

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



2000

Public sitting

held on Thursday, 7 December 2000, at 10.15 a.m.,  
at the International Tribunal for the Law of the Sea, Hamburg,

President P. Chandrasekhara Rao presiding

The “Monte Confurco” case  
(Application for prompt release)

*(Seychelles v. France)*

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**Verbatim Record**

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*Present:*

President	P. Chandrasekhara Rao
Vice-President	L. Dolliver M. Nelson
Judges	Hugo Caminos
	Vicente Marotta Rangel
	Alexander Yankov
	Soji Yamamoto
	Anatoli Lazarevich Kolodkin
	Choon-Ho Park
	Thomas A. Mensah
	Paul Bamela Engo
	Joseph Akl
	David Anderson
	Budislav Vukas
	Rüdiger Wolfrum
	Edward Arthur Laing
	Tullio Treves
	Mohamed Mouldi Marsit
	Gudmundur Eiriksson
	Tafsir Malick Ndiaye
	José Luis Jesus
Registrar	Gritakumar E. Chitty

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*Seychelles represented by:*

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

*as Agent,*

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

*as Deputy Agent,*

*and*

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

*as Counsel,*

*France represented by:*

Mr. Michel Trinquier, Deputy Director for the Law of the Sea, Fisheries and the Antarctic, Office of Legal Affairs of the Ministry of Foreign Affairs,

*as Agent,*

*and*

Mr. Jean-Pierre Quéneudec, Professor of International Law at the University of Paris I, Paris, France,

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

*as Counsel,*

1 **THE PRESIDENT:** Before we start today's proceedings, may I refer to the passing  
2 away of one of our dear colleagues, Judge Zhao on 10 October 2000. We miss his  
3 presence today. He was an eminent international lawyer and made important  
4 contributions to our work. Let us observe a minute's silence in honour of the  
5 departed soul. I now give the floor to the Registrar.

6 **THE REGISTRAR:** Today, the Tribunal will take up the hearing in Case No. 6 in the  
7 list of cases. It has been listed as *The Monte Confurco Case, (Seychelles versus*  
8 *France.*

9 Agents and Counsel for both Seychelles and France are present.

10 The application was duly filed in the Registry of the tribunal on 27 November 2000  
11 on behalf of the Republic of Seychelles against the Republic of France for the  
12 prompt release of the *Monte Confurco* and its Master.

13 The Application is made under Article 292 of the United Nations Convention on the  
14 Law of the Sea.

15 **THE PRESIDENT:** This public sitting is held pursuant to Article 26 of the Statute of  
16 the Tribunal to hear the parties present their evidence and arguments in the  
17 *Monte Confurco* case.

18 I call on the Registrar to read out the submissions of the Seychelles as contained in  
19 its Application.

20 **THE REGISTRAR:** The Applicant requests:

21 "1. To declare that the Tribunal has jurisdiction under Article 292.

22 2. To declare the present Application admissible.

23 3. To declare that the French Republic has contravened Article 73, paragraph 4, by  
24 not properly giving notice of the arrest of the vessel *Monte Confurco* to the  
25 Republic of Seychelles.

26 4. To declare that the guarantee set by the French Republic is not reasonable as to  
27 its amount, nature or form.

- 1 5. With respect to the Master of the vessel, *Monte Confurco*, Mr José Pérez  
2 Argibay:
- 3 - To ask, as an interlocutory measure for reasons of due process that the  
4 French Republic allow the Captain to attend the hearing which is shortly to  
5 take place in Hamburg.  
6
  - 7 - To find that the French Republic has failed to observe the provisions of the  
8 Convention concerning prompt release of masters of arrested vessels.  
9
  - 10 - To require the French Republic promptly to release the Master, without bond,  
11 in light of the presence of the ship, cargo, etc. as a reasonable guarantee,  
12 given the impossibility of imposing penalties of imprisonment against him and  
13 the fact that he is a European citizen.  
14
  - 15 - To find that the failure of the French Republic to comply with the provisions of  
16 Article 73, paragraph 3, in applying to the Master measures of a penal  
17 character constitutes a *de facto* unlawful detention.  
18
- 19 6 To set a bond in the maximum amount of FF 2,200,000 (based upon  
20 FF 200,000 for failure to notify presence and FF 2,000,000 for up to four tons  
21 of catch theoretically taken in the worst of cases).  
22
- 23 7 With regard to the nature of the bond, that the Tribunal consider that the value  
24 of the cargo seized, the fishing tackle seized, the bait and the fuel constitute  
25 part of the guarantee; according to our calculations, the value of the foregoing  
26 being FF 9,476,382.  
27
- 28 8 That the Tribunal choose between the financial instrument issued by a  
29 European bank or a guarantee comprising the value of an equivalent number  
30 of tons to be immediately discharged.  
31
- 32 9 With regard to the form of the financial bond, as a subsidiary measure, in the  
33 event that the Tribunal chooses to set a symbolic financial bond, the Applicant  
34 requests that the tribunal note its desire for a bank guarantee by a leading

1 European bank rather than payment in cash, to be deposited with the French  
2 Republic unless the parties decide that it be deposited with the Tribunal, in  
3 exchange for the release of the vessel.”  
4

5 **THE PRESIDENT:** On the same day that the Application was filed in the Registry, a  
6 copy of the Application was transmitted to the Government of France. By Order of  
7 27 November 2000, the President of the Tribunal fixed 7 and 8 December 2000 as  
8 the dates for the hearing of the case. The Respondent filed its Response with the  
9 Registry of the Tribunal on 6 December 2000.

10  
11 I call on the Registrar to read out the submissions of France as contained in its  
12 Response.

13  
14 **THE REGISTRAR:** In its Response the Government of France concludes as  
15 follows:

16  
17 “On the basis of the foregoing presentation of facts and considerations of law, the  
18 Government of the French Republic, while reserving the right to supplement or  
19 amend the present submissions, as appropriate, requests the Tribunal, rejecting the  
20 second submission made on behalf of the Republic of Seychelles, to declare and  
21 adjudge:

- 22  
23 1. that the bond set by the competent French court for the release of the  
24 *Monte Confurco* is reasonable in the circumstances of the case in light of all the  
25 relevant factors.  
26  
27 2. that the application submitted on 28 November 2000 on behalf of the Republic of  
28 Seychelles is therefore not admissible.”

29  
30 Copies of the Application and the Response have been made available to the public  
31 in accordance with the Rules of the Tribunal.

32 **THE PRESIDENT:** The Tribunal notes the presence in court of Mr Ramón Garcia  
33 Gallardo, Agent for the Republic of Seychelles, and Mr Michel Trinquier, Agent of

1 the Republic of France. I now call on the Agent of the Applicant to note the  
2 representation of the Seychelles.

3 **MR GALLARDO:** Mr President, Mr Vice-President, distinguished members of the  
4 Tribunal, distinguished representatives of the French Republic, as the Agent of the  
5 Seychelles Republic, but also as an advocate, allow me to say that it is indeed a  
6 great honour and pleasure to inaugurate this new courtroom in the headquarters of  
7 the International Tribunal for the Law of the Sea. Built by the contracting parties  
8 supported by Germany, this new building welcomes us today as a living  
9 representation of the dignity which everyone expects of this lofty international  
10 jurisdiction. To me, this represents the commitment and firm determination of the  
11 international community to view the oceans and seas as a zone of peace and justice.

12 The administration of justice is a difficult task. An understanding of the law of the  
13 sea is no longer sufficient. One also needs human and technical resources to do so.  
14 This modern building on the edge of the Elbe, with the latest technology, will promote  
15 and advance the expeditious administration of justice.

16  
17 Let me also express my condolences upon the death of Judge Zhao, a prominent  
18 person in the field of the Law of the Sea, whom I had the pleasure of meeting during  
19 the *Camouco* case.

20  
21 To introduce my team, Mr President, firstly, M Jean-Jacques Morel, a French  
22 Attorney at the Court of St Denis, La Réunion, participating in maritime and penal  
23 law matters; also as counsellor Mr Bruno Jean-Etienne, of French nationality; and  
24 Miss Dolores Dominguez Perez, of Spanish nationality, both attorneys and  
25 assistants at the firm of S J Berwin in Brussels.

26  
27 The small country of the Seychelles with 60,000 inhabitants and few resources has  
28 authorised us to represent its interests and the interests of its vessel before the  
29 Tribunal.

30  
31 **THE PRESIDENT:** I now call on the Agent of France to introduce his delegation.

32

1 **MR TRINQUIER** (Interpretation): Mr President, distinguished members of the  
2 Tribunal, for my part, since I have been asked to do so, I shall confine myself to  
3 introducing the French delegation and as counsel, Professor Jean-Pierre  
4 Queneudec, Professor of Public International Law at the University of Paris and also  
5 as counsel, M Jacques Belot, a lawyer at the Bar of La Réunion.

6  
7 **THE PRESIDENT:** Following consultations with the Agents of the parties, it has  
8 been decided that the Applicant, Seychelles, will be the first to present its evidence  
9 and arguments. Accordingly, the Tribunal will hear Seychelles first. In the afternoon,  
10 the Tribunal will hear France.

11  
12 I now give the floor to the Agent of Seychelles.

