Presentation given by
the President of the International Tribunal for the Law of the Sea
to the Meeting of the Friends of the Tribunal
at the
Permanent Mission of Germany to the United Nations
in New York
21 June 2007

The potential of the International Tribunal for the Law of the Sea in the management and conservation of marine living resources

I. Introductory remarks

It is well known that the current state of global fisheries is alarming. Experts agree that the causes of unsustainable fisheries are complex and due to many factors: illegal fishing; overfishing; inadequate or ineffectively implemented conservation and management measures; disregard for the interdependency of marine living resources; and environmental degradation, to mention but a few. The main factor may be illegal, unregulated and unreported fishing ("IUU fishing"). What has become clear to the international community in the last few years is that IUU fishing not only seriously undermines efforts to conserve and manage fishery resources but also has serious economic implications for some of the poorest countries in the world, which are dependent on fisheries for their food, livelihood and revenue, to quote from *High Seas Task Force (2006), Closing the Net: Stopping illegal fishing on the high seas*, *Final report of the Ministerially-led Task Force on IUU Fishing on the High Seas (page 16)*.

Customary international and treaty law have developed sophisticated legal regimes governing the utilization and management of maritime resources. At the heart of the oceans regimes are the fundamental freedoms of the high seas, which include freedom of navigation and freedom of fishing. All States have the freedoms of the high seas, which they exercise primarily through the vessels flying their flags. The management of living resources rests with organs and institutions of the international community. Since the adoption of the rudimentary rules in this respect by the United Nations Convention on the Law of the Sea ("the Convention"), several international instruments have been developed. Compared with the Convention, those instruments follow a different, more ecologically-oriented approach. In the exclusive economic zones, the management of marine living resources falls under the competence of the respective coastal State. However, when drawing up appropriate measures, coastal States do not have total freedom. In coastal and archipelagic waters, it is again the coastal States which manage marine resources. In these areas the influence of international law is limited. In general, it is safe to say that international law distributes the prescriptive and the executive functions for the management of marine living resources between coastal States, organs and institutions of the international

community and flag States. It is obvious that such a system, involving several actors, requires dispute-settlement mechanisms. Before I deal with the potential role of the International Tribunal for the Law of the Sea in this respect, let me briefly explain the distribution of competences as outlined by the Convention and later modified or supplemented by specific international agreements.

II. The sectoral approach to fishing

a) *In the territorial sea and archipelagic waters*

The territorial sea and archipelagic waters are part of the territory of a coastal State. As a rule, fishing activities in these two maritime zones fall under the exclusive jurisdiction of the coastal State. The Convention does not give coastal States specific guidance as to how to exercise their law-making jurisdiction over the management and conservation of living resources in these zones. Foreign vessels exercising the right of innocent passage in the territorial sea and through archipelagic waters are not allowed to engage in fishing activities. In addition, foreign ships exercising the right of innocent passage have to comply with the laws and regulations of the coastal State with respect to the conservation of the living resources of the sea and the prevention of infringement of fisheries laws and regulations. It may, however, be argued that, in exercising their sovereign rights as concerns marine living resources, coastal or archipelagic States have to take into account article 193 of the Convention. According to that provision, they have the sovereign right to exploit their natural resources in accordance with their environmental policies and their duty to protect and preserve the marine environment. This means that the respective international rules on the protection of the marine environment come into play. Those international rules were very basic when the Convention was adopted, now they are beginning to take on substance.

b) *In the exclusive economic zone*

The main competence for establishing legislative measures for the conservation and management of living resources in the exclusive economic zone falls on the coastal State. Paragraph 4 of article 62 of the Convention confirms the

primacy of the competence of the coastal State to regulate fishing in the exclusive economic zone for aspects such as fishing licences, fishing gear, fishing season, etc. The list contained in article 62, paragraph 4, is not exhaustive. However, when designing its policy on the management of living resources in the exclusive economic zone, a coastal State is not totally free, as article 61, paragraph 2, of the Convention clearly indicates. The coastal State must ensure that the living resources in the exclusive economic zone are not overexploited. There is also the obligation to maintain populations at or restore them to levels which can produce the maximum sustainable yield, taking account of the interdependence of stocks and any internationally recommended minimum standard.

