

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



STATEMENT BY

MR. L. DOLLIVER M. NELSON,

PRESIDENT OF THE
INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ON

THE COMMEMORATION OF THE 20TH ANNIVERSARY OF THE OPENING
FOR SIGNATURE OF THE 1982 UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA

AT

THE PLENARY OF THE FIFTY-SEVENTH SESSION OF THE
UNITED NATIONS GENERAL ASSEMBLY

9 DECEMBER 2002

Mr President,

1. It is a great honour for me to address the General Assembly on the occasion of the Commemorative Meeting of the 20th Anniversary of the Opening for Signature of the 1982 United Nations Convention on the Law of the Sea. It is a particular pleasure for me to speak to a General Assembly that meets under the presidency of Mr Jan Kavan, Deputy Prime Minister and Minister for Foreign Affairs of the Czech Republic.

2. The International Tribunal for the Law of the Sea is one of the institutions established by the 1982 Convention on the Law of the Sea, the others, of course, being the International Seabed Authority and the Commission on the Limits of the Continental Shelf. The Tribunal held its first session in October 1996 and thus has been functioning as a judicial institution for six years. Six years constitute a fairly short period in the life of any international institution, let alone a global international judicial institution. During the first year, the Tribunal developed its rules of procedure, the guidelines concerning the preparation and presentation of cases before the Tribunal and the resolution on the internal practice of the Tribunal.

3. The Statute of the Tribunal provides for the establishment of the Seabed Disputes Chamber and for special chambers. The special chambers include the Chamber of Summary Procedure and the two chambers formed by the Tribunal in 1997: the Chamber for Fisheries Disputes and the Chamber for Marine Environment Disputes.

4. The Seabed Disputes Chamber has mandatory jurisdiction over all activities in the Area, that is, all activities of exploration and exploitation of the resources of the international seabed area.

I. The judicial work of the Tribunal

5. To date eleven cases have been submitted to the Tribunal.¹

II. Prompt release of vessels and crews

6. The Tribunal has now dealt with five prompt release cases (the *M/V "SAIGA" Case* (1997), the *"Camouco" Case* (2000), the *"Monte Confurco" Case* (2000), the

¹ 1. *The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release* (1997)
 2. *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)* (1998)
 3. and 4. *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures* (1999)
 5. *The "Camouco" Case (Panama v. France), Prompt Release* (2000)
 6. *The "Monte Confurco" Case (Seychelles v. France), Prompt Release* (2000)
 7. *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)* (2000)
 8. *The "Grand Prince" Case (Belize v. France), Prompt Release* (2001)
 9. *The "Chaisiri Reefer 2" Case (Panama v. Yemen), Prompt Release* (2001)
 10. *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures* (2001)
 11. *The "Volga" Case (Russian Federation v. Australia), Prompt Release* (2002).

“*Grand Prince*” Case (2001) and the “*Chaisiri Reefer 2*” Case (2001). A sixth case, the “*Volga*” Case, has been recently submitted to the Tribunal.

7. In these cases the Tribunal has been engaged in clarifying the rule contained in article 292 of the Convention with respect to the prompt release of vessels. The Tribunal is well aware that in deciding these prompt release cases it has to preserve a balance between the interests of the flag State and those of the coastal State and has seen this balance as a key to the determination of a reasonable bond. On this balance it has this to say in its Judgment in the “*Monte Confurco*” Case:

Article 73 identifies two interests, the interest of the coastal State to take appropriate measures as may be necessary to ensure compliance with the laws and regulations adopted by it on the one hand and the interest of the flag State in securing prompt release of its vessels and their crews from detention on the other. It strikes a fair balance between the two interests. It provides for release of the vessel and its crew upon the posting of a bond or other security, thus protecting the interests of the flag State and of other persons affected by the detention of the vessel and its crew. The release from detention can be subject only to a “reasonable” bond.

Similarly, the object of article 292 of the Convention is to reconcile the interest of the flag State to have its vessel and its crew released promptly with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties.

The balance of interests emerging from articles 73 and 292 of the Convention provides the guiding criterion for the Tribunal in its assessment of the reasonableness of the bond.

III. Provisional measures

8. The Tribunal has a general power to prescribe provisional measures under the Convention (article 290, para.1). This power was exercised in the *M/V “Saiga” (No. 2) Case*, which was not registered as a separate case since it was an incidental proceedings which formed part of the *M/V “SAIGA” Case* on merits.

9. The Tribunal also enjoys a special jurisdiction, a compulsory residual power under certain circumstances 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 that the urgency of the situation so requires”. The Tribunal is here called upon to prescribe provisional measures pending the final decision not by the Tribunal itself but by an arbitral tribunal yet to be constituted to which a dispute has been submitted. The Tribunal prescribed such provisional measures in both the *Southern Bluefin Tuna Cases* and the *MOX Plant Case*.

