

***INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA***



Statement by

**JUDGE JOSE LUIS JESUS,**

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

25 October 2010

Mr. Chairman,  
Mr Deputy Legal Counsel,  
Mr Chairman of ILC  
Ladies and Gentlemen,

It is with great pleasure that I address this meeting of distinguished legal advisers. I am honoured by the kind invitation addressed to me by you, Mr Chairman, on behalf of the organizers, to be here today, and grateful for the opportunity to exchange views with you on the work of the International Tribunal for the Law of the Sea (ITLOS) and on matters of common concern.

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 (hereinafter “the Convention”), which, as of now, has been ratified by an impressive number of 161 countries, from all regions of the world, both coastal and land-locked.

Since most of the countries represented here are parties to the Convention, the Tribunal is therefore a court of your own country’s creation and in it all the regions and the principal legal systems of the world are represented. Therefore, it is a pleasure and a duty for me to come before you, on this occasion, to brief you on the work of your judicial institution.

I will first give you a brief overview of ITLOS work during the 14 years since it started its functions. I will also provide you with some details on our current judicial work and, in particular, on the two cases that we have recently received. Finally, I will highlight some aspects of the law applied by the Tribunal in addressing legal issues raised in the context of cases that it has entertained.

### **Overview of our work - number of cases received**

The Tribunal is, as you know, a new and growing judicial institution. Nonetheless, 17 cases have been submitted to it since we began our work in 1996. Of these, 13 have been resolved; one was discontinued last December, at the request of the parties,

after several years on our log;<sup>1</sup> another was discontinued before the Tribunal could begin to deal with it;<sup>2</sup> and the last two cases, instituted in the past 11 months, are under way.

The cases handled by the Tribunal involved disputant States from all regions of the world. Most of them<sup>3</sup> involved urgent proceedings concerning the prompt release of vessels and crews<sup>4</sup> and provisional measures pending the constitution of an Annex VII arbitral tribunal.<sup>5</sup> Both procedures fall under the compulsory jurisdiction of the Tribunal, which has entertained nine prompt release cases and four cases involving Annex VII provisional measures.<sup>67</sup> We are happy to note that States are increasingly turning to ITLOS as a main judicial body for the resolution of law of the sea disputes, or to seek its legal guidance on law of the sea matters through advisory opinions.

While the Tribunal may not have received as many cases as we would have liked, it has nonetheless received a good share of law of the sea cases, bearing in mind the short span of its still young existence. As intended by the framers of the United Nations Convention on the Law of the Sea, it is becoming the primary international judicial body for disputes concerning a variety of law of the sea issues. Indeed, the cases

brought before it relate to a wide range of issues, such as protection of the marine environment, conservation of marine living resources, prompt release of vessels and

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<sup>1</sup> *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*.

<sup>2</sup> *The "Chaisiri Reefer 2" Case (Panama v. Yemen)*.

<sup>3</sup> The cases are: the *M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea)*; the *M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*; the *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*; the *"Camouco" Case (Panama v. France)*; the *"Monte Confurco" Case (Seychelles v. France)*; the *"Grand Prince" Case (Belize v. France)*; the *"Chaisiri Reefer 2" Case (Panama v. Yemen)*; the *MOX Plant Case (Ireland v. United Kingdom)*; the *"Volga" Case (Russian Federation v. Australia)*; the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*; the *"Juno Trader" Case (Saint Vincent and the Grenadines v. Guinea-Bissau)*; the *"Hoshinmaru" Case (Japan v. Russian Federation)*; and the *"Tomimaru" Case (Japan v. Russian Federation)*.

<sup>4</sup> See art. 292 of the Convention.

<sup>5</sup> See art. 290, para. 5, of the Convention.

<sup>6</sup> Proceedings relating to the request for provisional measures in the *M/V "SAIGA" (No. 2) Case* were also instituted on the basis of art. 290, para. 5, of the Convention. Further to an agreement between the parties to submit the case to the Tribunal, the case was dealt with by that body under art. 290, para. 1, of the Convention.

<sup>7</sup> The *Bluefin Tuna Cases*, the *MOX Plant Case* and the *Land Reclamation Case*.

crews, delimitation of maritime boundaries, responsibility and liability of sponsoring States on certain seabed activities, and compensation for illegal detention of vessels and crews. The cases that the Tribunal has received recently seem to confirm this encouraging trend.

