(Translation) Original: FRENCH

Republic of Panama v. French Republic

The M/V CAMOUCO

Application based on Article 292 § 1 of the United Nations Convention on the Law of the Sea.

Part I: Memorial presented by the Republic of Panama, represented by Maître Ramón García Gallardo of SJ Berwin & Co. acting as Agent.

Brussels, for Hamburg, Friday 17 January 2000

Plan of the Application

Application based on Article 292 § 1 of the United Nations Convention on the Law of the Sea.

I. Introduction

1. The undersigned, Ramón García Gallardo, lawyer at the Bar of Madrid and Brussels, of the firm SJ Berwin & Co. (London, Brussels, Frankfurt, Berlin, Madrid), acting on behalf of the **Republic of Panama**, in accordance with the power conferred in Panama City by the Ministry of Foreign Affairs on 28 December 1999 with the apostil of The Hague (**Annex A1**) and pursuant to Article 292 § 2 of the United Nations Convention on the Law of the Sea hereby file an Application whose purpose is that the **French Republic** should cease, without delay, the clear violation of various provisions of the said Convention, notably Articles 55 to 58 (hereinafter the Convention).

The Republic of Panama elects as its addres for service in Germany, with regard to all acts of procedure relating to this case, Mr. Ramón García Gallardo, SJ Berwin & Co. /Knopf Tulloch & Partners, Kurfurstendamm 63, D-10707 Berlin, Tel. 49.30.8817110; Fax: 49.30.8877177). The Applicant informs the Tribunal that it would like a copy of all written pleadings to be sent to the following address: Messieurs Ramón García Gallardo (SJ Berwin & Co, Square de Meeus, 19/3 B-1050 Bruxelles; Tel: 32.2.5115340; Fax: 32.2.5115917; E-mail: ramon.garcia.gallardo@sjberwin.com).

2. The Applicant declares, in conformity with Article 64 of the Rules of Procedure of the International Tribunal for the Law of the Sea, that it chooses French as the language of the proceedings and that, for every document submitted in a language other than French or English, the Applicant shall furnish a certified translation into French. Reference will occasionally be made in the following presentations to words of phrases in a language other than French.

3. On 7 January 2000, the Applicant addressed a letter to the French Ministry of Foreign Affairs (**Annex 2)** by telefax and by registered mail in order to inform the Ministry that the Applicant had received:

"authorization from the Ministry of Foreign Affairs of the Republic of Panama to initiate proceedings against the French Republic before the International Tribunal for the Law of the Sea to obtain the prompt release of the vessel and release of its captain"

and invited it

"to immediately secure the release from detention of the vessel and the release of the captain".

4. Following the expiry of the 10-day time-limit for a reply laid down by Article 292, there has been no reply to the above-mentioned letter and no agreement

between the parties to submit the matter of the release of the vessel or the release of the captain to a court or tribunal.

The Applicant therefore requests that the case be submitted to the International Tribunal for the Law of the Sea.

II / Background to the dispute

II.1 / The facts.

5. The Applicant wishes to indicate, as a preliminary matter, that the information presented herein satisfies the requirements laid down in article 111 of the Rules of Procedure of the Tribunal.

II.1.1 / Preliminary information

6. The Merce-Pesca Company, a legally registered Panamanian company, is the owner of the long-liner quick-freezer fishing vessel *Camouco* flying the Panamanian flag, registration number 21209-94-CH and with the international call-sign/code HP-6919. The technical characteristics of the vessel appear in **ANNEX 3** and are as follows:

--Outer length: 48 metres

--Beam: 8.20 metres

--Engine power: 1000 HP

--Hold capacity: 200 tonnes

--Tonnage: 571 GRT

--Registration: Panama.

7. The crew of the *Camouco* is made up almost entirely of sailors of Spanish nationality. (**ANNEX 4**) Its Master at the time of the arrest was Mr. José Ramón Hombre Sobrido (born 4 May 1973 in Ribeira, Spain, of Spanish nationality, passport no. 52459895-T), who holds the qualifications necessary to command a vessel of this kind.

8. During 1998 and 1999, the *Camouco* held a number of successive fishing licences:

A Panamanian licence, No. 009, granted for the fishing of toothfish, according to the deep “long-line" method, in international waters (between 20º and 50º latitude south and between 20º and 80º longitude east), granted by the Republic of Panama (**ANNEX 5**).

9. Meanwhile, the vessel had been chartered by two French operators: Armement SAPMER (end June, July, August 1998) and Armements

réunionnais (1 September 1998-early July 1999), during this period coming under provisional French registration and becoming the "SAINT JEAN", registered at Port aux Français (in the Kerguelen Islands). It used the following fishing licences:

- French licences to enable it, in the EEZ of Crozet, to fish for patagonian toothfish during the period June 1998 to 30 June 1999. (**ANNEX 6**).

- a C.C.A.M.L.R. (Commission pour la Conservation de la faune et de la flore maritimes de l'Antarctique) licence, granted by the French Republic for the period from 15 April 1999 to 30 August 1999, also for catching toothfish. (**ANNEX 7**).

10. When the contract with the French operators had expired, the *Camouco* got back its Panamanian flag at the beginning of July 1999 and operated in accordance with Panamanian law.

II.1.2 Circumstances of the boarding

11. The *Camouco* sailed from the Namibian port of WALVIS BAY on 16 September 1999 under the command of Captain José Ramón HOMBRE-SOBRIDO in order to engage in longline fishing in the international waters of the southern seas.

It should be pointed out that the Republic of Panama is not yet a contracting party of C.C.A.M.L.R. (Commission pour la Conservation de la faune et de la flore maritimes de l'Antarctique) and, consequently, the rules laid down are not applicable to vessels flying the Panamanian flag. Nevertheless, according to information of its Agent, the Republic of Panama will soon sign said convention, thus contributing to the protection of the maritime resources of the area.

12. Captain HOMBRE-SOBRIDO had previously signed a labour contract on 1 July 1999, which indicated in paragraph 3 that he explicitly undertook "not to engage in any other kind of fishing activity in the exclusive economic zone of any country" (**ANNEX 8**).

13. The vessel was boarded by the French surveillance frigate *Floréal* on 28 September 1999 in the exclusive economic zone (EEZ) of Crozet,[1], 160 nautical miles from the northern boundary. (**ANNEX 9**)

To date, only the Master continues to be held against his will in Reunion Island; the rest of the crew left Reunion on 13 October 1999. Only a crew of four persons remains on board to see to the maintenance of the vessel.

[1] When boarded, the vessel's GPS was as follows:
- L: 45º 23' 8 South
- G: 049º 56' 2 East.

14. At this point in the Application, the precise circumstances surrounding the boarding of “M/V *Camouco*” by the frigate *Floréal* need to be clarified by reference to the "protocols of violation and of arrest [*procès-verbaux d’infraction et d’appréhension*] Nos. 1/99 and 1/99 respectively” of the frigate *Floréal* and to the testimony of the various parties involved in this case, including the statements of the Master of the *Camouco*.

15. The Applicant wishes to draw the attention of the Tribunal to the fact that all the items of evidence indicated were held by the French authorities (maritime police and the Administrator of Maritime Affairs, together with the Public Prosecutor and the civil and examining magistrates) for over 15 days, making it impossible for the captain and his counsel and for counsel of the operator to learn their contents.

II.1.2.a / According to the French authorities (**Annex 10**), on 28 September, at 1328 hours (universal time D), the commander of the helicopter of the Surveillance frigate *Floréal* spotted the *Camouco* in the act of putting a longline over the side. Using VHF frequency 16, the helicopter asked the vessel to desist; it failed to comply; at 1431 hours (D) it answered the calls from the helicopter.

16. According to the observations of the French navy helicopter, the crew of the *Camouco*, after severing the longline, apparently discarded some bags, some of them containing fresh toothfish. One green bag, thrown into the sea, was recovered and contained thirty-four kilograms of fresh toothfish.

17. The vessel was inspected by the French authorities at 1540 hours (D). Six tonnes of frozen toothfish were found in the hold. According to the declaration of the French officer Thierry MOISSON, “The fish was frozen hard. It was impossible to insert a thermometre." The captain confirmed that it was toothfish and asserted that there were six tonnes of toothfish which had been caught on Elan Bank, located south of the EEZ of Crozet. Thierry MOISSON adds that "the freezing tunnels were empty and were not running". Moreover, the protocol of violation states that “The plant is clean”.

18. At 2140 hours (D), the *Floréal* recovered a buoy belonging to the *Camouco* and took the buoy, a long-line and an anchor on board.

A detailed description is included in the documents annexed.

19. The French officers accuse the vessel:

- of having committed the offence of fishing without authorization in the Crozet EEZ and of having on board 6 tonnes of toothfish, presumed to have been caught illegally.

- of having concealed identification markings on their vessel while it was flying a foreign flag,

- of having attempted to evade the control of the French authorities by taking flight.

II.1.2.b / According to Captain HOMBRE-SOBRIDO (ANNEX 11)

20. According to Captain HOMBRE-SOBRIDO, the vessel crossed the Crozet EEZ. The vessel was coming from international waters located south of the EEZ.

21. In his statements given in evidence to the examining magistrate, Captain HOMBRE-SOBRIDO confirms that it was his first fishing expedition on the vessel and that he had been fishing to the south of the EEZ. He intended then to make for Elan Bank but had been dissuaded from doing so by the poor weather. He had therefore decided to cross the Crozet EEZ in a south-north direction in order to go fishing at a bank located above the northern boundary of the Corzet EEZ (**ANNEX 12**).

22. It should be noted that, in accordance with current French rules, the *Camouco* faxed its particulars to the district of Crozet at 1417 hours (**ANNEX 13**). The Captain acknowledges that he forgot to fax these particulars to the Crozet authorities on entering the EEZ, even though the knew it was his duty to do so under French law. He clearly stated that he merely wished to cross the EEZ of the Crozet Islands, without fishing there. Furthermore, his fishing licence expressly prohibited him from fishing outside international waters.

23. Regarding the circumstances of the inspection of the vessel by the French authorities, the captain explained, in his statements, that the delay of one hour between the overflying by the helicopter and the stopping of the engines was due to the fact that:

"(he was) *in bed* (and that he had) *toothache and his mouth was hurting* (and that) *the second captain had come to fetch* (him) *to tell (him) that there was a helicopter*. (He) *came up to the bridge, replied to the radio message and stopped the engines"*.

24. As regards the identification markings, the captain of the *Camouco* emphasized in his statements that they were to have been redone after the Camouco's change of name during its previous fishing expedition, when it had been under the French flag, and because of the poor standard of the painting done at Walvis Bay. Moreover, he indicated that he had never worked on the vessel.

25. With respect to the 6 tonnes of frozen toothfish found on board the *Camouco*, the Captain stated that they had been caught to the south of the Crozet EEZ (where the *Camouco* had been before crossing the Crozet EEZ) and was surprised that his assistant had not noted the disputed 6 tonnes of toothfish according to normal practice. In fact, this was the product of the first days' fishing while heading. As for the 34 kilograms of fresh toothfish recovered by a French helicopter, the Captain said: "As far as I'm concerned, there was no fresh toothfish on board my vessel at that moment".

