The ‘Reasonableness’ of Unreasonable Arguments in Prompt Release Cases in the ITLOS

Taisaku IKESHIMA

Abstract

The jurisprudence of the International Tribunal for the Law of the Sea (ITLOS) in prompt release cases seems to have been clarified through a series of relevant precedents. Methods and criteria such as the reasonableness test for assessing the relevant factors related to a bond for prompt release may be said to have been standardised. It serves to balance the interests of the coastal States and the flag States, and it has its own merits and purposes, as is indicated in Articles 73 and 292 of the United Nations Convention on the Law of the Sea (LOS Convention). However, the procedures, which are limited in nature and purpose, are not suitable for dealing with the merits of cases of illegal, unreported, and unregulated (IUU) fishing, as a whole. The States using these procedures on prompt release should be prudent enough to utilize them for their original purpose.

I. Introduction

A total of nine cases at the International Tribunal for the Law of the Sea (ITLOS) have been concerned with the prompt release of detained vessels and the bond to be paid by the vessel owners. Since the establishment of the ITLOS, these cases have been an overwhelmingly important part of the tribunal’s jurisprudence. However, it cannot be said that the case law of the ITLOS is clear enough for the concerned States and practitioners of international law to rely on the predictability of the Tribunal. In other words, the criteria that the Tribunal uses
in assessing the ‘reasonableness’ of the bond or security posed by the detaining State still seem to be in the process of development as part of jurisprudence\(^4\).

In such cases, some cardinal provisions under the United Nations Convention on the Law of the Sea (LOS Convention) are to be mentioned before an account is made\(^5\). Article 73 of the LOS Convention provides as follows:

**Article 73**

Enforcement of Laws and regulations of the coastal State

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, 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.

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

3. Coastal State penalties for violations of fisheries laws and regulation in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

**Article 292** of the LOS Convention, below, should also be fully referred to.

**Article 292**

Prompt release of vessels and crews

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, 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 of 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.

The above two cardinal provisions of the LOS Convention with respect to prompt release cases have been analyzed by means of practical cases. Further, their practical meanings have been clarified by each judgment of the relevant cases at ITLOS. The original purpose behind the enshrinement of Article 292 into Part XV of the LOS Convention is to allow the intervention of the flag state of the detained vessel into the criminal procedures of the coastal state. In other words, it is an important intersection of the law of the sea with the domestic laws and regulations of the coastal state. Therefore, it is noteworthy in that the mechanism and institution of prompt release is a special procedure to strike a balance between the legal interest of the coastal state, which is secured by the exercise of its criminal jurisdiction, and that of the flag state, which is aimed at its freedom of navigation.

The author of this paper has already mentioned that the dispute settlement mechanism of the ITLOS under the LOS Convention currently plays an important role, particularly in the regulation of illegal, unreported and unregulated (IUU) fishing and in striking a balance between the coastal States’ and the flag States’ rights in the exclusive economic zone (EEZ). With regard to the first point, IUU fishing in the management area of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) has been the principal concern for the state parties of this Convention. Maritime enforcement action in
the CCAMLR area has been taken by Australia and France in the EEZs surrounding their Antarctic island territories. The growing tendency of IUU fishing in the EEZs of these countries has triggered more effective and rigorous enforcement practices by the concerned states in terms of implementing measures under the domestic laws of the coastal states. Thus, the cases concerning the prompt release of the detained vessels by coastal states such as Australia and France have been presented before ITLOS; these cases include the Volga, Camouco, Monte Confurco, and Grand Prince cases. In these cases, the main issues discussed by ITLOS were the ‘reasonableness’ of the bond and the security imposed by the concerned coastal states, which are likely to interpret and apply the provisions mentioned above in their own favour in order to justify their measures against the recently worsening practices of IUU fishing.

Therefore, the purpose of this paper is, first, to identify the major issues of the ITLOS jurisprudence, particularly in the prompt release cases, the judgments for which are adequate for deducing some general criteria for the concept of ‘reasonableness’, and second, to draw some conclusions on the current tendency in the law of the sea concerning prompt release and IUU fishery within the framework of the dispute settlement mechanism of the LOS Convention. Accordingly, it is necessary to briefly overview the essential points of each case on prompt release.

II. Some issues regarding the cases

Before considering the legal issues regarding the relationship between the prompt release of detained vessels and the enforcement of regulation by the coastal State, it is noteworthy that each case on prompt release at the ITLOS has its own particulars. This point should be discussed in detail.