10. In the *Southern Bluefin Tuna Cases*, both Australia and New Zealand requested the prescription of provisional measures under article 290, paragraph 5, of the Convention in their dispute with Japan concerning the southern bluefin tuna

(SBT). The principal measures requested were: that Japan immediately cease unilateral experimental fishing for southern bluefin tuna; that it restrict its catch in any given fishing year to its national allocation as last agreed in the Commission for the Conservation of Southern Bluefin Tuna, subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999; and that Japan act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute.

11. In this case the Tribunal noted, among other things, that in accordance with article 290 of the Convention, the Tribunal may prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment. It considered that the conservation of the living resources of the sea was an element in the protection and preservation of the marine environment. It noted that there was no disagreement between the parties that the state of southern bluefin tuna was severely depleted and was a cause for serious biological concern. The Tribunal was of the view that the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures were taken to prevent serious harm to stock of southern bluefin tuna.

12. The *MOX Plant Case* was another instance where provisional measures were sought pending the constitution of an Annex VII arbitral tribunal (article 290, para. 5). Ireland submitted a request for the prescription of provisional measures seeking the suspension of the authorization of the MOX Plant and the cessation by the United Kingdom of all marine transport of radioactive materials associated with the operation of the MOX Plant.

13. The Tribunal did not find that in the circumstances of the case the urgency of the situation required the prescription of the provisional measures requested by Ireland, in the short period before the constitution of the Annex VII arbitral tribunal.

14. The Tribunal, however, invoking its powers under its rules of procedure (article 89, para. 5) to prescribe measures different in whole or in part from those requested, prescribed provisional measures imposing on the parties the duty to cooperate and consult in certain specific areas, preserving what could be considered to be procedural rights. On the duty to cooperate the Tribunal had this to say:

The duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law

and went on to add

that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention.

15. As had been done in the *Southern Bluefin Tuna Cases*, the Tribunal again utilized the term “prudence and caution” to justify its action. It stated that “prudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate”.

16. The emphasis laid by the Tribunal both on the duty to cooperate and the notion of “prudence and caution” has led one commentator to remark that the significance of the decision in the *MOX Plant Case* goes beyond the mere prescription of provisional measures, and will undoubtedly contribute to the development of the international law of the environment [“sa décision dont l’intérêt dépasse largement le problème des mesures d’urgence, contribue incontestablement au développement du droit international de l’environnement”²].

17. The work of the Tribunal is not to be assessed only from cases which have been decided. It may also have played a role in resolving disputes which have been withdrawn before decision. The “*Chaisiri Reefer 2*” Case (Panama v. Yemen) is a case in point. The President had fixed 18 and 19 July 2001 as the dates for the hearing of this prompt release case. On 12 July 2001 the parties informed the Tribunal that the vessel, its cargo and crew had been released by Yemen and the case was accordingly removed from the list. There is little doubt that this dispute was settled because of the prospect of recourse to the Tribunal. The mere existence of the Tribunal, a standing body, may also assist States to settle their maritime disputes without resorting to litigation.

18. The *Swordfish* case raised an interesting question since when the Tribunal became seized of the case, a dispute arising from similar facts had already been submitted to the WTO Dispute Settlement Body by the European Community – raising the prospect of two dispute settlement procedures running in parallel. In reference to the *Swordfish* case, one commentator has posed the question: does international law have a doctrine of *lis pendens* or *forum non conveniens*? The phenomenon of the multiplication of international tribunals has thrown this question into high relief. The suspension of the subsequent proceedings before both the Special Chamber of the Tribunal and the WTO Dispute Settlement Body meant that the Tribunal was unable to shed any further light on this matter.

IV. The development of the international law of the sea by the Tribunal

19. The primary task of courts and tribunals is to settle disputes – as a former President of the ICJ more accurately put it: “to dispose, in accordance with the law, of that particular dispute between the particular parties before it”³. Nevertheless these institutions undoubtedly, in the nature of things, help in developing the law. The Tribunal has already started making its contribution. The Judgment in the *M/V “SAIGA” (No. 2) Case* on the merits is particularly noteworthy in that respect. It will be remembered that in this case the Tribunal had to decide whether or not the arrest and detention of the *Saiga* and its crew by the Guinean authorities were lawful and, if not, what amount of compensation had to be paid to Saint Vincent and the Grenadines.

20. This case raised a number of issues, among them nationality of claims, reparation, the use of force in law enforcement activities and such classic law of the sea issues as hot pursuit and the question of flags of convenience. On each of

² *RGDIP* 2002, p. 197.

³ Robert Y. Jennings, “The role of the International Court of Justice”, *BYIL*, 1997, p. 41.

these issues it is generally acknowledged that the Tribunal has made a contribution to the development of international law.

V. Nationality of claims

21. With respect to the nationality of claims the Tribunal supported Saint Vincent and the Grenadines' assertion that it had the right to protect the ship flying its flag and those who serve on board, irrespective of their nationality. The Tribunal held that the provisions of the Convention supported the view that a ship should be treated as a unit and it made this percipient observation:

The Tribunal must also call attention to an aspect of the matter which is not without significance in this case. This relates to two basic characteristics of modern maritime transport: the transient and multinational composition of ships' crews and the multiplicity of interests that may be involved in the cargo on board a single ship. A container vessel carries a large number of containers, and the persons with interests in them may be of many different nationalities. This may also be true in relation to cargo on board a break-bulk carrier. Any of these ships could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue.

