

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



2007

Public sitting

held on Friday, 20 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

<i>Present:</i>	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:

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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
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Mr Toshihisa Kato, Official, Russian Division, Ministry of Foreign Affairs,

Ms Junko Iwaishi, Official, International Legal Affairs Division, Ministry of
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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,
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as Counsel;

Mr Vaughan Lowe, Professor of International Law, Oxford University, United
Kingdom,

Mr Shotaro Hamamoto, Professor of International Law, Kobe University,
Kobe, Japan,

as Advocates.

The Russian Federation is represented by:

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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.

1 **THE PRESIDENT:** This session will be devoted to the second round of submissions
2 by both parties, beginning with the Applicant. Before inviting the Agent of Japan to
3 commence his statement, I would like to state that, following consultation with the
4 Agents of the parties, it has been decided that each party will present its final
5 submissions in this case, namely case number 14, at a sitting of the Tribunal to be
6 held on Monday 23 July 2007.

7
8 I now give the floor to Mr Komatsu, Agent for the Government of Japan, to explain
9 how his delegation will divide its time for this session.

10
11 **MR KOMATSU:** Thank you, Mr President. I would like to invite first our advocate,
12 Professor Hamamoto.

13
14 **THE PRESIDENT:** Professor Hamamoto, please take the floor. I have understood
15 that you will speak for roughly 20 minutes. Thank you very much indeed.

16
17 **PROFESSOR HAMAMOTO (Interpretation):** Mr President, members of the
18 Tribunal, it is a great honour for me to accept the charge that the Japanese
19 Government has conferred upon me. First, it is not true, contrary to what the
20 Respondent claims, that the Japanese Government has done nothing to respect
21 local laws and regulations that are applicable in the Russian EEZ. Second, it is not
22 accurate either that the Japanese Government has given its consent, even implicitly,
23 as to the method of calculation of the bond for the prompt release, which would
24 include the value of the vessel.

25
26 I will start with the first issue. The Respondent claimed in this morning's exposé that
27 Japan has done nothing to prevent Japanese fishing crew and owners of Japanese
28 fishing vessels from breaching Russian laws and regulations; that Japan has allowed
29 its fishing crew to violate Russian laws and regulations. Mr President, this allegation
30 is not in line with reality. The Japanese Government, far from being uninterested in
31 the matter, tries earnestly so that Japanese fishing crew carefully respect local laws
32 when they fish in the EEZs of other states. As the Japanese Government Agent
33 observed yesterday afternoon during his exposé, Japan, as a state that practises
34 responsible fishing, has recently strengthened its instruction *vis-à-vis* the fishing
35 industry in order to reduce to the minimum the risk that fishing would be carried out
36 violating conditions that are authorized in order to ensure the sustainable utilization
37 of marine living resources.

38
39 As to the Japanese fishing crew who fish in the EEZ of the Russian Federation, the
40 Japanese Government constantly reminds them of the importance of the issue and
41 sends them official communications so that they will respect Russian laws and
42 regulations.

43
44 In 2007, this year indeed, for instance, the Japanese Fishing Agency notified the
45 fishing industries through an official communication dated 8 June 2007 stating that
46 the Japanese fishing industries must respect the local laws and regulations
47 regarding fishing activities. The Fishing Agency thereafter organised on 14 June
48 2007 a conference with the Japanese fishing crew that were preparing to fish in the
49 Russian EEZ and during this conference the Japanese Government stated again the
50 importance of carefully respecting local laws and regulations.