Normally, with respect to cases of prompt release of a detained vessel under the LOS Convention, the two parties may choose, from among many options, the forum that will determine the conditions of the release. However, the ITLOS will seize if a decision is not taken within
ten days of detention. Under Articles 292 and 73(2) of the LOS Convention, arrested vessels and their crew shall be promptly released upon the posting of a reasonable bond or other security. Thus, the condition of ‘reasonableness’ and the content of ‘security’ are the main points of consideration here.

1. The *Saiga* Cases: Numbers 1 and 2

In the *Saiga* Case (No. 1), an oil tanker, the *Saiga*, whose flag was of Saint Vincent and the Grenadines, bunkered fishing vessels off the coast of Guinea and was arrested by Guinean Customs patrol boats. Saint Vincent and the Grenadines filed a case against Guinea, at the ITLOS, for the prompt release of the arrested vessel. According to Guinea, the bunkering had taken place in its contiguous zone and was an infringement of its customs legislation. The *Saiga* was arrested in Guinea’s EEZ following a hot pursuit. These prompt release proceedings were the first case before the ITLOS, and the first trial of the prompt release procedures under the Convention.

The Tribunal, by twelve votes to nine, held that the vessel be released on a bond of the amount of the gas oil taken from the vessel by Guinea and a further financial security of USD 400,000. The judgment did not clarify the requirements concerning ‘a reasonable bond’ but only stated that the ‘criterion for reasonableness encompasses the amount, the nature and the form of the bond’. Guinea’s objection that the application was inadmissible because no bond had been posted was not successful. As was pointed out by some of the judges who dissented, it may be said that, since the applicant in this case had not indicated non-compliance by the detaining State with respect to prompt release and as, therefore, the prompt release could not have been justified, the question of the amount or terms of the bond should not have addressed. The proceedings under Article 292 do not form a so-called preliminary or incidental case, but a discrete and definitive one. Although the judgment ‘leaves a number of important issues unresolved’, the Tribunal’s first judgment seems to have generally received a favourable evaluation.
The *Saiga* case (No. 2), in its first stage, dealt with the applicant’s request for indication of provisional measures by the Tribunal. The Tribunal delivered a unanimous Order, prescribing provisional measures for the continued detention of the *Saiga* and its crew. In the merits phase, the Tribunal considered the illegality of the arrest and detention of the *Saiga* and its crew, determined the liability caused by Guinea, and awarded damages for part of the loss due to the aforementioned discharges of gas oil.

2. The *Camouco* Case 18

In 2000, Panama filed an application against France, at the Tribunal, for the prompt release of the fishing vessel *Camouco*, whose flag was Panamanian, and its master, under Article 292 of the LOS Convention. The *Camouco* was arrested and detained by French authorities in 1999 for allegedly unlawful fishing of the Patagonian toothfish and for the *Camouco*’s illegal presence in the EEZ off the Crozet Islands (French Southern and Antarctic Territories). The main issues of this case were, first, whether the vessel should be released or not, and, second, the amount of bond or guarantee. The judgment was in favour of the release of the vessel and its master upon Panama’s posting of a bank guarantee or other agreed-upon financial security.

The Tribunal largely followed the precedent of the *Saiga* Case 19, but it also embarked on some new aspects of the matter. Under Article 292 of the LOS Convention, for the majority of the Tribunal, neither the time requirement for the application nor the principle of exhaustion of local remedies could hinder the scope of the Tribunal’s jurisdiction in these proceedings, since the phase of prompt release is a separate procedure that only deals with the question of release under Article 292(3) of the LOS Convention 20.

In a sense, the most important issue was the ‘reasonableness’ of the bond. Even though the Tribunal affirmed the reasonableness test that the *Saiga* (No. 1) judgment had indicated in its reasoning, the majority opinion in the judgment of the *Camouco* case also took into consideration factors such as the gravity of the alleged offences, the penalties
imposed or imposable under the laws of the detaining State, the estimated value of the detained vessel and cargo and the amount and form of the bond imposed by the detaining State\textsuperscript{21}. The amount of the bond that the Tribunal fixed was eight million FF, which was 40\% of the amount originally claimed by the detaining State, France\textsuperscript{22}.

3. The Monte Confurco Case\textsuperscript{23}

In 2000, Seychelles instituted proceedings against France at the ITLOS, for the prompt release of the Monte Confurco, a fishing vessel flying the flag of Seychelles, and its master, under Article 292 of the LOS Convention. The vessel was arrested by a French frigate in the EEZ off the Kerguelen Islands (French Southern and Antarctic Territories) for alleged illegal fishing and unannounced presence in the French EEZ.

