DISSENTING OPINION OF JUDGE TREVES

1. I voted against point 4 of the operative part of the Judgment which fixes the amount of the bond to be posted for the release of the *Camouco* from detention and of captain Hombre Sobrido from the situation of "court supervision" (*contrôle judiciaire*) in which he finds himself. I am of the opinion that the amount indicated therein is too low in order to be "reasonable" within the terms of article 292, paragraph 2, of the Convention.

2. Preliminarily, I would like to express my regret that the operative part does not reflect precisely enough the structure of the Judgment and that the Tribunal has thus missed an opportunity to clarify the different tasks to be discharged by the Tribunal in the proceedings set out in article 292 of the Convention. As is shown by the headings that divide the Judgment into sections, the Tribunal had, however, in mind the distinction between questions of jurisdiction, questions of admissibility and questions concerning the merits.

In particular, two questions must be distinguished which are not distinguished clearly enough in the Judgment. The first is the question whether the allegation mentioned in article 292, paragraph 1, concerns non-compliance by the State detaining the ship with one of the provisions of the Convention "for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security". The second is the question whether that allegation is "well-founded" (as said in article 113 of the Rules), or, in other words, whether the detaining State has not in fact complied with that provision. The first question can be classified as concerning admissibility, the second as concerning the merits, albeit within the limited meaning of "merits" in the proceedings for prompt release, in light of the narrow powers of the Tribunal in these proceedings. As the two questions are distinct, it becomes possible, in principle, to give a negative answer to the second while having answered the first in the affirmative.

Even though, in its reasoning, the Judgment finds, in paragraph 72, "that the Application is admissible" and that "the allegation made by the Applicant is well-founded for the purposes of the present proceedings", the operative part jumps directly from the point in which the Tribunal finds that "the Application for release is admissible" to the point in which it orders that France promptly release the ship and its Master. In order to ensure the transparency of the operative part, it would have been preferable, in my view, to have included in it a point concerning non-compliance of article 73, paragraph 2, by the detaining State.

3. Coming to the question of what should be the reasonable amount of the bond to be posted in the present case, it seems to me that the same notion of "reasonable bond" should be used to determine whether the bond fixed by the French judicial authorities is reasonable and to determine the

amount of the bond to be fixed, if need be, by the Tribunal. This is the approach followed by the Tribunal in paragraph 74 of the Judgment, even though I would have preferred that it had expressed it more explicitly.

4. The notion of "reasonable bond" to be determined by the Tribunal must be an international notion, based on the Convention. It does not necessarily have to coincide with what can be considered as reasonable from a domestic point of view.

In order to determine a bond which is reasonable from the point of view of the Tribunal, the starting point should be, in my opinion, to examine, first, the function the bond performs for the State that has detained the ship and, second, the function the bond performs for the flag State and the private interests acting on its behalf before the Tribunal.

5. For France, the State that has detained the ship, as emphasised in its pleadings, under article 142 of its Code of Criminal Procedure, in the present case the function of the bond or financial security is to guarantee the presence in court of the Master and the payment of the fines.

For Panama, the flag State, and for the private interests acting on its behalf, the function of the bond is, evidently, to enable the ship and its Master to go back to sea and to their profit-producing activities.

6. For the Tribunal, the task to be undertaken is to determine an amount for the bond which can reconcile the need of the State which has detained the ship to have a guarantee with the need of the flag State to obtain the release of the ship and its Master. The Tribunal should not give preference to one or the other of these two points of view. Both find their legitimacy in the Convention. In fact, on the one side, to provide for a bond in order to facilitate good administration of justice and the effectiveness of the decisions of courts complements the power to arrest and to institute judicial proceedings which article 73, paragraph 1, accords to the coastal State in order to ensure compliance with its laws and regulations concerning fisheries in its exclusive economic zone. On the other side, returning ships and their crew promptly to their productive activities, notwithstanding detention and the institution of legal proceedings, is a need that the Third United Nations Conference on the Law of the Sea considered so important that it introduced in the Convention the procedure of article 292. Therefore, a combined reading of articles 292 and 73 is required. In such reading, paragraph 2 of article 73, which is the provision to which article 292 refers, must be seen in the context of the other provisions of the same article and, in particular, of paragraph 1.

