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THE "CAMOUCO" (PANAMAV. FRANCE) (JUDGMENT). ITLOS Case No. 5. . International Tribunal for the Law of the Sea, February 7, 2000.

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

Vincent P. Bantz

Optional Clause and the extremely broad reservations contained in India's Optional Clause declaration, it is unlikely that the Court will be able to entertain any dispute involving that country, whether as applicant or as respondent, based on the Optional Clause.

PETER H. F. BEKKER
White & Case LLP, New York

Prompt release of vessels and crews—exhaustion of local remedies—lis pendens—*amount and form of reasonable bond—UN Convention on the Law of the Sea*

THE "CAMOUCO" (PANAMA V. FRANCE) (JUDGMENT). ITLOS Case No. 5. <http://www.un.org/Dept/los/ITLOS/JudgmentCamouco.htm>.
International Tribunal for the Law of the Sea, February 7, 2000.

On January 17, 2000, pursuant to Article 292 of the United Nations Convention on the Law of the Sea[1] (Convention), the International Tribunal for the Law of the Sea (Tribunal) was asked to order the prompt release of a fishing vessel and its master arrested by France for fishing violations in its exclusive economic zone (EEZ).[2] The application, filed on behalf of Panama,[3] challenged the decision of the French courts requiring that, to secure release of the vessel, a bond of twenty million French francs be posted in cash or by certified check or bank draft. A hearing was held on January 27 and 28. On February 7, by a vote of 19 to 2,[4] the Tribunal ordered France to release the vessel and its master promptly upon receipt of a bond in the form of a bank guarantee. By 15 votes to 6,[5] the Tribunal fixed the amount of the bond at eight million French francs.[6] The bond was posted, and the French courts released the vessel and its master in late March.[7]

The *Camouco*, a long-lining quick-freeze fishing vessel flying the Panamanian flag, was boarded by officers of the French frigate *Floréal* on September 28, 1999, in the EEZ of the French

[1] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, Art. 7, 1833 UNTS 397, *reprinted in* 21 ILM 1261 (1982) [hereinafter LOS Convention].

[2] The facts are summarized in paras. 25–29 of the Tribunal's decision, The "Camouco" (Pan. v. Fr.), Judgment, ITLOS Case No. 5 (Feb. 7, 2000) [hereinafter Judgment]. The Judgment, along with the other case documents cited in this report, are available online at <http://www.un.org/Depts/los/ITLOS/5Camouco.htm>. Where no paragraph numbers appear in an opinion or in the verbatim records, references are to page numbers as they appear in the text downloaded from the Web site by the authors. The page numbers are included for convenience and are not necessarily exact.

[3] Article 292(2) of the Convention authorizes applications for release "by or on behalf of" the flag state. The application was filed "on behalf of Panama" by a Spanish attorney who had been authorized by Panama to do so, although it was accompanied by a communication from the Embassy of Panama in Brussels appointing that attorney as "Agent of Panama." The same attorney represented the owners of the vessel in the French courts. *See* Judgment, *supra* note 2, para. 2; Verbatim Record (Application for Prompt Release) (Jan. 27, 2000), Doc. ITLOS/PV.00/1, at 5 [hereinafter Verbatim Record I]. The fact that the application was filed by the owner's attorney "on behalf of" rather than "by" Panama suggests particular caution in attributing to Panama any interpretations of the Convention and other legal arguments proffered to the Tribunal: this report, accordingly, refers to the "applicant" and, in so doing, reflects the view that the Tribunal could have been more precise in fashioning the title of the case—for example, by using the *ex rel.* formulation used by many municipal courts. It may be recalled that the alternative between filing applications "by" and "on behalf of" the flag state is afforded by the Convention only in the context of Article 292 proceedings, and was a compromise with the views of those who wished direct access in such proceedings by the owner or operator of the ship or representative of the crew. *See* 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, 211–13 (1996).

[4] The majority consisted of President Chandrasekhara Rao, Vice-President Nelson, and Judges Zhao, Caminos, Marotta Rangel, Yankov, Yamamoto, Kolodkin, Park, Bamela Engo, Mensah, Akl, Wolfrum, Laing, Treves, Marsit, Eiriksson, Ndiaye, and Jesus. Judges Anderson and Vukas dissented. Judgment, *supra* note 2, para. 78(3).

[5] Judges Kolodkin, Anderson, Vukas, Wolfrum, Treves, and Ndiaye dissented. *Id.*, para. 78(4).

[6] The applicant requested a translation into Spanish of the decision. The Tribunal did not accede to this request because Spanish was not a language chosen by the parties in their pleadings. *Id.*, para. 77; *see* Art. 64(4) of the Rules of the Tribunal.

