INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2007

6 August 2007

List of cases:
No. 15

THE "TOMIMARU" 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, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, TREVES, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, TÜRK, KATEKA, HOFFMANN; *Registrar* GAUTIER.

In the "Tomimaru" 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, Consulate-General of the Russian Federation, Hamburg, Germany,

as Co-Agent;

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

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

as Deputy Agents;

and

Mr Vladimir Golitsyn, Professor of International Law, State University of International 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 *53rd Tomimaru* (hereinafter "the *Tomimaru*"). The Application was accompanied by a letter of 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 of 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 21 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. 15 and named the *"Tomimaru" 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 the representatives of the parties on 10 July 2007, during which he ascertained their views with regard to questions of procedure. The 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. On 12, 18 and 21 July 2007, the Agent of Japan transmitted additional documents in support of its Application, copies of which were transmitted to the other party.

11. On 17 July 2007, the Russian Federation filed its Statement in Response, a copy of which was transmitted forthwith to the Agent of Japan. On the same date, the Russian Federation submitted additional documents in support of its Statement in Response, copies of which were transmitted to the other party.

12. By letters from the Registrar dated 9, 12 and 13 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 11 and 13 July 2007, the Co-Agent of Japan, and on 18 July 2007, the Agent of Japan, submitted documents, copies of which were forwarded to the other party.

13. In accordance with articles 45 and 73 of the Rules, the President held consultations with the Agents of the parties on 18 July 2007, during which he ascertained their views regarding the order and duration of the presentation by each party and the evidence to be produced during the oral proceedings.

14. Prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 20 July 2007, in accordance with article 68 of the Rules.

15. Prior to the opening of the oral proceedings, the Agent of Japan and the Agent of the Russian Federation communicated information required under paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal.

16. 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.

17. Oral statements were presented at four public sittings held on 21 and 23 July 2007 by the following:

On behalf of Japan:	Mr Ichiro Komatsu, Agent, Mr Vaughan Lowe, Advocate, Mr Shotaro Hamamoto, Advocate.
On behalf of the Russian Federation:	Mr Evgeny Zagaynov, Agent, Mr Vadim Yalovitskiy, Deputy Agent, Mr Vladimir Golitsyn, Counsel.

18. On 21 July 2007, Mr Vadim Yalovitskiy, Deputy Agent for the Russian Federation, delivered his statement in Russian. The necessary arrangements were made for his statement to be interpreted into the official languages of the Tribunal in accordance with article 85 of the Rules.

19. On 21 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 21 July 2007 and by the Respondent on 24 July 2007.

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

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 the *53rd Tomimaru* (hereinafter "the *Tomimaru*") 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 obligation under Article 73(2) of the Convention; and
(c) to order the Respondent to release the vessel of the *Tomimaru*, 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.

21. 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 the *53rd Tomimaru* (hereinafter "the *Tomimaru*") 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 obligation under Article 73(2) of the Convention; and
(c) to order the Respondent to release the vessel the *Tomimar*u, 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.

Factual background

Boarding and inspection of the *Tomimaru*

22. The trawler *Tomimaru* is a fishing vessel owned and operated by Kanai Gyogyo Co., a company registered in Japan. At the time of detention, the *Tomimaru* was flying the flag of Japan.

23. According to the fishing licence issued to the *Tomimaru* by the competent Russian authorities, the ship was authorized to fish walleye pollack and herring, from 1 October to 31 December 2006, in an area of the western Bering Sea located in the exclusive economic zone of the Respondent. The quota allowances fixed by the fishing licence were 1,163 tons of walleye pollack and 18 tons of herring.

24. On 31 October 2006, the *Tomimaru* was fishing in the area of the Respondent's exclusive economic zone designated above when it was boarded by officers from the patrol boat *Vorovskii* and inspected by officials from the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation. According to the letter of 5 November 2006 from the Northeast Border Coast Guard Directorate to the Inter-district Prosecutor's Office for Nature Protection in Kamchatka, the examination of the holds of the vessel revealed that there was an unaccounted amount of 5.5 tons of walleye pollack. The vessel was then re-routed and escorted to Avachinskiy Bay for further investigation.

25. By a note verbale dated 9 November 2006 from the Representative Office of the Ministry of Foreign Affairs of the Russian Federation in Petropavlovsk-Kamchatskii, the Consulate-General of Japan in Vladivostok was informed that, as a result of the inspection of the *Tomimaru* on 8 November 2006, not less than 20 tons of gutted walleye pollack, that was not listed in the logbook, were found on board the vessel, and "some kinds of fish products which are forbidden to catch, i.e. not less than 19.5 tons of various sorts of frozen halibut, 3.2 tons of ray, 4.9 tons of cod as well as not less than 3 tons of other kinds of bottom fish". Later, by a letter dated 22 December 2006, the Inter-district Prosecutor's Office for Nature Protection in Kamchatka informed the Consulate-General of Japan in Vladivostok that the accurate quantity of fish illegally caught was "established at 62,186.9 kg and the damage to the living [marine] resources in the Russian Federation amount[ed] to 8,800,000 rubles" (approximately US$ 345,000).

Institution of proceedings by the detaining State

26. According to the letter of 1 December 2006 from the Public Prosecutor's Office of the Russian Federation to the Consulate-General of Japan in Vladivostok, a criminal case was instituted against the Master of the *Tomimaru* on 8 November 2006 for "exploitation without permission of the natural resources in the exclusive economic zone of the Russian Federation, causing enormous environmental damages to the living [marine] resources equivalent to not less than 8,500,000 rubles" a crime stipulated in article 253, paragraph 2, of the Criminal Code of the Russian Federation. The Master was ordered to stay in Petropavlosk-Kamchatskii until the completion of the preparatory examination and the examination for the trial of the criminal case.

27. Article 253, paragraph 2, of the Criminal Code of the Russian Federation reads as follows:

[Translation from Russian provided by the Applicant]

> Research, search, prospecting and exploitation of the natural resources of the continental shelf of the Russian Federation or of the exclusive economic zone of the Russian Federation, conducted without appropriate permits, shall be punished by imposing a fine from one hundred thousand to five hundred thousand roubles or in the amount of the wages or other income of the convicted for a period from one year to three years or by corrective labour for a term of up to two years, with the deprivation of the right to hold certain duties or to engage in certain activities for a term of up to three years, or without such deprivation.

28. The *Tomimaru* was considered material evidence in the criminal proceedings under article 82 of the Code of Criminal Procedure of the Russian Federation and detained in Avachinskiy Bay.

29. According to the Application, the allegedly illegal portion of the catch of the *Tomimaru* was confiscated by the authorities of the Respondent. The rest of the catch was sold by the agent of the vessel owner and its value was returned to the owner.

30. It is not disputed by the parties that the other members of the crew were allowed to leave the Russian Federation after the completion of the investigation.

31. Administrative proceedings were instituted against the owner on 14 November 2006 for violation of article 8.17, paragraph 2, of the Code of Administrative Offences of the Russian Federation.

32. Article 8.17, paragraph 2, of the Code of Administrative Offences provides 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.

