

# 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

AGENDA ITEM 78(a) "OCEANS AND THE LAW OF THE SEA"

FOR

THE PLENARY OF THE SEVENTY-SIXTH SESSION OF THE

UNITED NATIONS GENERAL ASSEMBLY

9 DECEMBER 2021

Mr President,  
Distinguished delegates,

I am grateful for the opportunity to make this statement to the General Assembly on behalf of the International Tribunal for the Law of the Sea, as part of the Assembly's consideration of the agenda item "Oceans and the law of the sea". I would like to congratulate you, Mr President, on your election as President of the General Assembly and wish you every success in directing the work of the Assembly.

As a result of the COVID-19 pandemic, I was prevented from addressing you last year. I therefore wish to report to you on some organizational and judicial developments at the Tribunal since the last two sessions of the General Assembly. These developments have taken place against the backdrop of COVID-19 and I will also outline how the Tribunal has responded to the challenges created by the pandemic.

The Tribunal, like all other international organizations, has felt the impact of the COVID-19 pandemic. Thus, the Fiftieth Session of the Tribunal in autumn 2020 and the Fifty-first Session in spring 2021 were held in hybrid format, with some judges present in Hamburg and those unable to travel attending via video link from their places of residence.

In light of the experience of the pandemic, on 25 September 2020, the Tribunal amended its Rules of procedure in order to provide that, as an exceptional measure, for public health, security or other compelling reasons, hearings, readings of judgments or meetings of the Tribunal can be held entirely or in part by video link. Subsequently, from 13 to 19 October 2020, the Special Chamber of the Tribunal dealing with the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean* held a hearing in hybrid format, combining physical and virtual participation of members of the Special Chamber and representatives of the Parties.

Let me add that, at its Fifty-first Session, on 25 March 2021, the Tribunal also decided to amend its Rules, which were initially adopted on 28 October 1997, with a view to rendering them gender neutral.

Mr President,  
Distinguished delegates,

With your permission, I will now turn to the judicial work of the Tribunal. I am happy to report that, despite the impact of the COVID-19 pandemic, the Tribunal has continued to carry out its judicial mandate throughout the years 2020 and 2021, dealing with the two cases currently on its docket.

Let me first address the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean*, to which I have already referred. You may recall that, in relation to this dispute, Mauritius had initially, in June 2019, instituted Annex VII arbitral proceedings against the Maldives and that the Parties later, in September 2019, had agreed to transfer the dispute to a special chamber of the Tribunal.

On 18 December 2019, the Maldives filed written preliminary objections to the jurisdiction of the Special Chamber and the admissibility of Mauritius' claims. On 28 January 2021, the Special Chamber delivered its Judgment on the Preliminary Objections. Let me briefly highlight some important aspects of the Special Chamber's findings.

The Maldives presented five preliminary objections. As its first preliminary objection, the Maldives contended that the United Kingdom was an indispensable third party to the proceedings, but as the United Kingdom was not a party to those proceedings, the Special Chamber lacked jurisdiction over the alleged dispute. In its second preliminary objection, the Maldives submitted that the Special Chamber had no jurisdiction to determine the disputed issue of sovereignty over the Chagos Archipelago, which it would necessarily have to do if it were to determine Mauritius' claims in these proceedings.

The Special Chamber, which examined these two objections together, first addressed the relevance of an award which had been rendered on 18 March 2015 by an arbitral tribunal in the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*. In the view of the Special Chamber, this award demonstrated that, “aside from the question of sovereignty, the Chagos Archipelago has been subject to a special regime, according to which Mauritius is entitled to certain maritime rights”.<sup>1</sup>

It may be of particular interest to the General Assembly that the Special Chamber, in its considerations, also dealt with an advisory opinion of the International Court of Justice (the “ICJ”), rendered in response to questions submitted by the General Assembly, and with a resolution subsequently adopted by it. I refer here to the advisory opinion of the ICJ of 25 February 2019 on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* and to resolution 73/295 of the General Assembly of 22 May 2019.

