**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

YEAR 2007

6 August 2007

List of cases:
No. 14

# THE "HOSHINMARU" CASE

(JAPAN *v.* RUSSIAN FEDERATION)

PROMPT RELEASE

## JUDGMENT

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# JUDGMENT

*Present:* *President* WOLFRUM; *Vice-President* AKL; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, NELSON, CHANDRASEKHARA RAO, TREVES, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, TÜRK, KATEKA, HOFFMANN; *Registrar* GAUTIER.

In the "Hoshinmaru" Case

*between*

Japan,

*represented by*

Mr Ichiro Komatsu, Director-General, International Legal Affairs Bureau, Ministry of Foreign Affairs,

*as Agent;*

Mr Tadakatsu Ishihara, Consul-General of Japan, Hamburg, Germany

*as Co-Agent;*

*and*

Mr Yasushi Masaki, Director, International Legal Affairs Division, Ministry of Foreign Affairs,

Mr Kazuhiko Nakamura, Principal Deputy Director, Russian Division, Ministry of Foreign Affairs,

Mr Ryuji Baba, Deputy Director, Ocean Division, Ministry of Foreign Affairs,

Mr Junichi Hosono, Official, International Legal Affairs Division, Ministry of Foreign Affairs,

Mr Toshihisa Kato, Official, Russian Division, Ministry of Foreign Affairs,

Ms Junko Iwaishi, Official, International Legal Affairs Division, Ministry of Foreign Affairs,

Mr Hiroaki Hasegawa, Director, International Affairs Division, Resources Management Department, Fisheries Agency of Japan,

Mr Hiromi Isa, Deputy Director, Far Seas Fisheries Division, Resources Management Department, Fisheries Agency of Japan,

Mr Tomoaki Kammuri, Fisheries Inspector, International Affairs Division, Resources Management Department, Fisheries Agency of Japan,

*as Counsel;*

Mr Vaughan Lowe, Chichele Professor of Public International Law, Oxford University, United Kingdom,

Mr Shotaro Hamamoto, Professor of International Law, Kobe University, Japan,

*as Advocates,*

*and*

The Russian Federation,

*represented by*

Mr Evgeny Zagaynov, Deputy Director, Legal Department, Ministry of Foreign Affairs,

*as Agent;*

Mr Sergey Ganzha, Consul-General of the Russian Federation, Hamburg, Germany,

*as Co-Agent;*

Mr Alexey Monakhov, Head of Inspection, State Sea Inspection, Northeast Coast Guard Directorate, Federal Security Service,

Mr Vadim Yalovitskiy, Head of Division, International Department, Office of the Prosecutor General,

*as Deputy Agents;*

Mr Vladimir Golitsyn, Professor of International Law, State University of Foreign Relations, Moscow,

Mr Alexey Dronov, Head of Division, Legal Department, Ministry of Foreign Affairs,

Mr Vasiliy Titushkin, Senior Counsellor, Embassy of the Russian Federation, the Netherlands,

Mr Andrey Fabrichnikov, Senior Counsellor, First Asian Department, Ministry of Foreign Affairs,

Mr Oleg Khomich, Senior Military Prosecutor, Office of the Prosecutor General,

*as Counsel;*

Ms Svetlana Shatalova, Attaché, Legal Department, Ministry of Foreign Affairs,

Ms Diana Taratukhina, Desk Officer, Legal Department, Ministry of Foreign Affairs,

*as Advisers.*

THE TRIBUNAL

composed as above,

after deliberation,

*delivers the following Judgment:*

**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 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.

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,<br>Mr Vaughan Lowe, Advocate,<br>Mr Shotaro Hamamoto, Advocate. |
| *On behalf of the Russian Federation:* | Mr Evgeny Zagaynov, Agent,<br>Mr Alexey Monakhov, Deputy Agent,<br>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 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.

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;
>
> (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, Shimoniikawa-gun, 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 patrol boat. Subsequently, the *Hoshinmaru* was boarded by an inspection team of the State Sea Inspection of the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation (hereinafter the "State Sea Inspection"). According to the Applicant, at the time of boarding, the *Hoshinmaru* was at the position 56°09'N, 165°28'E, which is a point located within the exclusive economic zone of the Russian Federation and where the vessel was licensed to fish.

30. After boarding the vessel, an inspection team of the State Sea Inspection examined it. A protocol of inspection No. 003483 drawn up on 1 June 2007 by a senior state coastguard inspector recorded the following:

*[Translation from Russian provided by the Respondent]*

During the inspection of holds No 10 and No 11 the inspectors of the State [Sea] Inspection found out that under the upper layer of chum salmon sockeye salmon is kept.

Therefore an offence is detected: substitution of output of one kind (*chum salmon*) with the other kind (*sockeye salmon*) and, thus, concealment of part of sockeye salmon catch in the Exploitation area No 1; misrepresentation of data in a fishing log and daily vessel report (SSD).

31. On 2 June 2007, a protocol of detention was drawn up by an officer of the Frontier Service of the Federal Security Service of the Russian Federation which recorded the detention of the Hoshinmaru on the basis of the following reasons:

*[Translation from Russian provided by the Respondent]*

transmitting of untrue inadequate operational accounts in the form of SSD [daily vessel report], creating in the course of checking a difference between the amount permitted for catching by the license and the actual catch on board, incorrect reflecting of inadequate information on catching in the vessel's logbook, substitution of biological resources species.

32. The protocol of detention recorded that the Master refused to lead the vessel to Petropavlovsk-Kamchatskii and to sign the said protocol.

33. By a letter dated 2 June 2007, the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation informed the Consul-General of Japan in Vladivostok of the inspection and detention of the Hoshinmaru. According to that letter, "[t]he falsification of the species composition of the fish products […] was discovered and consequently, about 14 tons of raw sockeye salmons were illegally captured". The letter also stated that the actions of the Master were in violation of article 12, paragraph 2, of the Federal Law of the Russian Federation No. 191-FZ of 17 December 1998 on the exclusive economic zone of the Russian Federation, articles 35, paragraph 3, and 40, paragraph 2, of the Federal Law of the Russian Federation No.52-FZ of 24 April 1995 on Wildlife, and articles 3.5.1, 3.5.5, 3.5.6, 7, 14.1, 14.2 and 19 of the regulation on the operation of the anadromous stocks

living in the rivers of the Russian Federation approved by the Protocol dated 19 March 2007 of the 23rd Session of the Russian-Japanese Commission on Fisheries.

34. On 3 June 2007, the vessel was escorted for the purpose of judicial proceedings to the port of Petropavlovsk-Kamchatskii.

