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THE "TOMIMARU" (Japan v. Russian Federation). Judgment. ITLOS Case No. 15. At . International Tribunal for the Law of the Sea, August 6, 2007.

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INTERNATIONAL DECISIONS

EDITED BY DANIEL BODANSKY

International Tribunal for the Law of the Sea—exclusive economic zone—arrest of fishing vessel—duty of prompt release on bond—effect of confiscation of vessel—international standards of due process of law

THE “TOMIMARU” (Japan v. Russian Federation). Judgment. ITLOS Case No. 15. *At* <<http://www.itlos.org>>.

International Tribunal for the Law of the Sea, August 6, 2007.

Japan filed applications with the International Tribunal for the Law of the Sea on July 6, 2007, seeking prompt release on bond of two Japanese-flag fishing vessels detained by Russia for illegally fishing in its exclusive economic zone (EEZ) off eastern Siberia. One, the *88th Hoshinmaru*, had been arrested slightly over a month earlier. The other, the *53rd Tomimaru*, had been arrested over eight months earlier, on October 31, 2006. In its judgments of August 6, 2007, the Tribunal granted the application for release of the *Hoshinmaru*,¹ fixing a lower bond than Russia had specified, but denied the application for release of the *Tomimaru* on the ground that it was without object (para. 76).²

The chronology of events with respect to the *Tomimaru* is as follows:

On October 31, 2006, the *Tomimaru* was boarded in the Russian EEZ and arrested after an inspection revealed that five-and-one-half tons of walleye pollack on board were unaccounted for (para. 24). A subsequent inspection uncovered at least twenty tons of gutted walleye pollack that were not listed in the logbook, as well as other catch whose capture was forbidden (para. 25).

Criminal proceedings were instituted on November 8 against the master, who was ordered to remain in Russia (para. 26). Other crew members were permitted to leave following the investigation (para. 30).

Separate administrative proceedings were instituted against the owner on November 14 (para. 31).

The prosecutor in the criminal case fixed bond on December 12 (para. 36). Two days later, the owner sent a letter noting this fact and requesting that bond also be fixed with respect to the administrative offenses with which the owner was charged (para. 37).

On December 19, the court hearing the administrative charges rejected the petition for bond (para. 39). On December 28, that court imposed a fine and confiscated the vessel and its equipment (para. 42). This decision was affirmed on appeal by the Kamchatka District Court

¹ “Hoshinmaru” (Japan v. Russ.), ITLOS Case No. 14, para. 102 (Aug. 6, 2007). The judgments and other case materials of the International Tribunal for the Law of the Sea are available online at the Tribunal’s Web site, <<http://www.itlos.org>>.

² “Tomimaru” (Japan v. Russ.), ITLOS Case No. 15 (Aug. 6, 2007).

on January 24, 2007 (para. 43). On March 26, the owner petitioned for review of this decision by the Supreme Court of the Russian Federation; that petition was still pending at the time Japan filed the application for prompt release before the Tribunal (*id.*).

On April 9, the vessel was seized by the state and entered in the Federal Property Register as property of the Russian Federation (para. 44).

On May 15, a trial court imposed a fine on the master and awarded damages against him. The fine was paid but not the damages. The master was allowed to leave for Japan on May 30, with an appeal pending before the Kamchatka District Court (para. 45).

On July 6, Japan requested the Tribunal to order prompt release on bond (para. 1). Oral hearings were held on July 21 and 23 (para. 17). A few days later, on July 26, Russia informed the Tribunal that the Supreme Court of the Russian Federation had dismissed the owner's petition because there were no grounds for reviewing the judgment (para. 46).³

The Tribunal's opinion in "*Tomimaru*" emphasized that "a decision to confiscate a vessel does not prevent the Tribunal from considering an application for prompt release of such vessel while proceedings are still before the domestic courts of the detaining State" (para. 78). In this regard the Tribunal noted "that the decision of the Supreme Court of the Russian Federation brings to an end the procedures before the domestic courts" and "also that no inconsistency with international standards of due process of law has been argued and that no allegation has been raised that the proceedings which resulted in the confiscation were such as to frustrate the possibility of recourse to national or international remedies" (para. 79).⁴ The Tribunal ruled unanimously that "the Application of Japan no longer has any object and that the Tribunal is therefore not called upon to give a decision thereon" (para. 82).

