

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



Statement by

JOSÉ LUÍS JESUS,
President of the
International Tribunal for the Law of the Sea

to the

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of the General Assembly**

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CHECK AGAINST DELIVERY

Mr Chairman,

I am grateful to you, for your kind invitation for me to address the Sixth Committee on issues pertaining to the work of the International Tribunal for the Law of the Sea (“the Tribunal”). I am particularly delighted to be able today, in my capacity as President of the Tribunal, to speak in this Committee, in whose work I participated for many years as representative of my country and to which I will always be thankful, for it was in this Committee that a substantial part of my on-the-job training as an international lawyer took place.

I am greatly honoured and comforted to speak under the auspices of your gavel, Mr. Chairman. We have known each other and worked together for many years as delegates of our respective countries in this Committee as well as in the Law of the Sea meetings. Under your able and experienced leadership, your tenure as Chairman of this Committee has certainly been a great success. My congratulations to you!

Mr Chairman,

At the outset I would like to state that the ideas and opinions included in this statement are my own and cannot be attributed to the Tribunal.

I have chosen to give you an overview of the work of the Tribunal. I shall start with an outline of the jurisdiction of the Tribunal, giving a brief overview of disputes that it may entertain. I will also refer to its advisory role and highlight some aspects of the compulsory jurisdiction of the Tribunal, as envisaged in the Convention in relation to two urgent proceedings. I will give you a brief account of the cases that have been solved by the Tribunal and I will make a brief prognosis of our future work, to the extent that this is possible. I will also refer to the choice of procedure for the settlement of law of the sea disputes, as established in article 287 of the Convention, and finally I will inform you of activities carried out by the Tribunal to promote the knowledge of the dispute settlement system established in the Convention.

On the jurisdiction of the Tribunal

The Tribunal is a judicial body created by the 1982 United Nations Convention on the Law of the Sea (hereinafter “the Convention”), an international legal instrument that has been ratified by an overwhelming number of 158 States from all regions of the world and by the European Community

Since most of the countries represented here are parties to the Convention, the Tribunal is therefore an international court of your own creation and I am glad to note that amongst the 21 sitting judges of whom the Tribunal is at present composed, five are from Africa, five are from Asia, four are from Latin America and the Caribbean Countries, four from the Western Europe and Other States Group and three from Eastern Europe.¹

As an international judicial body with specialized jurisdiction over law of the sea disputes, the Tribunal holds a particular position for playing a major role in the settlement of law of the sea disputes. This role is enhanced by the fact that the Convention confers on it certain functions which are indeed unique in international adjudication.

The Tribunal has both contentious and advisory jurisdictions. In particular, it has jurisdiction over any dispute concerning the interpretation or application of the provisions of the Convention which is submitted to it in accordance with Part XV of the Convention.² It also has jurisdiction to entertain any dispute concerning the interpretation or application of an international agreement related to the purposes of the Convention which is submitted to it in accordance with the agreement, as well as any dispute relating to the interpretation or application of a treaty already in force concerning the subject-matter covered by the Convention if all the parties to such a treaty so agree.³

In practical terms this means that the Tribunal may entertain any dispute related to any matter that is covered by the provisions of the Convention or by the provisions of any agreement or treaty related to the purposes of the Convention. Such disputes could be related, for example,

¹ See list in Annex.

² See article 288, paragraph 1, of the Convention and articles 21 and 22 of the Statute of the Tribunal.

³ See article 22 of the Statute of the Tribunal.

to illegal, unreported or unregulated fishing (“IUU fishing”), to the conservation of marine living resources, to the protection and preservation of the marine environment, to navigational issues, to the prompt release of vessels and crews in cases of alleged violation of coastal States fisheries or marine environment regulations and standards, to provisional measures to protect the marine environment or the rights of the parties to a dispute submitted to Annex VII arbitration, to compensation for damage or wrongful acts against a State party related to activities covered by the Convention, to disputes arising out of the laying and repairing of submarine cables and pipelines on the continental shelves of coastal States, just to name a few of the many cases that may be the subject of a law of the sea dispute that may be entertained by the Tribunal.

