

Dili international conference: maritime boundaries and the Law of the Sea

Statement by the President of the International Tribunal for the Law of the Sea, H.E. Judge Vladimir Golitsyn,

Dili, Timor-Leste
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His Excellency, the Prime Minister of Timor-Leste, Dr. Rui Maria de Araújo,
His Excellency, the Minister of State, Coordinator of State Administration Affairs and
Justice, Mr. Dionísio Babo Soares,
Distinguished participants in the conference,
Ladies and Gentlemen,

I would like to express my gratitude to the organizers of this conference for inviting me and for affording me the opportunity to deliver a keynote speech about the role of international judicial bodies and, in particular, of the International Tribunal for the Law of the Sea, in strengthening the rule of law in international relations and these facilitating peaceful settlement of international disputes, including those related to maritime boundaries.

It is of particular pleasure for me to appear before you today because this year we are celebrating the 20th anniversary of the establishment of the Tribunal. On that occasion, a special event will be organized in New York in June during a Meeting of States Parties to the Law of the Sea Convention and a seminar and commemorative ceremony will be held on 5, 6 and 7 of October in Hamburg, Germany, at the seat of the Tribunal.

Although by historical standards the Tribunal is a relatively young judicial body, it has already developed, as I will demonstrate in my presentation, substantial jurisprudence in dealing with international disputes submitted to it.

I would like to start my presentation by a brief excursion to history by pointing out that the notion of an international rule of law was already in early accounts linked with the concept of judicial dispute settlement.

In the view of the German philosopher *Immanuel Kant*, lawlessness in relations between States leads to a constant threat of war that only allegiance to the rule of law can overcome. In his essay on *Perpetual Peace*, he also deplored the lack of international adjudication. “War”, he stated, “is ... an expedient adopted ... where no court of justice exists which could settle the matter in dispute”.¹

¹ Immanuel Kant, *Perpetual Peace. A Philosophical Essay*, 1795, translated by M. Campbell Smith, London: George Allen & Unwin Ltd., 3rd ed. 1917, Section II, Second Definitive Article, p. 136.

To the Russian public international lawyer *Fyodor Fyodorovich Martens*, a leading legal adviser to the Russian Tsar in the 19th century and one of the key figures of the 1899 Peace Conference in The Hague, legal regulation of international relations was absolutely essential. “If international life is necessary”, he wrote, “then the law governing it is equally so”.² Martens praised the establishment of the Permanent Court of Arbitration by the 1899 Conference as “the most equitable means of adjusting international difficulties”.³ However, he also noted with regret that a Russian proposal to make such dispute settlement obligatory for certain categories of disputes “was completely set aside by the Conference”.⁴

In modern times, calls for adherence to an international rule of law and for establishing an international judiciary have grown in frequency and become more widespread. In the 1940s, legal philosopher and public international lawyer *Hans Kelsen*, who advocated achieving “international peace through international law”⁵, found unsatisfactory “the fact that in case of disputes between States there exists no authority accepted generally and obligatorily as competent to settle international conflicts”.⁶ For *Kelsen* it was therefore indispensable to establish “an international court endowed with compulsory jurisdiction”.⁷

Kelsen was writing on the eve of the founding of the United Nations, whose Charter imposes a duty on Member States to settle their disputes by peaceful means.⁸ The Charter also established the International Court of Justice as the principal judicial organ of the United Nations.⁹ However, while there was “wide adherence to the importance of general compulsory jurisdiction consistent with the views of Hans Kelsen”¹⁰ prevailing at the time the Charter was drafted, no such compulsory jurisdiction was conferred on the Court.¹¹

The negotiations on the United Nations Convention on the Law of the Sea in the 1970s and early 1980s took place in a prevailing spirit of appreciation of international law and cooperation between States. The Convention is clearly influenced by the notion of an international rule of law. In its preamble, States Parties to the Convention declare that what they desire to establish through the Convention is nothing less than “a legal order for the seas and oceans”.

² Fyodor Fyodorovich Martens, “Le fondement du droit international”, *Revue de Droit International et de Législation Comparée*, 14 (1882), pp. 244-256, at p. 250. The original is in French and reads as follows: “[S]i la vie internationale est nécessaire, le droit qui la régit l’est tout autant”; translation by the Registry of the Tribunal.

