INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

2007

Public sitting

held on Thursday, 19 July 2007, at 3.00 p.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President Rüdiger Wolfrum presiding

THE "HOSHINMARU" CASE

(Application for prompt release)

(Japan v. *Russian Federation)*

Verbatim Record

Uncorrected
Non-corrigé

Present:	President	Rüdiger Wolfrum
	Vice-President	Joseph Akl
	Judges	Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Anatoli Lazarevich Kolodkin
		Choon-Ho Park
		L. Dolliver M. Nelson
		P. Chandrasekhara Rao
		Tullio Treves
		Tafsir Malick Ndiaye
		José Luis Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Shunji Yanai
		Helmut Türk
		James L. Kateka
		Albert J. Hoffmann
	Registrar	Philippe Gautier

Japan is 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, Professor of International Law, Oxford University, United Kingdom, and Mr Shotaro Hamamoto, Professor of International Law, Kobe University, Kobe, Japan,

as Advocates.

The Russian Federation is 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 of Inspection, State Sea Inspection, Northeast Coast Guard Directorate, Federal Security Service, and 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 Foreign Relations, Moscow,

Mr Alexey Dronov, Head of Division, Legal Department, Ministry of Foreign Affairs,

Mr Vasiliy Titushkin, Senior Counselor, Embassy of the Russian Federation in the Netherlands,

Mr Andrey Fabrichnikov, Senior Counselor, First Asian Department, Ministry of Foreign Affairs,

Mr Oleg Khomich, Senior Military Prosecutor, Office of the Prosecutor General;

as Counsel;

Mrs. Svetlana Shatalova, Attache, Legal Department, Ministry of Foreign Affairs, and Ms. Diana Taratukhina, Desk Officer, Legal Department, Ministry of Foreign Affairs;

as Advisers.

THE CLERK OF THE TRIBUNAL: The International Tribunal for the Law of the Sea in now in session.

THE REGISTRAR: On 6 July 2007, an Application was filed by Japan against the Russian Federation for the prompt release of the fishing vessel the *88th Hoshinmaru* and its crew.

The Application was made under article 292 of the United Nations Convention on the Law of the Sea.

The case has been named the "Hoshinmaru" Case (Japan *versus* Russian Federation) and entered in the List of cases as Case No.14. Today, the Tribunal will take up the hearing in this case.

Agents and Counsel for both Japan and the Russian Federation are present.

THE PRESIDENT: This public sitting is held pursuant to Article 26 of the Statute of the Tribunal to hear the parties present their evidence and arguments in the "Hoshinmaru" Case.

I call on the Registrar to read out the submissions of Japan as contained in its Application.

THE REGISTRAR: The Applicant requests the Tribunal:

"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 and the crew of the *88th Hoshinmaru* (hereinafter the "*Hoshinmaru*") 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 obligations under Article 73(2) of the Convention; and

(c) To order the Respondent to release the vessel and the crew of the *Hoshinmaru,* upon such terms and conditions as the Tribunal shall consider reasonable."

THE PRESIDENT: By letter dated 6 July 2007, a copy of the Application was transmitted to the Russian Federation. By the Order dated 9 July 2007, the President of the Tribunal fixed 19 July 2007 as the date for the opening of the hearing of the case.

On 15 July 2007, the Russian Federation filed its Statement in Response.

I now call on the Registrar to read the submission of the Russian Federation in its Statement in Response.

THE REGISTRAR: The Respondent 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.

Mr President, on 18 July, the Applicant filed an additional statement, which reads as follows:

"For the sake of clarity, the Government of Japan wishes to make plain that its Application in the 88th *Hoshinmaru* case, made under Articles 73 and 292 of the Convention, relates to the failure of the Russian Federation to comply with the provisions of the Convention for the prompt release of a vessel or its crew upon the posting of a reasonable bond or other financial security. A bond has been belatedly set for the release of the 88th *Hoshinmaru*; but Japan does not consider the amount set to be reasonable,

Accordingly, the setting of that bond does not resolve the dispute over the failure of the Russian Federation to comply with the provisions of the Convention for the prompt release of a vessel or its crew upon the posting of a reasonable bond or other financial security. While it is now unnecessary for Japan to include in its oral pleadings any submissions relating specifically to circumstances in which there is a complete failure to set any bond, Japan will address all other aspects of its Application."

Mr President, on the morning of 19 July the Respondent filed an additional statement, which reads as follows:

"With respect to the clarification provided by the Agent for Japan on the *Hoshinmaru* case, we would like to state that Russia does not accept the allegations contained therein. Contrary to the statement of the Applicant, the bond was set not belatedly but within a reasonable period of time. We take note of the statement of the Applicant that it is now unnecessary to include in its oral pleadings any submissions relating specifically to circumstances in which there is a complete failure to set any bond, but this statement implies that there is at least partial failure of the Respondent to comply with its obligations under the relevant provision of the Convention. We cannot agree with it."

THE PRESIDENT: Copies of the Application and the Statement in Response have been made available to the public.

The Tribunal notes the presence in court of Mr Ichiro Komatsu, Agent of Japan and Mr Evgeny Zagaynov, Agent of the Russian Federation.

I now call on the Agent of the Applicant to note the representation of Japan.

MR ICHIRO KOMATSU: Mr President, I am extremely honoured to appear before this auspicious tribunal representing my country as an Agent on behalf of the Government of Japan. I would like to introduce the members of my delegation.

As Advocates: Mr Vaughan Lowe, Professor of International Law, Oxford University, United Kingdom; Mr Shotaro Hamomoto, Professor of International Law, Kobe University, Kobe, Japan.

As Counsel: Mr Yasushi Masaki, International Legal Affairs Division, Ministry of Foreign Affairs; Mr Hiroaki Hasegawa, Director, International Affairs Division, Resources Management Department, Fisheries Agency of Japan; 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, Russian, International Legal Affairs Division, Ministry of Foreign Affairs; Mr Toshihisa Kato, Official, Russian Division, Ministry of Foreign Affairs; Ms Junko Iwaishi, Offiical, International Legal Affairs Division, Ministry of Foreign Affairs; Mr Hiromi Isa, Deputy Director, Far Seas Fisheries Division, Resources Management Department, Fisheries Agency of Japan; and Mr Tomoaki Kammuri, Fisheries Inspector, International Affairs Division, Resources Management Department, Fisheries Agency of Japan.

Thank you, Mr President.

THE PRESIDENT: Thank you, Mr Komatsu. Mr Zagaynov, please.

MR ZAGAYNOV: Mr President, distinguished members of the Tribunal, it is a great honour for me to appear before you as Agent for the Government of the Russian Federation in the present case.

