DISSENTING OPINION OF JUDGE WOLFRUM

1. I have voted in favour of operative paragraphs 1 to 3 and in favour of paragraph 5 but against operative paragraph 4 of the Judgment. I consider the bond of 8,000,000 FF to be far too low to be reasonable within the terms of article 292 of the Convention on the Law of the Sea (hereinafter "the Convention"). Furthermore, I disagree with the Judgment on two points: firstly, its reasoning on the unreasonableness of the bond set by French courts and, secondly, regarding the powers the Tribunal has to set aside national measures concerning the enforcement of laws and regulations on the management of marine living resources in the exclusive economic zone. Both issues are closely interrelated.

2. First I will address the question of how to establish whether a bond set by national authorities is reasonable. A literal reading of article 292, paragraph 1, of the Convention and the provisions to which it refers gives no explicit guidance on how to determine the amount of the bond. Some indications on that matter are to be found in the Rules of the Tribunal (hereinafter "the Rules"). Article 111, paragraph 2, of the Rules requires the Applicant to provide information about the value of the ship and on the bond requested by the detaining State. Article 111, paragraph 2(c), of the Rules qualifies both those amounts as being relevant to the determination of the amount of a reasonable bond and not solely or predominantly the value of the ship.

3. The Judgment does not give appropriate guidance on what basis it assesses a bond set by national authorities, on what are the possible reasons to declare a national bond to be unreasonable and on what are the criteria it uses to determine the amount of the bond set by the Tribunal. It satisfies itself (paragraph 66) with reiterating a statement from the *M/V "SAIGA" Case* which emphasizes that the criterion of reasonableness encompasses not only the amount but also the form of the bond. This can hardly be disputed, but it touches only on a side aspect of this case. In paragraph 67 the Judgment mentions several factors without, however, indicating how they are to be implemented. The particularity in this case is that the fines the Master of the *Camouco* and its owners may face are significantly higher than the alleged value of the vessel. Although the Judgment states in paragraph 69 that the bond may be higher than the value of the vessel it does not say why

and to what extent. What the Judgment, in essence, is lacking is an objective analysis of what is required to attain the aims which lie, in this case, behind the system requiring the posting of financial security. Only on that very basis would the Judgment have been able to assess the reasonableness of the bond determined by French judicial authorities and to determine the Tribunal's bond in a manner which does not face the criticism of bordering on subjective justice.

4. The assessment whether a measure taken, such as the determination of a bond under article 73, paragraph 2, of the Convention, requires the weighing of the rights and interests of the affected States involved, namely Panama and France, while taking into consideration the context in which the respective decision is to be made. On the basis of the foregoing, it is pertinent, as indicated above, to have recourse to the object and purpose of the procedure under article 292 of the Convention or – in other words, which rights and interests are to be protected thereunder – and to establish what guidance is to be gained therefrom for the determination of which bond can be considered reasonable.

5. It is commonly held that it is the object and purpose of the procedure under article 292 of the Convention to provide a mechanism for the prompt release of a vessel and crew from prolonged detention on account of the imposition of unreasonable bonds (paragraph 57 of the Judgment). This description just paraphrases article 292, paragraph 1, of the Convention but adds nothing to its interpretation. In particular it does not reflect that the procedure of article 292, paragraph 1, of the Convention may be applied in different contexts. Account has to be taken that in the present case the procedure has been initiated on the basis of the allegation that France had violated article 73, paragraph 2, of the Convention. In consequence thereof the rights and interests which coastal States enjoy in respect of the marine living resources form the background for this case before the Tribunal since the right to detain ships derives from the sovereign rights coastal States have in that zone.

6. According to article 56 of the Convention, coastal States enjoy sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of the exclusive economic zone. A coastal State may, in accordance with article 73, paragraph 1, of the Convention, take enforcement measures necessary to ensure compliance by foreign vessels with its laws and regulations adopted in conformity with the Convention. These measures may include boarding, inspection, arrest and the institution of judicial proceedings. The Convention imposes certain limitations upon

coastal States in respect of enforcement. This nevertheless broad authority of coastal States is limited, however, to actions needed by the coastal State in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in its exclusive economic zone as specified in article 56, paragraph 1, of the Convention. It goes without saying that in the exercise of their enforcement powers coastal States may specify monetary penalties they consider appropriate and establish – within the framework of the Convention or other applicable international agreements – their rules on arrest, detention and release upon bonding. In particular, the Convention does not put a limit on the amount of fines against violators a coastal State may consider appropriate.