[7] *See infra* notes 43–44.

island of Crozet in the French Southern and Antarctic Territories.[8] The officers said they found about six tons of frozen toothfish in the hold. They stated that they observed the *Camouco* letting out a longline over the side in the EEZ, that the *Camouco* did not reply to calls from the frigate, and that it jettisoned documents and forty-eight bags. One bag recovered by the French authorities contained thirty-four kilograms of fresh toothfish. The *procès-verbal* of violation further stated that the *Camouco*'s log revealed that it had previously transited the EEZ of Crozet between July 5 and July 16, 1999, and that it had not been authorized to do so. The master of the *Camouco* was accused of unlawful fishing in Crozet's EEZ, failure to declare entry into the EEZ while having about six tons of frozen toothfish on board, concealment of the vessel's markings while flying a foreign flag, and attempted flight. The *Camouco* and its crew were escorted to the French island of Réunion.

The master stated that he had been fishing south of Crozet's EEZ and then decided to cross it in order to fish at a bank located north of the EEZ. He had faxed the vessel's particulars on September 28 to French authorities but acknowledged that he forgot to fax the particulars on entering the EEZ, even though he knew that French law required such notice by fishing vessels carrying fish on board. He maintained that he never fished in Crozet's EEZ and that he strictly adhered to his contract of employment, which provided for fishing only on the high seas.[9] As for the bag of fresh toothfish recovered by the French authorities, the master said that he was not aware of the presence of any fresh toothfish aboard his vessel and that the bags jettisoned by the crew contained rubbish.[10]

At the request of the public prosecutor, the master was charged on the basis of the earlier *procès-verbal* of violation and placed under judicial supervision (*contrôle judiciaire*)[11] by the examining magistrate (juge d'instruction) of the tribunal de grande instance at Saint-Denis, Réunion. His passport was taken away.[12] On October 8, the chief magistrate of the tribunal d'instance of Saint-Paul, Réunion, at the request of the Regional and Departmental Directorate of Maritime Affairs, issued an order confirming the arrest of the *Camouco* and ordering its release upon the posting of a bond of twenty million francs in cash, certified check, or bank draft.[13]

[8] The *Camouco* had left the Namibian port of Walvis Bay in September 1999 in order to engage in longline fishing in the southern seas. At the time of the arrest, it was owned by Merce-Pesca (S.A.), a Panamanian corporation that was itself owned by two Spanish companies, Pesquera Mellon and Iminal Armadores. There were 29 crew members: 18, including the master, were Spanish nationals; 8 were Portuguese; 2, Chilean; and 1, Namibian. The vessel held a fishing license issued by Panama to Merce-Pesca to fish for "Patagonian toothfish" on the high seas in the South Atlantic.

Between June 1998 and July 1999, the same vessel, then named the *Saint-Jean*, had been chartered by French operators and provisionally registered in the Kerguelen Islands under the French flag. At that time, it was licensed to fish for toothfish in the French EEZ around Crozet, and also received a fishing license issued by French authorities under the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) (May 21, 1980, 33 UST 3476).

There is no indication that the *Camouco* was arrested for fishing in the area to which CCAMLR applies. France did not assert that it was implementing CCAMLR conservation measures, but did note that illegal, unregulated, and undeclared fishing in the EEZ, especially around Crozet, had disastrous consequences. *See* Verbatim Record, (Application for Prompt Release) (Jan. 27, 2000), Doc. ITLOS/PV.00/2, at 7 [hereinafter Verbatim Record II]. This argument may explain Judge Wolfrum's complaint that "the Tribunal should have taken notice of the commonly known fact that the fishing activities such as allegedly undertaken by the *Camouco* undermine the fishing regime established under [CCAMLR] and the conservation measures taken thereunder." Diss. Op. Wolfrum, J., para. 17. It is not clear whether the Tribunal's failure to do so reflected concerns that such an analysis might invite inconclusive debate as to whether environmental protection or economic protectionism explains the enthusiastic enforcement in question; allocation is the central issue in fisheries conservation.

[9] On Oct. 1, 1999, the owners of the vessel sent a fax to the French Departmental Directorate of Maritime Affairs and expressed their surprise at the presence of the vessel in the EEZ of Crozet. They stated that the captain violated his instructions by entering the EEZ, and apologized for the incident. *See* Verbatim Record I, *supra* note 3, Annex 15.

[10] *See id.*, Annex 11.

[11] "Judicial supervision may be ordered by the investigating magistrate if the person under investigation faces a penalty of imprisonment . . . . " Code of Criminal Procedure, Art. 138 (authors' translation).

[12] Except for four members who remained on board to see to the maintenance of the *Camouco*, the crew left Réunion on Oct. 13, 1999. *See* Judgment, *supra* note 2, para. 34.

[13] The Regional and Departmental Directorate of Maritime Affairs estimated the value of the vessel at 20 million francs, although there is no record of any survey. The value of the cargo was estimated at 380 thousand francs. It was decided that the catch itself (7,600 kg. of toothfish) would be sold as provided by French law. *See id.*, para. 69; Verbatim Record I, *supra* note 3, Annex 16.

