

International tribunals — International Tribunal for the Law of the Sea — Jurisdiction and admissibility — United Nations Convention on the Law of the Sea, 1982, Article 292 — Japan filing Application against Russian Federation for prompt release of vessel — Whether Tribunal having jurisdiction — Whether Application admissible — Whether Russian Federation breaching obligations under Article 73(2) of Convention

Treaties — Interpretation and application — United Nations Convention on the Law of the Sea, 1982 — Articles 73(2) and 292 — Whether Respondent complying with Article 73(2) of Convention — Whether Respondent providing for prompt release of vessel and crew upon posting of a reasonable bond or financial security — Time-limit for setting bond — Whether bond reasonable — Relevant factors — Facts and circumstances of case — Document concerning bond calculation communicated by Russia to Japan within framework of Russian–Japanese Commission on Fisheries — Whether Japan tacitly consenting — Whether bond of 22 million roubles reasonable — Determination by Tribunal of amount, nature and form of bond or other financial security to be posted — Article 113(2) of Rules of Tribunal — Article 293 of Convention — Applicability of Convention provisions and other international law rules not incompatible with Convention

Sea — Exclusive economic zone (“EEZ”) — Environment — Arrest and detention of Japanese vessel fishing in EEZ of Russian Federation with valid licence — Application for prompt release — Alleged offence of false record of catch of fish — Gravity of offence — Conservation and management of fish stocks in Russian EEZ — Bilateral cooperation between Japan and Russian Federation

*THE HOSHINMARU*¹(JAPAN *v.* RUSSIAN FEDERATION)

(APPLICATION FOR PROMPT RELEASE)

International Tribunal for the Law of the Sea. 6 August 2007¹ For a list of counsel, see para. 18 of the judgment.

Cambridge University Press

978-0-521-19801-1 - International Law Reports: Volume 143

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)2 INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
143 ILR 1

(Wolfrum, *President*; Akl, *Vice-President*; Caminos, Marotta Rangel, Yankov, Kolodkin, Park, Nelson, Chandrasekhara Rao, Treves, Ndiaye, Jesus, Cot, Lucky, Pawlak, Yanai, Türk, Kateka and Hoffmann, *Judges*)

SUMMARY: *The facts:*—On 1 June 2007, the *Hoshinmaru*, a fishing vessel flying the flag of Japan, owned by a Japanese company and whose Master and crew members were of Japanese nationality, was boarded and inspected by Russian Federation officials while fishing in the exclusive economic zone of the Russian Federation off the eastern coast of the Kamchatka Peninsula. The vessel and crew were arrested for contravening the terms of the fishing licence by substituting species for reporting purposes, which resulted in an illegal catch of sockeye salmon. The Master and crew failed to cooperate. On 3 June, the *Hoshinmaru* was escorted to the Russian port of Petropavlovsk-Kamchatskii for judicial proceedings and detained.

On 6 July 2007, Japan (“the Applicant”) filed an Application with the International Tribunal for the Law of the Sea under Article 292 of the United Nations Convention on the Law of the Sea, 1982 (“the Convention”)² against the Russian Federation (“the Respondent”) for the prompt release of the *Hoshinmaru* and its crew. The Applicant contended that the Tribunal had jurisdiction, that the Application was admissible, that the allegation was well founded, and that the Respondent had breached its obligations under Article 73(2) of the Convention.³ The Applicant sought an order that the *Hoshinmaru* be released upon terms and conditions considered reasonable by the Tribunal. The Respondent challenged the admissibility of the Application; in the alternative, it claimed that it had fulfilled its obligations under Article 73(2) of the Convention.

On 13 July 2007, the Respondent set the bond at 25 million roubles, adjusted to 22 million roubles (approximately US \$862,000) due to a revised estimate of the value of the vessel. The Respondent argued that the Application was thereby rendered moot since it had no object.

Held (unanimously):—(1) The Tribunal had jurisdiction to entertain the Application under Article 292 of the Convention. Japan and the Russian Federation were both States Parties to the Convention. Japan was the flag State of the *Hoshinmaru*. The *Hoshinmaru*, its Master and crew remained in the port of Petropavlovsk-Kamchatskii. The Applicant alleged that the Respondent had not complied with Article 73(2) of the Convention for the prompt release of the vessel and its crew upon the posting of a reasonable bond or other financial security. The Parties did not agree to submit the question of release of the vessel to another court or tribunal within ten days from the time of detention. Japan made the Application in accordance with Articles 110 and 111 of the Rules of the Tribunal (paras. 52-9).