22. A learned commentator has observed that on the issue of nationality of claims the Tribunal has made an important clarification both of the Convention on the Law of the Sea and of general international law. This dictum has undoubtedly taken into account a salient element of modern shipping.⁴

VI. Reparation

23. The Tribunal has made an equally significant contribution with respect to reparation. The Judgment in the *M/V "SAIGA" (No. 2) Case* contains a detailed account of the different heads under which damages were awarded and an Annex which sets out the members of the crew and other persons, e.g., the painters. It seems to be generally agreed that this aspect of the Judgment constituted a major contribution to the general law concerning damages. It may be noted that the findings of the Tribunal on reparation form part of the commentary on the relevant article in the International Law Commission's Draft Articles on State Responsibility.

VII. The use of force in law enforcement activities

24. In the *M/V "Saiga" (No.2) Case*, Saint Vincent and the Grenadines claimed that Guinea used excessive and unreasonable force in stopping and arresting the *Saiga*. The Tribunal came to the conclusion that Guinea had used excessive force endangering human life before and after boarding the *Saiga*. Guinea had as a consequence violated the rights of Saint Vincent and the Grenadines under

⁴ Shabtai Rosenne, "The International Tribunal for the Law of the Sea", *The International Journal of Marine and Coastal Law*, pp. 443-474 at p. 456.

international law. The Tribunal took particularly into account the circumstances of the arrest in the light of international law. It observed that

Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

A dictum whose intent is to protect the human rights of the members of the crew.

25. In this case also the Tribunal's findings illuminated certain areas of the international law of the sea, for example the rules with respect to hot pursuit, and the requirement of a "genuine link" between the vessel and its flag State.

VIII. The place of the Tribunal

26. The Convention offers States the choice of one or more of the following means for the settlement of disputes: (a) the International Tribunal for the Law of the Sea; (b) the International Court of Justice; (c) arbitration; and (d) special arbitration. States are free to choose by means of a written declaration one or more of these procedures for the settlement of disputes concerning the interpretation or application of the Convention. This user-friendly, flexible mechanism – the embodiment of the so-called Montreux formula – is the distinctive feature of the dispute settlement system in the Convention. It reflects the trend of modern international law with its diversity and flexibility of responses in terms of peaceful settlement of disputes tailored to meet the needs of present-day international society.

27. The Convention does not purport to establish any hierarchy among the various procedures. It lies in the power of each party to establish its own preference.

28. As of 2002, of the 32 States that have filed declarations under article 287 of the Convention, 18 States have chosen the Tribunal, three of them having specified the Tribunal as their only choice. Eighteen States have chosen the ICJ, six of them having specified the ICJ as their only choice. Of the 12 States which specified both the Tribunal and the ICJ, seven have not indicated any preference between the two institutions and five have indicated the Tribunal as their first preference. Thus State practice itself with regard to declarations does not give credence to the fact that any of these procedures enjoy any superior status.

29. President Amerasinghe, the first President of the Conference on the Law of the Sea once remarked that: "Dispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced, otherwise the compromise will disintegrate rapidly and permanently" – an oft-quoted observation. Among these dispute settlement procedures the International Tribunal for the Law of the Sea was designed to play a pivotal role in the resolution of disputes concerning the interpretation or application of the Convention.

30. It is sometimes stated that the multiplication of international tribunals may pose a real risk to the unity of international law. Whatever the merits of this proposition – and it is certainly not generally accepted – the Tribunal for its part has not shown any disinclination to be guided by the decisions of the ICJ. In fact, even in this short period of six years, decisions of the ICJ have been cited both in judgments of the Tribunal and in the separate and dissenting opinions of members of the Tribunal. The truth must lie in the words of a former President of the International Court of Justice:

It is inevitable that other international tribunals will apply the law whose content has been influenced by the Court (i.e., the ICJ), and that the Court will apply the law as it may be influenced by other international tribunals.⁵

31. The Tribunal has not yet fully developed its potential as the specialized judicial organ of the international community for the settlement of disputes concerning the interpretation or application of the Convention on the Law of the Sea. The last six years represents only a chapter of its earliest beginnings.

32. It is fitting here to recall the words of the Secretary-General at the official opening of the building of the Tribunal with respect to the centrality of the Tribunal in the resolution of maritime disputes:

It is the central forum available to States, to certain international organizations, and even to some corporations for resolving disputes about how the Convention should be interpreted and applied.

33. Mr. President,

The Tribunal continues to seek the moral and material support of States, of the United Nations and of the international community as a whole for the successful achievement of the objectives underlying its establishment.

⁵ Address by the President of the International Court of Justice, Judge Stephen Schwebel, to the General Assembly of the United Nations, 27 October 1998.