

“REASONABLE BOND” IN THE PRACTICE OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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The majority of cases brought before the International Tribunal for the Law of the Sea¹ (ITLOS or Tribunal) have been so-called prompt release procedures in accordance with Article 292 of the 1982 United Nations Convention on the Law of the Sea.² This provision of the 1982 Convention introduced a totally new procedure,³ previously unknown in international law and not followed since.⁴ 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 competence⁵—this new procedural safeguard of Article 292 is said to have been incorpo-

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1. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, annex VI, 1833 U.N.T.S. 3, 561 (entered into force Nov. 16, 1994) *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm [hereinafter ITLOS Statute].

2. United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 292, 1833 U.N.T.S. 3, 512 (entered into force Nov. 16, 1994), *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm [hereinafter 1982 Convention].

3. 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).

4. David H. Anderson, *Investigation, Detention and Release of Foreign Vessels Under the U.N. Convention on the Law of the Sea of 1982 and Other International Agreements*, 11 INT'L J. MARINE & COASTAL L. 165, 167 (1996).

The Article contains provisions and procedures which are novel, having appeared for the first time in the Convention. The Article does not have any antecedents in older treaties and it has not been followed in practice or by analogy since 1982. In other words, this is not one of the general rules of international law, which abound in other parts of the Convention.

Id.

5. The exclusive economic zone [hereinafter EEZ] reaches up to 200 nautical miles from shore. See 1982 Convention, *supra* note 2, arts. 55-75.

rated as a *quid pro quo* in order to safeguard the interests of the shipping nations.⁶

The novel character of the prompt release procedure, and probably also the specific rights it tries to protect, led some scholars to predict *in tempore non suspecto*, quite correctly as it later turned out, that this particular procedure “may even become one of the main attractions of the Tribunal.”⁷ The significance of the Article 292 procedure, together with the fact that the literature had not paid much attention to the specific legal and practical questions raised by this particular article,⁸ justified a special workshop on the topic in Hamburg during February 1996.⁹ The issue of “reasonable bond,” however, only received scant attention at that time.¹⁰

6. Rainer Lagoni, *The Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea: A Preparatory Report*, 11 INT’L J. MARINE & COASTAL L. 147, 148 (1996); Tullio Treves, *The Exclusive Economic Zone and the Settlement of Disputes, in THE EXCLUSIVE ECONOMIC ZONE AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982-2000: A FIRST ASSESSMENT OF STATE PRACTICE* (Erik Franckx & Philippe Gautier eds., forthcoming) (text on file with the author). See also Nathalie Ros, *Un bilan de la première activité du Tribunal international du droit de la mer (1996-2000)*, 46 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 496, 505 (2000) (fitting the prompt release procedure into the broader package deal arrived at during the Third United Nations Conference on the Law of the Sea, which required balancing the extensive competence of the coastal State, on the one hand, with the freedom of navigation, on the other); and 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, 202-08 (1996) (stressing more generally the importance of the settlement of dispute provisions of the 1982 Convention as a *quid pro quo* for extended coastal State jurisdiction). Oxman considers the arbitration and adjudication clauses of the 1982 Convention to be “central to the overall balance achieved.” *Id.* at 206.

7. Tullio Treves, *The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994*, 55 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 421, 446 (1995). See also Rainer Lagoni, *The International Tribunal for the Law of the Sea: Establishment and “Prompt Release” Procedures*, 11 INT’L J. MARINE & COASTAL L. 137, 137 (1996) (editorial) (“This procedure is new in international law and it is expected to gain some importance in the practice of the International Tribunal for the Law of the Sea”). When the first case brought before the Tribunal turned out to be a prompt release of vessel case, Lagoni further developed this idea: “Freigabefälle dürfen in der Rechtsprechung des Gerichtshofs auch zukünftig eine nicht unbedeutende Rolle spielen.” [“Prompt release cases will probably also in the future play a significant role in the case law of the Tribunal.”]. See Rainer Lagoni, *Freigabeklage und vorläufige Massnahmen vor dem Internationalen Seegerichtshof: Die Fälle M/V “SAIGA” (Nr. 1) und (Nr. 2)*, in LIBER AMICORUM GÜNTHER JAENICKE—ZUM 85. GEBURTSTAG 543, 544 (Volkmär Götz, et al. eds., 1998).

8. The commentary on the 1982 Convention prepared by the Center for Oceans Law and Policy of the University of Virginia, does provide a good analysis of the background and genesis of Article 292. See 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 66-71 (Myron H. Nordquist et al. eds., 1989) [hereinafter 1982 COMMENTARY VOL. 5]. See also A.O. ADEDE, THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A DRAFTING HISTORY AND A COMMENTARY 65-66, 108-12, 137-39, 160-62 (1987) (discussing the genesis of Article 292).

9. The proceedings of the Hamburg workshop were later published as a special issue of the *International Journal of Marine and Coastal Law*. 11 INT’L J. MARINE & COASTAL L. 137 (1996).

10. Only two articles in the Hamburg Symposium issue address the issue of reasonable bond. Lagoni, *supra* note 6, at 160-61; Tullio Treves, *The Proceedings Concerning Prompt*

Because half of the judgments rendered by the ITLOS to date concern Article 292 prompt release procedures, and since most specifically address the issue of "reasonable bond," 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 *en cours de route*. This article will first outline the relevant legal framework fixing the general contours of the "reasonable bond" notion. Second, the different prompt release of vessel procedures before the ITLOS will be analyzed. The main part of the article will then try, based on the theoretical and practical frameworks outlined in the previous parts, to come to grips with the notion of "reasonable bond." Finally, the article's conclusion, in Part IV, emphasizes that the Tribunal has, case after case, narrowed down the ambiguity surrounding the reasonable bond concept, without, however, having so far revealed all of its mysteries.

I. THEORETICAL LEGAL FRAMEWORK

The central provision of the 1982 Convention establishing the prompt release of vessel procedure is Article 292, which reads:

1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.
2. The application for release may be made only by or on behalf of the flag State of the vessel.
3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.
4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.¹¹

Because of the novel character of Article 292 as well as the main objective that it tried to achieve, namely to balance the interests of coastal and flag States, the drafting process proved to be a rather difficult exercise, even

Release of Vessels and Crews before the International Tribunal for the Law of the Sea, 11 INT'L J. MARINE & COASTAL L. 179, 196-98 (1996).

11. 1982 Convention, *supra* note 2, art. 292 (emphasis added).

though the principle of prompt release of vessels itself had rather easily been agreed upon.¹² The *ratione personae* jurisdiction to introduce such cases,¹³ as well as the determination of the competent court or tribunal, proved to be especially difficult issues to resolve.¹⁴

The adjective “reasonable” first appeared with the word “bond,” in the provision that later turned out to be Article 292, in the third draft of President Amerasinghe’s proposal in 1976.¹⁵ Apparently this change must be understood as merely cosmetic, rather than substantive, since it was made in order to conform more accurately with the other substantive provisions that already formed part of the Revised Single Negotiating Text.¹⁶

As stated in Article 292, the procedure only applies in instances where the 1982 Convention itself provides for the prompt release of vessels. 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,¹⁷ since all the Article 292 cases before the ITLOS have thus far concerned fishery matters.¹⁸ For that reason, it suffices here to concentrate on Article 73, which states:

12. Raymond Ranjeva, *Settlement of Disputes*, in 2 A HANDBOOK ON THE NEW LAW OF THE SEA 1333, 1382 (René-Jean Dupuy & Daniel Vignes eds., 1991). See also 1982 COMMENTARY VOL. 5, *supra* note 8, at 67.

13. Countries like the United States favored the right of individuals, like the owner or operator of a vessel, to have direct access under a prompt release of vessel procedure. But they proved rather unsuccessful in the end. See John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT’L L.J. 109, 147-49 (1998).

14. 1982 COMMENTARY VOL. 5, *supra* note 8, at 67-71.

15. REVISED SINGLE NEGOTIATING TEXT: PART IV, 6 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS, 5th Sess. at 147, U.N. Doc. A/CONF.62/WP.9/Rev.2, U.N. Sales No. E.77.V2 (1977).

16. 1982 COMMENTARY VOL. 5, *supra* note 8, at 69.

17. 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. In the Hamburg workshop on the prompt release of vessel procedure, two participants, who were both later to become judges at the Tribunal, held different opinions. See *supra* note 9 and accompanying text; Anderson, *supra* note 4, at 168-70 (pleading for a restrictive interpretation); Treves, *supra* note 10, at 186 (favoring a non-restrictive interpretation which would extend the application of Article 292 to cases where the 1982 Convention prohibits the detention of ships and crews). This discussion also surfaced during the *Saiga I Case*, but the Tribunal was able to sidestep the issue by declaring: “Having decided that the argument of Saint Vincent and the Grenadines based on article 73 of the Convention is well founded, it is unnecessary for the Tribunal to adopt a position on the non-restrictive interpretation of article 292 of the Convention referred to in paragraph 53 above.” The *M/V “Saiga” Case* (St. Vincent v. Guinea), Prompt Release, 1997 ITLOS No. 1, ¶ 73, available at http://www.itlos.org/start2_en.html [hereinafter *Saiga I*]. This open-ended formula, mentioning the non-restrictive interpretation while not evaluating it, in turn triggered a plea in favor of the restrictive interpretation. See *id.* ¶¶ 22-25 (joint dissenting opinion of Judges Park, Nelson, Chandrasekhara Rao, Vukas, and Ndiaye).

18. Some observers have argued that ITLOS may be moving towards a certain specialization in issues relating to marine living resources. See Ros, *supra* note 6, at 506-12 (noting that all the cases so far brought before ITLOS were directly or indirectly related to fisheries).

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

2. *Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.*

3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.¹⁹

The genesis of Article 73 makes it clear that States originally had quite divergent opinions on which State was competent to prosecute violations of the coastal State's sovereign rights in its EEZ. Countries like the United States, the former Soviet Union, and Japan were of the opinion that this jurisdiction formed, in principle, part of the competence of the flag State,²⁰ whereas many other countries instead attributed this competence to the coastal State.²¹ The reasonable bond notion surfaced for the first time in a 1972 proposal of the United States.²² The U.S. proposal seems to have formed the essence of the final compromise reached by the two camps, as it was already included in the text of the so-called Evensen group in 1975 in its definitive form.²³ Because of its open-ended nature, the compromise probably proved acceptable to coastal as well as flag States. This historical analysis itself does not provide any further conceptual clarification of the notion

Only the latest case of the Tribunal, namely a request for provisional measures in the *MOX Plant Case* (Ire. v. U.K.) of December 3, 2001, which is in essence a marine environmental law case, and which fell outside the time period covered by Ros's article, forms an exception to this rule, unless of course one considers the protection of the marine environment of the Irish Sea to be directly, or at least indirectly, related to fisheries. *Mox Plant Case* (Ire. v. U.K.), Provisional Measures, 2001 ITLOS No. 10, available at http://www.itlos.org/start2_en.html.

19. 1982 Convention, *supra* note 2, art. 73 (emphasis added).

20. 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 784, 786-90 (Myron H. Nordquist et al. eds., 1993) [hereinafter 1982 COMMENTARY Vol. 2]. If the coastal State was granted any competence to control fishing activities in its EEZ, it was always required to deliver the vessel promptly to the flag State if the latter had established an internal procedure to prosecute and punish such vessels. *Id.* at 787.

21. *Id.* at 784-95.

22. *Id.* at 790. The U.S. proposal has been related to the difficulties the U.S. tuna fleet had been experiencing in the Pacific. See Anderson, *supra* note 4, at 167. Certain Latin American countries had detained U.S. fishing vessels for lengthy periods of time. See Noyes, *supra* note 13, at 133 n.133.

23. 1982 COMMENTARY VOL. 2, *supra* note 20, at 791. The only further change to the proposal was that the word "crew" was later changed to "crews." *Id.*

of what is “reasonable.” Overall, 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,²⁴ as worked out by the Tribunal itself in accordance with its Statute,²⁵ 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.”²⁶ 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 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.²⁷

As will be seen below,²⁸ the form of the bond or security is an essential element in the determination of the reasonableness criterion. The Final Draft Rules of the International Tribunal for the Law of the Sea prepared by the Preparatory Commission for the International Sea-bed Authority and for the International Tribunal for the Law of the Sea (Preparatory Commission)²⁹

24. See Rules of the Tribunal, ITLOS/8, Sept. 21, 2001, available at http://www.itlos.org/documents_publications/rules_en.pdf [hereinafter ITLOS Rules].

25. See ITLOS Statute, *supra* note 1, art. 16. This Statute in fact forms Annex VI of the 1982 Convention, and thus is an integral part of the 1982 Convention, 1982 Convention, *supra* note 2, art. 318.

26. ITLOS Rules, *supra* note 24, art. 111(2)(d). This requirement is a direct result of one of the main novelties characterizing this procedure, and which the ITLOS Rules have helped to materialize, namely its expedience. Mohamed Mouldi Marsit, *Le règlement du tribunal international du droit de la mer*, 2 ANNUAIRE DU DROIT DE LA MER 1997, at 309, 319-23 (1998). See also Tullio Treves, *Le règlement du tribunal international du droit de la mer entre tradition et innovation*, 43 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 341, 363 (1997). “En ce qui a trait à la nécessité d’examiner l’affaire promptement, le Tribunal en a fait le critère inspirateur de toute la procédure qu’il établit.” [“The Tribunal has made the need to examine the matter promptly the cornerstone of the entire procedure it established.”] *Id.* (translation by author).

