INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

STATEMENT BY

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PRESIDENT OF THE
INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ON

AGENDA ITEM 71 (a)

AT

THE PLENARY OF THE SIXTY-FIRST SESSION OF THE
UNITED NATIONS GENERAL ASSEMBLY

8 DECEMBER 2006

Madam Vice-President,

1. It is an honour for me to address this sixty-first session of the General Assembly on the occasion of its annual examination of the item “Oceans and the law of the sea”. I would like to extend to the President of the General Assembly, my personal congratulations, and those of the Tribunal, on her election as President of the General Assembly.

2. At the outset, allow me to welcome Belarus, Niue and Montenegro which have become States Parties to the Convention in 2006, bringing the total number of parties to 152. As is the practice, I would like to report to the General Assembly on the developments which have taken place with respect to the Tribunal since the last meeting of the General Assembly. I will then make general comments on the work and the jurisdiction of the Tribunal.

3. With regard to organizational matters, on 19 September 2006, the Tribunal re-elected Mr. Philippe Gautier as Registrar of the Tribunal. The Registrar was elected by secret ballot among candidates nominated by the judges of the Tribunal. He will serve as Registrar for a term of five years.

4. The Tribunal held this year its Twenty-first and Twenty-second Sessions. These sessions were devoted essentially to legal matters having a bearing on the judicial work of the Tribunal and to other organizational and administrative matters. An important issue, which is currently under consideration by the Tribunal, concerns the procedure for the posting of a bond in prompt release proceedings. The Tribunal is examining the possibility of adopting guidelines for implementing article 114 of the Rules, which gives parties the option to post a bond or other financial security with the Tribunal, if they so agree. Guidance on the implementation of article 114 of the Rules may assist the parties in prompt release proceedings and facilitate the implementation of the Tribunal’s decision. These guidelines should render the prompt release procedure more effective.

5. Further, the Tribunal gave consideration to a question of great importance, namely, the competence of the Tribunal in maritime delimitation cases. Article 288 of the Convention confers jurisdiction on the Tribunal, as well as the ICJ or an arbitral tribunal, to deal with any dispute concerning the interpretation or application of the Convention. It is evident that disputes relating to maritime boundaries are – as a general rule – to be considered disputes concerning the interpretation or application of the Convention.

6. The general rule that all maritime delimitation disputes are subject to compulsory binding settlement is subject to an exception, as a State may exclude certain maritime delimitation disputes from compulsory procedures by the making of a declaration, in accordance with article 298, paragraph 1 (a) of the Convention. The disputes that may be excluded concern the delimitation of the territorial sea (article 15), the exclusive economic zone (article 74) and the continental shelf (article 83) as well as those involving historic bays or titles. If a State has made such a declaration, it will be bound to refer the sea-boundary dispute to compulsory conciliation if the conditions for conciliation provided for in article 298, paragraph 1 (a) are met. Such conditions are peculiar to the compulsory conciliation procedure; they do not apply to adjudication by the Tribunal, the ICJ or arbitration. This is of particular relevance to the condition regarding “mixed” delimitation cases, namely, cases in which a maritime dispute involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory, since article 298, paragraph 1 (a) excludes “mixed” cases from the submission to compulsory conciliation. This leads me to the particular question as to whether “mixed” delimitation disputes are subject to the compulsory jurisdiction of the Tribunal or any other court or tribunal referred to in article 287 of the Convention.

7. I should clearly state that the competence of the Tribunal, or any other court or tribunal, to deal with the main claim that maritime delimitation be effected according to articles 15, 74 or 83 includes the associated question of delimitation over land or

islands. This approach is in line with the principle of effectiveness and enables the adjudicative body in question to truly fulfill its function. Maritime boundaries cannot be determined in isolation without reference to territory. Moreover, several provisions of the Convention deal with issues of sovereignty and the inter-relation between land and sea. Accordingly, issues of sovereignty or other rights over continental or insular land territory, which are closely linked or ancillary to maritime delimitation, concern the interpretation or application of the Convention and therefore fall within its scope. This may be further evidenced by a reading *a contrario* of article 298, paragraph 1 (a), namely, in the absence of a declaration under article 298, paragraph 1(a), a maritime delimitation dispute including the necessarily concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory is subject to the compulsory jurisdiction of the Tribunal, or any other court or tribunal.

