Prompt release cases before the International Tribunal for the Law of the Sea

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The 1982 United Nations Convention on the Law of the Sea (the Convention) is one of the most important international treaties in contemporary international law. Its lengthy text, consisting of 320 articles plus 9 annexes, deals with a range of issues of vital economic importance to many States that had been left unregulated, or had been insufficiently regulated, in the previous 1958 Conventions on the Law of the Sea. Negotiations leading to its adoption lasted a marathon nine years (1973-1982), and its coming into force had to await another 12 years (November 1994), following its 60th ratification. Today, following the recent 10th anniversary of its entry into force, some 148 States are parties.

The Convention contains detailed provisions with respect to settlement of disputes arising under it. Disputes may be settled by any peaceful means chosen by the parties, but if no such settlement is reached, the dispute must be submitted for binding decision either to the International Tribunal for the Law of the Sea (the Tribunal or ITLOS), the International Court of Justice (ICJ), an arbitral tribunal constituted in accordance with Annex VII of the Convention, or a special arbitral tribunal constituted in accordance with Annex VIII of the Convention.

ITLOS is itself a creature of the Convention. It is a permanent international court with expertise in law of the sea matters that sits in Hamburg, with a Statute closely resembling that of the ICJ in The Hague. It has jurisdiction over all disputes and applications submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement which confers jurisdiction on it. The Tribunal is open to States Parties, and in certain circumstances, to entities other than States. (The European Community is a party to a case currently pending before it). It came into operation on 1 October 1996. To date, 13 cases have been submitted to it.

One of the significant features of the Convention was its recognition of the right of coastal states to declare an exclusive economic zone (EEZ) extending up to 200 miles from the State’s territorial sea baselines, in which the coastal State has sovereign rights for the purpose of exploiting and managing all natural resources. The Convention expressly recognises the rights of coastal States to enforce their laws made in the exercise of that right against vessels of all nationalities. Thus, for instance, authorities of a coastal
State may board, inspect, arrest and take judicial proceedings against foreign flag vessels and their crew believed to have engaged in illegal fishing in its EEZ.

However, Article 73 imposes a qualification on this power, requiring that arrested vessels and their crew shall be promptly released by the coastal State upon the posting of a reasonable bond or other security. This provision is intended to balance 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. Special provision is made for the settlement of disputes under this provision, in recognition of the fact that such disputes by their nature must be settled speedily. Under Article 292, where the flag State of a vessel alleges that authorities of another State Party has not complied its prompt release obligations, the question of release from detention may be submitted to ITLOS, if the parties fail to agree on another court or tribunal within 10 days from the time of detention. The Rules of the Tribunal provide that it is to give priority to applications for the prompt release of vessels or crews over all other proceedings before the Tribunal. The hearings of the application (normally limited to 2 days) are required by the Rules to commence within 15 days from the first working day after the application is received. The judgment of the Tribunal is then required to be given within 14 days of the closure of the hearing. Of all proceedings before international courts and tribunals, this mechanism is thus exceptionally fast.

Prompt release cases have formed an important part of the Tribunal’s work. Of the 13 cases submitted to it to date, 7 have been prompt release cases (the “Saiga” case (Saint Vincent and the Grenadines v. Guinea) (1997), the “Camouco” case (Panama v. France) (2000), the “Monte Confurco” case (Seychelles v. France) (2000), the “Grand Prince” case (Belize v. France) (2001), the “Chaisiri Reefer 2” case (Panama v. Yemen) (2001), the “Volga” Case (Russian Federation v. Australia) (2002), and the “Juno Trader” case (Saint Vincent and the Grenadines v. Guinea-Bissau) (2004)). Although these proceedings are designed to be dealt with quickly, problematic issues can arise, not all of which have been definitively answered in the Tribunal’s case law.

Only the flag State is entitled to bring prompt release proceedings. The Tribunal has held that it is not sufficient that the applicant State was the flag State at the time of arrest, but that it must also be the flag State at the time of the filing of the application for prompt release. In the Grand Prince case, the Tribunal declined jurisdiction on the ground that the applicant had ceased to be the flag State of the vessel before the application had been filed. In the Juno Trader case, the Tribunal considered an argument that the applicant had ceased to be the flag State prior to commencement of the proceedings, due to the fact that title to the vessel had passed to the arresting State in accordance with its national laws. The Tribunal considered that the change in ownership had not been definitive, since a court of the arresting State had ordered the suspension of the measure pursuant to which confiscation had occurred, pending a legal challenge. However, it remains an open question whether the Tribunal could have jurisdiction to order the prompt release of a vessel following a “definitive” confiscation of the vessel by the arresting State.
The prompt release obligation applies to vessels arrested for violations of the types of laws referred to in Article 73. The obligation does not necessarily apply to ships arrested for violations of other laws, such as smuggling. In the *Saiga* case, the Tribunal was faced with the issue whether the prompt release mechanism applied to a ship arrested for “bunkering” (refuelling) a fishing vessel within the EEZ of the arresting State, in violation of the latter’s laws. The Tribunal held that it did. It reasoned that the prompt release obligation did not depend on the way that a law was classified under national law, and that it was therefore irrelevant that the arresting State qualified the laws in this case as “customs” or “smuggling” regulations. However, the outer limits of the category of laws to which Article 73 applies may still need to be considered in future cases.

Article 292 states expressly that in prompt release proceedings, the Tribunal shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum. Thus, the Tribunal is not concerned in such cases with the question whether or not the vessel did in fact violate the laws of the arresting State. Nor can the Tribunal consider whether the national laws pursuant to which the ship was arrested are consistent with international law, or whether the arresting State has breached any other provision of the Convention. If the flag State considers that the arresting State has breached international law in arresting the ship, this must be raised in other proceedings. This occurred in the *Saiga* case, in which the Tribunal found, in a separate case, that the detaining State had violated international law in arresting that ship.

If the Tribunal finds that the prompt release obligation applies, it will determine whether the amount of the bond fixed by the detaining State is reasonable. If no bond has been fixed, the Tribunal will itself determine what is a reasonable bond. In the *Saiga* and *Juno Trader* cases the Tribunal held that a “reasonable” bond must be fixed (bearing in mind the balancing interests of the flag State and the detaining State), and that it was not open to the Tribunal to order that no bond, or only a “symbolic bond”, should be posted. The factors that the Tribunal will consider in fixing the bond 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. However, these factors are not exclusive, and other factors may be found to be relevant in future cases. Although the Tribunal has said it is not precluded from examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond, in the *Volga* and *Juno Trader* cases the circumstances of the seizure of the ship by the arresting State were found not to be relevant.

A further issue that the Tribunal must decide is the form that the bond should take. The Tribunal has generally ordered that the bond take the form of a bank guarantee. In *Monte Confurco*, the Tribunal rejected a request that the bond be in the form of cash or certified cheque. In the *Volga* case, the Tribunal affirmed that it was not possible to include further non-financial conditions on release, such as a requirement that information be provided about the owner and ultimate beneficial owners of the ship.
The prompt release mechanism demonstrates the speed with which an international court is capable of working, and this may account for the relatively significant use that has been made of this procedure. However, it remains a relatively novel procedure, and the case law in this area can be expected to continue to develop in the future.

Links:
(Judgments of ITLOS are at: http://www.itlos.org/start2_en.html)
International Court of Justice (ICJ): http://www.icj-cij.org

Photograph by Stephan Wallocha, courtesy of the International Tribunal for the Law of the Sea.