13  
14 **MR GALLARDO** (Interpretation): Mr President, Mr Vice President, distinguished  
15 members of the Tribunal, distinguished representatives of the French Republic, I  
16 came to the Tribunal in February during the *Camouco* hearing. I had been invited by  
17 the Registrar to visit this new building when the present chamber was still being built.  
18 I did not imagine that I would be back here so soon with a new case. What I did not  
19 want to imagine either was that I would be appearing before this Tribunal with a new  
20 case under Article 292 of the Convention, even less a new case against the French  
21 Republic. Precisely for this reason, I long hesitated to accept this case, reviewing all  
22 of the available information before suggesting that this case be submitted to the  
23 International Tribunal for the Law of the Sea. I truly felt that the French courts would  
24 respect the scope of the recent decision in the *Saiga* and *Camouco* cases on this  
25 occasion. I realise now with sadness that that is not the case.

26  
27 With regard the Captain of the *Monte Confurco*, it is not simply a matter of drawing  
28 conclusions from legislation as to sentences of imprisonment against the Captain  
29 and the crew. We hoped to see a clear application by the French judges, in  
30 conformity with Article 73, para. 3 of the Convention, and everyone knows that this  
31 prohibits sentences of imprisonment, as well as the jurisprudence in the *Camouco*  
32 case. Even if the Captain, strictly speaking, is not in prison, he is at present in a  
33 situation of *de facto* detention and all of this without counting the fact that he is a  
34 national of the European Union, a community where world-wide there are rules of



1 free movement and mechanisms to assure assistance to persons who stand  
2 accused in a trial.

3

4 With respect to the vessel, it was my hope firstly, on the part of the administrative  
5 and judicial authorities of France, to see a strict interpretation of their own legislation.  
6 I was asking for nothing more. As to possible maximum sanctions, in conformity with  
7 the circumstances of this case, I also expected that the *Saiga* and *Camouco* cases  
8 as to the fixing of a reasonable bond would be respected. Regrettably, things did not  
9 happen in that way. For that reason, I accepted this case jointly with my team  
10 members.

11

12 (The interpreters do not have a copy of this speech)

13

14 As a representative of the Republic of Seychelles, I felt that it was essential that  
15 each person accused -- a country or a ship owner in our case -- whether small or  
16 large, highly developed or not, should benefit from effective jurisdictional protection  
17 before international jurisdictions, as well as to day before an international tribunal.

18

19 (The interpreter cannot correctly interpret this speech because the interpreters do not  
20 have a copy of the speech)

21

22 As in the case before us, the Republic of Seychelles felt that it was necessary before  
23 this Tribunal to assert its sovereign rights.

24

25 **THE PRESIDENT:** Mr Gallardo, you are speaking too fast. Would you kindly slow  
26 down the pace of your presentation.

27

28 **MR GALLARDO** (Interpretation): It is with a full awareness and determination that  
29 the state of the Seychelles has come forward. This country felt, on a full  
30 understanding of the facts, that this case deserved to be brought to the attention of  
31 the Tribunal.

32 I say this for two reasons: first, violation of international law; secondly, the situation  
33 of the Captain and the amount of the bond of more than \$8 million or FF  
34 56,500,000.

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Some here will ask: do we have here another case of possible illegal fishing in the southern seas? Unfortunately, I must say "yes" and indeed I would say perhaps one too many. We must be aware that in the last 24 months only two vessels have been arrested, *Camouco* and *Monte Confurco* and both cases, perchance, have come before this Tribunal.

Let us recall that there are numerous vessels arrested each day in the world. Recently Ghana intercepted two French tuna fishing vessels; on 11 November a Falklands Islands vessel was spotted by Australia; and two Korean vessels were arrested in the Falkland Islands for fishing as well. Even the country I represent today has arrested French or Spanish vessels in its exclusive economic zone. Legislation in each case must be applied by striking a balance of interests, first for the benefit of observing conservation rules, as provided for in Part 5 of the Convention, and I agree with that, but also in strict respect for the economic interests of industrial, fishing and humanitarian interests with regard to the situation of the crew.

That is the issue which is at the root of incorporating Article 292 in the International Convention on the Law of the Sea. Nor can we expect from the French Republic to see what recently happened in Morocco where the King simply on his own decision released three foreign captains, as reported in *Il Pais* on 11 November. Here I would not address a request to a royal personage but simply ask for a reasonable application of the rules that apply to vessels under French jurisdiction with regard to the setting of a reasonable bond.

However, we must also and chiefly take into account, even in relation to internal French law, a careful and dynamic analysis of the Convention and of the jurisprudence of the Tribunal in order better to delineate this concept of reasonableness. Indeed, I think, with all due respect to the distinguished gathering, that the Tribunal here is at a crossroads. In this case it is once again facing a situation which more than in past cases should lead it to analyse not only national concepts but the concept itself of reasonableness and, above all, to consolidate its case law and clarify the *Camouco* jurisprudence. For the French Republic I hope

1 that other concepts such as the jurisdiction of the Tribunal and admissibility have  
2 sufficiently been qualified in the past cases and that we will not return to those  
3 matters, otherwise we would have to reiterate our arguments as well as the  
4 jurisprudence arguments of the Tribunal itself.

5

6 The Republic of Seychelles shall also attempt to take this case out of the political  
7 storm in which economic and environmental pressure groups and the administrative  
8 authorities of the French Republic are attempting to treat it in that context by making  
9 statements in the press that defy reality.

10

11 We did not come here either to give dissertations or listen to scientific presentations.  
12 The Republic of the Seychelles will listen with great interest to the statements of  
13 Professor Duhamel. I have already had occasion to read the interesting work and  
14 comparative studies on the environment, fisheries and longline fishing or trawler  
15 fishing. This research is all the more important in that it serves usefully to lead us  
16 into the scientific context of the CCAMLR.

17

18 In any event, the focus of the scientific approach is not that of this debate and the  
19 more so since the country that I represent is not a member of CCAMLR, or at least  
20 not so far. Our presentations will be based on simple facts: the geographical  
21 situation of this case and some technical points that will then enable us, in the light of  
22 relevant national and international law, to prove that the French Republic has once  
23 again committed violations of provisions of the Convention, and in particular the  
24 requirements set out in Article 292, para. 2 for the prompt setting of a reasonable  
25 bond.

26

27 Finally, I wish once again to express my regret eight months after the judgement in  
28 the *Camouco* case by this Tribunal, once again addressing you within the framework  
29 of a case falling in the same context. This is all the more regrettable in that in the  
30 previous case the result achieved was closer to the expression "much ado about  
31 nothing".

32

33 The French courts a few months later, after the hearing held before this Tribunal in  
34 April 2000, sentenced the Captain of the *Camouco* to a fine of FF 3 million, no

1 confiscation either of the vessel, the fish or of the fishing tackle and without any  
2 prosecution of the ship's owner as a legal person. Let us recall that the original bond  
3 of FF 20 million demanded by the French Republic was considered by the Tribunal  
4 as unreasonable and reduced it to FF 8 million, which made it possible to release the  
5 Captain and the vessel within a reasonable period.

6

7 The Captain was also allowed to leave La Réunion to return voluntarily for the  
8 hearing before the criminal court of Saint Denis. I am also vehemently convinced  
9 that if the French authorities in that case had favoured an analysis of possible  
10 contraventions but not in the limelight of the press and economic pressures and  
11 lobbies, this case would have been worth only a brief report in the newspapers of La  
12 Réunion. I wonder now in this respect whether we could have avoided bringing  
13 these proceedings before the Tribunal.

14

15 Independent of subsequent analysis of the facts in the proceedings, the Republic of  
16 Seychelles reiterates the full jurisdiction of the French Republic to deal with the  
17 substance of the case, not forgetting the full jurisdiction under the Convention of the  
18 International Tribunal for the Law of the Sea to determine the reasonable character,  
19 or the lack thereof, of the bond required thus far by the French Republic.

20

21 Let me briefly set forth the points that we will be addressing: factual framework of  
22 French legislation; implementation and application in France by judges and  
23 administrators of international law and international texts; international case law;  
24 the delicate question of admissibility; whether the application is well founded; the  
25 reasonable nature in particular of the bond, with regard to amount, nature and form;  
26 what is reasonable for us; the submission to be provided in the operative part of the  
27 judgement to ensure that the Tribunal, once a bond if any is set by the Tribunal and  
28 that bond is posted so that it will enable the release of the vessel and the Captain  
29 before a judgement on the merits is reached; and then final conclusions or  
30 submissions following the arguments of the French Republic.

31

32 With your permission, Mr President and judges, I shall now go on to explain the  
33 facts. We are again faced with a truly international dossier. Perhaps it is less  
34 complicated than that of the *Saiga*. Let me recall this affair. *Saiga* was a ship

1 belonging to a Cypriot company and managed by a Scottish company . It was  
2 arrested in the EEZ of Guinea. When it was arrested, it had been chartered by a  
3 Swiss company, but it was under the flag of Saint Vincent and Grendadines and its  
4 crew was Ukrainian. There were also Senegalese workers, and the cargo belonged  
5 to another Swiss company. So, do not worry, I think that the *Confurco* matter will be  
6 less complicated. We have a Seychelles vessel, we have an international crew,  
7 Spanish, Peruvians, Chileans, Mauritians and Namibians, belonging to a mixed,  
8 Spanish company established in the Republic of the Seychelles. This vessel has  
9 never been adjudged nor condemned before a tribunal of a Member State for any  
10 reason whatsoever, not even for illegal fishing.

