

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 occasion of the

**SPECIAL SESSION OF THE ASSEMBLY
TO MARK THE 10TH ANNIVERSARY OF
THE ESTABLISHMENT OF
THE INTERNATIONAL SEABED AUTHORITY**

Kingston, Jamaica
25–26 May 2004

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Kingston, Jamaica, 25 May 2004

I feel deeply honoured and indeed privileged to address this special session of the Assembly of the International Seabed Authority on the occasion of the tenth anniversary of the establishment of the Authority.

Together with the International Seabed Authority and the Commission on the Limits of the Continental Shelf, the International Tribunal for the Law of the Sea is an institution created by the 1982 Convention on the Law of the Sea. The Tribunal is a crucial forum for settling disputes concerning the interpretation and application of the Convention and therefore plays an important role in the development of the law of the sea.

The Tribunal is composed of 21 members enjoying, in the words of its Statute, “the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea”. The composition of the Tribunal ensures the representation of the principal legal systems of the world and equitable geographical distribution. The application of the principle of equitable geographical distribution has resulted in the Tribunal having proportionally more judges from developing countries than is the case with the International Court of Justice. The composition of the Tribunal thus seems more representative of the international community and in a sense reflects the widespread participation in the Conference.

Although the Tribunal finds its origin in efforts sponsored by the United Nations, it is not, unlike the International Court of Justice, an organ of the United Nations. It is one of the institutions created by the 1982 Convention on the Law of the Sea. An important consequence is that the expenses of the Tribunal are borne not by the United Nations but by the States Parties to the Convention and in the fullness of time, it is hoped, by the Authority. The relevant provision states that “[t]he expenses of the Tribunal shall be borne by the States Parties and by the Authority, on such terms and in such a manner as shall be decided at meetings of the States Parties” (article 19 of the Statute).

Choice of procedure for the settlement of disputes

As is by now well known, the Convention (in article 287) provides that when signing, ratifying or acceding to the Convention or at any time thereafter, a State may choose, by a written declaration, any one or more of the following means for the settlement of disputes concerning the interpretation or application of the Convention:

- a) the International Tribunal for the Law of the Sea
- b) the International Court of Justice
- c) an arbitral tribunal
- d) a special arbitral tribunal for disputes relating to (i) fisheries, (ii) protection and preservation of the marine environment, (iii) marine scientific research, or (iv) navigation, including pollution from vessels and from dumping.

This user-friendly, flexible mechanism – the embodiment of the so-called Montreux formula – is the distinctive feature of the dispute settlement in the Convention. It reflects the trend of modern international law with its diversity and flexibility of response in terms of the peaceful settlement of disputes tailored to meet the needs of present-day international society. When the parties to a dispute have accepted the same dispute settlement procedure, it may be submitted only to that

procedure. When they have not accepted the same procedure, it may be submitted only to arbitration. In addition, a State Party which is a party to a dispute not covered by a declaration in force shall be deemed to have accepted arbitration. Arbitration has therefore an important function. A most recent case in point is the submission of the dispute between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of their exclusive economic zones and continental shelves to an Annex VII arbitral tribunal. That is why it is important that States Parties should at least consider making declarations with regard to their choice of means for settlement of maritime disputes as has been recommended by GA resolutions, since arbitration can indeed be an expensive procedure.

Jurisdiction

The Tribunal has a seemingly wide jurisdiction. It has jurisdiction over all disputes concerning the interpretation and application of the 1982 Convention on the Law of the Sea. It has also jurisdiction over any dispute concerning the interpretation and application of an international agreement related to the purposes of the Convention, which is submitted to it in accordance with the agreement (article 288) e.g., the Fish Stocks Agreement (1995) and the Convention on the Protection of the Underwater Cultural Heritage (2001). This competence is limited. It arises “where no settlement has been reached by recourse to section 1” and is subject to the limitations and exceptions contained in section 3, in particular articles 297 and 298. Disputes which are excluded from compulsory procedures are those concerning fisheries and marine scientific research in the exclusive economic zone (article 297). An important cluster of disputes is also excluded namely a) maritime boundary disputes; b) disputes concerning military activities and c) disputes in respect of which the Security Council is seized. The Seabed Disputes Chamber has jurisdiction over all disputes with respect to activities in the international seabed area (Area).