27. ITLOS Rules, *supra* note 24, art. 113.

28. See *infra* text accompanying note 55.

29. *Draft Report of the Preparatory Commission Under Paragraph 10 of Resolution I Containing Recommendations for Submission to the Meeting of States Parties to be Convened*

provided that the bond or financial security should be deposited with the Tribunal.³⁰ This proposal was not adopted by the Tribunal, for in the final version, the Tribunal was replaced by the detaining State as the entity with which the security should be deposited, unless parties agreed otherwise.³¹

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. Furthermore, because the drafters bestowed the ITLOS with compulsory³² residual jurisdiction in this respect,³³ it is to be expected that the relevant case law will mainly be found there.³⁴ The fact that similar procedures before other courts or tribunals will normally take considerably more time,³⁵ or that such proce-

in Accordance With Annex VI, Article 4, of the Convention Regarding Practical Arrangements for the Establishment of the International Tribunal for the Law of the Sea, U.N. GAOR, Preparatory Commission for the International Tribunal for the Law of the Sea, vol. 1, add. 1, at 26-90, U.N. Doc. LOS/PCN/152 (1995). See *infra* note 131.

30. *Id.* at 68. This point was emphasized by Tullio Treves, *The Rules of the International Tribunal for the Law of the Sea*, 38 *INDIAN J. INT'L L.* 381, 404 n.71 (1998). See also Treves, *supra* note 26, at 364-65.

31. GUDMUNDER EIRIKSSON, *THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA* 212 (2000).

32. The fishing disputes relating to the EEZ have to a large extent been excluded from the compulsory settlement of disputes procedures entailing binding decisions. 1982 Convention, *supra* note 2, art. 297(3)(a). See Shabtai Rosenne, *Settlement of Fisheries Disputes in the Exclusive Economic Zone*, 73 *AM. J. INT'L L.* 89, 99 (1979) (stating that, even though in principle a large measure of compulsory jurisdiction has been introduced with respect to a significant number of new categories of maritime disputes, living resources of the EEZ form a notable exception). The prompt release of vessel procedure relating to such disputes, which forms the main subject of this article, is nevertheless a small inroad into that exclusion principle. See *supra* note 18 and accompanying text. To use the words of Judges Wolfrum and Yamamoto in their joint dissenting opinion in the *Saiga 1* decision: "Accordingly, the prompt release procedure may be seen as an exception to the limitations on applicability as contained in article 297 of the Convention." *The M/V "Saiga" Case (St. Vincent v. Guinea)*, Prompt Release, 1997 ITLOS No. 1, ¶ 18 (dissenting opinion of Judges Wolfrum and Yamamoto).

33. The Tribunal, as stated by Treves, "functions as the only possible dispute settlement body with compulsory jurisdiction." Treves, *supra* note 7, at 430. Even a flag State, party to the 1982 Convention, which has not opted for the Tribunal under Article 287, may thus, without difficulty, bring an application under Article 292 before the Tribunal against another State Party. See Thomas A. Mensah, *The Jurisdiction of the International Tribunal for the Law of the Sea*, 63 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UN INTERNATIONALES PRIVATRECHT* 330, 332 (1999).

34. Only if the parties agree to make use of another forum, or if the applicant, in the absence of such agreement, would rather opt for the court or tribunal accepted by the detaining State under Article 287 of the 1982 Convention—which seems rather improbable as demonstrated by the case law so far—can the ITLOS be avoided.

35. The mere setting up of an arbitration or a special arbitration in accordance with Annexes VII and VIII of the 1982 Convention would normally take more time than for the ITLOS, after having received an application, to decide a prompt release of vessel case. The element of expediency, which forms a cornerstone in the procedure before the Tribunal, might well give it an advantage over the International Court of Justice as well, especially in Article 292 cases. See *supra* note 26. Or as stated by D.H. Anderson: "There may well be a need for an International Court of Pie Powder in the maritime sector: Article 292 is only one example." D.H. Anderson, *Legal Implications of the Entry into Force of the UN Convention on the Law*

dures may simply be inadmissible *ratione personae* in other tribunals,³⁶ has even led one author to submit, after having subscribed to the point of view that most case law on this subject will be dealt with by the Tribunal,³⁷ that “although the ITLOS does not have *de jure* exclusive jurisdiction in prompt release cases, it may, in practice, be the only forum that will hear such cases and thus the only forum that will develop the law relating to the reasonableness of conditions for release.”³⁸ In this respect it is also noteworthy that the recently published *Dictionnaire de droit international public*, which updated the standard work of Basdevant of the 1960s,³⁹ added the entry “Mainlevée” with a subheading, “Prompte mainlevée de l’immobilisation d’un navire,” and defined the notion of prompt release in the following terms:

Procédure prévue par la convention de 1982 sur le droit de la mer, introduite devant une cour ou un tribunal international (*notamment le Tribunal international du droit de la mer*) par l’Etat du pavillon dont un navire est immobilisé par les autorités d’un Etat, partie à la convention, et qui allègue une violation des dispositions de la convention prévoyant la prompte mainlevée de l’immobilisation.⁴⁰

The entry in a specialized Russian dictionary on the law of the sea under a similar heading is also of note: “If within 10 days after the detention of the ship the parties do not reach an agreement on the submission of the dispute to any court or tribunal, provided by the Convention, it is submitted to the International Tribunal for the Law of the Sea.”⁴¹ Because the Tribunal did not try to clarify the notion of reasonable bond when it established the

of the Sea, 44 INT’L & COMP. L.Q. 313, 325 (1995) (internal quotation omitted).

36. According to Article 34(1) of the Statute for the International Court of Justice, for instance, only States may appear in contentious cases before the Court. Statute for the International Court of Justice, June 26, 1945, art. 34(1), 59 Stat. 1055, 33 U.N.T.S. 993.

37. “The ITLOS is . . . likely to hear almost all of the Article 292 prompt release cases.” Noyes, *supra* note 13, at 174. *See also id.* at 181 (stating that the ITLOS is unlikely to face competition in prompt release of vessel cases). *But see* Oxman, *supra* note 6, at 213-14 (assuming that “virtually all” prompt release applications will be made either to the International Court of Justice or the ITLOS). Oxman adds, nevertheless, that access to the former is much more limited. The prompt release of vessel procedure has indeed been described as one of the significant differences between the ITLOS and the International Court of Justice. *See* Choonho Park, *Judicial Settlement of International Maritime Disputes—An Overview of the Current System*, 28 STETSON L. REV. 1035, 1043-44 (1999).

38. Noyes, *supra* note 13, at 174. Or as stated by Treves: “[T]he Tribunal has (almost) exclusive compulsory jurisdiction.” Treves, *supra* note 30, at 401.

39. Dictionnaire de la terminologie du droit international (Jules Basdevant ed., 1960).

40. [“Procedure provided by the 1982 Law of the Sea Convention, introduced before a court or an international tribunal (*more particularly the International Tribunal for the Law of the Sea*) by the flag State whose vessel is detained by the authorities of a State party to the convention, and which alleges a violation of the provisions of the Convention providing for the prompt release.”]. Dictionnaire de droit international public 677 (Jean Salmon ed., 2001) (emphasis added) [hereinafter Dictionnaire] (translation by author).

41. Slovar’ mezhdunarodnogo morskogo prava [Dictionary of the International Law of the Sea] 157 (Iu. G. Barsegov ed., 1985) (translation by author).

ITLOS Rules, but only instructed the applicant to provide relevant information for consideration by it,⁴² a closer analysis of the Tribunal's case law on this issue is fully justified.

II. PRACTICAL IMPLEMENTATION BY THE ITLOS

Five prompt release cases have so far been decided by the ITLOS.⁴³ In chronological order they are: the *M/V Saiga 1 Case* (Saint Vincent and the Grenadines v. Guinea), decided on December 4, 1997;⁴⁴ the *Camouco Case* (Panama v. France), decided on February 7, 2000;⁴⁵ the *Monte Confurco Case* (Seychelles v. France), decided on December 18, 2000;⁴⁶ the *Grand Prince Case* (Belize v. France), decided on April 20, 2001;⁴⁷ and the *Chaisiri Reefer 2 Case* (Panama v. Yemen), introduced on July 3, 2001.⁴⁸

Only the last of these cases can be omitted from the present study. Not only was the case removed from the ITLOS list following an agreement between Panama and Yemen, but it also appears that the issuance of a reasonable bond was not in dispute.⁴⁹ Despite the fact that the Tribunal found that it lacked jurisdiction in the *Grand Prince Case*, that case nevertheless appears to have some relevance for the present study because at least one of the parties did argue the matter of the reasonable bond in some detail.

A. Saiga 1 Case

In the *Saiga 1 Case*, the amount, nature, and form of the bond or security were only marginal to the decision of the Tribunal. The Tribunal dis-

42. See *supra* note 25 and accompanying text.

43. These cases, as well as the separate and dissenting opinions, can be consulted at the official website of the ITLOS, available at http://www.itlos.org/start2_en.html.

44. The *M/V "Saiga" Case* (St. Vincent v. Guinea), Prompt Release, 1997 ITLOS No. 1, available at http://www.itlos.org/start2_en.html.

45. The "*Camouco*" Case (Pan. v. Fr.), Prompt Release, 2000 ITLOS No. 5, available at http://www.itlos.org/start2_enhtml [hereinafter *Camouco Case*].

46. The "*Monte Confurco*" Case (Sey. v. Fr.), Prompt Release, 2000 ITLOS No. 6, available at http://www.itlos.org/start2_enhtml [hereinafter *Monte Confurco Case*].

47. The "*Grand Prince*" Case (Belize v. Fr.), Prompt Release, 2001 ITLOS No. 8, available at http://www.itlos.org/start2_enhtml [hereinafter *Grand Prince Case*].

48. The "*Chaisiri Reefer 2*" Case (Pan. v. Yemen), Prompt Release, 2001 ITLOS No. 9, available at http://www.itlos.org/start2_enhtml.

49. Indeed, a Yemeni court had delivered a judgment ordering the release of the vessel and the payment of a commercial guarantee. On the same day, the shipowners of the vessel had supplied the requested guarantee. The dispute before the ITLOS merely concerned the fact that, despite the issuance and payment of the guarantee in question, the vessel had not been released. Press Release, ITLOS, Application Filed on Behalf of Panama Against Yemen for Release of Arrested Vessel (July 5, 2001) (ITLOS/Press51), available at <http://www.itlos.org/start2en.html>. Once this release materialized in practice, both parties agreed to discontinue the ITLOS proceeding, resulting in an order of the President of the ITLOS to remove the case from the list. The "*Chaisiri Reefer 2*" Case, Order 2001/4 (July 13, 2001), available at http://www.itlos.org/start2_en.html.

posed of the matter in six short paragraphs.⁵⁰ After having stated that “the most important guidance” for the implementation of Article 113(2) of the ITLOS Rules, imposing on the Tribunal the requirement to determine “the amount, the nature and the form of the bond,”⁵¹ is to be found in the term “reasonable” as prescribed by Article 292(1) of the 1982 Convention,⁵² the Tribunal remarked that the commercial value of the oil on board the *M/V Saiga* confiscated by the Guinean authorities had to be considered as security.⁵³

Based on these findings the Tribunal subsequently, rather like a *deus ex machina*, stated that in order to arrive at a reasonable bond the amount of the commercial value of the confiscated oil had to be augmented by a financial security of \$400,000 to be posted with the detaining State, unless the parties agreed otherwise. The Tribunal did not explain how it arrived at this figure, nor did it make any attempt to do so. The only guidance it gave was, first, that the posting of a mere “symbolic bond” or, for that matter, of no bond or security at all was excluded in the framework of an Article 292 procedure,⁵⁴ and second, that the reasonableness criterion “encompasse[d] the amount, the nature and the form of the bond or financial security,” so that the “overall balance” of these three distinct elements, and not necessarily each individual element separately, needed to be reasonable.⁵⁵

B. Camouco Case

In the *Camouco Case*, the amount, nature, and form of the bond or security formed a key element.⁵⁶ This issue was argued before the French courts as well as before the ITLOS. When the ship was seized by the French authorities for presumed violations of the fishery legislation of the EEZ of the Crozet Islands, the *procès-verbal* of seizure of the ship estimated the value of the ship at FFR 20,000,000 and the *procès-verbal* of seizure of the fish valued the 7,600 kilograms of toothfish at FFR 380,000. The national Court of First Instance, following the Regional and Departmental Director of Maritime Affairs who had requested a bond of no less than FFR 15,000,000 plus costs to be paid into the French Deposits and Consignments Office, set the

50. The *M/V “Saiga” Case* (St. Vincent v. Grenadines), Prompt Release, 1997 ITLOS No. 1, ¶¶ 80-85 (Judgment of Dec. 4, 1997), available at http://www.itlos.org/start2_en.html. In total, the judgment consisted of 86 paragraphs.

51. *Id.* ¶ 82.

52. *Id.*

53. *Id.* ¶¶ 83-84. The commercial value of the oil had been evaluated at approximately \$1,000,000. *Id.* ¶ 35.

54. *Id.* ¶ 81.

55. *Id.* ¶ 82.

56. The “*Camouco*” Case (Pan. v. Fr.), Prompt Release, 2000 ITLOS No. 5, ¶¶ 61-76 (Judgment of Feb. 7, 2000), available at http://www.itlos.org/start2_enhtml. More than 16 of the 78 paragraphs in this judgment discussed this issue.

bond at FFR 20,000,000 in cash, certified cheque, or bank draft to be paid into that office.

By means of a summons procedure, 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 of the 1982 Convention, but to no avail. Since the judge of the Court of First Instance did not have to give an account of the considerations for setting this amount, no relief was granted by the summons proceedings.⁵⁷ An appeal was later lodged against the order.⁵⁸

Before the ITLOS, the applicant again argued that the bond set by the French court was not reasonable.⁵⁹ This time, the Tribunal dealt with the issue at length and came to the conclusion that the bond was not reasonable.⁶⁰ The ITLOS further repeated its understanding, already emphasized in the *Saiga 1 Case*,⁶¹ 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.⁶²

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: "[T]he gravity of the alleged offences, the penalties imposed or impossible under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form."⁶³ Significantly, all of the enumerated factors that shed any further light on the practical implementation of the reasonableness criterion, concern the element "amount."

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.⁶⁴ The maximum penalty that could be imposed, according to

57. The only requirement to be found in the relevant French legislation (Article 142 of the Code of Criminal Procedure) is that the judge must distinguish between "the reparation of damages caused by the offence," on the one hand, and the fines, on the other. *Id.* ¶ 40 (quoting C. PR. PÉN. art. 142).

