INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

STATEMENT BY

H.E. JUDGE JIN-HYUN PAIK

PRESIDENT OF THE

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ON

AGENDA ITEM 74(a) “OCEANS AND THE LAW OF THE SEA”

AT

THE PLENARY OF THE SEVENTY-FOURTH SESSION OF THE

UNITED NATIONS GENERAL ASSEMBLY

10 DECEMBER 2019

Mr President,
Ladies and Gentlemen,

It is an honour for me to address the General Assembly this year on behalf of the International Tribunal for the Law of the Sea during the Assembly's consideration of the agenda item "Oceans and the law of the sea". Allow me first to convey to you, Mr President, my congratulations on your election as President of the General Assembly. I wish you every success in this distinguished office.

Before referring to matters of interest at the Tribunal, it is with great sadness that I must inform you of the passing of two former Judges of the Tribunal: Judge Alexander Yankov of Bulgaria on 17 October 2019 and Judge Hugo Caminos of Argentina, only two days ago, on 8 December 2019.

Judges Yankov and Caminos served as members of the Tribunal during the same period of time, namely from 1996 until 2011. They were involved, throughout their long, distinguished careers, in the development of law of the sea and the peaceful settlement of disputes. Among many other achievements, they played an important role during the Third United Nations Conference on the Law of the Sea. Judge Yankov served as Chairman of the Third Committee of the Conference and Judge Caminos was Deputy Director at the Office of the Special Representative of the Secretary-General of the United Nations for the Conference.

On behalf of the Tribunal, I wish to pay tribute to Judges Yankov and Caminos and their important contribution to the work of the Tribunal.

Turning to the judicial work of the Tribunal, I wish to inform delegates that 2019 has been a productive year for us in Hamburg. The Tribunal delivered a judgment on the merits as well as two orders in response to requests for provisional measures. Dealing with a wide range of legal issues, including the freedom of navigation, exclusive flag State jurisdiction on the high seas, and the military activities exception to compulsory dispute settlement, the Tribunal was called upon, in those cases, to interpret and apply key provisions of the United Nations Convention on the Law of the

Sea (which I will refer to as "the Convention") and, in doing so, provided greater clarity to States on the content of their rights and obligations thereunder.

On 10 April 2019, the Tribunal delivered its judgment in *The M/V "Norstar" Case (Panama* v. *Italy)*. You may recall that Panama had instituted proceedings against Italy by means of an application to the Tribunal dated 16 November 2015, in respect of a dispute between the two States in connection with the arrest and detention of the *M/V "Norstar"*, an oil tanker flying the flag of Panama. The preliminary objections phase of the case came to end with the Tribunal's judgment of 4 November 2016, rejecting Italy's preliminary objections on jurisdiction and admissibility. Oral proceedings on the merits took place in September 2018.

From 1994 until 1998, the *M/V "Norstar"* was engaged in supplying gasoil to mega yachts on the high seas in the Mediterranean Sea. In August 1998, an Italian public prosecutor issued a decree of seizure against the vessel, in the context of criminal proceedings for tax evasion. In September 1998, the Spanish authorities, at the request of Italy, seized the vessel when it was anchored in the bay of Palma de Mallorca, Spain. In 2003, an Italian court revoked the seizure and ordered that the vessel be returned to the owner but the owner never collected it. The vessel remained in port in Mallorca until 2015, when it was sold at public auction.

In its judgment of April 2019, the Tribunal considered the application of article 87, paragraph 1, of the Convention, which provides that all States enjoy the freedom of navigation on the high seas, to a situation in which a vessel was detained in internal waters in relation to activities allegedly carried out, in part, on the high seas. The Tribunal determined that the decree of seizure issued by Italy in respect of the *M/V "Norstar"*, and its execution, concerned "both alleged crimes committed in the territory of Italy and bunkering activities conducted by the *M/V "Norstar"* on the high seas."[1] In respect of the bunkering activities of the *M/V "Norstar"* on the high seas, the Tribunal found that they constituted "not only an integral part, but also a central element, of the activities targeted by the Decree of Seizure and its execution."[2]

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[1] *M/V "Norstar" (Panama* v. *Italy)*, Judgment, ITLOS Reports 2018-2019, para. 177.
[2] *Ibid*., para. 186.