The Russian Federation has appointed Mr Sergey Ganzha, Consul-General of the Russian Federation in Hamburg, to act as our Co-Agent.

With your indulgence, Mr President, I will now introduce the other members of our team. First of all, I would like to introduce our Deputy Agents: Mr Alexey Monakhov, Head of Inspection of the State Sea Inspection, Northeast Coast Directorate, Federal Security Service of the Russian Federation; and Mr Vadim Yalovitskiy, Head of Division, International Department of the Office of the Prosecutor General of the Russian Federation.

It is a great pleasure for me now to introduce Dr Vladimir Golitsyn, Professor of International Law of the State University of International Relations in Moscow, who will perform the functions of our Chief Legal Counsel.

Appearing as other counsel are: Mr Alexey Dronov, Head of Division of the Legal Department of the Ministry of Foreign Affairs of the Russian Federation; Mr Andrey Fabrichnikov, Senior Counselor of the First Asian Department of the Ministry of Foreign Affairs; Mr Vasiliy Titushkin, Senior Counselor of the Embassy of

the Russian Federation in the Netherlands; and Mr Oleg Khomich, Senior Military Prosecutor from the Office of the Prosecutor General of the Russian Federation.

Finally, our delegation is assisted by two Advisers: Ms Diana Taratukhina and Ms Svetlana Shatalova from the Legal Department of the Foreign Ministry of the Russian Federation.

I thank you very much, Mr President.

THE PRESIDENT: Thank you very much, Mr Zagaynov. Following consultations with the Agents of the parties, it has been decided that the Applicant, namely Japan, will be the first to present its arguments and evidence. Accordingly, the Tribunal will hear Japan first. Tomorrow morning, the Tribunal will hear the Russian Federation.

I now give the floor to the Agent of Japan.

MR ICHIRO KOMATSU: Mr President, distinguished Members of the International Tribunal for the Law of the Sea and distinguished representatives of the Russian Federation, it is a great honour for me to be given this opportunity to make a statement at this public sitting of the Tribunal as Agent on behalf of the Government of Japan. At this session, I will preset the factual background on this case and also the reasons why Japan came to a decision to institute the case before the ITLOS for the first time in our history. After my statement, our Advocate, Professor Vaughan Lowe of the University of Oxford will subsequently elaborate in detail on our legal position.

This is a prompt release application under Article 292 of the United Nations Convention on the Law of the Sea, in which Japan claims that the Russian Federation is in breach of Article 73(2) of the UNCLOS. Firstly, I would like to briefly recapitulate the facts and our gravamen.

The 88th *Hoshinmaru* is a fishing vessel owned and operated by a Japanese company, Ideka Suisan Company Limited. It has had Japanese nationality throughout the whole of the relevant period and retains it now. The *Hoshimaru* was fishing salmon and trout off the coast of Kamchatka Peninsula in the Exclusive Economic Zone of the Russian Federation pursuant to a licence issued by the Government of the Russian Federation. It was ordered to stop for inspection by the Russian authorities on 1 June 2007 and was seized and re-routed on an allegation of illegal fishing on the morning of 3 June. It arrived at the port of Petropavlovsk-Kamchatskii on the night of 5 June.

The Russian authorities alleged, as shown in Annex 4, that the amount and the kind of fish actually carried by the *Hoshinmaru* appeared to differ from those which had been recorded in its logbook, that is, around 20 tons of sockeye salmon, which is worth approximately 17 million yen, was registered as chum salmon, which is cheaper than sockeye salmon, and that this discrepancy constituted a violation of domestic law of the Russian Federation. The sockeye salmon allegedly illegally caught by the *Hoshinmaru* was seized and is held in custody by the Russian authorities.

The purpose of the application is not to shed light on the cogency of the allegation of violation made against the *Hoshinmaru*. This is a question firstly to be handled in the Russian domestic proceedings. I would like to point out, upon this basic premise, that the alleged violation by the *Hoshinmaru,* even if it is well founded, is not a grave breach, for instance, unlike fishing for unauthorized species or taking fish in excess of the allowance.

It was not more than inaccurately recording the vessel's catch by logging one species in place of another one, both species being authorized to fish. The seriousness of the alleged violation is relatively limited. For your reference, I would like to point out that the Japanese authorities treat this kind of violation in a less grave manner and I suppose that most other countries adopt the same kind of treatment.

Japan has been demanding from the Russian Federation the prompt release of the *Hoshinmaru* and its crew in accordance with the relevant provisions of the UNCLOS since immediately after the detention as the documents attached in the Annex of the Application show, but to no avail. Apparently in a flurry, after the submission of this Application by Japan, the Inter-district Prosecutor's Office notified, on 11 July 2007, the Consulate-General of Japan in Vladivostok of the amount of damages at 7,927,500 roubles, that is, approximately US$ 310,000, allegedly instituted against the catch of the living aquatic resources by the *Hoshinmaru* as shown in Annex13.

To make the matters more complex, in responding to the inquiry by the Embassy of Japan in the Russian Federation on the above notification, as shown in Annex 14, the Inter-district Prosecutor's Office replied orally on 12 July that this amount of damage is not the 'bond' as provided for in Article 73(2) of the UNCLOS and that the payment for the damage only ensures the release of the crew but not that of the vessel and the Master. It was, however, only on 13 July 2007, one week after the submission of this Application by Japan that the Ministry of Foreign Affairs of the Russian Federation belatedly notified the Embassy of Japan in the Russian Federation of the setting of the bond at 25,000,000 roubles, that is, approximately US$ 980,000. The Ministry of Foreign Affairs of the Russian Federation confirmed that payment of this amount would guarantee the release of the vessel and its crew including the Master in a *note verbale* as shown in Annex 15. Let me underline again that all these notifications were made by the Russian Federation very hastily only after our submission of this Application.

It is interesting to note that this kind of speedy action is in stark contrast with the ordinary response by the Russian Federation in past cases where Japanese vessels were detained and Japan requested expeditious setting of a bond. The Respondent argues in its Statement of Response that their setting of the bond on 13 July was reasonable in terms of timing. I humbly submit that the bond was set belatedly, and only under the pressure of international adjudication. As to the amount of the bond, I can simply say that it is exorbitant in the light, for example, of the value of the vessel, which is approximately between US$ 220,000 and US$ 320,000. This belated setting of the bond is, therefore, clearly inconsistent with the obligation incumbent upon the Russian Federation under Article 73(2) of the UNCLOS.

