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

MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD ON 21 AND 23 JULY AND 6 AUGUST 2007

The "Tomimaru" Case
(Japan v. *Russian Federation), Prompt Release*

PROCES-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
DES 21 ET 23 JUILLET ET DU 6 AOUT 2007

Affaire du « Tomimaru »
(Japon c. Fédération de Russie), prompte mainlevée

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the uncorrected verbatim records.

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En vue de faciliter l’utilisation de l’ouvrage, le présent volume comporte, outre une pagination continue, l’indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux non corrigés.

Minutes of the Public Sittings
held on 21 and 23 July and 6 August 2007

Procès-verbal des audiences publiques
des 21 et 23 juillet et du 6 août 2007

PUBLIC SITTING HELD ON 21 JULY 2007, 10.00 A.M.

Tribunal

Present: *President* WOLFRUM; *Vice-President* AKL; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, TREVES, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, TÜRK, KATEKA *and* HOFFMANN; *Registrar* 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,

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,
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as Co-Agent;

Mr Alexey Monakhov,
Head of Inspection, State Sea Inspection, Northeast Coast Guard Directorate, Federal Security Service,

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,
Attaché, Legal Department, Ministry of Foreign Affairs,

Ms Diana Taratukhina,
Desk Officer, Legal Department, Ministry of Foreign Affairs;

as Advisers.

AUDIENCE PUBLIQUE DU 21 JUILLET 2007, 10 H 00

Tribunal

Présents : M. WOLFRUM, *Président*; M. AKL, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, TREVES, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, TÜRK, KATEKA *et* HOFFMANN, *juges*; M. GAUTIER, *Greffier*.

Le Japon est représenté par :

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comme agent;

M. Tadakatsu Ishihara,
Consul général du Japon, Hambourg, Allemagne,

comme co-agent;

et

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Directeur, Division internationale des affaires juridiques, Ministère des affaires étrangères,

M. Kazuhiko Nakamura,
Directeur adjoint principal, Division des affaires russes, Ministère des affaires étrangères,

M. Ryuji Baba,
Directeur adjoint, Division des océans, Ministère des affaires étrangères,

M. Junichi Hosono,
Fonctionnaire, Division internationale des affaires juridiques, Ministère des affaires étrangères,

M. Toshihisa Kato,
Fonctionnaire, Division des affaires russes, Ministère des affaires étrangères,

Mme Junko Iwaishi,
Fonctionnaire, Division internationale des affaires juridiques, Ministère des affaires étrangères,

M. Hiroaki Hasegawa,
Directeur, Division des affaires internationales, Département de la gestion des ressources, Agence des pêcheries du Japon,

M. Hiromi Isa,
Directeur adjoint, Division des pêches dans les mers lointaines, Département de la gestion des ressources, Agence des pêcheries du Japon,

M. Tomoaki Kammuri,
Inspecteur des pêches, Division des affaires internationales, Département de la gestion des ressources, Agence des pêcheries du Japon,

comme conseils;

M. Vaughan Lowe,
professeur de droit international, Université d'Oxford, Royaume-Uni,

M. Shotaro Hamamoto,
professeur de droit international, Université de Kobe, Kobe, Japon,

comme avocats.

La Fédération de Russie est représentée par :

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Directeur adjoint, Département juridique, Ministère des affaires étrangères de la Fédération de Russie,

comme agent;

M. Sergey Ganzha,
Consul général de la Fédération de Russie à Hambourg,

comme co-agent;

M. Alexey Monakhov,
Chef du Service Inspection, Inspection maritime d'Etat, Direction des gardes-côtes de la frontière Nord-Est, Service fédéral de sécurité de la Fédération de Russie,

M. Vadim Yalovitskiy,
Chef de division, Département des affaires internationales, Ministère public de la Fédération de Russie,

comme agents adjoints;

et

M. Vladimir Golitsyn,
professeur de droit international, Université d'Etat des relations extérieures, Moscou,

M. Alexey Dronov,
Chef de Division Département juridique, Ministère des affaires étrangères de la Fédération de Russie,

M. Vasiliy Titushkin,
Conseiller principal, Ambassade de la Fédération de Russie aux Pays-Bas,

M. Andrey Fabrichnikov,
Conseiller principal, Premier département des affaires étrangères de la Fédération de Russie,

M. Oleg Khomich,
Procureur militaire principal, Ministère public de la Fédération de Russie,

comme conseils;

Mme Svetlana Shatalova,
Attachée, Département juridique du Ministère des affaires étrangères de la Fédération de Russie,

Mme Diana Taratukhina,
Chargée de dossier, Département juridique du Ministère des affaires étrangères de la Fédération de Russie,

comme conseillères.

Opening of the Oral Proceedings
[PV.07/04, E, p. 1–2]

The Registrar:
On 6 July 2007, an Application was filed by Japan against the Russian Federation for the prompt release of the fishing vessel *Tomimaru*. The Application was made under article 292 of the United Nations Convention on the Law of the Sea.

The case has been entered in the List of cases as Case No. 15 and named *The "Tomimaru" Case (Japan* v. *Russian Federation*), *Prompt Release*.

Today, the hearing in this case will be opened. Agents and Counsel for both Japan and the Russian Federation are present.

Mr President.

The President:
This is a public sitting held pursuant to article 26 of the Statute of the Tribunal to hear the parties present their arguments and evidence in the "*Tomimaru" 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 the *53rd Tomimaru* (hereinafter "the *Tomimaru"*) in breach of the Respondent's obligations under Article 73(2) of the Convention;
> (b) to declare that the application is admissible, that the allegation of the Applicant is well-founded, and that the Respondent has breached its obligation under Article 73(2) of the Convention; and
> (c) to order the Respondent to release the vessel of the *Tomimaru*, upon such terms and conditions as the Tribunal shall consider reasonable."
>
> Mr President.

The President:
By letter dated 6 July 2007, a copy of the Application was transmitted to the Russian Federation.

By Order dated 9 July 2007, the President of the Tribunal fixed 21 July 2007 as the date for the opening of the hearing in the case.

On 17 July 2007, the Russian Federation filed its Statement in Response.

I now call on the Registrar to read the submissions 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.

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.

Following consultations with the Agents of the parties, it has been decided that the Applicant, Japan, will be the first to present its arguments and evidence. Accordingly, the Tribunal will hear Japan first. This afternoon, the Tribunal will hear the Russian Federation.

I now give the floor to the Agent of Japan. I have been informed that he will be followed by Professor Lowe. Mr Komatsu, please.

Plaidoirie du Japon

EXPOSÉ DE M. KOMATSU
AGENT DU JAPON
[PV.07/04, E, p. 4–6, F, p. 2–6]

M. Komatsu :
Monsieur le Président, distingués membres du Tribunal international du droit de la mer et distingués représentants de la Fédération de Russie. C'est un grand honneur, pour moi, de faire cet exposé au cours de cette audience publique du Tribunal, à nouveau en tant qu'agent du Gouvernement du Japon, après l'exposé concernant l'affaire du *88 Hoshinmaru* il y a deux jours.

Comme je l'ai fait pour l'*Affaire du « Hoshinmaru »*, je récapitulerai les faits et les conclusions. Après mon exposé, notre avocat, le professeur Vaughan Lowe, de l'Université d'Oxford, donnera les détails de notre position juridique.

Dans mon exposé au début de la précédente audience publique traitant de l'*Affaire du « Hoshinmaru »*, j'ai indiqué la position du Gouvernement du Japon quant à l'obligation établie par l'article 73, paragraphe 2, de la Convention des Nations Unies sur le droit de la mer, ainsi que la nature des affaires de prompte mainlevée, cherchant à faire respecter cette obligation. Je ne le répéterai pas, alors que c'est également la base de mon exposé aujourd'hui, pour l'affaire du *53 Tomimaru*.

Monsieur le Président, maintenant, permettez-moi de récapituler brièvement les faits. Le *53 Tomimaru* est un navire de pêche possédé et géré par une compagnie japonaise, *Kanai Gyogyo*. Il a été de nationalité japonaise pendant toute la période qui nous concerne et la conserve actuellement. Le *Tomimaru* était engagé dans la pêche au lieu de l'Alaska dans la zone économique exclusive de la Fédération de Russie, dans la mer de Béring, conformément à une licence accordée par le Gouvernement de la Fédération de Russie. Après la pêche dans la mer de Béring, en route pour le port de Kushiro, Japon, il a été abordé par les autorités de la Fédération de Russie pour une inspection, le 31 octobre 2006, au large des côtes de la péninsule du Kamtchatka et le navire s'est vu ordonné de se diriger vers le port de Petropavlovsk-Kamtchatskii où il est arrivé le 2 novembre 2006. Cet ordre lui a été donné alors même qu'aucune charge ou allégation de violation des lois et règlements russes n'avait été mentionnée lors de l'abordage.

Toutefois, un officiel russe à bord du *Tomimaru* a signalé, pendant le voyage jusqu'au port de Petropavlovsk-Kamtchatskii, la différence entre la quantité réelle de poissons transportés par le navire et la quantité enregistrée dans son carnet de bord. Veuillez voir l'annexe 3.

Depuis lors, cela fait plus de huit mois – je répète : huit mois – que le navire est détenu, sans qu'aucune caution ou garantie ne soit fixée par la Fédération de Russie au sens de l'article 73, paragraphe 2, de la Convention, et ce en dépit des demandes répétées émises par le Japon.

Les procédures administratives contre le propriétaire du *Tomimaru* et son capitaine, ainsi que les procédures pénales contre le capitaine, ont été instituées début novembre 2006. Au cours des investigations pour ces procédures, les autorités russes ont auditionné tous les 21 membres d'équipage, comprenant 14 ressortissants japonais. Elles ont terminé les auditions de tous les membres d'équipage, à l'exception du capitaine, respectivement le 29 novembre 2006 au plus tard pour les procédures administratives, et le 7 décembre 2006 au plus tard pour les procédures pénales. Les autorités russes ont expliqué, en réponse à une requête du Gouvernement japonais, que les membres de l'équipage – veuillez voir annexes 5 et 19 – n'étaient pas en détention, à l'exception du capitaine contre lequel des mesures de

contrainte avaient été prises sous la forme d'un serment écrit de ne pas quitter Petropavlovsk-Kamtchatskii et de bien se comporter. Toutefois, comme le navire lui-même était retenu, l'équipage n'avait d'autre choix que de rester à bord pour en assurer la maintenance et la surveillance.

En février 2007, la Fédération de Russie a formé un recours au sujet de la saisie du navire et a ordonné à l'équipage de quitter le navire. Résultat : avant le 29 mars 2007, l'équipage, à l'exception du capitaine, a été contraint de partir pour le Japon. Le capitaine, toutefois, est resté consigné à Petropavlovsk-Kamtchatskii sur ordre des autorités russes, même après le départ du reste de l'équipage. Finalement, le capitaine est rentré au Japon le 31 mars 2007, environ deux mois après le retour des autres membres de l'équipage, c'est-à-dire près de sept mois – je répète : sept mois – après l'arraisonnement du navire.

Pendant toute cette période, le Gouvernement du Japon a insisté à maintes reprises, auprès de la Fédération de Russie, pour qu'elle fixe une caution raisonnable et qu'elle libère promptement le navire ainsi que l'équipage une fois la caution fournie. De plus, le propriétaire du navire n'a également cessé d'adresser les mêmes requêtes auprès des autorités russes. Le fait est que, malgré ces requêtes répétées et ininterrompues émanant du Gouvernement du Japon et du propriétaire, le navire n'a toujours pas été libéré. La demande de la part du Japon pour que la Fédération de Russie respecte ses obligations prévues par la Convention des Nations Unies sur le droit de la mer est tombée dans des oreilles sourdes. Le Japon a épuisé en vain tous les autres recours. Aujourd'hui, Monsieur le Président, en dernier ressort, le Japon soumet, à regret, l'affaire au Tribunal international du droit de la mer.

En termes de procédures internes, au niveau de la Fédération de Russie, les procédures pénales contre le capitaine, tout comme les procédures administratives contre le propriétaire et contre le capitaine, ont été lancées, comme je l'ai mentionné précédemment. Pour ce qui est des procédures pénales contre le capitaine, l'enquête a été menée contre le capitaine et les membres d'équipage. L'affaire a été portée devant le tribunal d'instance de Petropavlovsk-Kamtchatskii, le 2 mars 2007. Depuis lors et jusqu'à ce jour, six audiences publiques ont été tenues et, le 15 mai 2007, le tribunal d'instance a rendu son jugement ordonnant au capitaine de payer une amende et des dommages intérêts. Le capitaine a fait appel, devant le tribunal régional de Kamtchatka, le 25 mai 2007. Cependant, l'affaire est toujours en cours.

Quant aux procédures administratives contre le propriétaire, ce dernier est encore en appel devant la Cour suprême, contestant la décision des tribunaux inférieurs de confisquer le navire. La Russie plaide, dans son exposé en réponse, que le *Tomimaru* a été enregistré comme propriété de la Fédération de Russie dans le registre fédéral de propriété, conséquence de cette confiscation contestée, et que la demande de la part du Japon n'est pas recevable. Notre avocat argumentera, par la suite, en détail sur ce point.

A ce stade, j'aimerais simplement souligner deux choses :

1) la décision de confiscation est toujours contestée par l'appel du propriétaire devant la Cour suprême de la Fédération de Russie;

2) de toutes les façons, une mesure interne de confiscation basée sur des lois internes russes n'est pas opposable au Japon, qui est l'Etat du pavillon du navire au point de vue du droit international et, de toute manière, il s'agit d'une affaire distincte du changement de nationalité du navire. Comme il est indiqué dans l'annexe au recours, le *Tomimaru* conserve, de manière indiscutable, la nationalité japonaise non seulement au moment où le recours a été formulé, mais aussi au moment où je vous parle.

(Continuing in English) Mr President, let me turn to the situation of the crew from a humanitarian point of view. The Master had been detained for seven months and the other members of the crew had also been compelled to stay aboard the *Tomimaru* for several months. I have to emphasize again that this caused real and significant hardship to all the

crew members. None of the crew, including the Master, understands the Russian language at all. They were detained in very stressful circumstances in a foreign country where they were unable to communicate with the detaining authorities, even to explain their predicament in the most basic way, and they were detained in those conditions for a very long time.

The timing was particularly difficult. Early January is the most important festive time of the new year, or *Shogatsu*, for all Japanese people. It is the equivalent of Christmas in the Christian culture. The Japanese crew have been raised in a culture in which families and relatives gather in their home towns at the beginning of a new year and look back together at the past year. From this perspective, I would like the honourable Judges of this auspicious Tribunal to imagine the particular distress of the crew who had to stay in a foreign country, in a freezing climate, far from their loved ones at this traditional season.

As I emphasized in my statement regarding the *"Hoshinmaru" Case*, we believe that the causes of these problems and of the lengthy detention are basically attributable to the Russian domestic legal procedures in which both administrative and criminal proceedings unfold themselves separately and cumulatively without any coordination between each other. As a result, the obligation of the prompt release upon the posting of a reasonable bond is not fulfilled by the Russian Federation. For example, where the local prosecutor's office, which is mainly in charge of criminal proceedings, sets a bond, the local border coast guard and the regional court that deal with administrative proceedings often have not set a bond. The positions of the respective authorities on the question of setting bonds are not coordinated at all. No cohesive explanations are given. These problems are exactly what the owner of the *Tomimaru* had to face.

Let me explain the situation that the owner of the *Tomimaru* was forced to cope with. After the *Tomimaru* was arrested at the beginning of November 2006, the inspection had been carried out by officials of the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation. Neither a bond nor other security was set in that process. The criminal proceedings had been instituted by the Inter-district Prosecutor's [Office] for Nature Protection in Kamchatka, and the administrative proceedings had been carried out by the Northeast Border Coast Guard Directorate of the Federal Security Service.

On 12 December 2006, the damages were set in the amount of 8,800,000 roubles, that is, approximately US$ 350,000, by the Inter-district Prosecutor's [Office] for Nature Protection in Kamchatka, which is in charge of the criminal proceedings against the owner of the vessel, as shown in annex 36. Subsequently, on 14 December 2006, the owner presented a petition to the Northeast Border Coast Guard Directorate for a bond to be fixed to enable the *Tomimaru* to leave for Japan, as annex 37 shows. On 15 December 2006, in response to the petition, he was informed that this case had been filed with the Petropavlovsk-Kamchatskii City Court and that the Directorate had no authority to deal with the petition, as shown in annex 38. On 18 December 2006, the owner presented a petition requiring the bond to be set to the Petropavlovsk-Kamchatskii City Court during the administrative proceedings, as annex 39 shows.

According to the letter dated 19 December 2006, addressed to the owner of the vessel from a judge of the Petropavlovsk-Kamchatskii City Court, which appears at annex 6, "the provisions of the Code of Administrative Offences of the Russian Federation do not provide the possibility of releasing a property after posting the amount of bond by the accused on the case of administrative offences", and it decided to "reject the petition" to release the *Tomimaru* upon the posting of a bond or other security. Consequently, the vessel has not been released. The lower court issued an order for the confiscation of the vessel but would not set a bond that would actually secure the release of the vessel and the Master.

Mr President, one is really at a loss to try to understand the consistency between the above interpretation by the Petropavlovsk-Kamchatskii City Court of the Russian law,

namely that "the provisions of the Code of Administrative Offences of the Russian Federation do not provide the possibility of releasing a property after posting the amount of bond by the accused on the case of administrative offences", on the one hand, and the setting of the bond in the *"Hoshinmaru" Case* on 13 July 2007, immediately after Japan filing the case before the ITLOS, on the other. What is clear, however, is that the vessel and the crew would not have been released finally even if the owner had paid the damages of 8,800,000 roubles set on 12 December 2006.

In short, with regard to the *Tomimaru*, a bond, within the meaning of the provisions of article 73, paragraph 2, of the UNCLOS, namely a bond the posting of which will secure the actual release of the vessel and the Master, has never been set. In paragraph 77 of the Judgment in the case of the *MV "SAIGA"*, it is stated:

> "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."

The provisions and procedures of Russian law are not themselves the subject of this prompt release litigation. It is, of course, for Russia to decide for itself exactly how it conforms to its legal obligations under the Convention in prompt release cases. But once again I express our hope that the Russian Federation might consider whether for the future it needs to put in place new procedures that facilitate the discharge of the obligations to which it has committed itself in the Convention.

Mr President, it is evident that the ITLOS has jurisdiction over this case, and I would like to request the Tribunal, as the guardian of the law of the sea, to declare that the Russian Federation has breached its obligation under article 73, paragraph 2, of the UNCLOS and to order the Russian Federation to release the vessel *Tomimaru* upon such terms and conditions as the Tribunal shall consider reasonable.

As I stated in the public sitting with regard to the *"Hoshinmaru" Case*, Japan chose the Tribunal as a forum to achieve a peaceful settlement of this dispute, responding to the repeated breach of international rules by the Russian Federation. Once again, I renew the pledge of the Government of Japan to contribute to the strengthening of the rule of law in the international community by proactively utilizing international adjudication.

I would also like to reiterate that Japan, as a responsible fishery State, is determined to redouble its efforts to ensure the sustainable use of living resources in the ocean and the conformity of vessels flying its flag with the properly enacted laws of coastal States. Japan is committed to fulfil the agreement into which it entered in the 1982 Convention, and it asks that the Russian Federation be held to its commitment, too.

Mr President, I thank you for your attention.

The President:

Thank you, Mr Komatsu, for your statement.

May I now call upon Professor Lowe.

STATEMENT OF MR LOWE
ADVOCATE OF JAPAN
[PV.07/04, E, p. 6–22]

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

Mr President, I anticipate that my submissions will take something of the order of an hour, but there are limits to human endurance and it may be that you would prefer to have a break in the middle of that at about 11 o'clock rather than do a straight 90-minute stretch. Thank you.

The parties are again in this case largely in agreement as to the rules and principles that are applicable in this case and, to the extent that there are differences between us, many of those differences have been put before you in the hearing in the *"Hoshinmaru" Case*. I am not going to repeat our submissions made in that case but I should state for the record that we reaffirm the propositions that we put forward in that case over the last two days.

