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

MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD ON 19, 20 AND 23 JULY AND 6 AUGUST 2007

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

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
DES 19, 20 ET 23 JUILLET ET DU 6 AOÛT 2007

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

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

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

Minutes of the Public Sittings
held on 19, 20 and 23 July and 6 August 2007

Procès-verbal des audiences publiques
des 19, 20 et 23 juillet et du 6 août 2007

PUBLIC SITTING HELD ON 19 JULY 2007, 3.00 P.M.

Tribunal

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

Japan is represented by:

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

as Agent;

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

as Co-Agent;

and

Mr Yasushi Masaki,
Director, International Legal Affairs Division, Ministry of Foreign Affairs,

Mr Kazuhiko Nakamura,
Principal Deputy Director, Russian Division, Ministry of Foreign Affairs,

Mr Ryuji Baba,
Deputy Director, Ocean Division, Ministry of Foreign Affairs,

Mr Junichi Hosono,
Official, International Legal Affairs Division, Ministry of Foreign Affairs,

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

Ms Junko Iwaishi,
Official, International Legal Affairs Division, Ministry of Foreign Affairs,

Mr Hiroaki Hasegawa,
Director, International Affairs Division, Resources Management Department, Fisheries Agency of Japan,

Mr Hiromi Isa,
Deputy Director, Far Seas Fisheries Division, Resources Management Department, Fisheries Agency of Japan,

Mr Tomoaki Kammuri,
Fisheries Inspector, International Affairs Division, Resources Management Department, Fisheries Agency of Japan,

as Counsel;

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

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

as Advocates.

The Russian Federation is represented by:

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

as Agent;

Mr Sergey Ganzha,
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,

Mr Vadim Yalovitskiy,
Head of Division, International Department, Office of the Prosecutor General,

as Deputy Agents;

and

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

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

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

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

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

as Counsel;

Mrs Svetlana Shatalova,
Attaché, Legal Department, Ministry of Foreign Affairs,

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

as Advisers.

AUDIENCE PUBLIQUE DU 19 JUILLET 2007, 15 H 00

Tribunal

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

Le Japon est représenté par :

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

comme agent;

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

comme co-agent;

et

M. Yasushi Masaki,
Directeur, Division internationale des affaires juridiques, Ministère des affaires étrangères,

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

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

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

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

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

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

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

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

comme conseils;

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

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

comme avocats.

La Fédération de Russie est représentée par :

M. Evgeny Zagaynov,
Directeur adjoint, Département juridique, Ministère des affaires étrangères de la Fédération de Russie,

comme agent;

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

comme co-agent;

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

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

comme agents adjoints;

et

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

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

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

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

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

comme conseils;

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

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

comme conseillères.

Opening of the Oral Proceedings
[PV.07/01, E, p. 1–4]

The Registrar:
On 6 July 2007, an Application was filed by Japan against the Russian Federation for the prompt release of the fishing vessel the *88th Hoshinmaru* and its crew. The Application was made under article 292 of the United Nations Convention on the Law of the Sea.

The case has been entered in the List of cases as Case No. 14 and named *The "Hoshinmaru" Case (Japan* v. *Russian Federation)*, prompt release.

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

The President:
This is a public sitting held pursuant to Article 26 of the Statute of the Tribunal to hear the parties present their evidence and arguments in the *"Hoshinmaru" Case*.

I call on the Registrar to read out the submissions of Japan as contained in its Application.

The Registrar:
The Applicant requests the Tribunal:

> "Pursuant to Article 292 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"), the Applicant requests the International Tribunal for the Law of the Sea (hereinafter "the Tribunal"), by means of a judgment:
>
> (a) to declare that the Tribunal has jurisdiction under Article 292 of the Convention to hear the application concerning the detention of the vessel and the crew of the *88th Hoshinmaru* (hereinafter "the *Hoshinmaru*") in breach of the Respondent's obligations under Article 73(2) of the Convention;
>
> (b) to declare that the application is admissible, that the allegation of the Applicant is well-founded, and that the Respondent has breached its obligations under Article 73(2) of the Convention; and
>
> (c) to order the Respondent to release the vessel and the crew of the *Hoshinmaru,* upon such terms and conditions as the Tribunal shall consider reasonable."

The President:
By letter dated 6 July 2007, a copy of the Application was transmitted to the Russian Federation. By Order dated 9 July 2007, the President of the Tribunal fixed 19 July 2007 as the date for the opening of the hearing in the case.

On 15 July 2007, the Russian Federation filed its Statement in Response.

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

The Registrar:
The Respondent requests the Tribunal:

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

(a) that the Application of Japan is inadmissible;

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

Mr President, on 18 July, the Applicant filed an additional statement, which reads as follows:

"For the sake of clarity, the Government of Japan wishes to make plain that its Application in the *88th Hoshinmaru* case, made under Articles 73 and 292 of UNCLOS, relates to the failure of the Russian Federation to comply with the provisions of the Convention for the prompt release of a vessel or its crew upon the posting of a reasonable bond or other financial security. A bond has been belatedly set for the release of the *88th Hoshinmaru*; but Japan does not consider the amount set to be reasonable,

Accordingly, the setting of that bond does not resolve the dispute over the failure of the Russian Federation to comply with the provisions of the Convention for the prompt release of a vessel or its crew upon the posting of a reasonable bond or other financial security. While it is now unnecessary for Japan to include in its oral pleadings any submissions relating specifically to circumstances in which there is a complete failure to set any bond, Japan will address all other aspects of its Application."

Mr President, in the morning of 19 July 2007, the Respondent filed an additional statement, which reads as follows:

"With respect to the clarification provided by the Agent for Japan on the *Hoshinmaru* case we would like to state that Russia does not accept allegations contained therein. Contrary to the statement of the Applicant the bond was set not belatedly but within a reasonable period of time. We take note of the statement of the Applicant that 'it is now unnecessary to include in its oral pleadings any submissions relating specifically to circumstances in which there is a complete failure to set any bond.' But this statement implies that there is at least partial failure of the Respondent to comply with its obligations under the relevant provision of the UNCLOS. We [cannot] agree with it."

The President:
Copies of the Application and the Statement in Response have been made available to the public.

The Tribunal notes the presence in court of Mr Ichiro Komatsu, Agent of Japan, and Mr Evgeny Zagaynov, Agent of the Russian Federation.

I now call on the Agent of the Applicant to note the representation of Japan.

Mr Komatsu, please.

Mr Komatsu:

Thank you, Mr President, I am extremely honoured to appear before this auspicious Tribunal representing my country as an Agent on behalf of the Government of Japan. I would like to introduce the members of my delegation.

As Advocates: Mr Vaughan Lowe, Professor of International Law, Oxford University, United Kingdom; Mr Shotaro Hamamoto, Professor of International Law, Kobe University, Kobe, Japan.

As Counsel: Mr Yasushi Masaki, Director, International Legal Affairs Division, Ministry of Foreign Affairs; Mr Hiroaki Hasegawa, Director, International Affairs Division, Resources Management Department, Fisheries Agency of Japan; 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 Hiromi Isa, Deputy Director, Far Seas Fisheries Division, Resources Management Department, Fisheries Agency of Japan; and Mr Tomoaki Kammuri, Fisheries Inspector, International Affairs Division, Resources Management Department, Fisheries Agency of Japan.

Thank you, Mr President.

The President:

Thank you, Mr Komatsu.

Mr Zagaynov, please.

Mr Zagaynov:

Thank you, Mr President. Mr President, distinguished members of the Tribunal, it is a great honour for me to appear before you as Agent for the Government of the Russian Federation in the present case.

The Russian Federation has appointed Mr Sergey Ganzha, Consul-General of the Russian Federation in Hamburg, to act as our Co-Agent.

With your indulgence, Mr President, I will now introduce the other members of our team. First of all, I would like to introduce our Deputy Agents: Mr Alexey Monakhov, Head of Inspection of the State Sea Inspection, Northeast Coast Guard Directorate, Federal Security Service of the Russian Federation; and Mr Vadim Yalovitskiy, Head of Division, International Department of the Office of the Prosecutor General of the Russian Federation.

It is a great pleasure for me now to introduce Dr Vladimir Golitsyn, Professor of International Law of the State University of International Relations in Moscow, who will perform the functions of our Chief Legal Counsel.

Appearing as other counsel are: Mr Alexey Dronov, Head of Division of the Legal Department of the Ministry of Foreign Affairs of the Russian Federation; Mr Andrey Fabrichnikov, Senior Counselor of the First Asian Department of the Ministry of Foreign Affairs; Mr Vasiliy Titushkin, Senior Counselor of the Embassy of the Russian Federation in the Netherlands; and Mr Oleg Khomich, Senior Military Prosecutor from the Office of the Prosecutor General of the Russian Federation.

Finally, our delegation is assisted by two Advisers: Ms Diana Taratukhina and Ms Svetlana Shatalova from the Legal Department of the Foreign Ministry of the Russian Federation.

I thank you very much, Mr President.

The President:

Thank you very much, Mr Zagaynov.

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

I now give the floor to the Agent of Japan.

Argument of Japan

STATEMENT OF MR KOMATSU
AGENT OF JAPAN
[PV.07/01, E, p. 4–7, F, p. 9–11]

Mr Komatsu:
Mr President, distinguished members of the International Tribunal for the Law of the Sea and distinguished representatives of the Russian Federation, it is a great honour for me to be given this opportunity to make a statement at this public sitting of the Tribunal as Agent on behalf of the Government of Japan. At this session, I will present the factual background on this case and also the reasons why Japan came to a decision to institute the case before the ITLOS for the first time in our history. After my statement, our Advocate, Professor Vaughan Lowe of the University of Oxford, will subsequently elaborate in detail on our legal position.

This is a prompt release application under article 292 of the United Nations Convention on the Law of the Sea, in which Japan claims that the Russian Federation is in breach of article 73, paragraph 2, of the UNCLOS. Firstly, I would like to briefly recapitulate the facts and our gravamen.

The *88th Hoshinmaru* is a fishing vessel owned and operated by a Japanese company, Ikeda Suisan Company Limited. It has had Japanese nationality throughout the whole of the relevant period and retains it now. The *Hoshimaru* was fishing salmon and trout off the coast of the Kamchatka peninsula in the exclusive economic zone of the Russian Federation pursuant to a licence issued by the Government of the Russian Federation. It was ordered to stop for inspection by the Russian authorities on 1 June 2007 and was seized and re-routed on an allegation of illegal fishing on the morning of 3 June. It arrived at the port of Petropavlovsk-Kamchatskii on the night of 5 June.

The Russian authorities alleged, as shown in Annex 4, that the amount and the kind of fish actually carried by the *Hoshinmaru* appeared to differ from those which had been recorded in its logbook, that is, around 20 tons of sockeye salmon, which is worth approximately 17 million yen, was registered as chum salmon, which is cheaper than sockeye salmon, and that this discrepancy constituted a violation of the domestic law of the Russian Federation. The sockeye salmon allegedly illegally caught by the *Hoshinmaru* was seized and is held in custody by the Russian authorities.

The purpose of the application is not to shed light on the cogency of the allegation of violation made against the *Hoshinmaru.* This is a question firstly to be handled in the Russian domestic proceedings. I would like to point out, upon this basic premise, that the alleged violation by the *Hoshinmaru,* even if it is well founded, is not a grave breach, for instance, unlike fishing for unauthorized species or taking fish in excess of the allowance. It was not more than inaccurately recording the vessel's catch by logging one species in place of another one, being authorized to fish both species. The seriousness of the alleged violation is relatively limited. For your reference, I would like to point out that the Japanese authorities treat this kind of violation in a less grave manner and I suppose that most other countries adopt the same kind of treatment.

Japan has been demanding from the Russian Federation the prompt release of the *Hoshinmaru* and its crew in accordance with the relevant provisions of the UNCLOS since immediately after the detention as the documents attached in the Annex of the Application show, but to no avail. Apparently in a flurry, after the submission of this Application by Japan, the Inter-district Prosecutor's Office notified, on 11 July 2007, the Consulate-General of Japan in Vladivostok of the amount of damages at 7,927,500 roubles, that is,

approximately US$ 310,000, allegedly instituted against the catch of the living aquatic resources by the *Hoshinmaru* as shown in Annex 13.

To make the matters more complex, in responding to the inquiry by the Embassy of Japan in the Russian Federation on the above notification, as shown in Annex 14, the Inter-district Prosecutor's Office replied orally on 12 July that this amount of damage is not the "bond" as provided for in article 73, paragraph 2, of the UNCLOS and that the payment for the damage only ensures the release of the crew but not that of the vessel and the Master. It was, however, only on 13 July 2007, one week after the submission of this Application by Japan, that the Ministry of Foreign Affairs of the Russian Federation belatedly notified the Embassy of Japan in the Russian Federation of the setting of the bond at 25,000,000 roubles, that is, approximately US$ 980,000. The Ministry of Foreign Affairs of the Russian Federation confirmed that payment of this amount would guarantee the release of the vessel and its crew including the Master in a note verbale as shown in Annex 15. Let me underline again that all these notifications were made by the Russian Federation very hastily only after our submission of this Application.

It is interesting to note that this kind of speedy action is in stark contrast with the ordinary response by the Russian Federation in past cases where Japanese vessels were detained and Japan requested expeditious setting of a bond. The Respondent argues in its Statement of Response that their setting of the bond on 13 July was reasonable in terms of timing. I humbly submit that the bond was set belatedly, and only under the pressure of international adjudication.

As to the amount of the bond, I can simply say that it is exorbitant in the light, for example, of the value of the vessel, which is approximately between US$ 220,000 and US$ 320,000. This belated setting of the bond is, therefore, clearly inconsistent with the obligation incumbent upon the Russian Federation under article 73, paragraph 2, of the UNCLOS.

As is clear in Japan's Application, Japan is requesting the Tribunal to order the Respondent to release the vessel and the crew of the *Hoshinmaru* "upon such terms and conditions as the Tribunal shall consider reasonable". This request was a necessity in the situation where no bond had been set by the Russian Federation at the time of the filing of the Application. The Respondent argues in its Statement of Response that this request of Japan is formulated in "general and vague terms", and that "the Tribunal, acting under Article 292 of the UNCLOS, does not have competence to determine such general terms and conditions." This argument is out of place. Now that the Respondent has set a bond, albeit belatedly and excessive in amount, the Applicant hereby requests the Tribunal to determine a reasonable amount for the bond.

Let me now draw your attention to the fact that the vessel and the crew of the *Hoshinmaru* have been detained for more than a month. The crew had no choice but to maintain and guard their vessel which has been detained with no prospect for release by the Russian authorities. All 17 members of the Japanese crew, including the Master, are forbidden to return to Japan for a long period of time. This is entirely because the Russian Federation failed to set promptly a reasonable bond that ensures the release of the vessel and its crew. The Government of Japan submits that this constitutes a blatant infringement of the obligation under the UNCLOS. The reason why I underline this point is because the Russian Federation has been repeating this unworthy practice.

I would like to emphasize that the arrest and protracted detention of the *Hoshinmaru* is not an isolated incident. Several Japanese fishing vessels have been arrested in the EEZ of the Russian Federation in the past three years: three vessels in 2004, two vessels in 2005 and four vessels in 2006. Every time a Japanese vessel was arrested, Japan immediately and repeatedly urged the Russian Federation to promptly release it and its crew "upon posting of a reasonable bond or other security". Despite these efforts, in each case it has taken

approximately from one to four months before the actual release, and the record has not been improving.

Japan had no choice other than reluctantly to make this application this time. This is a consequence of the accumulation of failures by the Russian Federation to comply with their obligations under the UNCLOS.