7. In defining the object and purpose of the procedure under article 292, paragraph 1, of the Convention and, in particular, which rights and interests it is meant to preserve, it is also necessary to take into account the point that article 292, paragraph 1, of the Convention constitutes a procedural safeguard for vessels for the exercise of their rights they enjoy in accordance with article 58, paragraph 1, of the Convention in foreign exclusive economic zones. The Third U.N. Conference on the Law of the Sea did not consider it adequate to merely protect flag States by obliging coastal States to respect the rights of the former but it was felt necessary to reinforce such obligations *vis-à-vis* flag States through the procedure of article 292, paragraph 1, of the Convention.

8. On the basis of the foregoing, I consider that when taking a decision on the prompt release of a vessel under article 292, paragraph 1, in connection with article 73, paragraph 2, of the Convention the Tribunal should properly balance the interests of both States involved. In particular, the Tribunal must not unnecessarily impinge upon the enforcement rights of the coastal State concerned in accordance with article 73, paragraph 1, of the Convention. This reading of article 292, paragraph 1, is confirmed by article 292, paragraph 3, of the Convention, according to which a judgment of the Tribunal has to be "... without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew ...". This means that it is first and foremost the right of the coastal State to enforce its laws. Hence, no decision of the Tribunal shall be taken under article 292, paragraph 1, of the Convention which renders the right of the coastal State to prosecute violations of its laws an empty shell. This should have been taken into consideration by the Judgment when it set the

bond at a level which is not even half of what the French courts considered appropriate.

9. I will now turn to the second aspect on which I differ from the Judgment namely the limitations for the Tribunal to pronounce itself on measures under national law.

10. The procedure under article 292 of the Convention may be invoked in different cases such as: the detaining State does not provide for the release of a vessel upon bonding, the local courts reject the release of a vessel even if a bond has been offered, local authorities take no decision even if the release of the vessel has been requested, and, as in this case, a bond has been requested but it is considered unreasonable by the Applicant. It is only in the latter case where in accordance with article 113, paragraph 2, of the Rules the Tribunal has to declare a decision of a national institution, namely on the amount of the bond requested for release, to be unreasonable before it may proceed to its own decision on the amount of a bond and the release of the vessel and crew. I have had the opportunity to read the Declaration of Judge Mensah and I agree with his assessment of article 113, paragraph 2, of the Rules.

11. Without prejudice to the international limitations referred to above, coastal States enjoy considerable discretion in laying down the content of laws concerning the conservation and management of marine living resources in their exclusive economic zone and of the corresponding laws on enforcement. The Judgment has made no reference to these discretionary powers of the coastal States. They do not seem to play a role in the Judgment as a factor determining the power of the Tribunal *vis-à-vis* a coastal State. These discretionary powers or margin of appreciation on the side of the coastal State limit the powers of the Tribunal on deciding whether a bond set by national authorities was reasonable or not. It is not for the Tribunal to establish a system of its own which does not take into account the enforcement policy by the coastal State in question.

12. In principle, and without prejudice to its power to examine the compatibility of the national decisions with article 73, paragraph 2, of the Convention, it is not the Tribunal's role to challenge the decisions of French courts in a way that would make the Tribunal a court of third or fourth instance, something which it is not. This, however, is not the only point of relevance. The assessment by the Tribunal whether the bond set by the French authorities was reasonable or not has to take into account the fact that the French authorities have considerable discretionary power in this matter.

This discretionary power on the side of France comes into play on two levels. First, France had, within the framework of article 73, paragraph 2, of the Convention, discretionary power to establish its system on the release of ships and crew upon bonding and, secondly, the French authorities had discretionary powers in its implementation.

