The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994 – Comment

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As was to be expected, a paper by Tullio Treves leaves little occasion for comment.

Tullio has presented the Tribunal's status and scope of jurisdiction exhaustively and with intriguing insights, some of which at least to me were entirely new. His first chapter on status, dealing with the road to establishment, prompts me to begin my comment by relating how this Tribunal and its establishment progressed, as seen from the host-country Germany. Then a few remarks will follow regarding the one or the other point on jurisdiction, and finally I shall conclude with a more general observation on the Convention's entire dispute settlement system.

What then was the German side to the establishment of the Tribunal? Its success probably has more fathers and mothers, but I personally heard the idea of putting in a German candidature for the seat of the Tribunal for the first time from Uwe Jenisch, who in those days was the representative of the north German coastal *Länder* in our delegation. Of course the idea to submit such a candidature was an attractive one. But it is true there were already Portugal with Lisbon, Yugoslavia with Split/Dubrovnik and the UK with Bermuda in the field. So some people, of

course, were afraid of defeat. It was, however, felt that Germany earlier in this century had not exactly been known for the peacefulness of its method of dispute settlement. And for that reason, if not for any other, it would now be very fitting to put a major effort into that field. Thus an attractive site, a piece of real estate in Hamburg on its well-known Elbchaussee and the necessary finances, which in those earlier days were less scarce than today, had to be found. The UK did not press its Bermuda candidature, but Portugal and above all Yugoslavia were formidable competitors. Yugoslavia even remained so *post festum*. The German delegation canvassed extensively and thoroughly, and we were very fortunate in making the race in the fall of 1981 when Dr. Dreher, who is now living in retirement in nearby Freiburg, was head of our delegation.

Linked to this award was the understanding of the conference that States which had obtained the seat of an institution, i.e. Jamaica and Germany, should be parties to the Convention at the entry into force of the Convention and should remain so. This linkage was very annoying. But it has put us on the tips of our toes and we have been, I think, among the more active observers in the Preparatory Commission. We were observers because we did not sign the Convention, a decision which I personally regret. It would have been preferable in my view to follow the example of the majority of our European partners, but given the special relationship to the UK and others, we followed their example. In the conference the members of our delegation, above all Prof. Jaenicke, our legal adviser, but also Dr. Platzöder, had been active in negotiating the dispute settlement provisions. The same was true for the GDR delegation on behalf of which Prof. Wünsche even partly conducted the negotiations. The Preparatory Commission then elected as chairman of Special Commission Four, which was in charge of the Tribunal, the head of the East German delegation, Dr. Görner, who after reunification became special adviser in our delegation. In this special commission most of the instruments needed for the work of the Tribunal were negotiated and drafted. One item on the agenda of Special Commission Four was also to provide for contingency planning in case the prospective host country at the entry into force of the Convention would not have been present. And Dr. Görner then had consultations, among others with us, on when to start elaborating this contingency planning. Fortunately, the need for responding to that contingency did not arise.

With the reunification we in reunified Germany were offered the chance to take over the signatory position of the GDR. As a matter of state succession this would have been a very interesting construction

which we have examined and which I personally think would have been possible, since with that signature a membership in a body was given, and I still think that that would have been a viable choice. But again this did not materialize and in the end was probably not necessary.

Within the German delegation it is the Ministry of Justice which is in charge of preparing the German contribution to the Tribunal, and in the Ministry of Justice Mrs. Möller-Goddard, who is here present. It was in the final phase before the entry into force of the Convention that she and the rest of the delegation worked hard to arrive at an early establishment of the Tribunal. Tullio has referred in his paper rather kindly to some of the delegation's ideas in this context. Given the need for a wide representation on the bench and for sufficient financial means, we had to settle for a date in mid-1996 when more industrial States will have become States Parties electing judges and paying for them. The legal validity of this deferring decision by the first meeting of the States Parties has been doubted. I do not share these doubts. Particularly in view of the fact that this decision was taken unanimously. Let me add a footnote as far as the expenses of the Tribunal are concerned. They are not borne by the States Parties alone, which is interesting particularly for industrial States Parties like Italy and Germany, but also by the Authority. And I refer here to Art. 19 of Annex VI of the Convention. But, indeed, this additional source of income has not yet been tapped. It may for the foreseeable future not flow.

