

STATEMENT BY  
**H.E. JUDGE JIN-HYUN PAIK**

PRESIDENT OF THE  
INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

AT A VIRTUAL EVENT

ORGANIZED BY THE  
INTERNATIONAL FOUNDATION FOR THE LAW OF THE SEA:  
LAW-MAKING IN THE LAW OF THE SEA AND MARITIME LAW

13 AUGUST 2020

Dear colleagues, dear participants,

First of all, I would like to welcome you all to this online conference.

Since 2007, the Summer Academy of the International Foundation for the Law of the Sea has been held at the premises of the International Tribunal for the Law of Sea (“ITLOS” or “the Tribunal”) in Hamburg. We have become accustomed to welcoming a group of enthusiastic young people to the Tribunal each summer, and looking forward to exploring the law of the sea with the next generation.

Unfortunately, as a result of measures in place related to the COVID-19 pandemic, it was not possible to hold the Summer Academy this year. However, I am pleased that this virtual event has been organized and that we have the opportunity to exchange views on current issues in the law of the sea and to strengthen the network of alumni of the Summer Academy.

As you may know, ITLOS, as a judicial institution created by the United Nations Convention on the Law of the Sea (“the Convention”), has two functions: first, to settle disputes concerning the interpretation or application of the Convention

or other international agreements; and second, in so doing, to clarify and develop the law of the sea and international law in general. I guess that the second function may have some relevance to today's subject.

The COVID-19 pandemic has posed a serious challenge to the Tribunal in its performance of these functions. Therefore, this morning I wish to take this opportunity to make some brief remarks on how the Tribunal has coped with this challenge. The first impact of the pandemic was felt in relation to the previous administrative session of the Tribunal. As you may know, each year the Tribunal holds two sessions devoted to legal and judicial as well as organizational and administrative issues. The Forty-ninth Session, which took place in the middle of March this year, had to be shortened in light of the COVID-19 pandemic. During the session, many States began to close their borders and it became difficult for some Judges to return to their home countries.

As the spread of the virus progressed and the situation became increasingly serious in Germany and elsewhere in the world, it was decided to restrict the number of staff working at the Tribunal's premises. From 23 March until 18 May, the majority of the Registry staff worked remotely, while some staff members remained present at the premises in order to ensure essential functions. During this time, the Registry coordinated its work through tele- and videoconferencing. Most staff members have now returned to work at the premises of the Tribunal, while health and safety procedures are in place to prevent the spread of the virus. Visits to the Tribunal remain restricted until further notice.

As concerns its judicial work, the Tribunal currently has two pending cases on its docket: the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* and *The M/T "San Padre Pio" (No. 2) Case (Switzerland/Nigeria)*. In the latter, we are currently at the written phase and the Applicant's Memorial has been submitted in accordance with the time-limits fixed. To date, the COVID-19 pandemic has not had any impact on proceedings in that case.

In contrast, the pandemic has affected proceedings in the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*. This dispute was submitted to a Special Chamber of the Tribunal, composed of nine Judges, by special agreement of the Parties. On 18 December 2019, Maldives had filed written preliminary objections to the jurisdiction of the Special Chamber and the admissibility of Mauritius' claims. In my capacity as President of the Special Chamber, I held consultations with representatives of the Parties on 4 February 2020 to ascertain their views with regard to questions of procedure in respect of the preliminary objections. During these consultations the Parties agreed that the hearing should take place from 24 to 27 June 2020.

However, in light of the situation concerning the COVID-19 pandemic and the containment measures, including border and travel restrictions taken around the world, it was considered unrealistic to hold the hearing on the dates previously agreed. During further consultations, the Parties agreed that the hearing should be postponed to the week of 12 October 2020.

While the postponement of the hearing was made in the hope that it would take place with the physical presence of all participants, including Judges and representatives of the Parties, in Hamburg, the pandemic situation continues to be uncertain and it remains likely that travel and other restrictions might prevent at least some of the participants from taking part in the hearing in person. The Tribunal is therefore currently in the process of exploring options for remote participation in hearings.