In this case, the Respondent does not challenge the jurisdiction of the Tribunal. Both States are parties to the Convention which is in force between them. It is accepted that the *Tomimaru* was initially flying the Japanese flag when arrested – and I shall return a little later to the question of its nationality at the time of the application and the present moment. It is common ground that the vessel is detained, although the parties have different views of the character of that detention and of the reasons for it. And the application in this case was duly made. The *Tomimaru* was initially detained under Russia's EEZ fishery laws, which fall clearly within the scope of article 73 of the Convention, and you will find the relevant laws listed on page 2 of the report of the Russian Federal Security Service dated 5 November 2006, which appears as Respondent's annex 1. There is no agreement to submit this matter to any other court or tribunal; and the Application has been duly made in accordance with the Tribunal's Rules.

The Russian Federation does, however, raise three objections to the admissibility of this Application. First, that it is inadmissible because a reasonable bond was set; second, that it is inadmissible because the vessel was confiscated; and third, that the request that the Tribunal order the Respondent to release the *Tomimaru* "upon such terms and conditions as the Tribunal shall consider reasonable" is too vague and general.

That last, third, objection is the same as the objection made in the *"Hoshinmaru" Case* and Japan's response to it is the same as it was in that case. The nature and purpose of article 292 proceedings is clear and well-known to the Russian Federation and the Application quite properly asks the Tribunal to exercise its 292 powers to set a reasonable bond. I will not repeat our earlier argument but we adopt it here for the purposes of the present case, and I shall say no more about it.

That leaves two objections to admissibility: that a reasonable bond was set, and that the *Tomimaru* has been confiscated.

I should say at this stage that we consider this case to be very different from the case of the *Hoshinmaru*. As the *"Hoshinmaru" Case* developed it came to focus on the central question of the approach to the determination of a reasonable level at which to set a bond and, in particular, on the question of principle of immense practical importance to the fishing community, whether the value of a ship should be factored into the amount of the bond even in cases where the lesser gravity of the offence means that the confiscation of the vessel is not a realistic possibility.

This case, in contrast, focuses more on deficiencies in the process leading to the setting of the bond than it does on the level of the bond itself. Because of its focus on the adequacy of Russia's prompt release procedures, I am afraid that I need to take you in some detail through the facts of the case, and I hope that you will bear with me as I do.

The *Tomimaru* was licensed to fish in Russia's EEZ for the three months from 1 October 2006 to 31 December 2006. The licence is set out at annex 2 of the Application, which is a translation of the fishing licence issued by the Russian Federation to the *Tomimaru*. It was licensed to catch 1,163 tons of walleye pollack and 18 tons of herring.

As our Agent has said, it was boarded by Russian officials in the Russian EEZ on 31 October 2006. The Russian Federal Security Service said in the report of 5 November 2006, which appears as Respondent's annex 1, that it was stopped at a point 52°30" North and 160°17" East. The report also notes that the *Tomimaru* was detained and conveyed to the port of Petropavlovsk-Kamchatskii.

On 9 November 2006 the note verbale reproduced at annex 3 of the Application was sent to the Japanese Consul by a representative of the Russian Foreign Ministry. It noted that the *Tomimaru* was entitled to catch 1,163 tons of pollack but that not less than 20 tons of unregistered walleye pollack had been found on board. It also had on board 19.5 tons of halibut, 3.2 tons of ray, 4.9 tons of cod and not less than 3 tons of other fish, which it was forbidden to catch.

This was not a case of an alleged misrecording of a lawful, licensed catch, as in the *Hoshinmaru*. This was a case of catching species that the vessel was not licensed to catch, a clear case of unlawful fishing. On the other hand, the quantities need to be borne in mind. The ship was licensed to catch 1,163 tons of pollack, and it had 20 tons of unregistered pollack on board, that is, just over two per cent – two per cent of its authorized catch was not registered. In addition, it had just over 30 tons of fish on board that it had no right to catch in the Russian EEZ. That puts the offence into some kind of perspective.

According to paragraph 9 of Russia's Statement in Response, on 8 November criminal proceedings in case number 640571 – a number which we will hear later – were instituted against the Master of the *Tomimaru* on suspicion of the crimes in Article 253 of the Russian Criminal Law. The Master was asked to sign an undertaking not to leave the city of Petropavlovsk-Kamchatskii.

Annex 1 to Russia's Statement says on page 2 that legal proceedings regarding an administrative offence were instituted against the Master one week earlier, on 2 November, and I should note in passing, President, that the catch statistics in the report which appears as Respondent's annex 1 are incorrect. It says that the *Tomimaru* had caught 614,286 tons – over half a million tons – of pollack, which is a quite impossible figure. The real figure, as is clear from the decision of the Petropavlovsk court in Respondent's annex 6 at page 2, is 614,286 kilograms, and the other references in that report should also be to kilograms and not to tons.

The Representative Office of the Russian Ministry of Foreign Affairs wrote to the Japanese Consul-General on 9 November notifying it of the criminal proceedings. That note appears as Applicant's annex 3. The note also stated that the illegal catch had caused environmental damages to the resources of the Russian EEZ equivalent to not less than 8.5 million roubles. According to Russia's Statement, paragraph 11, on 14 November administrative proceedings were instituted against the owner of the *Tomimaru* alleging a violation of the Russian Code of Administrative Offences.

So now we have two sets of proceedings: the criminal proceedings against the Master, and the administrative proceedings against the owner. There is also the question of the environmental damages that have to be paid.

On 30 November the *Tomimaru*'s owners wrote to the Russian Federal Security Service North East Border Coast Guard Directorate. You will find that letter at Respondent's annex 2. The owners wrote to apologize for the actions of the Masters of their ships and to "guarantee payment of all appropriate penalties provided for in the Russian legislation" and to request the prompt release of the vessels against the posting of a reasonable bond.

On 1 December 2006 the Japanese Consul was informed by the Russian Federal Security Service in a letter that you will find set out as Applicant's annex 4 that, as was already known, the criminal cases had been established against the Masters of the *Tomimaru* and another vessel. It then said in the paragraph at the bottom of the first page of the letter that the vessels had "been identified as real evidence and attached to the document of the criminal cases."

The Federal Security Service letter of 1 December continued as follows:

> "The solution of the problem concerning the release of the abovementioned vessels and the posting of a bond as a guarantee of the investigation, as well as any kind of information concerning the progress of and perspective for the criminal case are under the exclusive competence of the Inter-district Prosecutor for Nature Protection in Kamchatka."

That was on 1 December and on the very same day, 1 December 2006, the Inter-district Prosecutor's Office for Nature Protection in Kamchatka wrote to the Japanese Consul, and you will find that letter in Respondent's annex 3. It said that in the criminal case filed against the Master of the *Tomimaru*, filed in November, he was accused of committing environmental damage of not less than 8.5 million roubles.

The 1 December letter from the Prosecutor's Office recalled on page 2 that the vessel, the *Tomimaru* itself, had been recognized as material evidence in the case under Article 82 of the Russian Code of Criminal Proceedings.

It further noted that the Master was obliged to stay in Petropavlovsk-Kamchatskii until the trial. It also addressed the prompt release duty under UNCLOS, saying in the bottom two paragraphs on page 2 of that letter:

> "Your arguments as regards the alleged violation of Article 73, paragraph 2, and Article 292, paragraph 1 of the UN Convention on the Law of the Sea are not quite proper, since according to Article 73, paragraph 1, and Article 292, paragraph 3 of the Convention, the release of the vessel takes place after the coastal State has taken all necessary measures as may be necessary to ensure compliance with the laws and regulations, including judicial proceedings, without prejudice to the merits of the case against the detained vessel, its owner or its crew, remaining competent to release the vessel or its crew at any time."

The point being made here is clear. On Russia's reading of the prompt release provisions, it *may* release the vessel and crew at any time if it wishes, but it is not *obliged* to release them until it has "ensured compliance with" its laws and regulations and judicial proceedings. And, as the obligation imposed on the Master of the *Tomimaru* to stay in Petropavlovsk makes clear, that could mean detention right up to the time of the trial.

Japan does not accept this as a valid interpretation of the prompt release procedure. In fact, it considers it to be incompatible with the prompt release procedure. To say that a State is entitled to detain a master and a vessel until the trial has taken place, without setting any

bond for their release, is to say that there is no right to prompt release before the trial. That, in our submission, is a direct contradiction of what the States Parties to UNCLOS had agreed.

So, on 1 December 2006, two letters are sent to the Japanese Consul. One, sent by the Federal Security Service, describes the Prosecutor's Office for Nature Protection as having "the exclusive competence" to decide on prompt release. The other, sent by the Prosecutor's Office for Nature Protection, makes it clear that in its view there is no right to prompt release. Nonetheless, it is true that the Prosecutor's Office for Nature Protection did say at the end of its 1 December letter, in the last paragraph on p. 2, that:

> "all investigations in respect of the *53rd Tomimaru* and its crew have been completed. Temporary restrictive measures could be lifted; however, the owner of the vessel, who bears responsibility for unlawful actions of the Master, has not until now applied to provide a bond commensurate to the amount of incurred damage."

You will recall that the figure that was specified in relation to the incurred damage was 8.5 million roubles. At the end of the next paragraph of the letter on page 3 the letter said:

> "As to the decision regarding the release of the detained vessels, it will be taken after the bond has been posted to include the judicial costs in respect of the cases on the administrative offences against the legal entities, i.e. the ship owners."

What happens next? On 8 December, the owner of the ship asked the Prosecutor's Office for Nature Protection to determine a bond in respect of the vessel. The reference to that is in paragraph 13 of Russia's Statement in Response.

On 12 December, the Prosecutor's Office replied to the owner's request for the assessment of the damage done by the Master of the *Tomimaru*. That letter of 12 December, which is one of the most important in this case, appears as Respondent's annex 4. It says, at page 2 in the last paragraph, that the damage caused to the Russian Federation was estimated at 8.8 million roubles, a small revision of the earlier figure. It said:

> "After the money (bond) towards the voluntary compensation for the damage caused to the Russian Federation is received into the deposit account [and here details of the account follow], the Prosecutor's Office for Nature Protection will no longer prevent free operation of the *53rd Tomimaru* trawler."

It is a crucial passage and I shall read it again.

> "After the money (bond) towards the voluntary compensation for the damage caused to the Russian Federation is received … the Prosecutor's Office for Nature Protection will no longer prevent free operation of the *53rd Tomimaru* trawler."

The actual decision on the owner's petition for a bond is set out in Respondent's annex 7.

In the Respondent's Statement in Response in paragraph 16 it is said that:

> "Despite the fact that on 12 December 2006 a reasonable bond for the release of the vessel was set by the Inter-District Prosecutor's Office for Nature Protection in Kamchatka on 18 December 2006 the owner requested the Petropavlovsk-Kamchatskii City Court to set a reasonable bond for the release of the vessel."

You might quite reasonably wonder why. The explanation appears in the papers that are annexed to the Application. If you have the folder to hand, it may be worth turning to it. In the Applicant's annex 37 is set out the petition dated 14 December 2006 from the owner to the State Maritime Inspectorate of the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation. I shall read out the petition. It says this and it is headed:

> "Petition concerning the case of administrative offences
>
> The Inter-district Prosecutor's Office for Nature Protection in Kamchatka, by the letter dated 12 December 2006 no. 1-640571-06 [you will recognize there the number of the criminal case against the Master], has set the amount of a bond upon the posting of which the vessel will be released, within the criminal case established against the Master of the vessel "*53rd Tomimaru"*.
>
> Considering the aforementioned fact, I [the owner] request the amount of a bond be set for the case of administrative offences established against the owner of the vessel "*53rd Tomimaru"*.
>
> In order to make a remittance, I request to notify the information on the bank requisites in addition."

Then there is attached to it the letter of 12 December from the Inter-district Prosecutor's Office for Nature Protection.

The reason for the owner's action is plain. The Prosecutor's Office for Nature Protection had indicated a bond that would work for the criminal charges against the Master but would not affect the administrative offences with which the owner was charged. There were two locks on the door that held the *Tomimaru* and the "voluntary contribution" of 8.8 million roubles would only open one of the locks. The owner wanted to be told how much it would cost him to open the other lock, in the administrative case. The reaction of the owner is quite natural. Nobody would want to pay a fine if he was not assured that the payment would result in the release of the vessel.

I also have to say, Mr President, that although Russia now refers to the 8.8 million roubles as a bond, it appears to us not to be a bond but rather a compulsory payment that the owner was obliged to pay in respect of damage to the environment – what the Prosecutor's Office rather euphemistically called a "voluntary compensation" towards the damage.

Next, we come to Applicant's annex 38. This is the determination on the examination of that petition from the owner. It is dated 15 December 2006. In annex 38, the first paragraph introduces the writer. The second paragraph records that the owner of the *Tomimaru* had requested the State Maritime Inspectorate to fix a bond in the case of the administrative offences; that is a reference to the letter of the previous day, 14 December, that I have just mentioned. The third paragraph records that on 15 December, the day after the owner's petition and the day that this decision was being taken, the State Maritime

Inspectorate had sent the papers on the administrative offences to the Federal Court in Petropavlovsk-Kamchatskii and that "the examination hereafter and the adoption of decisions on this case will be carried out by the Federal court of Petropavlovsk-Kamchatskii City in Kamchatka district."

Then on the next page in the next paragraph it reaches this conclusion:

> "Therefore, it becomes impossible for the officials of the State Maritime Inspectorate of the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation to examine the contents of the received petition."

And so the petition was then sent on to the Federal Court.

At this point, the owner decided to make a request to the Petropavlovsk-Kamchatskii City Court to set a reasonable bond. He did so on 18 December. That letter is set out in Applicant's annex 39.

The court decided swiftly. On the following day, 19 December, it decided – I quote here from the Respondent's Statement in Response paragraph 17 – that "the provisions of the Code of Administrative Offences do not provide the possibility of releasing a property after posting the amount of bond by the accused in the case of administrative offences."

The Statement in Response continues in its paragraph 18 by saying: "This ruling has never been contested by the attorneys of the owner of the vessel, though from a legal point of view such an opportunity existed."

I shall draw the threads together a little later, but already at this point certain problems must be apparent.

The vessel is detained by the Federal Security Service. The Federal Security Service tells the owner that only the Prosecutor's Office for Nature Protection can settle a bond. The Prosecutor's Office for Nature Protection says that it is entitled to hold the vessel and crew until the trial, but that it is prepared to release them if the owner "voluntarily" pays a contribution of 8.8 million roubles – one-third of a million US dollars – towards the damage that it has caused. Then the Petropavlovsk City Court tells the owner that there is no possibility of releasing a property by posting a bond in the case of administrative offences.

Yet, in front of this Tribunal, Russia seems to be suggesting that the owner should have appealed this court decision, as if there was a duty to exhaust local remedies – a suggestion that this Tribunal plainly dismissed in the *"Camouco" Case* in paragraph 57 where the Tribunal said: "it is not logical to read the requirement of exhaustion of local remedies or any other analogous rule into Article 292."

The owner did not pay the 8.8 million roubles. It is a very large sum of money, and what would the owner have gained by it? A willingness on the part of the Prosecutor's Office for Nature Protection to release the vessel in so far as the criminal proceedings were concerned, but apparently no possibility of obtaining a release as far as the administrative proceedings were concerned, for the simple reason that, according to the Russian court, no such release is legally possible.

Russia may say that the owners do not understand the Russian legal system, but one must have a certain sympathy for an owner who wonders how to reconcile a right to prompt release with a court decision that no release of property by the posting of a bond is possible in the case of administrative offences.

It was against this background that, on 28 December 2006, the owners pleaded guilty to the administrative offences, as they had indicated that they would do in their letter of 30 November. The court – the Petropavlovsk-Kamchatskii City Court, which had said that no release from the administrative proceedings was possible – decided to confiscate the

Tomimaru. Extracts from the ruling of that court appear in translation as Respondent's annex 6. The ruling stated that it could be appealed in the Court of the Kamchatka Region within 10 days, which is becoming a rather familiar figure in prompt release cases.

The owner did appeal on 6 January 2007, and the appeal was dismissed on 24 January 2007. That judgment is set out at Respondent's annex 8.

Then, on 9 April of this year, the Russian Federal Agency that manages federal property included the *Tomimaru* in the Federal Property Register as property of the Russian Federation.

But the saga is not yet over. As paragraph 22 of Russia's Statement in Response records, the owner then took action under the supervisory review procedure regarding the decision of the Kamchatka District Court, and this matter is still before the Russian Supreme Court, which has not yet taken any decision on it. The owner has, as yet, heard nothing from the Supreme Court. The question of the confiscation still remains open before the Russian courts, as the Respondent admits, as you will see from paragraph 22 of the Statement in Response.

In the meantime, the Master had also remained in detention. The Prosecutor's Office for Nature Protection was petitioned to release the Master, but it refused, in January 2007. In a letter to the Japanese Consul, set out at Applicant's annex 33, dated 19 January – which is more than three months after the Master and vessel had been detained – the Prosecutor said – and I am reading from the paragraph beginning at the bottom of page 1 of that letter:

> "The Masters of the trawlers, Mr Matsuo Takagiwa and Mr Kenji Soejima, in accordance with the Criminal Procedural Law of the Russian Federation are obliged to present at the preliminary examination until its conclusion and also present at the judicial examination, therefore their stay in Petropavlovsk-Kamchatskii city is mandatory. In the course of the investigated criminal case, a compulsory measure in the form of a written oath not to leave Petropavlovsk-Kamchatskii city and to behave themselves was chosen for them."

It then goes on again to address Russia's understanding of the prompt release obligations under the Convention. It says:

> "The arguments of the possible non-compliance with Article 73(2) of the United Nations Convention on the Law of the Sea as well as the superiority of the Russian legal norms"

– that is a reference to arguments on Russian law that the Russian lawyers for the owner had put forward –

> "are not accurate. Articles 73(1) and 292(3) of the said Convention reserve the right of coastal States to release at any time the vessel and its crew, in this case the Master, and provide that, without prejudice to the merits of any case against the vessel, its owner or its crew, the vessel be released after having carried out all the necessary measures required to ensure compliance including the proceedings.
>
> Under this circumstance, it is not possible at this moment to permit Mr Matsuo Takagiwa and Mr Kenji Soejima to leave Petropavlovsk-Kamchatskii city, considering the conditions laid out in the

> Criminal Procedural Code of the Russian Federation and the fact that it is not possible to conclude the investigation on the abovementioned criminal cases and the examination of the Court in the absence of the accused."

Two locks on the vessel; another lock on the Master. This is not what Japan understands the prompt release obligations under the Convention to require.

I will not take you through any more of the facts, save to say that you will see in the annexed papers ample evidence that throughout this period both the Japanese Consulate and the owners were trying persistently to find a reasonable solution that would allow the vessel and the Master to be released. The solution that Japan sought from the Russian procedures is precisely the solution that the Convention prescribes: prompt release on the posting of a reasonable bond.

Mr President, that would be a convenient point at which to break and, with your permission, after the recess I will turn to an analysis of the implications of the facts that I have just explained.

The President:
Thank you very much, Professor Lowe. The Tribunal will now adjourn for approximately 20 minutes.

(Short break)

The President:
Professor Lowe, please.

Mr Lowe:
Thank you. Mr President, before the recess I took you through the facts in this case. Now, in a position where the Master and crew have been released but the vessel still remains detained, I would like to turn to the implications of the facts as Japan sees them.

My first point is relevant to the first of Russia's objections to the admissibility of the Application. In paragraph 34 of its Statement in Response, Russia says:

> "The application is moot because on 12 December 2006 the Inter-District Prosecutor's Office for Nature Protection in Kamchatka duly set a reasonable bond in the amount of 8,800,000 roubles and specified in its letter to the owner of the company that the Prosecutor's Office would allow free operation of the vessel upon the payment of the bond."

