

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

**THE “MONTE CONFURCO” CASE**

**(Republic of Seychelles v. French Republic)**

**Statement in Response of the French Government**

**Paris, 5 December 2000**

## **Introduction:**

(1) In accordance with Article 111, paragraph 4, of the Rules of the International Tribunal for the Law of the Sea (hereinafter “the Tribunal”) the Government of the Republic of France intends to submit facts and considerations of law in reply to the request for the release of the vessel “Monte Confurco” submitted to the Tribunal by an Application on behalf of the Republic of Seychelles based upon Article 292 of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”).

(2) The Memorial submitted to the Tribunal on 28 November 2000 by Mr. Ramón García Gallardo of the firm SJ Berwin & Co, acting on behalf of the Republic of Seychelles as its agent, contains numerous questionable assertions, and often biased presentation of the facts and an attempt to call into question the veracity of what was observed and recorded by officers of the Navy. This presentation, therefore, shall endeavour to give the Tribunal a more objective view of the events which are at the origin of these proceedings and considerations upon which it may wish to base itself in reaching a decision on the case before it.

(3) The French Government wishes to stress, however, that the fact of not responding to certain arguments or certain claims by the Applicant obviously does not mean that it accepts such arguments or claims. It wishes, further, to point out that this presentation, drafted within the very brief time period provided for under Article 292 of the Convention, is confined to presenting the essential aspects of the French position in the present case. It goes without saying that several of these aspects will be the subject of further development during the oral proceedings.

(4) This presentation will consist of four parts which are not of equal importance. After presenting the facts underlying the case, we shall turn first to the jurisdiction of the Tribunal in this case and to the problem of the admissibility of the Application. The final part will be devoted to presenting the submissions of the French Government.

## **I – The Facts:**

### **a) chronology:**

#### **8 November 2000:**

##### ***07 hours: Detection***

The Navy surveillance frigate “Floréal” patrolling in the Exclusive Economic Zone of Kerguelen, detected an unidentified radar echo at a position 110 nautical miles from the western limit of that zone. In the following hour, every 20 minutes, the vessel spotted a series of longline buoys bearing respectively the numbers 1 and 8. They were located 5 and 7 nautical miles from the position of the unidentified vessel when it was detected.

The helicopter of the Floréal, after having noted on its radar the presence of no vessels other than that of the unidentified echo and of the Floréal within a radius of 50 nautical miles, that is to say a journey of 5 or 6 hours, spotted a third line of buoys with the figure 4 less than one nautical mile from the position of the echo at the time it was detected.

**10:19 Inspection of flag**

After having obtained confirmation from the competent French authorities that no vessel had identified itself in the Exclusive Economic Zone of Kerguelen, the Floréal began its flag inspection mission.

The fishing vessel changed course and speed several times. Its speed varied from 7 to 10 knots which, in light of the weather conditions, corresponds to its maximum speed. It did not identify itself until several minutes later as the Monte Confurco, with 40 personnel on board, but it refused to stop despite a request made to it by radio from the Floréal and the helicopter overflying it and presenting a sign bearing the word "STOP". It finally complied.

The helicopter crew noted that at the stern of the vessel several men were jettisoning boxes into the sea, one of which, recovered by a diver from the helicopter, contained defrosted sardines, bait used for longline fishing. Despite summons by radio given from the Floréal, the four men continued for about 20 minutes to throw bait and pieces of cardboard overboard.

**11:33 Boarding**

Arrival of the boarding party on the Monte Confurco was delayed by bad weather, which made it necessary to use the helicopter winch. It was noted that not all of the crew were assembled amidships.

The captain of the Monte Confurco and his second in command were discovered in the wheelhouse throwing into the sea fragments of torn documents, some of which were flung back by the wind and were recovered. Some appeared to be fragments of the fishing log, others gave list of vessels and the names of their captains, some of whom were known for having fished illegally in the Exclusive Economic Zone. A large number of small frozen fish and hooks was noted on the back of the amidships deck. Ultimately, the whole crew was assembled.

*Ships papers*

The captain, whose vessel was equipped with a VHF radiotelephone and an INMARSAT station in good working condition, acknowledged that he was in the Exclusive Economic Zone of Kerguelen, that he did not have a license to fish in that zone, that he had failed to notify his entry or the fact that he had fish on board, although 150 tons of toothfish were found in the holds. As a fishing log, he presented six handwritten sheets which were not continuous and which broke at 6 November. The map of Kerguelen, which was included in the list of maps on board, was missing.

*Equipment of the vessel*

A topped toothfish whose temperature proved that it had just been stored was found in the main refrigerated hold. Two others in the same condition were found later during a second inspection. The ship's factory seemed to have been recently cleaned, as bornout by the fact that work areas and containers were wet; traces of blood and scraps of toothfish were found there. In the longline preparation area defrosted sardines were found some of which were placed on hooks. Of the five storage areas contained there two, including a large one, were empty and the three others were half full. Two bottom anchors for longline fishing of the same kind as that which the Floréal recovered at 19:15 h were recovered nearby.

In the buoy area there were eleven red buoys of which four were equipped with flashing lights and a radio emitter designed to facilitate locating them. These four buoys were marked respectively 5, 6, 9 and 10 and carried numbers which complemented those of the buoys recovered at sea, and had been fitted out with the same technical improvement as buoy number 1 which would be recovered later on.

