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Prompt Release Obligation in the Jurisprudence of the International Tribunal for the Law of the Sea

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Prompt Release Obligation in the Jurisprudence of the International Tribunal for the Law of the Sea

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In accordance with Article 292 of the UNCLOS 1982, the International Tribunal for the Law of the Sea shall in its judgment determine in each case whether or not the allegation made by the applicant that the detaining State has not complied with a provision of the Convention for the prompt release of the vessel or the crew upon the posting of a reasonable bond or other financial security is well-founded. Because the 1982 Convention bestows extended jurisdiction on coastal States - a jurisdiction reaching far beyond the territorial seas - this new procedural safeguard of Article 292 is said to have been incorporated as a *quid pro quo* in order to safeguard the interests of the shipping nations. The present paper is an attempt to observe how Article 292 is in fact interpreted and applied by the ITLOS in the nine prompt release cases filed before it to date. The main thrust of the paper is to examine whether the overriding purpose of Article 292, that is, to serve as a compromise between the conflicting interests of the coastal and the flag states is fulfilled.

I. Introduction

The 1982 United Nations Convention on the Law of the Sea (UNCLOS)[1] imposed an obligation on States Parties to settle disputes by peaceful means and, in particular, also provides for compulsory procedures with binding decisions. The International Tribunal for the Law of the Sea, composed of twenty-one judges representing the principal legal systems of the world, is one of the means for the settlement of disputes entailing such decisions. The jurisdiction of the Tribunal, in principle, includes any dispute relating to the law of the sea, subject to certain limitations and optional exceptions. The Tribunal has compulsory jurisdiction in two instances: provisional measures and the prompt release of vessels and crews.[2]

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[1] United Nations Convention on the Law of the Sea, Dec. 10, 1982, annex VI, 1833 U.N.T.S. 3, 561.

[2] Helmut Tuerk, "The Contribution of the International Tribunal for the Law of the Sea to International Law", (2007) 26 *Penn St. Int'l L. Rev*. 289, at 290.

Of the fifteen cases decided to date by the ITLOS, nine are prompt release cases.[3] In chronological order they are: the M/V Saiga case,[4] the Camouco case,[5] the Monte Confurco case,[6] the Grand Prince case,[7] the Chaisiri Reefer 2 case,[8] the Volga case,[9] the Juno Trader case,[10] the Hoshinmaru case,[11] and the Tomimaru case.[12] In its fifteen years of existence the Tribunal has established a reputation for the expeditious and efficient management of cases and already has made a substantial contribution to the development of international law, in particular the law of the sea.

This prompt release obligation under Article 292 of the Convention introduced a totally new procedure,[13] previously unknown in international law and not followed since. Because the 1982 Convention bestows extended jurisdiction on coastal States in areas like fisheries and environmental protection - a jurisdiction reaching far beyond the territorial seas which hitherto formed the traditional maximum seaward extension of such competence - this new procedural safeguard of Article 292 is said to have been incorporated as a *quid pro quo* in order to safeguard the interests of the shipping nations.[14]

The novel character of the prompt release procedure, and probably also the specific rights it tries to protect, led some scholars to predict, quite correctly as it later turned out, that this particular procedure "may even become one of the main attractions of the Tribunal." Because nearly two thirds of the judgments rendered by the ITLOS to date concern Article 292 prompt release procedures, it is appropriate to examine closely this practice in order to appreciate how the Tribunal has refined the rudimentary provisions in its founding document and rules of procedure. This paper will first of all analyze the relevant legal framework in relation to the prompt release procedure, that is, Article 292, in the light of the main provision in the UNCLOS imposing prompt release obligation, that is, Article 73. The main part of the paper will address the major issues in the prompt release procedure, namely: jurisdiction, objections to admissibility, reasonableness of the bond or security, and the impact of

[3] There are18 cases in the docket of the ITLOS to date. Two are pending cases and one is a request for Advisory Opinion to the Sea Bed Chamber. The remaining 15 cases are already decided by the Tribunal.

[4] The M/V Saiga Case (Saint Vincent and the Grenadines v. Guinea), Judgment of December 4, 1997, Prompt Release, 1997 ITLOS Case No. 1.

[5] The Camouco Case (Panama v. France), Judgment of February 7, 2000, Prompt Release, 2000 ITLOS Case No. 5.

[6] The Monte Confurco Case (Belize v. France), Judgment of April 20, 2001, Prompt Release, 2001 ITLOS Case No. 6.

[7] The Grand Prince Case (Belize v. France), Judgment of April 20, 2001, Prompt Release, 2001 ITLOS Case No. 8.

[8] The Chaisiri Reefer 2 Case (Panama v. Yemen), Judgment of July 3, 2001, Prompt Release, 2001 ITLOS Case No. 9.

[9] The Volga Case (Russian Federation v. Australia), Judgment of 23 December 2002, Prompt Release, 2002 ITLOS Case No. 11.

[10] The Juno Trader Case (Saint Vincent and the Grenadines v. Guinea-Bissau), Judgment of 18 December 2004, Prompt Release, 2004 ITLOS Case No. 13.

[11] The Hoshinmaru Case (Japan v. Russian Federation), Judgment of 6 August 2007, Prompt Release, 2007 ITLOS Case No. 14.

[12] The Tomimaru Case (Japan v. Russian Federation), Judgment of 6 August 2007, Prompt Release, 2007 ITLOS Case No. 15.

[13] See, e.g., Eli Lauterpacht, The First Decision of the International Tribunal for the Law of the Sea: The M/V SAIGA, in Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday 395, 395 (Gerard Hafner et al. eds., 1998); Shabtai Rosenne, International Tribunal for the Law of the Sea: 1996-97 Survey, 13 Int'l J. Marine & Coastal L. 487, 504 (1998).

[14] Rainer Lagoni, The Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea: A PrePtory Report, 11 *Int'l J. Marine & Coastal L*. 147, 148 (1996).

confiscation of vessel on prompt release procedure. Finally, the article's conclusion emphasizes that the Tribunal has, case after case, narrowed down the ambiguity surrounding the prompt release procedure without, however, having so far revealed all of its mysteries and that despite the potential of Article 292 to serve as a compromise between coastal and flag States' interests, the coastal States naturally are in a position to tip the balance in their favour.

II. Jurisdiction

Several procedural conditions must be met for a flag State to make an application for the release of a vessel under Article 292. Questions of jurisdiction and admissibility are not addressed in a separate phase. The accelerated procedures anticipated in the Convention and the Tribunal's Rules on the prompt release of vessels necessitates that these challenges be raised and resolved as part of the submissions on detention and conditions of release of the vessel.

The requirements to be satisfied in order to found the jurisdiction of the Tribunal are provided for in Article 292, which, among others, reads as follows:

> 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….[15]

In determining the question of 'jurisdiction,' the Tribunal usually examines the following four factors:

(1) That the parties to the proceedings are States Parties to the Convention;
(2) That the parties did not agree to submit the question of release from detention to another court or tribunal within ten days from the time the vessel was detained;[16]
(3) That the applicant State is the flag State of the vessel detained; and
(4) That the applicant alleges that the detaining State has not complied with the provision of the Convention for the prompt release of the vessel.