Under article 73 of the Convention, the coastal State has the right to enforce fisheries and conservation regulations in the exclusive economic zone. Paragraph 1 of article 73 authorizes the coastal State to take such measures as may be necessary to ensure compliance with its laws and regulations, including boarding, inspection, arrest and judicial proceedings.

The coastal State's jurisdiction to legislate and enforce laws and regulations in the exclusive economic zone is a logical and perfect corollary to its exclusive sovereign rights to explore, exploit, manage and conserve living resources in that zone. These jurisdictional competences have to be respected by the flag State, which has to make every effort to ensure that coastal States implement them efficiently.

What is the role in this respect of flag States whose vessels fish in exclusive economic zones of other States? The Convention says nothing explicitly on this subject. Nevertheless, the role of the flag State is not as restricted as is it may seem. It is under the obligation to ensure that vessels flying its flag abide by the rules of the coastal State by exercising its competencies as a flag State. To uphold that obligation, two lines of argument may be invoked. The first is that international law, based at it is upon the sovereign equality of States and mutual respect, requires States to make every effort to ensure that no activities are carried out under their jurisdiction that might undermine activities which are performed by others covered by their jurisdiction and which are in conformity with international law. Secondly, as far as the protection of the marine environment is concerned, it may be argued that there

is a mutual obligation to reinforce each other's efforts to manage and conserve the marine environment. It may further be argued that every effort made to conserve and manage marine living resources – be it at national or international level – also serves common interests. This again would call for mutual respect and the enforcement of national measures.

In the case of straddling fish stocks, the Convention goes a step further. Article 63 of the Convention calls for cooperation between the flag State and the coastal State in the area adjacent to the exclusive economic zone, but not within the exclusive economic zone itself. This is in keeping with the principle of exclusivity of coastal States' rights and jurisdiction over living resources in the EEZ. Article 63 of the Convention has been criticised for not providing substantive guidance as to how the problems of regulating migratory stocks should be addressed.

Flag States whose nationals fish for highly migratory species that occur both within the exclusive economic zone and beyond have a duty to cooperate with the coastal State directly or through appropriate international organizations, to ensure that such species are preserved and used optimally throughout the region. If there is no regional organization, the flag State whose nationals harvest such species and the coastal State should cooperate to establish an organization in the region and participate in its work (Convention, article 64, paragraph 1).

c) On the high seas

Article 87 provides that States are free to fish on the high seas but, as article 116 of the Convention states, the freedom to fish is not absolute: it is subject to the following limitations:

- the State's treaty obligations;
- the rights, duties and interests of coastal States provided for, *inter alia*, in article 63, paragraphs 1 and 2 (for stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it) and articles 64 to 67 (highly migratory species, marine mammals, anadromous stocks, catadromous species); and
- the provisions of the Convention on the conservation and management

of the living resources of the high seas (articles 117 to 120).

The specific provisions of articles 63 and 64 to 67 ensure that the conservation and management of particular fish stocks in the exclusive economic zone and in areas of the high seas are harmonized.

The Convention provides the general obligation for all States to take measures to ensure that their nationals fishing on the high seas conserve the living resources thereof. Article 118 requires States to cooperate in the conservation and management of living resources in the high seas. The same article requires States whose nationals exploit identical or different living resources in the same area to enter into negotiations in order to take the measures necessary for the conservation of the living resources concerned. States should, as appropriate, cooperate to establish subregional or regional fisheries organization to that end. Article 119 shows that the principle upon which the conservation and management measures should be based is that of the best scientific evidence available.

Articles 117 to 120 underscore the obligation to cooperate of flag States or States whose nationals fish on the high seas. The duty imposed on flag States to cooperate with other States in order to conserve and manage fisheries in areas of the high seas confirms the law of nationality of ships and exclusive flag-State jurisdiction as contained in articles 91 and 94 of the Convention. Order on the oceans with respect to high seas fisheries is maintained principally through flag States.