² For the text of Article 292 of the Convention, see para. 52 of the judgment.

³ Article 73(2) provided that: “Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.”

(2) The Application for release was admissible.

(a) As required by Article 292(1) of the Convention, the Application was based on an allegation that the detaining State had not complied with Convention provisions for the prompt release of a vessel and crew upon the posting of a reasonable bond or other financial security (para. 60).

(b) The setting of the bond by the Respondent did not render the Application without object. A State might make an application under Article 292 of the Convention not only where no bond had been set but also where it considered the bond set to be unreasonable. It was for the Tribunal to decide whether a bond was reasonable under Article 292. While the nature of the dispute had not changed, its scope had narrowed to the reasonableness of the bond (paras. 61-6).

(c) The Application could be properly considered by the Tribunal; it was not too general. It was based on Article 292 read in conjunction with Article 73(2) of the Convention. The Tribunal was asked to exercise its power under Article 292(3), to order the release of the vessel and its crew upon the posting of a reasonable bond or other financial security (paras. 67-9).

(3) In the circumstances of the case, the Respondent had not complied with Article 73(2) of the Convention. Since the Application was well founded, the Respondent must release promptly the *Hoshinmaru*, including the catch on board and its crew.

(a) Although there was no precise time-limit for setting a bond in the Convention, it should be reasonable given the object and purpose of Article 292 of the Convention. Neither was there a specific time by which the flag State was required to file an application after the detention of the vessel or its crew; the earliest date was ten days from detention pursuant to Article 292(1) (paras. 70-80).

(b) The bond fixed had to be reasonable in light of the objective assessment of relevant factors, which included the gravity of the alleged offences, penalties under the laws of the detaining State and the amount and form of bond imposed by that State (para. 82).

(c) While an agreed procedure between States with long-standing relations regarding fisheries was helpful, and the Protocol or minutes of a commission such as the Russian–Japanese Commission on Fisheries could be the source of rights and obligations between parties, there was no evidence of acquiescence by Japanese representatives in the procedure contained in Russia’s bond calculation document communicated to Japan within the framework of that Commission (paras. 83-7).

(d) While confined to the question of release, the Tribunal was not prevented from examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond as set by the Respondent. In so doing it was not acting as a court of appeal (paras. 88-9).

(e) The bond of 22 million roubles (approximately US \$862,000) was not reasonable. While a violation of the rules on reporting might be sanctioned by the detaining State, a bond should not be set on the basis of the maximum

Cambridge University Press

978-0-521-19801-1 - International Law Reports: Volume 143

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)4 INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
143 ILR 1

penalties applicable to the owner and the Master. Neither should it be calculated on the basis of the confiscation of the vessel, given the circumstances of this case (paras. 90-4).

(4) The bond should amount to 10 million roubles in the form of a payment into a bank account or a bank guarantee. Although the *Hoshinmaru* held a valid fishing licence and the offence was committed within a broadly satisfactory cooperative framework in respect of the conservation and management of fish stocks in the Russian EEZ, it was not a minor or purely technical offence. The monitoring of catches, requiring accurate reporting, was essential for managing marine living resources (paras. 95-101).

Declaration of Judge Kolodkin: The bond issued by the Tribunal did not conform to the relevant legal arrangements between Japan and the Russian Federation. It did not take into account the gravity of the offence and its calculation was inconsistent with the Tribunal's practice of including the vessel's value in the bond (p. 29).

Declaration of Judge Treves: The provision in the operative part that the Master and crew were free to leave without conditions, even though they had not been considered as "detained", was not unnecessary since it preserved the efficacy of the judgment for the release of the vessel (pp. 29-30).

Declaration of Judge Lucky: The relevant meaning of the word "bond" was legal; the amount should not be punitive since guilt had not been established. In fixing a bond, the interests of the coastal State and flag State had to be balanced. The gravity of the alleged offence had to be weighed in the same manner as a national judge determining urgent applications. The bond should constitute sufficient security to ensure implementation of a court decision at the end of proceedings. A reasonable bond was less than that fixed by the Respondent (pp. 30-1).

Declaration of Judge Türk: While the Convention in Article 73(2) wisely avoided setting a precise time-limit for a bond, preserving necessary flexibility according to circumstances, it had to be borne in mind that the prompt release procedure was designed to be expeditious. As such, a bond was to be set as early as possible, varying according to the complexity of the detaining State's investigations. A maximum period of one month after detention seemed reasonable. International litigation should be a last resort in settling a dispute (pp. 31-3).