7. Coming to the application of these concepts to the case at hand, and beginning with the fines whose payment to France should be guaranteed by

the bond, it would seem that the fines which could be imposed on the Master correspond to current practice in a number of States. Moreover, certain circumstances which Panama has not denied persuasively, namely, in particular, that the logbook has been thrown into the sea and that the markings identifying the vessel have been covered, indicate that the French claim to obtain conviction and punishment is at least plausible. It seems, therefore, reasonable to take into account the maximum fine which might be inflicted on the Master.

The possibility to establish also criminal responsibility of the juridical person owner of the ship set out in the French law applicable to the case and to impose on such person fines which can reach a measure five times as high as those provided for the Master, corresponds to the logic, which one finds also in other legal systems, to impose monetary penalties on juridical persons which are entrepreneurs and to provide for such persons fines higher than those set out for natural persons, as it is presumed that their ability to pay is stronger. Consequently, the fines, set out by law, which could be imposed on Merce-Pesca, the company owner of the ship, should not be ignored.

However, it does not seem reasonable, in the circumstances of the present case, to take into account these fines to their maximum amount. No criminal action has been started for the time being against Merce-Pesca. Moreover, in the file one finds clear indications of the will of that company to avoid any violation of the sovereign rights of France over the living resources of its economic zone. One can mention the clause in the contract of employment concluded between Merce-Pesca and the Master which requires the latter "not to engage in any type of fishing activity in the exclusive economic zone of any country" and the letter of 1st October 1999 sent by Merce-Pesca to the French authorities in Réunion emphasizing that by entering French waters the Master had infringed its instructions. These elements suggest that the requirements that must be satisfied according to French law in order to establish the criminal responsibility of the juridical person (including, in particular, that the natural person has acted "on behalf" of the juridical person) might not be easy to ascertain. The possibility of the establishment of the criminal responsibility of Merce-Pesca and its sentencing to the maximum penalty thus becomes plausible only to a limited extent. This justifies taking such possibility into account only to that limited extent.

8. As regards the amount of the bond that might be envisaged from the point of view of the need that the ship and its Master return promptly to their activities, the value of the ship must be considered at the outset. The expert of Panama has assessed such value before the Tribunal as approximately 3,717,000 French Francs, without France raising objections. It cannot be overlooked, however, that the ship had been bought in 1996 for an amount equivalent to 8,250,000 French Francs and, above all, that Merce-Pesca and

Master Hombre Sobrido, in their *assignation en référé* before the President of the *tribunal d'instance* of Saint-Paul (Réunion) stated that the value of the ship "could not be more than 5,750,000 French Francs". While the value of 20,000,000 French Francs mentioned in the judicial decisions of Réunion seems unsubstantiated and largely exaggerated, it does not seem unreasonable to consider the value that the Panamanian interested parties have indicated before a French judicial authority.

From the same point of view, a bond higher than the value of the ship should be envisaged in the circumstances of the present case. It must be stressed that the purpose of the bond is not only that of releasing the ship but also that of freeing the Master. Moreover, it appears clearly from the file that a result which the Panamanian side may reasonably be considered to be seeking, and which would justify for it depositing a security in an amount greater than the value of the ship, is to maintain good relations with France with a view to obtain, as in the past, licences to exploit the living resources of the French economic zone. The letter by Merce-Pesca to the maritime authorities of Réunion of 1st October 1999 is explicit: "The agreement signed with the French charterers has been very fruitful and we did maintain very good relations with them, in view to re-establish co-operation in the future".

9. In light of the above considerations I am able to share the view adopted in the Judgment that the bond of 20 million French francs fixed by the French judges is not a "reasonable bond". Such a bond can, in my view, be justified only by an exaggerated assessment of the value of the ship, as done by the French courts, or by an excessive reliance in the possibility of establishing criminal liability of the juridical person owner of the ship, as did the French pleadings.

I cannot, however, follow the Judgment when it holds that the reasonable amount of the bond should be eight million French Francs. The amount fixed by the Tribunal is considerably lower than the amount which would have permitted to take into consideration a reasonable value of the ship, as well as the reasons, which exist in the circumstances of the present case, for fixing a bond higher than such value, and to take, at the same time, into account, within reasonable measure, that the criminal responsibility of the company owner of the ship might be established.

(*Signed*) Tullio Treves