2002

THE"GRAND PRINCE" (Belize v. France).Judgment. iTLOS Case No. 8. At'. International Tribunal for the Law of the Sea, April 20, 2001.

Bernard H. Oxman
University of Miami School of Law, bhoxman@law.miami.edu

Vincent P. Bantz

Law of the Sea Convention—prompt release proceedings—jurisdiction—nationality of ship—fisheries enforcement—confiscation—exceptions to compulsory jurisdiction

THE "GRAND PRINCE" (Belize v. France). Judgment. ITLOS Case No. 8. *At*<http://www.itlos.org/case_documents/2001/document_en_88.pdf>.
International Tribunal for the Law of the Sea, April 20, 2001.

The *Grand Prince,* flying the flag of Belize, was arrested on December 26, 2000, by a French surveillance frigate for unlawful fishing in the exclusive economic zone (EEZ) off the Kerguelen islands.[1] An application for prompt release on bond was filed with the International Tribunal for the Law of the Sea (Tribunal) on March 21, 2001, by the owner's attorney on behalf of Belize under Article 292 of the UN Convention on the Law of the Sea (Convention).[2] Addressing the issue *proprio motu,* on April 20, 2001, the Tribunal held that it did not have jurisdiction, because the applicant failed to establish that Belize was the flag state.[3] The Tribunal did not rule on the effect of a French court decision confiscating the vessel.

Following its arrest, the *Grand Prince* was escorted to the island of Réunion. The master was charged with fishing without authorization in the EEZ and for failing to give notice of entry into the EEZ and to declare some twenty tons of fish carried on board.[4] French records indicate that the master admitted illegal fishing but disputed the date.[5] On January 12, 2001, the tribunal d'instance of Saint-Paul, Réunion, confirmed the arrest of the vessel and conditioned release on payment of a bond of FF 11,400,000.[6]

On January 23, 2001, the tribunal correctionnel of Saint-Denis, Réunion, found the master guilty of all charges. Taking into account his cooperation with French authorities, the court sentenced him to a fine of FF 200,000 and awarded FF 20,000 in damages to each of several civil claimants. His passport was returned. The court also ordered confiscation of the vessel, the fishing gear, and the seized catch, with immediate execution notwithstanding appeal (which was pending when the Tribunal decided that it lacked jurisdiction under the Convention). The effect under French law was that title passed to the state.[7]

On February 19, 2001, the shipowner requested the chief judge of the tribunal d'instance of Saint-Paul to order the prompt release of the vessel as provided for in Article 73(2) of the

[1] The master was Spanish, and the crew, Spanish and Chilean. The International Tribunal of the Law of the Sea (Tribunal) summarized the facts in paras. 32–53 of its decision, "Grand Prince" (Belize v. Fr.), Judgment, ITLOS Case No. 8 (Apr. 20, 2001), *at*<http://www.itlos.org/case_documents/2001/document_en_88.pdf> [hereinafter Judgment]. The judgments and other case materials of the International Tribunal for the Law of the Sea are available online at the Tribunal's Web site, <http://www.itlos.org>.

[2] UN Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, Art. 292, 1833 UNTS 397, *reprinted in* 21 ILM 1261 (1982) [hereinafter Convention].

[3] The vote was 12-9. The majority comprised President Chandrasekhara Rao, Vice-President Nelson, Judges Kolodkin, Park, Bamela Engo, Mensah, Anderson, Wolfrum, Laing (a national of Belize), Treves, and Ndiaye, and Judge *ad hoc* Cot (chosen by France). In dissent were Judges Caminos, Marotta Rangel, Yankov, Yamamoto, Akl, Vukas, Marsit, Eiriksson, and Jesus. Judgment, *supra* note 1, para. 95.

[4] With respect to the questionable requirement of notification upon entry into the exclusive economic zone, see case report on the *"Camouco"* case at 94 AJIL 713, 715 (2000).

[5] *See* Judgment, *supra* note 1, para. 42. During the oral proceedings, however, the applicant stated that the vessel "had no time to fish because it was caught on the same day it entered the zone." Verbatim Record, Apr. 6, 2001, Doc. ITLOS/PV/01/3, at 4.

