

# ITLOS: Provisional Measures and Prompt Release

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# Provisional Measures v. Prompt Release

- Will be discussed separately as they address different remedies and are addressed separately in LOS Convention
- Provisional Measures: article 290
- Prompt Release: articles 73(2), 111(7), 226(1)(b), 226(1)(c), 292

# Provisional Measures

- LOS Convention Article 290(1) provides:
- Court (ICJ or ITLOS), ITLOS Seabed Dispute Chamber or arbitral tribunal is empowered -
  - to preserve the respective rights of the parties to the dispute, or
  - to prevent serious harm to the marine environment,
- pending final decision
- Article 290(5) - may act pending constitution of arbitral tribunal

# ITLOS on Provisional Measures

- Annex VI, ITLOS Statute, article 25, authorizes a special chamber to act (article 15) when no ITLOS quorum
- ITLOS Rules on provisional measures articles 89-95, online at [www.itlos.org/fileadmin/itlos/documents/basic\\_texts/Itlos\\_8\\_E\\_17\\_03\\_09.pdf](http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf)

# Provisional Measures

- Traditional purpose -- Preserve *status quo pendente lite* and maintain international peace and good order
- New purpose -- Protection of marine environment
- ITLOS – *prescribe* provisional measures
  - ICJ article 41 – *indicate or require* provisional measures
- Jurisdiction *prima facie* over the merits (parties and subject matter)
- Procedural urgency awaiting establishment of tribunal (para. 5 only)
- **Exercise of optional exclusion under article 297 not a bar**
- **Preserve rights of both parties (ITLOS) vice of *either* party (ICJ)**
- Separate opinions of Judge Laing, M/V *Saiga*, No. 2, and Southern Bluefin Tuna

# Provisional Measures-Jurisdiction

- Under article 290(1) to decide *prima facie* of its own jurisdiction, vice 290(5) to decide *prima facie* jurisdiction of another court/tribunal
- “*prima facie*”: a possible basis on which the jurisdiction of the Court might be founded (1972 ICJ Rep. 16, para. 17)
- Dispute with regard to interpretation or application of LOS Convention must have arisen by time application was filed
- “dispute” = disagreement on a point of law or fact, a conflict of views or interests
- Diplomatic exchanges necessary only in disputes re LOSC (article 283)
- Dissenting opinions in ITLOS M/V *Louisa* case felt there was no *prima facie* showing of jurisdiction

# Provisional Measures-Requirements

- Preservation of rights of parties: credible possibility that prejudice of rights might occur
- Irreparable harm/prejudice: not possible to restore injured party materially to situation if infraction occurred or not made good by payment of indemnity, compensation or restitution
- Urgency – time period
  - 290(1) case: pending final decision of case, vice
  - 290(5) case: pending constitution of tribunal (much shorter)
- Mensah, J., separate opinion MOX Plant case

# ITLOS Cases on Provisional Measures

- Under article 290(1):
  - M/V *Saiga* Case (St Vincent v Guinea), No. 2, 11 March 1998
  - Swordfish case (Chile v European Community), No. 7, 2000-2009
  - M/V *Louisa* Case (St. Vincent v Spain), No. 18, 23 Dec. 2010
- Under article 290(5) (pending establishment of arbitral panel):
  - Southern Bluefin Tuna Cases (NZ v Japan; Australia v Japan), Nos. 3 & 4, 27 August 1999
  - MOX Plant Case (Ireland v UK), No. 10, 3 December 2001
  - Land reclamation Case (Malaysia v Singapore), No. 12, 8 October 2003
  - The *ARA Libertad* Case (Argentina v Ghana), No. 20, 15 December 2012
  - The *Arctic Sunrise* Case (Netherlands v Russia), No. 21, 22 November 2013



