

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



STATEMENT BY

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PRESIDENT
OF THE
INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ON

THE REPORT OF THE TRIBUNAL

AT

THE TWENTY-FIFTH MEETING OF STATES PARTIES TO
THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

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Mr President,

1. I am honoured by the opportunity given to me to present to the Meeting of States Parties the Annual Report of the Tribunal for the year 2014. On behalf of the International Tribunal for the Law of the Sea, I convey to you, Ambassador Kriangsak Kittichaisaree, my sincere congratulations on your election as President of this Meeting and wish you every success in the performance of your duties.

Mr President,

Distinguished delegates,

2. The Annual Report of the Tribunal which is before you provides a comprehensive review of the Tribunal's activities for the period 1 January to 31 December 2014. In my statement today, I will limit myself to commenting on the main elements of this report. I will also provide the Meeting with an update on activities which have taken place this year.

3. As regards organizational matters, I wish to inform the Meeting of States Parties that Judge Vicente Marotta Rangel (Brazil) resigned as a member of the Tribunal on 18 May 2015. Judge Marotta Rangel had been a judge since the inauguration of the Tribunal in October 1996. His term of office was due to expire on 30 September 2017. Judge Marotta Rangel contributed greatly to the work of the Tribunal during his time on the Bench and we will miss him both as a colleague and as a friend. In accordance with article 6 of the Statute of the Tribunal, steps have

been taken, in consultation with the States Parties, to fill the vacancy. The ensuing election is scheduled to be held at a Special Meeting of States Parties.

4. During the period under review, changes occurred in the composition of the Tribunal. On 11 June 2014, the twenty-fourth Meeting of States Parties elected seven members of the Tribunal for a term of nine years. Among those seven members, the Meeting re-elected Judge Yanai (Japan), Judge Hoffmann (South Africa), Judge Pawlak (Poland), Judge Kateka (Tanzania) and Judge Paik (Republic of Korea). The two newly elected members are Judge Gómez-Robledo (Mexico) and Judge Heidar (Iceland).

5. On 1 October 2014, I was elected President of the Tribunal for a three-year term. On that same date, Judge Bouguetaia was elected Vice-President. On 2 October 2014, Judge Jesus was elected President of the Seabed Disputes Chamber. I take this opportunity to thank my predecessor, Judge Yanai, for his valuable contribution to the Tribunal's work.

6. In 2014, the Tribunal held a number of judicial meetings to deal with its case load. During these meetings, it considered and adopted its Judgment in the *M/V "Virginia G" Case*. The Tribunal also heard and deliberated on the case concerning the *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*.

7. On 14 April 2014, the Tribunal delivered its Judgment in the *M/V "Virginia G" Case*, settling the dispute between Panama and Guinea-Bissau arising out of the

arrest of the Panamanian flagged oil tanker *M/V Virginia G*. The vessel had been detained on the grounds that it was conducting bunkering of foreign fishing vessels in the exclusive economic zone of Guinea-Bissau without proper authorization and therefore in contravention of Guinea-Bissau's laws. The *M/V Virginia G*, together with the gas-oil it carried, was later confiscated by the authorities of Guinea-Bissau. Subsequently, the vessel was released. During the proceedings, Panama claimed that the actions taken by Guinea-Bissau against the vessel had violated, amongst others, its right under the Convention to enjoy freedom of navigation; it therefore sought compensation for damages and losses caused. Guinea-Bissau rejected the allegations and claims.

8. In its Judgment, the Tribunal made important pronouncements on matters relating to the existence of a genuine link between the flag State and a ship flying its flag, and the applicability of the exhaustion of local remedies rule. The key question, however, concerned the competence of the coastal State to regulate offshore bunkering in its exclusive economic zone. I will briefly comment on these issues.

9. Beginning with the question of the "genuine link", it may be noted that article 91, paragraph 1, of the Convention requires the existence of a genuine link between the flag State and the ship. In its Judgment, the Tribunal explained that this genuine-link requirement "should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag State to grant its nationality to ships".¹ It also clarified that, under article 94 of the Convention, the flag State is required "to exercise effective jurisdiction and control over that ship in order to ensure that it

¹ *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment of the Tribunal of 14 April 2014, para. 110.

operates in accordance with generally accepted international regulations, procedures and practices”, observing that “[t]his is the meaning of ‘genuine link.’”²