Let us consider that for a moment. Here is a vessel that is charged with having on board 20 tons of walleye pollack not listed in its logbook – it is another case of false recording of catch – and of taking 30.6 tons of fish belonging to species that it was entirely forbidden to catch; a total of 50.6 tons of fish, some of which it was absolutely forbidden to catch. You will no doubt compare that with the case of the *Hoshinmaru*, where the charge is that it falsely recorded 20 tons of fish that it was otherwise entitled to have on board.

In its Statement in Response, Russia says that the bond set by the Prosecutor's Office for Nature Protection on 12 December was reasonable and that, if paid, the Prosecutor's Office would allow the free operation of the vessel.

However, if, as seems to be the clear message in paragraphs 15 and 16 of the Statement in Response in this case, Russia regards 8.8 million roubles as a reasonable bond to secure the release of a vessel accused of taking 50.6 tons of fish, more than half of it wholly

illegally, you may wonder why it thought it was reasonable to set a bond of 25 million roubles for the *Hoshinmaru*, three times the reasonable *Tomimaru* bond, although the *Hoshinmaru* had taken only half the amount of illegal fish. This goes to the question of the consistency of the practice of the Russian authorities in administering these procedures, but no doubt the Respondent's Agent will explain this to us later today.

The explanation may be, of course, that the reasonable bond was only part of the price of release. The environmental damages – which we think is what is referred to as the environmental damages for which civil liability exists – could be satisfied by the payment of 8.8 million roubles, but the administrative penalties, the criminal charges against the Master, and so on, would not be covered by this payment. That seems to be reflected in paragraph 17 of the Statement in Response, which states:

> "… the provisions of the Code of Administrative Offences of the Russian Federation do not provide the possibility of releasing a property after posting the amount of bond by the accused on the case of administrative offences."

If that is so, it is rather misleading to suggest that the owner failed to take up the offer of posting an 8.8 million roubles bond for the release of the vessel, because providing one key does not release the vessel if there are two or more locks holding it in. In our submission, if a reasonable bond is to satisfy the requirements of articles 73 and 292 of the Convention, it must be a bond that will, when posted, actually secure the release of the vessel. According to the Russian court, the payment of 8.8 million roubles would not have done that.

Moreover, the payment was not even a bond. It was a "voluntary" payment of the assessed environmental damages. There is no suggestion that all or part of that 8.8 million roubles would be returned if the owner and Master of the *Tomimaru*, who at that time in December, you will remember, had not yet faced trial, had been acquitted or not convicted. There is no suggestion that any part of the money would be paid back, had they not been found guilty of the offences.

Japan therefore submits that no bond has been set that would release the vessel in this case, even though the owner has actively sought to have one set. The case is not moot, and we submit that this first objection to admissibility must be dismissed.

The second objection to admissibility is that the vessel has been confiscated. There are two aspects to this objection, one of which is procedural, the other substantive.

Russia suggests that because it regards the *Tomimaru* as its property, Japan cannot make this application to the Tribunal. Our main point is that the question of the confiscation of the *Tomimaru* is still before the Russian courts. If the *Tomimaru* really were the property of Russia, it would be free to sell it to some third party or to dispose of it as it chose, but what will it do if the Supreme Court rules that the confiscation was not valid? It will have to return the *Tomimaru* to its owner, and how could it do that if it had disposed of it to someone else? If Russia cannot dispose of it, how can Russia be the new owner whose rights have extinguished those of Kanai Gyogyo, the Japanese owner of the *Tomimaru*?

Japan considers the position to be clear and simple. The *Tomimaru* is liable to confiscation under Russian law. It is held by Russia, detained by Russia, and a final determination of the question of confiscation is pending before the Russian courts. That is precisely why Japan is now seeking an order for the prompt release of the vessel while the owner waits for that decision from the Russian court.

So, Japan considers the basic premise of Russia's objection to be misconceived. In Japan's view, Kanai Gyogyo has not yet lost its rights in the vessel and the vessel is not Russia's property to do with as it likes.

However, there is a further point. Even if it were correct that the *Tomimaru* had become Russian federal property, it would not make this claim inadmissible. The suggestion that it does confuses two distinct questions.

Article 292 gives to the flag State of the vessel the right to make applications. Indeed, paragraph 2 of article 292 says that "the application for release may be made *only* by or on behalf of the flag State of the vessel" – not on behalf of the owner, not by the national State of the owner, but by the flag State of the vessel.

The fact that the nationality of the owner changes has no necessary effect on the flag. A Japanese company may buy a vessel from a Russian company and the vessel may be flagged in some third State, but the sale and purchase of the vessel has no automatic effect on the nationality of the vessel. As Judge Mensah and President Wolfrum emphasized in paragraph 9 of their Joint Separate Opinion in the *"Juno Trader" Case*, "there is no legal basis for asserting that there is an automatic change of the flag of a ship as a consequence solely of a change in its ownership." Nor do ships become stateless when they are sold to a foreign owner. The position is simple. Ships retain their nationality until the necessary formalities have been fulfilled and they are either transferred to another flag or deregistered.

Therefore, as far as Japan is concerned, the *Tomimaru* remains a Japanese ship; and, because the *Tomimaru* is a Japanese ship, Japan is entitled to bring a prompt release application in respect of it regardless of the nationality of its owner. A change of ownership without a change of flag might have an impact on the substance of the claim, but it would not have an impact on the question of jurisdiction and admissibility. Accordingly, Japan considers that this objection to the admissibility of the application must also be rejected, because the *Tomimaru* is not Russian property and, even if it were, that would not be a bar to this application.

Mr President, I have addressed the objections to the admissibility of the application. Let me now turn finally to the application for relief from the Tribunal. Our case is straightforward and it will not take me long.

Japan's essential argument is this: The *Tomimaru* was arrested. It is still the subject of court proceedings in Russia, which may result in its return to its Japanese owner or may result in its definitive confiscation by the Russian Federation. While those proceedings are pending, the owner would like to have it released promptly and upon the payment of a reasonable bond. We know that Russia thinks that 8.8 million roubles is a reasonable bond, because it told us so in its Statement that it filed four days ago. It really is as simple as that.

Last night we obtained estimates of the value of the *Tomimaru* – in this case the appropriate measure of the bond is clearly the value of the ship – and those estimates range from US$ 260,000 to US$ 410,000. We have submitted those papers as annex 40, and I am grateful for the flexibility of both our colleagues and the Tribunal in allowing us to file those papers now.

However, there is also another interest at stake. As a reading of the papers in this case will show, the responsibility for prompt release procedures in Russia is divided among a number of agencies, and their views are not always consistent.

It may well be the fate of those seeking licences from a State or challenging decisions of a State to spend months in the gloomy labyrinth of a municipal legal system. States choose their own legal systems, and we must respect that. But in some contexts States have agreed that the need for swift action requires the creation of simple systems. The international agreements that regulate requests for permission to board foreign ships in the context of drug interdiction are one example; simplified extradition procedures or international arrest warrants are other examples.

Prompt release procedures are archetypal examples of this kind of international cooperation. Their purpose is to take a common international problem and to provide a

simple, easy solution for it. A shipping vessel is arrested. It may take months to determine the case finally. So release the vessel against payment of a reasonable bond and everybody is happy.

However, as the *Tomimaru* saga illustrates, this system is not working as it should in Russia. Vessels are being detained for weeks. That may not sound long, but a seven-week detention during an eleven-week fishing season can entirely wipe out the profits of the fishing vessel for that season. Prompt release procedures should be solving that problem, but the system is not working.

Russia, I think, acknowledges that there may be a problem here. On 8 February this year the Russian Ministry of Foreign Affairs sent a diplomatic note to the Japanese Embassy in Russia. You will find that note in annex 32 attached to the Application. It discusses the *Tomimaru* case and it concludes with these words:

> "Having considered all the situations, the Ministry is planning to work on the Russian authorities, if necessary, to explain the international obligations of the Russian Federation. The Ministry expresses its readiness to continue to contact with Japan on this issue."

We welcome that willingness to address the problem, the willingness to work on the Russian authorities and to explain Russia's international obligations to them, and we hope that the Tribunal will be able, in its judgment, to make what a former President described in a commentary on the Tribunal's Rules as its "contribution to the interpretative development of the Convention".

As is often remarked, articles 73 and 292 require prompt release on the posting of a reasonable bond but they give no real guidance on how this valuable legal instrument is to be constructed or operated in practice.

In the *"Hoshinmaru" Case* we expressed a hope that the Tribunal would indicate guidelines applicable to the very important issue of principle concerning the inclusion of the value of the ship in the calculation of reasonable bonds. In this case we hope that the Tribunal will be able to make a similar contribution, providing guidance to States on the need for simple procedures in which shipowners are directed to a single point of contact, from which they are able to get clear, consistent decisions in a reasonable time on a bond that, when posted, will secure the release of the vessel, Master and crew. If the Tribunal can guide States in this way, we believe it will be making a major contribution to the implementation of a strong, fair and efficient system for the regulation and conservation of international fisheries.

Mr President, Members of the Tribunal, that brings me to the end of these submissions on behalf of Japan. Unless I can help you any further, Sir, I simply have to thank you for your attention and say that our Agent will make the presentation in the second round.

The President:
Thank you. Thank you very much, indeed, Professor Lowe.

That brings us to the end of this sitting. The Tribunal will sit again this afternoon at three o'clock. At that sitting the representatives of the Respondent will address the Tribunal to present their submissions. I was informed we will hear three statements.

This sitting is now closed.

(The sitting closes at 11.50 a.m.)

PUBLIC SITTING HELD ON 21 JULY 2007, 3.00 P.M.

Tribunal

Present: *President* WOLFRUM; *Vice-President* AKL; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, TREVES, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, TÜRK, KATEKA *and* HOFFMANN; *Registrar* GAUTIER.

For Japan: [See sitting of 21 July 2007, 10.00 a.m.]

For the Russian Federation: [See sitting of 21 July 2007, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 21 JUILLET 2007, 15 H 00

Tribunal

Présents : M. WOLFRUM, *Président*; M. AKL, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, TREVES, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, TÜRK, KATEKA *et* HOFFMANN, *juges*; M. GAUTIER, *Greffier*.

Pour le Japon : [Voir l'audience du 21 juillet 2007, 10 h 00]

Pour la Fédération de Russie : [Voir l'audience du 21 juillet 2007, 10 h 00]

The President:
Good afternoon. We will resume the oral proceedings. Before giving the floor to the Agent of the Respondent, I first call the interpreters who will interpret the statement from Vadim Yalovitskiy from Russian into one of the official languages of the Tribunal to make the declaration set out in article 85, paragraph 4, of the Rules of the Tribunal.

MR LAKEEV *sworn in (in English)*

The President:
Thank you very much.

MS EVAROVSKAYA *sworn in (in English)*

The President:
Thank you very much. Could you kindly walk up to the booth, but take your time.

May I now call upon Mr Zagaynov, Agent for the Government of the Russian Federation, to take the floor. Mr Zagaynov will then be followed by Vadim Yalovitskiy and he will be followed by Professor Golitsyn.

Argument of the Russian Federation

STATEMENT OF MR ZAGAYNOV
AGENT OF THE RUSSIAN FEDERATION
[PV.07/05, E, p. 1–5]

Mr Zagaynov:
(Interpretation from Russian) Thank you, Mr President. Mr President, distinguished members of the Tribunal, honourable representatives of Japan, it is a great honour and privilege for me to act as an Agent for the Russian Federation in this case. This time the honourable judges have to consider the soundness of the Application of Japan concerning prompt release of the Japanese vessel *Tomimaru*, which was arrested in the Russian exclusive economic zone on 1 November 2006 together with two other Japanese fishing vessels.

As was agreed during our consultations, for the sake of saving time, I will briefly enumerate the points developed in the presentations of the Russian Federation in the *"Hoshinmaru" Case* that we consider relevant in the present case. In particular, these are our comments on the rights and obligations of a coastal State to protect marine living resources in its exclusive economic zone, on the problem of illegal, unreported and unregulated fishing, on the general framework of the relations between Russia and Japan in the field of fisheries and, finally, on the issue of State responsibility, which in our opinion goes beyond the scope of the prompt release procedure under article 292 of the UN Convention on the Law of the Sea.

Mr President, distinguished members of the Tribunal, when a provision of an international treaty is formulated so concisely as is the case with paragraph 2 of article 73 of the 1982 Convention, a judicial organ applying it for the settlement of inter-State disputes has to work out its own interpretation of the text. In regard to the prompt release procedure, this venerable Tribunal has already elaborated sufficiently detailed and consistent case law. We believe that the present case will be a very important step in its further development. In our view, your decision on it will have far-reaching consequences for the jurisprudence of the Tribunal.

Of course, first and foremost I mean the issue of admissibility, for in this case the Tribunal has to examine an Application concerning a vessel on which a decision on merits has already been taken by a competent national court of the coastal State and, what is more, this decision on merits has already been executed.

The question of the effects that a confiscation pronounced by a competent court of the coastal State may have on the jurisdiction of the Tribunal and on the admissibility of an application filed under article 292 of the Convention has already been raised before the Tribunal, in particular in the proceedings concerning the *"Grand Prince" Case* brought by Belize against France and in the *"Juno Trader" Case* between Saint Vincent and the Grenadines and Guinea-Bissau.

In the first case, nonetheless, the Tribunal did not have to take a stance *vis-à-vis* this important question, because in the light of the deregistration of the *Grand Prince* and on the basis of an overall assessment of the material placed before it, the Tribunal concluded that the documentary evidence submitted by the Applicant failed to establish that Belize was the flag State of the vessel when the application was made.

In the *"Juno Trader" Case* the Tribunal did have jurisdiction to consider the Application of Saint-Vincent and the Grenadines. The particular circumstances of that case, however, were very different from the circumstances of the present one. First of all, the decision on the confiscation of the vessel *Juno Trader* was taken by an administrative body, the Inter-ministerial Maritime Control Commission of Guinea-Bissau. Second, this

administrative decision was afterwards suspended by a decision of a competent national court.

This time the Tribunal has to examine the question whether it is appropriate for it to decide on the prompt release of a vessel which has been confiscated in accordance with due international procedure and has already been transferred into the property of the coastal State.

According to paragraph 3 of article 292 of the UN Convention on the Law of the Sea, the Tribunal examining applications for release "shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew". It is obvious, therefore, that once the case had already been considered before the appropriate domestic forum on the merits, the decision rendered had already entered into legal force, and moreover executed, there is no more sense for the Tribunal to examine an application for the prompt release.

It must be noted in this connection that in its Application Japan has anticipated the eventual argument of the Respondent that the application is inadmissible because the period of time that had elapsed since the initial arrest of the Japanese vessel was too long.

In our view, however, it is not the lapse of time in itself which makes this application inadmissible. The Russian Federation shares the opinion of the honourable Judges, as well as of our respected opponents, that article 292 of the Convention does not indeed fix a particular time limit for the flag State of the detained vessel to present its claims concerning prompt release before the Tribunal. It is the stage of development of the events in this case which deprives an application for prompt release, in our opinion, from its object.

The point is that by the judgment of 28 December 2006 the Petropavlovsk-Kamchatskii City Court decided that the *Tomimaru* should be confiscated. What is important is that, in contrast to the *"Juno Trader" Case*, as I have already mentioned, it was a judicial and not an administrative decision.

The judgment ordering confiscation was made in compliance with the provisions of Russian law. Such penalty for violations of fisheries laws and regulations in the exclusive economic zone is provided not only in Russian legislation but also in many other national laws. Moreover, if we interpret paragraph 3 of article 73 of the Convention using the rule of contraries, such penalty is in full conformity with international law. Let me remind you that, according to the above-mentioned provision of the Convention, coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone, in the absence of agreements to the contrary by the States concerned, may not include imprisonment or any other form of corporal punishment.

In accordance with paragraph 1 of Article 30.1 of the Code of Administrative Offences of the Russian Federation, if an administrative matter has been considered by a magistrate or a judge of an equal standing, its decision or judgment can be appealed in the district court or in another court of equal standing. The owner of the *Tomimaru* exercised this procedural right. As a consequence, the decision of the Petropavlovsk-Kamchatskii City Court concerning the confiscation of the vessel was upheld on 24 January 2007 by the Kamchatka District Court.

It is worth noting in this connection that, to our knowledge, the owner of the vessel appealed only against the decision on confiscation. While doing this, he or his attorneys had the possibility to contest the ruling of 19 December 2006, by which their petition to set a reasonable bond for the prompt release of the vessel was rejected. The attorneys designated by the owner of the *Tomimaru* did not, however, seize this opportunity and appealed only against the penalty imposed by the court judgment.

The decision on confiscation was upheld and, pursuant to paragraph 3 of Article 31.1 of the Code of Administrative Offences of the Russian Federation, immediately entered into force.

By an implementing act, the Federal Agency of the Russian Federation on Management of Federal Property in the Kamchatskii District on 9 April 2007 included the arrested vessel into the Federal Property Register as property of the Russian Federation.

It is true that a complaint against the decision of the Kamchatka District Court was lodged before the Supreme Court of the Russian Federation.

It should be emphasized, however, in this regard that this complaint was lodged in the framework of the supervisory review procedure, which in Russian procedural law is a kind of exceptional judicial review, while the normal procedure concludes with an appeal.

The principal task of the supervisory procedure is to guarantee uniformity in the application of legal norms. This is, therefore, the first ground for accepting complaints lodged against judicial decisions which have already entered into legal force. Secondly, decisions upheld in the course of an appeal can be annulled at a supervisory stage if they infringe on human and civil rights and freedoms proclaimed by universally recognized principles and norms of international law and international treaties of the Russian Federation. Lastly, such decisions can be annulled if they violate the rights and legitimate interests of an indefinite number of people or other public interests.

The decision on the merits of the case has already entered into legal force and been executed, as I have mentioned. In the light of the above-mentioned clarifications, we are arguing that the case of the *Tomimaru* has reached such a stage of development that the prompt release procedure under article 292 of the Convention is no longer relevant. Therefore, we are asking the distinguished Tribunal to exercise its judicial propriety and declare the application of Japan inadmissible.

In case the Tribunal does not agree with our firm conviction about the inadmissibility of the case, the Russian Federation asks the Tribunal to declare that the Respondent has fully complied with its obligations under article 73 of the Convention. Our arguments on this matter will be presented by our next speakers.

Mr President, distinguished members of the Tribunal, honourable representatives of Japan, I would now like to make some comments on the statements of the Applicant this morning.

The Applicant repeatedly draws the attention of the Tribunal to alleged flaws and inconsistencies in the Russian legislation. Having the privilege of standing today before the most eminent experts in the field of the law of the sea from different regions of the world, I would like to express my humble opinion that it would hardly be possible to find a perfect legal system. In our view, there is always room for improvement. Like any other country in the world, the Russian Federation works to improve its legislation. By the way, we certainly take into account the difficulties which our Japanese partners have in the field of release of vessels. Mr Komatsu certainly knows that we have discussed these issues with the Japanese authorities. It should be mentioned *à propos* this, that among many countries fishing in the Russian EEZ, it is only Japan that has problems with prompt release. Still, in our view, there is no doubt that the content of the Russian national legislation is not and cannot be the object of the present dispute.

Mr President, unfortunately, during the hearings in both cases we have had to discuss on a number of occasions the issues of translation. I would like to address this issue with respect to the statements of the Applicant this morning.

It is worth noting that while referring to a very important document in this case, namely the letter of 12 December from the Inter-district Prosecutor's Office for Nature Protection in Kamchatka, which was setting the bond, Professor Lowe this morning used a document presented by the Respondent in annex 4. I would certainly not deny that the language in this letter is not very elegant. Still, the same document is reproduced as annex 36 to the Application, and this wording is translated there in a much simpler way. The document

says: "The free use of the trawler *Tomimaru* will not be prevented by the Inter-District Prosecutor's Office once the bond is paid to the deposit account". Then the details of the account follow. In our view, it shows that the Applicant has always had a clear and correct understanding of the meaning of this letter establishing the bond and providing the necessary bank requirements for its payment.