* * * *

Although the "*Hoshinmaru*" and "*Tomimaru*" cases were the eighth and ninth applications for prompt release filed with the Tribunal, they had some novel features. They are the first such cases to involve fishing in the North Pacific. The applications were filed by a state that had not historically resorted to adjudication to resolve its disputes, and against a state that, prior to the dissolution of the Soviet Union, was not generally noted for its amenability to compulsory jurisdiction—the Russian Federation's acceptance of the Law of the Sea Convention⁵ (LOS Convention) marking a notable change.⁶ Also, while earlier prompt release cases involved vessels not authorized to fish in the EEZ of the arresting state, in these cases the fishing vessels were licensed by Russia to fish in its EEZ at the time of the arrest; the alleged infractions related to falsification of the type and volume of catch⁷ and, in the case of the *Tomimaru* (paras. 24, 25), catch not permitted by the license.

³ The Tribunal considered it appropriate to take this fact into consideration (para. 68). It noted that, after being informed of the Supreme Court's decision, Japan did not maintain its argument that the confiscation of the *Tomimaru* was not final (para. 79).

⁴ As is apparent, for example, from the declaration of Judge Yanai (para. 2), this finding was fairly deferential to the respondent given the complexity of, and alleged lack of clarity in, its domestic procedures.

⁵ UN Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397, *reprinted in* 21 ILM 1261 (1982) [hereinafter LOS Convention], *available at* <<http://www.un.org/Depts/los/index.htm>>.

⁶ The Russian Federation ratified the Convention on March 12, 1997, and in November 2002, it was the applicant before the Tribunal in the "*Volga*" case, where it sought prompt release of a fishing vessel detained by Australia. "*Volga*" (Russ. v. Austl.), ITLOS Case No. 11 (Dec. 23, 2002).

⁷ *See* "*Hoshinmaru*," paras. 31, 33.

Although the “*Tomimaru*” case was the third occasion on which the detaining state challenged a prompt release application on the ground that the fishing vessel had been confiscated, this case was the first in which the Tribunal faced the issue squarely. France argued in the “*Grand Prince*” case,⁸ Guinea-Bissau argued in the “*Juno Trader*” case,⁹ and Russia argued in the “*Tomimaru*” case that confiscation of a vessel renders the obligation to release it on bond without object. The Tribunal agreed with that proposition in the “*Tomimaru*” case, stating: “A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object” (para. 76). In other words, the confiscation extinguishes the duty to release the vessel on bond.

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. It provides that the coastal state may take such measures in the EEZ, including boarding, inspection, arrest, and judicial proceedings, as may be necessary to ensure compliance with its laws and regulations regarding exploration, exploitation, conservation, and management of living resources. 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. The Tribunal noted that Article 73 makes no reference to confiscation of vessels but added that it “is aware that many States have provided for measures of confiscation of fishing vessels in their legislation with respect to the management and conservation of marine living resources” (para. 72). Japan had not contested the right to confiscate as such.¹⁰ This is not surprising. The UN Food and Agriculture Organization (FAO) lists both Japan and Russia among the many countries that permit confiscation of the vessel, gear, and catch for fishing violations.¹¹

⁸ “*Grand Prince*” (Belize v. Fr.), ITLOS Case No. 8 (Apr. 20, 2001). The Tribunal never reached the confiscation issue because it found *proprio motu* that it lacked jurisdiction on the grounds that the applicant, quite independently of any effect of the confiscation, had failed to establish that it was the flag state at the time the application for prompt release was made. *Id.*, paras. 61, 77, 93. The present author has had occasion to comment twice on the question of confiscation and prompt release raised by France in the “*Grand Prince*” case, once briefly in Bernard H. Oxman & Vincent P. Bantz, *Case Report: The “Grand Prince” (Belize v. France)*, 96 AJIL 219 (2002), and once at greater length in Bernard H. Oxman & Vincent P. Bantz, *Un droit de confisquer: L’obligation de prompt mainlevée des navires*, in LA MER ET SON DROIT: MÉLANGES OFFERTS À LAURENT LUCCHINI ET JEAN-PIERRE QUÉNEUDEC 479 (2003). Readers may be amused to learn that the editors of the *Mélanges* prompted the division of the title of the essay into two sentences and the movement of the question mark from its original position at the end of the title.