Following a request for urgent proceedings filed by the master and the ship owner in the tribunal d'instance of Saint-Paul, on December 14 the same chief magistrate confirmed his decision of October 8.[14] The owners had alleged that France violated Article 73(4) of the Convention by failing to promptly notify the flag state. Noting that the value of the vessel did not exceed 5,775,000 francs, they asserted that the required bond was ludicrous (*faramineuse*) and asked the court to reduce it to 4,000,000 francs.[15] Failing such reduction, they warned that they would seek recourse to the Tribunal under Article 292 of the Convention. The chief magistrate ignored the allegations concerning violation of the Convention and declined to explain the basis upon which the bond was calculated.[16] On December 23, 1999, the master appealed to the Cour d'appel of Saint-Denis. That appeal was pending when the application for release was filed with the Tribunal.

France argued that the applicant was estopped from applying to the Tribunal because it had waited more than three months, rather than applying to the Tribunal soon after the expiry of the ten-day period specified in Article 292. Among other things, the applicant replied that the decision to file an application at the international level was made only when the results of the domestic proceedings in Réunion finally revealed that no release would be granted.[17] The Tribunal concluded that Article 292

> does not require the flag State to file an application at any particular time after the detention of a vessel or its crew. . . . It does not suggest that an application not made to a court or tribunal within the 10-day period or to the Tribunal immediately after the 10-day period will not be treated as an application for "prompt release" within the meaning of article 292.[18]

Article 292(3) specifies that a tribunal "shall deal only with the question of release." On these grounds, France successfully challenged the admissibility of allegations that it violated: Article 73(3), which precludes imprisonment for fisheries violations; Article 73(4), which requires prompt notice to the flag state of detention and other actions taken; and provisions relating to freedom of navigation in the EEZ and to abuse of rights.[19]

[14] *See* Verbatim Record I, *supra* note 3, Annex 21.

[15] *See id.*, Annex 19. In its response, the Regional and Departmental Directorate for Maritime Affairs concluded that the defendant did not have standing to invoke Article 73(4). As regards the bond, the directorate relied on the French text of Article 73(2) of the Convention and considered a 20 million franc bond to be *suffisante*. *Id.*, Annex 20; *see infra* note 26 and accompanying text.

[16] In his reasoning, the chief magistrate noted:

> Attendu qu'il appartient au juge saisi de fixer le cautionnement par application des règles fixées à l'article 142 du Code de procédure pénale; qu'il n'a pas à rendre compte des éléments sur lesquels il s'est fondé pour à la fois garantir le paiement des pénalités encourues et garantir la représentation des prévenus en justice, eu égard à la nature des faits.

Verbatim Record I, *supra* note 3, Annex 21. *See* Judgment, *supra* note 2, para. 42.

[17] Although the point was not raised in the proceedings, it is possible that some of the Panamanian officials whose opinions might have been sought before authorizing an application for vessel release to an international tribunal were preoccupied during the fall of 1999 with preparations for the assumption of full control over the Panama Canal at the end of the year.

[18] Judgment, *supra* note 2, para. 54.

[19] *Id.*, paras. 59–60. French law requires fishing vessels entering the EEZ of the French Southern and Antarctic Territories to indicate their presence and declare to the district head of the closest islands what tonnage of fish they have on board. Failure to do so is punishable by a fine of one million francs or a prison sentence of six months, or both. Art. 4 of Law No. 66-400 of June 18, 1966, as amended by Law No. 97-1051 of Nov. 18, 1997; J.O. of June 21, 1966, at 5035; J.O. of Nov. 19, 1997, at 16723; *see* Judgment, *supra* note 2, para. 39.

The underlying question is whether such measures violate the freedom of navigation in the EEZ guaranteed by Article 58 of the Convention, particularly since the elaborate provisions of Articles 61 to 73 of the Convention regarding coastal state rights to regulate fishing in the EEZ say nothing about prior notification of entry into the EEZ. Revealing something less than intimate familiarity with the Convention, the application in its challenge to these measures incorrectly referred to the right of innocent passage in the EEZ. *See* Verbatim Record I, *supra* note 3, para. 92. Even more surprisingly, the application conceded that imposing a fine (and not merely an evidentiary presumption) for failure to advise of entry into an EEZ seemed normal and may form part of the means a coastal state has to control access to its EEZ. The application merely asserted that the fine itself was disproportionate. *See id.*, para. 99. In addition, the application deemed it an abuse of right to establish an irrebuttable presumption that,

France also argued that although the master was under judicial supervision, he was not strictly in detention.[20] Moreover, he had not filed a request for the lifting of judicial supervision before the international proceedings had been instituted.[21] The applicant noted that the investigating magistrate rejected the master's request for release from judicial supervision on the same day it was made.[22] The Tribunal accepted the applicant's view:

> It is admitted that the Master is presently under court supervision, that his passport has also been taken away from him by the French authorities, and that, consequently, he is not in a position to leave Réunion. The Tribunal considers that, in the circumstances of this case, it is appropriate to order the release of the Master.[23]