1
2 These Japanese measures are no a piece of paper; they are substance. The
3 Japanese fishing vessels which fish in the EEZs of other countries are obligated
4 under Japanese legislation regarding fishing to obtain before they depart from
5 a Japanese port to obtain Japanese Government authorization. In this certificate of
6 authorization from the Government it is specified that the Japanese fishing crew that
7 are leaving to fish in this EEZ must respect and follow laws and regulations that are
8 applicable locally in those EEZs where they will fish. If the Japanese Government
9 has to observe that there has been a violation *vis-à-vis* this conditionality on the part
10 of a Japanese fishing vessel, in other words, if the Japanese Government sees that
11 a Japanese fishing vessel has breached local laws and regulations applicable, the
12 Government will for sure question the various fishing crew and, if there is sufficient
13 proof, with certainty, that these fishing crew have indeed violated local laws and
14 regulations, then administrative penalties will follow. The fishing crew will be
15 forbidden from fishing during a certain period and they will have to stay in port in
16 Japan during that period.

17
18 It is certain that the Japanese Government will take the necessary measures so that
19 its fishing crew will respect applicable local laws and regulations. The Japanese
20 Government wishes to take advantage of this opportunity in front of this august
21 Tribunal to say that it has a sincere wish to continue to try and make its fishing crew
22 respect local laws and regulations. As result of the measures that the Japanese
23 Government has taken in a continuous fashion, it is impossible to say that the
24 Japanese Government has done nothing to prevent the Japanese fishing industries
25 ignoring applicable local laws and regulations in the EEZs of other countries, other
26 states, and in particular, in the Exclusive Economic Zone of the Russian Federation.

27
28 In this context, may I be allowed, Mr President, to say a few words regarding the
29 sanctions that the Russian authorities wish to decide and that have not yet been paid
30 by Japanese fishing crew. We take this issue very seriously and we take all the
31 measures that are possible in the matter but we need to observe that there are
32 situations whereby the various fishing crew are in a situation of financial bankruptcy
33 and in the worst of cases these fishing crew have even died. In those situations it is
34 impossible from a legal viewpoint to obtain payment of these fines. No legal
35 recourse is possible. The Japanese Government will of course seek to find a
36 satisfactory solution to such issues.

37
38 I would like to emphasize that the Russian Federation delegation has said that it has
39 appreciated the efforts engaged in by the Japanese Government in order to solve
40 this issue in the case of fines that have not been paid on the occasion of a recent
41 conference which took place in 2006.

42
43 Now I come to the second part of my exposé. The Respondent also claims that
44 Russia has put forth during bilateral conferences between Russia and Japan a
45 procedure which would apply regarding prompt release. This procedure contains
46 a calculation method as to the necessary bond for the prompt release, the document
47 that the Respondent is presenting to the Tribunal in its Annex 17. According to the
48 Respondent, this document indicates that the bond should include the price of the
49 vessel at issue and Japan, according to the Respondent, has not opposed itself to

1 this procedure; that this lack of opposition, this silence, would mean that Japan is in
2 agreement, according to the Russian Federation

3
4 We do not share this way of seeing things. The issue is that of a difference that
5 might be possible between a Japanese language text and a Russian language text
6 regarding this document – a problem of translation possibly. According to the
7 Japanese version, what should be understood as to what should be included in the
8 bond is the price, which in Japanese is the word “*gyogū*”, which means “the means”,
9 “the tools”, “the fishing gear” and it does not cover the vessel. Therefore, according
10 to the Japanese text, the value of the vessel would not be included in the bond that
11 would be necessary for a prompt release. It seems that the Respondent claims that
12 the Russian text says that the value of the vessel must be included in the calculation
13 of the prompt release bond. It is important, Mr President, to observe clearly in this
14 context that the text at issue is written in Russian and Japanese and that the English
15 text in Annex 17 presented by the Respondent is merely a simple translation from
16 the Russian text. The Japanese Government states that it has not given its consent
17 as to the accuracy of this English language translation from the Russian text,
18 therefore there could be a difference between the two language versions, be they
19 Russian or Japanese, which should be taken on board by the Tribunal.

20
21 We wish to draw your attention to the fact that there is a note to the document at
22 issue. This note says that the procedure, this method of bond calculation, is only
23 applicable in cases of relatively minor violations whereby the fines would not go
24 beyond US\$ 100,000. This note corresponds with note number 2 to Annex 17
25 presented by the Respondent, but I would wish to observe, Mr President and
26 honourable Judges, that the English language translation that has been supplied by
27 the Respondent does not correspond in fact either to the Japanese text or to the
28 Russian text. The Japanese Government is ready to supply the Japanese text later
29 on, if you so wish.

