

Settlement of Disputes II International Tribunal for the Law of the Sea

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Introduction

It gives me great pleasure to speak to you today on the International Tribunal for the Law of the Sea. As you have heard, the Tribunal is a new actor on the international scene, only six years old next week. Its case-work is not yet extensive, and thus I like to use every opportunity such as that presented today to familiarize the international community with our activities.

I will not spend too much time on the details of our work. After a general introduction, I would like to spend most of my allotted time on the jurisdiction and competence of the Tribunal and our working methods and then give a quick overview of the cases which the Tribunal has dealt with. Finally, I would like to close by putting the Tribunal in its international perspective.

First, on some introductory elements:

As Professor Oxman indicated, the Tribunal was a creation of the Law of the Sea Convention and, as I said before, it began its work six years ago, at its seat in Hamburg, Germany. The choice of Hamburg was made pursuant to an offer by the German authorities to provide, at a nominal rent, a Headquarters building, a beautiful facility on the banks of the Elbe.

There are 21 Judges, of which only the President is serving full-time at the seat in Hamburg, the others remaining on call to proceed expeditiously to Hamburg when a case is convened. The salary scale reflects this status, with a one-third salary, based on the salaries of the Judges of the International Court of Justice, and additional remuneration for work done on cases.

The Judges are elected by the States which are Parties to the Convention, now 138, which also provide the budget for its activities. It is strictly speaking not a body of the United Nations, that is, with no formal relation to the 50 or so United Nations Member States which are not Parties to the Convention.

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The members are elected on a geographical basis: five are from Africa, five are from Asia, four from the Western Europe and Others Group, four are from Latin America and the Caribbean and three are from Eastern Europe. The term of office is nine years.

Before turning to some jurisdictional details, let me first deal with the question: Why a new Court for the Law of the Sea? I will return to this later, but for now let me emphasize three points made by Professor Oxman earlier: first, there were certain new concepts emerging in the Law of the Sea Conference which would excite some legal controversy; second, there was not universal satisfaction with the only existing court at the time, the International Court of Justice; third, there would be need for a specialized court to deal with Deep Sea Bed Mining, with parties which did not have access to the traditional third party dispute settlement mechanism.

Jurisdiction

I turn now to deal with the jurisdiction of the Tribunal.

At the outset, I must admit that the jurisdictional provisions of the Convention are quite complex (and I commend Professor Oxman for his clear treatment of some of the aspects). The complexity is, however, more evident to the potential general analyst than, perhaps, the Court when faced with a concrete case. Indeed, in confining attention to the jurisdiction of the Tribunal, the treatment of the system laid down in the Convention is immensely simplified.

In my treatment today, I shall use the traditional categories of subject-matter jurisdiction and jurisdiction over persons, but merely for descriptive purposes rather than dogma, and, in fact, in order to introduce the novelties in the Tribunal system and its active role in two types of cases: that of the so-called prompt release of vessels; and the provisional measures in matters before arbitral tribunals.

Turning first to the subject-matter jurisdiction of the Tribunal, it is clear that the main task of the Tribunal will be the resolution of disputes between States Parties concerning the interpretation and application of the Convention. Given the comprehensive nature of the Convention, this field of activity, though limited in scope, promises to have many facets, such as exercise of fisheries jurisdiction, marine pollution, navigation through straits and the laying of pipelines, to mention only a few areas.

The Tribunal, through its Seabed Disputes Chamber, has jurisdiction (under article 191) to give advisory opinions at the request of the Assembly or the Council or the International Seabed Authority on legal questions within the scope of their activities. The Tribunal has also, in its Rules, provided for the possibility of giving advisory opinions submitted pursuant to an international agreement related to the purposes of the Convention (Rules, article 138).

In addition to its jurisdiction with respect to the provisions of the Convention, there is a possibility (under article 288(2)) to resolve disputes submitted to it concerning

the interpretation and application of other international agreements related to the purposes of the Convention.

One such agreement is the Agreement of 4 August 1995 for the Implementation of the Provisions of the Law of the Sea Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. This Agreement provides for the application of Part XV of the Convention to disputes with respect to the Agreement itself and to fisheries agreements relating to straddling fish stocks or migratory fish stocks, whether or not the parties to the Agreement are also parties to the Convention.

Another example is the Protocol, adopted on 7 November 1996, to the Convention of 29 December 1972 on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972.

While these provisions on the Tribunal's subject-matter jurisdiction establish solidly its nature as a "treaty Tribunal", questions of customary international law and other questions outside the four corners of the Convention would nonetheless be addressed were it necessary to decide a case. For example, questions of marine delimitation would often relate to disputes over sovereignty over land territory and the Tribunal would be required to pronounce on such questions in reaching a decision.

