



ITLOS PRESIDENT ADDRESSES THE 100TH SESSION OF THE IMO LEGAL COMMITTEE

During the 100th session of the IMO Legal Committee, Judge Shunji Yanai (President of the International Tribunal for the Law of the Sea (ITLOS)) delivered an address which focused on the relationship between the Tribunal and IMO.

IMLI also maintains strong institutional links with ITLOS. Judge Shunji Yanai (President of ITLOS), Judge Helmut Tuerk (Judge of ITLOS), Judge Anthony Lucky (Judge of ITLOS), Judge Markiyon Kulyk (Judge of ITLOS), and Professor Philippe Gautier (Registrar of ITLOS) have visited IMLI on several occasions and have addressed its generations of lawyers. In recognition of the contribution of the Tribunal to the development, interpretation and implementation of international maritime law, in 2008, the Institute conferred on the Tribunal the “Award for Meritorious Contribution towards the Development, Interpretation and Implementation of International Maritime Law”.

Acknowledging the valuable comments of Judge Shunji Yanai, the Institute would like to reproduce below the speech he delivered at the 100th session of the IMO Legal Committee.

“Mr. Secretary-General of the International Maritime Organization,
Distinguished delegates,
Ladies and gentlemen,

It gives me great pleasure to join you in this magnificent celebration of the 100th session of the Legal Committee of the International Maritime Organization. I am very honoured to be here today, for, among other reasons, this is the first time a president of the International Tribunal for the Law of the Sea has delivered a statement before IMO. On behalf of the Tribunal, I would like to thank the Secretary-General, Mr. Koji Sekimizu, for his kind invitation to participate in this event, which provides an excellent opportunity to strengthen cooperation between the two institutions.

I have chosen to speak today about the relationship between the Tribunal and IMO. I will approach the topic from the perspective of the 1982 United Nations Convention on the Law of the Sea (hereinafter “the Convention” or the “Law of the Sea Convention”) and its dispute settlement procedures, giving particular attention to the Tribunal’s role and IMO’s under the Convention and IMO treaties.



Mr. Koji Sekimizu (IMO Secretary-General and Judge Shunji Yanai (President of the International Tribunal for the Law of the Sea)

The International Tribunal for the Law of the Sea, with its seat in Hamburg, Germany, is an international judicial body created by the Convention to adjudicate disputes and render advisory opinions concerning the law of the sea. It is composed of 21 judges elected by the States Parties to the Convention from among experts in this field of law. Judges hold office for a term of nine years and may be re-elected. In view of the large number of judges composing the Tribunal, representation of the principal legal systems of the world and equitable geographical distribution can be assured in the Tribunal as a whole.

The Tribunal was established under the Convention to play a central role in the peaceful settlement of disputes relating to the law of the sea. Its jurisdiction comprises all disputes and all applications submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement conferring jurisdiction on the Tribunal (Statute, article 21). The categories of disputes that may be submitted to the Tribunal are thus manifold.

First of all, the Tribunal has jurisdiction over any dispute concerning the interpretation or application of the Convention. Regarded as the “constitution for the oceans”, the Convention establishes an international legal order governing all ocean space, its uses and resources. With reference to each of the various maritime zones, the Convention allocates rights and obligations to States, including coastal, flag and port States. These rights and obligations concern not only the traditional uses of the seas, such as navigation and fishing, but also modern ones, including deep-seabed mining, marine scientific research and transfer of marine technology. Notwithstanding the wide scope of ocean matters falling within the jurisdiction of the Tribunal under the Convention, I will focus on those aspects that have a particular bearing on IMO’s work.

