INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Presentation by

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to the Seminar on Exploration and Exploitation of Deep Seabed Mineral Resources in the Area: Challenges for Africa, and Opportunities for Collaborative Research in the South Atlantic Ocean

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Excellencies,
Ladies and Gentlemen,

I. Introduction

It is a distinct honour and privilege for me to address you at this international Seminar devoted to the challenges and opportunities for Africa in connection with the exploration and exploitation of deep seabed mineral resources. On behalf of the President of the International Tribunal for the Law of the Sea, H.E. Judge José Luis Jesus – whose personal greetings I wish to convey - I would like to thank the Secretary-General of the International Seabed Authority, H.E. Nii Allotey Odunton, and the Nigerian Inter-Ministerial Standing Committee on the International Seabed Authority for their kind invitation to participate in this highly important event.

I note that the agenda of today is devoted to the work and functions of the three international institutions created by the United Nations Convention on the Law of the Sea of 10 December 1982, namely the International Seabed Authority, the International Tribunal for the Law of the Sea and the Commission on the Limits of the Continental Shelf. Let me add on a personal note that I had the privilege of being a delegate to the Assembly of the International Seabed Authority and the Chairman of its Credentials Committee for many years and for several years also a member of the Council of the Authority. I am therefore particularly pleased to be able to address you today.

It cannot be emphasized often enough that the United Nations Convention on the Law of the Sea which entered into force on 16 November 1994 after eight years of protracted and particularly difficult negotiations – to which all of us who participated in them and are here at this Symposium can bear witness – is one of the most important treaties ever elaborated under auspices of the United Nations. At present, 156 States and the European Community are parties to it. The Convention is thus slowly moving toward universal adherence which has greatly been facilitated by the entry into force on 28 July 1996 of the Agreement relating to the

implementation of Part XI of the Convention dealing with the international seabed area.

Since its entry into force the Convention on the Law of the Sea has undoubtedly played a major role in bringing order to the oceans and eliminating the causes for many maritime disputes between States. Although the Convention provides a comprehensive regime for the seas, regulating all ocean space, its uses and its resources, there are nevertheless bound to be gaps - as in any multilateral convention which is also a framework treaty. These gaps have been and will continue to be filled in by implementing instruments and to a certain extent by jurisprudence. The latter is facilitated by the fact that the Convention contains quite an innovative system for the settlement of disputes. It has been observed that it is one of the most far-reaching and complex systems of dispute settlement to be found anywhere in international law. There can be no doubt that the underlying rationale for the creation of such a system was the wish to safeguard the many delicate compromises enshrined in the Convention and to secure its uniform interpretation and application.

II. The International Tribunal for the Law of the Sea

Part XV of the Convention deals with the settlement of disputes. It imposes an obligation on States Parties to settle disputes by peaceful means and, in particular, also provides for compulsory procedures with binding decisions. Annex VI of the Convention contains the Statute of the International Tribunal for the Law of the Sea which is one of the four means for the settlement of disputes entailing such decisions. The alternative means are the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII of the Convention and a special arbitral tribunal under Annex VIII for certain categories of disputes - fisheries, protection and preservation of the marine environment, marine scientific research, or navigation, including pollution from vessels and dumping.

The International Tribunal for the Law of the Sea, which became operational on 1 October 1996, is the specialized international judicial body established for the settlement of disputes concerning the interpretation or application of the Convention on the Law of the Sea, and for rendering advisory opinions. The jurisdiction of the

Tribunal, in principle, includes any dispute relating to the law of the sea, such as disputes relating to maritime boundaries, fisheries, sea pollution or marine scientific research.

The Tribunal is composed of 21 judges “elected from persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea” (Statute, article 2, paragraph 1). Let me add that it is, at present, the largest world-wide judicial body. In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution must be assured (Statute, article 2, paragraph 2). The composition of the Tribunal clearly shows that added weight has been given to developing countries in comparison with the International Court of Justice, where, in practice, judges from the five permanent members of the Security Council occupy one third of the 15 seats. If the Tribunal does not include upon the bench a judge of the nationality of a party to a dispute, that party may designate a person of its choice to sit as a judge *ad hoc*.

The law to be applied by the Tribunal comprises the Convention, and other rules of international law not incompatible with it. This does not, however, preclude the Tribunal from holding jurisdiction to determine a matter *ex aequo et bono*, if the parties so agree. Decisions are final and the parties to the dispute are required to comply with them. The decisions, however, have no binding force beyond the parties to the dispute, although they may be quite significant for the development of the law of the sea in general, and may, in addition, influence the future interpretation of this body of law. It should also be noted that parties have no recourse to appeal against a decision of the Tribunal.

