INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

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Public sitting
held on Thursday, 7 December 2000, at 15.15 p.m.,
at the International Tribunal for the Law of the Sea, Hamburg,
President P. Chandrasekhara Rao presiding

The “Monte Confurco” case
(Application for prompt release)

(Seychelles v. France)

Verbatim Record

Uncorrected
Non-corrigé

Present:	President	P. Chandrasekhara Rao
	Vice-President	L. Dolliver M. Nelson
	Judges	Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Soji Yamamoto
		Anatoli Lazarevich Kolodkin
		Choon-Ho Park
		Thomas A. Mensah
		Paul Bamela Engo
		Joseph Akl
		David Anderson
		Budislav Vukas
		Rüdiger Wolfrum
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		Tullio Treves
		Mohamed Mouldi Marsit
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Seychelles represented by:

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as Agent;

Mr. Jean-Jacques Morel, *Avocat*, Bar of Saint-Denis, Réunion, France,

as Deputy Agent;

and

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Mr. Bruno Jean-Etienne, Legal Assistant, S.J. Berwin & Co., Brussels, Belgium,

as Counsel,

France represented by

Mr. Michel Trinquier, Deputy Director for the Law of the Sea, Fisheries and the Antarctic, Office of Legal Affairs of the Ministry of Foreign Affairs,

as Agent;

and

Mr. Jean-Pierre Quéneudec, Professor of International Law at the University of Paris I, Paris, France,
Mr. Jacques Belot, *Avocat*, Bar of Saint-Denis, Réunion, France,

as Counsel,

THE PRESIDENT: I now call upon the Agent of France to make his presentation.

MR QUENEUDEC (Interpretation): Mr President, Judges, it is a great honour for me join with you in the inauguration of these wonderful premises, even if the French delegation would have preferred that this be done under difference circumstances and on another occasion.

The French Government, as already stated in its Memorial in respect of the *Monte Confurco* matter, does not dispute the competence of the ITLOS to deal with the matter under Article 292 of the Convention on the Law of the Sea. But, as was also stated, we consider that this is a limited competence because the Tribunal in this framework can deal only with the matter of release, as stated in paragraph 3 of that article. We therefore consider that the conclusions presented on behalf of the Republic of Seychelles in relation to the non-notification of the vessel and in relation to Article 73, paragraph 3, of the Convention on the Law of the Sea, which excludes imprisonment, are not admissible as a matter principle. Furthermore, we do not agree about the admissibility of the ninth conclusion relating to the conclusion itself. We believe that the reasonable nature of the case will have to be viewed in the light of the reasonable framework of the case.

As far as the particular circumstances are concerned, the request put forward on behalf of the Republic of the Seychelles amounts to a manipulation of the facts, when they are not being denied, without any proof whatsoever. Sometimes they are just allegations. Mr President, gentlemen, it was not on account of a so-called unrebuttable matter that we decided to seize the goods. It was because there were serious reasons which, quite logically, led us to consider that the vessel was carrying out illegal fishing when it was in fact surprised.

These matters have been summed up in, among other things, a procès-verbal d'infraction. The agents working on behalf of the Republic of Seychelles could have had this, had they asked for it, from 21 November onwards, two days after the *Monte Confurco* arrived at the Island of La Réunion. The procès-verbaux in no way bind the judge, even if they have been established by people whose honesty, whatever one might say about it, can in no way be doubted, unless, of course, there

is proof. However, we find that the agent working on behalf of the Republic of Seychelles has not in this case proved anything to cast serious doubt on the accusations made against the *Monte Confurco*. Mr President, gentlemen, these facts are very troubling.

There are many facts and they all tally. Let us look at them. We have a vessel that has not been notified, although there was an opportunity to do so, a vessel that was surprised in the middle of the Exclusive Economic Zone of the Kerguelen, where there was no other vessel within 50 miles. There were also various buoys and long lines which were made and arranged in exactly the same way as the buoys on board. All these buoys had a logical series of numbers, details of batteries and lamps, and they had the same dates on them. This vessel changed its path, speeded up and stopped only after a certain time. The crew jettisoned bait and long lines which were simply not sufficient for a fishing expedition. The vessel had also been very hastily and imperfectly cleaned. As we can see from the back, there were still hooks and bait on the decks; the factory was still wet from recent washing; there was fish gut around, and so on.

We have a master who tried to conceal the proof of the violation by destroying documents, getting rid of IT files, presenting documents that were not at all credible, showing fishing zones in which, as we will hear later from Professor Duhamel, it has been scientifically proved only very few toothfish exist. There are also Memorials of GBS, which indicate very many zones within the economic zone of the Kerguelen. There is a chronometer, used to find the position of the buoys, which is no longer working, but, when you look at the kind of breakdown, you can understand that it was deliberately broken. The facts are there.

Can one apply a legal presumption? The facts are there. Why are these facts not opposed by other facts? I pose that question to you, Mr President and Judges. These facts are very serious but, beyond that, we have a more serious and broader problem of organised, illegal fishing that endangers the future of these fish resources, as we shall hear from Professor Duhamel. Illegal fishing has indeed been structured in a perfectly well organised manner. There are powerful economic and financial interests involved, attracted by considerable profits from these

activities. The vessels that carry out illegal fishing are supported by specialist lawyers, which one always finds in this kind of business, and very often they are the first to know about such incidents. They are lawyers who know all about these techniques, and that allows them to protect the captains from being sued.

Over recent years we have caught 18 captains. The eighteenth is Argibay Perez. Of the 18, one only was sued and punished. All the others are now all over the place. When we tried to find them, we discover that we do not know where they live. They are not known at the addresses that they had originally given, so we can no longer get our hands on those people. For the most part, these captains are citizens of one of the countries of the European Union.

These vessels often change their names. They very often change their flags and are very often the property of so-called “one ship companies”. This is a very useful formula by which to hide the identity of the true interests of the people for whom they are working and also to prevent proper action being taken against the people responsible. It is also a useful means by which to avoid the high fines that are being imposed on such small companies. These vessels are organised in a network. They communicate with each other, thanks to codes such as the one that we found on the *Monte Confurco*. It is true that they try to escape the surveillance of coastal states, but they are also ready to help each other and are extremely efficient at doing so.