The goniometer, which serves to locate longline buoys by radio, was not functioning; the captain stated that he did not use this equipment. The apparatus for memorising the geographical co-ordinates installed on the three GPS position finders in the wheelhouse indicated a large number of points recorded, corresponding to positions located in the Exclusive Economic Zone of Kerguelen.

### **19:15 h – 21:25h**

The Floréal observed a series of unnumbered buoys as well as the longline of radio buoy number 1 detected at 7:48 h, which presented the same improvised feature as the buoys found aboard the Monte Confurco. The buoys, the fishing lines belonging to the longline itself and the anchor turned out to be of the same manufacture as those found aboard the fishing vessel. The hooks were still baited with sardine heads.

### **23:00 h**

The captain of the Monte Confurco was discovered deleting figures from a computer file. This led to the discovery of a list of INMARSAT telephone numbers of other longline fishing vessels some of which were known for having illegally fished in the French Exclusive Economic Zone, as well a table for coding information.

### **23:20 h**

A procès-verbal of violation was drawn up.  
The Monte Confurco was diverted.

## **9 November**

### **9:15 h**

The Floréal observed buoys 4 and 8. They both had the same characteristics as buoy number 1.

### **19:56 h**

A procès-verbal of apprehension was served upon the captain of the Monte Confurco, who signed it and was given a copy.

## **10 November**

### **8:19 h**

The prefect of Réunion informed the flag State (Consul General of the Republic of Seychelles in Paris).

## **19 November**

The Floréal and the Monte Confurco arrived in Réunion (Port-des-Galets) at 8:30 h after a journey which took longer than usual because of poor conditions.

## **20 November**

Three procès-verbaux of seizure, pertaining respectively to the vessel, the catch, and the fishing tackle, were drawn up by the maritime affairs service of the department.

## **21 November**

The captain, Mr. ARGIBAY PEREZ, was placed under court supervision by an order of the Tribunal de grande instance of St Denis.

## **22 November**

An order of the chief judge of the Tribunal d'instance of Saint-Paul ruling on a request of the maritime affairs service to authorise the release of the seized vessel subject to prior payment of a bond of 95 400 000 ff, set the said bond at 56 400 000 francs.

### **b) inconsistencies relating to the routes followed and the areas where the Monte Confurco claims to have fished**

#### **Route followed by the Monte Confurco**

According to statements of the captain which are presented in the Application, the "Monte Confurco" was located at 47° 40' S and 63° 30' E on 7 November at 10:00 h, universal time. When it was detected by the Floréal on 8 November at 7:00 h local time (i.e. 2:00 h universal time), it was at the position 49° 27.9' S and 66° 37.5'E.

Between these two positions, which have been declared or observed, there are 160 miles, that is 300 kilometres, which means that the "Monte Confurco" was sailing at an average speed of 10 knots, namely its maximum speed, or possibly faster in light of the weather conditions observed, and subject to making only a continuous and direct transit.

On board, or near the bait, buoys and tackle were found which proved that there had been recent activity under-way, which the captain indeed does not deny. The speed of the "Monte Confurco" while fishing was less than its speed when it was simply sailing. It was at a standstill<sup>1</sup> when it was at anchor or recovering buoys, which, it appears unquestionable, belonged to the vessel. It therefore seems impossible that the position outside the French EEZ on 7 November could be correct. This vessel was unquestionably inside the French EEZ of the Kerguelen islands for several days.

Furthermore, it proved impossible to verify the indications given by the captain in his logbook, inasmuch as the captain recognised that the point which he had referred to as being the location of his vessel on 8 November at 8:00 h and which puts him at the western limit of the EEZ was false and that his real position was 80 nautical miles further to the east and therefore that much closer to Kerguelen.

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<sup>1</sup> With a 16-year-old engine the maximum speed of the Monte Confurco is from 8 to 10 knots according to water temperature. When it is putting longlines into the water, the speed cannot exceed 5 knots; when it is bringing up the longlines its speed cannot exceed 1 knot.

## Fishing Areas

*1/ Positioning on 7 November 2000 at 10:00 h where the longliner claims that it was "finishing its fishing in international waters at 47°40' S - 63°30' E."*

This position (only 12 miles from the French economic zone !) is located in international waters managed by the Commission for the Conservation of Antarctic Marine Living Resources. This area is included in statistical Division 58-5-1 which is delimited on the north by latitude 45°S, on the east by longitude 60°E, on the west by longitude 80°E, and on the south by latitude 51°30'S between 60°E and 66°30'E (sector concerned).

This Statement, with regard to fishing at that position, fails to observe the conservation measure 172/XVIII of the CCAMLR, which, based on the conclusions of its Scientific Committee (potential non-viability of a fishery, even of an exploratory kind, by reason of the absence of toothfish stock; recommending prohibition of fishing), laid down, by this conservation measure valid during the 1999/2000 southern season (refer to document entitled "official list of conservation measures in force, 1999/2000, published by CCAMLR) of 1 December 1999 to 30 November 2000, the prohibition of fishing of *Dissostichus* spp. (excepting the waters of the Kerguelen EZ as is specified in the conservation measure) in its Division 58-5-1. This measure was adopted pursuant to Article IX of the Convention, defining the manner of establishing conservation measures for the observance of Article II (purpose: conservation of Antarctic marine resources) of this same Convention.

The fact that the "Monte Confurco" claims to have fished in a sector of the CCAMLR zone where toothfish fishing is totally prohibited means that the Seychelles (flag State of this vessel) is undermining the efforts of that international Convention, which seeks rationally to manage the marine resources under its competence.