III. Obligations of flag States under the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement)

Unlike the Convention, the Fish Stocks Agreement provides an elaborate list of measures which the flag State is obliged to take. The listing of the duties of the flag State does not mean that the Fish Stocks Agreement does not conform to or goes beyond the Convention. On the contrary, it confirms and strengthens the well-established law on nationality of ships and the principle of exclusive flag-State jurisdiction on the high seas as set forth in article 91 of the Convention and elaborated in article 94.

Part V of the Fish Stocks Agreement lists the duties of the flag State as regards the observation and implementation of rules in order to ensure that vessels flying its flag do not undermine conservation and management objectives in the high seas areas. Article 18, paragraph 2, of the Fish Stocks Agreement requires the flag State to authorize vessels flying its flag to fish on the high seas only when it can exercise its responsibilities in respect of such vessels effectively. Measures to control the vessels flying the flag of Contracting States include: i) granting fishing licences; ii) establishing regulations concerning the terms and conditions of the licence; iii) prohibiting unlicensed or irregularly licensed vessels from fishing; iv) ensuring that vessels flying its flag do not carry out unauthorized fishing in waters of national jurisdiction; v) establishing a national record of vessels authorized to fish on the high seas and granting access to that information to interested States; vi) requiring vessels to be marked appropriately; vii) establishing systems for determining the position of vessels and catches of targeted and non-targeted species; viii) requirements for verifying the catch through observer programmes and inspection schemes; and ix) controlling, monitoring and surveillance of fishing and related activities (Fish Stocks Agreement, article 18, paragraph 3).

Flag States principally remain responsible for enforcing compliance with conservation and management measures on the high seas. However, if the relevant fishing area is covered by a regional fisheries arrangement, the duly authorized inspector of a member State of that regional fisheries arrangement is authorized to board and inspect fishing vessels of another State to ensure compliance (Fish Stocks Agreement, article 21, paragraph 1). If there are clear grounds for believing that a vessel has engaged in fishing activities contrary to conservation and management measures for a particular high seas fishing area, the inspecting State should secure evidence and promptly notify the flag State of the alleged violation (Fish Stocks Agreement, article 21, paragraph 5).

IV. Obligations of flag States under the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement)

The Compliance Agreement confirms the law of nationality of ships and exclusive flag State jurisdiction, as contained in article 91 and elaborated in article 94 of the Convention, and the obligation of States to conserve and manage fisheries in areas of the high seas, as contained in article 118 of the Convention. Nevertheless, the value of the Compliance Agreement goes beyond the reiteration of long-established laws and principles. It is the first global instrument that details the duties of the flag State with respect to vessels fishing on the high seas in the context of conservation and management of fisheries. These duties concern not only ship registration and fishing licences but now also include the obligation to exchange and provide information. Fisheries experts have emphasized how critical appropriate information is for the implementation and enforcement of conservation and management measures.

Article III of the Compliance Agreement sets out the responsibility of the flag State concerning conservation and management measures in areas of the high seas. Each party is obliged to take the necessary steps to ensure that fishing vessels flying its flag do not engage in activities that undermine the effectiveness of international conservation and management measures. In particular, no party should allow any fishing vessel entitled to fly its flag to fish in the seas or to be used for fishing on the high seas without the authorization of that party (Compliance Agreement, article III, paragraph 2). When granting authorization to carry out fishing, the party must be satisfied that it is able to exercise effectively its responsibilities over the vessel pursuant to the Compliance Agreement (article III, paragraph 3). Parties also have a duty not to authorize fishing vessels previously registered in another territory that undermined international conservation and management measures to be used for fishing on the high seas unless certain conditions are met (Compliance Agreement, article III, paragraph 5,).

Aside from providing details of flag State responsibility over fishing vessels on the high seas, the Compliance Agreement also puts additional pressure on flag States in that it requires them to take enforcement measures. Such measures could

include, where appropriate, making the contravention of the provisions of the Agreement an offence under national legislation (Compliance Agreement, article III, paragraph 8). In addition, the Compliance Agreement requires that “[t]he sanctions applicable in respect of such contraventions shall be of sufficient gravity as to be effective in securing compliance with the requirements of this Agreement and to deprive offenders of the benefits accruing from their illegal activities. Such sanctions shall, for serious offences, include refusal, suspension or withdrawal of the authorization to fish on the high seas”.