11

12 The *Monte Confurco* started at Port Louis in Mauritius on 21 August 2000 for longline  
13 fishing in international waters of the Southern Seas, which was to continue until the  
14 beginning of December 2000. You can follow all that on the sea chart. The  
15 *Monte Confurco* had a Seychelloise fishing licence, No. 710, which allowed it to fish  
16 in international waters, except the EEZ, without any express restriction that it should  
17 be able to fish under CCMALR rules. We will return to that later. The vessel was  
18 under the orders of the Master, Jose Argibay Perez, who had signed a contract on  
19 1<sup>st</sup> November 2000, in which it was said, in item 1, that he explicitly committed  
20 himself not to fish in any EEZ. That contract can be found in Annexe 7.

21

22 On map number 1 we have the continent to continent situation. On your right you  
23 can see Australia, on your left South Africa, in the north Madagascar, and I think one  
24 can even see the Republic of Seychelles. Further south, you have the French  
25 Southern and Antarctic Territories ... Crozet ... and on the right Amsterdam and the  
26 Archipelago of Kerguelen. They form only a very small part of the sea chart. The  
27 chart shows all the southern seas, which go from the left, the Atlantic side, to the  
28 Indian Ocean. On the right you can already see Australia and New Zealand. I think  
29 I should say that, in order to move in that zone of the southern seas, fishing vessels  
30 need about 10 days to actually get there, as well as to go back to their main port.

31

32 On map number 2, we go to the area of interception. On the screen you can see the  
33 South Pole, the Kerguelen Islands and the McDonald Islands.

34

1 (The speaker is still too fast)

2

3 On map number 3 you can see distances that separate the Kerguelen Islands from  
4 the closest inhabited areas. You will see that in relation to the island named  
5 “Desolation/Sadness” reference is made to extreme weather conditions which make  
6 navigation very difficult and living conditions almost impossible.

7

8 On map number 4 there is an official map of CCAMLR. You can see that the  
9 thickest line goes round the territory of the CCAMLR and that we are getting closer  
10 to the area of arrest.

11

12 Map number 5 shows the detail of map number 4. Here we can see the abrupt  
13 tracing of the CCAMLR lines in the Kerguelen/McDonald areas. That is parallel 80,  
14 which goes down suddenly to the Kerguelen and McDonald Islands, down to a much  
15 lower position, and on the right you have many areas of fishing in international, non-  
16 CCAMLR zones. There is a little hook in the north. These are also international  
17 waters.

18

19 On map number 6 we have the beginning of a series of maps extracted from sea  
20 charts. This map is an enlargement of the part corresponding to the Kerguelen and  
21 McDonald Islands. You can see the two EEZs, which overlap, and an intersection  
22 line which separates them.

23

24 On map number 7 we have the same zone, but we have added the CCAMLR lines  
25 that we saw earlier in maps 4 and 5. You can see how close the EEZs are, not only  
26 in respect of CCAMLR but also *vis-à-vis* the international waters.

27

28 On map number 8 we have the zone where the *Monte Confurco* had been fishing up  
29 to 7 November until about 1000 hours universal time before entering the EEZ, and its  
30 travel up to the point of interception on 8 November at about 0700 hours.

31

32 Map number 9 focuses on the north-west area of the EEZ, above the Kerguelen  
33 Islands, where the *Monte Confurco* had been fishing, according to information found  
34 by the French authorities, on 5, 6 and 7 November. This was indicated in its log

1 book, which the authorities of the French Republic now have. It shows the type of  
2 fishing and the number of days fished. It is very close indeed to the EEZ. Until  
3 today, the Republic of Seychelles did not forbid them to go into the CCAMLR area.  
4

5 Map number 9 shows that at 1000 hour universal time on 7 November the  
6 *Monte Confurco* stopped fishing in that zone and decided to go to the Williams Bank.  
7 As you can see, the Williams Bank is outside the EEZ and outside the CCAMLR  
8 area. To reach the Williams Bank, there are two possibilities. You can either go  
9 round the EEZ of the Kerguelen north or south, or cross the EEZ as straight and fast  
10 as possible in order to reach the Williams Bank as soon as possible. If you take  
11 these lines between the two points of 1000 hours on 7 November and 0200 hours  
12 universal time on 8 November and continue this line, you will see that you go below  
13 the islands and that route 130 leads you directly to the Williams Bank.  
14

15 The weather conditions were difficult. You can look at the procès-verbal of the  
16 French authorities. The wind was strong, at 40 kilometres per hour; there was  
17 snow; there were four metre high waves. Therefore, the Master, Argibay Perez,  
18 made a very clear choice. On 7 November he crossed the north-west limit of the  
19 Kerguelen EEZ. He could not notify his entry because his on-board fax machine was  
20 not working, as the French authorities have found. This statement is based on what  
21 the Master said. One therefore has to believe that, unless one has proof to the  
22 contrary. After 1600 hours of sailing at an average of 9 to 10 knots, at about 0700  
23 hours the *Monte Confurco* was intercepted by the French vessel, *Floreal*. This is a  
24 sailing speed which is completely plausible from a technical point of view, because it  
25 is quite a powerful vessel. This vessel had been re-modelled. It was a trawler and  
26 had become much more powerful. In order to use trawling nets, a trawler needs  
27 much more power than longliners. One should not forget this. It was perfectly  
28 normal, even if the French Memorial denies it, to take into account the weather  
29 conditions and the currents. Any sailor would be able to confirm this. Whether you  
30 can sail quickly or slowly depends on the currents. In Annexe 3 of our Request, we  
31 have stated that the vessel, with a horsepower of 1,200, could perform in certain  
32 ways.  
33

1 We should note that the *Monte Confurco* never tried to escape. The weather  
2 conditions would not have allowed it to rival the powerful engines of the *Floreal* and  
3 its helicopter. Therefore, this reasoning, which is mentioned in the various  
4 procès-verbaux of the French authorities, was not adopted by the prosecutor nor the  
5 judge during the hearing with the Captain, Argibay Perez. The same weather  
6 conditions caused the vessel not to stop its engines right away because, as every  
7 sailor knows, a vessel cannot stop in a heavy sea. It must necessarily keep on  
8 moving in order not to capsize, and very often one can move from one vessel to  
9 another, when they are side by side, in order to avoid risk.

10

11 The vessel had not tried to hide its flag, its name or anything at all. They definitely  
12 did not try to hide. The vessel was not caught *in flagrante*, as it were. There was no  
13 fishing going on. The characteristic indications of absence of fishing are quite clear  
14 in this matter. The factory was clean, except for two bits of fish that had been  
15 forgotten during the cleaning of the factory, which had remained fresh under the  
16 weather conditions. I think that is quite clear. Everybody knows how sailors work.  
17 They know what has to be done. We were also told that there were present a few  
18 crates of sardines; that was bait, some of which had been jettisoned into the sea.  
19 Why? In longline fishing, once the sardines have been frozen they serve no further  
20 purpose. This can be confirmed this afternoon. You cannot hook them on to hooks  
21 to use as bait. It is therefore perfectly normal to throw overboard such crates of  
22 sardines. The freezing tunnels were not working. They were quite dry.

23

24 France has mentioned in its Memorial a delicate question relating to the buoys.  
25 According to the French authorities, three buoys that had been allocated to the  
26 *Monte Confurco* were found a few miles further back by the *Floreal* before it  
27 intercepted the vessel. The buoy is one of the key elements in longline fishing,  
28 because it determines the beginning and end of the line. The dossier presented by  
29 France refers to buoys of different colours. They will talk about that this afternoon.  
30 I hope that we shall see the photographs this afternoon, when we shall be able to  
31 see whether or not these were the same colours as those of the vessel. These  
32 buoys are invariably made up of a buoy, a metal rod, a universal signal, namely a  
33 lamp, placed at the top of the mast, a battery which provides light for the beacon,  
34 and a radio transmitter in order to know where the lines are. These are used at



1 international level by all fishing vessels or longliners. Most of the fishing tackle can  
2 be bought in shops in Spain, Portugal, or wherever.

3

4 As far as the buoys are concerned, it is not at all rare to lose buoys in fishing,  
5 especially in bad weather. No similar battery was found on board the *Confurco*. The  
6 photographs that we have just seen on the screen show the traces of paint with  
7 which one normally numbers the buoys. In the dossier, the original of which I shall  
8 show you this afternoon – France may have the photographs – we can see that there  
9 are traces of paint which have nothing whatsoever to do with the paint found on  
10 board the *Monte Confurco*. France says that the numbers painted on the buoys are  
11 in line with the numbers of the *Monte Confurco* buoys. We shall see that the  
12 numbers are much bigger than those found near the *Monte Confurco* in the sea.

13

14 Therefore, I have very serious doubts as to the comparison or similarity which cannot  
15 justify objectively the fact that such buoys belong to the *Monte Confurco*. Almost 10  
16 days of sailing went by until the reports and the photographs were established on  
17 land; 10 days during which the crew of the *Monte Confurco* did not know about the  
18 interventions and tests carried out by the military staff on board the vessel.

19

20 In map 11 we can see that number 5 buoy was still on board. There were up to  
21 number 11 on board, which in fact contradicts the statement that it was odd to carry  
22 out fishing operations over three months with four buoys. Any reasonable person  
23 would have to ask himself, "Where is the fish?" If there is no fish, there cannot be  
24 any illegal fishing.