The main issue, in this case as well, was the meaning of ‘reasonableness’ of the bond or guarantee that had been imposed by the French court\textsuperscript{24}. The Tribunal noted that the balance of interests in Articles 73 and 292 of the LOS Convention provided the guiding criterion for its assessment of the reasonableness of the bond\textsuperscript{25}. On the other hand, there was the coastal State’s interest to take the appropriate measures to ensure compliance with the laws and regulations adopted by it and on the other hand, the interest of the flag State to secure prompt release of its vessels and crew from detention. In order for the Tribunal to check whether the amount of the bond was excessive and unrelated to the gravity of the alleged offence, the judgment in this case followed the precedents of prompt release at the ITLOS, as in the Saiga and Camouco cases.\textsuperscript{26}

Since the arguments developed by the two parties were far apart and since there was a lack of time and ability in seeking evidence in support of the allegations of either party, the Tribunal had to follow precedents in applying various factors to the present case\textsuperscript{27}. After considering the gravity of the alleged offences and the range of penalties imposable under French law for the alleged offences, the value of the vessel detained and of the fish and fishing gear seized\textsuperscript{28}, the Tribunal in its judgment held that the bond imposed by the French court was not
reasonable, and reduced the amount of the bond by a third and ordered that the form of the bond be changed from cash or certified cheque (which had been ordered by the French court) to a bank guarantee\textsuperscript{29}.

By the time the judgement was rendered in this case, the jurisprudence of the prompt release cases at the ITLOS seemed to have almost been consolidated, in terms of the ‘reasonableness’ test. Needless to say, the Tribunal is required to evaluate both sides of the arguments of both parties so that it can reach a conclusion, the objectivity of which is supported by the Tribunal’s evaluation of the circumstances, which it deems to be convincing enough to be ‘reasonable’. However, it may also be said that this ‘reasonableness’ depends on the circumstances on which each case is based\textsuperscript{30}. Moreover, it has been made clear by the Tribunal that the ITLOS ‘is not an appellate forum against decisions of domestic courts’\textsuperscript{31}.

4. The Grand Prince Case\textsuperscript{32}

In 2001, Belize instituted proceedings against France at the ITLOS for the prompt release of the Grand Prince, flying the flag of Belize, and its master. The vessel was arrested in the French EEZ off the Kerguelen Island (in the French Southern and Antarctic Territories) for the alleged offences of illegal fishing and unannounced presence in the French EEZ. The French criminal court at Saint-Paul convicted the vessel, confiscated the vessel, equipment and fish cargo and fined the master two million FF.

What is unusual about this case was the decision, by 12 votes to nine, that the application of Belize be dismissed because Belize had no standing (\textit{locus standi}) to file it at the Tribunal. In regard to the documents produced by Belize, the Tribunal was not satisfied that the Grand Prince was a vessel registered with Belize at the time in question\textsuperscript{33}. In other words, in the view of the Tribunal, Belize did not discharge its onus to prove that the vessel had been registered under its law at the time of the application to the ITLOS\textsuperscript{34}.

There should be some remarks with respect to the arguments that would have been concerned with the merits phase between the parties
at the Tribunal. Although the case itself has little meaning as a reliable precedent of prompt release, since it was dismissed, it is noteworthy that IUU fishing activities in the Southern Ocean have become a serious matter of concern in maritime and fishery States despite the fact that the regime of the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) has been tackling this very issue intensively for the last decade. The present case should be considered in this context. The French attitude to IUU has been like this for the same reason.

The next case is the *Chaisiri Reefer 2* case in 2001, where Panama filed proceedings against Yemen, at the ITLOS, for the prompt release of a detained vessel, although the parties afterwards resolved the dispute and the vessel was released. Thus, the case was ordered to be discontinued and removed from the list of cases. Since the case was not dealt with at the Tribunal, there is no need for discussion on the issue of prompt release.

5. The *Volga* Case

In 2002, the Russian Federation submitted an application to the ITLOS against Australia, under Article 292 of the LOS Convention, for the release of the *Volga*, a long-line fishing vessel flying the flag of the Russian Federation, and three crew members (who were Spanish). The vessel was arrested by Australian authorities beyond the limits of the EEZ off the Australian territory of Heard Island and the McDonald Islands for alleged illegal (or IUU) fishing in the Australian EEZ. The master and the crew of the *Volga* were detained under Australian law, and the three major persons aboard were charged with criminal offences. After the criminal procedures, the Supreme Court of Western Australia upheld the appeal of the three members and ordered their release under certain conditions.

