

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



Statement by

RÜDIGER WOLFRUM,

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

24 October 2005

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Excellencies,

Ladies and Gentlemen,

It is an honour for me, on behalf of the International Tribunal for the Law of the Sea, to address this meeting of distinguished Legal Advisers of Ministries of Foreign Affairs in my new capacity as President of the Tribunal. It is the first time that the Tribunal has participated in such a meeting and I wish to thank you sincerely for your kind invitation.

The International Tribunal for the Law of the Sea is a judicial body created by the 1982 United Nations Convention on the Law of the Sea. The Convention, which is one of the major achievements of the United Nations and its Members States, establishes a comprehensive legal framework to regulate all ocean space, its uses and resources. The Tribunal was established to play a central role in settling disputes relating to the law of the sea in accordance with the rule of law. As a standing court, the Tribunal is a forum which is readily available to parties.

First of all, I would like to give a brief overview of the cases dealt with by the Tribunal so far. I will then make a few remarks on the potential of the Tribunal which has not yet been fully exploited.

An overview of the jurisprudence of the Tribunal

Since the commencement of its activities in October 1996, 13 cases have been submitted to the Tribunal. Whilst the jurisdiction of the Tribunal is broad – it has jurisdiction over all disputes regarding the interpretation and application of the

Convention or of any other agreement related to the purposes of the Convention – the majority of the cases submitted to the Tribunal so far have been confined to instances where the jurisdiction of the Tribunal is compulsory. This concerns proceedings which require urgent action by the Tribunal and which may be instituted by any State Party to the Convention by means of a unilateral application. In this respect, I refer to two specific proceedings: the prompt release of vessels and crews under article 292 of the Convention and the prescription of provisional measures pending the constitution of an arbitral tribunal under article 290, paragraph 5, of the Convention.

Prompt release of vessels and crews

Pursuant to several provisions of the Convention, a State which has detained a ship flying the flag of another State for certain classes of offences – for instance, in respect of fishery or pollution offences – has the duty to release the vessel and/or its crew upon the posting of a reasonable bond. Whenever it is alleged that the detaining State has not complied with these provisions, the flag State of the vessel is entitled under article 292 of the Convention – a provision which constitutes a counterpart to the rights granted to coastal States – to request the release of the vessel before the Tribunal. I should also add that such an application does not necessarily have to be submitted by the flag State itself; the competent authorities of the flag State may authorize the shipowner, for example, to institute proceedings “on behalf of the flag State”. This procedure for the prompt release of vessels and crews as well as the possibility for private parties, if properly authorized by the flag State, to appear before the Tribunal are considered significant innovations provided by the Convention.

According to article 292 of the Convention, in prompt release proceedings, the Tribunal may deal only with the question of the release of the vessel without prejudice to the merits of any case before the appropriate domestic forum in respect of the vessel, its owner or its crew. In its jurisprudence, the Tribunal has strictly applied this requirement of the Convention.

The Tribunal has been seized of applications for prompt release in seven cases so far. In five of these cases, the Tribunal ordered the release of the vessel or its crew upon the posting of a reasonable bond. In respect of these five cases, it can be fairly said that the Tribunal has developed a coherent jurisprudence, particularly in applying relevant factors for determining a reasonable bond. In another case, the Tribunal decided that it lacked jurisdiction, the reason being that the applicant had not demonstrated its status as flag State of the vessel concerned. This underlines the importance that the Tribunal attaches to the matter of the registration of ships. In a further case, proceedings were discontinued. Here, the availability of the relief provided by the Tribunal helped in reaching an out-of-court settlement. It is of interest to note that nearly all prompt release cases submitted to the Tribunal were connected with fisheries. In particular, the “*Camouco*”, the “*Monte Confurco*”, the “*Grand Prince*” and the “*Volga*” cases raised issues concerning the problem of illegal, unreported and unregulated fishing in the Southern Ocean.

The Tribunal has acted in prompt release proceedings with remarkable efficiency and speed, having delivered its decisions, in accordance with its Rules, within the time-frame of approximately one month. The Convention requires that these cases be processed without delay. The urgency of these proceedings is justified in view of the financial burden resulting from the detention of a vessel as well as the humanitarian considerations regarding detained crews. Prompt release proceedings before the Tribunal may be considered an appropriate and cost-effective mechanism for parties faced with the arrest of vessels and crews.