[15] 1982 Convention, above note 1, Article 292 (1), (2) and (3).
[16] The UNCLOS 1982, article 292(1).

A. Jurisdiction *ratione personae*: By or on behalf of the flag State

Can private individuals, or corporations have a direct access to ITLOS in prompt release procedure under Article 292? The answer is in the negative. Only States are parties in prompt release procedures. The application for prompt release, therefore, may be made *only by or on behalf of the flag State* of the vessel.[17] When a coastal state detains a flag state's vessel and crew, the flag state or a person or entity authorized by the flag State as its agent may file an application at the ITLOS to order their prompt release under Article 292 of Convention.[18]

Although a flag state may raise these prompt release guarantees before the ITLOS or other tribunals, detained individuals have no assured access to courts. During the UNCLOS III negotiations, some delegations favored giving individuals access to the ITLOS in prompt release cases. For example, the United States advocated allowing "the owner or operator of any vessel detained by any state" to "bring the question of the detention of the vessel before the Tribunal in order to secure its prompt release." [210] According to the compromise language of Article 292, however, "the application for release may be made only by or on behalf of the flag State of the vessel." [211] To initiate an Article 292 prompt release application, either the flag state must bring it or the flag state must designate the vessel captain, the vessel owner, a shipping association, or some other entity to do so.

If states are the only entities that can bring prompt release applications, fewer applications would likely be filed. Many states will choose not to pursue disputes on behalf of private interests, either diplomatically or in litigation before the ITLOS. A state's foreign affairs office may prefer that vessel owners or captains pursue their own claims in the coastal state's courts or that they appeal to the coastal state's government officials. States are often reluctant to bring claims against other states, even if they are meritorious or implicate important "State interests," for fear of upsetting friendly relations or disrupting negotiations on other matters. Such concerns may likewise deter states from approving individual access in prompt release cases.

The decisive factor in determining jurisdiction of ITLOS in prompt release cases is whether the applicant is the flag State of the vessel. While the detaining State may question the ownership of particular vessels, as happened in the *M/V Saiga* and the *Volga*, the Tribunal will have jurisdiction under Article 292 if the applicant State is the flag State of the vessel at the time the application is made.[19]

The issue of whether the applicant State was the flag State of the vessel was central and decisive in the *Grand Prince*. The Grand Prince was a fishing vessel flying the flag of Belize when it was arrested in the EEZ of France by a French frigate on 26 December 2000. The vessel and crew were escorted to France where the Master was charged with failure to announce entry into the EEZ as well as fishing without authorization in the EEZ. The Master admitted the violations. At the conclusion of the criminal proceedings, Belize filed an application under Article 292 at ITLOS.

The Tribunal raised *proprio motu* the question of whether Belize was the flag State of the Grand Prince for the purposes of filing the application. This question was relevant because

[17] Article 292 (2), the UNCLOS 1982.

[18] J. E. Noyes, "The International Tribunal for the Law of the Sea", (1998) 32 *Cornell Int'l L.J.* 109, at 141.

[19] Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge University Press (2005), 88.

the vessel had been issued a provisional patent of navigation which expired on 29 December, 2000. Although Belize was clearly the flag State at the time of the arrest of the vessel, the issue was whether it was the flag State when the application was filed on 21 March 2001. Belize relied, among others, on a letter from the Attorney General authorizing the Agent to institute the proceedings before ITLOS in which the vessel was described as "of Belize flag". France drew the Tribunal's attention to a *note verbale*, dated 4 January 2001, in which the Ministry of Foreign Affairs of Belize notified the Embassy of France that in light of the second reported violation committed by the vessel, the punitive measure being imposed was its de-registration effective the day of the note.

The nationality of ships is governed by Article 91(1) of the UNCLOS 1982 which reaffirms the principle that "there must exist a *genuine link* between the State and the ship."[20] In accordance with its decision in *M/V Saiga (No. 2)*, the Tribunal noted that the conduct of the flag State at all times material to the dispute was an important consideration.[21]The majority of the Tribunal effectively accorded more weight to the *note verbale* as an official government communication than to the other documents. The conclusion reached was that Belize did not act at all time material to the dispute as flag State and that accordingly it did not have jurisdiction to determine the application.[22] Although the dissenting judges took the contrary view,[23] the clear ruling of the majority of the Tribunal reaffirms the genuine link principle without solely relying on the claim of the State in question.

B. Posting of bond: not a precondition to a prompt release application

The issue as to whether an applicant State must post a bond prior to the institution of proceedings under Article 292 in order to exercise jurisdiction was addressed in the *M/V Saiga*. In that case Saint Vincent and the Grenadines had not offered Guinea any bond or financial security. Instead, the applicant State applied to the Tribunal for release of the vessel while indicating that it was prepared to provide any security reasonably imposed by the Tribunal to the Tribunal itself.[24] Guinea argued that since Saint Vincent and the Grenadines had not paid any bond, an application could not be instituted under Article 292. The Tribunal, however, was of the view that the posting of the bond was not a precondition of the applicability of Article 292.[25]

France also argued in the *Camouco* that the allegations under Article 73 are not well founded on the basis that no bond or other security had been posted and this act was a necessary condition to be satisfied before a vessel and its crew could be released.[26] The Tribunal referred back to its ruling in the *M/V Saiga*.[27] In addition, the Tribunal could look to Article 292(4), which reads: "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." This provision allows for the possibility that a bond would not be paid prior to the order of the court or tribunal and thus would not a prerequisite for an application under Article 292.[28]

[20] Article 91(1), the UNCLOS 1982.
[21] The *Grand Prince*, para. 89 (Citing *MV Saiga (No. 2)* Para 68).
[22] Ibid. paras 89 and 93.
[23] Ibid. Dissenting Opinion of judges, para. 14.
[24] The *M/V Saiga*, Prompt Release, para. 23.
[25] Ibid., para. 76.
[26] *The Camouco*, para. 62.
[27] Ibid., para. 64.
[28] Natalie Klein, above note 25, 94.

Nevertheless, the posting of a bond or financial security was essential for the release of the vessel and thus could not be waived in its entirety in view of the nature of the prompt release proceedings.[29]

III. Admissibility

In addition to objections to the jurisdiction of the Tribunal, the detaining State may raise various challenges to the admissibility of an application. Issues outside the scope of the specific provisions on prompt release are inadmissible for purposes of Article 292 procedures. The timing of the application, problems of *lis pendens* and the requirement to exhaust local remedies were all argued by France as reasons to find an application inadmissible under Article 292 in the *Camouco* case.

