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

2007

Public sitting
held on Saturday, 21 July 2007, at 10.00 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,
President Rüdiger Wolfrum presiding

THE "TOMIMARU" CASE

(Application for prompt release)

(Japan v. *Russian Federation)*

Verbatim Record

Uncorrected
Non-corrigé

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

Japan is represented by:

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

as Agent;

Mr Tadakatsu Ishihara, Consul-General of Japan, Hamburg, Germany,

as Co-Agent;

and

Mr Yasushi Masaki, Director, International Legal Affairs Division, Ministry of Foreign Affairs,
Mr Kazuhiko Nakamura, Principal Deputy Director, Russian Division, Ministry of Foreign Affairs,
Mr Ryuji Baba, Deputy Director, Ocean Division, Ministry of Foreign Affairs,
Mr Junichi Hosono, Official, International Legal Affairs Division, Ministry of Foreign Affairs,
Mr Toshihisa Kato, Official, Russian Division, Ministry of Foreign Affairs,
Ms Junko Iwaishi, Official, International Legal Affairs Division, Ministry of Foreign Affairs,
Mr Hiroaki Hasegawa, Director, International Affairs Division, Resources Management Department, Fisheries Agency of Japan,
Mr Hiromi Isa, Deputy Director, Far Seas Fisheries Division, Resources Management Department, Fisheries Agency of Japan,
Mr Tomoaki Kammuri, Fisheries Inspector, International Affairs Division, Resources Management Department, Fisheries Agency of Japan,

as Counsel;

Mr Vaughan Lowe, Professor of International Law, Oxford University, United Kingdom,
Mr Shotaro Hamamoto, Professor of International Law, Kobe University, Kobe, Japan,

as Advocates.

The Russian Federation is represented by:

Mr Evgeny Zagaynov, Deputy Director, Legal Department, Ministry of Foreign Affairs,

as Agent;

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

as Co-Agent;

Mr Alexey Monakhov, Head of Inspection, State Sea Inspection, Northeast Coast Guard Directorate, Federal Security Service, and Mr Vadim Yalovitskiy, Head of Division, International Department, Office of the Prosecutor General,

as Deputy Agents;

and

Mr Vladimir Golitsyn, Professor of International Law, State University of Foreign Relations, Moscow,

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

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

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

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

as Counsel;

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

as Advisers.

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

THE REGISTRAR: On 6 July 2007, an Application was filed by Japan against the Russian Federation for the prompt release of the fishing vessel the *53rd 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.

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 ("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 obligations 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."

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 of the case.

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

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

THE REGISTRAR: The Respondent requests the Tribunal:

"to decline to make the orders sought in paragraph 1 of the Application of Japan. The Russian Federation requests the Tribunal to make the following orders:

(a) that the Application of Japan is inadmissible;

(b) alternatively, that the allegations of the Applicant are not well-founded and that the Russian Federation has fulfilled its obligations under paragraph 2 of Article 73 of the United Nations Convention on the Law of the Sea.

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 (Interpretation): Mr President, distinguished members of the International Tribunal for the Law of the Sea and distinguished representatives of the Russian Federation, it is a great honour for me to make this statement at this public sitting of the Tribunal as Agent again, following the statement on the *88th Hoshinmaru* case two days ago. As I did with regard to the *Hoshinmaru* case, I will recapitulate the facts and our conclusions. After my statement, Professor Lowe of the University of Oxford will elaborate in detail our legal position. In my statement at the beginning of the previous public sitting dealing with the *Hoshinmaru* case, I stipulated the view of the Government of Japan on the obligation provided by Article 73(2) of the United Nations Convention on the Law of the Sea (UNCLOS) and the character of the prompt release cases seeking fulfilment of this obligation. I will not repeat this as it is also the basis of my statement today on the *53th Tomimaru* case.

Mr President, allow me briefly to recapitulate the facts. The 53rd Tomimaru is a fishing vessel owned and operated by a Japanese company, Kanai Gyogyo. It has had Japanese nationality throughout the whole of the relevant period, and it retains this nationality now. The Tomimaru was involved in fishing walleye pollack in the Exclusive Economic Zone of the Russian Federation in the Bering Sea pursuant to a licence issued by the Government of the Russian Federation. It was boarded by the authorities of the Russian Federation for inspection on 31 October 2006 off the coast of the Kamchatka Peninsula and it was ordered to sail to the port of Petropavolovsk-Kamchatskii; it arrived there on 2 November 2006. It was ordered to do so in spite of the fact that there was no charge or allegation of any violation of Russian laws and regulations made during boarding. However, a Russian official on board the *Tomimaru* indicated during the voyage to the port of

Petropavlovsk-Kamchatskii that there was a difference between the actual amount of fish being carried by the vessel and the amount recorded in its logbook. For this, please refer to Annex 3.