26. There is no evidence indicating that this toothfish was fresh, since the authorities claim to have recovered from the water, onto the *Floréal*, a bag containing 34 kg of fish, without Captain HOMBRE-SOBRIDO being able to say whether it was fresh or not and whether it belonged to his vessel. It was only during questioning, eight days later, that the national police showed him a black and white photograph taken on a vessel (presumably the Floréal) which showed a plastic bag with fish inside. It was surprising that this vital piece of photographic evidence was the only black and white photograph, unlike the others shown to him, which were colour photographs.

27. According to information gathered in other fisheries cases monitored by the *Floréal*, samples are kept in its refrigerators as evidence. With all due respect to the French Republic, the Applicant can only express surprise that this bag of fish was not shown to Captain HOMBRE SOBRIDO and that he was able to see only photographs of it.

28. Furthermore, as regards the plastic bags thrown into the sea by the crew before the vessel was boarded, the Captain said that they were identical to those used on board the *Camouco* and were used for dumping rubbish (fish, old clothing, bottles) in the sea. He also said that he had not waited for the arrival of the helicopter in order to dump 48 bags of rubbish. *"It was a coincidence. I don't think my crew could have put fresh toothfish in those bags because we had not been fishing"*.

[29. The Captain also said that he did not recognize the fishing stamp [*marque de pêche*] Giono and emphasized that the fact the frequencies recorded in the logbook of the *Camouco* were identical to that of the stamp recovered by the French authorities was not relevant. The vessel had been on a fishing expedition under French charter a few months before, which would explain the presence in the EEZ of marks belonging to it when tje vessel held a French fishing license.][2]

30. Lastly, it should be noted that Captain HOMBRE-SOBRIDO had twice stated that he had never fished in the waters of the EEZ and disputed the assertions of the French authorities to the effect that the *Camouco* had been stationary between 0600 hours (D) and 1328 hours (D). With respect to his owner's orders, the captain stated that *"he asked me to fish in international waters"*.

II.1.2.c / On the unsigned statements of the rest of the crew of the *Camouco* appearing in the testimonies following examination [*interrogatoires*].

31. Unsigned as they were, the statements of the crew of the *Camouco* cannot be considered.

[2] As in the original.

The refusal of all crew members of the *Camouco* to sign was motivated by the fact that they were sceptical about the accuracy of the transcription of their statements, even though the police had provided them with an interpreter.

In reality the statements were taken by the national police in conformity with French law but without the presence of a lawyer.

II.1.3 / Events leading up to the submission of this application

32. On 29 September 1999, the captain was notified by the French authorities of the arrest of the vessel, the fishing gear, fishery products, communication equipment and fishing documents.

33. The vessel was then escorted, under the supervision of the French Navy, to Ile de la Réunion, to Port des Galets, where it arrived on 5 October 1999 at 1215 hours (D).

During those 7 days at sea, it was impossible for the vessel's captain and his crew to communicate either directly or freely with the owner, as all communications, oral and written, had to go via the frigate *Floréal*. It will also be noted that both the Merce-Pesca Company and its counsel attempted in vain to contact the *Camouco* by fax sent to the Directorate of Maritime Affairs *(***ANNEX 14**).

On 1 October 1999, by means of a fax for the attention of the Regional and Departmental Directorate of Maritime Affairs, the Merce-Pesca Company stated that*(***ANNEX 15**):

> *"The Merce-Pesca Company engaged in fishing activities in conformity with its fishing licence issued by the authorities of the vessel's flag State, which authorized it to fish "patagonian toothfish" in the co-ordinates around the Kerguelen and Crozet Islands, but naturally outside the EEZs (…).*
>
> *We must inform you that, by entering the Crozet EEZ, our Captain would have clearly breached our instructions, which were under no circumstances to enter the French EEZs of Kerguelen and Crozet"*.

34. On 7 October 1999, the Regional and Departmental Directorate of Maritime Affairs drew up two documents for the seizure of the vessel (estimating the value of the vessel at 20,000,000 FF (about US$ 3,115,750)), the seizure of the cargo with a value of 350,000 FF (about US$ 54,525) *(***ANNEX 16**). It should be noted that **the fishing gear and bait were not seized** (their value being approximately 1,500,000 French francs or US$ 225,000 cf. infra), contrary to French law, which provides that they should be seized in case of unlawful fishing, which is the reason why the ship was seized according to the French authorities (cf. INFRA applicable French law). The Merce-Pesca Company even managed to get them out of French territory to Walvis Bay on 21 October 1999. (cf. infra).

35. On 7 October 1999, Captain HOMBRE-SOBRIDO was charged and placed under judicial supervision by the Parquet of the Saint-Denis *Tribunal de Grande Instance* for **(ANNEX 17)**:

> *"Failure to declare entry into the EEZ;*
>
> *Unauthorized fishing in the Crozet Islands EEZ;*
>
> *Concealment of the vessel's identification marks and*
>
> *Refusal to submit to inspection by officials authorized by the fisheries police"*.

His Spanish passport was also taken from him, thus limiting his freedom of movement, in a highly questionable manner.

36. On 8 October 1999, the Saint-Paul Tribunal d'Instance made an Order *(***ANNEX 18**) confirming the arrest of the *Camouco* and ordering its release upon the posting of a bond of FF 20,000,000.

In the recitals of the Order, it is stated that:

> *"Whereas the vessel entered the EEZ of the French Southern and Antarctic Territories (T.A.A.F.) without prior authorization, and without making its presence known or declaring the tonnage of fish on board to the head of the district [chef de district] of the closest group of islands (…); whereas the presence on board of a certain tonnage of toothfish was established; whereas the fact that the vessel had been discovered in the EEZ without having made its presence known or declaring the amount of fish in their possession raises the presumption that all the catches had been illegally taken in the EEZ.*
>
> *Whereas, in the light of the foregoing, and particularly the value of the vessel and the penalties incurred, release mayonly be obtained by the prior payment of a bond of FF 20,000,000 (about US$ 3,115,751) laid down by Article 4 of the Law of 18 June 1996, as amended by the Law of 18 November 1996, and of Article 142 of the Code of Criminal Procedure".*

It will be noted that the amount of the bond was increased by FF 5 million in relation to the request made by the Regional and Departmental Director of Maritime Affairs of La Réunion, who called for a bond "not less than FF 15 million". The amount ultimately decided upon by the Saint-Paul Tribunal d'Instance was far greater, and this **without any genuine/real motivation on the part of the judge**. Further, the maritime administrator did not appoint a technical expert to establish the vessel's value and, without actually visiting the vessel, estimated its value as being FF 20,000,000.

37. At this juncture, and before embarking on further argument, it should be stressed that our case is the object of two distinct sets of proceedings before the French courts:

- one a civil case, namely, summary proceedings before the Saint-Paul Tribunal d'Instance, whose principal aim is to dispute the amount of the bond of FF 20,000,000 fixed by the Order of 8 October 1999 (this bond is **indivisible**, in other words, its aim is to guarantee that the captain appears in the proceedings and with regard to the solvency of Merce-Pesca Company when the final judgment is delivered).

- the other, a criminal case, before an examining magistrate, in which Captain HOMBRE-SOBRIDO is charged with various offences against French law relating to the TAAF.

38. The fact that there are two parallel sets of proceedings is extremely prejudicial, as French law does not differentiate between a bond payable by the owner of a vessel and a bond payable as a guarantee that the Captain (a Spanish national) will appear.

39. While it is legitimate to seek to secure payment by the owner of any fines which may be determined on conclusion of the proceedings on the merits, the bond demanded by the French judge is less legitimate where the Captain is concerned, for, since he is a national of the Community, the examining magistrate will have no difficulty in bringing him to court under numerous bilateral conventions and Community law conventions binding the French Republic and Spain (i.e. by issuing letters rogatory).

Counsel of Merce-Pesca were not able to issue a summons for urgent proceedings until 16 days after the date of the Order, the French authorities having omitted to communicate the documentary evidence to them.

40. On 22 October 1999, **in order to secure the prompt release of the vessel and the crew**, counsel for the owner, Merce-Pesca, filed a summons for urgent proceedings (**ANNEX 19**)[3], the purpose of which was to secure the lifting of the seizure of the vessel, its cargo and crew and to reduce the bond to a "reasonable" amount under Article 292 § 1 of the United Nations Convention on the Law of the Sea. The principal arguments put forward related to:

> - the **failure to observe due process in** relation to the fact that the protocols of violation and arrest of 29 September 1999 were not communicated.
>
> - the **failure, by fixing an amount of FF 20,000,000**, to respect the **reasonableness of the bond** in conformity with Articles 73 § 2 and 292 of the United Nations Convention on the Law of the Sea.

[3] Maître Dominique Law-Wai, counsel of Captain HOMBRE-SOBRIDO, filed a summons on his behalf. This summons was similar to the one filed by Merce-Pesca Company.

- **clear violation of the duty to promptly notify the flag State**. Article 73 § 4 of the Convention lays down that:

*"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"*.

41. In his submissions in reply to the summons (**ANNEX 20**), the Regional and Departmental Director of Maritime Affairs of La Réunion dismisses the notion of *"reasonable bond"* favouring instead the term *"sufficient bond"*. He justifies the amount of FF 20,000,000 on the grounds that, on the one hand, the fine incurred for the possession of 7 tonnes of toothfish (only 6 tonnes according to the protocols of 7 October 1999) was FF 3,500,000, to which sum is to be added the value of the vessel itself.

42. On 14 December 1999, in other words over two months after the boarding of the vessel, the Saint-Paul Court delivered a notice of summary proceedings *(***ANNEX 21**), in which it rejects the arguments put forward by Merce-Pesca, and dismisses the requests of the parties for release and for reduction of the bond of FF 20,000,000.

In the recitals of the Order, it is stated that:

With respect to the bond: *"Whereas the bond must be determined pursuant to the rules laid down by Article 142 of the Code of Criminal Procedure; whereas it does not have to state the elements on which it has relied in order both to guarantee the payment of the penalties incurred and to secure appearance of the persons charged, having regard to the nature of the facts"*.

With respect to compliance with Article 73 § 4 of the United Nations Convention on the Law of the Sea: *"Whereas Article 73 § 4 recalls the duty to inform the flag State of the measures taken against vessels belonging to one of its nationals. But whereas the Applicant does not indicate how it is entitled to claim that there has been a violation of the rules of public international law"*.

43. The Tribunal will also note that **the situation of Captain HOMBRE-SOBRIDO has not changed** and that he is still being detained, against his will, on the Ile de la Réunion. Unless its Agent is mistaken, the Republic of Panama has still not received notification of the boarding of the *Camouco*.

