

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



STATEMENT BY
H.E. JUDGE JIN-HYUN PAIK

PRESIDENT OF THE
INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ON
AGENDA ITEM 77 (a) "OCEANS AND THE LAW OF THE SEA"

AT
THE PLENARY OF THE SEVENTY-SECOND SESSION OF THE
UNITED NATIONS GENERAL ASSEMBLY

5 DECEMBER 2017

Mr President,
Ladies and gentlemen,

It is a great honour for me to take the floor, on behalf of the International Tribunal for the Law of the Sea, at this seventy-second session of the General Assembly on the occasion of its examination of the agenda item "Oceans and the law of the sea". Mr President, I would also like to take this opportunity to extend to you my personal congratulations, and those of the Tribunal, on your election as President of the General Assembly.

Mr President,

I will first report on the organizational and judicial developments which have taken place since the last meeting of the General Assembly in December 2016. I will then make a few remarks on the perspectives for the future work of the Tribunal.

As regards organizational matters, I wish to inform you that on 14 June 2017 the Meeting of States Parties to the United Nations Convention on the Law of the Sea (hereinafter "the Convention") elected seven judges to the Tribunal for a term of nine years. Two judges of the Tribunal have been re-elected, namely Judges Boualem Bouguetaia of Algeria and José Luis Jesus of Cabo Verde. Five judges were newly elected: Mr Oscar Cabello Sarubbi of Paraguay; Ms Neeru Chadha of India; Mr Kriangsak Kittichaisaree of Thailand; Mr Roman Kolodkin of the Russian Federation; and Ms Liesbeth Lijnzaad of The Netherlands. The new judges were sworn in in Hamburg on 2 October 2017. Let me highlight that, as a result of these elections, the Tribunal now counts three female judges among its Members.

On 30 September 2017, my predecessor, Judge Vladimir Golitsyn, completed his three-year term as President of the Tribunal. On 2 October 2017, I was elected President of the Tribunal for a three-year term. On the same day, Judge David Attard of Malta was elected Vice-President of the Tribunal. Judge Albert Hoffmann of South Africa was elected President of the Seabed Disputes Chamber on 4 October 2017. As for the Registry, on 15 March 2017, the Tribunal elected Ms Ximena Hinrichs Deputy Registrar of the Tribunal for a five-year term. She took office on 25 June 2017, upon the retirement of the previous incumbent, Mr Doo-young Kim of the Republic of Korea, who had completed 15 years' service at the Tribunal.

Mr President,

With respect to judicial matters, I may report to you that the Special Chamber of the Tribunal formed to deal with the dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean delivered its Judgment on 23 September 2017.

In its Judgment, the Special Chamber delimited the maritime boundary between the two Parties in the territorial sea, the exclusive economic zone and the continental shelf, including the continental shelf beyond 200 nautical miles. In addition, the Chamber dealt with Côte d'Ivoire's claim that the responsibility of Ghana was engaged for alleged violations of the rights of Côte d'Ivoire.

The first question which the Special Chamber had to examine was "whether the Parties ha[d] already effected by agreement the course of their maritime boundary".¹ Ghana was of the view that a tacit agreement did exist on the basis of, inter alia, the Parties' "oil practice" for more than five decades.² This contention was opposed by Côte d'Ivoire.³ After examining the arguments and facts presented by the Parties, the Special Chamber found that "there is no tacit agreement between the Parties to delimit their territorial sea, exclusive economic zone and continental shelf both within and beyond 200 nm."⁴

In this connection, the Special Chamber emphasized that "oil practice, no matter how consistent it may be, cannot in itself establish the existence of a tacit agreement on a maritime boundary."⁵ It observed that "States often offer and award oil concessions in an area yet to be delimited" and that "[i]t is not unusual for States to align their concession blocks with those of their neighbouring States so that no areas of overlap arise."⁶ The Special Chamber considered that those States "do so ... not least out of caution and prudence to avoid any conflict and to maintain friendly relations with their neighbours."⁷ Therefore, it was of the view that "[t]o equate oil concession limits with a maritime boundary would be equivalent to penalizing a State for exercising such caution and prudence."⁸