Petition for the determination of a bond

33. On 30 November 2006, a representative of the company Yokei Suisan, the owner of another detained trawler – the *Youkeimaru* – wrote to the Northeast Border Coast Guard Directorate regarding the cases instituted against three Japanese corporations, including the owner of the *Tomimaru* ("Kanai Gyogyo"). The letter stated: "We apologize for the actions of our masters and guarantee payment of all appropriate penalties provided for in the Russian legislation" and requested that "the possibility of release of our vessels upon posting the bond, which will be set by the Russian side" be considered. In response to this request, the Northeast Border Coast Guard Directorate wrote to the Consulate-General of Japan in Vladivostok on 14 December 2006 and asked the Consulate-General to notify the representatives of the companies concerned that the matter was being handled by the Inter-district Prosecutor's Office for Nature Protection in Kamchatka.

34. In a letter dated 1 December 2006 sent to the Consulate-General of Japan in Vladivostok, the Inter-district Prosecutor's Office for Nature Protection in Kamchatka observed that "the owner of the vessel, who bears responsibility for unlawful actions of the Master, has not until now applied to provide a bond commensurate to the amount of incurred damage". The letter added: "As to the decision regarding the release of the detained vessels, it will be taken after the bond has been posted to include the judicial costs in respect of the cases on the administrative offences against the legal entities, i.e. ship owners".

35. On 8 December 2006, the owner sent a petition to the Inter-district Prosecutor's Office for Nature Protection to request that a bond be fixed for the release of the vessel.

36. The owner was informed by a letter dated 12 December 2006 from the Inter-district Prosecutor's Office that "[a]ccording to the estimation of the damage, the amount of the damage to the Russian Federation is equivalent to 8,800,000 rubles. The free use of the trawler *'53rd' Tomimaru* will not be prevented by the Inter-district Prosecutor's Office once the bond is paid to the deposit account […]". The amount of 8,800,000 roubles (approximately US$ 345,000) was not paid.

37. On 14 December 2006, the owner sent a "petition concerning the case of administrative offences" to the Northeast Border Coast Guard Directorate" in which he noted that the Inter-district Prosecutor's Office for Nature Protection "has set the amount of a bond upon the posting of which the vessel will be released, within the criminal case established against the Master of the *'53rd' Tomimaru*" and then added: "[c]onsidering the aforementioned fact, I request the amount of a bond be set for the case of administrative offences established against the owner of the *'53rd' Tomimaru*".

38. After the owner had been informed that the matter was being handled by the Federal Court of Petropavlovsk-Kamchatskii, he made a similar request for a bond to the Petropavlovsk-Kamchatskii City Court with respect to the administrative proceedings.

39. By a decision dated 19 December 2006, the City Court rejected the petition for the setting of a reasonable bond for the *Tomimaru* for the following reasons:

[Translation from Russian provided by the Applicant]

the measures to ensure the proceedings on administrative offences have been taken in accordance with Articles 27.1 and 27.14 of the Code of the Administrative Offences of the Russian Federation by means of detention of the vessel […]

The provisions of the Code of Administrative Offences of the Russian Federation do not provide the possibility of releasing a property after posting the amount of bond by the accused on the case of administrative offences.

In accordance with Article 29.10(3) of the Code of Administrative Offences …, the problems concerning the property of detention … taken into custody shall be solved at the resolution of the case of administrative offences taken as the result of administrative offences.

40. Article 29.10(3) of the Code of Administrative Offences provides as follows:

[Translation from Russian provided by the Applicant]

A decision with regard to a case concerning an administrative offence should settle the questions concerning seized items and documents, as well as items under arrest, if an administrative penalty in the form of confiscation or compensated seizure has not been imposed or may not be imposed in respect of them …

41. In addition to the action taken by the owner of the vessel, several requests have been made by the Government of Japan through its Consulate-General in Vladivostok (notes and letters dated 27 November 2006, 28 November 2006, 19 December 2006, 21 December 2006, 22 December 2006, 26 December 2006 and 27 December 2006) or its Embassy in Moscow (notes verbales dated 23 January 2007 and 7 March 2007) for the prompt release of the vessel and its Master.

Further developments in proceedings before the courts of the detaining State

42. The Petropavlovsk-Kamchatskii City Court delivered its judgment in the proceedings instituted against the owner on 28 December 2006. In its judgment, the court made the following ruling:

> *[Translation from Russian provided by the Respondent]*
>
> To recognize that the corporate entity Kanai Gyogyo Co. (6-3-25, Irifune, Kushiro city, Hokkaido, Japan) is responsible for committing an administrative offence under Article 8.17, Section 2, of the Russian Federation Code of Administrative Offences and to impose an administrative penalty in the form of a fine totalling double the cost of biological (living) aquatic resources that were the subject of the administrative offence in the amount of 2 865 149 rubles and 50 kopecks and to confiscate the 53rd Tomimaru vessel with all its technical and other equipment, communications facilities, salvage appliances and installations.

43. The owner of the vessel then filed an appeal at the Kamchatka District Court on 6 January 2007. The Kamchatka District Court confirmed on 24 January 2007 the decision of the Petropavlovsk-Kamchatskii City Court concerning the confiscation of the *Tomimaru*. The owner then took action under the supervisory review procedure regarding the decision of the Kamchatka District Court on 26 March 2007. The procedure was pending before the Supreme Court of the Russian Federation at the time of filing of the Application.

44. By Order No. 158-r of 9 April 2007 of the Federal Agency on Management of Federal Property, the *Tomimaru* was "seized by the State as beneficiary" and was entered in the Federal Property Register as property of the Russian Federation.

45. The Petropavlovsk-Kamchatskii City Court decided on 15 May 2007 to impose a fine of 500,000 roubles (approximately US$ 19,600) and to award damages of 9,000,000 roubles (approximately US$ 353,000) against the Master. The Master paid the fine but not the damages and on 30 May 2007 was allowed to leave Petropavlovsk-Kamchatskii for Japan. According to the Applicant, an appeal in this case is pending before the Kamchatka District Court.

46. After the closure of the hearing, on 26 July 2007 the Respondent informed the Tribunal that the Supreme Court of the Russian Federation had dismissed the complaint concerning the confiscation of the *Tomimaru* since "[…] there are no grounds for review of the Judgment on the basis of the arguments of the complaint".

47. Invited by the Tribunal to comment on the information from the Respondent, the Agent of the Applicant transmitted a communication on 27 July 2007 in which he made, *inter alia*, the following observation:

> [Japan] hopes that the Tribunal will consider the request made by counsel for Japan in the second round of hearings in the *Tomimaru* case that the Tribunal addresses in its judgment at least certain important matters of principle concerning prompt release obligations.

Jurisdiction

48. 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.

49. 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.

50. The status of Japan as the flag State of the *Tomimaru* is not disputed by the Respondent. However, the Respondent is of the opinion that the change of ownership of the vessel, by way of confiscation, renders the Application without object.

51. The *Tomimaru* was detained in Avachinskiy Bay.

52. The Applicant alleges that the Respondent has not complied with article 73, paragraph 2, of the Convention regarding the prompt release of the vessel upon the posting of a reasonable bond or other financial security and that the Application therefore falls within the scope of application of article 292 of the Convention.

53. Article 73, paragraph 2, of the Convention reads as follows:

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

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

55. 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.

Admissibility

56. 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, such allegation is set forth in the Application of Japan.

