

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



Statement by

JUDGE JOSE LUIS JESUS,

President of the
International Tribunal for the Law of the Sea

to the Informal Meeting of Legal Advisers
of Ministries of Foreign Affairs

New York

27 October 2009

Mr Chairman

Ladies and Gentlemen,

It is with great pleasure that I address this meeting of distinguished legal advisers. I am sincerely honoured and grateful for the kind invitation addressed to me by the organisers to be here today, and for the opportunity to exchange views with you on the work of the Tribunal and matters of common concern.

The International Tribunal for the Law of the Sea (ITLOS) entertained its two last cases in 2007. My predecessor has already had the occasion to inform you at your meeting held that year about some of the legal issues related to those two cases of prompt release of vessels and crews, that is to say the “*Tomimaru*” and the “*Hoshinmaru*” Cases. I should therefore not waste your time by repeating what he has already stated before you.

For lack of new cases to comment on, I will seize this opportunity to address some of the legal issues related to prompt release, including issues related to the changes made earlier this year to our Rules regarding the posting of the reasonable bond in prompt release cases, and then I will highlight a few legal issues and draw your attention to some useful procedures available at the Tribunal. Finally, I will give you a brief account of the *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*, a case still pending before a special chamber of the Tribunal.

Mr Chairman,

In March of this year, the Tribunal amended articles 113, paragraph 3, and 114, paragraphs 1 and 3 of its Rules. The changes introduced are aimed at creating conditions that will better secure the prompt implementation of the Tribunal’s decisions on prompt release of vessels and crews. These changes were prompted by some difficulties experienced by parties in the implementation of the Tribunal’s decisions.

As you may be aware, of the thirteen cases that have been solved by the Tribunal since it started its work in 1996 nine are cases of prompt release of vessels and crews. The immediate implementation of the orders for release of vessels and crews upon the posting of the bond by the flag State, as may be decided by the Tribunal, is of paramount importance if the urgent character of the prompt release procedure is to be attained as envisaged by the Convention.

Overall, the record of the implementation of the Tribunal's decisions on prompt release by the States parties involved is positive and shows that this procedure is useful to States in helping them to immediately solve the issue of detention of vessel and crew, while the case on the merits runs its course through the domestic court of the detaining State.

However, we have come to observe that sometimes the immediate nature of the release is somewhat hurdled, though not in a fundamental way, by delays in prompt implementation of the Tribunal's order of release of vessel and crew.

In two cases, the *M/V "SAIGA" Case* (Saint Vincent and the Grenadines v. Guinea), Prompt Release, and the *"Juno Trader" Case* (Saint Vincent and the Grenadines v. Guinea-Bissau), Prompt Release, the immediate release of vessels and crews upon the posting of the bond fixed by the Tribunal was delayed due to issues raised in the context of the implementation of the Tribunal's orders.

In its Judgment of 4 December 1997 in the *M/V "SAIGA" Case*, the Tribunal decided that the bond for the release of the *Saiga* was to be posted in the form of a letter of credit or bank guarantee. Indications regarding the content and terms of the bond to be posted were not included in the judgment.

The bank guarantee was communicated to the Agent of the Respondent on 10 December 1997. According to the correspondence between the parties, the Agent of the Applicant considered that the guarantee had been validly posted on that date and therefore demanded that the vessel be released immediately. The Agent of the Respondent did not promptly accept the guarantee, mainly for reasons related to the language in which the guarantee should be issued, the identity of the signatories of

the draft guarantee and their authority to act on behalf of the issuer, the circumstances for payment, and similar arguments.

During a period of approximately two months, negotiations regarding the terms of the guarantee took place between the parties. As a result, the vessel *Saiga* was only able to leave the territory of the detaining State 80 days after the decision of the Tribunal for its prompt release had been issued.

Difficulties were also later on experienced in the implementation of the Tribunal's order in the "*Juno Trader*" Case.

In the weeks that followed the delivery of its Judgment in this case, the Tribunal received several communications from the Applicant complaining that it was facing obstacles in securing the release of the vessel on account of practical difficulties alleged by the Respondent in implementing the Tribunal's order. These difficulties were similar to those that had been raised in the implementation of the Tribunal's decision in the *M/V "SAIGA"* Case as referred to above.

As a result, the ship *Juno Trader* was only released three months after the delivery of the Tribunal's Judgment.