The issue before the Tribunal, again, was the reasonableness of the bond and/or other security. Russia argued that the bond sought by Australia was not reasonable since the conditions it imposed were against Article 73(2) of the LOS Convention. Australia maintained that the
bond was reasonable with regard to the circumstances of the particular case. The *Volga* was allegedly engaged in IUU fishing in the area covered by CCAMLR, and the continuing IUU fishery in this area was, for Australia, a matter of international concern. This point was central to the case even though this type of very essential and substantial issue may not be relevant in a prompt release case due to the limitation of the original framework of the mechanism enshrined in Articles 73 and 292 of the LOS Convention. The Tribunal was called upon to complete the task of deciding whether the bond set was reasonable or not in light of Article 292.

The Tribunal followed the reasonableness test that the *Camouco* case had used when it assessed the relevant factors concerning the reasonableness of the bond or other financial securities. The Tribunal reiterated that the purpose of the procedure under Article 292 was to secure a prompt release of the vessel and its crew upon the posting of a reasonable bond, pending completion of the judicial procedures before the domestic courts of the detaining State. The Tribunal sought a balance between the gravity of the alleged offences and the penalties that may have been imposed for them under Australian law.

What is peculiar about the present case is that the Tribunal had to deal with the question of whether the additional conditions that Australia had imposed upon the release of the vessel were within the meaning of the terms of Article 292 or not. These conditions were that the vessel (should) carry a vessel monitoring system (VMS) and that the information details about the owner and the ultimate beneficial owner of the vessel be submitted to its authorities. However, the Tribunal ruled that since the term ‘bond or other security’ in Articles 73(2) and 292 of the LOS Convention should be interpreted as referring to a bond or security of a purely financial nature due to the lack of clear expression to this effect in any part of the LOS Convention, non-financial conditions such as those imposed by Australia, i.e., a ‘good behaviour bond’, could not be considered a bond or other financial security under the Articles mentioned above. The Tribunal only accepted the amount that represented the full value of the vessel, fuel, lubricants and fish-
ing equipment, and did not accept the non-financial conditions set down by Australia since they could not be considered to be components of the bond or other security.

Australia sought the legality of the imposition of a ‘good behaviour bond’ to prevent future violation. The Tribunal, however, did not consider it to be a proper bond or security within the meaning of Article 73(2) of the LOS Convention since it interpreted Article 73 as one that envisages enforcement measures in respect of the violation of a coastal State’s laws and regulations that is alleged to have been committed. Therefore, in this case, it may be said that the procedures concerning prompt release are very narrowly set and framed, and that the Tribunal interpreted the provisions concerning prompt release literally and did not allow any derogation by way of imposing additional conditions apart from the terms under the relevant Articles.

6. The Juno Trader Case

In 2004, Saint Vincent and the Grenadines instituted proceedings against Guinea-Bissau, at the ITLOS, for the prompt release of the reefer vessel Juno Trader, which was flying the flag of Saint Vincent and the Grenadines. The vessel and its crew were allegedly detained by the Guinea-Bissau authorities for the violation of national fisheries laws in its EEZ.

After finding that the application was well-founded and that the respondent should promptly release the vessel upon the posting of a reasonable bond, the Tribunal moved on to consider the factors determining the reasonableness of a bond by relying on jurisprudence concerning prompt release cases at the ITLOS. First of all, it assessed the proportionality of the gravity of the alleged offences to the amount of the bond imposed or imposable. The main issue in this case was the amount of the bond on the basis of the value of the Juno Trader and the cargo, both of which had to be decided by the Tribunal due to the severe difference in the arguments of both parties.

The judgment rendered by the Tribunal was a unanimous decision on all points, which was extremely rare in the light of the jurisprudence
of the ITLOS, although some declarations and separate opinions of the judges were attached to the judgment. In other words, the substantial issue of this case was apparent and had almost no disagreement among the judges. The significance of this case, in terms of precedence, is the Tribunal’s statement that the obligation of prompt release ‘includes elementary considerations of humanity and due process of law’ and that there must be a ‘concern for fairness’ in the process of fixing a reasonable bond\textsuperscript{50}. As is shown in the judgment of this case\textsuperscript{51}, the assessment of the relevant factors concerning the prompt release of the vessel and its crew must be ‘an objective one, taking into account all information provided to the Tribunal by the parties’\textsuperscript{52}. This point was also repeated by some judges in their opinion that a fair trial and due process must be guaranteed\textsuperscript{53}.

7. The Hoshinmaru Case\textsuperscript{54}

In 2007, Japan instituted a case against the Russian Federation, under Article 292 of the LOS Convention, for the prompt release of the Hoshinmaru, which flew the flag of Japan, and its crew, both of which were detained by the Russian authorities for the alleged violation of national fisheries laws in its EEZ.