35. On 4 June 2007, administrative proceedings were instituted against the owner of the Hoshinmaru by a Decision of the Military Prosecutor's Office of Garrison, which reads, *inter alia*, as follows:

> *[Translation from Russian provided by the Respondent]*
>
> taking into consideration the existence of sufficient evidence of the Ikeda Suisan company's guilt in committing the administrative offence, punishable under article 8.17, part 2, of the Code on Administrative Offences of the Russian Federation and being guided by articles 25.11, 28.1, 28.4, 28.7 of the Code and Article 25 of the Federal Law "On the Office of Prosecutor of the Russian Federation"
>
> Decided as follows:
>
> 1. To institute the administrative proceedings under article 8.17, part 2, of the Code on Administrative Offences of the Russian Federation with regard to the "Ikeda Suisan" company.
> 2. To operate administrative investigation with regard to the "Ikeda Suisan" company and to entrust the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation to operate such investigation.
> 3. To inform interested parties about this Decision.

36. Article 8.17, paragraph 2, of the Code on Administrative Offences of the Russian Federation reads as follows:

*[Translation from Russian provided by the Respondent]*

> Violating the rules of catching (fishing) aquatic biological (living) resources and of protection thereof, or the terms and conditions of a license for water use, or of a permit (license) to catch aquatic biological (living) resources of the internal sea waters, or of the territorial sea, or of the continental shelf and (or) the exclusive economic zone of the Russian Federation – shall entail the imposition of an administrative fine on citizens in the amount of from half the cost to the full cost of aquatic biological (living) resources, which have become the subject of the administrative offence, with or without confiscation of the vessel and of other instruments of committing the administrative offence; on officials in the amount of from one to one and a half times the cost of aquatic biological (living) resources, which have become the subject of the administrative offence, with or without confiscation of the vessel and of other instruments of committing the administrative offence; and on legal entities in the amount of from twofold to threefold the cost of aquatic biological (living) resources which have become the subject of the administrative offence with or without confiscation of the vessel and of other instruments of committing the administrative offence.

37. On 7 June 2007, the cargo on board the *Hoshinmaru* was inspected by officials of the State Sea Inspection. According to the Application, "the allegedly illegal catch of the *Hoshinmaru* was seized and is held in custody by the authorities of the Respondent, and the rest of the catch is conserved in the vessel of the *Hoshinmaru*".

38. The Respondent alleges that the Master of the *Hoshinmaru* refused to take the vessel for safekeeping. The Respondent further states that a senior inspector of the State Sea Inspection decided, on 8 June 2007, to transfer the *Hoshinmaru* with all its facilities and equipment for safekeeping to the company Kamchatka Logistic Centre.

39. On 13 June 2007, the chief inspector of the State Sea Inspection decided to request documentation from the owner of the vessel with a view to facilitating the administrative proceedings. According to the Respondent, documents were received on 4 July 2007.

40. On 26 June 2007, a criminal case No. 700518 against the Master of the *Hoshinmaru* was instituted by the investigation authority of the Northeast Border Coast Guard Directorate for the criminal act stipulated in article 256, paragraph 1(a) and (b), of the Criminal Code of the Russian Federation concerning "illegal fishing with grave damages and with the use of self-propelled mode of transport". According to the provisional investigation, the Master had failed to fulfil the requirements contained, *inter alia*, in the following regulations:

> (a) Articles 3.5.1, 3.5.5, 7, 14.1, 14.2 and 19 of the regulation on the operation of the anadromous stocks living in the rivers of the Russian Federation approved by the Protocol dated 19 March 2007 of the 23rd Session of the Russian-Japanese Commission on Fisheries;
> (b) Article 12 of the Federal Law of the Russian Federation No. 191-FZ of 17 December 1998 on the exclusive economic zone of the Russian Federation;
> (c) Article 40, paragraph 2, of the Federal Law of the Russian Federation No. 52-FZ of 24 April 1995 on the Wildlife.

41. Articles 3.5.1, 3.5.5, 7, 14.1, 14.2 and 19 of the regulation on the operation of the anadromous stocks living in the rivers of the Russian Federation approved by the Protocol dated 19 March 2007 of the 23rd Session of the Russian-Japanese Commission on Fisheries read as follows:

> *[Translation from Russian provided by the Applicant]*
>
> 3.5.1 To observe the regulations on the fishing (catch) and the restrictions on the fishing (catch) of stipulated living resources as well as to fulfil the requirements set out in the operation license (permission) on the living resources.
>
> 3.5.5 To submit a daily, ten-day and monthly report on the result of the operation in accordance with the Attachment I-4, I-5 and I-6 of this regulation.

3.5.6 To keep an operation log (Attachment I-7 and I-8). The log shall be strapped and authenticated by means of the seal and signature of the owner of the vessel.

7. The operation is permitted for the licensed amount in the licensed area during the licensed period by using a drift net. Other fishing gear and fishing methods are prohibited.

14.1 The calculation of the consumption of the fishing allocation in the salmon-trout operation by the drift-net fishing shall be carried out on each fishing vessel, by the weight of the caught salmon/trout and its number, species by species.

14.2 All caught fish shall be classified and weighed out, the result of which shall be recorded on the operation log of the drift-net fishing vessel to an accuracy of 1kg and 1 fish.

19. It is prohibited to keep the various species of salmon/trout together in a hold. When the various species of salmon/trout are kept together in a hold, they must be clearly separated by each species (vertical partition).

42. Article 12, paragraph 2, of the Federal Law of the Russian Federation No. 191-FZ of 17 December 1998 on its exclusive economic zone reads as follows:

*[Law of the Sea Bulletin No. 46, United Nations (2001), pp. 46-47]*

2. Licence holders shall be obliged:
- To observe the established rules for catching (harvesting) living resources and the limits on their catch (harvest), and to comply with the conditions of the licence (permit) for the commercial exploitation of living resources;
- To make the payments stipulated in a timely fashion;
- To prevent the degradation of the natural conditions of the habitat of living resources;

- To prevent illegal acclimatization of species of living resources and to comply with the requirements of the quarantine regime;
- To ensure unimpeded access to a commercial fishing vessel by officials of protection agencies;
- To ensure, at their own expense, optimum working conditions for officials of protection agencies;
- To submit to the specially empowered federal executive body for the border service, federal executive body for fisheries, federal executive body for environmental protection, federal executive body for customs matters, federal executive body for currency and export control and federal executive body for taxation readily and without charge reports, including computer printouts, on the volumes of the catch (harvest) and the periods, types and areas of commercial exploitation of living resources, including information on the quantity, quality and species of living resources and products derived therefrom loaded onto or from other vessels and on the quantity, quality and species of living resources and products derived therefrom unloaded or loaded in foreign ports;
- To maintain regular contact with the coastal services of the Russian Federation and, if appropriate equipment is available, to transmit, at the main international synoptical times, to the nearest radiometeorological centre of the Russian Federation, operational data on meteorological and hydrological observations in accordance with the standard procedures of the World Meteorological Organization and urgent information on oil pollution of the marine environment if observed;
- To keep a commercial fishing logbook in the format stipulated by the specially empowered federal executive body for fisheries;
- To have special distinguishing marks;
- To mark set fishing (harvesting) gear at both ends with the name of the vessel (for foreign vessels, the name of the flag country), the number of the licence (permit) for the commercial exploitation of living resources and the index number for the fishing (harvesting) gear.

