

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