Even though the Russian Federation objected to the admissibility of the case on the grounds that no bond had been set by the time of the filing of the application (though the bond was set a week later), the Tribunal found it admissible since a Russian objection of this kind did not change the nature of the dispute, but narrowed the scope of the dispute in terms of the reasonableness test\textsuperscript{55}. The time requirement to set a bond is not provided for in the LOS Convention, but both parties agreed that it should be set within a reasonable time. Here, again, the question is concerned with the reasonableness test under Article 292, i.e., that of the time required for setting a bond.

A more fundamental issue in this case was the reasonableness of the bond set by the Russian Federation. The Tribunal did not accept the argument made by the respondent that the penalty should be calculated on the basis of the amount of the fish allegedly illegally taken,
the value of the vessel and the administrative expenses of conducting the investigation for the Russian authorities, and that these factors were set out and agreed upon with Japan in the Russian-Japanese Joint Commission on Fisheries. The Tribunal did not find it sufficient to establish the acquiescence of the Japanese representatives in the process of the calculation of the bond\textsuperscript{56}. Unlike the other cases of prompt release, this case did not entail a matter of IUU fishing activities, since the vessel and the crew had a licence\textsuperscript{57}.

Moreover, taking into account jurisprudence\textsuperscript{58}, the Tribunal found it not reasonable, in light of the circumstances of the present case, to set the bond on the basis of the maximum penalties, or to calculate the bond based on the confiscation of the vessel\textsuperscript{59}. The Tribunal reduced the amount of the bond set by Russia by more than half, considering the proportion of the amount of the bond to the gravity of the alleged offences\textsuperscript{60}, although it showed, to a certain degree, its understanding of the serious situation and the dangers of over-exploitation caused by IUU fishing in the area\textsuperscript{61}. The judgment given was unanimous, though there were some declarations and a separate opinion. In other words, the legal question was not extremely complicated but was fairly clear.

8. The Tomimaru Case\textsuperscript{62}

In this case, as well, Japan instituted an application against the Russian Federation for the prompt release of the fishing vessel Tomimaru, which flew the flag of Japan. The vessel had been confiscated on the basis of the decision of the respondent’s local court. Moreover, the release of the master and crew was not at issue since they had been released before this decision. The main issue was the detention of the vessel and its crew by the Russian authorities for the alleged violation of national fisheries laws in its EEZ.

However, the Tribunal unanimously found that the application was without object\textsuperscript{63}. The Tribunal differentiated the two important questions: (1) whether confiscation may have an impact on the nationality of a vessel; and (2) whether confiscation renders an application for the prompt release of a vessel without object\textsuperscript{64}. The Tribunal denied the
impact in the first question on the grounds that the balance of interests of the flag State and of the coastal State established in the LOS Convention must be maintained. In other words, ‘the confiscation of a vessel does not result per se in an automatic change of a flag or in its loss’\(^{65}\). As for the second question, the Tribunal answered positively and emphasised the importance of the prompt action that the flag State is responsible for under Article 292. According to the judgment, the Tribunal could consider an application for prompt release while proceedings still were before the domestic courts of the detaining State\(^{66}\).

Normally, confiscation incurs the transfer of title from the owner of the material in question to the detaining State. In the present case, since the Supreme Court of the Russian Federation had rendered its final decision, which brought an end to the procedure before the domestic courts, the Tribunal was rather obliged to refrain from considering the case, in accordance with Article 292(3) of the LOS Convention, which provides for not giving ‘prejudice to the merits of any case before the appropriate domestic forum against the vessel or its crew’\(^{67}\). Thus, the Tribunal found that the application was without object.

**III. Considerations of the issues**

As the Tribunal’s jurisprudence on prompt release demonstrates, the most important issue in this regard is the reasonableness test. The relevant factors that must be taken into account are now almost identifiable thanks to the development of case-law at the Tribunal. As is suggested, Article 73 of the LOS Convention appears to permit confiscation of the catch, the vessel and the equipment as punishment for violating coastal state laws and regulations.

The only specific restriction imposed on penalties for violations of fisheries laws and regulations in the EEZ is that they may not include imprisonment (in the absence of agreement to the contrary by the states concerned) or any other form of corporal punishment\(^{68}\). No additional condition concerning imposing a bond is admitted by the Tribunal. Regarding this aspect, the Tribunal’s strict approach in applying the
relevant provisions of UNCLOS is comparatively consistent throughout the jurisprudence, with the result of fairly solid (almost unanimous) decisions, which have been favourable for the applicants and not for the respondents.

