THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: SEVERAL CONSIDERATIONS ABOUT ITS JURISDICTION AND PROCEDURES

Speech by Judge Hugo Caminos, Representative of the International Tribunal for the Law of the Sea, at the First Meeting of International and Regional Courts of Justice of the World on the One-Hundredth Anniversary of the Central American Court of Justice

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It is a great honour for me to participate, representing the International Tribunal for the Law of the Sea, in this, the first meeting of International and Regional Courts of Justice of the World, in celebration of the one-hundredth anniversary of the founding of the Central American Court of Justice. I bring to you the very sincere greetings of the President of the Tribunal at Hamburg, Professor Dr. Rüdiger Wolfrum, and all the Tribunal's judges from Africa, Asia, the Caribbean, Latin America and Western and Eastern Europe.

The United Nations Convention on the Law of the Sea entered into force on 16 November 1994. In contrast to the Geneva Conventions of 1958, which resolved the issue of the settlement of disputes concerning interpretation or application of those Conventions with an optional protocol, Part XV of the 1982 Convention on the Law of the Sea provides a compulsory framework integrated into that Convention for settlement of such disputes. The International Tribunal for the Law of the Sea was established at Hamburg on 1 October 1996.

Allow me to tell you from the outset, that that framework is not only an innovation but also an important step in the development of that area of international law. Many authors have stressed that the Convention's greatest contribution to the strengthening of the rule of law in international relations is contained in its article 286 on the application of procedures for the settlement of such disputes. That provision,

although with several limitations and optional exceptions, meets the vital interests of the States and provides that any dispute concerning the interpretation or application of the Convention, which has not been settled by other peaceful means agreed upon by the parties, shall be submitted, at the request of either party, to the court or tribunal having jurisdiction. That means that by becoming a party to the Convention, a State assumes the obligation of using compulsory procedures as provided for in Part XV of the Convention.

As you know, the Convention regulates all aspects of the ocean space, which cover three quarters of our planet, its use and its resources. Among other aspects, that includes fisheries, the delimitation of the various maritime areas, protection and conservation of the marine environment, scientific research, the legal regimes of the territorial sea, the exclusive economic zone, the continental shelf and the seabed beyond the limits of national jurisdiction. For that reason the Convention of the Law of the Sea has been described metaphorically as “a constitution for the oceans”.

As a specialized judicial body, the jurisdiction of the International Tribunal for the Law of the Sea includes all disputes concerning that branch of international law, as specified in the Convention. The Tribunal is open to States and other entities that are not States “which contribute to its integrating nature”. Its decisions are definitive and compulsory for the parties to a dispute. In other words, except in its specialized jurisdiction, in every other aspect it enjoys a standing comparable to the International Court of Justice.

The *in personam* jurisdiction of the Tribunal constitutes an important innovation. Article 20, paragraph 1, of its Statute provides: “The Tribunal shall be open to States Parties.” But the definition of “States Parties” is not limited to sovereign States. Article 1, paragraph 2, of the Convention stipulates that “States Parties” means States which have consented to be bound by this Convention and for which this Convention is in force, as well as entities which become Parties to that Convention, namely international organizations. That is the case of the European Community.

In addition, other entities which are not States shall have access to the Tribunal for issues concerning exploitation of the seabed or in all disputes submitted to the Tribunal in pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case (article 20, paragraph 2, of the Statute).

The first sentence of that article refers to the jurisdiction of the Sea-Bed Disputes Chamber with respect to activities in the Area between States Parties, and natural or juridical person and a prospective contractor .Besides, the Tribunal shall be open to entities other than States Parties in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal.

The Convention establishes a regime of freedom of choice by the parties of the compulsory means to settle their disputes. Article 287 enumerates these means: The International Tribunal for the Law of the Sea, the International Court of Justice, arbitration and a special arbitral tribunal formed by experts for specified disputes.

Although the Tribunal is the first in the list of means of settlement of disputes its jurisdiction can be exercised only when the conditions stipulated in that provision are fulfilled. The parties can have recourse unilaterally to the Tribunal when they have made a declaration upon signing, ratifying or adhering to the Convention or at any later date at which they opt for the Tribunal. If the parties to a dispute have not chosen the same jurisdiction, that will be submitted to arbitration. However, that does not affect the compulsory jurisdiction of the Seabed Disputes Chamber. Almost three quarters of the 157 States Parties to the Convention have abstained until now from opting for one or more of the jurisdictions listed. Although the lack of a declaration does not necessarily imply a preference for arbitration, that would be applicable as the residual procedure stipulated in the Convention.

Independent of the choice of the means of settlement, the International Tribunal for the Law of the Sea has compulsory jurisdiction in two cases of urgent proceedings: the prompt release of arrested ships and their crews, and the prescription of provisional measures. Up until now, the judicial activity of the

International Tribunal for the Law of the Sea has been dominated by these two categories of cases.

As for the first category, that of cases of foreign vessels and their crews arrested by a State Party for specific infractions provided for in the Convention, if within 10 days from the time of arrest the parties have not reached agreement to submit the question to a court or tribunal and the flag State has not opted to submit the case to another court or tribunal accepted by the detaining State, the question of release may be raised by the flag State or on its behalf before the International Tribunal for the Law of the Sea.

That jurisdiction is applicable when it is claimed that the detaining State did not observe the Convention's provisions concerning prompt release of the ship or its crew once a reasonable or other financial guarantee has been posted.

Prompt release is provided for in cases of detention by a coastal State in order to guarantee compliance with its laws and regulations established in the exercise of its sovereign rights over the exploitation of the living resources in its exclusive economic zone. Another case is that of executory measures by coastal States of the rules and international standards for the prevention, reduction and control of pollution caused by ships in their territorial waters or exclusive economic zone.