One has been able to find out about that through a shipwreck that occurred in October this year involving a vessel with a --- flag, and that vessel sunk. From all the information that we had from the Ministry of Foreign Affairs and information received from the Consulate of Chile in Paris about the crew, all this information had been given out in a third country. The machinery had obviously been very well oiled. They managed to evacuate the crew and they were able to give information on what had happened to them.

We experienced increasing difficulty finding ports for unloading the illegal catches. These vessels had a lot of imagination. They were able to unload their catches, on the high seas, on to smaller vessels that could take the catches straight to port.

These are the sort of the things that happen in illegal fishing, and that is what we found when we examined the case of the *Monte Confurco*. Therefore, Mr President and gentlemen, the serious facts relating to the *Monte Confurco*, such as organised, illegal fishing, which is really the background to the whole matter, justified the fact that one set a very high bond in absolute terms, as we shall see later. However, we consider it to be reasonable in this particular case. To think differently about this would mean that one is avoiding the meaning of a particular article that relates to the protection of good fishermen in order to avoid the resources of the planet being over exploited. If one did not do anything about that, one would be undermining the efforts of the coastal states. I am quite sure that your Tribunal would not wish that.

Mr President, I thank you for your kind attention and, with your permission, I would now like you to hear the evidence of the expert who we wish to present, Professor Duhamel.

PROFESSOR DUHAMEL, sworn
Examined by MR TRINQUIER

Q (Interpretation) With your permission, Mr President, Professor Duhamel, would you introduce yourself to the court?
A (Interpretation) Mr President, members of the Tribunal, I am a Professor at the National Museum of Natural History in Paris, at the Laboratory of General and Applied *d'ichtyologie.* This laboratory deals with fish, and solely with fish. My specialisation is the fish of the Southern Indian Ocean. For this purpose, I presented a thesis, what is called in France a *state thesis,* concerning the fish specifically of the zone of Kerguelen. That thesis was devoted to four types of fish of which one is the *legine.* A quarter of my address will be devoted to that; that is, the toothfish, in English. For 22 years now I have been working in the Southern Indian Ocean on board fishing vessels and scientific research vessels. At present, I have spent something like two-and-a-half years at sea in ships of that type.

Q What is your knowledge of the area and the species in question?
A My knowledge of the toothfish is acquired at sea. For that purpose it was necessary for me to do an immense amount of work as to the geographical distribution and depth distribution, migration and biological species. All these parameters were concerned in what is called the dynamics of an exploited fish population which makes it possible to manage the resources in a scientific way and to propose taking samples of one or other species, in this case the toothfish, of what in the short term – to say in the long term would be rather bold – would be the average value which could be extracted from the natural millieu without imperiling the species. That is the kind of work which I have been doing and for which I have been asked for an opinion.

Q What are your functions with the CCAMLR? Those are the functions you have described. Do you have other official functions? Do you have relations with other foreign scientists in this field?
A The CCAMLR for the conservation of the marine, flora and fauna of the arctic is a convention which relates to conservation and, according to its Article 2, with the rational management of the resource. Each year I am asked to give an opinion on the exploitation situation, the state of the resources and the French exclusive economic zone around Kerguelen.

I work only in that sector because that is the area in which I specialise. On the other hand, in that sector I work in collaboration with colleagues from South Africa, Australia and also with Russian and Japanese colleagues with whom I have considerable joint campaigns for assessment of resources, for example, the most recent being evaluation of the resource of longline fishing. That was carried out in 1996 and 1997 around Crozet and Kerguelen. The result of that evaluation campaign, not of any work which was personal and unique to me, the joint data for the international organisation being CCAMLR, the evaluation of the fish stocks, they give their views on the present stocks of fish in that area.

Q How are the stocks of toothfish managed?
A The toothfish is a fish which has special biological characteristics. It is a fish which can be 2 m 15 in length and 80 kilos in weight. However, there are problems with regard to its population dynamics. It is a fish which lives up to 30 or 40 years, according to the results of examination, and which is maturity late. This has consequences on the exploitation of the fish. This is stock which renews itself very slowly and for which over-exploitation has practically irreversible consequences. The stock cannot recreate itself rapidly. It is a species for which great care is needed in its exploitation. That great care is required both as to the stock and as to the means of fishing. In this southern area there are both trawling activities and longline activities. These methods of fishing have consequences for the stock. They catch different parts of the stock. The longline catches the adult fish and the trawling the younger ones. Enormous precautions have to be taken for the exploitation of this resource, which is called a long-lived resource, and therefore one which renews itself slowly. Each year we assess the state of the resource by one of the means I have mentioned to you. First, in vessels working in that area, we set observers aboard to accumulate the necessary statistical and scientific information needed to assess the stock. We use a mathematical model to project into the future to see whether or not we are operating on a viable level or whether on the contrary the stock is in good form.

Of course, steps have to be prepared for adaptation of the fishing – to know the number of vessels fishing and the amount captured when caught by this or that method of fishing, but also – this is the role of CCAMLR – to see the impact on the ecosystem. The Southern Ocean is perhaps a long way away for you, but there are birds such as the albatross, which also get caught by the longlines. That also has to be taken into account for the conservation and exploitation of the stock. That is why we have to say “Take care with regard to this method of fishing. You run risks both for the stock and for the environment”. With this method of fishing, there may be no risks to the stock but there may be risks to the environment.

The purpose of the management – because it is a managed stock – is to try to reach a compromise between the resource, the exploiter and future trends. We try to refine our results by more and more exact models. For that, of course, we need a lot of data, which is first of all obtained at sea by our observers.

Q Could you show us the positions at which the Captain of the *Monte Confurco* says that he fished? You have seen those. What is your view on that?
A You did give me these positions and on the basis of those documents I have endeavoured to see whether it was possible to carry out longline fishing in these depths. I only took the most recent positions with regard to the case before you today. I hope that you can see on this map where the *Monte Confurco* has been marked on 8 November 2000- and the position in which is supplied for 7 November and the period from 4-6 November 2000.

When you look at the most recent publications in this field, which concern the geographical and mathematical distribution of this species, they describe a distribution between about 70 metres depth and 1,500 metres. The upper level may vary by 50 metres or so, not much more. This publication has never been contradicted since it was issued.

If you look at the positions marked here, we have progressively isobars, that is, lines of the same depth, between 1,000 metres here and 2,000 metres here, 3,000 metres and 4,000 metres. You will note that the positions here are somewhat between the 3,000 metre and 4,000 metre isobars. From a scientific point of view, I cannot recognise the existing species at these depths. At that depth there are only local fish which cannot be exploited by this means.

