INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



STATEMENT BY

H.E. JUDGE VLADIMIR GOLITSYN

PRESIDENT OF THE

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ON

AGENDA ITEM 79 (a) "OCEANS AND THE LAW OF THE SEA"

AT

THE PLENARY OF THE SEVENTIETH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

8 DECEMBER 2015

Mr President,

Ladies and Gentlemen,

It is a great honour for me, on behalf of the International Tribunal for the Law of the Sea, to address the General Assembly this year, which marks the seventieth anniversary of the United Nations. On this eminent occasion, I wish to convey to you, Mr President, my congratulations on your election as President of the General Assembly and wish you every success in the performance of your mandate.

I am grateful for the opportunity afforded me to make a statement during the General Assembly's consideration of the agenda item "Oceans and the law of the sea". In my statement today, I will first address matters concerning the organization of the Tribunal. I will then consider the contribution made by the Tribunal to the peaceful settlement of disputes relating to the law of the sea, focusing on its most recent decisions.

As regards organizational matters, I wish to inform you that Judge Vicente Marotta Rangel from Brazil resigned as a member of the Tribunal on 18 May 2015. His resignation has created a vacancy on the bench of the Tribunal for the remainder of his nine-year term, ending on 30 September 2017. On 1 October 2015, the Registrar of the Tribunal circulated a note verbale announcing that the election to fill the vacancy for the remainder of the term would be held on 15 January 2016. I will also mention that the documents concerning the election have been circulated to States Parties as documents of the meetings of States Parties to the United Nations

Convention on the Law of the Sea, which I will refer to from now on as the "Convention".

Allow me to take this opportunity to pay tribute to Judge Marotta Rangel, who was a judge from the Tribunal's inception in October 1996. During his term of office of almost nineteen years, he made much-appreciated contributions to the work of the Tribunal. We will miss Judge Marotta Rangel both as a colleague and a friend.

Mr President,

Ladies and gentlemen,

The Tribunal's judicial activity continued to increase in 2015. On 2 April 2015, the Tribunal delivered its first advisory opinion; this was in a case concerning illegal, unreported and unregulated fishing, which is known as IUU fishing. In addition, on 25 April 2015, the Special Chamber of the Tribunal formed to deal with the dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean adopted an order prescribing provisional measures. Finally, on 24 August 2015, the Tribunal issued an order prescribing provisional measures in respect of the dispute between Italy and India concerning the *Enrica Lexie* incident. Through these decisions, the Tribunal made further contributions to the peaceful settlement of disputes and the development of the law of the sea. I will now speak briefly about each of these cases.

As indicated in my statement to the General Assembly last year, the Sub-Regional Fisheries Commission, known by its initials "SRFC", a regional fisheries

organization comprising seven States in West Africa, namely, Cabo Verde, Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone, submitted a Request for an advisory opinion to the Tribunal in March 2013. In its Request, the SRFC posed four questions to the Tribunal concerning IUU fishing, to which the Tribunal provided answers in its Advisory Opinion of 2 April 2015.

In the first question, the Tribunal was requested to determine the "*obligations* of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zones of third party States". The Tribunal first clarified the scope of application of this question by stating that it related to the obligations of flag States not members of the SRFC "where vessels flying their flag are engaged in IUU fishing within the exclusive economic zone of SRFC Member States".¹ The Tribunal underlined that, under the Convention, "responsibility for the conservation and management of living resources in the exclusive economic zone rests with the coastal State"², which therefore has "the primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing".³ It emphasized, however, that this responsibility of the coastal State "does not release other States from their obligations in this regard".⁴

The Tribunal then turned its attention to the issue of flag State responsibility for IUU fishing, noting that this matter was not directly addressed in the Convention. It therefore proceeded to examine the relevant provisions of the Convention dealing with flag State obligations in the context of the conservation and management of

¹ Case 21, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of the Tribunal of 2 April 2015, paragraph 89.

² *Ibid.*, paragraphs 101 and 104.

³ *Ibid.*, paragraph 106.