Turning now to the question of jurisdiction over persons, the Convention identifies five categories of persons which could become parties to a case before the Tribunal:

First, the States Parties which have chosen the Tribunal under article 287 as a means for the compulsory binding settlement of disputes, under the conditions applicable to that choice;

Secondly, in the case of disputes with respect to activities in the international seabed area, the following: States Parties; the International Seabed Authority; the so-called Enterprise established under article 158(2); and natural or juridical persons involved in such activities;

Thirdly, in the case of actions for the release of vessels and crews under article 292, any State Party detaining a vessel and any State Party which is the flag State of the vessel.

Fourthly, States Parties which have submitted a dispute to arbitration, with respect to provisional measures pending constitution of the arbitral tribunal (article 290(5)).

Fifthly, any entity other than a State Party in accordance with agreements conferring jurisdiction and accepted by all parties to the case, whether special agreements or general agreements related to the subject-matter of the Convention.

It can be seen from the foregoing that the Tribunal could have before it quite a disparate set of parties to which the provisions on intervention (articles 31 and 32 of the Statute of the Tribunal) could add. The most novel among them are the natural and legal persons, which do not have access to any other international tribunal at present. It should also be noted that the States Parties could include (under the provisions of article 305 and Annex IX) certain inter-governmental organizations, a category which already includes the European Community.

Now I would like to backtrack to discuss further two categories of cases which are novel to the Tribunal and which have impacted most heavily on its activities: so-called prompt release of vessels and provisional measures in cases of arbitral proceedings.

As for the question of prompt release, the Convention sets out a number of instances where a ship, when arrested by a coastal State, shall be released upon the posting of a reasonable bond or other financial security. To safeguard this right, which is based on a balance of interests of the flag State and the coastal State, the Convention further provides that if the detaining State does not release the ship, the flag State can bring the matter before the Tribunal to call on it to order the detaining State to comply. The jurisdiction of the Tribunal does not extend to the merits of the action taken by the coastal State in arresting the ship, but rather only to the question of the release, including the reasonableness of the bond. Five of the Tribunal's first 10 cases have been submitted under this heading.

The second novel head of jurisdiction is a consequence of the possibility of States Parties bringing cases to arbitration under the system of the Convention. At least at this early stage, the main avenue of dispute settlement is likely to be arbitration.

The procedure for establishing an arbitral tribunal can take some time. Each party has to appoint arbitrators; there has to be agreement on the jointly appointed arbitrators; then the administration has to be set up. The Convention provides that in the period until the arbitration can commence, a party to a dispute may call on the Tribunal to enact provisional measures, for example, to preserve the rights of the parties. Three of the cases before the Tribunal were brought under this heading.

Procedure

Before dealing with the cases before the Tribunal, I wish to say a few words on the Tribunal's working methods.

Six years ago, when we began our work, a review had just been undertaken by leading academics and practitioners on the working methods of the International Court of Justice, specifically addressed to the expense and delay of proceedings. Although incentive was perhaps not needed, this report certainly provided us with reassurance that the international community would welcome efforts to reduce the expense of litigation and enhance efficiency. Indeed, the States Parties to the Convention had expressly specified in Section 1 (2) of the Annex to the Agreement of 28 July 1994 relating to the Implementation of Part XI of the Convention that, in order to minimize

costs to States Parties, the organs of the Convention, including the Tribunal, shall be cost-effective.

As a point of departure it must be admitted that the Tribunal, when it began its work on establishing its working methods, was aware that it had to take account of factors over which it would have no control, some of them endemic to international disputes. These factors might counter-act whatever attempts we have made to adopt efficient, cost-effective and user-friendly methods of work. I hope, however, that experience will show that the steady implementation of certain provisions which the Tribunal has adopted in its Rules and other documents will enable it to achieve these goals. Examples include: the statement in article 49 of the Rules that proceedings shall be conducted without unnecessary delay or expense; the setting of specific time-limits for the various stages of proceedings; and the indications in article 68 of the Rules and in articles 2 and 3 of the Resolution on the Internal Judicial Practice that the Tribunal will take an early “hands-on” approach in its proceedings. The Tribunal’s decision to establish, already at an early stage of its work, two standing special chambers, the Chamber for Fisheries Disputes and the Chamber for Marine Environment Disputes, goes in this direction as well.

