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The International Tribunal for the Law of the Sea and the Oil and Gas Industry

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Mr Chairman, Ladies and Gentlemen,

It is an honour for me to be present at this prestigious meeting at the invitation of the organizers. I am representing here the International Tribunal for the Law of the Sea and its President, Judge Rüdiger Wolfrum.

President Wolfrum is presently busy chairing the current session of the Tribunal in Hamburg. He has asked me to convey his best wishes for a successful meeting and to contribute to your debates with a brief paper illustrating the possibilities for a fruitful relationship between the Tribunal and the oil and gas industry.

1. What the International Tribunal for the Law of the Sea has to offer

The International Tribunal for the Law of the Sea (ITLOS - the Tribunal) is a specialized international tribunal established in Hamburg in 1996 on the basis of the United Nations Convention for the Law of the Sea (UNCLOS - the Convention) to which to date 155 States (including the European Community) are party. It is competent to settle disputes concerning the interpretation and application of the Convention. As the Convention regulates most aspects of the law of the sea, its relevance is obvious for the oil and gas industry, an industry that conducts exploration for and exploitation of oil and gas in the seabed and transports oil and gas by ship and by underwater pipelines all over the world.

Disputes between States may be submitted to ITLOS by agreement of the parties or unilaterally. In the latter case, we speak of compulsory jurisdiction. The Tribunal exercises such compulsory jurisdiction in competition with the International Court of Justice ("ICJ") and *ad hoc* arbitration tribunals, the jurisdiction of each depending on a combination of unilateral declarations of preference States Parties may make under article 287 of the Convention. As the mechanism concerning such declarations uses international arbitration as the "default" dispute-settlement means, the most likely avenue for establishing the jurisdiction of the Tribunal in contentious cases is the agreement of the parties.

In some cases ITLOS enjoys, nevertheless, exclusive compulsory jurisdiction not in competition with the ICJ or with arbitration. Apart from all sorts of disputes, whose time seems not to have yet come, concerning the exploration for and exploitation of mineral resources of the seabed beyond national jurisdiction which belong to the compulsory and exclusive competence of the eleven-member Chamber for Seabed Disputes, the exclusive compulsory jurisdiction of the Tribunal is exercised in two different urgent procedures.

The first is the procedure for the prompt release of detained vessels and crews, which can be submitted to the Tribunal against the detaining State by the flag State and also – a possibility that private industry should appreciate – "on behalf" of the flag State, in other words: by the interested private party such as the shipowner, provided it is authorized by the flag State (article 292). The cases for which such procedure is available concern non-compliance with provisions of the Convention regarding fisheries and pollution providing for prompt release of vessels and crews upon the posting of a reasonable bond or other financial guarantee. The determination of the reasonable bond is an important aspect of these proceedings

The second is a procedure for the prescription of binding provisional measures pending the establishment of a competent arbitral tribunal. In this case, when the preservation of the rights of the parties or the prevention of serious harm to the marine environment is a matter of urgency in a dispute for the settlement of which the constitution of an arbitral tribunal has been requested, the interested party or parties may request the Tribunal to prescribe the necessary provisional measures.

Most of the fifteen cases that have been submitted to ITLOS to date fall into one of these two categories. The majority of the prompt release cases were submitted on behalf of the flag State by the interested private parties. Two States, the Russian Federation in the *Volga* Case against Australia of 2002, and Japan, in the *Hoshimaru* and the *Tomimaru* cases against the Russian Federation, as recently as last July, have, however, submitted the case directly to the Tribunal. In the provisional measures cases the Tribunal has developed, through the measures it has prescribed, a dispute-management attitude which has helped parties to cooperate and in some cases to settle the dispute without needing to reach an arbitration award on the merits.

Through all cases that have been brought to it the Tribunal has become well known for the expeditiousness and for the user-friendliness of its proceedings.

The fishing industry has been the most active before it – even though the Tribunal has also heard cases concerning other economic activities, such as bunkering at sea, treatment of nuclear materials and land reclamation.

