

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



Statement by

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International Tribunal for the Law of the Sea

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Mr Chairman,
Excellencies,
Distinguished members of the International Law Commission,

Ladies and Gentlemen,

I am very honoured to have been invited to deliver this year's Gilberto Amado Memorial Lecture. Indeed, I feel very proud and humbled to join such a distinguished list of eminent international jurists who, over the years, have delivered memorial lectures in celebration of Gilberto Amado's highly regarded contributions to international law and to the work of the International Law Commission. The life and work of this great Brazilian international lawyer, his talent, his dedication, as well as his solid legal knowledge and thinking are a great inspiration to those of us striving to labour in this field. I take special pride, as a Portuguese speaker, in addressing you today in celebration of his work and his life-long dedication to international law.

I am also very honoured and grateful to all of you for sparing some of your precious time to be here today.

I take this opportunity to thank Ambassador Gilberto Saboia of Brazil for the invitation.

Jurisdiction of the Tribunal

Ladies and Gentlemen,

When I was approached to deliver this lecture, I thought that it would be a good opportunity to talk about some procedural matters that are peculiar to the International Tribunal for the Law of the Sea. I thought this, partly because the Tribunal, as a novel institution, is not well known to the greater public, and partly because I would like to share with you some particular elements of the special and innovative procedures at the Tribunal that represent a development in the procedures of international courts and

tribunals. So I decided that today I would seize this occasion and, with your indulgence, this is the way I shall proceed.

Ladies and Gentlemen,

The theme of my presentation is “advisory opinions and urgent proceedings at the Tribunal”. As an introduction I will start by giving a brief outline of the overall jurisdiction of the Tribunal.

The International Tribunal for the Law of the Sea¹ is entrusted by the 1982 United Nations Convention on the Law of the Sea (hereinafter “the Convention”) with the authority to settle disputes concerning the law of the sea. However, in accordance with the Convention, the Tribunal is not the only court available for that purpose to disputant parties.

To settle law of the sea disputes States may choose, in accordance with article 287 of the Convention, through a written declaration, the Tribunal, the International Court of Justice (ICJ) or arbitration in accordance with annexes VII and VIII of the Convention. If disputant States have not previously made a choice or have not chosen the same means of dispute settlement, arbitration in accordance with Annex VII of the Convention applies as the default compulsory means of dispute settlement.² A State wishing to avoid compulsory arbitration should therefore consider making a declaration in accordance with article 287, by choosing other means of dispute settlement.

The compulsory mechanism, as embodied in Part XV, is perhaps one of the most important and innovative features of the Convention dispute-settlement system though its impact is somewhat diluted by the exclusion from it of certain categories of disputes in respect of the rights of the coastal State relating to fisheries and scientific research in its exclusive economic zone (EEZ)³ and by the possibility for States to opt out of this compulsory mechanism when it is a matter of disputes on delimitation of maritime

¹ The Tribunal was established by the 1982 United Nations Convention on the Law of the Sea. It is composed of 21 judges and began its activities in October 1996

² See article 287, paragraph 3.

borders, disputes related to military activities and those that may be under consideration by the Security Council in compliance with its responsibilities under the Charter.⁴

Although, as I have already stated, disputes concerning the law of the sea may be brought to different international courts and tribunals, in accordance with article 287 of the Convention, the International Tribunal for the Law of the Sea has a core competence to deal with all disputes and all applications submitted to it in accordance with the Convention. As an international judicial body with specialized jurisdiction, the Tribunal is particularly positioned to play a major role in the settlement of international law of the sea disputes. This role is enhanced by the fact that the Convention confers on the Tribunal certain functions which are indeed unique in international adjudication.

As is the case of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), the Tribunal has both contentious and advisory jurisdiction. In particular, it has jurisdiction over (a) any dispute concerning the interpretation or application of the provisions of the Convention which is submitted to it in accordance with Part XV;⁵ (b) any dispute concerning the interpretation or application of an international agreement related to the purposes of the Convention, which is submitted to it in accordance with the agreement; and ⁶ (c) any dispute concerning the interpretation or application of a treaty already in force concerning the subject-matter covered by the Convention if all the parties to such a treaty so agree.⁷

The Tribunal, as a full court, has also jurisdiction to entertain requests for advisory opinions, based on a procedure which has no parallel in previous adjudication practice, as we shall see later.⁸

³ See article 297 of the Convention.

⁴ See article 298 of the Convention.

⁵ See articles 288, paragraph 1 of the Convention and Articles 21 and 22 of the Statute of the Tribunal.

⁶ See article 288, paragraph 2.

