INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
YEAR 2001

20 APRIL 2001

List of cases:
No. 8

THE "GRAND PRINCE" CASE

(BELIZE *v.* FRANCE)

APPLICATION FOR PROMPT RELEASE

JUDGMENT

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JUDGMENT

Present: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, AKL, ANDERSON, VUKAS, WOLFRUM, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS; *Judge* ad hoc COT; *Registrar* CHITTY.

In the "Grand Prince" Case

between

Belize,

represented by

Mr. Alberto Penelas Alvarez, Attorney, Bar of Vigo, Spain,

as Agent;

and

Mrs. Beatriz Goicoechea Fábregas, Attorney, Bar of Vigo, Spain,

as Counsel,

and

France,

represented by

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

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

as Counsel,

THE TRIBUNAL,

composed as above,

after deliberation,

delivers the following Judgment:

Introduction

1. On 16 March 2001, the Registrar of the Tribunal was notified by a letter from the Attorney General of Belize and Minister responsible for the International Merchant Marine Registry of Belize (IMMARBE) dated 15 March 2001, transmitted by facsimile, that Mr. Alberto Penelas Alvarez was authorized to make an application to the Tribunal on behalf of Belize under article 292 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"), with respect to the fishing vessel *Grand Prince*.

2. On 21 March 2001, an Application under article 292 of the Convention was filed by facsimile in the Registry of the Tribunal on behalf of Belize against France concerning the release of the *Grand Prince*. A copy of the Application was sent on 22 March 2001 by a note verbale of the Registrar to the Minister for Foreign Affairs of France and also in care of the Ambassador of France to Germany.

3. In accordance with article 112, paragraph 3, of the Rules of the Tribunal as amended by the Tribunal on 15 March 2001 (hereinafter "the Rules"), the President of the Tribunal, by Order dated 21 March 2001, fixed 5 and 6 April 2001 as the dates for the hearing with respect to the Application. Notice of the Order was communicated forthwith to the parties.

4. By note verbale from the Registrar dated 22 March 2001, the Minister for Foreign Affairs of France was informed that the Statement in Response of France, in accordance with article 111, paragraph 4, of the Rules, could be filed in the Registry not later than 96 hours before the hearing.

5. Pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Secretary-General of the United Nations was notified by the Registrar on 22 March 2001 of the receipt of the Application.

6. The appointment of Mr. Alberto Penelas Alvarez as Agent, for the purpose of the Application for prompt release of the *Grand Prince*, was confirmed by a letter from the Attorney General of Belize dated 26 March 2001, transmitted by facsimile to the Registrar.

7. The Application was entered in the List of cases as Case No. 8 and named: The "Grand Prince" Case.

8. Pursuant to article 72 of the Rules, information regarding experts was submitted by the Agent of Belize to the Tribunal on 27 March 2001.

9. On 28 March 2001, the Government of France filed observations regarding the Application submitted on behalf of Belize for prompt release of the *Grand Prince*, by a letter from the Director of Legal Affairs, Ministry of Foreign Affairs, a copy of which was transmitted forthwith to the Agent of Belize. In its observations, the Government of France requested the Tribunal, by means of an order and without need of holding public hearings for that purpose, to declare that the Application was without object and that it must therefore be rejected.

10. In accordance with article 24, paragraph 3, of the Statute of the Tribunal, States Parties to the Convention were notified of the Application by a note verbale from the Registrar dated 29 March 2001.

11. On 29 March 2001, the Agent of Belize transmitted a reply to the observations of the Government of France with regard to the Application.

12. On 30 March 2001, in order to complete the documentation, the Registrar requested the parties to submit the following documents referred to in the Application:

- procès-verbal of violation no. 4/00 of 26 December 2000;
- procès-verbal no. 09/2001 P.C.G. *Jonquille* of the French Maritime Police.

On the same day, the Government of France submitted the requested documents, copies of which were transmitted to the Agent of Belize.

13. On 2 April 2001, the Agent of Belize transmitted a certificate dated 30 March 2001 issued by IMMARBE, a copy of which was transmitted to the Government of France.

14. In accordance with article 45 of the Rules, on 2 April 2001, the President met the representatives of Belize and France and ascertained their views with regard to questions of procedure.

15. On 3 April 2001, the Tribunal met to discuss questions of procedure in connection with the Application filed on behalf of Belize and the observations of the Government of France on questions of jurisdiction and admissibility. Following the meeting, the Registrar addressed to Belize and France, on the same day, identical letters which read as follows:

> I have the honour to inform you that the Tribunal met today to discuss questions of procedure in connection with the Application filed on behalf of Belize on 21 March 2001 and the observations offered by France on 28 March 2001 in relation thereto and authorized me to convey the following to the Applicant and the Government of France.
>
> The Tribunal considers that the issues arising out of the Application and the observations of France on questions of jurisdiction and admissibility require a full examination consistent with principles of administration of justice and the urgent nature of prompt release proceedings in accordance

with the United Nations Convention on the Law of the Sea and the Rules of the Tribunal.

The President of the Tribunal, in his Order dated 21 March 2001, has already fixed 5 and 6 April 2001 as the dates for the hearing, in accordance with article 112, paragraph 3, of the Rules of the Tribunal.

This procedure is without prejudice to any decision which the Tribunal will take with regard to its jurisdiction and the admissibility of the Application.

16. On 4 April 2001, the Registrar was notified of the appointment of Mr. François Alabrune, Deputy Director of Legal Affairs of the Ministry of Foreign Affairs of France, as Agent of France.

17. On 4 April 2001, France notified the Tribunal of its intention to choose Mr. Jean-Pierre Cot, Emeritus Professor, University of Paris I (Panthéon-Sorbonne), France, as judge *ad hoc* pursuant to article 17, paragraph 2, of the Statute of the Tribunal.

18. By a letter of the Registrar dated 4 April 2001, the Agent of Belize was immediately informed of the intention of France to choose Mr. Cot as judge *ad hoc* and was invited to furnish any observations by 4 April 2001, 3:00 p.m. On that date, the Agent of Belize furnished observations in respect of this matter.

19. On 4 April 2001, the Tribunal met to consider the observations made by the Agent of Belize on the intention of the Government of France to choose Mr. Cot as judge *ad hoc*. The Tribunal found no objection to the choice of Mr. Cot as judge *ad hoc*. The parties were informed accordingly by letters of the Registrar dated 4 April 2001. Mr. Cot was admitted to participate in the proceedings after having made the solemn declaration required under article 9 of the Rules in relation to the case at a public sitting of the Tribunal held on 5 April 2001.

20. In accordance with articles 45 and 73 of the Rules, on 5 April 2001, the President held a teleconference with the Agents of the parties and ascertained their views regarding the order and duration of the presentation by each party and the evidence to be produced during the oral proceedings.

21. After the closure of the written proceedings and prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 5 April 2001 in accordance with article 68 of the Rules.

22. Prior to the opening of the oral proceedings, the Agent of Belize and the Agent of France submitted documents required under paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal.

23. Pursuant to article 67, paragraph 2, of the Rules, copies of the pleadings and documents annexed thereto were made accessible to the public from the date of opening of the oral proceedings.

24. Oral statements were presented at three public sittings held on 5 and 6 April 2001 by the following:

On behalf of Belize: Mr. Alberto Penelas Alvarez, Agent;

On behalf of France: Mr. François Alabrune, Agent,
Mr. Jean-Pierre Quéneudec, Counsel.

25. At a public sitting held on 6 April 2001, the following experts were called by the Agent of Belize:

Mr. Faustino Carceller Villalta, naval engineer and marine surveyor
(examined by Mr. Penelas Alvarez and cross-examined by Mr. Quéneudec);
Mr. Antonio Alonso Pérez, merchant navy captain and marine surveyor
(examined by Mr. Penelas Alvarez and cross-examined by Mr. Quéneudec).

Both experts gave evidence in Spanish. The necessary arrangements were made for the statements of the experts to be interpreted into the official languages of the Tribunal.

26. On 5 April 2001, a list of questions which Members of the Tribunal wished to put to the parties was communicated to the Agents.

27. During the public sitting held on 6 April 2001, the Agent of Belize and the Agent of France addressed some of the questions referred to in paragraph 26. On the same day, the Agent of Belize and the Agent of France submitted written responses to the questions referred to in that paragraph.

28. On 6 April 2001, the Agent of France submitted copies of a note verbale dated 4 January 2001, sent by the Ministry of Foreign Affairs of Belize to the French Embassy in El Salvador, and of a letter dated 26 March 2001, sent by IMMARBE to the Honorary Consul of France in Belize City, copies of which were transmitted to the other party.

29. During the course of the hearing held in the afternoon of 6 April 2001, the President asked the Agent of Belize to indicate any objections to the submission of the said documents pursuant to article 71 of the Rules. No objection was raised by the Agent of Belize. However, the Agent of Belize offered comments on these documents.

30. In the Application of Belize and in the observations of the Government of France, the following submissions were presented by the parties:

On behalf of Belize,
in the Application:

1.- To declare that the Tribunal has jurisdiction under article 292 of the United Nations Convention on the Law of the Sea to hear the present application.

2.- To declare the present application admissible.

3.- To declare that France failed to comply with article 73, paragraph 2, of the Convention, as the guarantee fixed for release of Grand Prince is not reasonable as to its amount, nature or form.

4.- To declare that France failed to comply with article 73, paragraph 2, of the Convention by having evaded the requirement of prompt release under this article by not allowing the release of the vessel upon the posting of a reasonable, or any kind of, guarantee alleging that the vessel is confiscated and that the decision of confiscation has been provisionally executed.

5.- To decide that France shall promptly release the Grand Prince upon the posting of a bond or other security to be determined by the Tribunal.

6.- To determine that the bond or other security shall consist of an amount of two hundred and six thousand one hundred forty nine (206,149) Euros or its equivalent in French Francs.