43. Article 40, paragraph 2, of the Federal Law of the Russian Federation No.52-FZ of 24 April 1995 on the Wildlife reads as follows:

*[Translation from Russian provided by the Applicant]*

2. License holders for the use of wildlife shall have the (following) obligations:

To use wildlife only in the forms described in the license;
To comply with the prescribed rules, regulations, and periods concerning the use of wildlife;
To apply methods, when using the wildlife, that will not cause damage to the integrity of the natural world;
To prevent the destruction or degradation of the natural habitat of the wildlife;
To calculate the quantity and assess the current conditions of the utilizable wildlife, and also to assess the condition of their natural habitat;
To take the necessary measures for ensuring the reproduction of the wildlife;
To support state authorities in accomplishing the protection of the wildlife;
To ensure the protection and reproduction of the wildlife, including rare and endangered species;
To apply humane methods when using the wildlife;

Rules, periods, and a list of instruments and methods for catching the wildlife that were permitted for application, shall be formulated by state authorities, which have been given special authorization to protect, control and regulate the utilization of the wildlife and their natural habitat, and approved by the Government of the Russian Federation or the agencies of executive power of the subjects of the Russian Federation.

44. According to the investigation authority, the charge against the Master was as follows:

*[Translation from Russian provided by the Applicant]*

> [the Master] caught 6,343 sockeye salmon (total weight 20,063.80 kg) […] without the necessary license […], and subsequently processed them into 1,057 gutted, headed, gilled and salted sockeye salmon (total weight 15,199.85 kg). He recorded these products on the daily logbook and the daily ship reports as chum [salmon] which are cheaper products than sockeye [salmon]. This caused serious damages equivalent to not less than 7 million rubles against the living aquatic resources in the Russian Federation.
>
> […]
>
> A criminal case is established for the suspicion of the criminal act stipulated in Article 256(1)(a) and (b) of the Criminal Code of the Russian Federation.

45. Article 256, paragraph 1(a) and (b), of the Criminal Code of the Russian Federation reads as follows:

*[Translation from Russian provided by the Applicant]*

> 1. Illegal catching of fish, [marine mammals] and other aquatic animals or harvesting of sea plants, if these acts have been committed:
>
> a) resulting in large damage;
> b) with the use of a self-propelled transport floating craft or explosives, chemicals, electric current, […];
> shall be punishable by a fine from one hundred thousand to three hundred thousand roubles or in the amount of the wages or other income of the convicted for a period from one year to two years or by corrective labour for a term of up to two years, or by placing under arrest for a term of four to six months.

46. In a letter addressed to the Consulate-General of Japan in Vladivostok dated 11 July 2007, the Inter-district Prosecutor's Office confirmed that damage equivalent to 7,927,500 roubles had been caused to the living aquatic resources by the illegal catch.

47. By a note verbale dated 6 June 2007 addressed to the Ministry of Foreign Affairs of the Russian Federation, the Embassy of Japan in the Russian Federation requested that the *Hoshinmaru* and its crew be released upon the posting of a reasonable bond in accordance with article 73, paragraph 2, of the Convention. Similar notes were sent to the Ministry of Foreign Affairs of the Russian Federation on 8 June 2007, and to the Embassy of the Russian Federation in Japan on 12 June 2007.

48. Examination procedures to evaluate the vessel were instituted by a decision of 29 June 2007 of a senior coastguard inspector of the State Sea Inspection. In a letter dated 6 July 2007 addressed to a representative of the owner of the *Hoshinmaru*, the State Sea Inspection requested information on the estimated value of the vessel necessary for the determination of the amount of the bond. According to the Respondent, no reply was received.

49. By a note verbale dated 6 July 2007, addressed to the Embassy of Japan in the Russian Federation, the Ministry of Foreign Affairs of the Russian Federation informed the Embassy of Japan that the detained vessel *Hoshinmaru* and its crew would be promptly released upon the posting of a bond, the amount of which was in the process of being determined.

50. Subsequently, by a note verbale dated 13 July 2007, the Ministry of Foreign Affairs of the Russian Federation informed the Embassy of Japan that the bond was set at 25,000,000 roubles including the amount of damages equivalent to 7,927,500. The note verbale stated that after the posting of the bond the *Hoshinmaru* and its crew, including the Master, would be able to promptly leave the Russian Federation.

51. The Respondent initially set the bond at 25,000,000 roubles; the amount was changed during the hearing to 22,000,000 roubles, owing to a revised estimate of the value of the vessel. According to the Respondent, the bond was calculated to take into account: the maximum fine imposable on the Master, i.e. 500,000 roubles (legal basis: article 256 of the Criminal Code of the Russian Federation); the maximum fine imposable on the owner: 2,001,364.05 roubles (method of calculation: value of the illegal catch (33.25 roubles/kilo x 20,063.8 kilos) x 3; legal basis: article 8.17, part 2, of the Code on Administrative Offences of the Russian Federation); the procedural costs of 240,000 roubles (in accordance with article 24.7 of the Code on Administrative Offences of the Russian Federation); penalty for damages caused by illegal fishing or harvesting of protected marine living resources: 7,927,500 roubles (method of calculation: 1,250 roubles (value of 1 piece of sockeye salmon x 6342), legal basis: articles 1064 and 1068 of the Civil Code of the Russian Federation; articles 4, 40, 55, 56 and 58 of the federal law on wildlife, Regulation No. 724/2000); and the value of the vessel of 11,350,000 roubles.

**Jurisdiction**

52. The Tribunal must, at the outset, examine whether it has jurisdiction to entertain the Application. The requirements to be satisfied in order to found the jurisdiction of the Tribunal are provided for in article 292 of the Convention, which reads as follows:

*Article 292*
*Prompt release of vessels and crews*

> 1. 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.

2. The application for release may be made only by or on behalf of the flag State of the vessel.

3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.