As to the Chagos advisory opinion, the Special Chamber found that “[t]he determinations made by the ICJ with respect to the issues of the decolonization of Mauritius in the Chagos advisory opinion have legal effect and clear implications for the legal status of the Chagos Archipelago” and that “[t]he United Kingdom’s continued claim to sovereignty over the Chagos Archipelago is contrary to those determinations.”<sup>2</sup> The Special Chamber also found that, “[w]hile the process of decolonization has yet to be completed, Mauritius’ sovereignty over the Chagos Archipelago can be inferred from the ICJ’s determinations”.<sup>3</sup>

With respect to UNGA resolution 73/295, the Special Chamber noted that this resolution demanded that the United Kingdom withdraw its administration over the Chagos Archipelago within six months of its adoption. In the view of the Special Chamber,

[t]he fact that the time-limit set by the General Assembly has passed without the United Kingdom complying with this demand further strengthens the Special Chamber’s finding that its claim to sovereignty

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<sup>1</sup> *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) Preliminary Objections, Judgment*, para. 246.

<sup>2</sup> *Ibid.*, para. 246.

<sup>3</sup> *Ibid.*, para. 246.

over the Chagos Archipelago is contrary to the authoritative determinations made in the advisory opinion.<sup>4</sup>

On this basis, the Special Chamber rejected both the first and the second preliminary objection of the Maldives. It found that,

whatever interests the United Kingdom may still have with respect to the Chagos Archipelago, they would not render the United Kingdom a State with sufficient legal interests, let alone an indispensable third party, that would be affected by the delimitation of the maritime boundary around the Chagos Archipelago.<sup>5</sup>

The Special Chamber also considered that its

findings as a whole provide it with sufficient basis to conclude that Mauritius can be regarded as the coastal State in respect of the Chagos Archipelago for the purpose of the delimitation of a maritime boundary even before the process of the decolonization of Mauritius is completed.<sup>6</sup>

Time does not permit me to go into detail with regard to the Maldives' other objections. Let me just say that the Special Chamber also rejected these objections, after it had found that the Parties' obligation under article 74, paragraph 1, and article 83, paragraph 1, of the United Nations Convention on the Law of the Sea ("the Convention") "to effect the delimitation of the exclusive economic zone and the continental shelf by agreement"<sup>7</sup> had been fulfilled, that "a dispute existed between the Parties concerning the delimitation of their maritime boundary"<sup>8</sup> at the time of filing of the Notification, and that Mauritius' claims did not constitute an abuse of process.<sup>9</sup>

The Special Chamber concluded that it had "jurisdiction to adjudicate upon the dispute concerning the delimitation of the maritime boundary between the Parties in the Indian Ocean and that the claim submitted by Mauritius in this regard [was]

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<sup>4</sup> *Ibid.*, para. 246.

<sup>5</sup> *Ibid.*, para. 247.

<sup>6</sup> *Ibid.*, para. 250.

<sup>7</sup> *Ibid.*, paras. 269, 293.

<sup>8</sup> *Ibid.*, para. 335.

<sup>9</sup> *Ibid.*, para. 349.

admissible.”<sup>10</sup> The Special Chamber found it appropriate, however, to defer some matters to the proceedings on the merits.<sup>11</sup>

After the judgment on preliminary objections, the merits phase of the case, which had previously been suspended, resumed. Meanwhile, the Parties have filed a Memorial and a Counter-Memorial, respectively, in accordance with time-limits fixed by Order of the President of the Special Chamber dated 3 February 2021.

The second case on the docket of the Tribunal is *The M/T “San Padre Pio” (No. 2) Case (Switzerland/Nigeria)*. 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. On 17 December 2019, the Parties agreed to transfer the dispute to the Tribunal.

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. Switzerland filed the Memorial within the time-limit. By Order of 5 January 2021, the time-limit for the submission of the Counter-Memorial of Nigeria was extended to 6 April 2021. No Counter-Memorial was filed by Nigeria within the extended time-limit.

By Order of 18 June 2021, having ascertained the views of the Parties, the President fixed 9 September 2021 as the date for the opening of the hearing. However, by letter of 30 July 2021, Switzerland requested that “the opening of the oral proceedings be postponed until a later date towards the end of fall 2021” and referred in this respect to “the ongoing implementation of a Memorandum of Understanding ... concluded by Switzerland and Nigeria on 20 May 2021 regarding the issue of the *M/T ‘San Padre Pio’*.” By Order of 10 August 2021, the President, having regard to the special circumstances of the case and having sought the views of the Parties, decided to postpone the opening of the oral proceedings until a later date to be fixed after consultations with the Parties.

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<sup>10</sup> *Ibid.*, para. 351.

<sup>11</sup> *Ibid.*, paras. 353 and 354 (6).