⁴ *Ibid.*, paragraph108.

living resources.⁵ The Tribunal found that flag States have the specific duty "to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities".⁶ It further explained that, pursuant to articles 58, paragraph 3, and 62, paragraph 4, of the Convention, "the flag State has 'the responsibility to ensure' ... compliance by vessels flying its flag with the laws and regulations concerning conservation measures adopted by the coastal State".⁷ In order to meet this responsibility, the flag State must take the necessary measures, including those of enforcement, as well as effectively exercise its jurisdiction and control in "administrative, technical and social matters" over ships flying its flag in accordance with article 94, paragraph 1, of the Convention.⁸

On the subjects of the meaning of the expression "responsibility to ensure" and the interrelationship between the notions of obligations "of due diligence" and obligations "of conduct", the Tribunal applied the clarifications given by the Seabed Disputes Chamber in its Advisory Opinion on the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.*⁹ In this regard, it concluded that the obligation of a flag State to ensure that vessels flying its flag are not involved in IUU fishing is an obligation "of conduct", which is a "due diligence obligation", not an obligation "of result".¹⁰

The second question before the Tribunal concerned the liability of the flag State for IUU fishing activities conducted by vessels flying its flag. To respond to this

⁵ *Ibid.*, paragraph 110.

⁶ Ibid., paragraph 124.

⁷ Ibid., paragraph 127.

⁸ *Ibid.*, paragraphs 127 and 134.

⁹ *Ibid*., paragraph 125.

¹⁰ *Ibid.*, paragraph 129.

question, the Tribunal found guidance in the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts, observing that articles 1, 2 and 31, paragraph 1, thereof were the rules of general international law relevant to the second question.¹¹

Capitalizing on the approach taken by the Seabed Disputes Chamber in its first advisory opinion, the Tribunal concluded that

the liability of the flag State does not arise from a failure of vessels flying its flag to comply with the laws and regulations of the SRFC Member States concerning IUU fishing activities in their exclusive economic zones, as the violation of such laws and regulations by vessels is not *per se* attributable to the flag State.¹²

The Tribunal clarified that the liability of the flag State arises from its failure to comply with its "due diligence" obligations concerning IUU fishing activities conducted by vessels flying its flag in the exclusive economic zones of the SRFC Member States.¹³ The Tribunal underlined that the flag State is not liable if it has taken all necessary and appropriate measures to meet its "due diligence" obligations.¹⁴

In the third question, the Tribunal was requested to assess whether, in the case of a fishing license issued to a vessel within the framework of an international agreement with an international agency (or a flag State), the international agency (or

¹¹ *Ibid.*, paragraph 144.

¹² *Ibid.*, paragraph 146.

¹³ *Ibid.*, paragraph 146.

¹⁴ *Ibid.*, paragraph 148.

the flag State) would be liable for the violation of the fisheries legislation of the coastal State by the vessel in question. The Tribunal observed that the question involved the issue of liability of international organizations and that the organizations concerned were those to which their member States had transferred competence in matters concerning fisheries.¹⁵ In the case before it, the organization in question was the European Union.¹⁶

The Tribunal was of the view that in cases where such an organization concludes a fisheries access agreement with an SRFC Member State, which provides for access by vessels flying the flag of a member State of that organization to fish in the exclusive economic zone of the SRFC Member State, "the obligations of the flag State become the obligations of the international organization".¹⁷ Therefore, the organization is required to ensure "that vessels flying the flag of a member State and do not conduct IUU fishing activities within the exclusive economic zone of that State".¹⁸ According to the Tribunal, only the international organization may be held liable for breach of its obligations and not its member States. Therefore, if the international organization liable for the violation.¹⁹

In response to the fourth question, which related to the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, the Tribunal enumerated a number of obligations borne

¹⁵ *Ibid.*, paragraphs 156 and 157.

¹⁶ *Ibid.*, paragraph 157.

¹⁷ *Ibid.*, paragraph 172.

¹⁸ Ibid., paragraph 172.

¹⁹ Ibid., paragraph 173.

by the SRFC Member States, in particular: the obligation to cooperate with the competent international organizations to ensure through proper conservation and management measures that the maintenance of the shared stocks in the exclusive economic zone is not endangered by over-exploitation; the obligation to "seek ... to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks"; and, in relation to tuna species, the obligation to cooperate directly or through the SRFC with a view to ensuring conservation and promoting the objective of optimum utilization of such species in their exclusive economic zones.²⁰

I wish to point out that in its Advisory Opinion the Tribunal provided important clarification on matters which are not directly addressed in the Convention, for instance, the issue of flag State obligations and flag State liability in relation to IUU fishing activities. While it is true that the Advisory Opinion was limited to the exclusive economic zones of the SRFC Member States,²¹ it may also be of value to those seeking legal guidance in pursuing their efforts to deter IUU fishing.

