II. INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, *HOSHINMARU (Japan v Russian Federation)* AND *TOMIMARU (Japan v Russian Federation)*, PROMPT RELEASE JUDGMENTS OF 6 AUGUST 2007

A. Introduction

On 6 August 2007, the International Tribunal for the Law of the Sea (Tribunal) delivered two judgments under Article 292 of the UN Convention on the Law of the Sea (Convention).[1] Both cases originated from the arrest by Russia, in accordance with Article 73 of the Convention, of two Japanese fishing vessels in its exclusive economic zone (EEZ), for fisheries-related violations. However, while in one instance the Tribunal decided in favour of the release of the vessel upon the payment of a bond of 10 million roubles,[2] in the other case, the Tribunal found that the confiscation of the ship, ordered as a penalty under Russian law, had rendered the application for prompt release without object.[3]

These two cases continue a series of decisions where the Tribunal progressively clarified not only the elements of the bond which conditions the release of vessels and crews, but also the relations between the coastal State's duty to release under Article 73(2) and its right under Article 73(1) to 'take such measures, including . . . judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it'. The prompt release procedure is new in international law.[4] In the *Tomimaru* case the Tribunal for the first time indicated whether, and in which circumstances, the confiscation of an arrested vessel may lawfully put an end to the obligation of prompt release.[5] In the *Hoshinmaru* case the Tribunal assessed the amount of the bond in accordance with the criteria it had laid in previous cases, in particular the gravity of the alleged offences. It affirmed its power of independent appreciation of the nature of the offence. These two aspects directly derive from the purpose of Article 73, which, for the Tribunal, 'identifies two interests, the interest

[1] 1833 UNTS 396 (opened for signature 10 December 1982, entered into force 16 November 1994). See below n 12 for the text of the Article.

[2] *Hoshinmaru (Japan v Russian Federation)* (Prompt Release, Judgment of 6 August 2007) <www.itlos.org/case_documents/2007/document_en_295.pdf> accessed 20 April 2008 [102]. The Tribunal announced that the bond was paid by the shipowner on 15 August 2007 and that the vessel and its crew were released the day after. Press release ITLOS/Press 114 <www.itlos.org/news/press_release/2007/press_release_114_en.pdf> accessed 20 April 2008.

[3] *Tomimaru (Japan v Russian Federation)* (Prompt Release, Judgment of 6 August 2007) <www.itlos.org/case_documents/2007/document_en_296.pdf> accessed 20 April 2008 [82].

[4] D H Anderson, 'Investigation, Detention and Release of Foreign Vessels under the UN Convention on the Law of the Sea of 1982 and Other International Agreements' (1996) 11 International Journal of Marine and Coastal Law 165, 167. Generally, see Anne-Katrin Escher, 'Release of Vessels and Crews before the International Tribunal for the Law of the Sea' (2004) 3 The Law and Practice of International Courts and Tribunals 205–374 and 411–507; G Eiriksson, *The International Tribunal for the Law of the Sea* (The Hague Martinus Nijhoff 2000).

[5] The issue of confiscation arose in the *Grand Prince* case and in the *Juno Trader* case, although in different terms. See below, *D. Grand Prince (Belize v France)* (Prompt Release, Judgment of 20 April 2001) ITLOS Reports 2001 17, 45 [93]–[95]; *Juno Trader (Saint Vincent and the Grenadines v Guinea-Bissau)* (Prompt Release, Judgment of 18 December 2004) ITLOS Reports 2004 17, 36 [62].

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of the coastal State to take appropriate measures as may be necessary to ensure compliance with the laws and regulations adopted by it on the one hand and the interest of the flag State in securing prompt release of its vessels and their crews from detention on the other'.[6]

B. Complex Domestic Proceedings and Fragmentation of the Bond

The *Hoshinmaru* is a Japanese fishing vessel which had been provided by Russia with a fishing licence for drift net salmon and trout fishing in Russia's EEZ. The *Tomimaru*, also flying the flag of Japan, had been authorized by Russia to fish walleye pollack and herring in the Bering Sea. On 31 October 2006, it was boarded by Russian authorities who discovered on board an unaccounted amount of fish, and escorted it to Avachinsky Bay. After further inspection, it was found that not less than 20 tons of pollack had not been listed in the logbook, and that some kinds of fish products which it was forbidden to catch were also discovered.[7] For its part, the *Hoshinmaru* was boarded on 1 June 2007 while fishing off the coast of Kamchatka, and an inspection revealed that the logbook contained a misrepresentation of data regarding catches of chum salmon and sockeye salmon insofar as the catches of one kind of salmon were substituted with the other.[8] The vessel was escorted to Petropavlovsk-Kamchatskii and the allegedly illegal catch, weighing about 20 tons, was seized and the rest of the catch was conserved aboard.[9] The incident led to several domestic proceedings: on 26 June 2007, a criminal case was instituted against the Master of the *Hoshinmaru* under Article 256 of the Criminal Code of the Russian Federation, which punishes illegal fishing resulting in large damage.[10] On 3 June 2007, administrative proceedings were instituted against the owner of the vessel, the Ikeda Suisan company, under article 8.17(2) of the Code on Administrative Offences of the Russian Federation, which sanctions the violation of the rules on catching aquatic biological resources or the terms and conditions of a licence.[11]

The fixing of the bond for the release of the vessel and its crew proved problematic. Under article 73(2) of the Convention, 'arrested vessels and their crews shall be

[6] *Monte Confurco (Seychelles v France)* (Prompt Release, Judgment of 18 December 2000) ITLOS Reports 2000 80, 108 [70].

[7] 19.5 tons of various sorts of frozen halibut, 3.2 tons of ray, 4.9 tons of cod and no less than 3 tons of other kinds of bottom fish. *Tomimaru*, (n 3), [22]–[25]. The fishing licence allowed to fish 1,163 tons of walleye pollack and 18 tons of herring from 1 October to 31 October 2006; ibid [23].

[8] *Hoshinmaru* (n 75) [27]–[30]. The fishing licence was provided for 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, to catch in three areas of the EEZ between 15 May and 31 July 2007. Ibid [28].

[9] Application of Japan (6 July 2007) <www.itlos.org/case_documents/2007/document_en_282.pdf> accessed 20 April 2008 [13].

[10] The provisional investigation had also revealed that the Master had failed to fulfil requirements contained in other laws and regulations. Whereas he was charged under the Criminal Code, it is not clear how the other violations were prosecuted, if at all prosecuted. At the hearing, the Deputy Agent for the Respondent indicated that the 'penalties in relation to the present case included three elements: first, administrative *or* criminal responsibility of the Master . . .'. ITLOS/PV.07/2, Verbatim Record (20 July 2007) <www.itlos.org/case_documents/2007/document_en_285.pdf> accessed 20 April 2008, 11. Emphasis added.