I should also observe, in all this sector, in the CCAMLR zone here, statistical zone 58/1 of CCAMLR, in respect of which there is a special conservation measure which was decided upon last year and which forbids any exploratory fishing in that area since there are no fishable banks at that depth. Therefore, that is the situation as regards those positions supplied by the *Monte Confurco*. That is the only comment I have to make on those positions.

Q There were 158 tonnes of frozen toothfish on the *Monte Confurco*. To what overall tonnage would that correspond?
A You are, of course, quite right to make a distinction between what is already in the hold and what has been fished. What is in the hold is transformed fish. The figures that have been supplied to me, in which I have the fullest confidence -- the fish aboard the *Monte Confurco* had had their heads and tails cut off and their insides taken out. When the observers on board applied the conversion factor on the basis of what I may call for short the cut-down fish, one can calculate the original full length and weight of the fish; the fish inviscerated with their heads and tails cut off, and the relation between that and the living fish. If we take 158 tonnes, the conversion factor relevant to this type is somewhere between 1.66 and 1.75. That implies a catch in gross tonnage of about 260 to 270 tons of the whole fish. So, the figure you should consider on board the ship is not 158 tonnes but 270 tonnes of fish caught. When the CCAMLR, for example, lays down measures of conservation with a given tonnage, it always refers to gross tonnes, not transformed tonnes. That would otherwise give rise to improper adjustments. When you have a total allowed

catch, you have to apply the amount of the catch in gross tonnes so that is the relationship between 15 tones and the figure which we put forward of 260 to 270 gross tonnes.

Q What is the amount of a quota for one vessel and one season?
A It all depends on whether we are talking about our EEZ or the CCAMLR zone. It is easiest to give you the figure for our EEZ. In our EEZ the quota allocated to fishermen who have been given authorisations to fish are of the order in gross weight, taking all the fish together and all methods, about 500,200 tonnes. If you take account of the number of vessels which have been given fishing licences, six of them, that means an attribution per ship of about 850 tonnes per vessel. That is an annual attribution for one ship in the French zone, the zone of Kerguelen; that is 800 to 850 tonnes to be caught between 1 July of one year and 30 June of the following year, that is a southern year.

Q In assessing these quotas for next year, will this amount be deducted from next year's quota?
A The statements of the Captain give rise to no doubt. These were catches in the southern zone. Why do I state that? Because, quite simply, to the north of 45° south, in the zone outside the CCAMLR zone, the depths are so deep that there is no line fishing so the fishing must be carried out in the CCAMLR area. It is clear that the 260 or 270 tonnes will have to be deducted from the general biomass, which will affect the establishment next year of new TACs, total allowable catches, for legal purposes. Of course, anybody who indulges in illegal fishing is not taken into account. This is for the legal fishing.

MR TRINQUIER: Mr President, I have finished my examination. I have no more questions to put to Professor Duhamel.

Cross-examined by MR GALLARDO:

Q (Interpretation) Professor Duhamel, I have read with great interest the articles you have published in various reviews. The figures for Seychelles catches, SHL fishing catches, in carrying out line fishing, and fishing according to CCAMLR regulations, can you confirm that those figures were available to CCAMLR and are published or available for publication?
A In reply, I must draw a distinction between a fishing log and what is called a catch document system, a CDS. A CDS is not a fishing log for the commercialisation of fishing. I cannot reply to your question because the Seychelle vessels have not produced fishing logs. I work solely on the statistics officially supplied on the basis of fishing logs.

Q My second and last question is: why is it given by CCAMLR on the basis of 1972 regulations that to the north west of Kerguelen outside the exclusive economic zone, that is to say the zone at 58/1 – can you assert that there is no possibility of fishing there?
A Quite frankly, zone 58/5.1 is not the forbidden zone, the zone forbidden for fishing by CCAMLR. It is also in 58/5.2 and zone 57. These are subject to identical measures for closure to fishing each year. These measures are adopted each year to see if there is any need to adapt them in those zones. Why is there that

prohibition of fishing? Because those zones do not make it possible -- the stability of the fish – on the banks which are available for fishing. At depths of 3,000 metres you will not find fish, so you cannot open a zone for fishing in that case. It is as simple as that.

THE PRESIDENT: Thank you very much. The Agent for France may resume his presentation.

(The witness withdrew)

MR TRINQUIER (Interpretation)**:** Thank you, Mr President. With your authorisation, I shall now hand over to Professor Quénedec, who will analyse the criteria for the reasonableness of the bond. He will be followed, perhaps after the usual break, by a speech by M. Belot, who will deal with the reasoning of the French *judge de premiere d'instance* with regard to the facts of the case and the French regulations in the matter. Professor Quénedec will then return in order to conclude briefly on the legal position of the Captain of the vessel.

MR QUENEDEC (Interpretation): Mr President, members of the Court, it is a great honour to appear once again before this International Tribunal for the Law of the Sea on behalf of the French Republic; a Tribunal which is now installed in its new premises on the edge of the water. Also, one must mention a difficult task given the fairly short time limits which are inherent in the urgency implied by the procedure of Article 292 of the Convention on the Law of the Sea.

It is for me to lay before you a number of elements which concern the reasonableness of the bond called for by France as a condition of releasing the *Monte Confurco*. The concept of reasonableness is at the very heart of the present case. This concept, one might say, dominates the essential question laid before the Tribunal.

The Tribunal is called upon to pronounce on the question whether the allegation is well founded that France has violated Article 73, paragraph 2 of the Convention by arresting the *Monte Confurco* and subjecting the lifting of that seizure to the payment of a bond which would not be a reasonable one.

The Tribunal is not called upon to find whether or not the French judge who ordered the payment of this bond of FF 56 million was right or wrong in doing so. Counsel for the Republic of the Seychelles this morning apparently wished to transform Article 292 proceedings into a sort of appeal, a systematic appeal against our national judicial decisions.

That is not the purpose of these proceedings or of this court. The problem is solely whether the bond fixed is or is not a reasonable one in the present case.

This concept of what is reasonable or the reasonable bond is not defined in the Convention, for the concept of what is reasonable is one of those for which the scope and meaning are left to be judged by those who have to apply and interpret the Convention. That means that the role and the responsibility of an international tribunal called upon to decide a dispute are extremely important. Here the court has to decide, by giving a precise content to this concept, what is reasonable.

