

**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 3.00 p.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)*

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**Verbatim Record**

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Uncorrected  
Non-corrigé

<i>Present:</i>	President	Rüdiger Wolfrum
	Vice-President	Joseph Akl
	Judges	Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Anatoli Lazarevich Kolodkin
		Choon-Ho Park
		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

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*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.*

1 **THE PRESIDENT:** Good afternoon. We will resume the oral proceedings. Before  
2 giving the floor to the Agent of the Respondent, I first call the interpreters who will  
3 interpret the statement from Vadim Yalovitskiy from Russian into one of the official  
4 languages of the Tribunal to make the declaration set out in Article 85 paragraph 4 of  
5 the Rules of the Tribunal.

6  
7 **MR LAKEEV:** Mr President, I, Vladimir Lakeev, solemnly declare upon my honour  
8 and conscience that my interpretation will be faithful and complete.

9  
10 **MS EVEROVSKAYA:** Mr President, I, Violetta Everovskaya, solemnly declare upon  
11 my honour and conscience that my interpretation will be faithful and complete.

12  
13 **THE PRESIDENT:** Could you kindly walk up to the booth, but take your time. May  
14 I now call upon Mr Zagaynov, Agent for the Government of the Russian Federation,  
15 to take the floor. Mr Zagaynov will then be followed by Vadim Yalovitskiy and he will  
16 be followed by Professor Golitsyn.

17  
18 **MR ZAGAYNOV:** Thank you, Mr President. Mr President, distinguished members  
19 of the Tribunal, honourable representatives of Japan, it is a great honour and  
20 privilege for me to act as an Agent for the Russian Federation in this case. This time  
21 the honourable judges have to consider the soundness of the Application of Japan  
22 concerning prompt release of the Japanese vessel *Tomimaru*, which was arrested in  
23 the Russian Exclusive Economic Zone on 1 November 2006 together with two other  
24 Japanese fishing vessels

25  
26 As was agreed during our consultations, for the sake of saving time, I will briefly  
27 enumerate the points developed in the presentations of the Russian Federation in  
28 the *Hoshinmaru* case that we consider relevant in the present case. In particular,  
29 these are our comments on the rights and obligations of a coastal state to protect  
30 marine living resources in its Exclusive Economic Zone, on the problem of illegal,  
31 unreported and unregulated fishing, on the general framework of the relations  
32 between Russia and Japan in the field of fisheries and, finally, on the issue of state  
33 responsibility, which in our opinion goes beyond the scope of the prompt-release  
34 procedure under Article 292 of the UN Convention on the Law of the Sea.

35  
36 Mr President, distinguished members of the Tribunal, when a provision of an  
37 international treaty is formulated so concisely as is the case with paragraph 2 of  
38 Article 73 of the 1982 Convention, a judicial organ applying it for the settlement of  
39 inter-state disputes has to work out its own interpretation of the text. In regard to the  
40 prompt-release procedure, this venerable Tribunal has already elaborated sufficiently  
41 detailed and consistent case law.

42  
43 We believe that the present case will be a very important step in its further  
44 development. In our view, your decision on it will have far-reaching consequences  
45 for the jurisprudence of the Tribunal.

46  
47 Of course, first and foremost I mean the issue of admissibility, for in this case the  
48 Tribunal has to examine an Application concerning a vessel on which a decision on  
49 merits has already been taken by a competent national court of the coastal state  
50 and, what is more, this decision on merits has already been executed.

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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 admissibility of an Application filed under Article 292 of the Convention has already been raised before the Tribunal, in particular, in 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 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 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.

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

5  
6 The judgment ordering confiscation was made in compliance with the provisions of  
7 Russian law. Such penalty for violations of fisheries laws and regulations in the  
8 Exclusive Economic Zone is provided not only in Russian legislation but also in many  
9 other national laws. Moreover, if we interpret paragraph 3, Article 73 of the  
10 Convention using the rule of contraries, such penalty is in full conformity with  
11 international law. Let me remind you that, according to the above-mentioned  
12 provision of the Convention, coastal state penalties for violations of fisheries laws  
13 and regulations in the Exclusive Economic Zone, in the absence of agreements to  
14 the contrary by the states concerned, may not include imprisonment or any other  
15 form of corporal punishment.

16  
17 In accordance with paragraph 1 of Article 30.1 of the Code of Administrative  
18 Offences of the Russian Federation, if an administrative matter has been considered  
19 by a magistrate or a judge of an equal standing, its decision or judgment can be  
20 appealed in the district court or in another court of equal standing. The owner of the  
21 *Tomimaru* exercised this procedural right. As a consequence, the decision of the  
22 Petropavlovsk-Kamchatskii City Court concerning the confiscation of the vessel was  
23 upheld on 24 January 2007 by the Kamchatka District Court.

24  
25 It is worth noting in this connection that, to our knowledge, the owner of the vessel  
26 appealed only against the decision on confiscation. While doing this, he or his  
27 attorneys had the possibility to contest the ruling of 19 December 2006, by which  
28 their petition to set a reasonable bond for the prompt release of the vessel was  
29 rejected. The attorneys designated by the owner of the *Tomimaru* did not, however,  
30 seize this opportunity and appealed only against the penalty imposed by the court  
31 judgment.

32  
33 The decision on confiscation was upheld and, pursuant to paragraph 3 of Article 31.1  
34 of the Code of Administrative Offences of the Russian Federation, immediately  
35 entered into force.

36  
37 By an implementing Act, the Federal agency of the Russian Federation responsible  
38 for the management of Federal property in the Kamchatskii district on 9 April 2007  
39 included the arrested vessel into the Federal Property Register as property of the  
40 Russian Federation.

41  
42 It is true that a complaint against the decision of the Kamchatka District Court was  
43 lodged before the Supreme Court of the Russian Federation.

44  
45 It should be emphasized, however, in this regard that this complaint was lodged in  
46 the framework of the supervisory review procedure, which in Russian procedural law  
47 is a kind of exceptional judicial review, while the normal procedure concludes with an  
48 appeal.

1 The principal task of the supervisory procedure is to guarantee uniformity in the  
2 application of legal norms. This is, therefore, the first ground for accepting  
3 complaints lodged against judicial decisions, which have already entered into legal  
4 force. Secondly, decisions upheld in the course of an appeal can be annulled at  
5 a supervisory stage if they infringe human and civil rights and freedoms proclaimed  
6 by universally recognized principles and the norms of international law and  
7 international treaties of the Russian Federation.

8  
9 Lastly, such decisions can be annulled if they violate the rights and legitimate  
10 interests of an indefinite number of people or other public interests.

11  
12 The decision on the merits of the case has already entered into legal force and been  
13 executed, as I have mentioned.

14  
15 In the light of the above-mentioned clarifications, we are arguing that the case of the  
16 *Tomimaru* has reached such a stage of development that the prompt release  
17 procedure under Article 292 of the Convention is no longer relevant.

18  
19 Therefore, we are asking the distinguished Tribunal to exercise its judicial propriety  
20 and declare the application of Japan inadmissible.

21  
22 In case the Tribunal does not agree with our firm conviction about the inadmissibility  
23 of the case, the Russian Federation asks the Tribunal to declare that the  
24 Respondent has fully complied with its obligations under Article 73 of the  
25 Convention. Our arguments on this matter will be presented by our next speakers.

26  
27 Mr President, distinguished members of the Tribunal, honourable representatives of  
28 Japan, I would now like to make some comments on the statements of the Applicant  
29 this morning.

