

## DISSENTING OPINION OF JUDGE JESUS

1. The Tribunal, when dealing with prompt releases cases, should have a clear understanding of what it is called to act upon, within the meaning of relevant provisions of the Convention, namely of article 292, so as to imprint consistency to its decisions and avoid unwarranted interference in any consideration on the merits of the case.

2. In the “*Monte Confurco*” Case, the Tribunal seems to have acted otherwise. That is why I disagree with some fundamental aspects of the majority decision, especially in respect to the approach retained by that majority to determine the reasonable bond. Accordingly, I voted against operative paragraphs 6 and 8 of the Judgment.

3. Indeed, in the exercise of its sovereign rights for the purposes of exploring, exploiting, conserving and managing the natural resources in its exclusive economic zone, the coastal State, as recognized by article 73 of the Convention, has the right “to take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the Convention”.

4. However, in order to avoid unnecessary prolonged periods of arrest or detention of vessels, the same article 73, paragraph 2, mandates that vessels and their crews be promptly released upon the posting of a reasonable bond.

5. These provisions of the Convention seem to strike a good balance between two different and opposing interests, protecting, on the one hand, the coastal State’s sovereign rights over living resources from being plundered by illegal fishing and, on the other hand, avoiding unnecessary prolonged vessels arrest and detention that might, otherwise, cause heavy losses to the vessel’s operator.

6. It is therefore important that the Tribunal should be able to preserve this balance whenever it is called, under the prompt release procedure, to determine what a reasonable bond should be in alleged fisheries violations.

7. I am afraid that the majority decision in the “*Monte Confurco*” Case failed to preserve such a balance.

8. This Tribunal has no role to play in any aspect or consideration upon the merits of the case. Indeed, article 292 of the Convention is quite clear in this regard when it states that “... [t]he ... tribunal ... shall deal only with the

question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew".

9. One can understand the limitation imposed by the Convention on an international court or tribunal that, when dealing with a prompt release case, should only determine a reasonable bond and not delve into the merits of any case, a matter left, rightly so, to the domestic jurisdiction, in order to preserve the integrity of the coastal State's sovereign rights that otherwise might be disrupted.

10. The role of this Tribunal in prompt release cases of arrested or detained vessels for alleged violations of fisheries laws and regulations should thus be only one: to determine under the concrete circumstances of each case if the bond imposed by the domestic court is or is not reasonable. This is the only determination that the prompt release procedure requires from this Tribunal and nothing else. To go beyond this and to make qualifications of facts and law applicable to the case, as reflected in some paragraphs of the majority decision, is to encroach upon the exclusive jurisdiction of the domestic courts on the merits of the case.

11. Therefore, the core issue to be considered here is which criterion or approach to take in order to determine if a bond imposed by a domestic forum is or is not reasonable for the purposes of article 292 of the Convention, without having to make any consideration on the merits of the case.

12. In addressing this issue, the majority was unable to find a direction that would have preserved the limitation put on it by article 292 of the Convention not to deal with the merits of the case.

13. Accordingly, in order to establish a bond that it can consider as reasonable for the purposes of articles 73 and 292 of the Convention, the majority felt compelled to make some considerations on the merits of the case, evaluating facts and assessing evidence submitted in the course of the proceedings, drawing legal conclusions, actions that that, in my view, fall clearly within the purview of the domestic courts and not of this Tribunal.

14. The Tribunal, in so doing, embarked upon what I consider to be a constructive interpretation of its role in prompt release cases. Such position is totally unnecessary, finds no support in article 292 of the Convention and impinges upon the legitimate sovereign rights of the coastal States.

15. The majority could have avoided such unwarranted course of action and the temptation of making consideration on the merits of the case, had it adopted a common sense approach.

16. Indeed, since, under the Convention, the penalties involved in this case can only have an economic or monetary nature (see article 73, paragraph 3, of the Convention), it might make sense, it might be "reasonable", for the vessel's owner or the flag State to post a bond, the amount of which might be determined somewhere between the value of the vessel and the value of the totality of the assets seized by the coastal State.

17. A reasonable person, a prudent vessel operator, in general, might not post a bond, the amount of which is much higher than the value of the vessel (or its operational value) or, at most, the totality of the value of the assets seized by the detaining State.

18. There is no obligation on the vessel's owner to post a bond. He might do so if, in economic terms, it makes sense to him. Otherwise he might well wait for the decision of the domestic forum and risk only the value of its assets seized.

I would have thought that this should be the basis, the yardstick against which to measure the reasonableness of the bond.

19. In determining the reasonable bond one must not lose sight of its finality and therefore if the bond imposed by the domestic court is much higher than the value of the vessel (or its operational value) or, as the case may be, higher than the value of all the assets seized, it might then not be reasonable for the vessel's operator to activate the prompt release procedure, since he would run the risk, if condemned by the domestic court, of losing not only the cargo and other assets seized in the event of their confiscation, but also the bond posted.

