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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **THE “HOSHINMARU” CASE JAPAN V. RUSSIAN FEDERATION ITLOS REPORTS 2005-2007, P. 18**

AUTHORED BY - BHOOMIKA KUMAR<sup>1</sup>

Quorum : Judge Kolodkin, Judge Treves, Judge Lucky, Judge Turk. Judge Yanai

## **Introduction**

Hoshinmaru is a fishing vessel owned and operated by Ikeda Suisan Co registered in the Toyama Prefecture in Japan. It was bearing the Japanese flag during the detention and had Japanese nationality when the application was filed. It has seventeen Japanese crew members who were detained. Hoshinmaru is a Japanese fishing vessel which was in the Exclusive Economic Zone belonging to the Russian Federation (hereinafter known as “EEZ”) on 1st of June 2007. Upon entering the EEZ, it was detained by the Russian authorities in the port of Petropavlovsk-Kamchatsky. The Russian Federation had initiated criminal proceedings against the Master of the vessel and administrative proceedings against the owner of the vessel without any security bond which would equip the vessel and crew to leave detention. Their contention was that the fishing had caused damages equivalent to 7,927,500 roubles to the living aquatic species.

The vessel was detained at 56-09N, 165-28E, which falls within the ambit of Russian EEZ. It was detained on the allegation that the category of fish that was recorded in the logbook was different to the ones that was found to be on the vessel and this discrepancy constituted a violation of domestic law. The Japanese ministry was informed about the criminal investigation and the administrative detention initiated via a letter and that the crew would be detained until the investigation would be completed. Japan’s contention is that no bond or security has been fixed which would facilitate the crew and the vessel to leave upon posting.

The Russian Federation filed a response in pursuant of Article 111(4) of the rules of Tribunal to the application filed by Japan. The Hoshinmaru was licensed by the Federal Service for Veterinary and

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Phytosanitary Supervision to fish in the EEZ. According to the Protocol of Detention of the Fishing Vessel, the vessel was inspected and upon which there seemed to be substitution of fish species and falsification of the logbook. After which administrative proceedings were initiated as per the orders of the State Sea Inspection of the Northeast Border Coast Guard Directorate of the Federal Security Service. According to the respondent the Master has refused to accept the safe keeping of the vessel. Criminal proceedings were initiated according to para. 1 of Article 256 of the Criminal Code of the Russian Federation relating to illegal catching of marine living resources. The security bond was provided considering the refusal of the Master to sign the ‘not to leave the city’ undertaking.

As per para. 1 of Article 4 the Agreement on the mutual relations in the field of fisheries off the coasts between the two countries signed in 1984, both the party has to take all necessary measures to ensure that the fishing conducted in EEZ by the nationals and vessels must observe measures for conservation of living resources and other nuances established. The Respondent also claims that this detention was not done in isolation but 25 other such violations over the years.

### **Application filed by Japan**

The application filed by Japan for the prompt release of a vessel and its crew. The application is filed in pursuant to Article 292 of the United Nations Convention on the Law of the Sea ( hereinafter “the Convention”), Japan has requested the International Tribunal for the Law of the Sea( hereinafter “the Tribunal”) to sit for the issue and provide with a judgment.

Article 292 of the Convention declares that the Tribunal has the jurisdiction to adjudicate with respect to the detention of the vessel and the crew of the 88th Hoshimaru (hereinafter “the Hoshimaru”) wherein the Respondent has violated the obligation under Article 73(2) of the Convention.<sup>2</sup>

### **Issues raised**

1. Does the Tribunal have jurisdiction pursuant to Article 292 of the Convention to adjudicate the detention of the vessel and the crew of the 88th Hoshin Maru by the Respondent while breaching the State’s obligation under Article 73(2) of the Convention?

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<sup>2</sup> “Hoshinmaru” (Japan v. Russian Federation), Order of 9 July 2007, ITLOS Reports 2005-2007, Application Filed by Japan, p. 7.



2. Has the Respondent breached the obligation reiterated in Article 73(2) of the Convention?
3. To order reasonable conditions of release of the vessel and the crew by the Tribunal.