4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

53. Japan and the Russian Federation are both States Parties to the Convention. Japan ratified the Convention on 20 June 1996 and the Convention entered into force for Japan on 20 July 1996. The Russian Federation ratified the Convention on 12 March 1997 and the Convention entered into force for the Russian Federation on 11 April 1997.

54. The status of Japan as the flag State of the *Hoshinmaru* is not disputed by the Respondent.

55. The *Hoshinmaru*, its Master and its crew remain in the port of Petropavlovsk-Kamchatskii.

56. The Applicant alleges that the Respondent has not complied with the provisions of article 73, paragraph 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.

57. The parties did not agree to submit the question of release of the vessel to another court or tribunal within 10 days from the time of detention.

58. The Tribunal is of the view that the Application for the prompt release of the vessel was made by the Government of Japan in accordance with articles 110 and 111 of the Rules.

59. For these reasons, the Tribunal finds that it has jurisdiction under article 292 of the Convention.

**Admissibility**

60. Article 292, paragraph 1, of the Convention provides that an application for release must be based on an allegation that the detaining State has not complied with the provisions of the Convention for the prompt release of a vessel and its crew upon the posting of a reasonable bond or other financial security. In the present case this requirement for admissibility is satisfied as such allegation is set forth in the Application of Japan. The parties disagree on other aspects of the admissibility of the Application.

61. The Respondent maintains that this Application for prompt release is inadmissible for two reasons.

62. First, the Respondent claims that the application became moot on 13 July 2007, when the competent Russian authorities informed the Applicant that the bond had been set in the amount of 25,000,000 roubles (approximately US$ 980,000) and that upon payment of it the vessel and its crew, including the Master, would be allowed to leave the territory of the Russian Federation. The Respondent maintains that events subsequent to the filing of an application may render an application without object.

63. The Applicant contends that "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". Clarifying its original submission, on 18 July 2007, after receiving the Statement in Response, it claims that the amount of the bond set by the Respondent on 13 July 2007 is unreasonable and that the bond does not meet the requirements of article 292 of the Convention. It further maintains that the bond was not set promptly.

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 of an application may render an application without object (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 272, para. 62; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at p. 95, para. 66; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, p. 182, at p. 197, para. 55).

65. However, in the present case, the Tribunal considers that the setting of the bond by the Respondent does not render the Application without object. In the *M/V "SAIGA" Case*, the Tribunal held that a State may make an application under article 292 of the Convention not only where no bond has been set but also where it considers that the bond set by the detaining State is unreasonable (*ITLOS Reports 1997*, p. 16, at p. 35, para. 77). The Tribunal reaffirms this jurisprudence and emphasizes that it is for the Tribunal to decide whether a bond is reasonable under article 292 of the Convention.

66. The Tribunal considers that the nature of the dispute between the parties has not changed. It notes, however, that the scope of the dispute has narrowed and that the legal dispute between the parties concerning the release of the vessel now turns on the reasonableness of the bond.

67. Secondly, the Respondent maintains that the Applicant's submission in paragraph 1(c) is too vague and too general. In its view, it is so unspecific that it neither allows the Tribunal to consider it properly, nor the Respondent to reply to it. Moreover, the Respondent alleges that the Tribunal does not have competence under article 292 of the Convention to determine the terms and conditions upon which the arrested vessel should be released. The Respondent further states that, according to article 113, paragraph 2, of the Rules, the Tribunal only has to determine the amount, nature and form of the bond or financial security to be posted for the release of the vessel and the crew.

68. The Tribunal finds that there is no merit in these arguments. The Tribunal considers that the Application is based on article 292 read in conjunction with article 73, paragraph 2, of the Convention. The Applicant asks the Tribunal to exercise its power under article 292, paragraph 3, of the Convention, to order the release of the vessel and its crew upon the posting of a reasonable bond or other financial security.

69. Accordingly, the Tribunal holds that the Application is admissible.

**Non-compliance with article 73, paragraph 2, of the Convention**

70. The Applicant requests the Tribunal to declare that the Respondent has not complied with article 73, paragraph 2, of the Convention because it has not provided for the prompt release of the vessel and its crew upon the posting of a reasonable bond or financial security.

71. Article 73, paragraph 2, reads as follows:

> Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

72. The *Hoshinmaru* was ordered to stop on 1 June 2007 and was boarded in the exclusive economic zone of the Russian Federation by a team of inspectors from a patrol boat of the State Sea Inspection of the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation. It was escorted by the patrol boat to the Respondent's port of Petropavlovsk-Kamchatskii, where the vessel and its crew have since remained.

73. A bond for the release of the vessel and its crew was not set by the Respondent until 13 July 2007, seven days after the Application for the prompt release of the *Hoshinmaru* was filed and more than five weeks after the vessel was arrested. The Respondent did not react to several requests from the Applicant to have the vessel and its crew released upon the posting of a reasonable bond or other financial security made since 6 June 2007. The Respondent, for its part, argues that the delay was due to the lack of cooperation of the Master and the owner of the vessel.

74. The parties disagree as to whether the Master and the crew are being detained along with the vessel.

75. The Applicant contends that the Master and the crew of the *Hoshinmaru* remain in detention, that crew members need to be present on board for the proper maintenance of the vessel and that the release of the crew cannot be separated entirely from the release of the vessel.

76. The Respondent argues that the members of the crew, with the exception of the Master, have never actually been detained and that, if crew members do not have formal permission to enter the Russian Federation and to leave the country, this is not due to the offence committed but to the fact that the owner of the vessel is required to apply to the competent authorities for such permission – a common and simple procedure applicable to all foreign sailors arriving in Russian ports.

77. The Tribunal notes the statement by the Respondent that the restrictions on the free movement of the Master were lifted on 16 July 2007. The Tribunal further notes that the Master and the crew still remain in the Russian Federation.

78. The Applicant maintains that contrary to article 73, paragraph 2, of the Convention the bond was not set promptly. This allegation is denied by the Respondent.

79. However, both parties agree in principle that a bond should be set within a reasonable time, taking into account the complexity of the given case.

80. The Tribunal notes that the Convention does not set a precise time-limit for setting a bond (*"Camouco", ITLOS Reports 2000*, p. 10, at p. 28, para. 54). The Tribunal further notes that, given the object and purpose of article 292 of the Convention, the time required for setting a bond should be reasonable. It observes that article 292 of the Convention does not require the flag State to file an application at any particular time after the detention of a vessel or its crew and that the earliest date for initiating such procedure before the Tribunal is, in accordance with paragraph 1 of that provision, 10 days from the time of detention.

