

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



Statement by

H.E. JUDGE 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

29 October 2007

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Mr Chairman
Excellencies,
Ladies and Gentlemen,

It is with great pleasure that I address today this meeting of distinguished legal advisers. I am sincerely honoured and grateful for your kind invitation and the opportunity to exchange views on legal matters of common concern.

During this year, the Tribunal delivered two judgments in prompt release cases. I would like therefore to present to you the main legal issues underlying these cases. I will then make a few remarks on the question of harmonization of jurisprudence and advisory opinions.

Judicial work of the Tribunal

On 6 July 2007, two applications for prompt release were submitted to the Tribunal under article 292 of the United Nations Convention on the Law of the Sea ("the Convention") by Japan against the Russian Federation. For the first time in the Tribunal's history, two applications - which also involved the same parties - were filed simultaneously. This put great pressure on the parties 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.

The “Hoshinmaru” Case (No. 14)

The first of the two cases concerned an application for the release of the fishing vessel *Hoshinmaru* and of 17 members of its crew. In this regard, allow me to highlight the following issues.

With regard to admissibility, the Respondent claimed that the application should become moot as the Russian authorities had set a bond subsequent to the filing of the application by Japan. The Tribunal dismissed this claim and observed that the decisive date for determining the issues of admissibility was the application filing date; however, it recognized that events subsequent to the filing of an application may render an application without object. In support of its conclusion, the Tribunal reiterated its jurisprudence in the *M/V “SAIGA” Case*.

The Respondent also argued that the criteria on the basis of which it had set the bond had been agreed with Japan within the framework of the Russian-Japanese Commission on Fisheries. This argument gave rise to issues of acquiescence and the status of a protocol or minutes of meetings. In this regard, the Tribunal recognized that a protocol or minutes of meetings of a joint commission may be the source of rights and obligations but, in the case before it, the acquiescence of the Japanese representatives to the alleged agreed procedure for setting bonds had not been sufficiently established. Relying on the jurisprudence of the International Court of Justice, the Tribunal observed that, in the context of the case, tacit consent or acquiescence could not be presumed.

On the question of the reasonableness of the bond of 22,000,000 roubles (approximately US\$ 862,000) set by the Respondent, the Tribunal, consistent with its jurisprudence, applied to the *“Hoshinmaru” Case* the various factors for determining a reasonable bond which it had developed in previous judgments. It may be noted that, in this case, the Tribunal observed that the amount of a bond should be “proportionate” to the gravity of the alleged offences. I should explain that the alleged offence related to inaccurate reporting of the species caught, namely the declaration of 20 tons of raw sockeye salmon as the cheaper chum salmon. In the view of the Tribunal, a violation of the rules on reporting may be sanctioned by the detaining

State but the Tribunal considered it unreasonable for a bond to be set on the basis of the maximum penalties which could be applicable to the owner and the master of the vessel. Furthermore, given the circumstances of the case, the Tribunal also found it unreasonable to calculate the bond on the basis of the confiscation of the vessel. The Tribunal then fixed the bond for the release of the vessel, including its catch on board, at a total amount of 10,000,000 roubles, which is significantly lower than the sum requested by the Russian Federation and slightly higher than the security suggested by Japan (8,000,000 roubles). The Tribunal also decided that the master and crew of the *Hoshinmaru* should be released unconditionally.

It may be observed that, unlike previous cases the Tribunal has dealt with, the "*Hoshinmaru*" Case did not entail fishing without a licence. The Tribunal, however, noted that the offence committed by the master was not a minor one nor one of a purely technical nature and that *[I quote]* "[m]onitoring of catches, which requires accurate reporting, is one of the most essential means of managing living resources" *[end of quote]* (see paragraph 99 of the Judgment).

I am glad to report that, upon the payment of the bond by Japan, the *Hoshinmaru* and its crew were released a mere ten days after the delivery of the Tribunal's judgment and on the same day as the receipt of the bond by the Russian Federation. This highlights the parties' prompt compliance with the Tribunal's decision.