To respond to this challenge, the Tribunal, in subsequent prompt release cases, developed its jurisprudence aimed at preventing that these kind of practical difficulties could in future cases be raised, in order to avoid, as much as possible, the delaying of the prompt implementation of its prompt release orders.

In addition, the Tribunal, after careful consideration, changed its Rules of Procedure, allowing for the posting of the reasonable bond fixed by it either with the detaining State or with the Registrar, as it may determine in a particular case. The Tribunal amended articles 113, paragraph 3, and 114, paragraphs 1 and 3 relating to the posting of the reasonable bond fixed by it in prompt release cases.

Prior to these amendments, a bond or other financial security in cases of prompt release of vessels and crews could be posted only with the detaining State, unless

the parties agreed otherwise. Pursuant to the amendments introduced to those two articles, the Tribunal now has the option to determine, on a case-by-case basis, whether a bond or other financial security is posted with the detaining State or with the Registrar of the Tribunal.

The text of the amendments introduced to articles 113, paragraph 3, and 114, paragraphs 1 and 3, are posted on the ITLOS website. I shall therefore not read them out for the sake of saving you time.

In addition, in order to assist parties in implementing the amended rules, the Tribunal adopted, on the same date, Guidelines concerning the posting of a bond or other financial security with the Registrar, the text of which is also displayed on our website.

In introducing these changes, the Tribunal was guided by the Convention's balanced approach embodied in the prompt release procedure. To protect the interests of the detaining State, this procedure assures the availability of sufficient financial security to ensure the payment of all penalties that may be imposable by the domestic court of the detaining State, while protecting the interests of the flag State and the ship owner by facilitating the expeditious return of vessel and crew to service.

Mr Chairman,

Another matter that deserves a brief annotation here is the Tribunal's consideration of time-limits on simultaneous submission of cases entailing urgent proceedings.

As you are aware, the two prompt release applications entertained by ITLOS in 2007 were submitted by Japan against the Russian Federation. This was the first time that two such applications were being submitted *simultaneously*. The fact that the two cases had to be handled at the same time and during the same period put great work pressure on the parties themselves, as well as on the judges and the Registry. The Tribunal was, however, able to deliver both judgments on 6 August 2007, in compliance with the time-limits set out in its Rules.

To avoid the work pressure posed on all those involved by urgent cases that are submitted simultaneously, the Tribunal has since addressed the issue of how best to manage the time-limits and what to do to better cope with such a situation. The purpose was to look for possible avenues to enable it in future to exercise some flexibility in handling two prompt release proceedings simultaneously. The Tribunal, however, concluded that, for the time being, no amendments to its Rules for this purpose seem to be necessary.

Turning now to prompt release procedures in cases of damage to the marine environment, I would like to stress that the prompt release procedure as envisaged in the Convention only applies to two situations of detention or arrest of vessels and crews: it applies to cases of release from detention of vessel and crew for alleged violation of fisheries legislation of the coastal State, as referred to in article 73, and it applies to cases of release from detention for alleged violation of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, as referred to in article 220, paragraph 7, or 226 (1)(b).

It is to be noted that all the prompt release cases so far entertained by the Tribunal were cases falling under the purview of article 73 of the Convention, that is to say they were cases that involved release from detention or arrest of vessels and crews for alleged violation of the coastal State's fisheries legislation in the EEZ.

The Tribunal has not as yet received any application for prompt release of vessels and crews detained for alleged marine pollution offences or environmental damage under article 220, paragraph 7, or article 226 (1)(b).

One of the reasons that may explain why States have so far not had recourse to prompt release procedures in situations of detention of vessels and crews for marine pollution might be the lack of information on how this procedure works, having in mind the complex manner in which the relevant provisions are drafted.

Although in the case of release from detention for marine pollution offences the provisions of article 220, paragraph 7, or 226 (1)(b) do not refer expressly to the

crew members of the detained vessels, they are nonetheless to be included in the prompt release procedures since they are part of the vessel as a unit.

It is to be noted in this regard that, with the exception of the particular circumstance referred to in article 230, paragraph 2 *in fine*, the Convention does not authorize the imprisonment of any person for pollution which is not wilfully caused, as is also the case with fisheries violation in the EEZ, as prescribed in article 73, paragraph 3.