10. As regards the applicability of the exhaustion of local remedies rule, the Tribunal recalled that under international law the rule does not apply where the claimant State is directly injured by the wrongful act of another State.³ The Tribunal therefore examined whether the claims of Panama related to a direct violation on the part of Guinea-Bissau of the rights of Panama.⁴ Considering, however, that the submissions of Panama contained what are known as “mixed claims”, the Tribunal observed that “[w]hen the claim contains elements of both injury to a State and injury to an individual, for the purpose of deciding the applicability of the exhaustion of local remedies rule, the Tribunal has to determine which element is preponderant”.⁵ Since the principal rights alleged by Panama to have been violated by Guinea-Bissau, for instance, the right to enjoy the freedom of navigation, were rights that belong to Panama under the Convention, the Tribunal concluded that the alleged violations of these rights amounted to direct injury to Panama and that the claim of Panama as a whole was brought on the basis of an injury to itself.⁶ In short, the Tribunal found that the exhaustion of local remedies rule was not applicable.

11. I will turn now to the key question of bunkering. This question is not explicitly addressed in the Convention, nor has it been decided upon in international adjudication. It did however arise in the *M/V “Saiga” Case* but remained

² Ibid., para. 113.

³ Ibid., see para. 153.

⁴ Ibid., see para. 154.

⁵ Ibid., para. 157.

⁶ Ibid., see para. 157.

unanswered.⁷ This time, in the *M/V “Virginia” G Case*, the Tribunal was required to clarify the matter by interpreting relevant provisions of the Convention.

12. It may be recalled that the main point of contention between the Parties was whether Guinea-Bissau had violated the Convention when it arrested, and later confiscated, the *M/V Virginia G*. To decide this issue, the Tribunal had to address the question of the coastal State’s competence under the Convention to regulate bunkering of foreign fishing vessels in its exclusive economic zone. After analysing the relevant provisions of the Convention and the practice of States, the Tribunal expressed the view that

“the regulation by a coastal State of bunkering of foreign vessels fishing in its exclusive economic zone is among those measures which the coastal State may take in its exclusive economic zone to conserve and manage its living resources under article 56 of the Convention, read together with article 62, paragraph 4, of the Convention. This view is confirmed by State practice which has developed after the adoption of the Convention”.⁸

13. The Tribunal also emphasized that “the bunkering of foreign vessels engaged in fishing in the exclusive economic zone is an activity which may be regulated by the coastal State concerned” and that “[t]he coastal State, however, does not have such competence with regard to other bunkering activities, unless otherwise determined in accordance with the Convention.”⁹

⁷ See *M/V “SAIGA” (No.2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p.10, para. 138, at p. 57.

⁸ *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment of the Tribunal of 14 April 2014, para. 217.

⁹ *Ibid.*, para. 223.

14. The Tribunal decided that Guinea-Bissau's legislation on bunkering of fishing vessels was in conformity with articles 56 and 62, paragraph 4, of the Convention.¹⁰ Nevertheless, it still had to deal with the question whether the confiscation of the *M/V Virginia G* and the gas oil on board was justified. In this regard, the Tribunal was of the view that the enforcement action taken against the *M/V Virginia G* was not reasonable in the light of the circumstances of the case, and found that the confiscation by Guinea-Bissau of the *M/V Virginia G* and the gas oil on board was in violation of article 73, paragraph 1, of the Convention.¹¹ Ultimately, in its Judgment, the Tribunal awarded compensation to Panama in respect of some of its claims for damages.

15. In this connection, I wish to mention that a separate chapter of the Annual Report contains information on communications received from parties pursuant to judgments or orders of the Tribunal. With regard to the *M/V "Virginia G" Case*, reference is made in the Report to information communicated by the Parties to the Tribunal in the course of 2014, concerning payment of the compensation the Tribunal awarded to Panama in the Judgment of 14 April 2014. A number of communications were exchanged between the Parties on this matter, copies of which were transmitted to the Tribunal. According to a communication received by the Tribunal on 5 May 2015, no payment of compensation had yet been made.

Mr. President,

Distinguished delegates,

¹⁰ Ibid., see para. 236.

¹¹ Ibid., see paras. 270 and 271.

16. A few weeks ago, on 2 April 2015, the Tribunal delivered its first advisory opinion. The Request for an advisory opinion was submitted to the Tribunal in late March 2013 by the Sub-Regional Fisheries Commission (“the SRFC”), which is a regional fisheries organization composed of seven West African States. In its Request, the SRFC posed four different questions to the Tribunal concerning illegal, unreported and unregulated fishing (“IUU fishing”) activities in the exclusive economic zone of the SRFC Member States.

17. The annual report for next year will provide more detailed information about the Tribunal’s Advisory Opinion. Meanwhile, allow me to make a few remarks on the Tribunal’s decision.