Finally, the position given by the "Monte Confurco" is located in waters more than 3500m deep according to one of the nautical maps most recently updated (map 7604 of SHOM published in 1999!) which makes it strictly impossible, biologically speaking, for toothfish to be found at that depth. Toothfish is a fish which is found at depths between 70 m and 1500m (see FAO Species Identification Files for the Southern Seas, volume II published in 1987, or Fishes of the Southern Ocean, published in 1990) and sometimes up to 1600 to 1700m (but certainly not twice that depth !). It is therefore truly impossible for toothfish fishing to take place at that position.

A responsible attitude by the Seychelles towards the CCAMLR would have been to provide statistics concerning discharges of this longliner since it has flown the Seychelles' flag. The Government of Mauritius produced an official document transmitted and recorded by the CCAMLR under number SCOI-00/27 which records several discharges by this longliner during the year 2000.

*2/ Analysis of six sheets concerning the positions where the "Monte Confurco" fished during September, October and November of the year 2000*

The "Monte Confurco" was recorded to be present in Mauritius on 21 August 2000 and the first position where it fished on 1 September may be possible, taking into

account the route. The positions given (at approximately 38°S and 50°E) are located in subtropical zones (same latitude as the St-Paul and Amsterdam islands, French ZE) and are remarkably stable during more than two months! It is quite troubling that a longliner should have remained in the same position in this way for such a long time without having experienced declines in catches which would have obliged it to move on.

If one looks at map 7604 of SHOM (cited above) the positions given for 1 September to 22 October 2000 are on the south-west Indian ridge, where there is no toothfish because those waters are unsuitable for this species for bio-geographical reasons! Indeed, between 43 and 44°S one encounters a succession of hydrological barriers (subantarctic front, subtropical front) which prevent toothfish from migrating towards the north (which is not the case in South America, where the Humboldt Current permits this species to be found in deep waters off the coast of Chile). At these latitudes and at these depths, the only species that is harvestable is the emperor (*Hoplostethus atlanticus*), and longline fishing is not an appropriate means for catching them. Several French research fishing campaigns conducted in recent years on this southwest Indian ridge have failed to prove the presence of toothfish. It is therefore impossible for a commercial catch such as the ostensibly over 150 tons of the "Monte Confurco" to have been achieved in these latitudes. One may observe from these pages that the depths where fishing is recorded to have taken place fall between 1400 m and 1540 m which reflects actual toothfish fishing practises (which could, for that matter, be demonstrated by the length of the lines used between the (surface) buoys and the anchor (for fixing one end of the longline to the seabed)).

After a transfer operation with the Praslin, as indicated on 23 October, the longliner, between 24 and 27 October travelled down by 44°S and 45°E, that is to a point 20/30 miles east of the Crozet EZ! This place is known as the Del Cano Rise (see map SHOM 7604). Here, the depths and latitude make it possible for toothfish to be present in these international waters outside the CCAMLR zone; however, tests conducted by French longliners in July 2000 and also by South African longliners in the CCAMLR zone very nearby with respect to conservation measure 189/XVIII (statistical subarea 58-6) indicate very low yields which are not cost-effective.° Based on this observation, a tonnage in the hold of over 150 tons would require a fishing campaign of four to five continuous months in the area under better conditions! Moreover, the fishing season was only between 1 May and 31 August 2000. In order to avoid excessive mortality of birds (in accordance with Article IX, § 2, subsection I of the Convention). The fact that a longliner flying the Seychelles flag should permit toothfish fishing in an area so close to the CCAMLR zone outside the exploratory fishing season does not contribute to the principle of responsible fisheries by fishing States!

After 27 October, the longliner is supposed to have sailed (going around the Crozet ZE, since it did not announce its passage through it to the French authorities) up to the eastern edge of the ZE of Kerguelen, where it gives its fishing positions for 3 to 6 November (about 47°45'S - 61°15'E). These positions, outside the French EZ, fall under the competence of the CCAMLR (because they are south of 45°S), because this is in statistical subdivision 58-5-1. Besides the fact that the actual depth rule out the presence of toothfish at these positions, the presence of a longliner flying the Seychelles flag and fishing here further undermines the efforts of the CCAMLR to manage marine resources in this area, since toothfish fishing is strictly prohibited up to

30 November 2000 by conservation measure 172-XIX (renewed in 2000/2001 as from 1 December 2000).

## **II – JURISDICTION OF THE TRIBUNAL**

1. It has been established that the conditions for the jurisdiction of the Tribunal under Article 292 of the United Nations Convention on the Law of the Sea have been met in this case. Accordingly, the Government of the French Republic considers that the Tribunal has jurisdiction to hear the request submitted on behalf of the Seychelles Republic, subject to the following two observations:

2. Firstly, it should be noted that the Application submitted on behalf of the Republic of the Seychelles was not submitted “in accordance with the power of attorney dated 28 December 1999” as is erroneously stated on page 46 of the Application, since the power of attorney issued on that date to Mr. Garcia Gallardo originated with another State and pertained to another case before the Tribunal previously (the “Camouco” case, *Panama v France*). The mandate given to act on behalf of the Seychelles in the present case is that which bears the date 20 November 2000 (Annex 1 of the Application).

