

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



STATEMENT BY

H.E. JUDGE ALBERT HOFFMANN

PRESIDENT
OF THE
INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ON THE REPORT OF THE TRIBUNAL FOR 2019

AT THE THIRTIETH MEETING OF STATES PARTIES TO THE
UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

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Mr President,
Distinguished delegates,

1. As we are prevented from meeting in person, I have prepared this statement to present to you the Annual Report of the International Tribunal for the Law of the Sea for the year 2019. The past few months have been challenging for all of us, and I am grateful for this opportunity to address the Meeting of States Parties for the first time in my capacity as President of the Tribunal and to be able to inform you about the work of the Tribunal.

2. On behalf of the Tribunal, I convey to you, Mr President, our congratulations on your election as President of the Meeting of States Parties and wish you every success in the completion of your mandate. I also wish to thank the Division for Ocean Affairs and the Law of the Sea for finding a way to allow the essential business of the Meeting to take place, despite the difficult circumstances in which we find ourselves.

3. I am particularly grateful that the triennial election of Members of the Tribunal could take place at the end of August 2020. As you will recall, the States Parties re-elected Judge Attard and Judge Kulyk and elected Ms Kathy-Ann Brown (Jamaica), Ms Ida Caracciolo (Italy), Mr Jielong Duan (China), Ms María Teresa Infante Caffi (Chile) and Mr Maurice Kamga (Cameroon). The terms of office of these seven judges began on 1 October 2020 and the five new judges were sworn in in Hamburg on the same date.

4. On 30 September 2020, my predecessor, Judge Jin-Hyun Paik, completed his three-year term as President of the Tribunal. On 2 October 2020, I was elected President of the Tribunal for the next triennium. On the same day, Judge Tomas Heidar of Iceland was elected Vice-President of the Tribunal, and on 7 October 2020 Judge Neeru Chadha of India was elected President of the Seabed Disputes Chamber. I wish to thank my predecessor, Judge Paik, for his exemplary leadership and service to the Tribunal over the last three years.

5. Before turning to the Annual Report of the Tribunal, I wish to acknowledge that some of the essential business of this year's Meeting remains uncompleted. I noted with appreciation that an informal virtual session was held on 16 October 2020, to brief delegations on the pending items on the agenda of the Meeting and the proposed organization of work, timetable and modalities for the consideration of these items. As you will understand, the approval of the budget of the Tribunal is of critical importance for the continued functioning of the Tribunal. The Tribunal greatly appreciates the cooperation of all States Parties in reaching a decision on this agenda item by the end of this year.

6. The Annual Report of the Tribunal gives an account of the Tribunal's activities for the period 1 January to 31 December 2019. In my statement, I will refer to some of the main aspects of the report and then provide the Meeting with additional information on more recent developments and the current business of the Tribunal.

7. I will first address the Tribunal's judicial work and I am glad to note that 2019 was a busy year for the Tribunal. The Tribunal delivered a judgment on the merits in the *M/V "Norstar" Case (Panama v. Italy)*, as well as two orders in response to requests for provisional measures in the *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)* and the *M/T "San Padre Pio" Case (Switzerland v. Nigeria)*. In addition, two new cases were submitted to the Tribunal in 2019, one to a special chamber and one to the Tribunal as a whole.

8. As the former President already reported to you on the Judgment in the *M/V "Norstar" Case* and the provisional measures Order in *Ukraine v. Russian Federation* at last year's Meeting, I will give an overview of the latest decision of the Tribunal, the Order on provisional measures in the *M/T "San Padre Pio" Case (Switzerland v. Nigeria)*, before informing you about the two new cases submitted in 2019.

9. On 21 May 2019, a request for the prescription of provisional measures under article 290, paragraph 5, of the Convention was submitted to the Tribunal by Switzerland. The Request related to a dispute between Switzerland and Nigeria concerning the arrest and detention of the vessel *M/T "San Padre Pio"*, its crew and

cargo. The case was entered in the List of cases as Case No. 27. Previously, by a notification addressed to Nigeria on 6 May 2019, Switzerland had instituted arbitral proceedings under Annex VII to the Convention in the dispute.

