

(Revised Translation, 4 April 2001)

OBSERVATIONS OF THE FRENCH GOVERNMENT
regarding the application for prompt release
submitted on behalf of Belize to
the International Tribunal for the Law of the Sea
concerning the vessel *Grand Prince*

Presented as an application for "prompt release of the fishing vessel *Grand Prince* pursuant to article 292 of the United Nations Convention on the Law of the Sea", the application addressed on 21 March 2001 to the International Tribunal for the Law of the Sea by Mr. Alberto Penelas Alvarez on behalf of Belize cannot be regarded as instituting a proceeding governed by the provisions of article 292. The application so submitted by Belize manifestly does not fall under the provisions of that article.

The Government of the French Republic is therefore of the view that, for its part, it need not submit the Statement in Response called for by article 111, paragraph 4, of the Rules of the Tribunal.

The reasons that may be adduced in support of this position are of two kinds. The first relate to the very nature of the prompt release proceeding, and the second derive from the circumstances surrounding the application.

1 - Reasons pertaining to the nature of the prompt release proceeding

The procedure provided for under article 292 has as its sole purpose to ensure the prompt release of a vessel upon the posting of a reasonable bond, pending the completion of judicial proceedings brought against the captain or owner of the vessel before the jurisdictions of the detaining State. Thus, when the internal judicial procedures have reached their conclusion and, in particular, when they have led to the pronouncement of a sentence of confiscation of the vessel, any possible resort to the article 292 procedure loses its reason for being. In such a case, the application for prompt release is moot (*dépurvue d'objet*).

As from the time when a national court has pronounced confiscation of the vessel as the applicable sanction, the introduction of a prompt release proceeding before the International Tribunal for the Law of the Sea is not only no longer possible but indeed is not even conceivable. As part of a proceeding of this kind, the Tribunal decides as to the reasonableness of the bond required to order the release of the vessel. This presupposes, firstly, that simple provisional measures of an interlocutory (*conservatoire*) kind have been taken with respect to the vessel, and, secondly, that those measures can be revoked (*rapporé*) or stayed in exchange for a guarantee of enforcement of possible debts to the State by the owner of the vessel. But a confiscation declared by a national court as a principal or secondary penalty has as its effect authoritatively and definitively to transfer to the State the property confiscated. The owner of the vessel loses his title by virtue of the judicial decision and, if he seeks to recover his rights in the property, the remedies open to him can no longer be pursued within a proceeding for prompt release, since he can no longer be considered as the holder of title (*titulaire d'un droit de propriété*) to the vessel.

Moreover, we should not lose sight of the fact that, by reason of the particular function assigned to it, the procedure under article 292 cannot interfere with judicial proceedings initiated by the coastal State concerned with a view to enforcement action against violations of its laws and regulations committed by the detained vessel.

This flows from paragraph 3 of article 292, which provides: " The ... tribunal shall deal ... with the application for release and shall deal only with the question of release, **without prejudice to the merits of any case before the appropriate domestic forum** against the vessel, its owner or its crew." The English text of this provision says: " without prejudice to the **merits** of any case before the appropriate domestic forum against the vessel, its owner or its crew." In any penal proceeding instituted against the captain of a foreign fishing vessel for violation of the laws and regulations of the coastal State, the determination of the applicable penalty and the imposition of that penalty are an integral part of what one calls "the merits", i.e. the very **substance** of the case submitted to a national court, as is clearly indicated in the Spanish text of article 292, paragraph 3 ("sin prejuzgar **el fondo** de cualquier demanda interpuesta ante el tribunal nacional").

The International Tribunal for the Law of the Sea cannot, through the means of a prompt release proceeding, interfere in the conduct or result of an internal judicial proceeding. Yet, that would be the case if the Tribunal were to entertain the application submitted to it on 21 March on behalf of Belize. Thus, it cannot hear the said application with a view taking a decision that would have the force of *res judicata* (*autorité de la chose jugée*).

2. Reasons pertaining to the circumstances surrounding the application

The vessel *Grand Prince* was found in violation in the French Exclusive Economic Zone, was boarded and detained on 26 December 2000, and was escorted to the island of Reunion, where it arrived on 9 January 2001. The Director of Maritime Affairs of Reunion declared the provisional impoundment of the vessel, which was confirmed on 12 January by an Order of the Tribunal d'Instance of Saint Paul which, furthermore, fixed the amount of the bond to be paid to permit release from impoundment. Moreover, on 11 January, the Deputy Prosecutor of the Republic before the Tribunal de Grande Instance of Saint Denis drew up an arraignment (*procès-verbal d'interpellation*) against the captain of the vessel and, considering that in this case the introduction of an investigative proceeding (*instruction*) was not necessary, decided directly to summon the accused to appear at a hearing of the criminal court on 23 January, pursuant to articles 393 *et seq.* of the Code of Penal Procedure. (ANNEX I) The judgment of the criminal court, handed down the same day (ANNEX II) pronounced the confiscation of the vessel *Grand Prince* with immediate execution notwithstanding appeal, pursuant to article 131-6-10 of the Penal Code and article 471, final paragraph, of the Code of Penal Procedure (ANNEX III). Further, the captain was sentenced to a fine and damages.