58. *Id.* ¶ 42.

59. Instead of the FFR 20,000,000 set by the French court, the applicant proposed an amount of FFR 1,300,000, from which the value of the confiscated fish, FFR 350,000, still had to be deducted. *Id.* ¶ 64.

60. *Id.* ¶¶ 64-70.

61. See The M/V "Saiga" Case (St. Vincent v. Grenadines), Prompt Release, 1997 ITLOS No. 1, ¶ 82 (Judgment of Dec. 4, 1997), available at http://www.itlos.org/start2_en.html.

62. The "Camouco" Case (Pan. v. Fr.), Prompt Release, 2000 ITLOS No. 5, ¶ 66 (Judgment of Feb. 7, 2000), available at http://www.itlos.org/start2_enhtml. The *Saiga 1 Case* is explicitly referred to by the Tribunal. *Id.* ¶ 66.

63. *Id.* ¶ 67.

64. Law No. 66-400, art. 4 (June 18, 1966, as amended by the Law of Nov. 18,

the French agent, was FFR 5,000,000. He further informed the Tribunal that the company that owned the *Camouco* could also be held criminally liable for offenses committed by the master, and fined up to a limit of five times the penalty imposed on the master.⁶⁵ According to the Tribunal, however, the French authorities had not yet relied on the criminal penalty, for no such charges had been brought against the company.⁶⁶

Second, as far as the value of the detained vessel was concerned, the Tribunal referred to Article 111(2)(b) of the ITLOS Rules requiring that the application contains "data relevant to the determination of the value of the vessel," but again emphasized that the vessel's value by itself was not the controlling factor for determining the amount of the bond.⁶⁷ 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 20,000,000.⁶⁸ 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. Having come to that conclusion, the Tribunal then had to determine what it considered to be a reasonable bond or security. Unlike in the previous phase,

1997)(Fr.) provides:

Any person who fishes, hunts marine animals or exploits marine products on land or on board a vessel, without having first obtained the authorization required under article 2, or fails to give notification of entering the economic zone, or to declare the tonnage of fish held on board, shall be punished with a fine of 1.000.000 francs and six months' imprisonment, or with one only of these two penalties.

Id. ¶ 39 (quoting the Law on Sea Fishing and the Exploitation of Marine Products in the French Southern and Antarctic Territories, Law No. 66-400 of June 18, 1966).

65. Meaning, *in casu*, FFR 25,000,000 on top of the FFR 5,000,000 imposable on the master.

66. The "Camouco" Case (Pan. v. Fr.), Prompt Release, 2000 ITLOS No. 5, ¶ 68 (Judgment Feb. 7, 2000), available at http://www.itlos.org/start2_enhtml.

67. *Id.* ¶ 69.

68. One, nevertheless, has the impression that the French authorities did not necessarily consider the value of the *Camouco* to be FFR 20,000,000, but rather viewed that sum as the amount of the bond, which under French law is determined on the basis of the two separate factors discussed. *Supra* note 57 (discussing Article 142 of the French Code of Criminal Procedure). See also Bernard H. Oxman & Vincent Bantz, *The "Camouco" Case (Panama v. France) (Judgement)*, in *International Decisions*, 94 AM. J. INT'L L. 707, 717-18 (2000). Thus, on the one hand, the bond should be severe enough to assure the appearance of the accused at all stages of the proceedings against him. On the other, it should make sure that it covers reparation for damage incurred by the violation, if proven, as well as possible fines related thereto. The two paragraphs to which the judgment refers in this respect, ¶¶ 36 and 42, do not, however, appear to sustain the Tribunal's point of view. In other words, according to the French law, nothing seems to prevent the release of a vessel from being conditioned on the furnishing of a security in an amount that surpasses the value of the ship.

where the Tribunal focused on the amount, it now simply appeared to rely on these findings to put forward a figure that it considered reasonable under the circumstances, namely FFR 8,000,000. More attention in this phase was devoted to the nature and the form of the bond or financial security. The Tribunal was of the opinion that unless the parties agreed otherwise, the bond should take the form of a bank guarantee. Even though the applicant requested that the guarantee be entrusted to the Tribunal, it refused to accede to this particular request since Article 113(3) of the ITLOS Rules requires the agreement of the parties, which was absent *in casu*.⁶⁹ The Tribunal finally also determined the minimum content of the guarantee or security in question. The latter should contain the exact reason why it was issued, and the purpose for which it should be used, as well as the modalities of such payment.⁷⁰

C. 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*.⁷¹ Special attention is therefore given to this case, especially since it appears that the French Court of First Instance at Saint-Paul, Réunion, referred back to the jurisprudence of the ITLOS when fixing the bond of the *Monte Confurco*. On the bases of the three *procès-verbaux* drawn up by the French authorities on seizure of the vessel, the toothfish onboard the vessel, namely 158 tons, was valued at FFR 9,000,000, the fishing gear at FFR 300,000, and the ship itself at FFR 15,000,000.⁷² Special about this case was that the vessel had already been at sea for about two-and-a-half months and that it was said to have been crossing the French EEZ around Kerguelen Islands in order to arrive at Williams Bank. The latter is located in international waters southeast of the French EEZ and outside of the conventional area of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR).⁷³ The vessel's

69. ITLOS Rules, *supra* note 24, art. 113(3). In other words, the will of the parties remains law in this respect. But absent such a concordance of wills, the bond or security shall be posted with the detaining State. As mentioned before, a prior attempt to include a provision in the ITLOS Rules, which would have required the bond to be posted with the Tribunal, proved unsuccessful. *See supra* notes 29-31 and accompanying text.

70. The "Camouco" Case (Pan. v. Fr.), Prompt Release, 2000 ITLOS No. 5, ¶ 76 (Judgment of Feb. 7, 2000), *available at* http://www.itlos.org/start2_enhtml. If the release of the vessel is to be prompt, so is the payment under the guarantee (once a written demand is made by the competent authorities of the detaining State accompanied by a certified copy of the final judgment or decision, unless the parties agree otherwise).

71. Of a judgment consisting of 96 paragraphs, 32 were devoted to the amount, nature, and form of the bond. *See* The "Monte Confurco" Case (Sey. v. Fr.), Prompt Release, 2000 ITLOS No. 6, ¶¶ 64-95 (Judgment of Dec. 18, 2000), *available at* http://www.itlos.org/start2_enhtml.

72. *Id.* ¶ 34.

73. Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 33 U.S.T. 3476, 19 I.L.M. 841 (1980), *available at* <http://www.ccamlr.org/English/>

master intended to spend the final weeks of the fishing expedition at Williams Bank before turning back.⁷⁴ For this reason, the ship was already half full at the time of the seizure in the French EEZ off Kerguelen Islands. The seizure was based on the facts that the ship had failed to announce its presence and the quantity of fish it was carrying when entering that zone, and that it was fishing without prior authorization.

The large amount of fish on board the vessel, which had not been declared on entry into the French EEZ, is an element that helps in understanding the rather high bond requested by the Regional and Departmental Director of Maritime Affairs of Réunion, namely FFR 95,400,000.⁷⁵ The Court of First Instance, in its order fixing the bond, explicitly referred to the fact that the toothfish found on board the vessel raised the presumption that the whole of the catch had been unlawfully fished in the French EEZ.⁷⁶ This element also constituted the most important factor that the Court took into consideration when determining the amount of the bond, namely FFR 79,000,000 as fines incurred by the master on the basis of the 158 tons of fish it carried in its holds. The other elements advanced by the Court were the value of the ship, evaluated at FFR 15,000,000 by a French marine surveyor, and the compensation victims are generally granted, estimated to be less than FFR 100,000.⁷⁷ On the basis of these elements, the Court 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).⁷⁸

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. First of all, the Court mentioned that it was the overall balance of the amount, the form, and the nature of the bond that determined the bond's reasonableness. Second, it mentioned all of the clarifying elements advanced by the ITLOS with respect to the amount factor; namely the seriousness of the violations, the penalties that can be imposed, the value of the ship, and, finally, the value of the cargo.⁷⁹ 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.

conv/e_conv_intro.htm#Top%20of%20Page [hereinafter CCAMLR].

74. See Monte Confurco Case, ¶ 47.

75. *Id.* ¶ 35.

76. *Id.* ¶ 37.

77. *Id.* ¶ 38.

78. *Id.* ¶ 39.

79. *Id.* ¶ 41.

The applicant, however, contested this point of view believing the bond to be unreasonable. Instead, the applicant submitted that FFR 2,200,000 constituted a reasonable bond. According to the applicant, this amount included FFR 200,000 for the failure to notify French authorities about the presence of the vessel in the French EEZ and FFR 2,000,000 for the presence itself, based on a worst-case scenario in which the vessel could at best have taken four tons of toothfish while sailing through the French zone.⁸⁰

The ITLOS began by reminding the parties that Article 73(1) and (2) try to harmonize two interests.⁸¹ The first paragraph of Article 73 allows the coastal State to ensure compliance with the laws and regulations it adopts in the exercise of its sovereign rights to explore, exploit, conserve, and manage the living resources of its EEZ. The second paragraph protects the interests of the flag State by securing the prompt release of vessels and their crews from detention by the coastal State. The posting of a reasonable bond is a key element by which the 1982 Convention tries to strike a fair balance between the two distinct interest groups. Article 292 serves a similar purpose since it allows the flag State to have its vessels released promptly, while at the same time guaranteeing the coastal State that the defendant will appear in court and pay the penalties incurred.

The Tribunal subsequently clarified the delicate relationship of a prompt release of vessel procedure based on Article 292 of the 1982 Convention with the national law and regulations of the detaining State, as well as court procedures instigated there relating to the same facts. Even though the ITLOS denied being an appellate forum against decisions of national courts, it will nevertheless treat both elements just mentioned merely as relevant facts it has to assess, together with other relevant factors, in order to determine whether the reasonableness criterion prescribed by Article 292 has been complied with. The ITLOS also cannot prejudice the merits of the case pending before the appropriate domestic forum, but it is nevertheless competent to examine the facts and circumstances of the case insofar as such examination proves necessary for a proper appreciation of the element "reasonableness." The only limitation is the fact that an Article 292 procedure is characterized by its expediency, limiting the powers of the Tribunal to seek further evidence in support of the allegations made by the parties.

In order to determine whether the bond posted by the French Court was reasonable, the Tribunal first recalled its previous case law on the subject before further elaborating these guidelines by applying them to the case at hand. In the *Monte Confurco Case*, the ITLOS explicitly referred to the crucial part of its judgment in the *Camouco Case*⁸² 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

80. *Id.* ¶ 65.

81. *Id.* ¶ 70.

82. *Id.* ¶ 76.

detained vessel and the cargo seized, and the amount of the bond imposed by the detaining State and its form.”⁸³ It also referred to the *Saiga I Case*,⁸⁴ by quoting the passage where the overall nature of the reasonableness criterion is stressed, spanning the amount, form, and nature of the bond together, without having to be applicable to each and every single one of these latter elements separately.⁸⁵

The ITLOS then applied each of the relevant factors:

1. *The gravity of the offences.*

The French authorities went to great lengths to emphasize the general context of unlawful fishing in the region, and more particularly the conservation measures taken under the CCAMLR with respect to toothfish, which were said to be undermined by the illegal fishing operations in the French EEZ in the area. The ITLOS was very succinct in its comments on this point. It simply stated: “The Tribunal takes note of this argument,”⁸⁶ without, however, indicating the importance it attached to this particular factor.

2. *The penalties imposed or impossible under the laws of the detaining State.*

With similar indifference the ITLOS took note of the range of penalties, which under French law are considered as grave. The applicant, however, argued that the vessel had not been fishing in the French zone and that consequently the only offence committed was the failure to notify the French authorities of the entry into the French EEZ and the tonnage of fish carried. According to the applicant, the maximum penalties taken into account by the French judge were therefore not related to the facts of the case.⁸⁷

3. *The value of the detained vessel and the cargo seized.*

As far as the ship is concerned, the parties differed widely. The *procès-verbal* had valued the ship at FFR 15,000,000 on the basis of an estimation made by a French marine surveyor.⁸⁸ But during the oral procedure, the defendant relied on another expert opinion, which estimated the value of the ship at approximately \$1,500,000.⁸⁹ The applicant, however, relied on expert estimates between \$400,000 and \$450,000.⁹⁰ 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 more-

83. See *supra* text accompanying note 63.

84. The “Monte Confurco” Case (Sey. v. Fr.), Prompt Release, 2000 ITLOS No. 6, ¶ 76 (Judgment of Dec. 18, 2000), available at http://www.itlos.org/start2_en.html.

85. See The “Camouco” Case (Pan. v. Fr.), Prompt Release, 2000 ITLOS No. 5, ¶ 66 (Judgment of Feb. 7, 2000), available at http://www.itlos.org/start2_en.html (quoting The M/V “Saiga” Case (St. Vincent v. Guinea), Prompt Release, 1997 ITLOS No. 1, ¶ 82 (Judgment of Dec. 4, 1997), available at http://www.itlos.org/start2_en.html).

86. The “Monte Confurco” Case, 2000 ITLOS No. 6, ¶ 76.

87. *Id.* ¶ 83.

88. *Id.* ¶ 84.

