INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Statement by

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President of the
International Tribunal for the Law of the Sea

at the

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Mr President,

It is a great honour and a pleasure for me, in my capacity as President of the International Tribunal for the Law of the Sea, to address this Conference of Ministers of OLDEPESCA. I wish you a successful meeting.

We are grateful to the Executive Director, Mr Angel Rivera Benavides, for the kind invitation extended to us to participate in this meeting.

Mr President,
Distinguished Ministers and Participants,

I am glad to have been given this opportunity to share with you information relating to the mission and work of the International Tribunal for the Law of the Sea, headquartered in Hamburg, Germany.

The International Tribunal for the Law of the Sea is an institution created by the 1982 United Nations Convention on the Law of the Sea (hereinafter "the Convention"), an instrument that has been ratified by an overwhelming number of countries of Latin America and the Caribbean. The Tribunal is therefore an international judicial institution of your own creation and I am glad to note that amongst the 21 sitting judges of whom the Tribunal is composed, four are from this region.[1]

The Tribunal is entrusted by the Convention with the authority to settle disputes concerning the law of the sea and 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 holds a particular position for playing a major role in the settlement of 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.

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;[2] (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[3] (c) any dispute relating to 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.[4]

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[1] Judge Hugo Caminos from Argentina, Judge Vicente Marotta Rangel from Brazil, Judge Dolliver Nelson from Grenada and Judge Anthony Lucky from Trinidad and Tobago.
[2] See articles 288, paragraph 1, of the Convention and articles 21 and 22 of the Statute of the Tribunal.
[3] See article 288, paragraph 2.
[4] See article 22 of the Statute of the Tribunal.

The Tribunal, as a full court, also has jurisdiction to entertain requests for advisory opinions,[5] based on an international agreement related to the purposes of the Convention.

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 Area[6] 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 in the 1994 New York Agreement on the implementation of Part XI of the Convention.

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. In the case of the Tribunal, 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, the Enterprise or natural and juridical persons or a state enterprise may also be parties to disputes.[7]

The Tribunal functions as a full court and in chambers. Apart from other standing chambers, it has a Chamber for Marine Environment Disputes and a Chamber for Fisheries Disputes. Parties to a dispute may wish to refer a case either to the Tribunal as a full court or to a standing chamber. In addition to the Standing Chambers of the Tribunal, parties to a dispute may request the Tribunal to establish an *ad hoc* chamber to deal with a particular dispute. Chile and the European Community already took advantage of this option in the year 2000, when they submitted to an *ad hoc* chamber of the Tribunal the *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean.*

We have entertained 15 cases, of which 13 have been resolved and one is still pending before a special Chamber. These cases involved States from different regions, including States from the Latin American and the Caribbean Region. In connection with cases brought before the Tribunal, I would like to remind States Parties that a trust fund has been established by the UN General Assembly in order to give financial assistance to developing States for settling their disputes through the Tribunal.

Mr President,

I note with great interest that the programme of this meeting devotes substantial time to the examination of a number of questions relating to fisheries such as fisheries management, illegal, unreported and unregulated fishing (“IUU fishing”), deep-sea fisheries, as well as the impact of the marine environment on the conservation of fish stocks.

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[5] See article 138 of the Rules of the Tribunal and article 21 of the Statute of the Tribunal.
[6] See articles 187 and 188, paragraphs 1 and 2(a) of the Convention.
[7] 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 Law of the Sea Convention established important provisions aimed at ensuring the conservation and optimum utilization of marine living resources. Of particular significance to the conservation and management of fisheries are the provisions contained in Part V of the Convention on the exclusive economic zone and Part VII on the high seas. The provisions of Part XII of the Convention on the protection and preservation of the marine environment are also relevant to fisheries, taking into account that fisheries have an effect on and are affected by the marine environment as a whole.