In such a case, you will certainly observe what three former Presidents of the International Court of Justice once called the frustration of a praetorian guard, to take the formulation used in a joint opinion of the late Judge Ruda in Jimenez de Arechaga v President Bedjaoui. It is for a judge -- in this case yourselves -- to put money into the concept of what is reasonable in order to apply it to the case which is now before you. In doing so, as a judge, you members of the International Tribunal on the Law of the Sea will find it difficult to be inspired by the words of Confucius: "If I were an emperor, I would start by writing a dictionary, so that I should give meaning back to words". Indeed, the word "reasonable" and the expression "reasonable bond" cannot be defined in any general or abstract manner. This word and this expression are not comparable to a crystal ball. Their meaning is not immutable. Their meaning may vary according to circumstances and to periods of time. One can, no doubt, apply here to the word "reasonable" what Chief Justice Marshall said in 1819 about the word "necessary" in a matter of McCulloch in Maryland before the Supreme Court of the United States. He was saying in respect of the word "necessary" that (continued in English) " it has not a fixed character peculiar of itself. It admits all degrees of co-operation". This word, like others, is used in various

senses and in its construction the subject, the context, the intention of the person using it are all to be taken into view."

(Interpretation) Therefore when one speaks of "reasonable bond" within the framework of the procedures of Article 292 of the Convention, one is led to place this formula "reasonable bond" and compare it to something more circumstantial and balanced; in other words, one has to compare it with what is appropriate. Appropriate relates to circumstances. One does understand that the French version of the text of Article 73 para.2 of the Convention of the Law of the Sea uses the expression "une caution ou une guarantie suffisante". In other languages one talks about a caution or a guarantee which is reasonable -- in French "suffisante" and in other languages "reasonable". It boils down more or less to the same thing but there is a difference.

In the case of the *Camouco* the Tribunal indicated the elements that might, amongst other things, turn as criteria for assessing the reasonable character of a guarantee. It is enough to refer to paragraph 77 of the finding of 7 February 2000, which states that, amongst the elements to be taken into consideration, there are four base criteria: the seriousness of the alleged violations; the sanctions due to the abdication of the regulations of the state; the value of the immobilised ship and the arrested cargo; and the amount of the bond and the form in which it is required.

If one takes the first criterion adopted by the Tribunal in the earlier case, the seriousness of the violation, there is really no point in spending a lot of time on this now. The nature of the violations found are in respect of the *Monte Confurco* and their degree of seriousness can be seen from the statement of fact which the French Government presented to the Tribunal.

The nature of these violations and their degree of seriousness can also be seen from the various procès-verbaux and findings which were made and handed to the Tribunal. In the presentation made by the French Agent at the beginning of the hearing, there are reminders of this.

Now I shall confine myself merely to noting that these facts speak for themselves

and leave no doubt about the absence of reasonable doubt. In other words, there is no reasonable doubt relating to the reality of the violations committed and on the particular seriousness which they possess.

A shipping vessel under the Seychelles' flag was presented to us this morning as sailing down a straight line via the French Economic Zone around the Kerguelen Islands and transiting between two points situated outside this economic zone. Let us admit this is so. Fine, but this vessel when it is called by radio starts changing course; it zigzags and several times it changes direction. Its crew jettisons various objects and documents. The Master of this vessel very hastily destroys several documents, but the visiting team from the surveyors' vessel, the *Floreal.* has already boarded *Monte Confurco.* Certain documents were blown back by the wind and they found that these were written documents which the Master was trying to destroy. These are not facts which can be said to be trite. They definitely signify something.

If we take the second criterion to be implemented, the criterion relating to sanctions which might be applied under French legislation, yes, the fines which are set out by International Tribunal for the Law of the Sea, the legal provisions relating to sea fishing and the exploitation of fish in southern seas, provide for very high maximum fines. The reason for this is that it is not just a matter of penalising violation of national rules adopted according to the international commitments of France but up to a point it is also a matter of giving these sanctions when they are applied dissuasive effect to the extent that the characteristics of the zone of the southern seas makes it easier than elsewhere to disregard domestic and international rules which are intended to conserve biological resources and especially the marine biological resources which are most fragile.

As far as that maximum amount is concerned, the various fines are provided for under French legislation and we will come back to later to what those involve in this particular case.

I now move on to the third criterion which was identified by the Tribunal in the earlier case of speedy release. This relates to the value of the vessel. Unless the Tribunal itself requires an expert opinion and would designate an expert to carry it out, the

Tribunal cannot but find that there is a disagreement between the two parties relating to the value of the ship. The Applicant puts forward an assessment between FF 3 million and 4 million and the two expert opinions carried out by the French say it is between FF 12 million and 15 million. There is a difference of FF 9 million between these two assessments. Is this just a random fact? However, the difference of FF 9 million corresponds to the estimated value of the seized cargo.

I think that one should note that, by fixing the amount of the bond, the French Judge merely looked at the assessment of the ship, the first one made on the spot by an expert in the Department of Réunion, and he did not take into account the value of the cargo which had been seized. Of course this cargo was also seized and legally it was part of a different seizure. We must not forget that in this matter there were three different seizures: that of the vessel; that of the cargo; and that of the fishing gear..

When the French Judge on behalf of the Ministry of Marine Affairs had to say something about the conditions under which a release of the vessel could take place, it was quite logical that the French Judge should have focused on the value of the vessel, without taking into accent the value of the cargo. M Belot will talk about that later and develop in further detail the fourth criterion relating to the form and nature of the bond, which is in fact the fourth element that the Tribunal had identified in the preceding case of *Camouco*.

However, as President and Judges of the court, apart from these four criteria, there are other elements in assessing the reasonable nature of the bond in this particular case. The two parties agree on that. The Agent of the Republic of Seychelles recognised this morning that, apart from these four criteria, there were other parameters to be taken into account. I would, however, like to point out to him that the parameters which he mentioned are not particularly relevant to my mind. The Agent for Seychelles said that, amongst the circumstances which the Tribunal had to take into account, there were factual elements, such as the fact that the Seychelles flag is not a flag of convenience and that there were regulations in the Seychelles relating to the exercise of fishing activities, and not only in the Seychelles

zone but also for vessels under the Seychelles' flag. That is all very well but it does not really seem to be relevant to our case.