89. *Id.*

90. *Id.*

over to the amount for which the vessel had been sold in 1999, the ITLOS considered this figure to be reasonable.⁹¹

With respect to the cargo, the value of FFR 9,000,000, as estimated in the relevant *procès-verbal*, was not contested by the parties.⁹² Nevertheless, two specific related problems did arise. First, the French Court had not provided for securing confiscation of the cargo, or of the fishing gear. The fishing gear had been valued in the *procès-verbal* at FFR 300,000, and the applicant had not contested this figure.⁹³ Even though the respondent did not consider the value of the fishing gear and the cargo to be an issue before the ITLOS, but rather to be considered under an appropriate procedure according to French law, the Tribunal considered these elements to constitute relevant factors for the proper assessment of the reasonableness of the bond.⁹⁴

The second important element considered by the ITLOS with respect to the cargo was the presumption relied on by the French Court that the whole cargo of fish, because it had not been declared at the time of entry of the vessel into the French EEZ, had unlawfully been fished inside that zone. In reality, the French Court had based the maximum of the fines that a later trial judge might impose *in casu* on about half of the amount of toothfish present on board the *Monte Confurco* at the time of seizure.⁹⁵ The Tribunal, however, considered this particular assumption by the French court not to be born out by the information before it. That information proved insufficient to support an assumption that even a substantial part was taken inside the French EEZ or to indicate with any certainty how long the *Monte Confurco* had remained in the French EEZ.⁹⁶

4. *The amount of the bond imposed by the detaining State and its form.*

The above-mentioned considerations led the ITLOS to the conclusion that the bond imposed by the French Court had been unreasonable.⁹⁷ 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.⁹⁸ Very much in line with its decision in the *Camouco Case*,⁹⁹ the Tribunal in this phase simply put forward a figure and then concentrated on the nature and the form of the bond or the security.¹⁰⁰

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.¹⁰¹

91. *Id.*

92. *Id.* ¶ 85.

93. *Id.*

94. *Id.* ¶¶ 85-86.

95. *Id.* ¶ 87.

96. *Id.* ¶ 88.

97. *Id.* ¶ 89.

98. *Id.* ¶ 93.

99. See *supra* note 69 and accompanying text.

100. The "Monte Confurco" Case, 2000 ITLOS No. 6, ¶¶ 93-95, available at http://www.itlos.org/start2_enhtml.

101. *Id.* ¶ 93.

Since this particular method had proved sufficient in the *Camouco Case*, the Tribunal saw no reason to follow the submission by the French agent that only cash or a certified check should be acceptable.¹⁰² It nevertheless specified to some extent the content of the bank guarantee by enumerating some of the elements that the latter should necessarily contain: The issuing of the bond was to be in consideration of the release of the *Monte Confurco* and its master in relation to the specific incident in the case; the issuer was to guarantee to pay France a sum up to FFR 9,000,000, depending on the final judgment in the French courts and immediately following written demand by France accompanied by a certified copy of the final judgment, decision, or arrangement.¹⁰³

D. Grand Prince Case

On December 26, 2000, less than a week after the ITLOS rendered its decision in the *Monte Confurco Case*, another ship, the *Grand Prince*, was arrested by the French authorities in the French EEZ around the Kerguelen Islands. For the purposes of the present article, the case is somewhat special, because the applicant initially agreed with the bond posted by the French Court of First Instance on January 12, 2001. But the case became more complicated because of the criminal proceedings brought before the French *tribunal de grande instance* at Saint Denis, Réunion. The day before the bond was set, the master of the vessel admitted the violations with which he was charged before the public prosecutor of the criminal court,¹⁰⁴ who fixed the criminal hearing for January 23. At that criminal hearing, the court ordered the confiscation of the vessel and its equipment and gear, as well as the fishing products.¹⁰⁵ More importantly, the confiscation of the vessel and the equipment were said to have *exécution provisoire*, meaning that the confiscation was immediately enforceable regardless of whether an appeal had been lodged.¹⁰⁶ An appeal was subsequently lodged on January 31 by the ship-owner, with the case scheduled for hearing on September 13, 2001.¹⁰⁷

On February 19, the ship owners applied to the Court of First Instance, requesting the release of the *Grand Prince* on the presentation of a bank guarantee in the amount previously fixed. Their request was denied, how-

102. *Id.*

103. *Id.* ¶ 95.

104. The "Grand Prince" Case (Belize v. Fr.), Prompt Release, 2001 ITLOS No. 8, ¶ 45 (Judgment of Apr. 20, 2001), available at http://www.itlos.org/start2_enhtml. Only minor qualifications were made by the master of the *Grand Prince* to the charges, namely that the illegal fishing had started on December 26, and not on December 24, as stated in the *procès-verbal*. The fact that the logbook was only completed up to December 23 was explained by the facts that the new logbook had been locked up in a cupboard and the crew had lacked the time to make the necessary entries.

105. *Id.* ¶ 50.

106. *Id.*

107. *Id.* ¶ 51.

ever, because the judge believed he no longer had jurisdiction to order the return of the vessel once the criminal court had ordered its confiscation with *exécution provisoire*.¹⁰⁸

On March 21, 2001, an application under Article 292 of the 1982 Convention was filed on behalf of the flag State. Two separate lines of argument were presented. First, it was argued that the particular interplay between the Court of First Instance and the *tribunal de grande instance*, with the latter ordering the confiscation of the vessel and this decision being provisionally executed regardless of a pending appeal, totally undermined the effectiveness of the prompt release requirement under Article 73 of the 1982 Convention.¹⁰⁹ Second, and, more importantly for the present article, the applicant argued that the bond set by the Court of First Instance had been reasonable.¹¹⁰

France only responded to the first allegation because it formed part of its main contention that the Tribunal lacked jurisdiction. It based this submission principally on Article 292(3) of the 1982 Convention, which strictly limits the jurisdiction of the competent court or tribunal to the question of the release "without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew."¹¹¹ Since the *tribunal de grande instance* had strictly applied French substantive and procedural legal provisions when it ordered the confiscation of the vessel to be immediately enforceable notwithstanding the lodging of an appeal, the case had been heard on the merits before an appropriate French court. If the Tribunal were to order the release of the vessel, it would clearly interfere with the judgment of a municipal court given on the merits of the case. No matter how interesting this point might have appeared from a theoretical point of view,¹¹² however, the Tribunal decided it had no jurisdiction based on an argument it had raised *proprio motu*, namely that the ship did not fly the flag of Belize at the time of the filing of the application.¹¹³

With respect to the reasonableness criterion for the amount, form, or nature of the bond, therefore, only the applicant developed detailed arguments. France's position only appears in the decision of the Court of First Instance. France considered it unnecessary to develop this issue any further in the proceedings before the ITLOS given the fact that the Tribunal was considered to

108. *Id.* ¶¶ 52-53.

109. *Id.* ¶ 54.

110. *Id.*

111. *Id.* ¶ 57.

112. Judges Caminos, Rangel, Yankov, Yamamoto, Akl, Vukas, Marsit, Eiriksson, and Jesus, in their joint dissenting opinion to this case, explicitly regretted that the Tribunal was prevented from addressing this issue. The "Grand Prince" Case (Belize v. Fr.), Prompt Release, 2001 ITLOS No. 8, ¶ 17 (dissenting opinion of Judges Caminos, Marotta Rangel, Yankov, Yamamoto, Akl, Vukas, Marsit, Eirikson, and Jesus of Apr. 20, 2001), available at http://www.itlos.org/start2_enhtml.

113. The "Grand Prince" Case (Belize v. Fr.), Prompt Release, 2001 ITLOS No. 8, ¶¶ 92-93 (Judgment of Apr. 20, 2001), available at http://www.itlos.org/start2_enhtml.

have no jurisdiction in the first place.¹¹⁴ The Tribunal itself decided that it had no jurisdiction, and consequently it did not even touch on this issue.¹¹⁵

The French Court of First Instance had considered the following relevant elements: first, the value of the ship, as appraised by a marine surveyor, at FFR 13,000,000; second, “the fines incurred by the master” on the basis of eighteen tons of toothfish on board the vessel that had not been declared on entry into the French EEZ, estimated at FFR 9,000,000; and third, “compensation of less than 400,000 FF which victims are generally granted.”¹¹⁶ On the basis of these considerations, the bond was set at FFR 11,400,000, of which guaranteeing the payment of fines and the confiscation of the vessel was the most important element, representing FFR 10,000,000, followed by securing the appearance of the captain of the vessel, valued at FFR 1,000,000, and guaranteeing payment of the damages caused, FFR 400,000.¹¹⁷

The applicant contested the reasonableness of this bond. The value of the vessel was said to have been highly exaggerated. Instead of the FFR 13,000,000 put forward by the French marine surveyor, the market value of the vessel in question was estimated at FFR 2,361,600.¹¹⁸ Furthermore, the French Court had not considered as security the value of the fish, the fishing gear, and fishing materials, which had also been confiscated and had been evaluated at more than FFR 1,000,000.¹¹⁹ For that reason, the amount of the bond should have been fixed at FFR 1,352,337.40 instead of FFR 11,400,000 as set by the French Court. In its final submission, the applicant requested that certain minimum elements be mandated in the wording of the bond.¹²⁰ The requested elements mirrored the requirements set by the ITLOS in the *Monte Confurco Case*.¹²¹

III. ANALYSIS OF THE CONCEPT “REASONABLE” WITHIN THE PROMPT RELEASE OF VESSEL PROCEDURE

This part will be structured along the following lines. First, some remarks will be made about the particular drafting technique relied on in Article 292 of the 1982 Convention. These comments will be followed by an excursion into the crucial differences apparent when one compares the different authentic language texts of this document. A third section will look into the substantive aspects of the matter. The concluding section of this part will evaluate the developments noted thus far.

114. *Id.* ¶¶ 57-61.

115. *Id.* ¶ 93.

116. *Id.* ¶ 44.

117. *Id.* ¶ 45.

118. *Id.* ¶ 55.

119. *Id.*

120. *Id.* ¶ 31(9).

121. *See supra* notes 100-02 and accompanying text.

A. Considerations Relating to the Drafting Technique

As demonstrated above, the drafters of the 1982 Convention intended to leave it up to the judges or arbiters to give concrete content to the notion of reasonableness in the framework of Article 292. In a context of codification of treaty terms, this is not an unusual method. Relying on concepts in a text, which still have to be filled in at a later stage, helps the drafters to move forward without having to specify every single detail of its possible application. This method proves especially beneficial if it concerns fact-intensive applications. The concept can be encountered, in practice, in so many different situations, which are all different *inter se*, that an attempt to codify them all would be doomed to fail, either because of material impossibility, or because making the rule any more specific would stir up insurmountable disagreement among the drafters. Reliance on the concept of reasonableness in Article 292 of the 1982 Convention is a good example of the practical application of this method, which, it should be stressed, is by no means exceptional in the overall practice of contemporary international lawmaking.¹²²

The 1982 Convention contains several such undefined concepts.¹²³ Specific reference can be made here to Article 300, specifically devoted to the concepts of "good faith" and "abuse of rights." What is more, the 1982 Convention even introduces a similar concept in an area of law that had previously been regulated in some detail by conventional provisions: e.g., bound-

122. See generally OLIVIER CORTEN, *L'UTILISATION DU "RAISONNABLE" PAR LE JUGE INTERNATIONAL: DISCOURS JURIDIQUE, RAISON ET CONTRADICTIONS* (1997). See also *DICTIONNAIRE*, *supra* note 40, at 924, listing numerous occasions where this adjective reasonable is encountered in international law: "L'adjectif se retrouve à la fois au sein de règles primaires (qualification d'un délai, d'un préavis, d'une répartition, d'un taux . . .) et dans le cadre d'opérations d'interprétation (sens raisonnable, résultat raisonnable), d'établissement des faits (certitude raisonnable), ou plus largement de raisonnement juridique (déduction raisonnable, supposition raisonnable, etc.)." [The adjective is to be found as well in primary rules (qualification of a time limit, a notice, a division, a rate, . . .) as in the framework of interpretation processes (reasonable meaning, reasonable result), of the determination of facts (reasonable certainty), or more generally of legal reasoning (reasonable conclusion, reasonable supposition, etc.)] (translation by author). The 1982 Convention and its annexes are a good illustration, since the term "reasonable" occurs not less than 48 times, of which 28 are in the actual text of the 1982 Convention. In the 1982 Convention, "reasonable" usually occurs as a qualifying adjective in a primary rule, e.g., "reasonable bond" (arts. 73(2) and 292(1)); "reasonable measures" (arts. 79(2) and 115 ("reasonable precautionary measures")); "reasonable opportunity" (art. 242(2)); "reasonable period of time" (arts. 74(2), 83(2), 242(6), 253(3), and 298(1)(a)(i)); "reasonable procedures" (art. 226(1)(b)); "reasonable regard" (art. 147(1) & (3)); "reasonable risk" (art. 225); "reasonable rules, regulations and procedures" (art. 255); "reasonable safety zones" (arts. 60(4) and 260 ("safety zones of a reasonable breadth")); "reasonable terms and conditions" (arts. 144(2)(a), 266(1), and 269(b) ("reasonable conditions")); "unreasonable threat" (art. 226(1)(c)(emphasis added)); and "reasonable time-limit" (art. 294(2)). The 1982 Convention also employ the term "reasonable" in the rules for interpretation: "reasonable grounds for believing" (arts 108(2), 206, and 211(6)(a)); "reasonable ground for suspecting" (art. 110(1)); or in the expression "so far as reasonable and practicable" (art. 236).

123. See, e.g., "due regard," "appropriate," and other such concepts, found repeatedly throughout the 1982 Convention.

ary delimitations.¹²⁴ Reference here is to be made to Article 83(1), which states that the delimitation of the continental shelf between States must result in an “equitable solution.”¹²⁵ Contrary to the situation that existed before the 1982 Convention, Article 83 is indeed characterized by a complete absence of any practical method to achieve the required end result.¹²⁶ The result has been what one author labeled, in French, the “décodification” of this branch of the law of the sea.¹²⁷ This formulation proved necessary because the drafters of the 1982 Convention were utterly divided over the method to be applied in maritime delimitation. The reliance on an “equitable solution” constituted, in reality, an agreement to disagree further,¹²⁸ deferring the ultimate decision to the judiciary.¹²⁹

A similar technique has been applied to the prompt release of vessel procedure with the introduction of the notion “reasonable.” In the difficult exercise of balancing the interests of the coastal and flag States,¹³⁰ the notion of reasonableness plays a crucial role. Attempts to further clarify the framework in which the prompt release procedures had to operate, and thus to restrict the discretionary powers of judges or arbitrators on this point, proved unsuccessful.¹³¹ This complete lack of guidance has not, however, negatively influenced the concrete application of this particular notion, for the simple

124. See Erik Franckx, *Maritime Boundaries in the Baltic Sea: Post-1991 Developments*, 28 GA. J. INT'L & COMP. L. 249, 251-54 (2000) (discussing the role of international tribunals in delimitation of maritime boundaries). “[T]he international law of maritime delimitation is not to be found in treaty law, nor in customary law, but is rather found in judicial decisions.” *Id.* at 253-54.