7.- To determine that the monetary equivalent to (a) 18 tonnes of fish on board the Grand Prince held by the French authorities, and valued on 123,848 Euros (b) the fishing gear, valued on 24,393 Euros (c) the fishing materials valued on 5,610 Euros, totalling 153,851 Euros, shall be considered as security to be held or, as the case may be, returned by France to this party.

8- To determine that the bond shall be in the form of a bank guarantee.

9.- To determine that the wording of the bank guarantee shall, among other things, state the following:

A.- In case France returns to the shipowner the concepts referred to under point 7 (of the present submissions):

> "The bank guarantee it is issued in consideration of France releasing the Grand Prince, in relation to the incidents dealt with in the Order of 12 January 2001 of the Court of First Instance of Saint-Paul and that the issuer undertakes and guarantees to pay to France such sums, up to 206,149 Euros, as may be determined by a final and firm judgement or decision of the appropiate domestic forum in France or by agreement of the parties. Payment under the guarantee would be due promptly after receipt by the issuer of a written demand by the competent authority of France accompanied by a certified copy of the final and firm judgement or decision or agreement."

B.- In case France does not return to the shipowner the concepts referred to under point 7 (of the present submissions):

> "The bank guarantee it is issued in consideration of France releasing the Grand Prince, in relation to the incidents dealt with in the Order of 12 January 2001 of the Court of First Instance of Saint-Paul and that

the issuer undertakes and guarantees to pay to France such sums, up to 52,298 Euros, as may be determined by a final and firm judgement or decision of the appropiate domestic forum in France or by agreement of the parties. Payment under the guarantee would be due promptly after receipt by the issuer of a written demand by the competent authority of France accompanied by a certified copy of the final and firm judgement or decision or agreement."

10.- To determine that the bank guarantee shall be invoked only if the monetary equivalent of the security held by France is not sufficient to pay the sums as may be determined by a final and firm judgement or decision of the appropiate domestic forum in France.

On behalf of France,
in the observations:

[*Translation from French*]

The Government of the French Republic requests the International Tribunal for the Law of the Sea, by means of an Order and without need of holding public hearings for that purpose, to note that the Application for release lodged on 21 March 2001 on behalf of Belize is without object [*sans objet*], that it must therefore be rejected, and that there are thus no grounds to institute proceedings.

31. In accordance with article 75, paragraph 2, of the Rules, the following final submissions were presented by the parties at the end of the hearing:

On behalf of Belize:

1. To declare that the Tribunal has jurisdiction under article 292 of the United Nations Convention on the Law of the Sea to hear the present application.

2. To declare the present application admissible.

3. To declare that France failed to comply with article 73, paragraph 2, of the Convention, as the guarantee fixed for release of Grand Prince is not reasonable as to its amount, nature or form.

4. To declare that France failed to comply with article 73, paragraph 2, of the Convention by having evaded the requirement of prompt release under this article by not allowing the release of the vessel upon the posting of a reasonable, or any kind of, guarantee alleging that the vessel is confiscated and that the decision of confiscation has been provisionally executed.

5. To decide that France shall promptly release the Grand Prince upon the posting of a bond or other security to be determined by the Tribunal.

6. To determine that the bond or other security shall consist of an amount of two hundred and six thousand one hundred forty nine (206,149) Euros or its equivalent in French Francs.

7. To determine that the monetary equivalent to (a) 18 tonnes of fish on board the Grand Prince held by the French authorities, and valued on 123,848 Euros (b) the fishing gear, valued on 24,393 Euros (c) the fishing materials valued on 5,610 Euros, totalling 153,851 Euros, shall be considered as security to be held or, as the case may be, returned by France to this party.

8. To determine that the bond shall be in the form of a bank guarantee.

9. To determine that the wording of the bank guarantee shall, among other things, state the following:

A. In case France returns to the shipowner the items referred to under point 7 (of the present submissions):

"The bank guarantee it is issued in consideration of France releasing the Grand Prince, in relation to the incidents dealt with in the Order of 12 January 2001 of the Court of First Instance of Saint-Paul and that the issuer undertakes and guarantees to pay to France such sums, up to 206,149 Euros, as may be determined by a final and firm judgement or decision of the appropriate domestic forum in France or by agreement of the parties. Payment under the guarantee would be due promptly after receipt by the issuer of a written demand by the competent authority of France accompanied by a certified copy of the final and firm judgement or decision or agreement."

B. In case France does not return to the shipowner the items referred to under point 7 (of the present submissions):

"The bank guarantee it is issued in consideration of France releasing the Grand Prince, in relation to the incidents dealt with in the Order of 12 January 2001 of the Court of First Instance of Saint-Paul and that the issuer undertakes and guarantees to pay to France such sums, up to 52,298 Euros, as may be determined by a final and firm judgement or decision of the appropriate domestic forum in France or by agreement of the parties. Payment under the guarantee would be due promptly after receipt by the issuer of a written demand by the competent authority of France accompanied by a certified copy of the final and firm judgement or decision or agreement."

10. To determine that the bank guarantee shall be invoked only if the monetary equivalent of the security held by France is not sufficient to

pay the sums as may be determined by a final and firm judgement or decision of the appropriate domestic forum in France.

On behalf of France:

[*Translation from French*]

The Government of the French Republic requests the Tribunal, rejecting all submissions to the contrary made on behalf of the State of Belize,

1. First, to note that the Application for prompt release filed on 21 March 2001 on behalf of Belize is not admissible, that, in any case, the Tribunal has no jurisdiction to entertain the Application and that it must, therefore, be rejected.

2. Alternatively, to adjudge and declare that the conditions normally governing the adoption by the Tribunal of a decision concerning prompt release upon the posting of a reasonable bond have not been fulfilled under the circumstances of this case and that, therefore, the Application by the Applicant should be denied.

Factual background

32. The *Grand Prince* is a fishing vessel. At the time of its arrest on 26 December 2000, it was flying the flag of Belize. According to the provisional patent of navigation issued by the International Merchant Marine Registry of Belize on 16 October 2000, the owners of the vessel were the Paik Commercial Corporation of 35A Regent Street, Belize City. According to the bill of sale dated 27 March 2000, the vessel was purchased by the Paik Commercial Corporation from the Reardon Commercial Corporation of the same address in Belize City. According to the vessel's certificate of class dated 23 June 1999, the owners of the vessel were NOYCAN B.L. -MOANA- VIGO, Spain. In response to a question from the Members of the Tribunal as to the beneficial ownership of the vessel, the Agent of the Applicant stated that the owners of the vessel were Paik Commercial Corporation and the Agent of the Respondent stated that France was unaware of the actual owners of the vessel.

33. According to the Applicant, at the time of its detention, the vessel was going to be reflagged and registered in Brazil where the vessel had been allocated a fishing licence.

34. The Master of the *Grand Prince* was Mr. Ramón Francisco Pérez Novo, a national of Spain, and the vessel carried a crew of 37 including the Master, made up of nationals of Spain and Chile. According to the Application and to the Master's testimony to the authorities in Réunion, the vessel had sailed from Durban, South Africa, early in December 2000 in order to fish for Patagonian toothfish and, on an experimental basis, lobster in the international waters of the Southern Ocean. In this connection, the provisional patent of navigation was endorsed with the following:

VESSEL SHALL NOT ENGAGE IN ILLEGAL FISHING AND SHALL COMPLY WITH ALL FISHING REQUIREMENTS AND REGULATIONS APPLICABLE TO THE SPECIFIC FISHING AREA. FAILURE TO COMPLY WILL RESULT IN A PENALTY UP TO US$ 50,000.00 DEPENDING ON THE SERIOUSNESS OF THE

OFFENCE AND RELAPSING COULD LEAD TO THE EX-OFFICIO CANCELLATION OF STATUS.

35. On 26 December 2000, at 8:53 hours, the *Grand Prince* was boarded by the crew of the French surveillance frigate *Nivose* in the exclusive economic zone of the Kerguelen Islands in the French Southern and Antarctic Territories.

36. A procès-verbal of violation (*procès-verbal d'infraction*) No. 04/00 was drawn up on 26 December 2000 by the Captain of the *Nivose* against the Master of the *Grand Prince* for having:

(a) fished without authorization in the exclusive economic zone of the Kerguelen Islands under French jurisdiction;
(b) failed to announce his entry into the exclusive economic zone of the Kerguelen Islands and to declare some twenty tonnes of fish carried aboard.

37. On 26 December 2000, the Commander of the frigate *Nivose* drew up three procès-verbaux of apprehension (*procès-verbaux d'appréhension*) Nos. 05/00, 06/00 and 07/00, recording therein the *apprehension* of the *Grand Prince*, the fishing gear, the electronic and electric fishing gear, the navigation and communication equipment, the ship's papers, and the fish catch.

38. The *Grand Prince* was rerouted and escorted under the supervision of the French frigate to Port-des-Galets, Réunion, where it arrived on 9 January 2001.

39. On 11 January 2001, the Regional and Departmental Director of Maritime Affairs of Réunion drew up four procès-verbaux of seizure (*procès-verbaux de saisie*) Nos. 10/AM/2001, 11/AM/2001, 12/AM/2001, and 13/AM/2001. In support of the charges levelled, the procès-verbaux of seizure relied upon the following:

[*Translation from French*]

1. The vessel *Grand Prince* was observed fishing within the French economic zone at 47° 49' South by 73° 45' East (95 miles north/north-east of Kerguelen Islands) on 26 December 2000 at 8:58 hours.

2. It was noted that entry into the Kerguelen exclusive economic zone had not been declared.

3. It was observed that there was a longline in the water, cut by the ship's rail [*sectionnée par le bord*] during a helicopter overflight and, 500 metres from the vessel, fishing gear identical to that of the *Grand Prince*.

