# Civil Liability for Environmental Damage: Discrepancies between National and International Courts in Fishery Cases

By Shams Al Din Al Hajjaji



## I. Introduction

Countries have different approaches to resolving violations of environmental law. Many countries, such as the United States and Canada, primarily adopt civil liability for environmental damage (hereinafter CLED) as a method of tackling environmental violations.[1] Others, such as France, Russia, and Brazil, adopt criminal liability for environmental damage (hereinafter RLED).[2] Whereas many countries strive to lower their environmental standards to facilitate trade and maximize economic benefits,[3] they re-

1 For the United States, *see* Envtl. Prot. Agency, Clean Air Act Stationary Source Civil Penalty Policy, (1991) http://www2.epa.gov/sites/production/files/documents/penpol.pdf (for US civil liability policy); *see also* Jack Willis, *Insuring Civil Fines and Penalties*, http://www.aon.com/risk-services/environmental-articles/article_ins-civil-finespen.jsp (last visited Feb. 3, 2017). For Canada, see Env't & Climate Change Can., Administrative Penalty System Consultation Document, https://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=465314E0-1&offset=2&toc=show (last visited Feb. 3, 2017).

2 *See generally* Org. for Econ. Cooperation & Dev., Environmental Policy and Regulation in Russia: The Implementation Challenge, http://www.oecd.org/env/outreach/38118149.pdf (Russia); Vincent Brenot, *Environmental Law and Practice in France: Overview*, Thomson Reuters: Prac. L. (Nov. 1, 2015), https://uk.practicallaw.thomsonreuters.com/7-503-4572?originationContext=document&transitionType=documentItem&contextData=(sc.Default)&firstPage=true&bhcp=1 (France); Eduardo Damiao Goncalves et al., *Environmental Law and Practice in Brazil: Overview*, Thomson Reuters: Prac. L. (Oct. 1 2012), http://us.practicallaw.com/2-508-8459 (Brazil).

3 Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?*, 48 Hastings L.J. 271, 351–52 (1997).

main reluctant to grant international jurisdiction the authority over their criminal legislation, which includes RLED.[4] When both national and international courts adopt CLED, there is no issue of complementarity. Discrepancies arise when national courts adopt RLED, while international courts adopt CLED. Member states of the United Nations Convention on the Law of the Sea (UNCLOS) resort to the International Tribunal for the Law of the Sea (ITLOS) to overcome the consequences inevitably arising from RLED. This article argues that, to fully comply with CLED applications on the international level, states—and especially UNCLOS member states—should abolish their RLED.

The change in the nature of the dispute from RLED—on a national level—to CLED—on an international level—not only raises challenges with regard to the outcome of the dispute, but it also violates both the national and international litigant's right to legal prediction of risk in the dispute.[5] For example, a fisherman has the right to predict the outcome of his illegal behavior. If the legal practice sustains the fine as a punishment for a certain violation, adopting detention as a new legal policy violates the defendant's right to predict the outcome of his behavior. Also, the inability of the prosecutor and judge to foresee the precedent of the highest courts—whether national or international—in regard to a certain case is considered a waste of resources and violation of legal precedent.[6]

On the international level, the prediction of litigation risk lies in the litigant's right to predict the outcome of the dispute. Parties have the right to predict international proceedings, especially for the ITLOS. The change in nature of the dispute from RLED to CLED prejudices the right of parties to predict tribunal proceedings.[7] ITLOS adopts a CLED approach in dealing with the issue of bond determination and confiscation.[8] Even though this article does not argue against changing the nature of the dispute, it aims to provide guidance to countries and lawyers dealing with international courts, especially to countries that adopt RLED.[9] Highlighting the issue of bond determination and confiscation in the proceedings of the ITLOS can thus help lawyers avoid long and costly litigation processes on both a national and an international level.[10]

The research is concerned with the difference between RLED and CLED, the difference in the ruling between national and international courts, and the economic interpretation for the gap between national/international and CLED/RLED. Bond

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4 In international criminal law, the principle of complementarity makes the only criteria for resort for international crimes whether national courts are not able or not willing to prosecute certain crimes. To read about the principle, see Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 2–3 (2005).

5 *See* Timothy S. Kaye, *Risk and Predictability in English Common Law*, *in* RISK AND THE LAW 95, 107–08 (Gordon R. Woodman & Diethelm Klippel eds., 2009).

6 *See id.* at 108.

7 Peter K. Manning, *Reflections on Risk Analysis, Screening and Contested Rationalities*, 48 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 453, 460 (2006).

8 *See infra* Section III.A and III.B.

9 *See* Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT'L L. 277, 278–83 (2001).

10 *See id.* at 284–85.

determination and confiscation in fishery cases illustrate these discrepancies.[11] While both CLED and RLED ensure the right of a bond to enforce their rules, they differ in how bonds are determined.[12] In addition, CLED and RLED have different approaches with regard to what is subject to confiscation.[13]

This article urges UNCLOS member countries to consider legislative amendments to comply with the rulings of ITLOS. There is a discrepancy between plaintiffs who are able to present their case to ITLOS and those who cannot. In most fishery cases, plaintiffs are unable to resort to ITLOS, and national courts deal with these cases based on their own understanding, not that of ITLOS.[14] This is because many plaintiffs either do not have any political influence over their government to resort to ITLOS, or they ignore their countries' right to resort to ITLOS.

The article uses three legal approaches: the positive law approach, the economic approach, and the comparative law approach. First, the positive law approach is based on the rule of law applied in international conventions, proceedings, principles, and customs. Based on Article 38 of the Statute of the International Court of Justice, the ITLOS is allowed to use treaties, customs, or general principles of international law in its judicial processes.[15] ITLOS uses UNCLOS and its precedents as primary sources for its judgments.[16]

Second, the economic approach is based on maximizing effectiveness.[17] ITLOS balances the various interests in any given dispute, while maintaining maximum benefits for both parties.[18] For example, when ITLOS determines bond reasonableness, it considers illegal fish-catch as part of the bonds.[19] It takes into consideration the balance between different state interests,[20] which is the balance between the prompt release of the ship

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11 *See generally* Ted L. McDorman, *An Overview of International Fisheries Disputes and the International Tribunal for the Law of the Sea*, 40 CAN. Y.B. INT'L L. 119 (2002) (discussing bond determination and confiscation of vehicles in various ITLOS cases).

12 *See infra* Section III.B.

13 *See infra* Section III.A.

14 *See* John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. 109, 146 (1998) (explaining how ITLOS determined that questions regarding the release of the M/V Saiga "should be decided wholly by the national courts of Guinea").

15 Statute of the International Court of Justice, art. 38, 1947 I.C.J. Acts & Docs. 37.

16 *See e.g.*, Camouco (Pan. v. Fr.), Case No. 5, Judgment of Feb. 7, 2000, 4 ITLOS Rep. 10, para. 66.

17 *See* Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L. L. 1, 3–4 (1999).

18 *See* GAO Jianjun, *Reasonableness of the Bond under Article 292 of the LOS Convention: Practice of the ITLOS*, 7 CHINESE J. INT'L L. 115, 136–37 (2008) (discussing how the term "reasonable" has different meanings for each of the parties).

19 *See* Monte Confurco (Sey. v. Fr.), Case No. 6, Judgment of Dec. 18, 2000, 4 ITLOS Rep. 86, para. 86; Volga (Russ. v. Austl.), Case No. 11, Judgment of Dec. 23, 2002, 6 ITLOS Rep. 10, paras. 61–69; *see also* Christoph Schwarte, *Environmental Concerns in the Adjudication of the International Tribunal for the Law of the Sea*, 16 GEO. INT'L ENVTL. L. REV. 421, 426-27 (2004).

