

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



STATEMENT BY

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PRESIDENT
OF THE
INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ON

THE REPORT OF THE TRIBUNAL

AT

THE TWENTY-SIXTH MEETING OF STATES PARTIES TO
THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

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Madam President,

1. It is a pleasure for me to address the Meeting of States Parties on the occasion of the presentation of the Annual Report of the Tribunal for the year 2015. On behalf of the International Tribunal for the Law of the Sea, I convey to you, Madam President, our congratulations on your election as President of this Meeting and wish you every success in the performance of your mandate.

Madam President,

Distinguished delegates,

2. The Annual Report of the Tribunal gives a detailed account of the Tribunal's activities for the period 1 January to 31 December 2015. In my statement, I will concentrate on the main elements of the report and will also provide the Meeting with information on activities which have taken place this year.

3. To begin with, I should like to address some organizational matters. As the distinguished delegates are aware, a vacancy occurred in the Tribunal in May 2015 and the election to fill the vacant post took place at the resumed twenty-fifth Meeting of States Parties, held on 15 January 2016. On that occasion, Judge Cachapuz de Medeiros (Brazil) was elected to serve as a member of the Tribunal for the remainder of his predecessor's term, namely, until 30 September 2017. As for the Registry, the Tribunal, on 9 March 2016, re-elected Mr Philippe Gautier Registrar of the Tribunal for five years.

Madam President,

Distinguished delegates,

4. In 2015, the Tribunal experienced an increase in its judicial activities. During this period, the Tribunal held several judicial meetings to hear and deliberate on cases submitted to it. On 2 April 2015, the Tribunal delivered its first Advisory Opinion on a request submitted by the Sub-Regional Fisheries Commission. On 25 April 2015, the Special Chamber of the Tribunal formed to deal with the dispute

between Ghana and Côte d'Ivoire concerning delimitation of the maritime boundary in the Atlantic Ocean delivered an Order prescribing provisional measures.

Furthermore, on 24 August 2015, the Tribunal delivered an Order prescribing provisional measures in the dispute between Italy and India concerning the "*Enrica Lexie*" incident. I will deal with each of these cases in turn.

5. As pointed out in my statement to the Meeting of States Parties last year, in March 2013, the Sub-Regional Fisheries Commission, to which I will refer as the "SRFC", submitted a Request for an Advisory Opinion to the Tribunal. The SRFC is a regional fisheries organization composed of seven member States, namely, Cabo Verde, the Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone. In its Request, the SRFC posed the Tribunal four questions dealing with illegal, unreported and unregulated fishing ("IUU fishing"). Allow me to highlight some elements of this decision, which I believe provide valuable input to the progressive development of the law of the sea.

6. This Advisory Opinion offered an important opportunity for the Tribunal to address the issue of its advisory jurisdiction. The Tribunal first noted that, under article 21 of its Statute, its jurisdiction "comprises three elements: (i) all 'disputes' submitted to the Tribunal in accordance with the Convention; (ii) all 'applications' submitted to the Tribunal in accordance with the Convention; and (iii) all 'matters' (...) specifically provided for in any other agreement which confers jurisdiction on the Tribunal."¹ In the view of the Tribunal, the third element (all 'matters') "should not be interpreted as covering only "disputes", for, if that were to be the case, article 21 of the Statute would simply have used the word "disputes". Consequently, it must mean something more than only "disputes". That "something more" must include advisory opinions, if specifically provided for in "any other agreement which confers jurisdiction on the Tribunal."²

¹ *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of the Tribunal of 2 April 2015*, paragraph 54.

² *Ibid.*, para. 56.

7. While finding that it had jurisdiction to entertain the Request submitted to it by the SRFC, the Tribunal clarified that “the jurisdiction of the Tribunal in the present case is limited to the exclusive economic zones of the SRFC Member States.”³

8. The Tribunal then dealt with the first question submitted to it, relating to flag State responsibility for IUU fishing activities conducted within the exclusive economic zone of third party States. In this context, the Tribunal examined a number of provisions of the Convention dealing with flag State obligations as concerns the conservation and management of living resources. In this respect, the Tribunal found that, pursuant to article 94 of the Convention, the flag State is required to “adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State’s responsibilities under the Convention in respect of the conservation and management of marine living resources”.⁴ In addition, with reference to article 192 of the Convention, the Tribunal determined that the flag State is under the further obligation to ensure “compliance by vessels flying its flag with the relevant conservation measures concerning living resources enacted by the coastal State for its exclusive economic zone”.⁵ The Tribunal specified that these are obligations of “due diligence”.