3. Moreover, the Government of the French Republic wishes to recall that the Tribunal’s jurisdiction under Article 292 is a limited jurisdiction, in the sense that the Tribunal may address only the issue of release, as spelled out by Article 292, paragraph 3, of the Convention.

Contrary to certain allegations advanced by the Applicant, the only question before the Tribunal therefore is that of determining whether the provisions of the Convention providing for release subject to the posting of a bond have been observed or not as far as the “Monte Confurco” is concerned.

## **III - THE PROBLEM OF THE ADMISSIBILITY OF THE APPLICATION:**

4. According to the French Government, the Application submitted to the Tribunal on behalf of the Republic of Seychelles is not admissible as to any of the submissions it sets forth, either because those submissions suffer from some kind of inadmissibility of principle, or because they rest upon allegations which are entirely unfounded.

### **A) Inadmissibility in principle of certain Submissions:**

5. The 3<sup>rd</sup> Submission set forth by the Applicant must be rejected because, by requesting the Tribunal “to declare that the French Republic has contravened Article 73 (4) by not properly giving notice of the arrest of the vessel Monte Confurco to the Republic of Seychelles”, the Applicant openly disregards the fact that the jurisdiction of the Tribunal under the procedure in Article 292 pertains only to the question of release and that the provisions of paragraph 4 of Article 73 do not refer to that question. Moreover, this conclusion rests not only on an inaccurate presentation of the facts but also on a manifest distortion of them, inasmuch as, contrary to the version of the facts presented in paragraphs 44 to 46 of the Application, the Prefect of Réunion, by letter of 9 November 2000, transmitted on 10 November 2000 by fax, informed the Consul



General of Seychelles in Paris of the measures taken against "Monte Confurco" and its Captain (Annex 4)

6. The 5<sup>th</sup> Submission also is inadmissible, particularly when the Tribunal is requested "to find" (...) that the French Republic has failed to observe the provisions of Articles 73, paragraph 3, by applying to the Master measures of a penal character [sic] constituting a de facto unlawful detention". It is sufficient to recall that these provisions are not of a nature to be invoked in the framework of a procedure under Article 292, as the Tribunal stressed in the "Camouco" case. Considering the submissions by which the Applicant had requested a finding of violation of Article 73, paragraphs 3 and 4 of the Convention, the Tribunal on that occasion stated:

"The scope of the jurisdiction of the Tribunal in proceedings under Article 292 of the Convention encompasses only cases in which "it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security". As paragraphs 3 and 4, unlike paragraph 2, of Article 73 are not such provisions, the submissions concerning their alleged violation are not admissible." (Judgement of 7 February 2000, paragraph 59).

7. With regard to the other elements of the 5<sup>th</sup> submission of the Application, they too must be rejected, inasmuch as they rest upon a clear misunderstanding of the legal situation of the Captain of the "Monte Confurco", who was referred to the prosecutorial authorities on 21 November 2000 and against whom criminal proceedings are underway. The Captain of the vessel has been placed under court supervision. This is a simple preventive measure which is adopted with respect to persons about whom there is reason to fear that they may seek to evade justice. The practical application of court supervision in this case has taken the form of withdrawal of the person's passport in order to ensure that he will in fact be present on the day of the hearing before a French jurisdiction, which has been set for 9 January 2001. It is surely abusive to attempt to present this measure of court supervision as a form of deprivation of liberty. Judicial supervision is not a form of pre-trial detention, or even a form of house arrest. It would therefore be completely inaccurate to consider that the Captain of the "Monte Confurco" is in some way a "prisoner" or deprived of his liberty. To the contrary, he is free to go about the territory of the Department of Réunion. Under these conditions, the request for the "prompt release of the Master" is entirely pointless and can only be rejected. This is all the more true in that the Applicant claims that this so-called "release" should take place "without any bond"; which runs counter to the relevant provisions of the Convention applicable to this case.

8. Although they are not formally repeated in the final submissions of the Applicant, the allegations according to which France has ostensibly violated provisions of the Convention concerning freedom of navigation and according to which French Legislation is jeopardising that freedom should also be expressly rejected by the Tribunal as being entirely inadmissible in the framework of this case.

#### **B) Inadmissibility of the 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> submissions:**

9. These submissions all concern the bond provided for in Article 73, paragraph 2, of the Convention in the event of the arrest of a foreign fishing vessel. The

inadmissibility of these submissions depends upon demonstrating that the allegation of a violation by France of this provision of the Convention is well-founded. In accordance with the general principle of Procedural Law according to which the burden of proof of a fact falls upon the party asserting it, it obviously falls to the Applicant in the present case to come forward with evidence that his allegation is well-founded. It is not sufficient to establish that the allegation of non-observance of the Convention is apparently of a sufficiently plausible character to be put forward as arguable; because the specific procedure of Article 292 is entirely independent and leads to a definitive decision on the question whether or not there has been non-observance of the provisions of the Convention concerning prompt release. The Tribunal, therefore, is not called upon here to pronounce itself *prima facie*, but rather to take a definitive decision on the question.

10. The assessment of whether or not the allegation of violation of Article 73, paragraph 2, of the Convention is well-founded, is, however, itself closely dependent upon an assessment of the reasonable or unreasonable character of the bond. The Applicant has not shown that the bond required for the release of the vessel "Monte Confurco" was not reasonable. Moreover, it has invoked, in support of its arguments, provisions of the Convention which are not applicable in this case, referring specifically to Article 226 of the Convention, whereas only Article 73, paragraph 2, is applicable in this case. The French Government intends to demonstrate to the contrary, that the bond required here is reasonable both as to its amount and as to its nature and form.