8. I would like to add that the parties to a dispute on issues on maritime delimitation may at any time agree to submit the dispute to the Tribunal through the notification of a special agreement, even when they have chosen other compulsory means under article 287 of the Convention. Through a special agreement the parties can also overcome any limitations or exceptions to compulsory jurisdiction. As regards “mixed” delimitation cases, the area to be delimited will normally be determined in the special agreement between the parties and nothing prevents them from submitting to the Tribunal any maritime delimitation case involving issues regarding land boundaries or cases involving disputed sovereignty over islands.

9. Regarding the judicial work of the Tribunal, I would like to mention that the Special Chamber of the Tribunal formed to deal with a dispute between Chile and the European Community concerning the conservation and sustainable exploitation of swordfish stocks met on 28 and 29 December 2005 to consider the request of the parties for a further postponement of the time-limits in the proceedings before it. On the basis of the information provided by the parties, the Special Chamber, by its Order of 29 December 2005, extended the time-limit for making preliminary objections until 1 January 2008 while maintaining the rights of the parties to revive the proceedings at

any time. It may be noted that the Special Chamber stated in its Order that “it is in the interests of the proper administration of international justice that proceedings in the case be conducted without unnecessary delay” (paragraph 14) and considered that “it should facilitate so far as is compatible with the United Nations Convention on the Law of the Sea, the Statute and the Rules, direct and friendly settlement of the dispute between the Parties” (paragraph 15). It further observed that “the Parties have to provide adequate justification for seeking an extension of any time-limit” (paragraph 16). This case is still pending on the docket.

10. The system of *ad hoc* special chambers, which was used for the first time by Chile and the European Community, is a flexible mechanism that combines the advantages of a permanent court with those of an arbitral body. The parties have control over the chamber’s composition, as they may choose any of the 21 judges who are to sit in the chamber and may also appoint judges *ad hoc* if the chamber does not include a member of the nationality of the parties. Under the Statute, a judgment given by any of the chambers is considered as rendered by the Tribunal. A further advantage is that the parties have at their disposal the Rules of the Tribunal, which allow the case to be processed swiftly. The parties have a certain degree of flexibility in that they may propose modifications or additions to the Rules. Interested delegations will find detailed information on the Tribunal’s proceedings and its special chambers in the *Guide to proceedings before the Tribunal,* copies of which are available here. The Guide will be available next year in the six official languages of the United Nations.

Madam Vice-President,

11. This year, the International Tribunal for the Law of the Sea celebrated its tenth anniversary. The ceremony to mark the occasion was attended by the President of the International Court of Justice, the Legal Counsel of the United Nations, the Secretary-General of the International Seabed Authority, representatives of the Federal Government of Germany, the Senate of the Free and Hanseatic City of Hamburg as well as legal advisors and other representatives from more than 80 States. The

celebration continued with a symposium on “The jurisprudence of the Tribunal: Assessment and Prospects”, organized by the International Foundation for the Law of the Sea.

12. In its first decade of existence, the Tribunal has established itself as an effective body to settle law of the sea disputes in accordance with the rule of law. As stated by the Legal Counsel of the United Nations at the anniversary ceremony, the Tribunal has established a jurisprudence which has already contributed to the development of international law of the sea in a notable way and plays an important role in the pacific settlement of disputes relating to the application of the Convention. The celebration of the tenth anniversary was also a perfect opportunity to strengthen the relationship between the International Court of Justice and the Tribunal. On that occasion, Judge Rosalyn Higgins, the President of the International Court of Justice, declared that (and I quote) “within a decade, the Tribunal has pronounced interesting law, built a reputation for its efficient and speedy management of cases and shown innovative use of information technology” (end of quote). Judge Higgins also emphasized that the mutual respect prevailing between the two judicial institutions helped them in achieving their (and I quote) “common goal of a mutually reinforcing corpus of international law in the settlement of international legal disputes.” (end of quote)

13. In these ten years, there has been excellent cooperation with the United Nations and the Division for Ocean Affairs and the Law of the Sea in several aspects, in particular, with regard to the participation of the Tribunal at the Meeting of States Parties. Annually, the States Parties meet in New York to consider matters relating to the Tribunal, the International Seabed Authority, the Commission on the Limits of the Continental Shelf and other important matters. Given the interest of the States Parties for the Tribunal, we would certainly welcome that the States Parties could meet in Hamburg in the future to come.