30  
31 The Applicant repeatedly draws the attention of the Tribunal to alleged flaws and  
32 inconsistencies in the Russian legislation. Having the privilege of standing today  
33 before the most eminent experts in the field of the law of the sea from different  
34 regions of the world, I would like to express my humble opinion that it would hardly  
35 be possible to find a perfect legal system. In our view, there is always room for  
36 improvement. Like any other country in the world, the Russian Federation works to  
37 improve its legislation. By the way, we certainly take into account the difficulties  
38 which our Japanese partners have in the field of release of vessels. Mr Komatsu  
39 certainly knows that we have discussed these issues with the Japanese authorities.  
40 It should be mentioned *a propos* this, that among many countries fishing in the  
41 Russian EEZ, it is only Japan that has problems with prompt release. Still, in our  
42 view, there is no doubt that the content of the Russian national legislation is not and  
43 cannot be the object of the present dispute.

44  
45 Mr President, unfortunately, during the hearings in both cases we have had to  
46 discuss on a number of occasions the issues of translation. I would like to address  
47 this issue with respect to the statements of the Applicant this morning.

48  
49 It is worth noting that while referring to a very important document in this case,  
50 namely the letter of 12 December from the Inter-District Prosecutor's Office for



1 Nature Protection in Kamchatka, which was setting the bond, Professor Lowe this  
2 morning used a document presented by the Respondent in Annex 4. I would  
3 certainly not deny that the language in this letter is not very elegant. Still, the same  
4 document is reproduced as Annex 36 to the Application, and this wording is  
5 translated there in a much simpler way. The document says: "The free use of the  
6 trawler *Tomimaru* will not be prevented by the Inter-District Prosecutor's Office once  
7 the bond is paid to the deposit account". Then the details of the account follow.

8  
9 In our view, it shows that the Applicant has always had a clear and correct  
10 understanding of the meaning of this letter as establishing the bond and providing  
11 the necessary bank requirements for its payment.

12  
13 Mr President, in his statement, the Applicant mentioned that the crew members of  
14 the vessel *Tomimaru* were under detention and were not allowed to leave the  
15 Russian Federation for Japan. This issue has not been raised in the submissions of  
16 Japan and we did not prepare a reply to it. Still, I hope I will be able to make some  
17 comments in this regard.

18  
19 First, it should be noted that all the crew members left Russia long ago. Thus, their  
20 release cannot be the object of an application under prompt release procedures.

21  
22 I would like to draw the attention of the honourable Tribunal to the letter of the Senior  
23 Counsellor of Justice of the Inter-District Prosecutor's Office for Nature Protection in  
24 Kamchatka to the Consulate-General of Japan in Vladivostok, dated  
25 1 December 2006 (Annex 5 of the Application).

26  
27 The fifth paragraph on page 2 of the letter says that all the investigation against the  
28 vessel *Tomimaru* and its crew has been completed. Moreover, the last paragraph on  
29 the same page of the letter says that the decision to let the members of the crew of  
30 the trawlers leave the Russian Federation can be adopted without delay whenever  
31 requested by the owner of the vessel.

32  
33 Furthermore, the Senior Counsellor of Justice of the Inter-District Prosecutor's Office  
34 for Nature Protection in Kamchatka, by the letter dated 22 December 2006  
35 (Annex 22 of the Application) informed the Consulate-General of Japan in  
36 Vladivostok that the competent Russian authorities have repeatedly notified the  
37 Consulate-General as well as the agents of the owners of the vessel that the crew  
38 could be allowed to leave the place as soon as the request from the ship owner is  
39 received. Still, no request has ever been received from the owner.

40  
41 Finally, as mentioned this morning by Japan, the crew, after all, was ordered to leave  
42 the vessel. In our view, this can hardly be called detention.

43  
44 As for the Master of the vessel, the next speaker from our delegation, Mr Yalovitskiy,  
45 will explain the situation.

46  
47 Having said that, I would like now to thank the honourable judges for the attention  
48 they have generously paid to my presentation and request you, Mr President, to give  
49 the floor to Mr Yalovitskiy, who will elaborate on the factual outline of the case.

1 **THE PRESIDENT:** Thank you very much indeed, Mr Zagaynov. I give the floor to  
2 Mr Yalovitskiy. Let us wait to see if the interpreters are ready.

3  
4 **MR YALOVITSKIY (Interpretation):** Distinguished President, honourable Judges,  
5 esteemed members of the Japanese delegation: I am the Head of section in the  
6 Department of Legal Assistance in the main directorate for International Cooperation.  
7 This is the department belonging to the Prosecutor-General of the Russian  
8 Federation and I have the duty to resolve issues of legal assistance in criminal and  
9 administrative cases.

10  
11 With regard to the information provided by the esteemed Japanese delegation in its  
12 application concerning the circumstances of proceedings that have been instituted  
13 against the Master and the owner of the *Tomimaru 53* before the domestic courts of  
14 the Russian Federation, let me draw your attention to the following circumstances.

15  
16 On 31 October 2006, an inspection group of the State Sea Inspection of the  
17 Northeast Border Coastguard Directorate of the Federal Security Service of the  
18 Russian Federation stopped and inspected a fishing vessel under the flag of Japan –  
19 the *Tomimaru 53*, whose owner was the Kanai Gyogyo Company, Japan.

20  
21 After analysis of the documents available on board the vessel, data of its daily ship  
22 records as well as data provided by the Russian Licensing Authority, it was  
23 established that the *Tomimaru 53* vessel having a valid licence was harvesting in the  
24 Exclusive Economic Zone of the Russian Federation the following species of fish:  
25 pollack (1,163 tonnes) and herring (18 tonnes). The vessel had on board a catch of  
26 614,286 tonnes of pollack and 6,379 tonnes of herring. Out of this catch, there were  
27 387 tonnes of pollack and 6,315 tonnes of herring, and that was supported by the  
28 harvesting documentation and regular data of daily ship records. These data were  
29 also in other records in the Kamchatka authorities. During the preliminary  
30 inspection, the amount of product on board the ship corresponded to that recorded in  
31 the documents. However, taking into account that there was no possibility to  
32 examine all the vessel, we could not confirm the real amount of catch on board the  
33 ship during the preliminary inspections.

34  
35 In this connection, on 2 November 2006, another inspection was carried out. During  
36 the additional inspecting, an unrecorded catch was found of 5.5 tonnes, and there  
37 were 8.8 tonnes of raw fish.

38  
39 On 3 November 2006, in accordance with parts 1 and 2 of Article 2.6 of the Code on  
40 Administrative Offences of the Russian Federation, it was decided to institute  
41 administrative proceedings against the Master of the vessel, Mr Takagiva Matsuo.

42  
43 [Interruption in interpretation]

44  
45 This pronouncement was made on the basis of the Russian Code, Part 2, Article 2.6  
46 of the Code of Administrative Offences. In accordance with Article 23.10 of the Code  
47 of Administrative Offences, administrative proceedings were charged to the State  
48 Sea Inspection of the Northeast Border Coastguard Directorate of the Federal  
49 Security Service of the Russian Federation. That is, there were administrative  
50 proceedings against the Master.