11. It should be pointed out that the French text of Article 73, paragraph 2, does not use the adjective "reasonable" in reference to the bond, but rather the following expression: "Lorsqu'une caution ou une garantie suffisante a été fournie..." whereas the English text says "the posting of reasonable bond or other security". This difference between the two language versions certainly does not indicate a difference of meaning between them, but does, however, provide an indication of the meaning that may be attached to the concept of reasonableness, which, like all variable concepts, is a general standard whose content varies according to the circumstances; the standard of reasonableness is, from this point of view, comparable to the concept of equity. As International Case Law has repeatedly had occasion to recall, that which is reasonable and equitable in a particular case necessarily depends on the circumstances. This is why one may validly take the view that that which is reasonable in some circumstances is that which is appropriate and sufficient in the light of those circumstances, whereas that which appears as unreasonable would be that which is inappropriate to the situation.

12. The concept of "suffisante" or "reasonable" cannot be defined in the abstract, and therefore its content depends on taking into account various elements. In the previous case, the Tribunal considered that a number of elements were relevant to evaluate the reasonable character of a bond and it stated in this regard:

"...a number of factors are relevant in an assessment of reasonableness of bonds or other financial security. They include the gravity of the alleged defences, the penalties imposed or impossible under the Laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form. (Judgement of 7 February 2000, paragraph 67)

13. As clearly emerges from the presentation of the facts underlying the present case (see above), the contraventions of laws and regulations applicable in the Exclusive Economic Zone of the French southern and Antarctic territories which are noted against the “Monte Confurco” and its captain constitute contraventions of special seriousness, for which the total fines incurred by the captain reach the sum of 79 000 000 francs. As regard the value of the vessel, it has been estimated at 15 000 000 francs by the marine surveyor approved by the Court of Appeal of St Denis de la Réunion. It should be pointed out in this connection that the operating value of the vessel is greater than its commercial value and that this is a consideration which should not be disregarded.

Accordingly, the President of the Tribunal d’instance of St Paul, at the request of the Departmental and Regional Director of Maritime Affairs, set the amount of the bond at 16 400 000 francs, indicating that the bond was intended to ensure the appearance of the captain of the “Monte Confurco” to the extend of 1 000 000 francs to guarantee reparation of damages caused by the contraventions noted to the extend of 400 000 francs and to guarantee payment of fines to the extend of 55 000 000 francs. In his order of 22 November 2000, the President of the Tribunal d’instance prescribed that payments of the bond should be “either in cash or in the form of a certified check or banker’s draft”, because this form of payment of a bond is required by the Code of Penal Procedure. In the view of the French Government, when the Tribunal is led to pronounce itself upon a request submitted under Article 292 of the Convention and it makes use of the powers it derives from Article 113 of its Rules, it cannot disregard requirements which are laid down by the rules of the national law of the detaining State.

14. These elements, which should be taken into consideration in evaluating the reasonableness of the bond, are not, however, the only ones to be taken into account. The Tribunal is fully aware of this since, in the above mentioned “Camouco” case it had clearly let it be understood that the elements referred to in paragraph 67 of its Judgement were not necessarily the only ones that should be taken into account as is shown by the wording “among these elements” at the beginning of the aforementioned sentence. Indeed, there are other elements which are also such as to lead to an appropriate assessment of the reasonableness of the bond. These other elements relate to circumstances which characterise the present case and the legal context which characterises it. In this regard, it has been said “That which is reasonable [...] depends essentially on the one hand on the factual circumstances surrounding the particular case, and on the other hand on values involved in the concrete application of the law to the particular case” (Jean SALMON, “Les notions à contenu variable en droit international public” in: Ch. Perelman et R. Vander Elst, *Les notions à contenu variable*, Bruylant, Brussels, 1984, p. 265.).

**15. The general context of unlawful fishing in the region concerned: importance of the threat of unlawful fishing to the future of toothfish resources and measures taken by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)**

Among the circumstances constituting what one might call the “factual background” of the present case, there is one whose importance is fundamental. That is the general context of unlawful fishing in the region concerned.

Since 1996 the CCAMLR has been faced a systematic plundering of toothfish resources managed in the Southern Sea (the geographical area of its competence). This trend is the result exclusively of longline fishing, with ship owners being attracted by immediate profits. It takes place essentially in the Indian sector of the Southern Sea (statistical area 58 of the CCAMLR). This situation leads to an underestimation of real catches (since those catches are of course not declared to the joint statistical bureau of the FAO/CCAMLR) and distorts evaluations of the working group on fish stock assessment (WG-FSA) under this international Convention. This situation has been correctly assessed because it is an important subject of discussion at the annual meetings of the Standing Committee on Control and Inspection (SCOI) of the Commission.