³ Fyodor Fyodorovich Martens, “International Arbitration and the Peace Conference at The Hague”, *The North American Review* Vol 169, No. 516 (Nov. 1899), pp. 604-624, at pp. 615 and 605.

⁴ *Ibid.*, pp. 615/616.

⁵ Hans Kelsen, *Peace through Law*, The University of North Carolina Press: Chapel Hill, 1944, p. 9.

⁶ *Ibid.*, p. 13.

⁷ *Ibid.*, p. 14.

⁸ See articles 2, paragraph 3, and 33 of the Charter of the United Nations.

⁹ See article 92 of the Charter of the United Nations.

¹⁰ Mary Ellen O’Connell and Leonore Vanderzee, “The History of International Adjudication”, in: Cesare PR Romano / Karen J. Alter / Yuval Shuny (eds.), *The Oxford Handbook of International Adjudication*, Oxford: Oxford University Press, 2014, pp. 40-62, at p. 56.

¹¹ See article 36 of the Statute of the International Court of Justice.

The Convention also represents major steps forward with respect to the matters of dispute settlement and compulsory adjudication. It first echoes the duty imposed on States by the United Nations Charter to settle disputes by peaceful means.¹² In addition, the Convention obliges States Parties to submit disputes for which no such settlement has been reached to binding international adjudication or – in the words of the Convention – to “compulsory procedures entailing binding decisions”.¹³

States Parties may choose their preferred adjudicatory body¹⁴ – the International Tribunal for the Law of the Sea, the International Court of Justice or an arbitral tribunal – but the possibilities open to them for avoiding any such procedure are very limited. Of course, as you may know, the Convention allows States Parties to exclude certain categories of disputes from those procedures. Thus, under article 298, paragraph 1 (a), of the Convention, a State Party may make a declaration that it does not accept compulsory adjudication with regard to, among others, disputes relating to sea boundary delimitation or those involving historic bays or titles. While in such cases the road to adjudication may be blocked, States may still have the option to resort to another procedure which does not entail binding decisions but some degree of third party involvement in the possible of resolution of the dispute. This procedure is conciliation under Annex V of the Convention explicitly provided for in article 298, paragraph 1(a). The procedure could be initiated by any party to a dispute and does not require the consent of the other party. It has not been used until Timor-Leste initiated this procedure recently this year.

Ladies and Gentlemen,

Of the adjudicatory bodies referred to in the Convention, the International Tribunal for the Law of the Sea is the primary judicial body entrusted under the Convention to deal with disputes concerning its application and interpretation.

The Tribunal’s jurisdiction encompasses, in the first place, the adjudication of contentious cases between States Parties in disputes concerning the application or interpretation of the Convention. In addition, the Tribunal enjoys specific competencies with regard to provisional measures and the prompt release of arrested vessels and their crews. Moreover, both the full Tribunal and one of its specialized chambers, the Seabed Disputes Chamber, have authority to issue advisory opinions in specific cases.

In exercising its contentious jurisdiction, the Tribunal makes a major contribution to the peaceful settlement of international disputes – a function which has aptly been referred to as the “archetypical role” of international courts and tribunals.¹⁵ In fact,

¹² Article 279 of the Convention.

¹³ Article 286 and title of Part XV, Section 2, of the Convention.

¹⁴ Article 287 of the Convention.

¹⁵ Karen J. Alter, “The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review”, in: Jeffrey L. Dunoff / Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations. The State of the Art*, Cambridge: Cambridge University Press, 2013, pp. 345 - 370, at p. 354.

whether a judicial body can and does resolve disputes has been called a “classic ‘rule of law test’”.¹⁶

Let me cite one example from the practice of the Tribunal to illustrate its dispute settlement function. When the case concerning *Delimitation of the maritime boundary in the Bay of Bengal* between Bangladesh and Myanmar was referred to the Tribunal in December 2009, the two States could already look back on a history of negotiations between them on the boundary issue starting in 1974. Fourteen rounds of negotiations had taken place during this time and two “Agreed Minutes” had been signed but no agreement had been reached on the course of any part of the maritime boundary.¹⁷

Within less than two and a half years, the Tribunal delivered a judgment in March 2012 delimiting the maritime boundary in the territorial sea, the exclusive economic zone and the continental shelf within and beyond 200 nautical miles from the coast.

