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ITLOS CASE № 6 "MONTE CONFURCO" (SEYCHELLES V. FRANCE): THE APPLICATION OF UNCLOS 82 RULES

The Article is devoted to analysis of ITLOS Case №6 "Monte Confurco" and the practice of application of UNCLOS 82 rules while deciding this case. The importance of deciding of this case for the international practice in the field of the Law of the Sea.

The results of deciding of the case and further ways of development of the international practice for creating the legal basis in deciding similar cases.

Keywords: International Tribunal for the Law of the Sea, UNCLOS 82, Monte Confurco, France, Seychelles.

Кобзар А., Рябов М. ITLOS Справа №6 m/x «Monte Confurco»: застосування положень Конвенції ООН з морського права 1982 року. – Стаття.

Стаття присвячена аналізу справи «Monte Confurco» і вивченню практики застосування положень Конвенції ООН з морського права 1982 року при вирішенні цього спору. Розкрито значення вирішення даного спору для міжнародної практики у сфері морського права. Проаналізовані результати врегулювання спору і подальші шляхи розвитку міжнародної практики для створення правових базисів у випадках вирішення аналогічних спорів.

Ключові слова: Міжнародний трибунал з морського права, *UNCLOS 82*, Monte Confurco, Франція, Сейшельські острови.

Кобзарь А., Рябов М. ITLOS Дело №6 m/x «Monte Confurco»: применение положений Конвенции ООН по морскому праву 1982 года. – Статья.

Статья посвящена анализу дела «Monte Confurco» и изучению практики применения положений Конвенции ООН по морскому праву 1982 года при разрешении этого спора. Определено значение разрешения данного спора для международной практики в сфере морского права. Проанализированы итоги урегулирования спора и дальнейшие пути развития международной практики для создания правовых базисов в случаях разрешения аналогичных споров.

Ключевые слова: Международный трибунал по морскому праву, *UNCLOS 82*, Monte Confurco, Франция, Сейшельские острова.

Introduction

The “Monte Confurco” Case was the third prompt release matter to come before the Tribunal. The application for the prompt release of the “Monte Confurco” and its Master was brought on behalf of Seychelles against France on 27 November 2000 [1, p. 4]. The “Monte Confurco” was flying the flag of Seychelles while engaged in longline fishing in the Southern seas when on 8 November 2000 French authorities in the EEZ of the Kerguelen Islands boarded it [1, p. 11]. An estimated 158 tons of Patagonian toothfish was found on board the “Monte Confurco” that was allegedly caught illegally [1, p. 12].

In the proceedings before ITLOS, France claimed that the amount of 56,400,000 French francs as fixed by the court of first instance at Saint Paul was reasonable for the release of the “Monte Confurco” and its Master [1, p. 5, 13]. Seychelles pleaded with the Tribunal to set a bond

in the maximum amount of 2,200,200 French francs [1, p. 8]. Seychelles also requested the Tribunal to consider the value of the cargo, fishing gear, bait and gasoil amounting to 9,800,000 French francs, to form a part of the guarantee [1, p. 10].

In its judgment, the Tribunal indicated that in the assessment of a reasonable bond, the Tribunal would treat the laws of the detaining state and the decisions of its courts as relevant facts [1, p. 20]. In the same vein, it opined that the amount of the bond should not be excessive and unrelated to the gravity of the alleged offences [1, p. 21]. In this context, the Tribunal has been criticised for sidestepping the question of how a situation needs to be handled where state practice varies from its statutory laws in the enforcement of fisheries laws, particularly on the issue of imprisonment.

The Tribunal recalled its words from the judgment in the "Camouco" Case where it had pointed out a number of factors relevant to the assessment of a bond, including the gravity of the alleged offences, penalties prescribed under the laws of the detaining state, value of the vessel and its cargo and the amount and form of the bond sought by the detaining state. However the Tribunal clarified that this could by no means be deemed as a complete list of factors. It also mentioned specifically that it did not "intend to lay down rigid rules as to the exact weight to be attached to each of them" [1, p. 21].

In the "Monte Confurco" Case, the Tribunal also affirmed that it "considers that the value of the fish and of the fishing gear seized is also to be taken into account as a factor relevant in the assessment of the reasonableness of the bond", which had to be deducted from the bond to be paid. However, the Tribunal found that the bond of 56,400,000 French francs as imposed by the French court was not "reasonable" within the meaning of Article 292 of the Convention. In its judgment of 18 December 2000, the Tribunal ruled by 17 votes to three that the reasonable bond for the release of the "Monte Confurco" and its Master should be a total of 18,000,000 French francs. The Tribunal held that this bond would be comprised of two parts – 9,000,000 French francs as the monetary equivalent of 158 tons of fish as already held by the French authorities and 9,000,000 French francs to be posted with France [1, p. 23-24].