The Tribunal's role in the law of the sea dispute settlement system goes beyond its judicial competence. Under Annex VII, article 3, of the Convention, its President is given the important authority to appoint arbitrators at the request of any of the parties to a dispute submitted to an Annex VII arbitral tribunal, whenever the parties do not agree on the choice of arbitrators. Parties have, on occasion, sought and benefited from the President's assistance in this regard. Most recently this assistance was provided in connection with the appointment of three arbitrators in the Annex VII arbitration between Bangladesh and India concerning their dispute on maritime delimitation in the Bay of Bengal.

The Tribunal has also contributed to the dissemination of knowledge of the law of the sea dispute settlement system. The dispute settlement provisions of the Convention, as is generally known, are not easy to understand. Aware of this, the Tribunal has, since its inception, tried to be user-friendly. For this purpose, a number of initiatives have been implemented. For example, we have organized a series of regional workshops to disseminate practical knowledge about the dispute settlement provisions of the Convention, as well as the procedures available at the Tribunal and the practical procedural steps needed for dealing with a case. One such workshop was recently conducted in Fiji<sup>8</sup> for legal representatives of the Pacific island nations.

We have also prepared a practical guide to our procedures in order to help States and lawyers to better understand the steps involved in bringing a case before the Tribunal. This guide can be downloaded from our website. In addition, a detailed commentary to the Rules of the Tribunal, written by a number of our judges, makes a useful contribution to the understanding of our procedures.

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<sup>8</sup> 8 regional workshops have been organized in west, east and southern Africa, in the Middle East, in Latin America, in the Caribbean and in the Pacific.

The Tribunal's case management has a justified reputation for being cost- and time-effective. As directed by our Rules,<sup>9</sup> the proceedings before the Tribunal are conducted without unnecessary delay or expense. The M/V "Saiga" (2) Case – a case on the merits handled by the Tribunal – took less than two years to resolve and the case between Bangladesh and Myanmar, currently before us, will probably be resolved within a similar time-frame, in accordance with the Orders issued on the conduct of the case. To date, all the cases of prompt release and provisional measures entertained by the Tribunal have been resolved within a month period.

### **New cases received**

Since I addressed this Meeting last year, two new cases have been submitted to the Tribunal: Case No. 16, the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal* and Case No. 17, a request for advisory opinion concerning *responsibilities and obligations of States sponsoring persons and entities with respect to activities in the [International Seabed] Area*.

### **Case No. 16, on maritime delimitation**

Case No. 16, instituted before the Tribunal on 14 December 2009, as stated, relates to the dispute between the People's Republic of Bangladesh and the Union of Myanmar concerning the delimitation of their maritime boundary in the Bay of Bengal. This is a milestone for the Tribunal since it is its first case on maritime delimitation.

After consultation with the two parties on the conduct of the case, the Tribunal set the time limits for presentation of the memorial and the counter-memorial. It subsequently set time limits for the filing of the reply and the rejoinder, also in conformity with the consultations with the parties. The written proceedings are under way and Bangladesh has already submitted its memorial as scheduled. The counter-memorial, to be filed by Myanmar, is due on 1 December 2010. The written phase of the proceedings should conclude by 1 July 2011. Both parties have chosen judges *ad hoc* to sit in the case.

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<sup>9</sup> See article 49 of the Rules of the Tribunal.

**Case No. 17 – Request for an advisory opinion**

In May 2010, the Tribunal's Seabed Disputes Chamber received a request for an advisory opinion from the International Seabed Authority. This case has been entered in the List of Cases as No. 17 and here again the proceedings are well under way. The written and oral proceedings have already taken place. A significant number of States parties and international organizations made submissions during the written phase of the proceedings and made also oral presentations during the 3-day hearing held in the Seabed Disputes Chamber, which, meanwhile, has begun its deliberations. Since, under the Convention, advisory opinions are to be given as a matter of urgency, a decision is expected in early 2011.

This request for an advisory opinion is a significant development in our work since it is the first case brought before the Seabed Disputes Chamber, which, as the body with exclusive competence over the bulk of the seabed-related disputes and requests for advisory opinions, on matters concerning the Area has enormous potential. As seabed activities increase, the disputes that may be brought before the Chamber will, in all likelihood, also increase.

**Discontinuance of Case No. 7 - Conservation of swordfish stocks**

On the other hand, Case No. 7, *concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean, between Chile and the European Community, later on European Union*, which had been referred to an *ad hoc* special chamber of the Tribunal, was discontinued last year at the request of the two parties. This case, which had been on our log since 2000, was resolved out of court, through negotiations between the parties. Although the Chamber did not deal with the substance of this case, the fact that it had been filed with the Tribunal may have helped the parties to reach an out of court agreement.