[11] *Hoshinmaru* (n 2) [35]–[36].

promptly released upon the posting of reasonable bond or other security'. In its first case, the Tribunal noted that '[t]here may be an infringement of article 73, paragraph 2, . . . even when no bond has been posted, [eg] when the posting of the bond has not been possible, has been rejected, or is not provided for in the coastal State's laws or when it is alleged that the required bond is unreasonable'.[12] Japan claimed that no bond had been set by Russia,[13] and attempts were made on several occasions to urge the Russian authorities to set a bond.[14] The latter, however, claimed that they received certain documents late and that some others were not received.[15] It was not until July 6 that Russia informed Japan that the amount of the bond was being determined, and it was fixed at 25 million roubles on 13 July.[16] Whereas Russia alleged that the Application had thereby become moot,[17] Japan insisted that the essence of its Application had remained unchanged, for it did not consider the bond reasonable.[18] The Tribunal agreed: 'The scope of the dispute has narrowed and . . . the legal dispute . . . now turns on the reasonableness of the bond'.[19]

In the *Saiga (Prompt Release)* case, the Tribunal said that 'the requirement of promptness has a value in itself'.[20] It is thus wrong to allege that, because article 73(2) does not set any precise time limit for the setting of the bond, 'the criteria relating to the setting of the bond should be distinguished from the criteria relating to the release of the arrested vessel [ie prompt release]'.[21] Indeed, the Tribunal considered that the duty of prompt release on reasonable bond meant that 'the time required for setting a bond should be reasonable'.[22] While the Tribunal had stated earlier that 'the criterion of reasonableness encompasses the amount, the nature and the form of the bond',[23] it is

[12] *M/V Saiga (Saint Vincent and the Grenadines v Guinea)* (Prompt Release, Judgment of 4 December 1997) ITLOS Reports 1997 10, 35 [77]. Article 292(1) says: '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'. The provisions in the Convention which expressly contain the duty of prompt release are Article 73(2), Article 220(6) and (7) and Article 226(1)(c); ibid [52].

[13] Application (n 9) [20]. The Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation informed on 2 June 2007 the Consul-General of Japan of the detention of the *Hoshinmaru*. Prompt notification of the flag State is a duty of the detaining State under Article 73(4) of the Convention.

[14] ibid [15]–[19] (communications of 6, 8, 9, 12 and 21 June 2007).

[15] Statement in Response of the Russian Federation (15 July 2007) <www.itlos.org/case_documents/2007/document_en_283.pdf> accessed 20 April 2008 [19]–[20].

[16] ibid [21], [23]. The Application of Japan was filed with the Tribunal on 6 July. Before the Tribunal, the Deputy Agent for Russia announced that the bond had been reduced to 22 million roubles, taking account of a re-evaluation of the vessel by Russia. ITLOS/PV.07/2, above (n 83) 12–13.

[17] *Hoshinmaru* (n 75) [62].

[18] 'It would . . . be absurd if an applicant were obliged by the setting of an unreasonable bond to withdraw its application and to draw up a fresh application'. ITLOS/PV.07/1, Verbatim Record (19 July 2007) <www.itlos.org/case_documents/2007/document_en_284.pdf> accessed 20 April 2008, 10–11.

[19] *Hoshinmaru* (n 75) [66].

[20] Above (n 12) [77].

[21] ITLOS/PV.07/2 (n 83) 15 (argument for the respondent).

[22] *Hoshinmaru* (n 10) [80].

[23] *Saiga (Prompt Release)* (n 12) [82].

now evident that the time between the arrest of the vessel and the setting of a bond must also be reasonable; such assessment cannot be made *in abstracto* and will take 'into account the complexity of the given case'.[24] The balance of interests in article 73, however, also concerns the attitude of the flag State, for, although article 292 does not require it to file an application at any particular time after the detention of the vessel,[25] there may be a moment when an application for prompt release comes too late.[26]

Another problem is that article 73(2) requires the release of arrested vessels and their crews.[27] Two issues are important here: whether crew members are in detention, and whether the bond should be fixed in one aggregated amount. *The first issue* directly relates to the jurisdiction of a court or tribunal, or the Tribunal, under article 292, for only crews in detention can be released on bond. In its Application in the *Hoshinmaru* case, Japan claimed that both the vessel and its crew remained under the 'control' of Russia.[28] The respondent, on the other hand, alleged that only the Master was being detained, and that the other crew members could return to Japan once so requested by the owner.[29] The Master had been asked to sign an undertaking not to leave the city of Petropavlovsk-Kamchatskii. However, this restriction was withdrawn on 16 July.[30]

The notion of 'detention' received a functional, not formal, interpretation by the Tribunal, which considered that crew members who are not in a position to leave the territory of the detaining State are, in fact, in detention and, therefore, must be released upon the payment of a bond.[31] The Tribunal is not bound by the legal classifications of

[24] *Hoshinmaru* (n 2) [79]. The Tribunal did not address the issue of whether the fixing of a bond after the Application was lodged was reasonable. Article 300 of the Convention demands that States fulfil their obligations in good faith and that they exercise their rights in a manner that does not constitute an abuse of right. Under Article 292(1), an application for prompt release may be filed 10 days after the detention of the vessel and its crew, that is, the date of its apprehension.

[25] *Camouco (Panama v France)* (Prompt Release, Judgment of 7 February 2000) ITLOS Reports 2000 10, 28 [54].

[26] See below n 108 and accompanying text.

[27] Article 292(1) says: '. . . 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 . . .' Emphasis added. Theoretically, a coastal State could detain certain crew members and allow the vessel to leave. Practically, though, the vessel and its catch are the substantive assets at stake; in addition, imprisonment and other forms of corporal punishment are prohibited by article 73(3). Lagoni argues that, in effect, the detention of the crew alone also amounts to a detention of the vessel, for a released vessel without its crew would be further delayed in leaving. R Lagoni, 'The Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea: A Preparatory Report' (1996) 11 International Journal of Marine and Coastal Law 147, 159.

[28] Application (n 9) [41]. See also ITLOS/PV.07/1 (n 91) 7.

[29] Statement in Response (n 15) [16]. The Agent for Russia explained: '[T]he members of the crew, with the exception of the Master, have never been actually detained . . . [A]s foreign sailors, they do not have formal permission to go ashore on the territory of the Russian Federation . . . [I]n order to get such a permission the owner of a foreign vessel or its agent has to apply for it to the competent Russian authorities . . . Once the crew members are given this permission, they can go ashore, buy tickets and fly home'. ITLOS/PV.07/2 (n 10) 4. He also claimed that the crew cannot be considered in detention because someone has to take care of the vessel and the fish; ibid.

[30] ibid.

[31] *Camouco* (n 25) [71]. This concerned the procedure of judicial supervision under French law. Tullio Treves, now a Judge at the Tribunal, defined detention as 'all cases in which the movement of a vessel or of its persons is prevented by authority'. T Treves, 'The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea' (1996) 11 International Journal of Marine and Coastal Law 179, 182.

the detaining State.[32] In the case at hand, the Tribunal did not consider the Master and the crew members to be 'detained', and it simply noted that they 'still remain in the Russian Federation'.[33] In the operative part of its Judgment, the Tribunal decided that Russia promptly release the *Hoshinmaru* and its catch upon the posting of a bond. The bond arguably takes account of the charges against the Master but, since he was not detained, the Tribunal merely said that he and the crew 'shall be free to leave without any conditions'.[34]

The second issue raised particular difficulties in the *Tomimaru* case. There, a criminal case was instituted against the Master on 8 November 2006 under article 253(2) of the Criminal Code of the Russian Federation, which notably punishes exploitation of the natural resources of the Russian EEZ without a permit. The allegedly illegal portion of the catch was confiscated and the rest was sold by the agent of the owner.[35] The other crew members were allowed to leave Russia before the end of March 2007.[36] In parallel, administrative proceedings were instituted against the owner on 14 November 2006 under article 8.17(2) of the Code of Administrative Offences.[37] A *malaise* was obvious from the outset, when the Application indicated that a bond was set on 12 December 2006 by the Inter-District Prosecutor for Nature Protection in Kamchatka in the amount of 8.8 million roubles, but that this bond only concerned the criminal case and would not secure the release of the vessel.[38] The bond was not paid, and the merits of the case were decided on 15 May 2007 by the Petropavlovsk-Kamchatskii City Court which imposed against the Master a fine and the payment of damages.[39] For Russia, however, the bond set on December 12 was 'established for the release of the arrested vessel'.[40] On 8 December, the owner had requested the Northeast Border Coast Guard Directorate of the Federal Security Service, which had arrested and inspected the vessel, to determine a bond in respect of the vessel. However, the Consul-General of Japan was informed on 14 December that

[32] *Saiga (Prompt Release)* (n 12) [71].