20 United Nations Convention on the Law of the Sea art. 73, Dec. 10, 1982, 1833 U.N.T.S. 397.

and the interest of the coastal state in applying its laws.[21] In the *Juno Trader* case, ITLOS found that the objective of Article 292 of the UNCLOS was to "reconcile the interest of the flag State to have its vessel and its crew released promptly with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties."[22] Hence, law and economics clarify the balance between the coastal and flag states' interests in any given case.

The third methodology is the comparative law approach. The scope of the research lies in comparing CLED and RLED between national and international courts. The relationship between international law and comparative law manifests itself in the complementarity principle between them.[23] This principle gives the national courts preference over international courts with regard to disputes.[24] Moreover, RLED is exclusively applied on a national level, while CLED is used on both levels.[25] This article urges countries that adopt RLED to reform their national laws to comply with international practices. Examining countries' practices and reviewing RLED can help avoid any discrepancy in environmental disputes between national and international courts.

The article is divided into four main sections, which are theory, practice, economic interpretation, and recommendations. The first section tackles the theoretical difference between CLED and RLED. It compares state interests and their respective targets. The aim of the comparison is to show the different understanding of both concepts in theory. The second section highlights discrepancies in the practice of both international and national courts with regard to two issues: confiscation and bond determination in fishery cases. The research reveals differences between proceedings in international courts and rulings in national courts for the same issue. The third section deals with the economic interpretation of the gaps between national and international courts, and CLED and RLED. It shows that adopting the CLED achieves the equilibrium point between the coastal state interest and flag state in the fishery cases. Finally, the article recommends a solution to overcome discrepancies between national and international courts.

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21 Anne-Katrin Escher, *Release of Vessels and Crews before the International Tribunal for the Law of the Seas*, 3 LAW & PRAC. INT'L CTS. & TRIBUNALS 205, at 273–74 (2004) ("Article 292 balances the interest of the flag State in the prompt release of the vessel and the interest of the detaining State in financial security for damage caused by the vessel").

22 Juno Trader (St. Vincent v. Guinea), Case No. 13, Judgment of Dec. 18, 2004, 8 ITLOS Rep. 17, para. 84 (quoting Monte Confurco (Sey. v. Fr.), Case No. 6, Judgment of Dec. 18, 2000, 4 ITLOS Rep. 86, para. 71).

23 *See* Diego P. Fernández Arroyo, *Private International Law and Comparative Law: A Relationship Challenged by International and Supranational Law*, 11 Y.B. PRIV. INT'L L. 31, 71 (2009).

24 Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 389 (1998); *see also* Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT'L L. 277, 278–89 (2001) (focusing on the UNCLOS and the issue of complementarity and compulsory judgments of the ITLOS).

25 *See* Michael M. O'Hear, *Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime*, 95 J. CRIM. L. & CRIMINOLOGY 133, 133 (2004).

## II. Theory: CLED versus RLED

The environment is a public good, and it is difficult to assign a monetary value to violations against it.[26] Countries adopt either RLED or CLED when faced with such violations. The choice of either method is dictated by the efficiency in restoring the situation to its previous state. Yet, the difference between RLED and CLED is not without ambiguity. It depends on two major distinctions that characterize environmental liability as RLED or CLED.[27] These distinctions are the states' interest in the environmental dispute and its objectives.

First, CLED and RLED have different state and defendant perspectives regarding environmental disputes.[28] In RLED, the governmental status supersedes that of the defendant. This difference is based on the government's right to protect its own environment.[29] Even though countries have separate environmental codes, they use criminal law tools to oppose environmental fragmentations and hold certain acts punishable.[30] Governments hold individual and corporate acts punishable to enforce and achieve the purposes and aims of criminal justice.[31] In CLED, the state stands on an equal footing with the defendant.[32] The government tolerates a certain level of fragmentation, where defendants have a certain right to damage the environment. It tries to strike a balance between social benefit and social damage, which is social optimal quantity of environmental damage.[33]

Second, different rules apply to CLED and RLED. In CLED, these rules are limited to restorative and remedial actions for excessive damages to the environment.[34] Interna-

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26 Dep't of the Env't & Energy, Australian Gov't, Techniques to Value Environmental Resources: An Introductory Handbook ch. 1, http://www.environment.gov.au/node/13336 (noting that "[m]any environmental resources are not traded in markets and so do not have an obvious price").

27 *C.f.* Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 Tul. L. Rev. 487, 507–11 (1996) (describing the interaction of environmental and criminal law).

28 *See* Lina Carlsson, Mark Wilde, *Civil Liability for Environmental Damage–A Comparative Analysis of Law and Policy in Europe and in the United States, the Hague, Kluwer Law International, 2002*, 15 Rev. Quebecoise de Droit Int'l, no. 1, 2002, at 245, 247–48 (discussing the private and public interests at stake for both civil and criminal liability).

29 *See* Richard L. Stroup, Eco-nomics: What Everyone Should Know About Economics and the Environment 39 (2003).

30 *See* Michael Faure et al., European Union Action to Fight Envtl. Crime, Instruments, Actors and Institutions in the Fight Against Environmental Crime 71–74 (2015), http://efface.eu/sites/default/files/Instruments,%20Actors%20and%20Institutions%20in%20the%20Fight%20Against%20Environmental%20Crime.pdf.

31 *See generally* In the Name of Justice: Leading Experts Reexamine the Classic Article "The Aims of the Criminal Law" (Timothy Lynch ed., 2009).

32 *Cf.* Harvey A. Silverglate, *Federal Criminal Law: Punishing Benign Intentions—A Betrayal of Professor Hart's Admonition to Prosecute Only the Blameworthy*, *in* In the Name of Justice, *supra* note 31, at 92–93 (describing ways in which "the deck is so heavily stacked against criminal defendants").

33 Paul Krugman & Robin Wells, Economics in Modules 115 (3rd ed. 2015).

34 *See id.*

tional environmental law deals with the protection of the environment and aims to increase mutual cooperation among the international community.[35] RLED is not only directed towards restorative and remedial actions (like CLED); it also enforces punitive actions.[36] Government plays a major role in decreasing environmental damages through RLED, while preventing the defendant from gaining any potential economic benefit. Through RLED, the government tries to achieve economic advantages for itself and disadvantages for the defendant.[37]

Courts' endeavors to achieve a balance between the state's interests and the defendant's legal right vary based whether the liability is CLED or RLED. In CLED, the equilibrium point leans toward the middle between the state's and defendant's interests. In RLED, this equilibrium point is more restrictive, and its benefits lean more towards the government than the defendant.[38] The differences listed above are illustrated in three graphs. Graph (1) represents both governmental and defendant interests in CLED. This equals social cost and benefit. The defendant tries to achieve maximum benefit at the expense of the environment, while the government attempts to achieve maximum benefit with less environmental harm. The court determines where the balance lies (point E-1). To achieve this, it calls upon experts and collects evidence from both parties.[39]

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35 Daniel Bodansky, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 21 (2010).

