

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



2000

Public sitting

held on Friday, 8 December 2000, at 10.00 a.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

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 |
| | Edward Arthur Laing |
| | Tullio Treves |
| | Mohamed Mouldi Marsit |
| | Gudmundur Eiriksson |
| | Tafsir Malick Ndiaye |
| | José Luis Jesus |
| Registrar | Gritakumar E. Chitty |

Seychelles represented by:

Mr. Ramón García Gallardo, *Avocat*, Bar of Brussels, Belgium, and Bar of Burgos, Spain,

as Agent,

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

as Deputy Agent,

and

Mrs. Dolores Domínguez Pérez, Attorney, Bar of La Coruña and Brussels, Legal Assistant, S.J. Berwin & Co., London, United Kingdom, Brussels, Belgium,

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,

1 **THE PRESIDENT:** I give the floor to the Agent of the Applicant.

2

3 **MR GALLARDO** (Interpretation): First, I would like to ask the President whether it is
4 possible that, apart from the two matters of our submission, I can have the extra
5 20 minutes that you promised me if we do not manage to finish in time.

6

7 **THE PRESIDENT:** You can, yes.

8

9 **MR GALLARDO** (Interpretation): Mr President, Members of the Court and
10 Representatives of the Republic of France, first, I should like to say something about
11 the comments made by the Representative of France relating to the legal assistance
12 selected by the Republic of Seychelles.

13

14 First, it has become more and more usual at international level to use specialised
15 lawyers who know the particular legal situations well, because they are becoming
16 more and more complicated. It is not just before the international tribunals that one
17 has representation by external lawyers, not only representatives of states and
18 professors, but there are other tribunals where one has had an opportunity of
19 representing several companies.

20

21 If one accepts the dossier such as that which entertains us today, everybody is
22 entitled to defence. A thief is so entitled. Why not a ship's owner? It was the choice
23 of the Republic of Seychelles to decide who its counsel and legal representatives
24 should be at this international level. It is inadmissible to have a note-verbal from the
25 Republic of France addressed to the Representatives of Seychelles regarding this
26 matter. I have not read the text of the note-verbal where they are trying to set out
27 that there is no need to have foreign lawyers. Furthermore, if we have selected an
28 international team, it was in order to better represent the country of the ship owner.
29 An explanation of the laws and administration of French legal practices would be
30 void of any objectivity if it were presented only by the legal representatives of the
31 Republic of France. I made sure that I would be accompanied by a French
32 colleague, and he will be able to give a more objective meaning to the strict
33 interpretation of French laws and practices. I have finished with that particular
34 comment now.

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As far as the French representation is concerned, they talked about the systematic resort to Article 292. All we have to say is that France, along with approximately 150 countries – I cannot remember exactly how many – has ratified the International Convention on the Law of the Sea. If they made any reservations on Article 292, there have been none, either today or previously. The proof is that we are here again. It does not only concern my country or less democratic countries. Other countries are entitled to appear here. We should not talk too much about the past. All we have to discuss is the present case, not that relating to the *Camouco*.

The purpose of my exposé will be concentrated, as I stated yesterday, on the value of the vessel and the reports put forward by both parties - our expert is Mr Antonio Alonso - and the value of the cargo, and later on I will say something about the right to reply relating to the scope of the comment made by the Representative of France yesterday afternoon.

As far as the value of the vessel is concerned, I do not know whether you already have on the screen the report that was presented by the Republic of the Seychelles by the ship brokers, Moran and Company. Without repeating what was said yesterday, this person has the necessary capability and experience, which is recognised world-wide, in respect of the sale and purchase of fishing vessels. I will give a list to the Tribunal of the various analyses that he has made over the last 10 years. I think there were 84 such cases. I will also provide a brochure relating to the expertise and the kind of work done by that brokerage firm.

Mr Albino Moran, as I said yesterday, apologised for his absence. He did not know the scope of Article 292, and other constraints have prevented him from appearing before this Court. As far as his report is concerned, we are dealing with a vessel that started as a trawler and was changed to a longliner. It is classified under the Bureau Veritas Classification and it is not, contrary to what the Representative of France is trying to say, a luxury vessel. If we can make comparisons, we are not faced with a Rolls-Royce; it is not a Mercedes, it is not a BMW, it is not an Audi or a Toyota; it is not one of the prestige makes. It would be closer to a Citroen 2 CV, a tiny car.

1 The expert report of Mr Moran says that he has participated in such expertise. He
2 has known the ship for many years. The ship was moved from one owner to the
3 other. There is the deed of sale for 50 million pesetas, and you can see that on the
4 screen, and we have also shown the exchange rate. All this has been properly
5 documented in the papers that I have produced. It would have a value at the time
6 equivalent – I think the French Franc was stronger at the time, over FF 4 million – to
7 \$890,000. These are objective elements. You can find that in the deed of sale of
8 22 October last, and we will give you a copy of that particular deed of sale. The fish
9 was then sold at \$400,000 - and the French Franc was beginning to be rather weak
10 against the dollar – which corresponds to FF 2.5 million.

11

12 Mr Moran was asked to provide an expert report during that procedure, and on 23
13 November he tabled a report which gave the various technical specification and
14 contains very important information relating to the world market situation for vessels.
15 He gave an assessment, saying that the vessel was worth something like \$400,000.
16 Taking into account the rate of exchange at the time, the figure was FF 3,112,000.
17 Perhaps you could put a question to the expert on this vessel, because he is the one
18 who has all the information.

19

20 Mr President, I have requested the presence of the expert.

21

22 **THE REGISTRAR:** Mr President, the expert, Mr Antonio Alonso Perez, made the
23 declaration yesterday, and I would ask that he be reminded of the declaration that he
24 made. The interpreter, Mrs L Kruger, also made the declaration yesterday and I
25 would remind her of that as well. It may be more convenient if the interpretation is
26 consecutive rather than simultaneous.

27

28 **ANTONIO ALONSO PEREZ, recalled**
29 **Examined by MR GALLARDO**

30

31 Q Good morning, Mr Perez. Could you please tell the Tribunal your full name
32 and profession?

33 A I am Antonio Alonso Perez. I am a Merchant Navy captain and a
34 maritime/marine surveyor. I am also the expert for the classification questions for
35 the Honduran flag.

