

APPLICATION OF JAPAN

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

THE 53RD TOMIMARU

JAPAN V. RUSSIAN FEDERATION

(APPLICANT) (RESPONDENT)

APPLICATION FOR THE PROMPT RELEASE OF A VESSEL

6 JULY 2007

**APPLICATION FOR PROMPT RELEASE OF
THE VESSEL OF THE “53RD TOMIMARU”**

Application of Japan

A. Introduction

1. 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.
2. The Applicant makes this application based on Articles 73 and 292 of the Convention. Supporting documents, as listed below, are attached to this Application.
3. Pursuant to Article 56 (2) of the Rules of the Tribunal, Mr. Ichiro KOMATSU, Director-General of the International Legal Affairs Bureau, Ministry of Foreign Affairs of Japan has been appointed by the Government of Japan as its Agent for the purpose

of all proceedings in connection with this Application. The Government of Japan has also appointed Mr. Tadakatsu ISHIHARA, Consul-General of Japan in Hamburg as its Co-agent for the purpose of all proceedings in connection with this Application.

4. The Government of Japan gives the following contact details for the communications between the Court and the Government of Japan.

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B. Statement of Facts

(a) General Overview

5. This Application is made in respect of the *Tomimaru*, a Japanese fishing vessel detained in the Russian exclusive economic zone (hereinafter “EEZ”) by the authorities of the Respondent since 2 November 2006 and currently detained in the Russian port of Petropavlovsk-Kamchatskii.
6. The *Tomimaru* is a fishing vessel owned and operated by Kanai Gyogyo Co., a Japanese company registered at 6-3-25, Kushiro city, Hokkaido, Japan. The *Tomimaru* was flying the Japanese flag at the time of detention and retains Japanese nationality at the time of filing of this Application. It is registered at Kushiro city, Hokkaido, Japan. The *Tomimaru* is a vessel of 279 tons. It has a cargo capacity of 263.6 cubic meters for freezer and 580.6 cubic meters for cold storage and fish tank. The estimated value of the vessel and its equipment is 92,894,507 Yen. Documents that evidence the

ownership and specifications of the *Tomimaru* and support the estimate of value are attached as Annex 1.

7. The *Tomimaru* had 14 Japanese crew members including its Master and 7 Indonesian crew members. The Master and all other members of the crew have now left Russia.
8. There are two sets of proceedings that have been instituted against the Master and the owner of the *Tomimaru* before the domestic courts of the Respondent: (a) criminal proceedings against the Master, in respect of which a bond of 8,800,000 rubles (approximately US\$ 343,000) was set on 12 December 2006; (b) administrative proceedings against the owner of the *Tomimaru*, in respect of which no bond has been fixed.

(b) **The Sequence of Events**

9. The *Tomimaru* was licensed by the Respondent to fish in the Respondent's EEZ during the period between 1 October and 31 December 2006 (see Annex 2). Pursuant to that licence, the *Tomimaru* was fishing in the Respondent's EEZ in the western Bering Sea with the Respondent's permission. On 31 October 2006 the *Tomimaru* was en route from its licensed fishing area to the port of Kushiro in Japan, when it was boarded by officials from the Respondent's patrol boat No. 160. According to the Master of the *Tomimaru*, the boarding occurred at 18:20 (Japan Standard time) on 31 October 2006 and was carried out by three officials belonging to the Respondent. According to the Master of the *Tomimaru*, the place of boarding was at 52-16N, 160-52E, within the Respondent's EEZ.
10. No charge or allegation of any violation of the Respondent's law was made upon boarding, but the *Tomimaru* was ordered to sail to the port of Petropavlovsk-Kamchatskii, where the vessel and the crew were detained. During the

voyage to that port, an official of the Respondent on board the *Tomimaru* indicated that the actual amount of fish being carried by the *Tomimaru* appeared to differ from the amount recorded in its logbook and that the difference was about five tons.

