

**Speech by Mr R. Wolfrum,
President of the International Tribunal for the Law of the Sea,
on the occasion of the Information Session
organized by the Tribunal for the Diplomatic Corps**

6 October 2005

Your Excellencies,
Ladies and Gentlemen,

The International Tribunal for the Law of the Sea is deeply honoured to host, at its headquarters, the first information session on the work of the Tribunal for the diplomatic corps. It is a great privilege for us to welcome diplomatic and consular representatives of 53 States as well as representatives of international organizations based in Germany and of the German Foreign Office. You embody a section of the international community for whose benefit the Tribunal was established in 1996. On behalf of the Tribunal, I extend a warm welcome to our distinguished guests.

It is an honour for me, in my new capacity as President of the Tribunal for the next three years, to address you here today. I would like to take this opportunity to thank my predecessor, Judge Dolliver Nelson, for the excellent work he has done over the past three years. I also wish to welcome five new Members of the Tribunal: Judges Stanislaw Pawlak of Poland, Shunji Yanai of Japan, Helmut Türk of Austria, James Kateka of Tanzania and Albert Hoffmann of South Africa. They, as well as Judge Choon-Ho Park and Judge Dolliver Nelson, will serve until 2014.

The Tribunal is a standing court created by the United Nations Convention on the Law of the Sea of 1982 to play a central role in the peaceful settlement of disputes relating to the law of the sea, thus, establishing the rule of law in this context. In its nine years of existence, the Tribunal has dealt with 13 cases. Mostly, these cases have been confined to instances where the jurisdiction of the Tribunal is obligatory. I refer to the prompt release of vessels and crews and the prescription of provisional measures, matters that require immediate action.

Some specific provisions of the Convention empower a State, in certain circumstances, to detain a vessel flying the flag of another State, for instance, in

respect of fishery or pollution offences. Article 292 of the Convention gives a State Party to the Convention the right to bring an application to the Tribunal to request the release of the vessel flying its flag when it is alleged that the detaining State has not complied with the provisions for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security. I should underline that the application for release does not have to be submitted by the flag State itself. It may be made “by or on behalf of the flag State”, for example, an application could, and has in fact, been made by the shipowner of the vessel if duly authorized by the flag State. This is considered a significant innovation of the Convention.

The Tribunal has been seized with applications for the prompt release of vessels and crews in seven cases. Here, it can be fairly said that the Tribunal has developed a coherent jurisprudence, particularly, in applying relevant factors for determining the reasonableness of bonds. It is of some interest to note that four of these cases, the “*Camouco*”, the “*Monte Confurco*”, the “*Grand Prince*” and the “*Volga*”, raised issues concerning the problem of illegal, uncontrolled and undeclared fishing in the Southern Ocean.

The Tribunal also has compulsory jurisdiction with respect to the prescription of provisional measures. It has the power, under certain circumstances, to prescribe such measures “[p]ending the constitution of an arbitral tribunal to which a dispute is being submitted”. This procedure has already been invoked in the *Southern Bluefin Tuna Cases*, the *MOX Plant Case*, and the land reclamation case, which are disputes dealing with the protection of the marine environment. Certainly, these cases have enabled the Tribunal to contribute towards the development of international environmental law.

In the *Southern Bluefin Tuna Cases* concerning a dispute between, on the one hand, New Zealand, Australia and, on the other hand, Japan relating to the depletion of a fish stock, the Tribunal stated, in its Order of 27 August 1999, that “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment” (paragraph 70). An important finding in the Tribunal’s Order was that “the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to

stock of southern bluefin tuna” (paragraph 77). It has been observed that the provisional measures prescribed by the Tribunal have assisted the parties to find a solution. For instance, Professor Crawford, who acted as counsel in the *Southern Bluefin Tuna Cases*, stated that [I quote]:

“There, the Tribunal’s intervention at the stage of provisional measures played a very significant role in bringing the parties – Australia, New Zealand and Japan – back to negotiations with each other... the eventual result was that the Southern Bluefin Tuna Commission was revitalized. It is now functioning well.”¹

[end of quote]

In the *MOX Plant Case*, the Tribunal was faced with a dispute between Ireland and the United Kingdom regarding the potential harmful impact on the marine environment of the extension of a nuclear plant in Sellafield. In its Order of 3 December 2001, the Tribunal laid emphasis on the duty to cooperate between the parties in the protection and preservation of the marine environment. It also stressed the importance of procedural rights in environmental matters such as the requirement that the parties exchange information concerning the risks or effects of the operation of the activities concerned.