According to its mandate, IMO is the United Nations specialized agency responsible for developing regulations and standards relating to the safety of shipping and to ship-based pollution. IMO is also empowered to deal with the associated administrative and legal matters (see IMO convention, article 1(a)). In this regard, it may be noted that the Law of the Sea Convention acknowledges the role of IMO – and I quote – “in the field of navigation, including pollution from vessels and by dumping” – end of quote (see article 2, paragraph 2, of annex VIII to the Convention). IMO’s role under the Convention may also be inferred from a number of provisions therein dealing with safety at sea and pollution from vessels and by dumping. In these provisions, the term “competent international organization” when used in connection with the adoption of “generally accepted international rules and standards” is widely understood to refer to IMO and those rules and standards are understood to be those developed by IMO. This means that the Convention aims at ensuring implementation of these provisions by applying the relevant safety and anti-pollution standards developed by IMO, for instance, those contained in SOLAS and MARPOL. From the point of view of dispute settlement, such matters relate to the purposes of the Convention and fall within the Tribunal’s jurisdiction *ratione materiae*. This shows the extent to which the Tribunal and IMO may interact.

For its part, IMO has produced a substantial body of work in its specific role under the Convention. An IMO study lists some 70 articles of the Convention deemed relevant to the instruments and work of the Organization (see for instance LEG/MISC.7 of 19 January 2012). To be noted is that the Tribunal has had the opportunity to contribute to the interpretation and application of a number of these provisions in its jurisprudence. In this regard, I should like to draw your attention to the Tribunal’s Judgment in the *M/V SAIGA (No.2)* Case.

In that case, the Tribunal was called upon to consider issues having a bearing on the shipping community, such as the legality of a vessel’s detention, a ship’s nationality and registration, the genuineness of the link between a vessel and its flag State, and reparation for damage suffered by the flag State, the vessel and persons involved in the operation of the vessel. In particular, on the

question of whether a flag State was entitled to bring a claim on behalf of non-nationals, the Tribunal had this to say in its Judgment:

- I quote

“the Convention considers a ship as a unit [...] Thus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.”

(paragraph 106 of the Judgment)

- end of quote

Since its establishment, the Tribunal has dealt with nine cases instituted by or on behalf of flag States under article 292 of the Convention, which concerns the prompt release of detained vessels and crews. Allow me to describe this procedure in a nutshell. Where a vessel has been detained by a State for an alleged violation of its fisheries or anti-pollution laws, the flag State of the detained vessel may request the Tribunal to order the release of the vessel and its crew upon the posting of a reasonable bond or other financial security, provided, however, that certain procedural requirements are met. An innovative aspect of this procedure is that the application for release may be made either by the flag State itself or by an entity acting on its behalf. Under this latter possibility, a ship owner, for instance, if duly authorized by the flag State, may appear before the Tribunal.



*Judge Shunji Yanai and distinguished personalities who addressed the 100th session of the IMO
Legal Committee*

The Tribunal has elaborated a consistent jurisprudence on issues arising in prompt release cases. In particular, this is true for the question of the reasonableness of a bond, which the Tribunal has assessed on the basis of relevant factors (i.e., the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and the cargo seized, and the amount and form of the bond required by the detaining State).

To date, all prompt release cases have been submitted to the Tribunal on the basis of article 73 of the Convention, namely, for alleged violations of fishing laws in the exclusive economic zone, while none has been submitted for pollution offences. In this connection, it may be noted that articles 220, paragraph 7, and 226 of the Convention relate to the submission of an application for prompt release upon the posting of a bond in cases involving pollution of the marine environment. The implementation of paragraph 7 of article 220 requires the establishment of appropriate procedures - and I quote - “either through the competent international organizations or as otherwise agreed, whereby compliance with requirements for bonding or other appropriate financial security has been assured” – end of quote. Article 226 refers to violations of international rules and standards for the protection and preservation of the marine environment (subparagraph 1(b)), and to international rules and standards relating to seaworthiness of vessels (subparagraph 1(c)). Once more, these provisions reflect the necessary link between the Convention and IMO instruments.

I would like to add that if a vessel is detained on other grounds, not involving fisheries or pollution offences, the flag State has the option of seeking the release of the vessel as a provisional measure under article 290, paragraphs 1 or 5, of the Convention. Recently, on 15 December 2012, the Tribunal issued an order in the “*ARA Libertad*” Case prescribing the release of the Argentine frigate *ARA Libertad*, together with its Commander and crew, which had been detained in Ghana at the Port of Tema.