Under the release procedure, ITLOS is the body that ultimately determines the reasonableness of the bond and, once it has determined the amount of the bond or other guarantee it considers to be reasonable, it then orders the release of the detained vessel and crew upon the posting of the bond or guarantee.¹

This prompt release procedure, which takes less than a month to be completed from the submission of the Application to the delivery of the Tribunal's decision, may be used by flag States and ship owners to avoid that their detained vessels remain idle for long periods of time while a decision on the merits by the competent domestic court is awaited. It also provides a mechanism for swift release of crew members from detention that may otherwise last for long periods.

Mr Chairman,

I would now like to make some brief comments on another procedure entailing compulsory jurisdiction under the Convention. It is a procedure that is useful to States that may wish to take steps to timely protect their rights and the marine environment, pending the constitution of an Annex VII arbitral tribunal.

We have in our Rules two types of urgent proceedings: the provisional measures under article 290, paragraph 5, of the Convention; and the prompt release of vessels and crews under article 292 of the Convention. They both fall under the compulsory

¹ In the jurisprudence of the Tribunal the following factors have been taken into account for the determination of the reasonableness of the bond: (1) the gravity of alleged offences; (2) the penalties imposed or imposable; (3) the value of the vessel; (4) and the amount of the bond imposed by the detaining State and its form.

jurisdiction of the Tribunal. The Tribunal has so far received 15 cases, 13 of which² involved urgent proceedings.

Since I have already made some comments on the prompt release procedure I shall here address only the urgent proceeding on provisional measures under article 290, paragraph 5. This paragraph states that “Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4”.

The provisional measures referred to in this paragraph represent another example of a new procedural development in international adjudication. Before the Convention, no such possibility existed.

What is new about this procedure that makes it noteworthy? As is well known, usually a tribunal or court, domestic or international, when dealing with a case on the merits can be requested by one of the parties to the dispute to prescribe provisional measures pending the final decision on the case. That is the procedure envisaged in article 290, paragraph 1. However, as was stated before, in the case of provisional measures under article 290, paragraph 5, we are dealing with a different procedure, one that may, as a compulsory procedure, only be brought before ITLOS. In accordance with article 290, paragraph 5, if the parties have not reached an agreement on a court or tribunal, ITLOS may be requested by one of the parties -

² The *M/V “SAIGA” Case* (Saint Vincent and the Grenadines v. Guinea); the *M/V “SAIGA” (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea); *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan); the *“Camouco” Case* (Panama v. France); the *“MonteConfurco” Case* (Seychelles v. France); the *“Grand Prince” Case* (Belize v. France); the *“Chaisiri Reefer 2” Case* (Panama v. Yemen); the *MOX Plant Case* (Ireland v. United Kingdom); the *“Volga” Case* (Russian Federation v. Australia); *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore); the *“JunoTrader” Case* (Saint Vincent and the Grenadines v. Guinea-Bissau); the *“Hoshinmaru” Case* (Japan v. Russian Federation); the *“Tomimaru” Case* (Japan v. Russian Federation).

normally the applicant - to prescribe provisional measures to protect the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, even when the Tribunal is not entertaining the case on the merits.

This may be done in the following circumstances: article 287 of the Convention establishes that “when signing, ratifying or acceding to the Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration [...] (a) the International Tribunal for the Law of the Sea [...]; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII”. If the parties to a dispute have not chosen the same means for dispute settlement, as listed in article 287, then the dispute may be submitted by one of the parties to the arbitral tribunal under Annex VII to the Convention, which is the default procedure under the Convention. Once a party has notified the other party that it is instituting an Annex VII arbitral tribunal to deal with the dispute between them, one of the parties alone may request ITLOS to prescribe provisional measures under article 290, paragraph 5, pending the constitution of the arbitral tribunal. ITLOS will entertain the case if it finds that the urgency of such measures is warranted and that the arbitral tribunal has *prima facie* jurisdiction.

This procedure has been included in the Convention to make sure that while the arbitral tribunal is being constituted the rights of the parties to the dispute or the marine environment are not left unprotected. Indeed, whenever arbitral proceedings are instituted, it may take a long time before the arbitral tribunal becomes operative. Therefore this procedure provides an outlet for provisional measures to be prescribed by ITLOS until the arbitral tribunal is in a position to deal itself with a request for provisional measures, and may affirm, change or revoke the provisional measures eventually prescribed by ITLOS.