## Article 290(1) Cases on Provisional Measures

- M/V *Saiga* was detained on 28 October 1997 by Guinea in its EEZ for bunkering operations and detained until 4 March 1998. On 11 March 1998 ITLOS ordered provisional measures that Guinea not take any new measures against the ship or crew.
- M/V *Louisa*, a research vessel was detained at dock by Spain on 1 February 2006 notwithstanding a Spanish permit to conduct its activities, and remained in detention until after the filing of the request for provisional measures on 23 November 2010. On 23 December 2010 ITLOS (17-4) found it had *prima facie* jurisdiction but declined to prescribe provisional measures in light of Spain's assurances of protection of the marine environment from *Louisa* at the dock in Cadiz, and thus no harm to environment
- *Swordfish* case never got to a hearing

## Article 290(5) Cases on Provisional Measures pending establishment of Arbitral Panel

- Southern Bluefin Tuna case: provisional measures were prescribed (20-2) against Australia, NZ and Japan to limit scope of Japan's experimental fishing program and promote conservation and management
- MOX Plant: provisional measures were ordered against Ireland and the UK to consult on effects of opening of the MOX plant on the coast of the Irish sea. No urgency to justify Ireland's request
- Land reclamation: ordered provisional measures against Malaysia and Singapore to have experts report on effects of Singapore's land reclamation efforts, and ordered Singapore not to reclaim land so as to irreparably harm Malaysia or environment

## Article 290(5) Cases on Provisional Measures (2)

- *ARA Libertad*, an Argentinean Navy training vessel, on diplomatically approved port visit in Ghana, was detained in satisfaction of a NY court order re defaulted Argentinean government bonds. Argentina sought and obtained provisional measures ordering release of the vessel and crew
- *M/V Arctic Sunrise*, a Dutch registered Greenpeace ship, was detained by Russia after crew boarded a Russian oil platform in EEZ. With Russia not participating, ITLOS ordered release of ship and crew

# Prompt Release of Vessels and Crews

- LOS Convention, articles 73(2), 111(7), 226(1)(b), 226(1)(c), 292
- Article 73(1) permits a coastal State to board, inspect, arrest and sue vessels in its EEZ to ensure compliance with its EEZ laws and regulations
- Article 73(2) provides that arrested vessels and crews “shall be promptly released upon the posting of reasonable bond or other security.”
- Article 73(3) provides that penalties for violating EEZ fisheries laws and regulations “may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.”
- Article 73(4) requires notice to flag State

# Prompt Release – Article 111(7)

- In the article on hot pursuit, an exception to the normal rules:
- the release of a ship arrested within a coastal State's jurisdiction and escorted to port for inquiry may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the EEZ or high seas, if the circumstances [of the escort] rendered it necessary

# Prompt Release – Article 226

- If investigation of foreign vessel indicates a violation of applicable laws and regulations, or international rules and standards, for protection and preservation of marine environment, the vessel and crew shall be released “promptly subject to reasonable procedures such as bonding or other appropriate financial security” (para. 1(b))
- Release of vessel may be refused or made conditional upon proceeding to nearest appropriate repair yard, if release “would present an unreasonable threat of damage to the marine environment”. Flag State must be notified. Prompt release may be sought under article 292. (para. 1(c))
- No cases invoking article 226

# Prompt Release – Article 292(1)-(2)

- Compulsory dispute resolution rules on prompt release of vessels and crews when detaining State has not complied with other provisions for prompt release on posting of reasonable bond or other financial security
- Question may be submitted to any court/tribunal agreed to by the parties
- Otherwise, within 10 days of detention, to court/tribunal accepted by detaining State under article 287, or to ITLOS, unless the parties otherwise agree
- Application may be made only by or on behalf of flag State

# Prompt Release-Article 292(3)-(4)

- Court/tribunal
  - “shall deal without delay with the application”
  - “shall deal only with the question of release” without prejudice to domestic proceedings on the merits
- Detaining State may release vessel or crew “at any time”
- Upon posting of bond/financial security “determined by” the court/tribunal, detaining State “shall comply promptly with” court/tribunal’s decision concerning release of vessel or crew