[33] *Hoshinmaru* (n 2) [77].

[34] ibid [102(4)]. Judge Treves pointed out that 'this provision should not be read as concerning the release of the Master and crew from detention. It ought to be read, instead, as a complement to the provision for the release of the vessel. Its function is to prevent resort to conditions of any kind, bureaucratic or otherwise, concerning the departure of Master and crew, that might delay the departure of the vessel'. Decl. Treves <www.itlos.org/case_documents/2007/document_en_298.pdf> accessed 20 April 2008, 2. The same language was used by the Tribunal in the *Juno Trader* case, where the status of the crew was also in dispute, for St Vincent argued that the passports of the crew members had yet to be returned. In its Judgment, the Tribunal mentioned that in a letter of 15 December 2004, Guinea-Bissau informed it that all crew members were free to leave. In its operative part, the Judgment says that the crew members shall be free to leave Guinea-Bissau without any conditions. *Juno Trader* (n 78) [104(4)]. The Master had been fined €8,770, which he paid without admission of liability.

[35] Application of Japan (6 July 2007) <www.itlos.org/case_documents/2007/document_en_287.pdf> accessed 20 April 2008 [14]. The Agent for Russia indicated that administrative proceedings had been instituted against the Master on 3 November. ITLOS/PV.07/5, Verbatim Record (21 July 2007) <www.itlos.org/case_documents/2007/document_en_290.pdf> accessed 20 April 2008, 6. But it seems that no administrative case was begun.

[36] ibid [17]. [37] *Tomimaru* (n 35) [31]. [38] Application (n 35) [16].

[39] ibid [18]. The Master appealed to the Kamchatka District Court and paid the fine of 500,000 roubles but not the damages of 9 million roubles. He was allowed to return to Japan on 30 May 2007; ibid. The case was still pending when the Tribunal delivered its Judgment.

[40] Statement in Response of the Russian Federation (17 July 2007) <www.itlos.org/case_documents/2007/document_en_288.pdf> accessed 20 April 2008 [15].

the appropriate body was the Inter-District Prosecutor's Office.[41] But the owner could not ascertain whether the bond that was fixed would guarantee the release of the Master or the vessel, or both, or whether the amount requested constituted a 'bond' in the first place. Indeed, the letter of 12 December referred to the 8.8 million roubles as 'voluntary compensation for the damage cause to the Russian Federation'.[42] Furthermore, that letter referred to a case number which was the number of the criminal case against the Master.[43] On 14 December, the owner petitioned the Northeast Coast Guard Directorate to set a bond for the case of administrative offences, but was informed that it was the Federal Court of Petropavlovsk-Kamchatskii which was in charge of the matter.[44] And while, on 18 December, he petitioned the Petropavlovsk-Kamchatskii City Court for the setting of a bond in the administrative case, that court ruled on 19 December that the petition to release the *Tomimaru* was denied on the ground that 'the provisions of the Code of Administrative Offences of the Russian Federation do not provide the possibility of releasing a property after posting the amount of bond by the accused on the administrative offences'.[45] Before the Tribunal, this fragmentation of the bond in the criminal and administrative proceedings was referred to as the 'two locks' controversy, the Applicant considering that they were two locks at the door that held the *Tomimaru*, that the 8.8 million would only open one lock, and that the owner did not know how much it would cost him to open the other lock in the administrative case.[46]

Unfortunately, the explanations of the Respondent were less than fully clear.[47] Nevertheless, the Russian side maintained that the letter of 12 December was an order to the Coast Guard to release the vessel both for the purpose of the criminal and administrative cases, and that this constituted the bond under article 73(2) of the Convention.[48] Problems arising from ambiguities in domestic laws and procedures arose on several occasions, concerning both the legislation of the flag State and that of the detaining State.[49] Whereas knowledge of the detaining State's legal system is the

[41] ibid [13]–[14]. The owner had already made a petition to the Northeast Border Coast Guard Directorate on November 30 for a bond to be fixed for the release of the vessel. Application (n 108) [19].

[42] ITLOS/PV.07/4, Verbatim Record (21 July 2007) <www.itlos.org/case_documents/2007/document_en_289.pdf> accessed 20 April 2008, 11 (Agent for the Applicant).

[43] ibid.

[44] ibid [12].

[45] *Tomimaru* (n 3) [39]. 'This ruling was never contested by the attorneys of the owner of the vessel, though from a legal point of view such an opportunity existed'. Statement in Response (n 40) [18]. The vessel was considered material evidence in the criminal proceedings; ibid [28].

[46] ITLOS/PV.07/4 (n 42) 12.

[47] The Deputy Agent for Russia said that the Master could have applied to the investigator in charge of the criminal case to set a bond, but that he never did so. He also indicated that 'the decision to free the vessel could be adopted only after the ship-owner, who is responsible for the illegal acts of the Master . . . , had complied with two conditions: first, to present a claim to introduce a bond commensurate with the damage and, secondly, to make payment of the bond practically'. ITLOS/PV.07/5, above (n 108) 8. The State Sea Inspection, which had been asked by the owner to set a bond in the administrative case, 'took all the materials and passed them to the criminal case, so it did not have powers to resolve that issue . . . and the administrative case was passed to the court'. ibid 9.

[48] ITLOS/PV.07/7, Verbatim Record (23 July 2007) <www.itlos.org/case_documents/2007/document_en_292.pdf> accessed 20 April 2008, 3, 5–6.

[49] In the *Saiga* case the Tribunal overlooked a possible lapse in registration. St Vincent maintained at all times that it was the flag State, and issued a permanent certificate of registration two months after the expiration of the provisional certificate. In the *Grand Prince* case, however,

responsibility of the owner or of the other interests in the vessel through suitable counsels, the detaining State also has an obligation to ensure that its legal system allows for the good faith performance of the duty of prompt release of vessels and crews.[50] The duty in article 73(2) to release on bond is owed to flag States, not to owners, although that duty will logically be relied upon by owners in domestic proceedings, and it will also possibly be vindicated by the flag State under article 292. While the Tribunal did not have the opportunity to examine the fragmentation of the bond, as it found the application to be without object, it does not appear to be an obligation under article 73(2) that the bond be determined in one single amount by one single authority. A single incident will often trigger parallel cases under domestic law.[51] In *Saiga (Prompt Release)*, both the vessel and crew were detained and only charges against the vessel were recorded and no case had been started when the Application was made; hence, the bond fixed by the Tribunal concerned the release of both the vessel and its crew. In *Camouco*, a bond was fixed domestically for the release of the vessel but not for the release of the Master who had been charged (no charges had been made against the owner); the Tribunal determined a bond for the release of both the vessel and its Master.[52] In the *Volga* case, a bond had been requested by Australia for the release of the vessel and the crew members concerned were granted bail; the bond fixed by the Tribunal concerned the release of the vessel only, as the crew members who were charged with an indictable offence had paid bail money and left Australia.[53] In the *Juno Trader* case, the Master had already paid the fine before the case was brought to the Tribunal, and no bond had been fixed by Guinea-Bissau for the release of the vessel, which it had confiscated; the Tribunal calculated a bond for the

the issue was posed in a different context: the owner was planning to reflag the vessel in Brazil at the time it was arrested, and the Belizean authorities stated that they were awaiting the outcome of the case to decide on deregistration. Moreover, the case involved the reflagging of a fishing vessel, a problem that has attracted international concern. B H Oxman and V P Bantz, 'The Grand Prince' (2002) 96 American Journal of International Law 219, 222. See *M/V Saiga (No.2) (Saint Vincent and the Grenadines v Guinea)* (Merits, Judgment of 1 July 1999) ITLOS Reports 1999 10. In the *Juno Trader* case, there had been a considerable amount of confusion on the legal effect under the laws of Guinea-Bissau of a decision by an administrative body to confiscate the vessel. See V P Bantz, 'Views from Hamburg: The *Juno Trader* Case or How to Make Sense of the Coastal State's Rights in the Light of its Duty of Prompt Release' (2005) 24 University of Queensland Law Journal 414, 422.

