

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER**



**Building Transformative Partnerships for Ocean Sustainability:
The Role of ITLOS***

**Statement by Judge Jin-Hyun Paik
President of the International Tribunal for the Law of the Sea**

Excellencies, dear colleagues, ladies and gentlemen,

I am honoured to attend the 2018 WMU Global Ocean Conference as one of its keynote speakers. I am grateful to the WMU for this kind invitation. I also want to congratulate WMU for its outstanding achievements over the past 35 years and the launching of a new global ocean institute.

I do not have to emphasize in this gathering how important the sustainable use of the oceans and their resources is to all of us. In this regard, I just want to draw your attention to the fact that the United Nations Convention on the Law of the Sea ("the Convention" or the "UNCLOS") provides the legal framework for the conservation and sustainable use of the oceans and their resources. This is well-recognized in Goal 14 of the 2030 Agenda for Sustainable Development, which calls upon member States of the United Nations to "enhance the conservation and sustainable use of oceans and their resources by implementing international law as reflected in the United Nations Convention on the Law of the Sea, which provides the legal framework for the conservation and sustainable use of oceans and their resources".¹

Today I will address the role of the International Tribunal for the Law of the Sea ("the Tribunal"), which was established in 1996 in accordance with the UNCLOS, in enhancing ocean sustainability. The Tribunal has two important functions: first, it settles peacefully disputes concerning the interpretation and application of the Convention; second, in so doing it clarifies and develops international law. The two functions are, of course, closely interrelated. I will briefly address each of these functions of the Tribunal.

The role of the Tribunal in the settlement of disputes relating to the law of the sea

First, I will address the role of the Tribunal as a means of dispute settlement under the UNCLOS. While the Tribunal was established by the Convention as a new

* The views expressed in this statement are those of the author and do not necessarily reflect the views of the Tribunal.

¹ Transforming our world: the 2030 Agenda for Sustainable Development, *UN A/RES/70/1*, 21 October 2015, p. 24

standing court,² the Tribunal does not have the privilege of being the only and exclusive court to deal with disputes concerning the interpretation or application of the Convention. States parties to such a dispute may choose any peaceful means to settle it, including any court or tribunal.³ Even for compulsory procedures entailing binding decisions, the Tribunal is just one of the four means available under article 287, paragraph 1, of the Convention, together with the International Court of Justice ("the ICJ"), Annex VII arbitral tribunals, and Annex VIII special arbitral tribunals. More importantly, the Tribunal is not a residual means or default forum,⁴ except for the two urgent proceedings, namely prompt release proceedings under article 292 and provisional measures proceedings under article 290, paragraph 5, of the Convention. (An Annex VII arbitral tribunal is a default forum under article 287.) On the other hand, the jurisdiction of the Tribunal goes beyond the settlement of disputes submitted to it in accordance with the Convention. Article 21 of the Statute of the Tribunal stipulates that its jurisdiction comprises "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal". Thus the Tribunal can deal with disputes arising from agreements other than the Convention as long as they confer jurisdiction on the Tribunal.

Over the past twenty years, 25 cases have been submitted to the Tribunal.⁵ The subjects of those disputes are wide-ranging, from the arrest and detention of ships and crew to maritime boundary delimitation, from the obligation and liability of flag States in respect of IUU fishing to the conservation of living resources and the protection and preservation of the marine environment, and from the immunity of warship to responsibilities and obligations of States with respect to activities in the area beyond national jurisdiction ("the Area"). Cases have been submitted by States Parties evenly in terms of regions and the state of economic development.

Let me make four points as to the role played by the Tribunal in dispute settlement under the Convention.

First, the Tribunal has received more cases than any other procedures under article 287 of the Convention. The pace at which the Tribunal's docket has been established is comparable to that of other judicial bodies in their early years.