30
31 In any event, it is certain that the calculation method indicated in Annex 17 presented
32 by the Respondent only applies to minor violations whereby fines should not go
33 beyond US\$ 100,000. Indeed, to this day this method in practice has been applied
34 only to those cases where the fines are less than US\$ 100,000.

35
36 Mr President, how can it be possible to consider that a fine of US\$ 100,000
37 maximum would include the value of the vessel? It is absolutely impossible to fine
38 a fishing vessel in the Exclusive Economic Zones of Russia that costs only
39 US\$ 100,000. It is quite simply unrealistic. Logically it follows that this procedure,
40 this calculation method, does not include the value of the vessel. Therefore, it is
41 clear that the Japanese Government has never indicated its consent that the value of
42 the vessel should be included in the bond for the prompt release.

43
44 Mr President, thank you for your attention.

45
46 **THE PRESIDENT:** Thank you, Mr Hamamoto, for your statement. I take it that you
47 will produce the text to which you have referred directly, within this afternoon, please.

48
49 I call on Professor Lowe.

1 **PROFESSOR LOWE:** Mr President, members of the Tribunal, it falls to me to
2 complete this part of Japan's legal submissions. If you would allow me, before
3 I start, I would like to express a word of gratitude to our Russian colleagues. We
4 know that they have worked under great difficulty in a very short time limit in a case
5 with a complicated mixture of languages, and they have managed to produce a very
6 clear and elegant presentation of their case, which has made it easier for us to
7 engage with it and put our differences to you. I do not quite share their view about
8 the problem with time zones. I know that London is only eight hours behind Tokyo,
9 but the time split does at least mean that there has been no hour of the day or night
10 in the last two weeks when someone has not been working on both sides on the
11 preparation of these cases for the Tribunal.

12
13 We began this case with an application that Russia should set a reasonable bond for
14 the release of the *Hoshinmaru* at a time when no bond had been set. Now that a
15 bond has been set within what Russia regards as a reasonable time, we have heard
16 what Professor Golytsin said about the relationship between the criterion of
17 promptness and the duty of prompt release. I have to say that we find his reasoning
18 curious, reading into the obligation of prompt release an unnecessary qualification
19 that we think has no place there and which is contrary to the purpose of the prompt
20 release provisions. We do not accept that this is a proper interpretation of Article 73.
21 But I do not wish to make too much of that because I think that we are largely in
22 agreement as to the conclusions of the reasoning, however much we might disagree
23 over the reasoning that gets us there.

24
25 I think that both sides accept that states are entitled to take a reasonable time to
26 conduct reasonable investigations, that those investigations will vary according to the
27 seriousness and complexity of the offence, that the investigations should be carried
28 out with reasonable efficiency and expedition, and that the expectation is that the
29 time needed will be of an order which is commensurate with the urgency that is
30 indicated by the reference to a 10-day period in Article 292 of the Convention.

31
32 We may have different views on which side of the line the delay in setting the bond in
33 respect of the *Hoshinmaru* falls, but our main concern, now that a bond has been
34 set, is with the amount of that bond. I shall turn to that question.

35
36 Our central argument is that a reasonable bond cannot automatically be set at the
37 level of the total of the highest possible fines that could be imposed under all of the
38 possible offences with which the owner or the Master might be charged, plus the
39 highest possible level of any civil liability that they might incur, plus the value of the
40 ship, because the ship could, in theory, be confiscated. We say that bonds cannot
41 automatically be set at that level.

42
43 Bonds are supposed to be a practical way of balancing coastal and flag state
44 interests. They should secure the interests of the state in the penalties that might
45 reasonably be expected to be imposed in a particular case in practice. That means
46 that in cases of offences of lesser gravity – and I leave aside for the moment the
47 question whether the offence in this case is a grave offence or a lesser offence – the
48 likely fine should be covered but not the value of the vessel, because confiscation is
49 not a probable penalty in lesser offences.