The effects and threats of this unlawful fishing are of three kinds:

- 1) A decline in the total harvestable biomass of toothfish by uncontrolled catches and underestimation of the real catch which can lead to overexploitation of the resource and erroneous calculation of the annual total allowed catch (TAC). Naturally, it is the lawful fisherman who respect CCAMLR conservation measures who will be the first to bear the negative effects of this unlawful fishing when corrections are made to the models of evaluation, leading to proposals for a TAC.
- 2) There is an indirect effect of unlawful fishing upon populations of seabirds who live in the Southern Sea (Albatross and Petrels) through excessive mortality. Indeed, these longliners do not respect the conservation measures designed to minimise this problem (conservation measure 29/XVI in particular) which creates a major risk for the environmental balance.
- 3) Undermining of efforts to try to develop new and exploratory toothfish fisheries in a rational manner, through preventive limitations on catches and specific protocols (research plans) entrusted to international scientific observers (specific conservation measures in all of the areas, subareas and statistical subdivisions which previously did not have an established toothfish fishery)

By way of example, the Scientific Committee gives the following indications (section 5-36 of its XVIIIth annual report):

“that catches of *D. eleginoides* in the South African EEZ around the Prince Edward Islands (Subareas 58.6 and 58.7) have fallen to about 10% of their initial levels and biomass estimates around the Crozet Islands have declined to between 25 and 30% of their original levels” after only two years of illegal fishing!

Moreover, accidental mortality of sea birds caused by unregulated longline fishing in the Convention area for the Indian sector of the Southern Sea is alarming:

For zones 58-6 and 58-7	12 070 - 16 140 to 23 800 - 32 100 birds
Divisions 58 - 5 - 1 and 58 - 5 - 2	110-155 to 3 725 050 birds
Division 58 - 4 -4	3 015 - 4 to 5 030 - 7 130 birds

These figures led the Scientific Committee to state (section 4-60 of the report of the XVIIIth meeting): “that such levels of mortality are unsustainable for the populations

of albatrosses, giant petrels and white-chinned petrels breeding in the Convention Area". This while legal fishing, constrained by strict conservation measures (deadlines, fishing season, protection system...) achieves very significant results in reducing mortality!

In its annual reports the Commission is truly aware of all the problems due to illegal fishing, since section 5.5 of the report of the XVIIth annual meeting says:

"The Commission also noted that the Scientific Committee had recommended that the Commission take the most stringent measures possible to combat illegal, unregulated and unreported fishing in the Convention Area..."

In support of its conclusion a Catch Documentation System (CDS) was approved by the Commission in 1999 and established since 1 May 2000 to certify the origin of toothfish caught. Toothfish thus becomes, together with Southern Bluefin Tuna, the second species of fish in the world which has become the subject of a CDS, which shows the determination of the CCAMLR to combat this scourge which jeopardises its international credibility if it did not respond quickly. The CCAMLR is therefore well aware of the problem of overexploitation of the stock of toothfish and the risks that fishing presents for the environment.

The importance of this trend is not negligible, since a UUI evaluation of toothfish fishing is, at least, as follows (§ 5-4 of the report of the 18<sup>th</sup> reading of the Commission):

1996/97	38 000 to 42 000 tons
1997/98	33 583 tons
1998/99	10 773 tons (minimum estimates due to the increase in the difficulty of estimating catches)

In 1999/2000 incomplete estimates already show a figure of 6546 tons (§2.15 of the report of the 19<sup>th</sup> meeting of the Scientific Committee) which can only be considered underestimates of the real catches (§2.16 of same report). This UUI fishing is essentially carried in statistical area 58 (Indian Ocean sector of Southern Sea) (§2.17). This figure seems to be at least half below what is actually discharged in Mauritius by the non-member States of the CCAMLR (Belize, Panama, Sao Tome, Seychelles etc.).

Out of more than 40 vessels unlawfully fishing in 1996/97, there were still at least 16 longliners doing so in 1998/99 (see § 5-2 of the report of the 18<sup>th</sup> reading of the Commission). In 1999/2000 it is thus shown that, in the Kerguelen ZE (Division 58-5-1 of the CCAMLR), five illegal longliners were simultaneously fishing at certain times of the year (see document CCAMLR XIX/BG 19). This trend has diminished thanks to the deterrent effect of surveillance in the EZ of Australia, France and South Africa in the Indian sector of the Southern Sea, however it has not disappeared but has become more discreet in order to avoid detection (networks of longliners working in concert, transshipments at sea to falsify the origin of catchers and avoid CDS, exports to "hospitable" 3<sup>rd</sup> countries etc).

The foregoing figures should be seen in parallel with the declared catches in the Convention area (fishing controlled through sectoral allocation of TAC) in order to understand the scope of the trend.

1996/97	10 371 tons
1997/98	11 170 tons

1998/99                      17 278 tons (data extracted from the statistical bulletin, volume 12 (1990 - 1999) of the CCAMLR)

In emergence from these figures that unlawful fishing exceeds the amounts of catchers decided upon by the CCAMLR with the view to achieving sustainable use of the resource. The consequences are clear and can lead to disappearance of harvestable stocks of toothfish (even before they are evaluated in some zones!). Moreover, the effects on the environment are far from being minimal, with a very marked impact on the symbolic populations of Albatross and Pétrel.

## **16. Conservation and management measures conducted to achieve maintenance of biological resources under difficult conditions**

Moreover, account should be taken of efforts at conservation and management carried out by France in order to ensure the maintenance of biological resources in areas under its responsibility.

Systematic monitoring of activities and of fishing efforts in the economic zones of the French, Southern and Antarctic Territories has been introduced. Monitoring officers are assigned to vessels authorised to fish in those areas whose role consists of checking catches statistics in the sectors where the vessels are active. The data thus obtained are communicated to the CCAMLR working group entrusted with evaluating stocks. It is on the basis of these data that measures for the management of resources are adopted, such measures being tailored to each sector and adapted to each vessel authorised to fish in the waters under French jurisdiction. In addition fishing authorisations place an obligation on each fishing vessel to participate in captures for purposes of scientific research.