[50] See *Exchange of Greek and Turkish Populations* (Advisory Opinion) PCIJ Rep Series B No 10, 20.

[51] This was not the view of Judge Yanai, who noted the intricacy of the procedure in Russian law and considered that the bond was not fixed in the administrative case. For him, 'arrested vessels and their crews shall be promptly released upon the posting of a reasonable bond . . . without being subjected to parallel bonds . . . National prompt release procedures . . . should be simple and transparent'. Decl. Yanai <www.itlos.org/case_documents/2007/document_en_303.pdf> accessed 20 April 2008.

[52] The Master had been placed under a regime of judicial supervision and the investigating magistrate had rejected the Master's request for release from judicial supervision on the same day it was made. Under French law, judicial supervision is different from, and does not entail, provisional detention pending trail. Although a person under judicial supervision may be required to surrender a passport or post security, he is not thereby released from judicial supervision. B H Oxman and V P Bantz, 'The Camouco' (2000) 94 American Journal of International Law 713, 716. The issues were similar in the *Monte Confurco* case where France was also the Respondent.

[53] *Volga (Russian Federation v Australia)* (Prompt Release, Judgment of 23 December 2002) ITLOS Reports 2002 10.

release of the vessel only, as the crew were not detained, but the bond included the fine imposed on the Master, for the payment of the fine had been suspended domestically. In the *Hoshinmaru* case, too, the Master was not in detention; he was liable for fines and damages which had been taken into account in the bond fixed by Russia. While the Tribunal only ordered the release of the vessel, it arguably also took account of these damages when fixing the bond. Hence, the difference with the *Volga* case is that the bail that was paid there already guaranteed the execution of fines against the crew members on the merits and was thus not taken into account by the Tribunal to calculate the bond, whereas no such security had been paid in the *Hoshinmaru* case.[54] A bond fixed by the Tribunal under Article 292 ensures, on the one hand, the release of the vessel and its crew and, on the other hand, it guarantees the payment of penalties imposed on the merits. How the bond is calculated has now to be examined.

C. Elements of a Reasonable Bond: Reasonable Penalties Imposable

Article 73(2) requires that the bond fixed by the detaining State be reasonable. From the case law of the Tribunal, one can consider that reasonableness is an open-ended concept which aggregates certain factors, but that no pre-determined formula exists; it is the end result which must be reasonable.[55] The drafters of the Convention intended to leave it up to the judges to give concrete content to the notion of reasonableness.[56] The Tribunal indicated that the relevant factors 'include the gravity of the alleged offences, the penalties imposed or imposable 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'.[57] Although the Tribunal expressed the opinion that there was no rigid rule as to the exact weight to be attached to each of them,[58] it singled out the gravity of the alleged offences on three occasions: in the *Monte Confurco* case, it said that 'the amount of the bond should not be excessive and unrelated to the gravity of the alleged offence'.[59] In the *Juno Trader* case, it indicated that there was 'the need to avoid disproportion between the gravity of the alleged offences and the amount of the bond'.[60] In the *Hoshinmaru* case, the Tribunal stated: '[T]he amount of a bond should be proportionate to the gravity of the alleged offences'.[61] That case concerned misrepresentation of data in the logbook.[62] The bond, set at 22 million roubles, was

[54] The Master had paid the fine but not the damages. See above (n 39).

[55] See *Continental Shelf Case (Tunisia/Libya)* (Merits) [1982] ICJ Rep 18, 59. Vice-President Wolfrum regretted the lack of transparency in the appreciation of evidence by the Tribunal, which for him should be fully reasoned. *Saiga (No 2)* (n 49), 92 [2], Sep. Op. Wolfrum. One can note, however, that a reasoned judicial decision is not necessarily the same thing as a transparent one. Oxman and Bantz (n 52) 721.

[56] Erik Franckx, ''Reasonable Bond' in the Practice of the International Tribunal of the Law of the Sea' (2001–2002) California Western Law Journal 303, 323. Attempts to restrict the discretionary powers of judges on this point, such as by preventing the bond to exceed the value of the vessel, proved unsuccessful; ibid 324.

[57] *Camouco* (n 25) [67]. This is by no means a complete list. *Monte Confurco* (n 6) [76]. The Tribunal will have regard to all the circumstances of the particular case. *Volga* (n 53) [65].

[58] *Monte Confurco* (n 6) [76].

[59] ibid [73].

[60] *Juno Trader* (n 5) [89].

[61] *Hoshinmaru* (n 2) [88].

[62] See above (n 8).

considered 'exorbitant' by Japan.[63] At the hearing, the Advocate for Japan considered that even though the vessel had misreported the catch of an expensive species as a catch of a cheaper one, the catch was well within the licence limits and, therefore, there was no environmental damage as such.[64] In addition, to take account of the value of the vessel would not be justified when confiscation is not a realistic penalty.[65] For the Russian side, however, the offence was a serious one, as the proper recording of the catch was an essential prerequisite for Russia to exercise its sovereign rights in the EEZ.[66] Hence, the amount of the bond was at the core of the Tribunal's evaluation of the gravity of the offence. Thus, the Respondent considered that the bond must establish sufficient guarantees which are supposed to ensure proper implementation of any decision on the merits.[67]

The Tribunal found that a bond is not reasonable when it is based on the maximum penalties which could be applicable, given the circumstances of the case.[68] Hence, if the bond determined under Article 292 is based in part on the imposable penalties, and if these must be proportionate to the gravity of the alleged offence, the Tribunal's appreciation of the merits of the case is at stake. The alleged offence is a question of fact, and the Tribunal 'is 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'.[69] In the *Monte Confurco* case, the Tribunal had determined that the bond imposed by the French court, which was based on the presumption that all the fish found aboard had been illegally caught, was not 'entirely consistent with the information before this Tribunal'.[70] This had attracted the criticism of some judges, who cautioned against the Tribunal entering into the merits of the case,

[63] ITLOS/PV.07/1 (n 18) 5. The bond was computed as follows: 500,000 roubles as maximum imposable fine on the Master, 2,001,365.05 roubles as maximum imposable fine on the owner, 240,000 roubles in procedural costs, 7,929,500 roubles as penalty for damages caused by illegal fishing, and 11,350,000 as the value of the vessel. *Hoshinmaru* (n 12) [51].

[64] ITLOS/PV.07/1, 15.

[65] ibid 17–18.