Mr President,

Ladies and gentlemen,

Other examples of important pronouncements made by the Tribunal can be found in two recent decisions on requests for the prescription of provisional measures.

²⁰ *Ibid.*, paragraph 207.

²¹ *Ibid.*, paragraph 69.

I will first address the Request for the prescription of provisional measures filed by Côte d'Ivoire on 27 February 2015 in the case concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean. This case is pending before a special chamber of the Tribunal. In this regard, allow me to recall that, further to consultations which I held in December 2014 with representatives of Ghana and Côte d'Ivoire, the Parties concluded a special agreement to submit their dispute to a special chamber constituted pursuant to article 15, paragraph 2, of the Statute of the Tribunal. Following my consultations with the Parties, the Tribunal, by Order of 12 January 2015, formed the Special Chamber, which is made up of five judges, including two judges *ad hoc*, one chosen by Ghana and one by Côte d'Ivoire.

In its Request, Côte d'Ivoire asked the Special Chamber to prescribe provisional measures requiring Ghana to *inter alia* "take all steps to suspend all ongoing oil exploration and exploitation operations in the disputed area".²² Ghana requested the Special Chamber to deny all of Côte d'Ivoire's requests for provisional measures.²³ The Special Chamber delivered its Order on 25 April 2015.

In its Order, the Special Chamber observed that it "may not prescribe provisional measures unless it finds that there is 'a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute".²⁴ Concerning the rights which Côte d'Ivoire claimed on the merits and sought to protect, the Special Chamber stated that, before prescribing provisional measures, it

²³ *Ibid.*, paragraph 26.

²² Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Request for the prescription of provisional measures, Order of the Special Chamber of 25 April 2015, paragraph 25.

²⁴ *Ibid.*, paragraph 41.

need only satisfy itself that these rights are "at least plausible",²⁵ and concluded that Côte d'Ivoire had presented enough material to show that those rights in the disputed area were plausible.²⁶

After indicating that the risk of serious harm to the marine environment was of great concern to it,²⁷ the Special Chamber emphasized that the Parties should in the circumstances "act with prudence and caution to prevent serious harm to the marine environment".²⁸ It also considered that "there is a risk of irreparable prejudice where, in particular, activities result in significant and permanent modification of the physical character of the area in dispute and where such modification cannot be fully compensated by financial reparations"²⁹ and that "whatever its nature, any compensation awarded would never be able to restore the *status quo ante* in respect of the seabed and subsoil".³⁰ The Special Chamber therefore found that "the exploration and exploitation activities, as planned by Ghana, may cause irreparable prejudice to the sovereign and exclusive rights invoked by Côte d'Ivoire in the continental shelf and superjacent waters of the disputed area, before a decision on the merits is given by [it], and that the risk of such prejudice is imminent".³¹

The Special Chamber noted that it may prescribe measures different in whole or in part from those requested.³² In this regard, it stated that "the suspension of ongoing activities conducted by Ghana in respect of which drilling has already taken

²⁵ Ibid., paragraph 58.

²⁶ *Ibid.*, paragraph 62.

²⁷ *Ibid.*, paragraph 68.

²⁸ *Ibid.*, paragraph 72.

²⁹ Ibid., paragraph 89.

³⁰ *Ibid.*, paragraph 90.

³¹ *Ibid.*, paragraph 96.
³² *Ibid.*, paragraph 97.

¹⁰

place would entail the risk of considerable financial loss to Ghana and its concessionaires and could also pose a serious danger to the marine environment".³³ The Special Chamber therefore considered that an order suspending all exploration or exploitation activities conducted by or on behalf of Ghana in the disputed area, including activities in respect of which drilling had already taken place, would cause prejudice to the rights claimed by Ghana and create an undue burden on it and that such an order could also cause harm to the marine environment.³⁴ It found it appropriate, in order to preserve the rights of Côte d'Ivoire, to order Ghana to take all necessary steps to ensure that no new drilling either by Ghana or under its control took place in the disputed area.³⁵ The Special Chamber also requested each Party to submit a report and information on compliance with the provisional measures prescribed, which each Party did on 25 May 2015.

Mr President,

Ladies and gentlemen,

A further request for the prescription of provisional measures was submitted on 21 July 2015 by Italy with regard to its dispute with India concerning the *Enrica Lexie* incident. Before then, on 26 June 2015, Italy had instituted arbitral proceedings under Annex VII of the Convention against India in respect of this dispute. The provisional measures request was therefore made under article 290, paragraph 5, of the Convention, pending the constitution of the arbitral tribunal.