The Respondent in its Statement of Response underlines that in the *"Volga" Case* Australia invited the Tribunal to take into account "the serious problem of continuing illegal fishing in the Southern Ocean and the dangers this poses to the conservation of fisheries resources and the maintenance of the ecological balance of the environment". I would like to point out, in this regard, the fact that Japan has been actively cooperating in order to promote the conservation and the reproduction of salmon and trout of Russian origin within the framework of a bilateral treaty with the Russian Federation. Japan has been providing, for example, a sizable amount of equipment for the good functioning of hatchery and nursery for salmon and trout in the Russian Federation and the scientists of both countries are in agreement that the salmon-trout resources in the EEZ of the Russian Federation where this incident occurred are conserved at a high level.

Mr President, let me turn to the predicament of the crew. This must be addressed from a humanitarian point of view. The crew, including the Master, do not understand the Russian language at all. Suffering from tremendous stress, together with the lack of communication in a foreign country, they are being forced to live aboard the vessel for a prolonged time. They are under constant surveillance from Russian Coast Guard officers stationed on the vessel, who check each Tuesday when the guards are changed that all crew members are present on board. They are not even allowed to freely leave the ship. Only two members of the crew per day are given permission to take a walk around the quay, in the company of Russian Border Coast Guard.

This is the situation according to our latest information, received this very morning from our Consul in the region. There is no doubt that the crew remain in detention. Fortunately, the crew are enduring these stern conditions so far without showing serious mental disorder symptoms. The situation must, however, put the crew at real risk of developing stress-related disorders; and this fact must be obvious to those who are detaining them. One of the crew has already complained of medical problems with his stomach during the detention. This humanitarian consideration must be particularly understandable to the Russian Federation. When the Russian Federation appeared as the Applicant in the *"Volga" Case*, this was the highlight of their argument. In paragraph 24 of its prompt release application, the Russian Federation stated:

> "The crew are suffering from the effects of their prolonged detention in a foreign country whose customs and language are unfamiliar to them. They are receiving medical attention for psychological disorders and are reliant on the owner to meet the costs of the treatment."

(Continuant en français) Monsieur le Président, à en juger par nos précédentes négociations avec la Fédération de Russie concernant la saisie des navires de pêche, nous pensons que la longue détention, responsable de ces problèmes humanitaires, résulte fondamentalement du système juridique national en Russie. La procédure nationale russe, où les procédures administratives et pénales se déroulent séparément et cumulativement, sans coordination apparente entre elles, est à l'origine de ces problèmes. Il n'est pas exagéré d'en parler comme d'un « harcèlement de procédure ». Le résultat est, comme nous le voyons, qu'il n'y a aucune mainlevée des navires arraisonnés ni libération de leurs équipages sans délai, ce qui devrait être le cas une fois la caution raisonnable fournie.

Les lois nationales russes elles-mêmes ne forment pas l'objet de ce recours pour la prompte mainlevée. Et c'est à la Russie, bien entendu, et à elle seule, de décider de la manière dont elle se conforme aux obligations juridiques de la Convention dans des affaires de prompte mainlevée. Néanmoins, nous espérons que la Fédération de Russie pourrait envisager la nécessité de mettre en place des procédures qui faciliteraient l'acquittement des obligations de la Convention qu'elle s'est engagée à suivre. Comme je l'ai expliqué ci-dessus, l'argument du Japon dans ce recours est très clair. L'existence de la compétence du Tribunal et la recevabilité de cette affaire sont une évidence en elle-même selon l'article 292 de la Convention sur le droit de la mer. Par conséquent, le Japon prie le Tribunal de déclarer que la Fédération de Russie a violé ses obligations liées à l'article 73, paragraphe 2, de la Convention et qu'il ordonne à la Fédération de Russie de libérer le navire et l'équipage du *Hoshinmaru* après dépôt d'une caution d'un montant que le Tribunal considérerait comme raisonnable.

Avant de terminer, Monsieur le Président, j'aimerais souligner le fort engagement du Japon en faveur d'un règlement pacifique des différends internationaux et pour assurer une utilisation durable des ressources maritimes vivantes. A ce jour, le Japon a eu comme unique expérience celle de défendeur dans les *Affaires du thon à nageoire bleue* soumises à l'examen de ce Tribunal pour des mesures provisoires suite à la requête de l'Australie et de la Nouvelle-Zélande.

C'est la première fois que le Japon devient le requérant devant ce Tribunal. Le Japon a été l'un des principaux soutien du Tribunal depuis son adhésion à la Convention sur le droit de la mer, en 1996. Cette fois, le Japon a choisi le Tribunal comme un forum pour parvenir à un règlement pacifique, en réponse à la violation répétée des règles internationales par la Fédération de Russie. Ceci témoigne de la forte volonté du Japon de contribuer au renforcement du règne du droit au sein de la Communauté internationale par une utilisation proactive des instances internationales.

Je conclus maintenant mon exposé en ajoutant que le Japon reconnaît pleinement le droit et les besoins des Etats côtiers d'agir, comme le droit international les y autorise, afin de protéger leurs ressources. Le Japon a pris des mesures pour aider ces Etats et pour renforcer leurs mesures légales. Le Japon en tant qu'Etat pratiquant la pêche de façon responsable a récemment renforcé ses instructions auprès des industries de la pêche afin de réduire au minimum le risque qu'elles ne pêchent en violant les conditions autorisées en vue d'assurer l'utilisation durable des ressources vivantes de la mer. Cependant, étant donné que la Convention de 1982 met en équilibre les droits et les intérêts de tous les Etats Parties, le Japon demande maintenant que la Fédération de Russie satisfasse sa part de l'accord en s'acquittant de son obligation juridique de libérer sans délai le *Hoshinmaru* et son équipage, une fois la caution raisonnable fournie.

Je vous remercie, Monsieur le Président.

The President:
Thank you very much.

I call now on Professor Lowe to continue.

Professor Lowe, you will be speaking for roughly one hour. If you do that, I will not take a break, but if you speak for much longer than that, then I may interrupt you.

Mr Lowe:
I have a note, Mr President, in my submission for two convenient break points. It may well be that, with your permission, we might think of breaking a little before 4.30.

The President:
Thank you very much indeed.

STATEMENT OF MR LOWE
ADVOCATE OF JAPAN
[PV.07/01, E, p. 8–22]

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

I should begin with a word of gratitude. Prompt release cases are, by their nature, cases of urgency and cases in which the situation changes rapidly. This Tribunal has developed a procedure for dealing with prompt release cases which is unrivalled among international tribunals in terms of its speed and its flexibility. Japan is grateful for this flexibility, which has enabled it to work together with the Registry in order to submit the documents that the Tribunal needs for its work and to adjust the precise focus of its submissions in this case in the light of developments after the date on which its Application was submitted.

The parties are largely in agreement as to the rules and principles of law that are applicable in this case, and I can deal swiftly with most matters, but it is necessary that the Tribunal should be satisfied that it has jurisdiction to hear and decide this case and that there is a well-founded allegation that no reasonable bond has been set permitting the prompt release of the *Hoshinmaru*. So I shall first address questions of jurisdiction and admissibility, and then turn to the question of the failure to set a reasonable bond.

I think the parties are agreed that the Tribunal has jurisdiction. In addressing the question of jurisdiction in past cases, this Tribunal has sought to ascertain that six conditions are satisfied. First, that both the Applicant and Respondent are parties to the United Nations Convention on the Law of the Sea and that the Convention is in force between them. Second, that the vessel that is the subject of the Application flies the flag of the Applicant. Third, that the vessel is detained. Fourth, that the detention is pursuant to an exercise of powers to which the prompt release obligation attaches. Fifth, that there has been no agreement between the parties on the submission of the Application to any other court or tribunal. Sixth, that the Application is duly made in accordance with articles 110 and 111 of the Tribunal's Rules.

Both the Applicant and the Respondent are parties to the Convention. Japan ratified the Convention on 20 June 1996 and the Convention entered into force for Japan on 20 July 1996. The Russian Federation ratified the Convention on 12 March 1997, and the Convention entered into force for the Russian Federation on 11 April 1997.

The Respondent does not dispute the Japanese nationality of the *Hoshinmaru*. The details of the ownership, tonnage and construction of the vessel are set out in Annex 1 of our Application.

It is not disputed that the *Hoshinmaru* remains in port in the Russian Federation. The Respondent says that it is free to leave once the bond has been posted, but Japan says that the bond required is not reasonable and does not satisfy the requirements of article 73 of UNCLOS.

The detention is the result of the application of Russia's fishery laws, applicable in its exclusive economic zone. Those laws, which are listed on the last page of the letter of 2 June 2007 from Mr Lebedev of the Federal Security Service of the Russian Federation, which is set out at Annex 3 of the Applicant's annex, indisputably fall within the scope of UNCLOS, article 73, paragraph 2.

There has been no agreement between the parties upon the submission of this application to any other tribunal.

Finally, the Application has been duly made by the Government of Japan and there is no suggestion that any failure to fulfill the requirements of articles 110 or 111 of the Rules could deprive the Tribunal of jurisdiction.

The Respondent does, however, challenge the admissibility of the Application on two grounds. The first is that the Application made on 6 July this year became moot when Russia set a bond on 13 July. There is a straightforward answer to this point. Japan's Application is based on articles 73 and 292 of the Convention. Those articles require that "arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security", and they provide for an application to this Tribunal when it is "alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security".

The obligation under UNCLOS is not simply to set a bond, but to set a reasonable bond. As this Tribunal recognized in the *M/V "SAIGA" Case*, a State may make an application not only in cases where no bond has been set, but also where it considers that an unreasonable bond has been set. In paragraph 77 of its Judgment in the *M/V "SAIGA" Case*, the Tribunal said:

> "There may be an infringement of article 73, paragraph 2, of the Convention even when no bond has been posted. The requirement of promptness has a value in itself and may prevail when the posting of the bond has not been possible, has been rejected or is not provided for in the coastal State's laws or when it is alleged that the required bond is unreasonable."

Russia itself recognized in the *"Volga" Case* that an application can be made to this Tribunal for a determination that a bond is unreasonable. Paragraph 4 of Chapter 3 of Russia's Application in the *"Volga" Case* identified two grounds on which the Respondent in that case, Australia, was said to have breached its duties under the Convention, under article 73, paragraph 2. The first was that it had set conditions for release of the vessel which were not permitted under article 73, paragraph 2, but the second and distinct ground was that the amount of the security set by the Respondent was, in all the circumstances, unreasonable.

Japan's Application in this case was made under articles 73 and 292 of UNCLOS. It relates to the failure of the Russian Federation to comply with the provisions of the Convention for the prompt release of a vessel or its crew upon the posting of a reasonable bond or other financial security. It asks the Tribunal, and I quote from the Application, "to order the Respondent to release the vessel and crew of the *Hoshinmaru* upon such terms and conditions as the Tribunal shall consider reasonable". That is what article 73, paragraph 2, requires: "Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security".

A bond has, belatedly, now been set for the release of the *Hoshinmaru*, but Japan does not consider the amount set to be reasonable. Accordingly, the setting of that bond does not resolve the dispute over the failure of the Russian Federation to comply with the provisions of the Convention for the prompt release of the vessel and its crew upon the posting of a reasonable bond or other financial security.

It would, with great respect to our friends, be absurd if an applicant were obliged by the setting of an unreasonable bond to withdraw its application and to draw up a fresh application to this Tribunal, again asking the Tribunal to order the Respondent to release the vessel and its crew upon such conditions as the Tribunal considered reasonable – an application which would be identical with the first application, apart from the fact that it

would refer not to a failure to set a bond at all but rather to a failure to set a reasonable bond. If an applicant had to withdraw an application and then make a fresh one when an unreasonable bond was set, this would require further delay in these prompt release proceedings and that would defeat the object and purpose of the prompt release procedures. It would prevent the Tribunal from dealing with the application without delay, as article 292, paragraph 3, requires.

There may be times when legal formalism should prevail over efficiency, common sense and justice; but the Russian claim is not even a claim to restrain the Tribunal within the ropes of strict formality.

Japan's original request that the Tribunal set a reasonable bond was already plainly and wholly contained within its Application of 6 July this year. There is no alteration in Japan's case, and it is simply unnecessary for Japan now to include in its oral pleadings any submissions relating specifically to circumstances in which there has been a complete failure to set any bond. The Application for the setting of a reasonable bond stands.

The second objection, Mr President, to the admissibility of the Application is that it is too vague and general because it asks the Tribunal "to order the Respondent to release the vessel and crew of the *Hoshinmaru* upon such terms and conditions as the Tribunal shall consider reasonable".

At face value, this objection is disingenuous. Russia has been an Applicant before this Tribunal. It knows perfectly well what an article 292 prompt release application is, what object it serves, what is its scope, and what principles govern its determination. We know that because Mr Dzubenko, speaking for Russia, told this Tribunal in the *"Volga" Case*:

> "The Tribunal has decided a number of cases involving a request for the prompt release of a vessel up to date. There is now a body of law made by the Tribunal relating to such an application. The Russian Federation has closely examined this body of international law and asks this Tribunal to apply the principles used in previous cases to the present case."

That is what Japan is asking this Tribunal to do. The passage that I quoted was from page 8 of the transcript of 12 December 2002, morning hearing, at lines 36 to 40.

Russia tries to make a great point of the fact that Japan's article 292 Application asks the Tribunal to set terms and conditions for the release of the vessel and crew. It is hard to believe that there is any doubt on this point, but in case there is, let me say clearly that Japan has explicitly based its Application on articles 73, paragraph 2, and 292 of the Convention, and Japan is asking the Tribunal to exercise its powers under article 292 to deal with what article 292, paragraph 3, calls "the question of release". It is not asking the Tribunal to exercise any powers other than those that the Tribunal has under article 292 of the Convention.

The implication that the application is inadmissible because Japan did not specify what it regards as a reasonable amount for the bond is simply unsustainable. When Japan's application was made, no bond had been set. It was for Russia, not Japan, to set the amount of the bond. Now that the bond has belatedly been set, it would be pointless to insist that the application be amended so that Japan proposes some specific sum as if that sum were uniquely reasonable.

By making the application, Japan has put the determination of what would be a reasonable bond into the hands of this Tribunal. Japan has provided the information that is necessary to enable the Tribunal to make that determination – and I shall turn to that information shortly – and Japan will make short submissions as to the general approach to the determination of what is a reasonable bond.

It cannot really be otherwise. If an applicant asks the Tribunal only to set a bond at a specified amount and if the Tribunal disagrees with that amount, even by one cent, the Tribunal will technically refuse the applicant's request. If the Tribunal proceeds to fix some other amount, could a respondent complain that the Tribunal was not asked to set any other amount? Surely not. And surely there can be no objection if the applicant expressly requests the Tribunal to proceed to set a reasonable bond, exercising its article 292 competence. That is precisely what Japan is asking the Tribunal to do.

Mr President, members of the Tribunal, let me now turn to questions of substance. The prompt release cases decided by the Tribunal all adhere to the fundamental principle identified by the Tribunal as applicable in these cases; that is, the need to balance the interests of the coastal State and the flag State. That is not controversial.

It is also plain that the balance has to be struck by focusing on the particular episode. The factors are listed in the much-quoted paragraph 67 of the *"Camouco"* Judgment. That says:

> "The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form."

The focus is on the specific facts of the case. In particular, it is Japan's submission that the amount of the bond should *not* be fixed by the Tribunal so as to reflect approval or disapproval of the conduct of the detaining State, or indeed of the flag State.

The detaining State is obliged to set a reasonable bond promptly to allow the release of the vessel and its crew. At *that* stage a reasonable bond is simply one that provides the necessary security for the coastal State while maintaining a proper balance with the right of the flag State to the prompt release of the vessel and its crew. That is the same as the approach that this Tribunal adopts.