The Tribunal, as a full court, also has jurisdiction to entertain requests for advisory opinions,⁴ based on an international agreement related to the purposes of the Convention.

Apart from the competence of its Seabed Disputes Chamber to issue advisory opinions at the request of the Assembly or the Council of the International Seabed Authority, the Tribunal, functioning as a full court, also has an advisory jurisdiction, under article 138 of its Rules. Indeed, article 138 of the Rules indicates that the Tribunal “may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion”. This is an important procedural innovation which introduces a flexible and fresh approach to the issue of entities entitled to request advisory opinions.

Article 138 of the Rules of the Tribunal is based on article 21 of the Statute of the Tribunal, which confers broad jurisdiction when it states that “the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”.

Advisory opinions are non-binding but may play an important role in clarifying a legal point that may arise in the interpretation or application of the law. Although no request for advisory

⁴ See article 138 of the Rules of the Tribunal and article 21 of the Statute of the Tribunal.

opinions has so far been made, the advisory function of the Tribunal as a full court may provide a flexible mechanism for those seeking to clarify points of law or legal questions.

As States and other users of the Convention seem to differ on the interpretation and application of certain provisions of the Convention and new world events seem to demand a better understanding of the Convention's provisions, requests to the Tribunal for advisory opinions might prove to be a useful tool. They may assist parties in narrowing their differences on a given legal point or question and facilitate the settlement of disputes through negotiations, thus helping to curb further escalation of conflicts between States.

The recourse to advisory opinions could be used with respect to a wide variety of issues. It could be used, for example, to clarify legal questions relating to:

- a) Flag State responsibility regarding IUU fishing;
- b) The legal effect, if any, on coastal States' baselines of major land invasion by seawater, as a result of sea-level rise caused by climate change;
- c) Certain legal issues that might be raised in the context of the work of the Commission on the Limits of the Continental Shelf;
- d) Certain legal issues that might be raised in the context of the work of the Authority;
- e) Certain legal issues that might be raised in the context of different approaches to the interpretation of certain provisions of the Convention.

Jurisdiction of the Seabed Disputes Chamber

Apart from its jurisdiction as a full court, the Tribunal has also a Seabed Disputes Chamber which has a special jurisdiction making it virtually a Tribunal in itself within the Tribunal. The Seabed Disputes Chamber, composed of 11 of the 21 judges of the Tribunal, has quasi-

exclusive jurisdiction over any disputes related to activities in the Area⁵, that is to say any dispute that is related to the legal regime of the Convention applicable to the exploration and exploitation of the resources of the area of the seabed beyond the continental shelves of coastal States.

I would like to emphasize here the fact that disputes related to the seabed area may be entertained only by the Seabed Disputes Chamber and by no other international court. This Chamber has exclusive jurisdiction over such disputes. In accordance with the Convention⁶ there are only two instances in which disputes may be referred either to the Tribunal, or to binding commercial arbitration.

The Seabed Disputes Chamber also has jurisdiction to entertain any request for advisory opinions related to proposals or legal questions concerning the Area, as embodied in Part XI and related annexes of the Convention and in the 1994 New York Agreement on the implementation of Part XI of the Convention.

Functioning Structure of the Tribunal

The Tribunal functions as a full court or in chambers. Apart from the Chamber of Urgent Procedures, there is the Seabed Disputes Chamber which, as previously stated, has a special jurisdiction under the Convention. Other standing chambers have been set up. These are the Chamber for Marine Environment Disputes, the Chamber for Fisheries Disputes and the Chamber for Maritime Delimitation.

Parties to a dispute may wish to refer a case either to the Tribunal as a full court or to a standing chamber. In addition to the Standing Chambers of the Tribunal, parties to a dispute may request the Tribunal to establish a special chamber to deal with a particular dispute. Chile and the European Community already took advantage of this option in the year 2000, when they submitted to a special chamber of the Tribunal the *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*.

⁵ See articles 187 and 188, paragraphs 1 and 2(a) of the Convention.