36

1 Q Do you have any professional relation or family links with the Monteco
2 Shipping Company or its directors?
3 A No, none.
4
5 Q What are the types of activities undertaken by a maritime surveyor?
6 A The tasks of a marine surveyor normally are classification and damage
7 expertise and all concerns in that respect. In the course of the investigation of those
8 questions, we are concerned with information of all the ships and vessels at the
9 moment of inspection. As far as inspection is concerned, we make a point of finding
10 out all the circumstances before and after the moment of inspection, before doing the
11 expertise. Where taxation and classification is concerned, we find the value of the
12 object, the value of the vessel, at the precise moment of inspection. The courts and
13 tribunals ask us for our opinions, if there is any doubt during a case that is
14 proceeding.
15
16 Q Mr Alonso, do you have an habilitation to act in front of Spanish courts?
17 A Indeed, I have intervened in many proceedings before courts regarding
18 damage cases, taxation, valuation, even in dry dock repairs already proceeded for
19 vessels or in damage on the sea - for example, my expert opinion before the Court of
20 la Rochelle regarding a vessel which had been transformed from a merchant ship to
21 a tourist vessel.
22
23 Q Do you work for other organisation involved in maritime work – Assurance,
24 P&I (Protection and Indemnity)?
25 A Normally, we are asked to give our expert opinion, for example, if the hull of a
26 ship is damaged or if any further damage which could concern P&I is referred to.
27
28 He had been working for some of the possible companies in the intervention, for
29 example insurance companies like the French Sesame.
30
31 Q Did you also survey --- these longliners?
32 A Yes, I did indeed give my expert opinion on these kinds of vessels.
33
34 Q Do you know the vessel *Monte Confurco*?
35 A Yes, I do.
36
37 Q Why do you know it? Had you been involved in any expertise?
38 A Yes, I gave my expert opinion regarding this and this was in the course of an
39 inspection I was carrying out regarding the hulls and machines and possible civil
40 reference which may be concerned with this question.
41
42 Q Do you know the report of Mr Moran that has been presented to this Tribunal?
43 A Yes, I know it.
44
45 Q The report by Mr Moran, as you know, established the value of the vessel at
46 about \$400.000. Do you agree with this price assessment?
47 A I think that in this price the expert did not take into due account the
48 depreciation which has occurred from 1999 to date.
49
50 Q Why October 1999? Is that because of the last sailing of the boat?

1 A The value of this vessel had been fixed at two different moments of purchase.
2 The first moment of purchase took place in 1996 and the second in October 1999.
3 That means that, taking that price as a basis, the depreciation applied was roughly
4 30.48 per cent.

5
6 Q I see that you have prepared the expertise very well but can you tell me why
7 you arrived at this percentage?

8 A As I said, the depreciation is due to the two moments of sale, the first realised
9 in 1996, which was the price of 110 million pesetas and then on the second occasion
10 it was sold for \$400,000. That means that the depreciation that took place within this
11 lapse was about 41 per cent and that means a rate of 13.458 per cent. One has to
12 take into due account that within this lapse of time there is no mention of
13 maintenance and repairs being carried out, so that within this lapse of course the
14 vessel is only getting older and older. The maintenance required would be even
15 more and more costly.

16
17 Q So the age of the boat has a real influence on the price?

18 A Of course, naturally.

19
20 Q In this case of *Monte Confurco*, do you agree that converting a longliner into
21 a trawler is not the same?

22 A No, it is not the same at all. If a trawler is being constructed, of course it will
23 be fitted with very specific characteristics. When it is reconverted afterwards into
24 a longliner certain elements before the conversion of the vessel to a trawler are
25 eliminated and taken away from the ship. Then of course with a conversion to a
26 longliner, all the implementations are only done afterwards and of course, apart from
27 the fact that it is not the same boat, one has to think that it is not the real one and
28 that the original vessel had not been constructed for that purpose. For example,
29 where the engines are concerned, a trawler requires a much stronger, much more
30 potent engine and a longliner for example would never require such a strong engine.

31
32 Q Does a vessel like the *Monte Confurco*, as I will explain later, have any
33 insurance for the machinery and the hull? Is that normal for a vessel of this age?

34 A Yes, this is normal.

35
36 Q Can you explain why?

37 A Because normally P & I and the insurance for this kind of vessel would never
38 be granted for a vessel older than 20 years. Even if cases were secured, then the
39 secured premium would be much too high with regard to the value of the ship.

40
41 Q Mr Alonso, you have affirmed that it is quite normal not to subscribe to an
42 insurance policy for this type of vessel. In any case, what is traditionally insured in
43 these vessels? Is it P & I for members of the crew?

44 A As I said, in these kinds of vessels it is not normal to sign a P & I contract for
45 insurance of hull and machinery but in the other type of case it is normal to sign a
46 P & I contract for the crew. I correct that: for the civil responsibility and for the crew.

47
48 Q So it is normal in this type of boat that you insure the cargo and have civil
49 liability for third parties and to cover any medical or other type of assistance to the
50 crew?

1 A This is what I meant before: civil liability basically is meant to protect the
2 crew, give medical assistance and cover for whatever responsibility or liability may
3 occur regarding third parties, of course.
4

5 Q Mr President, in this way I will present to the Tribunal a certificate sent in
6 yesterday by the insurance company certifying what kind of insurance the boat is
7 covered for. (To the witness) just two more questions, Mr Alonso. In relation to the
8 inspections, the compulsory inspections that the vessel has to pass, every how many
9 years is that?

10 A The compulsory classification inspection takes place every four years.
11

12 Q With the information given from the ship owner, when does the next
13 inspection take place?

14 A Two months ago in September this year, 2000, would normally have been the
15 last inspection but, due to the fact that it was travelling on the sea, they granted
16 another prorogation of four months for the inspection so that the inspection would
17 take place in February.
18

19 Q Is it normal to grant this type of extension?

20 A Depending on the type of the vessel and the route it is travelling, it is quite
21 normal to grant a lapse or prorogation of between four and six months.
22

23 Q How much did the inspection cost to obtain this renewal?

24 A This type of inspection is quite expensive because it requires all the parts to
25 be taken out and an inspection of the motors, the engines and the hull. So it will cost
26 between 20 and 25 million pesetas.
27

28 Q That is FF 1 million. The last question: Mr Alonso, would you agree that
29 nobody would be interested in paying anything without passing this technical control
30 or inspection?

31 A Indeed, I do not think that anybody would pay anything for it because, unless
32 there is that inspection result on the table, nobody can be sure about the security
33 and navigability of the ship and nobody would be interested in it.
34

35 **THE PRESIDENT:** Would you like to repeat that question and let him answer it
36 again.
37

38 **MR GALLARDO:** I was just asking the expert if he agrees that for this vessel
39 particularly nobody would be interested in paying anything without the passing of the
40 technical inspection.

41 A I think nobody would be ready to buy such a vessel without the inspection
42 certificate on the table because, unless this exists, nobody can be sure about the
43 security of function of this vessel and fittings.
44

45 Q So, taking into account the percentage depreciation, the figures proposed by
46 the expert Mr Moran from the Republic of Seychelles, are you ---
47

48 **THE PRESIDENT:** Mr Gallardo, are you making your submissions or putting
49 questions?
50

1 **MR GALLARDO:** I am confirming the calculation. I want it in the verbatim.
2
3 **THE PRESIDENT:** The Agent of France has the opportunity to put questions.
4
5 **MR TRINQUIER:** I have no questions.
6
7 **THE PRESIDENT:** Would you like him to continue?
8
9 **MR GALLARDO:** Yes. So the conclusion is that the report from Mr Moran has to
10 be slightly amended, reducing this percentage of 13.58 as the price which in dollars
11 is the equivalent of US\$ 345,680 on yesterday's exchange rate, to FF 2,689,390. Do
12 you agree with this?
13 A Yes, I agree.
14
15 (The witness withdrew)
16
17 **MR GALLARDO:** Mr President, I shall continue in French. I do not want to go too
18 deeply into the question of the value of the vessel but I should deal with and make
19 observations on some of the suppositions put forward by the French Republic. I
20 think that you have the French expert's report. That should be on the screen. There
21 is an element which was assessed on 20 November, at FF 15 million. That is the
22 Chancerel report. That is \$1,935,000. Later, you will see that France had some
23 doubts. There was expertise on 15 December by a well-known house, Rogliano,
24 with whom we have frequently worked as lawyers. His assessment was
25 FF 11,061,000, with an equivalent of \$1,500,000 . I shall not waste any time on the
26 first report because the French have departed from that already by presenting a
27 report which shows a reduction of some 26 per cent in the valuation.
28
29 I should like to say that the Chancerel firm is in Réunion, which is where the ship
30 was taken after it was arrested. There are only a few shippers and they are not
31 used. They do not use longline vessels in that area, simply trawlers, which is a
32 totally different activity. In particular, this analysis does not contain a second
33 important part, apart from the technical questions; that is, the present context of the
34 value of the ship on the world market.
35
36 The report was not signed by a director of the firm but by a more junior person. The
37 head of the firm is someone who carries out evaluations for all French shipping firms.
38 I should note three matters regarding this. There are no references to other experts
39 who have examined the ship at a particular time; it is situated in Paris, and is on the

1 basis of recent sales of longline ships and concludes that the value is about
2 \$1.5 million.

