INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Statement by

H. E. RÜDIGER WOLFRUM,

President of the
International Tribunal for the Law of the Sea,

to the Sixth Committee of the General Assembly
of the United Nations

New York

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Mr Chairman,
Ladies and Gentlemen,

It is with great pleasure that I address today, on behalf of the International Tribunal for the Law of the Sea, this Sixth Committee of the General Assembly of the United Nations. It is the first time that the Tribunal has participated in this informal meeting of the Sixth Committee and I am sincerely honoured and grateful for your kind invitation. This is particularly so since you have no law of the sea topic on your agenda. However, law of the sea is an essential part of international law and it is important to scrutinize it from the point of view of international law in general.

As you all know, the United Nations Convention on the Law of the Sea of 1982 provides a universally agreed legal framework to regulate all ocean space, its uses and its resources. It is the result of the most comprehensive efforts to develop international law while responding to new scientific findings concerning the oceans and the seabed. This Convention would have proven ineffective if it had not incorporated an obligatory system for the settlement of disputes, of which the Tribunal forms an essential part. Created as an international judicial institution with specialized jurisdiction over law of the sea disputes, the Tribunal, together with the International Court of Justice, is appropriately placed to monitor the interpretation of the Convention and ensure that it is duly implemented.

This brings me to the topic which I have chosen to address today, namely, the functions of the Tribunal in the interpretation and implementation of the Convention and the settlement of law of the sea disputes. The Tribunal is able to fulfil this task

through effective decision-making and in accordance with the rule of law. Allow me to explain.

From the very beginning of the negotiations at the Third United Nations Conference on the Law of the Sea, it was understood that efficient means for dispute resolution were required in order to ensure that the Convention is implemented effectively. To this end, the Tribunal was endowed with the competence to deal with disputes concerning the interpretation or application of the Convention. In particular, it was established to deal with disputes relating to deep seabed mining.

It is natural that States, when performing their obligations under the Convention, may encounter differences regarding the meaning of its provisions, which are indeed numerous and in some cases quite broad. In fact the Convention is a framework agreement which is open for further development. The States participating in the Conference felt that a permanent and specialized court should be established, to settle those differences in accordance with the rule of law. Decision-making by an independent judicial body such as the Tribunal guarantees that the provisions of the Convention will be interpreted and applied consistently, equitably and in a universally acceptable form.

The Tribunal is a world court consisting of 21 judges with recognized competence in the law of the sea. The number of judges and their geographical distribution ensure that all regions and legal systems are represented on an equal footing and, at the end of the day, that decision-making is fair and impartial. In effect, the decisions rendered do not reflect a “partisan approach”. For instance, I should mention that in the *Juno Trader* case, the judgment was adopted unanimously. The *Land Reclamation* case, in which two judges *ad hoc* also participated in the proceedings, is another example of a case in which a unanimous decision was reached.

The Rules of the Tribunal set out expeditious and cost-effective procedures which guarantee a fair trial. They are modelled on the Rules of the ICJ. However, the Tribunal felt it necessary to incorporate some adjustments to increase the efficiency of the proceedings. In this sense, the Rules also incorporate the initial deliberations,

a step in the proceedings that takes place immediately prior to the commencement of the hearing, in order to allow judges to take full cognizance of the case. The process of the judicial deliberations leading to the adoption of a decision, as provided for in the Resolution on the Internal Judicial Practice, has proven to function efficiently, in particular, with regard to urgent proceedings in which the Tribunal has rendered its decisions within the period of one month. Interested delegations will find detailed information on the Tribunal's proceedings in the *Guide to proceedings before the Tribunal,* copies of which are available here.

Furthermore, I should also stress that the mere existence of the Tribunal, a standing body, may prevent conflicting parties from engaging in a dispute. In effect, the availability of relief via the Tribunal can and has facilitated the negotiation process between parties to a dispute and assisted them in reaching an out-of-court settlement, for instance, in the *Chaisiri Reefer 2 case*. To put it simply, the Tribunal's role as custodian of "good behaviour" ensures that the Convention is implemented in a just manner.

It is evident that the Tribunal has not exhausted its potential. There is certainly room for more judicial work. The Tribunal has broad competence in matters relating to the law of the sea and remains ready to settle a variety of disputes concerning the interpretation or application of the Convention.