Therefore, the Tribunal in prescribing a reasonable bond totalling to 18,000,000 French francs, reduced the bond of 56,400,000 French francs as sought by France by 68.09 per cent. Compared to the "Camouco" Case, this was an even greater reduction in the amount of the bond that the Tribunal had allowed, from what had been originally sought by France

in both cases, as the detaining state. Thus just like the "Camouco" Case, the Tribunal had paid little regard, if any, to the fact that the fines likely to be incurred by the Master of the "Monte Confurco" could be as high as 79,000,000 French francs if proven guilty of the alleged offences [1, p. 13].

The Tribunal was also said to have "second-guessed the French court" and was "in danger of straying into territory that properly belongs to the local court" by opining that not all of the catch could have been taken from the Kerguelen EEZ [1, p. 22]. The alleged offences were obviously deemed by France to be of a grave and serious nature as evident from the heavy fines that were imposable on conviction. Perhaps if the Tribunal had taken due consideration of the gravity of the alleged offences and the fines imposable under the laws of the detaining state – both criteria it had spelt out in the "Camouco" and the "Monte Confurco" Cases, it would have found it fitting to prescribe a higher bond as reasonable. This alarming omission on the Tribunal's part stands out all the more in view of some of the recollections and observations made by it in the judgment of the "Monte Confurco" Case:570

The Respondent has pointed out that the general context of unlawful fishing in the region should also constitute one of the factors which should be taken into account in assessing the reasonableness of the bond. In its view, this illegal fishing is a threat to the future resources and the measures taken under CCAMLR for the conservation of toothfish. The Respondent states that 'among the circumstances constituting what one might call the 'factual background' of the present case, there is one whose importance is fundamental. That is the general context of unlawful fishing in the region concerned. The Tribunal takes note of this argument.

It appears to the author that the Tribunal took note of the argument but the deficiency in according it the importance it deserved was reflected in its judgment determining a bond of 18,000,000 French francs as reasonable – far below the amount sought by the detaining state.

In this regard, some of the observations of Judge Anderson recorded in his dissenting opinion to the judgment of the Tribunal are noteworthy. Judge Anderson opined that the French court was correct in its approach in determining a reasonable bond for the release of the "Monte Confurco" and its crew [1, p. 4-5]. He noted that under French law in the present case, the maximum fine for illegal fishing was directly linked to the amount of illegally caught fish [3, p. 1-2]. He added that the French court in fixing the bond had exercised discretion normally available worldwide in pro-

ceedings for release on bail, and had taken into account half of the 158 tons of fish found on the "Monte Confurco" [3, p. 2-3]. He also mentioned that the domestic court had certain discretion or margin of appreciation in these cases and the French court had fixed the bond well below the amount of the maximum fine. Therefore given this understanding and appreciating the general need to curb illegal fishing in the region, the French court did not exceed its margin in the present case [3, p. 3]. In addition, the Judge pointed to the Tribunal's observation in paragraph 73 of its judgment – "the Tribunal is of the view that the amount of the bond should not be excessive and unrelated to the gravity of the alleged offences" [3, p. 4]. He then stated that in the present case:

The amount of the bond was directly linked to the charge of illegal fishing in the EEZ and to the fines available to the court in the event of a conviction under the law in force around the Kerguelen Islands.

This dissenting judgment of Judge Anderson reflects a strong criticism of the Tribunal's tendency to reduce substantially the bonds sought by detaining states for the release of detained vessels and crews. Arguing on a different plane, Judge Jesus in his dissenting opinion concluded that the Tribunal had unduly gone into the merits of the case and failed to preserve the balance of interests between the flag state and the coastal state [1, p. 5].

The dissenting judgments support the author's argument that in light of coastal states' endeavours to curb illegal fishing, a huge reduction of the bond as sought by France, does not have constructive implications for oceans governance.

Requests of the Tribunal of the Seychelles

Applicants, the state of Seychelles has applied to ITLOS under Article 292(2) of United Nations Convention on Law of Sea (UNCLOS) to have the release of the vessel from France. They requested the following:

1. To declare that the Tribunal has jurisdiction under article 292 of the United Nations Convention on the Law of the Sea to hear the application submitted today;
2. To declare the present application admissible;
3. To declare that the French Republic has contravened article 73 (4) by not properly giving notice of the arrest of the vessel "MONTE CONFURCO" to the Republic of Seychelles;
4. To declare that the guarantee set by the French Republic is not reasonable as to its amount, nature or form;

5. With respect to the master of the vessel "MONTE CONFURCO", Mr. José Pérez Argibay,

– To ask, as an interlocutory measure for reasons of due process, that the French Republic allow the Captain to attend the hearing which is shortly to take place in Hamburg;

– To find that the French Republic has failed to observe the provisions of the Convention concerning prompt release of masters of arrested vessels;

– To require the French Republic promptly to release the master, without bond, in light of the presence of the ship, cargo, etc. as a reasonable guarantee, given the impossibility of imposing penalties of imprisonment against him and the fact that he is a European citizen;

– To find that the failure of the French Republic to comply with the provisions of article 73 (3) in applying to the master measures of a penal character constitutes a de facto unlawful detention.