125. A similar provision may also be found in Article 74 of the 1982 Convention (delimitation of the exclusive economic zone between State with opposite or adjacent coast). However, because the concept of an EEZ was first codified by the 1982 Convention, it should be distinguished from the concept of the continental shelf contained in Article 83.

126. See 2 LAURENT LUCCHINI & MICHAEL VOELCKEL, *DROIT DE LA MER [LAW OF THE SEA]* 89 (1996).

127. Tullio Treves, *Codification du droit international et pratique des Etats dans le droit de la mer*, 22 RECUEIL DES COURS 11, 104 (1991).

128. Erik Franckx, *Coastal State Jurisdiction with Respect to Marine Pollution — Some Recent Developments and Future Challenges*, 10 INT'L J. MARINE & COASTAL L. 253, 254 (1995).

129. See PROSPER WEIL, *THE LAW OF MARITIME DELIMITATION: REFLECTIONS* 143-56 (1989). The result has been the creation of a sort of judge-made common law in the classic sense, notwithstanding that the rule of *stare decisis* is not applicable to international courts. See Jonathan I. Charney, *Progress in International Maritime Boundary Delimitation*, 88 AM. J. INT'L L. 227, 228 (1994).

130. See *supra* note 13 and accompanying text.

131. The attempt in the Preparatory Commission, see *supra* note 29 and accompanying text, which *inter alia* undertook preparatory work relating to the establishment of the ITLOS in the time period between the adoption of the 1982 Convention and its entry into force, to circumscribe the reasonableness criterion in this respect by preventing the bond to exceed the value of the vessel, for instance, did not succeed. See *International Tribunal for the Law of the Sea, Draft Rules of the Tribunal (Prepared by the Secretariat)*, U.N. Doc. LOS/PCN/SCN.4/WP.2/REV.1/Part I, art. 91 (1986), reprinted in 7 *THE LAW OF THE SEA: DOCUMENTS 1983-1989*, at 259, 298 (Renate Platzöder ed., 1989).

reason that "reasonable bond," embedded as it is in Article 292, will always be subject to a system of compulsory dispute settlement under the 1982 Convention.¹³²

In contrast, the other concepts mentioned above will not necessarily be subject to further interpretation. The achievement of an equitable result under the EEZ and continental shelf delimitation articles will often be left to the discretion of the parties themselves, i.e., regularly leading to a stalemate if parties are not inclined to compromise.¹³³ According to Article 298(1)(a)(i) of the 1982 Convention, a State has the option of declaring, at any time, in writing, that it does not accept the compulsory procedures entailing binding decisions with respect to EEZ and continental shelf delimitation issues. A number of States have already made such declarations,¹³⁴ either outright refusing such binding dispute settlement procedures¹³⁵ or limiting the choice of forum.¹³⁶ Furthermore, the application of the good faith and abuse of rights concepts, even though in general subject to Part XV provisions on the settlement of disputes, will often be excluded from third-party scrutiny.¹³⁷

Such exceptions to obligatory jurisdiction of a court or tribunal are not only absent with respect to the reasonableness criterion in Article 292 procedures, as already pointed out.¹³⁸ Article 292 procedures which will always be subject to obligatory third-party settlement, and very often only one institu-

132. See 1982 Convention, *supra* note 2, pt. XV, sec. 2, arts. 286-296 (entitled *Settlement of Disputes: Compulsory Procedures Entailing Binding Decisions*). See also *supra* note 33.

133. For political reasons, States are often not willing to depart from their respective positions when these concern issues relating to territorial sovereignty or zones over which States exercise sovereign rights.

134. See U.N. Division of Ocean Affairs and Law of the Sea, Choice of Procedure of State Parties under article 287 of the Convention, at http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm (last visited Feb. 27, 2002).

135. See *id.* (Argentina, Chile, France, Italy, Portugal, Russia, Tunisia, and Ukraine have refused binding settlement procedures).

136. States can limit forums in either in a positive way, by naming the only competent organ (Nicaragua, for instance, only accepts the jurisdiction of the International Court of Justice), or in a negative way, by naming the organ which is excluded. States in the latter group include countries such as Cuba and Guinea-Bissau (specifically excluding the International Court of Justice), Norway and Slovenia (explicitly excluding arbitration), and finally Iceland, which only accepts compulsory conciliation for continental shelf delimitation. Depending on the position of the other party to the dispute, such limitation can also easily lead to an impasse.

137. Or as stated in 1982 COMMENTARY VOL. 5, *supra* note 9, at 150, 152:

The presence of highly subjective elements in article 300 is compensated by the fact that the article comes within the scope of the provisions of Part XV for the settlement of disputes. This may lead to some measure of third-party control over the invocation of the article, although certain exceptions in article 297 go a long way towards protecting the discretion of coastal States from third-party adjudication.

Id.

138. See *supra* notes 23-33, 99 and accompanying text.

tion—the ITLOS—will be seized.¹³⁹ It can therefore safely be concluded that a rather consistent case law on the topic will develop,¹⁴⁰ of which the reasonableness criterion, of course, forms a crucial part.

B. Considerations Relating to Terminology

Any in-depth analysis of the concept “reasonable” within the prompt release of vessels procedure must necessarily touch on the differences among some of the six authentic texts of the 1982 Convention.¹⁴¹ The French text deserves special attention, for it uses in Article 73(2) the notion “suffisante”¹⁴² whereas “raisonnable” is used in Article 292.¹⁴³ If the “raisonnable” concept seems to require an upper and lower limit beyond which the bond would no longer be considered reasonable, “suffisante,” rather appears to focus on the lower limit, implying that this requirement will be met as soon as the bond exceeds a certain minimum level. In the framework of the delicate balance between the interests of the detaining State and the flag State, this difference is fundamental, and requires clarification.

This divergence surfaced for the first time in the *Camouco Case*. The French agent¹⁴⁴ and counsel¹⁴⁵ both pointed to certain differences among the French, English, and Spanish texts of the 1982 Convention, although no explicit reference was made at that time to the difference between “raisonnable” and “suffisante” in the French text of Article 73(2). The agent of Panama, having mentioned this semantic aspect in the application, did not further dwell upon the point since France was apparently not pressing the matter. He simply concluded by saying that “it is sufficiently clear that the word used in the Convention, and interpreted in this case, is ‘reasonable’ as opposed to ‘sufisante,’”¹⁴⁶ based on an analysis of the preparatory work as well as the French language version of the ITLOS Rules.¹⁴⁷ Nevertheless, Judge Anderson remarked in his dissenting opinion:

139. See *supra* notes 32-41 and accompanying text.

140. See also Noyes, *supra* note 13, at 172.

141. 1982 Convention, *supra* note 2, art. 320. These languages are Arabic, Chinese, English, French, Russian, and Spanish.

142. The English authentic texts uses “reasonable” here. See *supra* text accompanying note 19.

143. The English authentic text uses the same term “reasonable” here. See *supra* text accompanying note 11.

144. *Verbatim Record* (Application for Prompt Release) (Jan. 27, 2000), U.N. Doc. ITLOS/PV.00/2/Rev.1, at 17-18, available at http://www.un.org/Depts/los/itlos_new/VerbatimRecords/PV00_2E.htm.

145. *Id.* at 22-23.

146. *Verbatim Record* (Application for Prompt Release) (Jan. 28, 2000), U.N. Doc. ITLOS/PV.00/3/Rev.1, at 12, available at http://www.un.org/Depts/los/itlos_new/VerbatimRecords/PV00_3E.htm. Ramón García Gallardo, Panama’s Agent, relied on the French, English, and Spanish versions.

147. 1982 Convention, *supra* note 2, arts. 111(2)(d) and 113(1) are mentioned, where the English “reasonable” is matched by the French “raisonnable.” French and English are the of-

What is "reasonable" is an amount *suffisant/sufficient* to cover penalties which could be imposed upon conviction. There exists the danger of fixing the security under article 292 at a level which, being too low, could in practice "prejudice . . . the merits of (the) case before the appropriate domestic forum against the vessel, its owner or its crew."¹⁴⁸

In the *Monte Confurco Case*, the counsel for France did return to the subject by stating:

Therefore when one speaks of "reasonable bond" within the framework of the procedures of Article 292 of the Convention, one is led to place this formula "reasonable bond" and compare it to something more circumstantial and balanced; in other words, one has to compare it with what is appropriate, appropriate to circumstances. One does understand that the French version of the text of Article 73 para.2 of the Convention of the Law of the Sea uses the expression "une caution ou une garantie suffisante." In other languages one talks about a caution or a guarantee which is reasonable—in French 'suffisante' and in other languages "reasonable." It boils down more or less to the same thing but there is a difference.¹⁴⁹

So far, the ITLOS has not addressed the issue. The vice-president of the Tribunal, nevertheless, considered the matter to be important enough to analyze it specifically in a separate opinion.¹⁵⁰

For all these reasons, it appears appropriate to address this issue in more detail. Since the 1982 Convention has been drafted in six authentic language versions,¹⁵¹ one has to look first at the other languages not relied on by the parties so far during the proceedings before the Tribunal. The Russian version is similar to the English one, since it uses the same word, "razumnogo," in Articles 73(2) and 292 (1).¹⁵² The Arabic version also follows this pattern.¹⁵³ Only the Chinese version is similar to the French in using two differ-

cial languages of the Tribunal. See ITLOS Rules, *supra* note 24, art. 43.

148. The "Camouco" Case (Pan. v. Fr.), Prompt Release, 2000 ITLOS No. 5, at 8 (dissenting opinion of Judge Anderson) (quoting the 1982 Convention, *supra* note 2, art. 292 (emphasis in original)).

149. *Verbatim Record* (Application for Prompt Release) (27 Jan. 2000), U.N. Doc. ITLOS/PV.00/2/Rev.1, at 13, available at http://www.itlos.org/start2_en.html. In the French Statement in Response, a similar reasoning can be found in the following phrase: "This difference between the two language versions certainly does not indicate a difference in meaning between them but does, however, provide an indication of the meaning that may be attached to the concept of reasonableness." The "Monte Confurco" Case (Sey. v. Fr.), Prompt Release, 2000 ITLOS No. 6, at 2 (separate opinion of Vice-President Nelson), available at http://www.itlos.org/start2_enhtml (emphasis in original).

150. See The "Monte Confurco" Case (Sey. v. Fr.), Prompt Release, 2000 ITLOS No. 6, at 2-4 (separate opinion of Vice-President Nelson), available at http://www.itlos.org/start2_enhtml.

151. See *supra* note 141.

152. This primary meaning of "razumnogo" in English is "reasonable." RUSSIAN-ENGLISH DICTIONARY 535 (A.I. Smirnitsky ed., 1989). The Russian word that normally expresses the French term "suffisante" is "dostatocnyi." *Id.* [pin-point citations please]

153. The author would like to thank Feras Milhem, doctoral researcher at the Center for International Law of the *Vrije Universiteit Brussel*, Belgium, for this information.

ent concepts: In Article 292(1) “he-li-de” is used, meaning “reasonable,” whereas in 73(2) “sh-dang-de” is found, meaning “proper.”¹⁵⁴ In sum, the Arabic, English, Russian, and Spanish language versions rely on the same word “reasonable” in both instances, whereas the Chinese and the French versions rely on a different word in Article 73(2), namely “proper” and “suffisante” respectively.¹⁵⁵

As correctly pointed out by Judge Nelson, after having analyzed the work of the International Law Commission relating to this quite logical consequence of the increased drafting of multilingual texts,¹⁵⁶ comparing the different authentic texts of a convention might be relied on as a method to determine its true meaning.¹⁵⁷ He therefore concluded that:

not much should be made of the apparent divergence between the term “reasonable” and the term “suffisante” as used in article 73, paragraph 2. They simply have the same meaning or at least must be presumed to have the same meaning. The use of the word “suffisante” adds nothing more.¹⁵⁸

This argument could be further strengthened by referring to a judgment of the Permanent Court of International Justice, in which the Court stated that when two authentic texts contain a provision, of which one version appears to have a broader meaning than the other, the more limited interpretation should be adopted because it best represents the common will of the parties as the lowest common denominator.¹⁵⁹ As stated above, the upper limit, which clearly forms part and parcel of the notion “reasonable,” seems to be missing in the concept “suffisante,” and therefore the former should be preferred.

This line of reasoning is further substantiated by the fact that the concept “reasonable,” as demonstrated above, can be traced back to draft articles

154. The author would like to thank Prof. Kuen-chen Fu, Xiamen University, People's Republic of China, for having kindly provided this information.

155. See *International Decisions*, *supra* note 68, at 717 n.27 (reaching similar conclusions). See also The “Monte Confurco” Case (Sey. v. Fr.), Prompt Release, 2000 ITLOS No. 6, at 3 (separate opinion of Vice-President Nelson), available at http://www.itlos.org/start2_enhtml.

156. “Few plurilingual treaties containing more than one or two articles are without some discrepancy between the texts. The different genius [sic] of the languages, the absence of complete *consensus ad idem*, or lack of sufficient time to co-ordinate the texts may result in minor or even major discrepancies in the meaning of the texts.” *Report of the International Law Commission to the General Assembly*, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. INT'L L. COMM'N 169, 225 U.N. Doc. A/CN.4/SER.A/1966/Add.1 [hereinafter I.L.C. Report 1966].

157. The “Monte Confurco” Case (Sey. v. Fr.), Prompt Release, 2000 ITLOS No. 6, at 3 (separate opinion of Vice-President Nelson), available at http://www.itlos.org/start2_enhtml.

