Symposium on
"The Jurisprudence of the International Tribunal for the Law of the Sea: Assessment and Prospects"

International Tribunal for the Law of the Sea (ITLOS), Hamburg

29 and 30 September 2006

What influence does the jurisprudence of the International Tribunal for the Law of the Sea (ITLOS) have on public international law? Which cases have been brought before the Tribunal in the past? What will be the future role of the Tribunal? These questions among others have been assessed by the Symposium on *"The Jurisprudence of the International Tribunal for the Law of the Sea: Assessments and Prospects"* organized on the occasion of the 10th anniversary of the Tribunal on 29 and 30 September 2006. The symposium was held at the premises of the International Tribunal for the Law of the Sea (ITLOS) in Hamburg by the International Foundation for the Law of the Sea (IFLOS) in co-operation with Bucerius Law School Hamburg, the Law of the Sea and Maritime Law Institute of the University of Hamburg and the Federal Maritime and Hydrographic Agency Hamburg/Rostock.

The symposium attracted a distinguished audience of 180 scholars and practitioners from more than 53 countries and was generously sponsored by the Edmund Siemers-Foundation, the Zeit-Foundation Ebelin and Gerd Bucerius, the law firms "Dabelstein & Passehl" and "Ahlers & Vogel" and the German Shipowners' Association (VDR).

The various guests were welcomed by Professor *Doris König*, Chair of IFLOS, Bucerius Law School Hamburg, who gave a comprehensive insight into the work of IFLOS. Alongside the further development of the law of the sea the foundation is strongly engaged in enhancing developing countries' opportunities to access the Tribunal. To pursuit this objective, the foundation convened – in close co-operation with ITLOS – a workshop in Dakar, Senegal. Two more workshops will take place in Jamaica and Singapore in 2007. In addition, IFLOS intends to establish a Summer Academy on the seat of the Tribunal in Hamburg. Already in summer 2007, 30 to 40 participants will be provided with interdisciplinary courses and given the opportunity to receive a certificate in the international law of the sea and maritime law.

The first presentation by Judge *Rüdiger Wolfrum*, President of ITLOS, tended to sensitise the audience for the importance of international tribunals in international dispute settlement. In opposition to customary beliefs, first and foremost such disputes were brought to international tribunals that could not be reconciled by way of diplomacy. These cases were often very controversial and therefore a settlement body with high legitimacy was essential.

Judge *Wolfrum* argued that only international courts and tribunals can provide a sufficient level of legitimacy. And, as a scholar, he would appreciate a higher workload for international tribunals because merely their jurisprudence contributes to the development of international public law.

Sir Michael Wood, Senior Fellow of the Lauterpacht Centre for International Law, University of Cambridge, and former Legal Advisor to the UK Foreign and Commonwealth Office, examined the relationship between the Tribunal and General International Law. When interpreting or applying the provisions of the United Nations Convention on the Law of the Sea, the Tribunal is inevitably called upon to apply, from time to time, rules of general international law. *Sir Michael Wood* examined in which way the tribunal, whose jurisdiction is largely confined to the interpretation and application of a particular treaty (UNCLOS), might have to deal with general international law. With reference to the Convention and the Tribunal's case-law he illustrated several different ways how the Convention opens itself to general international law. There are provisions with direct or merely interpretive references and "gaps" have to be filled by way of applying analogy or secondary rules of international law. He discussed as well the Tribunal's *Kompetenz-Kompetenz* and concluded by assessing the Tribunal's contribution to the law and procedure of dispute settlement.

At the beginning of the second day of the Symposium, Professor *Alan Boyle*, University of Edinburgh School of Law, gave an overview of the environmental jurisprudence of the International Tribunal for the Law of the Sea. Initially, Prof. *Boyle* underlined the growing importance of international environmental law. He placed emphasis on the increasing number of cases in this area and pointed out that a modern account of international environmental law would have to deal with nearly twenty cases which have been decided since 1996, three of them being decisions of the Tribunal. Prof. *Boyle* went on to examine four special issues that have arisen in the ITLOS cases: the precautionary principle, environmental impact assessment, environmental co-operation and jurisdiction over marine environmental disputes. In particular, Prof. *Boyle* pointed out that ITLOS has not taken a narrow view of what is meant by 'the marine environment' when applying Art. 290 of UNCLOS. According to Prof. *Boyle*, the Tribunal has demonstrated its willingness to interpret and apply Part XII of the Convention consistently with the contemporary state of international environmental law, while avoiding particularly radical outcomes. Prof. *Boyle* concluded by criticising the existing system of compulsory settlement of disputes concerning the marine environment, which he called a "minefield of jurisdictional complexity".