6. To set a bond in the maximum amount of 2,200,000 French francs, based upon:

– 200,000 French francs for failure to notify presence;

– 2,000,000 French francs for a presence of 24 hours in the EEZ without giving notice and up to 4 tons of catch theoretically taken in the worst of cases, as the sole admissible evidence of presumption.

7. With regard to the nature of the bond, that the Tribunal consider that the value of the cargo seized, the fishing tackle seized, the bait and the gasoil constitute part of the guarantee; according to our calculations, the value of the foregoing being 9,476,382 French francs;

8. That the Tribunal choose between the financial instrument (constitution financiere) issued by a European bank or a guarantee comprised of the value of an equivalent number of tons to be immediately discharged.

9. With regard to the form of the financial bond, as a subsidiary measure, in the event that the Tribunal chooses to set a symbolic financial bond, the Applicant requests that the Tribunal note its desire for a bank guarantee by a leading European bank, rather than payment in cash, to be deposited with the French Republic unless the parties decide that it be deposited with the Tribunal, in exchange for the release of the vessel.

Arguments of France

On the basis of the foregoing presentation of facts and considerations of law, the Government of the French Republic, while reserving the right to supplement or amend the present submissions, as appropriate, requests the

Tribunal, rejecting the second submission made on behalf of the Republic of Seychelles, to declare and adjudge:

1. that the bond set by the competent French court for the release of the "Monte Confurco" is reasonable in the circumstances of the case, in light of all the relevant factors;

2. that the application submitted to the Tribunal on 27 November 2000 on behalf of the Republic of Seychelles is therefore not admissible

Also, Respondents, the state of France, has argued in as follows:

1. Breakdown of fax machine is no excuse for not notifying the entry in EEZ since the vessel was equipped with radio-telephone equipment and also INMARSAT station capable of sending and receiving telephone messages.

2. The location on November 7, 2000 was inside the EEZ waters of French jurisdiction and the vessel could not have covered so much distance in the time indicated by Applicant, and they alleged that the vessel was in EEZ water of Kerguelen islands for many days before being caught [1, p. 17].

Critical Appreciation

The majority judgment has been criticized, since though it stats that Article 73(2) is for the purpose of reconciling conflicting claims, but does the judgment actually do so is a matter of analysis. Though the judgment clearly states that ITLOS does not sit in appeal against the domestic court's jurisdiction but still the question of determining unreasonableness is based on the finding of the domestic court. There has been difference opinion by certain judges, in whose opinion the majority hasn't been able to appreciate the situation correctly. Judge Anderson, in his dissenting opinion stated that judgment should have been in favor of France, and the facts should have been seen in light of coastal state's duty to protect their resources, to curb illegal fishing and costly surveillance equipments [3, p. 1-4]. From an environmental perspective this seems to be a good interpretation, and an incentive for all countries to comply strictly with the law of the sea, and to preserve the sanctity and respect of the jurisdictional limits of other states. One more criticism of the judgment is that the tribunal has over looked the role of bond in the enforcement process of the laws of the detaining state (i.e. France), since bond is the guarantee that the amount of fine that the court will eventually impose is recouped [5, p. 286]. The same argument of the bond amount being the maximum was taken up in Volga case by Australia [2]. It also happens that after the release of the vessel and master,

the coastal state is in a disadvantaged position since the fact that the ownership of the vessel, if actually conducting the business of illegal fishing, is often concealed by layers of different complex corporate structures, therefore, it becomes very difficult for coastal state to recoup the costs, since the real ownership remains hidden.

Similarly, this judgment has been criticized by Judge Mensah, as to how the ITLOS has not appreciated correctly the facts. In his dissenting opinion he quotes that majority opinion proceeded on the basis that the information before the court was not consistent with information before the tribunal [1, p. 23]. However, it is true that international tribunals have a wide discretion in assessment of evidence, but this also shouldn't be stressed too far [7, p. 342].

Concluding, it can be said that this judgment is one which is criticized by academic community, and it needs to be seen that whether ITLOS will in future take a different route or not, from its current stance.

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