³³ *Ibid.*, paragraph 99.

³⁴ *Ibid.*, paragraphs 100 and 101.

³⁵ *Ibid.*, paragraph 102.

According to Italy, the dispute concerned "an incident that occurred [on 15 February 2012] approximately 20.5 nautical miles off the coast of India involving the *MV Enrica Lexie*, an oil tanker flying the Italian flag, and India's subsequent exercise of jurisdiction over the incident, and over two Italian Marines from the Italian Navy ... who were on official duty on board the *Enrica Lexie* at the time of the incident".³⁶ India maintained that "the incident arose 'from the killing of two innocent Indian fishermen on board an Indian fishing vessel, *St. Antony*', which on 15 February 2012 was 'engaged in fishing at a distance of about 20.5 nautical miles from the Indian coast".³⁷ India further maintained that it "*envisages* to exercise jurisdiction over the Marines".³⁸

Italy requested the Tribunal to prescribe the following provisional measures:

(a) India shall refrain from taking or enforcing any judicial or administrative measures against Sergeant Massimiliano Latorre and Sergeant Salvatore Girone in connection with the Enrica Lexie Incident, and from exercising any other form of jurisdiction over the Enrica Lexie Incident; and

(b) India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal.³⁹

³⁶ The "Enrica Lexie" Incident (Italy v. India), Request for the prescription of provisional measures, Order of 24 August 2015, paragraph 36.

³⁷ *Ibid.*, paragraph 43.

³⁸ *Ibid.*, paragraph 44.

³⁹ *Ibid.*, paragraph 29.

India requested the Tribunal "to reject the submissions made by the Republic of Italy in its Request for the prescription of provisional measures and [to] refuse prescription of any provisional measure[s] in the present case".⁴⁰

The Tribunal delivered its Order on 25 August 2015. In the Order, the Tribunal found that a dispute appeared to exist between the Parties concerning the interpretation or application of the Convention and that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute.⁴¹

The Tribunal pointed out that, in provisional measures proceedings, it is not called upon to "settle the claims of the Parties in respect of the rights and obligations in dispute and to establish definitively the existence of the rights which they each seek to protect".⁴² It noted that it needs only to satisfy itself that those rights "are at least plausible". ⁴³ In this respect, the Tribunal found that, in the case before it, both Parties had sufficiently demonstrated that the rights they sought to protect regarding the *Enrica Lexie* incident were plausible.⁴⁴

The Tribunal observed that, under article 290, paragraph 1, it "may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties, which implies that there is a real and imminent risk that irreparable prejudice could be caused to the rights of the parties to the dispute pending such a time when the Annex VII arbitral tribunal ... is in a

⁴⁰ *Ibid.*, paragraph 30.

⁴¹ *Ibid.*, paragraphs 53 and 54.

⁴² *Ibid.*, paragraph 83.

⁴³ *Ibid.*, paragraph 84.

⁴⁴ Ibid., paragraph 85.

position to modify, revoke or affirm the provisional measures".⁴⁵ With regard to the case before it, it considered that in the circumstances "continuation of court proceedings or initiation of new ones by either Party will prejudice rights of the other Party".⁴⁶ It concluded that this consideration "requires action on the part of the Tribunal to ensure that the respective rights of the Parties are duly preserved".⁴⁷

The Tribunal emphasised that its Order must protect the rights of both Parties and "must not prejudice any decision of the arbitral tribunal to be constituted under Annex VII".⁴⁸ Therefore, the Tribunal did "not consider it appropriate to prescribe provisional measures in respect of the situation of the two Marines because that touches upon issues related to the merits of the case" and "it will be for the Annex VII arbitral tribunal to adjudicate the merits of the case".⁴⁹

The Tribunal concluded that "the first and the second submissions by Italy, if accepted, will not equally preserve the respective rights of both Parties until the constitution of the Annex VII arbitral tribunal".⁵⁰ It stated that it "does not consider the two submissions by Italy to be appropriate and that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested".⁵¹ The Tribunal prescribed, as a provisional measure, that "Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any

⁴⁵ *Ibid.*, paragraph 87.

⁴⁶ *Ibid.*, paragraph 106.

⁴⁷ Ibid., paragraph 107.

⁴⁸ Ibid., paragraph 125.

⁴⁹ *Ibid.*, paragraph 132.