This judgment put an end to a long-standing dispute between the parties that had prevented them from benefitting fully from, in particular, their sovereign rights over the resources of the exclusive economic zone and the continental shelf. The Tribunal was able to achieve this in its decision thanks to its thorough assessment of the relevant facts, sound legal reasoning and application of a methodology for the delimitation of maritime boundaries which was consistent with the approach taken by other international judicial bodies.

While integrating its judgment into the framework developed in the international decisions, the Tribunal also made a number of contributions to the advancement of this jurisprudence.

Most remarkable in this respect is the Tribunal’s unprecedented decision to exercise jurisdiction in a dispute over the continental shelf beyond 200 nautical miles. I wish to highlight that the Tribunal made clear that it was not seeking to pre-determine its own approach or that of other courts and tribunals to future requests of this kind. The Tribunal explicitly stated that “the determination whether an international court or tribunal should exercise its jurisdiction depends on the procedural and substantive circumstances of each case”.¹⁸

The Tribunal did, however, specify that a decision not to exercise its jurisdiction “would not only [have] fail[ed] to resolve a long-standing dispute, but also would not [have] be[en] conducive to the efficient operation of the Convention”.¹⁹ In fact, the Tribunal came to the conclusion that, “in order to fulfil its responsibilities under Part XV, Section 2, of the Convention in the present case, it has an obligation to adjudicate the dispute and to delimit the continental shelf between the Parties

¹⁶ Rosalyn Higgins, “The Rule of Law: Some Sceptical Thoughts”, in: Rosalyn Higgins (ed.), *Themes and Theories. Selected Essays, Speeches, and Writings in International Law*, Vol. 2, Oxford: Oxford University Press, 2009, pp. 1330-1339, at p. 1332.

¹⁷ *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment*, ITLOS Reports 2012, p. 4, paras. 36-39; para. 98; para. 118.

¹⁸ *Ibid.*, at p. 101, para. 384.

¹⁹ *Ibid.*, at p. 102, para. 391.

beyond 200 [nautical miles]”.²⁰ At the same time, the Tribunal was of course mindful of the scope of its jurisdiction when it highlighted that “[s]uch delimitation is without prejudice to the establishment of the outer limits of the continental shelf in accordance with article 76, paragraph 8, of the Convention”.²¹

Delimiting the continental shelf beyond 200 nautical miles in the Bay of Bengal case also gave the Tribunal the opportunity to clarify other important issues arising in this context. For instance, in light of the disagreement between the parties over the meaning of the term “natural prolongation” in article 76, paragraph 1, of the Convention, the Tribunal embarked on an interpretation of what is a key element of the continental shelf definition given by the Convention. In the course of that examination the Tribunal stated that it found it “difficult to accept that natural prolongation ... constitutes a separate and independent criterion a coastal State must satisfy in order to be entitled to a continental shelf beyond 200 [nautical miles]”.²²

A further issue, and an unprecedented one, confronting the Tribunal resulted from the delimitation of the continental shelf beyond 200 nautical miles: the so-called “grey area”. As you know, this is an area in which, at one and the same time, one State (Myanmar here) exercises rights over its exclusive economic zone and the other (Bangladesh here) over its continental shelf beyond 200 nautical miles. With regard to this peculiar parallelism of entitlements, the Tribunal found that a “principle” is “reflected” in a number of provisions of the Convention²³ pursuant to which “[i]n such a situation ... each coastal State must exercise its rights and perform its duties with due regard to the rights and duties of the other”.²⁴

Thus, in the *Bay of Bengal* case, the Tribunal arrived at an outcome that was equally convincing to the two parties, both of which welcomed the judgment. By virtue of the binding force of the decision, they were able to embark on the exploitation, to their mutual benefit, of the resources over which their respective sovereign rights were now finally established.

Ladies and Gentlemen,

The number of cases involving maritime delimitation brought before international courts and tribunals is testament to the importance of the topic in modern law of the sea. The extension of coastal States’ rights under the United Nations Convention on the Law of the Sea has resulted in a growing number of overlapping claims by adjacent and opposite States and it is common knowledge that numerous disputes of this kind remain unsettled.

International dispute settlement offers a viable mechanism for States to settle maritime delimitation differences and achieve stable maritime boundaries. Stable and reliable boundaries are an essential prerequisite if States are to profit fully from

²⁰ Ibid., at p. 103, para. 394.

²¹ Ibid., at p. 103, para. 394.

²² Ibid., at p. 113, para. 435.

²³ Articles 56, 58, 78 and 79.