4. Presence in the factory of 200 baskets of prepared bait attached to hooks on a line.

5. Sixteen fresh toothfish were found near the longline hoisting gear, ten toothfish were being washed in a basin, three fresh toothfish were in another basin.

6. It was found that the factory had very recently been used and had not been cleaned.

7. Fifty-four crates of fish were found, at temperatures ranging from -1 degree to -12 degrees in the freezing tunnels.

8. Approximately 18 tonnes of toothfish were found on board.

40. These procès-verbaux of seizure provided for the seizure of approximately 18 tonnes of toothfish on board the vessel valued at 810,000 FF, the fishing gear valued at 5,610 Euro (36,801.6 FF), 40 tonnes of bait valued at 160,000 FF, and the vessel, its equipment and documents valued at 13,000,000 FF.

41. The procès-verbaux of seizure and the procès-verbaux of apprehension were all signed by the Master of the *Grand Prince*.

42. On 11 January 2001, the Deputy Public Prosecutor of the *tribunal de grande instance* at Saint-Denis summoned the Master of the vessel and informed him of the charges levelled against him by virtue of procès-verbal No. 09/2001 P.C.G. *Jonquille* of the Maritime Police. The Master of the vessel admitted the violations with which he was charged, subject to the qualification that his action of illegal fishing began from 26 December 2000 and not from 24 December 2000 as alleged in the charges. The Master added that, since the logbook was used up by 23 December 2000, they did not have the time to make entries from that date in the new logbook which was locked up in a cupboard. The Master was further informed that he should answer the charges levelled against him at a hearing of a criminal court (*tribunal correctionnel)* of the *tribunal de grande instance* at Saint-Denis to take place on 23 January 2001.

43. On 12 January 2001, the court of first instance (*tribunal d'instance*) at Saint-Paul made an order in which it noted, among other things, that the vessel *Grand Prince* entered the exclusive economic zone of the Kerguelen Islands without prior authorization, and without advising the head of the district of the nearest archipelago of its presence, or declaring the tonnage of fish carried on board (in violation of the provisions of article 2 of Law 66-400 of 18 June 1966, as amended by the Law of 18 November 1997) and that the fact that the vessel was found in the exclusive economic zone of the Kerguelen Islands with approximately 18 tonnes of toothfish on board without having given notice of its presence or declaring the quantity of fish carried raised the "presumption" that the whole of the catch was unlawfully fished in the exclusive economic zone of the Kerguelen Islands.

44. On the amount of the bond to be fixed, the court of first instance at Saint-Paul took the following into account:

(a) the value of the ship appraised by Mr. Chancerel, marine surveyor, at 13,000,000 FF;
(b) the fines incurred by the Master of the vessel (on the basis of 18 tonnes of fish caught and the provisions of Law 66-400 of 18 June 1966, as amended) calculated at 9,000,000 FF;
(c) compensation of less than 400,000 FF which victims are generally granted.

45. Considering the above, the court set the bond as follows:

(a) to guarantee the representation of the captain of the vessel apprehended: 1,000,000 FF;
(b) to guarantee the payment of damages caused by the offence registered: 400,000 FF;

(c) to guarantee the payment of the fines incurred and the confiscation of the vessel: 10,000,000 FF.

The total bond was thus fixed at 11,400,000 FF.

46. The court confirmed the arrest of the *Grand Prince* and declared that its release would be subject to the payment of a bond in the amount of 11,400,000 FF in cash, certified cheque or banker's draft, to be paid into the Deposits and Consignments Office (*Caisse des Dépôts et Consignations*).

47. In support of its order, the court relied on the following:

(a) Article 3 of the Law No. 83-582 of 5 July 1983, as amended, concerning the regime of seizure and supplementing the list of agents authorized to establish offences in the matters of sea fishing;
(b) Articles 2 and 4 of Law No. 66-400 of 18 June 1966, as amended by the Law of 18 November 1997, on sea fishing and the exploitation of marine products in the French Southern and Antarctic Territories;
(c) Article 142 of the Code of Criminal Procedure.

48. On 23 January 2001, the criminal court gave its judgment in which it found:

(a) It was uncontroverted that the *Grand Prince* entered the exclusive economic zone of the Kerguelen Islands without giving notice of its entry and without declaring the tonnage of fish on board;
(b) The *Grand Prince* was engaged in illegal fishing, since at the time of its arrest there were some fifteen longlines in the water and six buoys in the sea 450 metres from the vessel;
(c) It was uncontroverted that the accused knowingly engaged in illegal fishing;
(d) The unannounced entry of the vessel into the exclusive economic zone and the act of illegal fishing were sufficient to show that the fish found on board the vessel originated from illegal fishing;
(e) The fact that the logbook had not been filled in since 23 December 2000, and that fresh toothfish could still be found on board, constituted concordant presumptions.

49. As to the penalty for this type of offence, the criminal court observed that, since its detection required deployment of substantial and costly resources, it was important to avoid repetition of such offences and to prevent offenders from profiting from their illegal acts.

50. In the light of the above, the criminal court ordered the confiscation of the vessel, its equipment and gear as well as the fishing products seized; it further declared its order regarding the confiscation of the vessel and its equipment to be *avec exécution provisoire* (i.e., immediately enforceable notwithstanding the lodging of an appeal), pursuant to article 131-6 (10) of the Penal Code and article 471, final paragraph, of the Code of Penal Procedure. The Master of the vessel was also sentenced to a fine of 200,000 FF. The court also observed that it had limited the amount of the fine, taking into account the sincerity and cooperation of the accused and the shipowners. It further awarded damages to certain civil claimants.

51. On 31 January 2001, the shipowners filed an appeal against the judgment of the criminal court. The Applicant informed the Tribunal that this appeal was listed for hearing by the court of appeal (*cour d'appel*) on 13 September 2001.

52. On 19 February 2001, the shipowners submitted an application to the court of first instance at Saint-Paul for the release of the vessel upon presentation of a bank guarantee guaranteeing the payment of the sum specified by that court (i.e., 11,400,000 FF) in its order of 12 January 2001.

53. By its order of 22 February 2001, the court of first instance at Saint-Paul rejected this application for the following reasons:

[*Translation from French*]

> Considering that the criminal court has ordered the confiscation of the vessel in the case, with immediate execution notwithstanding any appeal [*exécution provisoire*]; that consequently the forum judge no longer has jurisdiction to order the return of the vessel to its owner or captain in consideration of a simple bank guarantee.

Arguments of parties

54. The Applicant contends that the *Grand Prince* entered the exclusive economic zone of the Kerguelen Islands on 26 December 2000 and not before; that the Master entered the said zone contrary to the instructions given to him by the owners of the vessel; that the vessel did not catch any fish inside the Kerguelen exclusive economic zone; that the bond fixed by the court of first instance at Saint-Paul was not a "reasonable bond or other security" within the meaning of article 73, paragraph 2, of the Convention in terms of its amount, form or nature; that the rejection on 22 February 2001 by the court of first instance at Saint-Paul of the application for the release of the vessel upon presentation of a bank guarantee of 11,400,000 FF was in violation of the provisions of article 73, paragraph 2, of the Convention; that the judgment of the criminal court to confiscate the vessel only a few days after the court of first instance fixed a bond for release of the vessel, amounted to a "trick" (or which, according to the Applicant, amounted to "fraud of law" as it is understood in laws of most States); and, that if this type of confiscation was permitted, article 73 of the Convention would become a "dead letter"; and that the release of the vessel by virtue of article 73, paragraph 2, of the Convention, read with article 292 of the Convention, was still an available remedy, notwithstanding the judgment of the criminal court ordering the confiscation of the vessel.

55. In support of the argument that the amount of bond fixed by the court of first instance at Saint-Paul is not reasonable, the Applicant argued that the international market price for a ship of the age and characteristics of the *Grand Prince* would be in the region of 360,000 Euro (2,361,600 FF). Further, the value of the fish, the fishing gear and the fishing materials, as determined by the French authorities, should have been considered as constituting security.

56. For these reasons, the Applicant requests the Tribunal to determine that France failed to comply with article 73, paragraph 2, of the Convention; that France should promptly release the vessel upon the posting of a bond or other security to be determined by the

Tribunal; that the bond or other financial security should consist of an amount of 206,149 Euro (1,352,337.40 FF); and that the monetary equivalent of fish, the fishing gear and the fishing materials seized by the French authorities, should be considered as security to be held or, as the case may be, returned by France to the Applicant.

57. France contends that the Application manifestly did not fall within the ambit of article 292 of the Convention and was on that account inadmissible. It further contends that the Tribunal had no jurisdiction to entertain the Application. In support of its stand, France maintained that since, in the present case, the competent domestic forum mentioned in article 292, paragraph 3, of the Convention had already delivered a judgment on merits ordering confiscation of the vessel, the introduction of a prompt release proceeding under article 292 of the Convention before the Tribunal at this stage was no longer possible, and that, if the Tribunal were to entertain the Application filed on behalf of Belize, it would have the effect of interfering with the judgment of a municipal court given on the merits of the case, contrary to the provisions of article 292, paragraph 3, of the Convention.

58. France further states that the accusation of the Applicant that the order of confiscation made by the criminal court of France only a few days after the setting of a bond by the court of first instance at Saint-Paul was a "trick" was totally unsupported. It points out that in this case the Tribunal was not competent, under article 292 of the Convention, to go into the allegations made by the Applicant of a denial of procedural fairness and due process in relation to judicial proceedings in France. It further points out that in the case before the criminal court the introduction of an investigative proceeding was not necessary and that the judgment ordering confiscation was made in full compliance with the provisions of French law.