However, it is also necessary to pay attention to the trend of many coastal States enacting legislation that empowers the coastguard or fishery protection agencies to board and inspect fishing vessels in the EEZ, and that these measures have been functioning mainly for a safeguard against IUU fishing, in the maritime areas of the Southern Ocean and in others areas, where IUU fishing has been considerably at issue among the States concerned. Some States have great concern about IUU fishing and have tried to tighten their regulation measures, such that the posture and attitude to IUU fishing of these more tightened measures will serve as a lesson or as a warning to others in the future.

Thus, these measures, including those of non-repetition of actions of the same kind, and severe penalties may incur a dispute concerning the prompt release of the detained vessels and their crew. In other words, in almost all the cases, there is inevitably a link between the substantive issue and that of prompt release. However, the jurisprudence has consistently turned a blind eye to this aspect within the framework of prompt release under the LOS Convention. This seems to have been so only in the name of ‘balancing the interests of the flag States and those of the coastal States’. There is, however, much debate about the question whether this slogan has been really kept at the Tribunal.

The next noteworthy point is that confiscation extinguishes the duty to release the vessel on bond, as was unanimously decided in the Tomimaru case. The Tribunal cautioned the flag State about undue delay, by stating:

'[C]onsidering the objective of Article 292 ..., it is incumbent upon the flag State to act in a timely manner. This objective can only be achieved if the shipowner and the flag State action within reasonable time either to have recourse to the national judicial system of the detaining State or to initiate the prompt release procedure under Article 292'.

121
In this connection, it is necessary to refer to the precedent in which the Tribunal did not accept the argument for a requirement of the exhaustion of local remedies before an application for prompt release could be submitted. The judgments rendered have emphasised the avoidance of undue delay, denial of justice (due process of law), etc.

The issue of confiscation, in this context, contains a very complicated and ambiguous problem that touches upon the relation between domestic law and international law. At least within the framework of prompt release under the LOS Convention, the procedures concerning prompt release have a limited function with a limited purpose, so that both national law and international law will have no conflict, in terms of this framework, under the LOS Convention.

IV. Conclusions

In sum, the following conclusions may be drawn.

First, the jurisprudence on prompt release at the ITLOS seems to have been considerably developed and consolidated. Its procedures are solely for their own purposes and are independent of the merits of the case, under Articles 73 and 292 of the LOS Convention, whose purpose is to strike a balance between the interests of the coastal and flag States. From the point of view of the coastal States, the proceedings at the Tribunal on prompt release will not meet their wishes, which tend to seek for harder measures to enforce their domestic legislation against IUU fishing. This may be understandable in the sense that the prompt release proceedings are not necessarily targeted at combating IUU fishery, but at the just and humanitarian approach of the last resort within the LOS Convention regime.

The nature and purpose of the procedures on prompt release, therefore, have nothing to do with the legality or illegality of the matters at issue in each case, no matter how strong and deep the connections between IUU fishing and prompt release cases may be. In this sense, the mechanism for prompt release under the relevant provisions in the LOS Convention may have been misunderstood or misused, mainly in the
cases involving IUU fishery issues. The LOS Convention is, needless to say, the typical result of a compromise between the coastal states and the flag states; this is also the case with the institution of prompt release in the LOS Convention.

However, it should be noted that the original purpose and objective of the prompt release mechanism are not to protect the values that are referred to under Part V of the LOS Convention, such as the conservation of the living resources of the sea and the effective enforcement of national fisheries laws and regulations, or to provide scope for ITLOS to challenge the discretionary powers of the coastal states in implementing measures concerning the enforcement of national laws and regulations on the management of marine living resources in the EEZ.

The purpose of the procedure in Article 292 is to secure the prompt release of a vessel and its crew on the posting of a reasonable bond, pending the completion of the judicial procedures before the courts of the detaining state. Thus, the Tribunal is called upon to decide solely if the bond set was reasonable according to Article 292 of the LOS Convention. Therefore, the Tribunal has clarified that non-financial conditions (such as a ‘good behaviour bond’) cannot be considered a ‘bond or other financial security’ for the purpose of applying Article 292 with respect to alleged violation of Article 73 (2) of the LOS Convention. Thus, in this context, it should be considered that the ITLOS and, more specifically, the prompt release mechanism are ineffective at properly addressing the issue of regulating IUU fishing, and that the LOS Convention itself does not provide a suitable or appropriate institution or mechanism to cope with this issue. In other words, the disputes between the coastal states and the flag states arising from the issue of regulating IUU fishing may not be substantially resolved under the LOS Convention regime. A study of the cases on prompt release suggests that the limited use, if not the ineffectiveness, of the dispute settlement mechanism under the LOS Convention in regulating or managing global fishery activities has made a significant impact on the development of regional and sub-regional complementary institutions such as the CCAMLR regime.
It may also be said that the reasonableness test concerning the assessment of the relevant factors for setting a bond prevails in the unreasonable and ironic situations in which coastal States have had difficulties in enforcing their more effective domestic measures.