Mr President, in his statement, the Applicant mentioned that the crew members of the vessel *Tomimaru* were under detention and were not allowed to leave the Russian Federation for Japan. This issue has not been raised in the submissions of Japan and we did not prepare a reply to it. Still, I hope I will be able to make some comments in this regard.

First, it should be noted that all crew members left Russia long ago. Thus, their release cannot be the object of an application under prompt release procedures.

I would like to draw the attention of the honourable Tribunal to the letter of the Senior Counsellor of Justice of the Inter-district Prosecutor's Office for Nature Protection in Kamchatka to the Consulate-General of Japan in Vladivostok, dated 1 December 2006 (annex 5 of the Application). The fifth paragraph on page 2 of the letter says that all the investigation against the vessel *Tomimaru* and its crew has been completed. Moreover, the last paragraph on the same page of the letter says that the decision to let the members of the crew of the trawlers leave the Russian Federation can be adopted without delay whenever requested by the owner of the vessel.

Furthermore, the Senior Counsellor of Justice of the Inter-district Prosecutor's Office for Nature Protection in Kamchatka, by the letter dated 22 December 2006 (Annex 22 of the Application), informed the Consulate-General of Japan in Vladivostok that the competent Russian authorities have repeatedly notified the Consulate-General as well as the agents of the owners of the vessel that the crew could be allowed to leave the place as soon as the request from the shipowner is received. Still, no request has ever been received from the owner.

Finally, as mentioned this morning by Japan, the crew, after all, was ordered to leave the vessel. In our view, this can hardly be called "detention".

As for the Master of the vessel, the next speaker from our delegation, Mr Yalovitskiy, will explain the situation.

Having said that, I would like now to thank the honourable Judges for the attention they have generously paid to my presentation and request you, Mr President, to give the floor to Mr Yalovitskiy, who will elaborate on the factual outline of the case. Thank you.

The President:

Thank you very much indeed, Mr Zagaynov.

I give the floor to Mr Yalovitskiy.

STATEMENT OF MR YALOVITSKIY
DEPUTY AGENT OF THE RUSSIAN FEDERATION
[PV.07/05, E, p. 6–11]

Mr Yalovitskiy:
(Interpretation from Russian) Distinguished President, honourable Judges, esteemed members of the Japanese delegation: I am the Head of Section in the Department of Legal Assistance in the Main Directorate for International Cooperation. This is the department belonging to the Prosecutor General of the Russian Federation and I have the duty to resolve issues of legal assistance in criminal and administrative cases.

With regard to the information provided by the esteemed Japanese delegation in its Application concerning the circumstances of proceedings that have been instituted against the Master and the owner of the *Tomimaru 53* before the domestic courts of the Russian Federation, let me draw your attention to the following circumstances.

On 31 October 2006, an inspection group of the State Sea Inspection of the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation stopped and inspected a fishing vessel under the flag of Japan, the *Tomimaru 53*, whose owner was the Kanai Gyogyo Company, Japan.

After the analysis of the documents available on board the vessel, data of its daily ship records as well as data provided by the Russian licensing authority, it was established that the *Tomimaru 53,* having a valid licence, was harvesting in the exclusive economic zone of the Russian Federation the following species of fish: pollack (1,163 tonnes) and herring (18 tonnes). The vessel had on board a catch of 614,286 tonnes of pollack and 6,379 tonnes of herring. Out of this catch, there were 387 tonnes of pollack and 6,315 tonnes of herring, and that was supported by the harvesting documentation and regular data of daily ship records. These data were also in other records of the Kamchatka authorities. During the preliminary inspection, the amount of product on board the ship corresponded to that recorded in the documents. However, taking into account that there was no possibility to examine all the vessel, we could not confirm the real amount of catch on board the ship during the preliminary inspections.

In this connection, on 2 November 2006, another inspection was carried out. During this additional inspection, an unrecorded catch was found of 5.5 tonnes, and there were 8.8 tonnes of raw fish.

On 3 November 2006, in accordance with parts 1 and 2 of Article 2.6 of the Code of Administrative Offences of the Russian Federation, it was decided to institute administrative proceedings against the Master of the vessel, Mr Takagiwa Matsuo. This pronouncement was made on the basis of the Russian Code, part 2, Article 2.6 of the Code of Administrative Offences. In accordance with Article 23.10 of the Code of Administrative Offences, these administrative proceedings were charged to the State Sea Inspection of the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation. That is, there were administrative proceedings against the Master.

At the same time, on 8 November 2006, in accordance with the same articles as well as Article 2.10 of the Code of Administrative Offences of the Russian Federation, proceedings were initiated against the shipowner of the vessel; that is, with regard to the shipowner of the *Tomimaru 53*, the Kanai Gyogyo Company. This is another case. This case was also referred to the Northeast [Border] Coast Guard State [Sea] Inspection.

Following the administrative investigation of the offences committed by the Master, Mr Takagiwa Matsuo, on 8 November 2006, a criminal case was started against him. It was the third case. That criminal case was initiated on the basis of the events provided for in paragraph 2 of Article 253 of the Criminal Code of the Russian Federation, concerning the

[exploitation of] natural resources in the territorial waters without legal permission, since the vessel did not have a valid Russian licence for the catch discovered on board the *Tomimaru 53* and the vessel did not have Russia's permission for that.

On 9 November 2006, the experts of the Kamchatka Regional Chamber of Trade and Commerce carried out an expertise to establish the exact quality and quantity of the illegal catch. It was revealed that, without the permission of the Russian authorities, considerable amounts of fish such as halibut, bass, ray, cod, sole and greenling were fished. Moreover, the inspection discovered on board an illegal stock of processed walleye pollock. In accordance with that finding, the damage caused to the biological resources of the Russian Federation amounted to 9,328,600 roubles, without taking into account the cost of illegally processed fish products.

In the course of the investigation of this criminal case, the Master of the *Tomimaru 53*, Mr Takagiwa Matsuo, was charged with crimes featured in two articles: first, I have already mentioned, Article 253 of the Criminal Code; secondly, paragraph 2 of Article 201 of the same Criminal Code of the Russian Federation. These offences are classified as abuse of authority, which in this context means that he used his powers to obtain an illegal interest for himself or for other persons which resulted in considerable damage to the legally protected interest of the society or of the State. The punishment for this offence is rather serious and may include imprisonment of up to five years.

Since the Master of the *Tomimaru 53* fishing vessel had made an illegal catch of large amounts of fish that were not permitted for catch – halibut, bass, ray, cod, sole and greenling – and exceeded the allowable quota of walleye pollack, causing considerable damage to the sea-living resource in the exclusive economic zone of the Russian Federation, he committed an act detrimental to the interests of the Russian Federation.

Mr President, distinguished members of the Tribunal, in today's intervention the Agent of Japan referred to the fact that there was a lock on the Japanese Master's door, implying that that was evidence of the Respondent's non-compliance with article 72, paragraph 3, of the Convention. That does not correspond to the reality of the situation. What is the essence of it? The Master, who was the subject of an investigation by the criminal court, had provided to him by the Japanese party an interpreter and legal counsel, and he was very well informed about all the rights to which he was entitled whilst under investigation.

In accordance with those rights fixed in the criminal proceedings, if the Master wanted to leave the territory of the port, he could have done so in accordance with the following procedure: together with his counsel, he could have applied to the investigator in charge of the criminal case, who had imposed the punishment of interdiction, to change that measure of restraint and choose a measure such as a bond. Such a bond relating to someone being investigated by the criminal court is provided for in Article 106 of the Criminal Code of the Russian Federation. The amount of such a bond is in no way related to the issue or amount of the caused damage.

Had the bond been deposited, he could have left the port freely with only one obligation, namely to attend promptly when invited to speak to the court. However, the Master never in fact exercised that legitimate right, although he did not have any barriers from the Russian side, so in this case the bond was never provided for the Master. In this respect, all the claims of the Japanese party that the Master of the *Tomimaru*, Mr Takagiwa Matsuo, was detained are baseless.

I allow myself to continue with the presentation of the circumstances of the case. It follows that the Master of the *Tomimaru 53* was charged with committing offensive acts that entailed a criminal and administrative responsibility. As a consequence of the situation surrounding the *Tomimaru 53*, the Russian party had undertaken the following measures to meet the requirements of article 73, paragraph 3, of the Convention of the United Nations.

On 1 December 2006, the Consul General of Japan in Vladivostok was served a clarification in response to his application on 30 November 2006, which stated that the resolution of the issue of releasing the vessel and posting a reasonable bond was within the competence of the Kamchatka Inter-district Prosecutor's Office for Nature Protection. This was explained in a letter from the Coast Guard, which clarified for the Japanese party the proper procedure for the definition of the bond.

On the same day, 1 December, a prosecutor of the Kamchatka Inter-district Prosecutor's Office, responding to the application of the Consul General of Japan on the release of the *Tomimaru 53*, explained that this criminal case was under investigation and in the hands of the State Sea Inspection. The response from the Prosecutor's Office clearly stated that the decision to free the vessel could be adopted only after the ship-owner, who is responsible for the illegal acts of the Master of the *Tomimaru 53*, had complied with two conditions: first, to present a claim to set a bond commensurate with the damage and, secondly, to make payment of the bond practically.

On 8 December 2006, the shipowner, Kanai Gyogyo, through the Kamchatka Inter-district Prosecutor's Office, applied – and hence we can conclude that the answer was clearly understood by the Japanese party – for information about the amount of the bond, after which the vessel could be set free by the Russian authorities in accordance with article 73 of the UN Convention on the Law of the Sea. That is contained in the appendix.

Therefore, the company was prepared to pay the bond for the release of the ship established by the Russian party to the stipulated bank account in the shortest period of time. This means that the shipowner asked the Prosecutor's Office to specify the bank account and the amount of the bond that the company, according to the terms of the letter, was prepared to pay. I therefore draw the Tribunal's attention to the fact that the company was prepared to pay that sum within the shortest period of time. The Russian party considers this letter to be a proper claim to allow the release of the *Tomimaru 53* in accordance with the UN Convention on the Law of the Sea after the bond had been posted. Moreover, this claim was presented to a properly authorized person from the Russian Federation.

On 12 December 2006, the investigator of the Prosecutor's Office who took the criminal case with regard to the Master of the *Tomimaru 53* adopted the procedural decision, which is also attached to the material provided by the Japanese party and was presented to the Prosecutor's Office. The topic was that the sum of the bond would be 8,800,000 roubles, and the account of the designated bank was specified for the transfer of the bond. As it is very important to emphasize each word, I will try to draw to the attention of the Tribunal and respected members of the Japanese delegation that in this paper and in the letter that was sent to the shipowner, it was stated that after the bond had been paid, the Prosecutor's Office would not prevent the free operation of the *Tomimaru 53*. What else was that, if not a proper announcement of the deed, in accordance with the UN Convention? We think that that is exactly what it is, and we hope that the distinguished court will take into consideration our point of view with regard to this paper. Again I use the terminology that was used by the Agent of the Japanese party.

I would like to draw the Tribunal's attention to the fact that this letter opened both of the so-called locked doors, that is, the so-called lock on the criminal case and the so-called lock on the administrative case with regard to the vessel, because, in accordance with the Russian legislation, the prosecutor is the authorized person who can order the State Sea Inspection of the Northeast Coast Guard Directorate of the FSS to release the vessel. That means that the prosecutor's decision removed those two limitations.

In spite of all the clarifications provided to the Japanese party with regard to the procedure for the payment of the bond, the amount of the bond, the account number to which

the money was to be transferred, the said money to cover the bond has never been received from the owner of the Japanese vessel.

Instead of depositing the bond as established by the authorities of the Russian party, the shipowner on 14 December addressed the State Sea Inspection with an application asking them to establish a bond which had already been set in connection with the fact that, on 15 December, the State Sea Inspection took all the materials and passed them to the criminal court, so it did not have powers to resolve that issue and it rejected the claim of the shipowner and the administrative case was passed to the court.

On 28 December 2006 the [Petropavlovsk-]Kamchatskii City Court ordered that the vessel's owner, Kanai Gyogyo Company, be pronounced guilty of committing the administrative offence fixed by Part II, Article 8.17 of the Code of Administrative Offences of the Russian Federation, in particular, violation of the rules of fishing operations for catching water biological living resources or the licence conditions for catching water biological living resources in the exclusive economic zone of the Russian Federation. As the punishment for this offence, the court set the penalty in an amount equal to twice the cost of the water biological living resources which were the subject of the administrative violation, which totalled 2,865,149 roubles, plus confiscation of the *Tomimaru* with all tools and equipment aboard the vessel at the time.

This pronouncement of the Russian court according to Russian legislation was the subject of a complaint against this decision on 25 January 2007. The Kamchatka Court pronounced the original decision of the first instance in force and in full and did not satisfy the complaint. So the decision of the court to punish Kanai Gyogyo Company, the vessel's owner, entered into force on 25 January 2007.

On 7 February 2007 the Petropavlovsk-Kamchatskii Bailiffs Department initiated enforcement proceedings under this judgment of the court, which were completed on 9 April 2007 with the transfer of the confiscated *Tomimaru* to the Territorial Directorate of the Federal Agency on Management of Federal Property in the Kamchatskii District. In accordance with the extract from the Federal Property Register of the Russian Federation, the fishing vessel *Tomimaru 53* is the property of the Russian Federation, and its identification number has been mentioned by the previous speaker.

That was the end of the administrative procedures against the company and the owner. Besides, on 15 May 2007 the Petropavlovsk-Kamchatskii City Court by its order condemned Japanese citizen Mr Takagiva Matsuo, former Master of the *Tomimaru 53*, as guilty of crimes provided for in Part 2, Article 253 and Part 2, Article 201 of the Russian Criminal Code. I have spoken about those articles. He was fined 500,000 roubles. As you see, no punishment such as detention was pronounced against the Japanese Master. In the course of the judicial proceedings the civil claim was satisfied on paying of damages in the sum of 9,328,600 roubles. As of today the penalty was paid but the damages have not yet been covered.

It should be noted that for the last four years around the coast of Kamchatka for violations similar to those made by *Tomimaru 53* seven more Japanese fishing vessels were detained. However, the illegal activities of Japanese citizen Takagiwa Matsuo inflicted the gravest damage to the interests of the Russian Federation. The Russian court was guided by these exact considerations in prescribing punishment.

Taking into account all the above facts, the Russian side cannot agree at all with the submission of the Japanese side on violation by the Russian party of its obligations under article 73, paragraph 2, of the UN Convention on the Law of the Sea as well as with the request to release the *Tomimaru 53* upon conditions established by the Tribunal.

In pursuance of the provisions of article 73 of the Convention, the Russian Federation, as a coastal State, in exercising its sovereign rights in the exclusive economic zone,

implemented those rights, up to and including arrest and criminal proceedings, which ensured the observance of the requirements of the Russian legislation adopted in full compliance with this Convention.

As for the submission of the Japanese party on the application of the provisions of article 292 of the Convention to release the *Tomimaru 53* upon posting the bond, this argument, in our opinion, does not have any legal grounds.

First, the allegations of the Japanese party concerning the fact that "the owner was ready and wishing to post the bond or other security to promptly release the vessel" as per paragraph 55 of Japan's counter memorandum, such a possibility as follows from the above-mentioned fact was available to the vessel's owner from 12 December 2006; however, he has not used it.

Second, at present the owner of the *Tomimaru 53* is the Russian Federation. Consequently, the former shipowner, the Kanai Gyogyo Company, in no way can quote that they are prepared to post a bond or wishing to do that as, contrary to the claim of the Japanese party, this does not correspond to reality. Consequently, article 292 of the Convention cannot be applied in this case as the right to apply to the Tribunal can be made only with regard to a detained vessel, not a confiscated vessel.

Today's statement of the Japanese party that the allegedly internal measures of the Russian Federation on confiscation of the vessel *Tomimaru 53* are not acceptable to it and it continues to consider this vessel as its own property in our opinion is an intervention into the exercise by the Russian Federation of its sovereign rights, which are directly foreseen by the provisions of the UN Convention on the Law of the Sea. The Russian party is of the opinion that the application of the Japanese party to the Tribunal on the Law of the Sea with regard to the release of the *Tomimaru 53* cannot be satisfied either in form or in essence.

Thank you for your attention. That is the end of my intervention. Thank you.

The President:

Thank you, Mr Yalovitskiy, for your statement. Thank you in particular for speaking slowly. It came through in translation quite well.

We now turn to Professor Golitsyn. Could you please continue?

STATEMENT OF MR GOLITSYN
COUNSEL OF THE RUSSIAN FEDERATION
[PV.07/05, E, p. 11–23]

Mr Golitsyn:
Thank you, Mr President.

With your permission, I would like to divide my presentation into two parts. I will deliver the first part and if the Tribunal will then declare a break, I will continue with the concluding part.

The President:
Thank you, yes.

Mr Golitsyn:
Mr President, distinguished Judges of the Tribunal, it is a great privilege and honour for me to appear before this Tribunal and to address legal issues arising in the *"Tomimaru" Case*. As in the *"Hoshinmaru" Case*, I would like to start with the requests that are addressed to the Tribunal.

The Applicant in its Application requests the Tribunal to do three things by way of judgment: first, 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 *53 Tomimaru* in breach of the Respondent's obligations under article 73, paragraph 2, of the Convention; secondly, to declare that the application is admissible, that the allegations of the Applicant are well founded and that the Respondent has breached its obligations under article 73, paragraph 2, of the Convention; and finally, to order the Respondent to release the vessel and the crew of the *Tomimaru* upon such terms and conditions as the Tribunal shall consider reasonable.

The Respondent for its part requests the Tribunal to decline to make these orders and to order first, that the Application of Japan is inadmissible and secondly, 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.

In my observations I will try to address in a comprehensive way legal issues arising in the light of these requests.

First, I would like to address the issue of the setting of the bond, because it appears that there is some confusion on the Applicant's side with regard to the understanding of this issue.

In two paragraphs of its Application the Applicant claims that the owner of the *53 Tomimaru* has at all times been ready and willing to post a bond or other security in order to secure the release of the vessel provided that the bond or other security were fixed and that the amount and conditions for their payment are reasonable, and that the authorities of the coastal State permit the actual release of the vessel.

It is also claimed in the Application that no bond or other security has been set and the vessel has not been released.

The above allegations do not correspond to the facts, which I would like now to bring to the attention of the Tribunal.

Paragraph 2 of article 73 of the Convention states that a reasonable bond or other security shall be set by a coastal State for the prompt release of the arrested vessel. So paragraph 2 of article 73 of the Convention basically states that the coastal State has an

obligation to set the bond, and it is assumed that it will be done in accordance with the applicable procedures of the coastal State.

In the *"Tomimaru" Case* all the necessary steps stipulated in paragraph 2 of article 73 have been taken by the Russian Federation as the coastal State to meet this requirement.

As noted in paragraph 69 of the Statement in Response, the Respondent first, identified the proper authority for the setting of the bond; second, set the bond; third, provided the owner with precise and clear information with regard to the amount of the bond and the account details; and fourth, assured the owner that the arrested vessel would be released upon the payment of the bond. These steps of the Respondent are described in paragraphs 14, 15 and 34-36 of the Statement in Response.

Let me now address each one of these steps to illustrate the actions taken by the Respondent.

First, the identification of the proper authority for the setting of the bond. As noted in paragraph 12 of the Statement in Response, on 1 December 2006 the Inter-district Prosecutor's Office for Nature Protection in Kamchatka informed the Consulate-General of Japan in Vladivostok that it was waiting for the due request for the setting of a bond.

A special emphasis was placed on the question of release of the vessel. The Applicant was assured that the decision to release the seized vessel would be made upon the payment of a bond.

On 8 December 2006, as is also pointed out in paragraph 14 of the Statement in Response, in reply to an inquiry by the owner of the vessel, the Northern Border Coast Guard Directorate for the Federal Security Service of the Russian Federation on 14 December 2006 confirmed to the Consulate-General of Japan in Vladivostok that the proper body to determine the bond in the case of the *53 Tomimaru* was the Inter-district Prosecutor's Office for Nature Protection in Kamchatka.