11. According to the explanation of the Master, the vessel arrived and anchored at the port of Petropavlovsk-Kamchatskii on 4 November 2006. The inspection was initiated on 5 November by officials of Northeast Border Coast Guard Directorate of the Federal Security Service the Russian Federation.
12. On 9 November 2006 a Note Verbale No. 018-3 2006 was issued by the representative of the Ministry of Foreign Affairs of the Russian Federation in Petropavlovsk-Kamchatskii (see Annex 3). It stated that:
 - (1) a criminal case had been instituted against the Master of the *Tomimaru* on 8 November 2006;
 - (2) the *Tomimaru* had permission to engage in fishing in the Russian EEZ for up to 1,163t of pollack and 18t of herring during the period from 1 October to 31 December 2006;
 - (3) upon inspection on 8 November 2006, more than 20t of walleye pollack that was not listed on the logbook was found on board the *Tomimaru*;
 - (4) more than 19.5t of halibut, 3.2t of ray, 4.9t of cod, and more than 3t of other fish, with a total value in excess of 8,500,000 rubles (approximately US\$ 330,000) were found on board the *Tomimaru*.
13. The *Tomimaru* itself was registered as evidence in the proceedings and was detained in the port of Petropavlovsk-Kamchatskii. This fact was confirmed in two subsequent letters: (i) the letter No. 21/705/1/3/1/9400 from Mr. S. Yu. Surin, Acting Chief of Northeast Border Coast Guard Directorate, Federal Security Service of the Russian Federation, addressed to the Consul-General of Japan in Vladivostok dated 1 December 2006 and received by the Consul-General on 4 December 2006 (see Annex 4), and (ii) the letter No.1-640571-06 from Mr. A. N. Teplyakov, the Inter-district Prosecutor for

Nature Protection in Kamchatka, addressed to the Consul-General of Japan in Vladivostok dated 1 December 2006 and received by the Consul-General on 6 December 2006 (see Annex 5).

14. The allegedly illegal portion of the catch of the *Tomimaru* 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 was returned to the owner.
15. The Master, crew and owner of the *Tomimaru* faced two distinct sets of proceedings: (i) criminal proceedings against the Master, and (ii) administrative proceedings against the owner of the *Tomimaru*. The owner of the *Tomimaru* has at all times been ready and willing to post 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 bond or other security were fixed and that their amount and the conditions for their payment were reasonable. On 30 November 2006 and 8 December 2006, the owner of the *Tomimaru* petitioned the prosecutor for the release of the vessel and its crew upon the posting of bonds or other security for both criminal and administrative proceedings.

The Criminal Proceedings

16. According to the Master of the *Tomimaru*, a bond was set on 12 December 2006 with the amount of 8,800,000 rubles (approximately US\$ 343,000) by Inter-District Prosecutors 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. As is mentioned in para. 19 below, the bond for the criminal case would not secure the release of the vessel. No bond or other security was fixed for the release of the vessel stated as para.19 below.
17. All of the crew except for the Master were allowed to leave for Japan before the end of March 2007.

18. There was a hearing in the criminal case against the Master on 2 March 2007. The Petropavlovsk-Kamchatskii City Court decided on 15 May 2007 to impose a fine (500,000 rubles; approximately US\$ 19,367) and award damages (around 9,000,000 rubles; approximately US\$ 348,618) against the Master. The Master appealed to the Kamchatska District Court. He paid the fine, but not the damages, and was allowed on 30 May 2007 to leave Petropavlovsk-Kamchatskii for Japan. This judicial process has not yet been concluded.

The Administrative Proceedings

19. On 30 November 2006, the owner made a petition to the Northeast Border Coast Guard Directorate for bond to be fixed so as to enable the *Tomimaru* to leave for Japan. Following the setting of the bond mentioned in para.16 above, the owner made a similar petition anew to the Northeast Border Coast Guard Directorate. It was informed on 15 December, in response to the petition, that this case had been filed with the Petropavlovsk-Kamchatskii City Court and that the Directorate had no authority to deal with that petition. On 15 December 2006, the owner made a petition for bond to the Petropavlovsk-Kamchatskii City Court during the administrative proceedings. According to the letter dated 19 December 2006 addressed to Kanai Gyogyo Co., the owner of the *Tomimaru*, from Judge I.V. Bazdnikin of Petropavlovsk Kamchatskii City Court (see Annex 6), the petition to release the *Tomimaru* upon posting of bond or other security was denied by the Court.
20. On 28 December 2006, the hearing in the administrative case was held. The Petropavlovsk Kamchatskii City Court decided that the vessel of the *Tomimaru* was to be confiscated, and imposed a fine on the owner in the amount of 2,865,149.5 rubles (approximately US\$ 111,000).