It is important also to mention one salient element which is not completely identified in the documents themselves but which is perhaps the most significant aspect of our working methods. I refer to a “spirit of collegiality” which has come to characterize the work of the Tribunal. Already bound together by our common regard for the rule of law and our dedication to the law of the sea, the Judges of the Tribunal have over the course of the first years of work developed efficient working methods which might have been considered impossible in so large a body. We developed a method whereby the views of all Judges were aired and, each being prepared to respect the views of the others, we arrived at results which are truly a group product.

The cases before the Tribunal

I turn now to give a brief overview of the 10 cases dealt with by the Tribunal. This spirit has prevailed in all our work, including the deliberations in our first ten cases. Specific examples include efforts to reach consensus on decisions, the procedures on the use of the official languages and efforts in judicial deliberations to reflect conflicting views in draft decisions.

The cases fall into three categories:

Cases dealing with the prompt release of ships and their crews;

Cases involving requests for provisional measures in disputes submitted to arbitration;

Cases on merits.

You will recall that I have already mentioned the first two categories.

First, there have been five cases seeking prompt release. All of them related to arrests for infringement of fisheries regulations in the exclusive economic zone. In one of them, the Tribunal decided that it lacked jurisdiction because of irregularities in the registration of the ship with the authorities of the flag State. A second case was settled when the coastal State released the vessel under terms agreed with the flag State. In the other three cases, the Tribunal found for the flag State and ordered the release of the arrested ship, in one case after setting itself the bond required and in the other two cases reducing the amount of the bond demanded by the arresting State. Pursuant to the nature of the proceedings, which I mentioned before, the Tribunal did not pronounce on the merits of the case and no conclusion should be drawn about the nature of the infractions leading to the arrest in each case.

The second category involved two cases where a process of arbitration was instituted under the Convention and one of the parties requested the Tribunal to prescribe provisional measures pending the constitution of the arbitral tribunal.

The first of these, which was actually a joinder of two cases, resulted from the initiation of arbitration proceedings by Australia and New Zealand against Japan in respect of the fishing for southern bluefin tuna in the waters of Australia and New Zealand and in the adjacent high seas area. These three countries had been cooperating in the fishery for over fifteen years, since 1993 on the basis of a trilateral agreement, and had agreed on quotas binding on them all. After 1997, they had been unable to agree on binding measures and in 1999 New Zealand and Australia sought legal remedies. The Tribunal decided to set provisional measures and established as a binding measure the quotas which had prevailed in the recent past, referring to the need to act with prudence and caution to avert further deterioration of the tuna resource.

The second of the cases in this category, and the most recent case before the Tribunal, was brought by Ireland against the United Kingdom to seek a provisional measure to prevent the United Kingdom from instituting a disputed method of reprocessing spent nuclear fuel at its Sellafield plant, as so-called mixed oxide fuel or MOX. Ireland maintained that the plant would increase marine pollution of the Irish Sea and beyond in the course of marine transportation of the fuel. The Tribunal did not accede to Ireland's main request, in the short period before the arbitral tribunal would be constituted. It did, however, decide to require the parties to cooperate and to enter into consultations to exchange information concerning the risks or effects of the proposed activities and in devising ways to deal with them.

I turn finally to the two cases which were submitted to the Tribunal for full treatment of the merits. The first was an offshoot of the first case on the prompt release of a ship, when the flag State, St. Vincent and the Grenadines, and the coastal State, Guinea, decided to bring to the Tribunal the question of the legality of the arrest of the ship involved, the SAIGA. The Tribunal decided that the arrest, which had taken place outside Guinean jurisdiction, was an illegal application of the right of hot pursuit and had moreover been carried out with excessive use of force. It awarded damages in the total of 2.1 million US Dollars for the shipowner, charterer and members of the crew.

The second substantive case was brought by agreement between Chile and the European Community and related to the fishing for swordfish in the South-Eastern Pacific Ocean. The Tribunal was asked to form a five-Judge Chamber to decide *inter alia* whether the Community was complying with the standards of the Convention in that fishery and whether Chile's Decree purporting to apply conservation measures on the high seas was in compliance with the Convention. At the present time, the case has been suspended following agreement between the parties and probably no decision will emerge from the case.

These, then, are the first 10 cases decided by the Tribunal. If I were to summarize my views on these cases, I would begin by saying that many interesting substantive issues have been raised and discussed. Furthermore, clarity has been obtained in certain procedural issues. I admit that I would have liked to have tackled even more of the issues raised, but it is, I have found, in the nature of judicial organs to reach its decisions on the most solid ground possible, which calls, perhaps, for a minimalist approach. I am sure that other opportunities will arise in the future for my colleagues to deal with such issues.