A significant achievement of the Convention was the creation, in Part XI, of an international legal regime governing the Area, that is, the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (Convention, article 1, paragraph 1 (1)). Disputes relating to activities in the Area are to be submitted to the Seabed Disputes Chamber, which is a chamber formed within the Tribunal.

The Conference on the Law of the Sea had originally envisioned the establishment of a Seabed Tribunal as one of the principal organs of the

International Seabed Authority to deal exclusively with seabed disputes. This approach was, however, abandoned in favour of establishing a fully-fledged Tribunal as an autonomous international judicial body with a Seabed Disputes Chamber. That Chamber, which is a “tribunal within a tribunal”, consists of eleven judges selected every three years. As in the case of the composition of the Tribunal, in the selection of the members of the Chamber, the representation of the principal legal systems of the world and the equitable geographical distribution are to be assured. In relation to such representation and distribution, the Assembly of the Authority may adopt recommendations of a general nature (Statute, article 35, paragraph 2). Thus far such recommendations have not yet been made.

I would now like to give you a brief overview of the jurisdiction of the Tribunal before providing you with information on its advisory competence. I will then focus on the jurisdiction of the Seabed Disputes Chamber, including its advisory function.

A. Jurisdiction *ratione materiae*

The Tribunal has broad jurisdiction over any dispute concerning the interpretation or application of the Convention and the Agreement relating to the Implementation of Part XI. Its jurisdiction becomes compulsory if the parties to a dispute have accepted it by a written declaration made in accordance with article 287 of the Convention.

That Article outlines various procedures available to parties to settle their disputes peacefully through the compulsory mechanisms established by it. It provides that a State party, when signing, ratifying or acceding to the Convention or at any time thereupon, is free to choose one or more of the four means for the settlement of disputes already mentioned, by submission of a written declaration to the Secretary-General of the United Nations. So far only 41 States have made such a declaration – and a mere 24 of those have accepted the Tribunal's compulsory jurisdiction. In the absence of such a declaration or if the parties have not accepted the same procedure under article 287, they are deemed to have accepted arbitration under Annex VII of the Convention - which is the default procedure if no choice has been made. As has been recommended by the General Assembly on various occasions, it is important that States Parties consider making a written

declaration with regard to their choice of procedure for the settlement of maritime disputes.

The jurisdiction of the Tribunal may also derive from relevant clauses included in international agreements relating to the law of the sea. At present, there are nine international agreements containing provisions making specific reference to the dispute settlement procedures of Part XV of the Convention and conferring therewith jurisdiction on the Tribunal. Let me just mention the Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995, the UNESCO Convention on the Protection of the Underwater Cultural Heritage of 2001 and as the most recent example the Nairobi International Convention on the Removal of Wrecks adopted in 2007. It is important to note that, with respect to these agreements, the procedures of Part XV apply, whether a party to the agreement is a State Party to the Convention on the Law of the Sea or not.

Article 22 of the Statute also allows the Tribunal to exercise jurisdiction over disputes relating to the interpretation or application of treaties which are already in force, and concern the subject-matter covered by the Convention, provided that all the parties to that treaty so agree.

Notwithstanding the above, the majority of the cases handled by the Tribunal so far have been submitted to it on the basis of the so-called “compulsory jurisdiction”. This title requires the Tribunal to exercise jurisdiction in cases that require urgent action independently of an expression of consent by the respondent State. I refer to proceedings for prompt release of vessels and crews (Convention, article 292) and provisional measures pending the constitution of an arbitral tribunal under Annex VII of the Convention (Convention, article 290, paragraph 5). In these instances, proceedings before the Tribunal are instituted unilaterally by means of an application.

The jurisdiction of the Seabed Disputes Chamber is also a compulsory one. I will deal with this point later in my presentation.

B. Access to the Tribunal

Compared to other international judicial bodies, the Tribunal is not only open to States Parties but also to non-State entities. The expression “States Parties” includes States, international organizations and certain self-governing associated States and territories which become parties to the Convention (Convention, articles 1, paragraph 2, and 305). The fact that an international organization may be a party to a dispute is a unique feature of the jurisdiction of the Tribunal. In a pending case, an international organization, namely the European Community, has already made use of this procedure.