18. In its Advisory Opinion, the Tribunal made important contributions to the development of the law of the sea by clarifying several matters not directly addressed in the Convention. This is particularly so as regards the obligations and liability of flag States in relation to IUU fishing in the exclusive economic zones of the SRFC Member States. The Tribunal also addressed the related issue of the liability of international organizations. Furthermore, it elaborated on the rights and obligations of the SRFC Member States in managing certain fish stocks.

19. With regard to the obligations of the flag State, the Tribunal first underlined that, under the Convention, “responsibility for the conservation and management of living resources in the exclusive economic zone rests with the coastal State”. According to the Tribunal, it is the coastal State which has in that zone “sovereign

rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living”.¹²

20. The Tribunal emphasized that “the primary responsibility of the coastal State in cases of IUU fishing conducted within its exclusive economic zone does not release other States from their obligations in this regard”.¹³ It identified a number of obligations of the flag State in cases where vessels flying its flag engage in IUU fishing in the exclusive economic zone of SRFC Member States.¹⁴ For purposes of the Advisory Opinion, the term “flag State” is understood to mean a State not a member of the SRFC¹⁵ and the flag State’s obligations include the obligation to

“take necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag with the laws and regulations enacted by the SRFC Member States concerning marine living resources within their exclusive economic zones for purposes of conservation and management of these resources.”¹⁶

21. A further obligation incumbent upon the flag State is to adopt “the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities in the exclusive economic zones of the SRFC Member States which undermine the flag State’s responsibility under article 192 of the Convention for protecting and preserving the marine environment and conserving the marine living

¹² *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of the Tribunal of 2 April 2015*, paragraph 104.

¹³ *Ibid.*, paragraph 108.

¹⁴ *Ibid.*, see paragraph 89.

¹⁵ *Ibid.*, see paragraph 88.

¹⁶ *Ibid.*, paragraph 219 (3).

resources which are an integral element of the marine environment”.¹⁷ The Tribunal specified that these are obligations of “due diligence”. In addition, the Tribunal pointed out that the flag State and the SRFC Member States are under an obligation to cooperate in cases involving IUU fishing in the exclusive economic zones of the SRFC Member States.

22. Concerning the liability of the flag State for IUU fishing activities conducted by vessels under its flag, the Tribunal stated that:

“The liability of the flag State does not arise from a failure of vessels flying its flag to comply with the laws and regulations of the SRFC Member States concerning IUU fishing activities in their exclusive economic zones, as the violation of such laws and regulations by vessels is not *per se* attributable to the flag State.”¹⁸

23. The Tribunal explained that the liability of the flag State “arises from its failure to comply with its ‘due diligence’ obligations concerning IUU fishing activities conducted by vessels flying its flag in the exclusive economic zones of the SRFC Member States.”¹⁹ Thus, “[t]he flag State is not liable if it has taken all necessary and appropriate measures to meet its ‘due diligence’ obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the exclusive economic zones of the SRFC Member States”.²⁰

¹⁷ Ibid., paragraph 219 (3).

¹⁸ Ibid., paragraph 219 (4).

¹⁹ Ibid., paragraph 219 (4).

²⁰ Ibid., paragraph 219 (4).

24. The Tribunal also had to deal with the question of the responsibility and liability of an international organization to which its member States have transferred competence in matters concerning fisheries. In the case before it, the Tribunal observed that the organization in question was the European Union. It stated that

“[i]n cases where an international organization, in the exercise of its exclusive competence in fisheries matters, concludes a fisheries access agreement with an SRFC Member State, which provides for access by vessels flying the flag of its member States to fish in the exclusive economic zone of that State, the obligations of the flag State become the obligations of the international organization.”²¹

25. According to the Tribunal, “only the international organization may be held liable for any breach of its obligations arising from the fisheries access agreement, and not its member States”.²² However, the Tribunal was of the view that “if the international organization does not meet its ‘due diligence’ obligations, the SRFC Member States may hold the international organization liable for the violation”.²³

26. Finally, the Tribunal specified a number of obligations of the SRFC Member States in ensuring the sustainable management of shared stocks. Concerning shared stocks occurring in the exclusive economic zones of the SRFC Member States, these obligations included the obligation to cooperate with the competent international organizations to ensure that the maintenance of those stocks is not endangered by overexploitation, the obligation to “seek ... to agree upon the

²¹ Ibid., paragraph 219 (5).

²² Ibid., paragraph 219 (5).