59. According to France, the power to confiscate under French law flowed from article 73 of the Convention which empowered the coastal State to define fishing offences and to establish penalties applicable to those who commit such offences and the only limit placed upon this power was the one stated in article 73, paragraph 3, which excluded penalties of imprisonment and corporal punishment. Confiscation as a penalty was expressly provided for not only in French legislation but also in many other national laws.

60. France further contends that the Application did not deal with the question of prompt release; rather, it had to do with the exercise by France of its sovereign rights and the alleged non-conformity of French law with the Convention in so far as it provided for the confiscation of fishing vessels. With respect to a wide dispute of that nature, the French Government states that, when ratifying the Convention, France declared, in accordance with article 298, paragraph 1(b), of the Convention, that it did not accept any compulsory procedure provided for in section 2 of Part XV of the Convention with respect to disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction under article 297, paragraph 2 or paragraph 3, of the Convention.

61. France maintains that the Application was without object, since the vessel for which the Applicant was requesting prompt release had already been confiscated pursuant to a judgment of a competent French court.

JURISDICTION

62. The Tribunal must, at the outset, examine the question whether it has jurisdiction to entertain the Application. The requirements to be satisfied in order to found the jurisdiction of the Tribunal are set out in article 292 of the Convention, which reads as follows:

Article 292
Prompt release of vessels and crews

1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and 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 or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

2. The application for release may be made only by or on behalf of the flag State of the vessel.

3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.

4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

63. Belize and France are both States Parties to the Convention. Belize ratified the Convention on 13 August 1983 and the Convention entered into force for Belize on 16 November 1994. France ratified the Convention on 11 April 1996 and the Convention entered into force for France on 11 May 1996.

64. The Applicant alleges that the Respondent has not complied with the provisions of article 73, paragraph 2, of the Convention for the prompt release of a vessel. It further alleges that the bond set by the Respondent was not reasonable, that the parties did not reach agreement within 10 days of the time of detention to submit the matter to another court or tribunal in accordance with article 292, paragraph 1, of the Convention, and that, accordingly, the Tribunal has jurisdiction to hear the Application under article 292 of the Convention.

65. The Respondent submits that the *Grand Prince* was subject to a measure of confiscation, imposed by the competent French court as a penalty, and the Application, for that reason, was without object and inadmissible, that, in any case, the Tribunal had no jurisdiction to entertain the Application and that it must, therefore, be rejected.

66. It is necessary here to examine the question of which entity has the *locus standi* to seek the release of a vessel from detention. In the scheme of article 292 of the Convention, it is the flag State of the vessel that is given the *locus standi* to take up the question of release in an appropriate court or tribunal. Any other entity may make an application only on behalf of the flag State of the vessel. As provided in article 292, paragraph 2, the application for release may be made "only by or on behalf of the flag State of the vessel."

67. The initial burden of establishing that Belize was the flag State when the Application was made is on the Applicant. In seeking to discharge this burden, the Applicant submitted the following documents:

(a) Letter dated 15 March 2001 from the Attorney General of Belize;
(b) Provisional patent of navigation issued by IMMARBE;
(c) Certification dated 30 March 2001 issued by IMMARBE and headed "TO WHOM IT MAY CONCERN".

68. The Attorney General's letter, authorizing Mr. Alberto Penelas Alvarez to make an application on behalf of Belize under article 292 of the Convention, stated that the vessel was "of Belize flag, which holds registration number 07972047 and call letters V3UJ7."

69. The date of issuance of the provisional patent of navigation was given as 16 October 2000 and the date of its expiration was given as 29 December 2000.

70. The IMMARBE certification of 30 March 2001 stated:

> TO WHOM IT MAY CONCERN
>
> The undersigned, Director and Senior Deputy Registrar of the International Merchant Marine Registry of Belize, duly empowered by the Merchant Ships Act, 1989/1996, hereby certifies that the vessel GRAND PRINCE is registered under the flag of Belize, holding registration Number 07972047 and call letters V3UJ7.
>
> It is also certified that there are documents relating to the status of the vessel that are pending to be processed, -including the cancellation of status which execution was suspended-, based on particular circumstances involving the situation of the vessel and relating to the detention instructed by the French authorities.
>
> It is further certified that, despite the expiration of the Patent of navigation and Ship station license, the vessel is still considered as registered in Belize until final decision of this Administration pending to the result of the court proceeding in which the vessel is engaged at the present time.

71. The Respondent drew the attention of the Tribunal to the following documents:

(a) Note verbale dated 4 January 2001 sent by the Ministry of Foreign Affairs, Belize, to the Embassy of France in El Salvador;
(b) Letter dated 26 March 2001 sent by IMMARBE to the Honorary Consul of France in Belize City.

72. In the note verbale of 4 January 2001, the Ministry of Foreign Affairs of Belize stated:

> The Ministry of Foreign Affairs of Belize presents its compliments to the Embassy of France in El Salvador and has the honour to refer to the Note of 3 January 2001 with reference to the detention of Belize-flagged vessel "Grand Prince".
>
> The Ministry of Foreign Affairs wishes to inform that Belize's shipping registry has confirmed that the vessel was registered with the Belize registry. However, as this is the second reported violation committed by the vessel, the punitive measures being imposed by the Belizean authority is its de-registration effective today 4 January 2001.
>
> The Ministry of Foreign Affairs of Belize avails itself of this opportunity to renew to the Embassy of France the assurances of its highest consideration.

73. The Tribunal also notes that the procès-verbaux of seizure Nos. 10/AM2001, 11/AM/2001, 12/AM/2001 and 13/AM/2001, drawn up by the Regional and Departmental Director of Maritime Affairs of Réunion on 11 January 2001, after recording that the *Grand Prince* flew the Belize flag at the time of the event, stated that Belize "deleted the *Grand Prince* from its registries following this violation" (translation from French). The Tribunal notes that this statement was made after the note verbale of 4 January 2001 from the Ministry of Foreign Affairs of Belize.

74. In the letter dated 26 March 2001, IMMARBE stated:

> This is in reply to your request for an update on the latest developments relating to the vessel GRAND PRINCE, which was detained by the French Authorities due to alleged infringement of the fishing regulation in the exclusive economic zone of Kerguelen.
>
> We would like to inform you that while we were in the process of canceling ex-officio the vessel's status, the owners requested an opportunity to defend themselves of the accusations by submitting an appeal to the Tribunal for the Law of the Sea.
>
> Under this context and being Belize a member of the Convention on the Law of the Sea we considered fair to allow the affected party to file its petition for which purposes we requested our competent authorities to grant the authorization for them to represent themselves at the mentioned Tribunal.
>
> Depending on the result of this court proceeding we will decide whether or not to enforce our decision to delete the vessel from our records.

75. During the public sitting held on 6 April 2001, the Respondent introduced the note verbale of 4 January 2001 from the Ministry of Foreign Affairs of Belize. The Applicant did not object to the introduction of this document but stated that this document was introduced

by France for the purpose of creating confusion regarding the current registration status of the vessel. In this connection, the Applicant drew the attention of the Tribunal to the IMMARBE certification of 30 March 2001.

76. The question arises as to whether the registration of the vessel in Belize continued following the expiry of the provisional patent of navigation or, as the case may be, was revived following the de-registration of the vessel with effect from 4 January 2001. The Tribunal considers that the documents placed before it by the parties disclose on their face contradictions and inconsistencies in matters relating to expiration of the provisional patent of navigation, de-registration of the vessel and suspension of de-registration, all of which give rise to reasonable doubt as to the status of the vessel when the Application was made. This doubt has a bearing on the question of jurisdiction of the Tribunal.

77. According to the settled jurisprudence in international adjudication, a tribunal must at all times be satisfied that it has jurisdiction to entertain the case submitted to it. For this purpose, it has the power to examine *proprio motu* the basis of its jurisdiction.

78. This Tribunal observed in the *M/V "SAIGA" (No. 2) Case* that, even where there is no disagreement between the parties regarding the jurisdiction of the Tribunal, "the Tribunal must satisfy itself that it has jurisdiction to deal with the case as submitted" (Judgment of 1 July 1999, paragraph 40). Likewise, the International Court of Justice has observed:

> The Court must however always be satisfied that it has jurisdiction, and must if necessary go into the matter *proprio motu*.
> (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972,* p. 46 at p. 52).

79. As a consequence, the Tribunal possesses the right to deal with all aspects of the question of jurisdiction, whether or not they have been expressly raised by the parties.

80. The Tribunal must, therefore, satisfy itself that the Application was "made on behalf of the flag State of the vessel", as required by article 292, paragraph 2, of the Convention.

81. As observed by the Tribunal in the *M/V "SAIGA" (No. 2) Case*, the Tribunal considers that "the nationality of a ship is a question of fact to be determined, like other facts in dispute before it, on the basis of evidence adduced by the parties" (Judgment of 1 July 1999, paragraph 66).

82. In this connection, the Tribunal notes that article 91 of the Convention provides:

Article 91
Nationality of ships

> 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

83. In Belize, under the Registration of Merchant Ships Act, 1989, the right of a fishing vessel to fly the Belizean flag flows from the act of registration. Accordingly, unless a fishing vessel like the Grand Prince is registered in Belize, Belize would not be the flag State of that vessel. It is necessary that there is sufficient evidence to establish that a vessel is registered and, therefore, has the right to fly the flag of Belize at the relevant time.

84. Of the documents before the Tribunal in the present case, the only document issued to the Grand Prince by Belize under the Registration of Merchant Ships Act, 1989, was the provisional patent of navigation. This document expressly stated that its date of expiration was 29 December 2000. The Applicant has not claimed that the shipowners sought extension of the period of the provisional patent of navigation, or that the provisional patent of navigation was extended or replaced by another statutory certificate. What were placed before the Tribunal were a letter and a certification from IMMARBE dated 26 March 2001 and 30 March 2001, respectively (IMMARBE communications), documents which on their face were intended to serve the purpose of authorizing the shipowners to make an "appeal" to the Tribunal. This is shown in particular by the statements contained in the IMMARBE communication of 26 March 2001 that the shipowners wanted an opportunity "to defend themselves of the accusations by submitting an appeal to the Tribunal for the Law of the Sea" and that IMMARBE "considered fair to allow the affected party to file its petition for which purposes we [IMMARBE] requested our competent authorities to grant the authorization for them to represent themselves at the mentioned Tribunal."

