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

2007

Public sitting

held on Monday, 23 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

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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:

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

MR KOMATSU (Interpretation): Thank you, Mr President. I would like to take the floor. Thereafter, Professor Lowe will conclude the Applicant's pleadings. Professor Hamamoto, would you kindly take the floor?

PROFESSOR HAMAMOTO (Interpretation): Mr President, honoured judges, it is an absolute honour to again address the International Tribunal for the Law of the Sea in the name of Japan.

During the proceedings that took place last Saturday, points of disagreement that subsist between the parties to the present proceedings have been expressed in a more and more clear fashion. We will focus on these issues. We will first talk about the question of confiscation and, secondly, the lack of constancy and consistency of the Russian system regarding prompt release.

The first item is confiscation. According to our dear Russian colleagues, if I am not mistaken, the present case is inadmissible in front of the International Tribunal for the Law of the Sea because the *Tomimaru* has already been confiscated. Mr President, as regards the issue of confiscation, we must specify particularly the point of disagreement, because it seems to us that the parties to the present proceedings are in agreement as to the principles but disagree as to its applications.

We know, of course, that Article 292(3) says that the Tribunal examines the issue of prompt release "without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew". The Respondent bases itself essentially on the position taken by France in the *Grand Prince* matter. We know what France said. Professor Jean-Pierre Quéneudec, a great authority on the law of the sea, who was the Advocate for France in that matter, said:

> "When the domestic legal proceedings introduced by the coastal state have concluded – in other words when the domestic proceedings are no longer pending (I repeat no longer pending) before a national tribunal – then recourse to the Article 292 procedure tends to lose all interest and even is no longer justified."

We share this analysis with the Russian delegation.

In a more recent matter, that of the *Juno Trader*, President Wolfrum and Judge Mensah stated that the prompt release procedure provided for under Article 292 of the Convention seeks to ensure the prompt release of a vessel pending a final conclusion of legal proceedings in front of the domestic courts of the coastal state. That is a free translation by the interpreter, not a verbatim quote.

They also added something very important, that is, that the procedure of confiscation must follow the principles of regularity of procedure prescribed under international

law. Here again, Mr President, our position is not different from that of these eminent judges.

Despite all this, we are told that we, the Applicant, insist on the admissibility of the current matter. It is not despite this but because of this that we reaffirm the admissibility of the current matter.

What is the situation in this case? On 28 December 2006, the Petropavlovsk-Kamchatskii City Court took the decision to confiscate the *Tomimaru*. Thereafter, this decision was confirmed by the Kamchatka District Court on 24 January 2007. As has been said by the Respondent, the decision of the Petropavlovsk-Kamchatskii City Court did not automatically lead to a change in the ownership of the *Tomimaru* to the benefit of Russia. The Russian Federal Agency in charge of this affair, on 9 April 2007, took the necessary decision under Russian law to this effect, after the request made by the owner of the *Tomimaru*, in front of the Supreme Court in March 2007.

I quote the original text in English of paragraph 22 of the Response from the Russian Federation: "the matter is currently before the Supreme Court of the Russian Federation, which has not yet taken any decision on it."

According to the information supplied to us, the request was made in front of the Russian Supreme Court in March 2007. The Supreme Court has asked for the text of the judgment of the Petropavlovsk-Kamchatskii City Court on 28 May 2007. This court submitted the text to the Supreme Court on 9 June 2007. The pending Supreme Court case reference is 60-AF07-32. The case is therefore absolutely pending, as is stated indeed in paragraph 22 of the Respondent's Response.

The Agent for the Respondent contends in this context that the pending case before the Supreme Court was submitted within the framework of a revision procedure, a kind of special examination. What does this mean? Professor Golitsyn, as well as the written presentation by the Respondent, refers to "clarifications", also to a letter from the Supreme Court dated 20 August 2003, according to which the decision of the District Court is not subject to appeal. It follows, according to the Russian Advocate, that the decision of the lower court has legal effect, despite the fact that the case is still pending in front of the Supreme Court.

Allow me, nonetheless, to comment, Mr President and distinguished judges, that the Respondent has not yet explained the legal status of this letter from the Supreme Court. It is an abstract statement, which indicates one or *the* correct interpretation of legislative text. It is not in the context of the *Tomimaru* case that this letter was written by the Supreme Court. As I have just said, it is an abstract statement that was written four years before the *Tomimaru* case. What is important is that the Supreme Court has not yet taken a concrete decision on the issue regarding the confiscation of the *Tomimaru*. The concrete case regarding the confiscation of the *Tomimaru* is still pending in front of the Supreme Court.

However, let us suppose for a moment that the judgment of the Petropavlovsk-Kamchatskii City Court regarding the confiscation of the *Tomimaru* has legal effect, as contended by the Respondent referring to this letter. The issue before this

Tribunal then would be to know whether the Montego Bay Convention prevents the Tribunal from carrying out its competence or whether it has jurisdiction in this situation.