It is no part of that calculation to impose an amount added to the bond by way of a fine on the vessel, or to deduct from the bond an amount by way of an expression of disapproval at the conduct of the detaining State, even if there has been an unacceptable delay in setting the bond. Such a delay might form the basis of other proceedings under the Convention, but the purpose of prompt release proceedings is not to investigate the history of the incident but to take a snapshot, and to ask simply: at this moment, given the accusations against the ship, its owners and Master, what are the terms of a reasonable bond that would permit the vessel and its crew to leave?

Similarly, it is not the purpose of article 292 proceedings to provide a remedy against any failures of other shipowners to pay fines or against any general problems concerned with unlawful fishing. These are matters that are reflected in the gravity of the offences, and therefore reflected in the severity of the fines that the Russian Federation has chosen to set for the offences in question. If the Respondent has questions, concerns or complaints about these matters, there are procedures through which it can address them, but they are not relevant in article 292 proceedings.

The Tribunal has made clear that its role in article 292 proceedings is not to go into the merits of the matter that underlies the detention. It made that plain in the *"Volga" Case* when it rejected Russia's argument that "in assessing the reasonableness of any bond, the Tribunal should take into account the circumstances of the seizure of the vessel on the high seas". The Tribunal said:

> "In the view of the Tribunal, matters relating to the circumstances of the seizure of the *Volga* as described in paragraphs 32 to 33 are not relevant to the present proceedings for prompt release under article 292 of the Convention. The Tribunal therefore cannot take into account the circumstances of the seizure of the *Volga* in assessing the reasonableness of the bond." (Paragraph 83 of the Judgment in the *"Volga" Case*).

The reasonableness is to be assessed by looking at the gravity of the alleged offence, as indicated by the penalties potentially applicable in respect of it, at the value of the vessel and at the value of any confiscated catch or equipment.

Now, with your permission, Mr President, I will take each of those factors in turn. Let me begin with the gravity of the offence. Japan fully accepts the right of coastal States to enforce their fisheries laws in accordance with the provisions of the Convention, and it fully accepts the importance of their interest in doing so.

Japan has itself insisted that Japanese vessels fishing under licences from other States must comply with the laws and regulations of those States and obey the commands of fishery protection officers. You will find some of the relevant statements set out in the fishing licence under which the *Hoshinmaru* operated, a copy of which appears as Annex 11 of our Application. The last three pages of that annex set out the "restrictions" and "conditions". You will see there the duties imposed on vessels to operate a vessel positioning system (set out in paragraph 8), and duties to comply with coastal laws, regulations and orders (set out in paragraphs 10 to 18).

The essential facts in this case are not in dispute. The *Hoshinmaru* was licensed by the Russian Federation to fish in the Russian EEZ from 15 May 2007 until 31 July 2007. That appears on page 4 of Annex 2, which is a translation of the fishing licence issued by the Russian Federation to the *Hoshinmaru*.

You will notice that the *Hoshinmaru* is licensed to be fishing even today as we sit here, as it has been for the past seven weeks. Whether or not an offence was committed, the detention has already prevented the vessel from fishing for seven out of the eleven weeks for which it was licensed to fish.

The *Hoshinmaru* was licensed to catch certain limited quantities of sockeye salmon, chum salmon, Sakhalin trout, silver salmon and spring salmon.

The *Hoshinmaru* was boarded by Russian officials in the Russian EEZ on 1 June 2007, at a point approximately 56°09"N and 165°28"E. You will find the approximate location marked on the map that appears as Annex 12 of our Application.

The charge against the *Hoshinmaru* is that the fish that it had on board did not correspond to those that it was licensed to catch and that they did not correspond to those that were recorded in its logbook. Permit me to repeat that, because it is a central fact that the Respondent will doubtless wish to have absolutely clear. The charge is that the fish that it had on board did not correspond to those that it was licensed to catch and did not correspond to those that were recorded in its logbook. It was said that underneath a layer of chum salmon, more expensive sockeye salmon were hidden. The details are set out in the document in Annex 6 of our Application, which is a translation of the letter dated 26 June 2007 from the Secretariat of the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation. Those details appear on the second page of that translation.

Specifically, it is said that the *Hoshinmaru* had caught 42,549.80 kg of sockeye salmon, of which 20,063.80 kg was recorded as chum salmon. They had caught 42,000 kg of sockeye salmon and 20,000 kg had been recorded as chum salmon.

Note, however, that the *Hoshinmaru* was *entitled* under the licence to catch 85,700 kg of sockeye salmon – more than four times as much as was said to be falsely recorded – and was also entitled to catch 85,200 kg of chum salmon, again far more than was falsely recorded. So the alleged offence is not fishing without a licence or overfishing; the alleged offence is falsely recording a catch that the vessel was entitled to take. The allegation is of false record-keeping.

The Government of Japan certainly does not condone false record-keeping; and it fully recognizes the importance of accurate record-keeping in the context of fisheries management. However, the fact remains that the *Hoshinmaru* was entitled to have on board all the fish that it actually had on board. That is a factor that, we submit, must be taken into account in assessing the gravity of the offence.

There is a further point. The allegedly illegal part of the *Hoshinmaru*'s catch was seized by the authorities in the Russian Federation and is still held in their custody. The 26 June letter, set out in Annex 6, says that the "damage" resulting from the *Hoshinmaru*'s alleged offence is equivalent to not less than 7 million roubles. The Russian Federation's Statement in Response gives a figure of 7,927,500 roubles – call it 8 million. There is no indication of how that figure of 8 million roubles, which is approximately US$ 311,000, is calculated; but that is not the main point.

We do not see how misreporting of fish that the vessel was entitled to take – not entitled to misreport but entitled to catch – can be said to have caused *any* damage to the living resources of the Russian EEZ.

It is true that a vessel might misreport a catch of an expensive species as a catch of a cheaper species, and then go on to catch and report in addition the full quota that it was allowed of the more expensive species, which it was entitled to take under the licence. However, the *Hoshinmaru* had not done that.

It was boarded two and a half weeks into its licensed fishing season. It was nowhere near having taken its full quota of fish. Its catch was well within the licensed limits. It had not taken more sockeye salmon than it was entitled to take; it had not taken more chum salmon than it was entitled to take. There is no question at all of it having taken more fish than the Russian Federation had already agreed that it could properly take out of the Russian EEZ.

The Russian Federation must have set the limits of the licensed catch at a level which it believed could be taken without damage to its EEZ resources. Indeed, it is obliged by article 61, paragraph 2, of the Convention to ensure that its EEZ is not overexploited. There can, therefore, be no damage to the living resources, because the licensed catch limits would obviously have been set by Russia at a level which did not cause any such damage; and the *Hoshinmaru* did not exceed its licensed catch limits.

Of course, the misreporting is an offence, for which a penalty may certainly be imposed: but to treat the 8 million roubles as environmental "damages" is plainly wrong.

We think this is apparent from the Respondent's Annex 10, the last page of which refers (in translation) to "the rates set for the calculation of penalties for damage". Those penalties apply, according to the Respondent's Annex 10, to damage "caused by extermination, illegal fishing or harvesting of protected marine living resources" of the Russian EEZ. We are not concerned here with the question whether misreporting catches that are not otherwise unlawful amounts to a violation of that provision, amounts to an offence.

What is clear is that the 8 million roubles – US$ 311,000 – that Russia has asked for represents the exposure of the *Hoshinmaru* to *fines* under Russian law. The 8 million rouble element in the bond that is described as "damages" is, like the rest of the 25 million rouble sum that has been set as a bond, simply a part of the financial security that is demanded in this case to secure the criminal liability of the *Hoshinmaru*.

Then there is the position of the Master and the crew. The Master is in a position similar to that of the Master of the *Camouco*, in respect of whom this Tribunal said, in paragraph 71 of the *"Camouco"* Judgment:

> "... the parties are in disagreement whether the Master of the *Camouco* is also in detention. It is admitted that the Master is presently under court supervision, that his passport has also been taken away from him by the French authorities, and that, consequently, he is not in a position to leave Réunion. The Tribunal considers that, in the circumstances of this case, it is appropriate to order the release of the Master in accordance with article 292, paragraph 1, of the Convention."

And as our Agent has told you, according to information that we have received within the past twelve hours, the crew also remain in detention.

Japan accepts that it is appropriate to include in a bond an element in respect of the release of the Master and crew, but it is absolutely plain that the Russian Federation is under a duty to release the Master and crew on payment of a reasonable bond, and that this has not yet happened.

I should add a note of caution here. There is a danger in thinking that if a State says to the crew, "You are free to go", then all is well. That ignores the practical reality. If fish remain stored on the ship, someone has to be present to monitor and maintain the refrigeration equipment. When the vessel is eventually released, someone must be on board in order to sail it back. The practical reality is that the release of the crew cannot be entirely separated from the release of the vessel, as though the vessel could look after itself. This reality has to be borne in mind when a reasonable and efficient system of prompt release is designed.

Let me, Sir, say something about the approach to valuation. Japan submits that the fundamental approach to determining a reasonable bond is straightforward. The bond is not a punishment; it is a security. It guarantees that whatever criminal sanctions may properly and reasonably be applied to the vessel's activities will be discharged. It follows that the amount of the bond should never be more than the amount of the fines that one might reasonably expect could in reality be imposed on the vessel's owners and crews in respect of the actual offences with which they are charged.

You may wonder why I use so many words, and why I do not say "no more than the fines to which they are exposed." There is a simple and important reason.

National laws are framed in general terms. A theft is committed when a bank is robbed and a theft is committed when a pencil is taken home by an employee from an employer's office for personal use. Both actions amounts to the same crime but the offences are very different in their gravity. It may be literally true that the bank robber and the employee face the same potential penalties, but in the real world it would be wrong and misleading to say that. In practice, an honest, common-sense evaluation is that the bank robber faces a very much higher penalty than the employee.

When one asks what sums would cover the penalties that might be imposed, one must take the gravity of the offence into account. It is simply wrong to suppose that in practice every person who violates a particular law faces the maximum penalty that could be imposed. One must look to the reality, at the levels of fine that are imposed in similar cases, at national guidelines on levels of fine, and so on.

Accordingly, we submit that it can never simply be assumed that a reasonable bond must cover the maximum penalty that could be imposed. If the offence is exceptionally grave, of the utmost seriousness, that might be a possibility: but that is something to be established

and proven on the facts; it cannot be presumed. That is why we speak of the amount of the fines that one might reasonably expect could in reality be imposed on the vessel's owners and crew in respect of the actual offences with which they are charged.

The amount of the bond may also include a reasonable element in respect of any fines that one may reasonably expect might be imposed on any individuals charged, in order to secure their presence before the State's courts, though individuals cannot, of course, according to article 73, paragraph 3, generally be made subject to imprisonment for fishery offences.

Then we come to the critical question of the value of the vessel. If the confiscation of the vessel cannot reasonably be considered to be a possibility in the circumstances of the specific case – and this is the position in relation to the *Hoshinmaru* – there is no reason for the bond to reflect the vessel's value. The bond should reflect only the fines that can reasonably be envisaged as being within the range of possible penalties that might be imposed on the owner and Master and crew. That is the maximum amount for which the bond should be fixed.

That kind of estimation is what criminal lawyers around the world do every day of the week. They say to defendants, "If you're found guilty, you'll almost certainly get between four and six years in prison". Not one year; not ten years; you won't be executed. It is reasonable to say that the defendant faces a penalty of up to six years in prison. It is a straightforward and routine matter to estimate probable penalties in the particular circumstances of a specific, concrete offence; and we submit that this must be done in assessing a reasonable bond.

We think this is perfectly consistent with Russia's understanding of its position. In the Respondent's Annex 17, attached to its Statement in Response, you will see at the end of the document – a model form concerned with prompt release bonds – that it says:

> "Reasonable bond is considered as provisional measure for paying out fines. In cases when obligations on fine payment are not fulfilled competent (appointed) authorities have right to compensate the amount of fine using pledged money, securities or property."

That is precisely right. The purpose of the bond is to cover the fines. The bond may be set with reference to the fines that are realistically foreseeable, but it may not be set any higher than that.

In particular, if the vessel is not liable to confiscation – for example, because it has committed a very minor offence under the fisheries laws, for which confiscation would plainly be unjustified – there is, logically, no reason at all why the bond should reflect the value of the vessel. No municipal court would fix the bail of someone charged with fraudulent accounting by reference to the value of the car that the person drives, and there is no more reason to take into account the value of the vessel in fixing a bond in respect of charges of falsely recording catches.

If a vessel is liable to confiscation, an element for the value of the ship may be included, in addition to the element for reasonable fines that might be imposed.

But it is not enough here to refer simply to "the value of the vessel". One has to focus clearly on what is at issue. The vessel is allowed to leave the detaining State, but the detaining State must not be appreciably worse off by allowing it to leave. The bond stands in the place of the vessel. So, one asks, what is the value that the detaining State has lost by allowing the vessel to leave? That would be the amount for which the detaining State could sell the vessel – its market value – minus the cost of the sale.

Let me emphasize this point. The bond is there to protect the legitimate interests of the detaining State; it is not the purpose of the bond to punish the shipowner. It does not matter that if the shipowner sought to replace the vessel it would cost him more than the market value of the vessel – more than the vessel would fetch if it were sold. Both parties are agreed that one must look on the bond as a security for the detaining State, as a substitute for the released vessel. Consequently it must be the market value of the vessel, not its replacement cost, minus the costs of sale, which we use as the relevant benchmark. That is what the released vessel is worth to the confiscating State; that is what the detaining State is at risk of losing if the vessel is released.

This, we say, is how the question of approaching the reasonableness of the bond must proceed; and if the bond is fixed at a level that exceeds what is justifiable by reference to these factors – if the bond is disproportionate – it would take on a punitive character. It would go beyond what is necessary to secure the interests of the coastal State, and would impose additional burdens on the owner which protect no legitimate interest of the coastal State. It would disrupt that delicate balance between the interests of the coastal State and the flag State that UNCLOS sought to strike.

Russia has argued that a reasonable bond is properly to be fixed as only a percentage, only a part of the total exposure to fines and confiscation. Russia has indicated that the range of 9 per cent to 25 per cent of that total exposure is appropriate. We have set out the passage where Russia announced its adherence to this approach, in the *"Volga" Case*, in paragraph 47 of the Application.

Japan agrees. Japan, Mr President, will be content to be treated by Russia as Russia demanded it should be treated by Australia in the *"Volga" Case*.

Mr President, that brings me to what would be a convenient point perhaps to break, and then I will finish my submissions afterwards.

The President:
Thank you, Professor Lowe. The meeting is adjourned for approximately 15 minutes.

(Short adjournment)

The President:
Please continue, Professor Lowe.

Mr Lowe:
Before the brief recess, Mr President, I outlined our submissions as to the manner in which the question of the reasonableness of the bond should be approached and I would like now to turn to the application of those principles to the specific facts of this case.

The criminal penalties in this case could in theory be almost 8 million roubles. That is both the measure of the gravity of the offence in the eyes of the Russian Federation, and the basic sum to be considered when considering the bond.

Eight million – in fact, it is 7,927,500 – roubles is the maximum figure. It must constantly be borne in mind that there has as yet been no trial and no conviction. We do not and we cannot know if the Master and owners of the *Hoshinmaru* will be convicted or acquitted, and we do not and we cannot know whether, if they are convicted, the maximum fine or some lesser penalty will be imposed.

If Russia considers that the maximum penalty is a fair and reasonable estimate of the actual penalty that would probably be applied if the Master and owners were guilty of the offences charged, it will no doubt explain why, and justify its position. We look forward to hearing that explanation from them in their submissions tomorrow.