It seems odd that, with the partial exception of the *Saiga* cases concerning bunkering at sea, activities having to do with oil and gas have been absent in the hall of justice of ITLOS. The potential for disputes of relevance for the oil and gas industry is, nevertheless, huge, as I shall try to explain reviewing briefly the kinds of such disputes that may be brought before the Tribunal.

2. Disputes relevant for the oil and gas industry that may be submitted to the Tribunal

The various categories of disputes I shall now be considering are all (with the partial exception of the prompt release ones) true international disputes, State-to-State disputes based either on an agreement between States or on the provisions of the Convention establishing compulsory jurisdiction.

It is nonetheless conceivable for the jurisdiction of ITLOS to be established on the basis of an agreement which is not between States. Article 20 of the Statute of the Tribunal (annex VI to UNCLOS) states that: “The Tribunal shall be open to entities other than States Parties…in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case”. It has been argued that the “agreement” mentioned in this provision need not necessarily be an “international agreement” as mentioned in UNCLOS article 288, paragraph 2, in considering the jurisdiction of all the adjudicating bodies mentioned in article 287. It would follow that, for instance, a company and a coastal State might submit to the Tribunal a dispute concerning the delineation and course of a pipeline on the continental shelf (under UNCLOS article 79, paragraph 3) on the basis of an agreement (which would not be an international one in the strict sense) between them.

3. Delimitation disputes

It is well known that oil and gas companies are reluctant to invest in contested maritime zones. It follows that the settlement of disputes concerning the delimitation of maritime zones between States whose coasts are adjacent or opposite is important for these companies. A clear, undisputed, borderline is a necessary pre-requisite for seeking oil and gas concessions and for exploiting the resource.Under UNCLOS, disputes concerning the delimitation of the territorial sea, the exclusive economic zone and the continental shelf can be brought unilaterally by one party to the competent international court or tribunal, unless this possibility has been excluded by a unilateral declaration made under article 298. About twenty suchdeclarations are on record. While this makes it unlikely, in some regions, that such disputes will be brought unilaterally to ITLOS or to another competent court or tribunal, this does not hold true in other regions, such as the Caribbean. In this region delimitation cases brought unilaterally under UNCLOS have been submitted to an arbitral tribunal respectively between Barbados and Trinidad and Tobago (award of 2006) and between Guyana and Suriname (award to be issued in 2007).

If the delimitation dispute is submitted by agreement, the declaration one or both parties may have made would not constitute an obstacle. Nor would any difficulties that might emerge if the dispute were brought to adjudication unilaterally arise. These difficulties may concern, in particular, the possible connections between the delimitation aspects of a dispute and aspects regarding sovereignty on land.

4. Disputes concerning oil and gas exploration and exploitation activities.

Disputes concerning the exercise of the coastal States' jurisdiction over the resources of their continental shelf are excluded from compulsory jurisdiction under article 297, paragraph 1, of UNCLOS. These disputes include those concerning the sovereign right of the coastal State over the oil and gas resources of the continental shelf and the conditions to be satisfied for their exploration and exploitation. So, a dispute concerning the rules adopted by the coastal State setting requirements for obtaining consent for oil and gas exploration or exploitation activities on the continental shelf would be excluded from compulsory jurisdiction. Such a dispute may, nevertheless, be submitted to adjudication by agreement.

However, other disputes connected with gas and oil exploration and exploitation are not excluded from compulsory jurisdiction. These are the disputes whose object is a conflict between the powers of the coastal State over its exclusive economic zone (including the seabed under it) and the exercise of the freedoms of the high seas that apply to such area, namely freedom of navigation, of overflight, of laying cables and pipelines and other internationally lawful uses of the seas associated with these freedoms (article 297, paragraph 1(a) and (b)).

5. Disputes concerning installations and structures

Installations and structures (not defined, but to be read as artefacts having a lesser degree of permanence than artificial islands, also mentioned in the same relevant articles of UNCLOS) on the continental shelf are included in the exclusive jurisdiction of the coastal State (articles 60 and 80). The same applies to the pipelines constructed or used in connection with the exploration of the continental shelf or the exploitation of its resources (article 79, paragraph 4).