As is clear in Japan's Application, Japan is requesting the Tribunal to order the Respondent to release the vessel and the crew of the *Hoshinmaru* "upon such terms and conditions as the Tribunal shall consider reasonable". This request was a necessity in the situation where no bond had been set by the Russian Federation at the time of the filing of the Application. The Respondent argues in its Statement of Response that this request of Japan is formulated in "general and vague terms", and that "the Tribunal, acting under Article 292 of the UNCLOS, does not have competence to determine such general terms and conditions." This argument is out of place. Now that the Respondent has set a bond, albeit belatedly and excessive in amount, the Applicant hereby requests the Tribunal to determine a reasonable amount for the bond.

Let me now draw your attention to the fact that the vessel and the crew of the *Hoshinmaru* have been detained for more than a month. The crew had no choice but to maintain and guard their vessel which has been detained with no prospect for release under the Russian authorities. All members of the 17 Japanese crew, including the Master, are forbidden to return to Japan for a long period of time. This is entirely because the Russian Federation failed to set promptly a reasonable bond that ensures the release of the vessel and its crew. The Government of Japan submits that this constitutes a blatant infringement of the obligation under the UNCLOS. The reason why I underline this point is because the Russian Federation has been repeating this unworthy practice.

I would like to emphasize that the arrest and protracted detention of the *Hoshinmaru* is not an isolated incident. Several Japanese fishing vessels have been arrested in the EEZ of the Russian Federation in the past three years: three vessels in 2004, two vessels in 2005 and four vessels in 2006. Every time a Japanese vessel was arrested, Japan immediately and repeatedly urged the Russian Federation to promptly release it and its crew "upon posting of a reasonable bond or other security." Despite these efforts, in each case it has taken approximately from one to four months before the actual release, and the record has not been improving.

Japan had no choice other than reluctantly to make this application this time. This is a consequence of the accumulation of failures by the Russian Federation to comply with their obligations under the UNCLOS.

The Respondent in its Statement of Response underlines that in the *Volga* case Australia invited the Tribunal to take into account "the serious problem of continuing illegal fishing in the Southern Ocean and the dangers this poses to the conservation of fisheries resources and the maintenance of the ecological balance of the environment." I would like to point out, in this regard, the fact that Japan has been actively co-operating in order to promote the conservation and the reproduction of salmon and trout of Russian origin within the framework of a bilateral treaty with the Russian Federation. Japan has been providing, for example, a sizable amount of equipment for the good functioning of hatchery and nursery for salmon and trout in the Russian Federation and the scientists of both countries are in agreement that the salmon-trout resources in the EEZ of the Russian Federation where this incident occurred are conserved at a high level.

Mr President, let me turn to the predicament of the crew. This must be addressed from a humanitarian point of view. The crew, including the Master, do not understand the Russian language at all. Suffering from tremendous stress, together with the lack of communication in a foreign country, they are being forced to live aboard the vessel for a prolonged time. They are under constant surveillance from Russian Coast Guard officers stationed on the vessel, who check each Tuesday when the guards are changed that all crew members are present on board. They are not even allowed to freely go out of the ship. Only two members of the crew per day are given permission to take a walk around the quay, in the company of Russian Border Coast Guard.

This is the position according to our latest information, received this morning from our consul in the region. There is no doubt that the crew remain in detention. Fortunately, the crew are enduring these stern conditions so far without showing serious mental disorder symptoms. The situation must, however, put the crew at real risk of developing stress-related disorders; and this fact must be obvious to those who are detaining them. One of the crew has already complained of medical problems with his stomach during the detention. This humanitarian consideration must be particularly understandable to the Russian Federation. When the Russian Federation appeared as the Applicant in the *Volga* case, this was the highlight of their argument. In paragraph 24 of its prompt release application, the Russian Federation stated: “The crew are suffering from the effects of their prolonged detention in a foreign country whose customs and language are unfamiliar to them. They are receiving medical attention for psychological disorders and are reliant on the owner to meet the costs of treatment.”

(Continued in French) Mr President, judging by our preceding negotiations with the Russian Federation concerning the arrest of fishing vessels, we believe that long detention is responsible for these humanitarian problems and that this does result from the national legal system in Russia.

The national Russian procedure is responsible for these problems where administrative and criminal procedures take place separately and cumulatively without apparent co-ordination between them. It is not exaggerating to talk about an abuse of procedure. The result is, as we see, that there is no prompt release of arrested vessels nor the freeing of their crews without any delay, which should be the case once a reasonable bond has been posted.

The national Russian laws themselves are not the object of this request for prompt release. It is up to Russia of course and only up to Russia to decide the manner in which it is going to meet its legal obligations arising from the Convention in prompt release cases. Nonetheless, we hope that the Russian Federation will be able to envisage the necessity to establish procedures which will facilitate it meeting its obligations according to the Convention which it has committed itself to follow. As I have explained, the argument of Japan in this application is very clear. The existence of the jurisdiction of the Tribunal and the admissibility of this case are evidence in themselves according to Article 292 of the Convention of the Law of the Sea. As a consequence, Japan requests the Tribunal to declare that the Russian Federation has violated its obligations linked to Article 73(2) of the Convention and that it orders the Russian Federation to release the vessel and the crew of the

Hoshinmaru after the posting of a bond, the sum of which the Tribunal will consider reasonable.

Before finishing, Mr President, I would like to emphasize the strong commitment of Japan in favour of peaceful regulation of international disputes in order to ensure the sustainable use of living maritime resources. Until this day Japan has had only one experience and that was as a Respondent in the *Blue Fin Tuna* case which was submitted to the Tribunal for examination and for the request for provisional measures following an application by Australia and New Zealand. It is the first time that Japan is an Applicant in this Tribunal. Japan was one of the main supporters of the Tribunal since it joined the Convention of the Law of the Sea in 1996. This time Japan has chosen the Tribunal as a forum in order to arrive at a peaceful agreement in response to the repeated infringement of international rules by the Russian Federation. This is evidence of the strong wish of Japan to contribute to the reinforcement of the rule of law within the international community by a proactive turning to international jurisdictions.

I would now like to conclude my exposé by adding that Japan fully recognizes the right and the need of coastal states to act as international law authorizes them in order to protect their resources.

Japan has taken measures in order to help these states and in order to reinforce their legal means. Japan, as a state that practices fishing in a responsible manner, has recently reinforced its instructions to the fishing industry in order to reduce to a minimum the risk that they do their fishing and violate authorized conditions in order to ensure sustainable use of living marine resources. In spite of this, and given the fact that the Convention of 1982 establishes a balance between the rights and the interests of all state parties, Japan requests that the Russian Federation meets its part of the agreement by acquitting itself of its legal obligation to release without delay the *Hoshinmaru* and its crew once a reasonable bond has been posted.