Second, the Tribunal has cautioned both the coastal and flag States not to abuse the domestic procedures of confiscation and to file cases for prompt release on time, despite the risk that the conditions of the domestic procedure conditions on the merits of a case on IUU fishery may have the effect of rendering the case at the ITLOS without object. Here we see the entangled but separated relationship between the domestic legal system and international legal order.

Finally, although the jurisprudence on prompt release at the ITLOS is still under development, one thing has become certain and clear: the procedures have been functioning with the results, per se, that the Convention framework intended. In connection to this, the following comment was made by an eminent international lawyer, former Judge Shigeru Oda, at the International Court of Justice (ICJ):

'It seems to [Judge Oda] that the whole structure of provisions for the prompt release of vessels and their crews under Article 292 in the Convention does not make any sense and is in fact unworkable. The relevant provision was drafted at UNCLOS III simply on the basis of wishful thinking, arising from a lack of understanding of the whole situation relating to the exercise of coastal jurisdiction in the exclusive economic zone'.

It is of interest that the first half of this statement has turned out to be beside the point and flawed. Rather, now, the utility of the Tribunal may be more highly valued. For Judge Oda and those who have been critical of the dispute settlement mechanism of the LOS Convention, the prompt release procedures may be the product of compromise between the coastal States and the flag States, i.e., the counterbalance of the ‘creeping jurisdiction’ of the coastal States that had been exceedingly prevalent at the time of the conclusion of the LOS Convention. However, more importantly, if one takes a careful look at the bigger picture of world fishery, which has been endangered by IUU fishing, one
will find it ironic that the reasonableness test in prompt release cases before the ITLOS does not ‘make any sense’ or is ‘unworkable’ in situations where repetitive IUU fishing has not been effectively suppressed.

(1 December 2009)

[Note] A part of this research was funded by the Research Grants of the Ministry of Education, Science and Technology. The author of this paper is also indebted to the service provided by the library of the SciencesPo in Paris, where he was ‘Professeur invité’ from February through March 2009.

1 See the following nine cases among others: (1) The M/V Saiga case (Saint Vincent and the Grenadines v. Guinea), Case No. 1, Prompt Release; (2) The Camouco case (Panama v. France), Case No. 5, Prompt Release; (3) The Monte Confurco case (Seychelles v. France), Case No. 6, Prompt Release; (4) The Grand Prince case (Belize v. France), Case No. 8, Prompt Release; (5) The Chaisiri Reefer 2 case (Panama v. Yemen), Case No. 9, Prompt Release; (6) The Volga case (Russian Federation v. Australia), Case No. 10, Prompt Release; (7) The Juno Trader case (Saint Vincent and the Grenadines v. Guinea-Bissau), Case No. 13, Prompt Release; (8) The Hoshinmaru case (Japan v. Russian Federation), Case No. 14, Prompt Release; (9) The Tomimaru case (Japan v. Russian Federation), Case No. 15, Prompt Release. All the relevant materials of these cases are from the following ITLOS official web site: http://www.itlos.org/start2_en.html


4 See Rothwell & Stephens, above n. 2, pp. 186-187; White, above n. 2, pp. 1050-1051.


For a recent study on enforcement practice in the CCAMLR area, see D. Guilfoyle, Shipping Interdiction and the Law of the Sea, Cambridge University Press, 2009, pp. 140-156.

For more detailed description, see for example Rothwell and Stephens, above n. 2; Guilfoyle, above n. 9, p. 155.


The Saiga Judgment, para. 60.

The Tribunal chose not to address the question whether bunkering in the EEZ was an activity associated with fishing activities or an activity associated with the operation of ships in the meaning of Article 58 of the LOS Convention. On this point, see Gavouneli, above n. 5, pp. 67-68. And see also Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto, para. 21.

The Saiga Judgment, para. 82.

See, for example, Dissenting Opinion of President Mensah, para. 5.

White, above n. 2, p. 1030.

Lowe, above n. 3, p. 196.


The Saiga (No. 1) Judgment, paras. 63 & 66.

‘Article 292 provides for an independent remedy and not an appeal against a decision of a national court.’ The Camouco Judgment, para. 58.

Judgment, para. 70.

Judgment, para. 74.

See, among others, Lowe, above n. 18, pp. 562-567.

The Monte Confurco Judgment, para. 68.

Judgment, para. 72.

Judgment, para. 76.

Judgment, paras. 77-88.