Disputes concerning the exercise of such exclusive jurisdiction of the coastal States, although they may be submitted to adjudication by agreement, are excluded from compulsory jurisdiction under UNCLOS. However, article 60 of UNCLOS spells out a number of principles for balancing the coastal State's jurisdiction over installations and structures and freedom of navigation, fishing activities and the preservation of the marine environment. The implementation of such principles may open the way to disputes included in compulsory jurisdiction.

In particular, paragraph 3 of article 60 sets out the obligation to remove abandoned or disused installations to "ensure safety of navigation" and having due regard to fishing, the protection of the marine environment and the rights and interests of other States. This obligation is to be implemented taking into account generally accepted standards, such as the recommendations the International Maritime Organization ("IMO") adopted on the subject in 1989. In light of the costs involved in the removal of abandoned and disused oil platforms and other installations and structures, this provision is of obvious importance for the oil and gas industry.

Disputes concerning this subject may involve a conflict between the sovereign rights of the coastal State and freedoms to navigate or lay cables and pipelines which are included in the compulsory jurisdiction of ITLOS and of the other adjudicating bodies under UNCLOS, article 297, paragraph 1.

6. Disputes concerning transportation of oil and gas by ships

One of the main interests of the oil and gas industry is to enjoy free navigation for ships – whatever flag they may be flying – transporting oil and gas all over the world. The availability of international courts and tribunals having jurisdiction to entertain disputes concerning navigation seems to be an important factor for buttressing the effectiveness of such freedom.

Navigation is one of the main subjects of UNCLOS and it is one over which compulsory jurisdiction extends. Indeed, disputes concerning navigation on the high seas are submitted to such jurisdiction without exception. This applies also to the waters of the exclusive economic zone, as freedom of navigation extends to those waters under article 58 of the Convention. In the exclusive economic zone, however, there may be conflicts between the exercise of freedom of navigation and the sovereign rights of the coastal State over its resources, for instance, in case of interference between navigation and oil fields or fishing grounds. This kind of disputes is also included in compulsory jurisdiction under article 297, paragraph 1(a) and (b).

Consequently, flag States of oil tankers and gas carriers are entitled to institute international disputes before ITLOS or another international court or tribunal competent under UNCLOS against any State Party to the Convention that creates obstacles to their movement in contravention of the prescriptions of the Convention.

Such obstacles may consist, *inter alia*, in establishing maritime zones not allowed by the Convention in which the coastal State claims rights exceeding those permitted by the Convention. This was the situation considered by the Tribunal in the "*Saiga" No. 2* case. This case concerned police action conducted by Guinea against a ship flying the flag of SaintVincentandthe Grenadines involved in the bunkering of fishing vessels. Such action was based on powers Guinea claimed on the basis of a "customs control" zone of 250 kilometres, a width exceeding by far the 24-mile limit of the contiguous zone, within which such police activities are allowed by UNCLOS. The Tribunal – while not considering it necessary in the circumstances of the case to take a stand on the legal regime of bunkering at sea - stated that Guinea's customs control zone was incompatible with the Convention and that the police action was illegal.

Disputes concerning navigation may also arise in relation to planned construction work that might be prejudicial to transit or innocent passage through international straits. An example of this kind of dispute is the *Great Belt* case which – before the entry into force of UNCLOS – was submitted to the International Court of Justice in 1991. In this case Finland claimed that the bridge Denmark was planning to build over the Great Belt, a strait used for international navigation, would be prejudicial to the exercise of innocent passage by Finnish drillships whose height exceeded that of the bridge. As is well known, the case was settled out of court. The importance of the issues debated remains, nonetheless.