1  
2 At the same time, on 8 November 2006, in accordance with the same Articles as well  
3 as Article 2.10 of the Code of Administrative Offences of the Russian Federation,  
4 proceedings were initiated against the ship owner of the vessel; that is, with regard  
5 to the ship owner of *Tomimaru 53*, the Kanai Gyogyo Company. This is another  
6 case. This case was also referred to the Northeast Coastguard State Inspection.  
7

8 Following the administrative investigation of the offences committed by the Master,  
9 Mr Takagiva Matsuo, on 8 November 2006 a criminal case was started against him.  
10 It was the third case. That criminal case was initiated on the basis of the events  
11 provided for in paragraph 2, Article 253 of the Criminal Code of the Russian  
12 Federation, concerning the exploitation of natural resources in the territorial waters of  
13 the Russian Federation without legal permission, since the Master of the vessel did  
14 not have a valid Russian licence for the catch discovered on board the *Tomimaru 53*  
15 and the vessel did not have Russia's permission for that.  
16

17 On 9 November 2006, the experts of the Kamchatka Regional Chamber of Trade  
18 and Commerce carried out an exercise to establish the exact quality and quantity of  
19 the illegal catch. It was revealed that, without the permission of the Russian  
20 authorities, considerable amounts of fish such as halibut, bass, ray, cod, sole and  
21 greenling were fished. Moreover, the inspection discovered on board an illegal stock  
22 of processed walleye Pollock. In accordance with that finding, the damage caused  
23 to the biological resources of the Russian Federation amounted to 9,328,600  
24 roubles, without taking into account the cost of illegally processed fish products.  
25

26 In the course of the investigation of this criminal case, the Master of the *Tomimaru*  
27 53, Mr Takagiva Matsuo, was charged with crimes featured in two Articles of the  
28 Criminal Code of the Russian Federation: first, I have already mentioned, Article 253  
29 of the Criminal Code; secondly, paragraph 2 of Article 201 of the same Criminal  
30 Code of the Russian Federation. These offences are classified as abuse of  
31 authority, which in this context means that he used his powers to obtain an illegal  
32 interest for himself or for other persons in the event that this resulted in considerable  
33 damage to the illegally protected interest of the society of the state. The punishment  
34 for this rather serious offence may include imprisonment of up to five years.  
35

36 Since the Master of the *Tomimaru 53* fishing vessel had made an illegal catch of  
37 large amounts of fish that were not permitted for catch – halibut, bass, ray, cod, sole  
38 and greenling – and exceeded the allowable quota of walleye pollack, by causing  
39 considerable damage to the sea-living resource in the Exclusive Economic Zone of  
40 the Russian Federation, he committed an act detrimental to the interests of the  
41 Russian Federation.  
42

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

1  
2 In accordance with those rights fixed in the criminal proceedings, if the Master  
3 wanted to leave the territory of the port, he could have done so in accordance with  
4 the following procedure: together with his counsel, he could have applied to the  
5 investigator in charge of the criminal case, who had imposed the punishment of  
6 interdiction, to change that measure of restraint and choose a measure such as  
7 a bond. Such a bond relating to someone being investigated by the criminal court is  
8 provided for in Article 106 of the Criminal Code of the Russian Federation. The  
9 amount of such a bond is in no way related to the issue or amount of the caused  
10 damage.

11  
12 Had the bond been deposited, he could have left the port freely with only one  
13 obligation, namely to attend the court promptly, when he would have been invited to  
14 speak to the court. However, the Master never in fact exercised that legitimate right,  
15 although he did not have any vires from the Russian side, so in this case the bond  
16 was never provided for the Master. In this respect, all the claims of the Japanese  
17 party that the Master of the *Tomimaru*, Mr Takagiva Matsuo, was detained are  
18 baseless.

19  
20 I allow myself to continue with the presentation of the circumstances of the case. It  
21 follows that the Master of the *Tomimaru* 53 was charged with committing offensive  
22 acts that entailed a criminal and administrative responsibility. As a consequence of  
23 the situation surrounding the *Tomimaru* 53, the Russian party had undertaken the  
24 following measures to meet the requirements of Article 73(3) of the Convention of  
25 the United Nations.

26  
27 On 1 December 2006, the Consul General of Japan in Vladivostok was served a  
28 clarification in response to his application on 30 November 2006, which stated that  
29 the resolution of the issue of releasing the vessel and posting a reasonable bond  
30 was within the competence of the Kamchatka Inter-District Prosecutor's Office for the  
31 Protection of the Environment. This was explained in a letter from the coastguard,  
32 which clarified for the Japanese party the proper procedure for the definition of the  
33 bond.

34  
35 On the same day, 1 December, a prosecutor of the Kamchatka Inter-District  
36 Prosecutor's Office, responding to the application of the Consul General of Japan on  
37 the release of the *Tomimaru* 53, explained that this criminal case was under  
38 investigation and in the hands of the State Sea Inspection; this was also mentioned  
39 in the letter from the coastguard. The response from the Prosecutor's Office clearly  
40 stated that the decision to free the vessel could be adopted only after the ship-  
41 owner, who is responsible for the illegal acts of the Master of the *Tomimaru* 53, had  
42 complied with two conditions: first, to present a claim to introduce a bond  
43 commensurate with the damage and, secondly, to make payment of the bond  
44 practically.

45  
46 On 8 December 2006, the ship-owner, Kanai Gyogyo, through the Kamchatka  
47 Inter-District Prosecutor's Office, applied – and hence we can conclude that the  
48 answer was clearly understood by the Japanese party – for information about the  
49 amount of the bond, after which the vessel could be set free by the Russian

1 authorities in accordance with Article 73 of the UN Convention on the Law of the  
2 Sea. That is contained in the appendix.

3  
4 Therefore, the company was prepared to pay the bond for the release of the ship  
5 established by the Russian party to the stipulated bank account in the shortest  
6 period of time. This means that the ship-owner asked the Prosecutor's Office to  
7 specify the bank account and the amount of the bond that the company, according to  
8 the terms of the letter, was prepared to pay. I therefore draw the Tribunal's attention  
9 to the fact that the company was prepared to pay that sum within the shortest period  
10 of time. The Russian party considers this letter to be a proper claim to allow the  
11 release of the *Tomimaru 53* vessel in accordance with the UN Convention on the  
12 Law of the Sea after the bond had been posted. Moreover, this claim was presented  
13 to a properly authorized person from the Russian Federation.

14  
15 On 12 December 2006, the investigator of the Prosecutor's Office who took the  
16 criminal case with regard to the Master of the *Tomimaru 53* adopted the procedural  
17 decision, which is also attached to the material provided by the Japanese party and  
18 was presented to the Prosecutor's Office. The topic was that the sum of the bond  
19 would be 8,800,000 roubles, and the account of the designated bank was specified  
20 for the transfer of the bond. As it is very important to emphasize each word, I will try  
21 to draw to the attention of the Tribunal and respected members of the Japanese  
22 delegation that in this paper and in the letter that was sent to the ship-owner, it was  
23 stated that after the bond had been paid, the Prosecutor's Office would not prevent  
24 the free operation of the *Tomimaru 53*. What else was that, if not a proper  
25 announcement of the deed, in accordance with the UN Convention? We think that  
26 that is exactly what it is, and we hope that the distinguished court will take into  
27 consideration our point of view with regard to this paper. Again I use the terminology  
28 that was used by the Agent of the Japanese part.

29  
30 I would like to draw the Tribunal's attention to the fact that this letter opened both of  
31 the so-called locked doors, that is, the so-called lock on the criminal case and the  
32 so-called lock on the administrative case with regard to the vessel, because, in  
33 accordance with the Russian legislation, the prosecutor is the authorized person who  
34 can order the State Sea Inspection of the Northeast Coastguard Directorate of the  
35 FSS to release the vessel. That means that the prosecutor's decision removed  
36 those two limitations.