In this context, the Tribunal provided an important clarification on the legal status of bunkering under the Convention. In the *M/V "Virginia G" Case*, the Tribunal had found that a coastal State may regulate the bunkering of foreign vessels engaged in fishing in the exclusive economic zone, while the coastal State does not have such competence with regard to other bunkering activities, unless otherwise determined in accordance with the Convention.[3] In the *M/V "Norstar" Case*, the Tribunal explained that "bunkering on the high seas is part of the freedom of navigation to be exercised under the conditions laid down by the Convention and other rules of international law."[4] On this basis, the Tribunal concluded that "the bunkering of leisure boats carried out by the *M/V "Norstar"* on the high seas falls within the freedom of navigation under article 87 of the Convention."[5]

The Tribunal also made important pronouncements with regard to article 87 of the Convention. It observed that this provision "proclaims that the high seas are open to all States"[6] and that "save in exceptional cases, no State may exercise jurisdiction over a foreign ship on the high seas."[7] The Tribunal also stated that "[f]reedom of navigation would be illusory if a ship – a principal means for the exercise of the freedom of navigation - could be subject to the jurisdiction of other States on the high seas."[8] It underlined that "the principle of exclusive flag State jurisdiction is an inherent component of the freedom of navigation under article 87 of the Convention", and held that this principle "prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas."[9]

Observing that the place where enforcement takes place is not the sole criterion in determining the applicability of article 87 to a given situation, the Tribunal found that article 87, paragraph 1, of the Convention was applicable to the case of the *M/V "Norstar"*, and that Italy, by extending its criminal and customs laws to the high

[3] *Ibid*., para. 219.
[4] *Ibid*., para. 219.
[5] *Ibid*., para. 219.
[6] *Ibid*., para. 214.
[7] *Ibid*., para. 216.
[8] *Ibid*., para. 216.
[9] *Ibid*., para. 225.

seas, by issuing a decree of seizure, and by requesting the Spanish authorities to execute it, breached the freedom of navigation which Panama, as the flag State of the *M/V "Norstar"*, enjoyed under that provision.[10]

The Tribunal awarded Panama compensation for the loss of the *M/V "Norstar".* The Tribunal further concluded that Italy did not violate article 300 of the Convention. The judgment of the Tribunal brought to an end a long-running dispute concerning the *M/V "Norstar"*, which had been arrested more than 20 years ago, in 1998. It also represents a significant contribution to the jurisprudence regarding the scope of freedom of navigation and exclusive flag State jurisdiction on the high seas.

Mr President,

Shortly after issuing its judgment in *The M/V "Norstar" Case*, the Tribunal was seized of a new case: on 16 April 2019, Ukraine submitted to the Tribunal a request for the prescription of provisional measures under article 290, paragraph 5, of the Convention. By its Notification and Statement of Claim dated 31 March 2019, Ukraine had instituted arbitral proceedings under Annex VII to the Convention against the Russian Federation in a dispute "concerning the immunity of three Ukrainian naval vessels and the twenty-four servicemen on board." The dispute relates to an incident which occurred on 25 November 2018, in which three Ukrainian naval vessels and their 24 servicemen were arrested and detained by the authorities of the Russian Federation. The incident took place in the Black Sea near the Kerch Strait.

Ukraine requested the Tribunal to indicate provisional measures requiring the Russian Federation to promptly release the three Ukrainian naval vessels and return them to the custody of Ukraine, to suspend criminal proceedings against the 24 detained Ukrainian servicemen and refrain from initiating new proceedings, and to release the 24 detained Ukrainian servicemen and allow them to return to Ukraine.

In a note verbale dated 30 April 2019, the Russian Federation conveyed its view that the arbitral tribunal to be constituted under Annex VII would not have

[10] *Ibid*., para. 226.

jurisdiction to rule on Ukraine's claim. The Russian Federation further informed the Tribunal of its decision not to participate in the hearing on provisional measures. However, the Russian Federation submitted to the Tribunal a Memorandum regarding its position on the circumstances of the case.

Oral statements were presented on behalf of Ukraine on 10 May 2019, while the Russian Federation was not represented at the public sitting.