[66] ITLOS/PV.07/2 (n 10) 7. 'If the substitution of the species on *Hoshinmaru* vessel had not been revealed . . . then the 20 tons of raw sockeye salmon would simply have been stolen . . . This offensive act could not be considered as a purely technical error . . . This fishing can only be legal when it is executed in compliance with all the applicable rules and norms established by the coastal State, including timely and exhaustive reporting of data on species'; ibid 10–11.

[67] Statement in Response (n 15) [60].

[68] *Hoshinmaru* (n 2) [93]. In the *Camouco* case, the issue of the French version of the Convention arose, which in Article 73(2) mentions a 'sufficient' guarantee. Article 292(1), however, mentions 'reasonable'. However, France did not rely on the word *suffisante*. The applicant (Belize) noted this fact and declared that it was sufficiently clear that the words used in the Convention, and interpreted in this case, is 'reasonable' as opposed to 'sufficient'. The Tribunal did not address the issue, but Judge Anderson invoked the French text in his dissenting opinion. Oxman and Bantz (n 52) 717. 'What is 'reasonable' is an amount *suffisant/sufficient* to cover penalties which could be imposed upon conviction. There exists the danger of fixing the security under article 292 at a level which, being too low, could in practice "prejudice . . . the merits of [the] case"'. *Camouco*, (n 25), 57, Dis. Op. Anderson.

[69] *Hoshinmaru* (n 2) [89]. This is taken from *Monte Confurco* (n 6) [74].

[70] *Monte Confurco* (n 6) [88]. The issue had also arisen in the *Camouco* case: French law requires that fishing vessels entering the EEZ of the French Southern and Antarctic Territories indicate their presence and declare what tonnage of fish they have on board. Failure to do so raises the presumption that all the fish was unlawfully fished in the French EEZ. The underlying question is whether such measures violate the freedom of navigation in the EEZ. Oxman and Bantz (n 52) 715.

for article 292(3) specifies that the merits of the case before the domestic forum must not be prejudiced by the prompt release procedure.[71]

Nevertheless, the Tribunal assessed the gravity of the offence and considered that the case was different from those it had dealt with before, as it did not concern fishing without a licence. By the same token, the Tribunal noted that the offence was not a minor one and that monitoring of catches was one of the most essential means of managing marine living resources.[72] In qualifying the nature of the offence, the Tribunal also took account of the bilateral relations between Russia and Japan which established an institutional framework for consultations on the management of fish stocks and on the enforcement of the applicable rules in the Russian EEZ in the Pacific. The Tribunal considered that the offences 'may be seen as transgressions within a broadly satisfactory cooperative framework'.[73] It is also likely that the Tribunal bore in mind the general context of the dispute, that is, illegal and unreported fishing, of which it had already taken note in the *Monte Confurco* and *Volga* cases.[74]

While the applicant conceded that the offence was a serious one,[75] the Tribunal agreed with the applicant's argument that confiscation of the vessel was not a realistic penalty.[76] It did not 'consider it reasonable that the bond should be calculated on the basis of the confiscation of the vessel, given the circumstances of the case', and noted that 'the applicable Russian regulations do not foresee automatic inclusion of the value of the arrested vessel in the assessment of the bond'.[77] This shows quite clearly that, for the Tribunal, article 292(3) was never intended to prevent it from making determinations bearing on the merits when these are necessary for the assessment of a reasonable

[71] eg Judge Mensah: '[S]ome of the statements come perilously close to an attempt by the Tribunal to enter into the merits of the case … [A]ny 'examination' of the facts must be limited to what is strictly necessary for an appreciation of the reasonableness or otherwise of the measures taken by the authorities of the arresting State'. *Monte Confurco* (n 79) 118, 121, Decl. Mensah. Judge Jesus considered that the Tribunal had preempted the domestic court from exercising its full competence on the merits; ibid 142 [25], Dis. Op. Jesus. Judge Mensah recently repeated his views, asking whether the facts and circumstances of the case can include those that go to demonstrate the strength or weakness of the case against the vessel, and claiming that the Tribunal should not take or express a view on the soundness of the charges against the vessel. T A Mensah, 'The Tribunal and the Prompt Release of Vessels' (2007) 22 International Journal of Marine and Coastal Law 425, 444, 446.

[72] *Hoshinmaru* (n 2) [98]–[99]. The proper management of fishing resources, as part of the achievement of sustainable fisheries, has been emphasized again recently by the UN General Assembly. See UN Doc A/62/260 (2007). For Judge Yanai, the offence was not likely to cause damage to the Russian EEZ, and the bond should have been set at a lower level. Sep. Op. Yanai <www.itlos.org/case_documents/2007/document_en_301.pdf> accessed on 20 April 2008 [3].

[73] *Hoshinmaru* (n 6) [98]–[99]. That framework consists of two agreements concluded on 7 December 1984 and 12 May 1985.

[74] *Monte Confurco* (n 6) [76]; *Volga* (n 126) [68]. The context of the dispute forms part of the circumstances of the case which allow the Tribunal to assess the gravity of the offence. However, it is important to note that a bond is fixed for a particular offence.

[75] ITLOS/PV.07/3, Verbatim Record (20 July 2007) <www.itlos.org/case_documents/2007/document_en_286.pdf> accessed on 20 April 2008, 6.

[76] See (n 65).

[77] *Hoshinmaru* (n 2) [93]. See article 8.17(2) of the Code of Administrative Offences, ibid [36]. Judge Kolodkin disagreed and found that the bond set by the Tribunal did not take account of the gravity of the offence and was inconsistent with the practice of the Tribunal, which includes the value of the vessel as a rule. Decl. Kolodkin <www.itlos.org/case_documents/2007/document_en_297.pdf> accessed 20 April 2008.

bond; this is quite different from the Tribunal deciding the merits itself. While, in light of the independent nature of the proceedings under article 292, the Tribunal is not a domestic court of appeals and is not bound by the determinations of domestic courts,[78] the domestic courts dealing with the merits will not be bound by the determinations of the Tribunal either.[79] However, it remains that the bond fixed under article 292 may be the only practical or, at least, easiest way for the detaining State to satisfy a judgment on the merits.[80] Therefore, the question of the intent of article 73 may be posed starkly as follows: were the negotiators of the Convention sophisticated realists who understood that the duty to release promptly on reasonable bond might in practice mean limiting the penalty to the cash guaranteed by a bond whose reasonableness might be reviewed by a standing international tribunal unlikely to be hostile to coastal State's interests?[81]

The *Hoshinmaru* case clearly suggests that the bond will be reduced by the Tribunal if the seriousness of the offence as alleged by the detaining State is unlikely to be borne by the facts. The relation of proportionality is one between the alleged offence and the bond, not between the bond and the penalties sought by the detaining State.[82] Therefore, since the bond is notably based on the penalties imposed or imposable, and since the bond must be proportionate to the gravity of the alleged offence, it is axiomatic that the Tribunal will assess the reasonableness of the domestic penalties. The Advocate for Japan enunciated it clearly: '[T]he amount of the bond should never be more than the amount of the fines that one might reasonably expect could in reality be imposed on the vessel's owners and crew in respect of the actual offence with which

[78] *Camouco* (n 25) [58].

[79] Bantz (n 49) 437. The Tribunal clearly emphasized that it cannot assess whether the conditions of the arrest were lawful. *Volga* (n 53) [83]; *Juno Trader* (n 78) [95]. But this is different from the assessment of the gravity of the alleged offence by the Tribunal. It is also important to note that such assessment has to be made quickly, for the Tribunal must render its judgment not later than 14 days after the closure of the hearing under Article 112(4) of the Rules of the Tribunal. There is thus an inherent limit to the extent to which the Tribunal could take cognizance of the facts in dispute and seek evidence. *Monte Confurco* (n 6) [74].