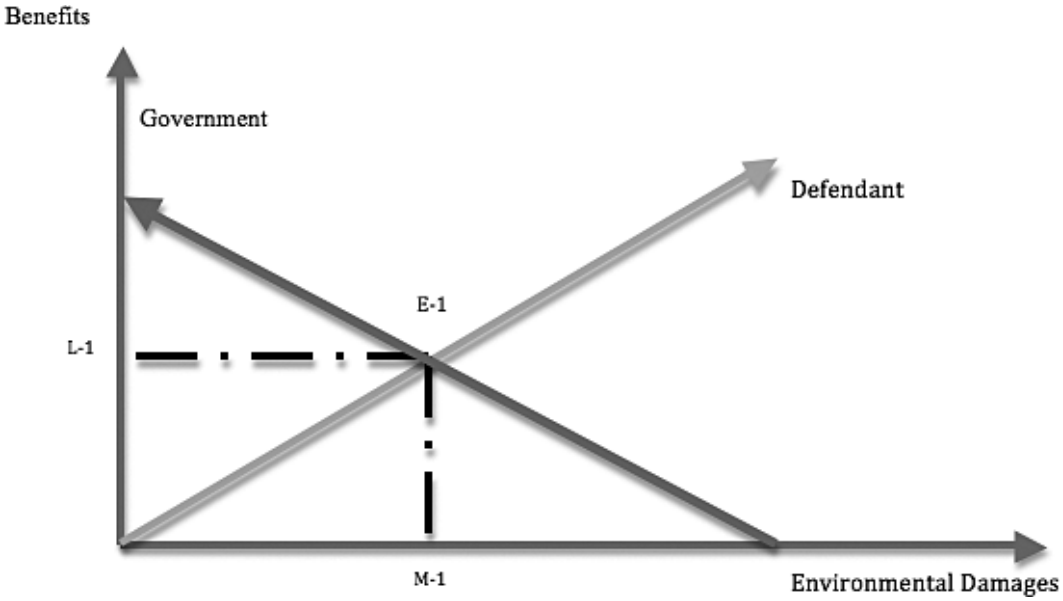
36 *See* Diana Deaconu-Dascalu & Silviu Deaconu, *Aspects Regarding the Contraventional Liability and the Criminal Liability For Environmental Damages*, TITU MAIORESCU U. L. REV. 61, 66 (2013) (defining environmental crime as "a crime committed with guilt, posing threat to values of the utmost importance to society, human health and the environment in general and which are punished by criminal law").

37 *See generally* Robert Deeb, *Environmental Criminal Liability*, 2 S.C. ENVTL. L. J. 159 (1993) (describing various environmental crimes and associated fines).

38 In regard to the economics of environmental crime, *see* Michael Watson, *Environmental Offences: The Reality of Environmental Crime*, 7 ENVTL L. REV. 190, 192–93 (2005).

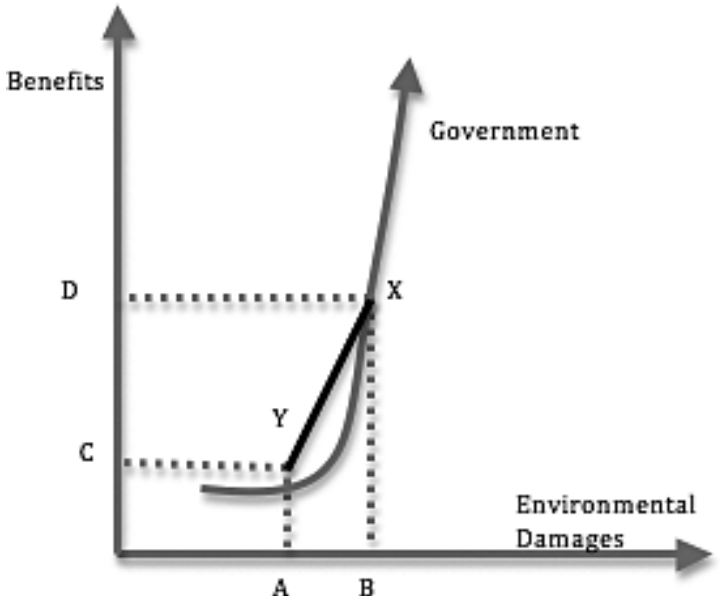
39 *See* David J. Beck, *The Role of the Expert Witness in Environmental Litigation*, LITIGATION 38 (Spring 1977).

GRAPH 1. CONFLICT OF INTERESTS IN CLED




Graph (2) represents the government's interest in RLED. It demonstrates the inelastic relationship between environmental damage and benefit. In CLED, Graph (1) shows the government's interest line starting with maximum environmental damages. Conversely, the government's interest in RLED starts with the least environmental damage and benefit (Graph (2)). On the Environmental Damage line, Point (A) represents environmental damages at the beginning of the criminal adjudication. Point (B) depicts the highest point of environmental damages that can be reached during the criminal adjudication process. Line (A-B) shows the potential increase in damage during criminal adjudication. It is less likely that damage will surpass Point (B) following bond determination, and the confiscation of materials used or obtained during the commission of the crime. On the benefits line, Point (C) represents the minimum benefit that the government achieves in criminal adjudication. Point (D) shows the maximum point of benefit. Line (C-D) shows the increase in governmental benefit arising from either confiscation of material, or setting a high bond. Line (X-Y) represents both potential gain and damage that the government claims from RLED, targeting less damage and more profit.

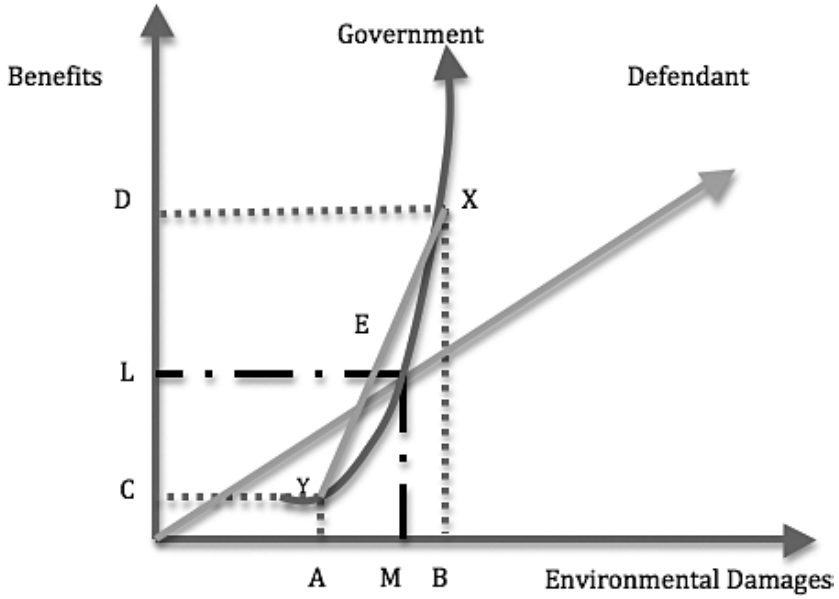
GRAPH 2. STATE'S INTEREST IN RLED




Graph (3) shows the court's equilibrium point for RLED. After adding the defendant's interest in the dispute (green line), the defendant tries to derive maximum benefit and environmental harm from such an act. As for the government, it aims to contain damage at a maximum of Point (B), and benefit at Point (D). The court's equilibrium lies in a middle point between Point (A) and (B). It is unlikely that the court will grant the defendant the right to greater harm beyond point (B) or benefit beneath point (C). It will not only reach an equilibrium point (E) in the middle of (X-Y), but will also reach limited damage Point (M) on Line (A-B) and a limited benefit for both the government and the plaintiff. This happens in some of the ITLOS cases, where national courts adjust the bond amount.[40]

40 *See* Tomimaru (Japan v. Russ.), Case No. 15, Judgment of Aug. 6, 2007, 9 ITLOS Rep. 74, paras. 36, 45 (the city court required 9.5 million rubles in fines and damages, an amount beyond the estimated 8.8 million rubles of damage done); Hoshinmaru (Japan v. Russ.), Case No. 14, Judgment of Aug. 6, 2007, 9 ITLOS Rep. 18, para. 50 (bond was originally set at 25 million rubles even though the damage was approximately 8 million rubles).

