

BERNARD BŁAŻKIEWICZ

THE „CAMOUCO” CASE: ARTICLE 292 OF THE UNITED NATIONS CONVENTION OF THE LAW OF THE SEA

INTRODUCTION

The “Camouco” case (*Panama v. France*) was the fifth¹ case brought before the International Tribunal for the Law of the Sea (ITLOS)². On 17 January 2000, proceedings were instituted before ITLOS on behalf of Panama (flag State) against France (coastal/port/detaining State). The basis invoked by the applicant was article 292 (prompt release of the vessels and crews) of the United Nations Convention on the Law of the Sea (UNCLOS)³. Both States are parties to UNCLOS. Panama ratified the Convention on 1 July 1996 and France ratified it on 11 April 1996. The case resulted from the arrest of the vessel “Camouco”.

¹The “Camouco” case (*Panama v. France*) application for prompt release Judgement. Other cases decided by the International Tribunal for the Law of the Sea are: the M/V “Saiga” (*Saint Vincent and Grenadines v. Guinea*) - case concerning prompt release of the vessel - Judgement rendered on 4 December 1997, The M/V “Saiga” - provisional measures - order of 11 March 1998, The M/V “Saiga” – Judgement on the Merits, “The Southern Bluefin Tuna cases” (*Australia v. Japan; New Zealand v. Japan*). After the preparation of this article ITLOS rendered judgements in the “Monte Confurco”, (*Seychelles v. France*); “Grand Prince” (*Belize v. France*). These cases were submitted under article 292. Author decided do not to insert to this article additional, relevant issues resulting from these cases. Judgements, orders, dissenting and separate opinions of the cases and verbatim of records of the public hearings are available on the Tribunal’s website: www.itlos.org.

²ITLOS is one of the institutions created by the United Nations Convention on the Law of the Sea. After entering into force on 16 November 1994 States parties elected 21 members of the Tribunal during the fifth meeting of States Parties (24 July - 2 August 1996).

³For the text of the United Nations Convention on the Law of the Sea, opened for signature on 10 December 1982, see 21 International Legal Materials, 1245 (1982).

FACTUAL BACKGROUND

The "Camouco" was a fishing vessel flying the flag of Panama. The vessel was provisionally registered on 21 September 1999. The owner of the vessel was a company registered in Panama – Merce-Pesca Company. On 16 September 1999, the vessel left Walvis Bay (Namibia) to conduct longline fishing in the southern seas. Seven days later, the "Camouco" was boarded by a French surveillance frigate in the Exclusive Economic Zone (EEZ) of the Crozet Islands, 160 nautical miles from the northern boundary of that zone. The procès-verbal of violation was drawn up on 28 September. The vessel was re-routed and escorted to the Port-des-Galêts (Réunion). Seven tonnes of the frozen Patagonian toothfish were found in the holds of the "Camouco". The procès-verbal stated the following violations: unlawful fishing in the EEZ, failure to declare entry into the EEZ, concealment of the vessel's marking while flying a foreign flag and attempt to flee to avoid verification by maritime authority.

The Judgement, as in the "Saiga" case, was followed by proceedings before national courts. On 7 October, the Master was charged and placed under court supervision. The rest of the crew left the vessel, except four members who remained on board to provide maintenance to the "Camouco". The Regional Department Directorate of Maritime Affairs requested confirmation of the arrest and prior authorisation for the release of the vessel, which was subject to payment of at least 15.000.000 FF to the court of first instance (Tribunal d'instance). The next day the court of first instance at Saint-Paul confirmed the arrest and ordered that the release was subject to the requirement of prior payment in the form of a bond in the amount of 20.000.000 FF in cash, certified cheque or bank draft payable to the Deposit and Consignments Office. On 22 October, the Merce-Pesca Company and the Master of the "Camouco" urgently applied to the court of first instance at Saint-Paul requesting the prompt release of the seized items and a reduction in the amount of the bond. On 14 December 1999, the Court issued a notice of summary proceedings, rejecting the arguments put forward by the Merce-Pesca Company and the Master of the "Camouco" and dismissing the request for the release and reduction of the bond. The owner and the Master appealed to the appeals court and Panama submitted that case to ITLOS.

Panama was represented by Mr. Ramon Garcia Gallardo, as Agent, and Mr. Jean-Jacques Morel, as Counsel; and acting on behalf of France were Mr. Jean-François Dobelle, as Agent, and Mr. Jean-Pierre Quéneudec, Mr. Francis Hurtut, Mr. Bernard Botte, Mr. Vincent Esclapez and Mr. Jacques Belot, as Counsel.

ARTICLE 292 AND UNCLOS DISPUTE SETTLEMENT

The settlement of disputes provisions in UNCLOS are contained in Part XV, which consists of three sections: section 1 – general provisions, section 2 –

compulsory procedures entailing binding decisions and section 3 – limitations and exceptions to applicability of section 2.