Separate Opinion of Judge Yanai: The bond should have been set at a lower level, given that the offence was not very grave. The falsely recorded amount of catch was within the limits set in the licence. It did not damage the conservation of the high level of salmon and trout resources in the Russian EEZ, for which there was long-standing bilateral cooperation between Japan and Russia as for fishery matters generally (pp. 33-5).

Cambridge University Press

978-0-521-19801-1 - International Law Reports: Volume 143

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)*THE HOSHINMARU*
143 ILR 1

5

The texts of the judgment and the declarations and opinion are set out as follows:

	<i>page</i>
Judgment on the Application for Prompt Release	5
Declaration of Judge Kolodkin	29
Declaration of Judge Treves	29
Declaration of Judge Lucky	30
Declaration of Judge Türk	31
Separate Opinion of Judge Yanai	33

The following is the text of the judgment of the Tribunal:

TABLE OF CONTENTS

	<i>paragraphs</i>
Introduction	1-26
Factual background	27-51
Jurisdiction	52-9
Admissibility	60-9
Non-compliance with article 73, paragraph 2, of the Convention	70-94
Amount and form of the bond or other financial security	95-101
Operative provisions	102

INTRODUCTION

1. On 6 July 2007, an Application under article 292 of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”) was filed by electronic mail with the Registry of the Tribunal by Japan against the Russian Federation concerning the release of the *88th Hoshinmaru* (hereinafter “the *Hoshinmaru*”) and its crew. The Application was accompanied by a letter dated 6 July 2007 from Mr Ichiro Komatsu, Director-General, International Legal Affairs Bureau, Ministry of Foreign Affairs of Japan, which transmitted a communication from the Minister for Foreign Affairs of Japan, notifying the Registrar of the Tribunal of the appointment of Mr Komatsu as Agent of Japan. By the same letter, the Registrar was notified of the appointment of Mr Tadakatsu Ishihara, Consul-General of Japan in Hamburg, as Co-Agent. The original of the Application and of the letter of the Agent of Japan were delivered on 9 July 2007.

2. A copy of the Application was sent on 6 July 2007, by electronic mail and facsimile, to the Embassy of the Russian Federation in Berlin. A

Cambridge University Press

978-0-521-19801-1 - International Law Reports: Volume 143

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)

6 INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
143 ILR 1

certified copy of the original of the Application was sent to the Embassy of the Russian Federation in Berlin on 10 July 2007.

3. By a note verbale from the Registrar dated 6 July 2007, the Minister of Foreign Affairs of the Russian Federation was informed that the Statement in Response of the Russian Federation, in accordance with article 111, paragraph 4, of the Rules of the Tribunal (hereinafter “the Rules”) could be filed no later than 96 hours before the opening of the hearing.

4. In accordance with article 112, paragraph 3, of the Rules, the President of the Tribunal, by Order dated 9 July 2007, fixed 19 July 2007 as the date for the opening of the hearing with respect to the Application. Notice of the Order was communicated forthwith to the parties.

5. The Application was entered in the List of cases as Case No 14 and named the “*Hoshinmaru*” Case.

6. In accordance with article 24, paragraph 3, of the Statute of the Tribunal (hereinafter “the Statute”), States Parties to the Convention were notified of the Application by a note verbale from the Registrar dated 9 July 2007.

7. In accordance with articles 45 and 73 of the Rules, the President held consultations with representatives of the parties on 10 July 2007, during which he ascertained their views with regard to questions of procedure. Japanese representatives were present at the consultations while the Russian representative participated via telephone.

8. Pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Secretary-General of the United Nations was notified by the Registrar on 11 July 2007 of the receipt of the Application.

9. On 11 July 2007, the Registrar was notified by a letter of the same date from the First Deputy Minister of Foreign Affairs of the Russian Federation of the appointment of Mr Evgeny Zagaynov, Deputy Director, Legal Department, Ministry of Foreign Affairs of the Russian Federation, as Agent of the Russian Federation. By the same letter, the Registrar was notified of the appointment of Mr Sergey Ganzha, Consul-General of the Russian Federation in Hamburg, as Co-Agent.

10. By letter from the Registrar dated 12 July 2007, the Co-Agent of Japan was requested to complete the documentation, in accordance with article 63, paragraph 1, and article 64, paragraph 3, of the Rules. On 18 July 2007, the Applicant submitted documents, copies of which were communicated to the other party.

