SEPARATE OPINION OF VICE-PRESIDENT NELSON

I have voted with the majority but I would like to make the following brief observations.

The role of the Tribunal in relation to national courts

It must be acknowledged that the power given this Tribunal, under article 292, to order the prompt release of vessels and crews upon the posting of a reasonable bond constitutes to a certain extent "an interference" with the coastal State's judicial authorities. This power is limited. First it applies only when "it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond" i.e. to a limited set of provisions (articles 73, 220 and 226). Secondly and most importantly it is made quite clear that the Tribunal "shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum ...".

The sole task of the Tribunal is to determine a reasonable bond. It is hard to imagine that the Tribunal can make such an assessment without looking into and indeed examining to the extent possible "the facts and circumstances of the case" (paragraph 74 of the Judgment). In other words such a determination cannot be made without entering into, what may be termed, domestic matters. As this Tribunal had occasion to state: "Article 292 provides for an independent remedy and not an appeal against a decision of a national court".[1]

In the same vein it must be remarked that the Tribunal has in fact been invested with the competence to limit – to put a brake on – the discretionary power of the coastal State with respect to the fixing of bonds in certain specific circumstances. That is a necessary consequence which arises from the very nature of the mechanism contained in article 292. The notion of reasonableness is here used to curb the arbitrary exercise of the discretionary power granted to coastal States. As has been observed:

[1] *The "CAMOUCO" Case* (Panama *v*. France), Judgment, 7 February 2000, paragraph 58.

> La notion de raisonnable est souvent invoquée dans le souci de limiter les compétences discrétionnaires que les Etats possèdent dans certains domaines.[2]

"Reasonable" and "suffisante"

France, in its Statement in Response, pointed out that "the French text of article 73, paragraph 2, does not use the adjective 'reasonable' in reference to the bond, but rather the following expression: 'Lorsqu'une caution ou autre garantie suffisante a été fournie …', whereas the English text says: 'the posting of reasonable bond or other security'. This difference between the two language versions certainly does not indicate a difference in meaning between them but does, however, *provide an indication of the meaning that may be attached to the concept of reasonableness*".[3]

In the oral pleadings, France argued that "[o]ne does understand that the French version of the text of article 73, paragraph 2, of the Convention on the Law of the Sea uses the expression 'une caution ou autre garantie suffisante'. In other languages one talks about a caution or a guarantee which is reasonable – in French 'suffisante' and in other languages 'reasonable'. It boils down more or less to the same thing but there is a difference" (ITLOS/PV.00/6, p. 13). (In French "Aussi comprend-on que la version française du texte de l'article 73, paragraph 2 de la Convention sur le droit de la mer utilise l'expression de: 'une caution ou autre garantie suffisante, ce qui revient quand même au même, mais qui est significatif de la tendance".)

France, in my view, is correct in asserting that the difference between the two language versions i.e. between the English expression "the posting of reasonable bond" and the French expression "[l]orsq'une caution ou autre garantie suffisante a été fournie" does not indicate a difference in meaning. France maintains, however, that it provides an indication of the meaning that may be attached to the concept of reasonableness. In other words the use of the adjective "suffisante" is not without effect in that it brings its own colour to the meaning of the term "reasonable".

The Arabic, Chinese, English, French, Russian and Spanish texts are all authentic versions of the Convention on the Law of the Sea (article 302). Articles 292 and 73 are the two relevant provisions in this case. It appears that all the other language versions use the equivalent of the English term "reasonable" in article 292, paragraph 1, and the majority of the language versions (Arabic, English, Russian and Spanish) utilise the term "reasonable"

[2]Jean J.A. Salmon, *Le concept de raisonnable en droit international public, Mélanges offerts à Paul Reuter, Le droit international: unité et diversité*, pp. 447–478 on p .459.

[3]Statement in Response of the French Government, paragraph 11 (emphasis added).

or its equivalent in article 73, paragraph 2. As the International Law Commission has so rightly remarked "[t]he plurality of the authentic texts of a treaty is always a material factor in its interpretation, since both or all the texts authoritatively state the terms of the agreement between the parties", and it went on pertinently to add "*[b]ut it needs to be stressed that in law there is only one treaty – one set of terms accepted by the parties and one common intention with respect to those terms – even when two authentic texts appear to diverge*."[4]

Of course it is true that the Vienna Convention on the Law of Treaties does not treat the question of comparing the authentic texts as one of the principal means of interpreting a multilingual treaty.[5] Yet it is consonant with practice and principle that "States should in good faith rely on all the texts in order to determine the true meaning of a convention".[6]

This approach, in my opinion, applies especially with respect to the interpretation and application of the Convention on the Law of the Sea. In that regard, it may be noted that in the *Case concerning filleting within the Gulf of St. Lawrence between Canada and France* (1986) the arbitral tribunal resorted, *inter alia*, to a comparison of the six authentic texts in order to interpret article 62, paragraph 4(a), of the Convention on the Law of the Sea.[7]

I am, therefore, of the opinion that not much should be made of the apparent divergence between the term "reasonable" and the term "suffisante" as used in article 73, paragraph 2. They simply have the same meaning or at least must be presumed to have the same meaning. The use of the word "suffisante" adds nothing more.

(*Signed*) L. Dolliver M. Nelson

[4]Emphasis added. In its commentary on the draft article which became article 33 in the Vienna Convention on the Law of Treaties (1969). *Yearbook of the International Law Commission*, 1966, Vol. II, p. 225.

[5]See *Yearbook of the International Law Commission*, 1966, Vol. I, pt. 2, 874th meeting, paragraphs 7–25 and paragraph 35.

[6]*Ibid*., p. 209.

[7]*Reports of International Arbitral Awards*, Vol. XIX, p. 225.