The Tribunal does have, what may be termed, a residual compulsory jurisdiction with respect to the prompt release of vessels (article 292) and the prescription of provisional measures under article 290, paragraph 5. It is hardly surprising that the majority of disputes which have been submitted to the Tribunal fell under these two headings: the prompt release of vessels and the prescription of provisional measures.

Prompt release of vessels

A State Party is entitled to submit to the Tribunal in certain specific circumstances the question of release from detention of a vessel flying its flag where the authorities of another State Party have detained the vessel and “it is alleged that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security”.

The Tribunal, to date, has had to interpret and apply the provisions on prompt release in six cases: the *M/V “SAIGA”* (1997), the *“Camouco”* (2000), the *“Monte Confurco”* (2000), the *“Grand Prince”*, (2001), the *“Chaisiri Reefer 2”* (2001) and the *“Volga”* (2002). In all these prompt-release cases the Tribunal has been primarily engaged in clarifying and refining the notion of what is meant by a reasonable bond in the relevant provisions of the Convention. It is essentially a process related to the interpretation and application of the Convention on the Law of the Sea, which is the central task of this specialized international tribunal. It is of some interest to remark that four of these cases, the *“Camouco”*, the *“Monte Confurco”*, the *“Grand Prince”* and the *“Volga”*, raised important questions with respect to the problem of illegal, uncontrolled and undeclared (iuu) fishing in the Southern Ocean.

Provisional measures

The Tribunal has a special residual 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 ... if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and the urgency of the situation so requires” (article 290, paragraph 5, of the Convention). Here the Tribunal is called upon to prescribe provisional measures pending the final decision to be given not by the Tribunal itself, but by an arbitral tribunal yet to be constituted to which a dispute has been duly submitted – where the merits and indeed questions of jurisdiction and admissibility may have to be decided. This procedure has already been invoked in the *Southern Bluefin Tuna Cases*, the *MOX Plant Case*, and the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*.

In these cases which dealt primarily with the protection of the marine environment, the Tribunal laid emphasis on the duty to cooperate. “The duty to cooperate”, it said, “is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law” (*The MOX Plant Case*, Order of 3 December 2001, paragraph 82). It also stressed the importance of exercising “prudence and caution” when undertaking activities which may cause harmful effects. The emphasis laid by the Tribunal both on the duty to cooperate and the notion of “prudence and caution” seems to signify that these decisions go beyond the mere prescription of provisional measures and in fact may contribute to the development of the international environmental law.

In the prescription of these provisional measures the Tribunal has taken fully into account the necessity to prescribe practical measures which would assist the parties to find a solution. With reference to the provisional measures prescribed by the Tribunal in the *Southern Bluefin Tuna Cases*, for instance, Professor Crawford, who acted as counsel in the *Southern Bluefin Tuna Cases*, had this to say:

“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.”
(Prof. James Crawford, *The “Volga” Case*, ITLOS/PV.02/02, 12 December 2002)

This in my view is an important consequence.

A case is still pending on the docket, the *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*, which was submitted to a chamber of the Tribunal. The time-limit for making preliminary objections with respect to the case was extended at the request of the parties to enable them to reach a settlement.

Seabed Disputes Chamber

Composition

The Seabed Disputes Chamber is the chamber formed within the Tribunal which is designed to deal with disputes arising from activities in the international seabed area. It is composed of 11 members, selected by a majority of the members of the Tribunal. In selecting the members of the Chamber, the representation of the principal legal systems of the world and equitable geographical distribution were to be assured. It may be noted that in the case of the election of the members of the Seabed Disputes Chamber the Assembly of the International Seabed Authority may make recommendations of a general nature with respect to the representation of the principal legal systems of the world and equitable geographical distribution. No such recommendations have yet been made. It will be remembered that the Seabed Disputes Chamber was originally an organ of the Authority and it was the Assembly of the Authority which elected its members. The members of the Chamber are now

“selected” by the Tribunal, although this specific link with the Authority is maintained.

Jurisdiction

The Seabed Disputes Chamber has jurisdiction, as has already been stated, over disputes with respect to activities in the international seabed area. That jurisdiction is mandatory (see article 287, paragraph 2).