37  
38 In spite of all the clarifications provided to the Japanese party with regard to the  
39 procedure for the payment of the bond, the amount of the bond, the account number  
40 to which the money was to be transferred, the said money to cover the bond has  
41 never been received from the owner of the Japanese vessel.

42  
43 Instead of depositing the bond as established by the authorities of the Russian party,  
44 the ship owner on 14 December addressed the State Sea Inspection with an  
45 application asking them to establish a bond which had already been set in  
46 connection with the fact that by definition, on 15 December, the State Sea Inspection  
47 took all the materials and passed them to the criminal case, so it did not have  
48 powers to resolve that issue and it rejected the claim of the ship owner and the  
49 administrative case was passed to the court.

1 On 28 December 2006 the Kamchatka City Court ordered that the vessel owner,  
2 Kanai Gyogyo Company, be pronounced guilty of committing the administrative  
3 offence fixed by Part II, Article 8.17 of the Code of Administrative Offences of the  
4 Russian Federation, in particular, violation of the rules of fishing operations for  
5 catching water biological living resources or the licence conditions for catching water  
6 biological living resources in the Exclusive Economic Zone of the Russian  
7 Federation. As the punishment for this offence, the court set the penalty in an  
8 amount equal to twice the cost of the water biological living resources which were  
9 the subject of the administrative violation, which totalled 2,865,149 roubles, plus  
10 confiscation of the *Tomimaru* vessel with all tools and equipment aboard the vessel  
11 at the time.

12  
13 This pronouncement of the Russian court according to Russian legislation was the  
14 subject of a complaint against this decision on 25 January 2007. The Kamchatka  
15 Court pronounced the original decision of the first instance in force and in full and did  
16 not satisfy the complaint. So the decision of the court to punish Kanai Gyogyo  
17 Company, the vessel owner, entered into force on 25 January 2007.

18  
19 On 7 February 2007 the Petropavlovsk Kamchatskii Bailiffs Department initiated  
20 enforcement proceedings under this judgment of the court, which were completed on  
21 9 April 2007 with the transfer of the confiscated *Tomimaru* vessel to the Territorial  
22 Directorate of Federal Agency for Federal Property Management in the Kamchatka  
23 region. In accordance with the extract from the Federal Property Register of the  
24 Russian Federation, the *Tomimaru 53* fishing vessel is the property of the Russian  
25 Federation, and its identification number has been mentioned by the previous  
26 speaker.

27  
28 That was the end of the administrative procedures against the company and the  
29 owner. Besides, on 15 May 2007 the Petropalovsk Kamchatskii City Court by its  
30 order condemned Japanese citizen Mr Takagiva Matsuo, former Master of the  
31 *Tomimaru 53*, as guilty of crimes provided for in Part 2, Article 253 and Part 2,  
32 Article 201 of the Russian Criminal Code. I have spoken about those Articles. He  
33 was fined 500,000 roubles. As you see, no punishment such as detention was  
34 pronounced against the Japanese Master. In the course of the judicial proceedings  
35 the civil claim was satisfied on paying of damages in the sum of 9,328,600 roubles.  
36 As of today the penalty has been made but the damages have not yet been covered.

37  
38 It should be noted that for the last four years around the coast of Kamchatka for  
39 violations similar to those made by *Tomimaru 53* seven more Japanese fishing  
40 vessels were detained. However, the illegal activities of Japanese citizen  
41 Takagiva Matsuo inflicted the gravest damage to the interests of the Russian  
42 Federation. The Russian court was guided by these exact considerations in  
43 prescribing punishment.

44  
45 Taking into account all the above facts, the Russian side cannot agree at all with the  
46 submission of the Japanese side on violation by the Russian party of its obligations  
47 under Part 2, Article 73 of the UN Convention on the Law of the Sea as well as with  
48 the request to release the *Tomimaru 53* vessel upon conditions established by the  
49 Tribunal.

50

1 In pursuance of the provisions of Article 73 of the Convention, the Russian  
2 Federation, as a coastal state, in exercising its sovereign rights in the Exclusive  
3 Economic Zone, implemented those rights, up to and including arrest and criminal  
4 proceedings, which ensured the observance of the requirements of the Russian  
5 legislation adopted in full compliance with this Convention.  
6

7 As for the submission of the Japanese party on the application of the provisions of  
8 Article 292 of the Convention to release the *Tomimaru 53* upon posting the bond,  
9 this argument, in our opinion, does not have any legal grounds.  
10

11 First, the allegations of the Japanese party concerning the fact that “the owner was  
12 ready and wishing to post the bond or other security to promptly release the vessel”  
13 as per paragraph 55 of Japan’s counter memorandum, such a possibility as follows  
14 from the above-mentioned fact was available to the vessel owner from 12 December  
15 2006; however, he has not used it.  
16

17 Second, at present the owner of the *Tomimaru 53* is the Russian Federation.  
18 Consequently, the former ship owner, the Kanai Gyogyo Company, in no way can  
19 quote that they are prepared to post a bond or wishing to do that as, contrary to the  
20 claim of the Japanese party, this does not correspond to reality. Consequently,  
21 Article 292 of the Convention cannot be applied in this case as the right to apply to  
22 the Tribunal can be made only with regard to a detained vessel, not a confiscated  
23 vessel.  
24

25 Today’s statement of the Japanese party that the allegedly internal measures of the  
26 Russian Federation on confiscation of a vessel *Tomimaru 53* are not acceptable to it  
27 and it continues to consider this vessel as its own property in our opinion is an  
28 intervention into the exercise by the Russian Federation of its sovereign rights, which  
29 are directly foreseen by the provisions of the UN Convention on the Law of the Sea.  
30 If so, the Russian party is of the opinion that Application of the Japanese party to the  
31 Tribunal on the Law of the Sea with regard the release of the *Tomimaru 53* vessel  
32 cannot be set aside either in form or in essence.  
33

34 Thank you for your attention. That is the end of my intervention.  
35

36 **THE PRESIDENT:** Thank you, Mr Yalovitskiy, for your statement. Thank you in  
37 particular for speaking slowly. It came through in translation quite well.  
38

39 We now turn to Professor Golitsyn. Could you please continue?  
40

41 **PROFESSOR GOLITSYN:** Thank you, Mr President. With your permission, I would  
42 like to divide my presentation into two parts. I will deliver the first part and if the  
43 Tribunal will then declare a break, I will continue with the concluding part.  
44

45 **THE PRESIDENT:** Thank you, yes.  
46

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

1  
2 The Applicant in its Application requests the Tribunal to do three things by way of  
3 judgment: first, to declare that the Tribunal has jurisdiction under Article 292 of the  
4 Convention to hear the application concerning the detention of the vessel and the  
5 crew of the 53<sup>rd</sup> *Tomimaru* in breach of the Respondent's obligations under Article  
6 73(2) of the Convention; secondly, to declare that the application is admissible, that  
7 the allegations of the Applicant are well founded and that the Respondent has  
8 breached its obligations under Article 73(2) of the Convention; and finally, to order  
9 the Respondent to release the vessel and the crew of the *Tomimaru* upon such  
10 terms and conditions as the Tribunal shall consider reasonable.

11  
12 The Respondent for its part requests the Tribunal to decline to make these orders  
13 and to order first, that the Application of Japan is inadmissible and secondly,  
14 alternatively, that the allegations of the Applicant are not well founded and that the  
15 Russian Federation has fulfilled its obligations under paragraph 2 of the Article 73 of  
16 the United Nations Convention on the Law of the Sea.