Second, the Tribunal has been doing much better in receiving cases on the merits and requests for advisory opinions over the recent years.⁶ This trend may be due to the fact that the Tribunal has over time built up a reputation and credibility as a judicial body. In this regard, it is interesting to note that parties to a dispute often agree to transfer to the Tribunal the dispute that has been submitted to Annex VII arbitration in accordance with article 287 of the Convention. This was the case with the *M/V "SAIGA" (No. 2) Case*, the *Dispute concerning the delimitation of the maritime boundary in the Bay of Bengal* and the *Dispute concerning delimitation of*

² Article 1, paragraph 1, of Annex VI to the Convention provides that "[t]he International Tribunal for the Law of the Sea is constituted and shall function in accordance with the provisions of this Convention and this Statute."

³ Article 280 of the Convention.

⁴ In accordance with article 287, paragraphs 3 and 4, of the Convention, an Annex VII arbitral tribunal is a residual forum.

⁵ For the complete list of cases, see <https://www.itlos.org/en/cases/list-of-cases/>

⁶ For example, since 2009, five contentious cases and two requests for advisory opinions have been submitted to the Tribunal. Before that, only two contentious cases had been submitted to the Tribunal.

the maritime boundary in the Atlantic Ocean. It is also interesting to note that a party to a dispute often makes a declaration to choose the Tribunal in accordance with article 287, paragraph 1, of the Convention immediately prior to the institution of the proceedings, so that the dispute is submitted to the Tribunal rather than to Annex VII arbitration. This was the case with the *M/V "Louisa" Case* and the *M/V "Norstar" Case*, which is currently pending before the Tribunal.

Another development worth noting is the utilization of a special chamber. Article 15, paragraph 2, of Annex VI to the Convention provides that the Tribunal shall form a chamber for dealing with a particular dispute submitted to it if the parties so request. The composition of such a chamber shall be determined by the Tribunal with the approval of the parties. The Special Chamber was first composed to deal with the *Case concerning the conservation and sustainable exploitation of swordfish stocks* between Chile and the European Union. It was formed again recently in the *Case concerning delimitation of the maritime boundary in the Atlantic Ocean* between Ghana and Côte d'Ivoire. The latter chamber was composed of three judges selected from the Members of the Tribunal and two judges *ad hoc* selected from outside the Tribunal. Considering that an Annex VII arbitral tribunal usually includes at least two or three judges from the Tribunal, in practice there is little difference between a special chamber and an Annex VII arbitral tribunal in terms of the parties' flexibility in selecting judges. On the other hand, a special chamber has an advantage in terms of facilities, cost and time. I therefore think that a special chamber can be an alternative to Annex VII arbitration. Indeed, the Special Chamber proceedings in the latest delimitation case have widely been recognized as a huge success.

Third, as more activities take place in the Area - as appears to be the case in view of the fact that the International Seabed Authority (the "Authority" or the "ISA") is currently preparing for the regulation of exploitation of the Area - diverse types of disputes will be sure to arise and be submitted to the Seabed Disputes Chamber, which has exclusive jurisdiction over them under article 187 of the Convention.

Finally, although this potential has yet to be tested, it should be recalled that access to the Tribunal is not limited to States Parties. Article 20, paragraph 2, of the Statute stipulates that the Tribunal shall be open to "entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case". Thus it appears that the Tribunal is open to a wider range of parties, including non-State entities. Exactly who has such access to the Tribunal remains to be seen but wider access can have important implications for the future of the Tribunal as a means of dispute settlement.⁷ Furthermore, article 37 of the Statute of the Tribunal provides that the Seabed Disputes Chamber shall be open to States Parties, the Authority and "the other entities referred to in Part XI, section 5". Such entities encompass the Enterprise, state enterprises, natural or juridical persons.

⁷ Alan Boyle suggests that access is probably the most significant difference between the Tribunal and the International Court of Justice. According to him, broader access to the Tribunal has an advantage to allow non-State entities to participate in the international legal system. See Alan Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", *International and Comparative Law Quarterly*, vol. 46 (1997), p. 51.

Thus the Chamber has the potential to serve as a primary means to settle disputes arising from activities in the Area when seabed mining becomes a reality.