## The application of international law other than the Convention

You may be interested to learn about the law that the Tribunal has applied in addressing issues raised by the cases brought before it: The Tribunal has applied not only the Convention, but also other rules of international law that are not incompatible with the Convention, pursuant to article 293 of the Convention.

As you know, the Convention provides extensive international regulation of the law of the sea. It includes both rules of customary law and several new provisions that reflect progressive development in this field achieved during the negotiations at the Third Conference.

By applying the Convention in a specific case, the Tribunal applies not only the new treaty provisions that it contains, but also the general international law that it codifies, as well as rules and standards found in agreements of a technical nature that have been absorbed by it through references to those agreements in several of its articles.<sup>10</sup> These references to rules and standards contained in such agreements broaden, to a certain extent, the Tribunal's jurisdiction to include technical maritime matters concerning navigation,<sup>11</sup> such as collision, safety at sea and traffic separation.

As shown by its case law, the Tribunal has been able to solve most legal issues raised in the context of a dispute submitted to it within the framework of the Convention. Indeed, in a number of cases, its provisions have provided all the necessary legal guidance. In the absence of sufficient guidance from the Convention, however, the Tribunal also applies "other rules of international law not incompatible with the Convention" as mandated by article 293, paragraph 1.<sup>12</sup>

This reference to "other rules of international law" should be understood to include rules of customary international law, general principles that are common to the major

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<sup>10</sup> See, inter alia, arts. 24 (4), 39 (2), 41 (3), 53 (8) 94 (2a) and 95 (5) of the Convention.

<sup>11</sup> See David Anderson, "The Enforcement of International Maritime Rules and Standards", in *Modern Law of the Sea, Selected Essays*, Boston, Martinus Nijhoff, 2008, vol. 59, p. 253.

<sup>12</sup> See art. 293, para. 1, and Annex VI, arts. 23 and 38.

legal systems of the world transposed into the international legal system,<sup>13</sup> and rules of a conventional nature.

The application of the norms of customary law and of general principles of law becomes relevant, as evidenced in the Tribunal's jurisprudence, in situations where, to use the terminology of a working group of the International Law Commission, the provisions of the Convention are "unclear or open textured"; where "the terms or concepts used in the [Convention] have an established meaning in customary law or under general principles of law"; or where the Convention does not provide sufficient guidance.<sup>14</sup>

How have these different manifestations of recourse to "other rules of international law" been articulated in the cases resolved by the Tribunal? The Tribunal has done so, especially by resorting to relevant pronouncements in the case-law of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) in order to identify relevant rules of customary law and general principles of law to support its findings and positions.

It has had recourse to the jurisprudence of other international courts and tribunals, for example, to establish the meaning of the concept of "dispute". to pronounce itself on the modalities for the grant of nationality to ships, to deal with party claims of exhaustion of local remedies and the exhaustion of negotiations, to evaluate the relationship between national law and international law and to determine the legal value of the minutes of negotiations. It has also clarified its understanding of the concepts of "public interest" and "state of necessity" in international law and the conditions for use of force in situations of hot pursuit.

The Tribunal has also referred to certain treaty sources, although sparingly, and in one instance it has relied on pronouncements of arbitral tribunals.

## Conclusion

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<sup>13</sup> R.R.Churchill and A.V.Lowe, *The Law of the Sea*, 3<sup>rd</sup> ed., Huntington, Juris Publishing, 1999.

<sup>14</sup> See the draft conclusions of the work of the Study Group of the International Law Commission on the fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/L.682/Add.1), 2 May 2006.



I would like to conclude my remarks by saying that the Tribunal's application of the "other rules of international law" referred to in article 293 of the Convention shows that the law of the sea is part and parcel of the international law system.

On the other hand, as I have mentioned, the Tribunal has, on occasions, resorted to the case law of the PCIJ and ICJ as a source for the identification of customary law and general principles of law, in situations where the Convention did not provide sufficient guidance. This shows an unequivocal reliance on the jurisprudence of other international courts on certain issues and provides clear evidence that, at least in the Tribunal's case, the concerns about possible fragmentation of the jurisprudence of international courts and tribunals are unwarranted.

Once again, I would like to thank you for inviting us to address this important gathering and we look forward to continuing this most helpful cooperation.

I thank you all for your attention.