Mr President,  
Distinguished delegates,

Earlier this year, on 1 October, the Tribunal celebrated its twenty-fifth anniversary. To mark the event, I gave a live address, broadcast on the Tribunal's website. In addition, a reception was held at the premises of the Tribunal, which was attended by the judges, the First Mayor of the Free and Hanseatic City of Hamburg, and members of the Diplomatic and Consular Corps. The Tribunal also released an anniversary film and published a fully updated version of its *Digest of Jurisprudence*, both of which are available on the Tribunal's website.

During the 25 years of its history, the Tribunal has established itself as the primary judicial body to which States parties to the Convention turn when seeking peaceful settlement of their disputes concerning the interpretation or application of the Convention. At this juncture, allow me to add some more general remarks about the Tribunal's work as well as about the future prospects of dispute settlement in the law of the sea.

One of the reasons for its privileged role in dispute settlement is the availability of efficient and fair procedures before the Tribunal that respond to the needs of States parties. By way of example, let me draw your attention to a procedure that is unique to the Tribunal and has been used frequently, in particular during the Tribunal's initial years. I am referring here to applications pursuant to article 292 of the Convention by a flag State or an entity acting on its behalf for the prompt release of a vessel or its crew, detained by the authorities of a State party on account of fisheries or marine pollution offences.

The arrest and detention of a vessel and its crew raise humanitarian and economic concerns, which worsen the longer detention continues. In such situations, prompt release proceedings offer an efficient means to secure the release of a vessel or its crew upon posting of a reasonable bond or other financial guarantee without prejudice to the consideration of the merits of the case. The Tribunal has entertained a number of applications pursuant to article 292 of the Convention and has

demonstrated its capacity to render judgments in such cases in a remarkably efficient and expeditious manner, within a time-frame of not more than 30 days from the receipt of the applications. Those cases also have provided the Tribunal with the opportunity to develop well-established jurisprudence, regarding, among other matters, the reasonableness of a bond or other financial security.

The arrest of vessels and crews continues to be a frequent occurrence in international navigation. The Tribunal remains available to entertain future applications for prompt release, thereby ensuring that the delicate balance between the rights and obligations of the coastal and flag States, as enshrined in the Convention, is upheld.

As confident as I am that the Tribunal will continue to resolve disputes in areas for which it has an established track record, I am equally optimistic about its prospects for handling new challenges in the law of the sea. The future of ocean governance is currently high on the agenda. The international community is becoming increasingly aware of the harmful effects of climate change on the sea, including ocean warming, ocean acidification and sea-level rise. Other challenges, such as the guarantee of basic human rights at sea, add to the complexity.

The question has therefore been raised whether the Convention is still fit for purpose in the contemporary era. I am confident to say that this question can be answered in the affirmative. In this regard, it is worth recalling the Convention's preamble, which specifies that the States parties were "[p]rompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea".

This aspiration culminated in a comprehensive treaty text dealing with a vast array of subject-matter. Of course, the drafters of the Convention could not predict all future uses of the oceans or ocean-specific risks. Nonetheless, they made the Convention "future-proof". Its resilient quality is plain to see in its many "rules of reference", which require States parties to observe provisions contained in other treaties or standards adopted by competent international organizations. The Convention is therefore often referred to as a "framework convention", a characteristic

which allows it to stay up to date in accordance with evolving international standards while maintaining its status as the central legal framework for ocean governance.

The adaptability of the Convention is also achieved through the work of international courts and tribunals. With some regularity, they are required to interpret broadly phrased terms or address matters not expressly stipulated in the Convention and thereby promote the progressive development of international law. The Tribunal's contributions in this respect are notable and date back to its earliest jurisprudence.

Thus, in its judgment in the *M/V "SAIGA" (No. 2) Case*, while acknowledging that the Convention "does not contain express provisions on the use of force in the arrest of ships", the Tribunal held that "international law ... requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances."<sup>12</sup> Moreover, in this judgment, the Tribunal stated that "[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law."<sup>13</sup> In its later jurisprudence, it also referred to the importance of "humanitarian concerns"<sup>14</sup> and emphasized that "States are required to fulfil their obligations under international law, in particular human rights law, and ... considerations of due process of law must be applied in all circumstances".<sup>15</sup>

The case law of the Tribunal has also left a lasting mark on how marine environmental considerations are to be factored into the application and interpretation of the Convention. In this regard, the Tribunal and a Special Chamber of the Tribunal have confirmed the duty of States to protect and preserve the marine environment, enshrined in articles 192 and 193 of the Convention.<sup>16</sup> The Tribunal also linked this

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<sup>12</sup> *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, pp. 61-62, para. 155.