GRAPH 3. CONFLICT OF INTEREST IN RLED




## III. PRACTICE: INTERNATIONAL AND NATIONAL COURTS RULING REGARDING CONFISCATION AND BOND DETERMINATION

There are two applications that demonstrate the gap between national and international courts: confiscation and bond determination. The aim of this comparison between international courts (represented in the ITLOS) and national legislation and proceedings is to prove that there is a wide disparity between the two levels of adjudication (national and international). This section illustrates the gap in applying confiscation and bond determination rules.

### A. CONFISCATION

International application of CLED bans the confiscation of the vessels,[41] while confiscation is permissible in national application of RLED.[42] On an international level, UNCLOS does not clearly ban states from confiscating criminal gains. However, Arti-

41 United Nations Convention on the Law of the Sea, *supra* note 20, art. 292, para. 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 . . . .").

42 *See* Paul Rice, *Harmonization of Criminal Environmental Liability Throughout the EU*, 15 ENVTL. CL. J. 281, 282 (2003).

cles 73 and 292 of the UNCLOS implicitly prohibit vessel confiscation.[43] Article 73(2) states that "[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security."[44] Article 292 of the UNCLOS states:

> 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. . . . 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.[45]

ITLOS deals with the consequences of confiscation.[46] ITLOS, successively, deals with the confiscation of the ship by national authorities, the catch found on board at the time of seizure, and any materials or documents used by the crewmembers of the ship.[47] In that sense, there is a conflict between national understanding and that of ITLOS in the confiscation of crime materials. On the one hand, national courts consider such materials as criminal gain, while on the other hand, UNCLOS maintains the right of the flag state to the prompt release of the ship and the crew.[48] Coastal states have the right to post reasonable bond when adjudicating offenses of the high seas.[49] The value of the fish catch, which is subject to confiscation in national law, is a contentious issue in the proceedings of ITLOS.[50] ITLOS values the coastal state's right to monetary damages, which is represented in the price of the vessel as part of the bond paid by the plaintiff.[51] Hence, the defendant claims the vessel according to UNCLOS.[52]

In the *Grand Prince* case, Belize argued that the French authority failed to comply with Article 73, paragraph 2 of the Convention and that it "evaded the requirement of prompt release under this article by not allowing the release of the vessel upon the

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43 *Cf.* Escher, *supra* note 21, at 251.

44 United Nations Convention on the Law of the Sea, *supra* note 20, art. 73, para. 2.

45 *Id.* art. 292, para. 1.

46 *See* Jillaine Seymour, *The International Tribunal for the Law of the Sea: A Great Mistake?*, 13 IND. J. GLOBAL LEGAL STUD. 1, 21–24 (2006).

47 *See, e.g.*, Tomimaru (Japan v. Russ.), Case No. 15, Judgment of Aug. 6, 2007, 9 ITLOS Rep. 74, paras. 28–29; Hoshinmaru (Japan v. Russ.), Case No. 14, Judgment of Aug. 6, 2007, 9 ITLOS Rep. 18, paras. 27–39.

48 United Nations Convention on the Law of the Sea, *supra* note 20, art. 73, para. 2.

49 *See id.*

50 *See, e.g.*, Grand Prince (Belize v. Fr.), Case No. 8, Judgment of Apr. 20, 2001, 5 ITLOS Rep. 17, paras. 44, 55.

51 *See* Volga (Russ. v. Austl.), Case No. 11, Judgment of Dec. 23, 2002, 6 ITLOS Rep. 10, para. 53.

52 Tomimaru (Japan v. Russ.), Case No. 15, Judgment of Aug. 6, 2007, 9 ITLOS Rep. 74, para. 76.

posting of a reasonable, or any kind of, guarantee alleging that the vessel is confiscated and that the decision of confiscation has been provisionally executed."[53] ITLOS found that it did not have jurisdiction and therefore did not reach the issue of whether confiscation of the ship was a violation of UNCLOS.[54]

In the *Tomimaru* case, ITLOS addressed the question of whether the confiscation of a vessel rendered an application for its prompt release without object under Article 292 of the Convention.[55] It recognized the coastal state's right in including confiscation measures in its internal legislation.[56] However, it maintained that these measures should not violate the balance of the interests of the flag state and of the coastal state established in the Convention.[57] As a result, it concluded that:

> A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object. Such a decision should not be taken in such a way as to prevent the ship owner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law. In particular, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention.[58]

On a national level, RLED permits all the forms of confiscation, including the vessels and crime materials. In the United States, the distinction between civil and criminal forfeiture has changed over time. The Supreme Court of the United States has changed its position over time.[59] The important distinguishing factor between civil and criminal forfeiture in American law is the fact that courts do not consider civil forfeiture a punishment.[60] Governments resort to civil forfeiture for various other reasons,[61] such as whether it is easier to assert probable cause of the assets, availability of the discovery to all parties in the case, and prompt transfer of ownership of the property to the government.[62] In *United States v. Ursery*, the Supreme Court maintained that "*in rem* civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause."[63] The Double Jeopardy Clause states, "[n]or shall any person be subject for the

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53 Grand Prince (Belize v. Fr.), Case No. 8, Judgment of Apr. 20, 2001, 5 ITLOS Rep. 17, para. 31.

54 *See id.* at paras. 93–94.

55 Tomimaru (Japan v. Russ.), Case No. 15, Judgment of Aug. 6, 2007, 9 ITLOS Rep. 74, para. 71.

56 *Id.* at para. 72.

57 *Id.* at para. 75.

58 *Id.* at para. 76.

59 *See* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 780–82 (1997).

60 George C. Pratt & William B. Peterson, *Civil Forfeiture in the Second Circuit*, 65 ST. JOHN'S L. REV. 653, 668 (1991).

61 AJ van der Walt, *Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause*, 16 S. AFR. J. ON HUM. RTS. 1, 8–9 (2000).

62 *See* Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L. J. 2446, 2448 (2016).

63 United States v. Ursery, 518 U.S. 267, 292 (1996).

same offen[s]e to be twice put in jeopardy of life or limb."[64] The Court asserts that since the early days of the nation, "Congress has authorized the [g]overnment to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based upon the same underlying events."[65] Hence, civil forfeiture occurs concurrently with criminal forfeiture.[66] As for criminal forfeiture, it is the court's procedure to seize the property of the defendant in certain cases.[67] The Fourth Circuit Court of Appeals asserts the need for criminal forfeiture provisions in common law.[68]

In France, confiscation has two aims. The first is to prevent tampering with evidence.[69] Authorized bodies take possession of the property under judicial supervision, especially when it is considered part of the evidence. Secondly, confiscation acts as a surety in case of the defendant's conviction.[70] The judiciary then enforces the confiscation of the seized property.[71] Likewise, the confiscation is made to ensure that the defendant pays all the fines incurred.[72]

In Germany, the general rule is to forfeit all tools and gains from the crime.[73] German jurists distinguish between two types of forfeiture. The first type involves forfeiture limited by the offender's culpability. Forfeiture can be punitive, retributive, compensatory, or preventative.[74] The second type involves a forfeiture provision that targets the defendant's property, gain, or money resulting from the crime and is not limited by personal culpability.[75] The German Criminal Code makes a clear distinction between confiscation and forfeiture.[76] The German court may order forfeiture of any gain acquired from a committed crime.[77] Confiscation on the other hand is permissible only if

> 1. the principal or secondary participant owns or has a right to the objects at the time of the decision; or 2. the objects, due to their nature and the circumstances, pose a danger to the general public or if there is reason to believe that they will be used for the commission of unlawful acts.[78]

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64 U.S. CONST. amend. V.
65 *Ursery*, 518 U.S. at 274.
66 *See id.*
67 *See generally* FED. R. CRIM. P. 32.2.
68 *In re* Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 649 (4th Cir. 1988) ("Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent.").
69 *See* CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 99 (Fr.).
70 *See id.* art. 706-103 (Fr.).
71 *See id.*
72 *See id.*
73 *See* STRAFGESETZBUCH [StGB] [PENAL CODE], § 73(1), *translation at* http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.).
74 *See* Justus Benseler, *Forfeiture Legislation in Germany: Legal Basis and Prosecution Practice*, 5 EUR. J. CRIME CRIM. L. & CRIM. JUST. 203, 204 (1997).
75 *Id.* at 204–05.
76 Michael Kilchling, *Tracing, Seizing and Confiscating Proceeds from Corruption (and Other Illegal Conduct) Within or Outside the Criminal Justice System*, 9 EUR. J. CRIME CRIM. L. & CRIM. JUST. 264, 273 (2001).
77 StGB § 73(1) (Ger.).
78 *Id.* § 74(2).