⁶ See article 188, paragraph 1 (a) and (b), and paragraph 2 (a), of the Convention.

Number of cases received

Up to now, we have entertained 15 cases, of which 13 have been resolved and one is still pending before the special chamber referred to above. All these 13 cases have been entertained by the Tribunal as a full court and, as stated, only one case was referred to a special chamber. The cases submitted to the Tribunal involved disputant States from all the regions of the world.

Most of the cases that have been brought to the Tribunal were in fact cases⁷ involving urgent proceedings. We have in our Rules two types of urgent proceedings: provisional measures under article 290, paragraph 5, of the Convention; and the prompt release of vessels and crews under article 292. They both fall under the compulsory jurisdiction of the Tribunal, that is to say it takes only one State to institute the case before the Tribunal.

Under article 290, paragraph 5, of the Law of the Sea Convention, the International Tribunal for the Law of the Sea under certain circumstances may prescribe provisional measures to protect the rights of the disputant parties or to protect the marine environment against impending damages.

What is new about this procedure? 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, in the case of provisional measures under article 290, paragraph 5, of the Convention, we are dealing with a different procedure, one that may, as a compulsory procedure, only be brought before the Tribunal. In accordance with this article, if a dispute has been submitted to an arbitral tribunal, under Annex VII of the Convention, the Tribunal may be requested by one of the parties to the

⁷ *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 "Monte Confurco" 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 "Juno Trader" Case (Saint Vincent and the Grenadines v. Guinea-Bissau); The "Hoshinmaru" Case (Japan v. Russian Federation); The "Tomimaru" Case (Japan v. Russian Federation).*

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

This procedure has been included in the Convention to make sure that, while an arbitral tribunal is being constituted, the rights of the parties to the dispute or the marine environment are not left unprotected. Indeed, whenever Annex VII 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 the Tribunal until the arbitral tribunal is in a position to deal itself with a request for provisional measures.

The Tribunal has entertained four cases of provisional measures under article 290, paragraph 5: the *Bluefin Tuna Cases*, the *MOX Plant Case* and the *Land Reclamation Case*⁸.

Prompt release of vessels and crews

Another type of urgent proceedings is the procedure for the prompt release of vessels and crews. It is also a novel procedure established by the Convention. This is a further instance in which the Tribunal may be called upon to entertain a case submitted to it based on compulsory jurisdiction. Compulsory jurisdiction means that the unilateral action of one disputant State is sufficient to bring a case to the Tribunal.

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 the fisheries regulations of the coastal State, as referred to in article 73, and it applies also 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 or 226 (1) (b).

⁸ 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.

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 cases that involved release from detention or arrest of vessels and crews for alleged violation of the coastal State fisheries legislation in the EEZ.

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

Although in the case of release from detention for marine pollution offences the provisions of article 220 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.

Under the prompt release procedure, the Tribunal 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.⁹

Pursuant to the Tribunal's jurisprudence, failure to comply with the provisions of the Convention for prompt release (article 73, paragraph 2) applies to situations: (1) when it has not been possible to post a bond; (2) when a bond has been rejected by the detaining State; (3) when the posting of a bond or other guarantee is not provided for in the coastal State's legislation; or (4) when the flag State alleges that the required bond is unreasonable.

The Tribunal has entertained nine cases involving the prompt release of vessels and crew submitted to it by States or on their behalf, following the detention of a fishing vessel for alleged violation of fishing regulations in the exclusive economic zone of a coastal State.

The prompt release procedure, which takes less than a month to be completed, from the date of the submission of the Application to the delivery of the Tribunal's decision, may be used

⁹ 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 impossible; (3) the value of the vessel; (4) the amount of the bond imposed by the detaining State and its form.

by flag States and ship-owners to avoid that 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.

This is an example of the Convention's balanced approach. To protect the interest 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, whereas to protect the interest of the flag State and the ship-owner, the procedure facilitates the expeditious return of vessel and crew to service.