In summing up, the number of cases the Tribunal has dealt with so far is relatively modest mainly because recourse to the Tribunal is not a default or residual procedure under article 287 of the Convention. However, there have been some encouraging developments, such as the transfer of cases from the Annex VII arbitral tribunal to the Tribunal and the utilization of a special chamber. The exclusive jurisdiction of the Seabed Disputes Chamber as well as potentially wider access to the Tribunal is another factor with positive implications for the Tribunal as a means of dispute settlement. For these reasons, I am quite optimistic about the future role of the Tribunal.

The Tribunal's jurisprudence and its contribution to ocean sustainability

Now I will turn to the jurisprudence of the Tribunal and its contribution to ocean sustainability. In this regard, I will focus on the contribution the Tribunal has made to the clarification and development of international environmental law.

It should be recalled that the Convention with its Part XII is considered one of the most comprehensive environmental treaties, attaching special importance to the protection and preservation of the marine environment. It should also be recalled, however, that the Convention, despite some mechanisms allowing for flexibility, is essentially a product of the law and realities of the 1970s and the early 1980s. The challenge facing the Tribunal is thus how to make the Convention relevant in an area in which law and realities have changed rapidly and will continue to do so. I think that the Tribunal has responded to this challenge remarkably well by interpreting and applying various provisions of the Convention related to the marine environment in accordance with the evolving state of international environmental law.⁸ I will highlight four important findings in this respect.

First, the Tribunal has taken a rather broad view of the scope of the marine environment as well as that of the obligation of States to protect the marine environment. According to the Tribunal, the protection and preservation of the marine environment is not confined to Part XII of the Convention. In this vein, the Tribunal found that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment".⁹ The Tribunal also noted that article 192 of the Convention imposes on "all" States Parties an obligation to protect and preserve the marine environment and this provision applies to "all" maritime areas.¹⁰

Second, the Tribunal emphasized the duty of cooperation in the protection of the marine environment. In a well-known passage in *MOX Plant and Land Reclamation in and around the Straits of Johor*, the Tribunal stated that:

⁸ See Alan Boyle, "The Environmental Jurisprudence of the International Tribunal for the Law of the Sea", *International Journal of Marine and Coastal Law*, vol. 23, no. 3, 2007, p. 389.

⁹ *Southern Bluefin Tuna, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, para. 70.

¹⁰ *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, para. 120.

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 that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention.¹¹

This finding of the Tribunal needs to be appreciated particularly in the light of the fact that the duty of cooperation is not clearly set out in the Convention.¹² Thus it is significant that the Tribunal referred to the duty of cooperation not only under the Convention but under general international law, because it would enable the Tribunal to invoke such duty in interpreting the relevant provisions of the Convention.

Third, the Tribunal has demonstrated a proactive attitude in acknowledging the precautionary approach perhaps more than any other courts and tribunals. While the precautionary approach had been pleaded in several cases before international courts and tribunals, the Tribunal's ruling in *Southern Bluefin Tuna* was the first to apply the core element of this approach.¹³ Without employing the term "precautionary approach", the Tribunal in this case prescribed the requested provisional measures, using reasoning and an expression which closely resemble the precautionary approach.¹⁴ When the Tribunal called upon the parties to "act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna",¹⁵ the Tribunal's intention was quite clear. This is further reinforced by subsequent paragraphs, which state that, although there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna¹⁶ and although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, the Tribunal nevertheless finds that "measures should be taken as a matter of urgency ... to avert further deterioration of the southern bluefin tuna stock".¹⁷ This line of reasoning has been followed in subsequent cases.

In *Responsibilities and obligations of States with respect to activities in the Area*, however, the Seabed Disputes Chamber of the Tribunal took a few steps further to clarify the legal status of the precautionary approach. In that case, the Chamber first noted that the Nodules Regulations and the Sulphides Regulations require sponsoring States and the Authority to apply the precautionary approach in respect of activities in the Area.¹⁸ The Chamber then went on further to note that "the precautionary approach is also an integral part of the general obligation of due

¹¹ *The Mox Plant Case, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, para. 82 and *Land Reclamation in and around the Straits of Johor, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, para. 92.

¹² Alan Boyle, *supra* note 75, p. 379.

¹³ *Ibid.*, p. 373.