81. The Tribunal will now turn to the reasonableness of the bond set by the Respondent.

82. The Tribunal has expressed its views on the reasonableness of the bond in a number of its judgments. In the *"Camouco" Case* it stated: "the Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or 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" (*ITLOS Reports 2000*, p. 10, at p. 31, para. 67). In the *"Monte Confurco" Case* it added that: "This is by no means a complete list of factors. Nor does the Tribunal intend to lay down rigid rules as to the exact weight to be attached to each of them" (*ITLOS Reports 2000*, p. 86, at p. 109, para. 76). In the *"Volga" Case* it stated that: "In assessing the reasonableness of the bond or other security, due account must be taken of the terms of the bond or security set by the detaining State, having regard to all the circumstances of the particular case" (*ITLOS Reports 2002*, p. 10, at p. 32, para. 65). In the *"Juno Trader" Case* the Tribunal further declared that: "The assessment of the relevant factors must be an objective one, taking into account all information provided to the Tribunal by the parties" (*ITLOS Reports 2004*, p. 17, at p. 41, para. 85).

83. In justifying the amount of the bond of 22,000,000 roubles (approximately US$ 862,000) as indicated in paragraph 51, the Respondent puts forward several arguments. It states that in the last two sessions of the Russian-Japanese Commission on Fisheries the Russian representatives had informed the Japanese representatives about the procedure that would be applied for the purpose of prompt release in cases of the detention of Japanese fishing vessels in the Russian exclusive economic zone. The Respondent further states that the criteria to be applied for the assessment of a bond in such cases were also specified during these sessions. The Respondent refers, in paragraph 65 of the Statement in Response, to documents contained in Annex 10 to the Protocol of the 23rd Session of the Russian-Japanese Commission on Fisheries dated 14 December 2006, as well as in Annex 4-2 of the Protocol of Russian-Japanese intergovernmental consultations on issues of harvesting of Russian originated salmon by Japanese fishing vessels in the 200-mile zone of the Russian Federation signed on 26 April 2007. According to those documents, the bond should be comparable to the amount of potential fines, compensation for damage caused, cost of illegally harvested living resources, products of their processing and instruments of illegal fishing (i.e. vessel, equipment, etc.). The Respondent expresses the opinion that such criteria and such procedure are consistent with the criteria elaborated by the Tribunal. The Respondent states that the Japanese representatives had not raised any objections to this methodology and that it can be inferred that they had acquiesced in it.

84. The Applicant, for its part, maintains that the Japanese Government had not given its consent, even tacitly, to a method of calculating a bond for prompt release which would include the value of the vessel. Further it contends that it had not given its consent to the Russian text of Annex 10 to the Protocol of the 23rd Session of the Russian-Japanese Commission on Fisheries dated 14 December 2006. In particular, the Applicant objects to the Respondent's interpretation that the value of the vessel would always be included in the bond.

85. The Tribunal is of the view that, especially between States that have long standing relations as regards fisheries, an agreed procedure for setting bonds in the event of the detention of fishing vessels may contribute to mutual confidence, help resolve misunderstandings and prevent disputes. In the present case, however, the Tribunal does not consider that the information submitted to it is sufficient to establish that the Japanese representatives had acquiesced in the procedure contained in the Respondent's document concerning the calculation of the bond communicated to Japan within the framework of the Russian-Japanese Commission on Fisheries.

86. The Protocol or minutes of a joint commission such as the Russian-Japanese Commission on Fisheries may well be the source of rights and obligations between Parties. In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 112), the International Court of Justice admitted this possibility, but added, quoting its judgment in the *Aegean Sea Continental Shelf Case*, that "the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up." (*Judgment, I.C.J. Reports 1978*, p. 3, at p. 39, para. 96). In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court considered:

> The Minutes are not a simple record of a meeting […]; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement. (*Judgment, I.C.J. Reports 1994*, p. 112, at p. 121, para. 25)

87. The Tribunal notes that, while on some matters the Protocols of the meetings mention agreed views, this is not the case as regards the criteria notified by the Russian side as to the setting of the bond. In this context, tacit consent or acquiescence cannot be presumed. The situation is not one where Japan would have been under an obligation to react according to the rule: *qui tacet consentire videtur si loqui debuisset ac potuisset (Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, at p. 23).

88. The Tribunal is of the view that the amount of a bond should be proportionate to the gravity of the alleged offences. Article 292 of the Convention is designed to ensure that the coastal State, when fixing the bond, adheres to the requirement stipulated in article 73, paragraph 2, of the Convention, namely that the bond it fixes is reasonable in light of the assessment of relevant factors.

89. The proceedings under article 292 of the Convention, as clearly provided in paragraph 3 thereof, can deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. Nevertheless, in the proceedings before it, 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 (*"Monte Confurco", ITLOS Reports 2000*, p. 86, at pp. 108-109, para. 74). However, the Tribunal wishes to emphasize that in so doing it is by no means acting as a court of appeal (*"Monte Confurco", ITLOS Reports 2000*, p. 86, at p. 108, para. 72).

90. As the Respondent explained, the bond of 22,000,000 roubles for the release of the *Hoshinmaru* was calculated on the basis of the potential fines imposable upon the Master and the owner of the vessel, a penalty calculated on the basis of the amount of sockeye salmon allegedly taken illegally, the value of the vessel and administrative expenses incurred by the Russian authorities for carrying out the investigation.

91. The Applicant maintains that for the bond to be reasonable its level must reflect certain factors, in particular the gravity of the offence. This would exclude setting bonds at a level reflecting the highest possible fines. The Applicant considers it unreasonable to take account of the value of the vessel when calculating the bond since the alleged offence was not of the same degree of gravity as overfishing or fishing without a licence. Under Russian law, confiscation is one of the possible penalties. However, the Applicant is of the view that, taking into account the lesser degree of gravity of the offence, it would be unreasonable to consider it as a likely outcome of domestic proceedings which might justify including the value of the ship in the calculation of the reasonable bond. According to the Applicant the amount of the bond should not be more than 8,000,000 roubles (approximately US$ 313,000) considering the potential penalties in this case.

92. The Respondent, for its part, argues that fishing can be legal only when it is carried out in compliance with all the applicable rules and norms established by the coastal State, including timely and full reporting of data on species and amounts of the catch to its competent bodies. It considers the offence to be of a nature of sufficient gravity to justify the confiscation of the vessel and the imposition of the maximum fine. Finally, it states that the the bond includes an amount of damages which is calculated in accordance with the law of the Russian Federation.