13. According to the French system as expressed in the order of the *tribunal d'instance* at Saint-Paul of 14 December 1999, it is the objective of bonding to secure payment of penalties incurred and to secure the appearance of the accused in the legal proceedings before the court. Also the Agent of France emphasized the fines the Master of the *Camouco* and the owner may incur; and he used these figures to justify the amount of the bond ("*caution*") of 20,000,000 FF. This above-mentioned objective of the French system on "*caution*" is not in contradiction with article 73, paragraph 2, of the Convention. The attempt of France to safeguard its enforcement rights, including its right to fine violators of its laws on the conservation and management of marine living resources in its exclusive economic zone is, as already said, part and parcel of the sovereign rights of France in this respect. Unless the Tribunal has considered this approach *ab initio* to be in violation of article 73, paragraph 2, of the Convention it should have made this approach the basis for its calculation of the bond. It was not for the Tribunal to substitute its own decision for the discretionary power of the coastal States in that respect. The Tribunal should have taken into consideration that the Convention restricts challenging the exercise of discretionary powers of coastal States and of the International Seabed Authority. The respective provisions may be taken to reflect a general approach which is relevant also for the implementation of article 292 of the Convention. It would be, in fact, illogical if the Tribunal could set aside essential elements of national enforcement systems concerning the conservation and management of the resources of the exclusive economic zones, such as on bonding, by developing its own system when its jurisdiction is restricted in respect of disputes concerning the interpretation or application of the provisions of the Convention under article 297, paragraph 3(a), of the Convention.

14. Moreover, as already indicated, in implementing the national system on arrest and bonding, the French authorities had a considerable margin of appreciation. Here again, the power of the Tribunal to challenge decisions

taken, namely the decision on the amount of the bond, is restricted. The Tribunal is in a situation which is not dissimilar to that faced by international human rights courts which, in general, have to verify whether national decisions or measures are in conformity with an international human rights agreement. They restrict themselves, generally speaking, to ascertaining whether such a decision or measure was unlawful under international law, or was arbitrary, or constituted an abuse of authority, or was made in bad faith, or was disproportionate (see, in particular, the Judgment of the European Human Rights Court in the case *Barthold*; on the development of the jurisprudence see Frowein/Peukert, *Europäische MenschenRechtsKonvention,* 2nd ed., 1996, at p. 335 *et seq.*). The Tribunal should have allowed itself to be inspired by this jurisprudence in defining its functions under article 292, paragraph 1, of the Convention.

15. The Judgment does not really reveal which approach has been followed or whether the amount of the bond it has determined reflects predominantly the value of the ship or the fines faced by the Master of the *Camouco* and its owners. This, however, is a crucial issue. If the bond set by the Tribunal is lower than the fines against the Master and the owners the French authorities will find it more difficult, if not impossible, to collect them. This means, in essence, that setting a bond which is too low – which is the case here – means that the enforcement rights of coastal State concerning its laws on the management of marine living resources in the exclusive economic zone have been curtailed.

16. Although I share some of the criticism indicated by the Judgment (paragraph 69) on the lack of coherency and transparency in how the amount of the bond has been determined for the release of the *Camouco*, in my view, the amount as determined by the Tribunal is too low by far. It does not constitute a safeguard for the French authorities to enforce French law if the allegations that French law had been violated are well founded. It just covers the maximum fines the Master faces but the bond, as set by the Judgment, does not provide for the satisfaction of any possible charges against the owner of the *Camouco*. Although no charges have been brought yet against the owner the Agent of France has made it quite clear that such charges are a possibility under French law. The implications thereof should have been taken into consideration although perhaps not to the maximum of the fines possible.

17. Finally, the Tribunal should have taken notice of the commonly known fact that the fishing activities such as those allegedly undertaken by the *Camouco* undermine the fishing regime established under the Convention on the Conservation of Antarctic Marine Living Resources and the conservation measures taken thereunder. This fishing regime, generally considered to belong to the more advanced ones, is the result of a cooperative effort undertaken by more than thirty States Parties. This effort reflects one of the most important structural principles of the Convention namely that conservation and management of marine living resources is a task in which all States involved shall cooperate. Curtailing the enforcement rights of one of the States Parties involved may be regarded as undermining the cooperative efforts and the obligation of all States exploiting particular stocks or fishing in particular areas to join in the cooperative management of those stocks and areas.

(*Signed*) Rüdiger Wolfrum