Until now, the Tribunal has heard nine cases involving prompt release.

As for the Tribunal's compulsory jurisdiction to prescribe provisional measures, those can be prescribed in two distinct situations. One is the dispute in article 290, paragraph 1, stipulating that if a dispute has been duly submitted to a court or tribunal the court or tribunal may prescribe any provisional measures which it considers appropriate to preserve the rights of the parties or to prevent serious damage to the marine environment, pending the final decision. That was the situation in the first of the cases in which the Tribunal prescribed provisional measures: the *M/V "SAIGA" (No. 2) Case*. That was an incidence that was part of the question that the Tribunal finally decided.

The other situation in which provisional measures may be prescribed is stipulated in article 290, paragraph 5, which provides that pending the constitution of an arbitral tribunal to which a dispute is being submitted, 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 EEZ, the Seabed Disputes Chamber may prescribe, modify or revoke provisional measures 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 may modify, revoke or affirm those provisional measures.

One of the differences between the two situations is that in one case the Tribunal may prescribe provisional measures if it considers that *prima facie* the Tribunal would have jurisdiction to hear the case. On the other hand, in the second situation, the Tribunal may prescribe provisional measures if it considers *prima facie* that the arbitral tribunal to be constituted would have jurisdiction.

On the basis of the latter, the Tribunal prescribed provisional measures in four cases: the *Southern Bluefin Tuna Cases (New Zealand* v. *Japan, Australia* v. *Japan),* the *MOX Plant Case (Ireland* v. *United Kingdom)*, and the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore)*.

In both situations, the parties were obliged to apply provisional measures immediately. The Tribunal's Rules developed that provision by establishing that each of the parties shall inform the Tribunal about compliance and, in turn, the Tribunal may request information about implementation of the measures prescribed.

Also the Tribunal's jurisdiction can be based on other international agreements. Article 288, paragraph 2, of the Convention stipulates that any of the courts or tribunals that the States Parties might choose to settle their disputes concerning the interpretation or application of the Convention also have jurisdiction to hear disputes 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. There are several agreements that provide the means of settlement stipulated in Part XV of the Convention. Among those is the Agreement on application of the provisions of the 1995 United Nations Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. That Agreement allows a State that is not a party to the Convention to become part of the Agreement. That is the case of the United States. Another example of that type of agreement is the Convention on the Protection of Underwater Cultural Heritage adopted by UNESCO in 2001.

The Seabed Disputes Chamber can give advisory opinions, when so requested by the Assembly or the Council of the International Seabed Authority, on legal questions arising within the scope of their activities (article 191). Such opinions shall be given as a matter of urgency.

The Convention contains no provision that grants advisory jurisdiction to the Tribunal. However, according to article 21 of the Statutes, the Tribunal's jurisdiction shall extend to all disputes and requests submitted in accordance with the Convention and all questions expressly provided for in any other agreement that gives jurisdiction to the Tribunal.

On the basis of that provision, article 138 of the Tribunal's Rules authorizes it to give an advisory opinion concerning the purposes of the Convention, if that is stipulated in an international agreement.

The Statute provides that the Tribunal, when the parties so request, shall form an *ad hoc* chamber to hear a dispute. The composition of that chamber shall be determined by the Tribunal with the agreement of the parties to the dispute. In that way, the parties exercise a control over the composition of the chamber and even can propose amendments to the Rules. The chamber's decision shall be considered as pronounced by the Tribunal.

In other words, the parties enjoy all of the characteristics of the arbitration, but without the expense that it implies. In addition, they obtain the decision of a

permanent judicial body and not that of a body that will no longer exist after the arbitral award is pronounced.

The *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* was submitted by Chile and the European Community to an *ad hoc* Chamber of the Tribunal. That Chamber is made up of five judges, four members of the Tribunal and an *ad hoc* judge, named by Chile. For the second time, at the request of the parties, the Chamber extended the period for presenting preliminary exceptions, until 1 January 2008, in order to continue negotiations in order to reach a settlement of the dispute.

Several instruments govern the procedure before the Tribunal: first, the Convention's applicable provisions; the Statute, the Rules, the Resolution on the Internal Judicial Practice and the Guidelines concerning the Preparation and Presentation of Cases.

The gist of the Rules is expressed in its article 49: "The proceedings before the Tribunal shall be conducted without unnecessary delay or expense."

Although the Tribunal drafts its Rules on the basis of those of the International Court of Justice, they differ from those of the ICJ because of the differences of jurisdiction, both *in personam* and *ratione materiae*, between both institutions.

One of my colleagues, Judge Rao, identified in an article several aspects of the Rules and decisions of the Tribunal that are absent in the respective instruments of the International Court of Justice. Among those aspects we can point out the following: the setting of periods of no more than six months for the presentation of claims, the setting of the date for beginning the oral hearings within six months after completion of the written procedure, the new concept of "preliminary proceedings" in order to prevent the abusive use of legal procedures in requests concerning limits to the applicability of compulsory measures of settlement, the short time between hearings and the decision in cases of prompt release of vessels and their crew and the procedure of the Seabed Disputes Chamber.

The guidelines on the preparation of cases before the Tribunal indicate the characteristics of the scope, format and presentation of claims and documents, as well as how to ensure brevity and non-repetition of the written phase in the oral hearing. In addition, it provides for the use of electronic means of communication. The parties have made use of those means, which allow them to send their claims, documents and other communications to the Tribunal by fax or e-mail.

As we pointed out, the Tribunal has exercised its legal functions the most in the two types of urgent proceedings in which the Convention grants it compulsory jurisdiction. But the Tribunal has jurisdiction to decide a wide range of disputes concerning the law of the sea and is prepared to assume that responsibility. That is our message to the international community.

Thank you