21. The owner of the vessel then submitted an appeal to Kamchatka District Court on 6 January 2007. The Kamchatka District Court confirmed on 24 January 2007 the decision of the Petropavlovsk Kamchatskii City Court on the confiscation of the *Tomimaru*. The owner then lodged a written objection regarding the above decision to the Kamchatka District Court on 12 February 2007. After the objection was dismissed by the Kamchatka District Court, the owner appealed to the Federal Supreme Court in Moscow on 26 March 2007. No decision has yet been made in the appeal to the Federal Supreme Court.
22. More than eight months have elapsed since the detention of the *Tomimaru*. The owner of the *Tomimaru* has repeatedly made clear to the relevant authorities in the Russian Federation its willingness to post bond or other security, provided that the amounts and conditions of posting are reasonable and that the authorities permit the actual release of the vessel. However, as of the time of the filing of this Application, no bond or other security has been set and the vessel has not been released.

(d) Communications between the Government of Japan and the Government of the Russian Federation

23. The Applicant repeatedly asked for the prompt release of the vessel and its Master.
24. On 5 and 6 November 2006, the Consulate-General sought the meeting with the crew for humanitarian reason by a letter was sent from Mr. Masayoshi Kamohara, Consul-General of Japan in Vladivostok to Major-General A.A Lebedev, Chief of State Maritime Inspectorate of the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation (see Annex 7) and also requested orally the prompt release of the vessel.
25. On 7 November 2006, Mr. Toshio Yamamoto, Counsellor, Embassy of Japan in

Moscow, made a similar request to Mr. A.B. Khokhoviev, Head of Division, First Asian Department, Ministry of Foreign Affairs of the Russian Federation.

26. Further requests were made by the following *démarches* :
- a. by an oral *démarche* from Mr. Yamamoto to Mr. A.B. Khokhoviev on 20 November 2006;
 - b. by an oral *démarche* from Mr. Kuninori Matsuda, Director, Russian Division, Ministry of Foreign Affairs of Japan to Mr. A.V. Kostin, Counsellor, Embassy of Russian Federation in Japan on 22 November 2006;
 - c. by a Note Verbale from the Consul-General of Japan in Vladivostok to the Representative Office of the Ministry of Foreign Affairs of the Russian Federation in Petropavlovsk-Kamchatskii on 21 November 2006 (see Annex 8);
 - d. by a Note Verbale to the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation on 21 November 2006 (see Annex 9); and
 - e. by a Note Verbale to the Inter-district Prosecutor's office for Nature Protection in Kamchatka on 21 November 2006 (see Annex 10).
27. The Respondent failed to fulfill its obligation of prompt release under the Convention. The Applicant explicitly referred to the Convention in its *démarches*. On 28 November 2006, Mr. Takashi Kurai, Minister, Embassy of Japan in Moscow, addressed Mr. O.V. Ivanov, Deputy Director, First Asian Department, Ministry of Foreign Affairs of the Russian Federation with clear references to Russia's obligation to release the vessel and the crew promptly upon the posting of reasonable bond or other security under Article 73 (2) of the Convention. The Applicant also referred to Article 292(1) of the Convention and reminded the Respondent that, failing an agreement within 10 days from the time of detention by the parties on the court or tribunal to which the question of release from detention may be submitted, the question could be submitted to the Tribunal.
28. Similar requests were made by the following Notes Verbales sent from the

Consulate-General of Japan in Vladivostok ;

- a. M-134-2006 dated 27 November 2006 to the Representative Office of the Ministry of Foreign Affairs of the Russian Federation in Petropavlovsk-Kamchatskii (see Annex 11);
 - b. A-75-2006 (see Annex 12) dated 28 November 2006 to the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation; and
 - c. A-76-2006 (see Annex 13) dated 28 November 2006 to the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation and the Inter-district Prosecutor's Office for Nature Protection in Kamchatka.
29. Similar requests were repeated orally in official communications made by the Applicant on 7 December 2006 in Moscow, on 12 December 2006 in Moscow, on 13 December 2006 in Tokyo, on 20 December 2006 in Moscow, on 22 December 2006 in Moscow, on 28 December 2006 in Tokyo and on 28 December 2006 in Moscow.
30. The Applicant reiterated these requests, seizing every possible opportunity. The communications included the following:
- a. Démarche by Mr. Yasuo Saito, Ambassador Extraordinary and Plenipotentiary of Japan to the Russian Federation to Mr. A.P. Losyukov, Deputy Foreign Minister on 18 January 2007;
 - b. Démarche by Mr. Shotaro Yachi, Vice-Minister for Foreign Affairs and Mr. Chikahito Harada, Director-General, European Affairs Bureau, Ministry of Foreign Affairs of Japan respectively to Mr. A.P. Losyukov, Deputy Foreign Minister on 23 January 2007, delivering a Note Verbale dated the same day (see Annex 14) ;
 - c. Démarche by Mr. Taro Aso, Minister for Foreign Affairs of Japan to Mr. Viktor Khirstenko, Minister of Industry and Energy of the Russian Federation on 26 February 2007;
 - d. Démarche by Mr. Shinzo Abe, Prime Minister of Japan, to Mr. Mikhail Fradkov, Chairman of the Government on 28 February 2007;
 - e. Démarche by Mr. Toshio Yamamoto, Counsellor, Embassy of Japan in Moscow to