Some crimes involve mandatory confiscation: treason and endangering external security,[79] crimes against national defense,[80] counterfeiting of money and stamps,[81] falsification of documents,[82] crimes endangering the public,[83] and crimes against the environment.[84] Similarly, there are some crimes that involve forfeiture only. These include crimes against sexual self-determination,[85] robbery and extortion,[86] crimes against competition,[87] and crimes in public office.[88] Additionally, a third type of crime involves both confiscation and forfeiture. These crimes are falsification of documents,[89] and punishable greed (unauthorized organization of a game of chance).[90]

### B. Bond Determination

The issue of bond determination is a challenging question.[91] In general, a bond is the amount of security with monetary value that the defendant has to pay to the public authority.

A bond requirement has several aims. First, it aims to ensure that the defendant will appear in court. In case the defendant fails to appear, the bond amount may be forfeited to the government.[92] Second, the safety of the victim and the victim's family may be considered in fixing the amount of bail and release conditions for the defendant.[93] Third, bond is taken to ensure that the defendant pays all his monetary sanctions.[94] If the defendant is convicted, the bond amount is used to pay any fines or compensation due by him/her.[95] Otherwise, the amount of bond is returned back to the defendant.[96]

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79 *Id.* § 101a.
80 *Id.* § 109k.
81 *Id.* § 150(2).
82 *Id.* § 282(2); *see also id.* §267.
83 *Id.* § 322.
84 *Id.* § 330c.
85 *Id.* § 181c.
86 *Id.* § 256.
87 *Id.* § 302.
88 *Id.* § 338.
89 *Id.* § 282.
90 *Id.* § 286.
91 Neil Corre & David Wolchover, Bail in Criminal Proceedings 2 (3d ed. 2004) ("The importance of the bail decision can hardly be exaggerated. It involves balancing the liberty of the individual who (in case of remand before conviction) has been found guilty of no offence against the need to ensure that accused persons are fully brought to trial and the public protected. Quite apart from depriving him of his liberty, a remand in custody may often have other harmful effects . . . On the other hand, it is rightly a matter of serious concern if a person granted bail absconds or commits offences while on bail.").
92 18 U.S.C. § 3146(d) (West 2012).
93 *See* Cal. Const. art. I, § 28(b)(3).
94 Harry R. Dammer & Jay S. Albanese, Comparative Criminal Justice Systems 136 (5th ed. 2013).
95 *Id.*
96 *See id.*

In fishery cases, international application of CLED requires a reasonable bond that has to be set based on restricted criteria,[97] while national RLED bond is, in most cases, left to the judges'/prosecutors' discretion.[98] Besides, a bond is a requirement on the international level.

On an international level, UNCLOS associates the idea of prompt release with the payment of a "reasonable bond."[99] The question of what constitutes a reasonable bond is left unanswered at both the national and international levels.[100] Article 292 paragraph 1 of UNCLOS states that a flag State may submit the question of release to ITLOS when it alleges that "the detaining State has not complied with the provisions of [UNCLOS] for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security."[101] The question of release from detention may be submitted to any court or tribunal agreed upon by the parties. It then requires that the bond shall be paid in return for prompt release. Article 292(4) states that, "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."[102] As a result, a dispute between national and international courts is raised regarding the level of a reasonable bond.

The question of bond determination is a common issue in ITLOS proceedings. In the *Volga* case, ITLOS found that the bond sought by the Australian authorities was "not reasonable within the meaning of article 292 of [UNCLOS]."[103] ITLOS determined the reasonable amount of the bond to be AU$1,920,000.[104] However, ITLOS found that setting a bond in respect of three crewmembers did not serve any practical purpose.[105] In the *Hoshinmaru* case, ITLOS considered the reasonableness of the bond (set by the Russian Federation over the Japanese vessel) on the basis of two issues.[106] First, ITLOS found that the Japanese vessel did hold a valid fishing license.[107] Second, there is strong bilateral cooperation between Russia and Japan in the field of conservation and reproduction of salmon and trout. ITLOS stated that "a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offenses, the penalties imposed or imposable under the laws of the

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97 *Cf.* Erik Franckx, *"Reasonable Bond" in the Practice of the International Tribunal for the Law of the Sea*, 32 CAL. W. INT'L L.J. 303, 313 (2002).

98 *See* DAMMER & ALBANESE, *supra* note 94, at 136.

99 United Nations Convention on the Law of the Sea, *supra* note 20, art. 73, para. 2; *see also* D.J. Devine, *Relevant Factors in Establishing a Reasonable Bond for Prompt Release of Vessel Under Article 292(1) of the United Nations Convention on the Law of the Sea 1982*, 27 S. AFR. Y. B. INT'L L. 140, 140 (2002).

100 *Id.* at 142.

101 United Nations Convention on the Law of the Sea, *supra* note 20, art. 292, para. 1.

102 *Id.* at para. 4.

103 Volga (Russ. v. Austl.), Case No. 11, Judgment of Dec. 23, 2002, 6 ITLOS Rep. 10, para. 88.

104 *Id.* at para. 90.

105 *Id.* at para. 74.

106 *See* Hoshinmaru (Japan v. Russ.), Case No. 14, Judgment of Aug. 6, 2007, 9 ITLOS Rep. 18, paras. 98–100.

107 *Id.* at para. 98.

detaining State, the value of the detained vessel and of the cargo seized."[108] As a result, ITLOS lowered the bond from 22 to 10 million rubles.[109]

In the *Camouco* case, ITLOS concluded several factors were relevant in an assessment of the reasonableness of bonds.[110] It made reference to legal precedent.[111] It stated that the offenses committed by the Master of the vessel were considered to be grave under French law.[112] It also suggested that the value of the fish found on board the vessel was taken into consideration when determining the reasonableness of the bond.[113] As for the detention of the crew, ITLOS found that it was appropriate to release the Master of the vessel based on the circumstances of the case upon the posting of the bond.[114]

In the *Monte Confurco* case, ITLOS considered the conflict between the flag and coastal states regarding Articles 73 and 292 of UNCLOS.[115] The interest of the coastal state was to protect its waters from damage,[116] while that of the flag state was to have the vessel promptly released.[117] These compromises gave ITLOS the ability to set a reasonable amount of bond.[118] Among the factors determining the amount of the bond, ITLOS placed special emphasis on the gravity of the offenses, as well as the value of the fish and the fishing gear seized.[119] ITLOS suggested that the gravity of the offenses in particular was always taken into consideration.[120]

