INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

STATEMENT BY

H.E. JUDGE VLADIMIR GOLITSYN

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 SIXTY-NINTH SESSION OF THE

UNITED NATIONS GENERAL ASSEMBLY

9 DECEMBER 2014

Mr President,
Ladies and gentlemen,

1. On behalf of the International Tribunal for the Law of the Sea, I wish to express my appreciation for the opportunity given to me to address this sixty-ninth session of the General Assembly on the occasion of its annual examination of the item “Oceans and the law of the sea”. I would like to extend to you, Mr President, my personal congratulations, and those of the Tribunal, on your election as President of the General Assembly.

2. Mr President, I will first make a few remarks relating to the organization of the Tribunal. Then, I will take this opportunity to elaborate on the role the Tribunal plays under the United Nations Convention on the Law of the Sea, which I will refer to as “the Convention”.

3. As regards organizational matters, I would note that on 11 June 2014 the Meeting of States Parties elected seven judges to the Tribunal for a term of nine years. Five judges of the Tribunal have been re-elected: Albert Hoffmann of South Africa; James Kateka of the United Republic of Tanzania; Jin-Hyun Paik of the Republic of Korea; Stanislaw Pawlak of Poland; and Shunji Yanai of Japan. The judges newly elected are Alonso Gómez-Robledo Verduzco of Mexico and Tomas Heidar of Iceland.

4. I would also note that, on 30 September 2014, my predecessor, Judge Shunji Yanai, completed his three-year term as President of the Tribunal. On 1 October 2014, I was elected President of the Tribunal for a three-year term, and the Tribunal elected Judge Boualem Bouguetaia Vice-President and Judge José Luis Jesus President of the Seabed Disputes Chamber.

Mr President,
Ladies and gentlemen,

5. I now wish to make a few remarks on the Tribunal’s role under the Convention. First, it should be underlined that the Tribunal has an important role in the dispute settlement system established by the Convention. It is one of the fora provided for under the Convention for the adjudication of disputes between States Parties concerning the interpretation or application of the Convention. Such a role is also played by the International Court of Justice and arbitral tribunals and States may choose among those different bodies by means of a declaration pursuant to article 287 of the Convention.

6. I wish to express my appreciation for the continued efforts made by the General Assembly to encourage States Parties to the Convention “that have not yet

done so to consider making a written declaration, choosing from the means set out in article 287".[1]

7. Let me also emphasize that, regardless of whether the parties to a dispute have made a declaration under article 287 or what choice they may have expressed in any such declaration, they may at any time agree to submit the dispute to their preferred dispute settlement body, including the International Tribunal for the Law of the Sea. The latest case decided by the Tribunal, a dispute between the Republic of Panama and the Republic of Guinea-Bissau concerning the oil tanker *M/V "Virginia G"*, was submitted pursuant to just such a special agreement concluded between the Parties, in which they agreed to bring the case before the Tribunal after Panama had instituted arbitration proceedings. This procedure is perfectly in line with article 280 of the Convention, which safeguards the parties' right "to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice."[2]

8. In the *M/V "Virginia G"* case, Panama claimed compensation for what it claimed to be the illegal arrest by the Guinea-Bissau authorities of the vessel *M/V "Virginia G",* flying the flag of Panama. The arrest took place in the exclusive economic zone of Guinea-Bissau on the alleged ground that the vessel, without proper authorization and therefore in contravention of Guinea-Bissau's laws, was conducting refuelling operations for foreign fishing vessels. In the parlance of commercial shipping, this is commonly referred to as "bunkering". The vessel, together with the gas-oil it carried, was later confiscated by the authorities of Guinea-Bissau.

9. The Tribunal was faced with a number of questions in this complex case. Given the time constraints, I will confine myself to two issues: first, the question of the existence of a genuine link; and second, the question of the legal characterization of bunkering to foreign vessels in the exclusive economic zone of a third State.

10. As regards the existence of a genuine link between a flag State and a ship flying its flag, it may be observed that such a link is required under article 91, paragraph 1, of the Convention. In its Judgment of 14 April 2014, the Tribunal stated that the genuine-link requirement "should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag State to grant its nationality to ships".[3] The Tribunal added that, under article 94 of the Convention, the flag State is required "to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted

[1] See A/RES/68/70, 9 Dec 2013, para. 44.
[2] Article 280 of the Convention.
[3] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, para. 110.*

international regulations, procedures and practices. This is the meaning of 'genuine link'." [4]

11. In the *M/V "Virginia G"* case, the key legal issue was that of bunkering in the exclusive economic zone and its regulation. The question to be addressed by the Tribunal was

> whether Guinea-Bissau, in the exercise of its sovereign rights in respect of the exploration, exploitation, conservation and management of natural resources in its exclusive economic zone, has the competence to regulate bunkering of foreign vessels fishing in this zone. To answer this question, the Tribunal needs to analyze the relevant provisions of the Convention and the practice of States in this regard.[5]

12. This question had not yet been decided upon in international adjudication. Moreover, the Convention contains no provision dealing explicitly with bunkering. In fact, the practice of bunkering emerged subsequent to the adoption of the Convention and was therefore not explicitly addressed therein. As a consequence, the Tribunal was required to interpret the Convention on this question.