57. The Respondent maintains that this Application for prompt release is inadmissible because the Applicant's submission in subparagraph 1 (c) is too vague and general. In its view it is so unspecific that it allows neither 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 other financial security to be posted for the release of the vessel and the crew.

58. The Tribunal notes 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 the crew upon the posting of a reasonable bond or other financial security.

Effects of confiscation

59. The Respondent maintains that the judgment of the Kamchatka District Court confirming the confiscation of the *Tomimaru* renders the Application under article 292 of the Convention without object. The Respondent argues that, according to article 292, paragraph 3, of the Convention, when examining applications for release, the Tribunal should 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 Respondent states that the case has been considered before the appropriate domestic forum on the merits; that the decision rendered by that forum has already entered into force and, moreover, has been executed. As a consequence, the Tribunal has no competence to examine an application for prompt release.

60. In support of this argument the Respondent states that on 28 December 2006 the Petropavlovsk-Kamchatskii City Court decided that the vessel should be confiscated and a fine of 2,865,149.5 roubles (approximately US$ 112,000) should be paid by the owner. This judgment was upheld on 24 January 2007 by the Kamchatka District Court, to which the owner had appealed. In this context the Respondent draws the attention of the Tribunal to a letter from the Supreme Court of the Russian Federation, dated 20 August 2003, providing clarification with regard to the entry into force of decisions and judgments concerning administrative offences in cases which have gone on appeal. According to this letter, if a matter has been considered by a magistrate judge or a judge of equal standing, its decision or judgment may be appealed in accordance with articles 30.2-30.8 of the Code of Administrative Offences of the Russian Federation.

61. The Respondent states that, in the light of the clarifications provided in the above-mentioned letter of the Supreme Court of the Russian Federation, the decision of the Kamchatka District Court entered into force immediately upon its delivery, i.e. on 24 January 2007. The Respondent further states that, following the completion of the above procedures and entry into force of the judgment of the Petropavlovsk-Kamchatskii City Court, the Federal Agency on Management of Federal Property in the Kamchatskii District by implementing act No.158-p of 9 April 2007 had included the *Tomimaru*, confiscated in accordance with the judgment of the court, in the Federal Property Register as property of the Russian Federation.

62. The Applicant is of the view that the confiscation cannot be regarded as final. It draws the attention of the Tribunal to the fact that the owner of the *Tomimaru* had lodged a complaint in accordance with the supervisory review procedure regarding that judgment of the Kamchatka District Court and that the matter was pending before the Supreme Court of the Russian Federation.

63. As far as the case before the Supreme Court of the Russian Federation is concerned, the Respondent maintains that this is not an appeal but a complaint lodged by the owner of the vessel in accordance with the supervisory review procedure exercised by the Supreme Court. In essence the Respondent maintains that such complaint does not suspend the effect of the judgment of the Kamchatka District Court. The Respondent states that the principal purpose of the supervisory procedure is to guarantee uniformity in the application of legal norms. Decisions upheld in the course of an appeal may be annulled at a supervisory stage if they violate human and civil rights and freedoms proclaimed by universally recognized principles and norms of international law and international treaties to which the Russian Federation is party. Furthermore, such decisions can be annulled if they violate the rights and legitimate interests of an indefinite number of people or other public interests.

64. The Applicant maintains that, regardless of the manner in which the procedure before the Supreme Court of the Russian Federation is qualified, this case is still pending. The Applicant stresses, referring in that respect to the Statement in Response, that the Supreme Court of the Russian Federation may annul the decision of the Kamchatka District Court of 24 January 2007.

65. The Applicant further stresses that the position concerning the nationality of the *Tomimaru* would be the same even if it had been confiscated by the Russian Federation. If the confiscation of arrested vessels were allowed to prevent the Tribunal exercising its prompt release jurisdiction, the prompt release obligations and procedures under the Convention would lose all practical meaning. The Applicant maintains, in any event, that ownership of a vessel is distinct from a change of nationality of a vessel. In the view of the Applicant the *Tomimaru* remains a Japanese ship and, because the *Tomimaru* is a Japanese ship, Japan is entitled to bring a prompt release application in respect of it regardless of the nationality of its owner.

66. As indicated in paragraph 46, after the closure of the hearing, on 26 July 2007, the Respondent informed the Tribunal that the Supreme Court of the Russian Federation had dismissed the complaint concerning the review of the decision on the confiscation of the *Tomimaru*.

67. The Tribunal also takes note of the comment made by the Applicant on the information from the Respondent, as referred to in paragraph 47.

68. The decision of the Supreme Court of the Russian Federation was taken after the closure of the hearing in this case. Nevertheless, the Tribunal considers it appropriate to take this fact into consideration.

69. The Tribunal emphasizes that two questions have to be distinguished: (i) whether confiscation may have an impact on the nationality of a vessel; and (ii) whether confiscation renders an application for the prompt release of a vessel without object.

70. As regards the first question, the Tribunal states that the confiscation of a vessel does not result *per se* in an automatic change of the flag or in its loss. Confiscation changes the ownership of a vessel but ownership of a vessel and the nationality of a vessel are different issues. According to article 91 of the Convention, it is for each State to establish the conditions for the granting of its nationality to ships and for the registration of ships. The State of nationality of the ship is the flag State or the State whose flag the ship is entitled to fly. The juridical link between a State and a ship that is entitled to fly its flag produces a network of mutual rights and obligations, as indicated in article 94 of the Convention. In view of the important functions of the flag State as referred to in article 94 of the Convention and the pivotal role played by the flag State in the initiation of the procedure for the prompt release of a ship under article 292 of the Convention, it cannot be assumed that a change in ownership automatically leads to the change or loss of its flag. The Tribunal notes that the Respondent has not claimed to have initiated procedures leading to a change or loss of the flag of the *Tomimaru*.

71. The Tribunal now turns its attention to the second question: whether the confiscation of a vessel renders an application for its prompt release under article 292 of the Convention without object.

72. The Tribunal notes that article 73 of the Convention makes no reference to confiscation of vessels. The Tribunal is aware that many States have provided for measures of confiscation of fishing vessels in their legislation with respect to the management and conservation of marine living resources.

73. In considering whether confiscation renders an application for the prompt release of a vessel without object the Tribunal has to take into account the object and purpose of the prompt release procedure. Account has to be taken also of article 292, paragraph 3, of the Convention which reads:

> 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.

74. As the Tribunal already stated in its judgment in the *"Monte Confurco" Case* (*ITLOS Reports 2000*, p. 86, at p. 108, para. 70), article 73 of the Convention establishes a balance between the interests of the coastal State in taking appropriate measures as may be necessary to ensure compliance with the laws and regulations adopted by it on the one hand and the interest of the flag State in securing prompt release of its vessels and their crew upon the posting of a bond or other security on the other. The Tribunal wishes to emphasize that a judgment under article 292 of the Convention must be "without prejudice to the merits of any case" ("*sans préjudice de la suite qui sera donnée à toute action*") before the appropriate domestic forum against the vessel or its crew and that this, too, is a factor in maintaining the balance between the interests of the coastal State and of the flag State.

75. It is the view of the Tribunal that confiscation of a fishing vessel must not be used in such a manner as to upset the balance of the interests of the flag State and of the coastal State established in the Convention.