The Tribunal adopted its Order on provisional measures on 25 May 2019. The Tribunal examined whether article 298, paragraph 1(b) of the Convention, relating to disputes concerning military activities, was applicable, thus excluding the case from the jurisdiction of the Annex VII arbitral tribunal. The Tribunal considered that the underlying dispute leading to the arrest of the three Ukrainian naval vessels concerned their passage through the Kerch Strait[11] and that "the Parties' differing interpretation of the regime of passage through the Kerch Strait" was "at the core of the dispute".[12] Considering the context in which the Russian Federation used force when arresting the Ukrainian vessels and the sequence of events, the Tribunal held the view that "what occurred appears to be the use of force in the context of a law enforcement operation rather than a military operation."[13] For the Tribunal, these circumstances suggested "that the arrest and detention of the Ukrainian naval vessels by the Russian Federation took place in the context of a law enforcement operation."[14] In addition, the "subsequent proceedings and charges against the servicemen further support[ed] the law enforcement nature of the activities of the Russian Federation."[15] Accordingly, the Tribunal considered that *prima facie* article 298, paragraph 1(b), of the Convention, which relates to military activities, did not apply.[16]

Having found that *prima facie* the Annex VII arbitral tribunal would have jurisdiction over the dispute submitted to it, the Tribunal examined the plausibility of the rights asserted by Ukraine and considered that "the rights claimed by Ukraine on

[11] *Ukraine* v. *Russia*, Order of 29 May 2019, para. 68.
[12] *Ibid*., para. 72.
[13] *Ibid*., para. 74.
[14] *Ibid*., para. 75.
[15] *Ibid*., para. 76.
[16] *Ibid*., para. 77.

the basis of articles 32, 58, 95 and 96 of the Convention are plausible under the circumstances."[17] It noted, in this regard, that two of the Ukrainian vessels were "warships within the meaning of article 29 of the Convention" and the third was "a ship owned or operated by a State and used only on government non-commercial service, as referred to in article 96 of the Convention."[18]

The Tribunal then found that there was "a real and imminent risk of irreparable prejudice to the rights of Ukraine pending the constitution and functioning of the Annex VII arbitral tribunal" and that "the urgency of the situation requires the prescription of provisional measures under article 290, paragraph 5, of the Convention."[19] The Tribunal recalled that a warship, as defined by article 29 of the Convention, "is an expression of the sovereignty of the State whose flag it flies",[20] a reality which is reflected in the immunity it enjoys under the Convention and general international law. The Tribunal further noted that "any action affecting the immunity of warships is capable of causing serious harm to the dignity and sovereignty of a State and has the potential to undermine its national security."[21]

Pending a decision by the Annex VII arbitral tribunal, the Tribunal ordered that the Russian Federation should immediately release the three Ukrainian naval vessels and return them to the custody of Ukraine, and immediately release the 24 detained Ukrainian servicemen and allow them to return to Ukraine.[22] The Tribunal did not consider it necessary to require the Russian Federation to suspend criminal proceedings against the 24 detained Ukrainian servicemen and refrain from initiating new proceedings.[23] However, Ukraine and the Russian Federation were ordered to refrain from taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.[24]

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[17] *Ibid*., para. 97.
[18] *Ibid*., para. 97.
[19] *Ibid*., para. 113.
[20] *Ibid.,* para. 110.
[21] *Ibid*.
[22] *Ibid*., para. 118.
[23] *Ibid*., para. 119.
[24] *Ibid*., para. 120.

Pursuant to article 95, paragraph 1, of the Rules and, as determined in the Tribunal's Order, the Parties submitted to the Tribunal reports and information on compliance with the provisional measures prescribed. By note verbale dated 16 September 2019, the Russian Federation informed the Tribunal that the 24 Ukrainian servicemen had been handed over to Ukraine and left the territory of the Russian Federation on 7 September 2019. By note verbale of 22 November 2019, the Russian Federation informed the Tribunal that the three Ukrainian vessels had been handed over to Ukraine on 18 November 2019.

Regarding the Annex VII arbitral proceedings instituted by Ukraine on 31 March 2019, I wish to inform the Assembly that, further to the request of Ukraine and following consultations with the Parties, I appointed three arbitrators and the President of the arbitral tribunal on 10 July 2019, in accordance with article 3 of Annex VII to the Convention. A first procedural meeting of the arbitral tribunal was held on 21 November 2019.