Japan recognizes that the legitimate interests of the coastal State must be protected, in the balance with the flag State interests, and Japan accepts the maximum exposure to whatever potential fines might realistically be expected to be imposed as the starting point for the analysis.

In this case there is no indication in the Russian submissions that the *Hoshinmaru* itself faces probable confiscation. Indeed, it would be extraordinary if the *Hoshinmaru* itself were liable to confiscation in respect of a charge that the Master had recorded one catch that he was entitled to take under the heading of another catch that he was entitled to take – unlawful as any false recording would undoubtedly be: and if such a penalty were imposed in a case such as this, one might ask how it could be reconciled with the prompt release procedures under the Convention.

So, it is now for this Tribunal to determine what a reasonable bond might be. It is not for Japan to propose a precise figure, but Japan considers that the amount cannot be any more than about 8 million roubles at the very highest, even if Russia justifies its decision to take into account the full amount of the criminal penalty when fixing the bond. Any higher sum would be "disproportionate", to use the language of human rights courts, and would have been determined by the arbitrary inclusion of sums that are not proportionate reflections of any of the factors which may legitimately be taken into account when calculating the bond. Indeed, I must emphasize that our submission is that when the precise nature and circumstances of the offences charged in this case are taken into account, a reasonable bond should certainly be much less.

In our submission, the value of the *Hoshinmaru* as a vessel is not relevant since it is not liable to probable confiscation, but Applicants in these proceedings are requested to offer data on the vessel, and we have done our best to obtain reliable, objective information. Japan has submitted four documents that give appraisals of the value of the vessel.

Annex 1 attached to the Application has, on its sixth page, a statement made by the owner of the *Hoshinmaru* that it was bought for 75 million yen in 2003 and that, applying depreciation methods that conform with Japanese corporation tax law, it had a value in June 2007 of 18,843,000 yen – that is, approximately US$ 155,000, or 4 million roubles.

Japan obtained three other appraisals of the value of the vessel. These are set out in the additional Annex, No. 17, headed "Appraisal", which we submitted yesterday.

One, made by the Japan Shipping Exchange Inc., sets the value as at 13 July 2007 at US$ 220,000. The second, made by Shin Nihon Kentei Kyokai, is based (as is indicated on page 1 of its valuation report) on new building and second-hand market trends of similar vessels based on authoritative statistical data obtained from the Japanese National Land and Transportation Ministry, from specialized magazines abroad, and from Japanese shipbuilders and brokers of fishing vessels. It values the vessel at US$ 265,000. The third, made by Nippon Kaiji Kentei Kyokai, taking into account the new building cost of a similar type of vessel, the depreciation in value corresponding to the vessel's age and the current market value, appraised the value as of 9 July 2007 at US$ 320,000. All of these estimates include the value of the fishing gear.

The bond set by the Russian Federation on 13 July was 25 million roubles – almost US$ 1 million (approximately US$ 980,913) – of which almost 8 million roubles were attributed to the environmental damage alleged to have been caused by the *Hoshinmaru*, and just over 17 million roubles – approximately US$ 670,416 – therefore remaining to be justified by reference to other factors. That is more than twice the highest valuation of the *Hoshinmaru*, and more than four times the owner's depreciated value appraisal of the worth of the vessel.

Given the logistical constraints under which we are all operating in these summary proceedings, it has not been possible to prepare and translate full witness statements or

affidavits to support these valuations; nor has it been possible for either side to secure the attendance of witnesses from the companies concerned to testify, through translators, on the valuation methodology. We submit that these objective expert valuations give a good basis for a pragmatic determination of a reasonable bond. You will note at the end of Annex 23 to Russia's Statement in Response that it said what evidence it, Russia, would need in order to determine the bond. It said – I quote from the last three lines of the final paragraph of Acting Chief Grinberg's letter to the owners of the vessel –

> "we would like to request you to provide us with information on insured amount and the sum of residual value of the medium-duty vessel [*Hoshinmaru*] necessary for the determination of the bond's amount".

Mr President and members of the Tribunal, Japan submits that there is no basis for valuing the *Hoshinmaru* at anything less than US$ 155,000 or more than US$ 320,000. On any calculation, a reasonable bond must therefore be substantially lower than the 25 million roubles recently set by the Russian Federation. In our submission, it should be set at a figure that reflects the exposure at the very highest, if Russia is able to justify it, of 8 million roubles in penalties.

This talk of numbers may seem very abstract, but there is a harsh reality to this issue – quite apart from the cost of actually obtaining the bond, which will of course be an additional cost to the shipowner over and above any penalty that might be imposed if the Master and owners of the *Hoshinmaru* are found guilty.

There is another matter. The *Hoshinmaru* has now been detained for practically the whole of the season during which it was licensed to fish in the Russian EEZ. It has lost all the income that it could have gained during that period. Even today, it could be lawfully fishing in the Russian EEZ. Some may say that if it is guilty of the charges – and that we do not yet know –, it deserves to lose that income: but it must be remembered that this loss would be in addition to any fines that are imposed.

We have to suppose that the Russian Federation fixes its fines at a level which it considers to be appropriate to the offences in question. But if the fines are set at a level appropriate to the offences in question, it is plainly inappropriate then to add some additional loss on to that by compelling the ship and the crew to lose further income. The amount of the additional lost income would be purely arbitrary. It would depend entirely on how long the vessel was detained before it was released and able to return to lawful fishing.

It is that arbitrariness, that anomaly, that the prompt release provisions are intended to prevent. As part of the bargain that massively extended coastal State jurisdiction over what were formerly high seas fisheries, flag States were given some guarantee that fishing activities would not be disrupted more than is necessary to secure the legitimate interests of the coastal State. That is what the prompt release procedures are intended do.

Sir, let me deal with one final point. Russia suggests that it has not unduly delayed the setting of a bond, and that it is not bound to set a bond "promptly" but only when it considers it appropriate to do so given the progress of the criminal investigation.

Japan accepts that a coastal State may detain a vessel for long enough to carry out a reasonably diligent and expeditious examination of the vessel and its catch and to record the evidence necessary to support the charges against the ship. That is obvious: no-one would argue that a ship is entitled to be released before the State has had a chance to gather the evidence against it. But that is as far as it goes.

In the words of this Tribunal, "The requirement of promptness has a value in itself" – paragraph 77 of the *"SAIGA"* Judgment. If vessels and crews are to be promptly released, the bond must be set promptly. It cannot be argued that it is enough to release the vessel and crew

"promptly" after the setting of a bond if there is an inordinate delay in the setting of the bond in the first place. That is why article 292 permits applications in prompt release cases to be made 10 days after the detention of the vessel.

Japan submits that the coastal State is obliged to release the vessel and its crew against payment of a reasonable bond after a period sufficient to give the coastal State a reasonable opportunity to collect the necessary evidence. This, in our submission, is an integral part of the "reasonableness" of the bond and of the UNCLOS prompt release obligation.

Mr President, members of the Tribunal, that brings me to the end of my submissions on behalf of Japan in this round of pleadings. Unless there is anything else with which I can help you, I simply thank you for your kind attention.

The President:

Thank you, Professor Lowe. That brings us to the end of this sitting. The Tribunal will sit again tomorrow morning at 10 o'clock. At that sitting, the representative of the Respondent will address the Tribunal and present their submissions. This sitting of the Tribunal is now closed.

(The sitting closes at 5 p.m.)

PUBLIC SITTING HELD ON 20 JULY 2007, 10.00 A.M.

Tribunal

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

For Japan: [See sitting of 19 July 2007, 3.00 p.m.]

For the Russian Federation: [See sitting of 19 July 2007, 3.00 p.m.]

AUDIENCE PUBLIQUE DU 20 JUILLET 2007, 10 H 00

Tribunal

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

Pour le Japon : [Voir l'audience du 19 juillet 2007, 15 h 00]

Pour la Fédération de Russie : [Voir l'audience du 19 juillet 2007, 15 h 00]

The President:
Good morning, everybody.

This morning we will resume the oral proceedings and I give the floor to Mr Zagaynov, the Agent of the Government of the Russian Federation.

Mr Zagaynov, please.

Argument of the Russian Federation

STATEMENT OF MR ZAGAYNOV
AGENT OF THE RUSSIAN FEDERATION
[PV.07/02, E, p. 1–6]

Mr Zagaynov:
Thank you very much, Mr President. Mr President, distinguished members of the Tribunal, honourable representatives of Japan, for me and for all members of our delegation it is a great honour to represent the interests of the Russian Federation before this venerable Tribunal.

At the outset, we would like to thank very sincerely the Registrar of the Tribunal and the members of the staff for their kind assistance, which has been extremely helpful in our preparation. This assistance was of particular value to us taking into consideration the time constraints of the prompt release procedure. For the Russian Federation the homework before these hearings required especially arduous efforts. It is the first time in the practice of the Tribunal that two cases have been instituted simultaneously. Obviously, this puts high pressure on those who prepare the pleading, especially on the Respondents' side. In our view, the issue of simultaneous applications should be addressed in the future in an appropriate way.

In this context, it would also be important to us to explain to you, Mr President, and to the honourable Judges, some geographic peculiarities of the region concerned. The point is that the facts underlying the Japanese applications took place off the coast of the Kamchatka peninsula situated some 8,000 km from Moscow. The time difference between our capital and Petropavlovsk-Kamchatskii is nine hours, so normally when we start our working day in Moscow our colleagues in the Far East are already leaving their offices for home. The usual time required to receive correspondence from that part of Russia is four days. In the meantime, it is obvious that in order to prepare a response to the Japanese applications we had to receive first all the necessary information from Kamchatka. In these circumstances, we did our best to provide the Tribunal with well prepared information and documentation. If it is not well structured or exhaustive, we would certainly try to make our points clear during the hearings.

Mr President, four and a half years ago the Russian delegation visited the premises of the Tribunal, though on that occasion it was appearing before this distinguished Tribunal in the position of an applicant. Of course, I am talking here about the *"Volga" Case* quoted by the Applicant on numerous occasions. *A propos*, I believe this is also the first time in the history of the Tribunal that a State which has appeared before it as an applicant now appears before it as a respondent.

As rightly pointed out in the Application, the Union of Soviet Socialist Republics made a special statement with respect to the jurisdiction of the Tribunal on issues of prompt release. This shows that our country from the very beginning has attached great importance to the role of the Tribunal, especially in these matters, to its contribution to the peaceful resolution of interstate conflicts pertaining to the most contradictory issues of the law of the sea.

The Russian Federation is one of the major maritime powers and one of the major coastal States in the world at the same time, and we are determined to protect and ensure by available legal means the rights and interests of Russia both as a flag State and as a coastal State.

As was pointed out yesterday by Japan, Russia is entitled to exercise in its exclusive economic zone in accordance with the international law sovereign rights of exploration and exploitation of natural resources. At the same time, as a coastal State, Russia has to discharge

certain obligations, one of the most important being the protection and sustainable use of the marine living resource. In order to discharge this obligation, Russia is required to ensure through proper conservation and management measures that the maintenance of living resources in its EEZ is not endangered by over-exploitation.

This case was initiated by Japan against the Russian Federation for the alleged violation of article 73 of the Convention. As the Tribunal stated in the *"Monte Confurco" Case*, and, as Japan itself acknowledged in its Application, article 73 of the UNCLOS is designed to strike a fair balance between the interests of the persons connected with the detained vessel and of the flag State in securing the prompt release and the interests of the detaining coastal State to take appropriate measures as may be necessary to ensure compliance with its fisheries laws and regulations adopted in accordance with paragraph 1 of article 73.

Now let me say a few words about the unique place which is Kamchatka. This part of Russia can boast particularly diverse and abundant wildlife, which is in many respects due to the highly productive waters from the North Eastern Pacific Ocean and the Bering and Okhotsk Seas. In particular, it contains perhaps the world's greatest diversity of salmonid fish. Nonetheless, commercial over-exploitation of marine resources in recent years has taken its toll on several fish species. Illegal catch of some species now exceeds biologically safe limits, which has severely depleted some precious fish stocks of that region.

It is obvious that in order to address this danger a wide international cooperation is needed. In our relations with Japan we have had a long history of such cooperation. Thus, two agreements on cooperation in fishery matters were concluded between the Soviet Union and Japan in 1984 and 1985. Both of them provide for the establishment of joint commissions, entrusted with the responsibility to ensure a proper implementation of the respective agreements.

In accordance with paragraph 1, Article 4, of the 1984 Agreement, each party has to take all the necessary measures to ensure that its nationals and fishing vessels conducting fisheries in the zone of the other party observe measures for the conservation of the living resources and other provisions and conditions established in the laws and regulations of that party. The flag States have not only rights and interests, as stated in paragraph 40 of the Japanese Application, but also obligations.

As the Applicant rightly stated in its Application, the arrest of the *Hoshinmaru* was not an isolated incident. In the course of the last few years the North East Border Coast Guard Directorate of the Federal Security Service of the Russian Federation revealed numerous violations of the laws and regulations concerning fisheries in the Russian exclusive economic zone by vessels flying the flag of Japan. For example, only in 2006 twenty-five such violations were registered. In the course of the 23rd Session of the Joint Commission in December 2006 the Russian authorities expressed to Japan its concern with respect to the fact that the number of violations increased during that year. Moreover, at sessions of both Commissions, Russia repeatedly drew the attention of the Japanese side to the increasing debt of Japanese companies for non-payment of accumulated damages caused to the living marine resources in the Russian EEZ. No measures with respect to the problem have ever been taken. All these problems represent serious concerns both for the Russian authorities and for the public opinion.

We acknowledge that according to paragraph 3 of article 292 of the Convention, in prompt release cases the Tribunal has to deal with the question of release only, without prejudice to the merits of any case before the appropriate domestic forum against the vessel and shipowner. Therefore, it is not, in general, the task of the Tribunal to consider the motives of the detaining State in applying measures to prevent violations of its legislation in the EEZ. As the Tribunal itself has pointed out, however, it is not precluded from examining

the facts and circumstances of the case to the extent necessary, for the reasonableness cannot be determined in isolation from facts.

That is why the Tribunal did take note of the environmental concerns of Guinea-Bissau and Australia as Respondents in the *"Juno Trader"* and *"Volga"* cases, respectively. President Nelson in the *"Camouco" Case* similarly mentioned that the Tribunal should take account of what, in the introduction to the Statement in Response of the French Republic, was referred to as "the context of illegal, uncontrolled and undeclared fishing in the Antarctic Ocean and more especially in the Exclusive Economic Zone of the Crozet Islands, where the facts of the case occurred". You, your Honour, in the same case referred to the need to protect the fishing regime established in the Convention for the Conservation of Antarctic Marine Living Resources, and the conservation measures taken thereunder.

In this connection, we would likewise ask the distinguished Tribunal to consider the general context of the seizure of the Japanese vessel *Hoshinmaru* and the efforts of the Russian competent organs to combat illegal and unsustainable fishing practices in the Russian Far East.

I would now like to turn to some of the allegations in the Application of Japan, to which the Russian Federation cannot consent. First of all, we consider it a misrepresentation that 17 Japanese crew members, including the Master, have been detained since 5 June 2007. Yesterday Japan raised the issue of the humanitarian aspects of the case and of the allegedly deplorable situation of the crew members, who were obliged to remain in a country the language and customs of which are totally unfamiliar to them. Moreover, according to Japan, the members of the crew were at risk of suffering from serious mental disorders because of the permanent stress and one of them even had some medical problems with his stomach.

I would like to state in this connection that, first of all, in the case of the *Hoshinmaru*, to our knowledge, no information on health problems has been communicated to the Russian authorities. Obviously, it should be one of the first things to do. On the contrary, in the case of the *Tomimaru*, which is an object of the second application of Japan filed with the Tribunal, there were indeed complaints concerning the state of health of one of the crew members. Accordingly, the Russian authorities took appropriate measures for his expeditious return to Japan.