14. Through the delivery of decisions in 13 cases, the Tribunal has been able to assist States in solving a variety of issues including prompt release of vessels and their

crews, protection and preservation of the marine environment, fisheries, the commissioning of a nuclear facility and the movement of radioactive materials, reclamation activities, freedom of navigation, nationality of claims, use of force in law enforcement activities, hot pursuit and the question of the genuine link between a vessel and its flag State. The Tribunal has also been successful in applying efficient and cost-effective procedures, which have allowed it to render its decisions within remarkably short periods. In this regard, I should like to thank the sponsors of the draft resolution for noting the Tribunal's continued and significant contribution to the settlement of disputes by peaceful means in accordance with Part XV of the Convention and for underlining the important role and authority of the Tribunal concerning the interpretation or application of the Convention and the Agreement relating to the Implementation of Part XI of the Convention.

15. It is however evident that the potential of the Tribunal has not been fully utilized. Possible litigants could take more advantage of the judges' skills and cost-effective procedures before the Tribunal. At the Tribunal's anniversary, I had the opportunity to state that "[n]ow that the Tribunal has established itself as an active and effective body in deciding law of the sea disputes it is an opportune moment for States to consider the choices open to them in the matter of dispute settlement mechanisms." Allow me to reiterate that States may avail themselves, at any time, of the possibility offered by article 287 of the Convention to make written declarations nominating the Tribunal as the preferred forum for the settlement of their disputes concerning the Convention. This is particularly relevant since of the current 152 States Parties to the Convention, just 39 States have made declarations under 287 – and only 22 of which have accepted the compulsory jurisdiction of the Tribunal. It should not be overlooked that, in the absence of a declaration, parties are deemed to have accepted arbitration. With regard to the choice of procedure, arbitration has proven to be *de facto* the general rule, while selecting the Tribunal or the ICJ remains the exception. It is doubtful whether this development was anticipated when the Convention was adopted or whether arbitration was rather meant to be the exception. It is therefore to be hoped that an increasing number of States will make declarations in accordance with article 287, as stated in the

draft resolution. I very much appreciate the promotion the Tribunal is receiving in this respect by the General Assembly.

16. A further alternative to confer jurisdiction on the Tribunal is through the insertion of jurisdictional clauses in international agreements related to the law of the sea. Eight such multilateral agreements have already been concluded, the most well-known being the Straddling Fish Stocks Agreement of 1995. In general, these agreements set out procedures for the settlement of disputes that adopt the mechanisms provided for in Part XV of the Convention *mutatis mutandis* and conferring therewith jurisdiction on the Tribunal. It might however be useful that future international agreements should indicate the default forum in the absence of declarations or agreement on the procedure for settlement. The Tribunal being an international maritime court is perfectly placed to play that role. These jurisdictional clauses are of advantage to the parties of international agreements since they provide certainty as regards the adjudication of potential disputes and ensure that the agreement is implemented effectively. Settlement of law of the sea disputes through the permanent judicial bodies referred to in Part XV is also essential for maintaining the integrity of the Convention.

17. I am therefore grateful to the sponsors of the draft resolution for having noted that States parties to an international agreement related to the purposes of the Convention may submit to the Tribunal any dispute concerning the interpretation or application of that agreement which is submitted to it in accordance therewith. You may wish to note that the Convention on the Removal of Wrecks currently under consideration at IMO has incorporated a settlement of dispute clause that refers to the dispute settlement system established by the Convention on the Law of the Sea. I would like to invite States to consider making use of the option of inserting similar jurisdictional clauses in future agreements. In my view, initiatives that are meant to preserve the integrity and the universal character of the Convention should be encouraged as they ultimately contribute to maintain the unity of international law.

18. This leads me to the recurring question of the potential fragmentation of

international law, an issue that arose out of the process of international judicial decentralization. As you know, the process of establishing specialized judicial bodies like the International Tribunal for the Law of the Sea was initiated by the international community in order to respond to the increasing expansion and specialization of international law. Such specialized judicial bodies are positive developments since they fulfill complementary needs and have therefore a role to play in maintaining the coherence of international law.

19. The Tribunal, in interpreting and applying the Convention, is required to apply rules of international law and has striven therewith to preserve the integrity of general international law. In its jurisprudence, the Tribunal has dealt with questions such as exhaustion of local remedies, use of force in the arrest of ships, or reparation and liability for damage, in conformity with general international law. The Tribunal also makes efforts to keep abreast of the judicial developments that take place in other international jurisdictions, in particular, the International Court of Justice.

