SEPARATE OPINION OF JUDGE ANDERSON

I have supported the decision that the Tribunal lacks jurisdiction for some reasons which go beyond those set out in the Judgment. These additional reasons are as follows.

With regard to **paragraph 92 of the Judgment**, in normal circumstances I would have favoured asking for more information about the legal status of the *Grand Prince* at the material times. However, in this case there is an unusual feature. The Agent appointed by Belize is not well placed, as a non-Belizean lawyer in private practice in Spain, to explain to the Tribunal the seeming inconsistencies in the statements of different government departments and agencies in Belize, as recorded in the documents listed in paragraphs 67 and 71 of the Judgment. Largely with this in mind, I supported the decision recorded in paragraph 92 of the Judgment not to seek further information from the Applicant.

Turning to the examination of the evidence in **paragraphs 84 to 93 of the Judgment**, there are some further factors which give rise to doubts on my part about the status of the vessel for the purposes of article 292 of the Convention. First, the late change of attitude of IMMARBE, as recorded in its two documents of 26 and 30 March 2001, appears to have been made upon the basis of misunderstandings of the true nature of the present proceedings. Secondly, the vessel appears not to have been issued with a certificate of registration as provided for in section 6 of the Registration of Merchant Ships Act (in its amended form). Rather, the vessel held a "Provisional patent of navigation" and a "Ship station license". Such documents are referred to in section 20 of the Act, which allows for the possibility of dual registration and, in particular, for foreign (i.e. non-Belizean) vessels to be registered in IMMARBE under the terms of a charter contract. However, there was no information before the Tribunal to the effect that this vessel was registered under section 20 as a foreign vessel. This raises the questions of why, on the one hand, those two documents were issued in this case and why, on the other, no certificate of registration was produced. Thirdly, the beneficial ownership of the vessel remains obscure, notwithstanding the answers to the Tribunal's enquiry (recorded in paragraph 32 of the Judgment). The vessel's economic links appear to be with Spain rather

than Belize. The vessel appears to have been under the flag of Belize for only a very short period, during which the owners were engaged in registering the vessel in Brazil. Its previous nationality is given on the face of the provisional patent of navigation as "Canadian", although the previous owner was stated to have been the Reardon Commercial Corporation of Belize.

In short, I detect much uncertainty surrounding the affairs of this particular *Grand Prince*, as well as the making of the Application for release. These additional factors were part of my "overall assessment" of the question of the flag (paragraph 93 of the Judgment).

In **paragraph 94 of the Judgment**, the Tribunal refrains from dealing with other questions of jurisdiction and admissibility. Leaving aside for the moment the question of *locus standi*, in my view there exist further factors militating against the exercise of jurisdiction. The submissions of the parties (paragraphs 30 and 31 of the Judgment) and their contentions (summarised in paragraphs 54 to 61 of the Judgment) demonstrate that several wide differences exist between them over questions of jurisdiction, admissibility and the merits. These differences appear to me to relate not only to the administration of justice in Réunion in regard to the *Grand Prince* but also to the interpretation and application of several important provisions contained in article 73 of the Convention. In the latter connection, the differences between the parties could involve issues relating to the phrase "boarding, inspection, arrest and judicial proceedings" in paragraph 1 and the term "arrested vessels" in paragraph 2, as well as the whole issue of forfeiture as a permissible penalty under paragraph 3. All these issues, especially the latter, appear to be of significance not just for the present parties but for States Parties to the Convention generally. Resolving these issues would require a thorough examination of the relevant provisions of article 73 in their context,[1] as well as recourse to other means of interpretation in accordance with the Vienna Convention on the Law of Treaties. These other means may include the preparatory work, the terms of related

[1]Volume II of the *Virginia Commentary* refers to the meaning of the term "arrest" (p. 795). Several other articles also refer to "arrest". In particular, article 28, paragraph 2, draws a distinction between "arrest" and "levying execution". See also the Commentary of the ILC on its draft article 21 (II *YBILC* (1956), p. 275).

instruments such as the Conventions on the Arrest of Ships,[2] and a study of State practice in the matter of penalties for serious fisheries offences as contained in the current legislation of States Parties.[3] (In this latter connection, there is a particular aspect in that the current fisheries legislation of Belize itself provides for the forfeiture of fishing vessels upon conviction in judicial proceedings.[4])

It is far from clear that the issues referred to above, especially those concerning the administration of justice and those arising under paragraphs 1 and 3 of article 73 of the Convention, fall within the scope of the Tribunal's jurisdiction to decide upon the question of release of the vessel under article 292. The Tribunal's jurisdiction is qualified in at least three ways by article 292, paragraph 3. First, the Tribunal is called upon to "deal only with the question of release" (emphasis added), including the amount and terms of a "reasonable" bond. Secondly, the Tribunal has to do so "without delay", yet the requirement of urgency makes it difficult for the Tribunal to conduct a thorough examination of disputed issues of interpretation arising under other articles of the Convention. (Moreover, the short time available affords scant opportunity in practice for any other States Parties to exercise their right under article 32 of the Tribunal's Statute to intervene "[w]henever the interpretation or application of this Convention is in question".) Thirdly, the Tribunal has to address the question of release "without prejudice to the merits of any case before the appropriate domestic forum", yet the release of a vessel which has been declared forfeit by a court as a penalty could well be

[2]The International Convention Relating to the Arrest of Sea-Going Ships (1952) defines arrest as the detention of a ship by judicial process to secure a claim, excluding the seizure of a ship in execution of a judgment (article 1).

[3]The FAO's publication entitled "Coastal State Requirements for Foreign Fishing" (FAO Legislative Study 21, Rev. 4) states (section 5) that: "In addition to fines, the vast majority of countries empower their courts to order forfeiture of catch, fishing gear and boats. In a few cases, forfeiture of vessels is automatic, even on the first offence." The accompanying Table E, headed "Penalties for unauthorized foreign fishing", lists over 100 jurisdictions, most of them States Parties to the Convention, which provide for forfeiture of the vessel used in unauthorized fishing activities.

[4]Fisheries (Amendment) Act 1987, amending sections 10 and 13A of the principal legislation, as available from the FAO Legislative Database (www.fao.org/).

considered to be capable of prejudicing (and even of prejudicing totally) the enforcement of the court's order. There is the clear risk that the vessel, immediately upon its release, would flee the area under the jurisdiction of the court concerned and never return. The penalty of forfeiture is qualitatively different from a monetary penalty.

The special procedure for release under article 292 is one which exists alongside the normal procedures for the settlement of disputes concerning the interpretation of the Convention provided for in the remainder of Part XV thereof. The *M/V "Saiga" (No. 2) Case* shows how the general provisions for the settlement of disputes concerning the interpretation or application of the Convention are in principle applicable to disputes concerning vessels, including applications for the release of a vessel. The release of the Saiga was sought as a provisional measure under article 290. Thus, even if in a particular instance no remedy lies under article 292, an effective remedy may still be available under the remainder of Part XV, including article 290.[5]

In my opinion, these additional factors tell against a finding that the Tribunal has jurisdiction over the Application as presented by the Applicant. It is on this basis also that I have supported the decision.

(*Signed*) David Anderson

[5] *M/V "Saiga" (No. 2) Case*, Order prescribing provisional measures and Judgment, both of 1999. The "circumscribed, additional" nature of the procedure under article 292, which "does not entail the submission of a dispute", is described in B. H. Oxman, "Observations on Vessel Release under the United Nations Convention on the Law of the Sea", 11 *IJMCL* (1996), p. 201 (Abstract).