In its Judgment, the Tribunal’s reasoning is ‘not entirely clear’ and troubling, as is pointed out by Lowe, above n. 18, pp.565-566.

Judgment, paras. 89 & 93.

Lowe criticises the Tribunal’s approach, by maintaining that ‘the Tribunal seems to be in danger of straying into territory that properly belongs to the local court’. Lowe, above n. 18, p. 566. In this sense, see also Judge Mensah’s Declaration and the Dissenting
Opinions by Judges Anderson and Jesus.

31 Lowe, above n. 18, p. 567.


33 The Grand Prince Judgment, para. 76.

34 Judgment, paras. 83-93.

35 See on this regime the following site: http://www.ccamlr.org/default.htm See also the detailed analysis of Baird, above n. 7, pp. 121-182.


38 Regarding the Australian national measures in question, see Baird, above n. 7, pp. 183-240. See also Freestone et al., The Law of the Sea, above n. 2, pp. 299-303.


40 The Volga Judgment, paras. 60-61.

41 In its judgment, the Tribunal ‘understands the international concerns about illegal, unregulated and unreported fishing and appreciates the objectives behind the measures taken by States, including the States Parties to CCAMLR, to deal with the problem’. Judgment, para. 68.

42 The Camouco Judgment, para. 67. The Tribunal also relied on the Monte Confurco Judgment, paras. 71-72.

43 The Volga Judgment para. 69.

44 Judgment, para. 75.

45 Judgment, para. 79.

46 Judgment, para. 80.

47 It is noteworthy that Judge ad hoc Shearer, who was appointed by Australia, and Judge Anderson dissented and that both Judges supported the idea that a broader interpretation of the relevant provisions of the LOS Convention may be allowed in light of the seriousness of the offence and the relevant circumstances therein. See their dissenting opinions.

48 An interesting follow-up to this case has been seen in the form of a judgment in civil proceedings before the Federal Court of Australia, which cannot be fully discussed in this paper. See Churchill, 2006, above n. 37, pp. 4-5.

49 See, among others, the following: Churchill, above n. 37, pp. 6-11; White, above n. 2, pp. 1045-1047.

50 The Juno Trader Judgment, para. 77.

51 Judgment, para. 85.

52 The Tribunal considered the question of the gravity of the alleged offences, the fines actually imposed, the penalties imposable, the value of the Juno Trader, and the value of the cargo. Judgment, paras. 86-93.

53 See Joint separate opinion of Judges Mensah and Wolfrum, para. 3.

The *Hoshinmaru* Judgment, para. 66.

Judgment, para. 85.

Judgment, para. 98.

Judgment, para. 82.

Judgment, para. 93.

The Tribunal stated that ‘the amount of a bond should be proportionate to the gravity of the alleged offences’. Judgment, para. 88.

Judgment, para. 99.


The *Tomimaru* Judgment, para 82.

Judgment, para 69.

Judgment, para. 70.

Judgment, paras. 75-78.

Judgement, paras. 79-80.

According to Churchill & Lowe, above n. 2, p. 292, some thirty-two States, a number of which are parties to the Convention, do provide in their legislation for imprisonment, even in the absence of agreements with other States.

For the current situations of the Southern Ocean, see Rothwell & Stephens, above n. 2, pp. 172-175.

For example, Gao also refers to this point, stating that ‘[t]he prompt release of detained vessels and arrested crews cannot be an issue isolated from those fundamental questions that relate to the competence of the coastal State with respect to the EEZ’. Gao, above n. 2, p. 131. See also S. Oda, ‘Dispute Settlement Prospects in the Law of the Sea’, (1995) 44 ICLQ 863, 866.

See the following Tribunal’s judgments to the same effect: the *Monte Confurco* Judgment, paras. 70-72; the *Volga* Judgment, para. 65; the *Juno Trader* Judgment, para. 89; the *Hoshinmaru* Judgment, para. 88; the *Tomimaru* Judgment, para. 74.

According to Anderson, ‘Article 292 may operate to avoid injustice’ if the issue is whether or not the detained vessel should be released on appropriate terms. Anderson, above n. 2, p. 295.

See, for example, Cogliati-Bantz, above n. 54, pp. 253-257.

See, for example, Gao, above n. 2, pp. 133-135

See for example the dissenting opinion of Judge Anderson in the *Camouco* case.

See for example the dissenting opinion of Judge Wolfrum in the *Camouco* case.

Para. 69 of the Judgment in the *Volga* case.

Para. 77 of the Judgment in the *Volga* case.

See the criticism of the articles (Anderson, Rothwell, etc.) above n. 2.

Oda, above n. 70, 44 *ICLQ* 863, 866-867.