The land reclamation case concerned a dispute between Malaysia and Singapore on the impact on the environment of land reclamation activities by Singapore. The Tribunal, in its Order of 8 October 2003, once again stressed the importance of cooperation between the parties in the protection and preservation of the marine environment. In its decision, the Tribunal also relied on the notion of “prudence and caution” to request the parties to establish mechanisms for exchanging information, and ordered that the parties establish a joint group of independent experts with the clear mandate to conduct a study with a view to determining the potential effects of the land reclamation activities.

¹ *The “Volga” Case*, Verbatim Record of 12 December 2002, p.m., ITLOS/PV.02/02, p. 15.

Regarding the land reclamation case, I would like to mention that on 26 April 2005 Malaysia and Singapore settled their dispute by signing an agreement to this effect. On 1 September 2005, a final arbitral award was rendered in the case in accordance with the terms set out in the settlement agreement. It may be noted that the provisional measures ordered by the Tribunal in 2003 were instrumental in bringing the parties together and promoting a successful diplomatic solution of the dispute. In this respect, I would like to refer to the remarks made by the Minister for Foreign Affairs of Singapore, Mr George Yeo, on 16 May 2005 before the Parliament of Singapore that [I quote from a press release issued by the Ministry of Foreign Affairs of Singapore]:

“Singapore and Malaysia jointly implemented the [Tribunal’s] Order by appointing a group of four experts to carry out the joint study”.

[...]

“Looking back, I would like to highlight two hallmarks of the joint study and settlement negotiations. One, is the involvement of an objective third party – ITLOS [this Tribunal], the Group of Experts and the Arbitral Tribunal – which made possible an impartial and objective assessment of the facts of the case and the merits of the competing arguments.”²

[end of quote]

While the Tribunal has received a number of prompt release and provisional measures cases, its core competence is to deal with disputes concerning the interpretation or application of the United Nations Convention on the Law of the Sea. The International Tribunal for the Law of the Sea is one of the four means for the settlement of disputes that entail binding decisions provided in the Convention (article 287). The other alternative means are the International Court of Justice, an arbitral and a special arbitral tribunal for certain categories of disputes. I should explain that under article 287 of the Convention a State Party to the Convention is free to choose one or more of these four means for the settlement of disputes by a written declaration. Out of the current 149 States Parties (i.e. 148 States and one

² See press release issued by the Ministry of Foreign Affairs of Singapore on 16 May 2005 containing “Remarks in Parliament by Singapore Foreign Minister George Yeo on the Settlement Agreement between Singapore and Malaysia on Land reclamation”, paragraphs 2 and 12, available at < <http://www.mfa.gov.sg> >.

international organization, the European Community), 36 have filed declarations under article 287 of the Convention and 22 States Parties have chosen the Tribunal as the means or one of the means for the settlement disputes concerning the Convention. In the absence of written declarations, the parties are deemed to have accepted arbitration. Therefore it is important that an increasing number of States make declarations under article 287 of the Convention with regard to their choice of procedure for settling disputes, as recommended by the General Assembly.

It should be noted that the parties may submit a particular dispute to the Tribunal, at any time, by means of a special agreement and parties have already done so in two occasions. In the *M/V "SAIGA" (No. 2) Case*, which was instituted by special agreement of the parties, the parties agreed to submit the merits of the dispute relating to the arrest and detention of the vessel *Saiga* to the Tribunal. In its Judgment delivered on 1 July 1999 – the only one so far on the merits of a case – the Tribunal made some important contributions to the development of international law with regard to issues such as the nationality of claims, reparation, use of force in law enforcement activities, hot pursuit and the questions of the genuine link between the vessel and its flag State.

Another case submitted by a special agreement of the parties is the dispute concerning the conservation and sustainable exploitation of swordfish stocks in the South-Eastern Pacific Ocean which was brought before a special chamber of the Tribunal. In this case – which is still pending on the docket – one of the parties to the dispute is an international organization, i.e. the European Community. It should be highlighted that the possibility for parties to submit their disputes to an *ad hoc* special chamber of the Tribunal, in accordance with article 15, paragraph 2, of the Statute is an interesting alternative for parties who are considering arbitration. An *ad hoc* special chamber is composed of members of the Tribunal and, if the Tribunal does not have a member of the nationality of one of the parties, it may also include *ad hoc* judges. The composition of this special chamber is determined by the Tribunal with the approval of the parties, which gives the parties the control over its composition. In my view, the potential resting in this option has not yet been realized.

States may also confer jurisdiction on the Tribunal through international agreements and there are seven international agreements which make reference to the Tribunal in respect of the settlement of disputes. A prominent example is the Straddling Fish Stocks Agreement of 1994. Such provision conferring jurisdiction on the Tribunal may also be inserted in bilateral agreements. This would certainly enhance the central role of the Tribunal in the settlement of disputes regarding law of the sea matters. In this respect, it is interesting to note the statement made by Dr Joe Borg, Commissioner for Fisheries and Maritime Affairs of the European Union in this courtroom on the occasion of his visit to the Tribunal on 2 September 2005, as follows [and I quote]:

“the EC can be a party before ITLOS, a fact which renders ITLOS the preferred choice for the European Community when it comes to disputes relating to the Law of the Sea. In order to strengthen this even further, the EU, where appropriate, could also offer to include a provision in the agreements relating to the Law of the Sea which it concludes with third countries binding the parties to refer the settlement of any disputes to ITLOS.”