Coming to the next step, the actual setting of the bond, with reference to the actual setting of the bond, I would like to draw the attention of the distinguished Judges to paragraph 15 of the Statement in Response, which stipulates that on 12 December 2006 the Inter-district Prosecutor's Office for Nature Protection in Kamchatka duly set a reasonable bond. The amount of the bond was set at the level of the overall damages to the marine living resources in the Russian exclusive economic zone equivalent to 8,800,000 roubles.

The next step is information brought to the attention of the owner with regard to the bond. As pointed out in paragraphs 15 and 36 of the Statement in Response, following the setting of the bond, the owner of the vessel was immediately informed about it and was provided with detailed instructions regarding the bank account to which the payment should be made.

The final step is the assurances given to the owner that the arrested vessel will be promptly released upon the payment of the bond. The competent Russian authorities, upon setting of the bond, also immediately informed the owner of the arrested vessel that the vessel will be promptly released upon payment of the bond.

Conclusions: It follows from the above explanations that the Applicant's claim that the bond set by the Russian authorities is not a bond for the purposes of paragraph 2 of article 73 of the Convention must be rejected. The fragmentation of the notion of bond, as suggested by the Applicant, would not be consistent with the purposes and nature of the bond, and this does not coincide with the actual proceedings carried out by the Respondent.

In the light of the foregoing, the Respondent would like to reiterate once again in very clear terms that a reasonable bond for the release of the *Tomimaru* was set by the competent authorities of the Russian Federation on 12 December 2006 for the purposes of prompt release of the *Tomimaru* vessel upon payment of the bond, as provided for in paragraph 2 of article 73 of the Convention.

As a reasonable bond has been set by the Respondent, the Tribunal should, in the view of the Respondent, exercise judicial propriety and order that the application concerning the prompt release of the *53 Tomimaru* is inadmissible.

I would now like to address the issue of the interrelation of various provisions of article 73 of the Convention.

Distinguished Judges, I would like now to address the issue which is sometimes forgotten or does not receive proper attention when prompt release proceedings under article 73 are involved.

Article 73 of the Convention was very carefully drafted to establish a proper balance between various interests. Although this article contains provisions protecting the interests of flag States through prompt release procedures, this article cannot and should not be understood as implying that the coastal State is otherwise restricted in exercising its sovereign rights within the exclusive economic zone.

According to paragraph 1 of article 73, the coastal State may, in exercise of its sovereign rights to explore, exploit, conserve and manage the marine living resources in the exclusive economic zone, take such measures – including boarding, inspection, arrest and judicial proceedings – as may be necessary to ensure compliance with the laws and regulations adopted in conformity with the Convention.

In the Statement in Response, it is emphasized in this respect that it follows from paragraph 1 of article 73 of the Convention that in exercise of its sovereign rights within the exclusive economic zone, the coastal State has full authority to take all the necessary measures, including the institution of judicial proceedings, to ensure full compliance with its conservation and management measures.

Paragraphs 2, 3 and 4 of article 73 of the Convention contain certain conditions that should be met and observed by the coastal State in situations where foreign vessels are detained or arrested, but these paragraphs are also drafted on the assumption that the owner of the vessel will meet its obligations and fully cooperate with the competent authorities of the coastal State.

I bring this consideration to the attention of the distinguished Judges because in the *"Tomimaru" Case* the owner of the vessel has never paid the bond which was set on 12 December 2006 by the proper Russian authorities. Therefore, the owner did not comply with its obligations under paragraph 2 of article 73 of the Convention.

In paragraph 67 of the Statement in Response, it is emphasized that payment by the owner of the vessel of a bond or other security set by the coastal authorities constitutes an obligation with which the owner of the vessel must duly comply. Prompt compliance by the owner with this obligation is the factor that triggers prompt release of the arrested vessel. So, article 73 of the Convention should be read and understood in its entirety because of the very careful balance of responsibilities and obligations established by it.

Paragraph 2 of article 73 of the Convention concerning prompt release of the arrested vessel cannot be read in isolation from paragraph 1 of this article concerning the exercise by the coastal State of its sovereign rights in the exclusive economic zone.

If the owner of a vessel does not comply with its obligations under paragraph 2 of article 73 of the Convention by not paying the bond, the coastal State does have full authority to proceed with all the necessary measures to ensure compliance with its laws and regulations, which are aimed at ensuring conservation and proper management of the marine living resources in the exclusive economic zone of the coastal State. The latter also includes the institution of appropriate judicial proceedings, which will be conducted in accordance with the applicable national laws of the coastal State.

In the case of the *Tomimaru*, the competent Russian authorities instituted the necessary judicial proceedings to ensure compliance with its laws and regulations, and they

did it in full conformity with the relevant provisions of the Law of the Sea Convention in exercise of the sovereign rights of the Russian Federation in the exclusive economic zone.

Now I would like to touch on the issue of why the application is inadmissible because the vessel in the *"Tomimaru" Case* was confiscated pursuant to a decision of the Russian court.

I would like now to address the issue of the inadmissibility of the application because of the confiscation of the *Tomimaru* vessel following the completion of the appropriate judicial proceedings of the Russian Federation.

The arguments that I would like to bring to the attention of the Tribunal in this regard should be understood in the context of other observations that I have already made regarding full compliance by the Respondent with its obligations under paragraph 2 of article 73 of the Convention.

First, I would like to address the issue of the applicable national judicial proceedings in the *"Tomimaru" Case*.

The case against the owner of the *Tomimaru* vessel was submitted in December 2006 to the Petropavlovsk-Kamchatskii City Court in accordance with the applicable proceedings.

On 28 December 2006, the Petropavlovsk-Kamchatskii City Court decided that the vessel should be confiscated and a fine of 2,865,149.5 roubles should be paid by the owner.

During the proceedings of the Court that led to the above judgment, the attorney representing the owner: pleaded guilty; asked the court to impose a fine equal to double damages without confiscation of the vessel because the offence had been committed by the owner for the first time; and, informed the court that the owner was ready to pay all fines and to cover the costs of the court's proceedings in this case.

On 6 January 2007, the owner of the vessel submitted an appeal against the aforementioned judgment to the Kamchatka District Court. The latter upheld the decision of the Petropavlovsk-Kamchatskii City Court on 24 January 2007.

In the light of the clarifications provided by the Supreme Court of the Russian Federation on 20 August 2003, which are referred to in paragraph 23 of the Statement in Response, the decision of the Kamchatka District Court entered into force immediately upon its delivery; in other words, on 24 January 2007. The decision was subject to enforcement from that date.

Following the entry into force of the decision of the Petropavlovsk-Kamchatskii City Court, the Federal Agency on Management of Federal Property included the fishing vessel *53 Tomimaru,* confiscated in accordance with the aforementioned decision of the Court, into the Federal Property Register as property of the Russian Federation.

It follows from the above that in the *"Tomimaru" Case* we deal with the following situation: the appropriate court proceedings were completed; the respective judgment, which included confiscation of the vessel, was rendered and entered into force; and the confiscated property, the fishing vessel *Tomimaru,* was included in the Federal Property Register as property of the Russian Federation.

I turn to the legal implications of the judgment. In its arguments on the legal implications of the judgment, which includes confiscation of the vessel, the Respondent extensively refers to the views expressed on this subject by the French Government in its communication of 28 March 2001, forwarded to the Registrar of the Tribunal by the Director of Legal Affairs of the Ministry of Foreign Affairs of France in connection with the application for prompt release submitted on behalf of Belize to the Tribunal with regard to the vessel *Grand Prince*.

The respondent fully shares these views. I would like to highlight some of the main elements of the arguments presented by the French Government. The reference to them in full is contained in paragraph 42 of the Statement in Response.

The French Government argues that:

> "when the internal judicial proceedings have reached their conclusion and, in particular, when they have led to the pronouncement of a sentence of confiscation of the vessel, any possible resort to Article 292 procedure loses its reason for being. In such a case, the application for prompt release is moot. As from the time when a national court has pronounced confiscation of the vessel as the applicable sanction, the introduction of a prompt release proceeding before the International Tribunal for the Law of the Sea is not only no longer possible but indeed is not even conceivable."

The French Government further argues that:

> "a confiscation declared by a national court as a principal or secondary penalty has as its effect authoritatively and definitively to transfer to the State the property confiscated. The owner of the vessel loses his title by virtue of the judicial decision and, if he seeks to recover his rights in the property, the remedies open to him can no longer be pursued within a proceeding for prompt release, since he can no longer be considered as the holder of the title to the vessel."

The French Government concludes the presentation of its position on this subject by stating that it flows from paragraph 3 of article 292 that:

> "The … Tribunal shall deal … with the application for release and shall deal only with the question of release, **without prejudice to the merits of any case before the appropriate domestic forum** against the vessel, its owner or its crew … In any penal proceeding instituted against the captain of a foreign fishing vessel for violation of the laws and regulations of the coastal State, the determination of the applicable penalty and the imposition of that penalty are an integral part of what one calls 'the merits'; i.e. the very **substance** of the case submitted to a national court."

The Respondent fully shares this position and strongly believes that, once the proceedings before the national court are completed and the judgment, which includes the confiscation of the arrested vessel, is rendered by the national court, the application of the prompt release proceedings under article 292 of the Convention would be equivalent to the interference by the Tribunal into the conduct and result of internal judicial proceedings of the coastal State concerned.

What situation do we have in the *"Tomimaru" Case*? In the *"Tomimaru" Case*, the Russian court rendered its judgment, which included confiscation of the *Tomimaru*. This judgment was upheld by the upper court fully in accordance with Russian procedural law and the principles of due process.

The judgment, thus, has entered into legal force and the property, the *Tomimaru*, was confiscated pursuant to this judgment and was entered into the Federal Property Register as property of the Russian Federation.

In the light of the foregoing, the Respondent believes that the case brought by the Applicant before the Tribunal must be declared inadmissible.

Now I would like to turn to the issue of why the Applicant requests that the Tribunal should order the release of the vessel upon such conditions and terms as the Tribunal considers "reasonable".

I refer to subparagraph 1(c) of the Application in the *"Tomimaru" Case*. This request is similar to the one in subparagraph 1(c) in the *"Hoshinmaru" Case* that was submitted by the Applicant.

In subparagraph 1(c) the Applicant requests the Tribunal to order the Respondent to release the vessel *Tomimaru* upon such terms and conditions that the Tribunal shall consider reasonable.

As I explained during the hearings in the *"Hoshinmaru" Case*, the Respondent is of the view that this request is formulated in a way that goes beyond the scope of what is envisaged in article 292 of the Convention because the Applicant requests the Tribunal to exercise functions that are not attributed to it under article 292 of the Convention.

I do not believe that it is necessary to repeat all the arguments presented on this subject in the *"Hoshinmaru" Case* because they are equally valid in the *"Tomimaru" Case*.

I would therefore ask the distinguished Judges to take the arguments presented by me on this subject in the *"Hoshinmaru" Case* also into account when they consider the *"Tomimaru" Case*.

The Tribunal has always determined under article 292 of the Convention not the terms and conditions, as requested by the Applicant, but a reasonable bond or other security, upon payment of which the arrested vessel shall be promptly released.

For the reasons explained in connection with the request contained in subparagraph 1(c) of the Application, the Respondent requests the Tribunal to declare the application inadmissible

May I stop here and continue after the break, Mr President?

The President:
Thank you, Professor Golitsyn. I believe that is appropriate.

We will adjourn for 20 minutes.

(Short break)

The President:
Professor Golitsyn, would you please continue?

Mr Golitsyn:
Mr President, distinguished Judges, I would now like to address the issue of the establishment of the jurisdiction of the Tribunal, as presented in subparagraph 1(a) of Japan's Application. This paragraph in the *"Tomimaru"* Application is identical to a similar subparagraph in the *"Hoshinmaru"* Application. Consequently, the arguments presented by me in the *"Hoshinmaru" Case* are valid for the *"Tomimaru" Case* as well. However, given the importance that we attach to this subject, I find it necessary to repeat them.

It is obvious that the first action that the Tribunal needs to take when it receives an application for the prompt release of a vessel is to satisfy itself that it has jurisdiction under article 292 of the Convention to adjudicate on the case.

If one looks at the request that is addressed by the Applicant in this regard to the Tribunal, one will find that the Tribunal is requested to declare its jurisdiction under article 292 on the assumption that the Respondent is in breach of its obligations under paragraph 2 of article 73 of the Convention.

We believe that in establishing its jurisdiction to adjudicate on the case, the Tribunal cannot and should not imply in advance that the allegations made by the Applicant regarding the non-compliance by the Respondent with the provisions of paragraph 2 of article 73 of the Convention are well grounded and therefore should be accepted.

Therefore, the Respondent cannot agree, as stated in paragraph 32 of its Statement in Response in the *"Tomimaru" Case*, with what is requested by the Applicant in subparagraph 1(a) of its Application in that case.

I would now like to make some comments with regard to observations made this morning. Quite a few observations were made by the Applicant this morning that are questionable and require comments. In my presentation I will comment only on those that are more or less of a legal nature.

I would like to start with comments on the statement that the owner of the vessel up until now has continued to make requests to set a reasonable bond for the release of the arrested vessel. It is our understanding that the owner has been trying through the applicable judicial proceedings to reverse a court's judgment regarding the confiscation of the vessel. However, the owner has not been making requests for the setting of a new bond. Such requests have been made by the Japanese authorities but not by the owner of the vessel.

The second observation that I would like to make relates to the remarks that were repeated several times this morning, the essence of which is that since the Supreme Court of the Russian Federation is currently involved in this matter, the decision of the Petropavlovsk-Kamchatskii City Court has not yet come into force, and that therefore the property for this vessel has not been transferred to the Russian Federation.

We are at least surprised by these remarks, because the legal situation was quite clearly explained in the Statement in Response. In paragraphs 22 and 23 of this Statement, it is explained that an appeal procedure was exhausted when the judgment of the Petropavlovsk-Kamchatskii City Court of 28 December 2006 was upheld by the Kamchatka District Court on 24 January 2007. As clarified in paragraphs 23 and 26 of the Statement in Response, once the appeal procedure was exhausted and the decision of the Petropavlovsk-Kamchatskii City Court came into force, the Federal Agency on Management of Federal Property by an implementing act of 9 April 2007 included the fishing vessel *Tomimaru*, confiscated in accordance with the decision of the court, in the Federal Property Register as property of the Russian Federation.

The matter now before the Supreme Court of the Russian Federation is not an appeal with regard to the judgment that has already come into force. It is an objection lodged by the owner of the vessel in accordance with the supervisory review procedure exercised by the Supreme Court – a procedure that is completely different from the appeal procedure. Consequently, the vessel is currently registered in the Federal Property Register as property of the Russian Federation.

It was alleged this morning that since the *Tomimaru* has not been excluded from the Japanese flag register, it cannot become the property of the Russian Federation until this situation is changed, because the *Tomimaru* cannot be re-flagged. In our view, that is a very strange assumption, which may be interpreted to mean that Japan can influence the decisions of Russian courts or prevent the implementation of their judgments. Japan definitely does not have this authority.

Besides, this assumption is based on an idea that the vessel is supposed to be re-flagged. However, as property of the Russian Federation, the *Tomimaru* vessel can be used for various purposes. For example, it can be placed as an exhibit in a museum of fishing vessels involved in illegal activities; it can be sold to a new owner who would change it into a seafood restaurant or make it a part of an amusement park; or it can be determined by the Federal Agency on Management of Federal Property that this vessel is in such poor condition

that it is nothing more than a piece of scrap metal and therefore should be completely demolished.

It was also claimed this morning that even if the owner had paid the bond established on 12 December 2006, the vessel would never have been released by the Russian authorities.

In the *"Hoshinmaru" Case* we were criticized by the Applicant's counsel for trying to invent a hypothetical situation and we were reminded that in the proceedings before this Tribunal we should deal only with the real facts. It is now our turn to remind the Applicant that the Tribunal does not deal with hypothetical situations but with the real facts. In this case, the fact is that on 12 December 2006 the Inter-district Prosecutor's Office for Nature Protection in Kamchatka duly set a reasonable bond in accordance with the authority delegated to it. It is a fact that the owner has never contested this bond and has never paid it. These are the facts, not a hypothetical situation, that should be presented to the Tribunal by the parties.

It was alleged this morning that there is some confusion between administrative and criminal proceedings of the Russian Federation that sometimes operate in parallel and that it is difficult to determine the authority that is responsible for the setting of bonds. We were told that this is a situation with two locks and that in the *"Tomimaru" Case* there was a key to only one lock, and that the owner, despite all efforts, failed to find a key to another lock. We would like to remind the Applicant that it is for the owner of the locks to know exactly what key would open them. In connection with this comment, we therefore wonder why our Statement in Response is being read by the Applicant selectively.

In paragraph 12 of the Statement in Response, it is explained that on 1 December 2006 the Japanese authorities were informed by the Inter-district Prosecutor's Office for Nature Protection in Kamchatka that it was waiting for a due request for setting a bond. Special emphasis was placed on the question of release of the vessel, and the authorities of the Applicant were informed that a decision to release the seized vessel would be made upon payment of the bond.

In paragraph 14 of the Statement, it is further clarified that in response to an enquiry from the owner of the vessel, the latter was informed that the proper body responsible for the determination of a bond in the case of the *Tomimaru* was the Inter-district Prosecutor's Office for Nature Protection in Kamchatka. As everyone knows, I hope, by now, on 12 December 2006 the Inter-district Prosecutor's Office for Nature Protection in Kamchatka duly set a reasonable bond in the amount of 8,800,000 roubles and informed the owner that the free operation of the vessel would be allowed on payment of the bond. We wonder why, after all these clarifications, one still has doubts about proper authority to establish a reasonable bond in the *"Tomimaru" Case*.

The Applicant expressed doubts as to whether the bond set on 12 December 2006 was a proper bond, a bond for the purposes of paragraph 2 of article 73 of the Convention. The respective letter informing the Japanese side about setting of a bond clearly stated (in brackets) that it was not a fine for ecological damages but a bond, in calculation of which ecological damage was one of the considerations. If the Japanese authorities had certain doubts about the nature and the purpose of the bond set on 12 December 2006, they should have consulted the competent Russian authorities and asked for clarifications. That has never been done.

The fact of the matter is that – even if the Japanese side considers the bond established by competent Russian authorities as a bond set at unreasonably low level – it is a reasonable bond established by the Russian authorities. No other reasonable bond has been set in this case by the competent Russian authorities under paragraph 2 of article 73 of the Convention. In this regard it is worth reminding that the competent Russian authorities evaluate each situation on a case by case basis, and that the procedures discussed at length at

the Joint Commission established under the 1984 Agreement have become operational only recently.

In statements by the Applicant this morning reference was made to a petition by the owner to the Petropavlovsk-Kamchatskii City Court asking this Court to set a reasonable bond. This petition was rejected by the Court as noted in paragraph 17 of the Statement in Response. It is probably worth commenting in this connection on actions undertaken by the owner of the vessel in the *"Tomimaru" Case*.

This reminds me of my younger years when I studied English and was advised on difference between the words "confused" and "confusing". It appears that in this case we are dealing with a confused owner of the vessel who constantly finds itself in confusing situations. Following the establishment of the reasonable bond by the competent Russian authorities on 12 December 2006, the owner for reasons that are difficult to understand, decided to ask the City Court to establish another bond. When the owner was rebuffed by that Court, its attorney, during the proceedings before the Court that led to a decision which included the confiscation of the vessel, claimed that it has some kind of understanding with the Russian law enforcement authorities regarding the setting of a bond and assessment of the damage.

One may wonder whether the owner was actually trying to reach an arrangement regarding the release of the vessel outside normal proceedings, which is not a legal way of managing such situations.

This may explain why the owner has never officially challenged the bond and has never paid it. However, we understand that this is mere speculation on our part and, as advised by the Applicant, we are not supposed to bring hypothetical situations to the attention of the Tribunal, which deals with the facts and only the facts.