44. The Applicant also wishes to indicate to the Tribunal **that the detention of the *Camouco* has, since 5 October 1999, cost the Merce-Pesca Company over FF 1,435,400 (some US$ 224,300)** in manpower expenses, counsel's fees, and shipping agency bills (**ANNEX 22**).

45. It is, therefore, all these facts which have today prompted the Republic of Panama to submit this Application to you, as all the above-

mentioned elements quite clearly establish that the French authorities did not follow the requirements of the United Nations Convention on the Law of the Sea regarding the principle of the prompt release of vessels and their crews from detention subject to the posting of a reasonable bond.

III/ Applicable law.

III.1/ National law (ANNEX 23)

II.1.a/ Law applicable to the seizure of the elements constituting the offence.

46. Law No. 83-582 of 5 July 1983 setting out the system for arrests and supplementing the list of agents empowered to declare that offences have been committed in the sphere of maritime fisheries states, in Article 2:

> *"**The competent maritime authority shall seize the prohibited nets, fishing gear and equipment** at all times and in all places where investigations can be made in sales and manufacturing premises. The court shall order their destruction.*
>
> *When they have been used for fishing in violation of laws or regulations, the nets, gear and equipment used below the surface [en plongée] and in submarine fishing [pêche sous-marine], in general all the instruments used for the purpose of fishing and which are not covered by the first paragraph of this Article, may be seized by the competent maritime authority; the court may call for them to be confiscate and order them to be sold, handed over to specialized institutions for maritime instruction, or decide that they shall be returned"*.

47. Its Article 3 states that:

> *"**The competent maritime authority may arrest a vessel or craft which has been used for fishing in violation** of laws or regulations.*
>
> *The maritime authority shall escort or have escorted the vessel or craft to the port which it has determined; it shall draw up a protocol for the arrest in which the vessel as craft shall be placed in the custody of the maritime affairs department.*
>
> *Within no more than seventy-two hours of the arrest, the maritime authority shall address to the district court at the place of the arrest an application accompanied by the protocol of seizure [procès-verbal de saisie] so that the court can confirm, by an Order made within no more than seventy-two hours, the arrest of the vessel or craft or decide to release it.*

At all events, the Order shall be made no more than six days after the arrest referred to in Article 7 or after the arrest.

The release of the vessel or craft shall be decided by the district court at the place of the arrest against the posting of a bond, the amount and arrangements for the payment of which it shall fix according to the conditions laid down in Article 142 of the Code of Criminal Procedure".

48. Article 4 states that:

*"**The fishing products taken in violation of the rule or regulations shall be seized by the competent maritime authority, which shall decide how to dispose of them**. They may be sold at public auction or by mutual agreement, according to the best conditions of the market, or handed over to a scientific, industrial or welfare establishment, or be destroyed, or, in the case of live products, returned to the sea. Where they are handed over to an industrial establishment it shall be in return for payment.*

Notwithstanding how they are disposed of, the offender or principal shall bear the costs arising from the said disposal and may be held responsible, under the supervision of the competent maritime authority, for physically seeing to this disposal, even where it entails a sale or their handing over to a third party as a gift or in return for payment. In the case of a sale by auction, the competent maritime authority may appoint the auctioneer to deal with the matter. The court may confirm the manner of disposing of the products and order their confiscation or return, or the confiscation or return of the values corresponding thereto.

When fisheries products [produits des pêches] have been sold without having been seized, the competent maritime authority may seize the sums produced by the sale; the court may decide their confiscation or return".

49. **In the present case**, it should be noted that only the fisheries products [produits des pêches] and the vessel were seized by the French authorities. The fishing gear and bait were not seized, as they should in fact have been under French law. It is therefore all the more paradoxical that the Regional Maritime Directorate of La Réunion should have allowed the gear and bait (value PTAS 36,192,859, or FF 1,500,000 or US$ 225,000) to leave French territory *(***ANNEX 24**).

50. It will be noted that Article 3 contemplates the vessel's arrest as a possibility (use of the verb "may" in the present tense) and makes its release subject to the strict application of Article 142 of the Code of Criminal Procedure, which lays down that a bond may only be required in order to guarantee:

"1. The appearance of the person charged, of the person detained or of the accused, in all the proceedings and for execution of the judgment, as well as, where appropriate, the execution of the other obligations imposed upon it;

2. Payment in the following order:

a) of compensation for the damages caused by the offence (…).

b) of the fines.

51. This condition that grounds be given [*condition de motivation*] is clearly lacking in the Orders made by the Saint-Paul Court, where the sum of FF 20,000,000 was fixed arbitrarily, without consideration of the offences actually committed in this instance. Yet stating the grounds is necessary if the bond[4] is to be considered valid.

III.1.b/ Law applicable to the offences committed by the captain.

52. The law applicable on the date of the facts and suppressing, in the EEZ of the French Southern and Antarctic Territories (T.A.A.F.), fishing offences came into force following a legislative amendment to the original law [*Loi d'origine*] of 1 August 1888 and by the Law of 18 June 1966 (cf. SUPRA **ANNEX 23**).

In its Article 1, it states that

"Maritime fishing, the hunting of marine animals and the exploitation of the products of the sea in the French Southern and Antarctic Territories are governed by the provisions of this law.

These provisions shall apply throughout the territory and, in the sea, along the coasts, throughout the whole area of French jurisdiction, where fishing is concerned."

53. Its Article 2 states that

"No one may fish or hunt marine animals or engage in the exploitation of the products of the sea, whether on land or on board ships, without authorization. (…) Any vessel entering the EEZ of the French Southern and Antarctic Territories has a duty to indicate its presence and to declare the tonnage it has on board (…)".

54. Article 4 lays down the penalties incurred for any violation of the above prohibitions: **up to FF 1,000,000 (about US$ 150,000) and 6 months'**

[4] It is settled case-law in the French legal system that each bond should cover both the guarantee of appearance of the person charged and also any damages and interest and/or fines (cf. Cour de Cassation, Chambre criminelle, 1 December 1981, *Bull*. No. 318; Cour de Cassation, Chambre criminelle, 8 July 1992, *Bull*. No. 318).

imprisonment for any person engaging in fishing (…) or the exploitation of the products of the sea (…) without having obtained the authorization required by Article 2 or who has failed to indicate having entered the economic zone or to declare the tonnage of fish on board.

55. However, the legal maximum laid down in Article 4 § 1 shall be increased by FF 500,000 for each tonne caught above 2 tonnes without having obtained the authorization laid down by Article 2 (…).

56. Furthermore, Article 10 lays down that

> *"The vessel and craft belonging to it, together with the equipment used by the offenders may be seized by the official making the arrest [agent verbilisateur]; the court may decide on the confiscation and sale of the equipment. The court shall also order the destruction of equipment not complying with regulations "*.

III.1.c/ Law applicable to the fines laid down by French law.

57. The maximum penalties laid down by the above-mentioned French law for fish caught illegally are as follows: up to FF 1,000,000 fine with an additional FF 500,000 per further tonne in excess of 2 tonnes of fish.

Consequently, bearing in mind the fact that the *Camouco* had 6 tonnes of toothfish on board, the total amount of the possible fine would be a maximum of FF 2,000,000 (or 500,000 X 4 tonnes over and above the ceiling of 2 tonnes).

58. Where the concealment of the identification markings is concerned, the fine should be fixed somewhere between FF 50,000 and FF 500,000 (**cf. SUPRA ANNEX 23**).

59. To sum up, and without prejudice to the innocence of the vessel and its captain, subsidiarily, they shall incur a maximum fine, without allowing for possible reductions of fines, in the worst possible case, of FF 3,500,000 (i.e. up to FF 1,000,000 for the captain + FF 2,000,000 for the 4 tonnes of toothfish above the ceiling of 2 tonnes + up to FF 500,000 for the offence of concealing identification markings).

60. It is clear that, in view of the facts described, the French courts would not, in the worst possible case, be in a position to apply the maximum amounts laid down for each offence.

III.2/ International law ratified by the French Republic.

61. In the context of the present case, the legal text to be considered is Decree 96774 ratifying the **United Nations Convention on the Law of the Sea, signed on 10 December 1982 at Montego Bay**. This international law

convention superseded French law[5] as soon as it was ratified on 30 August 1996 and published in the Official Journal of 7 September 1996.

62. France's position regarding these provisions of international law was expressed by the French representative on the opening of the proceedings of the Third United Nations Conference on the Law of the Sea, held in July 1974 **(ANNEX 25)**:

> *"(…) Thus, it was essential to provide means for the settlement of disputes. At the internal level, that work was done by the courts, which had a general and exclusive jurisdiction from which no one could escape. However, the adoption of a similar solution at the international level was clearly not compatible with the sovereignty of States. On the other hand, states might be willing to submit specific disputes to a mandatory settlement procedure. The Conference should set aside the notion of a court with general jurisdiction and think in terms of a series of procedures established ratione materiae. Such a solution would have the advantage of permitting recourse to qualified experts who would be most likely to consider cases objectively since they would be viewing them from a technical point of view; there would be no risk of having decisions based on considerations foreign to the dispute".*[6]

63. Bearing in mind what has just been said, the various provisions of the Convention, which is pivotal to the Application, need to be examined.

64. 1/ The obligation to respect the principles of freedom of navigation in the EEZ, without adding any conditions of passage which would go beyond what is laid down by the Convention (**Articles 55 to 58** and equivalent [**concordants**]).

65. **Article 55** provides:

> *« The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention. »*

66. **Article 56** provides :

> *1. In the exclusive economic zone, the coastal State has:*
>
> *(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or*

[5] Article 55 of the French Constitution of the 5th Republic states that "As soon as they are published, treaties or agreements properly ratified or approved have an authority superior to that of laws, subject, in the case of each treaty or agreement, to its application by the other party".

[6] Volume I of the summary records of meetings, page 155, para. 28; cf **Annex 21**.

non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

67. **Article 58** sets out the rights and obligations of other States in the exclusive economic zone :

« 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, ***the freedoms*** *referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.*

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

68. 2/ The obligation of prompt notification of arrests and detentions of foreign vessels is laid down by **Article 73 § 4**, entitled *"Enforcement of laws and regulations of the coastal State"*, which states that:

> *"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 any penalties subsequently imposed"*.

69. 3/ **Article 73 § 3** states that:

> *"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"*.

70. 4/ The obligation of prompt release of vessels and their crews is laid down by Article 73 § 2, which sates that:

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

71. This obligation is sanctioned by the **procedure laid down by Article 292 § 1** of the United Nations Convention on the Law of the Sea, which states that:

> *"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"*.

IV/ "Fumus boni Juris"

72. Even if the object of the present case is not to establish the reality of the violations which may have been committed by the *Camouco* in the French EEZ of Crozet, the Applicant, while respecting the full competence of the courts of the French Republic on matters of substance, wishes to draw the attention of the Tribunal to a set of elements which, according to this party, will serve to guide the Tribunal's reasoning.

73. I would be desirable for Captain HOMBRE SOBRIDO to be heard at the hearing before the International Tribunal for the Law of the Sea in order to corroborate the points set out below.