[6] FF 6.55957 = €1. In requiring that the bond be posted as cash, certified check, or bank draft, the court ignored the International Tribunal's determination in *"Camouco"* and *"Monte Confurco"* that a bank guarantee is sufficient. In other respects, however, the court seems to have learned from the Tribunal's rejection of the bond fixed by the French courts in those cases. It explained its reasons for fixing the bond and referred to both the Convention and the reasoning of the Tribunal in *"Saiga"* and *"Camouco."* Following the Tribunal's lead, the court's judgment even refers to the requirement that the bond be *"raisonnable,"* although the French text of Article 73(2) of the Convention is inexplicably aberrant at this point and uses *"suffisante." See* M/V "Saiga" (St. Vincent v. Guinea), Prompt Release, ITLOS Case No. 1, para. 82 (Dec. 4, 1997), *reported at* 92 AJIL 278 (1998); "Camouco" (Pan. v. Fr.), Prompt Release, ITLOS Case No. 5 (Feb. 7, 2000), *reported at* 94 AJIL 713 (2000); "Monte Confurco" (Seych. v. Fr.), Prompt Release, ITLOS Case No. 6 (Dec. 18, 2000), para. 93.

[7] *See* Judgment, *supra* note 1, para. 50.

Convention upon the payment of a bank guarantee of FF 11,400,000. In his order of February 22, 2001, the chief judge rejected the request in light of the confiscation ordered by the tribunal correctionnel.

Before the Tribunal, France drew a distinction between a case in which the outcome of domestic proceedings is still pending and one in which there is a judgment on the merits.[8] It contested jurisdiction and admissibility on the grounds that the confiscation was a decision on the merits by the French courts beyond the scope of prompt-release proceedings and rendering them without object,[9] and that review of the confiscation decision was subject to France's reservation to jurisdiction under Convention Article 298(1)(b).[10]

The applicant maintained that the confiscation amounted to a subterfuge or fraud on the law and was intended to evade the requirement of Convention Article 73(2) that fishing vessels arrested in the EEZ and their crews "shall be promptly released upon the posting of reasonable bond or other security." Article 73(2) would become a "dead letter," the applicant warned, if a state could circumvent its release obligation by confiscating the vessel.

The Tribunal did not reach these issues.[11] It observed, "According to 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."[12] Noting that under Article 292(2), the application for release may be made only by or on behalf of the flag state, and that the applicant has the initial burden of establishing that it represents the flag state,[13] the Tribunal proceeded to examine the evidence on this point.

The applicant presented the provisional patent of navigation (registration), which was issued by the International Merchant Marine Registry of Belize (IMMARBE) on October 16, 2000, and which indicated an expiration date of December 29, 2000; a letter from the attorney general of Belize dated March 15, 2001, which contained the authorization to file an application to the Tribunal on behalf of Belize and stated that the *Grand Prince* was registered in Belize; and an IMMARBE certification, dated March 30, 2001, that despite the expiration of the patent, the vessel was still considered registered in Belize pending the outcome of the court proceedings.[14] France presented a note verbale dated January 4, 2001, from the Ministry of Foreign Affairs of Belize delivered to the French embassy in El Salvador stating that, in view of the violation committed by the *Grand Prince*, it was being deregistered "effec-

[8] Verbatim Record, Apr. 5, 2001, Doc. ITLOS/PV/01/2, at 9.

[9] Article 292(3) provides, in pertinent part, "The court or tribunal 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." France argued, "In the instant case, the Tribunal could not order France promptly to release the *Grand Prince* upon the posting of a bond or other guarantee." Observations of the French Government, at 2 (on file with authors). If the Tribunal were to do so, it would "be interfering in the very substance of a penal proceeding which has been decided by the competent French jurisdiction, which is expressly ruled out by the provisions of article 292 itself." *Id.*

[10] Observations of the French Government, *supra* note 9, at 3; Verbatim Record, *supra* note 8, at 15–16. The French declaration is at<http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm>.