## **Arguments made by Russian Federation against the application filed by Japan**

- The Russian Federation requested to dismiss the application filed by Japan on the grounds that it is mere allegations which are not true as it has fulfilled all the obligations that a state ought to carry as per paragraph 2 of Article 73 of the Convention.
- They have also contested that the bond was set within a reasonable period unlike the allegations and the amount of the bond although is reasonable is completely a different issue and does not fall within the purview of the matter of 'prompt release of the Master and the crew'. And the setting of the bond itself is complying with the operatives of UNCLOS.
- According to the findings in protocol of inspection No.003483 conducted by a senior state coast guard inspector they found that the chum salmon was substituted by sockeye salmon and this constituted concealment of information. The sockeye salmon was caught in Exploitation area No 1. This led to misrepresentation of data in the fishing log and daily vessel report. The respondent detected a difference in the amount permitted for catching in the EEZ as per the license. The Master also refused to sign the protocol and this was received as hindrance for carrying forward the actions. This violated paragraph 2 of article 12 of the Federal Law. There were numerous violations under the same legislature that was previously approved by the Protocol signed in the 23rd Session of the Russian Japanese Commission of Fisheries.
- The Military Prosecutor's Office of Garrison also found the allegations to be true and sentenced under article 8.17 part 2 of the Code on Administrative Offences of the Russian Federation and the criminal case No 700518 was instituted as in paragraph 1(a) and (b), article 256 of the Criminal Code of the Russian Federation. According to these federal laws certain operatives were added in the Protocol. They also relied on the Law of the Sea Bulletin No. 46.<sup>3</sup>

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<sup>3</sup> Law of the Sea Bulletin No. 46, United Nations (2001), pp. 46-47.

## **Judgment on the questions raised**

### **1. Jurisdiction**

The jurisdictional requirements of the State party is established in article 292 of the Convention. Both the parties to the issue are State parties and have ratified and the convention entered into force. The status of the flag state is indisputable and agreed by both the parties. Japan alleged that the Russian Federation has not complied with para. 2 of Article 73 of the Conventions regarding the prompt release and the posting of a reasonable bond or other financial security. The application filed is in accordance with article 110 and 111 of the Rules. For these established reasons the tribunal has jurisdiction under article 292 of the Convention.

### **2. Admissibility**

The application for release must be based on an allegation that the State which is detaining is not complying with the provisions of the Convention given in para. 1 of Article 292. But the Russian Federation has provided an adequate bond to suffice the prompt release of the vessel and the Master. The issue at hand raised by the applicant is that mere setting of the bond does not resolve the bigger question of the bond being just and reasonable. The tribunal has affirmed that article 292 of the Convention does not just operate with setting of the bond but also the bond amount being reasonable. It was held in SAIGA Case that the tribunal is the competent authority to determine if the bond is reasonable under article 292 of the Convention. This question also changes the ambit of the issue raised where the original question was the 'prompt release of the vessel' but it is now the reasonableness of the bond. And the issue of admissibility has to be interpreted with article 292 and article 73 paragraph 2 of the Convention in conjunction.

### **3. Bond Amount**

The Convention nor the tribunal has not set a time limit for setting up the bond. Considering the damage that was caused, which was equivalent to 7,927,500 roubles to the living aquatic species due to the illegal fishing, the bond amount was set to 25,000,000 roubles. Posting of this bond would allow the Master and crew along with the vessel to promptly leave the Russian Federation. The bond amount was rectified during the hearing to 22,000,000 roubles after the estimation of the value of the vessel. Paragraph 51 of the judgment explained the rubrics of the bond scheme that was posted to the applicant. Along with that the Russian domestic law states that the administrative fine that is imposed will range anything from half to the full cost of the aquatic biological living resources and this will

aggravate to threefold based on the geography of the offense committed as in territorial sea or EEZ.<sup>4</sup>

## **Analysis of the Judgement**

Judge A Kolodkin declared that the bond issued through the tribunal is insignificant considering the gravity of the offense and does not align with the relevant legal agreements between both the parties. There is also an observation made on non-inclusion of the value of the vessel in the bond which is an inconsistent calculation considering the practice of the Tribunal.