74. First, it will be noted that the failure to respect the principle of the right to be heared [*principe du contradictoire*] by the French authorities arises at various stages in the arrest and detention of the *Camouco*:

- the circumstances of the boarding [*arraisonnement*] remain very unclear, and still contain many contradictions.

- The protocols of arrest and violation and the statements of Captain HOMBRE SOBRIDO (during questioning by the national police and during talks he had with the Agent to prepare this application) do not indicate that the *Camouco* was clearly in the act of conducting illegal fishing. The protocol of violation indicates that the vessel "is putting out a line", but no line was recovered in the wake of the vessel. Not a kilo of fish was recovered by the helicopter, not so much as a few metres of line with hooks to prove the *flagrante delicto* fishing.

75. The **birds** which can be seen circling the vessel on the photographs taken by the police are not a relevant indication because this is a relatively normal feature, as the *Camouco* was not very far from the coasts of various islands constituting the Crozet island group. Moreover, the birds could have been attracted by the fact that crew members were making use of the down-time during the crossing of the Crozet EEZ to discard garbage.

76. During their **inspection visit**, the officers of the *Floréal* did not find any trace of fresh fish in significant quantities. Apart from the six tonnes of frozen toothfish, there was no fresh fish.

77. At 2140 hours, when the *Floréal* recovered a fishing buoy which ostensibly belongs to the *Camouco*, it also recovered, according to the protocol of violation, a buoy of 1500 metres, an anchor and 200 metres of bottom-fishing line. However, the protocols do not refer to recovery of any quantity of fish on the hooks. This party has not found any in the documents adduced during the proceeding. That is therefore proof that this buoy, even if it appeared to belong to the *Camouco*, was not being used for fishing during the passage through the EEZ.

78. Moreover, we must go back to the **circumstances under which the buoy was recovered** by the *Floréal*. The *Floréal* used the on-board goniometre and the positions of the buoys which were memorized in it in order to confirm that the *Camouco* was actually engaged in unlawful fishing in the Crozet EEZ. When a long-line fishing vessel is engaged in fishing, it puts in the water two buoys linked together by a fishing line of over 8-12 kilometres, from which are hung some thousands of baited hooks to catch toothfish. Each buoy sends out a radio signal, which the goniometre receives, in order to make possible their recovery. They also emit "flashes" after dark, also to facilitate recovery.

79. Thus, the *Floréal* only had to use the goniometre to look for the positions along the supposed wake where the *Camouco* was thought to have been fishing illegally.

80. However, this party wishes to stress the following likelihood:

--either the buoy belongs to another vessel which fished in the area. Long-line fishing vessels fishing for toothfish use much the same kind of equipment and the same international suppliers.

--or the buoy may belong the *Camouco* / *Saint-Jean* and was lost during one of the fishing expeditions it engaged in when it operated in the area under French licences valid until June 1999. According to statements gathered from the former Spanish head of fishing for the Saint Jean, during the year's operations of the vessel under French licenses some lines were abandoned or lost, due to bad weather, in Crozet. This argument could explain the fact that the Goniometre still kept a position within the Crozet EEZ. It should be added that the distance between the place of arrest and the place where the buoy was found is many nautical miles.

81. - From the outset of the case, the incriminating evidence used in the examination [*interrogatoires*] and the preliminary investigation [*instruction*] into the alleged offences against Captain HOMBRE-SOBRIDO were not handled on an *inter partes* basis. In fact, for many days they remained in the hands of the officers of the *Floréal* and of the maritime police without being notified or given to the captain of the vessel until almost 15 days after the vessel docked.

82. - The Merce-Pesca Company and its counsel were not able to communicate freely with the *Camouco* for the 7-days voyage between the EEZ of Crozet and Port des Galets (Ile de la Réunion).

83. - During the examination by the national police between 5 and 7 October 1999, the members of the crew refused to sign their respective statements on the ground that they had doubts about the accuracy of the translation of what they said.

84. - The fact that only 6 tonnes of toothfish, completely deep-frozen, were found on board the *Camouco*, which had been caught outside the EEZ, 4 days before the boarding of the vessel.

85. – The fact that the vessel's holds were nearly empty: with a storage capacity of 120 Tonnes, 6 Tonnes of toothfish were seized.

86. - Serious doubts regarding the fact of having caught the vessel red-handed engaged in illegal fishing, since it proved impossible to establish the existence of fresh fish on the vessel. Indeed, it has not been established that the fish photographed on the *Floréal* came from the vessel. It could very well have come from the refrigerators of the *Floréal*.

87. The French authorities indicate that they found on board the *Camouco* documents demonstrating that the vessel was engaged in fishing activities in the Crozet EEZ. Said documents belong to the old captain of the vessel, when, during July 1998 and July 1999, the *Camouco* was fishing in the Crozet EEZ under the name Saint Jean.

88. On 7 October 1999, only two protocols were drawn up by the French authorities. However, they did not respect the legal provisions applying to seizures, which provide that in cases of illegal fishing the equipment and bait **must be seized**. In our case, they allowed them to go out (their value was approximately 1,500,000 FF or US$ 225,000).

89. The Republic of Panama understands the French authorities' concern with policing illegal fishing in the French Southern and Antarctic Territories. Such law enforcement is necessary, but it must respect the body or legal rules --both national and international-- which are binding upon the French authorities and which are designed to secure essential rights of all operators to engage in fishing activities, respecting the principles of the United Nations Convention on the Law of the Sea and the principles of public international law.

90. In light of the fact that many arrests have taken place in the area in recent years, the Republic of Panama can understand the practical difficulties of dealing with a substantial number of similar cases, but that should not rule out a minimum of case-by-case consideration, not only by French military and administrative authorities, but also by the French courts.

91. While respecting full French sovereignty in the treatment of these matters, the applicant nevertheless considers that in this case there are arguments and facts conducive to the view that the case would have warranted a more **objective and reasonable** approach.

V/ Clear violations of the United Nations Convention on the Law of the Sea.

91. The violations of the United Nations Convention on the Law of the Sea by the French Republic encompass five very important aspects of the provisions of that Convention relating to the conduct of fishing activities in the EEZ.

92. a/ First, an aspect relating to the **general principle of free navigation in the exclusive economic zone and more specifically to the consequences of the right of innocent passage through the EEZ.**

93. b/ Then the obligation of the **prompt notification to the flag State of the arrest of any vessel**;

94. c/ We will then demonstrate how the French Republic has breached **its obligations under Article 73 § 3 on the non-imposition of penalties of imprisonment for violations of fisheries laws in the EEZ**;

95. d/ A violation also of the requirement, indicated by Article 73 § 4 of the Convention, of the **prompt release of arrested fishing vessels** by the coastal State;

96. e/ Lastly, in the framework of this Application, a **fifth aspect** concerning the requirement, laid down by Article 292 of the Convention, of the **necessarily <u>reasonable</u> nature of the bonds** required in exchange for the prompt release of the arrested vessels.

<u>V.1 The violation of the international law of free navigation in the exclusive economic zone, more specifically as to presumptins under French law pertaining to failure to notify entry into the EEZ (violation of article 58)</u>

97. In its Order of 8 October 1999, in which it was decided to arrest the *Camouco* and to retain its captain's passport, the Saint-Paul Tribunal d'Instance stated:

> *"Whereas the vessel entered the exclusive economic zone of the French Southern and Antarctic Territories (T.A.A.F.) without prior authorization and without indicating its presence or declaring what tonnage of fish it had on board to the district head [chef de district] of the closest group of islands, as required by Law 66-400 of 13 June 1966 as amended by the Law of 18 November 1997; whereas a certain tonnage of toothfish was found on board; whereas* ***the fact that the vessel had been discovered in the exclusive economic zone without indicating its presence or declaring the quantity of fish it had on board, <u>leads to the presumption that all the catches had been illegally fished</u> in the exclusive economic zone****".*

98. The aforementioned French provisions in the Order establish an administrative formality of notification whose violation is sanctioned by a **fine (A)** and by an **irrebuttable presumption (B)**.

99. (A) The **fine** for failure to advise of entry into an EEZ seems normal and proportional and may, in our view, form part of the sanctions which a coastal State may adopt under international law in order to control access to the EEZ. However, the amount of the fine (up to 1 million FF) is, in our view, entirely disproportionate because such a violation absolutely does not warrant penalties such as those which have been imposed in the present case by way of summary proceedings.

100. (B) On the other hand, the **irrebuttable presumption** that any fish found aboard a vessel which has failed to advise of its passage through the EEZ is presumed to have been **fished in the EEZ** is excessive and, in our view, would not be compatible with international provisions.

101. In our case, it is this irrebuttable presumption which appears to have enabled the Tribunal d'Instance of Saint-Paul to take the view that there had been illegal fishing (6 tonnes of fish frozen before entering the EEZ which were found in the holds) and to conclude that said tonnage should be taken into account in calculating the amount of the bond.

102. With all due respect to the French Republic, this party regards it as unacceptable that the French authorities should have relied on such an presumption as a basis for considering that there had been an alleged violation of French maritime law by the *Camouco*.

103. Articles 55 to 58 of the Montego Bay Convention lay down a legal régime applicable to the Exclusive Economic Zone of any country. That regim is characterized by the fact that all States enjoy, in that zone, extensive freedoms, one of which is *"**freedom of navigation** and overflight and of the laying of submarine cables and pipelines"*. *This is no more than the application, in a Zone where the rights of States are probably more protected, of the fundamental freedoms of the law of the sea, in particular that of innocent navigation [navigation innocente], laid down by Articles 17 to 32 of that Convention, in relation to the territorial sea of any State".*

104. The French measure is, again, disproportionate, as a mere minor violation of failing to notify entry, resulting from the initial failure to give the notification required by French law, in no way warrants penalties such as those adopted by the Tribunal d'Instance.

105. Finally, with only this simple presumption as basis, it proved possible to impose an arrest which is the basis of the present dispute before the Tribunal. The request for the prompt release of the *Camouco* and its captain would have no meaning unless the French authorities had engaged in such an **abuse of rights**.

106. An abuse of rights which, moreover, presupposes a clear violation of Article 58 of the United Nations Convention, which ensures the right to peaceful navigation (for peaceful ends and without exploitation of fisheries resources) of any vessel flying a foreign flag. This party cannot accept that the French authorities can claim to apply their system for monitoring the duties of foreign vessels in their EEZ without in any way complying with the essential principles of international law, including the **presumption of innocence and the principle of proportionality**.

107. As the *Camouco* had not contemplated fishing in this zone, its captain did not consider it necessary to request such authorization. The *Camouco*, which crossed the EEZ of the Crozet Islands purely with a view to shortening the route necessary for it to arrive at its destination, outside the EEZ in question, merely exercised its right to freedom of navigation.