[11] Several judges in the majority commented separately on these issues. Judge Anderson questioned whether they could be decided in prompt-release proceedings. Judgment, *supra* note 1, Sep. Op. Anderson, J. Judge *ad hoc* Cot considered that an accusation of fraud was a serious one and that it was not justified by the facts; expeditious penal proceedings were not a violation of Article 292, but an application of its spirit, since they help to avoid undue immobilization of the vessel. *Id.*, Decl. Cot, J. *ad hoc*, paras. 5–7. The late Judge Laing considered that the confiscation of a vessel, even if valid under 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. *Id.*, Sep. Op. Laing, J., para. 10.

[12] Judgment, *supra* note 1, para. 77. The Tribunal cited *Appeal Relating to the Jurisdiction of the ICAO Council* (Ind. v. Pak.), 1972 ICJ REP. 46, 52 (Aug. 18), and M/V "Saiga" (No. 2) (St. Vincent v. Guinea), Judgment, ITLOS Case No. 2, para. 40 (July 1, 1999), *reported at* 94 AJIL 140 (2000).

[13] Judgment, *supra* note 1, para. 67.

[14] *Id.*, paras. 67–70.

tive today 4 January 2001."[15] In addition, a letter of March 26, 2001, sent by IMMARBE to the honorary consul of France in Belize refers to the decision by the Belizean authorities to suspend the deregistration process since "the owners requested an opportunity to defend themselves of the accusations by submitting an appeal to the Tribunal for the Law of the Sea."[16]

The Tribunal concluded that the only document issued to the *Grand Prince* under the Belizean Registration of Merchant Ships Act of 1989 was the provisional patent of navigation, which expired on December 29, 2000, and was neither extended nor replaced. It considered the remaining documents on which the applicant relied to be administrative letters unsupported by any action required by the law of Belize.[17] The IMMARBE communications indicating that the vessel retained the flag of Belize were expressly "intended to serve the purpose of authorizing the shipowners to make an 'appeal' to the Tribunal" and "were issued after the Application was made."[18] Its certification of March 30 "contains an element of fiction."[19] The note verbale of January 4, however, "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."[20] The Tribunal concluded:

> [T]he 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
> . . . .
>
> . . . .
>
> . . . [T]he 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.[21]

The dissenting judges considered that the Tribunal might have exercised its evidence-gathering powers under Article 77 of its Rules before reaching the conclusion that it did. They believed that the note verbale of January 4 indicated only that the Belizean authorities were in the process of deregistering the vessel; that the evidence before the Tribunal showed that the competent authorities regarded the *Grand Prince* as flying the Belizean flag; and that in any case the statements of the authorities sufficed to discharge the initial burden of establishing that the vessel had Belizean nationality. They doubted whether deregistration was a suitable means for implementing the obligation of the flag state effectively to exercise jurisdiction and control over the ship.[22] They also questioned the majority's reliance on the

[15] *Id.*, para. 72. France did not argue that it relied on the note from Belize or that the note otherwise created an estoppel. The *procès-verbal d'interpellation* of January 11, 2001, states that the vessel was flying the flag of Belize. The *procès-verbaux* of seizure prepared by the regional and departmental director of maritime affairs on January 11, probably in light of the January 4 note from Belize, state that the vessel was flying the flag of Belize when arrested, but was subsequently deleted from Belizean registry. The January 23 judgment of the criminal court states that the vessel was flying the flag of Belize.

[16] Judgment, *supra* note 1, para. 74.

[17] *Id.*, paras. 84, 86.

[18] *Id.* Judge Laing (a Belizean national) concluded that the IMMARBE letter and certification were "extra-legal accommodations being afforded, for whatever they were worth, to the ship owner in its effort to obtain relief from confiscation." *Id.*, Sep. Op. Laing, J., paras. 5–6. Judge Wolfrum took the position that registration cannot be maintained solely to preserve the right to institute prompt-release proceedings under Article 292. *Id.*, Decl. Wolfrum, J., para. 3.

[19] Judgment, *supra* note 1, para. 85.

[20] *Id.*, para. 87. Vice-President Nelson was of the view that Foreign Ministry statements of official government position communicated to another government are binding "or at least must be of high persuasive value." *Id.*, Decl. Nelson, V.-P.

[21] Judgment, *supra* note 1, paras. 76, 93.