²³ Ibid., paragraph 219 (5).

measures necessary to coordinate and ensure the conservation and development of such stocks”, and, in relation to tuna species, the obligation to cooperate with a view to ensuring conservation and promoting the objective of optimum utilization of such species in their exclusive economic zones.²⁴

27. Advisory opinions are recommendatory in nature. It is expected that the answers provided by the Tribunal in its Advisory Opinion will assist the Sub-Regional Fisheries Commission in carrying out its activities and pursuing its efforts to combat IUU fishing.

Mr President,

Distinguished delegates,

28. Further to consultations which I held in December 2014 with representatives of Ghana and Côte d'Ivoire, these States concluded a special agreement to submit the dispute concerning delimitation of the maritime boundary between them in the Atlantic Ocean to a special chamber of the Tribunal. At the request of the Parties, the Tribunal, by Order of 12 January 2015, formed a special chamber under article 15, paragraph 2, of the Statute. The Special Chamber is made up of five judges, including one judge *ad hoc* chosen by Ghana and one chosen by Côte d'Ivoire. The time-limits for the filing of written pleadings in the case were fixed by an Order of the President of the Special Chamber made on 24 February 2015.

²⁴ *Ibid.*, paragraph 219 (6).

29. I wish to report to you that in this case Côte d'Ivoire on 27 February 2015 filed with the Special Chamber a Request for the prescription of provisional measures under article 290, paragraph 1, of the Convention. In its Request, Côte d'Ivoire asked the Chamber to prescribe that Ghana, *inter alia*, "take all steps to suspend all ongoing oil exploration and exploitation operations in the disputed area". Ghana asked the Special Chamber to deny Côte d'Ivoire's requests. The Special Chamber held a hearing on 29 and 30 March 2015 and, after deliberation, delivered its Order on 25 April 2015.

30. In its Order, the Special Chamber stated that it may not prescribe provisional measures unless it finds that there is a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute.²⁵ It further stated that, before prescribing provisional measures, it "need not concern itself with the competing claims of the Parties, and that it need only satisfy itself that the rights which Côte d'Ivoire claims on the merits and seeks to protect are at least plausible".²⁶ The Special Chamber noted that the risk of serious harm to the marine environment was of great concern to it.²⁷ In this regard, consistent with the Tribunal's jurisprudence, it underlined that the Parties should in the circumstances "act with prudence and caution to prevent serious harm to the marine environment".²⁸ In addition, the Special Chamber explained that there is a risk of irreparable prejudice "where, in particular, activities result in significant and permanent modification of the

²⁵ Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Request for the prescription of provisional measures, Order of the Special Chamber dated 25 April 2015, see paragraph 41.

²⁶ *Ibid.*, paragraph 58.

²⁷ *Ibid.*, see paragraph 68.

²⁸ *Ibid.*, paragraph 72.

physical character of the area in dispute and where such modification cannot be fully compensated by financial reparations".²⁹

31. After noting that it may prescribe measures different in whole or in part from those requested,³⁰ the Special Chamber stated that "the exploration and exploitation activities, as planned by Ghana, may cause irreparable prejudice to the sovereign and exclusive rights invoked by Côte d'Ivoire in the continental shelf and superjacent waters of the disputed area, before a decision on the merits is given by the Special Chamber, and that the risk of such prejudice is imminent".³¹ The Chamber considered however that an order suspending all exploration or exploitation activities conducted by or on behalf of Ghana in the disputed area, including activities in respect of which drilling had already taken place, would cause prejudice to the rights claimed by Ghana and create an undue burden on it and that such an order could also cause harm to the marine environment.³² It therefore considered it appropriate, in order to preserve the rights of Côte d'Ivoire, to order Ghana to take all the necessary steps to ensure that no new drilling either by Ghana or under its control takes place in the disputed area.³³ The Chamber also requested each Party to submit a report and information on compliance with the provisional measures.³⁴

32. The Special Chamber's Order prescribing the provisional measures was adopted unanimously.

²⁹ Ibid., paragraph 89.

³⁰ Ibid., see paragraph 97.

³¹ Ibid., paragraph 96.

³² Ibid., see paragraphs 100 and 101.

³³ Ibid., see paragraph 102.

³⁴ Ibid., see paragraph 105.

Mr. President,

Distinguished delegates,

33. In 2014, the Tribunal held two sessions devoted to legal as well as organizational and administrative matters, of which an account is given in the document before you. During these sessions, the Tribunal also dealt with budgetary matters, which will be presented to you by the Registrar in a separate statement. At this point, it is appropriate to refer to some initiatives discussed by the Tribunal during this year's March session.