Provisional measures

As already mentioned, pursuant to article 290, paragraph 5, of the Convention, the Tribunal has the power to prescribe provisional measures “[p]ending the constitution of an arbitral tribunal to which a dispute is being submitted ... if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and the urgency of the situation so requires ...”. Here, a State Party may unilaterally request the Tribunal to prescribe provisional measures in a dispute against another State Party pending the final decision to be given not by the Tribunal itself, but by an arbitral tribunal yet to be constituted.

In this respect, it is of interest to note important innovations introduced by the Convention: firstly, the measures prescribed by the Tribunal are binding upon the parties. Secondly, the Tribunal may prescribe provisional measures not only to preserve the respective rights of the parties but also to “prevent serious harm to the marine environment”. In addition, the Tribunal may follow up the measures it has prescribed by requesting the parties to submit reports on compliance.

The procedure for the prescription of provisional measures under article 290, paragraph 5, of the Convention has already been invoked in four cases dealing with the protection of the marine environment: the *Southern Bluefin Tuna Cases*, the *MOX Plant Case*, and the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*.

In the *Southern Bluefin Tuna Cases*, between New Zealand and Australia on the one hand and Japan on the other, regarding the depletion of a fish stock, the Tribunal stated, in its Order of 27 August 1999, that “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment” (paragraph 70). An important finding in the Tribunal’s Order was that “the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to stock of southern bluefin tuna” (paragraph 77). It has been observed that the provisional measures prescribed by the Tribunal have assisted the parties in finding a solution. For instance, Professor Crawford, who acted as counsel in the *Southern Bluefin Tuna Cases*, stated that (I quote):

“There, the Tribunal’s intervention at the stage of provisional measures played a very significant role in bringing the parties – Australia, New Zealand and Japan – back to negotiations with each other... the eventual result was that the Southern Bluefin Tuna Commission was revitalized. It is now functioning well.”¹
(end of quote)

¹ *The “Volga” Case*, Verbatim Record of 12 December 2002, p.m., ITLOS/PV.02/02, p. 15.

In the *MOX Plant Case*, the Tribunal was faced with a dispute between Ireland and the United Kingdom regarding the potentially harmful impact on the marine environment of the extension of a nuclear plant. In its Order of 3 December 2001, the Tribunal emphasized the parties' duty to cooperate in the protection and preservation of the marine environment. It also stressed the importance of procedural rights in environmental matters, such as the requirement that the parties exchange information concerning the risks or effects of performing the activities concerned.

The *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*, relating to a dispute between Malaysia and Singapore, addressed the matter of the impact on the environment of land reclamation activities carried out by Singapore. The Tribunal, in its Order of 8 October 2003, once again stressed the importance for the protection of the marine environment of cooperation between the parties as well as the need to establish mechanisms for exchanging information. It also requested the parties to set up a joint group of independent experts to conduct a study to determine the potential effects of the land reclamation activities on the marine environment.

Regarding the *Land Reclamation in and around the Straits of Johor*, I would like to mention that on 26 April 2005 Malaysia and Singapore settled their dispute by signing an agreement to this effect. On 1 September 2005, a final arbitral award was made in the case in accordance with the terms specified in the settlement agreement. It should be noted that the provisional measures ordered by the Tribunal in 2003 were instrumental in bringing the parties together and providing a successful diplomatic solution to the dispute. In this respect, I would like to refer to the remarks made by the Minister for Foreign Affairs of Singapore, Mr George Yeo, on 16 May 2005 before the Parliament of Singapore (I quote from a press release issued by the Ministry of Foreign Affairs of Singapore):

“Singapore and Malaysia jointly implemented the [Tribunal's] Order by appointing a group of four experts to carry out the joint study.

[...]

“Looking back, I would like to highlight two hallmarks of the joint study and settlement negotiations. One is the involvement of an objective third party – ITLOS [this Tribunal], the Group of Experts and the Arbitral Tribunal – which made possible an impartial and objective assessment of the facts of the case and the merits of the competing arguments.”²

(end of quote)

Certainly, these cases have enabled the Tribunal to contribute towards the development of international environmental law, in particular, by stressing the duty of cooperation, the notion of prudence and caution and the importance of procedural rights as essential components of environmental obligations. It should also be noted that in its orders for provisional measures the Tribunal adopted a pragmatic approach and prescribed measures which in its view would assist the parties in finding a solution. As in prompt release cases, in provisional measures proceedings the Tribunal delivered its orders within remarkably short periods. This underlines the fact that the Tribunal offers parties cost-effective procedures.