93. The Tribunal does not consider the bond of 22,000,000 roubles (approximately US$ 862,000) to be reasonable. Although the Tribunal is of the view that a violation of the rules on reporting may be sanctioned by the detaining State, it does not consider it reasonable that a bond should be set on the basis of the maximum penalties which could be applicable to the owner and the Master, nor does it consider it reasonable that the bond should be calculated on the basis of the confiscation of the vessel, given the circumstances of this case. The Tribunal notes in this respect that the applicable Russian regulations do not foresee automatic inclusion of the value of the arrested vessel in the assessment of the bond.

94. For these reasons and in view of the circumstances of the case, the Tribunal finds that the Respondent has not complied with article 73, paragraph 2, of the Convention, that the Application is well-founded, and that, consequently, the Russian Federation must release promptly the *Hoshinmaru*, including the catch on board and its crew in accordance with paragraph 102.

**Amount and form of the bond or other financial security**

95. The Tribunal must now determine the amount, nature and form of the bond or other financial security to be posted, as laid down in article 113, paragraph 2, of the Rules. In accordance with article 293 of the Convention, the Tribunal must apply the provisions of this Convention and other rules of international law not incompatible with the Convention.

96. The Tribunal notes that the Respondent considers the offence committed by the Master of the *Hoshinmaru* to be a grave one. The Respondent maintains that the Master of the *Hoshinmaru* had declared 20 tons of raw sockeye salmon as the cheaper chum salmon. If the substitution of the species on the *Hoshinmaru* had not been revealed by the competent authorities of the Russian Federation, the 20 tons of sockeye salmon would simply have been stolen and taken illegally out of the exclusive economic zone of the Russian Federation. This amount of marine living resources could not have been accounted for by the competent bodies of the Russian Federation in exercising control over the percentage of total allowable catch of the species, i.e. sockeye salmon. In the view of the Respondent this was a classic manifestation of illegal, unreported and unregulated fishing. In the view of the Respondent, the gravity of the offence justifies the bond of 22,000,000 roubles.

97. The Applicant maintains that the alleged offence is not fishing without a licence or overfishing but falsely recording a catch that the vessel was entitled to take under its licence. Further, the Applicant argues that, since the amount of sockeye salmon on board the *Hoshinmaru* was well within the limit the vessel was licensed to fish, the sockeye salmon stock could not be considered to have been damaged or endangered.

98. The Tribunal notes that the present case is different from cases it has previously dealt with, since this case does not entail fishing without a licence. The *Hoshinmaru* held a valid fishing licence and was authorized to be present and to fish in the Russian exclusive economic zone. The Tribunal further notes that Russia and Japan cooperate closely in respect of fishing activities in the area in question. They have even established an institutional framework for consultations concerning the management and conservation of fish stocks which also deals with the enforcement of the applicable rules on the management and conservation of fish stocks in the exclusive economic zone of the Russian Federation in the Pacific. They have been cooperating in order to promote the conservation and reproduction of salmon and trout of Russian origin in the exclusive economic zone of the Russian Federation. The Tribunal notes that Japan expresses the wish to continue to endeavour ensuring that the crews of fishing vessels flying its flag respect local laws and

regulations.

99. The offences considered here may be seen as transgressions within a broadly satisfactory cooperative framework. At the same time, the Tribunal is of the view that the offence committed by the Master of the *Hoshinmaru* should not be considered as a minor offence or an offence of a purely technical nature. Monitoring of catches, which requires accurate reporting, is one of the most essential means of managing marine living resources. Not only is it the right of the Russian Federation to apply and implement such measures but the provisions of article 61, paragraph 2, of the Convention should also be taken into consideration to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation.

100. On the basis of these considerations, the Tribunal is of the view that the security should be in the total amount of 10,000,000 roubles. The security should take the form either of a payment made to the bank account indicated by the Respondent, or of a bank guarantee, if the Applicant prefers this alternative.

101. The bank guarantee should, among other things, state that it is issued in consideration of the Russian Federation releasing the *Hoshinmaru* in relation to incidents that occurred in the exclusive economic zone of the Russian Federation on 1 June 2007, and that the issuer undertakes and guarantees to pay the Russian Federation such sum, up to 10,000,000 roubles, as may be determined by a final judgment or decision of the appropriate domestic forum in the Russian Federation or by agreement of the parties. Payment under the guarantee would be due promptly after receipt by the issuer of a written demand by the competent authority of the Russian Federation, accompanied by a certified copy of the final judgment or decision or agreement.

**Operative provisions**

102. For these reasons,

THE TRIBUNAL,

(1) Unanimously,

*Finds* that the Tribunal has jurisdiction under article 292 of the Convention to entertain the Application made by Japan.

(2) Unanimously,

*Finds* that the Application with respect to the allegation of non-compliance with article 73, paragraph 2, of the Convention is admissible.

(3) Unanimously,

*Finds* that the allegation made by the Applicant that the Respondent has not complied with the provisions of article 73, paragraph 2, of the Convention for the prompt release of the *Hoshinmaru* and its crew upon the posting of a reasonable bond or other financial security is well-founded.

(4) Unanimously,

*Decides* that the Russian Federation shall promptly release the *Hoshinmaru*, including its catch on board, upon the posting of a bond or other security as determined by the Tribunal, and that the Master and the crew shall be free to leave without any conditions.

(5) Unanimously,

*Determines* that the bond shall amount to 10,000,000 roubles.

(6) Unanimously,

Determines that the bond of 10,000,000 roubles shall be in the form either of a payment into the bank account indicated by the Respondent, or, if the Applicant so prefers, of a bank guarantee from a bank present in the Russian Federation or having corresponding arrangements with a Russian bank.

Done in English and in French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this sixth day of August, two thousand and seven, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Japan and the Government of the Russian Federation, respectively.

*(signed)*
Rüdiger WOLFRUM,
President

*(signed)*
Philippe GAUTIER,
Registrar

*Judge* KOLODKIN, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

*(initialled)* A.K.

*Judge* TREVES, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

*(initialled)* T.T.

*Judge* LUCKY, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

*(initialled)* A.A.L.

*Judge* TÜRK, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

*(initialled)* H.T.

*Judge* YANAI, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

*(initialled)* S.Y.

## DECLARATION OF JUDGE KOLODKIN

Notwithstanding my vote, I feel it necessary to make the following points.

The bond issued by the Tribunal is not in conformity with the relevant legal arrangements between Japan and the Russian Federation. It does not take into account the gravity of the offence. Moreover, its calculation is inconsistent with the practice of the Tribunal, which, as a rule, includes the value of the vessel in the bond.