10. The Request related to an incident which took place on 23 January 2018, in which the Nigerian navy intercepted and arrested the *M/T "San Padre Pio"*, a motor tanker flying the flag of Switzerland, while it was "engaged in one of several ship-to-ship ('STS') transfers of gasoil."¹ After the arrest, the Nigerian navy ordered the *M/T "San Padre Pio"* to proceed to Port Harcourt, a Nigerian port, where the vessel, together with its crew members and cargo, was detained on 24 January 2018.² According to Switzerland, at the time of the arrest, the vessel "was approximately 32 nautical miles from the closest point of Nigeria's coast" and within the exclusive economic zone of Nigeria.³

11. A public hearing in the case took place on 21 and 22 June 2019. In its final submissions, Switzerland requested the Tribunal to prescribe provisional measures requiring Nigeria to immediately take all measures necessary to ensure that the restrictions on the liberty, security and movement of the "*San Padre Pio*", her crew and cargo were immediately lifted to allow them to leave Nigeria. Nigeria requested the Tribunal to reject all of Switzerland's requests for provisional measures.

12. The Tribunal promptly adopted its Order on provisional measures on 6 July 2019. Pursuant to article 290, paragraph 5, of the Convention, one of the conditions for the Tribunal to prescribe provisional measures is that it considers that *prima facie* the arbitral tribunal to be constituted would have jurisdiction. In this respect, in its Order, the Tribunal considered that "at least some of the provisions invoked by Switzerland appear to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded"⁴ and accordingly concluded "that a dispute concerning the interpretation or application of the Convention *prima facie* appears to have existed on the date of the institution of the arbitral proceedings."⁵

¹ *Switzerland v. Nigeria*, Order of 6 July 2019, para. 30.

² *Ibid.*, para. 33.

³ *Ibid.*, para. 30.

⁴ *Ibid.*, para. 60.

⁵ *Ibid.*, para. 61.

13. As regards the plausibility of rights asserted by the Applicant, the Tribunal noted that Switzerland sought to protect its rights to the freedom of navigation and other internationally lawful uses of the sea related to this freedom in the exclusive economic zone under article 58 of the Convention, and rights to exercise exclusive flag State jurisdiction over its vessels under article 92 of the Convention, which applies to the exclusive economic zone by virtue of article 58, paragraph 2.⁶ In accordance with the requirements necessary for the prescription of provisional measures, the Tribunal determined that the rights claimed by Switzerland on the basis of article 58, paragraphs 1 and 2, and article 92 of the Convention, were plausible.⁷

14. The Tribunal considered that, under the circumstances of the case, the arrest and detention of the *M/T "San Padre Pio"* "could irreparably prejudice the rights claimed by Switzerland relating to the freedom of navigation and the exercise of exclusive jurisdiction over the vessel as its flag State if the Annex VII arbitral tribunal adjudges that those rights belong to Switzerland".⁸ In this regard, the Tribunal noted that the *M/T "San Padre Pio"* had not only been detained for a considerable period of time but also that the vessel and its crew were exposed to constant danger to their safety and security.⁹

15. In light of these circumstances, the Tribunal found that there was "a real and imminent risk of irreparable prejudice to the rights of Switzerland pending the constitution and functioning of the Annex VII arbitral tribunal."¹⁰ The Tribunal accordingly found that the urgency of the situation required the prescription of provisional measures under article 290, paragraph 5, of the Convention.

16. Pending a decision by the Annex VII arbitral tribunal, the Tribunal ordered that Switzerland "shall post a bond or other financial security, in the amount of US\$ 14,000,000, with Nigeria in the form of a bank guarantee".¹¹ It also ordered that

⁶ Ibid., para. 106.

⁷ Ibid., para. 108.

⁸ Ibid., para. 128.

⁹ Ibid., para. 129.

¹⁰ Ibid., para. 131.

¹¹ Ibid., para. 146(1)(a).