# ITLOS Rules on Prompt Release

- Rules articles 110-114, online at [www.itlos.org/fileadmin/itlos/documents/basic\\_texts/Itlos\\_8\\_E\\_17\\_03\\_09.pdf](http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf)
- Guidelines on posting of bond or other financial security with the Registrar, 1 March 2009, online at [www.itlos.org/fileadmin/itlos/documents/basic\\_texts/Guidelines\\_Bond\\_17\\_03\\_2009\\_E.pdf](http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Guidelines_Bond_17_03_2009_E.pdf)

# ITLOS Cases on Prompt Release

- The M/V *Saiga* Case (St. Vincent & Grenadines v Guinea), No. 1, 4 December 1997
- The M/V *Camouco* Case (Panama v France), No. 5, 7 Feb. 2000
- The F/V *Monte Confurco* Case (Seychelles v France), No. 6, 18 December 2000
- The F/V *Grand Prince* Case (Belize v France), No. 8, 20 April 2001
- The F/V *Chaisiri Reefer 2* Case (Panama v Yemen), No. 9, 13 July 2001
- The F/V *Volga* Case (Russia v Australia), No. 11, 23 December 2002
- The F/V *Juno Trader* Case (St. Vincent & Grenadines v Guinea-Bissau), No. 13, 18 December 2004
- The F/V *Hoshinmaru* Case (Japan v Russia), No. 14, 6 August 2007
- The F/V *Tomimaru* Case (Japan v Russia), No. 15, 6 August 2007

# Why Prompt Release?

- From flag State perspective, to guard against over-long periods of detention pending trial, and risks of imposition of excessive penalties in national courts
- From coastal State perspective, secure appearance in court of Master and payment of penalties

*(Monte Confurco, para. 71)*

- Not dependent on existence of legal dispute
- Exhaustion of local remedies not required
- Separate proceeding from any other international or national case

# Who may invoke?

- Flag State party's representative
  - *Volga* case
  - *Hoshinmaru* case
  - *Tomimaru* case
- "On behalf of State Party" (292(2))
  - M/V *Saiga*
  - *Cumouco*
  - *Monte Confurco*
  - *Grand Prince*
  - *Juno Trader*

# Which Forum?

- In practice, only ITLOS
  - Geared to act quickly
- ICJ has no rules implementing article 292
- Takes too long to constitute an arbitral tribunal

# Prerequisites

- Must be the flag State at time the application was made, not earlier, at time of detention or failure to release on bond (*Grand Prince*, para. 93)
- “Detained”: any form of restraint (crew: *Monte Confurco*, para. 90), except final order of forfeiture of vessel (*Tomimaru*, para. 80)
- Article 73 limited to fishing vessels, support and catch transport vessels
- Bunkering of fishing vessels in EEZ: ordered release in *M/V Saiga* but in *Virginia G* (2014) can be regulated by coastal State under Article 56 and state practice

# Limitations in Prompt Release Cases

- Article 292 authority does not extend to supervising article 73(3) (penalties) and 73(4) (notice to flag State) (*Camouco*, para. 59; *Monte Confurco*, para. 63)
- Limited to question of release, not related matters (*Volga*)
- Bond does not have to be posted before invoking article 292 (*M/V Saiga*, para. 76)
- Tests for “reasonableness of bond”: *M/V Saiga*, para. 82; *Camouco*, para. 67; *Monte Confurco*, para. 76; *Volga*, para. 65; *Juno Trader*, para. 85; *Hoshinmaru*, para. 88
- Scope of “other financial security”: *M/V Saiga*, paras. 85 & 85; *Monte Confurco*, para. 93; *Volga*, para. 77

# Other Resources

- Judge David Anderson, “Prompt Release of Vessels and Crews,” *Max Planck Encyclopedia of Public International Law* (vol. VIII, pages 499-507, 2008, and online at [opil.ouplaw.com/home/EPIL](http://opil.ouplaw.com/home/EPIL))
- Judge P.C. Rao, “The International Tribunal for the Law of the Sea,” *Max Planck Encyclopedia of Public International Law* (vol. VI, pages 188-199, 2011, and online at [opil.ouplaw.com/home/EPIL](http://opil.ouplaw.com/home/EPIL))