85. The Tribunal notes that the assertion made in the IMMARBE communication dated 30 March 2001 that "despite the expiration of the Patent of navigation and Ship station license, the vessel is *still* considered as registered in Belize" (emphasis supplied) remained unsubstantiated and has to be understood in the light of what is stated in paragraph 84. In the view of the Tribunal, the assertion that the vessel is "still considered as registered in Belize" contains an element of fiction and does not provide sufficient basis for holding that Belize was the flag State of the vessel for the purposes of making an application under article 292 of the Convention. The IMMARBE communications cannot be treated as "documents" within the meaning of article 91, paragraph 2, of the Convention.

86. The Tribunal considers that the IMMARBE communications are in the nature of administrative letters, unsupported by references to any entries in the merchant marine register of Belize or any other action required by law. It is also noted that these communications were issued after the Application was made in this case.

87. The IMMARBE communications must be read together with the provisional patent of navigation and the note verbale of the Ministry of Foreign Affairs of Belize of 4 January 2001. On its face, the provisional patent of navigation became spent on 29 December 2000. The note verbale was an official communication from Belize to France, setting out the legal position of the Government of Belize with respect to the registration of the vessel. Having first noted that the vessel was registered in Belize, this note verbale declared that "as this is the second reported violation committed by the vessel, the punitive measures being imposed by the Belizean authority is its de-registration effective today 4 January 2001." If a document states that a measure referred to therein takes effect from the date on which the document is issued, the coming into effect of the measure cannot be said to

be conditional upon the occurrence of any future event. When the note verbale spoke in terms of "de-registration effective today", the act of de-registration must be taken to have commenced with effect from 4 January 2001.

88. The Attorney General's letter of 15 March 2001 does not offer any more clarity on the question of registration and nationality than the IMMARBE communications.

89. In the *M/V "SAIGA" (No. 2) Case*, the Tribunal considered that the conduct of a flag State, "at all times material to the dispute", was an important consideration in determining the nationality or registration of a ship (see Judgment of 1 July 1999, paragraph 68). The Tribunal finds that the Applicant did not act "at all times material to the dispute" on the basis that the Grand Prince was a vessel of its nationality. To the contrary, on 4 January 2001, Belize communicated to France, by means of a note verbale from the Ministry of Foreign Affairs, its decision to de-register the Grand Prince with effect from 4 January 2001.

90. In this connection, the Tribunal wishes to note that the Registration of Merchant Ships Act, 1989, was amended in 1996 with a view to strengthening the powers of the Registrar to de-register vessels. Section 25 of the Act, in its amended form, provides:

> Where a vessel registered in IMMARBE infringes, violates or engages in an activity in breach of this Act, or any regulations, resolutions or circular notes or letters made or issued thereunder, or any international convention to which Belize is a party, or any United Nations sanctions, the Registrar may revoke the registration of such vessel from IMMARBE or impose a fine not exceeding fifty thousand dollars.

91. The provisional patent of navigation issued in favour of the *Grand Prince* also carried an endorsement in line with section 25. In this connection, the Tribunal notes the efforts of Belize towards fulfilling its international responsibilities with respect to combating illegal fishing.

92. The Tribunal considered the question whether there was any need to seek further clarification in the matter of registration of the *Grand Prince* in Belize. The documents before the Tribunal bearing on registration of the vessel and, as a consequence, on its nationality – the provisional patent of navigation, the note verbale of the Ministry of Foreign Affairs, the IMMARBE communications and other documents – are not in dispute. The issue concerns the legal effects to be attached to these documents for the purposes of the present proceedings. In view of this, the Tribunal decided that it should deal with the question in the light of the material placed before it.

93. In the light of the expiration of the provisional patent of navigation or, as the case may be, in the light of the de-registration of the *Grand Prince*, referred to in the note verbale of 4 January 2001, and on the basis of an overall assessment of the material placed before it, the Tribunal concludes that the documentary evidence submitted by the Applicant fails to establish that Belize was the flag State of the vessel when the Application was made. Accordingly, the Tribunal finds that it has no jurisdiction to hear the Application.

94. In these circumstances, the Tribunal is not called upon to deal with the submissions of the parties on the remaining questions of jurisdiction, admissibility, and merits of the Application.

Operative provisions

95. For these reasons,

THE TRIBUNAL,

By 12 votes to 9,

Finds that the Tribunal has no jurisdiction under article 292 of the Convention to entertain the Application;

IN FAVOUR: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; Judges KOLODKIN, PARK, BAMELA ENGO, MENSAH, ANDERSON, WOLFRUM, LAING, TREVES, NDIAYE; *Judge* ad hoc COT;

AGAINST: *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, AKL, VUKAS, MARSIT, EIRIKSSON, JESUS.

Done in English and in French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this twentieth day of April, two thousand and one, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Belize and the Government of France, respectively.

(Signed) P. CHANDRASEKHARA RAO,
President.

(Signed) Gritakumar E. CHITTY,
Registrar.

Vice-President NELSON, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(Initialled) L.D.M.N.

Judge WOLFRUM, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(Initialled) R.W.

Judge ad hoc COT, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(Initialled) J.-P.C.

Judge ANDERSON, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) D.H.A.

Judge LAING, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) E.A.L.

Judge TREVES, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) T.T.

Judges CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, AKL, VUKAS, MARSIT, EIRIKSSON and JESUS, availing themselves of the right conferred on them by article 30, paragraph 3, of the Statute of the Tribunal, append their dissenting opinion to the Judgment of the Tribunal.

(Initialled) H.C.
(Initialled) V.M.R.
(Initialled) A.Y.
(Initialled) S.Y.
(Initialled) J.A.
(Initialled) B.V.
(Initialled) M.M.
(Initialled) G.E.
(Initialled) J.-L.J.

DECLARATION OF VICE-PRESIDENT NELSON

I am in agreement with the Tribunal's Judgment. I take this opportunity of making some brief observations on the note verbale of 4 January 2001.

Note verbale of 4 January 2001

The Tribunal, in coming to the conclusion that it has no jurisdiction to hear the Application, has arrived at this finding, based, for the most part, on an examination of the relevant documents relating to the registration or nationality of the *Grand Prince*. It seems to me that another factor comes into play. That is the status of the author of the note verbale. It must be presumed that a note verbale from the Ministry of Foreign Affairs must be treated as one coming from the Minister of Foreign Affairs. With respect to the competence of a Foreign Minister, the following observations have been made: "… it must be recognized that the constant and general practice of States has been to invest the Minister for Foreign Affairs – the direct agent of the chief of the State – with authority to make statements on current affairs to foreign diplomatic representatives, and in particular to inform them as to the attitude which the government, in whose name he speaks, will adopt in a given question" (*Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 91; diss. op. Anzilotti). This observation, although made more than 60 years ago, still holds good (see Sir Arthur Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des cours – Collected Courses of The Hague Academy of International Law*, 1994, III, p. 100). Such statements, written or oral, are binding upon States or at least must be of high persuasive value. That is why I am of the view that with respect to the communications coming from Belize relating to the registration of the *Grand Prince* this note verbale should enjoy a special status.

The contents of this note must also be taken into account. As the Tribunal has already recalled, the note verbale declares that "The Ministry of Foreign Affairs wishes to inform that Belize's shipping registry has confirmed that the vessel was registered with the Belize registry. However, as this is the second reported violation committed by the vessel, *the punitive measures being imposed by the Belizean authority is its de-registration effective today 4 January 2001*." ("Le Ministère des affaires étrangères a l'honneur de vous informer que les responsables du registre maritime bélizien ont confirmé que ledit navire se trouvait inscrit au registre du Belize. Toutefois, comme il s'agit de la deuxième violation signalée, *la sanction qui est imposée par les autorités béliziennes à titre de sanction est la radiation du navire du registre du Belize à compter de ce jour, 4 janvier 2001*.") (Paragraph 72 of the Judgment, emphasis added.) In my opinion the text is clear. The decision was taken to revoke the registration of the *Grand Prince* "effective today 4 January 2001". It may be remarked that the result of an examination of the contents of this note verbale also serves to enhance its authority.

(*Signed*) L. Dolliver M. Nelson

DECLARATION OF JUDGE WOLFRUM

The following is meant to emphasize certain points in the Judgment.

1. I concur with the finding of the Judgment that the Tribunal has no jurisdiction under article 292 of the Convention to adjudicate upon the Application brought by Belize against the French Republic. The Applicant has not established that the *Grand Prince* was registered in the International Merchant Marine Registry of Belize (IMMARBE) when the Application was submitted to the Tribunal, although I have no doubt that the vessel was registered in IMMARBE when it was arrested.

2. I further agree with the Judgment (paragraph 66) that an application under article 292 of the Convention may only be filed on behalf of a State if that State is the flag State of the respective vessel when the application is filed. This interpretation of article 292, paragraph 2, of the Convention is required by its object and purpose. This provision deals with the *locus standi in judicio* of a State, i.e. its right to act as an applicant. It is established that, in general, an applicant in international judicial proceedings must seek to defend its own interests which, under article 292 of the Convention, can only be those of a flag State.