34. I will refer first to the question of the Tribunal's participation in the International Civil Service Commission. As you know, there is no formal membership status in the ICSC; organizations which have committed to apply the United Nations common system may however contribute to the work of the ICSC by subscribing to its statute and making a financial contribution to it. It may be noted that, further to decisions of the Meeting of States Parties, the Tribunal ever since its establishment in 1996 has applied the United Nations common system to its staff.

35. Having the Tribunal participate in the ICSC is considered to present certain benefits. The Tribunal has therefore decided to seek approval from the Meeting of States Parties to subscribe to the ICSC statute, as of 1 January 2016, on the understanding that any additional expenditure should be absorbed by the current budget. Such a proposal has been included in the report on budgetary matters of the Tribunal for 2013-2014 and 2015-2016 (document SPLOS/280, paragraphs 24 to

28). The Registrar will provide further information on this proposal in his statement on budgetary matters.

36. As 2016 marks the 20th anniversary of the Tribunal, the Tribunal has envisaged organizing two events, one to be held in New York during the 26th Meeting of States Parties, and one in Hamburg in October 2016, to commemorate its first 20 years. Information about these events and invitations to them will of course be provided to the States Parties in advance. I would like to add that the Tribunal has set up a special trust fund to support these activities and welcomes any contributions to it.

37. This brings me to the subject of existing trust funds. In relation to the voluntary ITLOS trust fund established by the Secretary-General to assist States in the settlement of disputes through the Tribunal, I wish to inform the Meeting that a payment from that trust fund was made in May 2014 to one State which had participated in proceedings before the Tribunal. Taking this payment into account, the trust fund shows a balance of US\$ 74,317.43, as at March 2015. This development may serve as an incentive for States Parties to make further contributions to the ITLOS fund.

38. With the support of the Nippon Foundation, the Tribunal has established a trust fund to finance the participation of fellows in a capacity-building and training programme on dispute settlement under the Convention. In 2014, fellows from Albania, Cambodia, Madagascar, Mexico, Republic of Congo, Ukraine and Vietnam participated in this nine-month programme. They attended lectures on topical issues

related to the law of the sea and maritime law and training courses on negotiation and delimitation. I wish to thank the Nippon Foundation for its contribution to this programme.

39. The internship programme of the Tribunal, which offers young government officials and university students the opportunity to gain experience relating to the work of the Tribunal, has also benefitted from contributions made to special trust funds. These funds have been set up with assistance from the Korea Maritime Institute and the China Institute of International Studies. I wish to thank these institutions for their contributions to this programme. At the same time, I wish to note that the financial resources in these funds will have been expended by the end of this year. I therefore seize this opportunity to invite States Parties to consider making contributions in further support of the Tribunal's internship programme.

40. In this connection, I wish to underline the great importance which the Tribunal attaches to capacity-building. This is an effective tool to transmit knowledge in law of the sea matters and dispute settlement procedures to younger generations. Another capacity-building activity in which the Tribunal is involved is the Summer Academy, which is organized on a yearly basis in cooperation with the International Foundation for the Law of the Sea. The most recent session dealt with the topic "Uses and Protection of the Sea – Legal, Economic and Natural Science Perspectives" and welcomed 41 participants from 33 different States. I thank the International Foundation for the Law of the Sea for its important work.

41. For some years now, the Tribunal has organized a series of workshops on the settlement of disputes related to the law of the sea in different regions of the world. During 2014 a workshop was held in Nairobi in cooperation with the Government of Kenya and the Korea Maritime Institute; it was attended by representatives from seven States. I wish to convey our sincere appreciation to the Government of Kenya and the KMI for their assistance in organizing this event. I would like to add that we are planning a workshop this year as well, in Indonesia.

Mr President,

Distinguished Delegates,

42. I am happy to report that in January of this year I had the pleasure of welcoming a delegation from the International Court of Justice to the Tribunal. The ICJ delegation consisted of the then President of the ICJ, Judge Peter Tomka, five other judges of the ICJ and the Registrar of the ICJ. I was accompanied by five other judges of the Tribunal as well as the Tribunal's Registrar. The occasion provided the judges of the two judicial institutions with the opportunity to hold extensive discussions and exchange views on various aspects of international law of interest to both the Tribunal and the Court.

This brings me to the end of my statement.

I would like to conclude by conveying my appreciation to the Legal Counsel, to the Director of the Division for Ocean Affairs and the Law of the Sea and to her staff for

the invaluable work accomplished in relation to the law of the sea and the excellent cooperation extended to the Tribunal.

I thank you for your kind attention.