Judge T Treves has raised considerable doubts with the operatives of the judgment given in paragraph 77 in pursuant to the fact that the Master and the crew were still remaining in the Russian Federation since it was established that they were not detained under para. 1 of Article 292 of the Convention. The soft comment that “the master and the crew remain in the Russian Federation” does not contain the nuances of detention which was established in ‘Camouco’ Case.<sup>5</sup> There are questions raised on restrictions to freedom to qualify as detention. This needed to be read in equivalence to detention instead of complimentary to the issue of release of the vessel. This is also an obstacle to the ‘prompt release of the vessel’ after the bond in pursuant to article 292, paragraph 4 of the Convention.

Judge A A Lucky raised concerns over the amount of the bond. In article 73 of the Convention, the meaning of the bond is taken in the sense of bail bond established in criminal law and procedure to which the definition is also given in Black’s Law Dictionary. Ikeda Suisan Co., is a well known shipping company and is very unlikely to become insolvent therefore defeating the primary purpose of bail which is to ensure the attendance of the party at court proceedings. The notion of rule of law is that the individual must be punished for the crimes committed and not for the charge of a pending criminal offense and when the guilt is not admitted. The interest of both the coastal State and that of the flag State should be balanced while fixing the bond along with consideration of the alleged offenses, fishing policies and marine environment. Paragraph 67 in Panama v. France set the criteria to determine the reasonableness of bind or security. The dictum was reiterated in paragraph 79 of the “Monte Confurco” judgment.<sup>6</sup> But in the “Juno Trader” Case the tribunal stressed on determining if the State violated the provisions under article 73 of the Convention or if vessels of the applicant State

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<sup>4</sup> “Monte Confurco”, ITLOS Reports 2000, p. 86, at pp. 108-109, para. 74.

<sup>5</sup> ITLOS Reports 2000, p. 10, at p. 28, para. 54.

<sup>6</sup> ITLOS Reports 2000, p. 86, at p. 109, para. 76.

violated the legislation in the subject matter of fishing of the detaining State.<sup>7</sup> The tribunal has not adjudicated on this issue but specifically on Article 292, where the tribunal only dealt with the question of release with the appropriate domestic legislation. The decision was criticized because the bond fixed on the applicant was on a higher side. Judge T Treves had also raised concerns regarding the issue of detention of the Master and the crew and that it ought to be read as a complement to the operatives of release of the vessel. Judge S Yanai has provided a separate opinion on that case while having reservation on the calculation on the amount of the bond.<sup>8</sup>

## **Analysis**

The tribunal went with the non-presumption of tacit consent or acquiescence from the applicant and Japan is not under the obligation to react as the rule goes *qui tacet consentire videtur si loqui debuisset ac potuisset*<sup>9</sup>. The tribunal on law of the seas emphasized while delivering the judgment that this particular case stood out in comparison to the cases that they had previously dealt before. Some of the factors that catalyzed the course of the adjudication was that Hoshinmaru held a valid fishing license along with being authorized to fish in the Russian EEZ. The consensus was that the bond amount that was set was too high considering the valuation of the vessel and the technical nature of the case but it is unreasonable to set a bond on the maximum penalties that is awarded to an offense. The bond amount was set to be 10,000,000 roubles in the end.<sup>10</sup>

## **Conclusion**

This judgment pronounced by the tribunal stands out among its peers considering the application of the ‘rule of law’ along with the principles of natural justice to come to a reasonable bond amount.

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<sup>7</sup> ITLOS Reports 2004, p. 17, at p. 41, para. 85.

<sup>8</sup> “Hoshinmaru” (Japan v. Russian Federation), ITLOS Reports 2005-2007, p. 18

<sup>9</sup> Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962, p. 6, at p. 23.

<sup>10</sup> <https://leap.unep.org/en/countries/jp/national-case-law/hoshinmaru-case-japan-v-russian-federation>