⁷ See article 22 of the Statute of the Tribunal.

⁸ See article 138 of the Rules of the Tribunal and article 21 of the Statute of the Tribunal.

In addition, the Seabed Disputes Chamber, composed of 11 of the 21 judges of the Tribunal, has quasi-exclusive jurisdiction over any disputes related to activities in the Area⁹ and has also jurisdiction to entertain any request for advisory opinions related to the legal regime concerning the Area, as embodied in Part XI and related annexes of the Convention and the 1994 New York Agreement on the implementation of Part XI of the Convention.

The Chamber has quasi-exclusive jurisdiction because disputes over matters covered by the international seabed regime may be entertained only by the Chamber and by no other international court or tribunal, not even by the Tribunal as a full court, with the sole exceptions established in article 188, paragraph 1, whereby disputes between States concerning the interpretation or application of Part XI and related annexes may be submitted, at the request of the parties to the dispute, to a special chamber of the Tribunal or, in the case referred to in article 188, paragraph 2(a), whereby disputes concerning the interpretation or application of a relevant contract or a plan of work are to be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties agree otherwise.

The jurisdiction of the Tribunal *ratione personae* also represents an interesting development of procedural international law. Traditionally, as is known, only States have access to international courts and tribunals. In the case of the International Tribunal for the Law of the Sea, however, there has been a notable development in procedural law in this respect. Apart from States, international organizations may be parties to disputes before the Tribunal and, in the case of its Seabed Disputes Chamber, the International Seabed Authority, its Enterprise or natural and juridical persons or a state enterprise may also be parties to disputes.¹⁰

This procedural development, broadening the jurisdiction of the Tribunal *ratione personae* in a way that has not been done before, responds to the need to recognize

⁹ See articles 187 and 188, paragraphs 1 and 2(a).

¹⁰ See articles 187 and 288 of the Convention and articles 20, paragraph 2, and 37 of the Statute of the Tribunal (Annex VI of the Convention).

the increasing role of international organizations and to provide the operators and investors involved in deep seabed mining with an international judicial means to settle potential disputes. It is to be noted that article 20, paragraph 2, of the Statute of the Tribunal seems to have gone a step further, admitting the possibility of broadening access to the Tribunal even further when it states 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”.

Having outlined the overall jurisdiction of the Tribunal, today I will concentrate my observations on some aspects of its jurisdiction that are unique, for they mark a noticeable procedural difference between the Tribunal and other courts and tribunals referred to in article 287 of the Convention. These procedures are unique in the sense that, to a certain extent, they can be entertained only by the Tribunal and by no other forum for the settlement of international disputes referred to in article 287 of the Convention. The focus of my lecture today will therefore be on some features of these unique procedures, namely the procedural novelty of requests for advisory opinions to the Tribunal as a full court; urgent proceedings for the prescription of provisional measures under article 290, paragraph 5, of the Convention; and urgent proceedings for the prompt release of vessels and crews detained for alleged violations of fisheries legislation or for marine pollution.

Advisory Opinions

Since the Permanent Court of International Justice (PCIJ) was set up, the requesting of advisory opinions has been a usual procedure followed and it has played an important role in the development of international law.¹¹ Together with contentious cases, advisory opinions are nowadays an integral part of the competence of international courts.

¹¹ The Permanent Court in its 19 years of work issued twenty-seven advisory opinions, making a significant contribution to international law.

The precedent set by the PCIJ in asserting an advisory role for itself and the experience gained since then by that Court and the ICJ were to a great extent followed by the Statute and the Rules of the Tribunal. Indeed, the provisions of the Rules of the PCIJ and ICJ are reflected, with the necessary adaptations, in the Convention,¹² namely in its Annex VI, which contains the Statute of the Tribunal, and in Part XI of the Convention in respect of the jurisdiction of the Seabed Disputes Chamber.

The advisory function of the Tribunal is exercised by the Seabed Disputes Chamber and by the Tribunal as a full court.

The advisory functions of the Seabed Disputes Chamber

The Seabed Disputes Chamber may be requested to deliver an advisory opinion (a) at the request of the Assembly of the International Seabed Authority “on the conformity with [the] Convention of a proposal before the Assembly [of the International Seabed Authority] on any matter”;¹³ and also (b) at the request of the Assembly or the Council of the International Seabed Authority “on legal questions arising within the scope of their activities”.¹⁴

To a certain extent, the procedural mechanisms by which the Seabed Disputes Chamber may be requested to entertain an advisory opinion follow the procedural pattern set for requests for advisory opinions before the PCIJ and ICJ. The decision to request an advisory opinion is to be taken by a collective body, which in the case of the Seabed Chamber is either the Assembly or the Council of the International Seabed Authority. The situation differs, however, with respect to requests for advisory opinions made to the Tribunal as a full court.