50

1 There are thousands of infringements of national fisheries laws committed every day
2 around the world. If it was said of every infringement of a national fishery law that it
3 could lead to the confiscation of the vessel, the situation would become wholly
4 unmanageable and wholly unrealistic. We think that the bonds must be set at
5 a realistic level. That seems to us to be an inescapable conclusion and
6 consequence of the very concept of what a bond is.

7
8 If that principle is accepted, as we think it must be, the next question is whether the
9 coastal state can say: we have a complete and unrestricted freedom to decide
10 which offences are grave offences and which offences are not grave offences, and
11 we will set our bonds at the highest possible level in respect of all grave offences.

12
13 We say the answer to that question is: no. the reason that the answer is "no" is that
14 coastal states have agreed to conform to the provisions of the 1982 Convention,
15 which limit that complete freedom, quite apart from whatever other limitations there
16 might be under international law on that freedom. The limitation is imposed by the
17 obligation that the bond must be reasonable and, as this Tribunal has made clear,
18 that means that the level of the bond must reflect certain factors of which the chief is
19 the gravity of the offence.

20
21 The level of the bond cannot reflect the gravity of the offence if all bonds are set at
22 the highest level. They can only reflect the gravity of the offence if the bonds for
23 lesser offences are lower than the bonds for grave offences. But this is not a smooth
24 curve with a level of bond set as if it were on a graph with the gravity of the ascent
25 measured against the size of the bond and the two going up in a smooth line. There
26 is a kink in the curve. At some point we say that an offence becomes so serious that
27 it is not enough to add on another 1,000 roubles to the fine, or add on another
28 1,000 roubles in compensation for environmental damage. At some stage, a
29 completely new factor is triggered and we say that the offence becomes so grave
30 that the confiscation of the ship becomes a real possibility. At that point, there is not
31 another incremental change in the bond; the whole value of the ship is suddenly
32 attached into the bond, a value measured not in hundreds or thousands of roubles
33 but in millions of roubles. It is a quantum leap, a discontinuity in the curve, which we
34 regard as being a point of the utmost seriousness. There are certainly cases where
35 it is justified. We recognise that over-fishing is not simply a case of taking a few
36 extra tonnes of fish. If it is allowed to proceed without any check, it carries the risk of
37 severe damage to valuable and essential natural resources. But not every
38 infringement of fishing laws is a threat on that scale. Certainly all infringements
39 deserve to be punished, but they deserve a punishment that is proportionate to the
40 crime. That is, for us, a very important principle. Its acceptance is, we believe,
41 essential to the development of an effective system for policing fisheries and
42 balancing coastal and flag state rights. We hope that the Tribunal will be able to
43 indicate its thinking on this question in its decision in this case.

44
45 The bond set in this case was initially 25 million roubles, now reduced to 22 million
46 roubles. The 25 million rouble figure was calculated as three times the market value
47 of the mis-recorded fish, plus 7.9 million roubles of environmental damages, plus
48 perhaps 0.5 million roubles as a fine on the Master, plus a quarter of a million
49 roubles for costs, plus 14.8 million roubles for the value of the vessel; 25 million
50 roubles is practically US\$ 1 million.

1
2 How grave was the offence? The Respondent made two essential points concerning
3 the gravity. The first was that the Master had violated a long list of provisions of
4 Russian law, but that could not have been determinative. If I drive my car onto
5 a pavement while I am trying to do a U-turn in the street, I may commit a whole
6 series of crimes. I may be guilty of dangerous driving, driving without due care and
7 attention, endangering pedestrians, violating provisions of the Highway Code,
8 criminal damage to the pavement and unlawful trespass. I could go on and on. But
9 if I were prosecuted for every one of those crimes, it would be absurd. The fact that
10 I could, technically, be prosecuted for each of those separate offences does not
11 make my breach of the law any more grave, any more serious, than it would be if
12 I could only be prosecuted for one of them. I did what I did and I should be punished
13 accordingly. The gravity of an offence lies in the criminal conduct, not in the length
14 of the list of regulations that the conduct might have infringed.