7. Piracy, violence and illicit trafficking at sea

Piracy, defined as any illegal act of violence, detention or depredation committed for private ends by the crew or passengers of a ship and directed against another ship or persons or property on board such ship (UNCLOS, article 101), unfortunately, is not a phenomenon of the past. It is still a frequent occurrence in certain areas of the world such as the waters of Somalia or the South-East Asian seas. Other forms of violence at sea, equally and sometimes more worrisome, are not covered by the definition. These include hijacking of a ship by its passengers (the *Achille Lauro* case) and the use of a ship as a weapon of mass destruction, similar to the 11September 2001 model, but at sea.

These uses of violence at sea are normally envisaged within the framework of the fight against terrorism or organized crime, and specific criminal law conventions, such as the so-called SUA Convention (Convention for the Suppression of Unlawful Acts Against the

Safety of Maritime Navigation) of 1988 updated in 2005, have been adopted to deal with them.

These uses of violence are, however, obviously, forms of interference with the freedom of navigation. Disputes may arise between the flag State of the victim ship and the flag State of the pirate ship (if such ship retains a nationality). This may occur if the acts of violence are attributable to a State, or if a State has failed to exercise due diligence. Other disputes may arise concerning the compensation due under article 106 of UNCLOS when the seizure of the pirate ship has been effected without adequate grounds. The compulsory jurisdiction of UNCLOS seems difficult to deny for this kind of dispute.Freedom of navigation and the overlapping principle that ships are subject to the exclusive jurisdiction of the flag State constitute the main obstacle to the exercise of police activity (stopping, boarding, inspecting, detention, etc.) on the high seas regarding ships suspected of conducting illicit activities such as smuggling and drug trafficking, illegal immigration, transport and trafficking of weapons of mass destruction. While States have agreed in some conventions (not always widely ratified, however) on procedures that make the granting of the flag State's authorization to conduct such police activities easier and more expeditious, only in a very few cases, always included in bilateral agreements, have they accepted their ships being subjected to police activities by another State without authorization. Disputes between the flag State of a ship subjected to police activities without authorization, or beyond the limits and conditions of the authorization given, and the State conducting the activity may arise. They can be considered disputes concerning navigation and submitted to compulsory jurisdiction under UNCLOS.

Ships transporting oil and gas can be involved in various ways in the acts of violence considered above and in the ensuing disputes. They may be the victims or the instruments of violence. The development of legal principles and mechanisms for combating violence and terrorism, including the use of international courts and tribunals seems to be very much in the interest of the transportation of oil and gas.

8. Disputes concerning pipelines

The laying of submarine pipelines is one of the freedoms of the high seas which apply also to the continental shelf. The coastal State nevertheless enjoys specific powers on this subject that strike a balance with the abovementioned freedom. It may take reasonable measures for the exploration of the continental shelf, the exploitation of its resources and the

protection of the environment. Its consent is required for the delineation of the course for the laying of pipelines on the continental shelf. The pipelines used in connection with the exploration and exploitation of the resources of the continental shelf or with artificial islands, installations and structures thereupon are under the jurisdiction of the coastal State. The coastal State is entitled to impose conditions for pipelines entering its territory and the territorial sea.

In the implementation of the rules striking such balance between the freedom to lay pipelines and the recognized rights of the coastal State many disputes can arise. It may, for instance, be claimed that, through the conditions imposed for the delineation of the course of the pipeline, the coastal State is in fact denying or impeding the laying of the pipeline. It may also be disputed, *inter alia*, whether a certain pipeline is used in connection with the operation of artificial islands, installations and structures on the continental shelf.

All these disputes concern conflict between the freedom to lay cables and pipelines and the exercise of the recognized rights and jurisdiction of the coastal State in the exclusive economic zone and on the continental shelf. As such, under article 297, paragraph 1(a) and (b), compulsory jurisdiction applies to them.

Other disputes may concern the protection of pipelines and the duties of the State laying the pipeline, such as disputes concerning the breaking or damaging of the pipeline. It may happen that these disputes can be settled by domestic tribunals or by private arbitration tribunals. They may also arise between States. In this case, they would be included in compulsory jurisdiction under UNCLOS.