²⁴ *Delimitation of the maritime boundary in the Bay of Bengal (op.cit.)*, at p. 121, para. 475.

the richness of the resources located in the areas in which they exercise sovereign rights.

International courts and tribunals have developed a rich and comprehensive jurisprudence on maritime delimitation over recent decades. In its judgment in the Bay of Bengal case, the Tribunal highlighted the achievements of this jurisprudence, which (– and I quote –) “has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of methods employed to that end” (– end of quote–).²⁵

I would like to emphasize, of course, that this jurisprudence should not be seen as a straitjacket immobilizing courts and tribunals in future cases; while the applicable law and pertinent jurisprudence will constitute the basis on which decisions will have to be reached in maritime delimitation cases, each case will always be unique and will have to be considered in light of its particular circumstances.²⁶

Ladies and Gentlemen,

A further delimitation case has, recently been submitted to a Special Chamber of the Tribunal by Ghana and Côte d’Ivoire in a dispute concerning delimitation of their maritime boundary in the Atlantic Ocean. The proceedings on the merits of the case are pending and I will therefore refrain from any comment on them.

However, the Special Chamber has already decided about a request for the prescription of provisional measures submitted to it in this case. Côte d’Ivoire had requested the Special Chamber to prescribe provisional measures requiring Ghana to inter alia “take all steps to suspend all ongoing oil exploration and exploitation operations in the disputed area”.²⁷ Ghana requested the Special Chamber to deny all of Côte d’Ivoire’s requests for provisional measures.²⁸

The Special Chamber, in its Order delivered on 25 April 2015, gave clarification on important issues relating to the application and interpretation of the Convention, such as the extent to which exploration and exploitation activities in disputed maritime areas create a risk that irreparable prejudice may be caused to the rights of the parties in dispute.

The Special Chamber considered that “there is a risk of irreparable prejudice where, in particular, activities result in significant and permanent modification of the physical character of the area in dispute and where such modification cannot be fully compensated by financial reparations”.²⁹ It also held that “whatever its nature, any compensation awarded would never be able to restore the status quo ante in respect

²⁵ *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, at p. 64, para. 226.

²⁶ See *ibid.*, at p. 67, para. 235 (on the question which delimitation method should be followed).

²⁷ *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana/Côte d’Ivoire), Request for the prescription of provisional measures*, Order of the Special Chamber of 25 April 2015, paragraph 25.

²⁸ *Ibid.*, para. 26.

²⁹ *Ibid.*, para. 89.

of the seabed and subsoil”.³⁰ The Special Chamber therefore found that “the exploration and exploitation activities, as planned by Ghana, may cause irreparable prejudice to the sovereign and exclusive rights invoked by Côte d’Ivoire in the continental shelf and superjacent waters of the disputed area, before a decision on the merits is given by [it], and that the risk of such prejudice is imminent”.³¹

The Special Chamber noted that it may prescribe measures different in whole or in part from those requested.³² In this regard, it stated that “the suspension of ongoing activities conducted by Ghana in respect of which drilling has already taken place would entail the risk of considerable financial loss to Ghana and its concessionaires and could also pose a serious danger to the marine environment”.³³

The Special Chamber therefore considered that an order suspending all exploration or exploitation activities conducted by or on behalf of Ghana in the disputed area, including activities in respect of which drilling had already taken place, would cause prejudice to the rights claimed by Ghana and create an undue burden on it and that such an order could also cause harm to the marine environment.³⁴ The Special Chamber found it appropriate, in order to preserve the rights of Côte d’Ivoire, to order Ghana to take all necessary steps to ensure that no new drilling either by Ghana or under its control took place in the disputed area.³⁵

As regards provisional measures, let me add that the Tribunal may prescribe such measures not only in cases of which it is seised on the merits.³⁶ It may also do so in cases which are submitted to arbitration. In these cases, pending constitution of the arbitral tribunal, the Tribunal may order provisional measures if it considers that *prima facie* the arbitral tribunal would have jurisdiction and that the urgency of the situation so requires.³⁷ It is also worth noting that the Tribunal can prescribe such measures to preserve the respective rights of the parties to the dispute as well as to prevent serious harm to the marine environment.

In fact, the Tribunal has ordered provisional measures in several cases of this kind. In taking these decisions the Tribunal not only contributed to settling highly contentious matters between the parties concerned but it has also provided a number of important clarifications regarding the obligations of States under the Convention.³⁸

Ladies and Gentlemen,

With regard to the exploitation of natural resources in areas where the interests of two or more States meet, let me highlight another issue that has not yet been the

³⁰ *Ibid.*, para. 90.