Mr President,

On 21 May 2019, while the Tribunal's decision on Ukraine's application for provisional measures was pending, Switzerland submitted to the Tribunal a request for the prescription of provisional measures. By its Notification and Statement of Claim dated 6 May 2019, Switzerland had instituted arbitral proceedings under Annex VII to the Convention against Nigeria in respect of a dispute concerning the arrest and detention of the Swiss-flagged *M/T "San Padre Pio"*, its crew and cargo. The dispute concerns events occurring on 22-23 January 2018, when the motor tanker *"San Padre Pio"*, engaged in ship-to-ship transfer of gasoil in the exclusive economic zone of Nigeria, was arrested by the Nigerian navy. The *M/T "San Padre Pio"* together with its crew members and cargo was detained at Port Harcourt, Nigeria, on 24 January 2018.

Switzerland claimed that the dispute between Switzerland and Nigeria concerned the interpretation and application of Parts V and VII of the Convention, "including articles 56, paragraph 2, 58, 87, 92 and 94."[25]

[25] *Switzerland* v. *Nigeria*, Order of 6 July 2019, para. 48.

The Tribunal adopted its Order on provisional measures on 6 July 2019. The Tribunal considered that "at least some of the provisions invoked by Switzerland appear to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded"[26] and accordingly concluded "that a dispute concerning the interpretation or application of the Convention *prima facie* appears to have existed on the date of the institution of the arbitral proceedings."[27]

In accordance with the requirements necessary for the prescription of provisional measures, the Tribunal determined that the rights claimed by Switzerland on the basis of article 58, paragraphs 1 and 2, of the Convention and article 92 of the Convention were plausible.[28] Regarding the requirement of urgency, the Tribunal noted, inter alia, that the *M/T "San Padre Pio"* had not only been detained for a considerable period of time but also that the vessel and its crew were exposed to constant danger to their safety and security.[29]

Pending a decision by the Annex VII arbitral tribunal, the Tribunal ordered that Switzerland should post with Nigeria a bond or other financial security, in the form of a bank guarantee, and that Switzerland should undertake to ensure that the Master and the three officers would be available and present at the criminal proceedings in Nigeria if the Annex VII arbitral tribunal found that the arrest and detention of the *M/T "San Padre Pio"*, its cargo and its crew and the exercise of jurisdiction by Nigeria in relation to the event which occurred on 22-23 January 2018 did not constitute a violation of the Convention. The Tribunal further ordered that, upon the posting of the bond or financial security and the issuance of the undertaking, Nigeria should immediately release the *M/T "San Padre Pio"*, its cargo and its crew.

The Tribunal did not consider it necessary to require Nigeria to suspend all court and administrative proceedings and refrain from initiating new proceedings.[30] However, the Tribunal considered it appropriate to order both Parties to refrain from

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[26] *Ibid*., para. 60.
[27] *Ibid*., para. 61.
[28] *Ibid*., para. 108.
[29] *Ibid*., para. 129.
[30] *Ibid*., para. 142.

taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.[31] Pursuant to article 95, paragraph 1, of the Rules and as determined in the Tribunal's Order, the Parties submitted to the Tribunal reports and information on compliance with the provisional measures prescribed.

Mr President, I would now like to inform the Assembly about another case, recently submitted to the Tribunal. On 18 June 2019, Mauritius initiated Annex VII arbitral proceedings against the Maldives in relation to a dispute concerning the delimitation of the maritime boundary between the two countries in the Indian Ocean. I held consultations with the Parties at the Tribunal on 17 September 2019, and on 24 September they transmitted to the Tribunal a notification and special agreement to submit their dispute to a special chamber of the Tribunal, to be constituted pursuant to article 15, paragraph 2, of the Statute. By Order of the Tribunal of 27 September 2019, a special chamber of the Tribunal was formed to deal with the dispute. The Special Chamber consists of nine judges, including two judges *ad hoc*.

On 10 October 2019, in my capacity as President of the Special Chamber, I adopted an order fixing the time-limits for the submission of the written pleadings of the Parties. The Order provides that the Memorial of Mauritius should be submitted by 9 April 2020 and the Counter-Memorial of Maldives by 9 October 2020.