3
4 Let us be serious about this matter. One can only compare what is comparable. It is
5 not possible to compare what is not comparable. This is not a Rolls Royce among
6 shipping vessels. One of the vessels mentioned is very valuable. It is spacious and
7 includes up-to-date technology. It is a 1996 vessel and is valued at \$6 million. How,
8 in a one-and-a-half page report, can one compare a vessel worth \$6 million to one
9 worth \$1.5 million? There is nothing comparable about the two vessels.

10
11 I called Mr Moran in Argentina and asked for a counter report which adds objective
12 commentaries. We have put forward that report in English in reply to that of
13 Rogliano. That gives a true picture of the real situation. It states:

14
15 “We make reference to the letter issued by our good colleagues, Barry Rogliano
16 Salles, with reference to several really good fishing longliners which are for sale or
17 were sold several months or years ago.

18
19 “We, frankly, should say that there are simply no comparable units. They are
20 modern and sophisticated vessels designed by well known technical consulting
21 offices and built from the beginning as purely freezing longliners with the highest
22 standard of construction and fitted with the last generation of equipment. Even two
23 of them were built with the standard of Norwegian shipyards. Just only a superficial
24 overview of the vessels, any inexpert person can appreciate the differences. Permit
25 us to go through the different vessels.”

26
27 I shall just go through one or two. I shall not spend more time than that,
28 Mr President.

29
30 The first is “ *M/V Vierirasa Doce*. In the French report, the price is put at \$4 million in
31 the French report.

32
33 “She was built in 1991 ...”

34

1 The *Monte Confurco* was built in 1974

2

3 “as the biggest and most advanced freezing longliner ever built in Spain. She was
4 in operation for a few months due to the bankruptcy of IBSA. The vessel was taken
5 over by the biggest shipyard that operated her unsuccessfully during a couple of
6 fishing trips.

7

8 “Consequently, the vessel was stopped and kept laid up until 1996 when she was
9 sold to Messrs. S.A. Eduardo Vieira.

10

11 “If we have in mind that the vessel has been laid up in Réunion Island for another
12 ...[18 months], we are talking about a vessel that is practically new. She was built
13 with the highest specification. ...

14

15 “The actual owners put the vessel for sale in 1998 for 400 million pesetas, and later,
16 in 1999, they were requesting a price in the region of US\$ 3.5 million, but the vessel
17 nowadays is still unsold because the offers received were quite down to those
18 requested.”

19

20 I have not spoken about that because I have the value of \$8 million, but here we
21 have a description of another fishing vessel, the *M/V San Aotea*:

22

23 “She is a modern vessel designed as a freezing longliner with autoline system, built
24 in 1998 by Molde Shipyard in Norway.”

25

26 She was sold several times.

27

28 “She is also built according to the Det Norske Veritas and Norwegian Skip Kontrol,
29 with ice strengthening hull “quota C”.

30

31 The *Monte Confurco* does not have that ice protection.

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33 “This is an ideal vessel for operating in fishing grounds close to the home port, as it
34 is the case of New Zealand.”

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Then, *M/V The Valiant*:

“ Firstly, we should say that under our opinion, this vessel was sold in June 2000 from Globe Fishers – Belize to Consolidated Fisheries in Falkland [to fish for toothfish] for a price of about \$3 million that we considered extremely high.

“On the other hand she is a vessel built in 1985 by the Niigata Shipyard – Japan, probably the shipyard that more and better pelagic longliners have been built in the world.

“In October 1997 the vessel was bought by one of the shipowners with more knowledge of fishing with the longline system and they completely rebuilt her as a deep longliner for catching toothfish, etc, expending quite a lot of money, probably around US\$1.5 million.”

I shall not complete that. They refer to the *Monte Confurco*:

“She was originally built in 1975 ... in Spain as a freezing stern trawler and when in 1996 it was bought by the South African company, Monte Confurco (Pty) Ltd. She was transformed in a manual longliner with the installation of a weather deck, the sealing of the stern ramp and installation of manual hydraulic line hauler.

“At that time, we sold [Mr Moran] the vessel for approximately 115 million pesetas, due to the poor technical conditions after being laid up in Vigo without any maintenance.

“We cannot compare *Monte Confurco* with the above-mentioned vessels. She is more in line with the following vessels which are for sale or sold for prices in the region of around \$0.5 million.

“*M/V Isla Guenblin*: built in 1974 in Japan, Loa .. main engine Niigata”

and several other specifications.

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M/V Cristal Marino, the same, a Japanese vessel. *M/V Dorita*: built in 1980 in Japan, has similar characteristics.

“As brokers exclusively involved in the sale and purchase of fishing vessels through all over the world, we can observe that nowadays there is very few purchase inquiries for such a type of longliners fitted for fishing at deep sea. Obviously one of the reasons is the limited areas where the toothfish can be caught. Consequently, the market for such a vessel has dramatically fallen during last months. And if we are willing to give an example, let us go and concentrate on *M/V Valiant*. If this vessel should be put back in the market for sale, actual owners will be greatly surprised about the offers that they will receive. Also as economists, we can see that during some periods as the value of the shares in the stock market can be partly fired out, also the value of the vessels, as assets, can give us some surprise.

As Albino Moran & Partners, Shipbrokers, we remain at your full disposal ...”

To conclude, I have already spoken about the price compared in respect of the vessel at \$340,680, or the equivalent in French francs of 2,680,390.

I shall now spend a few minutes responding to the statement made by the representative of the French Republic yesterday afternoon, as far as the information concerned provided by Professor Duhamel.

By way of introduction, perhaps I may say that the comments of Professor Duhamel were theoretical, remote from practice and sometimes even remote from reality. The fact that nobody has challenged the scientific report does not imply that it is acceptable, as shipping firms have other economic interests. Shipping firms do not take part in the scientific discussions where these experiences are exchanged. As regards the scientific comments of Professor Duhamel, the surveys by him were carried out on scientific vessels or French fishing vessels. None were carried out on a ship using the deep level of line which is called the Spanish system.

1 We should point out that the vessels used by the French were principally trawlers,
2 that is, the vessels of the *Societe d'administration* operating off Kerguelen, with a
3 fishing capacity and a depth limited to 1000 metres. The net cannot be lowered to
4 any greater depth. Alternatively, they used vessels with a longline technology of
5 a different type, for example the automatic system which is used by the Japanese
6 and which does not go below 1500 metres or the Mustad system, which cannot be
7 adapted to particular marine banks and currents.