THE PRESIDENT: I call now on Professor Lowe to continue. Professor Lowe, you will be speaking for roughly one hour. If you do that, I will not take a break, but if you speak for more much longer than that, then I may interrupt you.

PROFESSOR LOWE: I have a note, Mr President, in my submission for two convenient break points. It may well be that with your permission, we might think of breaking a little before 4.30 for that.

Mr President, members of the Tribunal, it is an honour to have been entrusted with the presentation of this part of Japan's submissions, and it is a privilege to appear again before this distinguished Tribunal.

I should begin with a word of gratitude. Prompt release cases are, by their nature, cases of urgency and cases in which the situation changes rapidly. This Tribunal has developed a procedure for dealing with prompt release cases, which is unrivalled among international tribunals in terms of its speed and its flexibility. Japan is grateful for this flexibility, which has enabled it to work together with the Registry in order to submit the documents that the Tribunal needs for its work and to adjust the precise

focus of its submissions in this case in the light of developments after the date on which its application was submitted.

The parties are largely in agreement as to the rules and principles of law that are applicable in this case, and I can deal swiftly with most matters, but it is necessary that the Tribunal should be satisfied that it has jurisdiction to hear and decide this case and that there is a well-founded allegation that no reasonable bond has been set permitting the prompt release of the *Hoshinmaru*. So I shall first address questions of jurisdiction and admissibility, and then turn to the question of the failure to set a reasonable bond.

I think the parties are agreed that the Tribunal has jurisdiction. In addressing the question of jurisdiction in past cases, this Tribunal has sought to ascertain that six conditions are satisfied. First, that both the applicant and respondent are parties to the United Nations Convention on the Law of the Sea and that the Convention is in force between them. Second, that the vessel that is the subject of the application flies the flag of the applicant. Third, that the vessel is detained. Fourth, that the detention is pursuant to an exercise of powers to which the prompt release obligation attaches. Fifth, that there has been no agreement between the parties on the submission of the application to any other court or tribunal. Sixth, that the application is duly made in accordance with Articles 110 and 111 of the Tribunal's rules.

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 Respondent does not dispute the Japanese nationality of the *Hoshinmaru*. The details of the ownership, tonnage and construction of the vessel are set out in Annex 1 of our application.

It is not disputed that the *Hoshinmaru* remains in port in the Russian Federation. The Respondent says that it is free to leave once the bond has been posted, but Japan says that the bond required is not unreasonable and does not satisfy the requirements of Article 73 of UNCLOS.

The detention is the result of the application of Russia's fishery laws, applicable in its Exclusive Economic Zone. Those laws, which are listed on the last page of the letter of 2 June 2007 from Mr Lebedev of the Federal Security Service of the Russian Federation, which is set out at Annex 3 of the Applicant's annex, indisputable fall within the scope of UNCLOS Article 73(2).

There has been no agreement between the parties upon the submission of this application to any other tribunal.

Finally, the application has been duly made by the Government of Japan and there is no suggestion that any failure to fulfil the requirements of Articles 110 or 111 of the rules could deprive the Tribunal of jurisdiction.

The Respondent does, however, challenge the admissibility of the application on two grounds. The first is that the application made on 6 July this year became moot when Russia set a bond on 13 July.

There is a straightforward answer to this point. Japan's application is based on Article 73 and 292 of the Convention. Those articles require that "arrested vessels and their crews shall be promptly released upon the posting of a reasonable bond or other security", and they provide for an application to this Tribunal when it is "alleged that the detaining state has not complied with the provisions of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security".

The obligation under UNCLOS is not simply to set a bond, but to set a reasonable bond. As this Tribunal recognized in the *Saiga* case, a state may make an application not only in cases where no bond has been set, but also where it considers that an unreasonable bond has been set. In paragraph 77 in its judgment in the *Saiga* case, the Tribunal said:

> "There may be an infringement of article 73, paragraph 2, of the Convention even when no bond has been posted. The requirement of promptness has a value in itself and may prevail when the posting of the bond has not been possible, has been rejected or is not provided for in the coastal State's laws or when it is alleged that the required bond is unreasonable."

Russia itself recognized in the *Volga* case that an application can be made to this Tribunal for a determination that a bond is unreasonable. Paragraph 4 of Chapter 3 of Russia's application in the *Volga* case identified two grounds on which the respondent in that case, Australia, was said to have breached its duties under the Convention, under Article 73(2). The first was that it had set conditions for release of the vessel which were not permitted under Article 73(2), but the second and distinct ground was that the amount of the security set by the respondent was, in all the circumstances, unreasonable.

Japan's application in this case was made under Articles 73 and 292 of UNCLOS. It relates to the failure of the Russian Federation to comply with the provisions of the Convention for the prompt release of a vessel or its crew upon the posting of a reasonable bond or other financial security. It asks the Tribunal, and I quote from the application, "to order the Respondent to release the vessel and crew of the *Hoshinmaru*, upon such terms and conditions as the Tribunal shall consider reasonable". That is what Article 73(2) requires: "arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security".

A bond has, belatedly, now been set for the release of the *Hoshinmaru*, but Japan does not consider the amount set to be reasonable. Accordingly, the setting of that bond does not resolve the dispute over the failure of the Russian Federation to comply with the provisions of the Convention for the prompt release of the vessel and its crew upon the posting of a reasonable bond or other financial security.

It would, with great respect to our friends, be absurd if an applicant were obliged by the setting of an unreasonable bond to withdraw its application and to draw up a fresh application to this Tribunal again asking the Tribunal to order the Respondent to release the vessel and its crew upon such conditions as the Tribunal considered reasonable, an application which would be identical with the first application, apart from the fact that it would refer not to a failure to set a bond at all but refer to a failure to set a reasonable bond. If an applicant had to withdraw an application and then make a fresh one when an unreasonable bond was set, this would require further delay in these prompt release proceedings and that would defeat the object and purpose of the prompt release procedures. It would prevent the Tribunal from dealing with the application without delay, as Article 292(3) requires.

There may be times when legal formalism should prevail over efficiency, common sense and justice, but the Russian claim is not even a claim to restrain the Tribunal within the ropes of strict formality.

Japan's original request that the Tribunal set a reasonable bond was already plainly and wholly contained within its application of 6 July this year. There is no alteration in Japan's case, and it is simply unnecessary for Japan now to include in its oral pleadings any submissions relating specifically to circumstances in which there has been a complete failure to set any bond. The application for the setting of a reasonable bond stands.

The second objection, Mr President, to the admissibility of the application is that it is too vague and general because it asks the Tribunal "to order the Respondent to release the vessel and crew of the *Hoshinmaru* upon such terms and conditions as the Tribunal shall consider reasonable".

