UNCLOS Conference: How healthy is the ocean's constitution?
25 Years of the United Nations Convention on the Law of the Sea
Keynote address

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President
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Distinguished participants,
Dear colleagues,
Ladies and gentlemen,

First of all, I want to welcome you all today to the premises of the International Tribunal for the Law of the Sea ("ITLOS" or "the Tribunal"). I also want to thank the Hamilton Lugar School of Global and International Studies at Indiana University Bloomington, the University of Hamburg and the International Foundation for the Law of the Sea for taking the initiative to organize this conference and for inviting me to give a keynote speech. This morning, I will speak about the role of the Tribunal in the settlement of disputes related to the law of the sea and its contribution to the further development of the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention"). Certainly no place could be better suited to such an endeavour than the Tribunal's courtroom!

Dear colleagues,

I cannot begin my remarks about ITLOS without saying a few words about UNCLOS itself, as the Tribunal is a product of UNCLOS and constitutes an integral part of its dispute-settlement system. Such words may also be called for, in light of the theme of this conference, "How healthy is the ocean's constitution?"

Twenty-five years after the entry into force of the Convention, and 37 years after its adoption, it is my assessment that the legal regime created by the Convention has worked fairly well in promoting the rule of law at sea. The Convention has almost achieved universality, with 168 States parties so far. Since its entry into force, two additional implementing agreements have been adopted, and the third is currently under negotiation. The UNCLOS regime is stable yet flexible enough to accommodate any necessary changes.

This does not mean that there is no problem, challenge or practice that deviates from the provisions of the Convention. There are many. However, the Convention has been successful in creating the expectation among States that the rule of law exists and operates across the world's oceans and that justice can be done for all States, big or small, strong or weak, developed or developing. The comprehensive dispute-settlement system of the Convention - one of the major achievements of the Third United Nations Conference on the Law of the Sea ("UNCLOS III") - has played a significant role in this regard. Perhaps the most emblematic aspect of the rule of this

law is that a small State is able to institute a legal action against a bigger and more powerful State in international courts or tribunals. This is something which happens frequently in this courtroom and others.

Dear colleagues,

As you know, ITLOS is just one of the four means of compulsory dispute-settlement under Part XV of the Convention, which allows States parties a choice of procedure from among ITLOS, the International Court of Justice ("the ICJ"), an Annex VII arbitral tribunal, and an Annex VIII special arbitral tribunal. It is not even a so-called "default forum". However, this choice should not undermine the role of the Tribunal.

Indeed, the Tribunal has a unique character in the Convention regime. It is a permanent judicial institution created by the Convention with wide-ranging functions, some of which no other means under article 287 of the Convention can perform. In short, it is irreplaceable in the effective functioning of the legal system created by the Convention. Let me explain.

The Tribunal, of course, deals with inter-State disputes concerning the interpretation or application of the Convention. No doubt the exercise of contentious jurisdiction is a primary function of the Tribunal but its role goes far beyond that.

The Tribunal and its Seabed Disputes Chamber (the "Chamber") can also give advisory opinions. An advisory opinion of the Chamber is given at the request of the Council or Assembly of the International Seabed Authority (the "Authority" or "ISA") to assist the work of the Authority, another important institution created by the Convention to implement the concept of the common heritage of mankind. While the Convention does not contain an explicit provision for the advisory opinion of the full Tribunal, article 21 of the Statute of the Tribunal provides that the jurisdiction of the Tribunal comprises "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal." In 2015, on the basis of this provision, the Tribunal gave its first advisory opinion, namely in the matter of a request submitted by the Sub-Regional Fisheries Commission with respect to flag State responsibility and liability in respect of illegal, unreported and unregulated fishing.

In addition, the Tribunal has virtually exclusive jurisdiction to conduct prompt release proceedings under article 292 of the Convention, which is instrumental in safeguarding the interests of maritime States from the extension of coastal State jurisdiction under the Convention. Over the years prompt release proceedings have become one of the main activities of the Tribunal.

Now let me say a few words about the Tribunal's Seabed Disputes Chamber. This Chamber has compulsory and near-exclusive (with two exceptions) jurisdiction over disputes arising from activities in the Area, namely disputes concerning seabed mining activities. It should be noted that the Chamber has competence to deal with disputes involving not only States but also non-State entities such as the ISA, the Enterprise, and natural and juridical persons (private contractors). This represents a major innovation in international adjudication. While the Chamber's 11 members are selected from among the Members of the Tribunal, its jurisdiction exists separately from that of

the Tribunal. For this reason, the Chamber is often referred to as “a tribunal within the Tribunal”. When commercial mining begins - hopefully in the not too distant future - the Chamber is expected to carry out substantial judicial work.