25

26 On 8 November, in the afternoon, the *Floreal* took more than two-and-a-half hours  
27 to bring back the three buoys. They brought up part of the lines in order to see  
28 whether there were any fish. They were shown the buoys. They said that they  
29 belonged to the *Monte Confurco* but there was no crew there. There was no fish, no  
30 hooks and no bait. There was just the three buoys which had been landed 10 days  
31 later. What is even worse, they found these buoys with the help of the  
32 *Monte Confurco*. The Master of the vessel should have been there when the buoys  
33 were brought up. In this case he was not present. The buoys were brought up. In  
34 fact, they did not bring up the lines. They did not prove that there was any fish, so

1 there was no confirmation that the buoys had ever been on board the  
2 *Monte Confurco*. If the buoys had been found by the *Floreal*, they should have  
3 filmed that under normal conditions. The craft had been found a few hours earlier,  
4 but that was not put in the report. Therefore, how can one say that the buoys  
5 belonged to the *Monte Confurco*? Perhaps they belonged to other rogue vessels.  
6

7 I refer to one other matter. Page 6 of the French Memorial states that the ship was  
8 not able to fish north of the CCAMLR line in international lines. It states that  
9 technically and scientifically, the toothfish could not be found in those waters. That is  
10 a matter to be discussed. I talked to the Master on the phone. He said that it was  
11 perfectly possible to fish toothfish in that area. I refer to only very practical cases.  
12 The vessel engaged in some experimental fishing. At this time it was found. The  
13 CCAMLR will be able to confirm that. It is perfectly normal to find that type of fish.  
14 But it is also possible, as the Master confirmed, in that area to fish between 2 and  
15 4 tonnes of fish, as long as there are no whales present. It is perfectly possible to  
16 fish for toothfish at great depth and to put the buoys of the longline at a depth which  
17 the French authorities never reached. The longlines, with the Spanish system, can  
18 go down much further than normal trawlers.  
19

20 A second point mentioned in the French Memorial relates to the depth in that fishing  
21 area, especially on the last three days before it entered the EEZ. The technical part  
22 of the Memorial states that fishing is technically impossible at a depth of 500 metres.  
23 But there are many technical matters which have been raised in respect of French  
24 vessels. They were able to fish to a depth of 2,700 metres. The sea charts state  
25 2,700 to 3,000 metres. During that three days it was impossible for them to have  
26 fished a sufficient catch. You may know that there are very many sea charts which  
27 do not mention all the shipping areas. I refer, for instance, to the area in the English  
28 Channel where the depth is known to an inch, but that is not the case in the  
29 CCAMLR areas. The marine charts are not precise.  
30

31 There are then the explanations given by the Captain. There are technical  
32 explanations. In 1983 FAO stated that this fish cannot go deeper than a depth of  
33 1,700 metres. But this type of fish has a fishing bladder, *vessie natatoire*. If these fish  
34 want to go further down, they have to take in water. That is why the large ships,

1 which are normally fished by the longlines, can be found amongst the catch. Human  
2 beings cannot go further down than a particular limit. A fish can do so because it  
3 has natural ways of compensating. The French trawlers do not yet have experience  
4 of longline fishing. Spanish and Japanese vessels have been doing this type of  
5 fishing, but the French have not been able to carry out experimental fishing at that  
6 depth.

7

8 There are other technical matters. As regards the depth of fishing, the chord  
9 supports the line. A chord of 77 mm is attached to the fishing line. The anchor is  
10 18 mm. It can go down to 2,700 metres. As this type of fish does not have gills, one  
11 cannot go down much further. That is the reason why the fish are normally bigger  
12 than those which stay in shallower depths and which are fished by the trawlers.

13

14 I conclude the facts. The Tribunal will have to look at all these matters carefully.  
15 Article 292 states that the procedure before the Tribunal is independent. One has to  
16 establish objective analysis of the facts. That fact is vital. We find ourselves in a  
17 similar situation to that in the *Saiga* case, where the Tribunal considered that as far  
18 as that was concerned, one should be consistent and establish whether the  
19 allegations made are sufficiently plausible and arguable. The Tribunal cannot base  
20 itself only on the qualifications made by the parties, not even mine. Special attention  
21 should be given to paragraphs 71 and 72 of the same document where the Tribunal  
22 states that it is not bound by the qualifications when it decides the case. The  
23 Tribunal has to choose between one qualification which refers to violation of  
24 international law and another which would avoid that. In that case it would have to  
25 opt for the second possibility. Therefore, the two must be before the Tribunal in a  
26 position of equality, just as they would before a national tribunal.

27

28 If the Tribunal bases itself only on what one party said, there would be a violation of  
29 the principle of the equality of parties. The Tribunal would be taking the side of one  
30 of the parties. That *demarche*, which is reflected on page 57, is not a violation of  
31 Article 73, paragraph 1 of the Convention which relates to violations of fishing rules  
32 and the maximum fine possible, as in the *Saiga* case the Tribunal recognised a limit.  
33 Therefore the independence of the national judges is also guaranteed. The Tribunal

1 would therefore have established whether the allegations are arguable or sufficiently  
2 plausible and would justify the qualification presented.

3

4 However, it is our view that the interpretation which the French court made of its own  
5 applicable laws led to the setting of an exorbitant bond. That will be discussed by  
6 M Morel.

7

8 Mr President, how much time do I have left?

9

10 **THE PRESIDENT:** You have another 16 minutes.

11

12 **MR GALLARDO:** I shall briefly refer to the present situation and the Captain of the  
13 vessel. As regards the Captain, the judicial authorities of the French Republic have  
14 not allowed him to leave la Réunion. Once again, he has been placed under court  
15 supervision by the *Tribunal correctionnel de Saint Denis*. According to this order  
16 placing him under court supervision, he is blamed for two contraventions, not the  
17 four mentioned by the national police force. The prosecutor, the examining  
18 magistrate, charged him with only committing a fishing offence and failure to notify  
19 entry into the EEZ.

20

21 The rest of the crew has left la Réunion. Aboard, we have only a four member crew  
22 to oversee the vessel. Contrary to the provisions of Article 73, paragraph 3 of the  
23 Convention, the magistrate placed the Captain, Mr Argibay, under court supervision  
24 and withdrew his passport, thus limiting his freedom of movement. During the  
25 hearing the Captain stated:

26

27 “As a European citizen, I do not wish my passport to be taken away because I  
28 promise to return and be present at the hearing”,

29

30 which was set for 9 January. The judge replied, quite simply, that he placed him  
31 under court supervision without trial because the charges led to a possible sentence  
32 of imprisonment and even though the French Republic had ratified the  
33 UN Convention, the *Cour de cassation* of France had not yet taken a position on the  
34 matter. It will be noted that this is a cavalier attitude in complete contradiction to the

1 observations of the Agent of France in the *Camouco* case, who indicated that, in  
2 accordance with Article 73, paragraph 3 of the Convention, the Captain of the  
3 *Camouco* was not liable to a sentence of imprisonment.

4  
5 The Applicant wishes to draw the attention of the Tribunal to the fact that all the  
6 documents indicated above were withheld by the French authorities, the Maritime  
7 Police and the Administrator of Maritime Affairs, as well as the prosecutor and the  
8 civil examining magistrate for some 15 days making it impossible for the Captain and  
9 his lawyer to understand their contents. In other words, we became aware of the  
10 contents of the criminal charges only 15 days after the arrest of the vessel. We were  
11 not shown the list of the documents after the apprehension, neither the Seychelles  
12 Government nor the applicants of the shipowner nor the Captain.

13  
14 Through its agent, the French Republic informed us on 1 December that the Captain  
15 of the vessel would not be able to come to Hamburg because his presence at the  
16 hearing was not guaranteed. The Republic of Seychelles protests against that  
17 refusal. That is intolerable, and in total contradiction to the provisions of the  
18 Convention.

19  
20 I turn briefly to the vessel. Since its arrest on 9 November, after arriving in port, the  
21 vessel, its cargo and part of the tackle were seized by the authorities; in total  
22 158 tonnes of fish with a value of FF 9 million, in the order of \$ 1,500,000. That is  
23 with a value placed on 1 kilo of toothfish of FF 55, which is not disputed. We must  
24 simply say that this fish began to be unloaded yesterday into the hands of the  
25 French. They are distributing this booty of war even before a limited tender offer has  
26 been published. They have contacted three or four purchasers to ask them to  
27 finance the purchase of this product. That is a serious matter, especially when we  
28 presented an injunction (France this afternoon will submit a copy) by the  
29 administrative tribunal or court of law asking for the suspension of the unloading --  
30 that is until at least such time as this Tribunal decides or adopts its judgment, which  
31 will be within a brief time -- and without any guarantee.

32

1 They confirm the seizure of the vessel, placing it at a value of FF 15 million, that is in  
2 the order of \$2 million, on the basis of a report of the marine surveyor, a  
3 Mr Chancerel. We shall have occasion to comment as to the scope of his expertise.

4  
5 Finally, they also seized fishing tackle at an estimated value, unchallenged by the  
6 Seychelles, in the order of FF 300,000, that is some \$40,000.