In this overall scheme, monitoring is entrusted to the Navy, which alone has the high seas resources necessary and which strives to be present in the areas concerned 200 days out of the year in order to monitor both legal and illegal fishing. That monitoring is carried out under conditions which are all the more difficult because, in the vicinity of the Kerguelen islands, there are winds blowing at a strength of 7 on the Beaufort scale more than 280 days out of the year (which means winds of 60 to 120 km per hour and waves with 4 to 10 metre troughs). In addition the distances to populated areas in the Indian Ocean are very great and are lengthened even more by the slow transit speed of vessels due to high seas. Because it is impossible in the Kerguelen islands to build airport infrastructure, the economic area around the islands is also left beyond the reach of patrol aircraft. The coast of Réunion is nearly 4000 kilometres from Kerguelen, in other words 7 - 10 days sailing depending on the vessel and weather conditions. Due to this fact frigates assigned for monitoring in the French economic zone spend about a week there for a mission lasting a total of 3 weeks, and their monitoring coverage is spread very thinly because of the extent of the maritime areas concerned.

## **17. Behaviour of the "Monte Confurco" and it's crew**

The behaviour of the vessel and it's crew, the statements of the Captain, the equipment found on board and the patent evidence of recent use of equipment legitimately aroused suspicion among the authorities of the Floréal, who, as they proceeded to discover more troubling clues in the course of their enquiry, became certain that they had come across an illegal fishing operation, leading logically to an apprehension in which no legal presumption of any kind played a part:

### a) The presence of 3 longline buoys a short distance from the vessel

No other vessel was to be found within a radius of 50 miles around these buoys, whose characteristics are identical to those found on the "Monte Confurco". More specifically, there are 20 features which are similar between the buoys recovered at sea and those found on board. It is important to note that as to these 20 features, 11 pertain not only to the commercial origin of the devices, but are the result of rough modifications done by the arrested vessel. In addition the buoys recovered bore the numbers 1, 4 and 8 which partially complement the series of four buoys on board, which were numbered 5, 6, 9 and 10.

The Captain stated that all of the buoys were on board and that those which were recovered did not belong to him. If he is to be believed he would thus have undertaken a fishing campaign of several months (from 21 August 2000 to early December 2000) with only 4 buoys, which would seem economically unthinkable to professional seamen. Moreover, how can one then explain the fact that the batteries which were found on board to power the flashing lights of the buoys had the same lot number and the same date of expiration as those of one of the buoys recovered from the sea?

### b) Observations concerning the state of the equipment on the vessel and the fishing lines

The refrigerated hold and the factory, as well as the deck littered with sardine heads, lead one to think that the crew, suddenly and recently, no doubt during the evasive manoeuvres of the "Monte Confurco" between 9:10 am and 10:44 am at least, interrupted their activities in order to put everything hastily in order.

Thus one twice finds three topped toothfish not yet defrosted, undoubtedly forgotten during the hasty clean-up of the vessel and one wonders what they could have been doing in the commercial part of the vessel, if they had been intended as the captain states, as food for the crew.

Similarly, the factory of the vessel showed every sign of recent cleaning. Containers and working areas were still wet and traces of blood and scraps of toothfish could still be seen.

In the area used to prepare the longlines, there were five storage racks for lines, two of which were completely empty and three others only half full. Once again, notwithstanding the denials of the captain, it is hard to understand how his vessel could have gone out to fish without complete equipment. One can infer that the missing lines were actually in the water, the more so since some of the lines in this work area were

baited (defrosted sardines), and were therefore in the process of being prepared while the vessel was well within the EEZ.

c) items jettisoned

During its overflight the helicopter noted that in the space of half an hour some 15 boxes were thrown over board which attracted many seabirds. One of them was recovered and was discovered to contain bait, which lends support to the suspicion described above.

More seriously still, when the boarding crew was aboard the vessel, the captain and his second in command tore up documents in the wheelhouse and threw them into the water. One should therefore not be surprised that the captain is unable to present his fishing log.

He did of course present six loose pages, claiming that this was his fishing log, for which he used loose pages. He said that he drew up his fishing log only at the end of the tide, a way of proceeding which allows for all manner of manipulations and falsifications, the more so since some of the pages were written with pencil on paper.

d) the communication's equipment

It was apparent that the breakdown of the fax-machine could not justify failure to declare entry into the Exclusive Economic Zone since the vessel also had a radiotelephone and an INMARSAT "saturn" in perfect running order. The latter equipment would at least have served to directly contact the French authorities or the ship owner in order to inform the French authorities. In the wheelhouse of the "Monte Confurco" there are three GPS position finders. The memories of these devices make it possible to retain the geographical positions Away Point@. Six Way Points in the memory were found to be in Kerguelen EEZ. The captain acknowledged that the GPS Way Points normally serve as destination points or points along a route for vessels, but he pretended not to know who could have recorded them in these devices.

The goniometer which served to locate the vessels was out of service, broken as a result of what might appear as sabotage. The captain stated that he had not used it for a long time, although this instrument is absolutely indispensable for this kind of fishing and this kind of vessel.

e) observations concerning the vessel's computer equipment

In the memory of one of the two computers onboard, a document was found which the captain was discovered trying to delete, and with regard to which he acknowledges that this is a coding table in order to identify friendly vessels several of which are known to have fished illegally. The confidentiality surrounding exchanges between the different vessels sailing in the area only tended to heighten the suspicions of the boarding party as to the activities of the Monte Confurco in the French Exclusive Economic Zone and as to its belonging to an illegal fishing network.