108. It is inacceptable that the French authorities should have based their decision to arrest a vessel on mere presumptions, the basis of which is the simple fact that 34 kilograms of fresh toothfish were found in a bag recovered by the *Floréal*

109. In conclusion, the legislation of the French Republic creating a presumption that all fish found aboard a vessel which has failed to advise of its entry into the Crozet EEZ should be considered as illegally fished within said area constitutes a violation of the principle of respect for international freedom of navigation [*liberté de passage*] inasmuch as the obligations imposed by the French Republic as a coastal State exceed by far that which could be considered as a normal measure for protection of activities in the EEZ.

V.2/ Violation of the requirement of prompt notification of the arrest to the flag State laid down by Article 73 § 4.

110. As this party has already had occasion to explain, the *Camouco* continues to be detained at Port des Galets since 5 October 1999 and the French authorities in fact took control of the vessel from 28 September, in other words, a few days previously.

111. Most surprisingly this party has to state before the Tribunal that it is confronted by facts which have still not been notified to the Panamanian authorities, even though Article 73 § 4 of the United Nations Convention on the Law of the Sea states, as already pointed out, that:

> *"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"*.

112. Further, Article 73 § 2 of the same Convention lays down that:

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

113. The concept of prompt release is of fundamental importance in the context of the application of the legal provisions of that international convention. As we shall show, member States have sought to ensure the application of a protection régime reflecting a balance of the interests of the States concerned and of the owners of fishing vessels. By acting as it has done, and continues to do, the French Republic does not meet its minimum obligations in this respect.

114. By studying the travaux préparatoires of the United Nations Convention on the Law of the Sea, the aspect of prompt release was often discussed and thus sheds light on the meaning of the provisions ultimately adopted.

115. It must first be mentioned that the structure of Article 73 of the United Nations Convention on the Law of the Sea evolved a great deal between the beginning and end of the work on the Convention. Indeed, it was originally envisaged that greater power would be given to the flag State: according to the first version of the text, proposed by the United States of America:[7]

"an arrested vessel shall be delivered promptly to the duly authorised officials of the State of nationality. Only the State of nationality of the offending vessel shall have jurisdiction to try any case (…) regarding the violation of fishery regulations (…)".

116. Originally, therefore, the notion of promptness focused on the flag State which lay at the heart of the system for the repression of fishing offences. However, during the negotiations, this duty of promptness applied to the handing over of the offending vessel became simple promptness applied to the notification to the flag state of the situation of the offending vessel *(*Final version, Article 73 § 4).

117. The United States, in a revised position,[8] thus stated that

"any enforcement actions which were to be taken in such a manner as to minimise interference with the fishing and other activities in the marine environment".

118. This desire to minimise interference with fishing is also encountered in the abortive drafts for quantification of the period of time of this prompt release of the arrested vessels: The various versions of the text of Article 73 of the United Nations Convention on the Law of the Sea, halfway through the negotiations, referred to a waiting period [*période d'attente*] of 6 months during which the flag State was to notify the coastal State whether it wished to

[7] Document a/AC.138/SC.II/L4 and Corr.1, Article III, para. 4, reproduced in SBC Report 1971, at 241, 243 (U.S.A.).
[8] Document a/AC.138/SC.II/L9 and Corr.1, Article VIII, para. 4, reproduced in SBC Report 1972, at 175, 177 (U.S.A.), quoted by *United Nations Convention on the Law of the Sea, a Commentary, Part V, page 788*.

institute proceedings, under its national law, against the offences committed by the arrested vessel.[9]

119. The national delegations always insisted on the necessity for the prompt release of fishing vessels by the coastal State, considering that the substantive provisions of Article 73 were not adequate to guarantee the rapid release of vessels. Hence, the United States suggested in 1973 that

> *"The owner or operator of any vessel detained by any State shall have the right to bring the question of the detention of the vessels before the (Law of the Sea) Tribunal in order to secure its prompt release (…).".*[10]

120. The travaux préparatoires of this Article also show us that a time-limit of 10 days had been contemplated, which would have been given to the coastal State for releasing the arrested vessel.

121. During the negotiations, this "standby" period was subsequently transformed into the duty to promptly notify the flag State found in Article 73 § 2 as the coastal State gradually lost its role in the procedure to be implemented in the event of the arrest of fishing vessels.

122. So it is clear that **the notion of promptness must be considered as fundamental in ensuring that fishing activities are not excessively disrupted by forced detention following arrest**.

123. Hence, subject to any notification of which the Agent was not informed, the French administration clearly did not comply with this requirement, as it **has never promptly informed the Republic of Panama of the boarding of the *Camouco*, which took place over three months ago**.

124. In its submissions of 26 October 1999,[11] the Regional and Departmental Directorate of Maritime Affairs relied on a decision of the Criminal Chamber of the French Court of Cassation as justification of its failure to notify the flag State of the boarding of the vessel. According to that decision:

> *"A person under examination is not in a position to rely on a violation of the rules of public international law, this being so the judges rightly rejected the objection of nullity derived from the alleged violation of Article 73 § 4 of the aforementioned Convention"*.

125. The Applicant does not accept that this decision can be used by the French Republic as justification for a flagrant violation of its obligations under international law. In any event, that decision would clearly be inapplicable in

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[9] Proposal by 8 European States at the 2nd session in 1974, Document A/CONF.62/C.2/L.40 and Add.1, III Off, rec. 217, 218.

[10] A/AC.138/97, Article8, para. 2, reproduced in II SBC Report 1973, page 22 (USA).

[11] Cf. **Annex 18**.

the present proceedings involving as they do two States parties to the Convention.

126. Furthermore, the Applicant would stress that, even if the French Republic had notified the Republic of Panama of the boarding using a method of notification not brought to the attention of the Republic of Panama, **that notification should be characterized as belated, since at all events such a period of time exceeds the brief period which follows logically from the notion of prompt notification.**

V.3 Violation of Article 73 § 3 on the non-imposition of penalties of imprisonment in cases of fishing offences in the EEZ.

127. Captain HOMBRE-SOBRIDO is at the heart of criminal proceedings which could lead to a prison sentence and in which his present position constitutes **de facto** an arbitrary detention and is contrary to the provisions of article 73 § 3.

128. **The Captain of the *Camouco* was also placed "under judicial supervision" and prohibited from leaving the Ile de la Réunion**, with confiscation of his Spanish passport. This constitutes a serious violation of his personal rights since, even if no prison sentence was formally pronounced upon him, **he has been held against his will for over 100 days on the Ile de la Réunion** on the ground that has presence is necessary to the investigation which has still not yet been closed.

129. The Applicant therefore requests the Tribunal to consider that this situation, in its entirety, is not compatible with the obligation in Article 73 § 3 of the Convention, which states that:

> *"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"*.

130. In our case, however, even though, formally, Captain HOMBRE-SOBRIDO is not "imprisoned" strictly speaking, **the fact that he has been deprived of his passport and consequently of his freedom of movement is clearly a violation of the spirit of the Convention, which is aimed at preventing the excessive disruption of fishing activities** by the enforced detention of the fishing vessels and their crews.

131. The facts are as follows:

a/ Under the law applicable on the date of the facts punishing fishing offences in the EEZ of the French Southern and Antarctic Territories (T.A.A.F.) (**ANNEX 23**), Captain HOMBRE-SOBRIDO runs the risk of **a maximum fine FF 1,000,000 accompanied by 6 months' imprisonment**.

b/ The Captain was **held in custody** by the Gendarmerie between 5 and 7 October 1999. It was during this custody that he was questioned, without the presence of his counsel, and that he signed the statements on the events surrounding the boarding and inspection of the *Camouco* by the French authorities.

c/ On 7 October 1999, following an application for the opening of an investigation by the public prosecutor, Captain HOMBRE-SOBRIDO was examined by the investigating judge, Judge PINSON, for (cf. Supra **ANNEX 17**):

"Failure to declare that he had entered the EEZ;

Unauthorized fishing in the EEZ of the Crozet Islands;

Concealment of the vessel's identification markings and

Refusal to submit to inspection by the officials authorized by the fisheries police [police des pêches]".

d/ As regards the conditions for placing him under judicial supervision, Professors Stefani and Levasseur, in their handbook on "Criminal Procedure", note that

> *"Placement under judicial supervision can only be ordered if certain conditions are met; the person under examination must first be [liable to?] a term of imprisonment and not a simple fine"*.[12]

132. **Judicial supervision** was instituted by an Act of 17 July 1970 aimed at providing the examining judge with an intermediary stage between the freedom of the person charged pure and simple and his detention on remand. According to the theory,[13]

> *"Judicial supervision has been more used for keeping an eye on persons charged who would otherwise have been left in complete freedom than for avoiding placing certain persons charged in detention".*
>
> *Placing someone under judicial supervision is possible once the person charged may incur a heavy prison sentence and presupposes that the measure is justified by the needs of the examination or as a "security measure", which is a particularly unfortunate expression here, since it is a measure which was intended to be solely for the safety of the public and not their security, even though this expression*

[12] 16th edition of the Handbook, page 548, para. 559-1, Dalloz 1996.

[13] Procédure Pénale, Michèle-Laure Rassat, page 525 *et seq*., Editions PUF.

unfortunately proves to be perfectly correct in positive law. This latter case is primarily theoretical, as the true danger a person poses to public safety in fact makes his detention necessary.

(…) Placing under judicial supervision is possible for all authorities which may have to intervene in matters of detention, and mostly it will be at the initiative of the investigating judge (…)".

133. Professor Michèle-Laure Rassat also notes that:

"The idea behind the creation of judicial supervision was an excellent one, its purpose being to make possible the relatively close supervision of persons accused, whose situation did not seem serious enough for them to be detained, yet who could still not be allowed total freedom.

The way it is implemented is execrable, since ultimately it creates a threat to the liberty and dignity of a man which is far greater than that posed by detention on remand. In fact, any measures which are aimed at supervising the person concerned and preventing him from reoffending are legitimate and precisely correspond to the purposes of criminal proceedings. On the other hand, measures seeking to place constraint on the person charged with a view to his resocialization - which is never more than social standardization - are inadmissible.

This method assumes monstrous proportions when it is imposed on persons charged who are presumed innocent and whose legal innocence will perhaps be confirmed in the subsequent proceedings. Judicial supervision is seen as a measure which is necessary to an investigation or to guarantee public order. It is intolerable when it is a sign of a hand placed by the State on the innate personality of the individual regarded as innocent".

134. The situation is even more problematical when, on 15 October 1999, the investigating judge indicated to counsel of the Merce-Pesca Company and in the presence of Captain HOMBRE-SOBRIDO that he intended to maintain the judicial supervision of the captain of the *Camouco* until such time as he changed his statements regarding the facts alleged against him and the shipowner appeared before him.

135. Further, he indicated the fact that this case was not urgent. However, it is clear that there existed more effective means under international conventions on mutual judicial assistance for requesting the assistance, via letters rogatory, of Spanish or Panamanian judges in order to obtain testimony in Panama or Spain.

136. This party wishes to emphasize the fact that the situation is even more serious because:

--The French legislation does not provide for a different bond to cover the responsibility of the Master and that of the vessel (or only of the operator [*armement*]).