15
16 The essential crime in the case of the *Hoshinmaru* is falsification of records. That is
17 not a trivial offence. It is a serious offence. It threatens to undermine fisheries
18 management regimes, but the *Hoshinmaru* was not over-fishing. It was entitled to
19 catch the amount and the species of fish that it had on board. Yes, of course we
20 understand that it was not legally entitled to catch mis-reported fish, but I think the
21 Tribunal understands my point. Had the Master taken the same amount of fish as he
22 in fact took and recorded it accurately, he would have been entitled to have on board
23 all of the fish that he had on board. It may be, as Mr Monakhov said, that unlawful
24 fishing is unlawful fishing but there are degrees of unlawfulness and that must be
25 taken into account. The essential crime in this case was not over-fishing or fishing
26 for prohibited species: it was falsification of records.

27
28 Of course the alleged conduct of the *Hoshinmaru* would, if proven, be a crime, even
29 a serious crime, but it is, in our view, not a crime that is so obviously such a grave
30 offence that it can reasonably be assumed that the courts will, when they have heard
31 all the evidence, impose the very highest possible fines. It is not, we think, so grave
32 that it can be assumed that the courts will confiscate what is for fishermen the tools
33 of their trade.

34
35 Under the bankruptcy laws of many countries, when someone goes bankrupt and
36 their assets are seized to satisfy their creditors, they can lose their house, their car,
37 their jewellery, their wristwatches, their bank accounts, but in the end the bankruptcy
38 laws always let people keep the clothes on their backs and the tools of their trade;
39 and confiscation takes away the tools of the trade of the fishermen, their means of
40 survival.

41
42 Therefore, we say that the assumptions that the *Hoshinmaru* will be confiscated is
43 not justified and is unreasonable.

44
45 We were disappointed that the Respondent did not give details of penalties that have
46 been imposed in practice in similar cases. However, shortly you will see the papers
47 for the *Tomimaru* case, which contain details of arrests of Japanese vessels for what
48 appear to be graver offences, including illegal fishing and the catching of prohibited
49 species, and Russia did not confiscate all those vessels. Some of those vessels

1 were released without the payment of a bond to cover the value of the vessel. So,
2 why is the *Hoshinmaru* so different?
3

4 The Respondent's second argument addresses that question. It says that the false
5 reporting on the *Hoshinmaru* may potentially lead to graver consequences. I think
6 they were the words used by Professor Golitsyn. Here there is a really fundamental
7 legal issue. Is this Tribunal to look at what the vessel did or at what the vessel might
8 have done if it had not been stopped?
9

10 To demand a bond is, in effect, to make a provisional determination that the person
11 accused is guilty, that the person accused will have to pay the fine. It may well be
12 expedient to presume that someone is guilty until they are proved innocent of crimes
13 with which they are charged and the bond can be returned. However, it is quite
14 another matter to presume that someone is guilty of crimes with which they have not
15 been charged, crimes that one suspects they may have gone on to commit if they
16 had had the chance and had not been stopped. Yet this is what the allusion to the
17 possibility of the *Hoshinmaru* perhaps going on to commit some other illegality not
18 charged by the Russian authorities amounts to.
19

20 You have not seen the Master of the *Hoshinmaru*; you have not heard his side of the
21 story. You have heard Mr Monakhov explaining Russia's side, perhaps straying
22 a little beyond the role of an advocate and into that of a witness. The Applicant has
23 not had the opportunity to challenge any of that evidence, and it must not be thought
24 that we necessarily accept all the assertions on matters of fact that he made, but we
25 can put that aside. In all prompt release cases the Tribunal will be in this position.
26 We submit that it has no practical alternative than to base its decisions on the
27 undisputed facts that are laid before it, which means basing its decision on the
28 charges that have actually been made against the defendant and the likely outcome
29 of those charges, not on the basis of suggestions about things that the defendant
30 might have gone on to do if it had had the opportunity.
31