To mention these parameters is rather like the driver of a motorcar who is committing some sort of violation, such as driving too fast, where he invokes attenuating circumstances -- and I understood that this indeed was the purpose pursued by the Agent of Seychelles -- saying, "My car is properly registered and I have paid the full price. I am a driver who has several university degrees". I do not think this can be classed as being relevant in respect of violation. It is really the same for the parameters which were put forward this morning. These parameters have no or hardly any direct connection with the circumstances of our present case. As far as we are concerned, we continue to believe that amongst the other elements of assessment of the reasonable nature of a guarantee there are those which we have already mentioned in the written submission. They concern, as we said earlier, the general context of illegal fishing in the area, to which of course we have to add the special legal context in which this particular case should be placed.

When we are talking about the general context of illegal fishing, uncontrolled fishing and undeclared fishing in the region and the dangers which that represents for the conservation of stocks in the southern zones, this of course can constitute a criterion of assessment of what may be considered reasonable in a particular case and in the light of surrounding circumstances. This aspect shows a bit more clearly the need that I spoke about earlier for all coastal states of that region. They have to carry out dissuasive activities and therefore they have to fix bonds which appear to be very high. The amounts of bonds which apparently seem to be very high are in fact negligible if you compare them to the actual benefits achieved illegally by owners of fishing vessels. The least one can say about them is that they are not very scrupulous when it comes to respecting laws and regulations, whereas they do have the financial means to use all the possible procedures, both domestic and at international level, in order to try to escape fines and penalties. We have to take this background in to account.

As I was saying before, we also have the special legal context within which this present case moves. We cannot lose sight of what is actually involved in this

procedure. The question is this. Yes, or no: has France misunderstood the provisions of Article 73 para. 2 of the Convention? In other words, the question and the only question which the Tribunal should deal with bears on the implementation of the laws and regulations of the coastal state in the case of a fishing vessel being arrested.

To pose such a question means that one is faced with the problem of the sovereign right of the coastal state in its EEZ because the legal framework is that of the discretionary powers of assessment which lie in the coastal state in its EEZ. I was talking about discretionary powers. This does not mean that this is an arbitrary power. On the contrary, as highlighted in particular in 1986, in the arbitration finding between Canada and France in the matter in the St Lawrence Gulf. The coastal state must reasonably exercise its discretionary powers. There we find the word "reasonable" again: the reasonable exercise of its sovereign rights by the coastal state. That is precisely the purpose pursued by Article 73, para 2. 2 of the Convention. The coastal state has the right to seize foreign fishing vessels which are violating the rules but it must also not detain these fishing vessels to excess. On the contrary, the immobilisation of the vessel should cease as soon as a reasonable bond has been posted.

One can easily understand that the counsel of the other party have indicated relatively clearly that their aim in this case was to obtain from the International Tribunal for the Law of the Sea a reduction in the amount of the bond required by France. This morning they went so far as to moot that this might perhaps be the subject of some bargaining but. for a request presented under Article 292 to be successful along the lines hoped for by the other party, the applicant would have to provide very strong bases to the International Tribunal for the Law of the Sea to reduce the amount of the bond which was fixed by a national judge in line with domestic legislation.

This is not only where the applicant, in this case the Seychelles, must demonstrate that the allegation of a violation of Article 73 para 2 is well-founded, but by implementing the powers under Article 13 para 2 of its rules, the Tribunal cannot in

the name of the autonomy of a concept of international law consider that it is totally free of the applicable rules and of decisions taken in a national framework.

That would not be relevant. The legal rules and the internal judicial decisions do not, of course, bind the International Tribunal for the Law of the Sea, as such, as legal rules or as a legal precedent. However, the international judge must not disregard them. They are part of the facts. He cannot disregard them when they happen to be relevant. Their relevance and their degree of relevance arises from the fact that the amount and form of the bond required in this case result from the implementation of national rules by the domestic judge, who cannot disregard them. Therefore, the reasoning followed by the French Judge of the Court d'instance de Réunion when setting the guarantee and the manner in which he had reached this decision – in other words, the rational and reasonable nature of the action of the French judge – is one of the elements that the Tribunal should take into account. That is the reason why, in the following intervention, M Belot will discuss this item.

I have now finished. I thank you, Mr President and Members of the Tribunal. You may find it appropriate to take a break now.

THE PRESIDENT: If that is the desire of the French delegation, we shall adjourn for 15 minutes.

(Short recess)

THE PRESIDENT: I now give the floor to the Agent of France.

MR BELOT (Interpretation): Mr President, Members of the Tribunal, I have the honour to demonstrate to you that the reasonable bond set by the French judge was fixed on the basis of a particular strand of reasoning, so the provisions of the Montego Bay Convention and the provisions of French municipal law are perfectly to be reconciled and indeed supplement each other.

One should observe that the Order of the French judge expressly refers to Articles 292 and 73 of the United Nations Convention. Of course, they are the provisions of

French internal law, which the judge had to apply. He had no other option. Consequently, the applicable provisions governing this case are Articles 142 of the Code of Penal Procedure and 19 to 26.

Before going into the details of these provisions, I should like to emphasise that it is quite exceptional that a civil judge should be called upon to pronounce on the amount of the bond for a breach of the criminal law. Normally, it would be the *Tribunal Correctionelle* that would determine the amount of the bond. If with regard to fishing offences the competence is held by the civil judge, this is because the civil judge is the natural custodian of property. It is his habit to ensure that nobody is wrongfully robbed of his property. Therefore, it is a supplementary precaution taken by the legislator to entrust this case to a judge who will not in fact ultimately have to judge the case.

What is the French judge to do when the maritime authorities of the country come before him and transmit to him the record of the apprehension and the supporting documents? First, he has to endorse the apprehension, the seizure, and then he has to fix the amount of the bond for the release of the vessel. Validation of the seizure requires a formal examination of the documents in the case in order to ensure that there is no defect in the procedure. At the same time, he has to assess the amount of the bond, which in this case was a reasonable one.