76. A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object. Such a decision should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law. In particular, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention.

77. In this context, the Tribunal emphasizes that, considering the objective of article 292 of the Convention, it is incumbent upon the flag State to act in a timely manner. This objective can only be achieved if the shipowner and the flag State take action within reasonable time either to have recourse to the national judicial system of the detaining State or to initiate the prompt release procedure under article 292 of the Convention.

78. The Tribunal emphasizes that, considering the object and purpose of the prompt release procedure, a decision to confiscate a vessel does not prevent the Tribunal from considering an application for prompt release of such vessel while proceedings are still before the domestic courts of the detaining State.

79. The Tribunal notes that the decision of the Supreme Court of the Russian Federation brings to an end the procedures before the domestic courts. This has not been contested by the Applicant. After being informed of that decision, the Applicant did not maintain its argument that the confiscation of the *Tomimaru* is not final. The Tribunal notes also that no inconsistency with international standards of due process of law has been argued and that no allegation has been raised that the proceedings which resulted in the confiscation were such as to frustrate the possibility of recourse to national or international remedies.

80. The Tribunal considers that a decision under article 292 of the Convention to release the vessel would contradict the decision which concluded the proceedings before the appropriate domestic fora and encroach upon national competences, thus contravening article 292, paragraph 3, of the Convention.

81. For the reasons which it has given, the Tribunal does not consider it necessary to pronounce expressly upon the several submissions of the parties, in the form in which they have been cast and considers that the Application is without object.

Operative provision

82. For these reasons,

THE TRIBUNAL,

Unanimously,

Finds that the Application of Japan no longer has any object and that the Tribunal is therefore not called upon to give a decision thereon.

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 NELSON, 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) L.D.M.N.

Judge YANAI, 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) S.Y.

Judge JESUS, 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) J.L.J.

Judge LUCKY, 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) A.A.L.

DECLARATION OF JUDGE NELSON

I take this opportunity to make some brief remarks on paragraph 76 of the Judgment. The paragraph reads as follows:

> A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object. Such a decision should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law. In particular, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention.

This provision brings very much into play article 292, paragraph 3, of the Convention which states:

> 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.

This mechanism for prompt release is designed to isolate the prompt release proceedings from those taking place in the domestic forum and this must be a logical consequence arising from the very nature of the proceedings. As the Tribunal has itself asserted, it provides for an independent remedy and not an appeal against a decision of a national court (*"Camouco"*, para. 59). In other words, it is not the business of the Tribunal to act as a court of appeal.

To what extent does the Tribunal have the power to examine the facts of the case? It will be recalled that in the *"Monte Confurco" Case* the Tribunal had this to say on the matter:

> [T]he 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 precluded from examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond. Reasonableness cannot be determined in isolation from facts.
> (*"Monte Confurco" (Seychelles* v. *France), Prompt Release, Judgment, ITLOS Reports 2000*, para. 74)

Judge Mensah, in his Declaration, warned, correctly in my view, "that any 'examination' of the facts must be limited to what is strictly necessary for an appreciation of the reasonableness or otherwise of the measures taken by the authorities of the arresting State". He proceeded pertinently to add that "the Tribunal should exercise *utmost restraint* in making statements that might plausibly imply criticism of the procedures and decisions of the domestic courts". (emphasis added) (Mensah, Separate Opinion, *"Monte Confurco"*, p. 121. To the same effect see also Jesus, Separate Opinion, *ibid.*, p. 140, para.10.)

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

The approach taken by the Tribunal in this paragraph runs the risk of "straying into territory which more properly belongs to the local court".[1] Perhaps these are not matters to be dealt with within the system contained in article 292.

(signed) L.D.M. Nelson

[1] Lowe, "International Tribunal for the Law of the Sea: Survey for 2000", (2001) *16 International Journal of Marine and Coastal Law*, p. 549 on 566.

DECLARATION OF JUDGE YANAI

I concur with the Judgment rendered in the *"Tomimaru" Case* but I would like to make some observations on the question of proper functioning of the prompt release procedure.

1. The central issue in the *"Tomimaru" Case* was the effect of the confiscation of the vessel on the prompt release procedure under the United Nations Convention on the Law of the Sea. However, as the Supreme Court of the Russian Federation finalized the confiscation on 26 July 2007, the Tribunal "finds that the Application of Japan no longer has any object and that the Tribunal is therefore not called upon to give a decision thereon."(The operative provision of the Judgment). As a result, the Tribunal did not have the opportunity to express its views on other aspects of the case, particularly the question of the bond. So I would like to offer my observations on some of these aspects, other than the reasonableness of the amount of bond.

2. There are two factors that complicated the *"Tomimaru" Case*. First, the flag State, Japan, waited too long before filing the Application at the Tribunal. The vessel was boarded and inspected by Russian officers on 31 October 2006 in the Russian exclusive economic zone and detained thereafter, but the Application was not filed until 6 July 2007. During this extended period of time, the procedure on the confiscation of the vessel went ahead in the Russian Federation.

Another factor is the intricacy of the procedures concerning the release of detained foreign fishing vessels and the bond system in the Russian Federation.

The owner of the *Tomimaru* was informed by a letter dated 12 December 2006 from the Russian authorities concerned that the amount of the damages caused by the vessel to the Russian Federation was equivalent to 8,800,000 roubles and that the Russian authorities would not prevent the free use of the vessel once the bond were paid (paragraph 36 of the Judgment). The owner did not pay this amount because he had reason to believe that his vessel would not be released upon payment of this bond, which was considered to be a bond relating only to the criminal case and did not cover the case of the administrative offences established against the owner of the vessel. So he requested the Petropavlovsk-Kamchatskii City Court to set the amount of a bond for the case of the administrative offences. The City Court rejected the petition on 19 December 2006, stating that the Code of Administrative Offences of the Russian Federation does not provide for the possibility of releasing a property after posting the amount of bond by the accused in the case of administrative offences (paragraph 39 of the Judgement).

In short, a bond was set for the criminal case but no bond was fixed for the administrative case, owing to the lack of relevant provisions in the Code of Administrative Offences. So there was a fragmentation of bond.

Another difficulty the owner of the vessel faced was that the nature of the sum of 8,800,000 roubles requested by the Russian authorities was not clear at that time, December 2006. It was explained to the owner to be a voluntary compensation for the damage caused by the *Tomimaru*, although during the pleadings, the Respondent referred to this as a bond. The owner and the Master encountered other administrative or procedural difficulties but I refrain from going into further details.

3. Coastal States should exercise their sovereign rights in their exclusive economic zones in accordance with the relevant provisions of the Convention and ensure that their national legislations and procedures are in conformity with the Convention, so that the international law of the sea regime, including the prompt release procedure, can function properly. The purpose of my observations is not to criticize any particular State or its national legislation but for the better functioning of the prompt release procedure under the Convention. Bearing this in mind and based on the experience gained in the *"Tomimaru" Case* and the *"Hoshinmaru" Case*, I would like to submit the following points:

(a) Bond or other security under national laws should be unified and not be fragmented. In other words, arrested vessels and their crews shall be promptly released upon the posting of a reasonable bond or other security without being subjected to parallel bonds or other conditions.