A. Inadmissibility of questions besides the release of the vessel

The seizure of a vessel for violation of fisheries or environmental laws might provoke challenges relating to different provisions of the Convention that go far beyond the requirements to release a vessel or its crew promptly upon posting of a reasonable bond. The ITLOS has to date strictly adhered to the limits of its jurisdiction under article 292 and refused to consider questions that could be viewed as incidental to the arrest of vessels and crew. Nor has the Tribunal allowed challenges to the exercise of enforcement jurisdiction or hot pursuit to colour its consideration of what constitutes a reasonable bond.

In the *Camouco,* for example, Panama argued that France had violated paragraphs 3 and 4 of Article 73. These paragraphs provide that the coastal state cannot prescribe imprisonment or corporal punishment as penalties for violations of fisheries laws in the EEZ and that the coastal state is required to notify promptly the flag state of actions taken and penalties imposed in cases of arrest or detention of vessels. The Tribunal did not consider that these provisions could be challenged through the Article 292 proceedings since these were not provisions "for the prompt release of the vessel and its crew upon the posting of reasonable bond or other financial security." As such Panama's claims under these paragraphs were deemed inadmissible.[30]

The Tribunal similarly refused to deal with the questions relating to Article 73 (3) and (4) relating to the detention of the Master and the need to provide proper notification of the arrest respectively in the *Monte Confurco*.[31] These submissions were again deemed to be inadmissible as ITLOS was only to address non-compliance with Article 73 paragraph 2 of the Convention.[32]

The above rulings of the Tribunal clearly indicates that the Tribunal has opted to read article 292 narrowly in order that the only issues to be resolved concern the actual release and the question of bond. Other issues that could be related to those questions such as: questions of fairness of trial of a Master of the vessel, use of force employed in arresting the vessel, the validity of fishing laws and regulations being enforced, will be outside the scope of proceedings under Article 292. The Tribunal also will not trespass on other questions that

[29] The *M/V Saiga,* Prompt Release, para. 81
[30] The *Camouco*, Prompt Release, para. 59.
[31] The *Monte Confurco*, Prompt Release, para 63.
[32] The Tribunal's holding was unanimous on this point.

could, or should, be resolved in separate merits proceedings under the Convention. The *M/V Saiga*[33] and the *Volga*[34] are good examples.

B. Impact of domestic courts proceedings

The parallel nature of Article 292 cases and domestic court proceedings have led to questions of the timing of the application, *lis pendens*, abuse of process, and whether domestic proceedings should have been exhausted. The key factor in these decisions is that Article 292 provides for a discreet procedure that does not preempt a national court's determination of the merits of the dispute.

The delay in prompt release application: not a valid objection to admissibility

In the *Camouco*, France claimed that Panama had waited more than three months since the seizure to file the application before ITLOS and this delay amounted to an estoppel against Panama.[35] The applicant on the other hand argued that there was no time limit for making an application under Article 292, that in any event, there had not been any delay on its part because it was only on 14 December 1999 when the court of first instance made an order confirming its earlier order, that it came to know in a definitive manner that the sum to be secured by a bond was 20 million FF, and that it was then that it took a decision to approach the Tribunal.[36]

The Tribunal decided that there was no merit in arguments based on the delay in bringing the matter before ITLOS and that Article 292 did not require the flag state to file an application within any specified period of time following the detention of a vessel and its crew.[37]

Lis pendens: not *a valid objection to admissibility*

An application for prompt release under Article 292 during the pendency of domestic court proceedings also raises the issue of whether the principle of *lis pendens* renders the dispute inadmissible. For *lis pendens* to apply there must be identity of parties, of claims, and of object.[38] There can be no strict application of *lis pendens* between the prompt release proceedings and the domestic court processes because the parties and bases of claims will not be identical.[39]

Exhaustion of local remedies: not a requirement for admissibility

It is an established rule of customary international law that an injured natural or legal person must exhaust remedies in the State, which committed the internationally wrongful act, before its national State can bring an international claim on its behalf.[40] As this principle is a fundamental rule of State responsibility, it is applicable even in law of the sea cases and in that respect Article 295 of the UNCLOS 1982 provides as follows:

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[33] The *M/V Saiga*, Prompt Release, para. 50.
[34] The *Volga*, Prompt Release, para. 32.
[35] The *Camouco*, Prompt Release, para. 51.
[36] The *Camouco*, Prompt Release, para. 52.
[37] Ibid., para 54.
[38] See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987) 340.
[39] Natalie Klien, above ntoe 25, 100; The *Camouco*, Dissenting Opinion of Judge Vukas, at 3-4.
[40] See Article 44 (b), Articles on State Responsibility, 2001. See also K. Doehring, "Local Remedies: Exhaustion of", (1997) III *EPIL*, 38-242.

> Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted *where this is required by international law*.[41]

Article 292 cases also involve the relationship between the ITLOS and national courts. To what extent will the ITLOS defer to a national court in a prompt release case? The Law of the Sea Convention requires a party pursuing a claim involving the interpretation or application of the Convention first to exhaust local remedies "where this is required by international law." But the preference for states to address their own "internal" problems in their own courts before "elevating" the dispute to an interstate confrontation does not apply with respect to Article 292 prompt release cases. The Law of the Sea Convention explicitly authorizes the submission of prompt release applications to the ITLOS when a coastal state fails to release the vessel or its crew on the posting of a reasonable bond, and when the parties do not agree on another court or tribunal to hear the question of release within "10 days from the time of detention." Article 292 does not preempt national courts from ruling on the underlying merits of the dispute and subsequent arrest. The negotiators at UNCLOS III understood that the exhaustion of local remedies rule "was not likely to apply in cases relating to the prompt release of vessels,"[42]

In the *Camouco*, an objection to admissibility pleaded by the Respondent is that domestic legal proceedings are currently pending before the court of appeal, whose purpose is to achieve precisely the same result as that sought by the present proceedings under article 292 of the Convention.[43] The tribunal rejected the objection and expressed its view that:

> It is not logical to read the requirement of exhaustion of local remedies or any other analogous rule into article 292. Article 292 of the Convention is designed to free a ship and its crew from prolonged detention on account of the imposition of unreasonable bonds in municipal jurisdictions, or the failure of local law to provide for release on posting of a reasonable bond, inflicting thereby avoidable loss on a ship owner or other persons affected by such detention.[44]

The Tribunal finally concluded that:

> 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.[45]

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[41] Article 295, the UNCLOS 1982 [emphasis added].

[42] 5 United Nations Convention on the Law of the Sea 1982: A Commentary p. 295.7 (Shabtai Rosenne & Louis B. Sohn eds., 1989); 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," (1996) 11 *Int'l J. Marine & Coastal L*. 165, at 170, 177.

[43] The *Camouco*, Prompt Release, para. 55.

[44] Ibid., 57.

[45] Ibid. 58.