Cases on the merits

The jurisdiction of the Tribunal is not limited to urgent proceedings. On the contrary, its jurisdiction includes any dispute relating to the law of the sea and, as an illustration, we may refer to disputes regarding maritime boundaries, fisheries, sea pollution, or marine scientific research.

The parties may submit a particular dispute to the Tribunal at any time, by means of a special agreement and this has already been done on two occasions. In the *M/V “SAIGA” (No. 2) Case*, Saint Vincent and the Grenadines and Guinea, two States Parties to the Convention, agreed to submit to the Tribunal the merits of the dispute relating to the arrest and detention of the vessel *Saiga*. In its Judgment delivered on 1 July 1999, the Tribunal made some pronouncements concerning issues such as the freedom of navigation, enforcement of customs laws, nationality

² See press release issued by the Ministry of Foreign Affairs of Singapore on 16 May 2005 containing “Remarks in Parliament by Singapore Foreign Minister George Yeo on the Settlement Agreement between Singapore and Malaysia on Land reclamation”, paragraphs 2 and 12, available at < <http://www.mfa.gov.sg> >.

of claims, reparation, use of force in law enforcement activities, hot pursuit and the question of the genuine link between the vessel and its flag State, thereby making an important contribution to the development of international law regarding these aspects. It should be noted that the Tribunal delivered its Judgment within 15 months of the proceedings being instituted. Compared with other judicial bodies, this can certainly be considered a reasonable period of time.

Another case submitted to the Tribunal by means of a special agreement is the *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*. The dispute has been submitted to a special chamber of the Tribunal consisting of four judges of the Tribunal and one judge *ad hoc*. In this case – which is still pending on the docket – one of the parties to the dispute is an international organization, namely the European Community.

The potential use of the Tribunal

The Tribunal has dealt with 13 cases so far. In resolving these cases, the Tribunal has already made a significant contribution to the development of international law. In this respect, I would like to refer to resolution 59/24 of 17 November 2004, in which the General Assembly noted with satisfaction the Tribunal's continued and significant contribution to the peaceful settlement of disputes in accordance with Part XV of the Convention and underlined the Tribunal's important role and authority concerning the interpretation or application of the Convention and the Agreement concerning the Implementation of Part XI.

It is, however, evident that more use could be made of the Tribunal in the future. I take this opportunity to recall that the Convention provides States Parties with three options for the settlement of disputes: the Tribunal, the International Court of Justice and arbitration. Under article 287 of the Convention, States Parties may select by a written declaration their preferred means for the settlement of disputes. Of the current 149 States Parties (i.e. 148 States and one international organization, the European Community), 36 have filed declarations under article 287 of the Convention and 22 States Parties have chosen the Tribunal as the means or one of the means for the settlement of disputes concerning the Convention. It is to be

hoped that an increasing number of States will make declarations under article 287 of the Convention as concerns their choice of procedure for settling disputes, as recommended by the General Assembly.

It should be noted that in the absence of written declarations under article 287 of the Convention or if the parties have not selected the same forum, the dispute may be submitted only to arbitration, unless the parties agree otherwise. Here, it should be observed that the parties to a dispute may, at any time, reach an agreement to bring a dispute before the Tribunal.

Furthermore, I would like to draw your attention to the possibility for parties to submit a dispute to an *ad hoc* special chamber of the Tribunal, in accordance with article 15, paragraph 2, of the Statute. This was considered a suitable alternative by Chile and the European Community in the swordfish case. A special chamber of this nature is an interesting alternative for parties considering arbitration. Indeed, the composition of this special chamber is determined by the Tribunal with the approval of the parties, giving them control over the chamber's composition. The parties are also entitled to appoint a judge *ad hoc* if the chamber does not include a member of the nationality of one of the parties. Furthermore, the parties to a dispute do not have to bear the expenses of the proceedings before the Tribunal. They also have at their disposal the Rules of the Tribunal which, at the request of the parties, may be amended in particular proceedings. In my view, the potential offered by this option – we could call it “arbitration within the Tribunal” – has not yet been fully realized.