The Special Chamber also expressed the view that "evidence relating solely to the specific purpose of oil activities in the seabed and subsoil is of limited value in proving the existence of an all-purpose boundary which delimits not only the seabed and subsoil but also superjacent water columns."⁹

Furthermore, the Special Chamber considered that "the fact that bilateral exchanges and negotiations on the delimitation of a maritime boundary took place between the Parties indicates the absence, rather than the existence, of a maritime boundary."¹⁰

¹ Judgment, para. 100.

² Judgment, para. 113.

³ Judgment, para. 114.

⁴ Judgment, para. 228.

⁵ Judgment, para. 215.

⁶ Judgment, para. 225.

⁷ *Idem.*

⁸ *Idem.*

⁹ Judgment, para. 226.

¹⁰ Judgment, para. 243.

Regarding the delimitation methodology, the Special Chamber found “no convincing reason to deviate ... from the equidistance/relevant circumstances methodology”.¹¹ While Côte d’Ivoire had argued in favour of the application of the “angle bisector methodology”,¹² the Special Chamber noted that the relevant coasts of the Parties are straight and not unstable, and, therefore, it saw no reason to assume that the identification of base points and the drawing of a provisional equidistance line would be impossible or inappropriate.¹³

After having established the provisional equidistance line, the Special Chamber examined “whether relevant circumstances requiring an adjustment of ... [that] line ... exist”,¹⁴ and came to a negative conclusion.¹⁵

Regarding a possible cut-off resulting from the equidistance line, the Special Chamber held that “some cut-off effect exists to the detriment of Côte d’Ivoire”¹⁶ but that this effect is “not so significant” as to require an adjustment of the line.¹⁷ It held, in particular, that the cut-off only affects a part of the coast of Côte d’Ivoire and only comes into being 163 nm from the starting point of the equidistance line.¹⁸

With respect to the question as to whether the location of maritime mineral resources should be considered a relevant circumstance, the Special Chamber emphasized that “[m]aritime delimitation is not a means for distributing justice”¹⁹ and that the pertinent international jurisprudence, “at least in principle, favours maritime delimitation which is based on geographical considerations” and “[on]ly in extreme situations ... may considerations other than geographical ones become relevant.”²⁰

Likewise, as regards the Parties’ “oil practice”, the Special Chamber noted that “international courts and tribunals have been consistent in their reluctance to consider oil concessions and oil activities as relevant circumstances justifying the adjustment of the provisional delimitation line.”²¹

Regarding the delimitation of the continental shelf beyond 200 nm, the Special Chamber applied the same delimitation methodology as within 200 nm.²² It thus followed the Judgment of the Tribunal in the *Bay of Bengal case*, which is the first

¹¹ Judgment, para. 324.

¹² Judgment, para. 291.

¹³ Judgment, paras 302 and 318.

¹⁴ Judgment, para. 402.

¹⁵ Judgment, para. 480.

¹⁶ Judgment, para. 424.

¹⁷ Judgment, para. 425.

¹⁸ Judgment, para. 424.

¹⁹ Judgment, para. 452.

²⁰ Judgment, para. 453.

²¹ Judgment, para. 476.

²² Judgment, para. 526.

decision of an international court or tribunal delimiting the continental shelf beyond 200 nm.

After having delimited the maritime boundary between the Parties, the Special Chamber had to deal with Côte d'Ivoire's claim relating to Ghana's international responsibility. Côte d'Ivoire argued that Ghana's conduct in the disputed part of the continental shelf had violated Côte d'Ivoire's sovereign rights as well as article 83 of the Convention and the provisional measures prescribed by the Special Chamber in its Order of 25 April 2015.²³ The Special Chamber, however, came to the conclusion that none of Ghana's activities engaged its international responsibility.