32 Yes, the Tribunal can assume that the detaining state will be able to make good its
33 accusations and secure verdicts of guilty so that the penalties may be imposed, but it
34 cannot fix a reasonable bond by reference to what might have happened if the world
35 had been different. This, incidentally, we submit is the answer to Professor
36 Golitsyn's conundrum about the Tribunal basing its jurisdiction on an alleged breach
37 of Article 73 of the Convention when the Applicant has not proved that breach. The
38 Tribunal surely must assume that the Applicant can make good its claim, assert
39 jurisdiction and then decide whether or not the Applicant was right. I think the
40 technical term for the process is prolepsis, in Greek logic. If it did not do that, then
41 no court would ever be able to exercise jurisdiction in any case.
42

43 Mr President, members of the Tribunal, I am well aware of the fact that many people
44 will think that the Master of the *Hoshinmaru* was caught red handed, that it is
45 perfectly clear what he was about to go on to do, but there is a serious point here
46 about the responsibility of lawyers. It is the essence of the rule of law that people
47 should be punished for crimes that they are proved to have committed – not for
48 crimes that we suspect they have committed, not for crimes that they may have
49 wished to have committed, not because they seem to be the kind of people who
50 commit crimes, but because they have been proved to commit crimes.

1
2 Sometimes this requires lawyers, and in particular judges, to draw a clear line and to
3 say that the law demands proof, that it requires clear, consistent and principled
4 application. There may be crowds calling for the punishment of suspects,
5 demanding that people should be punished in case they go on to do something
6 wrong, but the crucial role of the lawyer is to withdraw from the heat of that kind of
7 argument and to reach principled decisions; and it is that principled reasonableness,
8 the framing of clear rules that can be applied practically and with fairness and justice,
9 that lies at the heart of the remedy that we are seeking in this case. We hope that
10 the Tribunal, in deciding on this specific case, will be able to develop its
11 jurisprudence so as to give a clear indication of how this very important element in
12 the UNCLOS balance between the flag and coastal state rights is to be secured.
13

14 Mr President, members of the Tribunal, our Agent will make our closing submission
15 on Monday but, unless there is any further matter with which I can help you, that
16 closes my submissions now on behalf of Japan.
17

18 **THE PRESIDENT:** Thank you very much, Professor Lowe. As agreed during the
19 consultations, the sitting will now be suspended until 6.00 p.m., when we will hear
20 the Respondent. The sitting is suspended.
21

22 **(Short break)**
23

24 **THE PRESIDENT:** Good afternoon. As indicated earlier, we resume the suspended
25 sitting and I now turn to the Representative of the Respondent to take the floor or at
26 least to indicate how you wish to divide your time.
27

28 **MR ZAGAYNOV:** Mr President, with your indulgence, I would kindly request you to
29 invite Professor Golitsyn to present the Rejoinder on behalf of the Respondent.
30

31 **THE PRESIDENT:** Thank you. Professor Golitsyn, would you please take the floor?
32

33 **PROFESSOR GOLITSYN:** Mr President, distinguished judges, first I would like to
34 address the issue of the Russian-Japanese cooperation in combating illegal fishing,
35 which was raised by the Applicant this afternoon.
36

37
38 The Russian Federation has never accused our Japanese partners of non-
39 cooperation in fishery matters. On the contrary, this morning it was explicitly pointed
40 out in our presentation that we have a long history of such cooperation with Japan.
41

42 In this spirit of this cooperation, we repeatedly expressed to the Japanese side our
43 readiness to settle any problems, including the present dispute, by bilateral
44 negotiations or consultations. However, the Applicant preferred to refer to the
45 judicial means of settlement.
46

47 What we say, however, is that the Japanese side does not fully comply with its
48 obligations under international law, including paragraph 1 of Article 4 of the 1984
49 Russian-Japanese Agreement in the field of fisheries off the coasts of the two
50 countries. Pursuant to the provisions of this agreement, each contracted party has

1 to take all the necessary measures to ensure that its nationals and fishing vessels
2 conducting fisheries in the zone of the other party observe measures for the
3 conservation of the living resources and other provisions and conditions established
4 by the laws and regulations that party.