¹³ See article 159, paragraph 10, of the Convention.

¹⁴ Article 191 of the Convention.

Advisory function of the Tribunal as a full court

Apart from the advisory role of the Seabed Disputes Chamber, the Tribunal, as a full court, also has advisory jurisdiction, under article 138 of its Rules. Indeed, article 138 of the Rules indicates that the Tribunal “may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion”.¹⁵

Unlike requests for an advisory opinion to be made to the Seabed Disputes Chamber, requests to the Tribunal for an advisory opinion can be made on the basis of an international agreement. A bilateral or a multilateral agreement seems to be considered an international agreement for this purpose. Presumably such an international agreement may be made between States, between States and international organizations or between international organizations. This is an important procedural innovation which introduces a flexible and fresh approach to the issue of entities entitled to request advisory opinions.

It is worth noting that in all other aspects requests for advisory opinions to the Tribunal as a full court follow the traditional requirements. This means that the request should be of a legal nature and also should be of a general nature. Possibly, it may even address a “legal question, abstract or otherwise”¹⁶ if the jurisprudence of the ICJ is to be followed by the Tribunal in this respect.

The Convention does not expressly refer to the advisory role of the Tribunal as a full court. However, article 21 of the Statute of the Tribunal implicitly provides for such role. Indeed, article 138 of the Rules of the Tribunal is based on article 21 of the Statute of the Tribunal, which confers broad jurisdiction when it states that “the jurisdiction of the

¹⁵ The advisory jurisdiction of the Tribunal is based on Rule 138 of the Convention. On the other hand, article 21 of the Statute of the Tribunal does confer on the Tribunal broad jurisdiction, which is also interpreted as providing an advisory function, by stating that “the jurisdiction of the Tribunal comprises all disputes and *all applications* submitted to it and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”.

¹⁶ See ICJ Advisory Opinion on Conditions of Admissibility of a State to Membership in the United Nations.

Tribunal comprises all disputes and all applications submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal”.

Advisory opinions are non-binding but can play an important role in clarifying the interpretation of the law. Although no request for advisory opinions has so far been made, the advisory function of the Tribunal as a full court may provide a flexible mechanism for those seeking to clarify points of law or legal questions. As States and other users of the Convention seem to differ on the interpretation and application of certain provisions of the Convention and new world events seem to demand a better understanding of the Convention’s provisions, requests to the Tribunal for advisory opinions might prove to be a useful tool. They may assist parties in narrowing their differences on a given legal point or question and facilitate the settlement of disputes through negotiations, thus contributing to curb further escalation of conflicts between States. Additionally, bearing in mind the cumbersome system of Review Conference of the Convention and the political difficulties in making recourse to such a Conference, interpretation of certain provisions of the Convention by means of an advisory opinion may be the most appropriate means of clarifying a legal matter arising within the scope of, or related to, the Convention.

An issue that might be raised in the context of the entity which is to transmit the request for an advisory opinion to the Tribunal is the concept of “body” in article 138 of the Rules of the Tribunal. Paragraph 2 of this article states that requests for advisory opinions to the Tribunal as a full court should be transmitted “by whatever body is authorized by or in accordance with the agreement”. The concept of “body” here may be subject to different interpretations, bearing in mind the practice of requests for advisory opinions made to the PCIJ and the ICJ. Some may be tempted to equate the word “body” to a “collective body” as a result of the inertia experienced in the past in the other international courts. As I have stated elsewhere regarding “the meaning of the expression “body”, it appears that any organ, entity, institution, organization or State that is indicated in such an international agreement as being empowered to request, on

behalf of the parties concerned, an advisory opinion of the Tribunal, in accordance with the terms of the agreement, would be a body within the meaning of article 138, paragraph 2, of the Rules. Since such body is only the conveyor of the request, it seems to be of little relevance to dwell on the nature of such body. Its legitimacy to transmit the request is derived from the authority given to it by the agreement and not by its nature and any other structure or institutional considerations”.

I now turn to urgent proceedings.

The Tribunal has simplified procedures for coping in an expeditious manner with specific cases, in accordance with its Statute and the Rules. They are urgent proceedings in the sense that they are dealt with in record time and usually, within a period of less than a month, from the filing of the application to the delivery of the judgment. This seems too good to be true in the nowadays practice of courts and tribunals. The swiftness of action has been a mark of the work of the Tribunal since its inception 12 years ago.