7  
8 Procedurally, there is an order concerning release of the vessel being subject to a  
9 bond in the order of \$7.5 million. We of course appealed within the time limits. We  
10 introduced an appeal before the same judge to revise the scope of his sentence. We  
11 do not yet know the date of the hearing. As I have confirmed to the Tribunal, we  
12 have appealed to the administrative court to ensure that the injunction against  
13 unloading the fish would not be adopted without giving administrative reasons. The  
14 consequences would be irreversible if the fish is unloaded because it would become  
15 defrosted.

16  
17 Before the coffee break, I wish to give you an overview of the position of the  
18 Seychelles concerning its legislation as to the vessel.

19  
20 The *Monte Confurco* flies the Seychelles flag, as is established in the documents  
21 contained in our application. The Republic of Seychelles has for a long time been  
22 developing an effective and responsible fishing industry. To date fishing is  
23 represented in the gross domestic product. Fishing is the main source of income for  
24 the Seychelles, higher even than the figure for tourism, although the Seychelles  
25 archipelago is a tourism location. Many foreign vessels, especially Spanish vessels,  
26 unload tuna in the exclusive economic zone of Seychelles in the port of Victoria, the  
27 capital of Seychelles.

28  
29 There is an authority which follows the English system of a Seychelles fishing  
30 authority, which has competence in overall fishing matters. Seychelles legislation  
31 provides for obtaining a fishing licence to fish in the EEZ and in international waters.  
32 You have seen this document in our annexes. For the time being, no measures  
33 have been taken as to the technical conditions for such a licence outside the internal  
34 waters.

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The Seychelles Government is a member of many regional organisations but not of CCAMLR. Seychelles is developing and strengthening its maritime policy, a policy that fully respects international conventions. It has ratified the FAO Convention on Responsible Fishing in International Waters. Even though that has not entered into force, I believe that thus far there have been 17 or 18 states that have done so; I believe 25 are needed. Seychelles is trying to comply with the conditions.

Oversight of ship owners is based on oversight through company and fiscal law by checking invoices for the sale of fish. As for tuna, and I think Professor Duhamel noted this in his defence Memorial, for toothfish there is a system that is beginning to develop internationally which is provided for in the FAO Convention. That is to issue a booklet to record catches requiring the presence of an inspector whenever a vessel reaches Seychelles, France or any other port. We have provided copies of that report concerning the catches of the vessel in the application. You can even see it on the Internet because the Government of Seychelles makes available to all Member States who have ratified this FAO Code of Conduct all information about catches. If ever there is a problem, they can lodge a complaint and inform the country. On any serious complaint, they can request information from the country.

The situation does not stop there. There is a draft law which will enter into force in 2001. With the assistance of the European Community, there will be a vessel-monitoring system. In order to keep track of vessels, it provides in particular that any Seychelles flag vessel must be equipped with a VMS device permitting localisation of the vessel, in order to find it within the various fishing zones, internal or external.

Coming back to the topic that recurs in this kind of case, Seychelles does not produce unlawful fishing in international waters. It issues licences for CCAMLR waters. Even though it is not a member, it respects CCAMLR through its own legislation. It is to be determined in the French courts and not here whether there have been contraventions of the fishing laws. It regulates fishing and non-lawful fishing. Its fishing is regulated. It issues licences. There are laws. There is a system for oversight and control. There are inspectors. There are systems to keep track of catches. If the administration ever has doubts, it will do what is needed, in

1 keeping with the FAO Code of Conduct. Finally, all catches are reported. I will not  
2 repeat the arguments. When the vessel arrives, the catch is reported.

3

4 To conclude this morning's presentation, there is a whole legislative arsenal  
5 domestically which resembles much more the common law system. I believe in the  
6 common law system that applies to other legislation in countries, which comply with  
7 the civil law tradition, there is a whole system that respects the rights of the  
8 defendant, such as the arrival on board of an inspector, hearings, legal assistance  
9 and legal counsel. It is quite surprising that still in France there seem to be doubts in  
10 the light of the International Convention on Human Rights. It is surprising that there  
11 are still legal proceedings where a person is charged and cannot communicate with  
12 a lawyer. There is normally a lawyer present such as on the arrival of the captain. It  
13 is quite surprising that in France still, although I think it is changing its system, the  
14 testimony of a witness when he is making a deposition can be taken without a lawyer  
15 present. In Spain or Seychelles this always takes place in the presence of a lawyer  
16 but here not. Here there have been interrogations of members of the crew which  
17 took place only before the military police, who simply threatened them that they  
18 would lose their licence and would be taken to Chile or Mauritius and a whole series  
19 of things which are rather remote from those in a law-abiding and civilised country,  
20 which I presume France to be.

21

22 To conclude, the Government of Seychelles also arrests foreign vessels -- Korean,  
23 Spanish, Sri Lankan, all kinds of vessels. There are rather high fines and the  
24 possibility of confiscation as well but it is most observant of the rights of the  
25 defendant. We must say that when a French tuna vessel was arrested with 100  
26 tonnes of fish, and you know how big such a vessel can be, resembling cruisers  
27 carrying 100 tonnes in the hold when they close their nets, there was no media  
28 exaggeration about this arrest and the rights of France were respected. One would  
29 expect reciprocity. French vessels, like those of other foreign countries, are also  
30 arrested.

31

32 Thank you once again. This afternoon we will continue with the presentation by M  
33 Morel of the scope of French legislation and the interpretation that is being given by  
34 the French courts and administration of its own legislation in conformity with



1 international law. I shall then move on to examine the expert we have brought with  
2 us and briefly ask a few questions and afford the Tribunal a chance to pose such  
3 questions as it wishes.

4

5 (Short recess)

6

7 **M MOREL** (Interpretation): Mr President, distinguished members of the  
8 International Tribunal for the Law of the Sea, we meet here at the beginning of this  
9 winter in the Hanseatic City of Hamburg to address the case of the longliner  
10 *Monte Confurco*. We are debating a prompt release case under Article 292 of the  
11 Montego Bay Convention, a text that you all know extremely well.

12

13 This application is introduced by the Seychelles, an archipelago in the turquoise blue  
14 of the Indian Ocean, a small state like the Maldives, Grenada, Belize and others.  
15 The Hague Convention on Global Warming, held a few days ago, may help because  
16 these states are threatened by flooding from the sea and run the risk of  
17 disappearing. These are small states that, nevertheless, have rights because they  
18 live from fishing and tourism. These are the resources of the Republic of Seychelles  
19 and hence it is right to assert its cause before a tribunal which should be the  
20 defender of this cause but must also weigh in the balance justice. I see the balance  
21 as part of the symbol of your institution. I shall bear in mind that symbol of equity,  
22 balance, reason and ultimately freedom.

23

24 We have coastal states which are jealous of their economic prerogatives. On the  
25 other hand, we have flag states for whom freedom of navigation on the high seas,  
26 freedom of navigation also in the EEZ and right of innocent passage must be  
27 recognised and affirmed as a fundamental principle of international law.

28

29 Thus, we return to this case and initially, following the statement of facts made by  
30 my colleague, Mr Gallardo, we shall now present the laws upon which these are  
31 based, particularly now the French laws. They are very simple. There are old laws  
32 governing fishing in France and the law of 1 March 1998. That law was amended  
33 initially on 18 June 1966 and amended again and this is now the current law, an

1 amendment of 19 November 1997, which contains the provisions that now govern in  
2 the coastal state, France.

3

4 In sum, what are these sanctions? you need a licence to fish. If you do not have  
5 a licence, you are firstly punished for failure to announce your entry into the  
6 exclusive economic zone and a failure to indicate the tonnage of fish on board. You  
7 are subject to a fine ranging up to FF 1 million.

8

9 Secondly, in the case of unlawful fishing, you run the risk of a fine that may go as  
10 high as FF 1 million, that fine being supplemented by another proportional fine --  
11 FF 500,000 per tonne fished over and beyond 2 tonnes, the threshold of 2 tonnes  
12 that the law grants you.

13

14 Then, and how can I fail to note this, as mentioned previously, that there is this other  
15 incongruous sanction of six months imprisonment that may also apply to an offender.  
16 The International Convention in Article 72 (13) provides that sanctions of the coastal  
17 state for violations of laws and regulations with regard to fishing in the EEZ cannot  
18 include imprisonment -- cannot and may not include imprisonment. You have here  
19 France, a country that voted three years ago for this text, subsequent to the  
20 ratification of that international convention imposing a prison term. Those are the  
21 substantive laws.

22

23 Then you have the procedure. The procedure, as Ihering the German jurist said, is  
24 the sister of freedom. The procedure consists of organising the arrest as a  
25 supplementary or additional punishment to the arrest, which is possible as the  
26 legislator says. This is not a systematic seizure. As we shall see later in the  
27 *Camouco* case, the vessel was not arrested. There is a possible seizure of the  
28 vessel; there is a possible seizure also of the product of the fishing. The law says  
29 "the product of fishing". The law does not say that all the fish that you have on board  
30 *ipso facto* means that this is all product of illegal fishing and must be seized. It says  
31 "the product of lawful fishing".

32

33 Thirdly, the seizure of the fishing tackle, the apparatus of the vessel. I shall pause  
34 for a moment. You have the substantive texts and the procedure and then you have

1 the crucial problem in this hearing in the etymological sense, the problem that is at  
2 the crossroads of this, which is the presumption of unlawful fishing which the coastal  
3 state absolutely wishes to impose on us. That means the entire quantity of toothfish,  
4 tuna, whatever. The Seychelles is a state where tuna fishing is a tradition. There  
5 are agreements with the European Union. One fishes for tuna or toothfish and we  
6 are told that if you are in the EEZ and have not announced your entry, there is this  
7 presumption, providing that everything you have on board will be considered to have  
8 been fished illegally.