[22] *Id.*, Diss. Op. Caminos, Marotta Rangel, Yankov, Yamamoto, Akl, Vukas, Marsit, Eiriksson, Jesus, JJ., paras. 3, 5, 10, 14, 16.

nationality of the vessel when the application was made, rather than when the wrong occurred.[23]

* * * *

Article 292 of the Convention was the exclusive source of the Tribunal's jurisdiction in this case.[24] The article specifies that an application thereunder may be made "only" by or on behalf of the flag state. The existence of this restriction may have convinced the Tribunal that it was appropriate to treat the issue as one of jurisdiction rather than admissibility[25] and, at least when the documentation before it raised doubts, to address the question of jurisdiction *proprio motu*.[26]

The dissent observed that the Tribunal's approach in the instant case was a departure from past practice.[27] In *"Saiga"* the Tribunal overlooked a possible lapse in registration.[28] While the issue posed there is similar in some ways, it arose in a different context.[29] Moreover, although the opinion does not address the matter, the instant case involved the reflagging of a fishing vessel, a problem that has attracted international concern.[30] Presumably, there were important reasons why the majority chose not to request more infor-

[23] *Id.*, para. 15. Judge Treves pointed out that in the context of prompt-release proceedings, the wrong is not the detention, but the breach of the duty to release promptly on reasonable bond. *Id.*, Sep. Op. Treves, J., para. 1. No distinction necessarily arises on the facts of this case between the nationality of the vessel at the time of the alleged wrong and its nationality at the time of filing the application. Although the *Grand Prince* was arrested on December 26, 2000, the decisions of the French courts on January 12, January 23, and February 22, 2001, were rendered after the events that cast doubt on the nationality of the ship—namely, the expiration of the provisional patent (December 29, 2000) and the note from Belize (January 4, 2001). *See generally* ERIC WYLER, LA RÈGLE DITE DE LA CONTINUITÉ DE LA NATIONALITÉ DANS LE CONTENTIEUX INTERNATIONAL (1990).

[24] Ordinarily, the Convention provides only for compulsory arbitration unless both the applicant and the respondent have filed declarations accepting the jurisdiction of the International Court of Justice or the Tribunal, which was not the case here. Convention, *supra* note 2, Art. 287. Article 292 permits applications for prompt release to be made to the Tribunal without regard to these declarations.

[25] *See generally* GEORGES ABI-SAAB, LES EXCEPTIONS PRÉLIMINAIRES DANS LA PROCÉDURE DE LA COUR INTERNATIONALE 206–13 (1967).

[26] One might note in this context that in U.S. federal courts, diversity of citizenship of the plaintiff and defendant is regarded as a question of subject-matter jurisdiction that cannot be waived. *See* U.S. CONST. Art. III, §2; FED. R. CIV. PRO. 12(h)(3); Capron v. VanNoorden, 6 U.S. (2 Cranch) 126 (1804).

[27] Judgment, *supra* note 1, Diss. Op. Caminos et al., JJ., para. 2. *See infra* note 29.

[28] M/V "Saiga" (No. 2) (St. Vincent v. Guinea), Judgment, ITLOS Case No. 2, para. 40 (July 1, 1999).

[29] In the cases involving the M/V *Saiga*—the first two for the Tribunal—it did not question nationality *proprio motu* either in the prompt-release proceedings or in connection with the subsequent request for provisional measures. M/V "Saiga" (St. Vincent v. Guinea), Prompt Release, ITLOS Case No. 1, para. 82 (Dec. 4, 1997); M/V "Saiga" (No. 2) (St. Vincent v. Guinea), Provisional Measures (Order), ITLOS Case No. 2 (Mar. 11, 1998). The question of a lapse in registration was not raised by the respondent until it objected to admissibility during the second stage of the second case arising out of the same incident; at that stage the Tribunal had jurisdiction over the merits predicated on a special agreement, including challenges to the legality both of the arrest and of the use of force resulting in personal injury. M/V "Saiga" (No. 2) (St. Vincent v. Guinea), Judgment, ITLOS Case No. 2, para. 40 (July 1, 1999), paras. 44–54. St. Vincent and the Grenadines maintained at all times that it was the flag state, and issued a permanent certificate of registration two months after the expiration of the provisional certificate. *Id.*, paras. 67–74. That did not occur in the instant case: the owner was planning to reflag the vessel in Brazil at the time it was arrested, and the authorities stated that they were awaiting the outcome of the case to decide on deregistration. Judgment, *supra* note 1, paras. 33, 70, 74.