158. *Id.* at 4.

159. *Mavrommatis Palestine Concessions* (Gr. Brit. v. Greece), 1926 P.C.I.J. (ser. A) No. 2, at 19. Even though the Court indicated that in following this principle it did not intend to lay down a general rule, the particular context, in which the present ambiguity occurs, appears to justify a restrictive interpretation *in casu*. See I.L.C. Report 1966, *supra* note 156, at 225-26.

suggested by the United States, as well with respect to Article 73(2)¹⁶⁰ and 292(1).¹⁶¹ Since the other language versions, including the French one, seem to have been translations of the English version, the English version should, quite naturally, be considered to give guidance.¹⁶² This position also finds support in the later interpretation given to these articles by the ITLOS Rules, of which the French text consistently uses "raisonnable."¹⁶³ In final analysis, even if one has to rely on Article 33(4) of the Vienna Convention on the Law of Treaties,¹⁶⁴ the customary law nature of which has recently been reaffirmed by the International Court of Justice,¹⁶⁵ a similar result would still be realized.¹⁶⁶

160. See *supra* text accompanying note 19.

161. See *supra* text accompanying note 11.

162. A study of the practice of the International Court of Justice, for instance, indicates that the highest judicial organ of the United Nations tends to rely solely on the English and French language versions of the Charter of the United Nations, even though according to the latter's Article 111, the Chinese, Russian, and Spanish texts of that document are equally authentic. See Jean Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals*, 37 BRIT. Y.B. INT'L L. 72, 143 (1961). See also U.S. v. Reparation Comm'n, 2 R.I.A.A. 777, 792 (1926). Following similar reasoning, the R.I.A.A. tribunal gave preference to the English version of the Treaty of Versailles, although the English and French versions are both equally authentic, because a particular legal term had clearly been borrowed from a common law system, and later merely translated into French. Even though a divergent opinion can be found in arbitral awards, Ian Sinclair nevertheless concludes: "Where there is a difference of meaning between expressions used in several authentic texts, some weight ought to be given to the original language text on which the negotiators agreed if it is apparent from the *travaux préparatoires* . . . that other language versions are mere translations." IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 152 (2d ed. 1984). See also ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 202-06 (2000).

163. See *supra* note 114 and accompanying text.

164. Vienna Convention on the Law of Treaties, 23 May 1969, art. 33(4), 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

165. LaGrand (Ger. v. U.S.), 2001 I.C.J. ¶ 101 (June 27). The Court stated:

In cases of divergence between the equally authentic versions of the Statute, neither it nor the Charter indicates how to proceed. In the absence of agreement between the parties in this respect, it is appropriate to refer to paragraph 4 of Article 33 of the Vienna Convention on the Law of Treaties, which in the view of the Court again reflects customary international law. This provision reads "when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." The Court will therefore now consider the object and purpose of the Statute together with the context of Article 41.

Id.

166. As noted by the ITLOS, Articles 73(1) & (2) and 292 attempt to reconcile the interest of the coastal States and flag States. The "Monte Confurco" Case (Sey. v. Fr.), Prompt Release, 2000 ITLOS No. 6, ¶¶ 70-72 (Judgment of Dec. 18, 2000). If the coastal States insist on a clear lower limit, in order to satisfy their claims, flag States will argue for a fixed upper limit, so that their ships can be economically profitable. Against this background, the object and purpose of the 1982 Convention plead in favor of a criterion containing both limits, and not just one.

On the basis of these arguments, it can be safely concluded that the particular wording in the French version of Article 73(2) adds nothing to the notion “reasonable” as it appears in the English text. In order to avoid similar arguments from being made in future prompt release of vessel cases by the detaining State, the Tribunal might well consider settling this issue once and for all.

C. Considerations Relating to Substance

A closer analysis of the case law of the ITLOS confirms the submission made above,¹⁶⁷ that a consistent case law will develop in this particular area. In all the prompt release of vessel cases so far heard and decided,¹⁶⁸ the Tribunal has continue 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 reasonable-ness 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.¹⁶⁹ This basic stepping stone in the Tribunal’s developing jurisprudence, small as it might be,¹⁷⁰ is later explicitly referred to, and moreover literally quoted, in the *Camouco Case*¹⁷¹ as well as in the *Monte Confurco Case*.¹⁷²

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.¹⁷³ This second fundamental building block is later quoted *in extenso* in the *Monte Confurco Case*.¹⁷⁴ 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.

As could be expected, however, the further the Tribunal tried to enclose the outer contours of the concept of reasonableness in prompt release of vessel cases, the more substantial differences appeared in the separate and dis-

167. See *supra* note 140 and accompanying text.

168. E.g., *Saiga 1*, the *Camouco*, and the *Monte Confurco Cases*.

169. See *supra* note 55 and accompanying text.

170. Judge Anderson emphasized in his dissenting opinion in the *Camouco Case* that this test does not, in fact, advance matters very much in the conceptualization of the reasonable-ness concept, since it only adds the elements of form and nature, whereas the crucial matter remains the amount of the bond. The “Camouco” Case (Pan. v. Fr.), 2000 ITLOS No. 5, at 4 (dissenting opinion of Judge Anderson) See also Judge Wolfrum’s statement that the judgment “touches only on a side aspect [of the reasonable bond issue].” *Id.* ¶ 3 (dissenting opinion of Judge Wolfrum).

171. See *supra* notes 61-62 and accompanying text.

172. See *supra* note 79 and accompanying text.

173. See *supra* note 63 and accompanying text.

174. See *supra* note 79 and accompanying text.

sending opinions of judges on a number of fundamental issues. For example, is the coastal State limited to the amount of fines imposable for fishing offences in its EEZ,¹⁷⁵ or not?¹⁷⁶ Can fines, and as a consequence the bond, take on a punitive or deterrent character,¹⁷⁷ or not?¹⁷⁸ Are legal presumptions in municipal systems of law considering all non-declared fish on board when entering the EEZ to have been caught inside that zone in conformity with the 1982 Convention,¹⁷⁹ or not?¹⁸⁰ Are national laws to be given special importance in the determination of the bond,¹⁸¹ or not?¹⁸²

Apart from all these intricate problems, two related questions stand out as of particular importance in the proper assessment of the reasonableness criterion. These are, on the one hand, the rule that the Tribunal should not be entering into the merits of the case, and, on the other hand, the relationship between the Tribunal and the national courts. In both instances, it appears clear that the extremes on either side of the issue would not be considered as reasonable. Prohibiting the Tribunal from looking at the facts would deprive it of the possibility of making a proper assessment, while obliging it to take into consideration all the facts would be inconsistent with the expediency of the procedure. It would, moreover, be materially impossible for the Tribunal to verify these facts before reaching a conclusion on reasonableness. The

175. See The "Grand Prince" Case (Belize v. Fr.), Prompt Release, 2001 ITLOS No. 8, ¶¶ 11-12 (separate opinion of Judge Laing), available at http://www.itlos.org/start2_enhtml (doubting whether confiscation can be imposed by the coastal States).

176. See The "Camouco" Case (Pan. v. Fr.), Prompt Release, 2000 ITLOS No. 5, ¶¶ 6, 8 (dissenting opinion of Judge Wolfrum), available at http://www.itlos.org/start2_enhtml. See also The "Monte Confurco" Case (Sey. v. Fr.), Prompt Release, 2000 ITLOS No. 6, at 2 (dissenting opinion of Judge Anderson), available at http://www.itlos.org/start2_enhtml ("[t]he Convention does not limit the size of the fines. . .").

177. See The "Monte Confurco" Case, Prompt Release, 2000 ITLOS No. 6, at 2 (dissenting opinion of Judge Anderson) (noting that deterrent fines serve a legitimate purpose).

178. See *id.* at 1 (declaration of Judge Tafsir Malick Ndiaye) (opining that fines should not be punitive or deterrent in nature).

179. See *id.* at 4 (dissenting opinion of Judge Anderson) (approving of the use of domestic legal presumptions in ITLOS cases). This point of view seems also implied in the dissenting opinion of Judge Jesus in the same case. *Id.* ¶ 32 (dissenting opinion of Judge Jesus).

180. See *id.* ¶ 4 (dissenting opinion of Judge Laing).

181. See Judge Ndiaye's declaration made with respect to the *Camouco Case*. The "Camouco" Case, Prompt Release, 2000 ITLOS No. 5, at 1 (declaration of Judge Ndiaye) (apparently considering national laws the only relevant factor); *id.* at 1 (dissenting opinion of Judge Anderson) (giving the national court a "broad margin of appreciation" and requiring "very strong grounds" for reducing the amount of the bond set by the national court) (internal quotations omitted); *id.* ¶ 14 (dissenting opinion of Judge Wolfrum) (The ITLOS should accord a "considerable margin of appreciation" to the national court.).

182. See *id.* ¶ 4 (dissenting opinion of Judge Treves) ("The notion of 'reasonable bond' to be determined by the Tribunal must be an international notion, based on the Convention. It does not necessarily have to coincide with what can be considered as reasonable from a domestic point of view."). See also *id.* at 3 (declaration of Judge Laing) ("[T]he Tribunal should never seek or appear to enforce the domestic laws of the detaining State. . ."); The "Monte Confurco" Case, Prompt Release, 2000 ITLOS No. 6, ¶¶ 6-7 (dissenting opinion of Judge Laing) (even the mere appearance that the ITLOS is simply following the national court should at all costs be avoided).

Tribunal is, furthermore, not a forum for appeal against decisions of national courts, but at the same time, were it obliged blindly to follow the decisions of national judges, the whole procedure of Article 292 of the 1982 Convention would become totally redundant. In both instances, it is clear, what is reasonable lies somewhere in between these extremes. But defining the outer limits of this gray zone seems, so far, to have eluded the judges.¹⁸³ They have only been able to give some very rough indications. With respect to the relationship between the Tribunal and national courts, the ITLOS has limited itself to stating the principle that it is not an appellate tribunal.¹⁸⁴ But in all cases where it had the occasion to make a ruling on the reasonableness of the bond or security, i.e., an area of law that had in the past been left to the domestic jurisdiction but has now been elevated to the level of an international tribunal for parties to the 1982 Convention,¹⁸⁵ the Tribunal has disavowed the national judge on some points.¹⁸⁶ The strictness of the principle that the Tribunal cannot look into the merits has been mitigated by adding that the Tribunal is nevertheless “not precluded from examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond.”¹⁸⁷ Needless to say, these views are bound to be raised again in future declarations, or in separate and dissenting opinions.

At the same time, the sequence of cases also indicates that the ITLOS learns from its own experience.¹⁸⁸ Ordering the release of the ship in the

183. Note Judge Mensah’s very careful wording in his declaration regarding the *Monte Confurco Case*. The “Monte Confurco” Case, Prompt Release, 2000 ITLOS No. 6, at 1 (declaration of Judge Mensah) (indicating that a particular paragraph of the judgment comes “perilously close” to entering into the merits of the case). Judge Mensah concludes: “In my opinion, the statements in paragraph 88 of the Judgment come uncomfortably close to exceeding what is necessary and appropriate.” *Id.* at 4.

184. The “Camouco” Case, Prompt Release, 2000 ITLOS No. 5, ¶ 58 (Judgment of Feb. 7, 2000). For a clarifying comment on this issue, see *International Decisions*, *supra* note 68, at 719-21.

185. See Treves, *supra* note 7, at 446.

186. In the words of Judge Nelson: “[T]he Tribunal has in fact been invested with the competence to limit—to put a break on—the discretionary power of the coastal State with respect to the fixing of bonds in certain specific circumstances.” The “Monte Confurco” Case, Prompt Release, 2000 ITLOS No. 6, at 1 (separate opinion of Vice-President Nelson). In the *Camouco Case* the Tribunal did not seem to accept the maximum penalty that could theoretically have been imposed on the master, but had not yet been prosecuted in practice, as reasonable for the determination of the bond. See *supra* note 66 and accompanying text. In the *Monte Confurco Case*, the Tribunal did not accept the assumption adhered to by the French judge who, on the basis of a legal presumption, considered that about half of the catch on board served as a basis for calculating impossible fines. See *supra* text accompanying notes 71-96. The Tribunal applied this power to limit the discretionary power of the coastal State in *Monte Confurco*. The “Monte Confurco” Case, Prompt Release, 2000 ITLOS No. 6, ¶ 88 (Judgment of Dec. 18, 2000). The adoption of this limiting power led to some uneasiness in the members of the Tribunal. See *supra* note 183. Some judges even responded with outright opposition. *Monte Confurco Case*, 2000 ITLOS No. 6, at 4 (dissenting opinion of Judge Anderson); *id.* ¶¶ 26-30 (dissenting opinion of Judge Jesus).

187. *Monte Confurco Case*, 2000 ITLOS No. 6, ¶ 74 (Judgment of Dec. 18, 2001).

188. Lagoni suggested this point after the first judgment rendered by the ITLOS. He compared the first judgment of this court with the maiden voyage of a ship: “Ausfahrt und

Saiga I Case on the posting of a reasonable bond or security "in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form,"¹⁸⁹ did not prove sufficient to enable a swift execution of the decision.¹⁹⁰ Indeed, when a few days later the applicant posted a bank guarantee, delivered by *Crédit Suisse*, with the agent of the defendant in order to obtain the release of the vessel, Guinea requested certain changes to be made to it, which the applicant in turn considered "unreasonable and either irrelevant or unacceptable."¹⁹¹ The ship was finally released about three months after the ITLOS had ordered its release.¹⁹² In the *Camouco Case*, therefore, the Tribunal, apparently based on this *lacuna* in the *Saiga I Case*,¹⁹³ for the first time explicitly stated that certain minimum wording, which it spelled out in full, should be included in the bank guarantee so as to avoid later disputes.¹⁹⁴

glückliche Heimkehr werden beachtet, Erfolg und Misserfolg abgewogen, Lehren aus den Erfahrungen gezogen." ["Sailing out and safe return are taken into account, successes and failures compared, lessons learned from the experience"]. Lagoni, *supra* note 7, at 544 (translation by author).