That decision on merits has already been made by domestic courts: a valid objection to admissibility

Another question is whether the final decision of the domestic courts on merits is regarded as a block to an application of prompt release under Article 292. This issue arose in the *Grand Prince* although it was unfortunate that the Tribunal did not have the opportunity to consider the issue. In that case, the court of first instance confirmed the arrest of the Grand Prince. Eleven days after this decision, the criminal court found that the Grand Prince had entered the EEZ without giving notice of its entry or declaring the tonnage of fish on board, engaged in illegal fishing, and that the master had knowingly engaged in illegal fishing. The court fined the Master and ordered the confiscation of the vessel and that the order should be immediately enforceable notwithstanding the lodging of an appeal.

After the decision, Belize submitted an application to ITLOS under Article 292 of the Convention. Belize alleged that France had evaded the requirement of prompt release by the '*prompt confiscation*' of the vessel, which amounted to a 'trick' or a 'fraud of law' as it would render Article 73 redundant.[46] On the contrary, France argued that it was no longer possible for Belize to file an application under Article 292, as the competent domestic forum had delivered judgment on the merits and ordered the confiscation of the vessel.[47] As the Tribunal decided it lacked jurisdiction because Belize was no longer the flag State of the detained vessel at the time of its application. There was no consideration of this question in the Tribunal's order.[48]

Be that as it may, in view of the object and purpose of Article 292, it would be inappropriate for an international court to order prompt release of a vessel when a decision on merits has already been reached before domestic courts. Article 292 provides a procedure for the question of release from detention and is "without prejudice to the merits of any case before the appropriate domestic forum."[49] It is clearly an interim proceeding and it allows the vessel to continue its business while the legal processes are in progress. Detention ends wha

The impact of confiscation

The impact of confiscation on prompt release procedure under Article 292 was addressed at length by ITLOS in the recent case of the *Tomimaru*.[50] Although the *Tomimaru* case was the third occasion on which the detaining state challenged a prompt release application on the ground that the fishing vessel had been confiscated, this case was the first in which the Tribunal faced the issue squarely.[51]

The Trawler Tomimaru was a fishing vessel owned by a company registered in Japan. At the time of detention in the EEZ of Russian Federation for violations of Russian fisheries laws on 31 October 2006, it was flying the flag of Japan. On 19 December 2006, the City Court of Russia decided to confiscate the vessel. The District Court confirmed the decision on 6

[46] The *Grand Prince*, Prompt Release, para, 30, 54.
[47] Ibid., para. 57.
[48] Ibid., paras. 89, 93.
[49] Article 292(1) and (3), UNCLOS.
[50] The *Tomimaru* case (Japan v Russian Federation), ITLOS, Prompt Release, Judgment of 6 August 2007.
[51] France argued in the *Grand Prince* case, Guinea-Bissau argued in the *Juno Trader* case, and Russia argued in the *Tomimaru* case that confiscation of a vessel renders the obligation to release it on bond without object. See Bernard H. Oxman, "International Decision: The 'Tomimaru' (Japan v. Russian Federation)", (2008) 102 *AJIL* 316, at 318.

January 2007. The owner of the vessel then applied on 26 March to the Supreme Court for supervisory review of the ruling of the District Court. On 6 July 2007, an application for prompt release of the vessel was filed by Japan with the ITLOS. After the closure of the hearing at ITLOS, on 26 July 2007, the respondent (Russian Federation) informed the Tribunal that the Supreme Court had dismissed the review concerning the confiscation of the Tomimaru.[52]

The Respondent maintained that the judgment of the District Court confirming the confiscation of the Tomimaru rendered the application under article 292 without object. The Respondent stated that the case had been considered before the appropriate domestic forum on the merits and that the decision rendered by that forum had already been executed because the Federal Agency on Management of Federal Property had included the Tomimaru in the Federal Property Register as property of the Russian Federation.[53]

The applicant on the other hand argued that the position concerning the nationality of the Tomimaru would be the same even if it had been confiscated and that since Tomimaru was still a Japanese flagged vessel, Japan is entitled to bring a prompt release application in respect of it regardless of the nationality of the owner.[54]

The Tribunal emphasized that two questions had to be distinguished: "(1) whether confiscation may have an impact on the nationality of a vessel; and (2) whether confiscation renders an application for the prompt release of a vessel without object."[55] In relation to the first question, the Tribunal ruled that "the confiscation of a vessel does not result *per se* in an automatic change of the flag or in its loss. The confiscation changes the ownership of a vessel but ownership of a vessel and the nationality of a vessel are different issues."[56]

As far as the second issue is concerned, Article 73 appears to permit confiscation of the catch, the vessel, and the equipment as punishment for violating coastal state laws and regulations.[57] The only specific restriction imposed on penalties for violations of fisheries laws and regulations in the EEZ is that they may not include imprisonment or any other form of corporal punishment. The Tribunal, therefore, noted that "Article 73 of the Convention makes no reference to confiscation of vessels. The Tribunal also recognized the fact that "many states have provided for measures of confiscation of fishing vessels in their legislation with respect to the management and conservation of marine living resources."[58] Japan had not contested the right to confiscate as such.[59] This is not surprising because the UN Food and Agriculture Organization (FAO) include both Japan and Russia in the list of many countries that permit confiscation of the vessel for fishing violations.[60]

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[52] The Tomimaru, Prompt Release, paras. 22-46.
[53] Ibid., para. 59.
[54] Ibid., para. 65.
[55] Ibid., para. 69.
[56] Ibid., para. 70.
[57] Bernard H. Oxman, "International Decision: The 'Tomimaru', at 318.
[58] The Tomimaru, Prompt Release, para. 72.
[59] Bernard H. Oxman, "International Decision: The 'Tomimaru', at 318.
[60] In his separate opinion in the *Grand Prince* case, at 2 n.3, Judge Anderson noted:
> 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."* 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 [emphasis added].

Japan and Russia are included in the list.

The Tribunal warned the coastal States against using confiscation of a fishing vessel in such a manner as to upset the balance of the interests of the flag State and of the coastal State established in the Convention.[61] The Tribunal further pointed out that "a decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object" and that "in particular, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention."[62]

At the same time the Tribunal suggested the applicant (Japan in this case) that "considering the objective of article 292 of the Convention, it is incumbent upon the flag state to act in a timely manner"[63] implying that, should the applicant filed the application for prompt release quite earlier - that is before the confirmation of confiscation – the outcome of the decision would be different. The Tribunal further emphasized that "a decision to confiscate a vessel does not prevent the Tribunal from considering an application for prompt release of such vessel while proceedings are still before the domestic courts of the detaining State."[64] In other words, even if the confiscation has legal effect under the law of the detaining state, and even if it is executed, the obligation of prompt release continues while the judgment is still under review by a domestic court.[65]

After noting that the decision of the Russian Supreme Court brought to an end the procedures before the domestic courts,[66] the Tribunal considered that "a decision under article 292 of the Convention to release the vessel would contradict the decision which concluded the proceedings before the appropriate domestic fora and encroach upon national competences, thus contravening article 292, paragraph 3, of the Convention."[67] The Tribunal ruled unanimously that "the Application of Japan no longer has any object and that the Tribunal is therefore not called upon to give a decision thereon."[68]