³¹ *Ibid.*, para. 96.

³² *Ibid.*, para. 97.

³³ *Ibid.*, para. 99.

³⁴ *Ibid.*, paras. 100 and 101.

³⁵ *Ibid.*, para. 102.

³⁶ See article 290, paragraph 1, of the Convention.

³⁷ See article 290, paragraph 5, of the Convention.

³⁸ I suggest deletion of the part highlighted in grey.

object of international adjudication but which seems to me to be of growing importance. It is the issue of the management of transboundary resources shared by adjacent or opposite States. With an increasing number of exploration and exploitation activities taking place on the ocean floor, it is only a matter of time before an ever-increasing number of oil and gas fields straddling maritime boundaries will be discovered.

As I mentioned, this issue has yet to be addressed in any delimitation judgment by an international court or tribunal. Jurisprudence has so far relied almost entirely on factors of coastal geography³⁹ and considerations of proportionality. Also, States parties to such disputes have not made any specific requests in this regard. However, the question arises whether the requirement of achieving an equitable solution is really satisfied by this approach to delimitation, in which the future use of transboundary resources is not given due consideration.

In respect of how to treat transboundary resources, there is considerable State practice to be found in bilateral treaties. Practice is not uniform, of course, and I will not venture into an in-depth analysis of it here. What emerges from several such treaties is the idea of unitization, i.e. the joint development of transboundary deposits as a unit.⁴⁰ More generally, treaties regularly stress the importance of cooperation between the States concerned, including information-sharing. Another recurrent element of such agreements is the laying down of procedures for the parties to follow in case transboundary deposits are discovered.⁴¹

It remains to be seen to what extent international judicial bodies will be confronted with disputes involving the management of transboundary resources. When agreeing to submit a boundary dispute to international adjudication, States may find it necessary to request the court or tribunal to take into account the existence of transboundary resources.

It will be for that judicial body to decide whether and to what extent its decision on the course of the boundary line needs to be informed by the location of such resource deposits so that an equitable solution can be achieved. I wish to emphasize that a decision of that kind can only be made with respect to each individual case, taking into account all its particularities.

³⁹ Cf. Y. Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation*, Oxford/Portland 2006, p. 323/324.

⁴⁰ *Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean* (2010), Annex II; *Treaty between the Republic of Trinidad and Tobago and Grenada on Delimitation of Marine and Submarine Areas* (2010), Article VII; *Agreement between the Government of the State of Israel and the Government of the Republic of Cyprus on the delimitation of the exclusive economic zone* (2010), Article 2; *Unitisation Agreement for the exploitation and development of hydrocarbon reservoirs of the Loran-Manatee field that extends across the delimitation line between the Republic of Trinidad and Tobago and the Bolivarian Republic of Venezuela* (2010).

⁴¹ Such clauses may, more generally, provide for the parties to engage in further negotiations (*Treaty between the Republic of Trinidad and Tobago and Grenada on Delimitation of Marine and Submarine Areas* (2010), Article VII) or may establish more detailed procedures to be followed (*Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean* (2010), Annex II).

Also, achieving an equitable solution in such cases does not necessarily require that a provisional, initially determined boundary line be adjusted. Parties may equally request the international court or tribunal to decide how they should arrange for the exploitation of shared resources straddling the boundary line. Inspiration may be taken from the bilateral treaty practice to which I previously referred. If requested by the parties to the case, a judicial body may, again if the specifics of the case so warrant, give indications on how the parties should organize the necessary cooperation between them. This could include unitization, if appropriate.

Ladies and Gentlemen,

Beyond settling concrete international disputes, the Tribunal in its jurisprudence also plays an important role with regard to the progressive development of international law. This is of particular relevance in the context of the United Nations Convention on the Law of the Sea, which, while being a comprehensive legal instrument, is also deliberately left open for further development. It contains numerous references to general international law and to “generally accepted international rules and standards”; and these require further elaboration.

The Tribunal has indeed already made significant contributions to the Convention’s further development, in particular when rendering advisory opinions.

To illustrate this, let me start with a subject which undoubtedly counts among those receiving the most attention in the current international law of the sea, namely the exploration and exploitation of the resources of the deep seabed beyond the limits of national jurisdiction.