(b) National prompt release procedure, including bond or other security, should be simple and transparent, so that the owners of arrested vessels and their flag States can easily understand the relevant procedures of the coastal States concerned. This will prevent conflicts between detaining States and flag States.

(c) The detaining States should decide on the amount of bond or other security and communicate it to the owners of vessels and other interested persons with reasonable promptness, since undue delay in the implementation of prompt release procedure will cause economic damage to the owners of vessels and humanitarian problems for their crew.

(d) National prompt release procedure should be based on the principle of due process of law in order to ensure fairness in its implementation.

(signed) S. Yanai

SEPARATE OPINION OF JUDGE JESUS

1. Although I voted in favour of the Judgment of the Tribunal, I feel compelled, nonetheless, to file this separate opinion to highlight my understanding of the issue of confiscation of fishing vessels by the detaining State for violation of fishing laws and regulations, since I do not share some of the tenets of the doctrinal construction built into the decision of the Tribunal on this case. The intention is not to deal with the legitimacy of the confiscation of vessels for fisheries-related violations *per se*, but only to underline certain aspects of it that may have a bearing on the outcome of prompt release cases.

2. Faced with an increase in illegal, unreported and unregulated fishing in their waters, coastal States have been resorting to harsh measures, in order to better protect their resources from being plundered and to avoid over-exploitation. In many cases, it is believed that fines imposed have not acted as a significant deterrent, as might have been expected, for effectively controlling and preventing illegal fishing.

3. As a result, one of the measures taken, not so infrequently, by a vast number of coastal States is confiscation of the fishing vessel because of illegal fishing. Confiscation is generally treated by the fisheries laws and regulations of the detaining State as a penalty or as a result of failure to pay fines imposed within the due time.

4. Article 73 of the Convention seems to give clear a direction as to the nature of the measures the coastal State may take to protect its sovereign rights over living resources in its exclusive economic zone (EEZ). Indeed, paragraph 1 of that article states that

> in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, [the coastal State may] take such measures [...] as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the Convention.

5. It would appear, from a careful reading of the provision of article 73 quoted above, that, whatever measure the coastal State takes to protect the living resources in its EEZ, it is a measure that the coastal State is entitled to take in exercising its sovereign rights over such resources, in order to secure the most effective protection of them from those who are plundering them, and prevent their depletion.

6. The penalty of confiscation of fishing vessels, in this regard, appears to be consistent with the provision of article 73, paragraph 1, of the Convention, for there is nothing in the Convention that would exclude the penalty of confiscation from those measures that, in accordance with this article, the coastal State is entitled to take against a vessel engaged in illegal fishing in its EEZ. This understanding seems to be supported by undisputed State practice.

7. Measures of the coastal States that would not be in conformity with the Convention are, for example, those referred to in paragraph 3 of article 73, that is to say, the imposition of the penalty of imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment, for fisheries violations committed in the EEZ. If such measures were to be taken by a detaining State, they would be considered, as referred to in paragraph 1 of article 73 of the Convention, as not being in conformity with the Convention. By the same token, if the intention of the Convention was to exclude confiscation of fishing vessels for violations of fisheries laws and regulations from the panoply of measures that the coastal State may take to protect its marine living resources, then the provision of paragraph 3 of article 73 would have said so, explicitly, as it did in relation to imprisonment and other forms of corporal punishment.

8. While not questioning the right of the coastal State to confiscate fishing vessels, this decision of the Tribunal includes a certain amount of elaboration which may imply that coastal States should not confiscate a fishing vessel immediately after its arrest or detention, so as to give time for the flag Sate to apply for its release upon the posting of a bond. This view seems to have found support in paragraph 76 of the decision of the Tribunal, *in fine*. In assessing the balance that should exist between the interests of the detaining State and of the flag State on the issue of prompt release, that paragraph declares that "[i]n particular, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention".

9. I do not share this view, for the following reasons:

(a) Firstly, confiscation of fishing vessels on account of illegal fishing is imposed as a penalty and, as such, confiscation is a matter to be considered part and parcel of the merits of a case, which is excluded from the jurisdiction of the Tribunal when seized of an application for the prompt release of fishing vessels, as set out in article 292, paragraph 3, of the Convention. Indeed, this article and paragraph, as mentioned before, make it clear that the prompt release procedure "is without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew".

(b) Secondly, the Tribunal has held, and rightly so, that laws and judicial decisions of States are to be considered by it as facts. Therefore national legislation and decisions should not be the object of a value judgment or qualification in a prompt release case.

(c) Thirdly, the prompt release procedure does not seem to prevent the detaining State from confiscating a vessel at any stage of its detention. The timing of the adoption of the measure of confiscation of a fishing vessel is an issue germane only to the consideration of the merits of the case. Whether the coastal State confiscates the vessel immediately after its detention or at a later stage, confiscation of detained fishing vessels is a matter that falls totally within the competence of the appropriate forum of the coastal State and should not, therefore, be a consideration of the Tribunal when it is dealing with a case concerning the prompt release of a fishing vessel. If the process leading to confiscation is tainted by irregularities or illegalities, the proper forum for seeking redress for such irregularities and illegalities is to be found in the local remedies available and not in the Tribunal, since it should consider only the application for release. It is to be noted in this regard that the imposition of penalties involving the confiscation of the vessel, lies at the very core of any merits case, since the very purpose of such a case is to decide whether or not penalties of one sort or another should be imposed. Therefore, the Tribunal, while seized of a prompt release case, is not called upon, for lack of competence, to make inroads into what is or is not confiscation properly exercised, whether or not it be exercised in a justifiably or unjustifiably hasty manner. Since confiscation, as stated before, is an issue that is relevant to the merits of the case, issues pertaining to the inappropriateness of confiscation, the justification or non-justification of the hasty manner in which it is carried out by the detaining State, and the absence of procedures that guarantee the due process of the law, among others, are issues whose relevance may be pursued in the appropriate domestic forum, but certainly not by the Tribunal in the context of a prompt release procedure

(d) Fourthly, as conceived and translated into article 292 of the Convention, the prompt release procedure is rather a means of avoiding a fishing vessel that is detained on account of violations of fisheries laws and regulations being left unnecessarily immobilized, pending the decision of the domestic forum on the merits . Its prompt release, therefore, presupposes that the vessel is still detained. Indeed, article 292, paragraph 1, states that "the question of release *from detention* may be submitted to any court or tribunal" (emphasis added). If, as a result of the automatic operation of the law or a domestic judicial decision or a decision of any other competent authority of the arresting State, the vessel has been the object of an irrevocable decision of confiscation by the arresting State, then the vessel is no longer detained within the meaning of article 292 of the Convention. Therefore the issue of prompt release becomes moot. This is, after all, the conclusion of paragraph 76 of the Judgment of the Tribunal in the present case, when it states that "A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object".

(e) Lastly, if the flag State wants its vessel released promptly from detention, then in order to avoid early confiscation of the fishing vessel, the flag State may, after satisfying the requirements of paragraph 1 of article 292 of the Convention, apply to the Tribunal for prompt release immediately after the 10 days from the time of the vessel's detention have elapsed.

(signed) J.L. Jesus

SEPARATE OPINION OF JUDGE LUCKY

Although I voted in favour of the Judgment of the Tribunal, I deemed it necessary to view this case from another perspective. Consequently, I have written a separate opinion.