In the *M/V SAIGA* case, ITLOS stated "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."[121] ITLOS lists the factors that must be considered as a basis for setting the bond; these factors include: "the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form."[122]

On a national level, bond determination is left to the discretion of the investigating authority in most developed countries' jurisdictions. In the United States, the "Excessive Bail Clause" of the U.S. Constitution maintains that "[e]xcessive bail shall not be re-

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108 *Id.* at para. 82 (quoting Camouco (Pan. v. Fr.), Case No. 5, Judgment of Feb. 7, 2000, 4 ITLOS Rep. 10, para. 67).
109 *Id.* at paras. 93, 100.
110 Camouco (Pan. v. Fr.), Case No. 5, Judgment of Feb. 7, 2000, 4 ITLOS Rep. 10, para. 67.
111 *See id.* at para. 66.
112 *Id.* at para. 68.
113 *Id.* at para. 69.
114 *Id.* at paras. 71–72.
115 *See* Monte Confurco (Sey. v. Fr.), Case No. 6, Judgment of Dec. 18, 2000, 4 ITLOS Rep. 86, para. 56.
116 United Nations Convention on the Law of the Sea, *supra* note 20, art. 73.
117 *See id.*
118 *See* P. Chandrasekhara Rao, *ITLOS: The First Six Years*, 6 MAX PLANCK Y.B. U.N. L.183, 231–32 (2002); *see also* Franckx, *supra* note 97, at 317.
119 Monte Confurco (Sey. v. Fr.), Case No. 6, Judgment of Dec. 18, 2000, 4 ITLOS Rep. 86, paras. 77–89.
120 *See id.* at paras. 73, 76.
121 M/V Saiga (St. Vincent v. Guinea), Case No. 1, Judgment of Dec. 4, 1997, 1 ITLOS Rep. 16, para. 82.
122 Camouco (Pan. v. Fr.), Case No. 5, Judgment of Feb. 7, 2000, 4 ITLOS Rep. 10, para. 67.

quired, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[123] The Eighth Amendment does not further define "excessive bail."[124] The U.S. Supreme Court maintains that "individualized findings, procedural protections, and the discretionary nature of the denial of bail are important factors in upholding detention without bail."[125] In *Carlson v. Landon*, the U.S. Supreme Court held that the Eighth Amendment does not grant a right to bail in all cases; it only maintains that the bail shall not be excessive.[126] The California Constitution entitles every defendant to be released on bail,[127] unless the crime is punishable by death (along with a few other exceptions).[128]

In France, there is nothing in the French Criminal Procedure Code that refers to the bailing of a defendant as an option for release. Nonetheless, pre-trial detention in France only occurs in two cases: (1) when the person under judicial examination risks incurring a sentence for a felony, and (2) when the person under judicial examination risks incurring a sentence for a misdemeanor of at least three years' imprisonment.[129] The purposes of pre-trial detention are: 1) to preserve material evidence or clues or to prevent either witnesses or victims or their families being pressured or fraudulent conspiracy between persons under judicial examination and their accomplices; 2) to protect the person under judicial examination, to guarantee that he remains at the disposal of the law, to put an end to the offense or to prevent its renewal; and 3) to put an end to an exceptional and persistent disruption of public order caused by the seriousness of the offense, the circumstances in which it was committed, or the gravity of the harm that it has caused.[130]

In Germany, the legislation delegates the power of determining the bond, and addressing the issue of excessive bond, to the judge.[131] The general rule in the German criminal system is that the defendant is not necessarily detained before trial.[132] Even though the judge has the right to set a bond, this right is rarely exercised.[133] One study found that only 12% of defendants were released on bail.[134] The general rule is that the prosecutor processes the case without arresting the defendant, unless "there is concern that the defendant would foil the process by absconding."[135]

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123 U.S. CONST. Amend. VIII.

124 Kayla Gassman, *Unjustified Detention: The Excessive Bail Clause in Removal Proceedings*, 4 AM. U. CRIM. L. BRIEF, no. 1, 2009, at 35, 39.

125 *Id.* at 35.

126 Carlson v. Landon, 342 U.S. 524, 545–46 (1952).

127 CAL. CONST. art. I, § 12.

128 *Id.*; *see also* Roy A. Gustafson, *Bail in California*, 44 CAL. L. REV. 815, 816 (1956).

129 CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 143-1 (Fr.).

130 *Id.* at art. 144.

131 STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], § 116a(2), *translation at* http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0935 (Ger.).

132 *See* Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 327 (1995).

133 StPO § 116 (Ger.); Frase & Weigend, *supra* note 132, at 329.

134 Frase & Weigend, *supra* note 132, at 329.

135 *Id.* at 327.

## IV. Economic Interpretation of the Discrepancies

International courts refute the national application of RLED regarding what is punitive and what is not.[136] On a national level, courts consider an illegal catch to be subject to confiscation for public benefit. This is based on the general notion in criminal law that a defendant must not obtain any advantage from his/her illegal gain.[137] The court ensures that the defendant is not reaping benefits from his/her unlawful conduct.[138] National courts consider the least amount of benefit that the defendant gains from his/her illegal activity.[139] The notion of preventing the defendant from illegal gain is based on the fact that the outcome of the confiscation is used to repay any damage inflicted through illegal acts, be they environmental, civil, or public damages. Hence, it is completely unacceptable for courts to allow defendants to benefit from illegal gain.

On an international level, ITLOS adopts a different rhetoric from that of the national courts. It considers illegal catch, which is subject to confiscation, a substantial factor in determining a reasonable bond.[140] The development of this position has evolved in two stages. In the first stage, ITLOS favors the defendant's right to the illegal catch, which is considered part of the required bond by the coastal state. The first stage was seen in the *Monte Confurco* and the *Volga* cases. In the *Monte Confurco* case, ITLOS considered the catch as part of the bond.[141] ITLOS stated "the value of the fish and of the fishing gear seized is also to be taken into account as a factor relevant in the assessment of the reasonableness of the bond."[142] In the *Volga* case, ITLOS restricted the right of the coastal state to confiscate the illegal fish catch from unlimited to limited quantities.[143] ITLOS stated that "the proceeds of the sale of the catch are included in the overall amount that will be retained by the Respondent or returned to the Applicant."[144]

In the second stage, ITLOS adds the environmental and social harm of illegal catch as a factor when it assesses reasonable bond. In the *Hoshinmaru* case, it stated that it would take into consideration such gravity "to ensure proper conservation and management measures that the maintenance of the living resources in the exclusive economic

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136 In his separate opinion in the *Juno Trader* case, Judge Lucky states "In my opinion, in arriving at a reasonable bond the following factors are relevant: (a) a bond must not be punitive or convey the idea that the amount of the bond was determined on the basis of any finding of culpability . . . ." Juno Trader (St. Vincent v. Guinea), Case No. 13, Judgment of Dec. 18, 2004, Separate Opinion of Judge Lucky, 8 ITLOS Rep. 83, para. 44.

137 Mihaela Aghenitei, *Confiscation of Criminal Proceeds in the European Union Criminal Law*, AGORA Int'l J. Jurid. Sci., no. 3, 2013, at 1, 2.

138 *See* Peter Alldridge, *Smuggling, Confiscation and Forfeiture*, 65 Mod. L. Rev. 781, 782 (2002).

139 *See id.*

140 Monte Confurco (Sey. v. Fr.), Case No. 6, Judgment of Dec. 18, 2000, 4 ITLOS Rep. 86, para. 86.

141 *Id.* at paras. 85–86, 93.

142 *Id.* at para. 86.

143 *See* Volga (Russ. v. Austl.), Case No. 11, Judgment of Dec. 23, 2002, 6 ITLOS Rep. 10, paras. 84–87.