Section 2 is applicable only if settlement of a dispute has not been reached by either negotiations or other peaceful means. At the request of any party, the dispute is submitted to the court or tribunal having jurisdiction in accordance with the Convention. The Convention gives a party to a dispute the option to choose a judicial body. The freedom of choice of procedure is a general rule contained in the Convention. States Parties bound by the compulsory binding procedure of the Convention⁴ are free to choose the dispute settlement mechanism: ITLOS, the International Court of Justice (ICJ), an arbitral tribunal or a special arbitral tribunal (Article 287). If both parties to a dispute have not chosen or agreed to the same mechanism, then the case has to be submitted to an arbitral tribunal.

The freedom of choice rule has limitations. The Convention confers on the Tribunal practically exclusive compulsory jurisdiction in respect of two specific substantive matters: prompt release of a vessel and provisional measures⁵, which orders cannot be properly issued by an arbitral tribunal. In such cases there is a need to have a permanent pre-established body. The Convention gives preference to ITLOS over the ICJ and therefore for such matters the Tribunal is solely competent.

That dispute concerning the “Camouco” was settled under Article 292 of UNCLOS, which deals with the prompt release of vessels and crew.

Article 292 is set out in Part XV, section 2, of UNCLOS, and confers on the Tribunal compulsory jurisdiction. The Tribunal’s jurisdiction under Article 292 is compulsory between States Parties to UNCLOS and may only be excluded by a permanent or ad hoc agreement. Therefore, article 292 contains special rules in comparison with other provisions in Part XV (Dispute Settlement) of UNCLOS.

The origin of the prompt release provision is the United States proposal in the Seabed Committee in 1973. The provision affords access to the Tribunal by the owner or operator of a detained vessel to seek its release without prejudice as to the merits of the case. This proposal was inspired by the experience of the US tuna fishing vessels in the Pacific⁶. The negotiating parties to UNCLOS did not consider it sufficient to insert in the text only substantive provisions and wanted to safeguard the recourse to ITLOS on issues of prompt release⁷.

Article 292 reads as follows:

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

⁴Of course there are statutory limitations and optional ones. See section 3, Part XV – Limitations and exceptions to applicability of section 2 (articles 297-299).

⁵The Seabed Dispute Chamber of the Tribunal has exclusive jurisdiction concerning the activities in the Area (article 187).

⁶D. H. Anderson, *Investigation, Detention and Release of Foreign vessels under the UN Convention on the Law of the Sea and other International Agreements*, “International Journal of Marine and Coastal Law”, Vol. 11, No. 2, p. 167.

⁷S. Rosenne, L. B. Sohn, *Article 292 Prompt release of vessels and crews*, [in:] M. H. Nordquist, S. N. Nandan, S. Rosenne, N. R. Grandy (editor in chief M. H. Nordquist), *United Nations Convention on the Law of the Sea, a Commentary*, Dordrecht, Boston, London, Vol. V, p. 67.

complied with the provisions of this Convention for the prompt release of the vessel and its crew upon the posting of a reasonable or other financial security, the question of release from detention may be submitted to any court or other tribunal agreed upon the parties or, failing such an agreement within 10 days from the time of detention, to a court of 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.

In paragraph 1 of the article we can read that the procedure is applicable only if both parties to the dispute are State Parties to UNCLOS. A State has the discretion to take any action to institute proceedings against a coastal State after 10 days, so the right to submit a case to a court or tribunal is limited in time⁸. In its application a State Party has to allege that a port or coastal (detaining) State has not complied with the provisions of the Convention for the prompt release of a vessel or its crew. The application can be submitted also "on behalf" of the flag State and it allows private parties to further their interests before the Tribunal without making formal exceptions to the rule that the dispute is between the State Parties. Of course this action has to be authorised by the State⁹. It safeguards quick action because sometimes a public administration (of the State of registration) may not take action for the prompt release of a vessel and its crew as quickly as it is necessary.

At least three conditions have to be fulfilled for a successful application: detention made by another State Party, flag State made an allegation that a ship did not comply with UNCLOS and a different forum has not been agreed. As a general rule the case may be submitted to any court or tribunal agreed to before the lapse of a 10-day period. If the competent body agrees, the case may be brought there even after the 10-day period. The competent body may be chosen from those specified in article 287 or elsewhere. If no agreement has been reached, then the parties can

⁸R. Lagoni, *The Prompt Release of the Vessels and Crews before the International Tribunal for the Law of the Sea: A Preparatory Report*, International Journal of Marine and Coastal Law, Vol. 11, No. 2, p. 150.