The presentation by the Agent of the Respondent before yesterday really clears up any doubt. According to him, the Russian Supreme Court has the power to annul the decisions of lower courts within the framework of this exceptional procedure. The confiscation decisions handed down by the lower courts are therefore subject to annulment by the Supreme Court at the end of the procedure that is pending at the time when I am talking.

Therefore, even if the Supreme Court's letter had some legal force in Russian law, which we must say is not yet proven, the issue is whether Article 292 of the Convention prevents the Tribunal from holding jurisdiction in a case where the domestic legal decision, which has binding effect, is actually pending in a legal proceeding at the end of which that decision – and that is important – could be annulled.

In summary, Jean-Pierre Quéneudec, the French Advocate, contends that the procedure Article 292 is no longer relevant when the domestic legal court case is no longer pending. President Wolfrum and Judge Mensah state that this procedure seeks to ensure the prompt release of a vessel pending the final conclusion of domestic legal proceedings. However, the confiscation situation for the *Tomimaru* case is pending in a legal proceeding at the end of which the decision could be annulled. I apologize for this repetition but it is very important. Therefore, there is no reason whereby this high jurisdiction of the law of the sea is obliged to abstain from deciding to exercise jurisdiction. The *Tomimaru* case is admissible.

Now I come to the second item in my presentation, the lack of constancy in the Russian system regarding prompt release. During the submissions on Saturday the two parties both spoke about the Russian domestic system regarding prompt release. As to the Applicant, Japan, Mr Komatsu and Professor Lowe spoke in detail about the complication, even the dead end, with the Russian domestic system regarding prompt release. There are two locks on the vessel, and indeed a third lock regarding the Master.

Mr President, members of the Tribunal, the lack of constancy or consistency regarding the Russian domestic system has prevented the prompt release of the *Tomimaru*. I will not repeat what Mr Komatsu and Professor Lowe said on Saturday on that issue; I will limit myself to responding to the Russian allegations.

First the famous issue regarding the locks and the keys. As we know, the Inter-Regional Office for the Prosecutor of the Kamchatka region on 12 December 2006 proposed to the owner of the *Tomimaru* to pay 8.8 million roubles. The owner has not paid this sum because, as Professor Lowe said the day before yesterday, this proposal only deals with the criminal proceedings and there is another set of proceedings currently ongoing, the administrative proceedings, therefore there are two locks on the vessel.

In order to open the second lock, the administrative lock, the owner had asked the Maritime Inspection for the Direction of North East Coastguard to fix a reasonable bond. To that our dear Russian colleagues answer as follows. The Japanese have a lack of understanding of the Russian procedures that are applicable. It was completely unnecessary that the owner addressed himself to the Petropavlovsk-Kamchatka City Court. Why? Mr Yalovitskiy, the Russian counsel, who the day before yesterday gave us a great deal of information regarding Russian law, drew our attention to a very important issue, stating that, in line with Russian legislation, the Prosecutor is authorised to order the Maritime Inspection Directorate for the North East Federal Security Service of the Russian Federation, in short, the Russian agency in charge of the administrative proceedings, to release the vessel.

To our regret, Mr Yalovitskiy only referred very vaguely to "Russian legislation" without any other specification.

The second issue is to show the complicated nature of the Russian system. Professor Golitsyn, the Russian advocate, suggested that we seek better advice if we do not understand the Russian system. Indeed, but I would like to draw your attention, Mr President, Judges, to the fact that it is a Russian attorney who represents, and still represents the interests of the Master and the owner of the *Tomimaru*. The decision to ask the City Court to set a bond regarding the administrative proceedings was taken on the basis of the advice given by this Russian attorney to the owner.

It is true that it is not completely inconceivable, at least in theory, that a local attorney does not know perfectly the local system. Nonetheless, Mr President and members of the Tribunal, when a professional local attorney does not understand the Russian system, is it possible to consider that as consistent, simple, clear or transparent?

In this respect, one must say that we have been encouraged by Mr Zagaynov's statement the day before yesterday. The Russian Agent said that his country is seeking to improve its country's legislation regarding prompt release, which is not perfect according to him, and recognising at the same time that ourselves, the Japanese parties, have difficulties in this area. Japan for its part wishes to take advantage of this opportunity to state that Japan is always ready to co-operate fully with the Russian Federation in this field as well as in many others.

Mr President, Judges, I thank you for having given me your kind attention. Now I would like to give the floor to Professor Lowe, who will speak to the issues relative to the bond and will show you thereafter the complete structure of the Japanese position.

THE PRESIDENT: Thank you very much, Professor Hamamoto. I now give the floor to Professor Lowe.

