DISSENTING OPINION OF JUDGE ANDERSON

Having dissented from the Judgment on several points, I should like in the short time available to explain my reasons, touching briefly on some other features of the Judgment which I welcome.

The Questions of Admissibility: points 2 and 3 of the *dispositif*

To begin with the latter, I agree that the complaints under article 73, paragraphs 3 and 4, are inadmissible, and that the application under article 73, paragraph 2, is "admissible" in the *strict* sense of that term. The strict meaning has been adopted for the first time by the Tribunal in point 3 of the *dispositif* (paragraph 96 of the Judgment). As a result, the structure of the *dispositif* is much clearer than the dispositifs in the *M/V "SAIGA"* and *"Camouco" Cases*. I can only endorse and welcome the new approach. The wider sense of the term "admissible" as used in those previous cases, as well as in the pleadings of the parties in the present case, equates to "well-founded", thereby mixing the question of admissibility with the merits. That approach has been the source of some confusion in the past.

The Merits of the Allegation under Article 73, Paragraph 2: points 4 and 5

Paragraphs 65 to 76 of the Judgment set out some general considerations, including the "guiding criterion" of balancing the respective interests of the parties (paragraph 72), with which I have little difficulty. My general approach, however, would be to concentrate more upon the question whether or not the allegation of non-compliance has been made out.

Pursuing this approach, it is clear that in a general sense the respondent has not failed to implement article 73, paragraph 2. France has *inter alia* provided in its legislation for the possibility of release against a reasonable bond by recourse to its courts. In the instant case, the Court of First Instance (CFI) has not failed to act. It has fixed an amount of *caution*. The vessel could

leave tomorrow on posting a bond in the prescribed amount and form. In fixing its amount, the CFI considered, naturally, the applicable law, that of the Kerguelen Islands.[1] It also paid particular regard to the requirement, contained in article 292 of the Convention, that a bond should be in an amount which was "reasonable". Finally, it used wording echoing the decision in the "*Camouco*" *Case*. In other words, the CFI applied directly the law of the Convention in reaching its decision on what was a reasonable bond. It did so after setting out full reasons. (Indeed, the decision is more transparent in some ways than paragraph 93 of the Judgment.) The CFI appears to have calculated the aggregate of the maximum fines and penalties that would be available to the criminal court were the latter to find the charges proven on 9 January 2001. Under the law in force in respect of the EEZ around the Kerguelen Islands, the maximum fine for illegal fishing is linked directly to the amount of illegally caught fish, as determined by the criminal court. This amount lies somewhere between 158 tons and zero. Only the criminal court will be able to assess the amount definitively.

The CFI, in fixing the bond, appears to have exercised a discretion normally available world-wide in proceedings for release on bail and to have taken into account about half of the 158 tons. In this process, the "worst case" has to be allowed for to an appropriate extent. Splitting the difference is usually considered reasonable. The CFI fixed the amount of the bond at a level well below the maximum fine. The domestic court has a discretion or margin of appreciation. I am not persuaded that the margin was exceeded in this case, especially when viewed against the wider factual background described below.

Paragraph 73 contains an *obiter dictum* to the effect that the amount of a bond should not be excessive and unrelated to the gravity of the offences with which the accused has been charged. In this case, the amount of the bond was directly linked to the charge of illegal fishing in the EEZ and to the fines available to the court in the event of a conviction under the law in force around the Kerguelen Islands. The Convention does not limit the size of fines, although it does exclude generally imprisonment for fisheries offences.

[1] I read with surprise the Declaration made by Judge Vukas. Among many reasons, the Tribunal deals "only with the question of release" in considering applications under article 292.

It is for the legislators and the courts of States Parties to lay down fines for illegal fishing. Where there is persistent non-observance of the law, deterrent fines serve a legitimate purpose.

There is a particular factor in this connection. Paragraphs 78 and 79 refer, respectively, to the conservation of the resources of the EEZ and to the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR). As part of the various different co-operative efforts of the numerous parties to that Convention to conserve the ecosystem, including fish stocks and birds, coastal States in the region, such as France, have attempted to curb illegal fishing in their EEZs, especially by long-liners. They have sought to do so by enacting appropriate legislation, by maintaining costly fishery patrols, and by prosecuting whenever a patrol vessel has good reason to suspect that an offence of illegal fishing has been committed. In order to deter illegal fishing, high maximum fines and other penalties (not including imprisonment) have been prescribed in legislation. High fines and other penalties have been imposed by the courts upon conviction for serious offences. A recent survey suggests that the increase in the level of fines and other penalties over the past five years has coincided with a decline in the number of sightings of vessels fishing without permission or in an unregulated manner.[2]

The Applicant in this case sought to show that not all the fish on board the vessel had been caught in the EEZ by contending *inter alia* that the vessel had been fishing in Statistical Division 58.5.1 in early November 2000. It should not be overlooked, however, that November was a month when the parties to CCAMLR had prohibited all directed fishing for toothfish in that Division.[3]

[2]Agnew, "The illegal and unregulated fishery for toothfish in the Southern Ocean, and the CCAMLR catch documentation scheme", *24 Marine Policy* (2000), p. 361, at p. 366, where it is stated that "[t]hese fines have had a significant effect on the number of vessels engaged in IUU fishing ...".