⁹T. Treves, *The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea*, International Journal of Marine and Coastal Law, Vol. 11, No. 2, p. 188. The initial draft (A/CONF.62/WP.9 (ISNT, Part IV, 1975) article 15, V Off. Rec. 111) gave the right to complain to the owner or operator of the vessel, crew member and passenger. This was changed by President Amerasinghe. See S. Rosenne, L. B. Sohn, *op. cit.*, p. 68.

either submit their case to a body in accordance with article 287 or the flag State can always submit the dispute to ITLOS. The Tribunal has 10 days in which to exercise its jurisdiction over all detention cases and State Parties to UNCLOS cannot modify this¹⁰.

Article 292 is an instrument for the substantive provisions of prompt release that are contained in the following articles of UNCLOS:

1. Articles concerning the protection and preservation of the marine environment – 226 (Investigation of foreign vessel), 218 and 220 (Enforcement by the port and coastal States), 219 (Seaworthiness), 229 (maritime claims) and 73 § 2 (fishing in the EEZ).

However, the Convention does not give the right to demand the prompt release in every case: see articles 99 (transport of slaves), 100 (piracy), 108 (illicit traffic in drugs) and 109 (unauthorised broadcasting).

The vessel detained under the mandatory sanctions of the UN Security Council cannot apply for its release under the UNCLOS provisions. A different type of release is also regulated in civil cases, which are governed by the provisions of the Brussels Convention relating to the Arrest of Seagoing Ships or by other laws of maritime claims.

We must keep in mind that UNCLOS is a framework Convention and its provisions, e.g., article 226, are linked to other instruments – MARPOL¹¹ and LDC¹². Of course, the Convention does not alter the rights and obligations of the States Parties arising from other agreements¹³. Another important element is that article 292 contains a novel provision, although not a general rule of international law¹⁴, which is unprecedented.

Judge Vukas in his dissenting opinion, appended to this judgement, describes essential components of Article 292¹⁵:

- a. not only can the Flag State of the vessel make the application, but also there is a requirement of later authorisation by the State;
- b. the equality of procedures principle-choice of procedure;
- c. short period as the one in which subjects concerned should act. If the local court rejects the release upon posting the bond or it is concerned by the party's unreasonableness, it should try to obtain a reversal decision if there is still time in the 10-day period. If there is a possibility of appeal, or the appeal cannot be decided within the 10-days period the parties should use the article 292 procedure, to choose

¹⁰R. Lagoni, *op. cit.*, p. 152.

¹¹International Convention on Prevention of Pollution from Ships 1973/78, *Journal of Laws of 1987*, No. 17, pos. 101.

¹²Convention on the Prevention of Marine Pollution by Dumping Wastes and other Matter 1972 (London Convention), *Journal of Laws of 1984*, No. 11, pos. 46.

¹³Articles 237, 311(2).

¹⁴D. H. Anderson, *op. cit.*, p. 167.

¹⁵The “Camouco” case dissenting opinion of Judge Vukas, para. 3.

the judicial body, and if no agreements have been concluded then after 10 days submit the case to ITLOS;

d. the court or tribunal where the case is submitted has to deal with it without delay; and

e. the detaining State must comply promptly with the decision of the court or tribunal.

The basis for the article 292 provisions can be found in the commercial importance of marine transport and exploitation. These provisions were inserted into the Convention to counter-balance the sovereign rights and jurisdiction of the coastal State in the EEZ. The detention of the tanker or fishing boat for long periods could result in an additional increase of petrol prices or fishing companies could suffer losses if the vessel were detained for a longer time in the relatively short fishing season. They prevent the abuse of the exercise of sovereign rights by the coastal State in the EEZ. The article 292 procedure does not entail the submission of the dispute on the merits to a court or tribunal for a judgement. The release process has to be prompt and cannot be affected by the domestic law notions and the Tribunal has to deal only with question of release without prejudice to the merits of any case before an appropriate domestic forum. Domestic forum includes a court (civil or criminal) or an administrative tribunal or similar body¹⁶. Another interesting issue raised by article 292 is that the principle of exhaustion of local remedies is excluded because of the need for prompt action.

VIEWS OF THE PARTIES

Panama and France presented contentions and submissions in the written proceedings, respectively, in their applications based on article 292 § 1 of UNCLOS, statements in response and oral proceedings. Public hearings were held on 27 and 28 January in Hamburg.

Panama in its application concerning prompt release of the vessel and its Master requested to confirm that the Tribunal had jurisdiction under article 292 of UNCLOS to declare that the application was admissible and that the French Republic had violated article 73 § 4 by tardy and incomplete notification of the arrest and seizure to the Republic of Panama. The application requested with respect to the Master and to the vessel "Camouco": a permission for Captain Hombre Sombrido to attend the hearing in Hamburg, to declare that the French Republic had failed to comply with Article 73 § 3 in applying to him criminal measures, which de facto constituted an unlawful detention, and with the provisions of the prompt release of the vessel, to release promptly without the bond and to determine the amount, nature and form of the bond or another financial guarantee, which would be posted in order to secure the release of the "Camouco" and its

¹⁶D. H. Anderson, *op. cit.*, p. 167.