Although France did not assert that exhaustion of local remedies under Article 295 was required before an application for release could be considered under Article 292, it challenged the admissibility of the application on grounds of *lis pendens*, noting that the purpose of the appeal pending in the French courts was to achieve the same result as that sought before the Tribunal, namely, to overturn the decision of the tribunal d'instance of Saint-Paul rendered on October 8, 1999.[24] The Tribunal disagreed. Recalling that Article 292 proceedings are without prejudice to the merits of the case in the domestic forum, the Tribunal considered it illogical to read into Article 292 the requirement of exhaustion of local remedies or any other analogous rule.[25]

Article 73 of the Convention deals with coastal state enforcement of its fisheries regulations in the EEZ. Paragraph 2 of that article provides, "Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security." Article 226(1)

absent notice of entry into the EEZ, all the fish found on board the *Camouco* were deemed to have been caught in the French EEZ.

In its Statement in Response, France did not address the consistency with the Convention of the notification requirements and related presumptions of French law. During the oral proceedings, however, the French agent noted that French law did not establish an irrebuttable presumption, but a simple presumption, the effect of which was to shift the burden of proof. Verbatim Record II, *supra* note 8, at 11.

[20] *See* Verbatim Record I, *supra* note 3, Annex 17. The bond ordered by the French court related only to release of the vessel. *See* Art. 3 of Law No. 83-582 of July 5, 1983; J.O. of July 6, 1983, at 2065. French statutes do not provide for compulsory bail of an individual placed under judicial supervision. Under French law, judicial supervision is different from, and does not entail, provisional detention pending trial. *See* Code of Criminal Procedure, Art. 144. Although a person under judicial supervision may be required to surrender a passport or post security, the person is not thereby released from judicial supervision. *See* Code of Criminal Procedure, Art. 138(11). The result is similar to that which might obtain in other systems where a foreign defendant is released pending trial on condition that he remain within the jurisdiction and surrender his passport.

[21] According to Article 140 of the French Code of Criminal Procedure, release from judicial supervision may be ordered at any time by the investigating magistrate, whether *sui sponte*, on motion of the public prosecutor, or upon request of the person concerned (the court having received the opinion of the public prosecutor).

[22] Verbatim Record I, *supra* note 3, at 22.

[23] Judgment, *supra* note 2, para. 71.

[24] *See* Verbatim Record II, *supra* note 8, at 14.

[25] Judgment, *supra* note 2, para. 57.

> Article 292 provides for an independent remedy and not an appeal against a decision of a national court. No limitation should be read into Article 292 that would have the effect of defeating its very object and purpose. Indeed, Article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period.

Id., para. 58. Prior to his election to the Tribunal, Judge Anderson stated that "it should not be presumed that Art. 295 is inapplicable, especially where a right of appeal is clearly a real possibility." David H. Anderson, *Investigation, Detention and Release of Foreign Vessels Under the UN Convention on the Law of the Sea of 1982 and Other International Agreements*, 11 INT'L J. MARINE & COASTAL L. 165,170 (1996). Others disagreed at the time. *See* Oxman, *supra* note 3, at 210–11 ("[i]nsofar as vessel release proceedings are concerned, there is no lack of persuasive arguments that Article 295 does not require exhaustion of local remedies . . . and that other provisions of Part XV that might frustrate or delay the proceedings are inapposite"). Although Judge Anderson appears to have moderated his view, he still failed to see how waiting for the result of the appeal could defeat the object and purpose of Article 292 when an applicant seeks a reduction in the amount of the security prescribed on appeal just a few days before seeking the same remedy from the Tribunal. Diss. Op. Anderson, J., at 2. Judge Vukas also disagreed with the majority on the question of *lis pendens*. In addition, he saw no reason for applying to the Tribunal one hundred days after the detention. Diss. Op. Vukas, J., paras. 5–7.

contains a comparable provision with respect to vessels arrested for pollution violations. Under Article 292, the Tribunal may be seized where "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." In the English text, the word *reasonable* is used consistently to refer to the legal standard for bond in the three articles noted. Similarly, the Spanish text consistently uses the adjective *razonable.* Although the French text of Articles 226 and 292 uses the word *raisonnable,*[26] Article 73(2)—the very provision at issue here—uses the adjective *suffisante.*[27] France did not, however, rely on the word *suffisante.* The applicant noted this fact and declared that it was "sufficiently clear that the word used in the Convention, and interpreted in this case, is 'reasonable' as opposed to 'sufficient'."[28] The Tribunal did not address the issue; the judgment uses *reasonable* and *raisonnable.*[29]