The other duties of the flag State under the Compliance Agreement concern the free exchange of information about the high seas. The flag State is responsible for ensuring that the requirements for marking vessels and obtaining information from the vessel about fishing operations, catches and landings are carried out (Compliance Agreement, article III, paragraphs 6 and 7).

V. Obligations of flag States concerning the conservation and management of fisheries in regional fisheries instruments

The main objective of many regional fisheries instruments is the conservation of marine living resources in the convention area covered by the regional instrument. Several of those instruments mention specific duties which flag States have to fulfil in respect of conservation and management of marine living resources, but in most cases they are directed to coastal States.

VI. The potential role of third party dispute settlement, in particular the International Tribunal for the Law of the Sea

a) *Introduction*

I hope I have illustrated sufficiently clearly the complex interaction between coastal States, institutions of the international community and flag States which is necessary for the management of marine living resources. Evidently, in such a system, disputes may arise concerning:

- the interpretation or application of the respective rules of the international instruments referred to;

- the fulfilment of its obligations by a flag State; and

- the appropriateness of measures taken by the coastal State (legislative or enforcement measures).

I shall deal with these questions from three angles; namely, by briefly describing the functions of ITLOS in general; by elaborating on them on the basis of article 73 of the Convention; and, finally, by briefly explaining the decision of the Tribunal in the bluefin tuna cases.

According to article 288 of the Convention, the International Tribunal for the Law of the Sea has jurisdiction over disputes concerning the interpretation and application of the Convention, “disputes” meaning legal disputes. However, measures taken by a coastal State or a flag State – be it at legislative or executive level – concerning the management of living resources fall squarely under that provision. There is, however, a caveat to be taken into account as far as coastal States are concerned. Article 297, paragraph 3, of the Convention exempts certain disputes concerning the management of living resources from compulsory dispute settlement. If such an exemption is invoked, the dispute should be submitted to compulsory conciliation.

I must also to refer to article 290, paragraph 1, of the Convention. In a dispute involving the management of marine living resources, the International Tribunal for the Law of the Sea can prescribe provisional measures, which it has done. The orders issued in that respect are binding. I would like to draw your attention to one fact. According to article 290, paragraph 1, of the Convention, provisional measures may be prescribed not only to protect the rights of either party but also to prevent serious harm to the marine environment. The protection of a stock from total depletion would meet that criterion. However, it should not be assumed that disputes concerning the management of living resources will generally be directed against coastal States. It is equally possible to challenge before the Tribunal the activities of flag States – or rather the lack of measures ensuring that the rules concerning the protection and proper management of fishery resources are fully and efficiently

implemented. I hope I have made it clear that the responsibility for the proper management of living resources is a shared one; it places not only coastal States but also flag States and – more recently – port States under an obligation. In particular as far as IUU fishing is concerned, port States play an increasing role in the implementation of the rules governing the elimination of IUU fishing as their purpose is to prohibit the landing of fish whose origin is clearly documented and show that it was harvested legally. Dispute-settlement procedures may be the most appropriate means of preventing the development of ports where fishing inspections do not live up to the applicable international standards.

As already indicated, disputes concerning high seas fisheries may be submitted to the Tribunal on the basis of the Fish Stocks Agreement as, for disputes concerning its interpretation or application, that agreement incorporates the mechanism set out in Part XV of the Convention. That mechanism applies to disputes between States parties to the Fish Stocks Agreement, whether or not they are parties to the Law of the Sea Convention (article 30). In addition, the jurisdiction of the Tribunal may also cover disputes concerning subregional, regional or global fisheries agreements relating to straddling or highly migratory fish stocks, since the Fish Stocks Agreement makes the Part XV mechanism applicable to them. In addition, parties may have recourse to the Tribunal with respect to disputes relating to fisheries whenever these disputes concern the interpretation or application of the provisions of the Convention, subject to the limitations and exceptions contained therein. Furthermore, parties may, at any time, conclude a special agreement to submit a fisheries dispute to the Tribunal and parties have done so on one occasion, namely, the case concerning swordfish stocks [*Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*].