- Mr. Andrei Fabrichnikov, Senior Counsellor, First Asian Department, Ministry of Foreign Affairs of the Russian Federation on 7 March 2007, delivering a Note Verbale dated the same day (see Annex 15);
- f. Démarche by Mr. Toshikatsu Matsuoka, Minister for Agriculture, Forestry and Fisheries to Mr. Mikhail Bely, Ambassador Extraordinary and Plenipotentiary of the Russian Federation to Japan on 23 March 2007;
- g. Démarche by Mr. Jun Yamashita, Director General, Resource Management Department, Fishery Agency to Mr. Valerii Toloknev, Counsellor, Embassy of the Russian Federation in Japan on 15 May 2007;
31. Nevertheless, up to the date of the submission of this Application to the Tribunal, no bond or other security that would allow the release of the *Tomimaru* has been set by the Respondent.

C. The Tribunal's Jurisdiction and the Admissibility of the Application

(a) Jurisdiction

32. Both the Applicant and the Respondent are 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. The arrest of the *Tomimaru* occurred on 31 October 2006.
33. Article 292 of the Convention 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.”

34. The Applicant applied to the Respondent for the prompt release of the vessel of the *Tomimaru*. The Applicant and the Respondent did not agree to submit the question of the release to any other court or tribunal within 10 days from the time of detention. Article 292 of the Convention specifies this Tribunal as the court or tribunal to which the question of prompt release can be submitted failing an agreement upon submission to some other court or tribunal. The Union of Soviet Socialist Republics, the predecessor of the Respondent, recognized “the competence of the International Tribunal for the Law of the Sea, as provided for in article 292, in matters relating to the prompt release of detained vessels and crews” in its declaration on the occasion of the signature of the Convention on 10 December 1982 (see Annex 16). The Applicant did not make any declaration or statement as such upon the signature or the ratification of

the Convention.

35. The *Tomimaru* is a fishing vessel which was flying the Japanese flag at the time of detention and retains Japanese nationality at the time of filing of this Application. In the administrative case against the owner of the *Tomimaru*, the Petropavlovsk-Kamchatskii City Court decided to confiscate the vessel, but the owner filed an appeal to the Federal Supreme Court.
36. The Applicant does not find any evidence at the time of this Application that the process of the confiscation has actually been completed. The decision is still at the stage of the appeal lodged by the owner of the *Tomimaru* and the owner has never been asked to follow procedures necessary for the change of either the ownership or the nationality of the vessel. The vessel is physically controlled by a private company appointed by the authorities of the Respondent; but this is merely for the purpose of secure preservation and security of the vessel. Therefore the ownership of the vessel remains unchanged and the nationality of the vessel continues to be that of the Applicant (see para. 6 above).
37. In any event, the position concerning the nationality of the *Tomimaru* would be the same even if it had been confiscated by the Russian Federation. In the *Juno Trader* case, this Tribunal distinguished between “a definitive change in the ownership of a vessel” and the question of the nationality of the vessel (The *Juno Trader* case, Judgment, 18 December 2004, para.63). In their Joint Separate Opinion Judges Mensah and Wolfrum specifically addressed the distinction. They said that “there is no legal basis for asserting that there is an automatic change of the flag of a ship as a consequence solely of a change in its ownership” (The *Juno Trader* case, Joint Separate Opinion of Judge Mensah and Judge Wolfrum, para.9).
38. Accordingly, the Applicant has at all material times been, and still is, the flag state of the *Tomimaru*, and the Tribunal has jurisdiction over this Application for the prompt

release of the vessel of the *Tomimaru* under Article 292 and Annex VI of the Convention.