144 *Id.* at para. 87.

zone is not endangered by over-exploitation."[145] It aims not only to protect the interest of coastal states but also to provide an environmental benefit.[146]

CLED and RLED offer a limited understanding of the different rhetoric of national and international courts. This is due not only to ITLOS adopting CLED but also to the development of a progressive economic understanding of CLED. The assumption is that national courts and ITLOS balance various considerations and interests when issuing a judgment. National courts balance the interests of state and defendant, while ITLOS balances the interests of coastal and flag states.[147] In the *Monte Confurco* case, ITLOS maintained that it considered the balance between the

> interest of the coastal State to take appropriate measures as may be necessary to ensure compliance with the laws and regulations adopted by it on the one hand and the interest of the flag State in securing prompt release of its vessels and their crews from detention on the other.[148]

As a result, the gap between ITLOS and the national courts increases if the former uses RLED.

The gap between RLED and CLED is illustrated in four graphs. The graphs show a movement along the curve of the coastal state interest when the ITLOS leans towards considering the catch as part of the bond. There are two major interests in the dispute, namely that of the coastal state and that of the flag state. The flag state interest, decreasing harm and increasing benefit, remains constant in all graphs. This interest is determined in a linear relationship. As for the coastal state, its interest changes from a national to an international level, due to change of the nature of the applicable law.

Graph (4) illustrates the relationship between environmental damage and benefit in CLED. Line (A) represents the interest of the coastal state, leaning towards less harm and more benefit. Line (B) shows the interest of the flag state, leaning towards maximum benefit while disregarding damage. The equilibrium point is the point where ITLOS aims to achieve balance between coastal state rights and flag state interests in each dispute.

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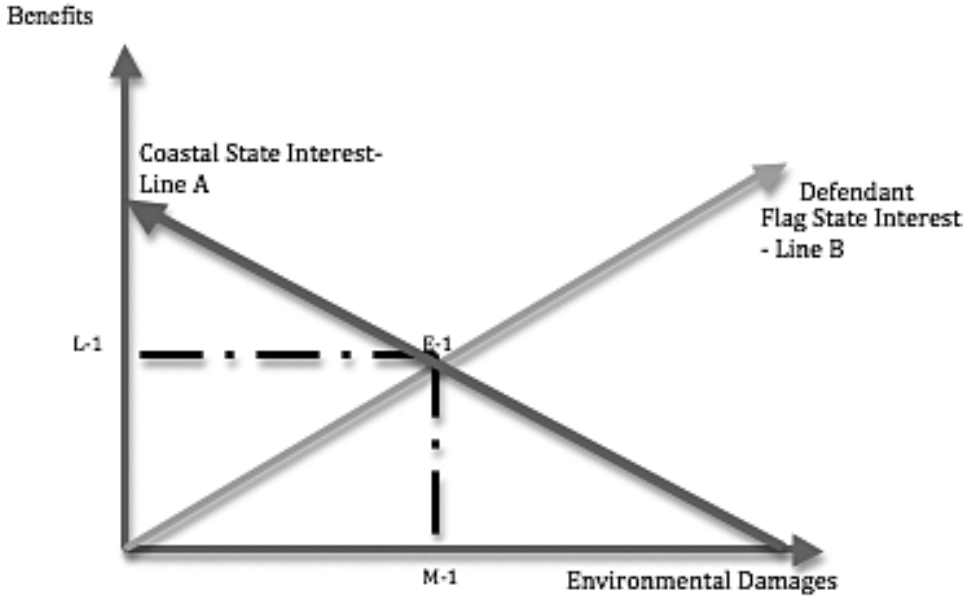
145 Hoshinmaru (Japan v. Russ.), Case No. 14, Judgment of Aug. 6, 2007, 9 ITLOS Rep. 18, para. 99.

146 HELMUT TUERK, REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA 136 (2012).

147 Zhang Xiangjun, *Balance of Interests Between Coastal and Fishing States in Prompt Release Cases: A Review of Cases No. 14 and 15 Before the ITLOS*, 2008 CHINA OCEANS L. REV. 400, 410–11 (2008).

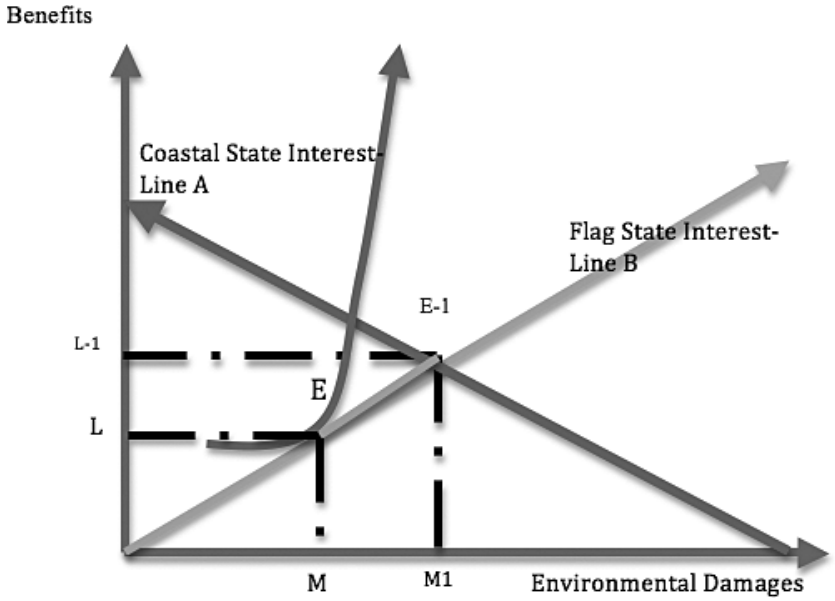
148 Monte Confurco (Sey. v. Fr.), Case No. 6, Judgment of Dec. 18, 2000, 4 ITLOS Rep. 86, para. 70.

GRAPH 4. ITLOS EQUILIBRIUM POINT



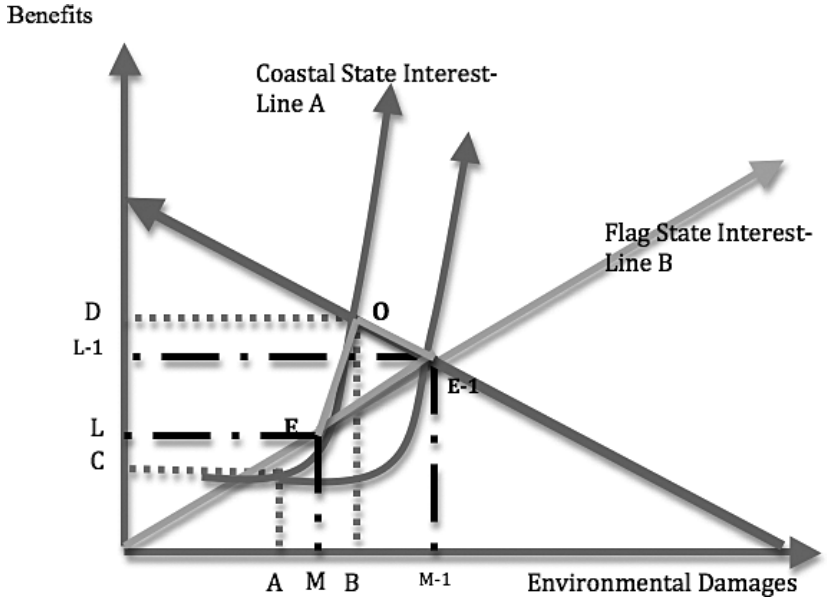

Graph (5) shows the gap between two equilibriums points. While the first point (E-1) represents the ITLOS equilibrium, the second (E) represents the equilibrium of national courts which adopt RLED. The reason is that governments lean towards more benefit and less harm. This is associated with factors such as the cost of international adjudication, which is huge compared to national adjudications. Furthermore, the difference between E-1 and E shows that coastal states should derive less benefit and more damage from the dispute.