17  
18 In my observations I will try to address in a comprehensive way legal issues arising  
19 in the light of these requests.

20  
21 First, I would like to address the issue of the setting of the bond, because it appears  
22 that there is some confusion on the Applicant's side with regard to the understanding  
23 of this issue.

24  
25 In two paragraphs of its Application the Applicant claims that the owner of the  
26 53<sup>rd</sup> *Tomimaru* has at all times been ready and willing to post a bond or other security  
27 in order to secure the release of the vessel provided that the bond or other security  
28 were fixed and that the amount and conditions for their payment are reasonable, and  
29 the authorities of the coastal state permit the actual release of the vessel.

30  
31 It is also claimed in the Application that no bond or other security has been set and  
32 the vessel has not been released.

33  
34 The above allegations do not correspond to the facts, which I would like now to bring  
35 to the attention of the Tribunal.

36  
37 Paragraph 2 of Article 73 of the Convention states that a reasonable bond or other  
38 security shall be set by a coastal state for the prompt release of the arrested vessel.  
39 So paragraph 2 of Article 73 of the Convention basically states that the coastal state  
40 has an obligation to set the bond, and it is assumed that it will be done in accordance  
41 with the applicable procedures of the coastal state.

42  
43 In the *Tomimaru* case all the necessary steps stipulated in paragraph 2 of Article 73  
44 have been taken by the Russian Federation as the coastal state to meet this  
45 requirement.

46  
47 As noted in paragraph 69 of the Statement in Response, the Respondent first,  
48 identified the proper authority for the setting of the bond; second, set the bond; third,  
49 provided the owner with precise and clear information with regard to the amount of  
50 the bond and the account details; and fourth, assured the owner that the arrested



1 vessel would be released upon the payment of the bond. These steps of the  
2 Respondent are described in paragraphs 14, 15 and 34-36 of the Statement in  
3 Response.

4  
5 Let me now address each one of these steps to illustrate the actions taken by the  
6 Respondent.

7  
8 First, the identification of the proper authority for setting of the bond.

9  
10 As noted in paragraph 12 of the Statement in Response, on 1 December 2006 the  
11 Inter-District Prosecutor's Office for Nature Protection in Kamchatka informed the  
12 Consulate-General of Japan in Vladivostok that it was waiting for the due request for  
13 setting of a bond.

14  
15 A special emphasis was placed on the question of release of the vessel. The  
16 Applicant was assured that the decision to release the seized vessel would be made  
17 upon the payment of a bond.

18  
19 On 8 December 2006, as is also pointed out in paragraph 14 of the Statement in  
20 Response, in reply to an inquiry by the owner of the vessel, the Northern Border  
21 Coastguard Directorate for the Federal Security Service of the Russian Federation  
22 on 14 December 2006 confirmed to the Consulate-General of Japan in Vladivostok  
23 that the proper body to determine the bond in the case of the 53<sup>rd</sup> *Tomimaru* was the  
24 Inter-District Prosecutor's Office for Nature Protection in Kamchatka.

25  
26 Coming to the next step, the actual setting of the bond, with reference to the actual  
27 setting of the bond, I would like to draw the attention of the distinguished judges to  
28 paragraph 15 of the Statement in Response, which stipulates that on  
29 12 December 2006 the Inter-District Prosecutor's Office for Nature Protection in  
30 Kamchatka duly set a reasonable bond. The amount of the bond was set at the level  
31 of the overall damages to the marine living resources in the Russian Exclusive  
32 Economic Zone equivalent to 8,800,000 roubles.

33  
34 The next step is information brought to the attention of the owner with regard to the  
35 bond. As pointed out in paragraphs 15 and 36 of the Statement in Response,  
36 following the setting of the bond, the owner of the vessel was immediately informed  
37 about it and was provided with detailed instructions regarding the bank account to  
38 which the payment should be made.

39  
40 The final step is the assurances given to the owner that the arrested vessel will be  
41 promptly released upon the payment of the bond. The competent Russian  
42 authorities, upon setting of the bond, also immediately informed the owner of the  
43 arrested vessel that the vessel will be promptly released upon payment of the bond.

44  
45 Conclusions: It follows from the above explanations that the Applicant's claim that  
46 the bond set by the Russian authorities is not a bond for the purposes of paragraph 2  
47 of Article 73 of the Convention must be rejected.

1 The fragmentation of the notion of bond, as suggested by the Applicant, would not  
2 be consistent with the purposes and nature of the bond, and this does not coincide  
3 with the actual proceedings carried out by the Respondent.

4  
5 In the light of the foregoing, the Respondent would like to reiterate once again in very  
6 clear terms that a reasonable bond for the release of the *Tomimaru* was set by the  
7 competent authorities of the Russian Federation on 12 December 2006 for the  
8 purposes of prompt release of the *Tomimaru* vessel upon payment of the bond, as  
9 provided for in paragraph 2 of Article 73 of the Convention.

10  
11 As a reasonable bond has been set by the Respondent, the Tribunal should, in the  
12 view of the Respondent, exercise judicial propriety and order that the application  
13 concerning the prompt release of the 53<sup>rd</sup> *Tomimaru* is inadmissible.

14  
15 I would now like to address the issue of the interrelation of various provisions of  
16 Article 73 of the Convention.

17  
18 Distinguished judges, I would like now to address the issue which is sometimes  
19 forgotten or does not receive proper attention when prompt release proceedings  
20 under Article 73 are involved.

21  
22 Article 73 of the Convention was very carefully drafted to establish a proper balance  
23 between various interests. Although this Article contains provisions protecting the  
24 interests of flag states through prompt release procedures, this Article cannot and  
25 should not be understood as implying that the coastal state is otherwise restricted in  
26 exercising its sovereign rights within the Exclusive Economic Zone.

27  
28 According to paragraph 1 of Article 73, the coastal state may, in exercise of its  
29 sovereign rights to explore, exploit, conserve and manage the marine living  
30 resources in the Exclusive Economic Zone, take such measures (including boarding,  
31 inspection, arrest and judicial proceedings) as may be necessary to ensure  
32 compliance with the laws and regulations adopted in conformity with the Convention.

33  
34 In the Statement in Response, it is emphasized in this respect that it follows from  
35 paragraph 1 of Article 73 of the Convention that in exercise of its sovereign rights  
36 within the Exclusive Economic Zone, the coastal state has full authority to take all the  
37 necessary measures, including the institution of judicial proceedings, to ensure full  
38 compliance with its conservation and management measures.

39  
40 Paragraphs 2, 3 and 4 of Article 73 of the Convention contain certain conditions that  
41 should be met and observed by the coastal state in situations where foreign vessels  
42 are detained or arrested, but these paragraphs are also drafted on the assumption  
43 that the owner of the vessel will meet its obligations and fully cooperate with the  
44 competent authorities of the coastal state.

45  
46 I bring this consideration to the attention of the distinguished judges because in the  
47 *Tomimaru* case the owner of the vessel has never paid the bond, which was set on  
48 12 December 2006 by the proper Russian authorities. Therefore, the owner did not  
49 comply with its obligations under paragraph 2 of Article 73 of the Convention.

