DISSENTING OPINION OF JUDGE LAING

1. I regret that I have been obliged to vote against the sixth operative provision of the Judgment. I have done so because of my position on the concept of a reasonable bond or other financial security and because, on my view of the facts and relevant law, the quantum of the aggregate security could have been under 9 million FF, not 18 million FF as in the operative provision. I assume (1) that, if the facts are later proven, the French territorial trial court will hold that there was non-notification of the vessel's presence in the exclusive economic zone and that there was illegal fishing therein and (2) that, under the relevant French law, the civil parties in the criminal proceedings, alleged victims claiming compensation, would prevail. At the suggested figure of not more than 9 million FF, the security should consist of the offloaded cargo of fish and there would be no need for a sizeable bank guarantee, if any.

2. I believe it will be helpful to state my assumptions concerning the apparent extent of illegal fishing that occurred and, very broadly, my predictions about how the trial court might handle it. Even though I cannot and would not claim to apply French law as an agent of that system, it is most definitely that source on which, primarily, my calculations are based. Given the precise fines that may be levied under the relevant French law, the judgment seems to be consistent with the view that there is adequate evidence of extensive illegal fishing or, possibly, that even minimal illegal fishing constitutes a grave offense (Judgment, paragraphs 44, 78–82 and 88). My own view is informed by my different understanding of the record and by the Tribunal's "arguable or sufficiently plausible" standard of appreciation, for determining whether an allegation by the flag State of non-compliance with article 73 of the Convention has been made out.[1] The hypothesis is that that

[1] As stated in paragraphs 50 and 51 of the Tribunal's Judgment in the *M/V "SAIGA" Case* (Prompt Release) this is:

> based on assessing whether the allegations made are arguable or are of a sufficiently plausible character in the sense that the Tribunal may rely upon them for present purposes [*separate, independent and accelerated prompt release proceedings*].

standard also applies to proof of the basic or threshold contentions by the detaining State and that such proof has been made out in this case. Nevertheless, on the record before the Tribunal, my view is equally tenable if the detaining State's contentions are subject to a different standard of appreciation.

3. I must observe that, whatever the standard of appreciation, it is difficult not to view several aspects of the record before us with substantial caution, given the largely circumstantial nature of many of its contents. Several of these are contradictory. The Tribunal did not get to see such important pieces of evidence as the vessel's logbook or its equivalent, even though it was acknowledged that it does exist. An allegedly crucial videotape of the vessel made by the apprehending or arresting vessel was not made available to the Tribunal since, regrettably, it was still under seal pursuant to judicial order. The record is therefore consistent with the probability that only some three or four days of illegal fishing and a minimal catch could be assumed, according to the domestic norms relating to fishing in the exclusive economic zone of the French territories. In these cases, such norms must be sensibly viewed by this Tribunal, the chief guardian of the 1982 Convention, which specifies the international parameters. My conclusion is influenced by my view that, in this task, the Tribunal is required fully to bear in mind Part V of the 1982 Convention, applying its sound judgment in construing such qualifications to the coastal State's capacity to take prescriptive and enforcement measures in the zone as the phrase "*as may be necessary* to ensure compliance with the laws and regulations adopted ... *in conformity with this Convention*" (emphasis added) in paragraph 1 of article 73. In its task, I expect the Tribunal increasingly to draw inspiration from a wide variety of international legal sources.[2] I return to this subject in paragraph 6.

[2]One example is article XX of the General Agreement on Tariffs and Trade setting forth a number of general exceptions to the requirement of non-discrimination. Several of these are required to be "necessary," a concept which has often been judicially interpreted.

4. In some States, illegal fishing can be proved by presumptions. I believe that national laws and regulations are not in conformity with the Convention if proof of their violation is adduced through legal presumptions. Possibly for this reason, the Respondent's pleadings sought to disavow the apparent reliance on a presumption by the bond-setting judge. This question was debated at length in the pleadings but the text of the Judgment makes it clear that the touted presumption that the entire catch on board was illegally caught did not influence the Tribunal's decision. Therefore, the Tribunal should have been less generous about the size of the security it determined.

5. I have found that, strictly as a matter of evidence, there is no proof of a substantial violation of the proscription of illegal fishing. Let me firmly stress, however, that I decry illegal fishing and that I wholeheartedly encourage all efforts to extirpate that menace through diplomacy and the most far-reaching measures of international cooperation.

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6. As may be inferred from paragraph 3, in my view, what is reasonable security should be solidly grounded on pertinent international legal principles. All the principled concerns that are apposite to the Convention and to the institution of prompt release should be applied in a harmonious manner. For instance, the environmental or conservation concerns of the Convention in relation to the exclusive economic zone are of evident importance, as is mentioned in paragraph 78 of the Judgment, as long as they are of a legal nature and not just policy aspirations or underlying values. As important as these concerns undoubtedly are, reasonableness must also be grounded on the economic, humanitarian and other concerns of the Convention, as stated in its Preamble, as inherent in the very title of the exclusive "economic" zone, and as gleaned from the provisions governing the concept and institution of prompt release. In this connection, it is worth recalling that the exclusive economic zone is a new jurisdiction carved out of high seas. The crucial concerns and interests of the coastal State must be delicately balanced with other concerns and interests inherited from the pre-1982 high seas regime and now explicitly re-vested by the Convention in flag States, as well

as coastal and other States. I reiterate my view that this Tribunal, not the national courts, is the chief guardian of all aspects of the Convention in prompt release cases. That role is of critical importance. In addition, the delicacy and complexity of these considerations highlight the fact that the prompt release competence under the Convention embraces much less than a handful of instances anticipated by article 292, read along with articles 73, 220 and 226.