On several occasions in the course of oral hearings this morning the Applicant questioned the current procedures in the Russian Federation used for the purposes of paragraph 2 of article 73 of the Convention. We were advised by the Applicant to refine these procedures to ensure more effective implementation of our obligations under paragraph 2 of article 73 of the Convention.

In response to these observations I would like to reiterate what I said yesterday during the proceedings in the *"Hoshinmaru" Case*, namely, that lack of understanding of the applicable Russian procedures, which is evident by what was stated by the Applicant during the oral proceedings this morning, could not serve as a justification for this kind of statement. The Russian Federation does have clearly defined procedures that allow it to meet all the requirements of paragraph 2 of article 73 of the Convention and these procedures have been effectively applied without any complaints over the years.

In my concluding remarks I would like to reiterate some of the main points of my presentation, which are the following.

In pursuance of its responsibilities under paragraph 2 of article 73 of the Convention, the competent authorities of the Respondent, namely the Inter-district Prosecutor for Nature Protection in Kamchatka, set a bond, provided the owner with the necessary details regarding the payment of the bond and informed the owner that they would release the vessel upon posting of the bond.

Article 73 of the Convention should be read in its entirety because its paragraphs are closely linked and inter-related to each other, and therefore paragraphs 2, 3 and 4 should be read in conjunction with what is stated in paragraph 1 of this article concerning the exercise by the coastal State of its sovereign rights in the exclusive economic zone.

As the owner of the *53 Tomimaru*, who has never contested the amount of the bond, has not promptly paid the bond, the necessary judicial proceedings were instituted in December 2006 before the Petropavlovsk-Kamchatskii City Court.

Following the entry into force of the decision of the Petropavlovsk-Kamchatskii City Court, the Federal Agency on Management of Federal Property included the fishing vessel *53 Tomimaru*, confiscated in accordance with the aforementioned decision of the Court, in the Federal Property Register as property of the Russian Federation.

In conclusion, I would like to state that factual information presented by the Respondent, as well as legal analyses of the provisions of article 73 of the Convention, unequivocally confirm that, contrary to what is alleged by the Applicant, the Respondent has fully complied with its obligations under paragraph 2 of article 73 of the Convention and that as a result, the case should be declared by the Tribunal inadmissible.

Thank you for your kind attention.

The President:

Thank you very much indeed, Professor Golitsyn.

That brings us to the end of this sitting. As agreed, the sitting will be resumed on Monday, 23 July, at 10 o'clock, when the representatives of the parties will present their second round of submissions. The Tribunal's sitting is now closed.

(The sitting closes at 5 p.m.)

PUBLIC SITTING HELD ON 23 JULY 2007, 10.00 A.M.

Tribunal

Present: *President* WOLFRUM; *Vice-President* AKL; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, TREVES, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, TÜRK, KATEKA *and* HOFFMANN; *Registrar* GAUTIER.

For Japan: [See sitting of 21 July 2007, 10.00 a.m.]

For the Russian Federation: [See sitting of 21 July 2007, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 23 JUILLET 2007, 10 H 00

Tribunal

Présents : M. WOLFRUM, *Président*; M. AKL, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, TREVES, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, TÜRK, KATEKA *et* HOFFMANN, *juges*; M. GAUTIER, *Greffier*.

Pour le Japon : [Voir l'audience du 21 juillet 2007, 10 h 00]

Pour la Fédération de Russie : [Voir l'audience du 21 juillet 2007, 10 h 00]

The President:
Good morning. This session will be devoted to the second round of the submissions by both parties, beginning with the Applicant, Japan. I will now give the floor to Mr Komatsu, the Agent for the Government of Japan. He will indicate how the time will be divided and who will take the floor.

Mr Komatsu, please.

M. Komatsu :
Je vous remercie, Monsieur le Président.

Monsieur le Président, à présent, avec votre permission je voudrais inviter d'abord notre avocat, le professeur Hamamoto, à prendre la parole. Ensuite, le professeur Lowe va clore l'argumentation de la partie demanderesse.

The President:
Thank you, Mr Komatsu.

Professor Hamamoto, would you kindly take the floor?

Réplique du Japon

EXPOSÉ DE M. HAMAMOTO
AVOCAT DU JAPON
[PV.07/06, F, p. 1–6]

M. Hamamoto :
Monsieur le Président, Messieurs les juges, c'est assurément un honneur de m'adresser à nouveau, au nom du Japon, au Tribunal international du droit de la mer.

Au cours des débats qui ont eu lieu samedi dernier, les points de désaccord qui subsistent entre les parties au présent litige se sont manifestés de manière de plus en plus claire. Nous allons nous concentrer sur ces points et, pour ce qui nous concerne, j'aborderai les questions relatives à la confiscation d'abord et du manque de constance ou de cohérence du système russe de la prompte mainlevée ensuite.

D'après nos chers collègues russes, si je ne m'abuse, la présente affaire est irrecevable devant le Tribunal international du droit de la mer parce que le navire *Tomimaru* a déjà été confisqué. Monsieur le Président, en ce qui concerne la question relative à la confiscation, il faut particulièrement bien préciser le point de désaccord, parce qu'il me paraît que les parties au présent litige s'accordent sur les principes mais diffèrent sur leur application.

Nous savons, bien sûr, que l'article 292, paragraphe 3, stipule que le Tribunal examine la question de la prompte mainlevée « sans préjudice de la suite qui sera donnée à toute action dont le navire, son propriétaire ou son équipage, peuvent être l'objet devant la juridiction nationale appropriée. »

La partie défenderesse se base essentiellement sur la position qu'a prise la France dans l'*Affaire du « Grand Prince »*, qui nous est également familière. Le professeur Jean-Pierre Quéneudec, une grande autorité du droit de la mer qui se trouvait être le conseil de la France dans cette affaire, soutient que :

> « Lorsque [l']action judiciaire interne [introduite par les autorités de l'Etat côtier] a abouti, c'est-à-dire lorsque l'instance judiciaire interne n'est plus pendante » – je répète : n'est plus pendante – « devant un tribunal national, le recours à la procédure de l'Article 292 tend à perdre non seulement tout intérêt, mais même à perdre toute raison d'être ».

Nous partageons cette analyse avec la délégation russe.

Dans une affaire plus récente, c'est-à-dire celle du *« Juno Trader »*, le Président Wolfrum et le Juge Mensah ont déclaré, quant à eux, que :

> « la procédure de prompte mainlevée prévue à l'article 292 de la Convention vise à assurer la mainlevée d'un navire dans l'attente de la conclusion définitive de l'action judiciaire menée devant les instances internes de l'Etat côtier. »

Ils ont ajouté d'ailleurs une chose très importante, c'est-à-dire que la procédure de confiscation « doi[t ê]tre conform[e] au principe de la régularité de la procédure prescrit par le droit international ». Monsieur le Président, notre position ne diffère pas de l'opinion de ces éminents juges non plus.

Malgré tout cela, la partie demanderesse, c'est-à-dire le Japon, insiste sur la recevabilité de la présente affaire, nous a-t-on dit. Non, ce n'est pas malgré cela, mais à cause de cela que nous affirmons la recevabilité de la présente affaire !

Quelle est la situation en l'espèce ? Le 28 décembre 2006, le tribunal d'instance de Petropavlovsk-Kamtchatskii a pris la décision de confisquer le *Tomimaru*. Ensuite, cette décision a été confirmée par le tribunal régional du Kamtchatka le 24 janvier 2007. Comme le précise la partie défenderesse, la décision du tribunal d'instance de Petropavlovsk-Kamtchatskii n'a pas fait tout de suite automatiquement du *Tomimaru* la propriété de la Russie. L'Administration fédérale russe responsable en la matière a pris, le 9 avril 2007, la mesure requise par le droit russe à cet effet et ceci, après la demande qu'a faite le propriétaire du *Tomimaru* auprès de la Cour suprême russe en mars 2007.

Comme nous le rappelle le paragraphe 22 de l'exposé en réponse de la Fédération de Russie – je cite le texte original en anglais : « *The matter is currently before the Supreme Court of the Russian Federation, which has not yet taken any decision on it.* » [« La question est actuellement devant la Cour suprême de la Fédération de Russie qui n'a pas encore pris de décision à ce sujet ».]

Selon les informations qui nous sont fournies, ladite demande a été faite auprès de la Cour suprême russe en mars 2007. Celle-ci a demandé le texte du jugement au tribunal d'instance de Petropavlovsk-Kamtchatskii le 28 mai 2007. Celui-ci, à son tour, a envoyé le texte à celle-là le 9 juin 2007. Le numéro de l'affaire pendante devant la Cour suprême est 60-AF07-32. L'affaire est ainsi bel et bien pendante, comme le dit en effet le paragraphe 22 de l'exposé écrit de la partie défenderesse.

Monsieur l'agent de la partie défenderesse soutient, dans ce contexte, que l'affaire pendante devant la Cour suprême est introduite dans le cadre d'une procédure de révision qui est une sorte d'examen exceptionnel. Qu'est-ce que cela veut dire ? Le professeur Golitsyn, ainsi que l'exposé écrit de la partie défenderesse, se réfère à des « *clarifications* » ou à une « lettre » de la Cour suprême, datée du 20 août 2003, selon laquelle la décision du tribunal régional n'est pas susceptible d'un appel. Il s'ensuit, selon le conseil russe, que la décision de la cour inférieure a force exécutoire, nonobstant le fait que l'affaire est encore et toujours pendante devant la Cour suprême.

J'aimerais bien me permettre, tout de même, de vous faire remarquer, Monsieur le Président, Messieurs les juges, que la partie défenderesse n'a pas encore expliqué le statut juridique de cette « lettre » de la Cour suprême. Il s'agit d'une déclaration abstraite qui indique une ou « l' »interprétation correcte d'une stipulation législative. Ce n'est pas dans le contexte de l'affaire du *Tomimaru* que cette « lettre » a été délivrée par la Cour suprême. Il s'agit, comme je viens de vous le faire remarquer, d'une déclaration abstraite faite quatre ans avant l'affaire du *Tomimaru*. Ce qui nous importe, c'est le fait que la Cour suprême n'est pas encore arrivée à prendre une décision concrète sur la question concrète de la confiscation du *Tomimaru*. L'affaire concrète de la confiscation du *Tomimaru*, quant à elle, est encore et toujours pendante devant la Cour suprême.

Mais supposons, pour le moment, que le jugement du tribunal d'instance de Petropavlovsk-Kamtchatskii sur la confiscation du *Tomimaru* ait force exécutoire en droit russe, comme le soutient la partie défenderesse en se référant à cette « lettre ». La question qui se pose alors devant ce Tribunal serait de savoir si la Convention de Montego Bay empêche le Tribunal d'exercer sa compétence dans une telle situation.

A cet égard, l'exposé de M. l'agent de la partie défenderesse d'avant-hier vient dissiper tous les doutes. Selon lui, la Cour suprême russe possède le pouvoir d'annuler les décisions des instances inférieures dans le cadre de cette procédure exceptionnelle. La décision de confiscation rendue par les tribunaux inférieurs est ainsi susceptible d'être annulée par la Cour suprême à la fin de la procédure qui est en cours au moment où je vous parle.

Donc, même si la « lettre » de la Cour suprême avait une certaine force juridique en droit russe, ce qui n'est pas encore démontré, il faut le dire, la question serait alors celle de

savoir si l'article 292 de la Convention empêche le Tribunal d'exercer sa compétence dans un cas où une décision interne judiciaire, ayant certes une force exécutoire, se trouve tout de même actuellement pendante dans une procédure judiciaire à la fin de laquelle elle peut être – et le mot est important – annulée.

Je résume : Jean-Pierre Quéneudec, le conseil français, soutient que la procédure de l'article 292 n'est plus pertinente lorsque l'instance judiciaire interne n'est plus pendante. Le Président Wolfrum et le Juge Mensah affirment que cette procédure vise à assurer la mainlevée d'un navire dans l'attente de la conclusion définitive de l'action judiciaire interne. Or, l'affaire de la confiscation du *Tomimaru* est pendante dans une procédure judiciaire à la fin de laquelle elle peut être – désolé pour cette répétition, mais c'est tellement important – annulée. Il n'y a donc aucune raison pour laquelle cette haute juridiction du droit de la mer soit contrainte de s'abstenir d'exercer sa compétence. L'*Affaire du « Tomimaru »* est recevable.

J'en viens maintenant à mon deuxième point, **l**e manque de constance du système russe de la prompte mainlevée. Au cours des débats qui ont eu lieu le samedi, les deux parties ont beaucoup parlé du système interne russe de la prompte mainlevée. Pour ce qui est du demandeur, le Japon, M. Komatsu et le professeur Lowe ont détaillé la complication, sinon l'impasse, du système interne russe en matière de prompte mainlevée : « Il y a deux cadenas sur le navire et un troisième sur le capitaine, en effet ».

Monsieur le Président, Messieurs les juges, le manque de constance ou de cohérence du système interne russe a empêché et empêche la prompte mainlevée du *Tomimaru*. Je ne répéterai pas ce que vous ont dit, samedi, Monsieur Komatsu et le professeur Lowe, à ce sujet. Je me limiterai à répondre aux allégations russes.

D'abord, la fameuse question de clefs et de cadenas. Comme on le sait, le Parquet interrégional pour la protection de la nature au Kamtchatka a proposé, le 12 décembre 2006, au propriétaire du *Tomimaru*, de payer 8,8 millions de roubles. Le propriétaire n'a pas payé ce montant parce que, comme le professeur Lowe vous l'a dit avant-hier, cette proposition ne concernait que la procédure pénale et qu'il existait une autre procédure en cours au même temps, une procédure administrative. Deux cadenas sur le navire, donc.

Pour ouvrir le deuxième cadenas, administratif, le propriétaire a demandé à l'Inspection maritime d'Etat de la Direction des gardes-côtes de la frontière Nord-Est de fixer une caution raisonnable. A cela, nos chers collègues russes nous répondent comme suit : il y a, chez nous – chez les Japonais – un manque de compréhension des procédures russes applicables. Il était complètement inutile que le propriétaire se soit adressé au tribunal d'instance de Petropavlovsk-Kamtchatskii. Pourquoi inutile ? Eh bien, M. Yalovitskiy, le conseil russe, qui nous a fourni avant-hier une information abondante sur le droit russe, attire notre attention sur un point important, en effet très important. Monsieur Yalovitskiy affirme que conformément à la législation russe, le Procureur est autorisé à ordonner à l'Inspection maritime d'Etat de la Direction des garde-côtes de la frontière Nord-Est du Service fédéral de sécurité de la Fédération de Russie – bref, l'organe russe chargé de la procédure administrative – de libérer le navire. A notre regret, M. Yalovitskiy s'est contenté de se référer très vaguement à la « législation russe » sans aucune précision.

Un deuxième point pour montrer la complexité ou la complication du système russe. Le professeur Golitsyn, conseil russe, nous a suggéré de chercher meilleur conseil si nous ne comprenions pas le système russe. Certes, mais j'aimerais bien attirer votre attention, Monsieur le Président, Messieurs les juges, sur le fait que c'est un avocat russe qui a représenté et qui représente toujours les intérêts du capitaine et du propriétaire du *Tomimaru* dans toutes ces procédures. La décision de demander de fixer la caution au tribunal d'instance à l'égard de la procédure administrative a été prise par le propriétaire sur la base du conseil que lui a donné cet avocat russe. C'est vrai qu'il n'est pas inconcevable, du moins en théorie,

qu'un avocat local ne maîtrise pas parfaitement le système local. Cela arrive. Cependant, Monsieur le Président et Messieurs les juges, lorsque même l'avocat professionnel local ne comprend pas le système, est-il permis de considérer celui-ci comme cohérent, simple, clair ou transparent ?

A cet égard, il faut dire que nous avons été encouragés par la déclaration faite par M. Zagaynov, dans son exposé d'avant-hier. L'agent russe dit que son pays travaille à améliorer sa législation en matière de prompte mainlevée qui n'est pas parfaite, selon lui, tout en reconnaissant que nous, les partenaires japonais, avons des difficultés dans ce domaine. Le Japon souhaite, quant à lui, profiter de cette occasion pour déclarer qu'il est toujours prêt à coopérer pleinement avec la Fédération de Russie dans ce domaine comme dans tant d'autres.
Monsieur le Président, Messieurs les juges, je vous remercie de m'avoir accordé votre aimable attention. Maintenant, je vous prie de bien vouloir donner la parole au professeur Lowe, qui vous parlera des questions relatives à la caution et vous montrera ensuite la structure complète de la position japonaise.

Merci, Monsieur le Président.

The President:
Thank you very much, Professor Hamamoto.

I now give the floor to Professor Lowe.

STATEMENT OF MR LOWE
ADVOCATE OF JAPAN
[PV.07/06, E, p. 4–12]

Mr Lowe:
Mr President, Members of the Tribunal, I now have to bring Japan's legal submissions in this case to a close.

Two days ago, after taking you through the key documents submitted in this case, I said that the *Tomimaru* was arrested; that it is still the subject of court proceedings in Russia, which may result in its return to the Japanese owner or may result in its definitive confiscation by the Russian Federation; and that while those proceedings are pending, the owner would like to have it released promptly upon payment of a reasonable bond.

We have listened with interest to the eloquent requests from Russia that you should deny the Japanese owner access to his vessel while the Supreme Court considers the position, and should instead allow the vessel to remain idle and unused in a Russian port. I shall respond to those requests.

Let me first address the question of admissibility and the plea that a reasonable bond had indeed been set on 12 December 2006. Professor Golitsyn is a very accomplished advocate, and his account of the unfolding of the *Tomimaru* affair was persuasive, but you may think that there is still something about the events of mid-December that does not quite fit.

Please allow me to direct you once again to the small number of documents that are crucial in this case. The first is the letter of the Prosecutor's Office for Nature Protection dated 12 December. We refer you to the text in Respondent's annex 4 because that is the text that Russia itself translated from Russian into English, so there should be no question of the accuracy of the translation. You will see at the head of that letter the date and the reference number: 1-640571-06. You will recall that 640571 was the number of the criminal law case against the Master. That is said in the Prosecutor's letter dated 1 December 2006, which is Respondent's annex 3, where it is said that:

> "on November 8, 2006, Kamchatka Inter-District Prosecutor's Office for Nature Protection filed criminal case No. 640571 against Takagiwa Matsuo, Master of the *53rd Tomimaru*, a Japanese vessel, accusing him of committing a crime under Article 253, Part 2 of the Criminal Code of the Russian Federation, i.e. extraction of natural resources in the exclusive economic zone of the Russian Federation without a license, which resulted in considerable environmental damage amounting to no less than 8,500,000 rubles."

So, the 12 December letter is a letter on the file in this case, criminal case 640571. The 12 December letter refers in paragraph 1 to the owner's request for the damage done by the Master to be assessed with a view to providing voluntary compensation for it and for the release of the vessel. So the request for the assessment is clearly for an assessment in the context of the proceedings against the Master in criminal case 640571.

This is confirmed in the next paragraph of the letter, which begins, "It has been established that Takagiwa Matsuo, Master of the *53rd Tomimaru* … was engaged in illegal fishing", and proceeds then to give details of his offence. There is, Mr President, not a single word in this letter about any offence committed by the owner or any charge against the owner, or any legal liability of the owner.

The next paragraph refers to the discovery of the unauthorized fish products on board the *Tomimaru*, and then you come to the two final paragraphs which I read to you on Saturday:

> "[T]he damage caused to the Russian Federation was estimated at 8,8000,000 rubles.
>
> After the money (bond) towards the voluntary compensation for the damage caused to the Russian Federation is received into the deposit account" – and the details of the account follow – "the Prosecutor's Office for Nature Protection will no longer prevent free operation of the *53rd Tomimaru* trawler."

A great deal turns on this, on what it means and on what its significance is; and we need to consider it carefully.