9

10 This is a crucial problem and I shall pause for a moment to address it. Today, before  
11 you, I affirm that this presumption does not exist in French law. You may ask what  
12 gives me the right to be so categorical. The answer quite simply is, first, the texts  
13 themselves. The texts, in the general sense and in the specific sense, do not  
14 indicate anything of the kind. Generally speaking, I refer to the constitutional  
15 provisions of France, which include the current constitution, including the Declaration  
16 of the Rights of Citizens, the Declaration of the Rights of Man, of 1789, which states  
17 that all men who are not yet convicted are presumed to be innocent, that is the  
18 presumption of innocence. That is what I know, and I believe that it should not yet  
19 be a dead letter and that it is not simply written for law books, of which, distinguished  
20 gentlemen, you are all well aware.

21

22 What do the texts specifically say? Is there a law? I challenge the other party to  
23 produce a text that introduces such a presumption. What is the presumption? The  
24 presumption is a consequence which the law infers from a known fact to an unknown  
25 fact. As I said at the beginning of this statement, I do not see in positive French law  
26 the existence of any such presumption.

27

28 If there is nothing in the texts, is there something along those lines in the  
29 jurisprudence, in the case law? In my view, the jurisprudence cannot pull such a  
30 presumption out of its hat, because we are talking here about criminal law, a specific  
31 field of the law. In any event, I have found some decisions. In a case that  
32 concerned the vessel *Explorer*, a vessel flying the Panamanian flag which had 81  
33 tonnes of fish in its hold, an Order was issued by the Criminal d'instance of Saint  
34 Paul on 19 March 1989. The bond was FF1 million. There was an appeal. The

1 Court of Appeal of Saint Denis brought it to FF12 million(*sic*), the final fine in this  
2 particular case. With 81 tonnes, if one applies the basic fine of FF1 million plus  
3 FF500,000 per tonne beyond two tonnes, we should have arrived at a fine of the  
4 order of FF40 million. I therefore do not find any presumption in the decision.

5

6 I will give another example and then stop. The law was fairly recently amended on  
7 19 November 1997. The first decision, issuing from the Tribunal d'instance of Saint  
8 Paul, concerns the vessel, *Magallanes*. There were on board 177 tonnes, a fairly  
9 large amount, of toothfish. The tribunal simply did a breakdown of what the  
10 prosecution had been able to prove. It is not up to us to prove anything. We said,  
11 "4,112 kilos". The court said "100 and some tonnes minus so many kilos, so the fine  
12 will be FF3 million." Where is the presumption that is sought to be applied to us  
13 today? Mr President, gentlemen, that presumption is so inexistent in present law  
14 that some authors who write about fishing in the Indian Ocean are calling for it.

15

16 As evidence, I produce a document that will be communicated to you, namely an  
17 interview with Mr De Zoestre. Who is he? He is the President of SATMER(?), a  
18 group of ship owners in La Réunion, which is a civil plaintiff in a court case  
19 concerning fishing and which, therefore, has a direct interest in ensuring that the  
20 prerogatives are respected. What does he say? - "We ask that the law be amended  
21 in such a manner as to avoid any appeal". That is true, especially when such  
22 appeals are serious, based on law and evidence which clearly should lead to a  
23 reform or modification of such a situation that is being imposed upon us. They now  
24 wish us to accept these sanctions without saying anything, without being able to  
25 defend ourselves. You can therefore see where we stand today.

26

27 As M De Zoestre says, "We must prove that a toothfish on board was actually caught  
28 in French waters." He knows what the law is. "We ask that the cargoes which have  
29 not been declared on entering the zone should make that cargo illegal." He creates  
30 a presumption there. It may happen one day – I do not know – but what I have  
31 found is that this presumption does not exist. It is being required here by the  
32 economic factors in the fishing sector of the Island of La Réunion.

33

1 Looking forward, I would say that such a presumption cannot exist. What  
2 M De Zoestre is asking for is, I believe, contrary to the general principles governing  
3 our criminal law. The criminal law is the strict interpretation, and Article 111(4) of the  
4 French Code takes up this affirmation, according to which criminal law is the strict  
5 interpretation of legislation. So we find ourselves in an area which touches directly  
6 upon, if not the freedom of people, at least their freedom of movement. Master  
7 Argibay is blocked in Réunion just now. The penalties are serious and the  
8 consequences are serious as well. Legislators in most countries take account of the  
9 fact that the criminal law must be strictly interpreted. In a case of doubt, such as  
10 this, we who have a Latin background would say "*indubio pro reo*"; so if there is a  
11 doubt, it must profit the person directly involved. This erroneous application of  
12 French law to the presumption of illegal fishing, which does not exist, leads to the  
13 fixing of astronomical, unreasonable and exorbitant penalties. You will understand  
14 the need for us to give explanations relating to an artificial, subjective, partisan  
15 machinery which leads to deforming the reality of the text in order to abusively  
16 punish the vessels of countries flying under a foreign flag. All they can do is come to  
17 you, gentlemen.

18  
19 I now turn to the Order of 22 November 2000, which fixes the bond at FF56,000 in  
20 the case of the *Monte Confurco*. FF56,400 is not much, is it? When we look at that,  
21 we can say, "What can this case cover to achieve such enormous amounts?" There  
22 are not many dossiers that have been dealt with in cases in the Indian Ocean that  
23 have reached such amounts.

24  
25 We are often asked, "Is not this a flag of convenience?" No, not at all. I have  
26 nothing against flags of convenience. France has a flag of convenience - the  
27 Kerguelen flag – by which, thanks to this flag, they can record or register vessels  
28 which do not have to respect certain social requirements on the mainland of France.  
29 Can the Seychelles today be considered as constituting a flag of convenience? The  
30 answer is that they cannot. It is a country that has a fishing tradition. It is not a  
31 country that represents a significant part of the world fleet, whether we are talking  
32 about cargo boats or fishing vessels. Is this a vessel, as we were told earlier in the  
33 *Camouco* matter, that is suspect because one often finds it in the EEZ? The answer  
34 is that it is not. I can already hear the Defendants saying, "This vessel in transit had

1 already been seen by the French naval vessel". They have never seen that ship –  
2 never. Were there log books for the catches? Yes. Were there documents? Yes.

3  
4 In the Memorial of the Defendants – and I stand to be corrected by my adversaries,  
5 who will this afternoon be able to provide the relevant paragraph of their Memorial - it  
6 is said that the information provided in the log book of catches is not plausible and  
7 that the fishing of toothfish in international waters is possible. When the *Floreal*  
8 came into play, was the vessel fishing? The answer is that it was not. The freezing  
9 tunnels were clean; the factory was quite clean; the weather was a little wet; it was  
10 less than 2 degrees; there was a little snow and wind; and it was cold. "Since it  
11 was slightly damp, you were obviously fishing." What is that? It is just assumption.  
12 Have they found 10 or even one tonne of fresh fish out of 158 tonnes? No. They  
13 found perhaps 20 kilos. There were three fish there for the ship's galley. They said,  
14 "Three fish - 10, 12".

15  
16 What about the buoys? The buoys bear numbers. A number of buoys were found  
17 on board, but a particular number of a buoy is missing. One buoy has been found  
18 which resembles this, which has a number but which is not a number on board.  
19 That is very surprising, because when you look at buoys you realise that they all look  
20 alike and that they are set up in the same way. You can find them in Port Luis. They  
21 provide a lot of fishing material. It is always the same fishing material that one  
22 provides. At the same time we are being told - and I think that our adversary's case  
23 crumbles there - that there was one buoy which was not marked. "I thought that all  
24 the buoys were numbered." "No, no", they said, "it is not numbered, but it is your  
25 buoy anyway." I am not making any comment on that. I shall not waste time on that.

26  
27 This matter is really fairly void. We are being told this morning, and we shall be told  
28 this afternoon, that for 20 or 30 kilograms of toothfish that were going to be eaten by  
29 the 40 crew members one has to pay FF56 million in respect of a vessel that does  
30 not have a flag of convenience, which was never noticed before. There are certain  
31 rules. You will remember the case of the *Camouco*. They said that it was a pirate  
32 vessel and that one could not see the name. But the photographs that you saw on  
33 your screens this morning were very clear. It was marked "*Monte Confurco*" and it  
34 very proudly flew its flag, so there was no problem of identification at all.

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This company of ship owners immediately addressed the authorities of Victoria, the capital of the Seychelles, to explain the problem that they had encountered – a ship which had a perfectly consistent path, sailing straight ahead. It had come from the north-west and it went to fish on the Williams Bank, going through the McDonald Island area. Therefore, its sailing path was perfectly consistent. It is with a dossier like this that one is trying to show up what the Seychelles were doing, whereas one is being required to pay FF56 million. Since the matter of the *Camouco*, the French authorities have obviously not learned much new, because, without going back to that matter at any length, there was a bond of FF20 million, which you, Mr President and Judges of the International Tribunal of the Convention of the Law of the Sea, reduced to FF8 million. What was the outcome? The result was a fine of FF 3 million and the ship was not confiscated. You can see the figures: FF 20 million, FF 8 million, and finally FF3 million.