These areas of the world’s oceans may contain deposits of key strategic metals and minerals such as copper, cobalt, nickel and manganese. While the demand for these continues to grow, including to meet the needs of the green economy, land resources are increasingly stretched, causing the economic, social and environmental costs of mining to rise.

Current global supply of these metals and minerals is distributed unevenly around the world. For example: the Democratic Republic of the Congo controls 47% of global cobalt reserves and Chile 30% of global copper reserves; South Africa possesses 80% of global manganese reserves, while China controls 95% of the global market in rare earth elements.

Deposits of these resources in the deep seabed by far exceed those on land. The economic situation will therefore change drastically once exploitation of them commences.

States and private-sector mining interests are keen to explore the potential of marine minerals both within and beyond national jurisdiction. Thanks to technological advances and a stable regulatory regime, both in national jurisdictions and in the international Area, deep seabed mining is an increasingly attractive option for investment in mineral development.

Twenty-three private companies and public entities, including from China, India, Japan and Russia, have thus far reserved areas under the Convention's regime for the exploitation of the deep seabed. Depending on the development of market prices for the minerals concerned, exploitation of the deep seabed may actually start in the next 2 to 3 years.

The Convention, which calls this part of the sea-floor simply "the Area", declares that "[t]he Area and its resources are the common heritage of mankind".⁴² It also establishes a system for the exploration and exploitation of these resources and requires that "[a]ctivities in the Area shall be organized, carried out and controlled by" the International Seabed Authority.⁴³ Under this system, any natural or juridical person wishing to carry out such activities must, among other requirements, be "sponsored" by a State.

In May 2010, the Council of the International Seabed Authority submitted a request for an advisory opinion⁴⁴ to the Seabed Disputes Chamber of the Tribunal.

Let me explain that the Seabed Disputes Chamber has a special status under the Convention and within the Tribunal. In particular, the Chamber, while being an integral part of the Tribunal, has its own exclusive jurisdiction, which is separate from that of the Tribunal. This jurisdiction is not limited to the Chamber's advisory function. It also comprises contentious cases, namely those involving disputes "with respect to activities in the Area".⁴⁵

I might add that, before being elected President of the Tribunal, I served for three years as the President of the Seabed Disputes Chamber.

In its request for an advisory opinion, the Council of the Authority requested the Chamber to answer several questions relating to the legal responsibilities and obligations of sponsoring States, the extent of their liability for any failure to comply with the applicable law and the necessary and appropriate measures that sponsoring States must take to fulfil their responsibilities.⁴⁶

The background to this request from the Authority was that two Small Island States from the Pacific Ocean, namely Nauru and Tonga, had sponsored applications by two private companies to the Authority for approval of plans of work for exploration for polymetallic nodules in the Area.⁴⁷ Nauru had pointed out to the Authority that it was "crucial that guidance be provided" on the relevant rules of the Convention's regime on the Area pertaining to responsibility and liability, "so that developing States can assess whether it is within their capabilities to effectively mitigate such

⁴² Article 136 of the Convention.

⁴³ Article 153, paragraph 1, of the Convention.

⁴⁴ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, para. 1.

⁴⁵ See articles 187 and 191 of the Convention.

⁴⁶ *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, para. 1.

⁴⁷ *Ibid.*, para. 4.

risks and in turn make an informed decision on whether or not to participate in activities in the Area”.⁴⁸

In its Advisory Opinion of 1 February 2011, the Chamber provided important clarification on a number of substantive matters that are crucial for the implementation of the Convention’s regime on deep seabed mining. It held that the liability of sponsoring States and that of contractors sponsored by them exist in parallel.⁴⁹ A sponsoring State’s liability arises from its failure to carry out its own responsibilities and there is no residual liability.⁵⁰

In addition, the Chamber clarified the significance of key legal concepts such as the “responsibility to ensure” and the “duty of due diligence”⁵¹ and strengthened the status of the “precautionary approach” in international law.⁵² These developments are relevant not only to the law of the sea but to international law in general and international environmental law in particular.

The advisory opinion of the Seabed Disputes Chambers produced almost immediate effects. It opened the door for a number of developing States to sponsor plans of work submitted to the International Seabed Authority for the exploration for resources of the Area. Those developing States include several small island States, namely Nauru, Tonga, Kiribati and the Cook Islands.⁵³

Ladies and Gentlemen,

With regard to the Area, let me briefly come back to the issue of transboundary resources. This time, I am, however, not referring to resource deposits straddling the maritime boundary of two States but those lying across the limit between national jurisdiction and the Area and which are a potential source of conflicts in the future.