7. As the Judgment essentially states, and the preceding discussion demonstrates, reasonableness must be further grounded on the fact that prompt release is an independent and autonomous international institution and set of concepts. However, this is somewhat blurred *inter alia* by the quantum of the security ordered in this case, which may innocently appear to send contradictory signals. In proceedings like this one, the Tribunal must be very aware of the mindset of the national bond-setting judge, who is assumed to be striving to comprehend the essence of such dynamic and evolving international concepts and institutions as the exclusive economic zone, prompt release and even residual but crucial elements of the high seas regime. The Tribunal may well empathize with the national judge's broadly nationalistic preoccupations. However, as in all our prompt release cases to date, the Tribunal must continue to avoid the appearance of undergirding national goals and preoccupations, especially since both parties before it are sovereigns.

8. The Tribunal must protect those who are or whose property is detained. To some degree, the Tribunal's complex function is that of the helpmate of the authorities of the detained vessel or crew and, at the same time, the presumptive *alter ego*, but also the guide, of the national bond-setting judge. It seems relevant to note that national adjudicating bodies welcome this guidance. This is evidenced by the adoption of the elements of paragraphs 66 and 67 of the "*Camouco*" Judgment by a Court of First Instance at Réunion in setting the security under debate in this case. Another instance is the utilization by a Regional Trial Court (*tribunal de grande instance*) on Réunion island, in the final judgment against the *Camouco*'s Master, of only 3 million of the 8 million FF security that we prescribed in "*Camouco*", i.e., an amount much less than the 20 million FF that was originally ordered by the territorial bond-setting judge.

9. Furthermore, the Tribunal's articulation of the very multi-faceted concept of reasonableness should, as relevant, be patently and fully grounded in such synonymous notions as proportionality, balance, fairness, moderateness, consistency, suitability, tolerableness and absence of excessiveness. I hope that, in cases like this, the apparently large size of the security such as that demanded by the Réunion Court of First Instance will not stimulate, even accidentally, the inflation of the norms for assessing the size of the security set by the detaining State and also the norms for establishing the size of the security that this Tribunal determines and our quantitative norms for reasonableness. This would violate the notions of proportionality and consistency. Such problems of proportionality and consistency could occur regardless of which of the variety of possible mathematical approaches are applied for the above-mentioned purposes, including when the Tribunal comes to considering the factor for assessing the reasonableness of "the bond imposed by the detaining State" that is mentioned among the factors in paragraph 67 of the "*Camouco*" Judgment.

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10. Paragraph 67 of "*Camouco*" also identifies as relevant to the assessment of reasonableness the factor of "the value of the detained vessel". The size of the security that is required by the Tribunal in this case might suggest that the Tribunal is apparently taking into consideration and adding to a quantitative base the value of the detained vessel. This value is particularly relevant in situations where the vessel is being abandoned or condemned, where it is being given as security and where it is confiscated. There might be other special situations. But even if the vessel's value is always routinely assessed, it is not appropriate automatically to add this value to that of the remainder of the security if imposable fines and penalties are already adequately covered by said remaining proposed security. On the other hand, it must be noted that the Tribunal has found that the vessel's value was the lowest of several figures determined by four experts – ranging from US$ 2 million to US$ 345,680. It is therefore patent that the lion's share of the security that the Tribunal determines is in respect of the alleged fishing, on which the Tribunal's explicit findings are equivocal.

11. The foregoing also suggests that the Tribunal cannot routinely adopt assertions that the vessel must or will certainly be confiscated as a penalty (another assessment factor mentioned in paragraph 67 of "*Camouco*") and that therefore the proposed security should be enhanced by a value equivalent to that of the vessel. Certainly that would be impolitic, uneconomic and ultimately counter-productive, as owners of detained vessels begin to abandon their vessels. From the perspective of the global economy and of the economic concerns (including the rights and interests of vessel owners, their business partners and their customers), confiscation is obviously very troublesome. And even in legal systems with exorbitant tendencies, the penalty of confiscation is apparently not normal in cases lacking the circumstance of aggravation or not otherwise requiring exemplary treatment according to generally accepted legal principles. Frankly, viewed globally from the law of the sea perspective, unlike the somewhat dramatic situation in the "*Camouco*", the offences here alleged and the facts on record involve conduct that is not aggravated, though it is quite unacceptable and unpardonable. Furthermore, in this case the detained person is a non-recidivist mariner accused of committing a first time violation in the detaining State's exclusive economic zone. Happily, the Judgment does not sanction confiscation. At the same time, I must state my concurrence that, on these facts, it is reasonable to assume that the national court will confiscate the vessel's gear that was seized.

(*Signed*) Edward A. Laing