I believe that, despite the solemn nature of this hearing, one should deflate the accusations. This is part of a policy of repression and control. This may be justified on the part of a coastal state, but it should be subject to certain limitations. There must be limits that are the subject of arbitration. He who has the power is always tempted to abuse that power.

I conclude by saying two things. First, each state, however small, or large like France, is very jealous of its sovereignty. But each state, even a small one, is entitled to have its flag, its rights, its prerogatives, respected. Each state is entitled to defend itself and to put forward its case, and not to be accused without being able to explain itself or to be pilloried by bad figures such as FF56 million. We are told that this shipping company has only one vessel. That is why we have come here to Hamburg to put our case.

I shall conclude with a comment by Isabel Autissier, who is well known in France, and perhaps around the world, because on several occasions she went round the world in a sailing boat and is a member of various bodies that control the Kerguelen areas.

1 A few days ago at a meeting in la Réunion, she reminded us, although she has very  
2 ecological attitudes, that fishing was perfectly normal and that one should not allow  
3 the fishes to die of old age.

4  
5 **MR GALLARDO** (Interpretation): Mr President, members of the Tribunal, perhaps  
6 I may say a few words about the admissibility of the request. The request is  
7 admissible, although the internal procedures have not been exhausted. The  
8 requesting party will introduce today an appeal against the order because when it  
9 was adopted, and in order to adopt it, we had not been heard. There was no  
10 hearing. We had no right to a hearing. Therefore, it is indispensable to appeal  
11 before the court. But in practice we have seen that such an appeal, which is  
12 plausible in parallel, may take many months. Therefore, we are much more  
13 interested in knowing the findings of the International Tribunal and what they are  
14 thinking about while the domestic matters continue.

15  
16 The Application is admissible because we see that the exhaustion of domestic  
17 remedies is not a necessary condition for introducing an action under Article 292.  
18 These are independent procedures. The procedure before the Tribunal is not  
19 recourse or an appeal against the order of 22 November. Article 292 authorises the  
20 submission of an application for release after a short period. In practical terms, the  
21 domestic recourses are normally not exhausted in so short a time.

22  
23 As a consequence, the fact is that the action before the national French jurisdiction is  
24 still pending, and this is not an obstacle to introducing a request for swift release  
25 before ITLOS. The French state has not complied with the provisions of the  
26 Convention relating to the release of the vessel or its crew.

27  
28 There are a few preliminary questions to take into account. First, the Master of the  
29 *Monte Confurco* is being accused of having contravened the fishing regulations of  
30 the EEZ of France. This question relates to Article 73 of the Convention. The  
31 provision of a bond or another guarantee is not necessarily a preliminary condition  
32 for submitting such a request.

33



1 I shall now refer to the admissibility of the Application. As regards the order of  
2 22 November, the judge had determined that the release of the vessel and the  
3 Master could be done if a bond of FF 56,400,000 was paid in cash, certified cheque  
4 or banker's draft in order to guarantee the following facts: FF 1 million to ensure that  
5 the Captain would be presented; FF 400,000 for paying for damage caused by the  
6 violation, and FF 55 million for payment of fines and confiscation of the vessel.

7

8 We consider that this bond is not reasonable. Furthermore, we must point out that  
9 under the order given by the French authorities, it does violate the principle of the  
10 defence. This is a guarantee where no difference is made between the Captain and  
11 the rest. We consider that this bond is not reasonable in respect of its amount, form  
12 and nature. Furthermore, we must point out that the order given by the French  
13 authorities violates the principle of the defence and especially the adversarial  
14 principle. The judge concerned ordered almost automatically, within a day, the  
15 seizure of the vessel by means of an order upon a request presented by Maritime  
16 Affairs. In this procedure the defendant is not involved. Therefore, his observations  
17 are not taken into account. The order is made known to him. Then of course, that  
18 party should be able to appeal.

19

20 However, the respondent can submit observations only during a hearing if an appeal  
21 is introduced. Reference is made in the French Memorial to what is reasonable or  
22 not reasonable. We shall not return to that particular aspect. It is much more  
23 important to maintain a balance between the different interests involved. The bond  
24 must be well balanced between the various concepts on this side of France, the  
25 coastal state. The purpose of the bond is to guarantee that the Captain will be  
26 brought to the court and pay his fines. A release can occur only if a reasonable bond  
27 has been paid or some other financial guarantee is given without prejudice to the  
28 follow up of any action which may affect the vessel, owner or the crew.

29

30 As regards Seychelles, the flag state, the purpose of the bond is to ensure that the  
31 vessel and its Captain should be able to go back to sea and continue their economic  
32 activities. The owner of the vessel or other persons affected by the immobilisation of  
33 the vessel, such as the crew, suffer losses. These could be avoided, however, after  
34 immobilisation and a longish rest. But due to unreasonable bonds being required by

1 domestic courts, the concept of reasonableness must conciliate the guarantee of  
2 safeguarding the rights of the coastal state. It must facilitate the proper  
3 administration of justice and efficiency of legal decisions. On the other hand, one  
4 must have a guarantee that one will obtain the release of the vessel and the Captain  
5 and ensure that the vessels will be able to continue their economic activities.

6  
7 Those two interests are perfectly legitimate and of equal weight, otherwise it is not  
8 possible to understand why the third conference of the United Nations has  
9 considered it so important to have a swift release, which it introduced into the  
10 Convention in Article 292.

11  
12 As far as the definition of “reasonable nature” is concerned, the Tribunal has given  
13 no exact definition but provided guidelines in the *Saiga* and *Camouco* cases of the  
14 overall balance between the amount, form and nature of the bond, which must be  
15 reasonable and further elements to be considered: in particular, the seriousness of  
16 the charges or infractions by virtue of the arresting state; the value of the vessel; the  
17 value of the cargo; the amount of the bond imposed and the form in which the bond  
18 is imposed.

19  
20 Further, the parties can add other elements that must be considered. Mr Morel will  
21 later address the seriousness of the offences and what sanctions can be imposed  
22 under the law of the state. Let us begin with the value of the vessel.

23  
24 As regards the value of the vessel, following the procès-verbal of seizure by the  
25 French Administration, the French court indicated that it was FF 15 million based on  
26 a report with which my side does not agree. However, that party did produce two  
27 experts’ reports, which will be shown later, putting the value of the vessel at a  
28 significantly lower amount. However, this morning we have just received a fourth  
29 report, presented this time by the French Republic which confirms our evaluation of  
30 the value of the vessel. I reserve further comment for tomorrow morning as to the  
31 fourth report which we have just received. We wish to prepare our comments on  
32 that.

33

1 Let us begin with the report of Mr Chancerel, the marine surveyor, who did a study at  
2 la Réunion. This report, which was communicated by the French delegation, dated  
3 4 November, states that the short time limits allowing the report did not allow him to  
4 carefully study the ship. It is based on the general state of the vessel by comparison  
5 with other vessels.

6  
7 The report contains many surprising factors. First, we consider it to be weak and  
8 incomplete. It is weak because it takes into account certain technical specifications  
9 but not the situation of the international market for fishing vessels equipped for  
10 freezing fish or of longline fishing vessels internationally. With all due respect, the  
11 person who drew up the report is not the most appropriate, given that in the only port  
12 of la Réunion which can harbour such vessels, fishing vessels are generally not  
13 received with the exception of small tuna fishing catamarans, and three or four  
14 French flag vessels working off Kerguelen. They do not have the experience to  
15 compare reports with other longline fishing vessels that may have been drawn up,  
16 which are possibly cargo vessels which come in with many supplies and products to  
17 la Réunion – cargo, container vessels and so forth, but not fishing vessels.

18  
19 It is also evident that this does not respect that which appears in every expert report:  
20 in evaluating the vessel, that includes all the fishing tackle that is currently being  
21 used. In a ship survey such as this, one sees the equipment, but one does not  
22 normally see the fishing tackle, the more so here since the Maritime Administration  
23 attached a value to the ship, the tackle and the cargo separately. In other words, it  
24 evaluated the fishing tackle. One cannot agree with this first report which evaluates  
25 the ship at FF 15 million.

26  
27 In our Application, we included a report from Albino Moran shipbrokers. That report,  
28 written in English, is in this regard not only an in-depth analysis of the technical  
29 specifications of the ship and its contents, but all of the criteria for evaluating this  
30 kind of vessel in light of the international market. The opinion appearing in the annex  
31 to my Application is that the value is in the order of \$ 400,000 to \$ 450,000. At the  
32 exchange rate of the French franc to the dollar, one can consider that that given by  
33 Mr Moran is FF 3,400,000.

34

1 Mr Moran would have wished to be present at this hearing, but due to other  
2 commitments he is delayed in Argentina. We did not know that these proceedings  
3 would take place so quickly. He sent me a letter in which he begs indulgence and  
4 confirms that he will not be able to attend. However, I have here his survey and his  
5 curriculum vitae. That shows that the company, and he in particular, are people who  
6 know the market. He is a naval engineer with high credentials. He is a person who  
7 speaks three languages. He has a masters degree in economics and worked for 10  
8 years in naval shipyards. He also worked in Astilleros, the most prominent shipyard  
9 in Spain, as a shipbroker. I will be asking that this brochure, which describes  
10 precisely his curriculum vitae and his qualifications, be admitted into evidence. He  
11 gave me a list of some fishing vessels sold by our organisation. In the 10 years of  
12 his career, he has participated as an independent entrepreneur or broker in surveys  
13 of some 84 vessels, in particular longliners and quite a few trawlers. I will submit  
14 that as evidence of the high qualifications of the person whom we have brought  
15 forward as an expert on fishing vessels.