The applicant noted that neither the *procès-verbal* of seizure of October 7, 1999, nor the order of the tribunal d'instance of Saint-Paul of October 8, 1999, provided any justification for estimating the value of the vessel at 20 million francs. The order merely noted that this amount was fixed "in the light of the value of the vessel and the penalties incurred." Moreover, in its order of December 14, the Saint-Paul tribunal expressly refused to elucidate the basis for the bond.[30] The applicant asserted that the sum of 20 million francs was unreasonable in light of the value of the vessel (which it estimated to be just under 3.5 million francs) and its cargo (the fish had been sold by the French authorities for about 350 thousand francs), and in light of the maximum fines for the offenses charged under French law (1 million francs, plus 500 thousand francs per ton in excess of two tons). In consideration of the loss already sustained by the owners because of the vessel's detention, the applicant requested that the vessel and master be released without bond[31] or, alternatively, that the security should comprise the 350 thousand francs received by France for the toothfish sold plus a bond of 950 thousand francs.[32] The applicant also requested that the bond be in the form of a bank guarantee rather than the cash, bank check, or certified check required by the French court.

France did not argue that the vessel was worth 20 million francs. Rather, it argued that the required bond was reasonable in the light of the possible fines to be imposed on the master

[26] In Articles 111 and 113 of the Rules of the Tribunal, the words *reasonable* and *raisonnable* are also used in this context.

[27] The authentic texts of the Convention are Arabic, Chinese, English, French, Russian, and Spanish. Convention, Art. 320. The words at issue are Latin-based cognates in English, French, and Spanish. According to Tarek Sayed, the Arabic text uses the same word for *reasonable* in all three articles. Kuo-ching Pu tells the authors that the word used in Chinese in Article 73 is different from the word used in both Articles 226 and 292, and that whereas the latter is properly understood to mean *reasonable,* the former might better be understood to mean *suitable.* Danil Khvedtchik informed the authors that the Russian text of the three articles also contains inconsistencies on this point, but the discrepancy is in Article 226 and may relate to the fact that the clause modified in that article is "procedures such as bonding."

[28] Verbatim Record (Application for Prompt Release) (Jan. 28, 2000), Doc. ITLOS/PV.00/3, at 9 [hereinafter Verbatim Record III].

[29] Judge Anderson does invoke the French text. *See* Diss. Op. Anderson, J., at 5, quoted *infra* note 37.

[30] *See supra* note 16.

[31] This point was ultimately dropped. The Tribunal had previously stated that it could not "accede to the request . . . that no bond or financial security (or only a 'symbolic bond') should be posted. The posting of a bond or security seems to the Tribunal necessary in view of the nature of the prompt release proceedings." M/V "Saiga" (St. Vincent v. Guinea), ITLOS Case No. 1 (Dec. 4, 1997), para. 81, <http://www.un.org/Depts/los/Judgment-Saiga.htm>.

In this context, it might be borne in mind that the duty to release under Articles 73 and 226 applies even if the arrest is lawful, and is expressly dependent upon the posting of bond or other financial security. Article 292 proceedings relate to this duty. The same considerations would not necessarily apply to a request for provisional measures under Article 290—for example, in a case in which the right to arrest and detain is itself contested on the merits. When a municipal court requires a party requesting provisional measures to post bond in a civil case, the purpose is to balance the risks and costs of provisional measures to both parties. The context is different when questions of bail and bond arise in criminal cases, such as those addressed by Articles 73 and 226.

[32] *See* Verbatim Record III, *supra* note 28, at 13.

and also on the owners of the vessel in the event that legal proceedings were instituted against them.[33] The object of the bond was not simply to ensure the payment of fines, but also to ensure appearance and the payment of any damages and interest. Moreover, a large bond would have a deterrent effect in France's struggle against the theft of its resources.[34] France also claimed that the required amount was comparable to that imposed in certain cases by other coastal states in the Southern Hemisphere.[35]

The issue was whether the required bond was reasonable "for the purposes of these proceedings."[36] In making this determination, the Tribunal took into account the gravity of the alleged offense, the penalties imposed or imposable, the value of the vessel and its cargo, and the amount of the bond required by the domestic court.[37] Since no charges had yet been made against the owners of the *Camouco,* however, the Tribunal did not take account of the fines that might be imposed on them. The Tribunal noted that while there was no evidence on record to substantiate the French authorities' assessment of the vessel's value at 20 million francs, the applicant presented uncontroverted expert testimony that the replacement value of the vessel was about 3.7 million francs.[38] The Tribunal concluded that "the bond of 20 million FF imposed by the French court is not 'reasonable'."[39] It decided that a bond or other security in the amount of 8 million francs[40] should be posted with France[41] and, unless otherwise agreed, should be in the form of a bank guarantee.[42]

On March 21, 2000, the civil chamber of the Cour d'appel of Saint-Denis considered the appeal of the order of December 14. Expressly quoting the obligation of the authorities of the detaining state to comply with the decision of the Tribunal under Article 292(4) of the Convention, the Cour d'appel ordered release of the vessel in light of the posting of the bank guarantee of 8 million francs as prescribed by the Tribunal.[43] The Panamanian agent

[33] France explained that the maximum fine that may be imposed upon the master was 5.5 million francs, and that the maximum fine that may be imposed upon the owner as a juridical person was 25 million francs (under French law, five times the amount that might be imposed upon a natural person).