In its Application to the International Tribunal for the Law of the Sea ("the Tribunal") the Applicant requests the Tribunal to:

> (a) declare that the Tribunal has jurisdiction under article 292 of the United Nations Convention on the Law of the Sea ("the Convention") to hear the Application concerning the detention of the vessel of the *53rd Tomimaru*, ("the *Tomimaru*"), in breach of the Respondent's obligations under Article 73(2) of the Convention;
> (b) declare that the Application is admissible, that the Application is well-founded, and that the Respondent has breached its obligation under Article 73(2) of the Convention; and,
> (c) order the Respondent to release the *Tomimaru* upon such terms and conditions as the Tribunal shall consider reasonable.

The Respondent 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.

The Facts (briefly)

The Applicant pleads that on 31 October 2006 the *Tomimaru* ("the vessel") was boarded by officials of the Respondent and ordered to sail to the port of Petropavlovsk-Kamchatskii where the vessel and crew were detained. No charge or allegation of any violation of the Respondent's laws was made upon boarding. During the voyage to the port, an official of the Respondent indicated that the actual amount of the fish transported by the vessel appeared to differ from the amount stated in the logbook and that the difference was about 5 tons. The vessel arrived at the port on 5 November 2006. On 5 November 2006 an inspection was carried out by officials of the Northeast Border Coast Guard Directorate of the Federal Security Service of the Respondent.

The Respondent pleads that on **1 November 2006** four vessels, including the *Tomimaru*, that were fishing in the Respondent's EEZ, were checked. In order to examine the actual catch of each vessel more thoroughly, the vessels were escorted to Avachinskiy Bay.

On **8 November 2006** the examination of the amount of catch was completed. The examination revealed a grave breach of the Respondent's national legislation, as well as serious damage to the environmental balance and security of the biological resources of the Respondent's EEZ. The breach is set out in a note verbale dated 9 November 2006 from the Representative Office of the Ministry of Foreign Affairs of the Russian Federation in Petropavlovsk-Kamchatskii to the Consulate-General of Japan in Vladivostok.

It is not disputed that:

(a) Japan ("the Applicant") and the Russian Federation ("the Respondent") are both Parties to the Convention;
(b) The *Tomimaru* is a fishing vessel owned and operated by Kanai Gyogyo, a Japanese company;
(c) The *Tomimaru* was flying the Japanese flag at the time it was detained by the relevant authorities of the Respondent;
(d) The *Tomimaru* was licensed to fish in the EEZ of the Respondent at the time of the detention;
(e) Apart from the Master of the vessel, members of the crew were allowed to leave the Russian Federation after completion of the investigation.

The Time-frame

The time-frame is important in order to demonstrate the conduct of the Parties prior to the submission of the application for prompt release. The time-frame is set out below:

On **8 November 2006**, criminal proceedings were instituted against the Master of the vessel.

On **9 November 2006** a note verbale was issued by a representative of the Ministry of Foreign Affairs of the Respondent at the port; the note sets out the charge against the Master and the results of the inspection.

The Applicant states that:

> The *Tomimaru* itself was **registered as evidence** in the proceedings and was detained in the port of Petropavlovsk-Kamchatskii. (emphasis added)

The alleged illegal portion of the catch of the vessel was confiscated by the authorities of the Respondent. It was transferred to the National Treasury of the Respondent. The rest of the catch was sold by the agent of the owner of the vessel and its value returned to the owner (there is no evidence that the owner objected to the confiscation and sale or refused to accept the monies raised from the sale).

The events following the above are crucial.

1. The Applicant states that "the owner of the *Tomimaru* has at all times been ready and willing to post a bond or other security in respect of all proceedings in order to secure the release of the vessel and its Master and crew provided that the amount and the conditions for their payment were reasonable". (The Respondent submits that a reasonable bond was fixed on 12 December 2006 but the owner did not post a bond, instead seeking relief in the national courts.)

2. On **14 November 2006**, administrative proceedings were instituted against the owner for violation of article 8.17, paragraph 2, of the Code of Administrative Offences of the Russian Federation.

3. On **30 November 2006** and **8 December 2006** the owner of the *Tomimaru* petitioned the Prosecutor, presumably, at the Inter-District Prosecutor's Office for Nature Protection in Kamchatka for a bond to be fixed so as to enable the vessel to leave for Japan. After a bond had been set, the owner made a similar petition to the Northeast Border Coast Guard Directorate. In response to the petition, the owner was informed that this case had been filed with the Petropavlovsk-Kamchatskii City Court and that the Directorate had no authority to deal with the petition.

4. On **15 December 2006**, the owner made a petition to the said City Court during the administrative proceedings to release the *Tomimaru* upon the posting of a bond or other security. The petition was refused by the Court.

5. On **28 December 2006**, the administrative case was heard. The Court decided to confiscate the *Tomimaru* and imposed a fine on the owner (approximately US$ 111,000).

6. On **6 January 2007**, the owner submitted an appeal against the decision to the Kamchatka District Court.

7. On **24 January 2007**, the Kamchatka District Court confirmed the decision of the Petropavlovsk-Kamchatskii City Court on the confiscation of the *Tomimaru*. The owner lodged a written objection to the decision on **12 February 2007**. The objection was dismissed.

8. On **26 March 2007** the owner appealed to the Federal Supreme Court of the Russian Federation for judicial review.

The Applicant claims that:

> as at the time of filing this Application (6 July 2007) no bond or other security has been set and the vessel has not been released.

The Respondent admits that on **8 December 2006** the owner of the vessel submitted a request to the District Prosecutor's Office and the Northeast Border Coast Guard Directorate to determine a bond. In response, the owner was advised that the proper body for determining bonds was the Inter-District Prosecutor's Office for Nature Protection in Kamchatka.

The Respondent submits that on **12 December 2006** the said Office duly set a reasonable bond and specified in a letter to the owner of the vessel that the Prosecutor's Office would allow the vessel to operate freely upon payment of the bond, which was fixed at 8,800,000 roubles. It claims that it has satisfied the provisions of article 73 of the Convention. The Respondent contends that the bond has never been paid or contested by the owner.

In view of the applicant's contention, it appears to me that there is no concrete evidence to support the claim that the owner was always willing to pay a fixed bond.

9. On **19 December 2006**, Judge I.V. Bazdnikin of the Petropavlovsk-Kamchatskii City Court rejected the vessel owner's petition for a reasonable bond to be set on the grounds that:

> The provisions of the Code of Administrative Offences of the Russian Federation do not provide the possibility of releasing a property after posting the amount of bond by the accused on the case of administrative offences. (See paragraph 17 of Response)

This ruling has never been contested by attorneys of the owner of the vessel. The Respondent submits that from a legal point of view such an opportunity existed.

10. On **28 December 2006** the Petropavlovsk City Court decided that the vessel should be confiscated and a fine of 2,865,149.5 roubles paid by the owner.

Delay in Making the Application

I have referred to the relevant dates above in order to demonstrate that the ensuing period between the detention of the vessel and the filing of the Application is one of the reasons why the Application is inadmissible. In my opinion this period is too long. During that period, the due process of law in the Russian judicial system was set in train in order to resolve the matter. After the hearing at which all the facts were considered, the City Court made an order *inter alia* for confiscation. The owner appealed to the City Court, but the City Court upheld its decision.