[80] It is true that a coastal State which imposes a confiscation on the merits is not bereft of any remedy if the owner does not comply with the judgment. The State can start proceedings in the jurisdiction where the vessel is located and various conventions exist on international cooperation in civil or criminal matters. See B H Oxman and V P Bantz, 'Un droit de confisquer? L'obligation de prompte mainlevée des navires' in V Coussirat-Coustère et al, *La mer et son droit. Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Paris Pedone 2003) 479, 495.

[81] Oxman and Bantz (n 49) 224. It does not seem correct to read in the factors chosen by the Tribunal to fix the bond the idea that the Tribunal struck the balance in favour of flag States. Contra D R Rothwell and T Stephens, 'Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests' (2004) 53 International and Comparative Law Quarterly 171, 183.

[82] In the *Camouco* case, the late Judge Laing examined the relation between the bond fixed by the Tribunal and the aggregate potential liability under domestic law and between the bond requested by the detaining State. *Camouco* (n 25) 43–44, Decl. Laing. While Tanaka correctly writes that the ratio between the amount of the bond to be posted and the aggregate potential liability provides no objective criterion, it cannot be said that 'from the case-law, it appears that the Tribunal did not support the idea of proportionality'. Yoshifumi Tanaka, 'Prompt release in the United Nations Convention on the Law of the Sea: Some Reflections on the ITLOS Jurisprudence' (2004) 51 Netherlands International Law review 237, 267. The proportionality that is taken into account is one between the bond and the offence.

they are charged'.[83] As a matter of judicial technique, it may very well be that the Tribunal will first consider the maximum penalties, and fix a security of a lesser amount if it considers them excessive and unreasonable in relation to the alleged offences; this involves considering, perhaps, the probability of conviction.[84] In that respect, it does not seem to be a correct assumption that, because the Convention does not limit the size of the fines, only very strong grounds should justify reducing the domestic bond.[85] Whereas the absence of an express computation of the bond fixed by the Tribunal may signify that only a tip of the veil surrounding the amount of the bond has so far been lifted,[86] in the *Hoshinmaru* case the bond reflects the balance between an offence which was deemed serious, but where confiscation was deemed not to be a reasonable penalty. Arguably, the 10 million roubles fixed by the Tribunal seem to result roughly from subtracting the value of the vessel and the fine already paid by the Master from the 22 million requested by Russia.[87] Nevertheless, the Tribunal will also be ready to give effect to an agreement between the parties on the calculation of the bond.[88] This may suggest that the Tribunal will recognize bond-fixing methods which could depart from the factors that it has established.[89]

[83] ITLOS/PV.07/1 (n 18) 16. He continued: 'The bond should reflect only the fines that can reasonably be envisaged as being within the range of possible penalties that might be imposed'; ibid 17.

[84] D J Devine, 'Relevant Factors in Establishing a Reasonable Bond for Prompt Release of a Vessel under Article 292(1) of the United Nations Convention on the Law of the Sea 1982' (2002) 27 South African Yearbook of International Law 140, 144.

[85] Contra *Camouco* (n 25) 50–51, Dis. Op. Anderson; see also *Monte Confurco* (n 6) 127 et seq, Dis. Op. Anderson, and *Camouco* (n 25) 68 [6], Dis. Op. Wolfrum. As put by Vice-President Nelson, 'the Tribunal has in fact been invested with the competence to limit— to put a break on— the discretionary power of the coastal State with respect to the fixing of bonds in certain specific circumstances'. *Monte Confurco* (n 6) 124, Sep. Op. Nelson.

[86] Franck (n 56) 334.

[87] Only in the *Volga* case was the amount of the bond easily identifiable with the aggregate value of the vessel, fuel, lubricants and fishing equipment as assessed by the respondent and not disputed by the applicant. Bantz (n 49) 442. The cargo will not be released when difficulties might be incurred in restoring it to the vessel if it had been discharged, or when it is seized or sold by the detaining State. Thus, when the release of the cargo is not ordered, the discharged cargo (or its monetary equivalent) or, if the cargo was sold, the proceeds of the sale, will be a guarantee kept by the detaining State. See also Devine, above (n 81) 147. The Tribunal, however, has not always attributed the same function to that guarantee. In the *Camouco* case it probably included it in its assessment of an overall reasonable bond. In the *Monte Confurco* case it considered it an additional security to be held by the detaining State. In the *Volga* case it did not take it into account. Bantz (ibid) 440–441. To date, the *Juno Trader* and *Hoshinmaru* cases are the only instances where the Tribunal ordered the release of the cargo together with the vessels, for the fish was still aboard when the Tribunal delivered the judgments. In the *Saiga (Prompt Release)* case, no bond had been requested and no penalty was imposed or imposable, as no domestic case had been launched. The Tribunal found it reasonable that the bond consist of the amount of gasoil discharged plus $400,000.

[88] *Hoshinmaru* (n 2) [85]. Such procedure would help prevent disputes; ibid.

[89] No such agreement was found to exist in the case at hand. Russia claimed that, in the course of sessions of the Joint Commissions established under the bilateral agreements, it was agreed that the criteria to be applied would take account of the potential fines and of the value of the vessel. Japan disagreed and raised a linguistic problem. ITLOS/PV.07/3 (n 148) 3. Looking at the terms of the minutes of the meetings and the particular circumstances, the Tribunal found that no agreement could have been constituted; *Hoshinmaru* (n 2) [86].

These problems will be raised starkly in cases where confiscation on the merits is automatic and, therefore, where the value of the vessel (and its equipment) is *ipso facto* included in the bond fixed by the detaining State, but where the gravity of the offence does not otherwise reasonably justify the confiscation of the vessel. The problem was not posed in these terms in the *Hoshinmaru* case because confiscation was not automatic under Russian law, but one can imagine that the Tribunal will also refuse to take account of penalties which are disproportionate.

D. Effect of a Final Judgment of Confiscation: Role of the Tribunal

The *Tomimaru* case is the first occasion when the Tribunal was confronted with a domestic final decision of confiscation of the vessel.[90] The issue of confiscation was raised for the first time in the *Grand Prince* case, but not decided upon, for the Tribunal found that it had no jurisdiction because the Applicant was not the flag State of the vessel. The latter had been confiscated on the merits by a French criminal court eleven days after a court of first instance had set a bond for the release of the vessel. Therefore, the question of the relation between the rights of the coastal State under article 73(1) and its duty of prompt release under article 73(2) emerged.[91] It was subsequently articulated in the *Juno Trader* case in the context of a non-final decision of confiscation, which does not raise the same issues as a final decision. The present writer suggested that the logic of the prompt release procedure demands that a non-final decision of confiscation cannot be considered a decision on the 'merits' for the purpose of putting an end to the detention of the vessel and crews and, therefore, the duty under article 73(2) does not disappear with a decision to confiscate which is appealable.[92] In the *Juno Trader* case, the Tribunal considered that a non-final decision could not affect either its jurisdiction or the admissibility of the Application, for the vessel remained in detention.[93] This was confirmed *obiter* in the *Tomimaru* case where the Tribunal stated: '[C]onsidering 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 pending before the

[90] The Tribunal, having found that the Application was without object, did not have the opportunity to examine the reasonableness of the bond that was fixed by Russia. The Advocate for Japan indicated that the case focused more 'on deficiencies in the process leading to the setting of the bond than it [did] on the level of the bond itself . . . This was a case of catching species that the vessel was not licensed to catch, a clear caser of unlawful fishing'; ITLOS/PV.07/4 (n 42) 7–8.