Dear colleagues,

Another important role of the Tribunal - though not widely known or appreciated - is facilitating the functioning of Annex VII arbitral tribunals. As you know, Annex VII arbitration is not just one of the four means available under article 287 of the Convention but a “default forum”. As such, a number of disputes concerning the interpretation or application of the Convention (so far 17 disputes) have been submitted to such arbitration. Therefore, it would be in the interest of States parties to the Convention to ensure that Annex VII arbitration functions effectively.

The interaction between the Tribunal and an Annex VII arbitral tribunal is threefold.

First, the Tribunal may prescribe provisional measures under article 290, paragraph 5, of the Convention pending the constitution of the arbitral tribunal. This is one of the most innovative features of the Convention. As the constitution of an arbitral tribunal takes time, there should be an arrangement to take care of the urgent need to preserve the rights of parties to the dispute or to prevent serious harm to the marine environment pending the constitution of such tribunal. This urgent procedure has frequently been utilized and its value has been well proven.

Second, when parties to the dispute cannot agree on the appointment of arbitrators within the set time limit, it is the President of the Tribunal who will appoint arbitrators in accordance with article 3 of Annex VII to the Convention. Strictly speaking, this may not be considered interaction between the Tribunal and the Annex VII arbitral tribunal, as it involves the President of the Tribunal rather than the Tribunal itself. Be that as it may, since one of the most difficult yet crucial parts of arbitration is to compose an arbitral tribunal, and parties to the dispute more often than not are unable to agree on the appointment of arbitrators, the appointing authority of the President of the Tribunal is essential to the effective functioning of Annex VII arbitration.

Third, the interaction between the Tribunal and Annex VII arbitration comes not only from the institutional arrangement but from the practice developed over the past two decades. In many Annex VII arbitrations, the Tribunal’s judges have served as arbitrators. This practice has significant advantages: it brings the expertise and experience of the Tribunal’s judges to the Annex VII arbitration; and more importantly it ensures the consistent and coherent interpretation of the Convention and thus avoids fragmentation of jurisprudence.

It should be recalled in this regard that one of the most serious concerns about article 287 of the Convention was the risk of fragmentation in the sense that different forums could interpret and apply provisions of the Convention differently. There was extensive debate about such risk in the early days after the entry into force of the Convention. However, 25 years later, we no longer hear much about it. This is not least due to the fact that ITLOS judges have been closely involved with Annex VII arbitration. In this regard, I am aware that there are some concerns about judges of permanent courts

such as ITLOS or the ICJ participating as arbitrators in arbitration. I am also aware that the ICJ has recently adopted a policy restricting its judges' involvement in investment arbitration (State/investor arbitration) or commercial arbitration. However, ITLOS judges serving as arbitrators in Annex VII arbitration is not quite comparable to the situation, in which judges of an international court or tribunal established to settle disputes between States by applying public international law serve as arbitrators in investment or commercial arbitration.

Dear colleagues,

Let me now turn to the jurisprudence of the Tribunal and its contribution to the development of international law. Much has been written and spoken about this subject and therefore I will not repeat that here. I would just like to make a few points.

First, while the primary function of the Tribunal is to settle a specific dispute submitted to it, the Tribunal, in so doing, develops and elaborates principles and rules of law set out in the Convention. The Tribunal, as a permanent, standing judicial institution created by the Convention, takes its role in this regard particularly seriously. It is well known that the Convention, as the constitution for the ocean, provides for a broad legal framework for regulating the conduct of States in the ocean but lacks specificity in many respects. Furthermore, the Convention contains many inherently ambiguous provisions. The Tribunal's role in the development and elaboration of such principles and rules by consistently interpreting and applying them to specific situations of cases before it is therefore crucial to the strengthening of the legal regime established by the Convention. The Tribunal is well aware of the need, and fully committed to the responsibility, to safeguard the fine balance achieved in the Convention as a package deal through its "jurisprudence". In fact, I would like to underscore that such institutional responsibility makes the Tribunal distinct from *ad hoc* arbitration, the function of which is to dispose of disputes before it.

Second, the Tribunal is also fully aware of the fact that it has no exclusive jurisdiction over disputes concerning interpretation or application of the Convention (but is one of the four means available under article 287 of the Convention). The Tribunal recognizes and respects the freedom of States parties to choose their preferred means and endeavours to make the system created by the Convention work without increasing the risk of fragmentation. Its jurisprudence shows that it has taken particular care to promote the uniformity and coherence of the Convention.