20. I mentioned earlier that the harmonization of the Convention may be preserved through the adjudication of maritime disputes by the Tribunal. In fact, only permanent courts can ensure consistency in the dispute resolution and the development of a coherent corpus of jurisprudence. In my view, the possible problems of coherence in international law may be controlled by coordinating the efforts of international organizations and international courts or tribunals. Therefore, I suggested at the Informal Meeting of Legal Advisors that the Secretary General of the United Nations could organize a meeting with the Presidents of all international courts and the Chairman of the International Law Commission in order to exchange views on ways to improve the unity of international law. I assume that such a meeting will take place in 2007, which I consider as an important step to consolidate the international jurisprudence.

Madam Vice-President,

21. I also wish to report that the Tribunal is organizing a series of workshops on the settlement of law of the sea-related disputes in different regions of the world, in cooperation with the Korea International Cooperation Agency of the Republic of Korea (KOICA) and the International Foundation for the Law of the Sea. The purpose of the workshops is to provide government experts working in the maritime field with insight into the procedures for the settlement of disputes contained in Part XV of the Convention, with special attention given to the jurisdiction of the Tribunal and the procedures for bringing cases before it.

22. At the invitation of the Government of the Republic of Senegal, the first regional workshop took place in Dakar, from 31 October to 2 November 2006. The workshop was attended by representatives of different ministries of thirteen African States who discussed the topic of “The role of the International Tribunal for the Law of the Sea in the settlement of disputes relating to the law of the sea in Wets Africa”. I would like to sincerely thank the Government of the Republic of Senegal for its support in organizing the workshop. Further regional workshops will be held by the Tribunal in Jamaica and Singapore in 2007. We are very grateful to the Governments of Jamaica and Singapore for their kind cooperation.

23. I am also glad to report that the International Foundation for the Law of the Sea will inaugurate a “Summer Academy” in the summer 2007. The academy will take place at the Tribunal’s premises over a period of four weeks, with courses in law of the sea and maritime law and will be open to students, young governmental officials and professionals from all over the world with expertise in law of the sea matters. I take this opportunity to sincerely thank the International Foundation for its continuous support to the activities and goals of the Tribunal.

24. Since I spoke to you in November last year, eight States have acceded to the Agreement on the Privileges and Immunities of the Tribunal, which brings the total to 29. I should like to mention, in this regard, to General Assembly resolution 60/30, in which the Assembly called upon States that have not done so to consider ratifying or

acceding to the Agreement. This recommendation has also been included in this year's draft resolution.

25. Madam Vice-President, I also wish to place on record my great appreciation for the excellent cooperation extended to the Tribunal by the German authorities. In this respect, we are looking forward to the entry into force of the Headquarters Agreement between the Tribunal and the Federal Republic of Germany, which was signed on 14 December 2004.

26. As at 15 November 2006, there was an unpaid balance of assessed contributions to the overall budget of the Tribunal amounting to € 2,096,166 for the 1996/97 to 2005-2006 budgets of the Tribunal. The Registrar has sent notes verbales to the States Parties concerned in July and November 2006, reminding them of their outstanding contributions to the budgets of the Tribunal. We are grateful to the sponsors of the draft resolution for incorporating an appeal to States Parties in this matter.

27. Recourse to the Tribunal incurs no court costs for the States Parties. However, the general rule is that each party to a case has to bear its own costs, for instance, for the preparation of pleadings, the professional fees of counsel and advocates or travel expenses. This aspect may deter a State with limited resources from bringing a case before the Tribunal. In this regard, I wish to draw the attention of the distinguished delegates to the trust fund to assist States Parties in the settlement of disputes through the Tribunal. The fund is administered by the United Nations (DOALOS). An application for assistance may be submitted by any State Party to the Convention and the financial assistance will be provided on the basis of the recommendations of a panel of experts. In 2005, an amount of $ 20,000 was awarded to Guinea-Bissau. The terms of reference of the fund also provides for the possibility to take up the offers by qualified lawyers, which may be made on a reduced fee basis, and which are to be maintained by DOALOS. The fund stands currently at $ 70,621.17. I wish therefore to invite States to consider the possibility of making voluntary financial contributions to the fund. You may wish to note that intergovernmental organizations, national institutions, non-

governmental organizations, as well as natural and juridical persons may also make contributions to the fund.

28. Madam Vice-President, I end by reiterating my gratitude to you and the Distinguished Delegates for the opportunity granted to me to address this august body. I also wish to thank the Distinguished Secretary-General, the Legal Counsel and the Director of the Division for Ocean Affairs and the Law of the Sea for their support. Madam Vice-President and Distinguished Delegates, I now wish the General Assembly every success in its important deliberations at this session.