There are some points that are clear. It is clear beyond doubt that the letter refers to the criminal case against the Master. That is, as I have shown you, apparent from the text of the letter itself but the matter is put beyond question by another document, which is Respondent's annex 7. That document, which is also dated 12 December 2006, is the actual legal instrument that sets out the decision of the Prosecutor's Office for Nature Protection on the owner's petition. It opens with the words "Major Investigator of the Kamchatka Inter-District Prosecutor's Office for Nature Protection, Lawyer, First Class, Kabychenko VA, having considered the petition of the Head of the Kanai Gyogyo Company in respect of criminal case no. 640571." It then sets out the facts and at the end of that decision it says:

> "Based on the above and in accordance with Articles 38, 122 and 159 of the Criminal Code of the Russian Federation, I **take the decision** to satisfy the petition of the Head of *Kanai Gyogyo Co.* in respect of assessing the amount of the damage caused by the Master of *53rd Tomimaru* to the Russian Federation with a view to its voluntary compensation."

Mr President, Members of the Tribunal, you will remember that in the *"Hoshinmaru" Case* Mr Monakhov said on Friday morning, transcript page 11, lines 28-31[*]:

> "Pursuant to the current legislation of the Russian Federation, these penalties in relation to the present case include three elements: first, administrative or criminal responsibility of the Master; second, administrative responsibility of the owner of the vessel; and third, civil liability for causing ecological damage."

There is no mention in the 12 December letter of the administrative responsibility of the Master of the *Tomimaru*. There is no mention of the administrative responsibility of the owner. How then should one read a request for the payment of 8.8 million roubles with a view to voluntary compensation of the damage caused by the *Tomimaru*? Is it not perfectly clear which element of the Russian system is being addressed in that letter?

I know that our friends think that we are easily confused and that we are in need of better legal advice than the owner and the Consul obtained from their expert advisers on Russian law, but we can read. What the decision and the letter written on the same day, 12 December 2006, which repeats in identical terms the content of that decision, both say is that

[*] Note by the Registry: This and the following refer to the uncorrected version of the verbatim records.

a voluntary contribution of 8.8 million roubles, made in the context of the criminal case against the Master, case 640571, will remove the objection of the Prosecutor's Office for Nature Protection to the release of the vessel.

Another point is clear. Yesterday, Mr Yalovitskiy told you, and I quote from page 10 of the transcript, at lines 38-43, that:

> "It should be noted that for the last four years around the coast of Kamchatka for violations similar to those made by *Tomimaru 53* seven more Japanese fishing vessels were detained. However, the illegal activities of Japanese citizen Takagiva Matsuo inflicted the gravest damage to the interests of the Russian Federation. The Russian court was guided by these exact considerations in prescribing punishment."

And so it should be. The graver the offence, the graver the punishment should be. We know that in the *"Tomimaru" Case* this was a grave offence because the confiscation of the vessel was ordered despite the fact that it was the first offence by the owner. You will see that point made in paragraph 22 of the Statement in Response.

The facts of the offences alleged against the *Tomimaru* were known to the authorities in November, well before the writing of the 12 December letter. Russia's note verbale to Japan date 9 November 2006, which is in Applicant's annex 3, stipulated both what species of fish had been unlawfully caught, and the weight of the illegal catch down to one decimal place.

Mr Yalovitskiy told you on page 7 of the transcript, at lines 17-24, that on 9 November Russian experts had examined the *Tomimaru* and concluded that the illegal catch caused damage amounting to 9,328,600 roubles, a very exact amount that indicates the precise knowledge of the quantity of illegal fishing. Mr Monakhov told you, on page 11 of this transcript, lines 33-39, that the penalty for the administrative offence of illegal fishing is a fine of between two and three times the cost of the catch illegally taken, with the possibility of the confiscation of the vessel in addition to that fine. So the level of the potential fine against the *Tomimaru* was obvious on 9 November – between 18 million and 27-28 million roubles, plus the possibility of confiscating the vessel.

As Mr Yalovitskiy told you, on page 10 of his transcript, lines 1-10, on 28 December the owner of the vessel was indeed found guilty of the administrative offence under Part II, Article 8.17 of the Code of Administrative Offences of the Russian Federation, and he was fined twice the value of the illegal fish which were the subject of the administrative violation, which totalled, 2,865,149 roubles, plus the confiscation of the vessel and all the tools and equipment aboard the vessel at that time.

Please note carefully that the confiscation was ordered in the context of the December 2006 trial of the owner on administrative offences, not in the May 2007 trial of the Master on criminal offences.

Here we have the gravest fishing offence in Russian waters in four years, where the Master is accused of illegally catching over 9 million roubles worth of fish, and charged with damage in the amount of 8.9 million roubles. The Master is eventually fined 500,000 roubles, with a penalty of 9,328 million roubles determined against him (page 10, lines 27-35, of the transcript) and the owner is charged with an administrative offence for which the penalty is at least twice, and possibly three times that amount, plus the possible confiscation of the vessel.

There is a total potential liability there of well over 30 million, something approaching 40 million roubles, although we accept that it is the realistically possible level of the penalty, not the theoretical maximum, that is the point of reference. Let us suppose that

the authorities thought that the penalties, including the value of the vessel, might in practice add up to, say, 25 million roubles.

Professor Golitsyn told you on Friday morning, at page 19 of the transcript, lines 17-34:

> "What is sometimes forgotten is that those who are responsible for the establishment of a bond are kept accountable for satisfying the requirement that the bond would constitute a sufficient security …. which would ensure implementation of the court's decision to be delivered following the conclusion of the court proceedings. For any harsh decisions taken by those responsible for the establishment of a bond without thorough investigation of the case, they may be reprimanded and held accountable if the bond does not constitute a sufficient security for the implementation of the judgment; and this human factor should also be taken into account when we speak about the reasonableness of a bond."

It is a fair point and gives an important insight into the incentives to set bonds at high levels.

He continued:

> "… the setting of a bond requires a thorough analysis of all the relevant factors, an assessment of the extent of their relevance to a particular case, an examination of all surrounding circumstances, and establishing the amount of bond or other security at a level that will provide sufficient guarantees and security for the proper implementation of any decision that may be adopted following the completion of the pending judicial or other legal proceedings in this case."

So, with the penalties that we have at stake in this case, possibly reaching up to 40 million roubles – and all of these penalties calculable, foreseeable, known to the Russian authorities on 12 December 2006 – one might have expected a bond of the order of 25 million roubles. The comparison with the 25 million rouble bond demanded in the *"Hoshinmaru" Case* will not be lost on the Tribunal.

How much does the Prosecutor's Office for Nature Protection set the *Tomimaru* bond for, having concluded its thorough examination of all the factors, and established the amount of bond that will provide sufficient guarantees and security for the proper implementation of any decision that may be adopted in the pending proceedings, conscious of its duty to protect the interests of the State, conscious of the duty of unpaid Japanese fines? It sets it for one-third of that amount, 8.8 million roubles, in the criminal case against the Master.

The owner of the *Tomimaru* has a vessel which is worth, on our valuations – which, to judge from the *"Hoshinmaru" Case*, tend to be lower than the Russian valuations – between US$ 260,000 and US$ 410,000; that is, between 6.6 and 10.4 million roubles. He wants the ship back while he awaits the trial of the owner and of the Master.

The owner at this point has already admitted wrongdoing in his letter to the Russian authorities on 30 November in which he apologizes for the actions of his Master (Respondent's annex 2). He knows at this time that he faces serious penalties. He may be aware that his is said to be the most egregious offence committed during the previous four years. With an exposure that in December 2006 the owner can already calculate, on the basis of known formulas in Russian law, as being somewhere upwards of 25 million roubles, plus the confiscation of his vessel, he is offered a bond of 8.8 million roubles.

What does he do? He writes the petition to the Coast Guard Directorate that is in Applicant's annex 37. He says:

> "The Inter-district Prosecutor's Office for Nature Protection in Kamchatka, by the letter dated 12 December 2006 …, has set the amount of a bond upon the posting of which the vessel will be released, within the criminal case established against the Master of the vessel "*53rd Tomimaru"*.
>
> Considering the aforementioned fact, I request the amount of a bond be set for the case of administrative offences established against the owner of the vessel "*53rd Tomimaru"*."

How should we interpret this? Japan says that the position is clear enough. Mr Monakhov described the three elements of penalties under Russian law: first, administrative or criminal responsibility of the Master: second, administrative responsibility of the owner: and, third, civil liability for causing ecological damage.

Japan says that the owner's letter should be understood to mean exactly what it says. A bond has been set in respect of the criminal offences. Please set a bond in respect of the administrative offences.

Russia asks you to interpret the letter differently. It says that the owner, advised by his Russian lawyers, is writing to the Russian authorities to say: you have set a bond that will release my vessel but it is too low – let me pay you more. I leave it to the Tribunal to decide which interpretation is the more likely to be correct.

Professor Golitsyn has freely offered advice on coping with the intricacies of Russian law: get better lawyers; and, ask the authorities for help and advice. His observations are interesting in the context of the subsequent developments.

The owner, you will remember, has petitioned the Coast Guard Directorate that arrested his vessel in the first place. He tells them that a bond has been set in the criminal case. He asks for a bond to be set in respect of the administrative offences, and he sends them a copy of the 12 December letter from the Prosecutor's Office for Nature Protection so that they can see for themselves exactly what the position is.

When the Coast Guard Directorate replies the following day in the letter that is Applicant's annex 38, does it says, "My dear man, you have mistaken the position. We know that you face 25 million roubles or more in penalties but you are free to take your ship if you give us 8.8 million roubles. You need do no more"? No, it does not. It says: "We have sent the file on to the Federal Court".

Does it say to the owner, "The court has your file but you need deal only with the Prosecutor's Office for Nature Protection"? No, it does not. It says, "The examination hereafter and the adoption of decisions on this case will be carried out by the Federal Court". So much for helpful advice from the Russian authorities.

The owner then petitions the City Court. The translation of that petition in Applicant's annex 39 is incomplete, as it indicates, but it is evident that it refers explicitly: first, to the setting of the bond in the criminal case by the Prosecutor's Office; and, second, to the setting of a bond in the context of administrative proceedings. It ends by asking the Court "to set a reasonable bond upon the positing of which the vessels will be released".

Does the Court say, "No need: the Prosecutor has already set the only bond needed"? Does the Court say, "We, the Court, decide that the vessel should be released if a bond of 8.8 million roubles is posted"? No, it does not. If you look at Applicant's annex 6, you will see exactly what the Court says.

Judge Bazdnikin has established (paragraph 1) that the administrative case against the owner of the *Tomimaru*, based on Article 8.17(2) of the Code of Administrative Offences is under way at the Petropavlovsk-Kamchatskii City Court – his Court; the court to which the owner has sent his petition to have the bond set.

Paragraph 2 says that on the previous day the owner petitioned for setting a reasonable bond upon posting of which the vessel shall be released.

In paragraph 3, "measures to ensure the proceedings on administrative offences have been taken in accordance with the Code of Administrative Offences, by means of detention of the vessel 53rd *Tomimaru*" – an explicit, unequivocal, unambiguous statement that the *Tomimaru* was detained in respect of not only the criminal proceedings but in respect of the administrative offences that were being handled by that very Court.

Paragraph 4: "The provisions of the Code of Administrative Offences of the Russian Federation do not provide the possibility of releasing a property after posting the amount of bond by the accused on the case of administrative offences."

If there were any room for doubt as to where that left the question of the release of the *Tomimaru,* paragraph 5 made the matter so clear that even a Japanese fisherman could understand it:

> "In accordance with Article 29.10(3) of the Code of Administrative Offences of the Russian Federation, the problems concerning the property of detention and documents as well as property taken into custody shall be solved at the resolution of the case of administrative offences taken as a result of administrative offences."

The *Tomimaru* was detained in respect of administrative offences; the owner petitioned the court dealing with those administrative offences to set a bond; the court told the owner that there was no possibility of releasing the vessel after posting a bond in the case of administrative offences; and that court told the owner that the question of detention would be resolved when the case regarding the administrative offences was resolved. No prompt release pre-trial. Period.

There was a very curious observation, which I thought I had misheard until I read it in Saturday's transcript on page 22, lines 1-10, made by Professor Golitsyn. He said:

> "[The owner's] attorney, during the proceedings before the Court that led to a decision which included the confiscation of the vessel, claimed that it has some kind of understanding with the Russian law enforcement authorities regarding the setting of a bond and assessment of the damage.
>
> One may wonder whether the owner was actually trying to reach an arrangement regarding release of the vessel outside normal proceedings, which is not a legal way of managing such situations."

We have no evidence of that and we cannot take a position on the truth of this suggestion. Quite why Professor Golitsyn thinks it likely that the Russian law enforcement authorities enter into understandings with defendants in criminal actions to reach arrangements outside the scope of normal proceedings I do not know. But, even if they do, to suggest that the owner would try to secure the enforcement, not of his legal rights, but of some rather shadowy, irregular, extra-legal "arrangement" by going to a Russian *court* surely strains belief. If there is any truth in that speculation by the Respondent, I fear that the situation in Kamchatka is rather worse than we had supposed. However, I have said enough about this.

The Respondent claims that it has to set bonds or guarantees at a level that will secure payment of any penalties that could be imposed. It knew that in this case those penalties could exceed 25 million roubles. The Respondent claims that the non-returnable 8.8 million rouble compensation for damage, invited in the letter of 12 December, was a prompt release bond and was the only bond required to secure the release of the *Tomimaru*.

Japan says that from the evidence placed before this Tribunal by both sides it is apparent: first, that the 8.8 million rouble voluntary compensation was not a bond; secondly, that the owner and the owner's Russian legal advisers had not failed wholly to understand the nature of Russian procedures; thirdly, that they had not taken leave of their senses in turning down a real chance of releasing the vessel in return for an 8.8 million rouble bond; and, fourthly, that no bond within the meaning of article 73 of the Convention has been offered to the owner.

Let me now sum up. I have explained why Russia's interpretation of the 12 December letter is not consistent with what it has said elsewhere in this case and in the *"Hoshinmaru" Case*.

Professor Hamamoto has explained our position on confiscation. We maintain that there is a right under article 73 to prompt release on payment of a reasonable bond for as long as there is a pending legal challenge – however the procedure is classified in municipal law – that can result in the annulment of the confiscation and the return of the ship to the owner.

I should add, parenthetically, that we maintain that this proposition applies to the legal procedures of all States Parties and to actions against all ships – tankers, cargo vessels, fishing vessels and so on – to which prompt release procedures apply. It is not a position tailored to the idiosyncrasies of Russian law.

There are two small points to make in passing. First, our remarks about the link between the nationality of the ship and the nationality of the owners were misunderstood by Russia. We did not say that as long as the flag remains the same, ownership cannot change. We said that a change of nationality of owner does not automatically lead to a change in the flag of the vessel. The change of a flag is a formal matter affecting the law applicable to the vessel and changing the State that bears responsibility for the vessel as its flag State. It is not something that happens at the stroke of a pen on a private contract of sale between private parties in circumstances where the States concerned are probably wholly unaware of the sale of the vessel.

Secondly, we do not say that a finding that the Tribunal has jurisdiction will necessarily entail the conclusion that the Tribunal considers that the allegation of a breach of article 73 is well founded. It is a provisional assumption, made on the basis of what philosophers call "prolepsis" and the rest of us call "common sense".

Sir, let me conclude. What does Japan ask for? First, Japan asks for the release of the *Tomimaru* on a reasonable bond, pending the decision of the Russian Supreme Court on the application for annulment of the confiscation decision.

Secondly, Japan would also value guidance from the Tribunal in its judgment on three matters: first, that fragmented bonds – bonds demanded by different agencies and for different purposes – are inconsistent with the purposes and nature of bonds in prompt release proceedings, and Professor Golitsyn conceded that point on Saturday (transcript, page 14, lines 1-3); second, that prompt release remains a right under articles 73 and 292 of the Convention for as long as there is a legal claim pending before the courts of a detaining State, which can result in the annulment or reversal of a decision to confiscate the vessel. Mr Zagaynov conceded that this can happen in the *Tomimaru* case (Saturday's transcript, page 4, lines 4-9); third, that the amount of bonds should be calculated according to consistent principles and that the value of a vessel should only be a factor in that calculation in those cases where confiscation is reasonably regarded as a probable penalty.

Sir, unless I can be of further assistance to the Tribunal, that completes my submissions on behalf of Japan.

The President:
Thank you very much, Professor Lowe.

I now call on the Agent of the Applicant, Mr Komatsu, to read the party's final submissions. A copy of the final submissions signed by the Agent shall be communicated to the Tribunal and transmitted to the other party in accordance with article 75, paragraph 2, of the Rules.

Mr Komatsu, please.

STATEMENT OF MR KOMATSU
AGENT OF JAPAN
[PV.07/06, E, p. 13]

Mr Komatsu:
Yes, Mr President, thank you, Sir. Upon the instruction of your Honour, I will now read the final submissions of Japan in the *"Tomimaru" Case*.

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 United Nations Convention on the Law of the Sea (hereinafter "the Convention") to hear the application concerning the detention of the vessel the *53rd Tomimaru* (hereinafter "the *Tomimaru*") in breach of the Respondent's obligations under Article 73(2) of the Convention;

(b) to declare that the application is admissible, that the allegation of the Applicant is well-founded, and that the Respondent has breached its obligation under Article 73(2) of the Convention; and

(c) to order the Respondent to release the vessel the *Tomimaru*, upon such terms and conditions as the Tribunal shall consider reasonable.

Thank you, Sir.

The President:
you, Mr Komatsu.

That brings us to the end of the submissions on behalf of Japan. As agreed with the parties, the sitting will now be suspended. We will resume at 1.00 p.m., at which point the submissions of the Russian Federation will be made.

The sitting is suspended.

(The sitting closes at 11 a.m.)

PUBLIC SITTING HELD ON 23 JULY 2007, 1.00 P.M.

Tribunal

Present: *President* WOLFRUM; *Vice-President* AKL; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, TREVES, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, TÜRK, KATEKA *and* HOFFMANN; *Registrar* GAUTIER.

For Japan: [See sitting of 21 July 2007, 10.00 a.m.]

For the Russian Federation: [See sitting of 21 July 2007, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 23 JUILLET 2007, 13 H 00

Tribunal

Présents : M. WOLFRUM, *Président*; M. AKL, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, TREVES, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, TÜRK, KATEKA *et* HOFFMANN, *juges*; M. GAUTIER, *Greffier*.

Pour le Japon : [Voir l'audience du 21 juillet 2007, 10 h 00]

Pour la Fédération de Russie : [Voir l'audience du 21 juillet 2007, 10 h 00]

The President:
Good afternoon.

May I now invite the Agent of the Russian Federation, Mr Zagaynov, to commence the submissions on behalf of the Russian Federation.

Mr Zagaynov:
Thank you very much, Mr President.

We would like to begin with a statement which will be made by myself. It will be followed by comments of Mr Yalovitskiy, who will do his best to speak without interpretation in English, and our rejoinder will be concluded by a statement of Professor Golitsyn.

The President:
Thank you. Please continue.

Rejoinder of the Russian Federation

STATEMENT OF MR ZAGAYNOV
AGENT OF THE RUSSIAN FEDERATION
[PV.07/07, E, p. 1–2]

Mr Zagaynov:
Thank you very much, Mr President, for giving me the floor. Mr President, distinguished Judges, distinguished Japanese colleagues. At the outset, I would like to refer to some quotations by the Applicant of my statement on Saturday which in my view were not quite correct.

First, I did not say that the Russian legislation is imperfect. What I said is that it would be rather hard to find a perfect legal system in the world. If you look at the way parliaments work all over the world, you will agree that the task of improving national legislation is conceived everywhere as very important. Russia is not an exception in this respect, but this does not imply in any way that existing legal tools and regulations do not provide for effective implementation of the provisions of the UN Convention on the Law of the Sea, including its provisions on prompt release.

What I said in addition and what I repeat now is that the content of the Russian national legislation cannot be the object of the present dispute. I am pleased to quote here Mr Komatsu, who in his statement last Saturday pointed out that the provisions and procedures of Russian law are not themselves the subject of this prompt release litigation. As he mentioned, it is of course "for Russia to decide for itself exactly how it conforms to its legal obligations under the Convention in prompt release cases." We fully agree with that.