8

9 It should be recalled that the fishing of the Saint-Paul vessel, belonging to the firm
10 SAPMER, which used that system, was a failure. It did not succeed in fishing in
11 deep levels off Kerguelen. The firm SAPMER found that this was a failure. That firm
12 signed a contract with a Spanish firm in order to use the so-called Spanish system.

13

14 The Spanish system of longline fishing involves using two lines. I am not sure of the
15 correct term but I think that the line or cable is the mother line above and there is a
16 fishing line below which is considerably weighted. On the other hand, the automatic
17 system and the Musted system involves only a single line with much less weight on
18 it. That means that it is weaker and cannot go as deep: 2,500 to 2,700 metres.

19 Furthermore, being weaker, that involves a greater risk of breakage. According to
20 our information, there are French firms which are entitled to fish off Kerguelen who
21 are beginning to use this technology and can reach those depths outside that zone in
22 international waters. The firm of Armement Legarrec is using the Spanish system.

23

24 Finally, it should be mentioned that the French firms are not ready to carry out
25 exploratory fishing in international vessels on Kerguelen. That would be 1
26 September to 30 June each year. An exploratory fishing campaign would be wanted
27 by CCAMLR. It begins on 1 April, but between 1 April and 30 June the French firms
28 have not operated in international waters. They only operated within the exclusive
29 economic zone.

30

31 With regard to the depth of the waters, could we please see the maritime chart
32 number 5 used in my speech yesterday. The chart shows the fishing areas of the
33 economic zone of Kerguelen. This chart shows once again the inconsistency with
34 what was put forward by Professor Duhamel. We can emphasise that there are

1 Spanish fishers who carry out toothfish fishing in Chile in waters with a depth of
2 2,500, in Pescanova country. The depth of the CCAMLR zone 58.15 mentioned
3 yesterday by Professor Duhamel can be seen on the screen. Here we have depths
4 which are quite unknown to the experts.

5

6 If we consult maritime charts, we can see that the distance between the isobars is
7 extremely large. On the other hand, we can look at the charts of the English
8 Channel, for example, where the distances are very close together because there is
9 considerable knowledge of the exact details of the seabed. Consequently, Professor
10 Duhamel cannot conclude as precisely as he did that in these waters it is impossible
11 to find toothfish, because there is variation in the depth of these waters, and it is not
12 established that that is so because scientists have never carried out studies of the
13 depths of these areas. It is the experience of the captains of the vessels that makes
14 it possible to ascertain the depths. Some captains have navigated for eight to 10
15 years at sea. These captains have been at sea since they were students.

16 Experience has shown that they have an acquaintance with the realities of fishing
17 which is often greatly superior to that of the scientists, even though the scientists
18 board the vessels in order to enlarge their knowledge acquired in the laboratory and
19 compare it with conditions at sea.

20

21 With regard to the latitude of southern, tropical waters, could we please have chart 5
22 again? This shows the fishing zones between 1 September and 23 October,
23 confirmed by the French Representatives. These are international waters outside
24 the CCMLAR. I am not a technician but I think that they are outside the firm line
25 showing the CCMLAR, above the Crozet Archipelago. Professor Duhamel said that
26 above certain tropical latitudes it is impossible to fish for toothfish because it would
27 not be economically viable. On that point, we should point out that viability is not an
28 objective, fixed concept. It varies according to whether one is within or outside the
29 exclusive economic zone. There are studies within the exclusive economic zone in
30 relation to international waters which show a difference of 32 per cent. I am not
31 going to repeat here the point made about the 5 to 8 per cent of catch in international
32 waters.

33

1 With regard to the question of viability, for a French vessel there are fiscal restraints.
2 Their ships are leased, not purchased. If they catch two tonnes, it is not a viable
3 return, because they can catch six to 12 tonnes in the exclusive economic zone. For
4 vessels that are not authorised to fish in these waters, there is a quite different
5 system and a quite different level of viability. We should recall that, in the majority of
6 cases, the system used is the Spanish system. That, compared with the Mustad
7 system, is much more efficient with regard to viability. It is not I who say that. The
8 French refer to the longline vessels of the Spanish system.

9

10 Finally, it should be pointed out, as I mentioned yesterday, that this species can be
11 found in waters of the same latitude. There are some examples that
12 Professor Duhamel can probably confirm: the Cap de Agulhas in South Africa and
13 the Valdibia Bank opposite Namibia, which is closer to the Equator, where that
14 species has been fished for the last five years. It is therefore appropriate that I
15 should express some doubts about the conclusions of Professor Duhamel.

16

17 To complete my account, I must cover some factual points. With regard to the
18 fishing campaign of the *Monte Confurco*, our opponent's reasoning gives the
19 impression that it regards the product, 158 tonnes, as having been caught in three
20 days. However, that is just not true. For that reason, we shall try to clarify the facts
21 on the basis of the assertions made by France, since the ship's log has been
22 confiscated. That record is in the hands of the French.

23

24 The first fishing period is from 1 September to about 22 October. After leaving
25 Mauritius about 20 August, the ship entered international waters – not CCMLAR
26 waters – to the north-east of the EEZ of Crozet; see chart 5. According to the
27 information supplied by the Master, fishing was reasonably economic, at 2.5 to 3
28 tonnes per day. When other ships arrived or the orques arrived - I think Professor
29 Duhamel will confirm that there are a lot of orques or cachalots, a sort of whale – the
30 vessel left that area after the arrival of the catchelots. Even if France challenges the
31 possibility of fishing in that area, this shows that that opinion can be refuted. On
32 23 October there was a transshipment, by the Seychellean vessel, *Praslin*, of supplies
33 and a crew member who had fallen ill. We calculate that for that period, that is

1 55 days, at an average of 2.5 to 3 tonnes, it makes about 130 to 150 tonnes of fish.

2 I am now talking about fish in the holds, not living fish.

3

4 The second fishing period was from 24 to 27 October. The vessel was in

5 international waters outside the CCMLAR area; it is the zone to the east of Crozet.

6 In this area, France recognises at the outset that fishing is possible – see page 6 of

7 its Memorial – but it subsequently changed its view when taking account of the most

8 recent scientific reports, which may be challenged. It has already been mentioned

9 that these scientific reports were carried out on vessels that do not use the Spanish

10 system, so that their value is very limited. The exact depths are not known and have

11 not been recorded. What counts is the experience of the fishing captains. We can

12 therefore repeat our arguments with regard to the latitudes. The precedents, and the

13 technology of the Spanish system, make fishing economically viable, though not at

14 the level of the French vessels. So we have an average of four tonnes a day fished

15 for three days, which makes 12 tonnes.

16

17 We now come to the third and last fishing period, between approximately 3 to

18 6 November. The vessel was near the Crozet EEZ in CCMLAR waters. Not being

19 a member of CCMLAR, no criticism should be made of its procedure. If France has

20 problems at that level, it should commence proceedings before international tribunals

21 with reference to Part 5 of the Convention and the Montego Bay Convention. The

22 vessel was then in the statistical area 58/5/1, mentioned by Professor Duhamel.

23 Professor Duhamel asserts that fishing for toothfish is impossible in that area

24 because these are very deep waters. However, we should emphasise that the depth

25 of the sea bed is totally unknown, because it has never been studied. That is the

26 reason why the isobars are very sparse. Each fishing captain knows the areas that

27 will result in greater success. Yesterday I had a letter from a fishing captain,

28 confirming that he had a fished to a depth of between 2,400 and 2,700 metres with

29 a more substantial longline.