States may also confer jurisdiction on the Tribunal through appropriate provisions included in international agreements. There are seven international agreements which make reference to the Tribunal in respect of the settlement of disputes. A prominent example is the Straddling Fish Stocks Agreement of 1994. Such a provision conferring jurisdiction on the Tribunal could also be included in bilateral agreements. This would certainly enhance the central role of the Tribunal in the settlement of disputes regarding law of the sea matters. In this respect, it is interesting to note the statement made by Dr Joe Borg, Commissioner for Fisheries and Maritime Affairs of the European Union, on the occasion of his visit to the Tribunal on 2 September 2005 (and I quote):

“the EC can be a party before ITLOS, a fact which renders ITLOS the preferred choice for the European Community when it comes to disputes relating to the Law of the Sea. In order to strengthen this even further, the EU, where appropriate, could also offer to include a provision in the agreements relating to the Law of the Sea which it concludes with third countries binding the parties to refer the settlement of any disputes to ITLOS.”

(end of quote)

If implemented, such a policy would give the Tribunal greater impetus.

While access to international courts or tribunals has traditionally been granted to States, the Statute has expanded the Tribunal’s jurisdiction to entities other than States Parties. This is another significant innovation of the Convention – an alternative which has not yet been fully explored.

Article 20, paragraph 2, of the Statute widens the jurisdiction *ratione personae* when it provides that 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 which is accepted by all the parties to that case”. This provision has to be read with article 21 of the Statute, according to which the Tribunal has jurisdiction with respect to “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”. In accordance with the said provisions, “entities other than States Parties” can have access to the Tribunal in respect of any dispute submitted under an agreement, if the agreement specifically confers jurisdiction on the Tribunal.

In this respect, however, several questions may be raised; for example, the meaning of the term “entities”. This term is quite broad and may include private bodies, such as private commercial corporations or non-governmental organizations. Further, the reference in article 20 of the Statute to “any other agreement” conferring jurisdiction on the Tribunal differs from article 288, paragraph 2, of the Convention, which states that jurisdiction may be conferred on the Tribunal by “an international agreement

related to the purposes of the Convention”. Since there is as yet no precedent here, it will be left to the Tribunal to decide as concerns these open questions.

The Convention provides for the establishment of the Seabed Disputes Chamber, composed of 11 members selected by the Tribunal. This Chamber has jurisdiction over disputes regarding activities in the international seabed area in accordance with Part XI of the Convention and the 1994 Implementation Agreement. Its jurisdiction is compulsory. Parties to these disputes may be States Parties, the International Seabed Authority, or state enterprises and natural or juridical persons, if certain conditions are met; for instance, the entity must possess the nationality of a State Party and be sponsored by this State.

The Seabed Disputes Chamber is competent to deal with different categories of disputes. These include disputes between States Parties concerning the interpretation or application of Part XI of the Convention and the 1994 Implementation Agreement; disputes between a State Party and the International Seabed Authority, for example, concerning acts or omissions of the Authority or of a State Party, alleged to be in violation of the Convention; and contractual disputes concerning the interpretation or application of a contract between a juridical person and the Authority.

The Seabed Disputes Chamber has another important function, which is to give advisory opinions at the request of the Assembly or the Council of the Seabed Authority on legal questions arising within the scope of their activities. In this respect, I would like to mention that advisory proceedings are not limited to matters relating to Part XI of the Convention. The Tribunal may also be requested to give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission of a request for such an opinion.

In addition to the *ad hoc* special chamber mentioned earlier and the Seabed Disputes Chamber, the Tribunal has established three other chambers in accordance with article 15 of its Statute: (i) the Chamber of Summary Procedure; (ii) the Chamber for Fisheries Disputes; and (iii) the Chamber for Marine

Environment Disputes. Any of these chambers is competent to deal with a case if the parties to the dispute so request. As can be seen, the parties may avail themselves of flexible dispute settlement procedures according to their needs.

In conclusion, I would like to reiterate that the Tribunal has already made a substantial contribution to the development of international law. Under the Convention on the Law of the Sea, it has the competence and means to deal with a wide range of disputes and is well equipped to discharge its functions speedily, efficiently and cost-effectively.

Excellencies,

Ladies and Gentlemen,

Allow me to express the Tribunal's gratitude to you for giving me the opportunity to speak to you today. I thank you for your kind attention.