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

Two days ago, after taking you through the key documents submitted in this case, I said that the *Tomimaru* was arrested; that it is still the subject of court proceedings

in Russia, which may result in its return to the Japanese owner or may result in its definitive confiscation by the Russian Federation; and that while those proceedings are pending, the owner would like to have it released promptly upon payment of a reasonable bond.

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

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

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

> "On November 8, 2006 Kamchatka Inter-District Prosecutor's Office for Nature Protection filed criminal case no. 640571 against Takagiwa Matsuo, Master of the *53rd Tomimaru*, a Japanese vessel, accusing him of committing a crime under Article 253, part 2 of the Criminal Code of the Russian Federation, i.e. extraction of natural resources in the Exclusive Economic Zone of the Russian Federation without a licence, which resulted in considerable environmental damage amounting to not less than 8,500,000 roubles."

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

This is confirmed in the next paragraph of the letter, which begins, "It has been established that Takagiwa Matsuo, Master of the *Tomimaru*, was engaged in illegal fishing", and it proceeds then to give details of his offence.

There is, Mr President, not a single word in this letter about any offence committed by the owner or any charge against the owner or any legal liability of the owner.

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

> "The damage caused to the Russian Federation was estimated at 8.8 million roubles. After the money (bond) towards the voluntary compensation for the damage caused to the Russian Federation is received into the deposit account" – and the details of the account follow – "the Prosecutor's Office for Nature Protection will no longer prevent free operation of the *53rd Tomimaru* trawler."

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

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

Mr President, members of the Tribunal, you will remember that in the *Hoshinmaru* case Mr Monakhov said on Friday morning, transcript page 11, lines 28-31:

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

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

I know that our friends think that we are easily confused and that we are in need of better legal advice than the owner and the Consul obtained from their expert advisers on Russian law, but we can read. What the decision and the letter written on the same day, 12 December 2006, which repeats in identical terms the content of that decision, both say is that a voluntary contribution of 8.8 million roubles made in

the context of the criminal case against the Master, case 640571 will remove the objection of the Prosecutor's Office for Nature Protection to the release of the vessel.

Another point is clear. Yesterday, Mr Yalovitskiy told you, and I quote from page 10 of the transcript at lines 37-42, that:

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

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

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

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

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

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

Here we have the gravest fishing offence in Russian waters in four years, where the Master is accused of illegally catching over 9 million roubles worth of fish, and

charged with damage in the amount of 9.9 million roubles. The Master is eventually fined 500,000 roubles, with a penalty of 9,328 million roubles determined against him (page 20, lines 27-35 of the transcript) and the owner is charged with an administrative offence for which the penalty is at least twice, and possibly three times that amount, plus the possible confiscation of the vessel.

There is a total potential liability there of well over 30 million roubles, something approaching 40 million, roubles, although we accept that it is the realistically possible level of the penalty, not the theoretical maximum, that is the point of reference. Let us suppose that the authorities thought that the penalties, including the value of the vessel, might in practice add up to, say, 25 million roubles.

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

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

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

He continued:

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

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

How much does the Prosecutor's Office for Nature Protection set the *Tomimaru* bond for, having concluded its thorough examination of all the factors and established the amount of bond that will provide sufficient guarantees and security for the proper implementation of any decision that may be adopted in the pending proceedings, conscious of its duty to protect the interests of the state, conscious of

the duty of unpaid Japanese fines? It sets it for one-third of that amount, 8.8 million roubles, in the criminal case against the Master.

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

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

What does he do? He writes the petition to the Coastguard that is in Applicant's Annex 37. He says:

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

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

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

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

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

The owner, you will remember, has petitioned the Coastguard Directorate that arrested his vessel in the first place. He tells them that a bond has been set in the criminal case. He asks for a bond to be set in respect of the administrative offences,

and he sends them a copy of 12 December letter from the Prosecutor's Office for Nature Protection so that they can see for themselves exactly what the position is.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE PRESIDENT: Thank you very much, Professor Lowe. I now call on the Agent of the Applicant, Mr Komatsu, to read the party's final submission. A copy of the final sum signed by the Agent shall be communicated to the Tribunal and transmitted to the other party in accordance with Article 75(2) of the Rules.

MR KOMATSU: Mr President, upon the instruction of your Honour, I will now read the final submissions of Japan on the 53rd *Tomimaru* case.

The Applicant requests the International Tribunal for the Law of the Sea (hereinafter "the Tribunal") by means of a judgment:

a. to declare that the Tribunal has jurisdiction under Article 292 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") to hear the Application concerning the detention of the vessel the 53rd *Tomimaru* (hereinafter "the *Tomimaru*") in breach of the Respondent's obligations under Article 73(2) of the Convention;

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

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

THE PRESIDENT: Thank you, Mr Komatsu. That brings us to the end of the submissions on behalf of Japan. As agreed with the parties, the sitting will now be suspended. We will resume at 1.00 p.m., at which point the submissions of the Russian Federation will be made. The sitting is suspended.

(Luncheon adjournment)