30

31 I now turn to the question of the buoys. I should like to make a few points about the

32 buoys. The Spanish, Portuguese and Norwegian suppliers are all the same. The

33 preparation and installation are identical. The material and colour of the ropes is

34 identical. The buoys are always coloured red, with one or two that fade in the sun.

1 Thousands of transmitters, as was mentioned yesterday, have been made with the
2 same frequency, somewhere around 26.8 and 27.2 MHz. On that, you can consult
3 any shipping firm in Norway or France. If you look at the colour photograph supplied
4 by France, you will see that the thickness of the letters on the buoys is not the same.
5 You have all seen the photograph. If you wish, it can be handed round. The red
6 colour of the buoys is not the same on the photos. There is no consecutive
7 numbering. There are photographs that were taken in the vessel. You will find a
8 number of buoys numbered 5. There are some missing numbers. I do not see what
9 calculation you can base on that.

10

11 It was asserted that three buoys had been fished out and that that shows that there
12 was a fishing expedition. But if you look at the photographs that have been supplied,
13 there are buoys all over the place – 15 or more. The buoys which it is said were
14 picked out of the sea by the *Floreal* were picked out in the absence of any
15 independent witness. The picking out of the sea of the buoys was not carried out in
16 a proper way. The buoys do not sink. The French Representative said yesterday
17 that normally the buoys will sink after a while. I have confirmed - and perhaps
18 Professor Duhamel can confirm the matter - that the buoys can go on floating for
19 months. They could belong to an authorised ship or not. They could have belonged
20 to a vessel that had left the zone several weeks early.

21

22 The longlines were not picked up. It would have been nice to have seen the video
23 on this, to see whether there were any hooks on the line. It is impossible to say
24 whether the fish that was attached to the hook, assuming that it ever existed, was
25 dead or alive. In other words, we cannot tell whether it was recently caught.

26 Professor Duhamel can confirm that the fish remains alive for some three to five
27 days after it has been hooked, so a big fish will last longer and a small fish will not
28 last as long. If the *corpus delicti* cannot be found or does not exist, the offence does
29 not exist. Where is the offence? Where is the violation?

30

31 My last point on the question of buoys is whether one can exclude the fact that the
32 specimen buoys were not held on board the *Floreal* when it was in Mauritius? When
33 the *Floreal* arrived in Mauritius, it arrived with coloured buoys on the deck. It is not
34 the first time that the French Navy has been challenged. I can hardly fail to mention

1 the *Rainbow Warrior* affair, where the French admitted what had happened after the
2 period of prescription had expired. In this context, we can recall the famous case of
3 *Vieirasa Doce*. That vessel remained in la Réunion for 18 months. That agreement
4 with France, which I signed, was confidential. We therefore cannot reveal what it
5 contained.

6
7 Nevertheless, it should be recalled that the French authorities mentioned the
8 existence of three violation reports, dated three years earlier, which, without
9 communication, is quite possible, two of which were given to the shipping firm more
10 than a year later. In two of those reports no offence was mentioned at all. The third
11 report was never transmitted, even if the consulate concerned with the case obliged
12 France to do it. The Conseiller de la Mise en e'tat is a sort of investigator of the
13 affair. Even after the fine of FF 5,000 per day had been imposed on France, which
14 has never been paid, with a precedent of that kind, you can understand why we have
15 some doubt as to some of the evidence. It is very easy for an advocate to say this,
16 but this is the truth of the matter.

17
18 I turn to the hooks and the bait. France contends that the longline was ready to be
19 put into the sea. This is not true. There is only one photograph showing this. Where
20 then are the photographs? It is amazing that there is only one, since this is such an
21 important matter of proof. In any event, if a few sardines had been put on the hooks,
22 it should be pointed out that the longlines used by the *Monte Confurco* have nearly
23 10,000 hooks. I am not referring now to the other system of fishing. This is a more
24 effective method and therefore uses more hooks. That implies that the preparation
25 of the hooks on the line, on the Spanish system, cannot be carried out casually. It
26 would take more than 10 hours. The practice of this vessel was to prepare the line
27 some 10 or 14 hours in advance. The situation of the sardines which were
28 unfreezing is a logical one, if you take into account that within a reasonable period
29 the vessel was about to leave the exclusive economic zone, so they were preparing
30 the line to be launched after leaving the EEZ.

31
32 Finally, the photographs. You can deduce what you like from photographs. For
33 example, the legend on photograph 19 says, "Three little toothfish found at 20 past
34 8 on 8 November 2000". But those two complete fish are not toothfish; they are

1 grenadiers with pointed tails, whereas the toothfish has a v-shaped tail. If you look
2 at the photograph on page 23, those two fish, even to me – and I am not a fishing
3 expert – are not toothfish; they are grenadiers. According to Professor Duhamel,
4 this has never been disputed. Can one see that these are toothfish? They are not.
5 They are grenadiers. The tail of the toothfish is v-shaped. In the light of that
6 photograph, it can be asserted that in the ship there was only a single, fresh
7 toothfish. If all that could be found was one toothfish and some hours later it was
8 said that there were two more toothfish, and this was the period of the offence, one
9 cannot see why we should be concerned with this whole affair on account of three
10 little toothfish.

11

12 To conclude on this, other photographs could have been supplied.
13 Professor Queneudec mentioned yesterday the question of the video. The Captain
14 is in la Réunion and could have been found. You can see on all these photographs
15 the seals that were sealed in the presence of the captain and his advocate.

16

17 I shall not continue further on the facts. It would be somewhat artificial to do so. It
18 has been conceded that there exists a policy on the part of France to carry out all
19 these seizures of vessels. What are they doing in the Falklands? They do not send
20 in the navy. They do not send in the navy in Australia. The navy do not like this. It
21 is not their job. In the Falkland Islands there is an administrative system. I do not
22 know how it is described in English. There are fishing vessels which carry out the
23 control of fishing. As in the *Camouco* case, the whole burden of this affair rests on
24 ship that was in fact innocent. Thank you very much, Mr President.

25

26 Could we perhaps have the coffee break now, Mr President, and continue
27 afterwards?

28

29 **THE PRESIDENT:** We have not planned a coffee break. We thought that you
30 would continue until 12 o'clock and finish. Will you be able to continue?

31

32 **MR GALLARDO:** I shall finish in a minute and then I shall ask Mr Morel to continue.

33

1 **THE PRESIDENT:** Would it in any way affect your presentation if you did not have a
2 break?

3

4 **MR GALLARDO:** No. We shall continue.

5

6 **THE PRESIDENT:** Thank you.

7

8 **MR GALLARDO** (Interpretation): To end, I would like to say something about the
9 value of the vessel, of the cargo and of the equipment. Can we perhaps see this on
10 the screen? We can see the elements used in assessing the reasonable amount:
11 \$344,000, the value of the cargo; \$1,224,000, the value of certain fishing material;
12 \$40,800 – and this was not quoted before – the value of the bait; \$20,000, the value
13 of gas oil. That gives a total of \$1,725,000 or FF 12,690,680. In fact, the total
14 amount is a little less than that. The total is \$1,667,680, or FF 12,540,330, with the
15 reduction carried out by the expert sent by the Republic of the Seychelles.