Possible problems arising from such a situation were already contemplated by the drafters of the Convention. Article 142 provides that “[a]ctivities in the Area, with respect to resource deposits in the Area which lie across limits of national jurisdiction, shall be conducted with due regard to the rights and legitimate interests of any coastal State across whose jurisdiction such deposits lie”. The same article also provides that “[c]onsultations, including a system of prior notification, shall be maintained with the State concerned, with a view to avoiding infringement of such rights and interests”. It further states that “[i]n cases where activities in the Area may result in the exploitation of resources lying within national jurisdiction, the prior consent of the coastal State concerned shall be required.”

The issue is complex with regard to dispute settlement. Of course, a dispute may arise in the context of managing such transboundary resources. In principle, such a

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, paras. 201 and 204.

⁵⁰ *Ibid.*, para. 110.

⁵¹ *Ibid.*, paras. 110 and 117.

⁵² *Ibid.*, para. 135.

⁵³ N.B: Other developing States having sponsored applications after the advisory opinion were China, Singapore and Brazil.

dispute may be subject to characterization as one about the interpretation or application of the Convention. But would it be a dispute between States Parties, as required for the applicability of Part XV of the Convention? On one side of the dispute would clearly stand a State, namely the coastal State. But what entity would be empowered to act on the other side and to defend in court the interests of mankind in its common heritage?

It is apparent that a number of questions arise in this context. You will understand that I can only mention those questions here; further analysis and debate will be required before answers can be found.

Ladies and Gentlemen,

Let me return briefly to return to the issue of advisory opinions. Such an opinion can not only be requested from the Seabed Disputes Chamber but also from the full Tribunal if an international agreement related to the purposes of the Convention provides for the submission of such a request. In March 2013, the Sub-Regional Fisheries Commission, a West African regional fisheries management organization, submitted such a request for an advisory opinion.⁵⁴ As a result, the Tribunal was faced with another very important and current issue: illegal, unreported and unregulated fishing, also known as IUU fishing.

The problem of IUU fishing is so widely acknowledged and discussed that I think it unnecessary to go into more detail as to the devastating consequences of this practice, which contributes to overfishing and massively endangers the sustainable development, and even survival, of fish stocks.

The Sub-Regional Fisheries Commission – or by its abbreviation: the SRFC – submitted a number of questions to the Tribunal; these related to among other things the obligations and liability of flag States with regard to IUU fishing activities as well as the liability of international organizations in this context.⁵⁵

Time does not permit a detailed view of the Tribunal’s advisory opinion, which was delivered on 2 April 2015. Nevertheless, I wish to highlight one of the Tribunal’s main conclusions, namely that a “flag State is under the ‘due diligence obligation’ to take all necessary measures to ensure compliance and to prevent IUU fishing by vessels flying its flag”⁵⁶ and that the flag State can be held liable if it fails “to comply with its ‘due diligence’ obligations concerning IUU fishing activities”.⁵⁷

The Tribunal further emphasized that flag States are obliged, for instance, to “take necessary measures, including those of enforcement”⁵⁸ and that, in flag States’ domestic legislation, “[s]anctions applicable to involvement in IUU fishing activities

⁵⁴ See article 138 of the Rules of the Tribunal. See also *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, *Advisory Opinion*, 2 April 2015, paras. 37-69.

⁵⁵ *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, *Advisory Opinion*, 2 April 2015, para. 2.

⁵⁶ *Ibid.*, para. 130.

⁵⁷ *Ibid.*, para. 146.

⁵⁸ *Ibid.*, para. 134.

must be sufficient to deter violations and deprive offenders of the benefits accruing from their IUU fishing activities”.⁵⁹

Ladies and Gentlemen,

This brings me to the end of my presentation. I have sought to demonstrate how the judicial practice of the International Tribunal for the Law of the Sea contributes to the peaceful settlement of disputes and, at the same time, is the source of significant contributions to the progressive development of international law.

I wish to thank the organizers of this conference again for their initiative and I wish us all, the organizers, the panellists and you, the audience, a fruitful and enriching conference. Thank you for your attention.

⁵⁹ *Ibid.*, para. 138.