3. I would like to emphasize that the statement made by the Director and Senior Deputy Registrar that "… despite the expiration of the Patent of navigation and Ship station license, the vessel *is still considered* as registered in Belize until final decision of this Administration pending to the result of the court proceeding in which the vessel is engaged at the present time …" (italics supplied) cannot be regarded as registration within the meaning of article 91 of the Convention or as equivalent thereto. It does not conform to the objective and purpose of registration. The registration of ships has to be seen in close connection with the jurisdictional powers which flag States have over ships flying their flag and their obligation concerning the implementation of rules of international law in respect of those ships. It is one of the established principles of the international law of the sea that, except under particular circumstances, on the high seas ships are under the jurisdiction and control only of their flag States, i.e. the States whose flag they are entitled to fly. The subjection of the high seas to the rule of international law is organized and implemented by means of a permanent legal relationship between ships flying a particular flag and the State whose flag they fly. This link not only enables but, in fact, obliges States to implement and enforce international as well as their national law governing the utilization of the high seas. The Convention upholds this principle. Article 94 of the Convention establishes certain duties of the flag State. Apart from that, article 91, paragraph 1, third sentence, of the Convention states that there must be a genuine link between the flag State and the ship. This means the registration cannot be reduced to a mere fiction and serve just one purpose, namely to open the possibility to initiate proceedings under article 292 of the Convention on the Law of the Sea. This would render registration devoid of substance – an empty shell. So far this Tribunal has never accepted that a vessel was registered under a particular flag solely on the ground that this State so claimed. In the *M/V "Saiga" Case* as well as in the *M/V "Saiga" (No. 2) Case,* where the nationality was disputed, the Tribunal assessed the evidence submitted (paragraph 44 and paragraphs 55 *et seq.* respectively), including the conduct of the flag State (see Judgment in the *M/V "Saiga" (No. 2) Case*, paragraph 68).

4. Moreover, such an approach, were it to be accepted, would mean that the jurisdiction of the Tribunal would depend upon a decision of national officials, without the State concerned assuming the responsibilities of a flag State in substance. This would be

incompatible with the role and function of the Tribunal and would erode the flag State system.

5. Finally, I would like to highlight the newly introduced provision in the legislation of Belize that permits the Belizean authorities to de-register a vessel for violations of international conventions and agreements. I consider this to be a commendable approach, which in an innovative manner strengthens the role of the flag State with a view to a more effective protection of national and international fishery resources or of the marine environment. It is for Belize to ensure that the relevant decisions are not taken in an arbitrary manner and that shipowners may have recourse to a procedure in which they can defend their rights.

(*Signed*) Rüdiger Wolfrum

DECLARATION OF JUDGE *AD HOC* COT

[Translation]

1. I agree on the whole with the judgment rendered in the "*Grand Prince" Case*. However, I wish to offer a few brief comments, firstly as to the question of jurisdiction, and secondly as to the role of lawyers in proceedings before the International Tribunal for the Law of the Sea.

I. Jurisdiction under article 292 of the United Nations Convention on the Law of the Sea

2. The Tribunal, having rejected the Application because Belize did not establish its *locus standi*, did not pronounce itself as to the question of its jurisdiction. I agree with this approach; standing to proceed should be examined before the jurisdiction of the Tribunal. But, since the question of jurisdiction was at the heart of the deliberations, I wish briefly to address it. I believe that the Tribunal should have declined jurisdiction in any event.

3. Article 292 of the Convention provides for a specific prompt release procedure. This exceptional proceedure is "without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew".

4. The Agent of Belize argued in support of the Tribunal's jurisdiction by accusing France of introducing a new concept of international law, that of "prompt confiscation". He contended that France, by instituting its criminal proceedings, had evaded the obligations of the Convention and emptied article 292 of all content. He in fact proposed the re-characterisation of the measures decided by the *tribunal correctionnel* of Saint-Denis, treating them as detention of the vessel within the meaning of article 292, thus establishing the jurisdiction of the Tribunal.

5. The accusation of fraud against the Convention is a serious one, which should not be taken lightly. I find nothing in the record of this case justifying it. The offences with which the captain of the *Grand Prince* was charged are established. The captain penetrated 50 miles into the exclusive economic zone of France. He knew that he had to declare his cargo upon entering the zone and he did not do so. He knew that fishing was prohibited and he nevertheless engaged in it. He readily admitted the facts.

6. French criminal procedure permits direct summons to a hearing when there is no cause for conducting an investigation. In this case, the relevant facts being undisputed, there was no reason for an investigation.

7. In the present case, the speed with which the criminal proceedings were conducted does not appear to me to constitute in any sense a violation of article 292, but rather, on the contrary, an application of the spirit of that provision. The purpose of article 292 is to avoid undue detention of a vessel. It is not intended to preclude application of criminal law by the coastal State to offences committed in the exclusive economic zone. It would be a peculiar reading of this provision to see in it a kind of impunity afforded to offenders by the payment of a bond. The "reasonable bond" would thus replace the penalties provided for by the law of the coastal State. It would no longer serve to ensure the appearance of the offender, but to give him the option of an alternative penalty to that defined by the national law. This would prejudge further proceedings before the appropriate domestic forum.

8. In order to speak of "fraud against the Convention" or of "prompt confiscation", it would be necessary to establish that the criminal prosecution was prompted by an intention of evading the provisions of article 292 of the Convention. In such a case, the Tribunal would then be entitled to proceed to recharacterize the national proceedings and to declare itself as having jurisdiction. That is obviously not so in the present case, where the facts were admitted, the offence established, and the proceedings by means of direct summons strictly in compliance with the Code of Criminal Procedure.

II. The role of lawyers before the Tribunal

9. Lawyers play an irreplaceable role before international tribunals in aiding the administration of justice. The emergence of new international fora, judicial or quasi-judicial, the introduction of non-governmental organizations or organizations of private persons into the process, have led to a significant development of international dispute settlement. We should welcome this and encourage this new synergy.

10. I note, however, that the role of lawyers has been questioned in recent years before several international fora. The special panel constituted by the World Trade Organization refused Saint Lucia the right to be defended by private lawyers in the case of the *Regime for the Importation, Sale and Distribution of Bananas*. The Appellate Body did not confirm that decision. In the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* before the International Court of Justice, Judge Oda criticised the fact that Congo was represented by a Belgian lawyer acting as agent.

11. The situation is not the same before the International Tribunal for the Law of the Sea. Article 292 of the Convention provides that the application for release "may be made only by or on behalf of the flag State of the vessel". It is generally agreed that this provision establishes the special role of private parties and their lawyers in the context of such proceedings.

12. The members of international courts and tribunals are chosen "from among persons enjoying … recognized competence in the field of the law of the sea" or "in international law" (Statute of the Tribunal, article 2; See also I.C.J. Statute, Article 2, to the same effect). These fora should be able to rely upon the distinguished contributions of lawyers arguing at the bar in the performance of their task.

13. The lack of a specialized bar before the Tribunal, of a minimum level of qualification in international law, of rules of professional conduct and of an organization entrusted with the task of enforcing them, may nevertheless pose a problem. In addition, there is the danger, underscored by Judge Oda, of a proliferation of applications that are manifestly unfounded, inspired by law firms for reasons having nothing to do with the interests of the applicant State.

14. The delegation of sovereignty by the flag State in appointing a lawyer as agent raises a different kind of problem. The dispute before the Tribunal remains an inter-State dispute. However, the lawyer-agent is not necessarily in close contact with the authorities of the flag State. The credibility and reliability of the information he provides as to the legal position of the flag State may be questionable. In the present case, the Tribunal had to be satisfied with

incomplete and contradictory information concerning the registration of the vessel and the position of Belize as to the nationality of the *Grand Prince.*

15. These are difficult questions. It falls primarily to the States parties to a dispute to answer them. They, acting in sovereign fashion, organize their representation and the defence of their interests. They do so at their own risk.

(*Signed*) Jean-Pierre Cot

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 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 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

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[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).

[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/).

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).

SEPARATE OPINION OF JUDGE LAING

1. The Tribunal's close examination of jurisdiction and my following discussion of the determination of nationality of vessels are justified by the international consequences which may flow from a judicial decision in a dispute or in an article 292 application involving the issue of nationality and the related interpretation of the Convention, as this Tribunal stated in paragraph 65 of its Judgment in the *M/V "Saiga" (No. 2) Case*.

2. Of vital importance in these questions is article 91, paragraph 1, of the Convention, which provides:

> *Article 91*
> *Nationality of ships*
>
> 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. ...

Thus, in the ideal situation, up to three elements may be involved in a determination of or as ingredients of the nationality of a vessel – (1) the actual grant of nationality by the flag State, (2) the registration of the vessel and (3) the flying of the flag State's flag as of right. In the composite notion of nationality, these elements roughly consist of, or are comparable to, firstly, a mental element; secondly, a material element; and thirdly, a symbolic element. All of these elements appear to be generally present in the legislation and practice on ship nationality of most States. However, the element that is almost universally provided for in any credible legislative scheme and in practice is the material ingredient of registration following a relatively formal and detailed application therefor.

3. Some confirmation of the importance and salience of registration is furnished by article 94, paragraph 2, of the Convention, which requires the flag State to maintain a register of ships. Confirmation is also supplied by the fact that registration is normally conclusive evidence of title to the vessel under private law.

4. Notwithstanding the foregoing, in lieu of registration, the important material ingredient of nationality might be supplied by generic "documentation" of nationality, provided for in cases where the flag State makes brief or "provisional" grants of nationality or other longer-term, yet temporary, grants of nationality to foreign vessels registered elsewhere but presently under bareboat charter, subject to the flag State's law. Application for such documentation generally appears to require less formality and detail than is normally required in an application for registration. The grant of nationality through documentation carries with it the right to fly the flag; but the documentary evidence of nationality issued to the ship is not the usual Certificate of Registration.