⁹ “*Juno Trader*” (St. Vincent v. Guinea-Bissau), ITLOS Case No. 13 (Dec. 18, 2004). The Tribunal never reached the confiscation issue because it found that the Regional Court of Bissau, in suspending application of the fine imposed on the vessel, removed the legal basis for the subsequent confiscation for nonpayment of the fine. *Id.*, paras. 52, 53, 62.

¹⁰ It expressly stated in oral argument (see Verbatim Transcript of July 21, 2007 (a.m.), at 17, ll. 6–8): “Japan considers the position to be clear and simple. The *Tomimaru* is liable to confiscation under Russian law. It is held by Russia, detained by Russia, and a final determination of the question of confiscation is pending before the Russian courts.”

¹¹ In his separate opinion in the “*Grand Prince*” case, at 2 n.3 (emphasis added), Judge Anderson noted:

The FAO’s publication entitled “Coastal State Requirements for Foreign Fishing” (FAO Legislative Study 21, Rev. 4) states (section 5) that: “In addition to fines, the vast majority of countries empower their courts to order forfeiture of catch, fishing gear and boats. In a few cases, forfeiture of vessels is automatic, even on the first offence.” The accompanying Table E, headed “Penalties for unauthorized foreign fishing”, lists over 100 jurisdictions, most of them States Parties to the Convention, which provide for forfeiture of the vessel used in unauthorized fishing activities.

That list of over one hundred jurisdictions includes Japan and Russia.

At the same time, we need to consider that Article 73 also provides that “[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.”¹² The function of release on bond is to permit the vessel and crew to be free pending further proceedings in domestic courts, with the bond held as surety against any penalties that may be imposed. Thus, the duty of prompt release on bond is itself a qualification on the enforcement powers of the coastal state. Obviously, the practical effect of this qualification could be to limit the penalty to the value of the bond. As noted in a prior case report, naïveté is not the most apparent characteristic of those who negotiated the Law of the Sea Convention.¹³

Japan instituted proceedings under Article 292 of the Convention. That article is specifically designed to facilitate enforcement of the prompt release obligation by permitting the question to be raised before the Tribunal if the vessel is detained for more than ten days.¹⁴ The article is narrowly tailored to that purpose, expressly providing that the Tribunal “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.”¹⁵ The question of whether a confiscation is lawful is not as such before the Tribunal in Article 292 proceedings.¹⁶

The question before the Tribunal in the “*Tomimaru*” case was, instead, whether the Russian confiscation would affect the duty of prompt release: when, if ever, and under what circumstances would a confiscation by the detaining state render an application for the vessel’s prompt release on bond without object? The Tribunal identified the relevant factors, applied them to this case, and found that in the circumstances, the conclusion of domestic proceedings did render the application for prompt release without object.¹⁷

Confiscation typically results in transfer of title to the confiscating state. Since an application for prompt release under Article 292 may be made only by, or on behalf of, the state that is the flag state when the application is made, the question arises as to how this requirement is affected by confiscation.¹⁸ The Tribunal here distinguished between transfer of title and transfer of registry. It stated that a vessel’s confiscation does not result per se in an automatic change of the

¹² LOS Convention, *supra* note 5, Art. 73(2).

¹³ Oxman & Bantz, Case Report, *supra* note 8, at 224.

¹⁴ Article 292 also applies to a similar obligation of prompt release where vessels and crew are arrested for pollution violations. *See* LOS Convention, *supra* note 5, Arts. 220(7), 226(1)(b). The question of confiscation may not often arise in that context; only monetary penalties may be imposed for pollution violations beyond the territorial sea (and even within the territorial sea absent “a wilful and serious act of pollution”). *Id.*, Art. 230.

¹⁵ *Id.*, Art. 292(3).

¹⁶ This limitation is especially important because the Tribunal may not otherwise have jurisdiction to adjudicate the question of the lawfulness of the confiscation. The LOS Convention generally excludes coastal state regulation of fishing in the EEZ from compulsory arbitration or adjudication. This exclusion arises from the general limitation on adjudicatory competence over disputes with regard to the exercise by a coastal state of its sovereign rights or jurisdiction in paragraph 1 of Article 297, and is specifically articulated with respect to fisheries in the EEZ in paragraph 3(a) of that article. Parties to the Convention have the right to opt for further limitations on jurisdiction over law enforcement activities with respect to fisheries in the EEZ. *Id.*, Art. 298, para. 1(b). Moreover, Article 292 is a narrow exception to the general right of the parties to the Convention to select the forum before which a question of interpretation or application of the Convention may be raised, with arbitration under its Annex VII as the residual procedure absent agreement or declarations by both parties providing otherwise. *Id.*, Arts. 280, 282, 287(5).