*(signed)* A. Kolodkin

## DECLARATION OF JUDGE TREVES

In paragraph 77 of the Judgment, the Tribunal, faced with the opposing contentions of the parties as to whether the Master and the crew are detained along with the vessel, after observing that the restrictions imposed on the free movement of the Master had been lifted on 16 July 2007, notes that "the Master and crew still remain in the Russian Federation". In the operative part the Tribunal decides that the Russian Federation shall promptly release the *Hoshinmaru* "and that the Master and the crew shall be free to leave without any conditions". This operative provision might seem questionable, as the Tribunal does not state that the Master and the crew are "detained" under article 292, paragraph 1, of the Convention.

In my view, the observation concerning the Master – whose situation up to 16 July 2007 was similar to that of *contrôle judiciaire* under French law, which the Tribunal has considered as corresponding to "detention" in its judgment on the *"Camouco" Case* (*ITLOS Reports 2000*, p. 10, paragraph 71) – seems to imply that, in the opinion of the Tribunal, neither the Master nor the crew is "detained", as does the mild statement that Master and crew "still remain in the Russian Federation". Limitations to their liberty to leave Russia depending on the need to apply for permission under rules applicable to all foreign sailors (paragraph 76), or on the need for crew members to be present on board to ensure the proper maintenance of the ship (paragraph 75), can hardly, in my view, qualify as restrictions to freedom that can be considered as "detention", even when such notion is broadly interpreted as the Tribunal correctly did in the *"Camouco" Case*. So, why provide that Master and crew "shall be free to leave without conditions"?

In my view, 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. A possible obstacle to the effectiveness of the "prompt" release of the vessel after the posting of the bond set by the Tribunal, as provided in article 292, paragraph 4, of the Convention, is thus eliminated.

The provision in the operative part that the Master and crew are free to leave without conditions, even though they have not been considered as "detained", is not unnecessary. It serves to preserve the efficacy of the judgment of the Tribunal for the release of the vessel.

*(signed)* T. Treves

## DECLARATION OF JUDGE LUCKY

I agree with the reasoning in the Judgment; however, I wish to add a few comments in respect of the amount of the bond.

In the context of article 73 of the Convention, the relevant meaning of the word "bond" must be taken as a legal one and as such should be given the meaning ascribed to it in the language of criminal law and procedure. The bond in this context is similar to bail bonds in criminal proceedings which are defined as:

> Written undertakings executed by the defendant … that the defendant will, while at liberty as a result of an order fixing bail and of the execution of a bail bond in satisfaction thereof, appear in a designated criminal action or proceeding when his attendance is required.
> *Black's Law Dictionary, eighth edition*

The primary purpose of bail is to ensure the attendance of a person at court proceedings. There is no evidence that the owner (the Ikeda Suisan Co., a Japanese registered company with a given address) is not well known or is likely to become insolvent, the undisputed evidence being that it was willing to post a reasonable bond. The amount of the bond must not be punitive because the essence of the rule of law is that a person should be punished for crimes he has committed, not when a charge for a criminal offence is pending and the person has not admitted guilt.

In fixing a bond, the interests of the coastal State and of the flag State should be balanced. The bond should secure the coastal State's interest in imposing penalties that take account of the gravity of the alleged offences and in policing its fisheries and marine environment.

In paragraph 67 of the judgment in the *"Camouco" Case (Panama* v. *France), ITLOS Reports 2000*, p. 31), the Tribunal set out the criteria for determining the reasonableness of a bond or security. The Tribunal repeated that dictum in paragraph 79 of the *"Monte Confurco"* judgment in which the Tribunal added that the list of factors was not complete.

In my separate opinion in the *"Juno Trader" Case* I said:

> It appears to me that in order to consider the gravity of the alleged offence the Tribunal would have to weigh the gravity in the same manner as a national judge determining urgent applications, for example in injunctive proceedings, and find whether a *prima facie* case has been made. In carrying out that exercise, the Tribunal will not be making any finding on the merits *per se* but will be determining whether or not the detaining State violated the provisions of article 73 of the Convention or whether the vessel of the applicant State violated the fisheries legislation of the detaining State.

I still subscribe to the above view.

Article 292 specifies in part that the "court or tribunal shall deal without delay with the application and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew".

In prompt release cases the bond should constitute sufficient security that would ensure implementation of a court decision at the end of the proceedings.

In these proceedings the question is whether or not the bond sought for the release of the vessel and crew is reasonable.

For the reasons set out above I am of the opinion that the bond fixed by the Respondent is on the high side. I am in favour of a bond which is less than that fixed by the Respondent

*(signed)* A.A. Lucky

## DECLARATION OF JUDGE TÜRK

1. In the present case the vessel was detained on 2 June 2007 and the bond was set by the Respondent on 13 July 2007. The Applicant maintained that contrary to article 73, paragraph 2, of the Convention the bond was not set promptly. This allegation was denied by the Respondent. However, both parties agreed in principle that a bond should be set within a reasonable time, taking into account the complexity of the given case (see paras. 78 and 79 of the Judgment).

2. In paragraph 80 of the Judgment the Tribunal notes that the Convention does not set a precise time-limit for setting a bond. The Tribunal further notes that, given the object and purpose of article 292 of the Convention, the time required for setting a bond should be reasonable. It observes, that article 292 of the Convention does not require the flag State to file an application at any particular time after the detention of a vessel or its crew and that the earliest date for initiating such procedure before the Tribunal is, in accordance with article 292, paragraph 1 of that provision, 10 days from the time of detention.

3. I fully agree with the position of the Tribunal set forth in paragraph 80 of the Judgment; the matter, however, calls for some further observations:

The Convention in article 73, paragraph 2, wisely avoids laying down a precise time-limit for the setting of a bond or other financial security, thus maintaining the necessary flexibility for dealing with the particular circumstances of each individual case. As the Tribunal already stated in the *"Camouco" Case (ITLOS Reports 2000*, p. 28, para. 54) and reiterated in paragraph 80 of the present Judgment, the Convention also does not require the flag State to file an application at any particular time after the detention of a vessel or its crew.

It must, however, be borne in mind that the prompt release procedure is designed as an expeditious procedure with the objective of ensuring that a detained vessel is not immobilized until the completion of the domestic administrative or criminal procedures of the detaining State, which might take many months. Furthermore, important humanitarian considerations must be taken into account for shortening, as far as possible, the time during which the crew of the detained vessel is not permitted to leave the detaining State.

In keeping with the fundamental objective and purpose of the prompt release procedure a bond or other financial security should be set at the earliest possible point in time. The due diligence which may in this regard be expected from the detaining State, however, also applies to the shipowner and the flag State. The shipowner should take prompt action in complying with the bond set by the detaining State, unless it considers the bond not to be "reasonable" – as required by articles 292, paragraph 1, and 73, paragraph 2, of the Convention. In such case the prompt release procedure under article 292 should, as soon as possible, be initiated through the flag State or, as the case may be, on its behalf.