1 In paragraph 67 of the Statement in Response, it is emphasized that payment by the  
2 owner of the vessel of a bond or other security set by the coastal authorities  
3 constitutes an obligation with which the owner of the vessel must duly comply.  
4

5 Prompt compliance by the owner with this obligation is the factor that triggers prompt  
6 release of the arrested vessel.  
7

8 So, Article 73 of the Convention should be read and understood in its entirety  
9 because of the very careful balance of responsibilities and obligations established by  
10 it.  
11

12 Paragraph 2 of Article 73 of the Convention concerning prompt release of the  
13 arrested vessel cannot be read in isolation from paragraph 1 of this Article  
14 concerning the exercise by the coastal state of its sovereign rights in the Exclusive  
15 Economic Zone.  
16

17 If the owner of a vessel does not comply with its obligations under paragraph 2 of  
18 Article 73 of the Convention by not paying the bond, the coastal state does have full  
19 authority to proceed with all the necessary measures to ensure compliance with its  
20 laws and regulations, which are aimed at ensuring conservation and proper  
21 management of the marine living resources in the Exclusive Economic Zone of the  
22 coastal state. The latter also includes the institution of appropriate judicial  
23 proceedings, which will be conducted in accordance with the applicable national laws  
24 of the coastal state.  
25

26 In the *Tomimaru* case, the competent Russian authorities instituted the necessary  
27 judicial proceedings to ensure compliance with its laws and regulations, and they did  
28 it in full conformity with the relevant provisions of the Law of the Sea Convention in  
29 exercise of the sovereign rights of the Russian Federation in the Exclusive Economic  
30 Zone.  
31

32 I would like to touch on the issue of why the application is inadmissible because the  
33 vessel in the *Tomimaru* case was confiscated pursuant to a decision of the Russian  
34 court.  
35

36 I would like now to address the issue of the inadmissibility of the application because  
37 of the confiscation of the *Tomimaru* vessel following the completion of the  
38 appropriate judicial proceedings of the Russian Federation.  
39

40 The arguments that I would like to bring to the attention of the Tribunal in this regard  
41 should be understood in the context of other observations that I have already made  
42 regarding full compliance by the Respondent with its obligations under paragraph 2  
43 of Article 73 of the Convention.  
44

45 First, I would like to address the issue of the applicable national judicial proceedings  
46 in the *Tomimaru* case.  
47

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

1  
2 On 28 December 2006, the Petropavlovsk-Kamchatskii City Court decided that the  
3 vessel should be confiscated and a fine of 2,865,149.5 roubles should be paid by the  
4 owner.

5  
6 During the proceedings of the court that led to the above judgment, the attorney  
7 representing the owner: pleaded guilty; asked the court to impose a fine equal to  
8 double damages without confiscation of the vessel because the offence had been  
9 committed by the owner for the first time; and, informed the court that the owner was  
10 ready to pay all fines and to cover the costs of the court's proceedings in this case.

11  
12 On 6 January 2007, the owner of the vessel submitted an appeal against the  
13 aforementioned judgment to the Kamchatka District Court. The latter upheld the  
14 decision of the Petropavlovsk-Kamchatskii City Court on 24 January 2007.

15  
16 In the light of the clarifications provided by the Supreme Court of the Russian  
17 Federation on 20 August 2003, which are referred to in paragraph 23 of the  
18 Statement in Response, the decision of the Kamchatka District Court entered into  
19 force immediately upon its delivery; in other words, on 24 January 2007. The  
20 decision was subject to enforcement from that date.

21  
22 Following the entry into force of the decision of the Petropavlovsk-Kamchatskii City  
23 Court, the Federal agency responsible for the management of Federal property  
24 included the fishing vessel 53<sup>rd</sup> *Tomimaru*, confiscated in accordance with the  
25 aforementioned decision of the court, into the Federal Property Register as property  
26 of the Russian Federation.

27  
28 It follows from the above that in the *Tomimaru* case we deal with the following  
29 situation: the appropriate court proceedings were completed; the respective  
30 judgment, which included confiscation of the vessel, was rendered and entered into  
31 force; and the confiscated property, the fishing vessel *Tomimaru*, was included in the  
32 Federal Property Register as property of the Russian Federation.

33  
34 I turn to the legal implications of the judgment. In its arguments on the legal  
35 implications of the judgement, which includes confiscation of the vessel, the  
36 Respondent extensively refers to the views expressed on this subject by the French  
37 Government in its communication of 28 March 2001, forwarded to the Registrar of  
38 the Tribunal by the Director of Legal Affairs of the Ministry of Foreign Affairs of  
39 France in connection with an application for prompt release submitted on behalf of  
40 Belize to the Tribunal with regard to the vessel *Grand Prince*.

41  
42 The respondent fully shares these views.

43  
44 I would like to highlight some of the main elements of the arguments presented by  
45 the French Government. The reference to them in full is contained in paragraph 42  
46 of the Statement in Response.

1 The French Government argues that:

2  
3 “when the internal judicial proceedings have reached their conclusion and, in  
4 particular, when they have led to the pronouncement of a sentence of  
5 confiscation of the vessel, any possible resort to Article 292 procedure loses  
6 its reason for being. In such a case, the application for prompt release is  
7 moot. As from the time when the national court has pronounced confiscation  
8 of the vessel as the applicable sanction, the introduction of prompt release  
9 proceedings before the International Tribunal for the Law of the Sea is not  
10 only no longer possible but indeed is not even conceivable.”

11  
12 The French Government further argues that:

13  
14 “a confiscation declared by a national court as a principal or secondary  
15 penalty has as its effect authoritatively and definitively to transfer to the State  
16 the property confiscated. The owner of the vessel loses his title by virtue of  
17 the judicial decision and, if he seeks to recover his rights in the property, the  
18 remedies open to him can no longer be pursued within a proceeding for  
19 prompt release, since he can no longer be considered as the holder of the title  
20 to the vessel.”

21  
22 The French Government concludes presentation of its position on this subject by  
23 stating that it flows from paragraph 3 of Article 292 that:

24  
25 “The ...Tribunal shall deal ... with the application for release and shall deal  
26 only with the question of release, without prejudice to the merits of any case  
27 before the appropriate domestic forum against the vessel, its owner or its  
28 crew ... In any penal proceedings instituted against the captain of a foreign  
29 fishing vessel for violation of the laws and regulations of the coastal State, the  
30 determination of the applicable penalty and the imposition of that penalty are  
31 an integral part of what one calls ‘the merits’; i.e. the very substance of the  
32 case submitted to a national court.”

33  
34 The Respondent fully shares this position and strongly believes that, once the  
35 proceedings before the national court are completed and the judgment, which  
36 includes the confiscation of the arrested vessel, is rendered by the national court, the  
37 application for the prompt release proceedings under Article 292 of the Convention  
38 would be equivalent to the interference by the Tribunal into the conduct and result of  
39 internal judicial proceedings of the coastal state concerned.

40  
41 What situation do we have in the *Tomimaru* case? In the *Tomimaru* case, the  
42 Russian court rendered its judgment, which included confiscation of the *Tomimaru*  
43 vessel. This judgment was upheld by the upper court fully in accordance with  
44 Russian procedural law and the principles of due process.

45  
46 The judgment, thus, has entered into legal force and the property, the *Tomimaru*  
47 vessel, was confiscated pursuant to this judgment and was entered into the Federal  
48 Property Register as property of the Russian Federation.

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

3  
4 Now I would like to turn to the issue of why the Applicant requests that the Tribunal  
5 should order the release of the vessel upon such conditions and terms as the  
6 Tribunal considers reasonable.

7  
8 I refer to subparagraph 1(c) of the application in the *Tomimaru* case. This request is  
9 similar to the one in subparagraph 1 (c) in the *Hoshinmaru* case that was submitted  
10 by the Applicant.