189. The M/V "Saiga" Case (St. Vincent v. Guinea), Prompt Release, 1997 ITLOS No. 1, ¶ 86(3)-(5) (Judgment of Dec. 4, 1997), available at http://www.itlos.org/start2_en.html.

190. This result might well be related to the fact that Article 113(2) of the ITLOS Rules, which reads "amount, nature and form," is less precise than the terms found in Article 91(1) of the Final Draft Rules, which instead used the terminology "nature, terms, and amount." See *supra* notes 24, 29 and accompanying text. Florian H. Th. Wegelein argues that "nature and form denote the legal classification—bond, financial security, money, or in kind—the word 'terms' refers to the conditions of the security." Florian H. Th. Wegelein, *The Rules of the Tribunal in the Light of Prompt Release of Vessels*, 30 OCEAN DEV. & INT'L L. 255, 278 (2000).

191. Press Release, ITLOS, Saint Vincent and the Grenadines Requests Provisional Measures in Respect of the M/V "Saiga" 1 (Jan. 13, 1998) (ITLOS/Press11), available at <http://www.itlos.org/start2en.html>.

192. Press Release, ITLOS, Guinea Complies With Judgment of the Tribunal—Arrested Vessel Released from Detention (Mar. 6, 1998) (ITLOS/Press14), available at <http://www.itlos.org/start2en.html>.

193. Judge Laing, in his separate opinion to the *Saiga II Case*, clarified somewhat the concrete difficulties that the parties had encountered, namely the language of the bond, communication problems, physical absence, because of travel, of the representatives of the parties, and novelty of the procedure. The M/V "Saiga" (No. 2) Case (St. Vincent v. Guinea), Merits, 1999 ITLOS No. 2 ¶¶ 57-58 (separate opinion of Judge Laing), available at http://www.itlos.org/start2_en.html. He further argued that even if, presumptively, a security ordered by the Tribunal will have to be reasonable, this might not necessarily be the case if it leaves certain details to be worked out by the parties. He therefore suggested a more active role for the Tribunal in this respect in future cases. *Id.* ¶ 58. See also Lagoni, *supra* note 7, at 560. It is also interesting to note that the Tribunal had to reply to the submission by Saint Vincent and the Grenadines that Guinea had violated the 1982 Convention by not promptly releasing the vessel pursuant to the Tribunal's previous judgment. The ITLOS did not accept Saint Vincent's argument on this point because not all factors contributing to this delay could be attributed to Guinea. This result appeared to be a mere Pyrrhic victory for Guinea in practice. The M/V "Saiga" (No. 2) Case, 1999 ITLOS No. 2 ¶ 165. See *International Decisions*, 94 AM. J. INT'L L. 140, 147 n.67 (2000).

194. See *supra* note 70 and accompanying text.

This minimum wording, though not explicitly referred to, was later literally repeated in the *Monte Confurco Case*.¹⁹⁵

If set practices lead to the expected results, meaning that if a previous judgment containing certain practices was implemented without specific difficulties, the Tribunal does not appear easily inclined to change those practices.¹⁹⁶

D. Evaluation

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. Certain elements have been sufficiently clarified by the Tribunal to provide guidance to States in their future actions. They concern foremost issues related to the nature and form of the bond or financial security.¹⁹⁷

Yet, only a tip of the veil surrounding the amount of the bond, which has been said to constitute the very heart of the problem,¹⁹⁸ has so far been lifted by the Tribunal. 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.¹⁹⁹ This particular method seems to gather grow-

195. See *supra* note 103 and accompanying text. The only difference was that in the *Camouco Case* the Tribunal referred back to the facts to describe the incident whereas in the *Monte Confurco Case*, it rather linked the incident to the municipal court order confirming the arrest of the vessel and fixing the bond. The “Monte Confurco” Case, 2000 ITLOS No. 6, ¶ 95.

196. When France specified that a guarantee or security should take the form of cash or a certified check in the *Monte Confurco Case*, the Tribunal responded that a bank guarantee had worked fine in the *Camouco Case*. See *Monte Confurco Case*, 2000 ITLOS No. 6 ¶ 93. Compare the dissenting opinion of Judge Anderson in the *Camouco Case*, where he considered it reasonable for the French court to have required the guarantee or security to take the form of cash or a certified check, 2000 ITLOS No. 5, at 10 (dissenting opinion of Judge Anderson), with his dissenting opinion in the *Monte Confurco Case*, where he accepts the standard set by the majority exactly because the French court appears to have also accepted it. 2000 ITLOS No. 6, at 5-6 (dissenting opinion of Judge Anderson).

197. See *supra* notes 188-95 and accompanying text. The voting pattern of the judges also supports this conclusion. In *Saiga I 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.

198. See *supra* note 170.

199. The case law of the ITLOS concerning prompt release of vessels would therefore seem to correspond to the results of the recent study by Corten, who concludes that courts normally apply “une méthode rationnelle d’interprétation du ‘raisonnable’ qui respecte le contenu variable de la notion.” [“a rational method of interpretation of the notion ‘reasonable’ that respects its variable content”] CORTEN, *supra* note 122, at 675 (translation by author). See also Olivier Corten, *Motif légitime et lien de causalité suffisant: Un modèle d’interprétation*

ing support among the judges of the Tribunal.²⁰⁰ The Tribunal, even though it used the words "a number of" and "include" when first enumerating these factors in the *Camouco Case*,²⁰¹ found it necessary to stress the non-exhaustive nature of this list in the most explicit of terms in the *Monte Confurco Case*: "[T]his is by no means a complete list of factors. Nor does the Tribunal intend to lay down rigid rules as to the exact weight to be attached to each of them."²⁰²

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.²⁰³ What the Tribunal has, therefore, done so far is to start applying this broad framework to concrete cases with ever increasing attention.²⁰⁴ Nevertheless, at the end of the road, when all relevant factors have been discussed and applied in a case, the setting of the bond itself still resembles as much a *deus ex machina* as it did during the first case.²⁰⁵ It is, therefore, not surprising²⁰⁶ that publicists and judges alike have repeatedly pointed to this absence of clarity.²⁰⁷ If a certain lack of predictability is already present with respect

rationnel du "raisonnable," 44 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 187 (1998) (discussing the objective character of the interpretation of the notion of reasonableness, as demonstrated by a thorough analysis of court decisions).

200. It is instructive to compare the different majorities by which the Tribunal has so far decided the amount of the bond. In the three cases mentioned *supra* note , and subject to the same comment made there, these figures are 12-9, 15-6, and 17-3 respectively. *M/V Saiga I*, 1997 ITLOS No. 1, at 17; *Camouco*, 2000 ITLOS No. 5, at 31; *Monte Confurco*, 2000 ITLOS No. 6, at 35.

201. See *Camouco*, 2000 ITLOS No. 5, ¶ 67.

202. *Monte Confurco*, 2000 ITLOS No. 6, ¶ 27.

203. See *Camouco*, 2000 ITLOS No. 5, ¶ 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.* ¶ 3 (separate opinion of Judge Wolfrum).

204. Compare *supra* notes 50-55, 56-70, and 71-103 and accompanying text.

205. See *supra* Part II.A. It is here, most probably, that the case law of the ITLOS on the prompt settlement of vessels departs from the general framework developed by Olivier Corten in his writings on the notion of reasonableness. See the writings of Corten, mentioned *supra* note 199. Although Corten admits that in a good number of cases the content of the notion is only marginally motivated by the judge, or even not at all, he concludes: "Si les parties contestent le caractère raisonnable d'un acte, d'une interprétation ou d'une certitude, une motivation détaillée tranche la controverse. Si la contestation ne porte pas, ou ne porte que de manière incidente, sur le contenu de la notion, la motivation restera sommaire." ["If the parties challenge the reasonable character of an act, an interpretation or a certainty, a detailed motivation settles the controversy. If the challenge does not, or only incidentally concerns the content of the notion, the motivation will remain succinct."] See Olivier Corten, *L'interprétation du "raisonnable" par les juridictions internationales: Au-delà du positivisme juridique?*, 102 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5, 18 (1998) (translation by author). Since the issue of the reasonableness of the bond normally forms the crux of prompt release of vessel cases, the case law of the ITLOS seems to defy this particular submission.

206. The analysis in Part II already pointed in that direction. See *supra* under II, 1, 2 and 3, D.

207. See, e.g., Bernard H. Oxman, *The M/V "Saiga" (Saint Vincent and the Grenadines*

to prompt release of vessel cases relating to fisheries issues, one might simply wonder what this might lead to if tomorrow a similar procedure were to be introduced concerning the presumed abusive application of a coastal State's environmental jurisdiction in its EEZ, where the valuation of the damages to the environment would undoubtedly further obfuscate the determination of the reasonableness criterion.²⁰⁸

The application of the principles enumerated by the Tribunal so far, it must be admitted, sometimes leads to concrete indications of what the Tribunal considers reasonable. 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.²⁰⁹ 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,²¹⁰ with the exception of the *Saiga I Case* where the estimates of the applicant were taken into account.²¹¹

Nevertheless, with respect to the other relevant factors, namely the gravity of the offences and the range of penalties applicable, the Tribunal usually

v. Guinea), ITLOS Case No. 1, 92 AM. J. INT'L L. 278, 281 (1998) (The Tribunal "offered no specific reason for fixing the amount of the bond"). With respect to the *Camouco Case*, see, e.g., D.J. Devine, *Prompt Release of Vessel and Master: The 'Camouco' Case (Panama v France) International Tribunal for the Law of the Sea, 7 February 2000*, 25 S. AFR. Y.B. INT'L L. 227, 230 (2000) ("it would have been useful to have had some indication of how the Tribunal arrived at a sum of FF8 million"); Vaughan Lowe, *The International Tribunal for the Law of the Sea: Survey for 2000*, 16 INT'L J. MARINE & COASTAL L. 549, 561 (2001) ("[t]he Tribunal appears to pluck its figure for a reasonable bond . . . out of thin air"); Oxman & Bantz, *supra* note 68, at 720 ("the opinion failed to reveal precisely how the amount of the bond was determined"), and Judge Wolfrum's dissenting opinion in *Camouco*, 2000 ITLOS No. 5, ¶¶ 4 ("[w]hat the Judgement, in essence, is lacking is an objective analysis of what is required to attain the aims which lie, in this case, behind the system requiring the posting of financial security"), ¶15 ("[t]he Judgement does not really reveal . . . whether the amount of the bond it has determined reflects predominantly the value of the ship or the fines faced by the Master of the *Camouco* and its owners"). With respect to the *Monte Confurco Case*, see, e.g. Lowe, *supra*, at 565 ("the reasoning leading to the Tribunal's 'reasonable' figure is not entirely clear"), 566 ("[i]t would, however, be of some help to national courts if the Tribunal were to explain the kind of reasoning that should in its view precede the determination of the level and form of a reasonable bond). See also 2000 ITLOS No. 6, at 2 (dissenting opinion of Judge Anderson) ("the decision [of the French court] is more transparent in some ways than paragraph 93 [setting the amount of the bond] of the Judgement").

208. See generally Treves, *supra* note 10, at 197-98. [please confirm this citation]

209. See The "Camouco" Case (Pan. v. Fr.), Prompt Release, 2000 ITLOS No. 5, ¶ 69 (Judgment of Feb. 7, 2000), available at http://www.itlos.org/start2_enhtml; The "Monte Confurco" Case (Sey. v. Fr.), Prompt Release, 2000 ITLOS No. 6, ¶ 84 (Judgment of Dec. 18, 2000), available at http://www.itlos.org/start2_enhtml.

210. See The "Camouco" Case, 2000 ITLOS No. 5, ¶ 69; The "Monte Confurco" Case, 2000 ITLOS No. 6, ¶ 85 (the latter emphasizing that this valuation was not disputed by the applicant).

211. The M/V "Saiga" Case (St. Vincent v. Guinea), Prompt Release, 1997 ITLOS No. 1, ¶ 83, available at http://www.itlos.org/start2_en.html.

simply states that it "takes note" of the submissions made,²¹² without any further indication of the weight given to the evidence or elements.²¹³ Especially in the *Monte Confurco Case* this technique sharply contrasted with the considerable efforts of France to develop the argument regarding gravity of the offense before the Tribunal.²¹⁴

The interaction among the different relevant factors, the fact that the list of factors is said to be non-exhaustive, and the Tribunal's manifest refusal to clarify the interrelation of the factors,²¹⁵ have made a horizontal analysis of the different cases, in order to try to discern some predictability for future cases, a very difficult, if not impossible, exercise. If one completes the comparison made by Judge Laing on the occasion of the *Camouco Case*, where he weighed the aggregate financial security decided by the Tribunal against the aggregate potential liability, a reasonable margin may be arrived at.²¹⁶ The same can be said if the financial security is compared with the aggregate value of the elements that the local courts appear to find relevant.²¹⁷ If the

212. See The "Camouco" Case, 2000 ITLOS No. 5, ¶ 68; The "Monte Confurco" Case, 2000 ITLOS No. 6, ¶¶ 79, 80.

213. See *supra* notes 86-87 and accompanying text.

214. The "Camouco" Case, 2000 ITLOS No. 5, at 3-4 (separate opinion of Vice-President Nelson). Or as stated by Ros:

Face aux requérants arguant du montant exorbitant des cautions, la France a d'ailleurs cherché à faire prendre en compte par le TIDM l'argument tiré des impératifs de lutte contre la pêche illicite. Ni dans l'affaire du *Camouco* ni dans celle du *Monte Confurco*, le Tribunal n'a cependant accepté d'entrer dans la logique de dissuasion qui préside à la détermination pragmatique du montant des cautions par les autorités françaises. [Facing applicants arguing the excessive amount of the securities, France has moreover tried to make the ITLOS take into consideration the argument based on the necessities of the crusade against illegal fishing. Neither the *Camouco* case, nor in the one concerning the *Monte Confurco*, did the Tribunal however accept the dissuasion logic governing the pragmatic determination of the amount of the securities by the French authorities].