Let me now turn to Prof. Treves' remarks on the scope of the Tribunal's jurisdiction. I find interesting Tullio's sharpening of the definition of compulsory and optional jurisdiction of the Tribunal. It is in any case an agreement that is needed, he says, and only the point in time of the agreement varies. If the agreement has been reached before the dispute arises, the jurisdiction is compulsory, if later then it is optional. This is one of the definitions which I think we could later on possibly discuss a little bit more. As far as advisory opinions are concerned, Tullio has mentioned and, I think quite rightly, regretted that institutions and organizations outside the Convention have not been given the right to ask for them. I would add that inside the Convention there is a third institution which so far has not had much publicity which is or will be the Commission on the Limits of the Continental Shelf, and I, for one, could have imagined that they would have been given the right to ask for an advisory opinion, which they have not. Then Tullio has picked up a problem which so far, unless somebody else enlightens me, I think, together with him, has originated through sloppy drafting. And that is

the question arising out of Art. 290 para. 5, where provisional measures may be requested pending the constitution of an arbitral tribunal. If the efforts to get them fail, the provision says that within two weeks from the date of the request for provisional measures the international tribunal may act. The question arises as to how the delay of these two weeks begins. I follow Tullio in saying that probably, to be on the safe side, it is necessary to submit the request to the Tribunal.

Then I just want to pick up on a short conversation which I had last night with Prof. Lagoni about Art. 292, which is another very interesting provision. There, in para. 2, it is said that in the context of the prompt release of vessels and crews the application for release may be made "only by or on behalf of the flag-state of the vessel". I belong to those who believe that the term "on behalf of" would allow legislation enabling let's say the captain, or possibly even the corporation of Hamburgian shipowners or whatever, to act on behalf of the flag-state, the flag-state in this instant being Germany. But here some legislation will be needed and I am confident that we will have that sort of legislation before the need arises.

This brings me already to my final and concluding remarks. We have heard or read, particularly in connection with the interesting paper of Dr. Oellers-Frahm on Arbitration, some rather cautious statements as to the prospects of the Convention's dispute settlement provisions in general, and of the role of the Tribunal in particular. Prof. Treves in his paper leaves open the delicate choice between the Tribunal and the Hague Court, as seems to be wise in the presence of Judges Fleischhauer and Koroma. Dr. Oellers-Frahm sees, also in maritime cases, the Tribunal clearly second to the Hague Court. She, moreover, does not foresee a considerable role in the settlement of disputes either for arbitration according to Annex VII or for special arbitration according to Annex VIII for reasons which she sets out in her paper. Tullio, however, stresses more, and I think he is right here again, the residuary role of arbitration. Without going into detail I refer here to Art. 286 and paras. 3 and 4 of Art. 287.

I personally am more optimistic as far as the role of the dispute settlement system of the Convention is concerned. In former instances, for example in the 1958 instruments on the Law of the Sea, there was an additional separate optional protocol on dispute settlement. This allowed interested States Parties to pick up one of the Law of the Sea conventions, to ratify it and to leave aside the dispute settlement Protocol. In our Convention of 1982, including the Implementation Agreement in Part

XI, the peaceful settlement of dispute system is an integrated constituent part of the Convention. Nearly a quarter of the Convention's articles are devoted to dispute settlement. It was a paper written by Prof. Sohn which drew my attention to this amazing proportion. These provisions leave open one or the other emergency exit. But on the whole, States Parties to the Convention and Implementation Agreement are well fenced in. In what I consider to be the vast majority of possible disputes, States Parties can no longer escape a third-party decision. They can, it is true, still refuse to obey. I would hope, however, that that will not be a frequent reaction. The settlement of dispute provisions of the Convention and the Implementation Agreement are therefore, in my view, literally the Magna Charta of those parties to a dispute which for lack of extra-juridical means or due to unwillingness to employ them have to rely on juridical means. I trust they will make use of them.