At face value, this objection is disingenuous. Russia has been an applicant before this Tribunal. It knows perfectly well what an Article 292 prompt release application is, what object it serves, what is its scope, and what principles govern its determination. We know that because Mr Dzubenko, speaking for Russia, told this Tribunal in the *Volga* case, and I quote:

> "The Tribunal has decided a number of cases involving a request for the prompt release of a vessel up to date. There is now a body of law made by the Tribunal relating to such an application. The Russian Federation has closely examined this body of international law and asks this Tribunal to apply the principles used in previous cases to the present case."

That is what Japan asks this Tribunal to do. The passage that I quoted was from page 8 of the transcript of 12 December 2002 morning hearing, at lines 3 to 40.

Russia tries to make a great point of the fact that Japan's Article 292 Application asks the Tribunal to set terms and conditions for the release of the vessel and crew. It is hard to believe that there is any doubt on this point, but in case there is, let me say clearly that Japan has explicitly based its application on Articles 73(2) and 292 of the Convention, and Japan is asking the Tribunal to exercise its powers under Article 292 to deal with what Article 292(3) calls "the question of release". It is not asking

the Tribunal to exercise any powers other than those that the Tribunal has under Article 292 of the Convention.

The implication that the Application is inadmissible because Japan did not specify what it regards as a reasonable amount for the bond is simply unsustainable. When Japan's Application was made, no bond had been set. It was for Russia, not Japan, to set the amount of the bond. Now that the bond has belatedly been set, it would be pointless to insist that the Application be amended so that Japan proposes some specific sum as if that sum were uniquely reasonable.

By making the Application, Japan has put the determination of what would be a reasonable bond into the hands of this Tribunal. Japan has provided the information that is necessary to enable the Tribunal to make that determination – and I shall turn to that information shortly – and Japan will make short submissions as to the general approach to the determination of what is a reasonable bond.

It cannot really be otherwise. If an Applicant asks the Tribunal only to set a bond at a specified amount and if the Tribunal disagrees with that amount, even by one cent, the Tribunal will technically refuse the Applicant's request. If the Tribunal proceeds to fix some other amount, could a Respondent complain that the Tribunal was not asked to set any other amount? Surely not. And surely there can be no objection if the Applicant expressly requests the Tribunal to proceed to set a reasonable bond, exercising its Article 292 competence. That is precisely what Japan is asking the Tribunal to do.

Mr President, members of the Tribunal, let me now turn to questions of substance. The prompt release cases decided by the Tribunal all adhere to the fundamental principle identified by the Tribunal as applicable in these cases; that is, the need to balance the interests of the coastal state and the flag state. That is not controversial.

It is also plain that the balance is to be struck by focusing on the particular episode. The factors are listed in the much-quoted paragraph 67 of the *Camouco* judgment. That says:

> "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."

The focus is on the specific facts of the case. In particular, it is Japan's submission that the amount of the bond should *not* be fixed by the Tribunal so as to reflect approval or disapproval of the conduct of the detaining state, or indeed of the flag state.

The detaining state is obliged to set a reasonable bond promptly to allow the release of the vessel and its crew. At *that* stage a reasonable bond is simply one that provides the necessary security for the coastal state while maintaining a proper

balance with the right of the flag state to the prompt release of the vessel and its crew. That is the same as the approach that this Tribunal adopts.

It is no part of that calculation to impose an amount to the bond by way of a fine on the vessel, or to deduct from the bond an amount by way of an expression of disapproval at the conduct of the detaining state, even if there has been an unacceptable delay in setting the bond. Such a delay might form the basis of other proceedings under the Convention, but the purpose of prompt release proceedings is not to investigate the history of the incident but to take a snapshot, and to ask simply: at this moment, given the accusations against the ship, its owners and Master, what are the terms of a reasonable bond that would permit the vessel and its crew to leave?

Similarly, it is not the purpose of Article 292 proceedings to provide a remedy against any failures of other ship-owners against the failures of other ship-owners to pay fines or against any general problems concerned with unlawful fishing. These are matters that are reflected in the gravity of the offences, and therefore reflected in the severity of the fines that the Russian Federation has chosen to set for the offences in question. If the Respondent has questions, concerns or complaints about these matters, there are procedures through which it can address them, but they are not relevant in Article 292 proceedings.

The Tribunal has made clear that its role in 292 proceedings is not to go into the merits of the matter that underlies the detention. It made that plain in the *Volga* case when it rejected Russia's argument that "in assessing the reasonableness of any bond, the Tribunal should take into account the circumstances of the seizure of the vessel on the high seas". The Tribunal said:

> "In the view of the Tribunal, matters relating to the circumstances of the seizure of the *Volga* as described in paragraphs 32 to 33 are not relevant to the present proceedings for prompt release under Article 292 of the Convention. The Tribunal therefore cannot take into account the circumstances of the seizure of the *Volga* in assessing the reasonableness of the bond." [Paragraph 83 of the judgment in the *Volga* case].

The reasonableness is to be assessed by looking at the gravity of the alleged offence, as indicated by the penalties potentially applicable in respect of it, at the value of the vessel and at the value of any confiscated catch or equipment. Now, with your permission, Mr President, I will take each of those factors in turn.
Let me begin with the gravity of the offence. Japan fully accepts the right of coastal states to enforce their fisheries laws in accordance with the provisions of the Convention, and it fully accepts the importance of their interest in doing so.

Japan has itself insisted that Japanese vessels fishing under licences from other states should comply with the laws and regulations of those states and obey the commands of fishery protection officers. You will find some of the relevant statements set out in the fishing licence under which the *Hoshinmaru* operated, a copy of which appears as Annex 11 of our Application. The last three pages of that Annex set out the restrictions and conditions. You will see there the duties imposed on vessels to operate a vessel positioning system (set out in paragraph 8), and

duties to comply with coastal laws, regulations and orders (set out in paragraphs 10 to 18).

The essential facts are not in dispute. The *Hoshinmaru* was licensed by the Russian Federation to fish in the Russian EEZ from 15 May 2007 until 31 July 2007. That appears on page 4 of Annex 2, which is a translation of the fishing licence issued by the Russian Federation to the *Hoshinmaru*.

You will notice that the *Hoshinmaru* is licensed to be fishing even today as we sit here, as it has been for the past seven weeks. Whether or not an offence was committed, the detention has already prevented the vessel from fishing for seven of the 11 weeks for which it was licensed to fish.

The *Hoshinmaru* was licensed to catch certain limited quantities of sockeye salmon, chum salmon, Sakhalin trout, silver salmon and spring salmon.