Following the order of the Court, the vessel was registered as the property of the Russian Federation. Whereas in the past the Tribunal has entertained applications made several months after the vessels in question had been detained, the circumstances in the present matter are different. In this case, the Application was made eight months after the detention of the vessel. What exacerbates the situation and makes the inadmissibility favourable to the Respondent is the conduct of the Applicant, owner and Master during the months between the vessel's detention and the submission of the Application. As I mentioned earlier, the vessel and crew were detained. On 31 October 2006 the vessel was taken to port and inspected after the flag State had been notified of the arrest and detention. On 12 December 2006 a bond was fixed.

It appears to me, having assessed the documentary evidence, that no bond was posted in relation to the vessel.

The owner, presumably with the knowledge and consent of the flag State, chose to apply to the domestic court for relief. Being unable to obtain the relief sought, the owner appealed to the higher court. By so doing, the owner began a process under national jurisdiction during which the order for confiscation was confirmed and the vessel was deemed the property of the Russian Federation.

It was only on 6 July 2007 that an application under article 292 of the Convention was made to the Tribunal. At that time the matter had been engaging the attention of the domestic courts in Russia. Throughout the period in question neither the owner nor the flag State had asked for a stay of execution pending the hearings on appeal.

If the Tribunal makes an order for prompt release upon the posting of a bond, the Tribunal could be deemed to be interfering in the internal proceedings of a domestic legal system and proceedings in national courts. I do not think article 292 of the Convention envisages interference in the judicial system of a State while proceedings are in progress, particularly when orders for confiscation have been made. In fact confiscation is not mentioned in articles 292 and 73 of the Convention. Article 73, paragraph 3, specifies the sanctions which a detaining State may not apply for violations of its fisheries laws and regulations in its exclusive economic zone. Article 73, paragraph 3, reads:

> Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

If it was the intention of the relevant articles to cover the question of confiscation, specific reference to its exclusion would have been made therein. Unless there is cogent, compelling evidence and reasons to the contrary, it can be presumed that due process was adhered to and in the circumstances the legal maxim *omnia praesemuntur rite esse acta* is applicable. The judicial integrity of the Russian legal system has to be respected.

Due process

The crucial question is whether there was an abuse of process. There is no evidence indicating an abuse of due process and therefore it can be presumed that *omnia praesemuntur rite esse acta*.

It seems to me that the correct procedure was adhered to by the Court (there is no evidence to the contrary) and the vessel was confiscated in accordance with the decision of the Court and entered in the Federal Property register as property of the Russian Federation. In circumstances such as those surrounding the present case, the Tribunal cannot overrule that decision and ought not to interfere in the decisions of national courts through prompt release proceedings.

Assuming, but not admitting, that the Tribunal has jurisdiction, it should not imply in advance that the allegations made by the Applicant regarding non-compliance by the Respondent with the provisions of paragraph 2 of article 73 of the Convention are well-founded and therefore acceptable. In my opinion, the Respondent had complied with the requirements set out in that article. A bond was fixed and the owner was advised:

> that if [the bond] was paid at the given address the Prosecutor's Office would allow the free operation of the vessel upon payment of the bond.

This could only mean that if the bond was posted by the owner, the vessel and crew would be free to leave for Japan.

Is the Application too vague?

I do not think so. My view is based on previous orders of the Tribunal and therefore it appears to me that the words have to be construed within the context of articles 292 and 73 of the Convention. This contention of the Respondent is *non sequitur*.

Is the Application moot?

I think that the Application is moot because, on 12 December 2006, the Respondent had complied with the provisions of article 73, paragaph 2. A bond had been fixed and the owner informed. The owner neither objected to nor accepted the offer. It should be pointed out that the Applicant did not make an Application to the Tribunal to fix a reasonable bond within a reasonable time.

Confiscation

There are clear distinctions in the legal meanings of "detention" and "confiscation".

> *To confiscate* means to appropriate (property) as forfeited to the Government (*Black's Law Dictionary, eighth edition*) or
>
> *To appropriate* to the public treasury (as a penalty); adjudge to be forfeited to the State" (*The New Oxford Dictionary*)
>
> *To detain* means: "keep in confinement or under restraint" (*The Oxford Concise English Dictionary, ninth edition*)

I think the confiscation of the vessel in the circumstances surrounding the case prevents the Tribunal from entertaining the case for the following reasons:

1. A bond had been fixed on **12 December 2006**. On **19 December 2006** the Petropavlovsk-Kamchatskii City Court rejected the Petition of the owner of the Tomimaru for a reasonable bond to be set on the grounds that the provisions of the Code of Administrative Offences of the Russian Federation do not provide the possibility of releasing property after the amount of the bond has been posted by the accused with respect to administrative offences. The ruling was not contested by the attorneys of the owner of the vessel, although they could have done so.

2. On **28 December 2006** the said Court decided that the vessel should be confiscated and a fine of 2,865,149.5 roubles paid by the owner. The owner could have appealed within 10 days. It must be noted that during the proceedings the attorney representing the owner pleaded guilty and asked the Court to impose a fine equal to twice the damages without confiscation of the vessel because it was the owner's first offence and the company was willing to pay all the fines and to cover the costs of the current proceedings.

3. On **6 January 2007**, the owner of the vessel submitted an appeal against the judgment of 28 December to the Kamchatka District Court, which upheld the decision of the City Court. Following the above decisions the Federal Agency on the Management of Federal Property in the Kamchatka District entered the *Tomimaru* (confiscated in accordance with the decisions of the Courts) in the Federal Property Register as property of the Russian Federation.

I cannot agree with the view of the Tribunal expressed in paragraph 78 of the Judgment which reads as follows:

> The Tribunal emphasizes that, considering the object and purpose of the prompt release procedure, a decision to confiscate a vessel does not prevent the Tribunal from considering an application for prompt release of such vessel while proceedings are still before the domestic courts of the detaining State.

In my opinion this statement is not necessary in view of the decision in this case. In a case such as the instant case where the merits of the case against the owner of the vessel were dealt with by courts of competent jurisdiction under the applicable laws of the Russian Federation confiscation is a *fait accompli*. Therefore the Application lost its force even before the Supreme Court of the Russian Federation delivered its judgment. Under Russian legislation, the decision by a district court concerning administrative offences cannot be appealed and the decision entered into force immediately upon pronouncement. The penalty of confiscation was imposed in this case. I am of the view that

the view expressed in paragraph 78 needs to be clarified. It seems to me that where the courts of a coastal State have confiscated a vessel for a breach of its laws the Tribunal could be prevented from considering an application for prompt release of a vessel.

The guilty plea

When a defendant pleads guilty to an offence, he is admitting the charges and accepting the facts presented by the prosecution. The court (judge) is not asked to make a finding of fact on the merits. In other words, the defendant in the present case, the owner, has admitted the wrongdoing and sought the mercy of the court with respect to sentencing, the merits having been determined and the sentence of the court pronounced. The learned judge pronounced his sentence, which was a fine and confiscation of the vessel. The owner appealed, presumably, the sentence of the Court.