IV. Non-compliance with a prompt release provision of UNCLOS

There are two key substantive questions to be addressed by an international court or tribunal under Article 292: whether there has been a violation of a prompt release provision of UNCLOS, and whether the bond set is reasonable.[69]

The requirement of non-compliance with a prompt release provision

The flag State of a detained vessel may make an application for the prompt release of the vessel under Article 292(1) if "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 other words, the flag state must bring an application with respect to a provision in UNCLOS that specifically require the prompt

[61] Ibid., para. 75.
[62] Ibid., para. 76.
[63] Ibid., para. 77.
[64] Ibid., para. 78
[65] Bernard H. Oxman, "International Decision: The 'Tomimaru', at 320.
[66] Ibid., para. 79.
[67] Ibid., para. 80.
[68] Ibid., para. 81.
[69] Natalie Klien, above note 25, 103.

release of vessels and crews upon posting of reasonable bond. If the application has no such linkage with a provision in UNCLOS that specifically require the prompt release, it is definitely inadmissible.

There is general agreement that detentions of vessels for violating EEZ fishing regulations under Article 73,[70] violations of rules relating to pollution from vessels under Article 220,[71] and investigations of foreign vessels for specified pollution violations under Article 226[72] fall within the scope of Article 292. Each of these Articles specifically refers to release of those vessels on the posting of a bond or financial security. Numerous other Convention provisions concerning the arrest of foreign flag vessels - e.g., for criminal activities in the territorial sea or for unauthorized broadcasting - do not refer to such a process.[73]

It is not necessary to go into detail here about the much-disputed question whether the list of instances explicitly found in the 1982 Convention is exhaustive or not,[74] since all the Article 292 cases before the ITLOS have thus far concerned fishery matters. For that reason, it is suffice here to relate article 292 cases with whether there was a non-compliance with the provisions of Article 73 (violations of EEZ fisheries laws) of the Convention.[75]

According to the majority, Guinea based its arrest on Article 40 of its Maritime Code and Law, which relates in part to sovereign rights over fisheries. The majority believed that bunkering fishing vessels could be "assimilated to the regulation of the exercise by the coastal State of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone. It can be argued that refueling is by nature an activity ancillary to that of the refueled ship." This characterization was helpful to the applicants because it provided a link to Article 73 and that Article's explicit requirement that arrested vessels and crews be promptly released.

The dissenting judges, on the other hand, found it plausible that Guinea's seizure and detention of the M/V Saiga had been for customs violations, and that Saint Vincent and the Grenadines thus had not demonstrated that their application was well-founded. The dissenters noted that all the other applicable laws relied on by Guinea related to customs offenses. Illegally supplying oil to vessels in Guinean waters was a type of smuggling that violated Guinea's customs laws. The dissenting judges felt that the requisite connection between Article 292 and a Convention article explicitly providing for prompt release on the posting of a reasonable bond was lacking. As President Mensah argued in his dissent, "no action taken by any official or authority in Guinea, before and after the arrest of the M/V Saiga, has had the faintest link with fisheries." As a result, according to dissenting judges, questions

[70] Article 73(2)
[71] Article 220(7).
[72] Article 226(1)(b).
[73] See 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" , (1996)11 *Int'l J. Marine & Coastal L.* 165; see also E.D. Brown, "The M/V 'Saiga' Case on Prompt Release of Vessels: The First Judgment of the International Tribunal for the Law of the Sea", (1998) 22 Marine Pol'y 307, 311-18 at 316-18.
[74] Whether Article 292 should be given a restrictive or non-restrictive interpretation, i.e., whether it can be applied to other instances than those explicitly provided under Articles 73, 220, and 226 of the 1982 Convention or not, was already disputed before the Tribunal started functioning. See, E.D. Brown, "The M/V 'Saiga' Case on Prompt Release of Vessels: The First Judgment of the International Tribunal for the Law of the Sea", (1998) 22 Marine Pol'y 307, at 311-18.
[75] 1982 Convention, supra note 1, Article 73 (2).

concerning the release of the M/V Saiga and its crew, along with all other aspects of the customs case, should be decided wholly by the national courts of Guinea.

Standard of proof for non-compliance

A difficult question that arises in prompt release procedures is whether or not the allegation of non-compliance with the Article is well-founded. The ITLOS grappled with the requirement of a well-founded allegation of non-compliance in its earliest decisions,[76] in particular, the very first prompt release case under the Convention, the *MV Saiga*.[77]

The M/V Saiga was an oil tanker sailing under the flag of Saint Vincent and the Grenadines that served as a bunkering vessel to fishing and other vessels off the coast of Guinea. The M/V Saiga entered the EEZ of Guinea to supply fuel to three fishing vessels but was arrested on October 28, 1997, outside Guinea's EEZ by Guinean customs patrol boats. Guinea asserted that the arrest of the M/V Saiga had been executed following a hot pursuit motivated by a violation of its customs laws in the Contiguous Zone of Guinea. The M/V Saiga, Guinea claimed, had been involved in smuggling in the sense of illegally supplying fuel to fishing vessels in violation of Guinea's customs legislation and that Article 292 was not applicable to an arrest for a case of smuggling.

On November 13, 1997, Saint Vincent and the Grenadines instituted proceedings in the ITLOS against Guinea, filing an application with the ITLOS under Article 292 and claiming that Guinea failed to comply with Article 73's requirements of prompt release and non-imprisonment. The ITLOS promptly held hearings and, on December 4, 1997, rendered its decision.

The ITLOS unanimously found that it had jurisdiction under Article 292, and the judges all agreed that some of the prerequisites in Article 292(1) were satisfied. In particular, a vessel of one State Party to the Convention (Saint Vincent and the Grenadines) was detained by another State Party (Guinea), and the two states had not agreed on a forum different from the ITLOS within ten days after the arrest. The ITLOS was split, however, over the admissibility of the application for release, because of disagreement concerning whether the application met Article 292(1)'s requirement that the flag state allege noncompliance with Convention provisions for "prompt release...upon the posting of a reasonable bond or other financial security." By a vote of twelve to nine, the ITLOS found the application of Saint Vincent and the Grenadines admissible and ordered Guinea to promptly release the M/V Saiga and its crew from detention. It also decided, by the same vote, that the release was conditional on the posting of a reasonable bond or security, and that the security consisted of the M/V Saiga's full load of gasoil (valued at approximately $ 1,000,000) plus an additional $ 400,000.

The majority and the dissenting judges disagreed about the applicant's burden, or standard of proof, in Article 292 proceedings. The majority noted that that it is required for the Tribunal to consider "with restraint" the merits of the release: The possibility that the merits of the case may be submitted to an international court or tribunal, and taking into consideration the accelerated nature of the prompt release proceedings. The Tribunal in this regard considers appropriate an approach based on assessing whether the allegations made are "*arguable*" or

[76] The *M/V Saiga*, Prompt Release, para. 51. Judge Anderson, in his dissent noted that the standard of a "sufficiently plausible character" was drawn from the decision of the ICJ in *Ambatielos* case. Ibid., Dissenting Opinion of Judge Anderson.