What does the judge do to carry out this assessment? There is an indication in the text of what he has to do. First, the purpose of the bond is to ensure that the defendant, that is to say the master of the vessel, will reappear, and, secondly, to ensure that the judgement can be carried out. That is not the same as the payment of fines. It is possible that there may be supplementary penalties. In addition to fines, confiscation may also be ordered. The judge has to take all these elements into account to fix the amount of the bond. That is why he first takes into account the value of the vessel. He takes it into account because it may be that the vessel is going to be confiscated. If it appears that an offence has been committed, there is a high degree of probability that the vessel will be confiscated, which in fact has occurred in most of the cases that have been submitted to the *Tribunal Correctionelle* in Réunion.

On this point, there is some disagreement between the Applicant and the French Republic as regards the value of the vessel. You will note that the French judge gave his decision on the basis of a judicial, expert report. It was difficult for him to act otherwise. He is bound to proceed to an assessment prepared by an expert approved by the Tribunal. To show that that valuation is not an arbitrary one but responds to the factual situation, we have also supplied to the Tribunal another valuation that arrives at more or less the same figure.

I note that, although there is disagreement with regard to the value of the vessel, the purchase act of the *Monte Confurco* has not been produced, even though it was sold as recently as December 1999, nor has the insurance policy been produced, which would show what the insured value of the vessel was. I believe that those documents have not been supplied because they would very probably show that the true value of the vessel is really FF15 million. There is absolutely no reason to disregard the valuation adopted by the French judge. The first point to be taken into account is the value of the vessel, in case the vessel is subsequently confiscated.

The other element that the judge took into account - and he followed the case law of this Tribunal – was the amount of the fines incurred. I think that it should be made clear that when the judge dealing with the seizure carries out this assessment, he is not --

(Difficulty with interpretation)

THE PRESIDENT: There seems to be an interpretation problem. We are not getting the English translation.

MR BELOT (Interpretation)**:** Thank you, Mr President. I was saying that the judge does not pronounce whether the facts have been proved. He pronounces on the likelihood of the facts being proved. He pronounces that it is likely that *this* or *that* amount of fish has been caught and consequently that the maximum amount of the fine will be fixed, and that was fixed at a certain number of millions of francs.

It is possible to follow very closely how the judge reached this figure. There were two offences for which the Master of the *Monte Confurco* was being prosecuted. The first was that of entering the French EEZ without notification. The second was that of unlawful fishing.

The first offence was not disputed. I think it would be extremely difficult for the Master to dispute the fact that he was caught in the EEZ without having announced his entry. Therefore, a fine of FF2 million could be imposed. In his statement, Captain Argibay said that he was travelling from one point to another, and the explanation that he has given is not very credible. He says that he was to the south-east of the zone of Kerguelen, whereas he recognises that he would have to go back to Port Louis to unload his catch. There is some contradiction in going so far from his home port, explaining that there was very little time for fishing. It is not a question of innocent passage. I therefore think that the first offence is very probably proved. It is very probable, therefore, that the fine of FF2 million would be imposed.

The second offence for which he was prosecuted was that of unlawful fishing. In order to see this offence in its proper light, one must ask two questions. First, was the *Monte Confurco* fishing? Secondly, in the light of the tonnage caught, how long had the *Monte Confurco* been fishing?

With regard to the first point, there is a certain amount of material in the dossier that enables one to conclude that most certainly this offence was committed. This morning you were told that the dossier was empty. To paraphrase a celebrated French judge, “On the contrary, it is full right up”. There are plenty of elements that are troubling or even overwhelming. Fishing can deduced, first of all, from the buoys nearby, which were picked up by the *Floreal*.

I am aware that an expert has been cited by the Applicant, and I can guess what arguments are going to based on that – the same that are regularly given in the criminal courts when these cases are heard, that is that there is only one supplier of such buoys and, therefore, all these buoys are identical, so that necessarily the buoys that were found in the sea could have been on any other vessel. However, if one looks more closely at these buoys, one finds that this is not a credible

explanation. First, a buoy is a complicated object made up of several elements. There is a battery and a lamp, and there are weldings in the body of it. The prosecuting authorities carried out a very careful comparison of all these elements and picked out only the relevant elements, namely the fact that a weld on one of the buoys found at sea was exactly the same as the weld on a buoy on the vessel.

As it happens, there are 20 points of resemblance. 15 of those are unique to the bateau. With regard to the knots, for example, one cannot say that all knots are the same. Nor can it reasonably be contended that these buoys were lost by some other ship. Once these buoys are in the water, they lose their buoyancy and disappear after a while. That means to say that those buoys must have been put into the sea fairly shortly before. Unless the Master can show to the contrary, those buoys very probably belonged to the *Monte Confurco*.

Furthermore, when one looks at the reports drawn up by the French observers, it will be found that a longline was about to be released and that a certain amount of bait was already on hooks. Although the *Monte Confurco* had been ordered stop, although a helicopter was stationary above the vessel with a banner reading “Stop”, the *Monte Confurco* did not stop, but, for two hours cases of bait were thrown overboard. Why were they thrown over? Because it was frozen bait that was ready for use. Only a few were found left on board. It is therefore perfectly clear that preparations were being made to let out a line.

This offence of fishing is therefore highly probable, and the judge could perfectly reasonably conclude that the *Monte Confurco* was engaged in illegal fishing. There is also a very strong chance that it had been doing so for a number of days. What elements permit one to draw that conclusion? First, the captain endeavoured, as far as possible, to delete as many of the weigh points on the GBS and to delete as much data as possible from the computer. All the same, a number of weigh points were found, and all those weigh points were within the EEZ.

This is reinforced by the statements by the crew. All members of the crew were interrogated. Not much information was obtained. However, three of them stated that they had been fishing up to 8 November. They explained that a buoy and a line

were placed at the end of the morning of 7 November. Another crew member said, "Before you arrested us, we had been fishing for two or three days". That shows that very likely it was not the beginning of fishing activity but that the ship was caught when it had already been doing so for some days. In those circumstances, it may be thought that if the Master cannot prove the contrary, it is very probable that he is guilty.

What was the attitude of the Master? The Master continually concealed elements of evidence. He denies everything. He disputes everything. He recognised that these are the same sort of buoys but he said that they do not belong to him. The only thing admitted by the Master, and it is rather curious, is that he destroyed some documents; he tore up some documents and threw them in the sea. When he was asked what they were, he said that they were positions of other vessels which were fishing in French waters. That is remarkable. Why should a master note down the positions of other vessels? He was asked, "Why did you tear up these documents?" He did not think that those were the positions of the *Monte Confurco*. That was absolutely startling, that the Master of a fishing vessel should carefully note the positions of his colleagues and not keep any log or fishing log. He was asked to produce his log book to see if it was properly kept. The fishing log was only 500 sheets, quite separate and which, curiously enough, did not go beyond 6 November. Why was that? Because he had not had time to catch up to 8 November and had been interrupted before then.