16

17 This is quite different from the first survey presented by France. It is surprising that  
18 the second expert report submitted by France, according to my rough calculations,  
19 provides for a value of the vessel in the order of FF 11,230,000. Therefore, it is no  
20 longer FF 15 million but FF11, 230,000 apparently. However, we shall have  
21 occasion to comment on the scope of the report.

22

23 In the absence of Mr Moran, I felt it was necessary at least to put to the Tribunal the  
24 possibility of posing questions to other experts and to our expert, in particular  
25 Mr Anton Alonso Perez. I request that he be admitted so that he may be questioned.  
26 The Tribunal or the French delegation may wish to ask questions of him in the  
27 absence of an expert in view of the fact that this may relate to the problems  
28 concerning the reasonableness of the decision of the bond or lack thereof.

29

30 I believe that the expert must be sworn.

31

32 **THE PRESIDENT:** Perhaps the interpreter may also be sworn and thereafter the  
33 witness, in accordance with Rule 80 of the Rules of the Tribunal. Would you please  
34 announce your name?

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(Interpreter sworn; name given)

**CAPTAIN ANTON ALONSO PEREZ, sworn**

(Difficulties with sound system and interpretation)

**MR GALLARDO:** Mr President, may I kindly request that we postpone this witness' evidence and that he stays in Hamburg until tomorrow morning, together with the analysis of the fourth report presented by the French side this morning.

May I proceed with my presentation?

**THE PRESIDENT:** Yes.

**MR GALLARDO** (Interpretation): I was referring to the expert surveys with a view to having a more in-depth knowledge of the value that this arrested vessel might have in La Réunion. We are going to prepare a specific statement about this subject, as I have said previously, with the presentation by the expert, in response to my questions.

As to the parameters to be taken into account by a court in reviewing the reasonableness of this matter, M Morel will speak about the seriousness of the offences and the sanctions provided for under French law. I was speaking about the value of the vessel, so I shall continue on the value of the cargo seized and other elements that have been seized.

The cargo of the vessel was seized and estimated at FF 9 million. That value is undisputed. The value was not taken into account by the court when it came to evaluating sentences or amounts of risks incurred. As I said previously, the cargo is being discharged even today. We may be able to give you the total tonnage but there is no dispute as to the value of F 9 million set by the Department of Maritime Affairs.

1 Regarding the tackle, that was set at FF 300,000, a value again disregarded by the  
2 French judge in Saint Paul. Apart from this fishing tackle, which was enumerated in  
3 the procès-verbale seizure, there is quite a bit of fishing equipment which is still on  
4 the ship, the value of which should be in the order of FF 300,000, approximately.

5

6 Let me add the bait which was on board. The French authorities never followed up  
7 clearly as to what should be done concerning the bait. The value of the bait is  
8 thought to be some FF 250,000.

9

10 The gas-oil remaining on board: if I recall correctly, there are some 90 tonnes, a  
11 value of another FF 200,000. Apart from all of this and the parameters established  
12 thus far by the courts according to those parameters, we feel that the Tribunal should  
13 also take into account other factors.

14

15 The Seychelles flag is not considered a flag of convenience. France has already  
16 recognised this. Secondly, Seychelles is a member of numerous international  
17 conventions, although it is not a member of CCAMLR. Seychelles has adopted  
18 measures, as I have shown this morning, as strict as those adopted by regional  
19 organisations such as, for instance, forms to be filled out on discharge like those of  
20 CCAMLR and the requirement that there be inspectors awaiting the arrival of a  
21 vessel. A licence is granted by Seychelles to boats fishing in international waters.  
22 This vessel did not fish unlawfully either in CCAMLR waters or in international  
23 waters. There are no unreported fisheries. I will not repeat all those arguments.

24

25 All of this obliges us to fill out the factors or parameters as to the gravity of offences  
26 and sanctions that may be imposed. My colleague will continue later as to the  
27 amount of the bond set by the French court and the form in which the bond is set.

28

29 MR MOREL (Interpretation): I will continue by tackling immediately the practical  
30 matter of the amount of penalties under French legislation, as I told you this morning.  
31 What was the outcome of the *Camouco* case? We were accused of illegal fishing up  
32 to FF 3 million and an omission to notify entry into the EEZ and the sanctions there  
33 are something like FF200 million.

34

1 As far as fishing is concerned, the judge tries to make a breakdown between those  
2 matters where one has no proof that the fish is of illegal origin. That part is because  
3 the vessel was caught in flagrant abuse of fishing. Well, you are not there to judge  
4 the substance. If we remain within the purview of the text, we know that we had  
5 been in the EEZ for 24 hours already and had crossed it directly. If someone is  
6 taken to a tribunal, he knows how much he can fish in just 24 hours. The figure is  
7 4 tonnes and that is FF 400,000. So for omitting to notify entry into the EEZ, the  
8 figure is a few million francs. One could discuss that not in terms of dollars but in  
9 French francs.

10

11 Roughly speaking, one should be able to agree what should be decided in the light  
12 of the penalties of the courts as to species and reasonable guarantee.

13

14 The second comment I would like to make is this. My colleague said earlier on that  
15 this had already been decided. The bond which can be required by France is a bond  
16 which is not sufficient. The word "suffisante" should be interpreted by "reasonable".  
17 In Article 292 of the Convention, as long as a reasonable bond is provided, the  
18 vessel will be able to go back to sea properly. I am not coming back to that. That is  
19 the concept of "reasonable".

20

21 The third point to which France reverts, and these again are matters which are being  
22 judged under your jurisdiction, is the illegal nature of the surveillance. We are told  
23 that the Master has not been imprisoned. That is a good thing but it has been  
24 conceded that he is not free to leave the island. He does not have free movement.  
25 This was dealt with in paragraph 73 of the *Camouco* judgement. It was stated there  
26 that the Tribunal considers under those circumstances it is appropriate to require that  
27 the captain to be released. That surely is quite clear. One comes back to that  
28 course. The Respondent comes back to that. All I am asking is the application of  
29 what has already been judged previously.

30

31 There is another matter. Since one apparently always has to go back to what has  
32 gone before, I can talk about how the bond has been calculated. This morning we  
33 are pleading here in your presence that one should deduct the value of the bait, the  
34 oil and fishing tackle on the one hand and the catch on the other. That represents

1 something like FF 1 million. On the other hand, when we are talking about the catch,  
2 that figure is something like FF 9million. These values are not in dispute. There  
3 again, it must be clear that the French authorities were very hasty in discharging the  
4 vessel.

5

6 I informed the administrative tribunal of Saint Denis in St Réunion and asked that the  
7 decision of the Department Maritime Affairs in Réunion be rescinded. Their decision  
8 to discharge was illegal. An appeal is pending. I ask that the judgement be  
9 suspended, or the application of the judgement be suspended. However, the  
10 administration did not follow our view and I gather that the cargo is now being  
11 discharged or unloaded.

12

13 I think that the French authorities have been too hasty and hastiness never goes  
14 hand-in-hand with justice.

15

16 We have the bond of FF 1 million but the figures should be your decision and one  
17 would have to be able to deduct the amount of the bond. A decision has been taken  
18 in your finding under paragraph 84 in the *Camouco* case in paragraph 79. In one  
19 case we were talking about the value of the oil and in the other the value of the catch  
20 that was involved.

21

22 There is one last point, and I must apologise because I have the impression that  
23 what I am saying now is a bit unnecessary because you know all these things. You  
24 have already examined all this. What should be the nature or form of the guarantee.

25

26 The French administration, in agreement with the judiciary, wants to impose upon us  
27 a cash payment. That might be a good thing in some operations but in this particular  
28 case it so happens that the operations are controlled by an international text. The  
29 Montego Bay Convention and Article 113 of your regulations give your Tribunal the  
30 possibility to decide what form this bond should take. It was judged, especially in the  
31 *Camouco* case, and I think here we are dealing with 74 or 81, and the Tribunal said  
32 that the bond should be established in the form of a banking guarantee.

33

34 We do have this in commercial and maritime law. This happens every day in all



1 sorts of ports: there is a release against a banking guarantee. Elsewhere one never  
2 asks for any cash payment.

3

4 To sum up, to fix the bond you can provide the possibility of offering this bond in the  
5 form of a banking guarantee from a well-known bank. In the matter of the *Camouco*  
6 and the FF3.5 million, was that paid? Yes, it was. They paid on the basis of the  
7 banking guarantee which was provided. There was no difficulty with that at all. So  
8 let us stop quibbling about such matters. This is unseemly. It also reminds me of  
9 fighting windmills. These are matters which have already been settled. All I am  
10 asking, Mr President, is to speak to your jurisprudence and your case law.

11

12 **THE PRESIDENT:** Have you completed your dissertation this morning or would you  
13 like to have more time?

14

15 **MR GALLARDO:** I did not respond in the light of the technical reports, and I will do  
16 so, together with the expert, tomorrow morning. The interpreter is not able to be  
17 here this afternoon.

18

19 **THE PRESIDENT:** Can we take it that you have completed your part of the hearing  
20 this morning?

21

22 **MR GALLARDO:** We will complete that tomorrow morning.

23

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32 **(Luncheon adjournment)**

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