The "Tomimaru" Case (No. 15)

I will turn now to the "*Tomimaru*" Case, which concerned an application for the release of the eponymous fishing vessel under article 292 of the Convention. This case raised interesting issues concerning the relation between international procedures and proceedings under domestic law. In particular, the Tribunal was faced with the effects of the confiscation of the vessel and the question as to whether the confiscation rendered the application without object.

The Respondent claimed that the *Tomimaru* had been confiscated according to the decisions of the domestic fora. After the closure of the hearing, the Respondent informed the Tribunal that the Supreme Court of the Russian Federation had dismissed the complaint concerning the confiscation of the vessel. The Respondent argued that the case had been dealt with on the merits before the Russian courts and that the relevant decisions had entered into force and been executed. On that basis, it claimed that, in accordance with article 292, paragraph 3, of the Convention, when examining applications for release, the Tribunal should deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum and, therefore, the Tribunal would have no competence to deal with the application.

In this case, the Tribunal had first to deal with the question as to whether confiscation might have an impact on the nationality of a vessel. The Tribunal expressed the view that the confiscation of a vessel does not result *per se* in an automatic change of the flag or in its loss. It also observed that confiscation changes the ownership of a vessel but underlined that ownership of a vessel and the nationality of a vessel are different issues.

Secondly, the Tribunal had to examine the question as to whether confiscation renders an application for the prompt release of a vessel without object. Here, the Tribunal noted the following [*quote*]:

article 73 of the Convention makes no reference to confiscation of vessels. The Tribunal is aware that many States have provided for measures of confiscation of fishing vessels in their legislation with respect to the management and conservation of marine living resources.
(paragraph 72 of the Judgment)

[*end of quote*]

The Tribunal then expressed the view that confiscation of a fishing vessel must not be used in such a way as to upset the balance of the interests of the flag State and of the coastal State which is established in the Convention. After observing

that a decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object, the Tribunal noted that confiscation decided in unjustified haste would jeopardize the implementation of article 292 of the Convention. The Tribunal also emphasized that a decision to confiscate a vessel does not prevent the Tribunal from considering an application for prompt release while proceedings are still before the domestic courts of the detaining State. What makes this judgment notable is its assessment of the interplay between national and international rules as well as its consideration of the relevance of national judicial decisions for the Tribunal.

In the *"Tomimaru" Case*, the Tribunal concluded that the application of Japan no longer had any object and that the Tribunal was not required to give a decision thereon.

I am pleased to state that the judgments in both the *"Hoshinmaru" Case* and the *"Tomimaru" Case* were adopted unanimously.

Harmonization of jurisprudence

I will turn now to the second part of my presentation dealing with the question of harmonization of jurisprudence. Allow me to refer in this regard to the relations between the Tribunal and the International Court of Justice ("ICJ").

Relations between the Tribunal and the International Court of Justice

At the outset, I should state that relations between the Tribunal and the Court have been marked by cooperation and mutual respect. The visit of the President of the International Court of Justice, Judge Rosalyn Higgins, to the Tribunal last year on the occasion of its tenth anniversary testifies to the cordial relations prevailing between the two institutions.

With regard to the developments of the Tribunal's jurisprudence in respect of the ICJ, the Tribunal, in its decisions, has not hesitated in referring, when appropriate, to the precedents set by that Court. The Tribunal has thereby helped to

strengthen the development of a corpus of jurisprudence. In my view, this demonstrates a constructive manner of maintaining consistency in international law and reinforcing the necessary coherence between general international law and the law of the sea. Harmonization of jurisprudence also offers a response to questions ensuing from the establishment of new international courts and tribunals and the multiplication of special regimes, such as the law of the sea.

I should underline that the law of the sea should not be seen as an autonomous regime but as a part of general international law. In effect, numerous provisions in the Convention are today considered part of general international law, and the obligations of States Parties under the Convention entail international legal obligations. Also, Part XV of the Convention on settlement of disputes contains provisions which aim at avoiding conflicts of jurisdiction. I refer to article 281 dealing with disputes concerning the interpretation or application of the Convention where the parties have agreed to seek settlement by means of their own choice, and article 282 concerning disputes which are also governed by general, regional or bilateral agreements. Moreover, the Tribunal is required under article 293 of the Convention to apply rules of international law that are not incompatible with the Convention.