[34] Verbatim Record II, *supra* note 8, at 17.

[35] *Id.* at 16.

[36] Judgment, *supra* note 2, para. 65.

[37] *Id.*, para. 67. Judge Laing believed that the Tribunal should determine a proper international standard and should not seek to enforce the domestic laws of the detaining state. Decl. Laing, J., at 2. Judge Ndiaye was of the view, however, that the laws and regulations of the coastal state are the point of reference for determining the reasonableness of the bond. Decl. Ndiaye, J. Invoking the French version of Article 73(2), Judge Anderson wrote, "What is 'reasonable' is an amount *suffisant/sufficient* to cover penalties which could be imposed upon conviction." Diss. Op. Anderson, J., at 5. Accordingly, in his view the bond should have taken full account of the gravity of the charges and the penalties imposable on the owners. *Id.*

[38] Judgment, *supra* note 2, para. 69.

[39] *Id.*, para. 70.

[40] *Id.*, para. 74. Judge Treves, although not defending the 20 million franc figure, believed that 8 million was too low. Diss. Op. Treves, J., para. 9. Judge Wolfrum agreed, and complained that the majority did not give an appropriate indication of the basis on which it assessed a bond set by national authorities. He believed that the Convention does not impose a limit on the size of fines a coastal state may exact, and argued that the Tribunal had impinged upon the enforcement rights of France under Art. 73(1) by setting a bond that was not even half of what was ordered by the French court. Diss. Op. Wolfrum, J., paras. 3, 6, 8, 16. It is not clear whether any of the judges considered whether some limitation is implied by the authorization in Article 73(1) to take such measures "as may be necessary" to ensure compliance with laws and regulations that must themselves conform to substantive criteria of the Convention, or by the prohibition on abuse of rights in Article 300, or, indeed, as a practical if not legal matter, by the requirement that the ship and crew be released promptly on bond that must be reasonable and that, if contested, can be set quickly by an international tribunal pursuant to a new international procedure. Of the weaknesses that might be discerned among those who participated actively in the negotiation of the Convention, naiveté is not the most obvious.

[41] Citing Art. 113(3) of its Rules, the Tribunal denied the applicant's request that the bond should be posted with the Tribunal, to be delivered to France.

[42] Judge Anderson did not consider it unreasonable for the French court to have ordered the security to be provided in cash. Diss. Op. Anderson, J., at 6.

[43] Société Merce-Pesca SA v. Etat français, Judgment of Mar. 21, 2000, CA Saint-Denis, ch. civ., Case No. 267/2000 (on file with authors).

informed the Tribunal on March 23 that the vessel had been released the previous day, and on March 24 that the master's passport had been returned.[44]

* * * *

In its second prompt-release case, the Tribunal once again demonstrated its capacity for swift action. In these cases, the Tribunal is, quite rightly, functioning primarily as an efficient and effective adjudicator of petitions to be set free in the most literal sense, and properly continues to resist the invitation to give primacy to formulating finely framed dictum explicated *in extenso.*

Those who argue that the outcomes of cases often reflect the substantive predispositions of the judges' states of nationality will again be surprised by the Tribunal: the decision reveals substantially the opposite of what those so inclined might have expected in a case challenging a bond fixed by the coastal state in a fisheries arrest. The majority included most judges from countries that might be regarded as particularly sympathetic to coastal state claims to discretionary control over fisheries, whereas the dissent included judges from European (but not Asian) countries that are at times more restrained about such claims. In addition, it can be argued that regional factors were irrelevant because the dispute was in substance between France and a Spanish fishing company.[45]

The Tribunal adopted a balanced approach that neither requires nor discourages exhaustion of local remedies in the context of prompt-release proceedings under Article 292. As in the instant case, one may await the outcome in municipal trial courts and even file a timely appeal of that outcome to a higher municipal court, without prejudice to the right of the flag state to petition the Tribunal for release at any time after the ten-day waiting period. The Tribunal correctly concluded that a compulsory delay to await the outcome of a pending appeal in a municipal court would defeat the purpose of Article 292. Indeed, that article expressly commands the Tribunal to proceed "without delay."

Suspending the right of the flag state to petition the Tribunal for release while municipal court proceedings are pending could, by forcing a choice, have the perverse effect of discouraging full use of local remedies; the ultimate effect might even be to preclude use of local remedies if, for example, the time limit for filing an appeal in municipal court were to expire before the Tribunal rendered its decision. It could also have the odd effect of permitting attorneys for private parties in municipal court, perhaps because of a difference in priorities or strategy, to frustrate a decision by a flag state to seek prompt release in an international forum. This merely serves to illustrate the reasons for doubting that the situation presented is one of *lis pendens* at all. Both the parties and the issues before a municipal court, even in a dispute over bond, are not necessarily the same as those before an international tribunal.[46] In the instant case, whatever the status of treaties under French municipal law, it is clear that the French courts were applying French statutes—which, indeed, is their duty—in proceedings to which Panama was not party.