¹⁷ In this regard, it should be noted that confiscation of a vessel would not render the obligation to release the master or crew without object. That was not at issue in this case because the master and crew had already been released.

¹⁸ With respect to diplomatic protection, the International Law Commission’s draft articles provide that nationality must be continuous “from the date of injury to the date of the official presentation of the claim” and that,

flag or in its loss, and noted that Russia had not claimed to have initiated procedures leading to a change or loss of the *Tomimaru's* flag (para. 70).¹⁹ Accordingly, Japan remained the flag state.

This discussion leaves one in some doubt as to what might happen in the next case—where the detaining state, having learned from this opinion, exercises its right as owner of the vessel to change flags. It is possible that a clue to the answer may be divined from the remainder of the Tribunal's analysis.

If the object of the duty of prompt release is to free the vessel on bond while proceedings are still pending, then how is that duty affected by an appeal of a confiscation? During oral argument, counsel for Russia maintained that the federal Supreme Court's review powers were limited and that notwithstanding the petition to the Supreme Court, under Russian law the confiscation was final and executed, with the consequence that the duty of prompt release on bond was without object (para. 63). The Tribunal did not agree that the duty of prompt release on bond is without object while review is pending in the courts of the detaining state. As previously noted, it emphasized that "considering the object and purpose of the prompt release procedure, a decision to confiscate a vessel does not prevent the Tribunal from considering an application for prompt release of such vessel while proceedings are still before the domestic courts of the detaining State" (para. 78).²⁰ In other words, even if the confiscation has legal effect under the law of the detaining state, and even if it is executed, the obligation of prompt release continues while the judgment is still under review by a domestic court. One presumes this period includes the time available under the law of the detaining state for filing an appeal or for petitioning for review.

The requirement of a final judgment no longer under appeal does leave one in some doubt, however, as to what might happen in a subsequent case—where the detaining state, having learned from this opinion, acts very quickly to render a confiscation order that either cannot be appealed or that is subject to very rapid confirmation by an appellate court. It is this possibility that presumably prompted some of the most interesting aspects of the Tribunal's opinion—including, in particular, its reference to international standards of due process of law.

Immediately following its statement that a decision to confiscate the vessel renders the procedure for prompt release without object, the Tribunal added in the very same paragraph:

Such a decision should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention; nor should it be taken

moreover, a "State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim." Report of the International Law Commission on its Fifty-eighth Session, UN GAOR, 61st Sess., Supp. No. 10, UN Doc. A/61/10 (2006)6, available at <<http://untreaty.un.org/ilc/reports/2006/2006report.htm>>; see *Loewen Group, Inc. v. United States*, Award, ICSID Case No. ARB(AF)/98/3 (NAFTA Ch. 11 Arb. Trib. June 26, 2003) (discussed in case report by William S. Dodge at 98 AJIL 155 (2004)).

¹⁹ The distinction between change of title and change of flag was previously noted by Judges Mensah and Wolfrum in "*Juno Trader*," sep. op. Mensah & Wolfrum, JJ., para. 9.

²⁰ In his separate opinion Judge Lucky, apparently disagreeing with the majority, asserted (p. 10) that

this statement is not necessary in view of the decision in this case. In a case such as the instant case, where the merits of the case against the owner of the vessel were dealt with by courts of competent jurisdiction under the applicable laws of the Russian Federation, confiscation is a *fait accompli*. Therefore the Application lost its force even before the Supreme Court of the Russian Federation delivered its judgment.

through proceedings inconsistent with international standards of due process of law. In particular, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention. (Para. 76)

While the judgment in the “*Tomimaru*” case was unanimous, the Tribunal’s foregoing discussion of the circumstances of the confiscation decision did not enjoy unanimous support. In his declaration, Judge Nelson questioned whether the Tribunal was straying into matters properly before the domestic courts.²¹ Judge Jesus (*sep. op.*, para. 9) argued at length that confiscation is a question of the merits excluded from challenge in prompt release proceedings and that a flag state can avoid rapid confiscation by seeking prompt release before the Tribunal immediately after the ten-day delay specified in the Convention. Indeed, Judge Lucky (*sep. op.*, 5–7) felt that Japan had waited too long and that its application for prompt release was inadmissible on those grounds alone. He emphasized that any other decision in the case would have interfered with the due process of Russian judicial proceedings.

