



Presentation Abstract

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The evolution of ITLOS jurisprudence on prompt release of vessels

The International Tribunal for Law of the Sea has dealt with nine cases relating to prompt release of vessels, envisaged in Article 292 of the United Nations Convention on the Law of the Sea. The jurisprudence of the Tribunal on this matter has generally been consistent and we now have rather a comfortable amount of information regarding, for example, elements to be taken into account in order to fix the amount of bond that the flag State is required to pay to the coastal State for the prompt release of the vessel in question. The evolution of jurisprudence, however, has not only cleared up ambiguities but clarified the core problem of the system itself, i.e. possible prejudice to the domestic judicial procedure taking place in the coastal State.

Article 292(3) of UNCLOS provides that the ITLOS shall deal with the application for prompt release “without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew”. This deference to domestic procedure is quite reasonable, since the international court or tribunal – mostly the ITLOS – dealing with an application for prompt release has been given no power to intervene in domestic procedure under UNCLOS.

However, the ITLOS jurisprudence tells us that this perfectly legitimate objective cannot be achieved in reality. For example, according to Article 73(2), “reasonable bond or other security” must be posted in order for the vessel to get released. This is again quite understandable: the released vessel will never go back to the coastal State in which it was arrested, except in a rare case in which it is completely acquitted of all charges brought forward against it. One would thus think that the amount of caution must be calculated on the basis of the fine that may be incurred, or the value of the vessel, if it is likely to be confiscated at the end of the domestic procedure. However, if we accept this solution, it is the ITLOS that is supposed to estimate what the domestic court will say. The judgment on the prompt release is usually – not always, as we will see – before the domestic court gives its final judgment. If the ITLOS is supposed to try to form such an estimation, how can it be possibly done “without prejudice to the merits of the case” in the domestic procedure?

Another problem occurs when the domestic court decides to confiscate the vessel in question in conformity with the domestic law of the coastal State. If the ITLOS nevertheless orders the prompt release of the confiscated vessel, such an order will squarely go against the clear text of the “without prejudice” clause of Article 292(3) UNCLOS. On the other hand, if the ITLOS is prevented from ordering the prompt release once the vessel in question gets confiscated, the domestic court will certainly be encouraged to proceed to a “prompt confiscation”. Therefore, it is most appropriate that the ITLOS posted the following “warning” in the *Tomimaru* case (Japan v. Russia, 2007):

“Such a decision [i.e. confiscation] should not be taken in such a way as to prevent the shipowner 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.” (para. 76)

At least two questions remain, however. In practical terms, it will be extremely difficult, if not absolutely impossible, that the ITLOS finds a particular decision on confiscation rendered by a domestic court to be “inconsistent with international standards of due process of law”. The *Tomimaru* case, in fact, exemplifies such difficulty. Secondly and more fundamentally, how can the ITLOS identify such “international standards of due process of law”?

ITLOS cases to be referred to¹

- *Camouco (Panama v. France)* (Prompt Release, Judgment of 7 February 2000) [2000] ITLOS Rep. 10.

- *Monte Confurco (Seychelles v. France)* (Prompt Release, Judgment of 18 December 2000) [2000] ITLOS Rep. 86.

- *Grand Prince (Belize v. France)* (Prompt Release, Judgment of 20 April 2001) [2001] ITLOS Rep. 17.

- *Volga (Russia v. Australia)* (Prompt Release, Judgment of 23 December 2002) [2002] ITLOS Rep. 10.

- *Juno Trader (Saint Vincent and the Grenadines v. Guinea Bissau)* (Prompt Release, Judgment of 18 December 2004) [2004] ITLOS Rep. 17.

- *Hoshinmaru (Japan v. Russia)* (Prompt Release, Judgment of 6 August 2007) [2007] ITLOS Rep. 18.

- *Tomimaru (Japan v. Russia)* (Prompt Release, Judgment of 6 August 2007) [2007] ITLOS Rep. 74.

¹ All documents are available online at <http://www.itlos.org/index.php?id=35>.