16

17 Finally, before I give the floor to my colleague, although this is not the object of the
18 procedure under Article 292, I would like to make the following comment. The
19 French Republic has also violated Article 73, paragraph 4, of the Convention, and we
20 have already mentioned that in our submission. In the case of arresting foreign
21 vessels, the coastal states must inform the flag state as soon as possible of the
22 arrest and possible sanctions. It is France this time that has been involved. One
23 should criticise the fact that the notification was incomplete, whereas it informs only
24 the vessel, and France said that they had been surprised in illegal fishing.

25 Furthermore, France gave information on the legal follow up and the ... This
26 notification is incomplete because it does not indicate the facts which have given rise
27 to immobilisation, nor on the sanctions which might flow. We have received the
28 procès-verbal d'infraction at the Government of the Seychelles, but we only received
29 it four days later, after the vessel reached la Réunion. The Master was not told
30 within 24 hours of the procès-verbal and this is something that has to be done within
31 24 hours after boarding.

32

1 We would like to remind you that Article 73 states that every time new, important
2 measures are adopted, they will have to be notified promptly to the flag state. This
3 was not done.

4
5 Finally, we would like to remind you that the violations such as non-notification of
6 entering the EEZ and the amount of the fines or the consequences which may arise
7 from the failure to notify are not fair measures in regard to the freedom of navigation.
8 The French demands are disproportionate, because a minor misdemeanour such as
9 a failure to notify does not deserve such a high sanction.

10

11 Mr President, I have finished. How many minutes do I still have available for my
12 case?

13

14 **THE PRESIDENT:** You have been given until 12 o'clock, but you want an extension
15 of 20 minutes. You have that time.

16

17 **MR GALLARDO:** We started at 10.15, not at 10 o'clock.

18

19 **THE PRESIDENT:** Yes.

20

21 **MR GALLARDO:** Can we consider 12.30?

22

23 **THE PRESIDENT:** Fine.

24

25 **MR GALLARDO:** Thank you.

26

27 **MR MOREL (Interpretation):** Mr President, Members of the Court, my colleague has
28 spoken about the factual aspects of this particular dossier. I would like to revert to
29 the applicable law. If I may, I would like to divide my statement into eight points,
30 which I think will allow us to see exactly what happened. I shall throughout my
31 statement try to answer the arguments that were developed yesterday by the
32 opposing party, which I believe will make it possible for you to have a more precise
33 idea of this dossier.

34

1 To begin with, we are told that out of 18 masters of fishing vessels before the court in
2 la Réunion over 10 years, only one apparently has been punished – just one. That is
3 absolutely wrong. They have all been judged by the criminal court of Saint Denis de
4 la Réunion and were all punished in some way. First, they were punished by the
5 seizure of the catch, so what one has taken can no longer be taken away; secondly,
6 by the seizure of the vessel, which was sometimes applied; and, finally, by fines
7 which were ordered.

8

9 In any case, when the vessel was able to leave again. a payment bond was offered
10 and this made it possible to implement the judgement, the legal decisions.

11

12 When the bonds were unreasonable they simply were not paid. What happened
13 then? What did the administration do? It very meticulously sank the vessel which
14 had not honoured the bond that was posted and they were therefore not able to go
15 back to sea. When you are told that there is no sanction and it is impunity, et cetera,
16 that is not true. The sanctions were indeed very strict. France has had to sink over
17 the last ten years something like ten ships, which are now at the bottom of the Indian
18 Ocean. They are homes for fish nowadays. This is wonderful for deep-sea divers at
19 Réunion.

20

21 You are also told that there is impunity and it is not possible to notify the decisions.
22 How is it not possible to notify decisions? You can do that in two ways. These legal
23 decisions are signified to the holder of the vessel -- under the law there has to be
24 somebody who holds the level -- and the *Monte Confurco* is now in the hands of a
25 company and the notifications can be made to them. In maritime law the consignee
26 is a sort of letterbox for the ship owner, so it is possible also to send this information
27 to the domicile of the person involved. When you hand in your passport, what better
28 address can you have than the address on the passport of the master? Very often a
29 passport is confiscated. You have been told that. That is perfectly natural. A
30 notification of decisions can be made in that way.

31

32 You are also told about the guarantees -- well one does not really know what the
33 value of that is -- and that it cannot be guaranteed and the payments are never
34 made. Two examples show that again it is completely wrong. In the *Camouco* case

1 there was a simple banking guarantee. A piece of paper was handed over from a
2 well-known bank, the PnP, a big French bank, the National Bank of Paris. Was this
3 implemented? Yes, of course it was. The FF 3 million fine was paid.

4

5 The second example is the matter of a longliner. We were not able to tell your
6 jurisdiction at the time but it was under a flag of Panama and the fine was fixed at
7 FF 10 million. France, according to its habit, had asked for cash payment. Was that
8 paid? The answer is: yes, it was paid via myself, thanks to a certified cheque of my
9 colleague Ramon Garcia. I have here the receipt that proves that this amount was
10 indeed settled on 22 October 1998 at FF 10 million and the vessel was able to leave
11 again. So these decisions have been implemented.

12

13 Of course, when these bonds are unreasonable, then people do not pay. When you
14 have to pay several tens of millions of francs, and that is millions of dollars, for a
15 vessel, the value of which very often is not more than a few hundred thousand
16 dollars, what does the ship owner do? He must abandon his vessel. He can do
17 nothing else.

18

19 You can see that this is a very strong context, as it were, and that legal decisions are
20 actually applied. The proof of that is that there were more vessels fishing in those
21 waters ten years ago and there were more illegal battles but what has happened?
22 Only one vessel has now been arrested. I think this gives you a better idea of the
23 proportions involved in this dossier.

24

25 The second point I wanted to make is this. Yesterday afternoon you were told about
26 sanctions. As far as that is concerned, there are two types of sanctions: basic
27 sanctions and so-called proportional sanctions. This is a very original thing really
28 because it is in connection with the amount of the catch and the opposing party has
29 to prove that these were illegally caught.

30

31 First of all, what about the basic sanctions? It seemed to me that I had stated very
32 clearly that the penalty for violation and going into the EEZ illegally was FF 1 million
33 only at the most. Perhaps I was not clear enough but I never spoke about any
34 existing confusion. All I was saying was that this FF 1 million for entering the EEZ in

1 practical terms is cut down to FF 200,000 only. To secure payment of damages one
2 quotes FF 400,000. This is exaggerated. In practical terms, the sums allocated are
3 FF 200,000, FF 100,000 per third party. Each party is usually given FF 100,000.

4
5 Opposing counsel will not deny that because he is also the counsel of those two
6 companies. You can see that Mr Jacques De Zoestre, whom I talked about
7 yesterday, plays a very central part in all this That is the company that is unloading
8 the *Camouco* at present. It is that company which has already launched an
9 international tender to sell the toothfish, before actually knowing what the fate of that
10 fish is going to be, before you have taken a decision and before the administrative
11 court has decided. It has done that already on that spot. SAPMER is now one of
12 the parties requesting damages. As we said yesterday, it is asking for a modification
13 of the legislation. As you see, it is the state, SAPMER, and one can wonder about
14 the whole set up and about the links that can exist between various types of dossier.
15 As far as I am concerned, I believe that this is not the impartiality that a state should
16 show.