The *Hoshinmaru* was boarded by Russian officials in the Russian EEZ on 1 June 2007, at a point approximately 56º-09N and 165º-28E. You will find the approximate location marked on the map that appears as Annex 12 of our Application.

The charge against the *Hoshinmaru* is that the fish that it had on board did not correspond to those that it was licensed to catch and that they did not correspond with those that were recorded in its log-book. Permit me to repeat that, because it is a central fact that the Respondent will doubtless wish to have absolutely clear. The charge is that the fish that it had on board did not correspond to those that it was licensed to catch and did not correspond to those that were recorded in its logbook.

It was said that under a layer of chum salmon, more expensive sockeye salmon were hidden. The details are set out in the document in Annex 6, which is a translation of the letter dated 26 June 2007 from the Secretariat of the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation. Those details appear on the second page of the translation.

Specifically, it is said that the *Hoshinmaru* had caught 42,549.80kg of sockeye salmon, of which 20,063.80kg was recorded as chum salmon. They had caught 45,000kg of sockeye salmon and 20,000kg had been recorded as chum salmon. Note, however, that the *Hoshinmaru* was *entitled* under the licence to catch 85,700kg of sockeye salmon – more than four times as much as was said to be falsely recorded – and was also entitled to catch 85,200kg of chum salmon, again far more than was falsely recorded. So the alleged offence is not fishing without a licence or overfishing; the alleged offence is falsely recording a catch that the vessel was entitled to take. The allegation is of false record-keeping.

The Government of Japan certainly does not condone false record-keeping; and it fully recognizes the importance of accurate record-keeping in the context of fisheries management. However, the fact remains that the *Hoshinmaru* had on board all the fish that it actually had on board. That is a factor that we submit must be taken into account in assessing the gravity of the offence.

There is a further point. The allegedly illegal part of the *Hoshinmaru's* catch was seized by the authorities in the Russian Federation and is still held in their custody. The 26 June letter, set out in Annex 6, says that the "damage" resulting from the *Hoshinmaru's* alleged offence is equivalent to not less than 7 million roubles. The Russian Federation Statement in Response gives a figure of 7,927,500 roubles – call it 8 million. There is no indication of how that figure of 8 million roubles, which is approximately US$ 311,000, is calculated; but that is not the main point.

We do not see how misreporting of fish that the vessel was entitled to take – not entitled to misreport but entitled to catch – can be said to have caused any damage to the living resources of the Russian EEZ.

It is true that a vessel might misreport a catch of an expensive species as a catch of a cheaper species, and then go on to catch and report in addition the full quota that it was allowed of the more expensive species which it was entitled to take under the licence. However, the *Hoshinmaru* had not done that.

It was boarded two and a half weeks into its licensed fishing season. It was nowhere near having taken its full quota of fish. Its catch was well within the licensed limits. It had not taken more sockeye salmon than it was entitled to take; it had not taken more chum salmon than it was entitled to take. There is no question at all of it having taken more fish than the Russian Federation had already agreed that it could properly take out of the Russian EEZ.

The Russian Federation must have set the limits of the licensed catch at a level which it believed could be taken without damage to its EEZ resources. Indeed, it is obliged by Article 61(2) of the Convention to ensure that its EEZ is not over exploited.

There can, therefore, be no damage to the living resources, because the licensed catch limits would obviously have been set by Russia at a level which did not cause any such damage; and the *Hoshinmaru* did not exceed its licensed catch limits.

Of course, the misreporting is an offence, for which a penalty may certainly be imposed, but to treat the 8 million roubles as environmental "damages" is plainly wrong.

We this is apparent from the Respondent's Annex 10, the last page of which refers (in translation) to the "rates set for the calculation of penalties for damage".

Those penalties apply, according to the Respondent's Annex 10, to damage "caused by extermination, illegal fishing or harvesting of protected marine living resources" of the Russian EEZ. We are not concerned here with the question whether misreporting catches that are not otherwise unlawful amounts to a violation of that provision, amounts to an offence that falls within that provision.

What is clear is that the 8 million roubles – US$ 311,000 – that Russia has asked for represents the exposure of the *Hoshinmaru* to fines under Russian law.

The 8 million rouble element in the bond that is described as 'damages' is, like the rest of the 25 million rouble sum that has been set as a bond, simply a part of the financial security that is demanded in this case to secure the criminal liability of the *Hoshinmaru*.

Then there is the position of the Master and crew. The Master is in a position similar to that of the Master of the *Camouco*, in respect of whom the Tribunal said, at paragraph 71 of the *Camouco* judgment:

"The parties are in disagreement as to whether the Master of the *Camouco* is also in detention. It is admitted that the Master is presently under court supervision, that his passport has also been taken away from him by the French authorities, and that, consequently, he is not in a position to leave Réunion. The Tribunal considers that, in the circumstances of this case, it is appropriate to order the release of the Master in accordance with Article 292, paragraph 1, of the Convention."

And as our Agent has told you, according to information received within the past twelve hours, the crew also remain in detention.

Japan accepts that it is appropriate to include in a bond an element in respect of the release of the Master and crew, but it is absolutely plain that the Russian Federation is under a duty to release the Master and crew on payment of a reasonable bond, and that this has not yet happened.

I should add a note of caution here. There is a danger in thinking that if a state says to the crew, "You are free to go", then all is well. That ignores the practical reality. If fish remain stored on the ship, someone has to be present to monitor and maintain the refrigeration equipment. When the vessel is eventually released, someone must be on board in order to sail it back. The practical reality is that the release of the crew cannot be entirely separated from the release of the vessel, as though the vessel could look after itself. This reality has to be borne in mind when a reasonable and efficient system of prompt release is designed.

Let me, sir, say something about the approach to valuation. Japan submits that the fundamental approach to determining a reasonable bond is straightforward. The bond is not a punishment; it is a security. It guarantees that whatever criminal sanctions may properly and reasonably be applied to the vessel's activities will be discharged. It follows that the amount of the bond should never be more than the amount of the fines that one might reasonably expect could in reality be imposed on the vessel's owners and crew in respect of the actual offences with which they are charged.

You may wonder why I use so many words, and why I do not say "no more than the fines to which they are exposed." There is a simple and important reason.

National laws are framed in general terms. A theft is committed when a bank is robbed and a theft is committed when a pencil is taken home by an employee from an employer's office for personal use. Both actions amounts to the same crime but the offences are very different in their gravity. It may be literally true that the bank robber and the employee face the same potential penalties, but in the real world it

would be wrong and misleading to say that. In practice, an honest, common-sense evaluation is that the bank robber faces a very much higher penalty than the employee.