9. At the same time, the Tribunal made it clear that “in light of the special rights and responsibilities given to the coastal State in the exclusive economic zone under the Convention, the primary responsibility for taking the necessary measures to prevent, deter and eliminate IUU fishing rests with the coastal State”.⁶

10. The second question submitted to the Tribunal related to the liability of the flag State for IUU fishing activities conducted by vessels under its flag. In its response, the Tribunal found 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”. It clarified that “[t]he liability of the flag State arises from its failure to

³ *Ibid.*, paragraph 69.

⁴ *Ibid.*, paragraph 119.

⁵ *Ibid.*, paragraph 120.

⁶ *Ibid.*, paragraph 106.

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".⁷

11. The third question involved the issue of liability of international organizations within the framework of a fisheries access agreement concluded with a SRFC Member State. The Tribunal noted that such agreements exist with the European Union and stated that, in the context of these agreements, the obligations of the flag State become the obligations of the international organization and therefore the international organization must ensure that vessels flying the flag of one of its member States comply with the fisheries laws and regulations of the SRFC Member State and do not conduct IUU fishing activities within the exclusive economic zone of the SRFC Member State.⁸ As a result, only the international organization may be held liable for any breach of its obligations arising from the fisheries access agreement, and not its member States, and if the international organization does not meet its "due diligence" obligations, the SRFC Member State may hold the organization liable for the violation.⁹

12. The Tribunal finally defined, in its response to the fourth question, a catalogue of rights and obligations of SRFC Member States with a view to ensuring the sustainable management of shared stocks and stocks of common interest occurring within their exclusive economic zones.

13. This Advisory Opinion aimed at providing assistance to the SRFC in the performance of its activities and contributing to the implementation of the Convention.¹⁰ However, it may well be of value to all those engaged in preventing and deterring IUU fishing activities in other areas.

14. I will turn now to the dispute between Ghana and Côte d'Ivoire concerning delimitation of the maritime boundary in the Atlantic Ocean. As pointed out to the Meeting during my statement last year, this dispute was submitted to a special

⁷ *Ibid.*, paragraph 146.

⁸ *Ibid.*, paragraph 172.

⁹ *Ibid.*, paragraph 173.

¹⁰ *Ibid.*, paragraph 77.

chamber formed by the Tribunal, pursuant to article 15, paragraph 2, of its Statute. The Special Chamber is made up of five judges, including one judge *ad hoc* chosen by Ghana and one chosen by Côte d'Ivoire. Now, the written proceedings in this case are ongoing and the Memorial by Ghana as well as the Counter-Memorial by Côte d'Ivoire have been filed within the prescribed time-limits. In addition, the Special Chamber authorized the submission of a Reply by Ghana and a Rejoinder by Côte d'Ivoire and the time-limits for the filing of these pleadings are 25 July and 14 November 2016, respectively. It is therefore expected that the hearing in the case will take place in February 2017.

15. With regard to this case, on 27 February 2015, Côte d'Ivoire filed with the Special Chamber a Request for the prescription of provisional measures under article 290, paragraph 1, of the Convention, asking the Chamber to prescribe that Ghana, *inter alia*, "take all steps to suspend all ongoing oil exploration and exploitation operations in the disputed area".¹¹ In its written statement, Ghana asked the Special Chamber to deny Côte d'Ivoire's requests.¹²

16. In its Order delivered on 25 April 2015, 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".¹³ It also noted that "urgency is required in order to exercise the power to prescribe provisional measures, that is to say the need to avert a real and imminent risk that irreparable prejudice may be caused to rights at issue before the final decision is delivered".¹⁴ Concerning the rights which Côte d'Ivoire claims on the merits and seeks to protect, the Special Chamber stated that, before prescribing provisional measures, it need only satisfy itself that these rights "are at least plausible".¹⁵

¹¹ *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.

¹² *Ibid.*, paragraph 26.

¹³ *Ibid.*, paragraph 41.

¹⁴ *Ibid.*, paragraph 42.

¹⁵ *Ibid.*, paragraph 58.

17. Under article 290, paragraph 1, of the Convention, provisional measures may be prescribed to preserve the respective rights of the parties to the dispute or prevent serious harm to the marine environment pending the final decision. In this connection, the Special Chamber underlined that the Parties should in the circumstances “act with prudence and caution to prevent serious harm to the marine environment”.¹⁶ The Special Chamber then noted 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”,¹⁷ 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”.¹⁸ 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 the Special Chamber, and that the risk of such prejudice is imminent”.¹⁹

18. The Special Chamber added that “the suspension of ongoing activities conducted by Ghana in respect of which drilling has already taken 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”.²⁰ Thus, the Special Chamber considered it appropriate, “in order to preserve the rights of Côte d’Ivoire, to order Ghana to take all the necessary steps to ensure that no new drilling either by Ghana or under its control takes place in the disputed area”.²¹

19. Pursuant to the Order, Ghana and Côte d’Ivoire each had to submit an initial report not later than 25 May 2015 to the Special Chamber. I am glad to confirm that both Parties submitted within the prescribed time-limit their initial reports on the measures taken.