5. This is the case with the legislation of Belize. Under the Belize Registration of Merchant Ships Act, 1989, both provisional and permanent nationality are referred to as "registration." However, guided by article 91 of the Convention and international practice, it is useful to distinguish between documentation and registration. In Belize, the application for provisional nationality is required to be accompanied by a limited number of supporting papers. Notably, no proof of title is required. The nationality document which is issued is

called the provisional patent of navigation. The permanent nationality patent, with accompanying title rights, may only be issued once proof of title is later submitted, subsequent to the grant of provisional nationality, followed by a detailed application accompanied by various technical vessel certificates and other papers.[1]

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* *

6. Notwithstanding any such distinctions, in Belize, and elsewhere, both registration and generic documentation have in common the fact that they are substantive requirements prescribed for in pre-existing legislation. This was not the case with the letter of 26 March 2001 from the Deputy Registrar of IMMARBE and that functionary's purely informal and evidently *ad hoc* certification of 30 March 2001 in an unusual document addressed "To Whom It May Concern". Whatever can be said about what these documents might have signified as far as concerns the mental and symbolic elements, they satisfied no legislative requirement and did not constitute the critical material element of nationality. Their language leads me to the conclusion that they were extra-legal accommodations being afforded, for whatever they were worth, to the shipowner in its effort to obtain relief from confiscation and, seemingly, release from detention of the vessel. In addition, the letter by the Attorney General cannot be treated as anything more than what it apparently was – a verification or authorization of the Agency status for these proceedings. On its face, it incidentally confirmed only a general understanding of the vessel's flag status and also constituted an accommodation.

7. The accommodatory nature of the communications mentioned in the preceding paragraph is underscored by the fact that, as the Judgment states, the evidence is clear that the provisional patent of navigation expired on 29 December 2001 and/or that the bare penumbra of provisional (or, one might say, probationary) grant of nationality was revoked on 4 January 2001. As to whether the affirmations of such revocation made on that date by the Ministry of Foreign Affairs were accurate, there applies the principle of *omnia praesumitur rite et solemniter esse acta donec probetur in contrarium*: all things are presumed to have been rightly and duly performed until it is proved to the contrary. Especially given the seriousness of the diplomatic commitment, I do not see any evidence that this presumption was dislodged.

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* *

8. Furthermore, informal and *ad hoc* statements by governmental or quasi-governmental functionaries on issues relating to nationality cannot be and are not determinative of the weighty international question of jurisdiction in proceedings under article 292 of the Convention, in light of the law and practice referred to in paragraphs 2-5 and in view of the consequences which may flow from an international judicial decision involving the question of nationality.[2]

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[1] See N. Ready, *Ship Registration,* pp. 1–9, 133–136 (1998), discussing the concepts of registration and documentation, as illustrated by the law and practice of Panama, which closely resemble those of Belize.

[2] The findings in this Opinion about proof of nationality are not inconsistent with this Tribunal's finding of the existence of nationality mentioned in paragraphs 67–73 of the *M/V "Saiga" (No. 2*) *Case* indicating, in effect, that there were clear and multiple evidences of the material and symbolic elements, the flag State had palpably

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9. Finally, I feel compelled to express my first thoughts about limited aspects of the issue of confiscation of vessels under foreign flags. This is because such a confiscation often creates the sort of emergency that may justly stimulate judicial speech, as do the humanitarian and economic needs that are part of the *raison d'être* for and the concerns behind the institution of prompt release. However, the following remarks are not to be taken as my decisive views on this aspect of the case.

10. Firstly, as I state in paragraph 8 in relation to certain *ad hoc* statements, I believe that confiscation of a vessel under a foreign flag, even if valid according to national law, cannot, *per se*, be accepted by an international adjudicatory body if, in intent or effect, it would exclude the jurisdiction of that body or extirpate rights or an entire remedial scheme explicitly recognized in an important instrument with such wide participation as the 1982 Convention.

11. Secondly, as I understand it, in cases other than violations of neutrality status during wartime, under international law there is a substantial presumption against the legality of confiscation of vested rights or property owned by foreigners in the circumstances outlined in the preceding paragraph, particularly when such rights or property consist of foreign flag vessels found on the high seas or otherwise outside the territorial jurisdiction and normal prescriptive competence of the confiscator, as here. As I noted about the exclusive economic zone in the *M/V "Saiga"* (*No. 2*) *Case*,[3] article 73 and other provisions of Part V of the Convention do acknowledge the existence of some coastal State jurisdiction and prescriptive competence over vessels concurrent with that of the flag State. Of course, the grant to coastal States of that jurisdiction and competence is limited to aspects of the largely economic sovereignty over natural resources and, at face value, does not specify, require or apparently envisage confiscation – a type of measure which was not tolerated in the high seas by the pre-1982 law. Furthermore, I am unaware of any textual or other credible evidence that Part V of the Convention necessarily implies such a potentially draconian penalty.

12. Thirdly, in view of the foregoing paragraph, it needs to be carefully examined whether such confiscation as described in paragraphs 10 and 11 is a type of measure "adopted by [the coastal State] in conformity with this Convention," in the terms of article 73, paragraph 1.

13. Finally, such confiscation raises significant questions about due process and the essential humanitarian and economic motivations and concerns to which I have alluded in paragraph 9. Therefore, *prima facie*, its justifiability also needs to be carefully examined.

(*Signed*) Edward A. Laing

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and consistently manifested that it possessed a positive mental element, good faith was implicated and circumstances somewhat in the nature of preclusion were present.

[3] *M/V "Saiga" (No. 2) Case*, Separate Opinion of Judge Laing, paragraphs 35–54.

SEPARATE OPINION OF JUDGE TREVES

While I share the conclusions reached in the Judgment, I would like to add some observations concerning two aspects of the reasoning of the Tribunal.

1. The first such aspect concerns the relevant time for the status of the applicant State as the flag State of the vessel. The Judgment does not explicitly take a position on this question. In the *"Camouco"* (paragraph 46) and *"Monte Confurco"* (paragraph 58) Judgments the Tribunal has said that the status of the applicant State as the flag State was not disputed "both at the time of the incident in question and now" (the time of the Judgment). These are, however, in my view, mere statements of fact which cannot be read as expressions of the position of the Tribunal on the legal question of the relevant time (nor on whether the Tribunal can question the nationality of the ship when it has not been challenged by a party).

In my view, the question of the relevant time for the status of the applicant State as the flag State of the vessel must be considered in light of article 292 as a whole.

Article 292 of the Convention establishes, for limited purposes, a form of diplomatic protection. In submitting an application for release, the flag State espouses a private claim of persons linked to it by the nationality of the ship. This becomes even clearer considering that the application may also be submitted directly by the interested private persons "on behalf" of the flag State.

In cases of diplomatic protection, the nationality requirement must be satisfied at least at the time of the submission of the claim and at the time of the commission of the wrongful act. The time of the submission of the application does not raise major difficulties in general as well as in prompt release proceedings. The Judgment, in paragraph 66, by referring to paragraph 2 of article 292, seems to assume that the relevant time is indeed that of submission of the application.

As regards the time of the commission of the wrongful act, it must be noted that, in the Judgment in the *M/V "SAIGA" (No. 2) Case*, the Tribunal considered the nationality of the *Saiga* at the moment of the arrest of the vessel. In fact, this was the moment of the alleged wrongful act, as Saint Vincent and the Grenadines claimed that the arrest had been effected in violation of the Convention.

In a case submitted to the Tribunal for the prompt release of a vessel, the claimed wrongful act is not, however, the arrest of the vessel. It is rather the non-compliance with a provision of the Convention for the prompt release of the detained vessel upon the posting of a reasonable bond or other financial security. Consequently, the relevant time is that at which it can be alleged that such breach of the Convention has occurred. This time comes on a date subsequent to the date on which the vessel was arrested. Such may be the date on which the detaining State has refused to release the vessel notwithstanding the posting of a reasonable bond, the date on which the offer of such bond has been refused, the date on which it can be claimed that release is not being done promptly, the date on which a bond is fixed and is deemed to be unreasonable and the dates on which other conceivable violations of rules such as article 73, paragraph 2, can be alleged to have occurred.

In the present case, this date seems to be not earlier than 12 January 2001, when the *tribunal d'instance* fixed a guarantee, of a given form and amount, for the release of the

vessel, or, perhaps, as late as 22 February 2001, when payment of the guarantee was refused by the Order of the Judge of the *tribunal d'instance*.

2. The second aspect of the reasoning of the Tribunal on which I would like to make some observations concerns the crucial question of whether in fact Belize was the flag State at the relevant time. The analysis of the documents available to the Tribunal, as set out in the Judgment, seems adequate to satisfy me that, on the relevant dates, Belize was not the flag State of the *Grand Prince*. More than the arguments based on the different hierarchical positions in the Belizean Government of the authorities who signed the communications considered by the Tribunal, or on the burden of proof, which does not seem relevant in a situation in which the Tribunal is acting *proprio motu*, I find important the remark made in the Judgment that the two documents of the 26 and 30 of March "on their face were intended to serve the purpose of authorizing the shipowners to make an 'appeal' to the Tribunal" (paragraph 84).

These and other available documents show no trace of action taken by the shipowner to prevent or remedy the lapse of registration set for 29 December 2000 in the provisional patent of navigation, or to react to the sanction of de-registration mentioned in the Foreign Ministry's note verbale of 4 January 2001. The impression one gathers is that the only concern of the shipowner was to be authorized to submit to the Tribunal an application on behalf of Belize, while its mind was already set on registering the vessel in Brazil.

The shipowner, through its lawyer, was in fact authorized to act on behalf of Belize by the letter of the Attorney General of 15 March 2001. Neither this letter, nor the mention it contains that the *Grand Prince* was registered in Belize, eliminate, however, the fact that, more than two months before the letter was sent, the date for the lapse of registration had been reached and the Belizean Foreign Ministry had sent a communication to the effect that registration had either been deleted or was in the process of being deleted with immediate effect as a sanction provided for in the Belizean law. The conclusion that can reasonably be drawn is that the registration of the *Grand Prince*, if indeed it remained in existence at the relevant date, was solely for the purpose of submitting an application under article 292.