⁵⁰ *Ibid.*, paragraph 126.

⁵¹ Ibid., paragraph 127.

decision which the arbitral tribunal may render".⁵² Pursuant to the Order of the Tribunal, India and Italy each submitted a report, on 18 and 23 September 2015 respectively, on compliance with the provisional measures prescribed.

When taking its decision, the Tribunal reaffirmed its view, as already expressed in previous cases, that "considerations of humanity must apply in the law of the sea as they do in other areas of international law".⁵³ The Tribunal made clear that it was aware of "the grief and suffering of the families of the two Indian fishermen who were killed" as well as of "the consequences that the lengthy restrictions on liberty entail for the two Marines and their families".⁵⁴

Mr President,

Ladies and gentlemen,

This brief overview of the Tribunal's recent judicial work shows that States increasingly bring cases concerning their disputes to the Tribunal. The Tribunal's jurisprudence clearly demonstrates its potential and the Tribunal is committed to further facilitating access to its procedures.

I am pleased to inform you that, in line with this commitment, a Joint Declaration was signed on 31 August 2015 between the Tribunal and the Ministry of Law of the Republic of Singapore. In this declaration, both sides agree that, whenever proceedings are instituted before the Tribunal or a special chamber of it, States parties to the dispute may propose that the chamber or the Tribunal meet in

⁵² *Ibid.*, paragraph 141.

⁵³ *Ibid.*, paragraph 133.

⁵⁴ *Ibid.*, paragraphs 134 and 135.

the region, at a place convenient to them. If the chamber or the Tribunal finds it is desirable in such case to sit or exercise its functions in Singapore, the Government of Singapore will provide appropriate facilities. I wish to reiterate my gratitude to the Singaporean Government for its willingness to assist the Tribunal in this respect.

As you know, the Tribunal is also active in disseminating knowledge about the mechanisms for dispute settlement established by the Convention and the procedures applicable to cases before the Tribunal. It does so by, among other activities, organizing regional workshops in different parts of the world and conducting capacity-building programmes at its premises in Hamburg.

The most recent regional workshop, the eleventh so far, was held on 27 and 28 August 2015 in Bali, Indonesia. It was organized with the assistance of the Korea Maritime Institute and in cooperation with the Ministry of Foreign Affairs of the Republic of Indonesia. I wish to express my sincere gratitude to both the Ministry of Foreign Affairs of Indonesia and the Korea Maritime Institute for their generosity and excellent cooperation. Representatives of 14 States from the region attended the workshop, which was preceded by a seminar on "Maritime Delimitation and Fisheries Cooperation" on 26 August 2015.

Through its internship programme, the Tribunal provides training opportunities to young government officials and university students. Since the establishment of the programme in 1997, 310 interns from 94 States have profited from this opportunity. Scholarships to support interns from developing countries are paid from a trust fund which was set up by the Tribunal and which has received grants from several

donors, including the Korea Maritime Institute, to which I wish to convey my gratitude once again.

Finally, the Nippon programme is a capacity-building and training programme designed to provide government officials and researchers with advanced legal training in international dispute settlement in law of the sea matters. The programme was established in 2007 and has been running since then with the continuous support of the Nippon Foundation of Japan. I wish to take this opportunity to express my gratitude to the Nippon Foundation for their generosity.

Mr President,

Ladies and gentlemen,

Before concluding my remarks I wish to highlight that the coming year, 2016, marks the 20th anniversary of the Tribunal, which, as you know, was officially inaugurated on 18 October 1996. We plan to commemorate this anniversary with a number of events. The main event of the year will be a commemorative ceremony to be held in Hamburg on 5 October 2016. It will be followed, on 6 and 7 October, by a symposium on "UNCLOS and the Tribunal's contribution to international dispute settlement". In addition, a side event will be held during the Meeting of States Parties in June 2016.

These events will be an occasion to review the development of the work of the Tribunal since its early days and will also set the scene for the Tribunal's way into the future. A more detailed programme of the anniversary celebrations is currently

being prepared. Invitations will of course be addressed to all States Parties to the Convention.

Mr President,

Ladies and gentlemen,

This brings me to the end of my statement. I am grateful for the opportunity to address the General Assembly and for your interest in the Tribunal's work. I also wish to seize this occasion to express my gratitude to the Director of the Division on Ocean Affairs and the Law of the Sea and her staff for their continued and excellent cooperation and assistance. Thank you very much.