In cases challenging the amount of bond fixed by a municipal court, an underlying issue concerns the municipal judge's scope of discretion in applying municipal law when that same judge (or at least the state) is also bound to comply with a standard set forth in a supervening international instrument, in this case a less than fully determinate standard of

[44] Letters of March 23, 2000, and March 24, 2000, from the agent of Panama to the registrar of the Tribunal (on file with authors).

[45] Some skeptics might argue, however, that the case was brought on behalf of Panama, not Spain, and that all the judges from the European Union dissented on the central issue of the amount of the bond. Even so, the disagreement of Judge Treves and perhaps Judge Wolfrum with the *dispositif* seems to be over a relatively small difference in the amount. *See* Diss. Op. Treves, J., para. 9; Diss. Op. Wolfrum, J., para. 8.

[46] The International Court of Justice has pointed out that an international tribunal applies different law to different parties even when, in essence, the same claim had been made before a domestic court. *See* Elettronica Sicula S.P.A. (Elsi) (U.S. v. Italy), Judgment, 1989 ICJ REP. 13, para. 59.

reasonableness. But unlike a few dissenters, the Tribunal seems to have viewed the issue here not so much as one of wondering how much deference is due the municipal judge's appreciation of the Convention's criteria in the context of this case, but as one of determining whether the municipal judge applied the Convention at all.

Although treaties prevail over statutes under French law,[47] and the public prosecutor, as well as the master and the owner, referred to the Convention in their submissions, the chief magistrate of the tribunal d'instance had nothing to say about the Convention or his reasoning thereunder. Instead, he expressly declined to indicate his reasoning even under French statutes, recalling that, under the Code of Criminal Procedure, it is for the judge to set the bond, and he is not required to give an account of the considerations on which he based his decision.[48] It would appear that the judge was either unaware of, or unmoved by, the need to ensure compliance with the Convention's requirement of reasonable bond or, for that matter, the practical desirability—in a case that might well be considered by an international tribunal—of affording the latter tribunal some basis for understanding, and therefore deferring to, the reasoning of the municipal court.[49]

The Tribunal's opinion reflects the view that the Convention's requirements and standards for bonding are autonomous and do not depend on municipal law.[50] Its decision to order release of the master, whose passport was taken but who was not in jail, reflects the view that release on bond under the Convention includes freedom to leave the country. These views, in turn, reflect an informed understanding of the purpose of the Convention's provisions regarding release on bond.[51] Although the opinion failed to reveal precisely how the amount of the bond was determined, the Tribunal did identify the factors it took into account, and may well identify additional criteria in future cases in light of their particular facts. What constitutes "reasonable" bond is a highly fact-specific issue.[52] The question is whether the end result in a given context reasonably balances the right to prompt release with the right to try and punish.[53]

[47] CONST., Art. 55; *see* Administration des Douanes c. Société "Cafés Jacques Vabre," Judgment of May 24, 1975, at 497, Cass. ch. mixte, 1975 Bull. Civ. IV, No. 4, D. 1975, JCP 1975 II; *In re* Nicolo, Decision of Oct. 20, 1989, D. 1990, 135, JCP III, No. 21, at 371 (1989), 25 Revue Trimestrielle de Droit Européen 786 (1989).

[48] *See supra* note 16. This conclusion is not obvious under French law. "Méconnaît l'art. 142 la décision qui se borne à ordonner un cautionnement sans précision de son affectation." Judgment of Oct. 13, 1988, Cass. crim., 1988 Bull. Crim., No. 257. Article 142 of the Code of Criminal Procedure provides:

> When the person under investigation is required to furnish security, such security guarantees: (1). The appearance of the accused, whether charged or not, at all stages of the proceedings and for the execution of judgment, as well as, where appropriate, the execution of other obligations which have been imposed upon him. (2) . . . Payment, in the following order of: (a). reparation of damages caused by the offense and restitution . . . (b). fines. The decision that compels the defendant to furnish security shall determine the sums assigned to each of the two parts of the security.

In the latter case, "ce montant et ces délais doivent être fixés compte tenu notamment des ressources de l'inculpé." Code of Criminal Procedure, Art. 138(11).

[49] Some dissenting judges referred to the practice of the European Court of Human Rights in according a margin of appreciation to municipal authorities. *See* Diss. Op. Anderson, J., at 1 (national courts should be accorded a broad margin of appreciation); Diss. Op. Wolfrum, J., para. 14 (the Tribunal should restrict itself to ascertaining whether the decision of the national court was unlawful under international law, or arbitrary, or made in bad faith). The analogy is not fully developed; in at least some respects, it may be inapposite. Moreover, the European Court takes care that the margin is not "excessive." *See* Letelier v. France, 207 Eur. Ct. H.R. (ser. A) 1991.