GRAPH 5. TWO DIFFERENT EQUILIBRIUMS IN A DISPUTE



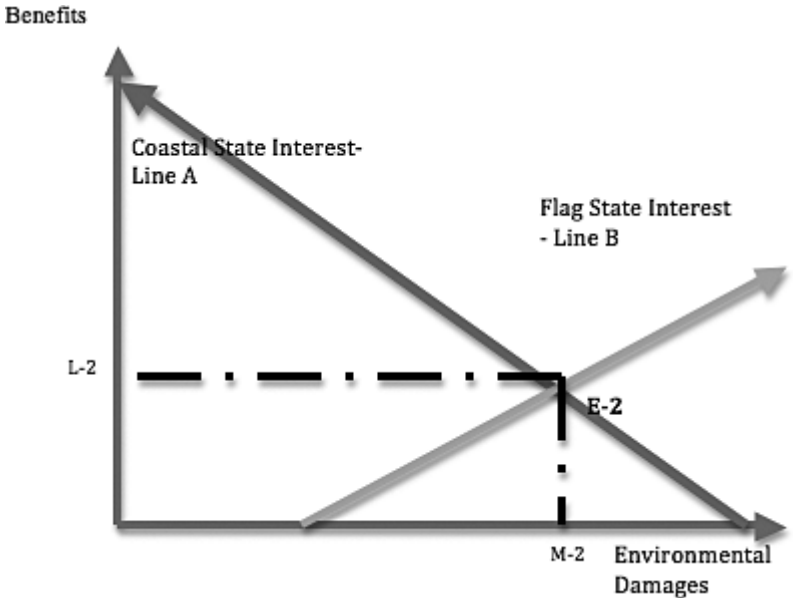

In Graph (6), the triangle (E-E-1-O) represents the gap between national and international adjudication. On the national level, courts tend to derive less harm on Line (A-B) and higher benefits on line (C-D) from the dispute. At ITLOS, the coastal state derives more harm at point (M-1), a point beyond the average harm on the national level. The coastal state still gets high benefit (which is however less than maximum potential of benefit). The triangle (E-E-1-O) shows the area of total gain, be it benefit or harm.

GRAPH 6. THE GAP BETWEEN NATIONAL AND INTERNATIONAL ADJUDICATION



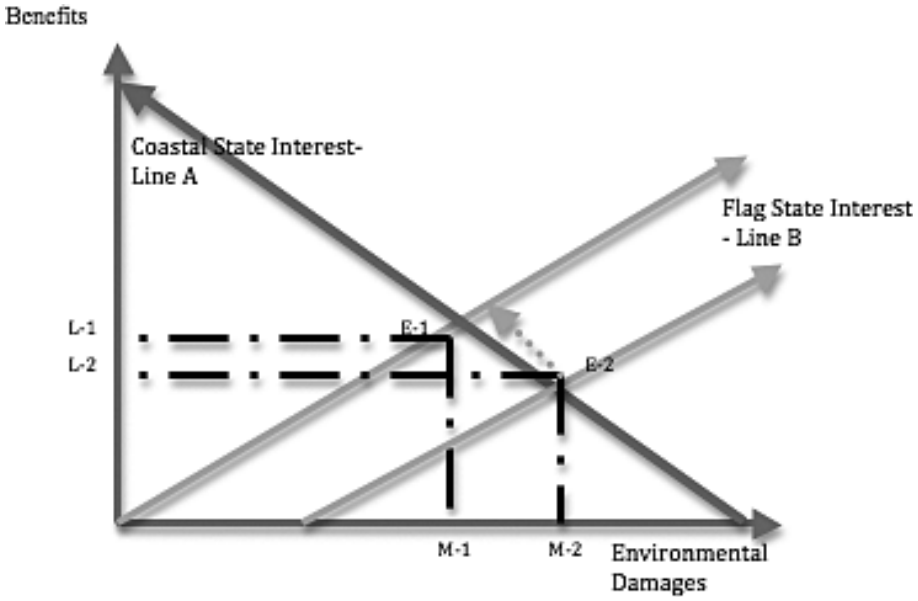

The special shift, initiated by ITLOS regarding the illegal fish catch being part of the bond, can be illustrated in two different graphs. Graphs (7) and (8) clarify the change in the direction of the ITLOS towards the confiscation of the caught fish, and considering it part of the bond. These graphs show the movement along the curve of the flag state interest. In Graph (7), the equilibrium point starts at a higher level of harm, as the tribunal considers the illegal catch as part of the bond.

GRAPH 7. THE EQUILIBRIUM OF ILLEGAL CATCH AS PART OF THE BOND




In Graph (8), ITLOS re-maintains the lower level of equilibrium. Line B retreats towards less damage to the environment. It will retreat from the equilibrium point E-2 to equilibrium point E-1. The graph is in line with previous mandates of environmental equilibrium at the point of equal environmental harm and environmental benefit. Mandates of the tribunal raise the limit borders of the environmental harm.

GRAPH 8. THE RETURN TO NORMAL TRIBUNAL EQUILIBRIUM



## V. Conclusion and Recommendations

Prediction saves lawyers lengthy and costly litigation process. Countries, lawyers, and law enforcement officers have the right to predict judgments. This right reduces the cost of resorting to national and international adjudication.[149] If lawyers and law enforcement officers were aware of the precedent, they would have likely followed it. The existence of two different approaches, CLED and RLED, that govern the same behavior violates litigation rights in legal prediction. This article aims to provide guidance to countries and lawyers on the judicial behavior and approach of ITLOS. While some countries adopt RLED, ITLOS changes RLED to CLED.

ITLOS adopts the CLED approach in settling disputes, while national courts adopt the RLED.[150] As a result, the change in nature of the dispute from RLED to CLED prejudices the right of parties to predict ITLOS proceedings. Countries should abolish their RLED and reform their national environmental laws to abolish the uncertainty in the fishery cases.[151] Instead, they should comply with the international approach to these issues, which differs from their understanding and practice. It helps avoid any discrepancy that arises between national and international courts. Parties have the right to predict ITLOS proceedings.

In its jurisdiction, ITLOS often considerably changes the nature of the original dispute from a RLED to CLED. ITLOS is not likely to change its understanding of the nature of the dispute, as illustrated in the cases presented earlier. It is now the role of national legislative courts to adopt this understanding of CLED, especially in fishery cases. This change will not only help countries in the event that plaintiffs resort to ITLOS, but will also ensure the equality principle between those who can resort to the tribunal and those who cannot. It is now clear that whenever a case involves RLED, this likely involves a waste of resources, or an injustice to parties.

*Shams Al Din Al Hajjaji is a judge at North Cairo Primary Court.* *The author wishes to extend his deep gratitude and appreciation to Lila Sheira and Claire Weyland for their constructive comments and helpful edits, and his wife for her continuous help and support.*

149 Steve Charnovitz, *A World Environment Organization*, 27 Colum. J. Envtl. L. 323, 335 (2002).

150 *See supra* Section I.

151 *Cf.* Ehud Guttel & Alon Harel, *Uncertainty Revisited: Legal Prediction and Legal Postdiction*, 107 Mich. L. Rev. 467, 491 (2008) ("Criminal law theory often emphasizes the importance of certainty and predictability.").