The Chamber has jurisdiction over disputes between States Parties concerning the interpretation or application of Part XI and the relevant annexes. In such cases the dispute can be submitted at the request of the parties to the dispute to a special chamber of the International Tribunal for the Law of the Sea to be formed in accordance with Annex VI, articles 15 and 17, or at the request of any party to the dispute to an *ad hoc* chamber of the Seabed Disputes Chamber to be formed in accordance with Annex VI, article 36.

This procedure, as one commentator has said, reconciled “the necessity of ensuring the uniform interpretation and application of Part XI, stressed by the Group of 77, with the need for a certain choice of procedures emphasised by some industrialised States”. It gives the parties a certain freedom of choice of means of settling disputes, which is, of course, the hallmark of the dispute settlement system as contained in the Convention.

Disputes with regard to contracts

The Authority, in exercising its functions, will necessarily have to enter into contracts with States Parties and State enterprises and natural or juridical persons.

In the case of disputes concerning the interpretation or application of a contract, the Convention provides that such disputes shall be submitted, at the request of any party, to binding commercial arbitration. But it makes the important reservation that

a commercial arbitral tribunal to which the dispute is submitted shall have no jurisdiction to decide any question of interpretation of the Convention. That question shall be referred to the Seabed Disputes Chamber for a ruling. If the arbitral tribunal determines, either at the request of a party or *proprio motu*, that its decision depends upon a ruling of the Seabed Disputes Chamber, the arbitral tribunal shall refer the question to the Chamber for such a ruling. This compromise procedure was designed to preserve the unity of interpretation of the provisions of Part XI.

Disputes between a State Party and the Authority

The jurisdiction of the Chamber also includes disputes between a State Party and the Authority concerning acts or omissions of the Authority or of a State Party alleged to be in violation of Part XI or the relevant Annexes, or of rules, regulations and procedures of the Authority, and acts of the Authority alleged to be in excess of jurisdiction or a misuse of power. It may here be noted that the Convention itself has imposed some limitations on the jurisdiction of the Chamber with respect to decisions of the Authority.

The Seabed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority. Without prejudice to article 191, in exercising its jurisdiction pursuant to article 187, the Seabed Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this Convention, nor declare invalid any such rules, regulations and procedures. Its jurisdiction in this regard shall be confined to deciding claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention. (Article 189)

This provision was meant to ensure that the Authority had full freedom “to discharge its important and innovative responsibilities on behalf of ‘humankind’ as a whole”. However, it has been roundly criticized for being “contradictory and confusing”.¹ For instance, how can the Seabed Disputes Chamber decide claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the obligations of the parties to the dispute under the Convention without at times pronouncing itself on the question whether these rules, regulations and procedures are in conformity with the Convention. But, as has been said, “there is no doubt that the vagueness of Article 189 was intentional and designed to conceal the substantive divergences separating the negotiators”. This brings to mind these wise observations of Professor Johnson:

Anyone familiar with the procedures of international conferences must realize that to expect from them the elegant standards of Lincoln’s Inn is to cry for the moon. At the same time, if there is anything that the individual commentator can do to help to clarify a confused situation, it would seem to be his clear duty to try.
(Prof. D.H.N. Johnson, “The Nationality of Ships”, *Indian Yearbook of International Affairs*, 1959, pp. 3-15 on p. 11)

Advisory opinions

The Seabed Disputes Chamber has another important function. It shall give an advisory opinion at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency. (See also article 159, paragraph 10)

This is a complex and elaborate system – the result of a series of compromises which has not yet been tested by practice. The Seabed Disputes Chamber is, however, ready and prepared to play its role in the resolution of deep seabed disputes whenever they may arise.

¹ Lucius C. Cafilisch, “The settlement of disputes relating to activities in the international seabed area.” In: C.L. Rozakis and C.A. Stephanou (eds), *The New Law of the Sea*, 1983, pp. 303-344, on p. 315.

Mr President,

This brings me to the end of my brief presentation – an aperçu – of the work of the Tribunal and its links with the Authority. May I end by saying that the Tribunal continues to seek the moral and material support of the international community as a whole for the successful achievement of the objectives underlying its establishment.