

SEPARATE OPINION OF VICE-PRESIDENT NELSON

The unique procedure embodied in article 292 of the Convention has for its object a single purpose – that is – to ensure that “if a ship or vessel is arrested because of a violation of coastal state regulations and if the Convention provides for its release on the posting of a bond or other security, then there should be an assurance that the release could be effected promptly”, thus avoiding the substantial expenses that the vessel, owner or charterer would incur while the vessel was being kept idle in detention.¹

The first proposal on this matter submitted in 1973 in the Seabed Committee by the United States brought this simple purpose out quite clearly:

The owner or operator of any vessel detained by any State shall have the right to bring the question of the detention of the vessel before the Tribunal in order to secure its prompt release in accordance with the applicable provisions of this Convention, without prejudice to the merits of any case against the vessel.²

Article 292, paragraph 1, reflects this intent. A State Party is granted the power to submit to this Tribunal, in certain specific circumstances, the question of release from detention of a vessel flying its flag where the authorities of another State Party have detained the vessel 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”³ (“qu’il est allégué que l’Etat qui a immobilisé le navire n’a pas observé les dispositions de la Convention *prévoyant* la prompte mainlevée de l’immobilisation du navire ou la mise en liberté de son équipage dès le dépôt d’une caution raisonnable ou d’une autre garantie financière”. Emphasis added).

There is no doubt in this case that article 73 is the relevant provision. It states expressly that “[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security”. In short it is an article which, in accordance with the terms of article 292, makes provisions “for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security”. The link between article 73 and article 292 is established by the fact that article 73 is one of the articles which provides for the prompt release of vessels upon the posting of a bond and, in my opinion, gives meaning to the expression “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”.

¹ Explanatory Statement by the Secretary on Supplement to the Draft Rules of the Tribunal on the Prompt Release of Vessels and Crews (LOS/PCN/SCN.4/WP.2/Add.1) (1985) in LOS/PCN/152, Vol. III, 1 May 1995, p. 389.

² UN Document A/AC.138/97. Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, Vol. II (1973), p. 23.

³ On which see paragraphs 23-25 of the Dissenting Opinion of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye in the *M/V “SAIGA” Case* (Prompt Release) (1997).

Article 292, paragraph 3

The mechanism for prompt release of vessels is designed to isolate the proceedings from those taking place in the domestic forum and this must be a logical consequence arising from the very nature of the proceedings. “The court or tribunal shall deal ... 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 ...” (article 292, paragraph 3. Emphasis added).

In the oral pleadings France stated that the Tribunal should “... take great care not to interfere with the functions of the French courts seized of the same question” as the one before the Tribunal (oral pleadings of France, ITLOS/PV.00/2, p. 19). In other words the Tribunal may have to refrain from giving a judgment on the prompt release of the vessel while the same matter is before the local courts. To my mind such an approach would fly in the face of the very object and purpose of article 292. That is why it is also difficult to accept that the local remedies rule (article 295) has any relevance with respect to the operation of article 292. (See oral pleadings of France, ITLOS/PV.00/2, p. 16.)

The Tribunal is likewise debarred from dealing with matters such as the freedom of navigation and the incompatibility of French law with the 1982 Convention on the Law of the Sea, as raised by Panama. These matters are alien to the question of release of the vessel.

The reasonable bond

The expression “reasonable bond” appears in both articles 292 and 73. In particular, article 73 declares that “[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security”. The Tribunal has in a previous decision held, correctly in my view, that the most important guidance in the determination of the bond or other financial security is that the bond must be reasonable.⁴

In the first place there can be no doubt that it is the Tribunal’s task to determine, in case of any dispute, what is reasonable. As was stated so many years ago:

It is not now for either of the Parties to the Treaty to determine the reasonableness of any regulation made by Great Britain, Canada or Newfoundland, the reasonableness of any such regulation, if contested, must be decided not by either of the Parties, but by an impartial authority.⁵

Secondly, the bond must be reasonable in the sense of being fair and equitable and “what is reasonable and equitable in any given case must depend on its particular circumstances”.⁶

⁴ *The M/V “Saiga” Case*, Prompt Release (1997), p. 23, para. 82.

⁵ *North Atlantic Coast Fisheries Case*, Great Britain v. United States, Award of 7 September 1910, *Reports of International Arbitral Awards*, Vol. XI, p. 189.

⁶ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, I.C.J. Reports 1980, p. 96, para. 49.

The particular circumstances of the case determine the reasonableness of the bond. The process is not at all dissimilar to that utilized by international tribunals in the quest for an equitable result in maritime boundary delimitations.⁷ In that domain also, international tribunals have to take into consideration the relevant circumstances in order to reach an equitable result. That is why, in my opinion, this Tribunal is not only obliged to look at factors such as those mentioned in paragraph 67 of the Judgment but it should also take account of what, in the introduction to the Statement in Response of the French Republic, was referred to as “the context of illegal, uncontrolled and undeclared fishing in the Antarctic Ocean and more especially in the exclusive economic zone of the Crozet Islands where the facts of the case occurred”.⁸

This material constitutes part of the “factual matrix” of the present case⁹– the factual background surrounding the case. In my view this factor ought to have played some part, not by any means a dominant part, but a part nevertheless in the determination of a reasonable bond. However, my difference with the Judgment of the Tribunal on this matter was not sufficient to impel me to dissent.

(Signed) L. Dolliver M. Nelson

⁷ See Olivier Corten, “L’interprétation du ‘raisonnable’ par les juridictions internationales : au-delà du positivisme juridique ?” *Revue Générale de Droit International Public, Tome CII – 1998*, pp. 5–43 on p. 12.

⁸ Statement in Response of the French Republic, p. 2. France has developed this theme both in the Statement in Response and in its oral pleadings.

⁹ See Jiménez de Aréchaga, Separate Opinion in the *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *I.C.J. Reports 1982*, p. 106, para. 24.