As for the language problems, the crew members at all stages have had access to the consular agents of Japan, who speak perfect Russian.

Besides that, as we mentioned in our Statement in Response, the members of the crew, with the exception of the Master, have never been actually detained. The Agent for Japan told you yesterday that ostensibly only two members of the crew each day were allowed to walk along the quay under the surveillance of the Russian guards. We have to clarify, nonetheless, that even if it is true, this is due not to their status as detained offenders, but to the fact that as foreign sailors, they do not have formal permission to go ashore on the territory of the Russian Federation.

According to the clarification of the Russian competent authorities, in order to get such a permission the owner of a foreign vessel or its agent has to apply for it to the competent Russian authorities. It is an absolutely common and simple procedure. Once the crew members are given this permission, they can go ashore, buy tickets and fly home or wherever they want to go, and this rule applies not only to the crew members of the detained vessel, but to all foreign sailors arriving at Russian ports. It would be rather illogical if the crew of an arrested vessel were in a better position than other seamen.

In the case of the *Hoshinmaru,* the owner of the vessel did not demonstrate much interest in obtaining such permission for the crew members, as well as in the destiny of the crew in general. By the way, it was only on 4 July that he sent to the Respondent an application for the prompt release, which was received even later. Neither did he make any

efforts to arrange for their return to Japan. As a result, the members of the crew remained on board the vessel without actually being detained. In other cases of detained Japanese vessels, however, such permission was given without any problems and the crew members actually left for Japan.

We cannot accept the argument that the crew is detained because someone has to take care of the detained vessel and the fish. Obviously, that would mean that it would be impossible to detain a vessel at all without detaining its crew.

As for the Master of the *Hoshinmaru*, on 11 July 2007, that is nearly 40 days after the detention of the vessel, he was asked to sign a written undertaking not to leave the city of Petropavlovsk-Kamchatskii. However, according to our competent authorities, on 16 July this restriction was withdrawn upon the completion of the necessary requirements of the Russian authorities conducting an investigation. In other words, nobody from the crew was detained when the application was filed and nobody is detained now.

I would like to address the statement of Japan in paragraph 46 of its Application. According to the Applicant, Russia and Japan are in agreement concerning the approach to the determination of what is a "reasonable bond" or other security. To support this statement, Japan quotes an extract from the presentation of the counsel for the Russian Federation in the *"Volga" Case*, Mr David, stating that the Tribunal is setting bonds varying in amounts between 9 and 25 per cent of the total potential exposure to fines and confiscation. This conclusion derived by Mr David from the declaration of Judge Laing in the *"Camouco" Case* was not supported by the Tribunal, however. The bond set by the Tribunal was much higher. On the other hand, Mr David repeatedly mentioned that Russia considered it appropriate to apply this approach to that particular case, the *"Volga" Case*.

We do share the opinion of our opponents, nevertheless, that the parties indeed agreed some time ago on the approach to the criteria for setting a "reasonable" bond or other security.

It is worth explaining in this regard that in the course of the last two sessions of the above-mentioned Joint Commissions on Fisheries, the Russian representatives briefed the Japanese side about the criteria to be applied for the assessment of a bond for the purpose of prompt release in the case of the detention of Japanese fishing vessels in the Russian exclusive economic zone. According to the documents subsequently forwarded to the Japanese side as official documents clarifying the Russian position on that issue and annexed to our Statement in Response, the bond should be comparable to the amount of potential fines, compensation for the damage caused, the cost of the illegally harvested living resources, the products of their processing and the instruments of illegal fishing (i.e., vessel, equipment, et cetera). These criteria are, in our view, consistent with the criteria elaborated by this distinguished Tribunal. The Japanese representatives have not raised any objections with regard to them; therefore, it can be implied that they have acquiesced to them. It is rather hard to understand why the Japanese side preferred to challenge this criteria and methodology before the Tribunal and not during the bilateral meetings on fisheries issues.

Mr Monakhov, who is supposed to speak after me, will explain in detail the way the amount of the bond was calculated. I would only like to mention that in our view the setting of the bond should not deprive the coastal State of ensuring the proper application of all relevant provisions of the national legislation, including imposing fines and damage compensation.

A prominent Japanese expert in the field of international law, Professor Oda, stated in one of its recent publications, entitled *Fifty Years of the Law of the Sea*, that

> "the arrested vessel is to be promptly released on the understanding that the captain or owner will be tried before a judicial court of the coastal

> State in due course. In fact, however, the appearance of the captain and owner of the arrested vessel is highly unlikely. In addition, no hint is given in the UN Convention of what is 'reasonable bond or other security'. It might be pointed out that the reasonableness of a bond or other security can never be proved from the objective point of view. Thus, the amount of the bond or other security might in practice be fixed by each coastal State at an amount equivalent to the fine that might be imposed by its courts at a later stage".

In our view, also the bond in this case should cover all applicable fines and damage compensation.

Japan has raised the issue of State responsibility and eventual reparation in its Application. We consider it unnecessary to remind you that the question of responsibility goes beyond the scope of the prompt release procedure under article 292 of the Convention. We would, however, reiterate our position that the Russian Federation reserves rights to respond to these statements of Japan, as may be necessary.

Mr President, as mentioned in our Statement in Response, in the framework of this judicial procedure, we are asking the Tribunal to declare the application of Japan inadmissible because a reasonable bond for the release of the *Hoshinmaru* was set by the competent Russian authorities.

In case the Tribunal decides that the application is admissible, however, we are requesting it to declare that the Russian Federation did not breach its obligation under paragraph 2 of article 73 of the 1982 Convention because it has fixed a reasonable bond for the release of the *Hoshinmaru* and because, in the particular circumstances of this case, for example the non-cooperation of the owner of the vessel, this was done within a reasonable time limit.

Mr President, distinguished members of the Tribunal, honourable representatives of Japan, thank you for your careful consideration of my opening statement.

The President:
Thank you very much, Mr Zagaynov.

STATEMENT OF MR MONAKHOV
DEPUTY AGENT OF THE RUSSIAN FEDERATION
[PV.07/02, E, p. 6–14]

The President:
We will now hear the statement of Mr Monakhov. However, before we proceed to do so, we will first call the interpreters who will interpret his statement from Russian into one of the official languages of the Tribunal to make the declaration set out in article 85, paragraph 4, of the Rules of the Tribunal.

Could the interpreters please come forward? The interpreters have to come from their booth at the top of the building.

(Pause)

MR LAKEEV *sworn in (in English)*

The President:
Thank you very much, this will be recorded.

MS EVAROVSKAYA *sworn in (in French)*

The President:
Thank you, this will equally be recorded. We will continue when you give me an indication that you have arrived back in your booth.

(Pause)

Mr Monakhov, when you speak, please take into consideration that you will be translated into one language and then into another language. Therefore, please speak slowly, otherwise we will become lost.

Mr Monakhov:
(Interpretation from Russian) Distinguished Mr President, I am the Head of the State Sea Inspection of the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation, which under the law is in charge of monitoring the observance of the rules of taking living marine resources in Russian waters, in particular in the exclusive economic zone. In line with my duty, I took direct part in the consideration of the situation of the *88th Hoshinmaru* and its Master. That is why I know about the matter not by hearsay.

Allow me to dwell upon some aspects that, in my opinion, are important in the context of the Tribunal's conclusion on the issue of the amount of a reasonable bond to be applicable in the case under consideration.

As the Russian party notes in paragraph 53 of its Statement on the case under consideration, the level of gravity of the alleged offence which formed grounds to detain and/or arrest the vessel and its crew, as well as sanctions fixed by the laws of the detaining State for committing such an offence, are among the criterion of "reasonableness" of the bond – the conclusion in the *"Camouco" Case*.

In the case under consideration, the checking and inspection of the *88th Hoshinmaru* vessel, recorded in accordance with the procedure fixed by law, revealed the fact of substituting the species composition of the products, which served as grounds for instituting a case of an administrative offence against the owner and Master of the vessel. The

responsibility for such an offence is provided for in Part 2, Article 8.17, of the Code on Administrative Offences of the Russian Federation.

The subject of the provisions of the article amounts to the establishment of responsibility and administrative punishment, *inter alia*, for violation of rules or conditions of the licence which regulate activities in internal sea waters, territorial sea, the continental shelf and/or the exclusive economic zone of the Russian Federation.

Speaking about the level of gravity of the act which served as the ground for detaining the vessel, I would like to emphasize the following aspects.

First, with regard to the serious nature of the offence, the owner and Master violated not individual technical requirements with regard to fishing operations but, in fact, a whole set of rules, norms and standards with which strict compliance is the essential prerequisite for Russia to exercise efficiently its sovereign rights to preserve and manage living marine resources in its exclusive economic zone and to allow access of foreign fishing vessels for fishing.

Article 61 of the UN Convention on the Law of the Sea states:

> "The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone[, and] shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation."

We consider that this norm establishes not only the right but the obligation of the coastal State.

It should be particularly noted that the offence amounts to the illegal catch of a species, namely sockeye salmon, which belongs to the anadromous stocks. Pursuant to article 66, paragraph 1, of the UN Convention on the Law of the Sea, the "States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks."

In the context of the implementation of these rights and responsibilities, the Russian Federation has adopted national laws and rules regulating the EEZ regime and its related fishing operation, which are binding upon Russian and foreign individuals and legal entities.

The fundamental principle which forms the basis of laws and rules is the obligation of all users of the EEZ biological resources to comply with laws and rules, including the standards of fishing operations, catch limits, as well as conditions of authorization (licence) to catch water biological resources in good faith and to the full extent. This obligation is provided for in Part 2, Article 12, of the Federal Law on the Exclusive Economic Zone of the Russian Federation and Part 2, Article 33, of the Federal Law on Wildlife. The non-compliance of the users of resources under such an obligation, especially irregular and clandestine in nature, causes serious concerns, for it casts doubt on the very possibility to adopt proper measures to preserve and manage the water biological resources and, in the final analysis, can result in the threat to the preservation of water biological resources stocks.

Noting the importance of homogeneous and efficient implementation of the legislation on responsibility for environmental offences, the Plenary of the Supreme Court of the Russian Federation, in its Statement No. 14 of 5 November 1998 on practical application by courts of legislation on responsibility for environmental offences, noted:

> "The high level threat to the public from such kinds of offences is explained by the fact that the sustainability of environmental nature's

> resource potential, as well as the right of everybody to a friendly environment, are the subject of encroachment of the said offences",

including Article 42 of the Constitution of the Russian Federation that everyone shall have the right to a friendly environment.

Under Article 10 of the Federal Law on Fishing and Preservation of Water Biological Resources, water biological resources, including fish stocks, in the exclusive economic zone are the federal property of the Russian Federation. The right to use them by private persons arises from the authorization to catch (or take) issued by the competent body in accordance with the established procedure. According to Part 2, Article 16, of this Federal Law, "fishing is executed in accordance with the rules regulating the catch (take) and preservation of water biological resources." A similar norm is found in Part 3, Article 35, of the Federal Law on Wildlife.

Taking the above-mentioned into account, I would like to draw the attention of the Tribunal to the fact that in the *"Hoshinmaru" Case* a complex of interrelated and complementary rules, standards and norms which regulate the fishing operation in the Russian EEZ made the subject of the offence.

In the course of the administrative investigation carried out by competent Russian authorities and in complete compliance with the legislation in force, it was established that the owner and Master violated the Federal Law on the Exclusive Economic Zone of the Russian Federation and the Federal Law on Fishing and Preservation of Water Biological Resources as well as the following rules regulating fishing operations.

The owner and Master violated paragraphs 7.1, 9.2 and 9.4 of the Fishing Rules in the Far East Fishery Basin, which require the users of water biological resources to commit to provide for a separate account of the catch and delivery of water biological resources by species; to specify the weight ratio of biological resources species and the catch in the vessel logbook and other reporting documents. The daily logbook reports on *Hoshinmaru 88* obviously violated Order 338 of the Russian Federation of 30 November 1990 of the Russian Commission on Fisheries and consciously false information of the catch was registered.

In accordance with those Rules, the user is not entitled to accept, deliver, or carry aboard the vessel the catch of water biological resources or products made of one species named another or without specifying the species composition, as per paragraph 9.2 of the Fishing Rules. Also, the owner has no right to register and provide information in false amounts of the catch and its species composition, paragraph 9.3; also, to carry aboard the fishing vessel products not recorded in the vessel logbook and technological journal, paragraph 9.4.

The USSR and Russia in their relations with Japan also regularly took and continue to take measures to better organize activities related to preservation, reproduction and optimal use and management of living resources in the Northern Pacific. To this end, both countries concluded inter-governmental agreements on mutual relations in fishing in the coastal areas of both countries on 7 December 1984 and on cooperation in fishery on 12 May 1985, which foresee the establishment of joint inter-governmental commissions. In the framework of those commissions, the parties regularly discuss and inform each other of rules and standards applicable in the exclusive economic zone of each state party.

In this connection, after the results of the Russia-Japan inter-governmental consultations on the catch of salmons of Russian origin by Japanese fishing vessels within a 200-mile zone of the Russian Federation, and in accordance with paragraph 8 of the minutes of consultations, the Russian party informed the Japanese party on the rules of catching anadromous species of fish inhabiting rivers of the Russian Federation and measures for their preservation. As a result of the efforts of the Russian and Japanese parties exerted within the

framework of the above-mentioned commissions, each Japanese vessel engaged in fishing in the EEZ of Russia carries a complete set of documents regulating this kind of catch in the Russian and Japanese languages. Such a compilation of papers I have here in Japanese and it contains all the norms and rules which should be observed by a Japanese Master while working in the exclusive economic zone of Russia. It contains all the details of the fishing operations.

So the owner and Master of *Hoshinmaru 88* were completely conscious of the illegal nature of the actions and their negative consequences. However, pursuing their vested interests they committed pre-determined violation of the laws and rules of the coastal State. If the substitution of the species on *Hoshinmaru* had not been revealed by the competent authorities of the Russian Federation, then 20 tons of raw sockeye salmon would simply have been stolen and taken out of the EEZ of Russia illegally. This amount of water biological resources could not have been accounted for by the competent bodies of the Russian Federation in exercising control over the percentage of total allowable take of this species, i.e., sockeye salmon. So in this case we are witnessing evidence of a classical manifestation of illegal, unreported and unregulated fishing, an offensive activity giving rise to serious concern in the international community with regard to the preservation of resources, paragraph 2 of article 61 of the UN Convention.

This offensive act could not be considered as a purely technical error while making respective records in the logbook during the fishing operation which, as the Agents of the Japanese party insist, was allegedly legal, within the licence quota and in accordance with the available fishing licence. This fishing can only be legal when it is executed in compliance with all the applicable rules and norms established by the coastal State, including timely and exhaustive reporting of data on species and amounts of the catch to its competent bodies. This point of view in particular has been confirmed in the practice of Russian courts. The hidden products of sockeye salmon have nothing to do and cannot have anything to do with the available quota permitted to the owner.

Twenty tons of illegally caught raw sockeye salmon indicated in the investigative documents were not mentioned in the daily ship record and were not fixed in the logbook as sockeye salmon caught according to licence number XKC-07-10, a copy of which is contained in Annex 2 to the Application of Japan. Therefore, there are no grounds to say that 20 tons of illegally caught raw sockeye salmon were caught according to the licence and within the limit of the quota.

As I have already noted, according to the case law of the Tribunal, it is well founded to assess the gravity of offences taking into consideration the penalties that may be imposed for the corresponding offences under the laws of the Respondent.