17
18 I was talking about proportional sanctions as well. Yesterday it was demonstrated
19 that there is a twofold error: there is an arithmetical error and a legal error as well.
20 The arithmetical error: we were told, "We are reasonable people because we take
21 into account only one-third of the cargo". A calculation was made and we were told
22 that from a figure of FF 400,000 -- and I said it was half -- the value of the vessel was
23 FF 50 million and on the other side we have already reached FF 11 million. We
24 know that our own assessments are less to secure for the master a fine for a failure
25 to notify of FF 1 million and one for illegal fishing of FF 1 million. That is FF
26 18,400,000. The difference between FF 56,400,000, which is the sanction to be
27 imposed upon us, and FF 18,400,000 is supposed to cover the whole of the
28 proportional sanction. How many tonnes come to FF 38,000? Does that pay for
29 one-third of the cargo, 52 tonnes out of a total of 156? No, not at all. FF 38 million is
30 something mathematical. It pays for 76 tonnes of fish, plus 2 tonnes and that is
31 78 tonnes. Is 78 tonnes one-third of the cargo? No, not at all, it is 50 per cent of the
32 cargo since 158 tonnes divided by 2 is 79 tonnes.

33

1 You can see that the calculation does not tally. One is telling us, if this were a
2 present, that we are taking into account only one-third because we are reasonable
3 people. In the calculation you can see that this is not right and that wool is being
4 pulled over your eyes. The basis of 33 per cent that the advocate is talking about is
5 in fact 50 per cent. On what basis is it 50 per cent?

6

7 Now we come to the legal error after the mathematical error. The opposing party
8 considers, quite arbitrarily, and there is no other explanation for it, that half of the
9 cargo is due to illegal fishing. One starts with a certainty of a particular cargo of
10 156 tonnes and then we achieve an unknown fact and that is to say that 50 per cent
11 is illegal fishing. So one has based this on a known fact, the weight of the cargo,
12 towards an unknown fact of what the percentage of the illegal catch is. Is that not a
13 presumption in legal terms?

14

15 Yesterday you were told that this presumption does not exist and that they certainly
16 do not apply it. You can see that there are many contradictions here. I shall not be
17 so cruel as to belabour this point any further because you are told that the
18 presumption does not exist and that one does not apply it, but, yes, it does exist, as
19 I have just demonstrated. Yes, the 50 per cent is applied and one is given a present
20 of the half. How very generous but on what legal basis? Have they shown proof that
21 half of the cargo was found in the process of being frozen and that the temperature
22 was -5° or -10° , whereas we know that the final temperature is -21° ? The whole
23 cargo was at a temperature of -21° except for three fish. You saw the photographs
24 of those. From the consultations we had last night, we realised that these
25 photographs represented a different type of fish; there was just one toothfish and
26 two other fish. We can see this quite clearly on the photographs. The tails are
27 different. On what type of reasoning is all this built? What type of calculation has
28 been used? I simply do not see that there is any consistency in what our respondent
29 was saying.

30

31 Those are the presumptions they are applying. We were told that this was not
32 arbitrary but discretionary. I am very sorry, but this is a penal matter and in such
33 matters there is no such thing as a discretionary application and one must not be

1 arbitrary either. The methods which you apply are unreasonable and that is why we
2 ask that this should be sanctioned.

3

4 After the proportional sanctions, I come to the proportionality that must exist because
5 one of your criteria is proportionality between the sanction applied and the bond
6 usually adopted in your jurisprudence in your Tribunal. I certainly will not launch
7 forth into hazardous calculations. All I will say is that there was a decision in the
8 *Saiga* case. This decision seemed crystal clear to me.

9

10 The sanction or the fine applied -- as you can see on the screen -- was \$15 million.
11 What was the guarantee adopted? That was \$1.4,000,000, that is to say
12 9.3 per cent of the possible or the sanction applied. Should we make a parallel with
13 the present dossier? In this case, on the basis of 158 tonnes of cargo, minus
14 2 tonnes of franchise, that is 156 tonnes. A fine of FF 500,000 would mean
15 FF 78 million for that number of tonnes. If we applied the same ratio as the one that
16 you accepted in the *Saiga* case, 9.3 per cent, to FF 78 million, we would come up
17 with FF 7, 254,000. FF 7 million should be compared to the FF 56 million which is
18 being required as a reasonable guarantee.

19

20 There is no doubt whatsoever that this slightly academic calculation is done on the
21 basis that you indicated and which I adopted very happily in order to show you the
22 extent to which these requirements were incongruous and astronomical. The figure
23 of FF 7 million should be a ceiling and all the more so as in the *Saiga* case the value
24 of the vessel was \$1.5 million. We can see that amongst the criteria your case law
25 adopts the proportionality of the sanction applied and the value of the fish. I am not
26 going to start the discussion all over about what that is today -- a few hundred
27 thousand dollars, perhaps \$500,000. You can see that the ratio is, roughly speaking,
28 3:1 as between the value of the *Saiga* and the value of the *Monte Confurco*. This
29 means that on the basis of proportionality we have FF 7,254,000. If you divide this
30 by 3 because the coefficient is three times less, the figure is roughly FF 2.5 million .
31 That is the figure we are proposing. You can see that our calculation is consistent.

32

33 I think these are reasonable amounts because we went into the EEZ 24 hours before
34 we were arrested. Yesterday you said that three sailors said that they were there for

1 three days. Yes, they went in into the zone on the afternoon of 7th at a speed of
2 between 9 and 10 knots; the following day, on 8th, they are 150 kilometres into the
3 zone; the freezing tunnel is dry; the fish are at a temperature of -21°. Where is the
4 proof of illegal fishing? There is no such proof because the fish were caught much
5 earlier at the end of August.

6

7 So much for figures. I would like to say something about the fact that this vessel was
8 perfectly identifiable. It was not anonymous.

9

10 According to the usual habit, the French authorities asked how many hours the
11 vessel had been sailing from the time it was called upon to stop to stopping. That
12 might have been 15 to 20 minutes and there must have been a reaction time of more
13 than 30 seconds. One is at sea and the weather is bad. The suggestion is that they
14 were endeavouring to flee. Those accusations were hurriedly withdrawn. That was
15 the point of the relationship or proportionality between the fine and the bond, that
16 one knows that two to three tonnes of fish are caught per day. All this was
17 mentioned in order that you can assess as objectively as possible.

18

19 My fifth point is: in what form should the security that was going to fix be offered?
20 Our opponents claim that the Tribunal d'Instance, which was the civil jurisdiction
21 which fixed the bond to liberate the ship, is obliged to fix a cash payment because
22 those are the rules of the French Code of Criminal Procedure. That is correct and it
23 is true that is what the Code of Criminal Procedure provides but we are not at that
24 level. Can one come before an international tribunal set up by a treaty ratified by
25 France and say to you, Mr President and members of the Tribunal in Hamburg, that
26 you must keep yourselves within the limits of municipal law and you cannot break out
27 of them? Furthermore, the Constitution of the Fifth Republic of 4 October 1958
28 provides in Article 55 -- the text can be supplied if you would find it useful -- that
29 treaties properly ratified have a higher value and prevail over law. That signifies that
30 the Convention of Montego Bay, ratified by France and the case law based on that
31 treaty, quite clearly have overriding value in relation to internal law, both within
32 metropolitan France and in French overseas possessions.

33

1 Furthermore, in the *Camouco* case you endorsed that practice by finding that a mere
2 bank guarantee supplied by a first rate bank was sufficient to satisfy the claim of the
3 respondent, which in that case also was France. I would add that France had no
4 difficulty in applying that and the internal court, taking note of your decision, simply
5 adopted that consequently and endorsed it, as was normal. On this point, I state that
6 the obligation of the state where one a treaty has been ratified is an obligation of
7 result. We do not have to inquire into the means that might be adopted by France in
8 order to respect the word it has given. It is a written commitment to the treaty.
9 There again, the case law of the European Communities Court is perfectly consistent
10 on that point.