Taking note of the existing concerns of our Japanese partners, we have certainly been open to contacts on this issue. This is precisely why we decided to clarify the issue of the setting of the bond in the framework of existing tools of cooperation in the field of fisheries. Our openness to the dialogue seems to have been presented by the Applicant as a sort of argument against the position of the Russian Federation in this case. If this is the correct reading, it would certainly be an unusual approach to the way bilateral issues should be treated in modern international relations.

Then another quotation by the Applicant concerned the phrase that the Supreme Court of the Russian Federation can annul a decision of a lower court. This is true but, again, the phrase was taken out of context. It was followed by explanations that there exist only limited grounds upon which the Supreme Court of the Russian Federation can exercise this function. According to the Russian legislation judicial acts which have already entered into legal force are subject to modification or annulment if a Court conducting supervisory review – in this case the Supreme Court – establishes that this judicial act, first, disrupts the uniformity in the interpretation and application of legal norms; second, infringes upon human and civil rights and freedoms proclaimed by universally recognized principles and norms of international law and international treaties of the Russian Federation; and third, violates rights and legitimate interests of an indefinite number of people or other public interests.

Meanwhile, as for the complaint of the owner of the *Tomimaru*, the Supreme Court has not yet even decided if the complaint received from the owner of the vessel is admissible. According to Russian procedural law, the supervisory review procedure is an exceptional judicial review of decisions which have already entered into force. Its function is not to duplicate the procedure of an appeal which presupposes the revision of a contested decision *in corpore* (in full amount) but to carry out certain specific tasks.

We did not find in the Russian administrative legislation the notion of a final decision. On the other hand, reference is commonly made to the criterion of the entry into legal force of a decision and its implementation.

As is explained in the letter of the Supreme Court of the Russian Federation dated 20 August 2003 which provides clarification with regard to entry into force of decisions and judgments concerning administrative offences, the decisions rendered by district courts cannot be appealed and, in accordance with paragraph 3 of Article 31.1 of the Code of Administrative Offences of the Russian Federation, enter immediately into force upon their pronouncement. Thus, the decision of the Kamchatka District Court upholding the earlier decision of the Petropavlovsk-Kamchatskii City Court on confiscation of the *53rd Tomimaru* entered into force on 24 January 2007.

The Applicant referred to the *"Grand Prince" Case*. As we stated before, we also consider it very relevant to this case. There is also, however, a difference between the *"Grand Prince" Case* and the present case. In the *"Grand Prince" Case* Belize filed its Application to the Tribunal on 15 March 2001, while its appeal against the judgment of the criminal court on confiscation was listed for hearing by the Court of Appeal on 13 September 2001. It was still possible to revise or annul the decision of the French court in the course of an appeal and eventually cassation.

Nonetheless, even at this stage of the proceedings, an application by the shipowner for the release of the vessel upon presentation of a bank guarantee guaranteeing the payment of the sum specified by the court was rejected by the French court on the following grounds:

> "Considering that the criminal court has ordered the confiscation of the vessel in the case, with immediate execution notwithstanding any appeal [exécution provisoire]; that consequently the forum judge no longer has jurisdiction to order the return of the vessel to its owner or captain in consideration of a simple bank guarantee."

In the case of the *53rd Tomimaru* the appeal of the owner against the decision of the Petropavlovsk-Kamchatskii City Court ordering confiscation of the vessel has already been rejected. Moreover, as is known, the execution of the decision on confiscation of the vessel is not "provisional" as in the *"Grand Prince" Case*.

That concludes my remarks.

Thank you, Mr President.

The President:

Thank you very much, Mr Zagaynov. Would you call upon the next speaker of your delegation?

STATEMENT OF MR YALOVITSKIY
DEPUTY AGENT OF THE RUSSIAN FEDERATION
[PV.07/07, E, p. 3–4]

Mr Yalovitskiy:
Mr President, honourable Judges, distinguished members of the Japanese delegation, the Applicant asserted that the Russian legal procedure impedes the release of the vessel and thus explained why the shipowner failed to pay the bond.

If I may refer to my statement of 21 July, there I clearly indicated that the investigator of the Prosecutor's Office who was in charge of the *53rd Tomimaru* case on 12 December 2006 adopted the decision to satisfy the application of the shipowner and established, in full compliance with article 73, paragraph 2, of the UNCLOS the amount of the bond equal to 8,800,000 roubles and specified the account number in the designated bank for the transfer of the bond. He also pointed out that after deposition of the bond the Kamchatka Prosecutor's Office will not prevent free operation of the *53rdTomimaru*.

This decision of the Investigator of the Kamchatka Prosecutor's Office removed in fact two of those "locks" mentioned by Professor Lowe in his statement. The Prosecutor gives an order to the Coast Guard to release the vessel both for the purpose of the criminal and administrative case. Assertions of the Applicant that the lawyer of the shipowner could not realize the competence of the Prosecutor are wrong. Moreover, the Russian side cannot bear responsibility for the lawyer chosen by the Japanese side to represent its interests in the case.

We are not aware of any document provided to the Tribunal by the Applicant in support of the above. The Russian lawyer on the *53rd Tomimaru* case was well aware of his right under Article 123 of the Procedural Criminal Code of the Russian Federation to lodge a complaint about the decision of the Investigator of 12 December 2006. Such complaint should have been lodged to the Prosecutor thus requesting all the necessary clarification as to the possible amount of the bond. The Prosecutor, in the case of such a request from the lawyer, the Master and the shipowner, shall provide them with all the requested clarifications within three days (Article 124 of the Procedural Criminal Code of the Russian Federation).

However, none of the actions, neither the complaint nor the request for clarification, was taken by the Japanese side. Instead, the shipowner once again addressed the Coast Guard, despite the fact that on 1 December 2006 this office notified the shipowner that the issue of establishing the bond and release of the vessel falls to the competence of the Prosecutor.

I dare hope that the above explanations are quite exhaustive and show to the Tribunal that the Russian side strictly followed the prescribed procedures for the establishment of the bond. The Japanese side was fully aware of its rights and obligations in the case and its lawyer had every possibility of implementing these rights. Thus, the Russian side cannot bear any responsibility for the deeds or misdeeds of the lawyer chosen by the interested parties to represent their interests.

The *53rd Tomimaru* was detained under a criminal case to ensure civil action and it is a fact that the Prosecutor's Office was competent to dispose of the vessel. After some time, the Prosecutor's Office was fully aware of the administrative case against the shipowner and the Master of the *53rd Tomimaru* since this administrative case laid the ground for the criminal case. Thus, the assertions of the Applicant that the Prosecutor could not have knowledge of the administrative case and could not take it into account while deciding on the bond issue are unjustified.

Such arguments of Professor Lowe seem to be lame. It is obvious that the vessel could not be confiscated in May 2007 due to a simple but quite strong fact: this vessel had already

been confiscated in the administrative case in accordance with the decision of the Petropavlovsk-Kamchatskii City Court of 28 December 2006.

We would also like to draw the Tribunal's attention to the fact that the Applicant, while formally arguing about the so-called imperfection of the Russian legislation, in fact failed to produce any legally sound arguments to that end, limiting itself just to emotional considerations.

Thank you.

The President:

Thank you very much, Mr Yalovitskiy.

I now call upon Professor Golitsyn to continue.

STATEMENT OF MR GOLITSYN
COUNSEL OF THE RUSSIAN FEDERATION
[PV.07/07, E, p. 4–7]

Mr Golitsyn:
Mr President, distinguished Judges, it is a great honour for me to make these final comments in the current proceedings. In my presentation I will touch upon two issues: first, the authority which is entitled in the Russian Federation, authorized to decide on the final setting of the bond; and, secondly, the issue of the reasonableness of the bond.

In the light of questions raised this morning by the Japanese side concerning the criminal and administrative procedures related to the setting of the bond, in our presentation we have to go back to what we said earlier in our meticulous description of the procedures followed by the competent Russian authorities in this regard. The explanations provided by us confirm that in the *"Tomimaru" Case* the competent Russian authorities followed these procedures step-by-step. We are mystified as to why the Applicant remains lost in trying to understand these procedures after such a thorough presentation.

In a nutshell, it all comes to the designation of a proper authority to set a bond in a particular case, which is not a fragmented bond but the bond that is set as a result of all applicable proceedings, encompassing all of them, and which is set by the proper authority to do that.

What should also be kept in mind is that these are pre-trial procedures and that this is the practice that has been followed in all cases where violations of Russian fishing regulations have been discovered by the competent Russian authorities.

In our previous interventions, it was noted that we are puzzled by the way the Applicant uses annexes and documentation relevant to the *"Tomimaru" Case*. The Japanese side picks up and makes reference to those annexes and information that in its view serves its purposes and strengthens its arguments. At the same time, it has a tendency to side-step information which it not in its favour. Maybe this is the normal way to present cases before the Tribunal, but we have no choice but to bring the attention of the distinguished Judges and the Applicant to what is stated in our Statement in Response, facts on which the Applicant is silent.

As we have just explained, the setting of a bond is usually assigned under the Russian system to a particular authority, and the owner is informed about it. I would like, in this regard, to bring to the attention of the distinguished Judges what is stated in paragraphs 13, 14 and 15 of the Statement in Response.

In paragraph 13, it is noted that on 8 December 2006 the owner of the vessel asked the Inter-district Prosecutor's Office for Nature Protection in Kamchatka and the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation to determine the bond in respect of the vessel.

According to paragraph 14, in response to this inquiry of the owner of the vessel, the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation on 14 December 2006 confirmed to the Consulate-General of Japan in Vladivostok that the proper body to determine the bond in the case of *53rd Tomimaru* was in this case the Inter-district Prosecutor's Office for Nature Protection in Kamchatka.

As finally stated in paragraph 15 of the Statement in Response, on 12 December 2006, the Inter-district Prosecutor's Office for Nature Protection in Kamchatka duly set a reasonable bond. It specified in its letter to the owner of the vessel that the Prosecutor's Office would allow free operation of the vessel upon the payment of the bond. The details of the deposit account were also provided to the owner. The amount of the bond was set at the

level of overall damages to living marine resources in the Russian exclusive economic zone equivalent to 8,800,000 roubles.

In concluding on this subject, I would like to reiterate what was stated by the Respondent yesterday, namely that upon completion of all the necessary procedures, the Respondent: identified the proper authority for the setting of the bond; set the bond; provided the owner with the precise and clear information with regard to the amount of the bond and the account details: and assured the owner that the arrested vessel would be released upon the payment of the bond.

The bond established on 12 December 2006, whether the Japanese side appreciated it or not, was the bond that was set for the purposes of paragraph 2 of article 73 of the Convention. There was no fragmentation of the bond. It was one bond required under paragraph 2 of article 73 of the Convention. Therefore the hair-splitting by the Applicant this morning between criminal and administrative proceedings was quite interesting, and we appreciate the time spent by the Applicant on doing that. However, this was a pure description by the Applicant of how it understands the applicable procedures and nothing more.

In relation to the Applicant's interpretation of the letter dated 12 December 2006, we would like to comment that reference to the index number in the letter does not mean that it relates only to one type of proceedings. This is an invention by the Applicant. What the Applicant fails to understand is that this letter was related to both proceedings and was written by the authority that was designated, as noted above, to set a reasonable bond.

Here I would like to repeat once again what has been repeated by us during these proceedings over and over again. The Russian Federation is well aware of its responsibilities under paragraph 2 of article 73 of the Convention. Therefore, on 12 December 2006, it set a reasonable bond for the purposes of article 73 of the Convention and no other bond has been subsequently set by the Russian authorities under this article. The failure by the owner of the *Tomimaru* to pay this bond is a clear non-compliance by it of the provisions of the Convention, which eventually resulted in harsh punishment of the owner,

As for the attempt by the owner to seek a solution through some other proceedings, I refer to my remark yesterday which was criticized by Professor Lowe this morning with the addition of some remarks by him on the nature of the Russian legal system. Please be advised that I referred to what is stated on this subject on page 2 of the judgment by the Petropavlovsk-Kamchatskii City Court of 12 December 2006. The judgment contains reference to the relevant statement by the attorney for the owner during the court proceedings. I will refrain from further comments as, in my view, what is stated by the attorney has nothing to do with the adequacy of the legal system.

Another remark: this morning it was said that the Russian legal system should be transparent and clear. It was questioned whether it is. I am not aware of, and nor am I familiar with, legal systems that are not transparent. At least this is definitely not the case of the Russian legal system. As to whether the system is clear or not, and we believe it is, I make this remark with some reservations because if legal systems – and I speak in general – had been crystal clear, there would have been no room for us attorneys!

I now switch to the question of reasonableness of the bond in the *"Tomimaru" Case*, an issue around which the Applicant was tiptoeing constantly in its two presentations this morning. The Applicant expressed some kind of unhappiness that a reasonable bond set by the Russian authorities on 12 December 2006 was at an unreasonably low level, approximately one-third of the penalty that could have been imposed for offences committed in this case. We were criticized that it is a bond that is not commensurate with the potential penalties. We were also criticized that here we are not consistent with our arguments in the

"Hoshinmaru" Case where we made reference to a human factor, namely to the accountability of those involved in the setting of the bond for their actions.

In response to these observations, I would like to bring to the attention of the distinguished Judges the following. The *"Hoshinmaru"* and the *"Tomimaru"* are two different cases and therefore invoking one case in the context of the other is questionable, unless we are dealing with obvious things that exist in both cases.

In both cases in our Statement in Response – in the chapter on Statement of Facts – the Respondent included sections on the context of the case, which are practically identical. However, the implications of what is stated in these sections are different in each case as far as the setting of a bond is concerned because of the timing difference in these two cases.

What is stated in sections on the context of the case is that there was a pattern of increasing violations by the Japanese fishing vessels of the Russian regulations in the exclusive economic zone; that there was a pattern of non-payment of fines imposed by the competent Russian authorities for crimes committed in the zone. These unfortunate developments led to the establishment by the competent Russian authorities of special procedures that were conveyed to the Japanese authorities within the framework of the activities of two Joint Commissions established by the 1984 and 1985 bilateral agreements between the two countries. Therefore, in the *Tomimaru* case the bond was determined more or less at the level of fines that had been imposed in the past years and the newly developed procedures, referred to above, were not yet used in that case. In the *Hoshinmaru* case, the calculation of the bond was made in accordance with the procedures that I have just mentioned, about which the Japanese side was promptly informed and with regard to which it has never raised any questions.

It follows from the above that a reasonable bond set by the Russian authorities on 12 December 2006, which, according to the comments of the Applicant, was set at an unreasonably low level, was consistent with the practice that existed at that time. However, we agree with the Applicant that it was too low. As the system of these unreasonably low level bonds did not work and resulted in increased violations by the Japanese fishermen, the systems have been improved through the introduction of new procedures for the calculation of bonds. In accordance with the newly adopted procedures, fines are and will be established at a level commensurable with the committed offences, and reasonable bonds will therefore be at a higher level, as was done in the *Hoshinmaru* case.

I would like to thank you for your kind attention.

The President:

Thank you very much, Professor Golitsyn, for your statement.

I now call on the Agent of the Russian Federation to read his party's final submissions. A copy of the final submissions, signed by the Agent, shall be communicated to the Tribunal and transmitted to the other party in accordance with article 75, paragraph 2, of the Rules.

Mr Zagaynov, please.

STATEMENT OF MR ZAGAYNOV
AGENT OF THE RUSSIAN FEDERATION
[PV.07/07, E, p. 7–8]

Mr Zagaynov:
Thank you, Mr President. The Russian Federation requests the International Tribunal for the Law of the Sea 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.

Thank you.

The President:
Thank you very much, Mr Zagaynov.

Closure of the Oral Proceedings
[PV.07/07, E, p. 8–9]

The President:
That brings us to the end of the oral proceedings in the *"Tomimaru" Case*. I would like to take this opportunity to thank the Agents, Counsel and Advocates of both parties for the excellent presentations that they have made to the Tribunal over the past days. In particular, the Tribunal appreciates the professional competence and personal courtesies exhibited so consistently by Agents, Counsel and Advocates on both sides. We have indeed greatly benefited from your expertise and we thank both sides most profoundly for the very kind words that you have expressed to the Tribunal.

The Registrar will now address questions in relation to documentation.

The Registrar:
Mr President, in conformity with article 86, paragraph 4, of the Rules of the Tribunal, the parties have the right to correct the transcripts of the presentations and statements made by them in the oral proceedings in the original language used. Any such corrections should be submitted as soon as possible but in any case no later than 6 p.m. on Tuesday, 24 July 2007.

In addition, the parties are requested to certify that all the documents that have been submitted and which are not originals are true and accurate copies of the originals of those documents. For that purpose, the Agents of the parties will be provided with a list of documents concerned.

With respect to the questions put to the parties by the Tribunal, the Agents of the parties are also requested to provide the Registry with responses not later than 6 p.m. on Tuesday, 24 July 2007.

Thank you, Mr President.

The President:
The Tribunal will now withdraw to deliberate on this case. The judgment will be read on a date to be notified to the Agents. The Tribunal has tentatively set a date for the delivery of the judgment in this case. The date is 6 August 2007. The Agents will be informed reasonably in advance if there is any change to the schedule, either by way of advancing the date or by way of postponement.

In accordance with the usual practice, I request the Agents to kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations of the case prior to the delivery of the judgment.

The hearing is now closed.

May I announce that the public sitting in the *"Hoshinmaru" Case* will begin in approximately 10 minutes to hear the final submissions of both parties.

(The hearing closes at 1.40 p.m.)

PUBLIC SITTING HELD ON 6 AUGUST 2007, 1.00 P.M.

Tribunal

Present: *President* WOLFRUM; *Vice-President* AKL; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO. NELSON, CHANDRASEKHARA RAO, TREVES, NDIAYE, JESUS, LUCKY, PAWLAK, YANAI, TÜRK, KATEKA *and* HOFFMANN; *Registrar* GAUTIER.

For Japan:

Mr Ichiro Komatsu,
Director-General, International Legal Affairs Bureau, Ministry of Foreign Affairs,

as Agent.

For the Russian Federation:

Mr Sergey Ganzha,
Consul-General, Consulate-General of the Russian Federation, Hamburg, Germany,

as Co-Agent.

AUDIENCE PUBLIQUE DU 6 AOUT 2007, 13 H 00

Tribunal

Présents : M. WOLFRUM, *Président*; M. AKL, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, TREVES, NDIAYE, JESUS, LUCKY, PAWLAK, YANAI, TÜRK, KATEKA *et* HOFFMANN, *juges*; M. GAUTIER, *Greffier*.

Pour la Japon :

M. Ichiro Komatsu,
Directeur général, Bureau international des affaires juridiques, Ministère des affaires étrangères,

comme agent.

Pour la Fédération de Russie :

M. Sergey Ganzha,
Consul général de la Fédération de Russie à Hambourg,

comme co-agent.

Reading of the Judgment
[PV.07/10, E, p. 1]

The Registrar:
The Tribunal will today deliver its Judgment in the *"Tomimaru" Case,* Application for Prompt Release, Case No. 15 on the List of cases, Japan, Applicant, and the Russian Federation, Respondent. The Tribunal heard oral arguments from the parties at four public sittings on 21 and 23 July 2007.

Mr President.

The President:
The Tribunal notes the presence in court of Mr Ichiro Komatsu, Agent of Japan. It also notes the presence today of Mr Sergey Ganzha, Co-Agent of the Russian Federation.

I will now read relevant parts from the Judgment in the *"Tomimaru" Case*.

[*The President reads the extracts.*]

The sitting is now closed.

(*The sitting is closed at 3.45 p.m.*)

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in the *"Tomimaru" Case (Japan* v. *Russian Federation), Prompt Release.*

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques de l'*Affaire du « Tomimaru » (Japon c. Fédération de Russie), prompte mainlevée.*

Le 29 mars 2010
29 March 2010

Signé/Signed
Le Président
José Luís Jesus
President

Signé/Signed
Le Greffier
Philippe Gautier
Registrar