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

The punishment provided for in Part 2 of Article 8.17 of the Code on Administrative Offences in regard to the owner or [legal representative of the vessel] is a fine constituting from double to triple the cost of the marine biological living resources which were the object of the administrative offence, accompanied or not by the confiscation of the vessel and other instruments used to commit the crime. The severe character of this punishment also proves the fact that the Russian legislator considers this offence as serious and grave.

I would like to note that while investigating the case, we were confronted with the clear unwillingness both of the Master and of the owner to cooperate in the matter in order to speed up the proceedings of the case, including for the purpose of the soonest determination of the reasonable bond. All the problems which arose with regard to the vessel *Hoshinmaru*

could have been avoided if the Captain had not offered passive resistance to the investigation by having refused point blank to sign all the procedural documents and to re-route voluntarily to the port, where the necessary proceedings were to be established. It took additional time to bring the vessel in tow to the port.

In order to have a thorough investigation according to the determination of the bond, initially it was necessary to witness and to fix the following data: documentary confirmation of the owner of the ship; whether the Master, who has committed the offence, is an employee of the respective legal entity; proof of the fact that the vessel is registered in a Japanese port with a specific shipowner.

On June 13, 2007 necessary facts were received from the shipowner party on the basis of the State Sea Inspection on the necessity to receive facts. The facsimile copies of the documents indicating the requested data – which, however, cannot be used as reliably establishing respective legal facts – were received by the State Sea Inspection from the legal counsel of the alleged shipowner only on 27 June this year, certified copies but without any translation into Russian, which was only supplied on 4 July this year.

As to the elements of which the amount of the bond consists, that is to say, the appropriate standard, which, in our understanding, was previously adopted by both parties within the framework of the above-mentioned Russian-Japanese inter-governmental consultations referred to above, it is reflected *inter alia* in Item 4, Annex II-1 to the Memorandum II of 26 April 2007.

In accordance with this standard, and this is reflected in the annex, the bond shall include the amount of the fines, compensation for the damage caused, the value of illegally harvested live marine resources, as well as products of processing and the value of instruments of committing the offence, i.e., the vessel and the tools of illegal fishing.

On July 13, on the basis of these criteria, the Russian Federation established the bond as 25 million roubles. Taking into account the time factor, the bond was calculated proceeding from the preliminary appreciation of the cost of the vessel that was set at 14.4 million roubles. On 18 July we received the final appreciation expertise which was conducted by a Russian consulting group, Capital Plus. Since this document was received at the very last moment, we could not present it as an annex to our statement in full text and we provide only the final conclusion of that document. The calculations themselves take up some 60 pages in Russian and translation could hardly be done in such limited terms. Nevertheless, we kindly request the Tribunal to take into consideration these detailed materials and we are prepared to attach them to the case.

The appreciation of the vessel was conducted in accordance with the federal law on assessment procedures in the Russian Federation and the criteria established by Governmental Decree No. 519 of 6 July 2001. As for the calculation methodology, a kind of combination of comparative and costs/expenses approach was applied in this case.

Following the type of vessel, the experts took into account the following parameters: year of production, technical parameters, engine power. This was made on the basis of the analysis of six other vessels in Russia and abroad by the comparative method. In accordance with the cost/expenses approach, the expert took into consideration the following parameters: physical wear and tear, functionality, and appearance of the vessel.

In accordance with the first approach, the value of the vessel was established roughly at 10.3 million roubles whereas the second approach brought 12 million roubles. The joint appreciation result was 11,350,000 roubles.

Proceeding from this fact, the Russian side brought the proposed bond down to 22 million roubles. This sum includes fines which may be imposed on the Master of the vessel and also compensation for the damage caused to living marine resources.

In accordance with paragraph 2 of Article 8.17 of the Code on Administrative Offences of the Russian Federation, the fine imposed against a legal person may amount to threefold the level of the costs of the marine biological resources that constitute the object of this administrative case.

The cost of one kilo of sockeye salmon according to technological expertise is 33.25 roubles. This amount should be multiplied by the weight of this illegal catch of sockeye salmon, 20,063.8 tons, and multiplied by three. That is established by the sanctions law. Thus, the total is 2,001,364.05 roubles. This Article 8.17, paragraph 2, stipulates as well the possibility of confiscating the vessel. Thus, the bond should include the above-mentioned value of the vessel of 11,350,000 roubles.

The Master, in accordance with Article 256 of the Criminal Code, may be fined up to 500,000 roubles. This sum is also included in the bond.

In accordance with the Civil Code of the Russian Federation, Articles 1064 and 1068, and the Federal Law on Wildlife, Articles 4, 40, 55, 56 and 58, compensation may be imposed for the caused damage that is calculated under Government Decree No. 724 of the Russian Federation of 26 September 2000. I would like to emphasize that we are talking only about compensation and not about fine. This Decree of the Government stipulates that compensation for one piece of sockeye salmon is set at 1,250 roubles, thus 6,342 pieces of sockeye salmon come to 7,927,500 roubles. The amount of this compensation is prescribed strictly by Russian legislation and cannot be reduced or increased in any circumstances.

For carrying out the expertise and other procedural actions 240,000 roubles was spent from the federal budget, the so-called administrative costs of this case. The costs with regard to the legal person in accordance with Article 24.7 of the Code on Administrative Offences of the Russian Federation are covered by the shipowner, the legal entity. This sum is also included in the calculated bond. The value of the illegal catch of living marine resources of 667,121.35 roubles and the processed catch produced from this illegal catch of 387,596.2 roubles is not included in the bond, as the illegal product was taken or removed from the vessel.

Thus, the total sum of the bond proposed by the Russian side is 25 million roubles. Let me point out once again that this sum is calculated on the basis of the criteria set out in the documents of the bilateral Russian-Japanese Fisheries Commission and reflects the amount of the eventual fines under Russian legislation and, in our view, correlates with the criteria set up by the Tribunal.

At the same time, in our opinion, the Tribunal in its conclusions should not limit the possibility of a respective national judicial body limiting in advance its powers to cover the fines established by the national legislation.

I would like to draw your attention to the following: the body which is in charge of investigation of this offence, the State Inspection, received a request to set the bond only on 18 July.

Distinguished President and members of the Tribunal, I thank you for your kind attention.

The President:
Thank you, Mr Monakhov.

Mr Zagaynov, you wanted to say something?

Mr Zagaynov:
Yes, thank you very much, Mr President. I want to clarify that the final amount of the bond proposed by the Russian Federation is 22 million roubles and not 25 million. Thank you.

The President:
That was well understood.

It is now the turn of Mr Golitsyn. We have scheduled a break at 11.45.

You can interrupt your statement whenever you believe it proper. I do not want to interrupt you.

STATEMENT OF MR GOLITSYN
COUNSEL OF THE RUSSIAN FEDERATION
[PV.07/02, E, p. 14–22]

Mr Golitsyn:
Mr President, distinguished Judges of the Tribunal, it is a great privilege and honour for me to appear before this Tribunal and to address legal issues arising in the *"Hoshinmaru" Case*.

The Applicant in its Application requests the Tribunal to do three things by way of judgment. Firstly, to declare that the Tribunal has jurisdiction under article 292 of the Convention to hear the application concerning the detention of the vessel and the crew of the *88th Hoshinmaru* in breach of the Respondent's obligations under article 73, paragraph 2, of the Convention. Secondly, to declare that the application is admissible, that the allegation of the Applicant is well-founded, and that the Respondent has breached its obligations under article 73, paragraph 2, of the Convention. Finally, to order the Respondent to release the vessel and the crew of the *Hoshinmaru* upon such terms and conditions as the Tribunal shall consider reasonable.

The Respondent, for its part, requests the Tribunal to decline to make these orders and to order: first, that the application of the Chair of Japan is inadmissible; and, secondly, alternatively, that the allegations of the Applicant are not well-founded and that the Russian Federation has fulfilled its obligations under paragraph 2 of article 73 of the United Nations Convention on the Law of the Sea.

In my observations I will try to address in a comprehensive way legal issues arising in the light of these requests. I will start with the crucial matter of whether the allegation of the Applicant is well-founded and whether there are any grounds to claim that there has been a breach of obligations by the Respondent under paragraph 2 of article 73 of the Convention. Paragraph 2 of article 73 of the Convention states that: "Arrested vessels and their crews shall be promptly released upon posting of reasonable bond or other security".

In paragraph 23 of the Statement in Response, the attention of the Tribunal is brought to the fact that a bond, the setting of which is required by paragraph 2 of article 73, was set by the Russian Federation on 13 July 2007.

The competent Japanese authorities and the owner of the vessel have been promptly informed about the setting of the bond, as well as about the concrete details regarding payment of the bond, including the bank account. Consequently, in this case we have to address two issues: namely, the time frame within which the bond was set and the issue of whether the bond is reasonable as required by the Convention.

I will first speak about the time frame for setting the bond. The Applicant alleges in paragraph 48 of its Application that "in order to be reasonable, a bond or other security must be set promptly". This assumption was reiterated by the Applicant during oral hearings yesterday.

The Applicant claimed yesterday that it follows from the Convention that in order for the vessel to be promptly released, the bond should also be set promptly. It was noticeable that while inventing the requirement of the prompt setting of the bond, the Applicant was silent on whether a bond or other security should be paid promptly, a conclusion which may be reached with sufficient certainty in analyzing the text of paragraph 2 of article 73.

The Respondent is of the view that the textual analysis of paragraph 2 of article 73 clearly shows that the Convention in this paragraph does not set any precise time limit for the setting of the bond or other security. We believe that the criteria relating to the setting of the bond should be distinguished from the criteria relating to the release of the arrested vessel.

The textual analysis of paragraph 2 of article 73 proves, in our view, without any doubt, that this paragraph is composed of two corresponding parts, and that the term

"prompt" relates only to the part which requires that the arrested vessel and its crew be released promptly.

The above conclusion is indirectly, in our view, confirmed by judgments in prompt release cases rendered by this distinguished Tribunal. Thus, in the *M/V "SAIGA" Case*, and I refer to paragraph 82 of the Judgment of 4 December 1997, the Tribunal, by stating that reasonableness includes "the amount, the nature and the form of the bond", put strong emphasis on economic aspects. Consequently, the requirement of promptness is attributable to the aspects of release.

An examination of decisions delivered by the Tribunal in connection with the prompt release procedures in our view confirms that the Tribunal has never considered that there is any precise time limit which is imposed by the Convention on the coastal States in the case of prompt release. I refer to the cases: *"Camouco", "Monte Conurco", "Grand Prince", "Volga"* and *"June Trader"*.

Distinguished Judges, while objecting to the invoking by the Applicant of the concept of promptness in respect of the time frame, the Respondent does not want to create an impression that it is of the view that the coastal State is not bound by any time considerations at all under paragraph 2 of article 73. What the Respondent wants to state is that the Convention is silent on this issue and that because of the absence of precise time requirements regarding the setting of the bond, the coastal State enjoys certain flexibility in this regard. The latter does not imply – and I would like to stress this – that this flexibility is unlimited. Quite the contrary: the Respondent recognizes that the bond should be fixed by a coastal State within a reasonable period of time and without undue delay.

However, it is understood that in order to set a reasonable bond, the competent authorities of a coastal State need to conduct an effective and thorough investigation of each case. The circumstances surrounding such investigations may differ as cases may differ from one another. For example, in order to set a reasonable bond, the coastal State should have access to all necessary information concerning the vessel and its activities. Such information should be provided by the owner of the vessel and its master. Any lack of cooperation in this regard may delay the process of setting the bond. Another consideration is the gravity of the offences. Offences which are of a grave nature usually require lengthy investigation, which may result in the delay of setting the bond.

I will now address the circumstances that affect the time frame in the *"Hoshinmaru" Case*. The Respondent strongly believes that in the *"Hoshinmaru" Case* the bond was set within a reasonable period of time. The circumstances that affected the setting of the bond in this case, *inter alia*, include the following.

In the *"Hoshinmaru" Case* we are dealing with the particularly grave violation of the applicable laws and regulations of the coastal State, as demonstrated in Chapter 1 of the Statement in Response and demonstrated by the previous speaker. The Statement of Response states that fish fixed in the vessel's logbook were substituted by different fish species. Under the upper cover of chum salmon, the sockeye salmon was hidden. The Master of the *Hoshinmaru* transmitted false daily information, vessel reports; intentionally registered and provided false information on actual catch; intentionally fixed false information in the logbook; and did not effectively control the fishing quota issues. The Master and the owner of the vessel did not fully cooperate with the Respondent's competent authorities. The Master of the vessel refused to keep the vessel safe and the Respondent's competent authorities had to find a company for its safekeeping – Kamchatka Logistik Center – to which the vessel was later transferred. All this proves that we are dealing in this case with grave offences.

In the oral hearing yesterday, the Applicant claimed that it takes all necessary measures to ensure proper compliance by its fishermen with the laws and regulations of coastal States in their exclusive economic zones, including the activities of the Japanese

fishermen in the Russian exclusive economic zone. However, there is an obvious disconnect between what was stated by the Applicant yesterday and the harsh reality.

As documented during the last two sessions of the Joint Russian-Japanese Commission established under the 1984 Agreement, which is acknowledged by Japan as a member of that Commission, we are witnessing a growing number of violations by Japanese fishermen in the Russian exclusive economic zone. The gravity of such offences is also rising.

In oral hearings yesterday, the Applicant, in addressing the question of the gravity of the alleged offences, brought the attention of this honourable Tribunal to the fact that the *Hoshinmaru* was not over-fishing and that it was not fishing unlicensed and that actually the amount of fish on board and the fish species correspond to the licence. Furthermore, the Applicant stated that the Master of the vessel was entitled to have all the fish that it had caught on board.

The Applicant concluded that if the Master did not exceed the licence limit and did not catch the fish prohibited to fish, no particular grave violation of the applicable laws and regulations of the coastal State took place.

The Applicant suggested that false information in the vessel's logbook and false daily reports, as well as substitution of one fish for another, does not constitute grave violation and does not lead to over-exploitation of living marine resources in the Respondent's exclusive economic zone.

In fact, however, it should be observed that the substitution of the more expensive fish by a cheaper fish in the vessel's logbook and false reporting may potentially lead to consequences that are even more grave than simple over-fishing.

Let us assume that the *Hoshinmaru* had not been inspected and detained on 1 June 2007. The Master of the vessel then reported that he caught a certain amount of cheap fish, although what he actually caught was expensive fish. That misrepresentation was intentional and was done by the Master with the obvious intention to over-fish the expensive fish during the licence period, a quota for which was allocated to this vessel under the licence. Stating it simply, let us assume that on 1 June the *Hoshinmaru* caught 20 tons of expensive fish and substituted it for cheap fish. It means that in the following days of the licence period the *Hoshinmaru* could catch 20 tons of expensive fish out of the quota.

Violation is violation, no matter what kind of explanation is provided for it, because there was a clear intention to commit crime by violating the laws and regulations of the coastal State.

It was also notable during the oral hearings that the Applicant deliberately picked up only one or two elements of the crime committed by the Master – for example, the substitution of expensive fish for cheap fish. At the same time, the Applicant sidestepped other offences that were committed by the Master (referred to above) which proves that the crimes committed by the Master were of a grave character.

Because of the gravity of the offences in the *"Hoshinmaru" Case*, the competent Russian authorities had to undertake a thorough and time-consuming examination during which they were required to determine the overall amount of the illegal catch, the amount of different fish species, the average weight of a single fish, and the average cost of fish species and illegal catch. This list is not exhaustive. The speaker before me addressed it in a more comprehensive way.