¹⁴ See Tullio Treves, "The Settlement of Disputes concerning the Protection of the Marine Environment and the Exploitation of the Marine Resources: The Practice of ITLOS", Marta Chantal Ribeiro (ed), *30 Years after the Signature of the United Nations Convention on the Law of the Sea: The Protection of the Environment and the Future of the Law of the Sea*, Coimbra Editora, 2014, p. 161.

¹⁵ *Southern Bluefin Tuna*, para. 77.

¹⁶ *Ibid.*, para. 79.

¹⁷ *Ibid.*, para. 80.

¹⁸ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion of 1 February 2011, ITLOS 2011*, paras. 125-130.

diligence of sponsoring States, which is applicable even outside of the Regulations".¹⁹ According to the Chamber, "[t]his obligation applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks".²⁰ A sponsoring State would not meet its obligation of due diligence if it disregarded those risks.²¹ In a subsequent *dictum*, the Chamber even came close to acknowledging the customary legal status of the precautionary approach when it stated that:

the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.²²

Fourth, the Tribunal clarified the obligation to conduct environmental impact assessments. In *Responsibilities and obligations of States with respect to activities in the Area*, the Chamber noted that the obligation to conduct environmental impact assessments is a direct obligation under article 206 of the Convention and the Nodules and Sulphides Regulations of the Authority. The Chamber then went on to state that it is "a general obligation under customary international law".²³ In this regard, the Chamber recalled the judgment of the ICJ in *Pulp Mills on the River Uruguay*, in which the ICJ stated that environmental impact assessment is "a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law".²⁴ The Chamber observed that this obligation therefore can cover activities in the Area even beyond the scope of the Regulations if there is a risk that such activities may have a significant adverse impact on a shared resource in a transboundary context.²⁵

The above findings and other relevant rulings of the Tribunal and its Chamber demonstrate their willingness to be proactive in preserving and protecting the marine environment. In so doing, I think that the Tribunal has emerged as an important voice to safeguard the marine environment and promote ocean sustainability for States Parties to the Convention as well as the international community as a whole.

Conclusion

In concluding, there is no need to emphasize the importance of the oceans at this conference. Most of the world trade is transported by sea. The oceans and seas are an important source of food and fossil fuel. The oceans also provide us with fresh water and genetic resources. At the same time it acts as a stabilizer of the world's climate. It is thus not an exaggeration to say that life on earth is largely dependent on the way we use and protect the oceans.

¹⁹ *Ibid.*, para. 131.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*, para. 135.

²³ *Ibid.*, para. 145.

²⁴ *Pulp Mills on the River Uruguay, Judgment, I.C.J. Reports 2010*, para. 204.

²⁵ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion of 1 February 2011, ITLOS Reports 2011*, para. 148.

The multiplication and intensification of the uses of the oceans, however, have resulted in a serious deterioration of the oceans and their resources and ecosystem. It is by now clear that the ocean resources are by no means inexhaustible and that their free and unrestricted use by all is unsustainable. They also led to the increased possibilities for disputes and conflicts among States. Thus the need for effective global ocean governance does not require much explanation.

With the ever increasing uses of the oceans, the importance of the UNCLOS as a legal pillar of such governance is now greater than ever. However, the Convention cannot be expected to achieve its goal of establishing a legal order for the oceans unless and until State Parties implement it in good faith and comply with its provisions. Moreover, the Convention, which contains many inherently uncertain or ambiguous provisions, could easily be interpreted and applied differently by different States. That is why it is crucial that the Convention has authoritative mechanisms to ensure its uniform interpretation and application. I believe that the Tribunal, as a principal, if not exclusive, mechanism in this regard, has played an important role over the past two decades. The Tribunal has peacefully settled maritime disputes by authoritatively interpreting and applying the Convention and other international law. In so doing, the Tribunal has clarified and developed international law of the sea. As a consequence, it has fostered the positive attitude of States toward the rule of law and ocean sustainability. Admittedly its full potential has yet to be realized. I hope that the Tribunal will be able to make more valuable contributions to the rule of law at sea and ocean sustainability in the years to come.