5
6 On the other hand, the fact of the debt of Japanese companies for non-payment of
7 fines and compensation for damages awarded cannot be denied. This matter is also
8 another serious concern for the Russian Federation.

9
10 As for the allegation of the Japanese side that they have never agreed with the
11 criteria established by the Russian side for calculating the amount of a bond in case
12 of the detention of Japanese fishing vessels in the Russian EEZ, we would like to
13 note the following. All the documents of the Joint Commissions are always
14 discussed in detail in the course of their sessions. Protocols of such sessions are
15 submitted for signature to the Representatives of the two countries only after the text
16 of the Protocol, its Annexes, and other documents related to them, clarifying their
17 provisions have been discussed and all possible disagreements have been resolved
18 through bilateral consultations.

19
20 This has also been the case with the Annexes relevant to this dispute. Moreover,
21 Japan has never objected to their content. It is true that Russia only recently began
22 to apply the criteria enumerated in those Annexes, but the Japanese side was
23 promptly informed about this new practice.

24
25 Concerning the inconsistency between the Russian and Japanese texts of the
26 relevant Annexes, it is worth mentioning that indeed, according to the Protocols, only
27 two languages are used by the Joint Commissions and there is no official text in
28 English. As these Annexes contain the rules established by the Russian authorities,
29 however, it is obvious that the original text is Russian and that the Japanese text is
30 purely its translation. Therefore, the Russian text should be used for the purposes of
31 the interpretation of that particular Annex.

32
33 The term used in the Russian text – “tools of offence” or, literally, “tools to commit an
34 offence” – is taken from the Code of the Administrative Offences of the Russian
35 Federation, which treats a vessel as one of the possible tools of offence. Moreover,
36 according to our experts, the difference between the Russian and Japanese texts is
37 only in one hieroglyph, so it could be either a mistake in the translation or just a
38 technical error.

39
40 As for the limit of 100,000 roubles, it is precisely when the potential fine exceeds this
41 limit that the criteria set out in the relevant Annexes to the Protocols of the Joint
42 Commission should apply.

43
44 Turning now to the legal arguments presented this afternoon, we would like to state
45 the following. We share what was stated by Professor Lowe on the issue of the time
46 frame. We agree that although the two parties differ on the question of terminology
47 regarding the issue of the time frame for the setting of a bond or other security, the
48 parties are actually in agreement, or at least their approaches to this issue are not so
49 different. It appears that both the Russian Federation and Japan proceed on the
50 understanding that paragraph 2 of Article 73 of the Convention requires that a

1 reasonable bond or other security should be set without undue delay within a
2 reasonable period of time. Therefore, the crucial issue remains the reasonableness
3 of the bond.

4
5 In his statement, Professor Lowe alleged that under the applicable national
6 regulations and procedures of the Russian Federation, the setting of a bond should
7 always be done at the highest possible level and should include the cost of the
8 detained vessel, based on the assumption that this vessel could be confiscated. In
9 that regard, he argued that the value of the arrested or detained vessel should not be
10 included in cases of lesser offences. It is our understanding that at the same time he
11 concurred that in cases where grave violation of national laws and regulations of the
12 coastal state foresee a possible confiscation of the vessel upon completion of the
13 court proceedings, the value of the vessel may be included in the bond set by the
14 competent authorities of the coastal state. He referred to the relevant provisions of
15 the Convention on the Law of the Sea and stated that this type of approach would be
16 consistent with those provisions of the Convention.