--If international law does not provide for penalties of imprisonment in cases of fishing violations, the national judge cannot use measures established specifically in procedures which can lead to sentences of imprisonment (such as judicial supervision) to sanction fishing violations which, under international law, cannot be sanctioned by measures of deprivation of liberty [*mesures restrictives de liberté*].

--The measures of judicial supervision under French law cannot even be applicable under internal law because international law (article 73, paragraph 3) lays down a prohibition on imposing penalties of imprisonment for fishing violations. Further, the doctrine and French case-law referred to above establish that measures of judicial supervision, such as retention of a passport, can never be imposed in cases in which the maximum penalty is a fine rather than a sentence of imprisonment.

--The aforementioned point was confirmed by the state prosecutor [*Procureur Général*] in fishing cases recently brought before the Tribunal Correctionnel in which no penalty of imprisonment was pronounced because "according to the prosecutor" they would be inconsistent with international law.

--The measure imposed by the examining magistrate against the Master is highly discriminatory because retention of a passport can only take place against foreign nationals, even though the Spanish Master held on Reunion Island is a European citizen.

V.4/ Violation of the duty of the "prompt release" of fishing vessels detained, the prompt release of the captain and the belated fixing laid down by Article 73 § 2.

137. As already stated, the notion of promptness must determine the actions of the authorities of the coastal State. Indeed, all these provisions are aimed at preventing excessive disturbance to fishing activities by enforced detention following arrest.

138. This concept of expeditious treatment must be applied to both the administrative and judicial authorities of the coastal State. In this case however, this requirement under the Convention has not been fully complied with.

139. In the first place, the French authorities took over 15 days to send copies of the protocols of arrest and violation [*procès-verbaux d'appréhension et d'infraction*] relating to the arrest of 28 September 1999, thereby delaying the summons for urgent proceedings. These protocols were essential for developing the argument for the submissions filed in support of that summons.

140. Furthermore, the French authorities **did not deal with the summons for urgent proceedings as quickly as they could have done**: the meaning of the French procedure for urgent proceedings was distorted as the district court judge took over two months to confirm his Order yet without putting forward any valid argument in justification of the exorbitant amount of the bond.

141. It was therefore not until 14 December 1999 that the Tribunal d'Instance of Saint-Paul made its Order confirming, for both the Merce-Pesca Company and Captain HOMBRE-SOBRIDO, the amount of FF 20,000,000 as the bond guaranteeing the vessel's release.

142. The Applicant also wishes to draw the attention of the Tribunal to the fact that this delay caused by the French authorities merely worsened the situation of the vessel and its captain and meant that, instead of exhausting French internal remedies, we turned to the Tribunal to obtain as quickly as possible the cessation of the vessel's detention and of the deprivation of liberty of Captain HOMBRE-SOBRIDO.

143. The aforementioned Order of 14 December 1999 is currently the object of an appeal before the Court of Appeal of Saint-Denis, which, bearing in mind the backlog of that Court, may take 8 to 12 months more. It will be noted that, in a previous case (the vessel EXPLORER flying a Panamanian flag), a n initial bond was fixed at FF 1,000,000 for that vessel which was transporting over 100 tonnes of fish.

144. In a surprising decision revealing the awkward division between political power and judicial power on the Ile de la Réunion, the Administrator of Maritime Affairs brought an urgent appeal before the Court of Appeal which was dealt with in less than 8 days, increasing the amount of the bond to FF 12,000,000 (some US$ 1,875,170).

V.5/ Violation of the requirement of the reasonableness of the bond posted in exchange for the prompt release from detention of fishing vessels laid down by Article 73 § 2.

145. The duty of prompt release laid down by Article 73 § 2 of the Convention can be analyzed separately from the procedure established by Article 292, which requires a bond of a reasonable amount as a *sine qua non* of the prompt release of the vessel.

146. Admittedly, Article 292 of the United Nations Convention states that:

> *"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 (…)

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".

147. Article 226 of the same Convention states that:

"1. a) States shall not delay a foreign vessel longer than is essential for purposes of the investigations provided for in articles 216, 218 and 220. (…)

b) If the investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly ***subject to reasonable procedures*** *such as bonding or other appropriate financial security (…)".*

148. In fact, the bond required on the release of a fishing vessel from detention must represent a reasonable guarantee for a coastal State on the one hand and for the owner of the vessel and his crew on the other:

- For the coastal State, it is the **guarantee that its power of sanction vis a vis the offenders will be fully applied;**

- For the owner of the vessel and the crew, it is the **guarantee of being able to see the detention terminated with the greatest possible speed and according to reasonable conditions of release.**

149. In the present case, the French Republic has engaged in completely abusive application of its right to demand a bond or financial guarantee for the release of the arrested vessel.

150. The demand by the competent authorities for a bond of FF 20,000,000 amounts to the imposition of a disproportionate condition considering the value of the vessel itself and its cargo when it was boarded.

151. This party considers it necessary to offer a detailed analysis of the concept of "reasonableness" as an essential element in the context of the requirement of any bond or financial guarantee as a precondition for the release of any vessel arrested.

V.5.1/ Analysis of the terms of the United Nations Convention on the Law of the Sea.

152. In the view of this party, the competent authorities of the French Republic may have committed the error of applying the United Nations Convention on the Law of the Sea without according due importance to the

element of the reasonableness and proportionality of the bond, owing principally to the fact that the French version of the Convention lays down, in its Article 73.2, the need for an "sufficient" ("*suffisante*") bond, not a "reasonable" ("*raisonnable*") one.

153. Detailed analysis of the various language versions of the United Nations Convention on the Law of the Sea clearly shows that the bond to be posted must be reasonable and must be assessed in concreto, in the light of each factual situation.

154. For assessing the precise scope and meaning of a text translated into many languages, a number of methods are commonly used, including: a) a comparison of the different language versions in order to establish the true meaning of the provision which is being interpreted;[14] b) a study of the travaux préparatoires; and c) separation of the provisions of substance and the provisions of form and procedure.

155. We consider it appropriate to analyze the text of the Convention using the systems referred to under a) and b) above.

V.5.1a/ Analysis of the language versions of the Convention.

156. We will use the method of linguistic comparison[15] by means of a parallel reading of Articles 73 § 2, 218 § 4, 226 and 292 of the United Nations Convention on the Law of the Sea.

Articles	**French**	**English**	**Spanish**
73 § 2	caution ou d'une garantie suffisante	reasonable bond or other security	fianza razonable u otra garantía
218 § 4	toute caution ou autre garantie financière	any bond or other financial security	cualquier fianza u otra garantía financiera
226	*après l'accomplissement de formalités raisonnables, telles que le dépôt d'une*	subject to reasonable procedures such as bonding or other appropriate	una vez cumplidas ciertas formidades razonables, tales como la constitución de una

[14] See for example the work entitled "Droit International Public" on the methods commonly used for interpreting international conventions, Nguyen-Quoc-Dinh - Patrick Daillier - Alain Pellet, L.G.D.J. 88th edition, 1999, 1317 pp.

[15] Cf. Article 33 § 3 and 4 of the Vienna Convention on the Law of Treaties, which states that: *"3. The terms of the treaty are presumed to have the same meaning in each authentic text.*

4. Except where a particular text prevails (…), 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".

	caution ou d'une autre garantie financière	financial security	fianza u otra garantía financiera apropriada
292	caution raisonnable ou d'une autre garantie financière	reasonable bond or other financial security	fianza razonable u otra garantía financiera

157. The importance of the element of reasonableness can thus be seen, in the three major linguistic versions analyzed, in relation to the one suggested by the French authorities of "sufficient nature" ("*caractère suffisant*") to be considered when determining the bond permitting the prompt release from detention of a vessel and its captain.

158. It should also be noted that, in French, the semantic difference between the two terms is quite important as the term "reasonable" refers to the notion of reason in the sense that the bond must be determined by the authorities of the coastal State bearing in mind what is reasonable and proportionate with regard to the particular conditions of the case. Conversely, the term "sufficient" ("*suffisant*") does not imply that one must take into account external elements, which may influence the authorities of the coastal State.

159. An analysis of the definitions of the terms "reasonable" ("*raisonnable*") and "sufficient" ("*suffisant*") in other languages also shows us the significant differences which exist between these two words.

160. In Spanish also the word *"razonable"* is defined as *"arreglado, justo, conforme a la razon"* (in an unambiguous sense bound up with the idea of reason, justice and equity), whereas the word *"suficiente"* is defined as *"bastante para lo que se necesita"* (with a single meaning signifying adequate quantity for the purposes envisaged).[16]

161. And the English language tells us that the terms "reasonable" and "sufficient" are not synonyms. Thus, the word *"reasonable"* is defined as *"within the limits of reason; not greatly less or more than might be thought likely or appropriate; moderate, specially in price"*. The term *"sufficient"* is defined as *"adequate (esp. in quantity or extent) for a certain purpose; enough"*.

162. In conclusion, it will therefore be noted that, even if the French version of the text of the Convention entails a different translation of one concept (that of a reasonable bond), the others versions quoted above and other linguistic versions of the United Nations Convention on the Law of the Sea quite clearly establish **the necessarily reasonable nature of the bond**.

V.5.1b/ Analysis of the travaux préparatoires of the United Nations Convention on the Law of the Sea.

[16] Definitions taken from the "Diccionario de la Lengua Española". Real Academia Española, Madrid 1992, Vol. II, pp. 1731 and 1916.

It is most interesting to read the travaux préparatoires of the Convention, as the word “reasonable” is frequently used in them.

The notion of “reasonable bond” appeared in the second session of the Conference, in 1974, in an American proposal relating to **Article 73**.[17]

That version stated that:

*“Arrested vessels and their crew shall be entitled to release upon the posting of a **reasonable bond** or other security. Imprisonment or other forms of corporal punishment in respect of conviction for fishing violations may be imposed only by the State of nationality of the vessels or individual concerned”*.

164. In reality, this notion of a bond is closely connected to the second phrase which disappeared during the subsequent discussions, as this bond appears to have been required in order to prevent the coastal State from imprisoning the members of the crew, leaving this right solely to the flag State. The logic was thus as follows:

- either a bond posted to the coastal State,

- or more coercive measures taken solely by the flag State.

165. Logically elements of explanation are also found in the travaux préparatoires of **Article 292**. This article was designed to reinforce the substantive provisions of the United Nations Convention on the Law of the Sea relating to the prompt release of the vessels referred to in Article 73 § 2. Those negotiating the text introduced a rapid procedure to make it possible to deal with cases where the coastal State detained the vessels boarded in their areas of sovereignty.[18]

166. As a counterweight to the rapid, protective aspect of the procedure in Article 292 for the shipowners and the flag State, it was originally envisaged that the prompt release of the vessels would be subject to the substantive conditions of the Convention, notably that of the payment of a reasonable bond and the condition that the procedure before the Tribunal did not block the procedures before the courts of the coastal State.