I think that one may consider that it is highly probable that the Master would be convicted. The amount of the bond corresponds to the payment of the fines. The judge had to follow a certain strain of reasoning to arrive at the figure he fixed. Article 42 of the Code of Criminal Procedure provides that a figure must be attached to each head of offence, so some to the representation of the Master, to the civil party; to damages to holders of the quotas; the value of the vessel and the payment of the fine. We end up with FF 56 million. From those figures, FF400,000 is for the civil parties and one must deduct FF 15 million for the value of the ship. The total amount is FF 40 million. One can then deduct FF 1 million for ensuring the presence of the Master. That leaves FF 39 million to meet any fines which might be imposed on the Captain and the *Monte Confurco*.

Of those FF 39 milliion, I would recall that there is FF 1 million which corresponds to entry without notification. On that subject, contrary to what has been said by the other party, there is not FF 1 million to cover both the failure to notify entry and the first two tonnes. There is FF 1 million strictly for the failure to notify entry.

In France you have the non-accumulation of penalties but that applies to imprisonment and not fines. There is no accumulation between these two. So, the figure of FF 39 million corresponded to the unlawful fishing. FF 1 million fine was incurred by the first two tonnes and then the fine may be FF 500,000 per tonne above that figure. That figure that was adopted corresponds exactly to 158 tonnes of unlawfully caught fish. In the hold of the *Monte Confurco* 158 tonnes of frozen fish were found. We have also seen that that corresponded to about 270 tonnes of gross toothfish. So, the judge found that the maximum which the Criminal Court could consider; that the whole of the catch might have been caught unlawfully. There is no legal presumption to the effect that that 158 tonnes had been caught in the exclusive economic zone.

There was a very moderate application of French law, which was made by the French judge. The judge has been criticised for not having taken into account the value of certain other elements and incorporating them into the bond figure. For example, in particular it is said that he did not take into account the value of the fish, the value of the bait nor the fuel oil. That requires some explanation on my part.

When a vessel is arrested for carrying out illegal fishing the Maritime Authorities must seize the catch and also catch the bait and the equipment. That is an obligation. This is a totally different procedure with which the judge does not have to deal. Like your Tribunal he only has to concern himself with the seizing of the vessel, the apprehension of the vessel, and not the other seizures. There are two quite separate reports drawn up of these two seizures.

I observe that the Applicant was not deceived because it has told us that it brought proceedings before the Administrative Tribunal to dispute directly the seizure of the catch. The unloading of the catch was simply an act of seizure. There are thus

distinct heads on which the criminal tribunal were subsequently to decide. It was then open to it to confirm the confiscation of the catch or to order that it be given back or replaced by financial compensation. These are two matters which are quite distinct.

With regard to the bait, of which it is said that the judge took no account, it remains available in la Réunion. It has not been seized and can be taken by the owner of the vessel. As for the fuel, which it is said was not taken account of, the judge said that they entirely understand the argument of Seychelles, but it was the fuel oil which was in the tanks of the vessel. That will only be relevant when the vessel buys it back in order to leave after the bond has been posted. All this did not have to be taken into account by the judge of Saint Paul and does not need to be taken into account by you.

As regards the form of the bond, there again the judge merely followed the provisions under French legislation. Nonetheless, he was requested to set this aside and to state that the bond will be in the form of a banker's guarantee. This is not possible under the French Criminal Code. Under French law one can settle a bond only with a certified cheque, in cash or in a banker's draft. This is handed to the Tribunal of First Instance. If it is cash, it is paid into the C*aisse des Dépôts et Consignations.* Why does one require that? The Criminal Court has already given its views on this, stating that there were no other possibilities under French law. So, one should understand the reason for this. The purpose of the bond is to implement the decision through the payment of fines. It is very easy to make sure, especially for somebody who does not reside on French territory, that such a decision is never implemented and that the fine is never paid. Therefore, one has to say that the decision is definitive. That is not difficult to do. In fact after the first judge of the Criminal Court has given its views one can appeal against that decision. Obviously, the person charged, the Captain in this case, would immediately leave the territory of la Réunion and one would never be able then to call him to come back before the Court of Appeal. In other words, the decision would be given by the court in the absence of the person involved. One can oppose that.

Up until now, one has never yet been able to signify a decision of a Court of Appeal to a master of a fishing vessel. Unless the Captain is again arrested by the French authorities, he would always have the possibility of appeal. If a decision is given by the Court of Appeal, any delay involved would never start because one would not be able to signify the judgment. Because there is no possibility for that under French legislation, one would have to require the entire payment of the bond. One has already mentioned commercial practices and one sees in commercial matters it is enough to have a banking guarantee. That, of course, is true except that the provisions are not the same. It is possible to have a decision by the Court of First Instance by a provisional implementation because a judgment like that would first have to be signified.

I realise that all this may sound a little tedious, but there are practical reasons which lead the judge to require that the bond be paid by a certified cheque. A number of decisions were mentioned in order to show that in the past there have been fines that were paid and that the amount of the fines was not very high. I can guarantee that those decisions were selected very carefully. You will find that the oldest and most favourable cases were presented here. As to the decision relating to the *Camouco*, it is shown that the fines were paid, but I confess that the decision can be interpreted in two ways. The Criminal Court considered that it was not established that the whole of the cargo had been fished illegally and therefore decided on a very moderate fine. Your jurisdiction fixed the bond at 8 million and the shipowner made a very simple calculation. It cost him less to pay 3 million than to maintain banking of 10 million, which of course he did not have to pay. But this affected his accounts. So, in fact, this is the only case where no appeal was made and the fine was paid. There are no other cases. No fine up until now, except the one relating to the *Camouco,* has ever been paid.

In order to avoid this system becoming a custom, you are being asked to take account of the French regulations and to admit the fact that the bond will have to be paid in the form of a certified cheque. Thank you, Mr President and judges.