(b) **Time elapsed since the initial boarding of the vessel enables the Tribunal to render judgment**

39. There is a question whether sufficient time has elapsed since the arrest and detention of the *Tomimaru*, and whether too much time has elapsed since that detention.
40. The Tribunal has rendered several judgments based on Articles 73(2) and 292 of the Convention. The time that elapsed between the date of arrest and the submission of the application to the Tribunal varied in these cases. Nevertheless, judging by preceding cases and by the reference in Article 292(1) to a 10-day period for agreement upon a court or tribunal to which to submit a question of prompt release, it could be considered that it is necessary for some time to have passed after the detention before an prompt release application is made.
41. In the present case, almost nine months have elapsed since the arrest of the *Tomimaru*. That period is comfortably within the range of times that the Tribunal has accepted in previous cases. It is, moreover, a period that the Russian Federation plainly considered reasonable when it filed its own application in the *Volga* case, ten months after the initial arrest.
42. In the *M/V Saiga* case, the vessel was arrested by Guinea on 28 October 1997. Saint Vincent and Grenadines filed the application of the case to the Tribunal half a month after the arrest, on 13 November 1997. In the *Monte Confurco* case, the vessel was boarded by French officials on 8 November 2000. Seychelles filed its application to the Tribunal about 20 days after the arrest, on 27 November 2000. In the *Juno Trader*, the vessel was boarded by the officials of Guinea-Bissau on 26 September 2004. Saint Vincent and the Grenadines filed its application with the Tribunal on 18 November

2004, less than two months after the boarding. In the present case, more than eight months have passed since the arrest of the *Tomimaru*. It is clear that a sufficient period of time has elapsed between the arrest of the vessel and the filing of the case.

43. The contrasting argument, that an application is inadmissible if too much time has elapsed since the initial arrest, was raised by France as the Respondent in the *Camouco* case. There the vessel was arrested on 28 September 1999, and Panama filed the case with the Tribunal on 17 January 2000. France challenged the admissibility of the application, *inter alia* on the ground that more than three months had passed since the detention of the *Camouco*. The Tribunal, however, took a different view. It stated:

“54. The Tribunal finds that there is no merit in the arguments of the Respondent regarding delay in the presentation of the Application. In any event, article 292 of the Convention requires prompt release of the vessel or its crew once the Tribunal finds that an allegation made in the Application is well-founded. It does not require the flag State to file an application at any particular time after the detention of a vessel or its crew. The 10-day period referred to in article 292, paragraph 1, of the Convention is to enable the parties to submit the question of release from detention to an agreed court or tribunal. It does not suggest that an application not made to a court or tribunal within the 10-day period or to the Tribunal immediately after the 10-day period will not be treated as an application for “prompt release” within the meaning of article 292.”

(The Camouco case, Judgment, 7 February 2000)

44. In the *Volga* case, ten months elapsed between the arrest of the vessel on 7 February 2002 and the filing of the application by the Russian Federation on 2 December 2002. Australia, the Respondent, did not raise any objection; and the Tribunal said nothing to indicate any change in the position that it had taken on this point in the *Camouco* case.

45. Furthermore, the setting of time limits within which prompt release claims must be brought could discourage the pursuit of amicable settlements of disputes between States Parties through bilateral negotiations.
46. The Applicant has made this Application reluctantly and after sustained and serious attempts to find an agreed solution to what has become an increasingly urgent problem. The arrest and detention of the *Tomimaru* by the Respondent is not an isolated incident: it is part of a pattern of illegal measures taken by the Respondent against fishing vessels flying the Japanese flag in the Northwest Pacific Ocean. For example, the 3rd *Kaiyomaru* was arrested on 14 March 2003 and its crew was released on 25 January 2004 after detention of more than 10 months. The 63rd *Yoshieimaru* was arrested on 28 July 2004, and its Master was released on 20 November 2004 after detention for nearly four months. The 28th *Marunakamaru* was arrested by the Respondent on 9 February 2005; its Master was released on 8 May 2005 after detention for three months. The 35th *Jinpomaru* was arrested on 18 March 2005 and its Master was released 5 June after two and a half months.
47. On 31 October 2006 when the *Tomimaru* was arrested by the Respondent, the 5th *Youkeimaru* and *Gyokuryumaru* were also detained by the Respondent. The *Gyokuryumaru* and its crew were released on 29th December 2006. The 5th *Youkeimaru* and its crew (except for the Master) were released on 12th January 2007, and the Master was allowed to leave for Japan on 28th February 2007. Even more recently, the 88th *Hoshinmaru* was arrested on 3 June 2007 and has been detained for more than 30 days with no bond or other security set for its prompt release. This is not an exhaustive list. In many other cases, vessels and members of crew had been detained for several months or more by the Respondent.
48. It is not the intention of the Applicant to request the Tribunal to render judgment on the illegality of detentions of vessels other than the *Tomimaru*, and their Masters, in the present proceeding. (The Applicant is requesting the Tribunal in a separate application