20. On the other hand, seen from the side of the detaining coastal State, if no bond is to be posted on account of being excessively high, in the end the coastal State would, in any case, have to rely only on the value of the vessel and other assets seized, as the case may be, to respond for the fines (whatever their amount might be) and other penalties that might be imposed. It might be therefore not reasonable for the coastal State to impose a bond much higher than the value of the assets seized, *maxime*.

Accordingly, the maximum amount that can be posted as a reasonable bond is, at the same time, the maximum amount that the detaining coastal State can rely on, if no bond is posted.

21. The exact amount of the bond, ranging from the value of the vessel to the value of all the assets seized, would depend on the particular circumstances of the case, namely the value of the vessel, cargo and other assets

seized, as well as the imposable fines and other penalties, under the detaining State legislation, having in mind the different weight to be given to each one of these relevant factors retained in paragraph 67 of the "*Camouco*" Case.

This is to me a better criterion to establish the reasonableness of the bond, one that is objective and does not disregard the command of article 292 of the Convention, imposing judicial restraint on this Tribunal when dealing with prompt release cases.

22. Therefore, I believe that, had this approach been the basis for the determination of the reasonableness of the bond, the balance embodied in articles 73 and 292 of the Convention between the coastal State rights to take action for the protection of its sovereign rights over living resources and the right of the flag State to seek relief from an unnecessary prolonged arrest or detention of a vessel, would have been preserved, without prejudice to the merits of any case before the French domestic courts, against the vessel, its owner or its crew.

23. Based upon this approach, though relying upon a different reasoning, I hold, like the majority, that the bond of 56,400 million FF, imposed by the order of the court of first instance at Saint-Paul to release the vessel *Monte Confurco* and its captain, pending the decision of the appropriate domestic court, is too high an amount and, therefore, it can not be considered a reasonable bond under the circumstances.

24. However, I do not agree with the majority decision, specifically in respect to the following fundamental points, in addition to what I have said in relation to the approach for fixing the reasonable bond:

25. Firstly, the majority decision, instead of treating "the laws of the detaining State and the decisions of its courts as relevant facts", without having to qualify them, in attempting to determine the reasonable bond, ends up preempting the domestic court from exercising its full competence on the merit of the case, by asserting the right for "examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond" (paragraph 74 of the Judgment).

26. Proceeding along this line, the Tribunal deals with considerations, clearly on the merits of the case, when it states that it "... is aware that the expert opinion of the scientist referred to in paragraph 54 suggests that not all the fish on board could have been fished outside the exclusive economic zone of the Kerguelen Islands".

It then draws the conclusion that it "does not, however, consider the assumption of the court of first instance at Saint-Paul as being entirely consistent with the information before this Tribunal".

It goes on, stating that "Such information does not give an adequate basis to assume that the entire catch on board, or a substantial part of it, was taken in the exclusive economic zone of the Kerguelen Islands; nor does it provide clear indications as to the period of time the vessel was in the exclusive economic zone before its interception" (paragraph 88 of the Judgment).

27. The preceding quotations from the majority decision clearly demonstrate that it acted beyond what is expected from the Tribunal in accordance with article 292 of the Convention.

28. It might well be the case that these findings might prove to be true, but that is a determination that can only be made by the domestic court. It is not the competence of this Tribunal to anticipate and therefore preclude the domestic court's positions on these very important aspects on the merits of the case. Besides, even if the Tribunal were to ascertain its competence to deal with such considerations, it did not have before it enough evidence to conclude in one way or the other.

29. Whether the vessel *Monte Confurco* fished or did not fish in the exclusive economic zone of the Kerguelen, or whether it caught the whole or only part of the amount of fish seized in the arrest by the French authorities, those facts are immaterial and irrelevant to the prompt release procedure before this Tribunal which should only be concerned with the determination of what a reasonable bond should be.

30. Such position taken by the majority is tantamount to making considerations on the merits of the case for which this Tribunal has no competence, as explained before, and raises the issue of overlapping jurisdiction with the domestic court.

31. Secondly, the majority decision held that "... the monetary equivalent of the 158 tons of fish on board the *Monte Confurco* held by the French authorities, i.e., 9,000,000 FF, shall be considered as a security to be held or, as the case may be, returned by France to the Applicant" (paragraph 93 of the Judgment).

32. In my view the majority decision was unwise to have taken the value of the fish seized as part of the bond, when the domestic legislation makes it subject to confiscation. One important aspect of legitimate penalties normally

imposed by coastal States legislation (amongst them the French legislation), in such cases, is the confiscation of the product of illegal fishing.

33. It is conceptually wrong, in a case where the Tribunal has no competence on the merits, to consider as part of the bond or security any seized asset that, in the end, might be confiscated, by the decision of the appropriate domestic court, as part of the penalties imposable by the national legislation.

Indeed, it is beyond my understanding to grasp the rationale of such a decision of the majority in considering as part of the bond or security the very product of a claimed illegal activity.

34. In addition, by so doing, the majority decision clashes with the legitimate jurisdiction of the domestic court to exercise, here again, its full competence on the merits of the case.

Accordingly, I respectfully dissent.

*(Signed)* José-Luis Jesus