[end of quote]

This policy would, if implemented, create a momentum in favour of this Tribunal.

I would like to highlight that there is another alternative to have recourse to the Tribunal which might be of interest to possible users, such as private parties. It should be mentioned that article 20, paragraph 2, of the Statute, widens the jurisdiction *ratione personae*, of the Tribunal when it provides that the Tribunal “shall be open to entities other than States Parties ... in any case submitted to any other agreement conferring jurisdiction on the Tribunal ...”. This provision has to be read in connection with article 291, paragraph 2, of the Convention which specifies that the dispute settlement procedures of the Tribunal are open to entities other than States Parties only as specifically provided for in the Convention.

Article 21 of the Statute opens up the jurisdiction *ratione materiae* of the Tribunal to all matters specifically provided for in “any other agreement which confers jurisdiction

on the Tribunal". Here, this provision has to be read together with article 288, paragraph 2, of the Convention which states that the Tribunal is competent to deal with any dispute concerning "an international agreement related to the purposes of this Convention".

By virtue of these provisions, the Tribunal can exercise jurisdiction in disputes where the parties may be non-State entities if a dispute arises under an agreement which is related to the purposes of the Convention. This will be the case if the agreement specifically provides that the disputes arising under the agreement should be submitted to the Tribunal for settlement and the agreement is binding upon the parties. Although, there is as yet no precedent on the matter, it seems that such an agreement conferring jurisdiction on the Tribunal must necessarily be "international" in character. Parties to the agreement may be, for instance, private commercial corporations or insurance companies. Jurisdiction on the Tribunal may be conferred, for example, by means of an agreement between a classification society and a flag State or a shipowner dealing with maritime matters. What it is important to note here is that, within the framework of the already mentioned provisions of the Convention and the Statute, agreements related to the purposes of the Convention could open the access of the Tribunal to private entities.

The Statute of the Tribunal provides for the establishment of the Seabed Disputes Chamber which is composed of 11 members selected by the Tribunal. On 4 October 2005, new members of the Chamber were selected and, on the same day, they elected Judge Hugo Caminos as their president. May I take this opportunity to congratulate Judge Hugo Caminos, on his election as President of the Seabed Disputes Chamber.

The Seabed Disputes Chamber has jurisdiction over disputes regarding activities in the international seabed area. Its jurisdiction is compulsory. Parties to these disputes may be States Parties and the International Seabed Authority. It is of interest to note that private parties may also bring disputes before the Seabed Disputes Chamber. Here, the Convention explicitly mentions state enterprises and natural or juridical persons if certain conditions are met, for instance, that the entity possesses the nationality of a State Party and is sponsored by such State.

There are different categories of disputes that belong to the jurisdiction of the Seabed Disputes Chamber. These include disputes between States Parties concerning the interpretation or application of Part XI of the Convention and the relevant Annexes; disputes between a State Party and the International Seabed Authority, for example, concerning acts or omissions of the Authority or of a State Party alleged to be in violation of Part XI or the relevant Annexes; and contractual disputes concerning the interpretation or application of a contract between a juridical person and the Authority.

The Seabed Disputes Chamber has another important function. It shall give advisory opinions at the request of the Assembly or the Council of the Seabed Authority on legal questions arising within the scope of their activities. In this respect, I would like to mention that the Tribunal itself can give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specially provides for the submission of a request for such an opinion.

In addition to the *ad hoc* special chamber mentioned earlier and the Seabed Disputes Chamber, the Tribunal has established three other chambers in accordance with article 15 of its Statute: (i) the Chamber of Summary Procedure; (ii) the Chamber for Fisheries Disputes; and (iii) the Chamber for Marine Environment Disputes. Any of these chambers is competent to deal with disputes if the parties so request. The Tribunal thus has flexible dispute settlement procedures to suit the needs of the parties.

I would like to take this opportunity to inform you that the diplomatic corps will be invited to attend a celebratory meeting to be held in October 2006 on the occasion of the tenth anniversary of the Tribunal. Let us hope that these events will pave the way towards fruitful contacts between the diplomatic corps and the Tribunal.

To conclude, I wish to express once more our appreciation to you for your presence at the seat of the Tribunal. A reception will be held in the rotunda, the area directly under the courtroom but I would first like to invite you to ask any questions you may have.