<sup>13</sup> *Ibid.*

<sup>14</sup> See e.g. *M/T "San Padre Pio" Case (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019, p. 405, para. 130.

<sup>15</sup> *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 46, para. 155.

<sup>16</sup> *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, p. 70, para. 76; *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, p. 160, paras. 69, 70.

duty to the conservation of the living resources of the sea which it considered to be “*an element in the protection and preservation of the marine environment*”.<sup>17</sup> Moreover, the Seabed Disputes Chamber, in its 2011 advisory opinion on the *Responsibilities and obligations of States with respect to activities in the Area*, referred to the obligations relating to the preservation of the environment of the high seas and in the Area as having an “*erga omnes character*”.<sup>18</sup>

In several cases dealing with matters relating to the marine environment, the Tribunal also emphasized that States should act with “prudence and caution”.<sup>19</sup> Building on this notion, the Seabed Disputes Chamber, in its 2011 advisory opinion, made a significant contribution to strengthening the status of the precautionary approach in international law. The Chamber, *inter alia*, held that “the precautionary approach is ... an integral part of the general obligation of due diligence of sponsoring States”<sup>20</sup> under the Convention’s regime for the exploitation of the resources of the Area. The Chamber also recognized that a trend had been initiated “towards making [the precautionary] approach part of customary international law.”<sup>21</sup>

I am confident that this brief jurisprudential survey makes apparent that the Tribunal, whether in the exercise of its contentious or of its advisory jurisdiction, has the ability and willingness to retain its leading role in ensuring the harmonious application of the Convention as the law of the sea faces new conundrums in the future.

Mr President,

Distinguished delegates,

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<sup>17</sup> *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 295, para. 70.

<sup>18</sup> *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, ITLOS Reports 2011, p. 10, at p. 59, para. 180.

<sup>19</sup> See e.g. *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, *op.cit.*, p. 296, paras. 77 and 79; *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, *op.cit.*, p. 160, para. 72.

<sup>20</sup> *Responsibilities and obligations of States with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, *op.cit.*, p. 46, para. 131.

<sup>21</sup> *Ibid.*, p. 47, para. 135.

Before I conclude, let me give you a brief update on the Tribunal's activities in the field of capacity building. Unfortunately, some of these activities have also been affected by the COVID-19 pandemic. Thus, the Tribunal could not continue its established practice of holding regional workshops on the settlement of disputes related to the law of the sea. In this regard, I wish to thank the Government of Cyprus for its financial support towards the organization of a future regional workshop in the Mediterranean. Similarly, the Summer Academy, which is normally organized annually by the International Foundation for the Law of the Sea on the premises of the Tribunal, could not take place in 2020 and 2021. Instead a compact online course on the law of the sea and maritime law was organized by the Foundation.

I am pleased to report, however, that the Tribunal continued to host interns in its internship programme throughout this period. I also wish to recall that a trust fund set up by the Tribunal is available to support interns from developing countries and several grants have been made to this fund over the years, including by the Korea Maritime Institute and the Ministry of Foreign Affairs of the People's Republic of China. I wish to express my sincere gratitude for this support.

The Tribunal also continued its capacity-building and training programme in international dispute settlement in the law of the sea, which has been organized annually since 2007. Since its establishment, this programme has been run with the financial support of the Nippon Foundation. I wish to take this opportunity to express my sincere gratitude to the Nippon Foundation for its enduring commitment to the programme.

The Tribunal has also taken steps to expand its capacity-building activities. Thus, in 2020, the Tribunal received a grant from the Republic of Korea to fund a workshop aimed at legal advisers, in particular from developing countries, to familiarize them with the Convention's dispute-settlement mechanisms. I wish to thank the Republic of Korea for this generous grant. Unfortunately, the workshop could not take place in 2020 or 2021 owing to the prevailing restrictions. We are confident, however, that we will be able to organize the workshop in the coming year.

Finally, I wish to draw your attention to the Tribunal's new Junior Professional Officer programme, which was established on 30 September 2021. It is designed for young professionals to serve in the Legal Office or in other departments of the Tribunal's Registry. States parties were informed of the new programme by note verbale. Information has also been made available on the website of the Tribunal.

Mr President,  
Distinguished delegates,

Having come to the end of my address, I would like to underscore that the Tribunal benefits from excellent cooperation with the United Nations. In this respect, I wish to express our gratitude to the Secretary-General, the Legal Counsel and the Director of the Division for Ocean Affairs and the Law of the Sea for their support and cooperation.

Thank you for your kind attention.