[30] The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov. 23, 1993, *in* FOOD AND AGRICULTURE ORGANIZATION AND DIVISION OF OCEAN AFFAIRS AND THE LAW OF THE SEA, UNITED NATIONS, INTERNATIONAL FISHERIES INSTRUMENTS WITH INDEX 41, UN Sales No. E.98.V.11 (1998), states in its preamble:

> [T]he practice of flagging or reflagging fishing vessels as a means of avoiding compliance with international conservation and management measures for living marine resources, and the failure of flag States to fulfil their responsibilities with respect to fishing vessels entitled to fly their flag, are among the factors that seriously undermine the effectiveness of such measures.

See also id., Art. 3. At the time of the case, this agreement had been accepted by the European Union but not Belize, and was not yet in force. *See* <http://www.fao.org/Legal/default.htm> (visited Sept. 21, 2001).

mation from Belize.[31] A clue may be found in the dissent, which expressed regret that the majority's decision prevented the Tribunal from considering significant issues,[32] presumably those regarding the confiscation order.

France had a right under Convention Article 73(1) to impose penalties for violation of its fisheries laws in the EEZ, and Article 73(3) expressly excludes only imprisonment and corporal punishment. France also had a duty under Article 73(2) to release the vessel promptly on reasonable bond. Even if the Article 73(1) right permits confiscation,[33] or if its exercise is not subject to review in prompt-release proceedings or otherwise, the question is whether confiscation may nullify the Article 73(2) duty. The answer requires interpretation of Article 73(2), read alone and in the context of both Article 73 as a whole and other provisions, including Article 300, which requires good faith fulfillment of obligations and prohibits abuse of right.[34]

A good faith confiscation (or a judicial preference for presuming good faith) does not end the difficulty. Is there an option of rapid confiscation that renders effectively meaningless the obligation to release the ship promptly under the Convention? Would an affirmative response encourage a rush to judgment in criminal proceedings that poses a risk of human rights violations? Or encourage a rush to the Tribunal that would afford municipal courts less opportunity to consider the question of release on bond? If a change of flag or deregistration may be a mere formality once title is assumed by the state, and if the state instituting Article 292 proceedings must be the flag state at the time of application,[35] would that rule out such proceedings or merely reopen the underlying inquiry in another form?

How much, if anything, is lost if the penalty is the value of the ship (or more) rather than the ship itself? The coastal state is free to establish monetary penalties reasonably calculated to deter violations, and also to establish criteria to guide precise calibration of penalties by its courts. In previous cases, the Tribunal indicated that both the potential penalties and the value of the vessel may be taken into account in determining the reasonableness of the bond.[36] In this context, the question of the intent of Article 73 might be posed starkly as

[31] Judge Anderson observed that the applicant's agent was "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." Judgment, *supra* note 1, Sep. Op. Anderson, J., at 1. While acknowledging the special nature of prompt-release proceedings, Judge *ad hoc* Cot worried about the designation of a private attorney as agent; the Tribunal needs to have reliable information on the legal position of the flag state. He also questioned the incentives of private lawyers. *Id.*, Decl. Cot, J. *ad hoc*, paras. 13–14. These observations seem to assume the traditional posture of the state as applicant. In prompt-release proceedings, however, the application may be brought "on behalf of" rather than "by" the flag state, rendering the state (if it wishes) only the nominal party. *See* Bernard H. Oxman, Book Review, 95 AJIL 731, 733–34 (2001); Bernard H. Oxman, *Observations on Vessel Release Under the United Nations Convention on the Law of the Sea*, 11 INT'L J. MARINE & COASTAL L. 201, 211 (1996). The question of private attorneys has arisen in other contexts. Saint Lucia was allowed to be represented by private advisers in oral hearings before the WTO Appellate Body, *see European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/AB/R, paras. 10–12 (Sept. 9, 1997), but the panel below had refused to do so, notably on the ground that the common use of private attorneys would put an economic burden on developing countries, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/R/USA, paras. 7.10–.12 (May 22, 1997).

