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