to render judgment on the illegality of the detention of the vessel and the crew of the 88th *Hoshinmaru*.) The Applicant puts these facts before the Tribunal to explain why its patience has been exhausted and it now considers that no reasonable alternative is available except to seek the enforcement of its rights under the Convention. The Applicant does, however, reserve all of its rights under international law to pursue the State responsibility of the Respondent in respect of violations of its duties under the Convention concerning the prompt release of those other vessels and their crews.

(c) The Tribunal can render judgment although domestic proceedings are continuing and even if the vessel is confiscated

49. A criminal case and an administrative case against the owner of the vessel have been instituted before the domestic courts of the Respondent, and these proceedings are continuing. However, it is the very purpose of the prompt release provisions in the Convention to secure the release of vessels and crews before proceedings in the arresting State's courts are concluded, and to prevent the confiscation of vessels and detention of crews without the fixing of bond permitting the prompt release of vessels and crews.

50. The effect of continuing domestic procedures was considered in the *Camouco* case. There the Tribunal stated:

“55. The other objection to admissibility pleaded by the Respondent is that domestic legal proceedings are currently pending before the court of appeal of Saint-Denis involving an appeal against an order of the court of first instance at Saint Paul, whose purpose is to achieve precisely the same result as that sought by the present proceedings under article 292 of the Convention. The Respondent, therefore, argues that the Applicant is incompetent to invoke the procedure laid down in article 292 as ‘a second remedy’ against a decision of a national court and that the Application

clearly points to a ‘situation of *lis pendens* which casts doubt on its admissibility’. The Respondent draws attention in this regard to article 295 of the Convention on exhaustion of local remedies, while observing at the same time that “strict compliance with the rule of the exhaustion of local remedies, set out in article 295 of the Convention, is not considered a necessary prerequisite of the institution of proceedings under article 292’.

56. The Applicant rejects the argument of the Respondent and maintains that its taking recourse to local courts in no way prejudices its right to invoke the jurisdiction of the Tribunal under article 292 of the Convention.

57. In the view of the Tribunal, it is not logical to read the requirement of exhaustion of local remedies or any other analogous rule into article 292. Article 292 of the Convention is designed to free a ship and its crew from prolonged detention on account of the imposition of unreasonable bonds in municipal jurisdictions, or the failure of local law to provide for release on posting of a reasonable bond, inflicting thereby avoidable loss on a ship owner or other persons affected by such detention. Equally, it safeguards the interests of the coastal State by providing for release only upon the posting of a reasonable bond or other financial security determined by a court or tribunal referred to in article 292, without prejudice to the merits of the case in the domestic forum against the vessel, its owner or its crew.

58. Article 292 provides for an independent remedy and not an appeal against a decision of a national court. No limitation should be read into article 292 that would have the effect of defeating its very object and purpose. Indeed, article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period.”

(The Camouco case, Judgment, 7 February 2000)

51. In the Applicant’s view, it is clear that the process of the confiscation of the *Tomimaru*

has not yet been definitively completed. But even if it had, that would present no obstacle to exercise by this Tribunal of its prompt release jurisdiction.

52. The effect of a confiscation was considered in the *Juno Trader* case. There the Tribunal referred to the Respondent's argument that the vessel had been confiscated and was consequently not detained but rather in the possession of the Respondent as lawful owner. The Tribunal, noting that this argument was similar to the argument that the Tribunal lacked jurisdiction because the *Juno Trader* had lost the nationality of the Applicant State upon its confiscation, rejected this argument.

53. It is respectfully submitted that the Tribunal's reasoning is not only patently correct but also inevitable. If confiscation of arrested vessels were permitted, or were allowed to prevent the Tribunal exercising its prompt release jurisdiction, the prompt release obligations and procedures under the Convention would be evacuated of all practical meaning. They would become useless. Their very purpose is to ensure that when a vessel is arrested it is *not* confiscated but is promptly released upon payment of a reasonable bond or other security.

