DISSENTING OPINION OF JUDGE ANDERSON

Admissibility and Merits

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

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

The present proceedings and the proceedings in the national courts

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

show very strong grounds for reducing the amount of the security fixed by a national court under local law in order to succeed under article 292.

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

Moreover, the owners have subsequently exercised a second right of appeal to another court in Réunion. No decision on this second appeal has been reported to the Tribunal. In other words, shortly after the appeal was filed and whilst it was still under consideration, an application was made to this Tribunal on the same point. It must be unprecedented for the same issue to be submitted in quick succession first to a national court of appeal and then to an international tribunal, and for the issue to be actually pending before the two instances at the same time. This situation is surely undesirable and not to be encouraged. It smacks of "forum hopping" and hardly makes for the efficient administration of justice. An international tribunal can best adjudicate when the national legal system has been used not partially, as here, but completely and exhaustively.

This is the principle behind the "exhaustion of local remedies" rule, contained in article 295. Whilst article 292 does not use the word "dispute", it nevertheless speaks of an allegation that a State Party "has not complied with the provisions of this Convention ...", which gives a strong impression that some dispute must in fact exist between the two sides, particularly given the wide scope accorded to the term "dispute" in the jurisprudence. Article 295 provides that "*Any* dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the *procedures provided for in this section* only after local remedies have been exhausted ..." (emphases added). Article 292 clearly constitutes a procedure provided for in the same section as article 295, namely section 2 of Part XV. The

question arises whether there may not exist at present an international dispute between Panama (espousing the claim of a Panamanian corporation, albeit one stated to be beneficially owned by Spanish nationals) and France over an exceedingly narrow issue, namely *the amount of the security ordered so far by the French courts in Réunion in the case brought against the* Camouco.

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

Before leaving the question of the relationship between these proceedings under article 292 and those under the national jurisdiction, I would add a further point. The procedures followed in criminal cases vary from one legal system to another. Common law jurisdictions rely greatly upon oral testimony given by sea fisheries officers at a trial in open court. This enables the court to hold the trial shortly after the arrival of the detained vessel in port, thereby reducing the need to consider the question of release of the vessel and its crew against financial security pending the trial. Civil law systems of criminal procedure rely much more on written evidence and judicially-directed investigations, which may take more time. Both systems are, of course, fully compatible with internationally agreed standards for the protection of human rights. (It is worth noting that France is a party to the European

Convention on Human Rights, which protects the right to a fair trial within a reasonable time and the right not to be subjected to cruel and unusual punishments.) At the same time, article 292 may, in effect, put a premium upon holding trials of detained ships in fisheries and pollution cases without delay.

The Question of Compliance with article 73, paragraph 2

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

(a) The Factual Context

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

(b) Article 292

This novel provision is headed "*Prompt release of vessels and crews*", but there is no presumption in my view that release will be ordered by the Tribunal

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

(c) Part V

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

(1) **Article 61** imposes the duty on the coastal State to "ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation".

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

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

(3) **Article 63, paragraph 2, and article 64** look beyond the outer limits of the EEZ and provide for degrees of cooperation between coastal States and fishing States through appropriate subregional and regional organisations in the matter of conserving straddling fish stocks and highly migratory fish stocks. The Applicant's

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

(4) **Article 73** provides for the enforcement of fisheries laws and regulations of the coastal State "adopted by it in conformity with this Convention". In particular, according to article 73, paragraph 1, "[t]he coastal State may, in the exercise of its sovereign rights to ... conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection,

arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."

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

(d) Enforcement of Legislation by the Coastal State

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

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

suffisante". What is "reasonable" is an amount *suffisant/sufficient* to cover penalties which could be imposed upon conviction. There exists the danger of fixing the security under article 292 at a level which, being too low, could in practice "prejudice ... the merits of [the] case before the appropriate domestic forum against the vessel, its owner or its crew", contrary to paragraph 3 of article 292. In a criminal case, the processes of determining and then exacting the penalties upon conviction form integral parts of the merits.

(2) **The question of the gravity of the charges in this case** In paragraph 29 of the Judgment, the charges are listed and in paragraph 68 simple note is taken of "the gravity of the alleged offences", without more. In my opinion, greater weight should have been attached to this factor. The Report of the UN Secretary General mentioned above refers to the problems caused by illegal fishing in zones under national jurisdiction. In recent years, courts in different coastal States, especially jurisdictions in huge and remote EEZs, have imposed heavy penalties upon industrial freezer vessels with large fishing capacity found after due process of law to have been fishing illegally. Apart from the gravest offence of fishing without authorisation, other types of conduct by fishing vessels have been criminalised by legislators and courts. Examples of obstructing the work of duly authorised inspectors, masking a vessel's name and port of registry, keeping false logbooks, fleeing when detected in the EEZ, and throwing incriminating documents and illegally caught fish overboard before the inspectors arrive are all well-known to fisheries enforcement officers. Also in recent years, attempts have been made to disguise beneficial ownership through the formation of single ship companies in remote jurisdictions and through flying what are sometimes called "flags of convenience". The States concerned are often not members of the regional or subregional organisation for the conservation and management of fisheries in

a particular area visited by a vessel, even though in some cases the national State of both the captain and the beneficial owner is a full member of that organisation. This situation raises many questions over and above those considered by the Tribunal in paragraphs 75 to 88 of its Judgment of 1 July 1999 on the merits of the *M/V "SAIGA" Case*.

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

(4) **Special problems of ensuring effective law enforcement in extensive and remote EEZs** As indicated above, coastal States have duties under article 61 to ensure the effective conservation of the stocks. Poaching on a large scale makes this difficult to achieve. In remote insular territories surrounded by large EEZs, coastal States are often unable to maintain frequent patrols. Large factory/freezer vessels which remain undetected can soon decimate stocks. Effective enforcement of conservation measures is in the general public interest, but patrolling is very expensive. The problems of ensuring effective enforcement and effective conservation are acute in small island jurisdictions, including small island developing States. Thus, when a vessel is arrested, prosecuted and convicted, the fishery enforcement officers tend

to seek and the courts tend to impose swingeing penalties in an effort to deter others from breaking the law in a similar way. At the prior stage of considering the question of release pending trial, the judge is aware that if the security is fixed at a level below the amount of the penalties which may be imposed on conviction, the excess could well prove in practice to be irrecoverable.

Overall conclusion on the admissibility and merits of this Application

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

Operative paragraph 5 of the Judgment

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

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

(*Signed*) David H. Anderson