[3]Conservation Measure 172/XVIII. Seychelles, whilst using the CCAMLR catch reporting document, is not a party.

Reverting to the balancing of interests (paragraph 72), in my opinion, this "factual background" is relevant in balancing the respective interests of France and the applicant. Equally, it is material in forming a view of what is a "reasonable" bond within the *overall* scheme of the Convention, which imposes a duty on the coastal State to ensure that "the maintenance of the living resources of the exclusive economic zone is not endangered by over-exploitation" (article 61). The actual interests[4] of the two sides in this case lie on entirely different planes.

With regard to paragraph 84 concerning the valuation of the vessel, I agree with the conclusion to the effect that the Applicant's last valuation is "reasonable". It is also the lowest. This is not to say that the other valuations are necessarily "unreasonable". This consideration applies even to the only valuation available to the CFI: this was also the only valuation made in Réunion where the vessel is situated. The acceptance of that valuation by the CFI should not be treated as unreasonable in the circumstances. However, I accept that the Applicant's last valuation raises the question of making a reduction in the amount of the bond, bearing in mind the way in which it was calculated.

I do not accept the reasoning in paragraph 88 on two grounds. First, the expert evidence mentioned in paragraph 54 was to the effect that toothfish could not be caught in the places where the master claims to have been fishing before entering the EEZ around the Kerguelen Islands. To my mind, this evidence means, therefore, that the fish could have been caught either in the EEZ or *at other places south of the Antarctic Convergence outside the EEZ.* (I would observe in passing that the vessel's logbook might contain relevant information concerning the crucial question of where the vessel was fishing in September and October this year. No adverse inferences should be drawn form its non-production to the Tribunal.) The second point on paragraph 88 concerns the assumption stated to have been made by the CFI and its consistency with the information before the Tribunal. The CFI appears to me to have been exercising a discretion, not finding facts. Moreover, I see no difficulty in the presumption. In the legislation of many States, there is a *statutory* presumption to the effect that, in the event of non-notification of

[4]It should not be overlooked in this connection that the Application has been brought *on behalf of* the Applicant by the legal representatives of the vessel and its Master.

the quantity of fish on board a fishing vessel when it enters the EEZ, all fish on board are presumed to have been caught there, until the contrary is shown to the satisfaction of the court. Such arrangements and rebuttable presumptions serve, in practice, to protect loaded fishing vessels in transit through an EEZ. Indeed, the legislation of the Seychelles contains just such provisions.[5] If a fisheries inspector boards a vessel in the middle of an EEZ, as in this case, and forms a "good reason to believe that the ship has violated the laws" of the coastal State (i.e. the test in article 111), the initial presumption must be that all the fish on board have been taken in that EEZ. The trial court can assess any defence evidence tending to show that some or all of the fish had been caught outside the EEZ.

For these reasons, I do not agree with the conclusion in paragraph 91.

Remedies: point 6

With regard to paragraph 93, I agree that in fixing the amount of a bond at a reasonable level, it is appropriate to have regard to the value of fish on board (and indeed the fishing gear) which, having been provisionally impounded, could be confiscated by order of the court upon the conviction of the accused. As I understand it, in the present case, the fish and the gear have already been secured under the applicable law, pending the outcome of the trial on 9 January 2001. This consideration could have been taken into account in fixing the amount of the additional security, without more on the part of the Tribunal. In my view, it is unnecessary for the Tribunal in circumstances such as the present to *determine* that something which has already been secured "shall be considered as security". Apart from the consideration that international courts should exercise restraint, in practical terms the value of

[5]Section 15(2) of the Control of Fishing Vessels Decree 1979 reads:

"A radio call made by a foreign fishing vessel before entering the exclusive economic zone indicating that the vessel is exercising its right of free navigation through the exclusive economic zone and notifying its proposed route and the quantity of fish on board shall suffice to rebut the presumption" provided for "in subsection (1)."

The legislation is cited by Burke, in *The New International Law of Fisheries* (1994), pp. 329–330.

the fish is unlikely to be *precisely* 9,000,000 FF when sold on the market. In my view, both paragraphs 94 and 95 are overly prescriptive.

The Form of the Bond: point 7

I have not opposed point 7 of the *dispostif*, whereas I did dissent from the equivalent paragraph in the *"Camouco" Case*. My reason there was that, having regard to the applicable law, the requirement that security be provided in the form of cash or a cheque was the normal practice in Réunion. As noted in paragraph 93 of the present Judgment, in implementing the decision in the *"Camouco" Case*, no difficulty appears to have arisen from the Tribunal's decision that a bank guarantee would be the appropriate form of security. (A leading French bank having provided the guarantee, the court appears to have accepted it and to have applied directly the terms of the Convention and the Tribunal's decision made under article 292.) A bank guarantee is easier for a vessel owner to arrange, bearing in mind that the sums involved are relatively large for the Master and probably also for the owners of the vessel. Bank guarantees are used in other jurisdictions and they serve to protect the positions of both sides. Accordingly, I accept that the appropriate form here would be a bank guarantee.

The Terms of the Guarantee: point 8

A bank guarantee is a legal document that takes effect according to a system of national law and speaks for itself. It may serve to cause confusion to decide, as in point 8, when the guarantee may or may not be invoked. Accordingly, I have voted against this point also.

(*Signed*) David H. Anderson