9. Disputes concerning pollution

Under Article 297, paragraph 1(c), of UNCLOS, disputes concerning the exercise of its jurisdiction by the coastal States are included in the compulsory jurisdiction of the competent adjudicatory bodies “when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention”. The requirements set out in this provision introduce limitations to the compulsory jurisdiction of the adjudicatory bodies competent under the

Convention only as regards claims against the coastal State in the exercise of its sovereign rights or jurisdiction in matters concerning the protection and preservation of the marine environment. All other disputes concerning alleged violations of rules of the Convention on that subject may be submitted to the competent adjudicatory body without limitation. These include, in particular, disputes concerning the obligations of the flag States, the duty to cooperate of all States and other general principles set out in the Convention as regards the protection and preservation of the marine environment.

Many disputes concerning pollution can be settled through proceedings before domestic tribunals or private international arbitration. In some cases, a direct State-to-State clash may arise, for instance if it is claimed that the flag State has failed to take the measures prescribed under UNCLOS (or under specific conventions to which it makes reference) and the pollution incident is due to such failure. It is important to stress that in these cases compulsory jurisdiction is available under UNCLOS.

10. Prompt release disputes

The procedure for the prompt release of vessels and crews mentioned above is meant to avoid ships' lying idle in ports, awaiting the development of sometimes lengthy domestic proceedings. It aims to support the interest of the shipowner without prejudicing the claims of the coastal State.

The procedure is applicable in cases of alleged non-compliance with provisions of UNCLOS prescribing prompt release of vessels and crews upon the posting of a bond or other financial guarantee. Among such provisions are articles 220, paragraph 7, and article 226, paragraph 1. They concern ships detained because of alleged violations of rules and standards for the protection and preservation of the marine environment. If it is determined that these provisions have not been complied with by the detaining State, for instance because a bond has not been set or because an unreasonably high bond is required to be posted, the case may be submitted to the Tribunal by the flag State, or on its behalf by the interested private party. The Tribunal – following a very expeditious procedure – may then hand down a judgment prescribing the release of the vessel and crew upon the posting of a reasonable bond or other financial guarantee set by it, and without prejudice to the merits of the case before the appropriate domestic courts.

It is well-known that the oil and gas industry usually deals with the situation of tankers and other ships detained through domestic procedures by taking advantage of the P&I

Club facilities for satisfying the requirements of the guarantee. This probably explains why the prompt release procedure set out in UNCLOS has never been utilized in cases concerning tankers and other ships involved in the oil and gas industry that have been detained because of alleged violations of rules the protection of the environment.

The reason might, nevertheless, also reside in the fact that knowledge about this procedure and its advantages is not as widespread as it should be. My presence here today is a modest attempt to remedy this situation.

Apart from its expeditious character and its relatively low cost, there is one further aspect of the prompt release procedure which, in my view, is particularly attractive. This is that, notwithstanding the possibility of instituting such procedure "on behalf" of the flag State, this is an international procedure, a State-to-State procedure. It eliminates the unavoidable disparity between the private interested party and the sovereign coastal State. Resorting to it should be particularly attractive and productive in cases of weak, corrupt, arbitrary, or simply excessively slow and complicated domestic systems. Here the international publicity a case before an international tribunal entails may be decisive for obtaining in a reasonably short time and at a reasonable cost the result that the vessel and crew are promptly released.

11. Concluding remarks

The International Tribunal for the Law of the Sea is a well-oiled piece of machinery at the disposal of all States involved in maritime activities. Throughout the eleven years since its establishment in Hamburg, it has proven its ability to react promptly to requests for urgent decisions and expeditiously and studiously to requests for decisions in less urgent and more complicated cases. In all cases it has become well-known for its fairness and user-friendliness.

The Tribunal could, however, be used more. There is a huge potential lying idle. This is certainly something of concern to the judges and States Parties. It might, nevertheless, turn out to the advantage of interested parties, as it ensures full attention and expeditious treatment of new cases, especially if concerned with such important maritime activities as those in which the oil and gas industry is involved.