[50] Thus, for example, the Tribunal did not order that the bond be in the form of cash or a certified or bank check, notwithstanding the requirements of French law. *See* Code of Criminal Procedure, Arts. R.19–.23; Judgment of Apr. 23, 1991, Cass. crim., 1991 Bull. Crim., No. 191 ("le cautionnement ne peut être versé que par chèque certifié ou en espèces").

[51] *See supra* note 20.

[52] Vice-President Nelson considered that what is reasonable and equitable must depend on the particular circumstances of the case (citing Interpretation of the Agreement of Mar. 25, 1951 Between the WHO and Egypt, Advisory Opinion, 1980 ICJ REP. 73, para. 49 (Dec. 20)). Sep. Op. Nelson, V.P., at 2.

[53] In another context, see Continental Shelf (Tunis./Libyan Arab Jamahirya), Judgment, 1982 ICJ REP. 18, paras. 70–71 (Feb. 24): "It is, however, the result which is predominant; the principles are subordinate to the goal. . . . While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion."

In the United States, state courts have long been aware that well-reasoned decisions evaluating the state interests that must be taken into account in determining the scope of federally protected rights can help to elicit deference to state law from the U.S. Supreme Court. Municipal courts in Europe are also learning that well-reasoned decisions are more likely to elicit deference from regional international tribunals, be it in the context of the principle of subsidiarity in the European Community or in the context of the margin of appreciation under the European Convention on Human Rights. If nothing else, this case may help nurture a similar attitude in municipal courts generally, at least with respect to treaty obligations that may well be invoked before an international tribunal with compulsory jurisdiction.[54]

Notwithstanding the delay in instituting proceedings in the present case, the need for urgency in prompt-release cases makes it likely that only the decision of a municipal trial court, and not that of an appellate court, will ordinarily be available at the time the Tribunal is seized. Although trial courts are accustomed to the idea that their decisions will be reviewed, they are also accustomed to the considerable freedom afforded them by appellate courts on certain matters. It is likely that appellate courts, once they articulate the relevant considerations and standards, only episodically manifest an interest in fact-sensitive "trial management" matters such as bond. The underlying point of this case is that the Tribunal is not a municipal appellate court applying municipal law.

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

Maritime delimitation between opposite states—traditional "artisanal" fishing regimes—transboundary nonliving resources—interpretation of prior award—straight baselines—effect of coastal and midsea islands

ERITREA-YEMEN ARBITRATION (AWARD, PHASE II: MARITIME DELIMITATION). *Obtainable from* <http://www.pca-cpa.org>.
Arbitral Tribunal, December 17, 1999.

On December 17, 1999, the Arbitral Tribunal (Tribunal), convoked by Eritrea and Yemen in the Arbitration Agreement of October 3, 1996, and comprising Judges Rosalyn Higgins and Stephen Schwebel, appointed by Eritrea, Dr. Ahmed El-Kosheri and the late Keith Highet, appointed by Yemen, and Sir Robert Jennings, presiding, delivered the second award in a process that the parties had elected to conduct in two stages. In the first stage, the Tribunal addressed territorial sovereignty and the scope of the dispute.[1] The second and final award, reviewed here, addressed maritime delimitation. Unfortunately, the pleadings have not been published, and the student must rely on the Tribunal's brief summaries of them.

[54] The absence of *transparency* is again raised with reference to a judicial opinion, albeit this time to decry a lack of adequate reasoning in the decision of the municipal court, rather than in the Tribunal's Judgment. *See* Diss. Op. Wolfrum, J., para. 16; M/V "Saiga," *supra* note 31, Sep. Op. Wolfrum, V.P., para. 2, <http://www.un.org/Depts/los/ITLOS/SO_Saiga_Wolfrum.htm>. It might be noted in this regard that a reasoned judicial opinion is not necessarily the same thing as a transparent one. Consider, for example, the classically concise style of French decisions. Some courts, such as the European Court of Justice, give no indication of dissent and do not publish separate or dissenting opinions. Even courts that write voluminous majority and dissenting opinions are not immune to suspicions of a lack of candor. The rarity of complaints about the confidentiality of judicial deliberations following public proceedings suggests that transparency in the reasoning process itself is not necessarily regarded as desirable. It may be noted that Article 42 of the Rules of the Tribunal, based on Article 21 of the Rules of Court of the International Court of Justice, specifies that the deliberations of the Tribunal "shall take place in private and remain secret" and that the "records of the Tribunal's judicial deliberations shall contain only the title or nature of the subjects or matters discussed and the results of any vote taken" and "shall not contain any details of the discussions nor the views expressed, provided however that any judge is entitled to require that a statement made by him be inserted in the records."

[1] The author reported on the first stage in 93 AJIL 668 (1999).