The jurisprudence of the International Tribunal for the Law of the Sea was also examined by Professor *Robin Churchill*, University of Dundee School of Law, who focussed on disputes concerning the substantive fisheries provisions of UNCLOS and disputes under a number of treaties concerned exclusively with fisheries. He argued that the degree to which the International Tribunal for the Law of the Sea will be able to develop a significant jurisprudence relating to the substantive fisheries provisions of UNCLOS and special fisheries treaties depends both on the number and kind of cases that are referred to the Tribunal. Prof. *Churchill* highlighted the problem of jurisdiction pointed out by Prof. *Boyle* and stressed the fact that the absence of a compulsory jurisdiction of ITLOS significantly limited the number of cases brought before the Tribunal. This would also explain why the jurisprudence of the Tribunal relating to fishery matters was (at present) relatively modest, even though matters dealing with fishing formed the principal subject matter of no less than ten of the thirteen cases contained in the Tribunal's List of Cases. Prof. *Churchill* went on to identify Article 297 (3) UNCLOS as a substantial obstacle to the consideration of fisheries matters in the exclusive economic zone (EEZ) by the Tribunal. As a result, no substantive dispute involving fisheries in the EEZ had come before the Tribunal. Prof. *Churchill* furthermore analysed the two cases which have been brought before the Tribunal involving fishing for transboundary stocks on the high seas: the *Southern Bluefin Tuna* case and the *Swordfish* case. Prof. Churchill closed his speech remarking that many of the fisheries provisions of UNCLOS were open-textured and broadly drawn, and therefore in need of interpretation and clarification. In his view, this could be done by courts and tribunals. In practice, however, a good deal of interpretation, clarification and amplification has already occurred through treaties (such as the UN Fish Stocks Agreement and the FAO Compliance Agreement), soft law instruments (such as the Code of Conduct for Responsible Fisheries), and the practice of States – a trend that was likely to continue.

In the afternoon, the former president of ITLOS, Judge *Thomas A. Mensah*, analysed the Tribunal's jurisprudence relating to the prompt release of vessels. Judge Mensah stated that certain provisions of UNCLOS empowered a coastal State to arrest and detain a foreign ship if there was evidence that the ship has violated applicable national or international laws. Since Article 292 UNCLOS gives ITLOS compulsory and residual jurisdiction to deal with applications for the prompt release of ships and their crew when they are detained in a foreign port, ITLOS has dealt with several applications under Article 292 and in the process established a comprehensive jurisprudence. Judge *Mensah* gave an overview concerning not only the basis of jurisdiction to deal with an application and the circumstances in which an application is admissible, but also evaluated the nature and contents of the orders issued by ITLOS as well as the criteria determining the reasonableness of a bond to be posted for the

release. Finally, Judge *Mensah* examined the relationship of the orders of ITLOS to the merits of the arrest and detention.

Professor *Francisco Orrego Vicuña*, University of Chile School of Law and Judge ad-hoc at the International Tribunal for the Law of the Sea, reviewed the Tribunal's contribution to the settlement of some major issues concerning provisional measures in international law. First of all, Prof. *Orrego Vicuña* commented on the binding legal nature of provisional measures, a question that in his opinion has to be settled with respect to the wording of Article 290 of UNCLOS. Furthermore, Prof. *Orrego Vicuña* examined *inter alia* the duration and expiration of provisional measures, analysed the scope of the measures and commented on the Tribunal's cautious approach towards an emerging precautionary principle, stressing that issues of substance such as the precautionary principle should only be addressed in connection with the merits. Moreover, Prof. *Orrego Vicuña's* presentation dealt with aspects of the preservation of the marine environment by means of provisional measures as well as complex problems arising in connection with the interplay of different treaties governing provisional measures. Prof. *Orrego Vicuña* concluded with an admonition to take the distinction between provisional measures and the merits of a case seriously for the reason that otherwise the Tribunal would act outside of the powers conferred to it by Art. 290 of UNCLOS.

After all these distinguished reports, Judge *Wolfrum* recapitulated the results of the Symposium and expressed his hope that States will increasingly make use of the Tribunal's capabilities concerning the effective and expeditious settlement of disputes.

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