11
12 My sixth point is: should one take into account the value of the equipment which
13 was seized and the cargo? Sometimes I have the impression that I am trying to beat
14 down an open door because you decided -- and my colleague and I of course
15 consulted your case law -- the *Saiga* case. The respondent state had pumped out
16 the fuel which was in the vessel and that was a sort of guarantee in kind which had
17 to be taken into account and it merely needed to be completed and supplemented if
18 necessary.

19
20 Yesterday afternoon we were told, but knowing the systems of the administration we
21 took precautions, about what has been seized here: first, FF 9 million of toothfish;
22 secondly, equipment which is already in the hands of the French state. Now we ask
23 for some consistency with your case law and that you should say that the guarantee
24 can be in kind and that in that case this value of FF9 million should be deducted from
25 the FF 9 million guarantee to be given. If the guarantee as fixed by your Tribunal is
26 less than that figure, then we should be covered because the whole guarantee will
27 be covered by that. This point seems to me to be of absolute biblical simplicity.

28
29 I come to my penultimate point. It was said yesterday, I think by
30 Professor Quéneudec, and I appreciated this, that we should think of the Master
31 today because he has been exiled and kept against his will on the Island of Réunion
32 for a month now. He is waiting for your decision to know whether or not he will be
33 able to spend Christmas with his family. That is true.

34

1 In previous decisions of yours you have applied the Convention because in this
2 context one concentrates on the ship itself and whether the ship has been blocked
3 on a reasonable basis against a bond which is reasonable. As you know, the Master
4 has the possibility of obtaining from you an injunction to a staying of that, if there was
5 an injunction, and obtaining a longer time for the procedure. When he knows that
6 the case will be heard in January, why should the Master been held? I would add,
7 being a common law lawyer myself, that the Tribunal can judge the matter in the
8 absence of the Master. Suppose he does not come back?

9

10 In any event, the French Code of Criminal Procedure confirms the possibility of any
11 defendant to be judged in his absence and in the presence of and represented by his
12 advocate for anything less than two years' imprisonment. Is that applicable here?
13 The maximum is six months' imprisonment for this. Therefore, the Captain has the
14 possibility of being represented by a lawyer for this purpose.

15

16 That is what I wanted to say with regard to the Master. It was said that he is so free
17 that we cannot find him in Réunion. If you know Réunion, Mr President, you will
18 know that it is a very tiny island. Some of you come from immense countries. Of
19 course, looking for one individual would be like looking for a needle in a haystack.
20 One cannot go into the mountains in the middle of the island. On the coast the
21 population is concentrated. It is said that we have been trying to find this individual
22 for the purpose of opening the seals. Counsel from Brussels is not present. His
23 office is in the middle of the town, but in Réunion we have never heard that one has
24 to find somebody to open the seals.

25

26 The photos produced show what is under seal. Since those photos have been
27 produced, somehow the Master must have been summoned in order for the seals to
28 have been opened with his agreement. This is not a serious argument and I shall
29 not expand on it.

30

31 My eighth and last point, on which I will conclude, is the effectiveness of your
32 decision. We are talking of a calendar of this nature: you will give your decision in
33 10 days, between 15 and 18 December. Mr Pérez has been cited before the

1 Tribunal in Réunion on 9 January. We would not want your decision to be deprived
2 of effect.

3

4 Perhaps I may explain. If, during your deliberations, France tries to gain time in
5 order to say that nothing can be done until the judge has decided, your decision
6 must be executed without delay. We would attach particular importance to that
7 inasmuch as the security will be offered immediately in order that the vessel may be
8 liberated and that the Master can go home and celebrate the end of the year with his
9 family.

10

11 The matter is now in your hands. Ultimately, what are we asking for? We ask for
12 a duly weighed up and reasonable application, a moderate application of the texts.
13 In Latin adage it is said that the law is what is just. I ask you this morning to be just.
14 Thank you, Mr President.

15

16 **MR GALLARDO** (Interpretation) : Mr President, members of the Tribunal, we have
17 concluded our discussion. I do not know whether you would like my submissions in
18 writing to ratify what has been said already in our Application?

19

20 **THE PRESIDENT:** If you have them, would you kindly read them out now and later
21 give us a copy and one to the other side?

22

23 **MR GALLARDO** (Interpretation): Consequently, on the basis of Article 292 of the
24 Convention, Article 34 of Annex 6 to the Convention and the rules of the Tribunal,
25 the Applicant requests the Tribunal:

26

- 27 1. To declare that the Tribunal has jurisdiction under Article 292 of the United
28 Nations Convention of the Law of the Sea to hear the Application submitted by
29 the Republic of the Seychelles.
- 30 2. To declare the present Application admissible.

- 1 3. To declare that the French Republic has contravened Article 73, para.4, by not
2 properly giving notice of the arrest of the vessel *Monte Confurco* to the Republic
3 of Seychelles.
- 4 4 To declare that the guarantee set by the French Republic is not reasonable as to
5 its amount, nature or form.
- 6 5 With respect to the Master of the vessel, *Monte Confurco*, Mr. José Pérez Argibay:
- 7 - To note that the French Republic has failed to observe the provisions of the
8 Convention concerning prompt release of masters of arrested vessels;
- 9 - To require the French Republic promptly to release the Master, without bond, in
10 light of the presence of the ship, cargo, etc, as a reasonable guarantee, given the
11 impossibility of imposing penalties of imprisonment against him and the fact that
12 he is a European citizen.
- 13 - To find that the failure of the French Republic to comply with the provisions of
14 Article 73, para.3, in applying to the Master measures of a penal character
15 constitutes a *de facto* unlawful detention.
- 16 6 To set a bond in the maximum amount of FF 2,200,000 based upon FF 200,000
17 for failure to notify presence and FF 2 million for a presence of 24 hours in the
18 EEZ without giving notice, and up to four tonnes of catch theoretically taken, in
19 the worst of cases, as the sole admissible evidence of presumption.
- 20 7 With regard to the nature of the bond, that the Tribunal consider that the value of
21 the cargo seized, the bait and the gas oil constitute part of the guarantee;
22 according to our calculations this morning, the value being FF 9,476,000.
- 23 8 That the Tribunal choose between a financial instrument issued by a European
24 bank or a guarantee comprising the value of an equivalent number of tonnes to
25 be immediately discharged, since it seems that they have been discharged to
26 take account of that situation to assess the amount of the guarantee in first
27 instance.
- 28 9 With regard to the form of the financial bond, as a subsidiary measure, in the
29 event that the Tribunal chooses to set a symbolic financial bond, the applicant
30 requests that the Tribunal note its desire for a bank guarantee by a leading
31 European bank as admitted in the *Camouco* case and the text recognised in
32 order not to lose three weeks before possession of the vessel, to be deposited
33 with the Tribunal in exchange for the release of the vessel.

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THE PRESIDENT: Would the Agent of France be able to start his presentation at 2 pm or would he like to start at 2.15 pm or 2.30 pm?

MR TRINQUIER (Interpretation): Thank you, Mr President. I think that 2.15 pm would be perfectly appropriate. That would give us an extra 15 minutes.

THE PRESIDENT: The hearing is adjourned until 2.15 pm.

(Luncheon adjournment)