituted an abuse of authority, or was made in bad faith, or was disproportionate . . . (*ITLOS Reports 2000*, p. 71, para. 14).

25. This control of legality is exercised in particular with regard to errors in law. In deciding to combine release of the vessel with a bond imbued with a penal overtone, intended to ensure the good behaviour of the vessel during the period pending the decision of the Australian courts, the Australian authorities committed an error of law with regard to the lawful nature of the reasonable bond as provided for in articles 73, paragraph 2, and 292 of the Convention.

26. The bond or financial security provided for in articles 73, paragraph 2, and 292 is in fact a provision of a purely financial nature. It cannot be converted into a measure of court supervision. The analogy with bail under criminal law which may accompany release under court supervision pending trial does not hold water, since the English text speaks of "bond" and not "bail"; it uses the commercial law or even maritime law term and not the criminal law term. This interpretation is borne out by the context, the object and purpose of the Convention, and also by the *travaux préparatoires*. The provision was inserted in the Convention in order to ensure prompt release of the vessel and crew. It could not be combined with other conditions without having the effect of extending the coercive power of the coastal State to the detriment of the power of the flag State in the exclusive economic zone. Yet there is nothing in the Convention to suggest that the balance of the powers exercised in the exclusive economic zone has been modified in this way.

27. Above all, attaching conditions to the bond would transform the very nature of the procedure established by article 292 of the Convention. This provides for *prompt* release of the vessel and *prompt* release of the crew, not the conditional release of either of them. Attaching conditions to the bond or financial security would inevitably have the effect of complicating and slowing down the procedure, which would lose its *prompt* character. This would be tanta-

mount to deflecting the article 292 procedure from its purpose and distorting its meaning.

28. For these reasons I consider that Australia was not entitled to include a "good behaviour bond" totalling AU$ 1,000,000 in the amount of the reasonable bond leading to the prompt release of the vessel and crew.

(Signed) Jean-Pierre Cot