I should also like to draw your attention to article 31 of the Fish Stocks Agreement, which provides for the prescription of provisional measures. That provision is *lex specialis* with regard to article 290 of the Convention. It differs from the latter in two respects: according to article 31, paragraph 2, provisional measures may also be prescribed to prevent damage to the stocks in question as well as in situations referred to in article 7, paragraph 5, of the Agreement (compatibility of conservation and management measures) and in article 16, paragraph 2, thereof

(measures to be taken in high seas areas entirely surrounded by the exclusive economic zone of one State). It is safe to say that article 31 of the Fish Stocks Agreement is a further innovative development waiting to be used by States.

b) *Article 73 of the Convention*

I should like to be more specific and deal with the competences of the Tribunal as far as article 73 of the Convention is concerned.

That article deals with the measures a coastal State may take to 'ensure compliance with the laws and regulations adopted by it in conformity with this Convention'. Paragraph 3 states that violations of fisheries laws in the exclusive economic zone may not include imprisonment. However, there are other provisions of relevance in the Convention. Yet more have been established in specific international arrangements.

Whenever measures to enforce the national rules on the management and conservation of marine living resources in an exclusive economic zone are enforced against foreign vessels, they may be challenged before the Tribunal. In such a case, the adjudicative body in question may consider whether such laws were adopted in accordance with the Convention. The functions of the Tribunal in that respect are similar to those which national constitutional or supreme courts exercise at national level.

However, the Tribunal may be seized not only of cases where enforcement measures have been taken but also in those where there are doubts as to whether action or inaction on the part of coastal States or flag States is considered not to conform to the rules on the management and conservation of marine living resources. The Fish Stocks Agreement has broadened and detailed respective obligations and thus the potential of the Tribunal for the Law of the Sea.

c) *The* Southern Bluefin Tuna Cases

The *Southern Bluefin Tuna Cases* were submitted by New Zealand and Australia under article 290, paragraph 5, of the Convention. The applicants alleged that Japan had breached its obligations under articles 64 and 116 to 119 of the Convention in relation to the conservation and management of southern bluefin tuna

by failing to adopt the necessary conservation measures for its nationals fishing on the high seas, as required by article 119 of the Convention. I would like to emphasize that the cases confirm the point I made earlier, namely that flag States have an obligation to adopt conservation measures. The adoption of such measures requires not only that they be implemented and appropriate legislation be adopted but also that the necessary control and monitoring measures be taken. Such measures – or the lack thereof – can be challenged *in abstracto* and in specific situations, as in the bluefin tuna cases.

New Zealand and Australia further alleged that Japan had failed to cooperate with them in good faith and invoked article 64 of the Convention, which deals with fishing in exclusive economic zones. This was an interesting allegation since it assumed that specific obligations would ensue from the flag States' duty to cooperate with coastal States, as envisaged in article 64 of the Convention.

Let me indicate how the Tribunal dealt with these two allegations. It did not really decide on the first one. This may be due to several reasons, one of them being that Japan had undertaken to stop its experimental fishing for southern bluefin tuna. But the Tribunal made a pronouncement on the second allegation, stating that Japan had failed to comply with its obligation to cooperate under articles 64 and 118 of the Convention, which requires parties to cooperate in the conservation and management of marine living resources. I believe this decision was a good reflection of the growing need to conserve and manage marine living resources and the Tribunal's commitment to that cause.

Although the Tribunal's decision provoked the question as to whether in fact it had jurisdiction, the measures it prescribed prevailed. Recently, the Tribunal was informed that cooperation between States and entities fishing for bluefin tuna has intensified as a result of the Order of the Tribunal.

VII. Conclusion

To summarize briefly: the United Nations Convention on the Law of the Sea and subsequent international instruments provide detailed rules concerning the management and conservation of marine living resources. They oblige coastal States and the flag States of fishing vessels, in particular to cooperate to ensure that the

management and conservation measures the latter have taken are fully and efficiently implemented. The International Tribunal for the Law of the Sea has jurisdiction to ensure that this system of obligations is applied in accordance with the relevant legal instruments. The rules on provisional measures provide the Tribunal with the necessary tools to act expeditiously and prevent damage to fish stocks.