In order to reach this conclusion, the Special Chamber provided some clarification of the meaning of article 83, paragraph 3, of the Convention. This provision contains two obligations incumbent upon States that are parties to a delimitation dispute, namely the obligations to make every effort to "enter into provisional arrangements of a practical nature" and "not to jeopardize or hamper the reaching of the final agreement." The Special Chamber pointed out that both obligations are obligations of conduct.²⁴ Thus, the States concerned are not obliged to reach an agreement on provisional arrangements; however, they are under a duty to act in good faith.²⁵ In this respect, the Special Chamber emphasized the general obligation under article 83, paragraph 3, whereby, in the transitional period, States have to act "in a spirit of understanding and cooperation".²⁶

Mr President,

You may recall that, in this case, Ghana had initially instituted arbitration proceedings against Côte d'Ivoire under Annex VII to the Convention. Subsequently, the Parties agreed that the case should instead be dealt with by a special chamber of the Tribunal. This was not the first time that States decided, after arbitration proceedings had been instituted, to transfer a case to the Tribunal. It was only the second time, however, that the Parties agreed to submit the case to a special chamber. Nevertheless, the procedure before a special chamber may be an option for States when they are considering the possibilities available to them for the settlement of law of the sea disputes.

The Statute of the Tribunal provides that such "a chamber for dealing with a particular dispute" shall be formed if the parties to the dispute so request.²⁷ It is noteworthy that the Statute allows for considerable involvement of the parties in the selection of the members of the special chamber. While the composition of such

²³ Judgment, para. 544.

²⁴ Judgment, paras. 627 and 629.

²⁵ Judgment, para. 627.

²⁶ Judgment, para. 630.

²⁷ Statute, article 15, para. 2.

chamber is ultimately to be determined by the Tribunal, the Statute explicitly requires that this has to be done “with the approval of the parties.”²⁸ Furthermore, the parties have the right to choose judges *ad hoc* to serve as members of the special chamber if the Tribunal does not include upon the bench members of their nationality.²⁹

I may add that proceedings before a special chamber follow the Tribunal’s Rules of Procedure, which, having evolved over the years in the Tribunal’s practice, offer a stable and predictable basis for the conduct of proceedings. A judgment given by a special chamber is considered as having been rendered by the Tribunal and has therefore the same binding force as judgments of the Tribunal. Also, special chambers and the parties to cases before them profit from the support and the facilities of the Tribunal’s Registry. Finally, I would like to mention that, in cases between States Parties to the Convention, the Tribunal does not charge any judicial fees since, pursuant to its Statute, its expenses are borne by the States Parties as a whole.³⁰

Mr President,

Let me also highlight that, immediately after the Special Chamber had handed down its Judgment in the *Ghana/Côte d’Ivoire case*, the Parties’ representatives issued a joint communiqué in which they “reiterate[d] the mutual commitment of the two countries to abide by the terms of this decision ... and to fully collaborate for its implementation”. The joint communiqué also affirmed the two States’ “strong will to work together to strengthen and intensify their brotherly relationships of cooperation and good neighbourliness.”³¹

I am pleased to note that, in the joint communiqué, the Parties also commended the Special Chamber for its work, highlighting “the courteous attention with which the proceedings were conducted” and the “efficiency with which the case has been managed, resulting in an expeditious hearing to the mutual benefit of both parties”.

Mr President,

There is another case currently pending in the docket of the Tribunal, namely the *M/V “Norstar” case (Panama v. Italy)*. You may recall that this case, which was instituted before the Tribunal on 17 December 2015, concerns the arrest and detention of the *M/V “Norstar”*, an oil tanker flying the flag of Panama.

²⁸ Statute, article 15, para. 2.

²⁹ Statute, article 17, paras 2-4.

³⁰ Statute, article 19, para. 1.

³¹ The English text of the joint communiqué is available at:

<http://www.ghananewsagency.org/economics/ghana-c-te-d-ivoire-agree-to-abide-by-itlos-decision-122647>.