[91] Hence the author asked: 'Is there an option of rapid confiscation that renders effectively meaningless the obligation to release a ship . . . ? Would an affirmative response encourage a rush to judgment in criminal proceedings that poses a risk of human rights violations? Or encourage a rush to the Tribunal that would afford municipal courts less opportunity to consider the question of release?' Oxman and Bantz (n 49) 223. Belize maintained that the confiscation was intended to evade the duty of prompt release; France, on the other hand, argued that the confiscation had rendered Article 292 proceedings without object; ibid 220.

[92] Oxman and Bantz (n 80) 492–494. Indeed, the Tribunal found that a reasonable bond under Article 73(2) guarantees the execution of a *final* decision on the merits. See *Camouco* (n 25) [76]; *Monte Confurco* (n 6) [95]; *Juno Trader* (n 5) [102].

[93] *Juno Trader* (n 5) [62], [67]–[68]. For a case comment, see also E Sessa, 'La decisione dell'International Tribunal of the Law of the Sea nel caso Juno Trader' (2006) 108 Il Diritto Marittimo 1116.

domestic courts of the detaining State'.[94] In the *Tomimaru* case, however, the issue was one of a confiscation arising from a final judgment. The Petropavlovsk-Kamchatskii City Court had ordered the confiscation of the vessel on 28 December 2006, and this was confirmed on appeal by the Kamchatka District Court on 24 January 2007.[95] The owner had lodged an objection in accordance with the supervisory review procedure before the Supreme Court of the Russian Federation. There was some ambiguity on the effect of that procedure, for the Respondent quoted a letter of 2003 from the Supreme Court, stating that, in the case of administrative offences, the decision of the District Court cannot be appealed,[96] and later said that the procedure was an exceptional judicial review, while the normal procedure concludes with an appeal.[97] After the closure of the hearing, on 26 July 2007, Russia informed the Tribunal that the Supreme Court had dismissed the complaint concerning the confiscation.[98] While the Rules of the Tribunal only contain provisions on the production of documents during the written and oral phases, international proceedings are not governed by the same procedural rigour that may regulate domestic proceedings.[99] The Tribunal noted that the applicant did not maintain its argument that the confiscation was not final, and considered it appropriate to take the decision of the Supreme Court into consideration.[100] In that context, it was not the right to confiscate *per se* that was under examination, for although it is not listed in article 73(1), the Tribunal declared itself aware that many States provide for confiscation as a sanction.[101] The real issue was the effect of a final

[94] *Tomimaru* (n 3) [78]. Judge Lucky found this statement unnecessary. Sep. Op. Lucky <www.itlos.org/case_documents/2007/document_en_305.pdf> accessed on 20 April 2008 [3].

[95] ibid [42]–43].

[96] Statement in Response (n 40) [23].

[97] ITLOS/PV.07/5 (n 35) 3. 'The principal task of the supervisory procedure is to guarantee uniformity in the application of legal norms . . . Secondly, decisions upheld in the course of an appeal can be annulled at a supervisory stage if they infringe human and civil rights and freedoms proclaimed by universally recognized principles and the norms of international law and international treaties of the Russian Federation'; ibid 4. The Advocate for Japan stated before the Tribunal: '[E]ven if the Supreme Court's letter had some legal force in Russian law, which we must say is not yet proven, the issue is whether Article 292 . . . prevents the Tribunal from holding jurisdiction in a case where the domestic legal decision, which has biding effect, is actually pending in a legal proceeding at the end of which that decision . . . could be annulled'. ITLOS/PV.07/6, Verbatim Record (23 July 2007) <www.itlos.org/case_documents/2007/document_en_291.pdf> accessed on 20 April 2008, 3.

[98] *Tomimaru* (n 3) [46].

[99] *Mavrommatis Palestine Concessions Case (Greece v United Kingdom)* (Jurisdiction) PCIJ Rep Series A No 2, 34.

[100] *Tomimaru* (n 3) [68], [79]. See also *Hoshinmaru* (n 2) [64]: 'While the Tribunal takes the view that, in principle, the decisive date for determining the issues of admissibility is the date of the filing of an application, it acknowledges that events subsequent to the filing . . . may render an application without object'.

[101] ibid [72]. In it Application, Japan stated that if confiscation of arrested vessels were permitted, the prompt release obligations would be evacuated of all practical meaning. Application (n 35) [53]. If this was meant to be a general statement, this is incorrect. The problems are not articulated in the same way in article 230, for only monetary penalties may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment committed by foreign vessels within and beyond the territorial sea, except in the case of a wilful and serious act of pollution in the territorial sea. For the duty of prompt release under Part XII, see article 226(1)(b).

decision to confiscate on the duty of prompt release under article 73(2) and, therefore, on the jurisdiction of a court or tribunal under article 292.

One preliminary matter is clear: a final judgment does not, as such, prevent the Tribunal from examining the effect of that judgment on the prompt release procedure itself. In the *Grand Prince* case, France had toyed with the notion that a decision on the merits renders an application under Article 292 ipso facto without object and, together with Guinea-Bissau in the *Juno Trader* case and Russia in the *Tomimaru* case, alleged that a confiscation, which operates a transfer of ownership, deprives the owner of his title over the ship, or effectuates a change of the nationality of the vessel. The Tribunal indicated that a change of ownership has no impact on nationality, the loss of which is a matter for the flag State to decide.[102]

Now, the determination of the conditions under which a final judgment of confiscation terminates the duty of prompt release was regarded by the Tribunal as an issue of balance between the interests of the flag State and those of the coastal State, as are other issues of interpretation in article 73.[103] Whereas a final decision on the merits renders prompt release meaningless, it had been suggested that to give effect to *any* final decision to confiscate, in particular a rapid decision, may emasculate the prompt release procedure and upset the balance in article 73.[104] The Tribunal endorsed this view: '[C]onfiscation of a fishing vessel must not be used in such a manner as to upset the balance of interests . . . established in the Convention'.[105] One case where the duty under article 73(2) is emasculated is where the flag State is not notified of the detention under article 73(4) and, therefore, is prevented 'from resorting to the prompt release procedure set forth in the Convention'.[106] In these circumstances, one could allege that the right to confiscate is simply abused and, therefore, should not render the prompt release procedure inapplicable.[107] The reverse position is also true: a coastal State cannot be expected to wait to exercise its right to confiscate if the flag State, although duly notified under article 73(4), or the owner, do not act in a timely manner, either by resorting to the legal system of the detaining State or by using article 292. Therefore, it appears that the request for the setting of a bond must take place within a reasonable time.[108] This means that, on the one hand, it cannot be contended that the detaining State must wait indefinitely for a request to fix a bond before proceeding with the case

[102] ibid [70]. See also *Juno Trader* (n 5) [63] and 60–62 [9], [11], Joint Sep. Op. Mensah and Wolfrum. Indeed, there is a distinction between lack of jurisdiction to deal with the merits under article 292(3) and the power of a court or tribunal to examine its own jurisdiction under article 292(1). The latter includes the jurisdiction to determine whether vessels and crews are in detention and, therefore, whether the duty to release on bond still exists. Bantz (n 49) 430.

[103] *Tomimaru* (n 3) [74]. See (n 6).

[104] Oxman and Bantz (n 80) 497; Bantz (n 49) 429.

[105] *Tomimaru* (n 3) [75].

[106] ibid [76].