[32] Judgment, *supra* note 1, Diss. Op. Caminos et al., JJ., para. 17.

[33] As Judge Anderson noted:

> The [Food and Agricultural Organization'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.

Id., Sep. Op. Anderson, J., at 4 n.3. The most recent revision of the FAO document (Rev. 5; 1996) is available online at <http://www.fao.org/docrep/V9982E/v9982e00.htm>.

[34] *See supra* note 11 and accompanying text.

[35] *See supra* notes 21–23 and accompanying text.

[36] "Camouco" (Pan. v. Fr.), Prompt Release, ITLOS Case No. 5, para. 67 (Feb. 7, 2000); "Monte Confurco" (Seych. v. Fr.), Prompt Release, ITLOS Case No. 6, para. 76 (Dec. 18, 2000).

follows: were the negotiators of the Convention—and the countless lawyers who reviewed it—sophisticated realists who understood that the duty to release promptly on reasonable bond might in practice mean limiting the penalty to the cash guaranteed by a bond whose reasonableness might be reviewed by a standing international tribunal unlikely to be hostile to coastal state interests?

Indeed, the Convention specifies that only monetary penalties may be imposed in most cases for pollution violations by foreign ships.[37] The underlying questions posed by the French confiscation are not irrelevant, however. For one thing, the limitation to monetary penalties does not apply "in the case of a wilful and serious act of pollution in the territorial sea."[38] For another, if civil proceedings[39] joined to, or emanating from, a criminal or administrative proceeding prolong the detention, the kind of problem posed by the French confiscation in the instant case might arise again, albeit in a different, more complex, and potentially more serious context. The detention of a merchant ship affects not only the particular interests of its owner and flag state, but the broader interests of many states in navigation rights and the free movement of their exports and imports as implicated by the duty under Article 226(1)(b) to promptly release ships detained for pollution violations on the posting of reasonable bond.

One way to pose the question is whether the domestic decision not to release the vessel—even as a consequence of a judgment of confiscation—should be regarded as severable or as merged into the judgment on the merits.[40] If it is merged into the merits, and if Article 292 is regarded as inapplicable for that reason, then review by an international tribunal is compulsory under the Convention only in accordance with its general dispute settlement provisions, including Article 298(1)(b), which gives states the right to declare that they exclude disputes relating to the exercise of their fisheries-enforcement rights in the EEZ. France and a number of other states have made such declarations.[41]

Although France has now appeared three times as a respondent in prompt-release cases involving fisheries arrests off its Southern and Antarctic Terrritories,[42] this case is the first in which France invoked its declaration under Article 298(1)(b). It did so subtly, however. Consistent with its approach in the earlier cases, France did not assert that its declaration precludes a proceeding under Article 292 to review compliance with its prompt-release obligation under Article 73(2).[43] It claimed, instead, that its declaration excludes jurisdiction with respect to a dispute concerning the enforcement of its sovereign rights over living resources of the EEZ pursuant to Article 73(1), and thus precludes review of "a wide dispute" concerning its right to confiscate the fishing vessel as a penalty.[44] This argument parallels its position that the confiscation was a judgment on the merits that was excluded from Article 292 proceedings and that, in any event, rendered them without object.

[37] Convention, *supra* note 2, Art. 230(1). *But see infra* note 38.

[38] Convention, *supra* note 2, Art. 230(2).

[39] "Nothing in this Convention affects the institution of civil proceedings in respect of any claim for loss or damage resulting from pollution of the marine environment." *Id.*, Art. 229.

[40] Presumably, failure to demand prompt release at some point may constitute a waiver of the right or of the Article 292 remedy. The *"Camouco"* case did not address the legal issues that such delay might pose where there has been a final judgment. *See "Camouco,"* paras. 51–54.

[41] There is no comparable right to exclude jurisdiction with respect to arrests of foreign ships for pollution violations.

[42] *See* "Camouco," Prompt Release; "Monte Confurco," Prompt Release.