We have in our Rules two types of urgent proceedings: the provisional measures under article 290, paragraph 5, of the Convention; and the prompt release of vessels and crews under article 292 of the Convention. They both fall under the compulsory jurisdiction of the Tribunal. The Tribunal has so far received 15 cases and of them 13 cases ¹⁷ have been cases involving urgent proceedings.

I shall first address the urgent proceedings on provisional measures under article 290, paragraph 5. This paragraph states that “Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed

¹⁷ The *M/V “SAIGA” Case* (Saint Vincent and the Grenadines v. Guinea); the *M/V “SAIGA” (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea); *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan); the *“Camouco” Case* (Panama v. France); the *“MonteConfurco” Case* (Seychelles v. France); the *“Grand Prince” Case* (Belize v. France); the *“Chaisiri Reefer 2” Case* (Panama v. Yemen); the *MOX Plant Case* (Ireland v. United Kingdom); the *“Volga” Case* (Russian Federation v. Australia); *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore); the *“JunoTrader” Case* (Saint Vincent and the Grenadines v. Guinea-Bissau); the *“Hoshinmaru” Case* (Japan v. Russian Federation); the *“Tomimaru” Case* (Japan v. Russian Federation).

upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4”.

The provisional measures referred to in this paragraph represent another example of a new procedural development in international adjudication. Before the Convention, no such possibility existed.

What is new about this procedure that makes it noteworthy? As is well known, usually a tribunal or court, domestic or international, when dealing with a case on the merits can be requested by one of the parties to the dispute to prescribe provisional measures pending the final decision on the case. That is the procedure envisaged in article 290, paragraph 1. However, in the case of provisional measures under article 290, paragraph 5, we are dealing with a different procedure, one that may, as a compulsory procedure, only be brought before the Tribunal. In accordance with article 290, paragraph 5, if the parties have not reached an agreement on a court or tribunal, the Tribunal may be requested by one of the parties - normally the applicant - to prescribe provisional measures to protect the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, even when the Tribunal is not entertaining the case on the merits.

This may be done in the following circumstances: Article 287 of the Convention establishes that “when signing, ratifying or acceding to the Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration [...] (a) the International Tribunal for the Law of the Sea [...]; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII”. If the parties to a dispute have not

chosen the same means for dispute settlement, as listed in article 287, then the dispute may be submitted by one of the parties to the arbitral tribunal under Annex VII to the Convention, which is the default procedure under the Convention. Once a party has notified the other party that it is instituting an Annex VII arbitral tribunal to deal with the dispute between them, one of the parties alone may request the Tribunal to prescribe provisional measures under article 290, paragraph 5, pending the constitution of the arbitral tribunal. The Tribunal will entertain the case if it finds that the urgency of such measures is warranted and that the arbitral tribunal has *prima facie* jurisdiction.

This procedure has been included in the Convention to make sure that while the arbitral tribunal is being constituted the rights of the parties to the dispute or the marine environment are not left unprotected. Indeed, whenever arbitral proceedings are instituted, it may take a long time before the arbitral tribunal becomes operative. Therefore this procedure provides an outlet for provisional measures to be prescribed by the Tribunal until the arbitral tribunal is in a position to deal itself with a request for provisional measures, and may affirm, change or revoke the provisional measures eventually prescribed by the Tribunal.

This procedure is another instance of compulsory jurisdiction in the sense that it takes only one of the parties to the dispute to institute the proceedings through an application submitted to the Tribunal and, as a compulsory procedure, it can be entertained only by the Tribunal. The Tribunal has entertained four cases of provisional measures under article 290, paragraph 5 the *Bluefin Tuna Cases*, the *Mox Plant Case* and the *Land Reclamation Case*¹⁸.

It is to be noted that the Statute of the Tribunal introduced yet another new development to international adjudication regarding the nature of the Tribunal's decision on provisional measures by establishing that the Tribunal "prescribes" provisional

¹⁸ Proceedings relating to the request for provisional measures in the *M/V "SAIGA" (No. 2) Case* were also instituted on the basis of article 290, paragraph 5, of the Convention. Further to an agreement between the parties to submit the case to the Tribunal, the case was then dealt with by the Tribunal under article 290, paragraph 1, of the Convention.

measures, rather than “indicating” them. The Statute of the Tribunal, by stating that decisions on provisional measures are “prescribed”, made it clear that such measures have binding effect. This may have contributed to the recent evolution in the jurisprudence related to the legal effect of provisional measures in other judicial bodies.