In the view of the Respondent, all the above observations prove without any doubt that the bond in the case of the *Hoshinmaru* was set within a reasonable period of time, without any undue delay, and that the Respondent has fully complied with its obligations under paragraph 2 of article 73 of the Convention.

I now address the issue of the reasonableness of the bond. As I stated earlier, another issue that arises from paragraph 2 of article 73 of the Convention is the reasonableness of a bond or other security. In that paragraph, the Convention clearly states that the bond or other security fixed by the coastal State in the case of prompt release should be reasonable.

As the Tribunal itself acknowledged in its judgments on the prompt release of vessels, the issue of the reasonableness of a bond is a complex one. There are various factors that need to be taken into account by the coastal State in setting a bond, and the Tribunal provided some guidance in this regard.

I know that the *"Camouco" Case* has been extensively and frequently cited in other pleadings and that the Respondent also makes reference to it in paragraph 53 of the Statement in Response. However, because of the importance of what was stated by the Tribunal in that case, I believe that it is worth repeating its provisions, as follows:

> "The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form." (Paragraph 67, Judgment of 7 February 2000)

In subsequent cases, the Tribunal provided further clarifications on the issue of factors that may be relevant to the assessment of the reasonableness of a bond by pointing out that the list of factors provided by it is not a complete list and that, which I emphasize, the exact weight of each factor depends on the particular case.

Of particular importance in this regard was a clarification provided by the Tribunal in the *"Volga" Case*, where, in paragraph 69 of its Judgment, the Tribunal stated, *inter alia*, as follows:

> "Among the factors to be considered in making the assessment are the penalties that may be imposed for the alleged offences under the laws of the Respondent. It is by reference to these penalties that the Tribunal may evaluate the gravity of the alleged offences."

As demonstrated in paragraphs 57 to 59 of the Statement in Response, while examining particular cases, the Tribunal placed emphasis on specific factors that played a significant role in assessing the reasonableness of a bond in those cases.

Gravity of damage caused by the arrested vessel to the living resources and to the marine environment has always been considered to be an important factor that plays a crucial role in assessing the reasonableness of a bond.

The Respondent strongly believes that in evaluating various factors affecting the setting of bonds, it should always be borne in mind that the setting of a bond under paragraph 2 of article 73 of the Convention in no way releases the owner of the arrested vessel from liability under the applicable laws and regulations of the coastal State for violations of those laws and regulations.

Consequently, as emphasized by the Respondent in paragraph 60 of its Statement in Response, in deciding on a reasonable bond or other security to be set by it, the coastal State should establish sufficient guarantees which are supposed to ensure proper implementation of any decision that may be taken upon completion of the pending judicial or other legal proceedings of the coastal State.

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, as highlighted yesterday by the Applicant, 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.

Thus, as highlighted in paragraph 62 of the Statement in Response, 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.

The setting of the bond therefore requires that the owner of the vessel and the flag State provide to the coastal State information that is accurate, adequate, contains no discrepancies and corresponds to the facts established following the detention of the arrested vessel.

It is the Respondent's view that in the *"Hoshinmaru" Case* the bond that has been established is reasonable and that it was set by taking into account all the factors that were relevant to this particular case and were of significant importance.

The previous speaker provided to the distinguished Judges detailed information on factors that affected the setting of the bond in the *"Hoshinmaru" Case* and the procedures that were meticulously observed by the competent Russian authorities in this case.

That concludes my observations on the time frame for the establishment of a bond or other security under paragraph 2 of article 73 and on the requirements relating to the reasonableness of a bond. I hope that these observations will persuade the distinguished Judges to find that the Respondent has complied fully with its obligations under paragraph 2 of article 73 of the Convention and that the Applicant's allegations are not well founded.

I would now like to refer to the Applicant's request that the Tribunal should order the release of the vessel upon such terms and conditions as the Tribunal considers reasonable. I refer to sub-paragraph 1(c) of the Application.

Before I make any comments on this issue, I would like to reiterate that, in the Respondent's view, the application is inadmissible and that the Applicant's allegations concerning the non-fulfilment by the Respondent of its obligations under paragraph 2 of article 73 of the Convention are not well founded.

In sub-paragraph 1(c), the Applicant requests the Tribunal "to order the Respondent to release the vessel and the crew of the 88th *Hoshinmaru* upon such terms and conditions as the Tribunal shall consider reasonable". In the Respondent's view, the Tribunal is actually requested by the Applicant to exercise functions that are not attributed to it by article 292 of the Convention.

As noted in paragraph 38 of the Statement in Response, according to the general rule of international litigation, reflected in paragraph 2 of article 54 of the Rules of the Tribunal, the application shall specify the precise nature of the claim. This requirement is essential from the point of view of legal security and good administration of justice.

It is obvious that the Tribunal, acting under article 292 of the Convention, does not have competence to determine in general terms the conditions upon which the arrested vessel should be released. As stated in paragraph 2 of article 113 of the Rules of the Tribunal, in cases when the Tribunal finds that the application for the release of an arrested vessel and its

crew is well founded, it has only to determine the amount, nature and form of the bond or other financial security to be posted for the release of the vessel or the crew. Consequently, the Tribunal is not requested to determine general conditions and terms that the Tribunal may consider reasonable.

The Statement in Response contains references to several judgments rendered by this distinguished Tribunal – the cases of the *"Juno Trader"*, the *M/V "SAIGA"*, the *"Camouco"* and the *"Volga"* – which confirm, in our view without any doubt, that in all those cases the Tribunal has determined not terms and general conditions but a reasonable bond or other financial security, upon the posting of which the vessel and its crew shall be promptly released.

Because of the shortness of time allocated to my presentation, I do not refer to those particular cases in detail, but information about them can be found in paragraphs 41 to 44 of the Statement in Response.

During the oral pleadings yesterday, the Applicant claimed that in its request under sub-paragraph 1(c) it had never intended to go beyond what is provided in article 292 of the Convention. However, in analyzing this request, we are not dealing with what Japan hypothetically had in mind, implied or dreamed about when it submitted it. We are dealing with what the request actually asks the Tribunal to do. In our view, there is no doubt that the request as formulated goes beyond what is provided for in article 292 of the Convention.

I now touch on the issue of jurisdiction. I would like to address the issue of the establishment of the jurisdiction of the Tribunal as it is presented in sub-paragraph 1(a) of the Application of Japan.

It is obvious that the first action that the Tribunal needs to take when it receives an application for the prompt release of a vessel is to satisfy itself that it has jurisdiction under article 292 of the Convention to adjudicate on the case. If one looks at the request addressed to the Tribunal by the Applicant in this regard, one will find that the Tribunal is requested to declare its jurisdiction under article 292 on the assumption that the Respondent is in breach of its obligations under paragraph 2 of article 73 of the Convention. This is a very unusual request.

We believe that in establishing its jurisdiction to adjudicate on the case, the Tribunal cannot and should not imply in advance that the allegations made by the Applicant regarding the non-compliance by the Respondent with the provisions of paragraph 2 of article 73 of the Convention are well grounded and therefore should be accepted. Therefore, the Respondent cannot agree, as stated in paragraph 28 of its Response, with the Applicant's request in sub-paragraph 1(a) of its Application.

I would now like to make some observations on what was stated yesterday during the oral proceedings. Quite a few observations were made yesterday by the Applicant that are questionable and require some comment. In my presentation I have chosen only some of them.

First, I would like to comment on the observation by which it was implied that the Russian Federation lacks proper procedures to meet some of its obligations under international law in relation to the prompt release procedures defined in paragraph 2 of article 73 of the Convention. The Respondent cannot agree with this observation, because it is not accurate. The Russian Federation does have proper procedures that allow it to take all the necessary actions in the light of the obligations contained in paragraph 2 of article 73 of the Convention.

These procedures have been effectively applied over the years, and the fact that the Applicant decided to bring the case to the Tribunal under the prompt release procedures in no way may be used as a justification to make a claim that the Russian Federation does not have proper procedures.

Secondly, it was also claimed that the Russian criminal and administrative procedures applied in prompt release cases are confusing and complicate the implementation of paragraph 2 of article 73 of the Convention.

In that regard, it should be observed that a lack of understanding of these procedures, which is evident from what is stated on this issue in the Application, could not serve as a justification for this kind of statement. If it has any doubts or questions regarding the application of these procedures, Japan should either seek better advice on these procedures or consult more with the competent Russian authorities.

As was explained by the previous speaker, the Russian Federation does have clearly defined procedures that allow it to meet all the requirements of paragraph 2 of article 73 of the Convention, and that has been confirmed by the effective application of these procedures over the years without any complaint.

Thirdly, yesterday it was claimed by the Applicant that the speedy reaction of the Russian authorities in establishing the bond is contrary to the usual practices of the Russian competent authorities in similar cases and is provoked by the filing by the Applicant of its Application before this Tribunal. This statement again is incorrect, because it is pure coincidence that the bond was established shortly after Japan filed its Application to the Tribunal.

The procedures that led to the establishment of the bond were in the final stages, which were in no way related to the submission of the Application, and the Japanese side was pretty well aware of that. We believe that the Japanese side rushed the submission of its Application to create the impression that the setting of the bond by the Russian side was motivated by the filing of the Application.

I come now to my concluding remarks. I believe that the distinguished Judges are well aware that in the two cases currently before the Tribunal, the Respondent has found itself in an extremely difficult situation. Within a very short period of time, which was slightly more than a week, the Respondent has been requested to prepare responses and written statements for oral proceedings before the Tribunal in two distinct cases in a comprehensive manner. If the Respondent had been given reasonable and sufficient time to prepare its observations, that would have allowed the Respondent to cover the issues arising out of these cases more extensively. We therefore seek the indulgence and understanding of the Tribunal in this regard.

Thank you for your kind attention.

The President:

Thank you very much indeed, Mr Golitsyn.

That brings us to the end of this sitting. As agreed, the sitting will be resumed at 3 o'clock this afternoon, when the representatives of the parties will present their second round of submissions.

The sitting is now closed.

(The sitting closes at 11.50 a.m.)

PUBLIC SITTING HELD ON 20 JULY 2007, 3.00 P.M.

Tribunal

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

For Japan: [See sitting of 19 July 2007, 3.00 p.m.]

For the Russian Federation: [See sitting of 19 July 2007, 3.00 p.m.]

AUDIENCE PUBLIQUE DU 20 JUILLET 2007, 15 H 00

Tribunal

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

Pour le Japon : [Voir l'audience du 19 juillet 2007, 15 h 00]

Pour la Fédération de Russie : [Voir l'audience du 19 juillet 2007, 15 h 00]

The President:
This session will be devoted to the second round of submissions by both parties, beginning with the Applicant. Before inviting the Agent of Japan to commence his statement, I would like to state that, following consultation with the Agents of the parties, it has been decided that each party will present its final submissions in this case, namely Case No. 14, at a sitting of the Tribunal to be held on Monday, 23 July 2007.

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

Mr Komatsu:
Thank you, Mr President. I would like to invite first our advocate, Professor Hamamoto.

The President:
Professor Hamamoto, please take the floor. I have understood that you will speak for roughly 20 minutes. Thank you very much indeed.

Réplique du Japon

EXPOSÉ DE M. HAMAMOTO
AVOCAT DU JAPON
[PV.07/03, F, p. 1–5]

M. Hamamoto :
Monsieur le Président, membres distingués et éminents du Tribunal, je ressens comme un grand honneur la charge que le Gouvernement du Japon m'a confiée de m'adresser à vous aujourd'hui au nom du Japon.

La tâche qui m'appartient se divise en deux parties :

- d'abord, il n'est pas exact, contrairement à ce que prétend la partie défenderesse, que le Gouvernement japonais n'ait rien fait pour respecter les lois et réglementations locales applicables dans la zone économique exclusive russe;

- il n'est pas exact non plus que le Gouvernement japonais ait donné son consentement, même implicite, à la méthode de calcul de la caution de la prompte mainlevée qui comprendrait le prix du navire.

Je commence par aborder la première question.

Le défendeur soutient, dans son exposé de ce matin, que le Japon n'a rien fait pour empêcher les pêcheurs japonais et les propriétaires des navires de pêche japonais d'enfreindre les lois et les réglementations russes. Le Japon laisse les pêcheurs japonais violer les lois et règlementations russes, selon la partie défenderesse.

Monsieur le Président, cette allégation ne reflète pas la réalité. Le Gouvernement japonais, loin d'être désintéressé en la matière, s'efforce ardemment pour que les pêcheurs japonais respectent minutieusement les lois locales lorsqu'ils pêchent dans les zones économiques exclusives d'autres pays. Comme l'a fait remarquer l'agent du Gouvernement japonais à la fin de son exposé d'hier après-midi,

> « le Japon, en tant qu'Etat pratiquant la pêche de façon responsable, a récemment renforcé ses instructions auprès des industries de la pêche afin de réduire au minimum » – je répète : au minimum – « le risque qu'elles ne pêchent en violant les conditions autorisées au lieu d'assurer l'utilisation durable des ressources vivantes de la mer ».

Monsieur le Président, en ce qui concerne les pêcheurs japonais qui partent pour la zone économique exclusive de la Fédération de Russie, le Gouvernement japonais ne cesse de leur rappeler l'importance de la question et de leur adresser les communications officielles pour qu'ils respectent les lois et règlementations russes.

En 2007, cette année donc, par exemple, l'Agence des pêcheries japonaise a notifié aux industries de pêche une communication, datée du 8 juin 2007, disant que les industries japonaises devaient respecter les lois et réglementations locales en matière de pêcherie. L'Agence des pêcheries a ensuite organisé, le 14 juin 2007, une conférence avec les pêcheurs japonais partant pour la zone économique exclusive de la Russie au cours de laquelle elle a bien réaffirmé l'importance de respecter minutieusement les lois et réglementations locales.
Ces mesures japonaises ne restent pas un chiffon de papier. Les navires de pêche japonais qui partent pour les zones économiques exclusives d'autres pays sont obligés, par une loi japonaise en matière de pêche, d'obtenir, avant de partir d'un port japonais, une autorisation de la part du Gouvernement japonais. Dans l'attestation de cette autorisation gouvernementale, il est précisé que les pêcheurs japonais, destinataires de cette autorisation, doivent respecter et suivre les lois et règlementations locales applicables dans les zones

économiques exclusives dans lesquelles ils pêchent. Et si le Gouvernement japonais constate qu'il y a une violation de cette stipulation par un navire de pêche japonais, c'est-à-dire s'il constate qu'un navire japonais a enfreint des lois et des réglementations locales applicables, le Gouvernement ne manque pas d'interroger les pêcheurs concernés, et si la preuve suffisante indique avec certitude que ces pêcheurs ont, en effet, violé des lois et réglementations locales, les sanctions administratives s'imposent : il sera interdit à ces pêcheurs de partir pour la pêche pendant une certaine période et ils sont obligés de rester dans un port japonais pendant cette période.

Il est certain que le Gouvernement japonais prend ainsi les mesures nécessaires pour que ces pêcheurs respectent les lois et réglementations locales applicables. Le Gouvernement japonais souhaite profiter de cette occasion de manifester devant cette haute juridiction du droit de la mer sa sincère volonté de continuer de s'efforcer à faire respecter à ses pêcheurs les lois et règlementations locales.

Il résulte des mesures qu'a prises le Gouvernement japonais de manière continue qu'il est impossible – je répète : impossible ! – de dire que le Gouvernement japonais n'a rien fait pour empêcher les industries de pêche japonaise de méconnaître les lois et règlementations locales applicables dans les zones économiques exclusives des autres pays et, notamment, celle de la Fédération de Russie.