¹⁶ *Ibid.*, paragraph 72.

¹⁷ *Ibid.*, paragraph 89.

¹⁸ *Ibid.*, paragraph 90.

¹⁹ *Ibid.*, paragraph 96.

²⁰ *Ibid.*, paragraph 99.

²¹ *Ibid.*, paragraph 102.

20. As indicated earlier, the Tribunal received a further request for provisional measures on 21 July 2015, in a dispute involving Italy and India with regard to the “*Enrica Lexie*” incident. The Request was filed with the Tribunal pursuant to article 290, paragraph 5, of the Convention, that is, pending the constitution of the arbitral tribunal to which the dispute had been submitted. In fact, on 26 June 2015, Italy had instituted arbitral proceedings under Annex VII to the Convention against India in respect of the dispute, which concerns “an incident ... involving *the M/V Enrica Lexie*, an oil tanker flying the Italian flag, and India’s subsequent exercise of jurisdiction over the incident”.²²

21. Italy requested that the Tribunal 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.²³

22. 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”.²⁴

23. The Tribunal delivered its Order on 25 August 2015. In its Order, after finding that a dispute appeared to exist between the Parties concerning the interpretation or application of the Convention,²⁵ the Tribunal concluded that “the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute”.²⁶

²² *The “Enrica Lexie” Incident (Italy v. India)*, Request for the prescription of provisional measures, Order of 24 August 2015, paragraph 31.

²³ *Ibid.*, paragraph 29.

²⁴ *Ibid.*, paragraph 30.

²⁵ *Ibid.*, paragraph 53.

²⁶ *Ibid.*, paragraph 54.

24. The Tribunal then observed that, in provisional measures proceedings, it “does not need to concern itself with the competing claims of the Parties, it needs only to satisfy itself that the rights which Italy and India claim and seek to protect are at least plausible”,²⁷ and concluded that “both Parties have sufficiently demonstrated that the rights they seek to protect regarding the *Enrica Lexie* incident are plausible”.²⁸

25. The Tribunal stressed that, under article 290, paragraph 1, of the Convention, it may prescribe any provisional measures to preserve the respective rights of the Parties if “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 to which the dispute has been submitted is in a position to modify, revoke or affirm the provisional measures”.²⁹ In the case before it, the Tribunal found that “continuation of court proceedings or initiation of new ones by either Party will prejudice rights of the other Party”.³⁰ Therefore, the Tribunal concluded that action was required on its part to ensure that the respective rights of the Parties were duly preserved.³¹

26. The Tribunal emphasised, however, that the order must protect the rights of both Parties and “must not prejudice any decision of the arbitral tribunal to be constituted under Annex VII”.³² Thus, it considered that the two provisional measures requested by Italy, “if accepted, w[ould] not equally preserve the respective rights of both Parties until the constitution of the Annex VII arbitral tribunal”.³³ The Tribunal concluded that it “d[id] not consider the two submissions by Italy to be appropriate and that, in accordance with article 89, paragraph 5, of the Rules, it [could] prescribe measures different in whole or in part from those requested”.³⁴

²⁷ *Ibid.*, paragraph 84.

²⁸ *Ibid.*, paragraph 85.

²⁹ *Ibid.*, paragraph 87.

³⁰ *Ibid.*, paragraph 106.

³¹ *Ibid.*, paragraph 107.

³² *Ibid.*, paragraph 125.

³³ *Ibid.*, paragraph 126.

³⁴ *Ibid.*, paragraph 127.

27. Thus, as a provisional measure, the Tribunal prescribed that “both Italy and India [should] suspend all court proceedings and 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 decision which the arbitral tribunal may render”.³⁵

28. Pursuant to the Order, each Party had to submit an initial report not later than 24 September 2015,³⁶ and I am glad to inform you that such reports were transmitted to the Tribunal within the prescribed time-limit.

29. In this connection, I wish to point out that the variety of decisions rendered by the Tribunal in this short period and the complexity of matters involved testify to the progress achieved by the Tribunal in the settlement of disputes concerning the interpretation and application of the Convention. I am confident that the Tribunal will be able to build on the experience gained and that cases brought before it will continue to involve a broad spectrum of law of the sea matters.

30. That said, the Tribunal has been seized of a new case. On 17 December 2015, Panama filed an application instituting proceedings against Italy in a dispute regarding the arrest and detention of the vessel *M/V “Norstar”*. Subsequently, on 11 March 2016, Italy filed preliminary objections to the jurisdiction of the Tribunal and the admissibility of Panama’s application. As required under article 97 of the Rules, proceedings on the merits were suspended upon receipt of the preliminary objections. In accordance with the time-limits set for the presentation of written submissions and observations, Panama filed its pleading on 9 May 2016, while Italy will do so by 9 July 2016. On this basis, I wish to inform you that the hearing on the preliminary objections is expected to take place in September of this year.