[77] The *M/V Saiga*, Prompt Release

are of a "*sufficiently plausible*" character in the sense that the Tribunal may rely upon them for the present purposes. By applying such a standard the Tribunal does not foreclose that if a case were presented to it requiring full examination of the merits it would reach a different conclusion. This reliance on an "arguable or sufficiently plausible" standard suggests that the majority viewed Article 292 orders as akin to provisional measures.

The dissenters held that Article 292 cases are not merely preliminary to other proceedings, and the applicant should present more than "sufficiently plausible" allegations:

> We do not consider that a mere allegation that the detaining state has not complied with the provisions of article 73 of the Convention will satisfy the condition for the application of article 292 of the Convention. There must be a genuine connection between the detention of the vessel and its crew and the laws and regulations of the detaining state relating to article 73. The burden to establish such a connection is upon the Applicant. Without such a connection, the *Tribunal must conclude that the allegation that the detaining state has failed to comply with article 73 is unfounded*.

In subsequent decisions, the Tribunal effectively abandoned its earlier standard of "*arguable*" or "*sufficiently plausible*" character and utilized the standard set forth in Article 113 (1) of its Rules, which provide as follows:

> The Tribunal shall in its judgment determine in each case in accordance with article 292 of the Convention whether or not *the allegation* made by the applicant that the detaining State has not complied with a provision of the Convention for the prompt release of the vessel or the crew upon the posting of a reasonable bond or other financial security is *well-founded*.[78]

Judge Mensah, in his separate declaration in the *Camouco*, supported the reliance on this standard in view of the fact that the Rules represented "the well-considered understanding of the Tribunal regarding what is expected of it when dealing with disputes regarding the interpretation or application of Article 292 of the Convention." This standard was reaffirmed in the *Monte Confurco*. It now seems unlikely that the Tribunal will revert to a consideration of whether an allegation is "arguable" or "sufficiently plausible".

V. Assessing the reasonableness of the bond or security

In the difficult exercise of balancing the interests of the coastal and flag States, the notion of reasonableness plays a crucial role. The 1982 Convention merely puts forward the requirement that the bond or security to be fixed shall be 'reasonable' without giving any further indications as to how the notion of reasonable bond is to be applied in practice. Not much further guidance can be found in the Rules of the Tribunal, except that the applicant is supposed to provide the Tribunal with further information on what it "considers relevant to the determination of the amount of a reasonable bond or other financial security." In fact, the ITLOS Rules simply refer back to Article 292 of the 1982 Convention in this respect:

> 1. The Tribunal shall in its judgment determine in each case in accordance with

[78] Article 113(1), Rules of the Tribunal, International Tribunal for the Law of the Sea, ITLOS/8, 17 March 2009 [Emphasis added].

article 292 of the Convention whether or not the allegation made by the applicant that the detaining State has not complied with a provision of the Convention for the prompt release of the vessel or the crew upon the posting of a reasonable bond or other financial security is well-founded.

2. If the Tribunal decides that the allegation is well-founded, it shall determine the amount, nature and form of the bond or financial security to be posted for the release of the vessel or the crew.

3. The bond or other financial security for the release of the vessel or the crew shall be posted with the detaining State unless the parties agree otherwise. The Tribunal shall give effect to any agreement between the parties as to where and how the bond or other financial security for the release of the vessel or crew should be posted.[79]

Thus, the founders of the 1982 Convention left it up to the competent courts and tribunals that would be faced in the future with prompt release cases to give concrete content to the reasonableness criterion.

The *M/V Saiga* case

In the *M/V Saiga* case, the discussion on "reasonableness" of the bond was only marginal to the decision of the Tribunal. However, the Tribunal set out the basic guideline that the reasonableness criterion applies to the amount, the nature, and the form of the bond or financial security in globo, and not necessarily to each single constitutive element.

The *Camouco* Case

In the *Camouco* Case, the amount, nature, and form of the bond or security formed a key element. This issue was argued before the French courts as well as before the ITLOS. After the ship had been seized by the French authorities for violations of the fishery legislation of the EEZ, the national Court of First Instance, set the bond at FFR 20,000,000. The owner and the master of the vessel sought a reduction of the amount of the bond based on the reasonableness criterion in Article 292, but to no avail.

Before the ITLOS, the applicant again argued that the bond set by the French court was not reasonable. This time, the Tribunal dealt with the issue at length and came to the conclusion that the bond was not reasonable. The ITLOS further repeated its understanding, already emphasized in the *M/V Saiga* case, that the reasonableness criterion applies to the amount, the nature, and the form of the bond or financial security in globo, and not necessarily to each single constitutive element.

The Tribunal then moved on to enumerate, in a non-exhaustive manner, a number of factors that it considers relevant in the assessment of the reasonableness criterion, namely:

(1) The gravity of the alleged offences;
(2) The penalties imposed or imposable under the laws of the detaining State;
(3) The value of the detained vessel and of the cargo seized; and

[79] Rule 113, Rules of the Tribunal, ITLOS/8, 17 March 2009.

(4) The amount of the bond imposed by the detaining State and its form.[80]

The Tribunal then applied these different elements to the case at hand. First of all, it took note of the *gravity of the alleged offenses* as well as the *penalties provided for under French law*. In this regard, it noted the statement by the French agent that no imprisonment sanctions would be applied to fishing violations by foreign vessels in accordance with Article 73(3) of the 1982 Convention, even though the French penal code foresaw this possibility in theory. The maximum penalty that could be imposed, according to the French agent, was FFR 5,000,000.

Second, as far as the *value of the detained vessel* was concerned, the Tribunal emphasized that the vessel's value by itself was not the controlling factor for determining the amount of the bond. Since the figure of FFR 3,717,571, which the applicant advanced by means of expert testimony during the oral proceedings, had not been contested by the defendant, the Tribunal apparently accepted this amount as representing the value of the vessel at the time of the arrest, even though it stated that the French authorities in their internal procedures valued the ship at FFR 20,000,000. The Tribunal also noted the value of the cargo seized, which the defendant valued at FFR 380,000, a sum that the applicant apparently did not contest.

These considerations, as well as the overall circumstances of the case, led the Tribunal to hold that the bond of FFR 20,000,000 was not reasonable. The Tribunal considered FFR 8,000,000 as reasonable under the circumstances.

As far as the nature and the form of the bond or financial security are concerned, the Tribunal was of the opinion that unless the parties agreed otherwise, the bond should take the form of a bank guarantee.