When required to apply rules of international law, the Tribunal has found it necessary on a number of occasions to cite relevant decisions of the International Court of Justice. The Tribunal has relied upon the jurisprudence of the ICJ, for instance, in respect of issues concerning the state of necessity, the existence of a dispute, the ability of a tribunal to examine its jurisdiction *proprio motu*, the exhaustion of negotiations as a precondition for a dispute to be submitted to a court or tribunal, the decisive date for determining issues of admissibility, the notion of acquiescence and the status of a protocol or minutes of meetings.

I should add that the Tribunal, when appropriate, has also relied upon the decisions of the Permanent Court of International Justice and arbitral tribunals. Without a doubt, mutual respect among international courts and tribunals is a way of avoiding fragmentation of international law and of overcoming conflicts of jurisdiction.

The *Swordfish* case

This leads me to the topic of parallel proceedings before international judicial bodies. I refer to the possibility of two different judicial bodies dealing simultaneously with the same matter and involving the same parties. Various commentators have cited, in this respect, the *Swordfish* case between Chile and the European Community.

In December 2000, at the request of Chile and the European Community, the *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)* 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 and in December 2005 they were extended anew until 1 January 2008. The Special Chamber is expected to meet before the end of this year.

The question of the *Swordfish* Case has attracted the attention of various scholars as it has also been submitted to the World Trade Organization. I should explain that the parties' claims before the Special Chamber of the Tribunal concern issues of conservation and management of living resources as well as freedom of fishing on the high seas as they relate to the substantive obligations set out in the Convention and pursuant to Part XV thereof. On the other hand, before the WTO, trade-related issues, such as freedom of transit under the 1994 General Agreement on Tariffs and Trade, were presented. There, the parties, having reached a provisional arrangement, agreed to suspend the process for constituting a WTO panel to deal with this question.

It can be seen from the parties' claims that the questions brought before each judicial body differ in nature. There also seems in principle to be no obstacle to parties' bringing distinct aspects of a matter to more than one judicial institution. This could be viewed as an expression of the principle of free choice of means, a principle clearly enshrined in Part XV of the Convention. As the cases have been suspended,

one cannot but speculate about the possible outcomes. In any event, I would like to underline that judicial comity among courts and tribunals should encourage them to cooperate and to act rigorously within their own jurisdictional powers.

Advisory function of the Tribunal

There is a further alternative that could play a useful role in ensuring harmonized implementation of the Convention. I refer to the Tribunal's advisory function which is a significant innovation in the international judicial system.

The Tribunal's advisory function is based on article 21 of the Statute, which states that the jurisdiction of the Tribunal comprises "all disputes and all applications submitted to it" and "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal." Under article 138 of its Rules, 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 of a request for such an opinion. The request is to be transmitted to the Tribunal by the body which is authorized under the agreement to do so.

Future international agreements, for instance, between States or between States and international organizations could provide for recourse to the Tribunal's advisory procedures. Accordingly, the requesting body authorized under the agreement may ask the Tribunal for legal guidance on a specific question. In particular, the Meeting of States Parties to the Convention could decide to request an advisory opinion from the Tribunal on a legal question related to the Convention. It is worthy of note that advisory opinions are non-binding in nature and therefore provide an interesting alternative for conflict resolution.

In effect, advisory procedures before the Tribunal may assist parties in resolving disagreements and even prevent them from engaging in disputes. Opposing parties could ask the Tribunal to determine the principles and rules of international law applicable to a particular situation and undertake to reach an agreement on that basis. Advisory proceedings could also be advantageous for those seeking an indication as to how a specific sea-related matter could be interpreted

under the Convention or which would be the applicable law when there is no specific provision governing the matter.

Almost 25 years after the adoption of the Convention, it is not surprising that new economic and scientific uses of the seas continue to increase but their legal status sometimes remains controversial. New developments require new legal answers which may be given by the Tribunal through its advisory function. This may further enhance the harmonized implementation of the Convention and help to reinforce coherence in international law.

Mr Chairman
Excellencies,
Ladies and Gentlemen,

This brings me to the end of my presentation.

I end by reiterating my appreciation to you for giving me the opportunity to address this meeting. I thank you for your kind attention.