In this case, the Tribunal, on 4 November 2016, delivered a Judgment on the preliminary objections raised by Italy against the jurisdiction of the Tribunal and the admissibility of the Application. Currently, written proceedings on the merits of the case are being conducted, the first round of which has already been completed. By Order dated 15 November 2017, the Tribunal has authorized a second round of written pleadings and fixed the time-limits for the filing of a Reply by Panama and a Rejoinder by Italy. Oral proceedings are planned to be held in autumn 2018.

Let me now offer a few remarks on the perspectives for the future work of the Tribunal. I would like to make three points in this regard.

My first point relates to maritime delimitation. The Tribunal has handled two major cases concerning the delimitation of maritime spaces, the *Bay of Bengal case (Bangladesh/Myanmar)* in which a Judgment was given in 2012 and the *Dispute concerning delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)* on which I just reported to you. Both Judgments demonstrate that the Tribunal sees its role as being part of a community of international courts and tribunals and takes into account the existing jurisprudence. The Tribunal therefore offers the parties to maritime delimitation cases a fair degree of predictability.

At the same time, the Tribunal and the Special Chamber, in their respective Judgments, made important new contributions to the development of international jurisprudence on maritime delimitation. This was, for instance, the case when, as I mentioned before, the Tribunal in the *Bay of Bengal case*, for the first time in the history of international adjudication, proceeded to delimit the continental shelf beyond 200 nm. The Special Chamber in the case between Ghana and Côte d'Ivoire also provided clarification with regard to legal questions that had so far received only limited attention in international jurisprudence, such as the interpretation of article 83, paragraph 3, of the Convention. Let me add that the Special Chamber also broke new ground in its Order on Provisional Measures in that case in which it prescribed, among other measures, that new drilling activities conducted in the disputed area had to be suspended, pending the final judgment.

I should also not fail to mention that both delimitation cases were dealt with swiftly. In the *Bay of Bengal case*, the Tribunal issued its Judgment within two years and four months from the institution of proceedings.³² In the case between Ghana and Côte d'Ivoire, the Special Chamber's Judgment was handed down within two years and ten months.³³ For maritime delimitation cases, these are exceptionally short time-frames.

³² December 2009 - March 2012.

³³ December 2014 - September 2017.

In sum, one can safely say that the Tribunal has demonstrated its capacity to deal with complex maritime delimitation cases. It presents itself as an efficient dispute-settlement mechanism to which States may also wish to turn with their delimitation disputes in the future.

Mr President,

My second point relates to another area of law in which the Tribunal has had the opportunity to show its expertise, namely in cases relating to the arrest and detention of vessels. In fact, from the very first case brought to the Tribunal in 1997, the *M/V "Saiga" case*, to the case with which the Tribunal will deal next, the *M/V "Norstar" case*, questions arising from the arrest of vessels have been a steady part of the Tribunal's work.

Such disputes may come to the Tribunal in various forms. The most obvious is the prompt release procedure pursuant to article 292 of the Convention. In such cases, the Tribunal determines the reasonable amount of bond or other financial security upon the posting of which the vessel and/or the crew have to be released. This procedure, which is an urgent procedure, offers an efficient remedy for flag States and ship-owners.

The arrest of a vessel and/or crew has also given rise to requests for the Tribunal to prescribe provisional measures pursuant to article 290 of the Convention. In this context, the Tribunal had to deal, for example, with the seizure of a warship by a port State,³⁴ and with the arrest and detention of a vessel and its crew in a State's exclusive economic zone in the context of protest activities conducted by that vessel against an off-shore installation of that State.³⁵

Furthermore, questions arising from the arrest of vessels have also been brought before the Tribunal in cases on the merits, mainly in connection with claims for damages resulting from allegedly illegal arrests and detentions. The Tribunal has already awarded such damages in two cases, namely the *M/V "Saiga" (No. 2) case* and the *M/V "Virginia G" case*. Damages are also being claimed in the *M/V "Norstar" case* on which I can of course not comment any further as it is currently pending before the Tribunal.