Whatever may be the remedies which were or could be pursued by the shipowner or captain against this judgment within the internal French legal order, the flag State cannot thereafter base itself on the provisions of article 292 of the United

Nations Convention on the Law of the Sea in order to bring France before the International Tribunal for the Law of the Sea. In the instant case, the Tribunal could not order France promptly to release the *Grand Prince* upon the posting of a bond or other guarantee as to which it would set the amount and form, for it would then be interfering in the very substance of a penal proceeding which has been decided by the competent French jurisdiction --which is expressly ruled out by the provisions of article 292 itself, as has been recalled above.

Indeed, the application lodged with the Tribunal on 21 March 2001 incidentally acknowledges that there can no longer be any question of obtaining any manner of release, whether by providing a reasonable guarantee or by paying the bond initially set by the Tribunal d'Instance of Saint Paul: "As a result, the vessel could not be released neither upon the posting a reasonable guarantee, nor upon posting the bond initially fixed by the First Instance Tribunal of Saint Paul" (paragraph 28 of application).

The application seeks to overcome this impossibility by advancing the claim that there was ostensibly, on the part of France, a violation of the 1982 Convention because, in deciding on the confiscation of the *Grand Prince* only a few days after the setting of the bond by the Tribunal d'Instance of Saint Paul, and by further deciding on the immediate execution notwithstanding appeal (*exécution provisoire*) of this sentence in order to avoid any release from seizure, the criminal court of Saint Denis allegedly devised an "artifice" in order to evade the requirements of article 73, paragraph 2, of the Convention (paragraphs 24 and 25 of application).

When it advances "the artifice of deciding the confiscation of the vessel, and its provisional execution, with enough celerity to prevent its release by posting of any kind of guarantee" (paragraph 31), the application made on behalf of the State of Belize not only rests upon a mere groundless accusation (*procès d'intention*) unsupported by the slightest evidence, but it also disregards that the decisions taken by French judicial authorities were taken in full compliance with the provisions of applicable national law. In reality, this application seeks to allege the existence of a dispute pertaining to the implementation by France of powers conferred on it by article 73 of the Convention. The first paragraph of that article spells out that, in the exercise of its sovereign rights over living resources of the exclusive economic zone, "The coastal State may [...] take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."

It need hardly be recalled that this provision leaves to the national legislator the task of defining both fishing offenses and the penalties applicable to those who commit such offenses. Thus, it is up to the national judge hearing a specific case to determine the penalty to be applied in the light of the legislative provisions in force, the evidence produced, and the circumstances of the case. The only limit placed upon the power to exercise punitive powers by a coastal State is that stated in paragraph 3 of article 73, which excludes penalties of imprisonment and corporal punishment.

Further, it should be stressed that confiscation of a foreign fishing vessel convicted of violating the laws and regulations concerning fishing in the economic

zone is a perfectly lawful penalty under international law and is indeed expressly provided for not only in French legislation but also by many national laws (for example, Barbados, Comoros, Fiji, Grenada, Guyana, Indonesia, Jamaica, Malaysia, New Zealand, Norway, Portugal, Russia, Tanzania).

It follows from the foregoing that the matter actually dealt with in the application lodged with the Tribunal no longer concerns an issue of prompt release but rather a dispute of a different kind, one relating to the exercise by France of its sovereign rights, a dispute which, in any event, does not fall within the compass of article 292 of the Convention.

If Belize has empowered a person to act on its behalf pursuant to article 292, the holder of that power cannot claim to act outside that scope and, in particular, to submit to the Tribunal a question other than one dealt with in that article.

The French Government therefore is entitled to consider not only that this proceeding has been improperly commenced, but indeed that there are no grounds for a proceeding. In other words, with respect to this application, the Tribunal should direct a nonsuit.

Furthermore, with respect to a dispute of the type referred to above, the French Government would be entitled, in conformity with article 297, paragraph 3, of the Convention, to maintain that it is not required to accept submission of such a dispute to one of the procedures laid down in section 2 of Part XV of the Convention on the Law of the Sea, and that, under these circumstances, neither the International Tribunal for the Law of the Sea nor indeed any other international jurisdiction has jurisdiction to hear the case. In depositing its instrument of ratification, the French Government did formulate a declaration to that effect, in accordance with article 298, paragraph 1 (b) of the Convention.

For the foregoing reasons,

The Government of the French Republic requests the International Tribunal for the Law of the Sea, by means of an Order and without need of holding public hearings for that purpose, to note that the application for release lodged on 21 March 2001 on behalf of Belize is moot (*sans objet*), that it must therefore be rejected, and that there are thus no grounds to institute proceedings.

Paris, 28 March 2001

(signed)