As for the question of Japan’s timing, the Tribunal did seem to indicate some concern in principle. While cautioning the detaining state about undue haste, the Tribunal also cautioned the flag state about undue delay. It emphasized that

considering the objective of article 292 of the Convention, 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 take action within [a] 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 of the Convention. (Para. 77)

The Tribunal did not base its decision on delay by Japan. In declining to invoke this reason, the Tribunal may have recalled its earlier prompt release cases, in which it rejected a requirement of exhaustion of local remedies before a prompt release application may be made,²² but of course the practical problem of ongoing municipal court proceedings remains. If, on the matter of timing, the Tribunal accepted the view set forth in the separate opinions in the “*Tomimaru*” case, it could easily become enmeshed in complex problems of this nature. The absence of a requirement of exhaustion of local remedies does not mean that a state should be penalized for waiting to see what happens in municipal courts before deciding to resort to an international tribunal. The risk of confiscation—which would render an application for prompt release without object once municipal court proceedings are concluded—is in itself an incentive to avoid delay in seeking relief from the Tribunal.

As for the Tribunal’s articulation of the due process requirement, the misgivings expressed in the separate opinions do not appear to reflect fully the procedural setting in which the question of confiscation arises before the Tribunal. It is the detaining state that asserts that its own

²¹ Judge Nelson stated (p. 2):

The Judgment in paragraph 76 seems to suggest that this Tribunal has the power to examine whether the shipowner was prevented from having recourse to available domestic judicial procedures, to find out whether the proceedings were inconsistent with due process of law and so on. . . .

. . . Perhaps these are not matters to be dealt with within the system contained in article 292.

²² “*Camouco*” (Pan. v. Fr.), ITLOS Case No. 5, para. 57 (Feb. 7, 2000); see Bernard H. Oxman & Vincent P. Bantz, Case Report: The “*Camouco*” (Panama v. France), 94 AJIL 713 (2000).

act—its confiscation of the vessel—extinguishes its prompt release obligation under the Convention, rendering Article 292 proceedings to enforce that obligation without object. In so doing, it is the detaining state that places the issue before the Tribunal. Viewed in that light, it does not seem at all extraordinary for the Tribunal to consider, as it did in this case, whether the prompt release obligation had been properly extinguished by the detaining state. If the detaining state wishes to avoid the issue, it need not raise the question in the first place; it can simply litigate the question of the amount of the bond. After all, the value of tangible property can ordinarily be monetized, and it is up to the detaining state's legislature to set the amount of the fines that may be imposed, and up to its courts to fix reasonable bond in light of all relevant factors.²³

In the "*Juno Trader*" case, the Tribunal stated that

article 73, paragraph 2, must be read in the context of article 73 as a whole. The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision.²⁴

If one takes into account that the enforcement powers of the coastal state under Article 73 are balanced in the very same article not only by the restriction on imprisonment, but by the obligation of prompt release on bond, then it follows that those enforcement powers, while extensive, cannot be used to frustrate the obligation to release the vessel promptly on bond. The Tribunal appears to be on firm ground in this respect. The tests proffered by the Tribunal—availability of recourse to municipal and international remedies, international standards of due process, unjustified haste—would all appear to be pertinent to the question before the Tribunal in Article 292 proceedings involving confiscation of the vessel: whether the obligation of prompt release on bond has been extinguished and those proceedings are without object.

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²³ In the "*Camouco*" case, para. 67, the Tribunal offered the following guidance:

The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or impossible under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form.

²⁴ "*Juno Trader*," para. 77. In his separate opinion in that case (paras. 3, 5), Judge Treves elaborated on the importance of respect for human rights in this context.

* This case report is based on a paper presented by the author on October 17, 2007, in Seoul, at *Law of the Sea: A Half-Century After the Geneva Conventions*, a conference jointly organized by the Ocean Law Centre of Inha University and the Law of the Sea Institute of the University of California, Berkeley. The paper will be published in the proceedings of the conference.