Mr President, I believe that the willingness of Mauritius and Maldives to transfer their dispute from Annex VII arbitration to the Tribunal is a testament to the Tribunal's reputation for effective and efficient dispute settlement. In particular, it is clear that the Tribunal's flexibility - in terms of the size and composition of special chambers - to hear a particular dispute is of interest to States. The last maritime delimitation case decided by the Tribunal, that of *Ghana/Côte d'Ivoire,* was also transferred from Annex VII arbitration to a special chamber of the Tribunal by special agreement of the Parties. While Annex VII arbitration may be the default dispute-settlement mechanism under the Convention, the Tribunal has proven itself to be an increasingly attractive option for States seeking to settle disputes arising under the Convention.

[31] *Ibid*.

Mr President,

As you are aware, alongside its judicial work, the Tribunal is also active in the field of capacity-building and is committed to increasing knowledge of the possibilities it offers for the settlement of disputes. Before I conclude, I would like to take the opportunity to give you a brief overview of those activities.

In November 2019, the Tribunal held another of its regional workshops on the settlement of disputes related to the law of the sea, this time in the South American region. The event, which took place in Montevideo, Uruguay, was the fourteenth in a series of workshops held in different regions of the world to provide national experts with practical information on the dispute-settlement procedures available before the Tribunal. The Montevideo workshop was attended by representatives of ten States from the region. It was organized in cooperation with the Ministry of Foreign Affairs of Uruguay and with the financial support of the Korea Maritime Institute. At the workshop, a fruitful exchange on the relationship between the Tribunal and other regional agreements on dispute settlement took place. I wish to reiterate our sincere gratitude to the Government of Uruguay and to the Korea Maritime Institute for their cooperation and assistance.

Every year, the Tribunal offers some 15 internships of three months' duration to university students. In the twenty-two years of its existence, the programme has given 375 interns from 95 States the opportunity to acquire experience with the work of the Tribunal, many of whom have gone on to pursue careers in the field of law of the sea. I am glad to note that the Tribunal's internship programme is able to support interns from developing countries through a trust fund set up by the Tribunal. Several grants have been made to this fund over the years, among others, by the Ministry of Foreign Affairs of the People's Republic of China and the Korea Maritime Institute. I wish to express my sincere gratitude to both for this support.

Since 2007, the Tribunal has also run the Nippon programme, a nine-month capacity-building and training programme in international dispute settlement in the law of the sea. Five Fellows are participating in the current, thirteenth, cycle of the

programme. They are nationals of Bahrain, Chile, Côte d'Ivoire, Guyana and Lithuania. To date, 81 Fellows have had the opportunity to participate in the programme, which, since its establishment, has been organized with the financial support of the Nippon Foundation of Japan. I wish to take this opportunity to express my sincere gratitude to the Nippon Foundation for its commitment to the programme.

Before I conclude, Mr President, allow me to say a few words about the dispute-settlement system to be included in the new international legally binding instrument under the Convention on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. I read with great interest the advance revised draft text of the new instrument of 27 November 2019, and I wish to congratulate the President of the conference, Ms Rena Lee, on her stewardship of the negotiations.

The issue of dispute settlement is an important matter; I have already expressed some of my views on this here and elsewhere. Therefore, without reiterating what I have already stated, may I ask you to look into this matter and consider what the most appropriate system for dispute settlement would be, in order to ensure consistent and efficient interpretation and application of the new instrument. In this context, I wish to highlight that the Tribunal stands ready to deal with any further tasks with which the international community wishes to entrust it in the future.

Mr President,
Distinguished delegates,

Finally, regarding organizational matters, this year has seen changes in the Registry of the Tribunal. In September 2019, the Judges of the Tribunal elected Ms Ximena Hinrichs Oyarce, of Chilean nationality, as the Registrar of the Tribunal. Prior to her election as Registrar, Ms Hinrichs Oyarce served as Deputy Registrar of the Tribunal. I am proud to inform you that Ms Ximena Hinrichs Oyarce is the first female Registrar of the Tribunal. Ms Hinrichs Oyarce succeeds Mr Philippe Gautier, who resigned further to his election as Registrar of the International Court of Justice on 22 May 2019. On behalf of the Tribunal, I wish to express our gratitude and appreciation to Mr

Gautier for his outstanding service to the Tribunal for more than two decades. The Tribunal is currently receiving expressions of interest for the post of Deputy Registrar.

I would like to add that the Tribunal benefits from excellent cooperation with the United Nations. In this respect, I wish to express our gratitude to the Secretary-General, the Legal Counsel and the Director of the Division for Ocean Affairs and the Law of the Sea for their support and cooperation.

I thank you for your kind attention.