



INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,  
ADVISORY OPINIONS AND ORDERS

**THE “TOMINMARU” CASE  
(JAPAN v. RUSSIAN FEDERATION)  
List of cases: No. 15**

**JUDGMENT OF 6 AUGUST 2007**

**2007**



TRIBUNAL INTERNATIONAL DU DROIT DE LA MER



RECUEIL DES ARRÊTS,  
AVIS CONSULTATIFS ET ORDONNANCES

**AFFAIRE DU « TOMIMARU »  
(JAPON c. FÉDÉRATION DE RUSSIE)  
Rôle des affaires : No. 15**

**ARRÊT DU 6 AOÛT 2007**





Official citation:

*“Tomimaru” (Japan v. Russian Federation), Prompt Release, Judgment,  
ITLOS Reports 2005-2007, p. 74*

-----

Mode officiel de citation :

*« Tomimaru » (Japon c. Fédération de Russie), prompt mainlevée, arrêt,  
TIDM Recueil 2005-2007, p. 74*





6 AUGUST 2007  
JUDGMENT

**THE “TOMIMARU” CASE  
(JAPAN v. RUSSIAN FEDERATION)**

PROMPT RELEASE

**AFFAIRE DU « TOMIMARU »  
(JAPON c. FÉDÉRATION DE RUSSIE)**

PROMPTE MAINLEVÉE

6 AOÛT 2007  
ARRÊT





74

**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**



**TABLE DES MATIÈRES**

	Paragraphes
Introduction	1 – 21
Exposé des faits	22 – 47
Compétence	48 – 55
Recevabilité	56 – 58
Effets de la confiscation	59 – 81
Dispositif	82



75

## TABLE OF CONTENTS

### Paragraphs

Introduction	1 – 21
Factual background	22 – 47
Jurisdiction	48 – 55
Admissibility	56 – 58
Effects of confiscation	59 – 81
Operative provision	82



**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 *Tomimaru*, 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.