Declaration under article 287 of the Convention

Mr Chairman,

Since we have referred to the Annex VII arbitral tribunal and since it is a matter related to the jurisdiction of the Tribunal, 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 courts or tribunals referred to in article 287 to which they may wish to submit law of the sea disputes they have with other States. More than thirty States have indeed made declarations on their choice. Many, however, have not yet done so.

If disputant States, having made such a declaration, have not chosen the same means of dispute settlement or if they have not made any declaration at all under article 287, then arbitration in accordance with Annex VII of the Convention applies as the default compulsory means of dispute settlement.¹⁰ In this case, a State party to a dispute may unilaterally notify the other disputant State that it is instituting Annex VII arbitral proceedings under Annex VII of the Convention, at any moment after the possibilities of reaching a compromise through negotiations have failed,

¹⁰ See article 287, paragraph 3.

A State wishing to avoid compulsory arbitration under Annex VII and, consequently, the considerable additional expenses usually incurred in an arbitral procedure, may therefore wish to consider making a declaration, by choosing the Tribunal or other means of dispute settlement as indicated in article 287.

Perspective of future work of ITLOS

From what has been stated it is clear that the jurisdiction of the Tribunal and its Seabed Disputes Chamber covers a vast area of potential disputes. Therefore the question might be raised as to why more cases have not been referred to the Tribunal in its 13 years of existence.

A possible explanation is that States traditionally have their own way of dealing with disputes and, whenever feasible, they stay away from courts or tribunals. This is not a phenomenon that affects the work only of the Tribunal; it also affects the work of other international courts and tribunals.

A comparative approach to the law of the sea-related cases received, for example, by the International Court of Justice (“ICJ”) and by the Tribunal over the last 13 years, during which the Tribunal has been in existence, shows that the ICJ received six or seven cases, all related to the delimitation of maritime boundaries, whereas the Tribunal received 15 cases, related to protection of the marine environment, conservation of marine living resources and prompt release of vessels and crews, as well as compensation for illegal vessel detention. One may then observe that the absence of more law of the sea cases is a phenomenon that applies to both courts and not to the Tribunal alone.

I am therefore hopeful that, as the disputes mature and as we reach the stage of exploitation of the international seabed resources, more cases will be submitted to the Tribunal as well as its Seabed Disputes Chamber.

Finally, Mr Chairman I would like to inform you that the Tribunal continues its efforts to contribute to a better knowledge of the dispute-settlement system established by the Convention. In this regard, the Tribunal has organized seven regional workshops on its procedures for the settlement of disputes related to the law of the sea. The most recent of

these workshops took place last October in Cape Town to which Southern African countries were invited.

The Tribunal also established in 2007, with the support of the Nippon Foundation, an annual capacity-building and training programme on dispute settlement under the Convention. During the cycle 2008-2009, five government officials and researchers from China, Gabon, Indonesia, Kenya and Romania benefited from this programme.

In concluding, I would like once again to thank you, Mr Chairman, for the opportunity to address this important Committee. I thank you all for your attention.

Annex

Judges of the International tribunal for the Law of the Sea and the Regional Group to which they belong

Joseph AKL	Asian States
Boualem BOUGETAIA	African States
Hugo CAMINOS	Latin American and Caribbean States
P. CHANDRASEKHARA RAO	Asian States
Jean-Pierre COT	Western European and Other States
Zhiguo GAO	Asian States
Vladimir GOLITSYN	Eastern European States
Albert J. HOFFMANN	African States
José Luís JESUS	African States
James L. KATEKA	African States
Anthony Amos LUCKY	Latin American and Caribbean States
Vicente MAROTTA RANGEL	Latin American and Caribbean States
Tafsir Malick NDIAYE	African States
Dolliver NELSON	Latin American and Caribbean States
Jin-Hyun PAIK	Asian States
Stanislaw PAWLAK	Eastern European States
Tullio TREVES	Western European and Other States
Helmut TÜRK	Western European and Other States
Rüdiger WOLFRUM	Western European and Other States
Shunji YANAI	Asian States
Alexander YANKOV	Eastern European States