Moreover, the central processing unit of the second onboard computer was not to be found (only the monitor was there). The captain indicated that it was being



repaired in Mauritius, but it is hard to understand why an unusable item would be kept onboard, unless one considers that in reality the central processing unit had conveniently disappeared.

Thus, there was refusal to co-operate, inconsistencies, contradictory statements, statements refuted by facts, direct observations and acts of sabotage which comprised the set of clues that enabled the Floréal authorities to arrive at a firm conclusion, as indeed they might have done with much less evidence, that the vessel was unquestionably in the midst of a fishing operation and therefore in contravention at the time it was detected.

### **18. Legal Context of the facts underlying the present case**

It also seems necessary to take into account the legal context in which the facts underlying this case should be seen. One cannot lose sight of the fact that we are here in a situation of application of the laws and regulations of the coastal State in its Exclusive Economic Zone, in accordance with the heading of Article 73 of the Convention. According to the first paragraph of that Article,

“The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the Exclusive Economic Zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.”

The list of measures given here which a coastal State is entitled to take with respect to foreign fishing vessels found to be in contravention in the Exclusive Economic Zone corresponds precisely to the set of measures which the French authorities took with regard to the “Monte Confurco”. Moreover, one cannot underestimate the fact that the setting of a bond for the release of a vessel is the logical and necessary complement of the power enjoyed by a coastal State to proceed to seize a foreign fishing vessel and to bring judicial proceedings in the event of violation of its laws and regulations.

### **19. The purposes of bonds in the French judicial system: facilitating the proper administration of justice and ensuring the effectiveness of judicial decisions**

The provisions of French law concerning the posting of bonds, whose purpose is the proper administration of justice and ensuring the effectiveness of judicial decisions with respect for the rights of the defendant, were perfectly consistent with the jurisprudence of the Tribunal. Thus, in setting the amount of the bond, the Court of First Instance of Saint Paul took into account the value of the vessel. That value was set to 15 000 000 francs by Mr. Marin Chancerel, captain first class, an expert accredited to the Court of Appeal of St Denis de la Réunion. There are no grounds to reject the evaluation arrived at by this judicial expert.

The Court also took into account the possibility that the Penal Court, in addition to confiscation of the vessel, could levy a fine which it evaluated at 40 000 000 francs, in other words an amount substantially below the amount of the fine incurred for fishing 158 tons of fish. Finally, in keeping with the provisions of Article 142 of the Code of Penal Procedure, it took into account, to the extent of 400 000 F, the damages which could be claimed by the ship owners who held the fishing license for the Kerguelen EEZ, and added the sum of 1 000 000 F to secure the appearance of the captain in the proceedings.

It should be pointed out that only this person is subject to prosecution and that he will be held accountable to pay any fines which are levied. Supposing that the ship owner of the "Monte Confurco" is known, he would be jointly and severally liable with the captain for payment of the fines. If the ship owner is not being prosecuted in this case, it is because his real identity is unknown and he is concealing himself behind a "single ship company". It is a result of the offences committed by the captain that the ship was seized. It is in light of those actions that the Court adopted the amount of the fines and the confiscation of the vessel.

20. The same French Court will also pronounce itself with regard to the other seizures which are not before the Tribunal: the seizure of the fish found in the holds and the seizure of the tackle. These seizures are mandatory pursuant to Articles 2 and 4 of the law of 5 July 1983. These seizures are distinct from the seizure of the vessel, and they obviously cannot be taken into account as a way of meeting the bond. The value of these items should not be subtracted from the amount of the fine incurred, but should on the contrary be added.

21. This consideration alone should lead the Tribunal to reject the claim of the agent of the Republic of Seychelles to pay the bond in the form of the fish seized and the gasoil concerning which he concedes that it is still in the holds of the "Monte Confurco". Above all, the provisions of French law (Article R 19 to R 26 of the Code of Penal Procedure) provide that the payment of a bond can only be made by delivering to the clerk of the Tribunal de grande instance a certified check made out in its name or by delivering cash which the clerk is required to deposit it within two days in the office of consignments and deposits (caisse des dépôts et consignations) The Appellate Court of France (Cour de cassation) has held that there is no other possibility of payment.

These rules are explained by a concern to obtain effective payment in the event that pecuniary penalties are pronounced. As a result of these specific features of French procedural law it is easy to prevent a decision from becoming enforceable. It is enough to avoid receiving service. It is precisely in order to avoid such fraud from taking place that French law does not admit bank guarantees.

#### **IV SUBMISSIONS**

On the basis of the foregoing presentation of facts and considerations of law, the Government of the French Republic, while reserving the right to supplement or amend the present submissions, as appropriate, requests the Tribunal, rejecting the second submission made on behalf of the Republic of Seychelles, to declare and adjudge:

1. that the bond set by the competent French court for the release of the "Monte Confurco" is reasonable in the circumstances of the case, in light of all the relevant factors;

2. that the Application submitted to the Tribunal on 28 November 2000 on behalf of the Republic of Seychelles is therefore not admissible.

*(Signed)*

Agent of the Government of the French Republic

Michel Trinquier