54. For these reasons, the present Application falls within the Tribunal's jurisdiction and is admissible.

D. The Respondent is in Breach of its Obligations of Prompt Release

(a) General considerations

55. There is no doubt from the facts set out in Section B above that the *Tomimaru* was arrested and detained by the authority of the Respondent. The owner of the vessel has been ready and willing to post bond or other security necessary for the release of the vessel, provided that it is reasonable; and the owner remains ready and willing to do so.

However, no bond or other security that covers all the domestic proceedings has yet been set by the Respondent and the *Tomimaru* has not been released.

56. It is clear from the provisions of Article 73(2), interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Article, that the Respondent is under an obligation to fix a reasonable bond or other security in respect of arrested vessels and their crews and to release the arrested vessels and their crew promptly upon the posting of that bond or security. Article 73 of the Convention reads as follows:

Article 73

Enforcement of laws and regulations of the coastal State

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.
 3. 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.
 4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.
57. Article 73 strikes a fair balance between the interests of the flag State and that of the coastal State. The Tribunal, in the *Monte Confurco* case, explained the nature of Article 73 as follows:

“70. Article 73 identifies two interests, the interest of the coastal State to take 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 crews from detention on the other. It strikes a fair balance between the two interests. It provides for release of the vessel and its crew upon the posting of a bond or other security, thus protecting the interests of the flag State and of other persons affected by the detention of the vessel and its crew. The release from detention can be subject only to a “reasonable” bond.

71. Similarly, the object of article 292 of the Convention is to reconcile the interest of the flag State to have its vessel and its crew released promptly with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties.”

(The Monte Confurco case, Judgment, 18 December 2000)

58. The Applicant fully accepts that the Respondent has an interest in taking effective measures to ensure compliance with its domestic laws and regulations concerning its sovereign rights in its EEZ. The rights and interests of the coastal State, however, are not absolute and they do not exist in isolation. The flag State also has rights and interests. A fair balance must be struck between these rights and interests; and this is precisely what Article 73 aims at by creating a right to demand prompt release upon the posting of a reasonable bond or other security. In the present case, the rights of the Applicant, as the flag State of the *Tomimaru*, to secure prompt release of the vessel in question have clearly been infringed by the Respondent.

(b) The *Tomimaru* is “detained”

59. As has been observed in Section B above, the vessel was arrested and detained by the Respondent. There can be no doubt that the *Tomimaru* has been under the control of the

authority of the Respondent since 31 October 2006, and remains under its control at the present time.

(c) **The *Tomimaru* has not been “promptly” released**

60. As is clear from the facts described in Section B above, more than eight months have passed since the initial boarding by the Respondent’s officials on the *Tomimaru*. The Respondent has not released the *Tomimaru* “promptly” as required by Article 73(2) of the Convention.

(d) **State responsibility: reservation of rights**

61. Under international law, a State responsible for an internationally wrongful act is under an obligation to cease that act and to ensure that it is not repeated. Also, the responsible State is under an obligation to make full reparation for the injury caused by the international wrongful act. (See the ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA resolution 56.83, 12 December 2001, Articles 30 and 31.)

62. This Application is concerned only with the prompt release of the *Tomimaru*. The Applicant reserves all rights to pursue the responsibility of the Respondent under international law arising from detention of the vessel and the crew, including the question of reparation.

E. Bonds in the Present Case

63. The Respondent has failed to fulfil its obligation to set a reasonable bond or other security and to permit the prompt release of the *Tomimaru* upon its posting. The approach of the Tribunal to the determination of reasonableness of bond or other

security is now well established. In the *Volga* case the Tribunal said:

“63. In its previous judgments, the Tribunal indicated some of the factors that should be taken into account in assessing a reasonable bond for the release of a vessel or its crew under article 292 of the Convention. In the “*Camouco*” Case, the Tribunal indicated factors relevant in an assessment of the reasonableness of bonds or other financial security, as follows:

The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form.

(Judgment of 7 February 2000, paragraph 67).

64. In the “*Monte Confurco*” Case, the Tribunal confirmed this statement and added that “[t]his is by no means a complete list of factors. Nor does the Tribunal intend to lay down rigid rules as to the exact weight to be attached to each of them” (Judgment of 18 December 2000, paragraph 76).”

(*The Volga case, Judgment, 23 December 2002*)

64. It appears that the Applicant and the Respondent are in agreement concerning the approach to the determination of what is a ‘reasonable’ bond or other security.
65. The approach to the determination of a ‘reasonable’ bond or other security was addressed by the Respondent in the *Volga* case. It said that:

“The Russian Federation says that in the previous cases of the Tribunal the reasoning and outcomes show a consistent approach to the question of bonding and prompt release, which should be followed in this case. The cases show the Tribunal setting bonds at a percentage – and we are not saying this is some kind of mathematical formula – of the total potential exposure to fines and confiscation varying in amounts between 9 per cent and 25 per cent.