11  
12 In subparagraph 1(c) the Applicant requests the Tribunal to order the Respondent to  
13 release the vessel *Tomimaru* upon such terms and conditions that the Tribunal shall  
14 consider reasonable.

15  
16 As I explained during the hearings in the *Hoshinmaru* case, the Respondent is of the  
17 view that this request is formulated in a way that goes beyond the scope of what is  
18 envisaged in Article 292 of the Convention because the Applicant requests the  
19 Tribunal to exercise functions that are not attributed to it under Article 292 of the  
20 Convention.

21  
22 I do not believe that it is necessary to repeat all the arguments presented on this  
23 subject in the *Hoshinmaru* case because they are equally valid in the *Tomimaru*  
24 case.

25  
26 I would therefore ask the distinguished judges to take the arguments presented by  
27 me on this subject in the *Hoshinmaru* case also into account when they consider the  
28 *Tomimaru* case.

29  
30 The Tribunal has always determined under Article 292 of the Convention not the  
31 terms and conditions, as requested by the Applicant, but a reasonable bond or other  
32 security, upon payment of which the arrested vessel shall be promptly released.

33  
34 For the reasons explained in connection with the request contained in subparagraph  
35 1(c) of the application, the Respondent requests the Tribunal to declare the  
36 application inadmissible

37  
38 May I stop here and continue after the break, Mr President?

39  
40 **THE PRESIDENT:** Thank you, Professor Golitsyn. I believe that is appropriate. We  
41 will adjourn for 20 minutes.

42  
43 **(Short break)**

44  
45 **THE PRESIDENT:** Professor Golitsyn, would you please continue?

46  
47 **PROFESSOR GOLITSYN:** Mr President, distinguished judges, I would now like to  
48 address the issue of the establishment of the jurisdiction of the Tribunal, as  
49 presented in sub-paragraph 1(a) of Japan's Application.

50

1 This paragraph in the *Tomimaru* Application is identical to a similar sub-paragraph in  
2 the *Hoshinmaru* Application. Consequently, the arguments presented by me in the  
3 *Hoshinmaru* case are relevant to the *Tomimaru* case as well. However, given the  
4 importance that we attach to this subject, I find it necessary to repeat them.  
5

6 It is obvious that the first action that the Tribunal needs to take when it receives an  
7 application for the prompt release of a vessel is to satisfy itself that it has jurisdiction  
8 under Article 292 of the Convention to adjudicate on the case.  
9

10 If one looks at the request that is addressed by the Applicant in this regard to the  
11 Tribunal, one will find that the Tribunal is requested to declare its jurisdiction under  
12 Article 292 on the assumption that the Respondent is in breach of its obligations  
13 under Paragraph 2 of Article 73 of the Convention.  
14

15 We believe that in establishing its jurisdiction to adjudicate on the case, the Tribunal  
16 cannot and should not imply in advance that the allegations made by the Applicant  
17 regarding the non-compliance by the Respondent with the provisions of paragraph 2  
18 of Article 73 of the Convention are well grounded and therefore should be accepted.  
19

20 Therefore, the Respondent cannot agree, as stated in paragraph 32 of its Statement  
21 in Response in the *Tomimaru* case, with what is requested by the Applicant in  
22 sub-paragraph 1(a) of its Application in that case.  
23

24 I would now like to make some comments with regard to observations made this  
25 morning. Quite a few observations were made by the Applicant this morning that are  
26 questionable and require comments. In my presentation I will comment only on  
27 those that are more or less of a legal nature.  
28

29 I would like to start with comments on the statement that the owner of the vessel up  
30 until now has continued to make requests to set a reasonable bond for the release of  
31 the arrested vessel. It is our understanding that the owner has been trying through  
32 the applicable judicial proceedings to reverse a court's judgment regarding the  
33 confiscation of the vessel. However, the owner has not been making requests for  
34 the setting of a new bond. Such requests have been made by the Japanese  
35 authorities but not by the owner of the vessel.  
36

37 The second observation that I would like to make relates to the remarks that were  
38 repeated several times this morning, the essence of which is that since the Supreme  
39 Court of the Russian Federation is currently involved in this matter, the decision of  
40 the Petropavlovsk-Kamchatskii City Court has not yet come into force, and that  
41 therefore the property for this vessel has not been transferred to the Russian  
42 Federation.  
43

44 We are at least surprised by these remarks, because the legal situation was quite  
45 clearly explained in the Statement in Response. In paragraphs 22 and 23 of this  
46 Statement, it is explained that an appeal procedure was exhausted when the  
47 judgment of the Petropavlovsk-Kamchatskii City Court of 28 December 2006 was  
48 upheld by the Kamchatka District Court on 24 January 2007. As clarified in  
49 paragraphs 23 and 26 of the Statement in Response, once the appeal procedure  
50 was exhausted and the decision of the Petropavlovsk-Kamchatskii City Court came

1 into force, the Federal Agency responsible for the management of the federal  
2 property by an implementing Act of 9 April 2007 included the fishing vessel  
3 *Tomimaru*, confiscated in accordance with the decision of the court, in the Federal  
4 Property Register as property of the Russian Federation.

5  
6 The matter now before the Supreme Court of the Russian Federation is not an  
7 appeal with regard to the judgment that has already come into force. It is an  
8 objection lodged by the owner of the vessel in accordance with the supervisory  
9 review procedure exercised by the Supreme Court – a procedure that is completely  
10 different from the appeal procedure. Consequently, the vessel is currently registered  
11 in the Federal Property Register as property of the Russian Federation.

12  
13 It was alleged this morning that since the *Tomimaru* has not been excluded from the  
14 Japanese Flag Register, it cannot become the property of the Russian Federation  
15 until this situation is changed, because the *Tomimaru* cannot be re-flagged. In our  
16 view, that is a very strange assumption, which may be interpreted to mean that  
17 Japan can influence the decisions of Russian courts or prevent the implementation  
18 of their judgments. Japan definitely does not have this authority. Besides, this  
19 assumption is based on an idea that the vessel is supposed to be re-flagged.  
20 However, as property of the Russian Federation, the *Tomimaru* vessel can be used  
21 for various purposes.

22  
23 For example, it can be placed as an exhibit in a museum of fishing vessels involved  
24 in illegal activities; it can be sold to a new owner who would change it to a seafood  
25 restaurant or make it a part of an amusement park; or it can be determined by the  
26 Federal Agency responsible for the management of federal property that this vessel  
27 is in such poor condition that it is nothing more than a piece of scrap metal and  
28 therefore should be completely demolished.

29  
30 It was also claimed this morning that even if the owner had paid the bond  
31 established on 12 December 2006, the vessel would never have been released by  
32 the Russian authorities.

33  
34 In the *Hoshinmaru* case we were criticized the Applicant's Counsel for trying to  
35 invent a hypothetical situation and we were reminded that in the proceedings before  
36 this Tribunal we should deal only with the real facts. It is now our turn to remind the  
37 Applicant that the Tribunal does not deal with hypothetical situations but with the real  
38 facts. In this case, the fact is that on 12 December 2006 the Inter-District  
39 Prosecutor's Office for Nature Protection in Kamchatka duly set a reasonable bond  
40 in accordance with the authority delegated to it. It is a fact that the owner has never  
41 contested this bond and has never paid it. These are the facts, not a hypothetical  
42 situation, that should be presented to the Tribunal by the parties.