Switzerland “shall undertake to ensure that the Master and the three officers are available and present at the criminal proceedings in Nigeria if the Annex VII arbitral tribunal finds that the arrest and detention of the *M/T “San Padre Pio”*, its cargo and its crew and the exercise of jurisdiction by Nigeria in relation to the event which occurred on 22-23 January 2018 do not constitute a violation of the Convention”.¹² The Tribunal further ordered that Switzerland and Nigeria “shall cooperate in good faith in the implementation of such undertaking”.¹³

17. The Tribunal did not consider it necessary to require Nigeria to suspend all court and administrative proceedings and refrain from initiating new proceedings.¹⁴ However, the Tribunal did consider it appropriate to order both Parties to refrain from taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.¹⁵ Finally, the Tribunal fixed 22 July 2019 as the date by which both Parties had to submit to the Tribunal a report and information on compliance with any provisional measures prescribed pursuant to article 95, paragraph 1, of the Rules.¹⁶ Both Parties submitted to the Tribunal such reports and information within the prescribed time-limits.

18. I now turn to the two new cases submitted to the Tribunal in 2019. The first is the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*. On 18 June 2019, Mauritius had initiated Annex VII arbitral proceedings against the Maldives in relation to a dispute concerning the delimitation of the maritime boundary between the two countries in the Indian Ocean. During the consultations held by the President with the Parties on 17 September 2019, they agreed to transfer their dispute to a special chamber of the Tribunal, to be constituted pursuant to article 15, paragraph 2, of the Statute.

19. By Order of the Tribunal of 27 September 2019, a special chamber of the Tribunal was formed to deal with the dispute. The Special Chamber consists of nine

¹² *Ibid.*, para. 146(1)(b).

¹³ *Ibid.*, para. 146(1)(b).

¹⁴ *Ibid.*, para. 142.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, paras. 144, 146.

judges including a judge *ad hoc* chosen by Mauritius and a judge *ad hoc* chosen by Maldives. The case was entered in the List of cases as Case No. 28.

20. On 18 December 2019, Maldives filed written preliminary objections, in which Maldives challenged the jurisdiction of the Special Chamber and the admissibility of the claims submitted by Mauritius. Upon receipt of the preliminary objections by the Registry, the proceedings on the merits were suspended.

21. By order dated 19 December 2019, the President of the Special Chamber fixed 17 February 2020 as the time-limit for the filing by Mauritius of its written observations and submissions on the preliminary objections filed by Maldives and 17 April 2020 as the time-limit for the filing by Maldives of its written observations and submissions in reply. The Parties duly filed their respective written pleadings in accordance with these time-limits.

22. It had been anticipated that a public hearing on the preliminary objections of the Maldives would take place at the Tribunal this summer. However, owing to the COVID-19 pandemic, the resulting health concerns and various restrictive measures imposed globally, with the agreement of the Parties, it was decided to hold the hearing from 13 to 19 October 2020 instead. The Special Chamber also decided that the hearing would take place in a hybrid format, with a mix of virtual and in-person participation. I am pleased to report that the hybrid hearing functioned well, with participants able to attend either remotely or in person, and have their statements simultaneously interpreted from the one official language of the Tribunal into the other.

23. The second case submitted in 2019 was *The M/T "San Padre Pio" (No. 2) Case (Switzerland/Nigeria)*. As I noted in relation to the provisional measures request, on 6 May 2019, Switzerland had instituted arbitral proceedings under Annex VII to the Convention against Nigeria in a dispute concerning the arrest and detention of the *M/T "San Padre Pio"*, its crew and cargo. Further to consultations held by the President with representatives of Switzerland and Nigeria on 2 and 3 December 2019, the Parties agreed to transfer their dispute concerning the arrest and detention of the *M/T "San Padre Pio"*, its crew and cargo to the Tribunal.

24. On 17 December 2019, Switzerland and Nigeria transmitted a Special Agreement and notification to the Tribunal to submit the aforementioned dispute. The case was entered in the List of cases as Case No. 29. Each Party has chosen a judge *ad hoc*.

25. On 7 January 2020, the President adopted an Order fixing 6 July 2020 as the time-limit for the filing of the Memorial of Switzerland and 6 January 2021 as the time-limit for the filing of the Counter-Memorial of Nigeria. Subsequent procedure was reserved for further decision.