[107] The Tribunal noted that 'there is a connection between paragraphs 2 and 4 of article 73, since absence of prompt notification may have a bearing on the ability of the flag State to invoke article 73, paragraph 2, and article 292 in a timely and efficient manner'. *Camouco*, (n 25), [59]. While a breach of Article 73(4) is not within the jurisdiction of a court or tribunal under Article 292, such breach may have an impact on the issue of whether the vessel has still to be considered in detention, that is, whether the final decision to confiscate should be recognized.

[108] Judge Yanai emphasized that Japan had waited too long before filing the Application. Decl. Yanai, (n 51) [2.] See also Sep. Op. Lucky (n 94) [10]. See also *Juno Trader* (n 5) 63, [14], Joint Sep. Op. Mensah and Wolfrum. In the *Hoshinmaru* case, Judge Türk considered that the time of detention of the vessel and crew should not exceed approximately two months. Decl. Türk <www.itlos.org/case_documents/2007/document_en_300.pdf> accessed 20 April 2008, 2.

on the merits, but also, on the other hand, that a final decision on the merits must be surrounded by certain procedural and substantive guarantees.

Indeed, the Tribunal had indicated earlier that '[t]he obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that a bond or other financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision'.[109] This had prompted Judges Mensah and Wolfrum to emphasize that the procedure applied by the coastal State under Article 73(1) may be of relevance for the establishment of jurisdiction under article 292, and that 'a vessel continues to be a detained ship, within the meaning of article 292 of the Convention, until after the completion of national procedures that meet the standard of due process as developed in international law'.[110] In the *Tomimaru* case, the Tribunal stated for the first time that a decision to confiscate should not 'be taken 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'.[111] This is certainly a strong message to detaining States, particularly in light of the fact that not only are the merits of the case subtracted from the jurisdiction of a court or tribunal under article 292(3), but also because a dispute on the merits may otherwise not be subject to compulsory dispute settlement under Part XV of the Convention when the detaining State so wishes under Article 298(1)(b). The balance of interests in Article 73 thus requires that the jurisdiction of a court or tribunal under Article 292 encompass the ability to determine whether a good faith confiscation took place, and Judge Treves had suggested that 'confiscation obtained in violation of due process would seem . . . abusive so that it cannot preclude an order for release'.[112] In the *Tomimaru* case, the Tribunal did not expressly say that a confiscation obtained in violation of due process would not prevent the application of the prompt release procedure (as opposed to, eg constituting a breach of article 73(2) that could be justiciable under Part XV generally), but it stressed that no inconsistency with international standards of due process had been argued, and that a frustration of the possibility of recourse to applicable remedies had not been raised.[113] This may arguably suggest, by implication, that the Tribunal will examine such allegations and will uphold its jurisdiction under article 292 when a confiscation occurred that did not follow the requirements of due process. This possibility attracted the concern of some judges.[114] The Tribunal did not elaborate on the standards that it

[109] *Juno Trader* (n 5) [77].

[110] ibid 58, 62, [4], [12], Joint Sep. Op. Mensah and Wolfrum. In particular, the procedure under Article 292 could not be set aside by mere administrative action; ibid [12].

[111] *Tomimaru* (n 3) [76].

[112] *Juno Trader* (n 5) 73–74 [6], Sep. Op. Treves.

[113] *Tomimaru* (n 3) [79].

[114] Judge Nelson was of the opinion that these matters should not be dealt with under Article 292. Decl. Nelson <www.itlos.org/case_documents/2007/document_en_302.pdf> accessed 20 April 2008, 2. Judge Jesus disagreed with the Tribunal and considered that 'the prompt release procedure does not seem to prevent the detaining State from confiscating a vessel at any stage after its detention'. Sep. Op. Jesus <www.itlos.org/case_documents/2007/document_en_304.pdf> accessed on 20 April 2008 [9(c)]. Under this view, one could imagine agents of the coastal State vested with powers of immediate final sanction on the merits at sea. This does not seem compatible with the balance established in the Convention. Oxman and Bantz (n 80) 496. The same issue is raised with a confiscation that arises from the automatic operation of the law. Sep. Op. Jesus [9(d)].

would apply, for the issue was not raised.[115] The present writer has proposed elsewhere that the general presumption that States act in good faith, and the quick nature of prompt release proceedings under article 292,[116] could suggest that the non-recognition of a final judgment of confiscation would take place when the coastal State has manifestly and gravely violated its duty to provide for a due process that respects fundamental human rights; evidence of a serious violation may be found in gross abuse of rights, fraud, grave and manifest breach of internationally recognised procedural and substantive rules, or arbitrariness.[117] This may reflect the kind of standard alluded to by Judge Lucky who declared that, unless there is cogent, compelling evidence and reasons to the contrary, it can be presumed that due process was adhered to.[118]

E. Conclusions

The *Hoshinmaru* and the *Tomimaru* cases supply a very welcome contribution by the Tribunal on the nature of prompt release proceedings and the scope of its jurisdiction, especially in light of its duty not to prejudice the merits of the case that are decided domestically. It is now clear that, in fixing a reasonable bond, the Tribunal will not take account of domestic penalties, imposed or imposable, which do not reasonably correspond to the gravity of the offence as assessed by the Tribunal. In particular, the penalty of confiscation, if disproportionate in relation to the alleged offence, will not be recognized under article 292 proceedings, and the value of the vessel will not form part of the bond. This could also be the case of fines that are abusive or imposed or imposable without procedural guarantees.[119] The message here is that the bond that is determined domestically must incorporate the notion of reasonableness as articulated by the Tribunal, lest it be challenged, and reduced, under article 292; it is therefore also the whole domestic enforcement mechanism under article 73(1) that must be reasonable. Whereas both owners and flag States have a responsibility to request for prompt release on bond within a reasonable time, the right of the coastal State to pronounce the confiscation of the vessel will not *ipso facto* terminate the duty of prompt release: it will not terminate it when the confiscation is not final under the legal system of the

[115] Under article 293 of the Convention, a court or tribunal must apply rules of international law not incompatible with the Convention. The Tribunal determined that considerations of humanity must apply in the law of the sea. *Saiga (No 2)* (n 49) [155]. The Convention expressly incorporates human rights standards in certain provisions, such as article 230(3) on the recognized rights of the accused. See B H Oxman, 'Human Rights and the United Nations Convention on the Law of the Sea' (1997) 36 Columbia Journal of Transnational Law 399. See also above (n 110). The rights concerned are to be evaluated in the light of contemporary international law, which arguably embodies rigorous standards. Bantz (n 49) 432 (citing *Pope and Talbot Inc v Government of Canada* (Award in Respect of Damages), North American Free Trade Agreement (Arbitral Tribunal) (2002) 41 ILM 1347, 1358).

[116] See articles 111–112 of the Rules of the Tribunal. For a comment, see P Chandrasekhara Rao and Ph Gautier, *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Boston Martinus Nijhoff Publishers, Leiden, 2006).

[117] Bantz (n 49) 431–432 (also citing *Case Concerning Elettronica Sicula S.P.A. (ELSI) (United States of America v Italy)* (Merits) [1989] ICJ Rep 15, 76, for a definition of arbitrariness).

[118] Sep. Op. Lucky J (n 94) 7.

[119] See *Juno Trader* (n 5) 74 [6], Sep. Op. Treves.

detaining State; it will arguably not terminate it either when the final decision to confiscate was rendered in violation of the international standards of due process of law. Tribunal will, surely, have the opportunity to decide how the delicate balance between the interests of all involved is to be fine-tuned.

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