Madam President

Distinguished delegates,

³⁵ *Ibid.*, paragraph 131.

³⁶ *Ibid.*, paragraph 141.

31. During 2015, the Tribunal held two sessions devoted to the consideration of legal as well as organizational and administrative matters. A review of these matters is included in the Annual Report which is before you. Allow me to mention that, further to the decision of the twenty-fifth Meeting of States Parties, the Tribunal has subscribed to the Statute of the International Civil Service Commission, with effect from 1 January 2016. In line with usual practice, a report on the Tribunal's budgetary matters will be presented by the Registrar in a separate statement.

Madam President

Distinguished delegates,

32. Nearly twenty years ago, the International Tribunal for the Law of the Sea was inaugurated when it held its first session in October 1996. On that historic occasion, the then Secretary-General of the United Nations, Mr Boutros Boutros-Ghali, announced that “[w]ith the establishment of this Tribunal we enter a new era”. The Tribunal, he said, “w[ould] be a modern institution upholding the Rule of Law”, and “w[ould] be part of the system for the peaceful settlement of disputes as laid down by the founders of the United Nations”.³⁷ Much has been achieved since then, and it can be fairly stated that the Tribunal has been able to live up to those expectations.

33. To commemorate its 20th anniversary, the Tribunal has organized a series of events and activities, which will commence with a round-table on “The Role of the Tribunal in the Settlement of Disputes”. This side event will take place during this Meeting of States Parties, on Thursday, 23 June 2016 at 1.15 pm in conference room 1. Invitations to attend the ceremony have been extended to all Permanent Missions.

34. In addition, on 5 and 6 October 2016, a symposium on “The contribution of the Tribunal to the Rule of Law” will be held at the Tribunal's premises. This symposium is designed for legal advisors, practitioners, academics, agents and lead counsel who have appeared before the Tribunal. The symposium programme will be distributed during this Meeting of States Parties.

³⁷ Statement made on the occasion of the inauguration of the Tribunal, Hamburg, 18 October 1996.

35. Finally, a ceremony to commemorate the Tribunal's 20th anniversary will take place on 7 October 2016, in the City Hall of Hamburg. I am glad to inform you that, on this occasion, statements will be delivered by the Secretary-General of the United Nations, the President of the Federal Republic of Germany, the Minister of Justice of the Federal Republic of Germany, and the First Mayor of Hamburg.

36. In order to finance these various events and activities, the Tribunal has set up a trust fund. I take this opportunity to express our gratitude to the Government of Japan and the Korean Maritime Institute for their generous contribution to this fund, and to the Government of Germany and the City of Hamburg for providing financial support in organizing the commemorative ceremony on the 7th of October in the City of Hall of Hamburg.

37. As regards the voluntary ITLOS trust fund established by the Secretary-General to assist States in the settlement of disputes through the Tribunal, I wish to inform the Meeting that a contribution to the trust fund was made in 2015 by the Government of the Republic of the Philippines. With this contribution, the financial statements of the trust fund showed a balance of US\$ 131,684 as at 31 December 2015. I wish to thank the Philippines for its contribution to the ITLOS fund.

38. With the support of the Nippon Foundation, the Tribunal has established a further trust fund to finance a capacity-building programme on dispute settlement in law of the sea matters. In 2015, fellows from Brazil, Georgia, Iran, Liberia, Malaysia, Morocco and Senegal participated in this nine-month programme. I wish to thank the Nippon Foundation for its contribution to this programme.

39. In addition, special trust funds have been established to support the internship programme of the Tribunal, which offers training opportunities to university students. These funds have been set up with assistance from the Korea Maritime Institute and the China Institute of International Studies. I wish to thank these institutions for their contributions to this programme.

40. These various programmes demonstrate the great importance which the Tribunal attaches to capacity-building. An additional activity in which the Tribunal is involved is the Summer Academy, which is organized by the International Foundation for the Law of the Sea. The last session of the Academy was attended by 41 participants from 40 different countries. I wish to express our appreciation to the International Foundation for the Law of the Sea for its work.

41. The regional workshops organized by the Tribunal in recent years also contribute to enhance capacity-building. Last year, on 27 and 28 August, a further workshop on the settlement of disputes related to the law of the sea, the eleventh so far, took place in Bali, Indonesia. It was organized with the assistance of the Korea Maritime Institute and in cooperation with the Ministry of Foreign Affairs of Indonesia. I therefore wish to express my sincere appreciation 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.

Madam President,
Distinguished Delegates,

This brings me to the end of my statement.

I would like to conclude by expressing my appreciation to the Legal Counsel, to the Director of the Division for Ocean Affairs and the Law of the Sea and to her staff for their continued support of the Tribunal's work.

I thank you for your kind attention.