I will now turn to the next title of jurisdiction which has been of relevance to IMO.

The Tribunal’s jurisdiction extends to disputes concerning the interpretation or application of an international agreement related to the purposes of the Convention. IMO has already availed itself of this by including clauses relating to the jurisdiction of the Tribunal in some IMO instruments. As noted in the IMO study which I previously mentioned, such clauses were inserted in the 1996 Protocol to the London Dumping Convention and the 2007 Nairobi International Convention on the Removal of Wrecks. In this regard, IMO may encourage States to include the dispute

settlement procedures provided for in Part XV of the Convention, including recourse to the Tribunal, in future international agreements adopted under IMO's auspices.

Another means for conferring jurisdiction on the Tribunal which may be relevant to the work of IMO stems from article 22 of the Tribunal's Statute. Under this provision, the parties to an IMO instrument already in force and relating to the purposes of the Convention may confer jurisdiction on the Tribunal concerning the interpretation or application of the instrument. An agreement conferring jurisdiction may be concluded to that effect if all parties to the IMO treaty in question so agree.

The possibility for parties to an IMO agreement to have recourse to the Tribunal's advisory function may also be envisaged. Pursuant to article 138 of the Tribunal's Rules, the Tribunal may entertain a request for an advisory opinion if recourse to such option is specifically provided for in an international agreement. Such international agreement must relate to the purposes of the Convention. Only a few days ago, the Tribunal received its first request for an advisory opinion under article 138, which was submitted by the Sub-Regional Fisheries Commission (SRFC).

In this connection, I would like to mention that, in 2011, the Seabed Disputes Chamber of the Tribunal rendered an advisory opinion on Responsibilities and Obligations of States sponsoring Persons and Entities with Respect to Activities in the Area. In its Advisory Opinion, the Chamber analyzed such terms as "responsibility", "liability" and "damage" when examining a number of Convention provisions, including article 235. Concerning this article, the Chamber regarded the obligation to ensure availability of recourse for compensation in respect of damage caused by pollution as a direct obligation of the States concerned. The Chamber also drew attention to the possibility for the International Seabed Authority to consider the establishment of a trust fund to compensate for the damage not covered. These matters, which are covered by article 235 of the Convention, are familiar to the distinguished delegates as they are relevant to the IMO Legal Committee's work.

As can be seen from the foregoing, there are a number of possible areas of cooperation between the Tribunal and IMO. The Tribunal can assist IMO in settling disputes concerning the interpretation or application of the Convention and IMO agreements or can give advisory opinions. IMO, for its part, can encourage States to include clauses conferring jurisdiction on the Tribunal in future conventions. IMO can also give the Tribunal technical advice on such matters as navigational safety and the prevention and control of pollution from ships and by dumping.

Cooperation has also taken place at an administrative level. Since 2003, an administrative arrangement on cooperation has been in place between the Registry of the Tribunal and the IMO Secretariat. On this basis, inter alia, publications are regularly exchanged between the two organizations. In March 2013, the Tribunal welcomed Assistant Secretary-General Ms. Rosalie

Balkin at the Maritime Talks, jointly held by the International Foundation for the Law of the Sea and the Tribunal in its main courtroom. She was the first high-ranking IMO officer ever to visit the Tribunal to give first-hand information on recent activities of IMO and the challenges it is facing. I seize this opportunity to extend an invitation to you, Mr. Secretary-General, to visit the Tribunal and to foster further development in the cooperation between our two institutions.

I would like to add that IMO has extended important cooperation to the Tribunal's Nippon capacity-building and training programme on dispute settlement under the Convention, and I commend IMO for having enabled our Nippon fellows to visit its headquarters annually over the last six years.

To conclude, I would like to underline that the Tribunal and IMO occupy a wide range of common ground on law-of-the-sea and ocean matters. Although the roles of the Tribunal and IMO are clearly different, the activities of the institutions are complementary in ensuring the coherent and efficient implementation of the Convention and the IMO agreements relating to its purposes.”

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