[43] Those arguing that such a declaration may preclude jurisdiction in prompt-release proceedings would likely argue that the failure to release is itself an exercise of enforcement powers. Those arguing that it does not might point out that Article 73 expressly excludes from coastal state enforcement rights the power to refuse to release promptly on reasonable bond, and that Article 292, apart from the fact that it nowhere uses the word "dispute," exceptionally grants compulsory jurisdiction to the Tribunal to enforce the duty of prompt release and, in doing so, distinguishes the question of prompt release on reasonable bond from disputes regarding the legality of the arrest or prosecution.

[44] *See* Judgment, *supra* note 1, para. 60; Verbatim Record, *supra* note 8, at 15–16.

To those judges who believed that resolution of the important issues raised by the confiscation order might best be deferred, the Tribunal's decision to deal strictly with an applicant that failed to get its formal documentation in order may have seemed not only the easiest, but the most prudent, approach.[45]

BERNARD H. OXMAN AND VINCENT P. BANTZ
University of Miami School of Law

European Community—subsidies—free movement of goods—economic incentives for renewable energy—UN Convention on Climate Change

PREUSSENELEKTRA AG v. SCHLESWAG AG. Case C-379/98. *At* <http://www.curia.eu.int/en/index.htm>.
Court of Justice of the European Communities, March 13, 2001.

A German court of first instance (the Landgericht Kiel) requested the European Court of Justice[1] (ECJ) to decide whether Section 4(1) of the German law on the public electricity grid (Electricity Law)[2] was compatible with Article 28 (previously Article 30) of the Treaty Establishing the European Community (EC Treaty)[3] concerning the free movement of goods, and Article 87 (previously Article 92) of the EC Treaty concerning subsidies.[4] Section 4(1) of the Electricity Law obligates German electricity suppliers both to buy the electricity that is generated exclusively by renewable energy sources within their areas[5] and to pay the (private) providers a fixed minimum price. Under prevailing market conditions, this price is considerably higher than that paid for any type of energy generated from nonrenewable sources.[6] The additional costs are borne by the suppliers and passed on to upstream network operators/providers if the energy thus purchased exceeds 5 percent of the energy supplied by the former to end users.

[45] A discussion in the context of U.S. constitutional adjudication of "the techniques for *not* deciding, when a decision would be improvident for the nation," as Harry Wellington puts it in his foreword (at p. x), can be found in chapter 4, "The Passive Virtues," of Alexander M. Bickel's celebrated book, THE LEAST DANGEROUS BRANCH 111–98 (2d ed. 1986).

[1] In a procedure under Article 234 (previously 177) of the TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Mar. 25, 1957, 298 UNTS 11, *as amended by* TREATY OF AMSTERDAM, Oct. 2, 1997, 1997 O.J. (C 340) 1, *reprinted in* 37 ILM 56 (1998) [hereinafter EC Treaty].

[2] Gesetz über die Einspeisung von Strom aus erneuerbaren Energien in das öffentliche Netz (Stromeinspeisungsgesetz, StrEG) [Law on feeding electricity from renewable energy sources into the public grid], v. 7.12.1990 (BGBl. I S.2633), *as amended by* Gesetz zur Neuregelung des Energiewirtschaftsrechts [New law for the energy industry], v. 24.4.1998 (BGBl. I S.730).

[3] EC Treaty, *supra* note 1, Arts. 28, 87 (previously Arts. 30, 92).

[4] Case C-379/98, PreussenElektra AG v. Schleswag AG (Mar. 13, 2001). See the Web site of the Court of Justice of the European Communities (ECJ), <http://www.curia.eu.int/en/index.htm>, for its recent judgments and the opinions of the advocate general. Article 28 provides: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the Member States." Article 87(1) provides:

> Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.

Although we refer to articles of the EC Treaty as currently numbered, in the instant case the ECJ and also, on occasion, the advocate general use the *previous* numbers.

[5] Certain limits apply. Renewable energy sources, as listed in Section1 of the amended Electricity Law, include: hydraulic, wind, and solar energy; gas from waste dumps and sewage treatment plants; and biomass.

[6] This regime has since been superseded by the Gesetz für den Vorrang Erneuerbarer Energien (Erneuerbare-Energien-Gesetz, EEG), v. 29.3.2000 (BGBl. I S. 305), which sets up (Section 3) a purchase-obligation system similar to the Electricity Law, but provides (Section 11) for a compensation rule on the national level pertaining to all network operators. The same issues are raised.