When one asks what sums would cover the penalties that might be imposed, one must take the gravity of the offence into account. It is simply wrong to suppose that in practice every person who violates a particular law faces the maximum penalty that could be imposed. One must look to the reality, at the levels of fine that are imposed in similar cases, at national guidelines on levels of fine, and so on.

Accordingly, we submit that it can never simply be assumed that a reasonable bond must cover the maximum penalty that could be imposed. If the offence is exceptionally grave, of the utmost seriousness, that might be a possibility but that is something to be established and proven on the facts; it cannot be presumed. That is why we speak of the amount of the fines that one might reasonably expect could be imposed on the vessel's owners and crew in respect of the actual offences with which they are charged.

The amount of the bond may also include a reasonable element in respect of any fines that one may reasonably expect might be imposed on any individuals charged, in order to secure their presence before the state's courts, though individuals cannot, of course, according to Article 73(3), generally be made subject to imprisonment for fishery offences.

Then we come to the critical question of the value of the vessel. If the confiscation of the vessel cannot reasonably be considered to be a possibility in the circumstances of the specific case – and this is the position in relation to the *Hoshinmaru* – there is no reason for the bond to reflect the vessel's value. The bond should reflect only the fines that can reasonably be envisaged as being within the range of possible penalties that might be imposed on the owner and Master and crew. That is the maximum amount for which the bond should be fixed.

That kind of estimation is what criminal lawyers around the world do every day of the week. They say to defendants, "If you're found guilty, you'll almost certainly get between four and six years in prison". Not one year; not ten years; you won't be executed. It is reasonable say that the defendant faces a penalty of up to six years in prison. It is a straightforward and routine matter to estimate probable penalties in the particular circumstances of a specific, concrete offence; and we submit that this must be done in assessing a reasonable bond.

We think this is perfectly consistent with Russia's understanding of its position. In the Respondent's Annex 17, attached to its Statement in Response, you will see at the end of the document – a model form concerned with prompt release bonds – that it says: "Reasonable bond is considered as provisional measure for paying out fines. In cases when obligations on fine payment are not fulfilled competent (appointed) authorities have right to compensate the amount of fine using pledged money, security or property." That is precisely right. The purpose of the bond is to cover the fines. The bond may be set with reference to the fines that are realistically foreseeable but it may not be set any higher than that.

In particular, if the vessel is not liable to confiscation – for example, because it has committed a very minor offence under the fisheries laws, for which confiscation would plainly be unjustified – there is, logically, no reason at all why the bond should reflect the value of the vessel. No municipal court would fix the bail of someone charged with fraudulent accounting by reference to the value of the car that the person drives, and there is no more reason to take into account the value of a vessel in fixing a bond in respect of charges of falsely recording catches.

If a vessel is liable to confiscation, an element for the value of the ship may be included, in addition to the element for reasonable fines that might be imposed.

But it is not enough here to refer simply to 'the value of the vessel'. One has to focus clearly on what is in issue. The vessel is allowed to leave the detaining state but the detaining state must not be appreciably worse off by allowing it to leave. The bond stands in the place of the vessel. So, one asks, what is the value that the detaining state has lost by allowing the vessel to leave? That would be the amount for which the detaining state could sell the vessel – its market value – minus the cost of the sale.

Let me emphasize this point. The bond is there to protect the legitimate interests of the detaining state; it is not the purpose of the bond to punish the ship owner. It does not matter that if the ship owner sought to replace the vessel it would cost him more than the market value of the vessel – more than the vessel would fetch if it were sold. Both parties are agreed that one must look on the bond as a security for the detaining state, as a substitute for the released vessel.

Consequently it must be the market value of the vessel, not its replacement cost, minus the costs of sale, which we use as the relevant benchmark. That is what the released vessel is worth to the confiscating state; that is what the detaining state is at risk of losing if the vessel is released.

This we say is how the question of approaching the reasonableness of the bond must proceed, and if the bond is fixed at a level that exceeds what is justifiable by reference to these factors – if the bond is disproportionate – it would take on a punitive character. It would go beyond what is necessary to secure the interests of the coastal state, and would impose additional burdens on the owner which protect no legitimate interest of the coastal state. It would disrupt that delicate balance between the interests of the coastal state and the flag state that UNCLOS sought to strike.

Russia has argued that a reasonable bond is properly to be fixed as only a percentage, only a part of the total exposure to fines and confiscation. Russia has indicated that the range of 9 per cent to 25 per cent of that total exposure is appropriate. We have set out the passage where Russia announced its adherence to this approach, in the *Volga* case, in paragraph 47 of the Application.

Japan agrees. Japan, Mr President, will be content to be treated by Russia as Russia demanded it should be treated by Australia in the *Volga* case.

Mr President, that brings me to what would be a convenient point perhaps to break, and then I will finish my submissions afterwards.

THE PRESIDENT: Thank you, Professor Lowe. The meeting is adjourned for approximately 15 minutes.

(A short break)

PROFESSOR LOWE: Before the brief recess, Mr President, I outlined our submissions as to the manner in which the question of the reasonableness of the bond should be approached and I would like now to turn to the application of those principles to the specific facts of this case.

The criminal penalties in this case could in theory be almost 8 million roubles. That is both the measure of the gravity of the offence in the eyes of the Russian Federation, and the basic sum to be considered when considering the bond.

Eight million - in fact, it is 7,927,500 - roubles is the maximum figure. It must constantly be borne in mind that there has as yet been no trial and no conviction. We do not and we cannot know if the Master and owners of the *Hoshinmaru* will be convicted or acquitted, and we do not and we cannot know whether, if they are convicted, the maximum fine or some lesser penalty will be imposed.

If Russia considers that the maximum penalty is a fair and reasonable estimate of the actual penalty that would probably be applied if the Master and owners were guilty of the offences charged, it will no doubt explain why, and justify its position. We look forward to hearing that explanation from them in their submissions tomorrow.

Japan recognizes that the legitimate interests of the coastal state must be protected, in the balance with the flag state interests, and Japan accepts the maximum exposure to whatever potential fines might realistically be expected to be imposed is the starting point for the analysis.

In this case there is no indication in the Russian submissions that the *Hoshinmaru* itself faces probable confiscation. Indeed, it would be extraordinary if the *Hoshinmaru* itself were liable to confiscation in respect of a charge that the Master had recorded one catch that he was entitled to take under the heading of another catch that he was entitled to take – unlawful as any false recording would undoubtedly be and if such a penalty were imposed in a case such as this, one might ask how it could be reconciled with the prompt release procedures under the Convention.