Access by non-State entities is permitted in certain cases (Convention, article 291; Statute, article 20, paragraph 2). Firstly, the Tribunal is open to entities other than States Parties in any case expressly provided for in Part XI of the Convention. This refers to certain entities dealing with the Area and, as we will see later, it concerns the competence of the Seabed Disputes Chamber. Secondly, access to entities other than States Parties is permitted in a case submitted pursuant to an agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.

The jurisdiction of the Tribunal for the Law of the Sea is not as broad *ratione materiae* as that of the International Court of Justice, being confined to matters provided for in the Convention and related instruments. However, it is certainly more comprehensive *ratione personae*, as in cases before the Court only States may be parties. Access is probably the most significant difference between the Tribunal and the International Court of Justice.

Let me explain that from the point of view of the jurisdiction of an international court, a distinction is typically made between contentious and advisory jurisdiction. I have given an overview of the Tribunal’s jurisdiction in contentious cases to settle disputes upon binding decisions. I now wish to turn to the Tribunal’s advisory function which is of a recommendatory nature.

C. Advisory function

The advisory competence of the Tribunal consists of two mechanisms: on the one hand, the Tribunal itself may give advisory opinions and, on the other, the Seabed Disputes Chamber may exercise this function.

Article 21 of the Statute confers a broad jurisdiction on the Tribunal which also includes its advisory competence. This provision states that "[t]he jurisdiction of the Tribunal comprises all disputes and *all applications* submitted to it in accordance with this Convention and *all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal*" (emphasis added). Further to this provision, the Tribunal, acting as a full court, "may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion'', as established in article 138 of the Rules of the Tribunal. This article further specifies that the request for an advisory opinion is to be transmitted to the Tribunal by "whatever body" is authorized under such agreement to do so.

The Tribunal may therefore entertain a request for an advisory opinion if recourse to such possibility is explicitly provided for in an international agreement. It goes without saying that such an international agreement must relate to the purposes of the Convention. Moreover, this agreement should identify the specific "body" being empowered to request an advisory opinion from the Tribunal. With regard to the expression "body", it is understood that an organ or institution could be designated by the agreement as the requesting entity.

Advisory opinions are essentially non-binding. Thus, by their very nature, advisory opinions may provide a flexible venue for those seeking to clarify points of law concerning the interpretation or application of the Convention. To this end, recourse to independent legal advice from an international judicial body may prove to be a highly useful mechanism.

D. Jurisdiction of the Seabed Disputes Chamber

The provisions of the Convention dealing with the settlement of disputes concerning the Area constitute one of the particularly innovative features of the Convention on the Law of the Sea. This is not just because the Seabed Disputes Chamber has been entrusted with exclusive and mandatory jurisdiction over disputes concerning the Area, but also because access for non-State entities has been widened. According to the Convention, a whole range of entities have access to the Seabed Disputes Chamber including States Parties, the Authority, state enterprises, and natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, and are sponsored by the States Parties.

As stated earlier, the Seabed Disputes Chamber is a chamber of the Tribunal with exclusive jurisdiction over disputes arising out of the exploration and exploitation of the Area. The jurisdiction of the Chamber is obligatory and independent of any choice of procedure made under article 287 of the Convention (Convention, article 287, paragraph 2). There are particular categories of disputes over which the Seabed Disputes Chamber has jurisdiction and these are listed in article 187 of the Convention.

A first category includes disputes between States Parties concerning the interpretation or application of Part XI and the annexes relating thereto (Convention, article 187, paragraph (a)). It is to be understood that this should include the Agreement on the Implementation of Part XI. In such cases, the dispute may, at the request of the parties, be submitted to a special chamber of the Tribunal. It may also be submitted to an *ad hoc* chamber of the Seabed Disputes Chamber at the request of any party (Convention, article 188, paragraph 1).

In addition, disputes between a State Party and the International Seabed Authority also fall within the scope of jurisdiction of the Seabed Disputes Chamber (Convention, article 187, paragraph (b)). These disputes may concern acts or omissions of the Authority or of a State Party alleged to be in violation of Part XI and its annexes, or of rules, regulations and procedures of the Authority. They may also

relate to acts of the Authority alleged to be in excess of jurisdiction or to be a misuse of power.

It is well-known that the Authority has entered into a number of exploration contracts with several contractors. In this connection, let me explain that another category of disputes pertains to contractual disputes involving parties to a contract, namely, States Parties, the Authority, state enterprises and natural or juridical persons. Contractual disputes also concern acts or omissions of a party to a contract relating to activities in the Area and directed to the other party or directly affecting its legitimate interests. (Convention, article 187, paragraph (c)). Within this category of disputes, those concerning the interpretation or application of a contract or a plan of work are required to be submitted, at the request of any party, to binding commercial arbitration. This submission is, however, subject to the proviso that a commercial arbitral tribunal must not pronounce itself on questions of interpretation of the Convention.