The exact time-period for the setting of a bond will certainly depend on the degree of complexity of the investigations carried out by the detaining State and will thus have to vary from case to case. Nevertheless the ten-day time-frame enshrined in article 292, paragraph 1, of the Convention for seizing the Tribunal in prompt release cases, the requirement of article 292, paragraph 2, for the competent court or tribunal to deal without delay with an application for release and the stringent time limits imposed on the Tribunal by its Rules for dealing with such an application and the rendering of a judgment should be taken into consideration. Thus, a maximum period of approximately one month after the detention of a vessel and its crew would seem reasonable for the setting of the bond. In case the flag State engages the prompt release procedure under article 292, if it considers the bond or other financial security not to be reasonable, the time of detention of the vessel and/or its crew would then altogether not exceed approximately two months.

Although the flag State has the right to initiate a prompt release procedure already after ten days from the time of detention of vessel and crew, international litigation should, in general, be considered a last rather than a first resort for the settling of a dispute.

*(signed)* H. Türk

## SEPARATE OPINION OF JUDGE YANAI

I voted in favour of the Judgment since I substantially agree with its findings but I have reservations as to the way in which the amount of the bond was calculated.

1. The *Hoshinmaru* was licensed by the Russian Federation to catch certain limited quantities of sockeye salmon, chum salmon, sakhalin trout, silver salmon and spring salmon in the Russian exclusive economic zone from 15 May to 31 July 2007. When the *Hoshinmaru* was stopped and boarded by Russian officials on 1 June 2001, it was fishing with a valid licence in the area where it was licensed to fish and the fish on board corresponded to the species specified in the licence, namely, sockeye salmon, chum salmon and spring salmon. The amount of the three species on board was well within the limits set in the licence. Specifically, it is said that the *Hoshinmaru* had caught about 45,000 kg of sockeye salmon, of which approximately 20,000 kg had been recorded as cheaper chum salmon. However, the *Hoshinmaru* was licensed to catch 85,700 kg of sockeye salmon - which is more than four times the amount that was said to be falsely recorded - and 85,200 kg of chum salmon - which is again far more than said to be falsely recorded. So the alleged offence is not fishing without a licence or over-fishing; the alleged offence is falsely recording a catch that the vessel was entitled to take (Professor Lowe, Thursday, 19 July 2007, p.m., *ITLOS/ PV.07/1*, p. 14).

2. The Respondent included in its calculation of the bond an amount of 7,927,500 roubles as compensation for damage allegedly caused by the *Hoshinmaru* to salmon and trout resources in the Russian exclusive economic zone. Thus this amount forms part of the bond amounting to 22,000,000 roubles proposed by the Respondent. I am not in a position to challenge the way the amount of compensation for the alleged damage was calculated under the internal laws and regulations of the Russian Federation. Nevertheless, I am 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 my view, the following three factors are relevant to such an examination (paragraph 89 of the Judgment):

First, as stated in paragraph 1 above, the *Hoshinmaru* was fishing with a valid licence, and the falsely recorded amount of catch was well within the limits set in the licence. In this sense, the *"Hoshinmaru" Case* is different from cases the Tribunal has previously dealt with (paragraph 98 of the Judgment). When the competent authorities of the Russian Federation issued the licence to the *Hoshinmaru* on 14 May 2007, they must have ascertained that the amount of catch allocated to the *Hoshinmaru*, together with quotas for other national and foreign vessels, would not cause damage to salmon and trout resources in the Russian exclusive economic zone, let alone its environment. So I find it difficult to believe that the offence the *Hoshinmaru* committed by falsely recording the catch would cause damage to the conservation of salmon and trout resources in the Russian exclusive economic zone.

Secondly, as the Agent of the Respondent recognized, Japan and Russia have a long history of bilateral cooperation in fishery matters under the two agreements concluded between them in 1984 and 1985 (Mr Zagaynov, Friday, 20 July 2007, a.m., *ITLOS/PV.07/2*, p. 2). Japanese vessels fish salmon and trout in the Russian exclusive economic zone within this bilateral framework. In the conservation and management of anadromous stocks, both countries cooperate under the agreement of 1985, specifically through the Joint Commission established by it. In this connection, the Agent of the Applicant referred to this cooperation in the following statement:

> I would like to point out, in this regard, the fact that Japan has been actively cooperating in order to promote the conservation and the reproduction of salmon and trout of Russian origin within the framework of a bilateral treaty with the Russian Federation. Japan has been providing, for example, a sizable amount of equipment for the good functioning of hatchery and nursery for salmon and trout in the Russian Federation and the scientists of both countries are in agreement that the salmon-trout resources in the exclusive economic zone of the Russian Federation where this incident occurred are conserved at a high level (Mr Komatsu, Thursday, 19 July 2007, p.m., *ITLOS/PV.07/1*, p. 6).

The Tribunal also notes the long-standing bilateral cooperation between Japan and Russia in the field of fisheries including the conservation and reproduction of salmon and trout of Russian origin in the Russian exclusive economic zone (paragraph 98 of the Judgment).

Thirdly, I would like to shed light on another aspect of fishing resources by comparing the present case with the *"Monte Confurco" Case* and the *"Volga" Case*. The *Monte Confurco*, a vessel flying the flag of the Applicant (Seychelles), was allegedly engaged in the unlicensed fishing of toothfish in the exclusive economic zone of the Kerguelen Islands in the French Southern and Antarctic Territories. The *Volga*, a vessel flying the flag of the Applicant (the Russian Federation), was allegedly fishing Patagonian toothfish without licence in the Australian exclusive economic zone. Both cases were considered to involve illegal, unregulated and unreported fishing, and the respective Respondents, France and Australia, expressed concern about the depletion of these stocks as a result of continuing illegal fishing in the area covered by the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) (*The "Monte Confurco" Case, Judgment, ITLOS Reports 2000*, p. 110, paragraph 79; *The "Volga" Case, Judgment, ITLOS Reports 2002*, p. 33, paragraph 67). While a depletion of toothfish and Patagonian toothfish stocks is a matter of international concern and conservation measures have been taken under CCAMLR, salmon and trout resources in the Russian exclusive economic zone are conserved at a high level as mentioned above.

3. In light of the foregoing, the offence committed by the *Hoshinmaru* which is the false recording of the catch within the limits set in the valid licence cannot be considered as causing damage to salmon and trout resources in the Russian exclusive economic zone. If this relatively low degree of gravity of the offence and the above-mentioned aspects of fishing resources concerned had been adequately taken into account in the determination of the bond, its amount in the present case would have been set at a lower level.

*(signed)* S. Yanai