The *Monte Confurco* Case

Even more than in the *Camouco* Case, the amount, nature, and form of the bond formed the crux of the *Monte Confurco* Case. Special attention is therefore given to this case, especially since it appears that the French Court of First Instance referred back to the jurisprudence of the ITLOS when fixing the bond of the Monte Confurco. The French Court, while referring to Article 73(2) of the 1982 Convention, stated that the bond in question had to be reasonable. What is more, the Court used the arguments of the ITLOS in the Camouco Case to check whether the reasonableness criterion had been complied with in casu. It listed all the elements that the ITLOS had suggested in this respect. By explicitly referring to them, the French Court apparently attempted to demonstrate it had duly complied with the criteria set by the ITLOS for such cases.

The Court of First Instance in this way fixed the bond at FFR 56,400,000, of which the major part was to secure the payment of fines incurred and the confiscation of the vessel (FFR 55,000,000), followed by a substantially smaller part to secure the appearance of the captain of the arrested vessel (FFR 1,000,000), and finally by a part to secure the payment of the damage caused (FFR 400,000).

The applicant, however, believed the bond to be unreasonable. Instead, the applicant submitted that FFR 2,200,000 constituted a reasonable bond.

[80] The *Camouco* Case, Prompt Release, p. 67.

In order to determine whether the bond posted by the French Court was reasonable, the Tribunal first explicitly referred to the crucial part of its judgment in the *Camouco* Case where it cited as *relevant factors*, amongst others, "the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and the cargo seized, and the amount of the bond imposed by the detaining State and its form." The Tribunal then applied each of the relevant factors.

As far as the *value of the ship* is concerned, the parties differed widely. The respondent during the oral procedure relied on an expert opinion, which estimated the value of the ship at approximately $ 1,500,000. The applicant, however, relied on expert estimates between $ 400,000 and $ 450,000. During the oral procedure expert testimony had valued the ship at approximately $ 345,680. Since the latter figure had not been challenged by the defendant and corresponded moreover to the amount for which the vessel had been sold in 1999, the ITLOS considered this figure to be reasonable. With respect to *the cargo*, the value of FFR 9,000,000, as estimated in the relevant proces-verbal, was not contested by the parties.

The above-mentioned considerations led the ITLOS to the conclusion that the bond imposed by the French Court had been unreasonable. Instead, it fixed the bond at FFR 18,000,000, of which half was already in the hands of the French authorities, namely the monetary equivalent of the cargo seized on the arrest of the vessel.

As to the form of the bond, the Tribunal decided that the bond or security should take the form of a bank guarantee to be posted with France.

***The "Volga" Case* (2002)**

The *Volga* was arrested by Australian authorities on 7 February 2002 for illegal fishing in the Australian EEZ. A total of 131 tons of toothfish were found on board at the time of her arrest. The catch aboard was seized and promptly sold for approximately AU$ 1.9m, with the proceeds held in trust. Australia set a bond of approximately AU$ 3.33m for the release of the *Volga*. This comprised:

- AU$ 1.92m (approx) representing the agreed value of the *Volga*;
- AU$ 0.42m (approx) representing an amount for potential fines against the three crew members;
- AU$ 1m for the guarantee of non-repetition of IUU (illegal, unreported, and unregulated) fishing by the *Volga* as monitored by VMS.

Pursuant to Article 292 (which gives ITLOS compulsory jurisdiction over disputes concerning the prompt release), the Russian Federation on 2 December 2002 filed an application against Australia in ITLOS seeking the release of the *Volga* and her three crew members. Hearings were held on 12 and 13 December 2002, and judgment was delivered on 23 December 2002. By nineteen votes to two, ITLOS held that:

- Australia did not comply with the provisions of the LOS Convention for the prompt release of the *Volga* or her crew on the posting of a reasonable bond or other financial security;
- Australia must promptly release the *Volga* on the posting of a bank guarantee of AU$ 1.92m.

As Russia alleged that Australia failed to comply with Article 73(2) by setting a bond that was unreasonable and by imposing impermissible conditions for the release of the *Volga,* there were two questions before ITLOS.

(i) the reasonableness of the amount of the bond set by Australia;
(ii) whether Australia could, consistent with Article 73, set non-financial conditions for release of the *Volga.*

When the Tribunal considered the first relevant factor, the alleged offenses against Australian law, the Tribunal held that no direct weight was to be placed on the serious problem of IUU fishing. ITLOS then considered the bond sought by Australia and noted its tripartite nature (representing sums for the vessel, for the potential fines against the crew, and for "good behavior"). In relation to the vessel, the Tribunal held that the amount of AU$ 1.92m, representing the agreed value of the vessel was reasonable for the purposes of Article 292 of the LOS Convention. In relation to the potential fines against the crew, the Tribunal noted that it was unnecessary to consider the issue, given the crew's release.

The Tribunal noted that whether or not non-financial conditions could be imposed hinged on whether or not they could be described as a "bond or other security" as that phrase is used Article 73(2). It was held that, in light of the object and purpose of Art. 73(2) read together with Art. 292, the phrase must be taken to refer to a bond or security of a "financial nature."

In relation to the security of AU$ 1m (the so-called good behavior bond), the Tribunal held that such a security could not come within Article 73(2) because the bond or other security referred to is for the release of "arrested" vessel alleged to have committed offences. A bond to prevent future illegal activity, it was held, was not encompassed by Article 73(2).

On the basis of the foregoing considerations, the Tribunal considered that the bond as sought by Australia was not reasonable and held that the reasonable bond should be AU$ 1,920,000. With respect to *the form of the bond* the Tribunal was of the view that it should be, unless the parties otherwise agree, in the form of a *bank guarantee* from a bank present in Australia or having corresponding arrangements with an Australian bank.

Evaluation

A closer analysis of the decisions of the ITLOS demonstrates that a consistent case law will develop in this particular area. In all the prompt release of vessel cases so far heard and decided, the Tribunal has continued to build on and further develop the more rudimentary reasoning of previous cases.

In the Saiga 1 Case, the basic rule was put forward that the reasonableness criterion encompassed the amount, the nature, and the form of the bond or financial security in globo, meaning that in certain cases where either the amount, or the nature, or the form might, by itself, be found to be unreasonable, such a finding would not automatically undermine the overall reasonableness of the bond or security. This basic stepping stone in the Tribunal's developing jurisprudence, small as it might be, is later explicitly referred to, and moreover literally quoted, in the Camouco Case as well as in the Monte Confurco Case.

In the Camouco Case the Tribunal for the first time enumerated a non-exhaustive list of factors that it considers relevant while assessing the reasonableness factor. This second

fundamental building block is later quoted in extenso in the Monte Confurco Case. The Monte Confurco is, to date, the case in which the Tribunal has gone into the greatest detail in applying the relevant factors just mentioned.

Even if we acknowledge the bright prospects for the development of consistent case law, it must be concluded that the concept of reasonableness has, so far, not disclosed all its mysteries in the framework of prompt release of vessel cases.[81] Certainly, the case law of the Tribunal has continuously narrowed the outer contours of the notion by setting out a general frame of reference by means of so-called relevant factors and applying them in concrete circumstances. This particular method seems to gather growing support among the judges of the Tribunal. The Tribunal found it necessary to stress the non-exhaustive nature of this list in the most explicit of terms in the Monte Confurco Case.