Dans ce contexte, je vous prie de me permettre, Monsieur le Président, de dire un mot à l'égard des amendes imposées par les autorités russes qui restent impayées par les pêcheurs japonais. Nous prenons ce problème très au sérieux et nous prenons toutes mesures possibles. Mais il faut faire remarquer qu'il existe des cas dans lesquels les pêcheurs concernés sont déclarés en état de faillite. Au pire des cas, il arrive que les pêcheurs concernés soient décédés. Dans de tels cas, il est impossible, juridiquement, de récupérer les amendes : il n'y a pas de moyens juridiques. Le Gouvernement japonais s'efforcera, bien sûr, de régler de tels problèmes. Je voudrais souligner, Monsieur le Président, Messieurs les juges, que la délégation de la Fédération de Russie a dit qu'elle appréciait les efforts faits par le Gouvernement japonais pour résoudre cette question des amendes impayées, dans une conférence l'an dernier, en 2006.

Alors j'en viens à la deuxième partie de mon exposé. La partie défenderesse soutient également que la Russie a proposé, au cours de conférences bilatérales entre la Russie et le Japon, une procédure applicable en matière de prompte mainlevée. Cette procédure contient une méthode de calcul de la caution nécessaire pour la prompte mainlevée. Il s'agit, bien sûr, du document que la partie défenderesse soumet auprès de vous dans son annexe 17. Selon la partie défenderesse, ce document indique que la caution doit comprendre le prix du navire en question. Et le Japon, poursuit la partie défenderesse, ne s'est pas opposé à cette procédure. Ce manque d'opposition, le silence, entraîne l'acquiescement de la part du Japon, selon la Fédération de Russie.

Monsieur le Président, nous ne partageons pas cette manière de voir. Le problème est une différence possible, éventuelle, entre le texte japonais et le texte russe de ce document. Selon la version japonaise, ce qui doit être compris dans la caution, c'est le prix du « *gyogu* » en japonais. Le « *gyogu* », en japonais, veut dire les instruments et les outils pour la pêche, et il ne contient pas le navire. Donc, selon le texte japonais, le prix du navire ne sera pas compris dans la caution nécessaire pour la prompte mainlevée.

Il paraît que la partie défenderesse soutient que le texte russe indique que le prix du navire doit être compris dans la caution pour la prompte mainlevée. Il est important, Monsieur le Président, de faire remarquer clairement dans ce contexte que le texte en question est rédigé en russe et en japonais et que le texte anglais, contenu dans l'annexe 17, présenté par la partie défenderesse, n'est qu'une simple traduction faite par la Russie. Le Gouvernement japonais affirme ne pas avoir donné son consentement à cette traduction

anglaise. Il peut donc y avoir une différence entre les deux versions, japonaise et russe. Laquelle doit être prise en compte par le Tribunal ?

Monsieur le Président, nous souhaitons attirer votre attention sur le fait qu'il existe des notes ajoutées à ce document en question. Une de ces notes dit que cette procédure, cette méthode de calcul de la caution, n'est applicable qu'à des cas de violations relativement mineures dont les amendes ne dépassent pas 100 000 dollars des Etats-Unis. Cette note correspond à la note 2 contenue dans l'annexe 17 présentée par la partie défenderesse. Mais il faut que je vous signale, Monsieur le Président et Messieurs les juges, que la traduction anglaise fournie par la partie défenderesse ne correspond en fait ni au texte japonais ni au texte russe. Le Gouvernement japonais est prêt à vous soumettre le texte japonais à un stade ultérieur, s'il est permis.

En tout cas, il est certain que cette méthode de calcul, montrée dans le document à l'annexe 17 présenté par la partie défenderesse, ne s'applique qu'aux cas de violations mineures dont les amendes ne dépassent pas 100 000 dollars des Etats-Unis. En effet, jusqu'à présent, en pratique, cette méthode n'est appliquée qu'à de tels cas, c'est-à-dire qu'aux amendes de moins de 100 000 dollars des Etats-Unis.

Monsieur le Président, comment est-il possible de considérer qu'une amende d'un montant de 100 000 dollars des Etats-Unis, le maximum des amendes, comprenne le prix du navire ? Il est absolument impossible de trouver un navire de pêche qui part dans la zone économique exclusive de la Russie et qui ne coûte que 100 000 dollars des Etats-Unis. C'est purement et simplement irréaliste. Il s'ensuit logiquement que cette procédure, cette méthode de calcul ne comprend pas le prix du navire. Il est ainsi clair que le Gouvernement japonais n'a jamais manifesté son consentement à ce que le prix du navire soit compris dans la caution pour la prompte mainlevée.

Monsieur le Président, j'ai ainsi terminé.

The President:

Thank you, Mr Hamamoto, for your statement. I take it that you will produce the text to which you have referred directly, within this afternoon, please. Thank you.

Professor Lowe, please.

STATEMENT OF MR LOWE
ADVOCATE OF JAPAN
[PV.07/03, E, p. 4–8]

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

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

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

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

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

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

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

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

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

The level of the bond cannot reflect the gravity of the offence if all bonds are set at the highest level. They can only reflect the gravity of the offence if the bonds for lesser offences are lower than the bonds for grave offences. But this is not a smooth curve with a level of bond set as if it were on a graph with the gravity of the offence measured against the size of the bond and the two going up in a smooth line. There is a kink in the curve. At some point we say that an offence becomes so serious that it is not enough to add on another 1,000 roubles to the fine, or add on another 1,000 roubles in compensation for environmental damage. At some stage, a completely new factor is triggered, and we say that the offence becomes so grave that the confiscation of the ship becomes a real possibility. At that point, there is not another *incremental* change in the bond; the *whole* value of the ship is suddenly attached into the bond, a value measured not in hundreds or thousands of roubles but in millions of roubles. It is a quantum leap, a discontinuity in the curve, which we regard as being a point of the utmost seriousness.

There are certainly cases where it is justified. We recognize that over-fishing is not simply a case of taking a few extra tonnes of fish. If it is allowed to proceed without any check, it carries the risk of severe damage to valuable and essential natural resources. But not every infringement of fishing laws is a threat on that scale. Certainly all infringements deserve to be punished, but they deserve a punishment that is proportionate to the crime. That is, for us, a very important principle. Its acceptance is, we believe, essential to the development of an effective system for policing fisheries and balancing coastal and flag State rights. We hope that the Tribunal will be able to indicate its thinking on this question in its decision in this case.

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

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

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

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

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

Therefore, we say that the assumption that the *Hoshinmaru* will be confiscated is not justified and is unreasonable.

We were disappointed that the Respondent did not give details of penalties that have been imposed in practice in similar cases. However, shortly you will see the papers for the *"Tomimaru" Case*, which contain details of arrests of Japanese vessels for what appear to be graver offences, including illegal fishing and the catching of prohibited species, and Russia did not confiscate all of those vessels. Some of those vessels were released without the payment of a bond to cover the value of the vessel. So, why is the *Hoshinmaru* so different?

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

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

You have not seen the Master of the *Hoshinmaru*; you have not heard his side of the story. You have heard Mr Monakhov explaining Russia's side, perhaps straying a little beyond the role of an advocate and into that of a witness. The Applicant has not had the opportunity to challenge any of that evidence, and it must not be thought that we necessarily accept all the assertions on matters of fact that he made; but we can put that aside. In all prompt release cases the Tribunal will be in this position. We submit that it has no practical alternative than to base its decisions on the undisputed facts that are laid before it, which means basing its decision on the charges that have actually been made against the Defendant

and the likely outcome of those charges, not on the basis of suggestions about things that the Defendant might have gone on to do if it had had the opportunity.

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

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

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

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

The President:
Thank you very much, Professor Lowe.

As agreed during the consultations, the sitting will now be suspended until 6 p.m., when we will hear the Respondent. The sitting is suspended.

(Short adjournment)

The President:
Good afternoon. As indicated earlier, we resume the suspended sitting and I now turn to the representative of the Respondent to take the floor or at least to indicate how you wish to divide your time.

Mr Zagaynov:
Thank you, Mr President, with your indulgence, I would kindly request you to invite Professor Golitsyn to present the rejoinder on behalf of the Respondent.

The President:
Thank you.

Professor Golitsyn, would you please take the floor?

Rejoinder of the Russian Federation

STATEMENT OF MR GOLITSYN
COUNSEL OF THE RUSSIAN FEDERATION
[PV.07/03, E, p. 8–11]

Mr Golitsyn:
Mr President, distinguished Judges, first I would like to address the issue of the Russian-Japanese cooperation in combating illegal fishing, which was raised by the Applicant this afternoon.

The Russian Federation has never accused our Japanese partners of non-cooperation in fishery matters. On the contrary, this morning it was explicitly pointed out in our presentation that we have a long history of such cooperation with Japan. In the spirit of this cooperation, we repeatedly expressed to the Japanese side our readiness to settle any problems, including the present dispute, by bilateral negotiations or consultations. However, the Applicant preferred to refer to the judicial means of settlement.

What we say, however, is that the Japanese side does not fully comply with its obligations under international law, including paragraph 1 of Article 4 of the 1984 Russian-Japanese Agreement in the field of fisheries off the coasts of the two countries. Pursuant to the provisions of this agreement, each contracted party has to take all the necessary measures to ensure that its nationals and fishing vessels conducting fisheries in the zone of the other party observe measures for the conservation of the living resources and other provisions and conditions established by the laws and regulations of that party.

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

As for the allegation of the Japanese side that they have never agreed with the criteria established by the Russian side for calculating the amount of a bond in case of the detention of Japanese fishing vessels in the Russian exclusive economic zone, we would like to note the following. All the documents of the Joint Commissions are always discussed in detail in the course of their sessions. Protocols of such sessions are submitted for signature to the representatives of the two countries only after the text of the protocol, its annexes, and other documents related to them, clarifying their provisions, have been discussed and all possible disagreements have been resolved through bilateral consultations.

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

Concerning the inconsistency between the Russian and Japanese texts of the relevant annexes, it is worth mentioning that indeed, according to the protocols, only two languages are used by the Joint Commissions and there is no official text in English. As these annexes contain the rules established by the Russian authorities, however, it is obvious that the original text is Russian and that the Japanese text is purely its translation. Therefore, the Russian text should be used for the purposes of the interpretation of that particular annex.

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

As for the limit of 100,000 dollars, it is precisely when the potential fine exceeds this limit that the criteria set out in the relevant annexes to the protocols of the Joint Commission should apply.

Turning now to the legal arguments presented this afternoon, we would like to state the following. We share what was stated by Professor Lowe on the issue of the time frame. We agree that although the two parties differ on the question of terminology regarding the issue of the time frame for the setting of a bond or other security, the parties are actually in agreement, or at least their approaches to this issue are not so different. It appears that both the Russian Federation and Japan proceed on the understanding that paragraph 2 of article 73 of the Convention requires that a reasonable bond or other security should be set without undue delay within a reasonable period of time. Therefore, the crucial issue remains the reasonableness of the bond.

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

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

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

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

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

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

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

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

Thank you for your kind attention.

The President:
Thank you, Professor Golitsyn. Mr Zagaynov, I presume this ends the presentation from your delegation?

Mr Zagaynov:
That is right, Mr President.

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

That brings us to the end of this sitting. The Tribunal will resume the oral proceedings on 23 July 2007. At that sitting each party will present to the Tribunal its final submissions in accordance with article 75, paragraph 2, of the Rules.

The Tribunal's sitting is now closed.

(The sitting closes at 6.15 p.m.)

PUBLIC SITTING HELD ON 23 JULY 2007, 1.50 P.M.

Tribunal

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

For Japan: [See sitting of 19 July 2007, 3.00 p.m.]

For the Russian Federation: [See sitting of 19 July 2007, 3.00 p.m.]

AUDIENCE PUBLIQUE DU 23 JUILLET 2007, 13 H 50

Tribunal

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

Pour le Japon : [Voir l'audience du 19 juillet 2007, 15 h 00]

Pour la Fédération de Russie : [Voir l'audience du 19 juillet 2007, 15 h 00]

The President:

As indicated earlier, we will now resume the oral proceedings in the *"Hoshinmaru" Case*.

Following consultations with the Agents of the parties, it was decided that each party will present its final submissions today.

I now give the floor to Mr Komatsu, Agent for the Government of Japan, to read Japan's final submissions.

Reply of Japan (continued)

STATEMENT OF MR KOMATSU
AGENT OF JAPAN
[PV.07/08, E, p. 1]

Mr Komatsu:
Thank you, Mr President. I will now read out the final submissions of Japan with regard to the *88th Hoshinmaru* 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 of the *88th Hoshinmaru* (hereinafter "*the Hoshinmaru*") in breach of the Respondent's obligations under Article 73(2) of the Convention;

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

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

Thank you, Sir.

The President:
Thank you, Mr Komatsu.

I now call upon the Agent for the Government of the Russian Federation, Mr Zagaynov.

Please read the submissions.

Rejoinder of the Russian Federation (continued)

STATEMENT OF MR ZAGAYNOV
AGENT OF THE RUSSIAN FEDERATION
[PV.07/08, E, p. 1]

Mr Zagaynov:
Thank you, Mr President. The final submissions of the Russian Federation are as follows.

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

(a) that the Application of Japan is inadmissible;

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

Thank you, Mr President.

The President:
Thank you, Mr Zagaynov.

I would like to remind the parties that their final submissions have to be signed and submitted in writing, if you have not already done so, to the Tribunal and transmitted to the other party in accordance with article 75, paragraph 2, of the Rules.

Closure of the Oral Proceedings
[PV.07/08, E, p. 1–2]

The President:
I have already expressed my gratitude to both parties for their professional competence and I will not reiterate my words, but my gratitude is the same as in the previous case.

The Registrar will now address questions in relation to documentation.

The Registrar:
Mr President, in conformity with article 86, paragraph 4, of the Rules, the parties have the right to correct the transcripts in the original language of the presentations and statements made by them in the oral proceedings. Any such corrections should be submitted as soon as possible but in any case not later than 6 p.m. on 24 July 2007.

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

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

Thank you, Mr President.

The President:
Thank you.

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

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

This hearing is now closed.

(*The hearing closes at 2 p.m.*)

PUBLIC SITTING HELD ON 6 AUGUST 2007, 2.00 P.M.

Tribunal

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

For Japan:

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

as Agent.

For the Russian Federation:

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

as Co-Agent.

AUDIENCE PUBLIQUE DU 6 AOÛT 2007, 14 H 00

Tribunal

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

Pour le Japon :

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

comme agent.

Pour la Fédération de Russie :

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

comme co-agent.

Reading of the Judgment
[PV.07/09, E, p. 1]

The Registrar:
The Tribunal will today deliver its Judgment in the *"Hoshinmaru" Case*, Application for Prompt Release, Case No. 14 on the List of cases, Japan, Applicant, and the Russian Federation, Respondent. The Tribunal heard oral arguments from the parties at four public sittings on 19, 20 and 23 July 2007.

Mr President.

The President:
I now call on the Agent of Japan, Mr Ichiro Komatsu, to note the representation of Japan.

Mr Komatsu:
[notes the appearance of the members of the delegation of Japan]

The President:
Thank you very much indeed, Mr Komatsu, that you took the long trip to participate in the reading of the Judgment.

I now call on Mr Sergey Ganzha, Co-Agent for the Russian Federation, to note the representation of the Russian Federation.

Mr Ganzha:
[notes the appearance of the members of the delegation of the Russian Federation]

The President:
Thank you, Mr Ganzha.

I will now read the relevant parts from the Judgment in the *"Hoshimaru" Case*. The case has already been introduced by the Registrar.

[*The President reads the extracts.*]

The sitting is now closed.

(*The sitting is closed at 2.45 p.m.*)

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

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

Le 25 mars 2010
25 March 2010

Le Président
José Luís Jesus
President

Le Greffier
Philippe Gautier
Registrar