This procedure is another instance of compulsory jurisdiction in the sense that it takes only one of the parties to the dispute to institute the proceedings through an application submitted to the Tribunal and, as a compulsory procedure, it can be entertained only by the Tribunal. The Tribunal has entertained four cases of provisional measures under article 290, paragraph 5, the *Southern Bluefin Tuna*

Cases, the *MOX Plant Case* and the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*³.

It is to be noted that the Statute of the Tribunal introduced yet another new development to international adjudication regarding the nature of the Tribunal's decision on provisional measures by establishing that the Tribunal "prescribes" provisional measures, rather than "indicating" them. The Statute of the Tribunal, by stating that decisions on provisional measures are "prescribed", made it clear that such measures have a binding effect. This may have contributed to the evolution in the jurisprudence related to the legal effect of provisional measures in other judicial bodies.

Mr Chairman,

Since we have just referred to the Annex VII arbitral tribunal and since it is a matter related to the jurisdiction of ITLOS, allow me to briefly comment on the choice of means of dispute settlement under article 287.

As you are aware, States parties to the Convention are given the choice, which may be made at any moment, to select one or more means of dispute settlement to which they may wish to submit the law of the sea disputes they have with other States for settlement. A few States have indeed made such declarations. Many, however, have not yet done so.

A State wishing to avoid compulsory arbitration under Annex VII and the considerable additional expenses relating to an arbitral procedure may wish therefore to consider making a declaration in accordance with article 287, by choosing other means of dispute settlement

Mr Chairman,

Ladies and Gentlemen,

³ Proceedings relating to the request for provisional measures in the *M/V "SAIGA" (No. 2) Case* were also instituted on the basis of article 290, paragraph 5, of the Convention. Further to an agreement between the parties to submit the case to the Tribunal, the case was then dealt with by the Tribunal under article 290, paragraph 1, of the Convention.

Much has been said about the so-called fragmentation of international law and courts. This issue seems to be more relevant in the context of the jurisprudence developed by the International Court of Justice and the International Tribunal for the Law of the Sea, as the two only standing international judicial bodies to handle disputes between States. In this regard I would like to briefly state that relations between the Tribunal and the Court have been marked by cooperation and mutual respect.

I salute the presence here of Judge Owada, the President of the ICJ, whose goodwill I am sure will help to further the good relations existing between our two international courts. The visit of the then President of the International Court of Justice, Judge Rosalyn Higgins, to the Tribunal on the occasion of its tenth anniversary and the informal meeting held in 2008 between judges of the two institutions to exchange views on issues of common concern inaugurated a new era in the relations between our two courts. We look forward to continuing and further enhancing the cooperation and good relations between our two institutions.

With regard to the developments of the Tribunal's jurisprudence, the Tribunal, as my predecessor has already informed you, has not hesitated in referring in its decisions, whenever appropriate, to the precedents set by the ICJ. By so doing, the Tribunal has helped strengthening the development of a coherent corpus of jurisprudence. This demonstrates a constructive approach in securing and maintaining consistency in international law and international judicial decisions.

I should add that ITLOS has also, whenever appropriate, relied upon the decisions of the Permanent Court of International Justice and arbitral tribunals.

Finally, Mr Chairman, I would like to offer a brief comment on the pending *Swordfish* case. As this meeting was informed by my predecessor in 2007, in December 2000, at the request of the parties, Chile and the European Community, the dispute *concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* was submitted to a special chamber formed under article 15, paragraph 2, of the Statute of the Tribunal.

In March 2001, the parties informed the Chamber that they had reached a provisional arrangement concerning the dispute and requested that the proceedings before the Chamber be suspended. The time-limits in the proceedings were therefore extended by an order dated 15 March 2001. At the request of both parties further extensions were decided by the Chamber in 2003, 2005 and 2007. The Special Chamber met on 10 December last year and in its order dated 11 December 2008 decided on a further extension of one year for the time-limit for the submission of the pleadings in the case.

The Chamber is scheduled to meet once again in Hamburg in December of this year.

Mr Chairman,

I would like once again to thank the organisers for the kind invitation addressed to me and I look forward to continuing participating in this most useful exercise of exchanging views on legal and judicial matters of common concern.

I thank you all for listening.