The Convention, anticipating fisheries-related disputes that could arise between States also established a number of procedures that may be instituted before the Tribunal. Indeed, the Tribunal has jurisdiction to entertain any fisheries-related disputes between States and any dispute related to the preservation and the protection of the marine environment.

In this regard, I would like to draw your attention to the simplified procedures at the Tribunal for dealing expeditiously with some fisheries-related disputes and disputes on the protection and preservation of the marine environment. 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. The swiftness of action has been a mark of the work of the Tribunal since its inception 13 years ago.

We have in our Rules two types of urgent proceedings: provisional measures under article 290, paragraph 5, of the Convention; and the prompt release of vessels and crews under article 292. They both fall under the compulsory jurisdiction of the Tribunal, that is to say it takes only one State to institute the case before the Tribunal. Thirteen of the cases that have been brought to the Tribunal were in fact cases[8] involving urgent proceedings.

Under article 290, paragraph 5, of the Law of the Sea Convention, the International Tribunal for the Law of the Sea may prescribe provisional measures to protect the marine environment against impending damages.

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, of the Convention, we are dealing with a different procedure, one

[8] *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 "Monte Confurco" 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 "Juno Trader" Case (Saint Vincent and the Grenadines* v. *Guinea-Bissau); The "Hoshinmaru" Case (Japan* v. *Russian Federation); The "Tomimaru" Case (Japan* v. *Russian Federation).*

that may, as a compulsory procedure, only be brought before the Tribunal. In accordance with this article if a dispute has been submitted to an arbitral tribunal, under Annex VII of the Convention, the International Tribunal for the Law of the Sea may be requested by one of the parties to the dispute - normally the applicant - to prescribe provisional measures to protect its rights or to prevent serious harm to the marine environment, even when the Tribunal is not entertaining the case on the merits.

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.

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*[9].

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 can be brought to the Tribunal, "[w]here the authorities of a State Party have detained a vessel flying the flag of another State Party for alleged violation of fisheries legislation 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". 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)).

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

[9] 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.

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.

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.[10]

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.

This is an example of the Convention's balanced approach. To protect the interest of the detaining State, this procedure assures the availability of sufficient financial security to ensure the payment of all penalties that may be imposable by the domestic court of the detaining State, whereas to protect the interest of the flag State and the ship-owner, the procedure facilitates the expeditious return of vessel and crew to service.

Apart from its jurisdiction to entertain contentious cases, the Tribunal, as a full court, may also entertain a request for an advisory opinion on any legal point, including those relating to fisheries or to the protection of the marine environment. Article 138 of our Rules states 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".

A bilateral or a multilateral agreement seems to be considered an international agreement for this purpose. Presumably such an international agreement may be

[10] 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.

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.

Advisory opinions are non-binding and can provide a flexible mechanism for those seeking to clarify points of law concerning the interpretation or application of the Convention. Advisory proceedings may indeed constitute a useful tool for States seeking to reconcile differences in the interpretation of the provisions of the Convention.

In relation to your particular field of interest, requests to the Tribunal for advisory opinions may be used to clarify a legal point on any fisheries-related issue, including on matters pertaining to the flag State responsibility regarding IUU fishing.

Mr President,

The need to protect marine living resources and to preserve the marine environment cannot be emphasized strongly enough. The significant role that the Convention already plays by ensuring that States have recourse to a binding dispute settlement mechanism highlights the importance that the Tribunal could have in the settlement of disputes relating to fisheries and to the protection and preservation of the marine environment.

In concluding, I would like to inform that the Registry of the Tribunal at the request of any State member of the OLDEPESCA will be glad to provide any information or clarify any issue related to our procedures or to any question on how to introduce a case to the Tribunal.

To assist countries to understand the procedures at the Tribunal, a guide to our procedures has been prepared and can be retrieved from our website.

Once again I thank you, Mr President, for the opportunity.

I would also like to thank the host country, Bolivia, for its hospitality. It is a great pleasure to be here in this beautiful country.

I thank you all for your attention.