However, this does not mean that the Tribunal merely follows the jurisprudence established by other courts or tribunals. On the contrary, the Tribunal has not hesitated to take an innovative and creative approach to several issues, if necessary and appropriate. One of the best examples in this regard may be its decision in the *Delimitation of the maritime boundary in the Bay of Bengal*, in which the Tribunal followed the well-established jurisprudence on the method of delimitation with respect to the exclusive economic zone and the continental shelf within 200 nautical miles, while breaking new ground in delimiting a boundary for the continental shelf beyond 200 nautical miles for the first time in the history of maritime boundary delimitation adjudication. This decision has been widely acknowledged as a careful balance between continuity and change, and subsequently followed by other courts and

tribunals.

Third, one of the major, though not so obvious, contributions of the Tribunal is to bring new types of disputes into the realm of public international law and adjudication. This applies to disputes related to the arrest and detention of ships and international environmental disputes. Let me elaborate a little.

I would like to recall that almost two thirds of the cases submitted to the Tribunal over the past two decades have concerned disputes related to the arrest and detention of ships. This stands in stark contrast to the fact that, before the Convention entered into force, few of such disputes were subject to international adjudication. This may be somewhat surprising in light of the ubiquitous presence of ships at sea.

However, it should be noted that there are several intricate legal issues, both substantive and procedural, that need to be addressed before disputes relating to the arrest and detention of ships are brought to international adjudication. They include: the nationality and registration of ships; the concept of the genuine link; the nationality of claims, namely the question as to whether the flag State can make claims on behalf of persons who are not its nationals or cargo which does not belong to it; the nature of injury to a ship; and the applicability of the rule of the exhaustion of local remedies, to name but a few. The Tribunal, in dealing with disputes relating to the arrest and detention of ships, has clarified those legal issues and developed important legal doctrines, such as “a ship as a unit” doctrine or the concept of “flag State protection” compared with diplomatic protection. This clarification and development of law has been instrumental in opening a door for States to bring their ship-related disputes to international adjudication for peaceful resolution.

Now turning to international environmental disputes, at least five cases submitted to the Tribunal so far entirely or partially concern the protection and preservation of the marine environment. Again this stands in contrast to the fact that, before the 1990s, few international environmental disputes had been submitted to international adjudication. This was partly because, despite growing concerns about the state of the global environment and frequent rhetoric on the importance of its protection, doubts had lingered for a long time about the existence of general international environmental law and the utility of inter-State adjudication as a means to resolve international environmental disputes. However, this prevailing scepticism toward international environmental law and international environmental litigation started to dissipate in the 1990s, especially with ITLOS, together with the ICJ, taking a lead in clarifying and developing international environmental law. The Tribunal’s findings on the key notions of international environmental law, such as the precautionary approach, the duty to cooperate, environmental impact assessments, and the duty of due diligence were crucial in this regard. The Tribunal has thus played a vital role in opening a new chapter for judicial settlement of inter-State environmental disputes.

Finally, I would like to say a word or two about the jurisprudence of the Tribunal in relation to that of the ICJ. Observers of the jurisprudence of the Tribunal may have witnessed an ongoing process of “cross-fertilization” between the two judicial institutions. This form of judicial dialogue allows international courts and tribunals to draw upon each other’s case law and, where appropriate, adopt common approaches.

To the extent possible, this fosters the development of consistent jurisprudence which increases predictability and enhances the confidence of States in the virtues of the judicial settlement of international disputes.

ITLOS and the ICJ have each relied upon the relevant jurisprudence of the other body with regard to the application and interpretation of substantive international law, in particular in the fields of maritime delimitation and international environmental law. In addition, however, the Tribunal has also been inspired by the jurisprudence of the ICJ relating to procedural issues. In this regard it is worth recalling that the Statute and the Rules of the Tribunal, while containing significant differences and innovations, are partly modelled on those of the ICJ.

Let me, however, also emphasize that, notwithstanding the importance of cross-fertilization between the Tribunal and the ICJ, the two institutions continue to fulfil distinct mandates. The ICJ is a court of general jurisdiction which, in accordance with the United Nations Charter, has been designated as the principal judicial organ of the that organization. ITLOS, for its part, is the global adjudicatory body entrusted with the specific mission of resolving law of the sea disputes between States parties to the Convention. As the only permanent judicial institution to have been created by UNCLOS, it has the duty to act as the principal judicial guardian of the legal order of the oceans. The Tribunal is conscious of this role: it has performed its function conscientiously through its reasoned decisions and jurisprudence, and will continue to do so.

Dear colleagues,

In closing, I would like to thank the organizers again for inviting me to address this distinguished audience and for giving me the opportunity to reflect on the role of my Tribunal for the settlement of disputes related to the law of the sea and its contribution to the further development of principles and rules set out in the Convention. I look forward to productive discussions on various issues facing the Convention on the 25th anniversary of its entry into force. Thank you very much for your kind attention.