So, it is now for this Tribunal to determine what a reasonable bond might be. It is not for Japan to propose a precise figure but Japan considers that the amount cannot be any more than about 8 million roubles at the very highest, even if Russia justifies its decision to take into account the full amount of the criminal penalty when fixing the bond.

Any higher sum would be “disproportionate”, to use the language of human rights courts, and would have been determined by the arbitrary inclusion of sums that are

not proportionate reflections of any of the factors which may legitimately be taken into account when calculating the bond. Indeed, I must emphasize that our submission is that when the precise nature and circumstances of the offences charged in this case are taken into account, a reasonable bond should certainly be less.

In our submission, the value of the *Hoshinmaru* is not relevant since it is not liable to probable confiscation, but applicants are requested to offer data on the vessel, and we have done our best to obtain reliable, objective information. Japan has submitted four documents that give appraisals of the value of the vessel.

Annex 1 attached to the Application has, on its sixth page, a statement made by the owner of the *Hoshinmaru* that it was bought for 75 million yen in 2003 and that, applying depreciation methods that conform with Japanese corporation tax law, it had a value in June 2007 of 18,843,000 yen – that is, approximately US$ 155,000, or 4 million roubles.

Japan obtained three other appraisals of the value of the vessel. These are set out in the additional Annex, No. 17, headed 'Appraisal', which we submitted yesterday. One, made by the Japan Shipping Exchange Inc., sets the value as at 13 July 2007 at US$ 220,000. The second, made by Shin Nihon Kentei Kyokai, is based (as is indicated on page 1 of its valuation report) on new building and second-hand market trends of similar vessels based on authoritative statistical data obtained from the Japanese National Land and Transportation Ministry, from specialized magazines abroad, and from Japanese shipbuilders and brokers of fishing vessels. It values the vessel at US$ 265,000.

The third, made by Nippon Kaiji Kentei Kyokai, taking into account the new building cost of a similar type of vessel, the depreciation in value corresponding to the vessel's age and the current market value, appraised the value as of 9 July 2007 at US$ 320,000. All of these estimates include the value of the fishing gear.

The bond set by the Russian Federation on 13 July was 25 million roubles – almost US$ 1 million (approximately US$ 980,913) – of which almost 8 million roubles were attributed to the environmental damage alleged to have been caused by the *Hoshinmaru*, and just over 17 million roubles – approximately US$ 670,416 – therefore remaining to be justified by reference to other factors. That is more than twice the highest valuation of the *Hoshinmaru*, and more than four times the owner's depreciated value appraisal of the worth of the vessel.

Given the logistical constraints under which we are all operating in these summary proceedings, it has not been possible to prepare and translate full witness statements or affidavits to support these valuations; nor has it been possible for either side to secure the attendance of witnesses from the companies concerned to testify, through translators, on the valuation methodology.

We submit that these objective expert valuations give a good basis for a pragmatic determination of a reasonable bond. You will note at the end of Annex 23 to Russia's statement in response that it said what evidence it, Russia, would need in

order to determine the bond. It said – I quote from the last three lines of the final paragraph of Acting Chief Grinberg's letter to the owners of the vessel –

"we would like to request you to provide us with information on insured amount and the sum of residual value of the medium-duty vessel [*Hoshinmaru*] necessary for the determination of the bond's amount".

Mr President and members of the Tribunal, Japan submits that there is no basis for valuing the *Hoshinmaru* at anything less than US$ 155,000 or more than US$ 320,000.

On any calculation, a reasonable bond must therefore be substantially lower than the 25 million roubles recently set by the Russian Federation. In our submission, it should be set at a figure that reflects the exposure at the very highest, if Russia is able to justify it, of 8 million roubles in penalties.

This talk of numbers may seem very abstract but there is a harsh reality to this issue – quite apart from the cost of actually obtaining the bond, which will of course be an additional cost to the ship owner over and above any penalty that might be imposed if the Master and owners of the *Hoshinmaru* are found guilty.

There is another matter. The *Hoshinmaru* has now been detained for practically the whole of the season during which it was licensed to fish in the Russian EEZ. It has lost all the income that it could have gained during that period. Even today, it could lawfully be fishing in the Russian EEZ. Some may say that if it is guilty of the charges (and that we do not yet know), it deserves to lose that income but it must be remembered that this loss would be in addition to any fines are imposed.

We have to suppose that the Russian Federation fixes its fines at a level which it considers appropriate to the offences in question, but if the fines are set at a level appropriate to the offences in question, it is plainly inappropriate then to add some additional loss on to that by compelling the ship and the crew to lose further income. The amount of the additional lost income would be purely arbitrary. It would depend entirely on how long the vessel was detained before it was released and able to return to lawful fishing.

It is that arbitrariness, that anomaly, that the prompt release provisions are intended to prevent. As part of the bargain that massively extended coastal state jurisdiction over what were formerly high seas fisheries, flag states were given some guarantee that fishing activities would not be disrupted more than is necessary to secure the legitimate interests of the coastal state. That is what the prompt release procedures are intended do.

Sir, let me deal with one final point. Russia suggests that it has not unduly delayed the setting of a bond, and that it is not bound to set a bond 'promptly' but only when it considers it appropriate to do so given the progress of the criminal investigation.

Japan accepts that a coastal state may detain a vessel for long enough to carry out a reasonably diligent and expeditious examination of the vessel and its catch and to record the evidence necessary to support the charges against the ship. That is

obvious: no-one would argue that a ship is entitled to be released before the state has had a chance to gather the evidence against it, but that is as far as it goes.

In the words of this Tribunal, "The requirement of promptness has a value in itself" – paragraph 77 of the *Saiga* judgment. If vessels and crews are to be promptly released, the bond must be set promptly. It cannot be argued that it is enough to release the vessel and crew 'promptly' after the setting of a bond, if there is an inordinate delay in the setting of the bond in the first place. That is why Article 292 permits applications in prompt release cases to be made 10 days after the detention of the vessel.

Japan submits that the coastal state is obliged to release the vessel and its crew against payment of a reasonable bond after a period sufficient to give the coastal state a reasonable opportunity to collect the necessary evidence. This, in our submission, is an integral part of the 'reasonableness' of the bond and of the UNCLOS prompt release obligation.

Mr President, members of the Tribunal, that brings me to the end of my submissions on behalf of Japan in this round of pleadings. Unless there is anything else with which I can help you, I simply thank you for our kind attention.

THE PRESIDENT: Thank you, Professor Lowe. That brings us to the end of this sitting. The Tribunal will sit again tomorrow morning at 10 o'clock. At that sitting, the representative of the Respondent will address the Tribunal and present their submissions. This sitting of the Tribunal is now closed.

(The hearing adjourned at 5 p.m.)

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