167. Hence, the draft Article 292 was modified, at the request of certain states, in order to clearly limit its scope of application to the cases explicitly mentioned by the Convention (i.e. prompt release of fishing vessels arrested by a coastal State).[19] Clarification was therefore introduced in relation to the

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[17] Document A/CONF.62/C.2/L.47 (1974), Article 21, III Off. Rec. 222, 224 (USA).
[18] Document A/CONF.62/WP.9 (ISNT, Part IV/Rev.1 1976) Article 15, V Off. Rec. 111 (Chairman).

bond in order to avoid any problem of the interpretation of the term *"bond"*: the terms *"reasonable bond"* and *"other security or financial security"* were introduced into the draft article.

168. Lastly, in relation to the travaux préparatoires of Article 218, the commentators on the Convention state:

> *"The expanded expression of any bond or other financial security was introduced in the final stage of this article's development. It is intended to avoid any technical legal connotation which different legal systems might attach to the word bond (and its equivalent in other authentic texts of the Convention"*.[20]

V.5.1c/ Analysis of the Rules of Procedure of the International Tribunal for the Law of the Sea.

169. Use of the term "reasonable" in connection with the amount of the bond to be posted as a condition of the prompt release of any vessel is also found in the two official versions of the Rules of Procedure of the International Tribunal for the Law of the Sea:

Articles	French	English
111.2.d)	(…) pour la détermination du montant d'une caution ou autre garantie financière raisonnable ou pour toute autre question ….	(…) to the determination of the amount of a reasonable bond or other financial security and to any other issue…
113.1	(…) concernant la mainlevée de l'immobilisation du navire ou la libération de son équipage dès le dépôt d'une caution raisonnable ou d'une autre garantie financière…	(…) for the prompt release of the vessel or the crew upon the posting of a reasonable bond or other financial security…

170. It should be noted that, even in relation to the other questions, such as the settlement of disputes, use of the term "reasonable" is translated into English as *"reasonable"*. This is so of Article 57 of the Rules of Procedure.

V.5.2/ Analysis of the concept of "reasonableness" in international law.

[19] Document A/CONF.62/WP.9/Rev.2 (RSNT, Part IV, 1976) Article 14, VI Off. Rec. I44 (Chairman).

[20] Page 272, Commentary on the United Nations Convention on the Law of the Sea, published by the University of Virginia, Center of Oceans Law and Policy, Vol. IV, pp. 334 *et seq*.

171. The concept of reasonableness has often been analyzed by scholarly writers in the context of the application of public and private law. Below we indicate scholarly commentaries taken from detailed reports on this concept.

Thus, N. MacCormick, in a work devoted to concepts with variable content in law, has stated that

> "Reasonableness is indeed, we might all admit, a good thing in itself, even if, like moderation, **good only within reason and in moderation**".[21]

172. Marcel Fontaine, in an article entitled *"Best Efforts, reasonable care, due diligence et règles d'art dans les contrats internationaux"*, states

> *"What is the meaning of reasonable? Perhaps "reasonable" ought to be distinguished from "rational". "Reasonable", in the context concerned, does not mean "logical", in conformity with "reason in the philosophical sense", but* ***in conformity with "practical reason", good sense, generally accepted value judgements****. And this "practical reason" is exercised in situations where what conduct to adopt depends on the* ***taking into consideration and weighing up of a whole host of factors, the various different circumstances likely to influence the decision to be taken*** *(…)"*.

He adds that:

> *"Reference is often made to* ***conduct habitually adopted in the same circumstances****, "reasonableness" being* ***closely related to the concepts accepted in the social setting****. The requirement can also be reinforced by reference* ***to the conduct of an "experienced", "prudent" person, paying regard to the interests of all the parties****. (…)".*
>
> *What is "reasonable"… refers to* ***what is generally considered as having to be done in such a situation****"*.[22]

V.5.3/ Analysis of the concept of "reasonableness" in the case-law of the International Tribunal for the Law of the Sea (Case No. 1: "M/V SAIGA").

173. The Applicant wishes to stress the fact that the Tribunal itself has already pronounced itself as to the importance of taking into account the

[21] See N. MacCormick "On reasonableness". Les Notions à contenu variable en droit. Brussels, 1984, p. 131.

[22] See M. Fontaine, "Best efforts, reasonable care, due diligence et règles d'art dans les contrats internationaux". Revue de Droit des Affaires Internationales, Paris, No. 8-88, pp. 1011 *et seq*.

concept of "reasonableness" in setting any bond necessary for the prompt release of vessels arrested by national authorities.

In fact, in the French version of the Judgment of 4 December 1997, "**The M/V "Saiga**",[23] the Tribunal found that:

*"77. There may **be an infringement of article 73, paragraph 2**, of the Convention even when no bond has been posted. The requirement of promptness has a value in itself and may prevail when the posting of the bond has not been possible, has been rejected or is not provided for in the coastal state's laws **or when it is alleged that the required bond is unreasonable**.*

(…)

*82. According to article 113, paragraphe 2, of the Rules of the Tribunal, the Tribunal 'shall determine the amount, nature and form of the bond or financial security to be posted'. **The most important guidance in this determination is the indication contained in article 292, paragraph 1, of the Convention that the bond or other financial security must be 'reasonable'. In the view of the Tribunal, the criterion of reasonableness encompasses the amount, the nature and the form of the bond or financial security. The overall balance of the amount, form and nature of the bond or financial security must be reasonable.***

The Tribunal therefore accords vital importance to the balanced, non-exorbitant character of the bond to be laid down as a condition for the prompt release of a vessel.

174. In the same case, Judges Park, Nelson Chandrasekhara Rao, Vukas and Ndiaye, in their dissenting opinion, ratified the importance of the reasonableness of the bond in the context of the application of Article 292 of the Convention:

> *"If the Tribunal concludes that the allegation of the Applicant is well founded, it is competent to order the release of the vessel or its crew upon the posting of a reasonable bond or other financial security, as provided for in article 292"*.[24]

175. This party will clearly explain below which elements show that, in the present case, there is nothing to warrant the imposition of a bond of 20,000,000 French francs; such a sum is absolutely disproportionate to the value of the vessel and of its cargo, presumed to have been illegally caught.

176. The absence of adequate reasoning in this regard merely adds to the gravity of such decisions as those taken by the Tribunal d'Instance of Saint-

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[23] Aff. 1/97. Case concerning the M/V "Saiga", between Saint Vincent and the Grenadines and Guinea.

[24] Paragraph 7 of the dissenting opinion of Judges Park, Nelson Chandrasekhara Rao, Vukas and Ndiyae.

Paul, which are not exempt from political interference as regards the stance to be adopted by all the French authorities in order to combat violations of the French exclusive economic zones.

177. In conclusion, the Applicant invites the Tribunal, in the light of all the foregoing, to **consider that the notion of "reasonable bond" must be assessed as a measure having a value, proportionate to the value of the vessel and its cargo at the time of the fishing, which can never equate to a bond requiring a sum such as that in the present case**.

VI/ Absence of reasonableness and motivation regarding the "amount" of the bond required by the French Republic.

178. In the present case, it will be noted that the protocol of the arrest mentions, without providing any basis, a value for the vessel of FF 20,000,000 (an assertion not supported by any analysis of the state of the vessel).

For no apparent reason, the Tribunal d'Instance of Saint-Paul made an Order laying down a bond in the amount of FF 20,000,000.

In its Order, the Court states that:

> *"Whereas, in the light of these factors, and particularly the value of the vessel and the penalties incurred, release from arrest can only be effected on condition of the prior payment of a bond of FF 20,000,000 (approximately US$ 3,115,751) laid down by the application of Article 4 of the law of 18 June 1996, as amended by the law of 18 November 1996, and of Article 142 of the Code of Criminal Procedure"*.

179. The Applicant is surprised by the absence of reasoning for fixing an amount of FF 20,000,000. Indeed no facts are adduced in support of the imposition of that measure.

180. As this party already had occasion to explain on the occasion of the summons for urgent proceedings [*action en référé*], it should be stressed that it is utterly unrealistic to put the value of the vessel arrested at FF 20,000,000. In fact, the value of the vessel was stated by a naval inspector in a document dating from 21 January 1997, after supervising modifications following its repurchase, on 27 December 1996, by a Japanese tuna investment company (**ANNEX 27):**

Value of vessel: PTAS 135,000,000 = FF 5,455,206

181. Taking into account the natural depreciation of a vessel used for high seas fishing from 1996 to the date of the arrest, one can arrive at the following calculation:

182. Annual depreciation: 12.5%: 1997, 1998 and 1999: - 37.5% (FF 2,045,702).

Theoretical value: FF 3,409,504 (US$ 524,539)

(rate of exchange: 1 FF = 24,747 Ptas).

183. It should be noted that the *Camouco*, built in 1986/1987, was repurchased second-hand by the Merce-Pesca Company and the expert's report enclosed in Annex was drawn up after the refitting [*réforme*] referred to above.

184. As regards the absence of reasoning raised by this party on the occasion of proceedings before the French courts, the Tribunal d'Instance of Saint-Paul stated, in its Order of 14 December 1999, that:

> *"it is for the criminal court to determine the bond under Article 142 of the Code of Criminal Procedure, and there is no reason to indicate on what it is based with a view to guaranteeing both payment of the penalties incurred and the appearance of those charged having regard to the nature of the facts"*.

185. In our view, the Order made by the Tribunal d'Instance of Saint-Paul is in no respect in keeping with the letter and spirit of the texts which deal with the setting of bonds. Indeed, Article 142 of the Code of Criminal Procedure quoted above lists a number of cases in which the posting of a bond is justified. These cases represent both the conditions for the application of that Article and also the requirements as regards the reasoning for every measure of the kind provided for.

186. It can thus easily be concluded from this that fixing a bond must necessarily fall within the context of Article 142, which implies that there is a requirement of giving minimal reasoning. Yet neither the Order of 14 December 199?, nor that of 8 October 1999 (which quotes only Article 142 and Article 4 of the law of 18 June 1966) clearly show what the reasoning of the Tribunal d'Instance of Saint-Paul was in fixing the bond.

187. Further, to follow of the arguments of the Tribunal d'Instance of Saint-Paul, the sum of FF 20,000,000 required would have to be shown to contain an application of the scale of sanctions laid down by Article 4 of the law of 18 June 1966. It must also be emphasized that the French authorities apply a somewhat disconcerting method for calculating the bond in question, **whereas it is usually the value of the cargo which serves as basis for calculating the bond to be posted**.

188. The table below shows some of the fishing vessels boarded by the French Republic in the French Southern and Antarctic Territories (T.A.A.F.), indicating the volume of fish seized on board and the amount of the bond required by the French authorities.