26. I would now like to inform the Meeting about certain organizational matters. In this respect, on 20 September 2019, the Judges of the Tribunal elected Ms Ximena Hinrichs Oyarce, of Chilean nationality, as the Registrar of the Tribunal. Prior to her election as Registrar, Ms Hinrichs Oyarce served as Deputy Registrar of the Tribunal. Ms Hinrichs Oyarce succeeds Mr Philippe Gautier, who submitted his resignation on 3 June 2019, further to his election as Registrar of the International Court of Justice. On 13 March 2020, the Tribunal elected Mr Antoine Ollivier, of French nationality, as Deputy Registrar.

27. In 2019, as in previous years, the Tribunal held two sessions devoted to legal and judicial as well as organizational and administrative issues. The Annual Report which is before you includes a review of these issues. The Registrar has addressed the budgetary matters of the Tribunal in a separate statement.

28. In March of this year, in light of the alarming spread of the novel coronavirus, the Tribunal had to take emergency measures to protect the health of its members and Registry staff. In this regard, the Forty-ninth Session of the Tribunal, which was scheduled to take place from 9 to 20 March, was shortened and ended on Tuesday, 17 March 2020. From 23 March until 18 May, the majority of the Registry staff worked remotely, while some staff members continued to work at the Tribunal premises in order to ensure essential functions. Visits to the premises of the Tribunal were also restricted. During that time, the Registry coordinated its work from the premises through tele- and video-conferencing, and preparation for cases on the docket of the Tribunal continued. Most staff members have now returned to work at

the premises of the Tribunal, while health and safety procedures are in place to prevent the spread of the virus. Visits to the Tribunal remain restricted until further notice.

29. The COVID-19 pandemic caused us to reflect on various aspects of the work of the Tribunal and on means to adapt its working methods to the new circumstances. We considered it essential for the Tribunal to be innovative and we worked to identify suitable technology that would enable the Tribunal to operate effectively despite wide-ranging restrictive measures taken around the world.

30. As a result, the Tribunal was able to hold its Fiftieth Session, which began on 24 September 2020, in hybrid format, with some judges present in Hamburg and those unable to travel to Hamburg attending via video link from their homes.

31. On 25 September 2020, the Tribunal amended its Rules in order to provide that the Tribunal may decide, as an exceptional measure, for public health, security or other compelling reasons, to hold hearings and readings of judgments entirely or in part by video link. The Tribunal also amended its Rules to provide that the President may decide, as an exceptional measure, for public health, security or other compelling reasons, to hold meetings entirely or in part by video link.

32. On 1 October 2020, the swearing-in ceremony for the newly elected judges was held in hybrid format with some judges present in the courtroom and those unable to travel to Hamburg attending remotely via video link. The ceremony was streamed live on the Tribunal's website.

33. As I mentioned above, hearings on the preliminary objections raised by Maldives in the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* took place in hybrid format, with a mix of virtual and in-person participation. In the exceptional circumstances created by the COVID-19 pandemic, the Tribunal has thus demonstrated that it was able to fulfil its mandate.

34. In addition to its judicial and administrative work, the Tribunal conducts various activities with the aim of promoting capacity building in the law of the sea and of expanding knowledge of the Tribunal's role in the settlement of disputes. As in previous years, I would like to take this opportunity to update you on these activities. I should note that some of these activities have been affected this year by the COVID-19 pandemic, but I can assure you that the Tribunal remains committed to providing capacity building in future through whatever means possible.

35. The Tribunal regularly organizes regional workshops that enhance capacity building in the law of the sea. Fourteen of those workshops have been held so far, the most recent one being in November 2019 in Montevideo (Uruguay), which was attended by representatives of ten States from the South American region. The workshop was organized with the assistance of the Korea Maritime Institute and in cooperation with the Ministry of Foreign Affairs of Uruguay. I wish to express my sincere appreciation to both the Ministry of Foreign Affairs of Uruguay and the Korea Maritime Institute for their generosity and excellent cooperation.