The Tribunal in its international perspective

In concluding, I would like to present some thoughts putting the Tribunal in its international perspective. In particular, I wish to add a few words to what Professor Oxman has said about concerns that the recent proliferation of international courts can have some undesirable consequences, such as what has been characterized as the fragmentation of international law.

Dealing with the field of the law of the sea, my point of departure is to recognize how truly significant an achievement the Law of the Sea Convention was, not only in and of itself, but also as regards its impact on the development of international law as a whole. This is not a marginal field of law. What makes it so crucial for present developments is the fact that the law of the sea negotiations were characterized by a significant degree of community interest. In saying this, I don't turn a blind eye to other motivations of States involved in the process: national interests and what could often be seen as selfish economic interests. I would appear naïve if I did. I maintain, nonetheless, that had these interests not been embroidered in a general fabric of equity and accommodation of the entire international community, the end result of the Law of the Sea Conference would not have been the success it has proven to be. The law of the sea would be far different today. In particular, the Law of the Sea Tribunal would be a far different and less forward-looking institution than it is, if, indeed, it would have been established at all.

As Professor Oxman reminded us, the Convention is unique among the major lawmaking treaties in providing for a comprehensive regime for the settlement of disputes. In this respect, it represents a major departure from the trends of the 1970s and 1980s against third party dispute settlement. In fact, it was a miracle of sorts that such a

system was adopted in the climate of the times. And I think all of these thoughts must be put in the context of the development of international law as a whole.

At the time when the Law of the Sea Conference was starting its work, I think it is fair to say that in the developing world there was a general disenchantment with international law as a discipline. One strongly held view was that international law was the tool of the European countries, dominated in its formation and implementation by colonial and big power interests. These sentiments gave rise to efforts to establish new international law modalities, certainly much more political and (at least I would argue) much less “legal”, such as the concept of the new international economic order. Then along came the law of the sea negotiations, where the traditional international law subjects needed to be addressed from new perspectives, with new concepts emerging that had to be accommodated within the existing legal order.

These sentiments were perhaps most pronounced in the field of the settlement of disputes. The attitude in the developing world towards international law had been crystallized in an attitude of disapproval of the work of the International Court of Justice and the idea of recourse to international adjudication as a whole.

Quite fortuitously, the most influential molders of thought in international law were drawn to the law of the sea process, both from developing countries and from industrialized nations. While the law of the sea negotiations were a preeminently political process, involving the sovereign rights and vital interests of States, in most cases the leaders of the negotiations were experts in international law. Many delegations included prominent professors of international law. Indeed, I venture to say that there has never been such a gathering of leading international lawyers in international negotiations. In fact, as I think about these matters, I am recalling those who are no longer with us. In my case, I served under the leadership of: Hans Anderson, the leader of the Icelandic delegation; Andrés Aguilar, Chairman of the Second Committee; Shirley Amerasinghe, first President of the Conference; and Under-Secretaries-General Stavropoulos and Zuleta.

The experts assembled at the Conference were able to find common ground in the search for innovative solutions to international law questions. I am convinced that the success of their attempts inspired confidence in the Third World in the very discipline of international law. As I mentioned earlier, a firm indication of this was the inclusion in the Convention of the comprehensive system for the settlement of disputes, including the Law of the Sea Tribunal.

We have now a new firmament of international courts of which the Tribunal is a part. My point of departure is quite simple: the more opportunities there are available for the peaceful settlement of disputes, the better. And I would have thought that all international lawyers would share this view. Certainly, in the case of the Law of the Sea Tribunal, at least, the contrary view represents a lack of appreciation of those great international lawyers I have mentioned who set up this institution.

But I go even one step further. As a continuation of what I was saying before about the impact of the law of the sea on the development of international law, I am prepared to argue that the process I described earlier has resulted in an environment strengthening the classical regime of the settlement of disputes, not vice versa.

We see signs everywhere of growing respect for the rule of law in international relations. Specifically, in the field of the peaceful settlement of disputes, we have seen increased interest in and resort to the International Court of Justice and enhanced institutional arrangements for existing international human rights courts. It is in this environment that we witness the establishment of new international courts in the fields of criminal law and trade law.

To me, this current state of affairs is the lasting legacy of the law of the sea negotiations. I have come to believe that in the end what characterized the law of the sea negotiations and the subsequent and still ongoing implementation of the principles elaborated was a recognition that we were not throwing up our tents for one night only, as we say in my country, but rather were laying the groundwork for a legal regime to last for the foreseeable future.

I hope it is clear to all serious observers of the work of the Law of the Sea Tribunal that we are carrying on in that spirit.