

### 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, paragraph 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