Cambridge University Press

978-0-521-19801-1 - International Law Reports: Volume 143

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)

THE HOSHINMARU
143 ILR 1

7

11. On 13, 17 and 18 July 2007, the Applicant sent additional documents in support of its Application, copies of which were communicated to the other party.

12. On 15 July 2007, the Russian Federation filed its Statement in Response, a copy of which was transmitted forthwith to the Co-Agent of Japan. On 16 and 19 July 2007, the Russian Federation submitted additional documents in support of its Statement in Response. Copies of these documents were communicated to the other party.

13. On 17 July 2007, the Agent of the Russian Federation transmitted to the Tribunal two corrections to the Statement in Response. These corrections, being of a formal nature, were accepted by leave of the President in accordance with article 65, paragraph 4, of the Rules.

14. By letters from the Registrar dated 18 and 21 July 2007, the Co-Agent of the Russian Federation was requested to complete the documentation in accordance with article 63, paragraph 1, and article 64, paragraph 3, of the Rules. On 24 July 2007, the Agent of the Russian Federation submitted documents, copies of which were communicated to the other party pursuant to article 71 of the Rules.

15. Prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 17 July 2007, in accordance with article 68 of the Rules.

16. On 18 and 19 July 2007, the President held consultations with the Agents of the parties in accordance with articles 45 and 73 of the Rules. During the consultations on 18 July 2007, the President communicated to the Agents a list of points or issues which the Tribunal wished the parties specially to address.

17. Pursuant to article 67, paragraph 2, of the Rules, copies of the pleadings and documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings.

18. Oral statements were presented at four public sittings held on 19, 20 and 23 July 2007 by the following:

On behalf of Japan: Mr Ichiro Komatsu, Agent,
Mr Vaughan Lowe, Advocate,
Mr Shotaro Hamamoto, Advocate.

*On behalf of the
Russian Federation:* Mr Evgeny Zagaynov, Agent,
Mr Alexey Monakhov, Deputy Agent,
Mr Vladimir Golitsyn, Counsel.

19. On 20 July 2007, Mr Alexey Monakhov, Deputy Agent for the Russian Federation, delivered his statement in Russian. The necessary

Cambridge University Press

978-0-521-19801-1 - International Law Reports: Volume 143

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)

8 INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
143 ILR 1

arrangements were made for the statement of Mr Monakhov to be interpreted into the official languages of the Tribunal in accordance with article 85 of the Rules.

20. During the oral proceedings, the representatives of the parties addressed the points or issues referred to in paragraph 16. Written responses were subsequently submitted by the Applicant on 19 and 21 July 2007.

21. On 20 July 2007, a list of questions which the Tribunal wished the parties to address was communicated to the Agents. Written responses to these questions were subsequently submitted by the Applicant on 23 July 2007 and by the Respondent on 24 July 2007.

22. In the Application of Japan and in the Statement in Response of the Russian Federation, the following submissions were presented by the parties:

On behalf of Japan,
in the Application:

Pursuant to Article 292 of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”), the Applicant requests the International Tribunal for the Law of the Sea (hereinafter “the Tribunal”), by means of a judgment:

- (a) to declare that the Tribunal has jurisdiction under Article 292 of the Convention to hear the application concerning the detention of the vessel and the crew of the 88th *Hoshinmaru* (hereinafter “the *Hoshinmaru*”) in breach of the Respondent’s obligations under Article 73(2) of the Convention;
- (b) to declare that the application is admissible, that the allegation of the Applicant is well-founded, and that the Respondent has breached its obligations under Article 73(2) of the Convention; and
- (c) to order the Respondent to release the vessel and the crew of the *Hoshinmaru*, upon such terms and conditions as the Tribunal shall consider reasonable.

On behalf of the Russian Federation,
in the Statement in Response:

The Russian Federation requests the Tribunal to decline to make the orders sought in paragraph 1 of the Application of Japan. The Russian Federation requests the Tribunal to make the following orders:

- (a) that the Application of Japan is inadmissible;
- (b) alternatively, that the allegations of the Applicant are not well-founded and that the Russian Federation has fulfilled its obligations under paragraph 2 of Article 73 of the United Nations Convention on the Law of the Sea.