The judge's order was confirmed by the appellate court, the Kamchatka City Court. Following that decision, as I said earlier, the confiscated vessel was entered in the Russian Property Register as property of the Russian Federation. The owner then appealed to the Supreme Court of the Russian Federation for judicial review, which could only mean that the court was being asked to review whether the courts followed the rule of law and due process. Bearing in mind the question of time-frame relating to this case as set out earlier in this opinion, the doctrine of *laches* seems applicable. There is nothing on record to show that the Applicant or the owner applied for a stay of execution of the order to confiscate.

As I stated earlier and I repeat for emphasis, the vessel was confiscated and has been entered in the Federal Property Register as the property of the Russian Federation. Therefore if the Tribunal were to order the release of the vessel, it would be interfering in the due process of the Russian national court and its legal system.

For the avoidance of doubt, I must add that there is a distinction between flag State registration and ownership of a vessel, .i. e. between ownership and nationality. Therefore the ship can be de-registered by the new owners.

In my opinion the *Tomimaru* has been confiscated and the merits of the case have been determined and confirmed by the national courts. Further, although the Supreme Court of Russia has been asked by the owner to review the decision of the City Court, its function is of a supervisory nature and it will only consider the legality of the acts without examining the merits of the case.

The question of admissibility

Article 73 of the Convention reads:

> 1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
> 2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.
> [...]

The Applicant submits that there were two sets of proceedings against the Master and the owner of the *Tomimaru* in the domestic courts of the Respondent:

(a) criminal proceedings against the Master in respect of which a bond of 8,800,000 roubles (approximately US$ 343,000) was set on 12 December 2006; and
(b) administrative proceedings against the owner of the *Tomimaru*, in respect of which no bond was fixed.

Counsel for the Applicant contends that the Applicant was in a predicament because he had to post two bonds, one for 8,800,000 roubles and another which had not been fixed in order to secure the release of the *Tomimaru*, its Master and its crew.

The Respondent argues that on 12 December 2006 a bond was fixed in the sum of 8,800,000 roubles. This bond was set for the release of the *Tomimaru*. The bond was never contested or paid by the owner. The Applicant contends that this bond was in respect of the criminal proceedings. The question is whether the bond, fixed on 12 December 2006, was for the release of the vessel, Master and crew, or, in respect of the Master in the criminal proceedings. It seems to me that the Applicant was aware that the bond of 12 December was in respect of the vessel and crew because in paragraph 16 of the Application the Applicant states:

> According to the Master of the *Tomimaru*, a bond was set on 12 December 2006 with the amount of 8,800,000 roubles by the Inter-District Prosecutor's Office for Nature Protection in Kamchatka which mentioned that it would not hinder the vessel from navigating freely on condition that the bond would be paid.

Further, on 2 March 2007 the Master was fined 500,000 roubles, which he paid, and he was subsequently allowed to leave for Japan. This supports the view that the bond set on 12 December 2006 was in respect of the *Tomimaru*.

The bond was set by the Inter-district Prosecutor's Office for Nature Protection in Kamchatka which was authorized to fix a bond. But the owner did not post the bond. The owner requested the Petropavlovsk-Kamchatskii City Court to set a reasonable bond for the release of the said vessel. It is therefore apparent that the owner chose to ask the Court to fix a reasonable bond, ignoring what had been fixed by the Prosecutor.

The Applicant was advised that a bond in the sum of 8,800,000 roubles had been set by the Respondent. Yet even though the Applicant had the right to do so, an Application was not made to the Tribunal in accordance with article 292 of the Convention. That could have been an appropriate time to make an Application to the Tribunal for prompt release of the vessel. One would have thought that at that stage the Applicant would have made an Application to the Tribunal under article 292 of the Convention for the prompt release of the vessel and crew. It appears as though both the Applicant and the owner were content to approach the City Court for the fixing of a reasonable bond.

For the reasons set out above, I find the Application inadmissible.

Apart from the above, the Application is also inadmissible because the vessel has been confiscated in judicial proceedings, in accordance with the laws and regulations of the Respondent (the coastal State). The Applicant contends that the domestic judicial proceedings have not been exhausted and, in support of its arguments, submits that the question of confiscation is still engaging the attention of the Supreme Court of the Russian Federation because an application for judicial review of judgments of the City and District Courts which ordered and confirmed the decision to confiscate the *Tomimaru* was made to the said Court.

It is my view that the Tribunal should not envisage what the Supreme Court of the Russian Federation may do or may not do. The Tribunal ought to consider the documentary evidence and oral submissions in the matter. It seems clear to me that the domestic proceedings before the national courts have been concluded as regards the question of the merits and it is beyond the jurisdiction of the Tribunal to consider the merits. Article 292 of the Convention makes this quite clear. It reads in part:

> 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 ...

It must be noted that the relevant articles of the Convention are silent with respect to confiscation by coastal States. The question may be posed: Does confiscation circumvent the application of article 292? However, I think the circumstances of each case will determine whether confiscation circumvents the Application for prompt release under article 292 of the Convention.

Reference was made to the *"Juno Trader" Case* but a difference has to be made with respect to that case. In the *"Juno Trader" Case* the vessel was confiscated by an administrative forum. That decision was suspended by a court, pending a hearing on the merits. In the present case, the matter was heard on the merits and the order of the court executed.

In support of his contention that the appropriate court proceedings were completed, Counsel for the Respondent referred to part of the arguments presented by the French Government in the *"Grand Prince" Case*, which he adopted as part of his arguments.

The French Government argues that:

> When the internal judicial proceedings have reached their conclusion and, in particular, when they have led to the pronouncement of a sentence of confiscation of the vessel, any possible resort to Article 292 procedure loses its reason for being. In such a case, the Application for prompt release is moot. As from the time when the national court has pronounced confiscation of the vessel as the applicable sanction, the introduction of prompt release proceedings before the international Tribunal for the Law of the sea is not only no longer possible but is not even conceivable.

I agree with the above passage and add that the "pronouncement" stands, even though there is an application for judicial review before the Federal Supreme Court of the Russian Federation. The matter is under the jurisdiction of the national courts and the admissibility of an application in internal judicial proceedings which the parties had accepted would be interfering in the judicial proceedings of the coastal State.

Therefore, the Tribunal cannot circumvent or intervene in the due process of national courts.

For the reasons stated I am of the view that the Application is inadmissible.

After the close of oral proceedings the Registrar of the Tribunal was advised that the Supreme Court of the Russian Federation had found that there were no grounds for judicial review of the judgment of the Kamchatka City Court given on 24 January 2007.

On 27 July 2007 the Agent of Japan states in part that:

> Japan noted the contents of Russia's communication to the Registrar, dated 26 July 2007, concerning developments in Russia's Supreme Court in relation to the *Tomimaru* case.
>
> Japan regrets that it has not had the opportunity to address this development before the close of the written and oral proceedings in the case, and should not be understood to accept the propositions set out in the Russian communication.

The judicial proceedings before the Russian domestic courts have been exhausted. The Supreme Court of the Russian Federation has found that there are no grounds for reversing the judicial decisions of the District and City Courts of Petropavlovsk-Kamchatskii (letter of 26 July to the Registrar of the Tribunal from the Agent of the Russian Federation).

Having considered all the relevant evidence in this case from another perspective, I remain convinced that, even if the Supreme Court of the Russian Federation had not given its decision, the Application would remain inadmissible.

(signed) A.A. Lucky