Moreover, the Tribunal has refused to specify any of these factors as controlling in the determination of the reasonableness of the amount of the bond.[82] What the Tribunal has, therefore, done so far is to start applying this broad framework to concrete cases with ever increasing attention. It is, therefore, not surprising that publicists and judges alike have repeatedly pointed to this absence of clarity.

As the value of the ship is often very much disputed between the parties, the Tribunal has already twice relied on expert testimony offered by the applicant during the oral proceedings, and not disputed by the respondent. In the Monte Confurco Case it was even clearly stated that the Tribunal considered this assessment to be reasonable, something which had to be assumed in the Camouco Case. With respect to the cargo, it is the estimates of the respondent that seem to carry the day, with the exception of the Saiga 1 Case where the estimates of the applicant were taken into account.

Nevertheless, with respect to the other relevant factors, namely the gravity of the offences and the range of penalties applicable, the Tribunal usually simply states that it “takes note” of the submissions made, without any further indication of the weight given to the evidence or elements.[83]

VI. An adequate safeguard for the shipping interests?

As has been stated earlier, the 1982 Convention bestows extended jurisdiction on coastal States in areas like fisheries and environmental protection, even beyond its territorial sea and extending up to 200 nautical miles from its baselines (known as the Exclusive Economic Zone. The Convention accords coastal states significant authority to regulate many economic activities in the EEZ. At the same time, the Convention reflects delicate compromises on substantive provisions relating to fisheries activities in the EEZ and on the scope of third-party jurisdiction with respect to disputes concerning those activities. With respect to third-

[81] The voting pattern of the judges also supports this conclusion. In Saiga 1 Case, where the amount, nature, and form of the bond were voted on together, 12 judges voted in favor and 3 against. 1997 ITLOS No. 1, at 18. In the Camouco and Monte Confurco Cases, where the nature and form of the bond were voted on separately, these figures were 19-2 and 20-0 respectively. 2000 ITLOS No. 5, at 30; 2000 ITLOS No. 6, at 34.

[82] See Camouco, 2000 ITLOS No. 5, P 69. The Tribunal stated that the amount of the bond is not strictly tied to the value of the vessel and consequently may be higher. Judge Wolfrum, in his dissenting opinion, appeared to agree that the bond should not necessarily be tied to the value of the vessel, but objected to the absence of an explanation by the Tribunal why this is so or to what extent this bond may differ from the value of the vessel. Id. P 3 (sePte opinion of Judge Wolfrum).

[83] The "Camouco" Case, 2000 ITLOS No. 5, at 3-4 (separate opinion of Vice-President Nelson).

party settlement of EEZ disputes, Article 292, the prompt release provision, provides a narrow exception to Article 297, which limits the applicability of the Convention's mechanisms for binding third-party dispute settlement in EEZ fishing disputes. Article 292 was one product of the compromise at UNCLOS III concerning coastal State powers in the EEZ.

When a coastal state exercises enforcement and adjudicative jurisdiction over foreign ships for violating its EEZ fisheries or pollution regulations, the Convention requires the coastal state to release the arrested vessel and crew on the posting of a reasonable bond or other financial security. This new procedural safeguard of Article 292 (prompt release procedure) implicate geopolitical questions involving the balance of coastal and flag State rights and obligations in the EEZ.

The present paper, in the foregoing sections, has discussed how ITLOS in the prompt release cases interpreted and applied the relevant provisions of the Convention. The general remark that can be made is that the Tribunal has in its jurisprudence tried its best to strike a balance between the rights and interests of the respective parties. Nevertheless, it appears that there are factors that may tilt the balance towards the coastal State's interests.

No direct access of private persons to the prompt release procedure

Although a flag state may raise these prompt release guarantees before the ITLOS, detained individuals like Master and crew or the ship-owner have no assured access. During the UNCLOS III negotiations, some delegations favored giving individuals access to the ITLOS in prompt release cases. For example, the United States advocated allowing "the owner or operator of any vessel detained by any state" to "bring the question of the detention of the vessel before the [Law of the Sea] Tribunal in order to secure its prompt release."[84] According to the compromise language of Article 292, however, "the application for release may be made only by or on behalf of the flag State of the vessel." To initiate an Article 292 prompt release application, either the flag state must bring it or the flag state must designate the vessel captain, the vessel owner, a shipping association, or some other entity to do so.

The lack of assured individual access casts doubt on whether violations of individual rights are likely to be litigated. If vessel owners had the right to proceed directly against coastal States for prompt release violations, their decision to initiate the action would depend on how they estimate the financial interests at stake, the probability of a successful outcome, and the impact of litigation on their own relationship with the coastal state. If states are the only entities that can bring prompt release applications, fewer applications would likely be filed. Many States will choose not to pursue disputes on behalf of private interests, either diplomatically or in litigation before the ITLOS. A state's foreign affairs office may prefer that vessel owners or captains pursue their own claims in the coastal state's courts or that they appeal to the coastal state's government officials. States are often reluctant to bring claims against other states, even if they are meritorious or implicate important "State interests," for fear of upsetting friendly relations or disrupting negotiations on other matters. Such concerns may likewise deter states from approving individual access in prompt release cases.

The Convention, therefore, limits the ability of individuals and corporations to pursue prompt release proceedings against coastal states in the ITLOS. Restricting the access of private

[84] See U.N. Doc. A/AC.138/97, art. 8(2).

entities to the Tribunal deprives them of opportunities to seek judicial clarification of their rights and to pursue remedies when their rights have been infringed.

The impact of confiscation of vessels

In the *Tomimaru* case, the Tribunal explicitly ruled that the confiscation of the detained vessel would make the application for prompt release to be without object. At the same time, the Tribunal warned that "a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention." This is therefore a factor which will tilt the balance towards the coastal State. What makes the matter worst is that over one hundred countries in the world have legislation that allows the State to confiscate foreign vessels that violate fisheries laws.

All in all, although the prompt release obligation is meant to strike a balance between the coastal and shipping interests, the situation on the ground unfortunately tip towards the coastal State. The safeguard for the shipping interests appear to be not adequate.

VII. Conclusion

The International Tribunal for the Law of the Sea is a new international court established under the UN Convention on the Law of the Sea 1982. The Tribunal has compulsory jurisdiction in the applications for prompt release of vessels and crews under Article 292. The determination of the prompt release cases can be said as a distinctive feature of the Tribunal due to the fact that of the fifteen cases decided to date, nine are prompt release cases. The Tribunal has, case after case, narrowed down the ambiguity surrounding the prompt release procedure without, however, having so far revealed all of its mysteries and that despite the potential of Article 292 to serve as a compromise between coastal and flag States' interests, the coastal States naturally are in a position to tip the balance in their favour. The absence of direct access of private persons to the prompt release procedure and the tendency of the coastal state to confiscate the detained vessel are the two main factors that may shaken the delicate balance.