Allow me to turn now to the question of the Tribunal's role in the progressive development of the law of the sea. As reflected in its preamble, the Convention was established as a result of a process of codification and progressive development of the law of the sea. The Convention incorporated norms of customary international law but also - and most importantly - a number of new rules - regarding the conduct of marine scientific research, the archipelagic sea lanes passage, and the extension of the continental shelf to include the outer edge of the continental margin. Perhaps the most innovative provisions are those concerning the deep seabed beyond the limits of national jurisdiction and the protection of the marine environment. This latter aspect is mirrored in the Tribunal's competence to prescribe provisional measures. I would like to stress that under article 290 of the Convention the Tribunal may prescribe provisional measures not only to preserve the rights of the parties but also

to “prevent serious harm to the marine environment”. The Tribunal may be requested to prescribe provisional measures in two situations; (i) where a dispute on the merits has been submitted to the Tribunal; and (ii) where a dispute on the merits has been submitted to an arbitral tribunal, pending its constitution. It is also of interest to note that under the Straddling Fish Stocks Agreement of 1995 the Tribunal is empowered to prescribe provisional measures to protect the rights of the parties as well as to prevent damage to the fish stocks in question. In addition, this agreement authorizes the Tribunal to order provisional measures pending agreement between coastal States and fishing States concerning the conservation and management of straddling stocks. This underlines that the protection of the marine environment is meant to be one of the cardinal functions of the Tribunal.

The Convention was adopted more than two decades ago. Since then the economic uses of the seas, shipping and commercial activities, marine science and technology have continued to evolve and expand. To keep pace with the new developments, it is advisable that the comprehensive regime laid down in the Convention be read in accordance with present-day circumstances. I should recall, in this regard, that the Tribunal, like any other court or tribunal, has a role to play in paving the way for the progressive development of international law. In particular, in carrying out its task of interpreting the Convention and applying it to specific cases, the Tribunal may clarify the law through a dynamic reading of the Convention and in the light of the evolutionary changes in sea-related matters. The Tribunal may also be requested to make a pronouncement on a subject - even when there is no specific provision in the Convention. For instance, in the M/V “SAIGA” (No.2) case, the Tribunal was faced with an issue concerning the rights of States in connection with offshore bunkering, namely, the supply of gas oil to vessels at sea. This is a matter not specifically regulated under the Convention. In this particular case, it was not necessary for the Tribunal to make a pronouncement on this issue, but the case is interesting as it concerns an activity whose legal status is controversial. This is true in respect of other issues, such as marine protected areas on the high seas, terrorism at sea or marine biological diversity beyond areas of national jurisdiction.

Another important aspect for the implementation of the Convention is the role of the Tribunal and the International Court of Justice, as standing courts, in the

development of a corpus of jurisprudence. In this regard, I would like to recall that the dispute settlement mechanism under Part XV of the Convention, which is based on the principle of the free choice of means laid down in Article 33 of the Charter of the United Nations, provides for both voluntary and compulsory procedures. In accordance with Part XV, if parties fail to reach a settlement by voluntary means, they are obliged to resort to compulsory dispute settlement procedures entailing binding decisions. The Tribunal is one of the four compulsory means that the States Parties may choose for resolving their disputes concerning the Convention in accordance with article 287 of the Convention. However, I would like to emphasize one point in this context. Only permanent tribunals are institutions that allow the development of a corpus of jurisprudence as they have the capacity and the obligation to create a body of decisional law that will serve the long-term interests of all States. This should be borne in mind when States make their declarations on the choice of dispute settlement under article 287 of the Convention.

Let me explain this;notwithstanding the principle of free choice of means, it seems difficult to expect a coherent corpus of jurisprudence to be established through arbitration, for various reasons. Arbitration – one of the compulsory procedures under the Convention – is, basically, a three-party process involving two disputing parties and an arbitral tribunal. The disputing parties are entitled to appoint arbitrators and determine the rules that are to govern the arbitral proceedings. In general, other States play no role in selecting the arbitral tribunal and have no prerogative to attend the hearings which take place in private unless the parties decide otherwise. Similarly, the right of third parties to intervene in arbitral proceedings is not usually recognized. As arbitral tribunals are set up solely for the purpose of dealing with particular cases, have no institutional affiliations and no capacity to affect the legal interest of third States, they may see the disputing parties as their sole addressees and the resolution of the specific dispute as their only task.