In sum, one can say that the Tribunal offers a variety of procedures in cases dealing with the arrest and detention of vessels and crews and I am convinced that States Parties will continue to have recourse to those procedures in the future.

³⁴ *ARA Libertad*.

³⁵ *Arctic Sunrise*.

Mr President,

Let me now turn to the third point that I wish to make. It relates to new issues that might be submitted to dispute settlement before the Tribunal. In this respect, the international community is looking with great interest and anticipation at the current negotiations taking place, at the initiative of the General Assembly, concerning the development of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.³⁶

It is too early to say today what the exact contents of that instrument will be. It may be anticipated, however, that dispute-settlement provisions will be an important element of such instrument in order to maintain its consistent and efficient interpretation and application.

It is useful in this context to mention that new legal issues which emerge in international law of the sea can be addressed by the Tribunal not only in the context of its contentious jurisdiction but also through its advisory function. Advisory opinions can be requested from the Tribunal's Seabed Disputes Chamber as well as from the full Tribunal. Both possibilities have been made use of in the past. In 2011, the Seabed Disputes Chamber delivered an advisory opinion in response to a request from the Council of the International Seabed Authority, dealing with the "responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area". In 2015, pursuant to a request from the Sub-Regional Fisheries Commission, the full Tribunal issued an advisory opinion relating to illegal, unreported and unregulated fishing activities. In those opinions, both the Tribunal and the Chamber provided important clarifications with regard to a number of legal issues regarding international responsibility and environmental matters.

In any case, I wish to underline that the Tribunal stands ready to deal with any further tasks with which the States Parties to the Convention wish to entrust it in the future. The Tribunal is well placed for such endeavour; it is one of the main *fora* for the adjudication of disputes concerning the interpretation and application of the Convention and it has gained more than 20 years' experience in the settlement of disputes under the Convention.

Mr President,

As you are aware, the Tribunal is conducting activities to enhance knowledge of its role and activities in the settlement of sea-related disputes. Before I conclude, I would like to take the opportunity to give you a brief overview of those activities.

³⁶ United Nations General Assembly resolution 69/292 (19 June 2015).

In 2017, the Tribunal held another of its regional workshops on the settlement of disputes related to the law of the sea, this time in the Central American and Caribbean Regions. The event, which took place in San José, Costa Rica, was the twelfth in a series of workshops held in different regions of the world to provide national experts with practical information on the dispute-settlement procedures available before the Tribunal. The San José workshop was attended by representatives of 11 States. It was organized in cooperation with the Ministry of Foreign Affairs and Worship of Costa Rica and with the financial support of the Korea Maritime Institute. I wish to reiterate our sincere gratitude to the Government of Costa Rica and to the Korea Maritime Institute for their cooperation and assistance.

Every year, the Tribunal offers some 15 internships of a duration of three months to university students. In the twenty years of its existence, the programme has given 338 interns from 95 States the opportunity to acquire experience with the work of the Tribunal. I am glad to note that the Tribunal's internship programme is able to support interns from developing countries through a trust fund set up by the Tribunal. Several grants have been made to this fund over the years by the China Institute of International Studies, the Korea International Cooperation Agency and the Korea Maritime Institute. I wish to express my sincere gratitude to those organizations for this support.

Since 2007, the Tribunal has also been conducting the Nippon programme, a nine month capacity-building and training programme in international dispute settlement in the law of the sea. Seven Fellows are participating in the current, eleventh, cycle of the programme. They are nationals of the Democratic Republic of Congo, Cyprus, Egypt, Indonesia, Russia, Spain, and Trinidad and Tobago. To date, 72 fellows from 59 States have had the opportunity to participate in the programme, which, since its establishment, has been organized with the financial support of the Nippon Foundation of Japan. I wish to take this opportunity to express my sincere gratitude to the Nippon Foundation for its commitment to the programme.

Mr President,
Ladies and Gentlemen,

I would like to add 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.

I thank you for your attention.