Prompt release of vessels and crews

Another type of urgent proceedings is the procedure for the prompt release of vessels and crews. It is also a novel procedure established by the Convention. This is a further instance in which the Tribunal may be called upon to entertain a case submitted to it based on compulsory jurisdiction.

The prompt release procedure is established in article 292, which states that “[w]here the authorities of a State Party have detained a vessel flying the flag of another State Party 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 question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining state under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree”. This provision enables a flag State or an entity acting on its behalf to request the Tribunal to set a bond it considers reasonable and order the prompt release of a vessel and its crew detained by the authorities of a State Party for alleged violation of its fisheries legislation (article 73, paragraph 2) or for having caused marine pollution (articles 220, paragraph 7, and 226, paragraph (1)(b)).

It is to be emphasised that the prompt release procedure is a special one that, when based on compulsory jurisdiction, may only be instituted before the Tribunal in cases, as stated before, of detention of vessels and crew for alleged violation of fisheries legislation of the detaining State and for marine pollution or environmental damage. The

prompt release procedure cannot be used in cases of detention or arrest of vessels and crew for other reasons.

An application for the release of vessel and crew may be submitted to the Tribunal by the flag State alone when 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.¹⁹ According to the jurisprudence of the Tribunal, failure to comply with the provisions of the Convention for prompt release (article 73, paragraph 2) applies to situations: (1) when it has not been possible to post a bond; (2) when a bond has been rejected by the detaining State; (3) when the posting of a bond or other guarantee is not provided for in the coastal State's legislation; or (4) when the flag State alleges that the required bond is unreasonable.

It is interesting to note that, as established in article 292, paragraph 2 of the Convention, in prompt release cases the flag State may authorize in writing and through the competent authorities, a private person to institute prompt release proceedings before the Tribunal and to act on its behalf. Several applicant States have made use of this option in past cases entertained by the Tribunal.

Another interesting feature of this procedure is that, unless the case is dismissed on the grounds of lack of jurisdiction or inadmissibility, the outcome of the case will normally be the immediate release of vessel and crew, subject to the posting of the reasonable bond or other financial security as determined by the Tribunal.

The Tribunal has entertained nine cases involving the prompt release of vessels and crew submitted to it by States or on their behalf, following the detention of a fishing vessel for alleged violation of fishing laws in the exclusive economic zone of a coastal State. These applications made on the basis of article 73 of the Convention have

¹⁹ The jurisdiction of the Tribunal in prompt release cases is established when all the following conditions have been observed: (1) both disputant States are Parties to the Convention (art. 292); (2) the applicant is the flag State of the arrested vessel (art. 292); (3) the case of release has not been submitted to another court or tribunal in the 10 days following the detention (art. 292); (4) the vessel or crew are still detained for alleged fisheries violation; (5) no bond or other guarantee has been posted; and (6) articles 110 and 111 of the Rules of the Tribunal have been observed.

provided the Tribunal with the opportunity to develop what is now well-established jurisprudence. The Tribunal, however, has not as yet received any application for prompt release of vessels and crews detained for alleged marine pollution offences or environmental damage under article 220, paragraph 7, or 226 (1)(b).

One of the reasons that may explain why States have not so far had recourse to prompt release of vessels and crew in situations of detention of vessels and crew for marine pollution might be the lack of information on this possibility, having in mind the complex and convoluted manner in which these provisions are drafted.

Although these provisions do not refer expressly to the crew members of detained vessels, they are to be included in the prompt release procedures since they are part of the vessel as a unit. It is to be noted in this regard that the Convention, as stated in the Virginia Commentary on the Convention “does not authorize the imprisonment of any person; at most it permits the detention of the crew along with the vessel, but with prompt release procedures such as bonding or other appropriate financial security”.

The Tribunal is the body that ultimately determines the reasonableness of the bond and, once it has determined the amount of the bond or other guarantee it considers to be reasonable, it then orders the release of the detained vessel and crew upon the posting of the bond or guarantee.²⁰

This procedure may be used by flag States and ship owners to avoid that their detained vessels remain idle for long periods of time while a decision on the merits by the competent domestic court is awaited. It also provides a mechanism for swift release of crew members from detention that may otherwise last for long periods.

²⁰ In the jurisprudence of the Tribunal the following factors have been taken into account for the determination of the reasonableness of the bond: (1) the gravity of alleged offences; (2) the penalties imposed or imposable; (3) the value of the vessel; (4) and the amount of the bond imposed by the detaining State and its form.

This brings an end to my presentation. I hope I have not worn you out with so many details of our procedures at the Tribunal. For me, it has been a great pleasure to address you on these issues.

I thank you for your attention.