Finally, there are the disputes between the Authority and a prospective contractor concerning the refusal of a contract or a legal issue arising in the negotiation of the contract (Convention, article 187, paragraph 1 (d)), as well as the disputes involving the alleged liability of the Authority for any damage arising out of wrongful acts (Convention, article 187, paragraph 1 (e), and annex III, article 22).

The fact that the Convention sets some limitations on the jurisdiction of the Seabed Disputes Chamber should not be overlooked. According to article 189 of the Convention, the Chamber has no jurisdiction with regard to the exercise by the Authority of its discretionary powers. Nor does it have competence to pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with the Convention, or to declare such rules, regulations and procedures invalid.

E. Advisory function

An important aspect of the jurisdiction of the Seabed Disputes Chamber is its competence to give advisory opinions. The advisory competence of the Seabed Disputes Chamber is rooted in the precedent set by the Permanent Court of International Justice ("PCIJ") and followed by its successor, the International Court of Justice ("ICJ"). Like the PCIJ and the ICJ, the bodies authorized to request an advisory opinion from the Seabed Disputes Chamber are organs of an international organization. I am referring here to the Assembly and the Council of the International Seabed Authority.

The Seabed Disputes Chamber is competent to give advisory opinions in two instances:

- at the request of the Assembly of the International Seabed Authority "on the conformity with [the] Convention of a proposal before the Assembly on any matter" (article 159, paragraph 10, of the Convention); and

- at the request of the Assembly or the Council of the International Seabed Authority "on legal questions arising within the scope of their activities" (article 191 of the Convention).

With regard to questions of procedure, I wish to add that a request for an advisory opinion should contain "a precise statement of the question" (article 131, paragraph 1, of the Rules of the Tribunal). The question to be put to the Chamber should then be specific and of a legal nature. It is to be noted that a request for advisory opinions may be treated by the Chamber as a matter of urgency.

It is likely that in the future legal questions may arise regarding the activities of the Council and the Assembly or the legality of a proposal before the Assembly with respect to the Convention. In this regard, the Council or the Assembly, as the case may be, could make use of the advisory system of the Seabed Disputes Chamber in

order to shed light on issues relating to Part XI of the Convention and the Agreement.

III. Conclusion

Excellencies,
Ladies and Gentlemen,

In the twelve years of its existence the International Tribunal for the Law of the Sea has established a reputation for the expeditious and efficient management of cases, and has already made a substantial contribution to the development of international law. According to the United Nations Convention on the Law of the Sea the Tribunal has the competence and means to deal with a wide range of disputes, and is well equipped to discharge its functions speedily, efficiently and cost-effectively. The continued and significant contribution to the peaceful settlement of disputes in accordance with Part XV of the Convention is regularly being noted with satisfaction by the United Nations General Assembly.

The total of fifteen cases so far dealt with by the Tribunal – of which thirteen were introduced on the basis of the Tribunal's compulsory jurisdiction - may not appear particularly impressive. This record, however, does not compare unfavourably to that of other international judicial bodies in the initial stages of their existence. It should be borne in mind that the Tribunal is a relatively new judicial body which is yet to fulfil its potential as the specialized judicial organ of the international community for the settlement of disputes relating to the law of the sea. It has also been said that the existence of that Tribunal is one of the better guarded secrets of the United Nations system.

It is also of interest to note that recourse to the Tribunal involves no costs for the States Parties to the Convention. When a dispute involves an entity that is neither a State Party nor the International Seabed Authority, the Tribunal fixes the amount which that party must contribute towards the expenses of the Tribunal. Other costs, notably the fees for legal representation, are borne by the party incurring them, unless decided otherwise by the Tribunal. A trust fund to assist developing States to settle their disputes through the Tribunal has been established

by the Secretary General of the United Nations, following a decision of the General Assembly.

I hope that in the future the International Tribunal for the Law of the Sea - which, at present, is underutilized - will be given a more active role in the settlement of international maritime disputes. In particular, as the international community may in the years to come face new challenges on account of activities in the Area, the International Seabed Authority as well as the different entities involved might, if the need arises, take advantage of the procedures available before the Tribunal.

I thank you for your kind attention!