Table of ships boarded by the French Republic

Vessel	Date of Order	Flag	Nationality of operator and of captain	Tonnage seized (in KT)	Amount of bond (in KF)
Golden Eagle	8.7.99	Vanuatu	Hong Kong operator, Danish captain	22	10 million FF
Ercilla	17.9.98	Chile	Chilean operator and captain	130	65 million FF
Vieirasa Doce	30.12.98	Argentina	Argentinian operator and captain	+/- 91	45,5 million
Camouco	8.10.99	Panama	Panamanian operator, Spanish captain	6	20 million

Copies of the most relevant Orders appear in **ANNEX 27.**

189. The method of calculation used by the French authorities when fixing the amount of the bonds established as the condition for the release of the vessels mentioned in the above table derives from French laws. The law of 18 June 1966 for the repression of fishing violations in the EEZ of the French Southern and Antarctic Territories (T.A.A.F.) *(***Annex 23**) states, in Article 4, that a maximum amount of FF 1,000,000 shall be paid, with an additional FF 500,000 per tonne illegally caught in excess of 2 tonnes.

190. In our case, the sum obtained by the Tribunal d'Instance of Saint-Paul is in every respect identical to the one mentioned in the record [*procès-verbal*] of the Regional and Departmental Directorate of Maritime Affairs dated 7 October 1999.

191. The sum of FF 20,000,000 was therefore arrived at in a manner not in keeping with the above-mentioned method of calculation.

VII. Amount considered reasonable for the applicant, and form and nature of the bond to be posted by the operator of the *Camouco*

192. As a principal submission, the Applicant therefore requests that the prompt release from detention of the *Camouco* be granted without the posting of a bond on the grounds of the various factors mentioned above.

193. One should take into consideration that the vessel has been immobilized for over 100 days, that the 6 tonnes of fish have already been sold by the French State, having a value of 350,000 FF (approximately US4 54,000).

194. However, subsidiarily, the applicant considers that the failure to notify entry into the Crozet EEZ may constitute a minor infraction, for which a fair bond covering the procedures before the French courts could be required for an amount of FF 100,000 (approximately US$ 15,000). In a recent case (Vieirasa XII) which was the subject of a decision of 18 December 1998 of the same Tribunal Penal which will someday be seized with our case on Reunion Island, the Master was sentenced for failure to notify to a fine of FF 200,000 (approximately US$ 30,000). This last decision has become firm and final, without the French authorities interjecting any appeal. (**ANNEX 28**)

195. Finally, the Applicant wishes to point out to the Tribunal that the detention of the *Camouco* has, since 5 October 1999, cost the Merce-Pesca Company over FF 1,435,400 *(***Annex 22**) in manpower costs, counsel's fees and shipping agency bills. This situation, which is thus extremely prejudicial to the Merce-Pesca Company, will also need to be taken into consideration at the point when the Tribunal, should it do so, agrees to demand the prompt release of the *Camouco* from detention.

196. With regard to the "nature" of the bond, in such an event, the applicant wishes to make payment by means of a bank guarantee, rather than in cash, as the French authorities have required in previous cases (cf. *The Golden Eagle*).

197. With respect to the "form", and in light of the treatment of this type of case by the French Republic, the applicant requests the deposit of any possible bond directly into the hands of the Tribunal (if the French Republic agrees and if the Tribunal, pursuant to article 113, paragraph 3, accepts said agreement).

VIII./ Violation of the general principles of law concerning good faith and failure to respect the principle of proportionality.

198. The Applicant wishes to draw the attention of the Tribunal to numerous factual elements which show the **genuine good faith** of the owner of the *Camouco*.

For example, it should be emphasized that, as early as 1 October 1999, the Merce-Pesca Company contacted the competent French authorities in an attempt to clarify the situation of the *Camouco* so that it would not become untenable both for it, for the captain and the crew.

199. This desire to co-operate contrasts with the attitude shown from the outset by the French maritime authorities which, as we have indicated throughout this Application:

- did not permit free communication between the *Camouco* and the Merce-Pesca Company;

- kept evidence on board the frigate *Floréal*;

- prompted the refusal, by the crew of the *Camouco*, to sign their respective statements;

- did not communicate the records of the arrest of 28 September 1999 until a very late stage;

- withheld the passport of Captain HOMBRE SOBRIDO from his arrival on the Ile de la Réunion;

- did not promptly notify the flag State of the boarding of the *Camouco*;

- slowed down the general course of the procedure.

IX/ SUBMISSIONS.

200. In light of the foregoing, this party maintains that the bond imposed by the French authorities as a precondition for the release of the vessel *Camouco* complies neither with the requirements under international rules nor with the requirements of French law itself.

201. The absence of any reasons for the amount of the bond in question, which, moreover, has proved absolutely disproportionate considering the actual value of the vessel and its cargo when it was boarded, are incompatible with the requirement of "reasonableness" laid down by Articles 73 and 292 of the United Nations Convention on the Law of the Sea and by the precedent of the M/V Saiga case.

202. The present situation, highly prejudicial to the Applicant, is as follows:

a) With respect to the Captain of the *Camouco*, Mr HOMBRE SOBRIDO:

The Captain of the *Camouco* continues to be detained, without his passport and against his will, on the territory of the Ile de la Réunion. He has been under investigation since 7 October 1999, involved in penal proceedings, because the competent investigating judge in this case considers his presence indispensable to resolving the case.

This is a situation which, as we have shown, runs counter to the provisions of international law in this field.

b) With respect to the *Camouco*:

The *Camouco* has been detained at Port des Galets since 5 October 1999. The bond which was set on 8 October 1999 (and confirmed on 14 December 1999) by the competent French courts as a condition of the release of the vessel from detention, is 20,000,000 French francs which, as we have shown in this Application, presupposes a yardstick which is completely disproportionate, contrary to the provisions of international law applicable in this case, and naturally regarded as unacceptable by the shipowner concerned in this case.

* * * *

Consequently, pursuant to:

article 292 of the Convention,

article 34 of Annex VI to the Convention,

and articles 113 and 125 of the Rules of Procedure of the Tribunal,

the applicant

REQUESTS THE TRIBUNAL:

1/ To find that the Tribunal is competent under Article 292 of the United Nations Convention on the Law of the Sea to entertain the Application filed this day;

2/ To declare that the present Application is admissible;

3/ To declare that the French Republic has failed to comply with article 73, paragraph 4, by failing promptly to notify the Republic of Panama of the arrest of the *Camouco*.

A) WITH RESPECT TO THE CAPTAIN OF THE CAMOUCO, Mr HOMBRE SOBRIDO

4/ To request, as an interlocutory measure with a view to due process, that the French Republic permit Captain HOMBRE SOBRIDO to attend the hearing which is soon to take place in Hamburg;

5/ To find that the French Republic has failed to comply with the provisions of the Convention concerning the prompt release of the Masters of arrested vessels;

6/ To order the French Republic promptly to release Captain HOMBRE SOBRIDO without bond;

7/ To find that the French Republic has failed to comply with the provisions of Article 73 § 3 in applying to the Captain criminal measures which de facto constitute an unlawful detention.

B) WITH RESPECT TO THE VESSEL CAMOUCO

8/ To find that the French Republic has failed to comply with the provisions of the Convention concerning prompt release of the vessel *Camouco*;

9/ To order the French Republic promptly to release the vessel *Camouco*, without bond, in light of the losses and costs already sustained by the owner of the *Camouco*;

10/ Subsidiarily, to determine the amount, nature and form of the bond or other financial guarantee to be posted by the Merce-Pesca Company in order to secure the release of the *Camouco* and of Captain HOMBRE SOBRIDO;

In this connection, the Applicant requests the Tribunal to take note of its preference for a bond in the form of a bank guarantee from a leading European bank, rather than a cash payment, and for payment to be made to the International Tribunal for the Law of the Sea, for transmission by appropriate means to the French authorities in exchange for the release of the vessel.

As regards the amount of the bond, and bearing in mind the rules applicable in similar cases, this party proposes that the Tribunal should fix a bond not greater than the sum 100,000 French francs (ONE HUNDRED THOUSAND FRENCH FRANCS, i.e. approximately US$ 15,000), in which the Tribunal will take into account the many expenses already incurred by the Merce-Pesca Company since the boarding of the *Camouco*.

11/ To declare that the French Republic will bear the costs of the Applicant arising from the present proceedings

(signed)

Done at Brussels, Monday 17 January 2000
Ramón García Gallardo
Agent

Agent appointed by the Republic of Panama, under the power conferred on 28 December 1999 (This signature is certified as authentic pursuant to the requirements of article 110 § 3 of the Rules of Procedure of the Tribunal.)

LIST OF ANNEXES

1	Power of attorney from the Republic of Panama pursuant to article 292, paragraph 2
2	Letter addressed to the French Republic on 7 January 2000 informing it of the intention of the Republic of Panama to initiate prompt release proceedings before the International Tribunal for the Law of the Sea, together with proof of the dispatch thereof.
3	Technical characteristics of the vessel *Camouco*.
4	List of the crew of the vessel *Camouco*.
5	Fishing licence granted to the Merce Pesca company by the Republic of Panama.
6	Fishing licence granted to the *Camouco* / *Saint*
	Jean by the French Republic.
7	C.C.A.M.L.R. fishing licence granted to the *Camouco* / *Saint Jean* by the French Republic.
8	Employment contract of the master of the *Camouco* and certified French translation thereof.
9	Nautical chart representing the Crozet Islands and their Exclusive Economic Zone.
10	Protocols of arrest and violation and statement of Officer Thierry Moisson.
11	Statements of the Master of the *Camouco* concerning the circumstances of the arrest.
12	Explanatory map drawn by Captain HOMBRE SOBRIDO, and certified French translation thereof.
13	Telefax sent by the Master of the *Camouco* to the French authorities.
14	Telefax from Maître García Gallardo to Eric de Chavanne, for transmission to the *Camouco*.
15	Letter of 1 October 1999 from Merce Pesca to the French authorities.
16	Two protocols of seizure of the Regional and Departmental Directorate of Maritime Affairs relating to the seizure of the vessel, dated 7 October 1999.
17	Documents issued to the captain of the *Camouco* serving him with notice of his placement under judicial supervision.
18	Order of the Tribunal d'Instance de Saint Paul, dated 8 October 1999.
19	Summons to Merce Pesca to attend urgent proceedings, dated 22 October 1999.
20	Submissions of the Director of Maritime Affairs, dated 26 October 1999.
21	Second Order of the Tribunal d'Instance de Saint Paul, dated 14 December 1999.
22	Documents attesting to the costs incurred by the Merce Pesca company as a result of the detention of the *Camouco*.
23	French laws applicable to our case.
24	Documents of the Merce Pesca company establishing the value and type of fishing equipment and bait carried aboard the *Camouco* which were transferred to Walvis Bay, and certified French translation

	thereof.
25	Statement of the representative of the French Republic during the deliberations on the United Nations Convention on the Law of the Sea.
26	Documents establishing the real value of the Camouco at the time of the arrest.
27	Orders of the Tribunal d'Instance de Saint Paul on 8 July, 17 September, and 30 October 1998.
28	Decision of the Tribunal de Grande Instance of 18 December 1998.