It was an artificial creation, a fiction, as also noted in the Judgment in commenting on the Belizean assertion that the ship was "still considered" as registered in Belize (paragraph 85). Neither the attitude of the shipowner nor, what is more important, that of Belize as they emerge from the documents, show that "registration" was seen as entailing the normal consequences of registration, namely, the right to navigate under the flag of the registering State, and all the obligations concerning administrative, technical and social matters set out in article 94 of the Convention. Compliance with these obligations, as indicated by the Tribunal in the *M/V "Saiga" (No. 2)* Judgment of 1 July 1999, "secure more effective implementation of the duties of the flag State" by establishing a genuine link with the ship (paragraph 83). A "registration" of such an artificial character as that which might have existed for the *Grand Prince*, whatever the name it receives, cannot be considered as "registration" within the meaning of article 91 of the Convention. And it is only this kind of registration that makes a State a flag State for the purposes of article 292 of the Convention.

(*Signed*) Tullio Treves

DISSENTING OPINION OF JUDGES CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, AKL, VUKAS, MARSIT, EIRIKSSON AND JESUS

1. We regret that we are unable to support the decision of the Tribunal to the effect that it has no jurisdiction to entertain the Application by Belize on the ground that Belize was not the flag State of the *Grand Prince* on the date of the making of the Application.

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2. We agree, of course, as stated in its Judgment in the *M/V "SAIGA" (No. 2) Case* (paragraph 40), that the Tribunal must satisfy itself as to its own jurisdiction and must examine the issue *proprio motu* if necessary. We note, however, that in deciding to examine, *proprio motu*, the nationality of the *Grand Prince*, notwithstanding that France had not in the proceedings questioned the flag State status of Belize, the Tribunal departed from the approach it took in its Judgments in the three previous cases where the nationality of the vessels involved was not challenged: the *M/V "SAIGA" Case* (paragraph 45), the "*Camouco" Case* (paragraph 46) and the "*Monte Confurco" Case* (paragraph 59).

3. In the present case, having decided to take up, *proprio motu*, the question of its jurisdiction, the Tribunal decided to base itself solely on the documents before it and was consequently required to make certain assumptions as to the administrative actions taken or not taken by the Belize authorities. It would not have been necessary to make these assumptions had the Tribunal, once it began its deliberations, exercised its powers under article 77 of its Rules to seek information necessary for the elucidation of any aspects of the matters in issue. As indicated in paragraph 92 of the Judgment, the Tribunal decided not to do so.

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4. In its reasoning, the Tribunal has relied heavily on the note verbale of 4 January 2001 from the Ministry of Foreign Affairs of Belize to the French Embassy in El Salvador, and has consequently attached less importance to other documents before it.

5. If the view set out in the Judgment on the effect of the note verbale could be accepted (paragraph 87), no other questions on the nationality of the vessel would have arisen. In our view, however, the note verbale, even on its face, should be read only to indicate that the Belize authorities were in the process of de-registering the *Grand Prince*. Moreover, later information provided by Belize to the French authorities (the letter of 26 March 2001 from the Director and Senior Deputy Registrar of the International Merchant Marine Registry of Belize (IMMARBE) to the Honorary Consul of France in Belize City) and to the Tribunal (letter from the Director and Senior Deputy Registrar of IMMARBE of 30 March 2001; statement of Agent of Belize on 6 April 2001 (see ITLOS/PV.01/04, p. 4)) indicate that the procedures of de-registration had been suspended. This point was acknowledged by the Agent of France in a statement during the oral proceedings on 6 April 2001 (see ITLOS/PV.01/04, p. 5). Furthermore, the Judgment of 23 January 2001 of the criminal court of the *tribunal de grande instance* at Saint Denis notes that the *Grand Prince* was of the Belize flag, notwithstanding statements before it in the procès-verbaux of seizure of 11 January 2001 that the vessel had been deleted from the Belize registries.

* * * *

6. Turning now to the important issue of whether the other documents before the Tribunal could allow the Tribunal to conclude that Belize was not, at the time of making the Application, the flag State of the *Grand Prince*, we begin by noting that the Tribunal has not indicated any intention to deviate from the reasoning in its earlier decisions relevant to the issue of the nationality of ships.

7. The Tribunal cites as a point of departure article 91 of the Convention. The Tribunal had the occasion to invoke article 91 in its Judgment in the *M/V "SAIGA" (No. 2) Case*, where it is stated, in paragraph 63:

> Article 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, article 91 codifies a well-established rule of general international law. Under this article, it is for Saint Vincent and the Grenadines to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. These matters are regulated by a State in its domestic law. Pursuant to article 91, paragraph 2, Saint Vincent and the Grenadines is under an obligation to issue to ships to which it has granted the right to fly its flag documents to that effect. The issue of such documents is regulated by domestic law.

8. The Judgment in the *M/V "SAIGA" (No. 2) Case* further stated, in paragraph 65:

> Determination of the criteria and establishment of the procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State.

and in paragraph 66:

> The Tribunal considers that the nationality of a ship is a question of fact to be determined, like other facts in dispute before it, on the basis of evidence adduced by the parties.

9. In the *M/V "SAIGA" (No. 2) Case*, the Tribunal concluded, on the basis of the evidence before it, that Saint Vincent and the Grenadines had discharged the initial burden of establishing that the *Saiga* had Vincentian nationality at the time of its arrest, despite the fact that its Provisional Certificate of Registration had expired.

10. In the present case, the evidence before the Tribunal dealing with the question of the registration of the *Grand Prince* was all to the effect that the competent Belize authorities regarded the vessel as flying the Belize flag: the letter of the Attorney General of Belize of 15 March 2001; and the two communications of 26 and 30 March 2001 from the Director and Senior Deputy Registrar of IMMARBE. It can be noted that the Attorney General is the Minister responsible for IMMARBE and that the Senior Deputy Registrar of IMMARBE has, under the Belize legislation, all the relevant powers of the Registrar, including authority to register vessels in the Registry and to revoke the registration of vessels.

11. Dealing with the effect of the expiry of the patent of navigation, the Tribunal notes in passing the means by which the competent authorities could have extended the registration of

the *Grand Prince* (paragraph 84). Following on the statements of the Belize authorities in the documents referred to above, this listing of possible means should have satisfied the Tribunal as to the registration of the *Grand Prince* on the basis of the Tribunal's reasoning in the *M/V "SAIGA" (No. 2) Case*.

12. Instead, the Tribunal notes that the assertion on this question in the letter of 30 March 2001 "remained unsubstantiated" and "contains an element of fiction" (paragraph 85) and goes on to state that the communications from the Belize authorities were in the nature of administrative letters, "unsupported by references to any entries in the merchant marine register of Belize or any other action" (paragraph 86). The Tribunal based its consequential decision that the *Grand Prince* was not registered in Belize on the absence of such information. This approach would certainly have been more justified had the Tribunal chosen to use its powers to seek further information on the question under article 77 of its Rules.

* * * *

13. In connection with the documents before it, the Tribunal appears to have identified some difference of position among the Belize authorities on the question of the nationality of the *Grand Prince*. We, on the other hand, note from the documents that there was coordination on the question among the Belize authorities involved.

* * * *

14. In summary, we are of the view, firstly, that it cannot be concluded, on the basis of the documents before the Tribunal, that the registration of the *Grand Prince* had been revoked by the Belize authorities. Secondly, we are of the view that the statements of the competent Belize authorities that the *Grand Prince* was registered in Belize suffice to discharge the initial burden of establishing that it had Belize nationality, given that the Belize legislation provided for means by which the validity of provisional registration could be extended beyond the period of the provisional patent of navigation. Accordingly, we are of the view that the Tribunal has jurisdiction to entertain the Application.

* * * *

15. A more general point of interpretation of the Convention, going beyond the scope of the present case, is raised by the fact that the decision of the Tribunal proceeded from the assumption that the applicant in a proceeding under article 292 of the Convention must be the flag State at the time the application is submitted. In the circumstances of prompt release proceedings, the flag State at the time of detention, and at the time when an allegation is made of non-compliance with the provisions of the Convention on prompt release, would ordinarily still be the flag State at the time of making an application under article 292. The reasoning of the Tribunal to justify this as a legal requirement under article 292 is, however, not convincing. Regrettably, the deliberations in the present case have not allowed a full treatment of the consequences of this approach in various other circumstances which could be contemplated.

* * * *

16. The decision of the Tribunal has the effect, perhaps unintended, when depriving Belize of its rights as a flag State, albeit for the limited purposes of actions under article 292 of the Convention, also of condoning a system under which a flag State can in certain circumstances absolve itself of its duties as a flag State, including those laid down in article 94 of the Convention. It will be recalled that, under article 94, paragraph 1, every State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. It certainly cannot suffice for a flag State to seek to comply with this obligation merely by revoking, without more, the registration of ships flying its flag. The Tribunal should not have dealt as it did with a matter with such important consequences without the benefit of full consideration of the legal questions involved.

* * * *

17. Finally, we regret that the decision of the Tribunal has prevented it from considering issues of a legal nature which can significantly affect the development of the procedures to be followed in prompt release proceedings under article 292 of the Convention, including the relationship of such proceedings with the merits of cases before the domestic forum of the detaining State.

(*Signed*) Hugo Caminos
(*Signed*) Vicente Marotta Rangel
(*Signed*) Alexander Yankov
(*Signed*) Soji Yamamoto
(*Signed*) Joseph Akl
(*Signed*) Budislav Vukas
(*Signed*) Mohamed Marsit
(*Signed*) Gudmundur Eiriksson
(*Signed*) José Luis Jesus