Since then, the vessel has been detained for more than eight months – I repeat, eight months – without any bond or security having been set by the Russian Federation within the meaning of Article 73(2) of the Convention, and this is in spite of repeated requests submitted by Japan. Administrative proceedings against the owner of the *Tomimaru* and the Master as well as the criminal proceedings against the Master were instituted at the beginning of November 2006. During the investigation for these proceedings the Russian authorities interviewed all the 21 members of the crew, including 14 Japanese nationals who were among them. They finished the interviews of all the crew members with the exception of the Master by 29 November 2006 for the administrative proceedings and by 7 December 2006 for the criminal proceedings respectively. The Russian authorities explained, in response to an inquiry by the Japanese Government, that the crew member – and here I would invite you to refer to annexes 15 and 19 – were not in detention, with the exception of the Master against whom a compulsory measure was taken in the form of a written oath not to leave Petropavolovsk-Kamchatskii and to behave properly. However, because of the detention of the vessel itself, the crew members had no choice but to stay on board the vessel in order to maintain it and guard it.

In February 2007, the Russian Federation commenced proceedings regarding the attachment of the vessel, and the crew had to quit the vessel. As a result, by 29 March 2007 the crew members, except for the Master, were obliged to leave for Japan. The Master, nevertheless, was still under orders from the Russian authorities to stay in Petropavlovsk-Kamchatskii even after the return of the rest of the crew. Eventually, the Master returned to Japan on 31 March 2007, about two months after the return of the other members of the crew, that is to say, about seven months – I repeat seven months – after the seizure of the vessel.

Throughout this entire period, the Government of Japan repeatedly urged the Russian Federation to set a reasonable bond and to release the vessel and the crew promptly upon the posting of a bond. In addition, the owner of the vessel repeatedly made the same requests to the Russian authorities. The fact is that, in spite of these continuous and repeated requests by the Government and the owner, the vessel has still not been released. Japan's request that the Russian Federation comply with its obligations under the Convention of the United Nations on the Law of the Sea fell on deaf ears. Japan has exhausted all other possible measures, but to no avail. Today, Mr President, as a last resort, Japan is reluctantly bringing this case before the International Tribunal for the Law of the Sea.

In terms of domestic proceedings in the Russian Federation, both criminal proceedings against the Master and administrative proceedings against the owner and the Master were instituted, as I mentioned previously. In the criminal proceedings against the Master, the investigation was carried out against the Master as well as against the crew members. The case was submitted to the City Court in Petropavlovsk-Kamchatskii on 2 March 2007. Since then, until today, six public sittings have been held, and on 15 May 2007 the City Court rendered a judgment

ordering the Master to pay a fine and award damages. The Master appealed the case to the Kamchatka District Court on 25 May 2007. However, this case has not yet been concluded.

As to the administrative proceedings against the owner, the owner is still appealing to the Supreme Court, contesting the decision by lower courts to confiscate the vessel. It is argued by the Russian Federation in its Statement in Response that the *Tomimaru* was included in the Federal Property Register as property of the Russian Federation as a result of this challenge to confiscation, and therefore the Application by Japan is inadmissible. Our Advocate will subsequently argue in detail on this point.

At this point in time I would simply like to point out two matters. First, the confiscation decision is still being challenged by the owner's appeal to the Supreme Court of the Russian Federation. Secondly, a domestic measure of confiscation based on Russian domestic law is not opposable in Japan, which is the flag state of the vessel as far as international law is concerned, and in any event it is a matter distinct from the change of nationality of the vessel. As shown in the Annex to the Application, the *Tomimaru* unquestionably maintained its Japanese nationality not only at the time of the filing of this Application but also as I speak today.

(Continued in English): 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 the 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 coastguard 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 Coastguard 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 inter-district prosecutors for nature protection in Kamchatka, and the administrative proceedings had been carried out by the Northeast Border Coastguard Directorate of the Federal Security Service.

On 12 December 2006, damages were set in the amount of 8,800, 000 roubles, that is, approximately US$ 350,000 by inter-district prosecutors for nature protection in Kamchatka, which is in charge of the criminal proceedings, against the owners of the vessel, as shown in Annex 36. Subsequently, on 14 December 2006, the owner presented a petition to the Northeast Border Coastguard 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, it 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.

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 on 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(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 *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. However, 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(2) of the UNCLOS and to order the Russian Federation to release the vessel the *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 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 agreements into which it entered in the 1982 Convention, and it asks that the Russian Federation be held to its commitments 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.

PROFESSOR 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.

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 on 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 the bond 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-Kamchatski.

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 mis-recording 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-Kamchatski.

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 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 apologise 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-Kamchatski 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 a 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 prompt release, 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 Prosecutors 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 2006, 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 into the deposit account …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 *53rd Tomimaru*.
>
> Considering the aforementioned fact [the owner] requests 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 to 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 million US dollars – towards the damage that it has caused. Then the Petropavolovsk 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? That would be 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 form 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 noting 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 foot of page 1 of that letter:

> "The Masters of the trawler, 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 the compliance including [under] 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 above-mentioned 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 is required by the prompt release obligations.

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, would you like to proceed?

PROFESSOR LOWE: 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 Applicant 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 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 environment damages – which we think is what is referred to as the environment damages for which civil liability exists – could be satisfied by the payment of 8.8 million roubles, but 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 environment 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 Gyogyou, 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 Gyogyou 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 91 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 may 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 that the *Tomimaru* was arrested. It is still the subject of court proceedings in Russia, which may result in its return to is 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 co-operation. 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 do in Russia. Vessels are being detained for weeks. That may not sound long, but a seven-week detention during an 11-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 ship owners 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 Tribunal sitting is now closed.

(The hearing rose at 11.56 a.m.)