In this regard, it may be useful to observe that the Tribunal offers a suitable alternative to parties who are considering arbitration for resolving their maritime disputes. Parties have the option to have their dispute heard before an *ad hoc* special chamber, in accordance with article 15, paragraph 2, of the Statute. The advantages of this *ad hoc* system are of particular interest, especially when

compared with arbitration. On the one hand, parties have control over the chamber's composition, as they may choose any of the 21 judges who are to sit in the chamber. They may also appoint judges *ad hoc* if the chamber does not include a member of the nationality of the parties. For example, the chamber could be composed of three judges of the Tribunal and two judges *ad hoc.* On the other hand, 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. Furthermore, parties do not have to bear the costs of the proceedings before the Tribunal or one of its chambers. Chile and the European Community took advantage of the *ad hoc* system in the *Swordfish case*, which is still on the docket.

The development of a consistent corpus of jurisprudence might also be problematic with regard to dispute settlement through regional arrangements. Article 282 of the Convention permits the parties to a dispute concerning the interpretation or application of the Convention to have recourse to a procedure provided for in general, regional or bilateral agreements, if they so agree. In this instance, the agreed procedure will apply in lieu of the procedure provided for in Part XV of the Convention. This is allowed only if the procedure under the agreement other than the Convention entails a binding decision. In addition, the procedure must provide for the settlement of disputes concerning "the interpretation or application of this Convention" and not of any other agreement (*MOX Plant (Ireland* v. *United Kingdom), Provisional* M*easures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, para. 52, at p. 106). In this respect, States might be interested in concluding regional agreements, which follow specific approaches and could be considered more appropriate for dealing with local situations. However, we must keep in mind that sea-related disputes are to be adjudicated in accordance with the general law of the sea which is applicable to the international community as a whole. The principle of the universality of the Convention can be maintained only through dispute settlement procedures that pursue a global approach. The problems of ocean space are, as underlined in the preamble to the Convention, closely inter-related and need to be considered as a whole.

Finally, I should like to refer to the Tribunal's role as a forum which is available to settle litigation involving international organizations and private entities.

Although the implementation of the Convention is something which is primarily incumbent on States, international organizations and private entities have been entrusted with significant functions under the Convention. Accordingly, the Convention endowed the Tribunal with broad jurisdiction *ratione personae* including international organizations and private entities that may be parties to a dispute before it. This is a remarkable innovation in international adjudication.

Under the Convention, international organizations are treated in the same way as States Parties. In accordance with annex IX of the Convention, an international organization refers to an intergovernmental organization to which member States have transferred competence over matters governed by the Convention. It is of interest to note that a fisheries case I already mentioned, namely, the *Swordfish case* - which is pending before an *ad hoc* special chamber of the Tribunal – has as parties Chile and the European Community. The member States of the European Community have in fact transferred competence for fisheries matters to it. I should add that the European Community is the only international organization so far that has become party to the Convention. In view of their *locus standi*, the Rules of the Tribunal were formulated to give international organizations due access to the Tribunal.

On the other hand, private entities may appear either before the Seabed Disputes Chamber or the Tribunal. In accordance with Part XI of the Convention, the entitlement to appear before the Seabed Disputes Chamber belongs not only to the International Seabed Authority but also to private entities, including natural or juridical persons, for instance, if they possess the nationality of States Parties or are controlled by States Parties or their nationals. A dispute involving private entities may concern the interpretation or application of a contract, in which case the jurisdiction of the Chamber is mandatory.

As far as the Tribunal is concerned, private entities may be parties to a dispute before the Tribunal if the conditions of article 20 of the Statute are met. In this sense,

private entities may have recourse to the Tribunal in respect of matters specifically provided for in an agreement which confers jurisdiction on the Tribunal and is agreed upon by all the parties to that case. The Tribunal may become competent to hear a dispute on the basis of a binding agreement that contains a clause conferring jurisdiction on the Tribunal or a special chamber of the Tribunal for the settlement of disputes relating to the interpretation or application of that agreement. For example, such a clause could be inserted in agreements between a flag State and a classification society or a shipowner dealing with maritime matters. This could to a certain extent open up access to the Tribunal for private entities.

Mr Chairman,
Ladies and Gentlemen,

This brings me to the end of my presentation.

I end by reiterating my appreciation to you for giving me the opportunity to address this meeting. I thank you for your kind attention.