36. During the period 2019-2020, for the thirteenth time, a nine-month capacity-building and training programme on dispute settlement under the Convention was conducted with the support of the Nippon Foundation. Fellows from Bahrain, Chile, Côte d'Ivoire, Guyana and Lithuania took part. Despite the outbreak of COVID-19, all Fellows successfully completed the programme and managed to return home safely. I am glad to inform you that the fourteenth edition of the programme is currently underway. Owing to the COVID-19 pandemic, some changes have been made to the timetable and structure of the 2020-2021 programme, and some of this year's Fellows have not yet been able to travel to Hamburg. I wish to express the Tribunal's deep appreciation of the ongoing support given to this programme by the Nippon Foundation.

37. In addition, the Tribunal's internship programme offers training opportunities to university students and young government officials. During a three-month internship, interns are exposed to the work of the Tribunal, assisting the Registry with its functions, as well as preparing research papers in relevant fields. In 2019, 15 persons from 13 different States served as interns at the Tribunal.

38. The Tribunal also provides support to the International Foundation for the Law of the Sea, which organizes an annual Summer Academy. A number of Judges lecture on various law of the sea topics covered by this programme. Last year, the thirteenth session of the Academy was held at the Tribunal's premises from 21 July to 16 August 2019 and 41 participants from 28 different countries attended. Unfortunately, owing to COVID-19-related restrictions, the Summer Academy did not take place this year.

39. In order to provide financial assistance to participants from developing countries in the internship programme and the Summer Academy, special trust funds have been established with the support of the Korea Maritime Institute, the China Institute of International Studies and the Government of China. I wish to express our sincere appreciation to these benefactors for their contributions to the trust funds.

40. I am pleased to inform you that the Tribunal is also planning to implement a new capacity-building programme in 2021, in the form of a workshop for legal advisers. The purpose of the new capacity-building programme, funded by the Republic of Korea, is to familiarize participants at the level of legal adviser with the dispute-settlement mechanisms established by the Convention and to enhance the dispute-settlement capabilities, in particular of developing countries, by providing first-hand insight into the law of the sea and the procedure and practice of the Tribunal as well as significant matters related to the law of the sea. The workshop will be held at the seat of the Tribunal in Hamburg, and will run for one week. Owing to uncertainties arising as a result of the COVID-19 pandemic, the date of the workshop has not yet been finalized.

41. Finally, I wish to inform you that, on 11 June 2020, the Tribunal signed a Model Agreement with Singapore for the provision of facilities for the Tribunal or one of its chambers to sit or otherwise exercise its functions in Singapore. The agreement was signed in a digital ceremony by his Excellency Minister K. Shanmugam, the Minister for Law and Home Affairs of Singapore and by the former President of the Tribunal. It marks the culmination of several years of negotiations with the Government of Singapore.

42. The Model Agreement establishes the terms and conditions under which the Government of Singapore would provide the Tribunal with the appropriate facilities should the Tribunal or one of its chambers decide to sit or otherwise exercise its functions in Singapore in a specific case. The Model Agreement is largely based on the Agreement on the Privileges and Immunities of the Tribunal and covers a variety of important aspects, such as court facilities and privileges and immunities. I also wish to note that the Model Agreement places no extra financial burden on the Tribunal. It is our hope that the Model Agreement will promote peaceful settlement of disputes under the Convention and, in particular, will help pave the way for more countries in that region to seek recourse to the Tribunal for the settlement of their law of the sea-related disputes.

43. This brings me to the end of my statement. As I have outlined, the Tribunal has had to adapt its working practices in order to take into account measures adopted globally to contain the spread of COVID-19, both in respect of its judicial and administrative work and in respect of capacity building. I wish to assure States Parties that, despite the restrictions in place, the Tribunal stands ready to fulfil its mandate and deal efficiently with the cases currently pending before it as well as any new cases that may be submitted.

44. As I conclude, let me emphasize that the Tribunal enjoys excellent cooperation with the United Nations and in this respect, I wish to express our gratitude to the Secretary-General, the Legal Counsel and the Deputy Director in charge of the Division for Ocean Affairs and the Law of the Sea and his staff for their support and cooperation. I would also like to recognize the contribution of the former Director of the Division, Ms Gabriele Goettsche-Wanli, over the years and wish her all the best in her retirement. It is my sincere hope that next year we can all meet in person again.

I thank you all for your kind attention and send you my warmest regards in these difficult times.