17
18 We believe that again there is not much difference in general between our two
19 approaches to the issue of reasonableness of bond. However, contrary to what was
20 stated by Professor Lowe, the applicable Russian procedures and regulations do not
21 foresee automatic inclusion of the value of the arrested vessel into assessment of
22 the bond or other security that may be established by the coastal state for the
23 offences committed in its Exclusive Economic Zone. Actually, the Russian law
24 provides exactly what Professor Lowe stated, namely, that in assessing what should
25 be a reasonable bond in a particular situation, the competent Russian authorities are
26 required under the applicable regulations and procedures to take into account the
27 nature and gravity of the offences committed in its Exclusive Economic Zone.

28
29 Consequently, only in those cases where it is determined that the gravity of the
30 offences so require is the value of the vessel included in the calculation of the bond.
31 Usually, what happens is that the value of the vessel is included in the calculation of
32 bond mostly in those cases where the violation is of such a grave nature that the
33 applicable national law foresees that the court should decide on the confiscation of
34 this vessel because of the gravity of the offence.

35
36 In this regard, we would like to inform the distinguished Tribunal that in the last two
37 years there have been about 20 cases where it has been determined that the
38 committed offences were of such a grave nature that, by the respective decisions of
39 Russian courts, the fishing vessels involved in these offences have been
40 confiscated.

41
42 We therefore fully agree with Professor Lowe's statement that in deciding on the
43 amount of bond the competent authorities should be guided by a consideration that
44 the level of the bond should be commensurable with the offences committed by the
45 violator. It should be observed at the same time that in the *Hoshinmaru* case, which
46 is before the Tribunal, we are dealing with offences that are of a grave nature and
47 therefore the value of the vessel under the applicable Russian procedure is to be
48 included in the calculation of the bond.

1 Finally, we would like to comment on what was stated by Professor Lowe with regard
2 to the reference by the Respondent in one of its oral presentations on a hypothetical
3 situation that might arise in the *Hoshinmaru* case. He stated in this regard that the
4 Tribunal should base its conclusions only on undisputed facts and not on
5 hypothetical considerations. As he put it, people should not be punished for crimes
6 that they have not committed.

7
8 In response to this comment, we would like to observe that our reference to
9 hypothetical situation was included as a reaction to a hypothetical situation which he
10 had presented in his statement during the oral hearings that took place yesterday.
11 We fully agree with him that in the *Hoshinmaru* case we should deal with real facts
12 and actual offences. This is where we differ because, as has been determined by
13 the competent Russian authorities in the course of the thorough investigation of this
14 case, the owner and the Master of the vessel have committed serious offences of a
15 grave nature and that this should be taken into account by the Tribunal.

16
17 Professor Lowe further stated that the long list of the Master's actions with regard to
18 fishing – false reporting, substitution of fish species false information in the logbook,
19 etc – does not constitute a series of offences but the elements of one offence, and
20 that the length of the list does not aggravate the offence. The Respondent would like
21 to emphasize in this regard that every point on this long list constitutes a separate
22 offence which is punishable under the applicable Russian national law. The Master
23 employed a strategy of “covering up the traces”. This was a carefully planned
24 offence based on a complex mixture of fraud and misrepresentation of facts.

25
26 Thank you for your kind attention.

27
28 **THE PRESIDENT:** Thank you, Professor Golistyn. Mr Zagaynov, I presume this
29 ends the presentation from your delegation?

30
31 **MR ZAGAYNOV:** That is right, Mr President.

32
33 **THE PRESIDENT:** Thank you very much indeed. As I said earlier, the final
34 submissions are going to be read on Monday but since both Agents have asked to
35 see me after the end of this sitting, could I please ask, not only the Agents but the
36 counsellors who accompany them, to see me in, let us say, ten minutes in the room
37 behind my office where we met the first time.

38
39 Thank you very much. That brings us to the end of this sitting. The Tribunal will
40 resume the oral proceedings on 23 July 2007. At that sitting each party will present
41 to the Tribunal its final submissions in accordance with Article 75(2) of the Rules.

42
43 The Tribunal's sitting is now closed.

44
45 **(The hearing adjourned at 18.15)**