MR QUENENDEC (Interpretation): Mr President, judges of the court, I apologise for taking the floor again. I would merely like to draw your attention to one matter. So

far we have been speaking of vessels, fish and bonds but there are men on board ship. Every vessel is under the command of a master. For a few brief minutes, I should like to speak of the position of the Master of the *Monte Confurco.* Indeed, the fifth written conclusion tabled on behalf of the Republic of Seychelles requests the Tribunal to require from the Republic of France a swift release of the Captain without payment of any bond in view of the fact that the vessel, cargo, etc are a reasonable guarantee; that one cannot impose on him a penalty of imprisonment and he is a citizen of a country of the European Community.

The Captain of the *Monte Confurco* has been immobilised on the territory of the island of la Réunion. One has to see that in the legal and regulatory system of France – there is nothing special about it in this case – there is a concentration; one focuses on the Master of a shipping vessel and on the applicable penalties which might be applied to him.

I shall start by pointing out what has already been stated by other members of the French delegation. The Master of the *Monte Confurco* is not presumed to be guilty. Contrary to what the Applicants say, there is no presumption of guilt. They have even written that there was a terrible system of presumption and that France would try to apply this systematically and it might even be a sort of presumption *de jure,* an irrebuttable presumption – there is not. All there is is a discussion of the proofs which had been collected by the agents surveying the fishing system and the police when the crew and the captain arrived at la Réunion. As we have already stated, what does all this show? It shows that there exists several serious clues which tally and which seem to establish the fact that there was a violation.

Just to remind you, it has been established that no other fishing vessel was within the sector where the *Monte Confurco* was found. No other fishing vessel was at less than 50 sea miles. In other words, there was no other fishing vessel at less than six hours of sailing from the place where the *Monte Confurco* was found. However, buoys were found in the sea. Buoys of these longlines were found close to the point where the *Monte Confurco* had been detected. Distances vary between half a mile to 7 miles. In other words, these are distances which would lead you to believe that those buoys could, indeed, have been laid by vessel *Monte Confurco.* This morning

it was said that the frigate *Floreal*, when it brought up these buoys, had cut the lines and had brought up both the buoys and the anchor but had not brought up the longlines.

I think that it is enough to point out two things. Firstly, apart from certain odd things like the yellow submarine, war vessels or fishing surveillance vessels are not equipped to bring up longlines. It might even be very dangerous for them to do so. On the other hand, the Master of the frigate had no powers whatsoever to impose on the *Monte Confurco* the duty to lift these longlines itself in order to find out whether indeed whether fish were caught and whether there was bait present and make comparison.

One cannot approach the *Floreal* for that. In other words, we have a number of serious clues which seem to prove the existence of a violation. The reality of these violations is where adversaries have said, "This is very peculiar". The agents surveying the fishing sector in their procès-verbale have mentioned four violations but finally only two violations were retained. They seem to think that it is a very good thing perhaps that the refusal to obey the orders of the *Floreal* and to obey these orders within a reasonable time was not accepted as being guilty of flight and that there was no flight. However, one cannot invent this element in order to minimise the seriousness of the other violations which were adopted and with which the Master is being reproached but he is not considered to be guilty *a priori*.

All this is based on the procès-verbaux which were written by agents under oath. I really do not see officers of the French national navy being governed by bad temper and systematically setting out procès-verbaux which would deform the facts, and nor do I see the authorities of the legal system interrogating the Master and the crew and trying systematically to deform the facts.

Procès-verbaux are in fact protocols which set out the events and the agents under oath merely set down what they have seen and what has happened. The legal value of these procès-verbaux, of these protocols, is very simple really. Article 430 of the Civil Code of Criminal Procedure in France provides that, except in cases where the law says otherwise, the protocols and the reports setting out violations are valid only

as information, that the national navy and the naval police have collected information and all the information is concordant. However, these procès-verbaux are valid only until they are disproved. Procès-verbaux are means of producing proof and the judge, once he is aware of these elements -- and Article 427 of the Code of Criminal Procedures is quite formal about this and says that violations may be established by any kind of proof -- will decide according to his best judgement and the judge can base his decision only on proof with which he is provided during ht debate between both parties.

So the procès-verbaux are just one way of producing information, no more than that. It is on this basis and within the framework of the situation that was explained earlier that, after being questioned, the Master of the *Monte Confurco* was brought before the court and placed under court supervision.

I would like to point out that the statement made by the Captain was made once the vessel reached port. The statement was not made, contrary to what was rather loosely said this morning, before the military police, the gendarme. No doubt these gendarmes in France, as in some other countries, do have military status but, above all, they have another role and especially in respect of legal maters. So the hearing was conducted in front of the gendarme but just as is done with ordinary accused, such as thieves. This is where there is a difference from the *Camouco* case. There was no legal case opened with a period for instruction but the whole matter was brought directly to the criminal court. This was done as soon as possible. As we said before, this hearing will be on 9 January next year.

The Captain is under court supervision. This court supervision as such means that he had to surrender his passport. If he cannot leave Réunion and the legal area of the island, he is nonetheless free to move around as he wishes wherever that is in the Department of Réunion..

Mr President, it is already rather late. Therefore, I could perhaps tell you a little tale, as someone tells a story to children who have been particularly good. The best confirmation that we can find as to the very great freedom of movement enjoyed by the Master of the *Monte Confurco* is that naval officers of the *Floreal* when they

arrested the *Monte Confurco* recorded a video cassette in order to show quite clearly that the team visiting the *Monte Confurco* came by helicopter and was not doing anything wrong, but at the same time they did want to film what was going on and provide to the competent authorities a picture of what was actually on board ship and what was going on there. This videocassette is part of the dossier. Unfortunately, it was immediately put away. It is a secret now. We would like to have been able to show you this videocassette but we have been unable to do so. Why is that? In the French legal system when an item like that is placed under proper seal by the magistrates involved, the seal cannot be removed or broken except in the presence of the accused or of his lawyer, of his counsel. His counsel could not go to Réunion for reasons I do not understand and the French authorities did not know where the Master of the *Monte Confurco* actually was in Réunion. So it was impossible to break the seal because one was not able to find the Captain, Mr Argibay, in town. He is free to move around the territory of Réunion as he wishes.

I wanted to mention these few elements to you on behalf of the French delegation and on their behalf I would like to thank you for your kind attention.

THE PRESIDENT: You have completed your presentation now. The hearing is adjourned until 10.00 tomorrow.

(A*djournment*)