43  
44 It was alleged this morning that there is some confusion between administrative and  
45 criminal proceedings of the Russian Federation that sometimes operate in parallel  
46 and that it is difficult to determine authority that is responsible for the setting of  
47 bonds. We were told that this is a situation with two locks and that in the *Tomimaru*  
48 case there was a key to only one lock, and that the owner, despite all efforts, failed  
49 to find a key to another lock. We would like to remind the Applicant that it is for the  
50 owner of the locks to know exactly what key would open them. In connection with



1 this comment, we therefore wonder why our Statement in Response is being read by  
2 the Applicant selectively.

3  
4 In paragraph 12 of the Statement in Response, it is explained that on 1 December  
5 2006 the Japanese authorities were informed by the Inter-District Prosecutor's Office  
6 for Nature Protection in Kamchatka that it was waiting for a due request for setting  
7 a bond. Special emphasis was placed on the question of release of the vessel, and  
8 the authorities of the Applicant were informed that a decision to release the seized  
9 vessel would be made upon payment of the bond.

10  
11 In paragraph 14 of the Statement, it is further clarified that in response to an enquiry  
12 from the owner of the vessel, the latter was informed that the proper body  
13 responsible for the determination of a bond in the case of *Tomimaru* was the  
14 Inter-District Prosecutor's Office for Nature Protection in Kamchatka. As everyone  
15 knows, I hope by now, on 12 December 2006 the Inter-District Prosecutor's Office for  
16 Nature Protection in Kamchatka duly set a reasonable bond in the amount of  
17 8,800,000 roubles and informed the owner that the free operation of the vessel  
18 would be allowed on payment of the bond. We wonder why, after all these  
19 clarifications, one still has doubts about proper authority to establish a reasonable  
20 bond in the *Tomimaru* case.

21  
22 The Applicant expressed doubts as to whether the bond set on 12 December 2006  
23 was a proper bond, a bond for the purposes of paragraph 2 of Article 73 of the  
24 Convention. The respective letter informing the Japanese side about setting of  
25 a bond clearly stated (in brackets) that it was not a fine for ecological damages but  
26 a bond, in calculation of which ecological damage was one of the considerations. If  
27 the Japanese authorities had certain doubts about the nature and the purpose of the  
28 bond set on 12 December 2006, they should have consulted the competent Russian  
29 authorities and asked for clarifications. That has never been done.

30  
31 The fact of the matter is that whether the Japanese side considers the bond  
32 established by competent Russian authorities as a bond set at unreasonably low  
33 level it is a reasonable bond established by the Russian authorities. No other  
34 reasonable bond has been set in this case by the competent Russian authorities  
35 under paragraph 2 of Article 73 of the convention. In this regard it is worth reminding  
36 the Tribunal that the competent Russian authorities evaluate each situation on a  
37 case by case basis, and that the procedures discussed at length at the Joint  
38 Commission established under the 1984 Agreement have become operational only  
39 recently.

40  
41 In statements by the Applicant this morning reference was made to a petition by the  
42 owner to the Petropavlovsk-Kamchatski City Court asking this Court to set a  
43 reasonable bond. This petition was rejected by the Court as noted in paragraph 17  
44 of the Statement in Response. It is probably worth commenting in this connection on  
45 actions undertaken by the owner of this vessel in the *Tomimaru* case.

46  
47 This reminds me of my younger years when I studied English and was advised on  
48 difference between the words "confused" and "confusing". It appears that in this  
49 case we are dealing with a confused owner of the vessel who constantly finds itself  
50 in confusing situations. Following the establishment of the reasonable bond by the

1 competent Russian authorities on 12 December 2006, the owner for reasons that are  
2 diff to und, decided to ask the City Court to establish another bond. When the owner  
3 was rebuffed by that Court, its attorney, during the proceedings before the Court that  
4 led to a decision which included the confiscation of the vessel, claimed that it has  
5 some kind of understanding with the Russian law enforcement authorities regarding  
6 the setting of a bond and assessment of the damage.

7  
8 One may wonder whether the owner was actually trying to reach an arrangement  
9 regarding release of the vessel outside normal proceedings, which is not a legal way  
10 of managing such situations.

11  
12 This may explain why the owner has never officially challenged the bond and has  
13 never paid it. However, we understand that this is mere speculation on our part and,  
14 as advised by the Applicant, we are not supposed to bring hypothetical situations to  
15 the attention of the Tribunal, which deals with facts and only facts.

16  
17 On several occasions in the course of oral hearings this morning the Applicant  
18 questioned the current procedures in the Russian Federation used for the purposes  
19 of paragraph 2 of Article 73 of the Convention. We were advised by the Applicant to  
20 refine these procedures to ensure more effective implementation of our obligations  
21 under paragraph 2 of Article 73 of the Convention.

22  
23 In response to these observations I would like to reiterate what I said yesterday  
24 during the proceedings in the *Hoshinmaru* case, namely, that lack of understanding  
25 of the applicable Russian procedures, which is evident by what was stated by the  
26 Applicant during the oral proceedings this morning, could not serve as a justification  
27 for this kind of statement. The Russian Federation does have clearly defined  
28 procedures that allow it to meet all the requirements of paragraph 2 of Article 73 of  
29 the Convention and these procedures have been effectively applied without any  
30 complaints over the years.

31  
32 In my concluding remarks I would like to reiterate some of the main points of my  
33 presentation, which are the following.

34  
35 In pursuance of its responsibilities under paragraph 2 of Article 73 of the Convention,  
36 the competent authorities of the Respondent, namely the Inter-Agency Prosecutor  
37 for Nature Protection of Kamchatka, set a bond, provided the owner with the  
38 necessary details regarding the payment of the bond and informed the owner that  
39 they would release the vessel upon posting of the bond.

40  
41 Article 73 of the Convention should be read in its entirety because its paragraphs are  
42 closely linked and inter-related to each other, and therefore paragraphs 2, 3 and 4  
43 should be read in conjunction with what is stated in paragraph 1 of this Article  
44 concerning the exercise by the coastal state of its sovereign rights in the exclusive  
45 economic zone.

46  
47 As the owner of the 53<sup>rd</sup> *Tomimaru* vessel, who has never contested the amount of  
48 the bond, has not promptly paid the bond, the necessary judicial proceedings were  
49 instituted in December 2006 before the Petropavlovsk-Kamchatski City Court.

1 Following the entry into force of the decision of the Petropavlovsk-Kamchatski City  
2 Court, the Federal Agency responsible for the management of Federal Property  
3 included the fishing vessel 53<sup>rd</sup> *Tomimaru*, confiscated in accordance with the  
4 aforementioned decision of the Court, in the Federal Property Register as property of  
5 the Russian Federation.

6  
7 In conclusion, I would like to state that factual information presented by the  
8 Respondent, as well as legal analyses of the provisions of Article 73 of the  
9 Convention, unequivocally confirm that, contrary to what is alleged by the Applicant,  
10 the Respondent has fully complied with its obligations under paragraph 2 of Article  
11 73 of the Convention and that as a result, the case should be declared by the  
12 Tribunal inadmissible.

13  
14 Thank you for your kind attention.

15  
16 **THE PRESIDENT:** Thank you very much indeed, Professor Golitsyn.

17  
18 That brings us to the end of this sitting. As agreed, the sitting will be resumed on  
19 Monday 23 July at 10 o'clock, when the representatives of the parties will present  
20 their second round of submissions. The Tribunal's sitting is now closed.

21  
22 **(The hearing adjourned at 5.05 p.m.)**

23  
24  
25