The possibility of holding virtual hearings or so-called "hybrid hearings", in which some participants take part in in person and others remotely, raises several interesting questions both of a legal and of a more general nature.

One of those issues concerns the question as to whether, under the current Rules of the Tribunal, a virtual or hybrid hearing can be held.

The hearing is an essential part of the proceedings before the Tribunal. Pursuant to article 44, paragraph 3, of the Rules, "the oral proceedings shall consist

of the hearing by the Tribunal of agents, counsel, advocates, witnesses and experts". The Rules contain several provisions on the conduct of the hearing. However, neither the Statute nor the Rules explicitly address the question as to whether a hearing can be held by way of a videoconference.

Clearly, at the time when the Rules were drafted, virtual hearings were not foreseen, as the technology to allow for remote participation was not widely available at that time. However, this does not necessarily mean that the Rules exclude such possibility.

You may know that the International Court of Justice recently amended its rules to provide explicitly for a hearing entirely or in part by video link.<sup>1</sup> The Tribunal will in the near future also consider whether it is necessary to make similar amendments to its Rules.

In any case, I am convinced that the principal function of the hearing, namely to provide an opportunity for "direct confrontation of the parties before the Court and in open court",<sup>2</sup> can also be fulfilled without the physical presence of all actors. The key aspect is the direct exchange of arguments between the parties. With the help of modern videoconference technology, this seems to be possible in a virtual or partially virtual courtroom.

Pursuant to article 26, paragraph 2, of the Statute and article 74 of the Rules, hearings before the Tribunal are, in principle, open to the public. Public access is a fundamental feature of proceedings before standing international courts and tribunals and has been referred to in legal literature as "one of the features distinguishing the judicial settlement of an international dispute from settlement through arbitration". However, the COVID-19 pandemic may make it necessary to restrict physical access to the courtroom of the Tribunal. In such an event, public

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<sup>1</sup> ICJ Press Release No. 2020/16, 25 June 2020, available at: <https://www.icj-cij.org/files/press-releases/0/000-20200625-PRE-01-00-EN.pdf>

<sup>2</sup> M. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, Online edition 2017, volume 3, chapter 21, paragraph 317.

access to virtual hearings would be provided by livestream of the hearing, available on the internet, or if a livestream were unavailable, a webcast.

The holding of virtual hearings also raises technical challenges. For example, all speeches and statements made (and testimonies given) at the hearing in one of the official languages of the Tribunal have to be simultaneously interpreted into the other official language. The Tribunal must thus identify and test software that allows for videoconferencing with simultaneous interpretation. The location of relevant parties in different time-zones around the world can also raise practical issues, as can the extent of lockdown restrictions where the participants are based. However, I am confident that these technical and practical issues can be overcome with creativity, and that the Tribunal will continue to operate effectively and discharge its responsibilities despite wide-ranging restrictive measures taken around the world.

The Tribunal has already demonstrated its capacity to adapt to current circumstances in respect of a model agreement recently concluded with Singapore for the provision of facilities for the Tribunal or a chamber of the Tribunal to sit or otherwise exercise its functions in Singapore. While previously the agreement would have been signed by representatives of both Parties in person, on 5 June this year the Tribunal successfully organized a digital signing ceremony. The model agreement will form the basis of any future agreement to be signed by the Tribunal and Singapore if it is decided that a case submitted to the Tribunal or a chamber of the Tribunal is to be heard in Singapore. It is our hope that, in future, further model agreements may be signed with States in other regions of the world so as to offer States Parties increased flexibility and convenience in the settlement of any disputes arising under the Convention.

COVID-19 restrictions are likely to bring about further innovations in the way the Tribunal fulfils its mandate, allowing the Tribunal to deal expeditiously with the cases currently pending before it as well as any new cases that may be submitted.

Dear participants,

It remains for me to reiterate the Tribunal's appreciation to the International Foundation for the Law of the Sea for its work in strengthening the knowledge of law of the sea and maritime law internationally, and, in particular, for organizing what I am sure will be a most stimulating and informative event today.

Thank you for your kind attention.