Cambridge University Press

978-0-521-19801-1 - International Law Reports: Volume 143

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)

THE HOSHINMARU
143 ILR 1

9

23. Following the submission of its Application, the Applicant, by letter dated 18 July 2007, filed an additional statement which reads as follows:

For the sake of clarity, the Government of Japan wishes to make plain that its Application in the *88th Hoshinmaru* case, made under Articles 73 and 292 of UNCLOS, relates to the failure of the Russian Federation to comply with the provisions of the Convention for the prompt release of a vessel or its crew upon the posting of a reasonable bond or other financial security. A bond has been belatedly set for the release of the *88th Hoshinmaru*; but Japan does not consider the amount set to be reasonable.

Accordingly, the setting of that bond does not resolve the dispute over the failure of the Russian Federation to comply with the provisions of the Convention for the prompt release of a vessel or its crew upon the posting of a reasonable bond or other financial security. While it is now unnecessary for Japan to include in its oral pleadings any submissions relating specifically to circumstances in which there is a complete failure to set any bond, Japan will address all other aspects of its Application.

24. On 19 July 2007, before the opening of the oral proceedings, the Respondent filed an additional statement which reads as follows:

With respect to the clarification provided by the Agent for Japan on the *Hoshinmaru* case we would like to state that Russia does not accept allegations contained therein. Contrary to the statement of the Applicant the bond was set not belatedly but within a reasonable period of time. We take note of the statement of the Applicant that “it is now unnecessary to include in its oral pleadings any submissions relating specifically to circumstances in which there is a complete failure to set any bond”. But this statement implies that there is at least partial failure of the Respondent to comply with its obligations under the relevant provisions of the UNCLOS. We [cannot] agree with it.

25. In accordance with article 75, paragraph 2, of the Rules, the following final submissions were presented by the parties at the end of the hearing on 23 July 2007:

On behalf of Japan,

The Applicant requests the International Tribunal for the Law of the Sea (hereinafter “the Tribunal”), by means of a judgment:

- (a) to declare that the Tribunal has jurisdiction under Article 292 of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”) to hear the application concerning the detention of the vessel of the *88th Hoshinmaru* (hereinafter “the *Hoshinmaru*”) in breach of the Respondent’s obligations under Article 73(2) of the Convention;

Cambridge University Press

978-0-521-19801-1 - International Law Reports: Volume 143

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)

10 INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
143 ILR 1

- (b) to declare that the application is admissible, that the allegation of the Applicant is well-founded, and that the Respondent has breached its obligations under Article 73(2) of the Convention; and
- (c) to order the Respondent to release the vessel of the *Hoshinmaru*, upon such terms and conditions as the Tribunal shall consider reasonable.

On behalf of the Russian Federation,

The Russian Federation requests the International Tribunal for the Law of the Sea to decline to make the orders sought in paragraph 1 of the Application of Japan. The Russian Federation requests the Tribunal to make the following orders:

- (a) that the Application of Japan is inadmissible;
- (b) alternatively, that the allegations of the Applicant are not well-founded and that the Russian Federation has fulfilled its obligations under paragraph 2 of Article 73 of the United Nations Convention on the Law of the Sea.

26. By letter dated 25 July 2007, the Agent of Japan requested the correction of an error in the original version of the final submissions in subparagraphs (a) and (c) of which the words “and the crew” had been omitted purely by clerical error. This correction was accepted by leave of the President in accordance with article 65, paragraph 4, of the Rules.

FACTUAL BACKGROUND

27. The *Hoshinmaru* is a fishing vessel flying the flag of Japan. Its owner is Ikeda Suisan, a company incorporated in Japan. The Master of the *Hoshinmaru* is Mr Shoji Takahashi. The 17 crew members of the *Hoshinmaru* including the Master are of Japanese nationality.

28. According to the Certificate of Registration, the *Hoshinmaru* was entered in the State Ship’s Registry of Nyuzen-machi, Shimoniikawagun, Toyama Prefecture, in Japan on 24 March 2004. On 14 May 2007, the Russian Federation provided the *Hoshinmaru* with a fishing licence for drift net salmon and trout fishing in three different areas of the exclusive economic zone of the Russian Federation. According to the fishing licence, the *Hoshinmaru* was authorized to fish, from 15 May until 31 July 2007, the following: 101.8 tons of sockeye salmon; 161.8 tons of chum salmon; 7 tons of sakhalin trout; 1.7 tons of silver salmon; and 2.7 tons of spring salmon.

29. On 1 June 2007, the *Hoshinmaru* was fishing in the exclusive economic zone of the Russian Federation off the eastern coast of the Kamchatka Peninsula when it was ordered to stop by a Russian