Ros, *supra* note 6, at 507 (translation by author).

215. Whether the value of the ship or rather the fines is the determining factor for the Tribunal to set the amount of the bond has not yet been clarified in the judgments. For the only indication given by the Tribunal in this respect, see *supra* text accompanying note 203. This has resulted in different judges taking positions on both sides of the issue. See, e.g., *Camouco Case*, 2000 ITLOS No. 5, ¶ 16 (dissenting opinion of Judge Wolfrum) (criticizing the bond set by the Tribunal as too low); *Monte Confurco Case*, 2000 ITLOS No. 6, ¶ 19 (dissenting opinion of Judge Jesus) (centering his analysis around the value of the vessel); Treves, *supra* note 10, at 197-98 (finding both elements important parameters).

216. The "Camouco" Case, 2000 ITLOS No. 5, at 3 (declaration of Judge Laing). In the *Saiga 1 Case*, the bond represented 9% of the potential liability; in the *Camouco Case* the bond represented 26% of liability, if one included all potential charges. *Id.* The amount of the bond ordered in the *Monte Confurco Case* equaled 19% of the total potential liability originally requested before the French court. The "Monte Confurco" Case, 2000 ITLOS No. 6, ¶¶ 38, 96(6). Since the Tribunal did not fix a bond in the *Grand Prince Case*, the latter is left out of the picture in the present comparative analysis, which takes the financial bond set by the Tribunal as point of reference.

217. Because no bond or security was set or requested in the *Saiga 1 Case*, this case is not relevant for this analysis. The "Saiga 1" Case, 1997 ITLOS No. 1, ¶ 31. In the *Camouco*

financial security set by the Tribunal is compared with the value of the vessel and cargo, on the other hand, a totally different picture emerges,²¹⁸ which changes once again if only the value of the ship is brought into the equation.²¹⁹

The lack of precision, caused by the unwillingness of the Tribunal to narrow further the general contours set thus far, could have a negative influence on national judges who might well try to “misuse” the broad framework created by the Tribunal. Members of the Tribunal have noted that “national adjudication bodies welcome this guidance” and referred to the French judge of the Court of First Instance at Réunion who, when setting the bond for the *Monte Confurco*, applied the relevant factors put forward by the Tribunal in the *Camouco Case*, in order to substantiate the submission that national courts follow the guidance provided by the Tribunal.²²⁰ But one wonders if the lip service paid by the French Court in the *Monte Confurco Case* to the broad criteria set out by the Tribunal in the *Camouco Case* was more than mere window dressing;²²¹ an attempt to short-circuit the Tribunal by implying that the framework established by it had meticulously been complied with, instead of an effort to achieve the standard of reasonableness that the Tribunal had distilled out of the framework’s practical application.²²² A

Case the aggregate financial security is 40% of the bond set by the local court. In the *Monte Confurco Case* this figure is 32%.

218. In the *Saiga 1 Case* the value of the vessel (based on the amount for which it was insured (The “Saiga 1” Case, 1997 ITLOS No. 1, ¶ 35), since the parties did not argue this point) and the cargo together represented 180% when compared with the security set by the Tribunal in that case. In the *Camouco Case* that figure is 50%, and 64% in the *Monte Confurco Case*. This divergence is not present when comparing the aggregate value of ship and cargo on the one hand, and the bond set by the local court on the other. In both the *Camouco Case* and the *Monte Confurco Case* this represented 20%. For the reasons explained *supra* note 217, the *Saiga 1 Case* cannot be included here.

219. In the *Saiga 1 Case* the value of the ship represented 107% of the security set by the Tribunal. In the *Camouco Case* that figure is 46% and 14% in the *Monte Confurco Case*. The remarks made by Devine, questioning why in the *Camouco Case* the bond had to exceed the value of the vessel, apply *a fortiori* to the *Monte Confurco Case*. Devine, *supra* note 207, at 230. See also The “Monte Confurco” Case, 2000 ITLOS No. 6, ¶¶ 4 (dissenting opinion of Judge Laing) (commenting that “the tribunal should have been less generous about the size of the security it determined”). Judge Laing continued, “It is therefore patent that the lion’s share of the security that the Tribunal determines is in respect of the alleged fishing, on which the Tribunal’s explicit findings are unequivocal.” *Id.* ¶ 10. It is to be noted that these figures are still much higher than if one compares the value of the ship to the bond not set by the Tribunal but by the local court. In the *Camouco Case* this figure is 18%, in the *Monte Confurco Case* even as low as a mere 4%.

220. *Id.* ¶ 8 (dissenting opinion of Judge Laing).

221. See *supra* note 79 and accompanying text.

222. It appeared from the proceedings in the *Camouco Case* that under the French legal system the judge “is not required to give an account of the considerations on which he based himself both to secure payment of penalties incurred and to secure the appearance of the accused in legal proceedings,” justifying *in casu* the rejection of a summons proceedings that tried to reduce the amount of the bond before the French courts. See The “Camouco” Case, 2000 ITLOS No. 5, ¶ 42. Against this particular background the newly adopted attitude described above can hardly pass unnoticed. [what is this last sentence referring to?]

quick comparison of the actual bond set by that Court in both cases, and the elements taken into account for fixing their amount, seems to indicate that this French Court was not very much impressed, when the master of the *Monte Confurco* appeared before it, by the concrete signals addressed to it by the Tribunal on the occasion of the *Camouco Case*.²²³

Moreover, by explicitly explaining how the broad framework is filled out in practice, the decision of the French Court might be considered better reasoned and better founded in law than judgments of the Tribunal, based on the abstract approach outlined above, which have so far steadfastly refused to explain the most crucial element, namely why the Tribunal arrived at a particular amount when fixing the bond.²²⁴ This situation may invite "the criticism of bordering subjective justice."²²⁵ The risk is therefore not totally unwarranted that French courts may well start shaping the remaining pieces of the puzzle left open by the Tribunal, something that can hardly be considered to have been the intention of the ITLOS.

But the picture is not all that gloomy, for some positive signs can be noted, where the case law developed by the Tribunal has influenced the behavior of States according to the lines established by it. A prime example is the French Trial Court which, in its judgment against the master of the *Camouco*, only used part of the security prescribed by the Tribunal, which was already less than half of the bond originally ordered by the competent French Court.²²⁶ Reference can also be made to the attitude of parties appearing before the Tribunal in these kind of cases. In the *Grand Prince Case* it was clear that the parties, sometimes literally, relied on previous judgments in order to develop their submissions, indicating that the case law of the ITLOS is starting to guide the arguments developed by the parties.²²⁷

223. In the *Camouco Case*, the Tribunal reduced the bond to about 40% of the amount set by the Court of First Instance at Réunion. In the *Monte Confurco Case*, where the French Court, for the first time, pretended to have carefully followed the indications provided by the ITLOS, the amount of the bond was further reduced to a mere 32% of what the local court had decided. Also the relationship between the value of the ship estimated by the local surveyor, and taken as basis for the local court, and the value finally retained by the ITLOS in this respect further deteriorated (from 18% in the *Camouco Case*, to 16.5% in the *Monte Confurco Case*). The only improvement one can mention in this respect is the relationship between the aggregate potential liability on the one hand, and the required bond by the local court: in the *Camouco Case* the latter represented 66% of the former, in the *Monte Confurco Case* 59%, and in the *Grand Prince Case* 51%.

224. See The "Monte Confurco" Case, 2000 ITLOS No. 6, at 2 (dissenting opinion of Judge Anderson). See also *supra* note 207.

225. The "Camouco" Case, 2000 ITLOS No. 5, ¶ 3 (dissenting opinion of Judge Wolfrum).

226. See The "Monte Confurco" Case, 2000 ITLOS No. 6, ¶ 8 (dissenting opinion of Judge Laing). As such, it is much more convincing than the other argument developed by Judge Laing in this respect. [please clarify]

227. See *supra* notes 118-21 and accompanying text.

IV. CONCLUSIONS

The 1982 Convention has relied on the concept of “reasonableness” to harmonize the interests of the flag State with those of the coastal State in the framework of a document that drastically reconsidered the competence of coastal States over marine areas adjacent to their coasts. Unlike some other areas where similar techniques were used, the negative consequences attached to such an approach appear minimal with respect to the prompt release of vessel procedure. An application for the prompt release of a detained vessel is always subject to a compulsory procedure entailing binding decisions on the hypothesis that parties cannot agree on its exact content in a particular case. The conceptualization of the notion of reasonableness is, therefore, clearly not left to the discretionary power of individual States.

Moreover, at a time when much has been written on the presumed danger of divergence of international case law because of the multiplication of international adjudicating bodies,²²⁸ the development of the reasonableness criterion within the prompt release of vessel procedure appears to be safeguarded from such digressions as a result of the compulsory residual jurisdiction attributed to the Tribunal by the 1982 Convention in this respect. The ITLOS, in other words, finds itself in an ideal position to start generating its own case law, independently from any other body, in an area of law for which it was specifically created. The challenge is substantial, especially if one knows that its very competence on this matter had been questioned in the strongest of terms by a judge of the International Court of Justice in 1995:

It seems to this author that the whole structure of provisions for the prompt release of vessels and their crews under Article 292 in the Convention does not make any sense and is in fact unworkable. The relevant provision was drafted at UNCLOS III simply on the basis of wishful thinking, arising from a lack of understanding of the whole situation relating to the exercise of coastal jurisdiction in the exclusive economic zone.²²⁹

The continuous flow of cases that have been submitted to the ITLOS has allowed it to prove the contrary by starting to use its power.²³⁰ The pre-

228. For a good analysis focusing on the role of the ITLOS in this debate, see Tullio Treves, *Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 N.Y.U.J. INT’L L. & POL. 809 (1999). See also Carl-August Fleischhauer, *The Relationship Between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg*, 1 MAX PLANCK Y.B. UNITED NATIONS L. 327 (1997).

229. Shigeru Oda, *Dispute Settlement Prospects in the Law of the Sea*, 44 INT’L & COMP. L.Q. 863, 866-67 (1995).

230. In the latest survey of the practice of the ITLOS, which appeared in the *International Journal of Marine and Coastal Law*, one can read: “It has, certainly, consolidated its reputation for swift and efficient handling of prompt release cases. On this ground it cannot be faulted.” See Lowe, *supra* note 207, at 570. The Tribunal has thus proven to constitute an effective mechanism capable of limiting the further aggravation of disputes between parties to

sent analysis indicates that the Tribunal has moved forward cautiously, in a logical way, shaping and refining its policy in case after case. Whether in doing so, the Tribunal has shifted the balance incorporated in the 1982 Convention between detaining States and flag States, as one author suggested might arguably be the case,²³¹ is difficult to say with any certainty, especially in view of the broad margin of interpretation that the Tribunal has still reserved for itself concerning the most important aspect of the whole procedure, namely the setting of the amount of the bond. What is certain, however, is that the Tribunal still has some further fine-tuning ahead of it,²³² especially if it does not want to be overtaken by events.²³³

It is appropriate to conclude this article by paying particular attention to the one country that has so far been at the forefront of these developments: France. In three of the four cases covered by the present study, France was the country detaining a foreign flag vessel for having committed fisheries offenses in the EEZ of its southern territories. France is also the country that triggered the latest challenge to the competence of the Tribunal by having national courts deciding on short notice to confiscate a vessel by means of a judgment that becomes immediately enforceable notwithstanding the lodging of an appeal.²³⁴ France is of the opinion that the considerable efforts taken to protect the marine environment in the southern oceans, often at great cost, have not been correctly reflected in the case law of the ITLOS.²³⁵ It is therefore not surprising that it has been the first country to insist on appointing an

the 1982 Convention. See Hartmut von Brevern & Leopold von Carlowitz, *The MV "Saiga" Cases before the International Tribunal for the Law of the Sea*, 8 INT'L MARITIME L. 207, 218 (1999).

231. See Noyes, *supra* note 13, at 149-51. See also John E. Noyes, *Law of the Sea Dispute Settlement: Past, Present, and Future*, 5 ILSA J. INT'L & COMP. L. 301, 307 (1999).

232. Not only with respect to the substance, but also as a matter of policy. See *supra* note 205 and accompanying text. As correctly noted by Lowe, the judgments of the Tribunal would further gain in persuasiveness if the number of declarations, separate and dissenting opinions could be further diminished. Lowe, *supra* note 207, at 570.

233. See *supra* Part II.D.

234. This new challenge surfaced on the occasion of the *Grand Prince Case*, but was left unanswered because the Tribunal decided it lacked jurisdiction. See *supra* note 115 and accompanying text.

235. This feeling of not being well-understood is also widely reflected in the French literature on the subject, and may be characterized by the following statement by Ann Choquet:

L'Etat côtier est sommé de protéger le milieu marin et lorsqu'il adopte des mesures en ce sens, on lui reproche de prendre une caution déraisonnable. Pourtant, la France cherchait à répondre au pillage de la ressource dans ses zones, pillage systématique de la part de navires battant pavillon de complaisance. [The coastal State is called on to protect the marine environment, and when it adopts measures for that purpose, that State is blamed for having set an unreasonable bond. Yet France wanted to react against the plundering of the resources in its zones, systematic plundering that is by vessels flying flags of convenience.]

Ann Choquet, *La prompte mainlevée de l'immobilisation d'un navire et la libération de son équipage*, 53 LE DROIT MARITIME FRANÇAIS 540, 549 (2001) (translation by author).

ad hoc judge in a prompt release of vessel procedure.²³⁶ It probably also helps us to better understand the underlying reasons why France has recently made known its intention to submit a French candidate for the next round of elections of judges at the ITLOS.

236. This appointment occurred in the *Grand Prince Case*. Press Release, ITLOS, Judgment to be Delivered in the "Grand Prince" Case on Friday, 20 April 2001 at 3 P.M. (Apr. 19, 2001) (ITLOS/Press 47), available at <http://www.itlos.org/start2en.html>.