.....

... those cases are examples of the principles in action which the Russian Federation says should be applied to this case when you look at the proposal of the bonding arrangements and the dollar values of the bonding arrangements in this case”

[*The Volga case*, Hearing, 12 December 2002, a.m., pp.12, 13]

66. The Applicant concurs with the above opinion of the Respondent.

67. The Applicant also considers that the bond or other security must be reasonable not only as regards its amount but as regards the other conditions attached to it. Thus, in order to be reasonable a bond or other security must be set promptly and subject to reasonable conditions regarding the form and manner of posting, so that it is possible for the owner to post the bond or other security promptly and secure the release of the vessel.

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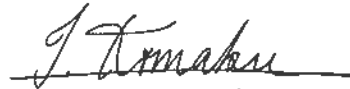
For the reasons set above, the Applicant requests the International Tribunal for the Law of the Sea by means of a judgment:

- (a) to declare that the Tribunal has jurisdiction under Article 292 of the Convention to hear the application concerning the detention of the vessel of 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.

[signature]



Agent of Japan

6 July 2007

List of Annexed Documents

1. Informations for the “53rd Tomimaru” (Fishing Vessel Original Register, License for fishing issued by the Government of Japan, Table of total depreciated asset value, Certificate of Vessel’s Nationality, Fishing Boat Registration Card)
2. 2006 License for fishing living aquatic resources issued by the Russian Federation
3. Note Verbale dated 9 November 2006 from the Representative Office of the Ministry of Foreign Affairs of the Russian Federation in Petropavlovsk-Kamchatskii city to the Consulate-General of Japan in Vladivostok (No.018-3 2006)
4. Note Verbale dated 1 December 2006 from Mr. Surin S. Yu., Acting Chief of Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation to the Consulate-General of Japan in Vladivostok (No.21/705/1/3/1/9400)
5. Note Verbale dated 1 December 2006 from the Inter-district Prosecutor’s Office for Nature Protection in Kamchatka to the Consulate-General of Japan in Vladivostok (No.1-640571-06)
6. Notice of decision dated 19 December 2006 from Judge Bazdnikin I.V. of Petropavlovsk-Kamchatskii City Court
7. Letter dated 5 November 2006 from Mr.Masayoshi Kamohara, Consul-General of Japan in Vladivostok to Major-General Lebedev A.A., Chief of the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation
8. Letter dated 21 December 2006 from Mr. Masayoshi Kamohara, Consul-General of Japan in Vladivostok to Mr. Polovnikov A.I., Representative of the Representative Office of the Ministry of Foreign Affairs of the Russian Federation in Petropavlovsk-Kamchatskii City
9. Letter dated 21 December 2006 from Mr. Masayoshi Kamohara, Consul-General of Japan in Vladivostok to Mr. Surin S.Yu., Acting chief of the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation
10. Letter dated 21 December 2006 from Mr. Masayoshi Kamohara, Consul-General of Japan in Vladivostok to Mr. Teplyakov A.N., Prosecutor of the Inter-district Prosecutor's Office for Nature Protection in Kamcharka
11. Note Verbale dated 27 November 2006 from the Consulate-General of Japan in

- Vladivostok to the Representative Office of the Ministry of Foreign Affairs of the Russian Federation in Petropavlovsk-Kamchatskii City (No.M-134-2006)
12. Note Verbale dated 28 November 2006 from the Consulate-General of Japan in Vladivostok to the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation (No.A-75-2006)
 13. Note Verbale dated 28 November 2006 from the Consulate-General of Japan in Vladivostok to the Inter-district Prosecutor's Office for Nature Protection in Kamchatka (No.A-76-2006)
 14. Note Verbale dated 23 January 2007 from the Embassy of Japan in the Russian Federation to the Ministry of Foreign Affairs in the Russian Federation (No.A-10-06)
 15. Note Verbale dated 7 March 2007 from the Embassy of Japan in the Russian Federation to the Ministry of Foreign Affairs in the Russian Federation (No.A-28-07)
 16. Declaration by the Russian Federation upon signature on the United Nations Convention on the Law of the Sea
 17. Map of the point of detention