13. The Tribunal analysed the Convention articles on the sovereign rights of coastal States in their exclusive economic zones and reviewed relevant State practice.[6] It came to the view that

> the regulation by a coastal State of bunkering of foreign vessels fishing in its exclusive economic zone is among those measures which the coastal State may take in its exclusive economic zone to conserve and manage its living resources under article 56 of the Convention read together with article 62, paragraph 4, of the Convention.[7]

It further noted that "[t]his view is also confirmed by State practice which has developed after the adoption of the Convention."[8]

14. The Tribunal thus concluded that

> the bunkering of foreign vessels engaged in fishing in the exclusive economic zone is an activity which may be regulated by the coastal State concerned. The coastal State, however, does not have such competence with regard to other bunkering activities, unless otherwise determined in accordance with the Convention.[9]

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[4] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, para. 113.*
[5] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, para. 208.*
[6] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, para. 210-216.*
[7] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, para. 217.*
[8] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, para. 217.*
[9] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, para. 223.*

15. While the Tribunal found, on this basis, that the bunkering operations conducted by the *M/V "Virginia G"* were in violation of rules of the coastal State,[10] it also held that the sanction imposed by Guinea-Bissau for this violation, i.e. the confiscation of the vessel and its cargo, was "not reasonable in light of the particular circumstances of the case".[11] The Tribunal thus found the confiscation of the *M/V "Virginia G"* to be in violation of article 73, paragraph 1, of the Convention, which requires that any enforcement measures taken must be "necessary" to ensure compliance with the laws and regulations adopted by the coastal State.[12] Ultimately, this finding led to a holding that Panama was entitled to reparation for damage suffered by it as a result of the confiscation of the vessel and its cargo.[13] The Tribunal did however not uphold all claims for damages submitted by Panama in this regard.

Mr President,
Ladies and gentlemen,

16. In making the above brief remarks on the *M/V "Virginia G"* case, I have intended to show that it is the role of the Tribunal in exercising its contentious jurisdiction and adjudicating cases to contribute to the development of international law and, in particular, the international law of the sea.

17. Other examples of important contributions made by the Tribunal can be found in previous decisions. I will confine myself to enumerating a few of these. I will refer first to the Tribunal's definition of the term "vessel" or "ship" in the *M/V "SAIGA" (No. 2) Case*, and in particular to the jurisprudence originating in it, according to which a ship has to be considered a "unit", including "everything on it, and every person involved or interested in its operations", regardless of their nationality.[14] This jurisprudence has found widespread acceptance in the law-of-the-sea community.

18. I will also briefly mention some of the important findings the Tribunal made in its first delimitation case, the case between Bangladesh and Myanmar concerning delimitation of the maritime boundary in the Bay of Bengal. In this case, the Tribunal, for the first time in international adjudication, ruled on the delimitation between two parties of their continental shelf beyond 200 nautical miles. In this context, the Tribunal provided clarification of the notion of "natural prolongation" in article 76 of the Convention. The Tribunal found that a State's entitlement to a continental shelf

[10] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, para. 267.*
[11] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, para. 270.*
[12] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, para. 271, 266.*
[13] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, para. 434.*
[14] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999,* p. 10, at p. 48, para. 106.

beyond 200 nautical miles should ... “be determined by reference to the outer edge of the continental margin”[15] and that natural prolongation should not constitute “a separate and independent criterion a coastal State must satisfy”.[16]

19. The case between Bangladesh and Myanmar is also noteworthy in that it is the first case in international adjudication in which a decision has been adopted on the issue of a “grey zone”. Such a zone occurs “when a delimitation line which is not an equidistance line reaches the outer limit of one State’s exclusive economic zone and continues beyond it in the same direction, until it reaches the outer limit of the other State’s exclusive economic zone.”[17] The immediate consequence is that, in a grey zone, one State has sovereign rights over the continental shelf and the other State has sovereign rights over the exclusive economic zone. The Tribunal held that “each coastal State must exercise its rights and perform its duties with due regard to the rights and duties of the other”[18] and that “there are many ways in which the Parties may ensure the discharge of their obligations in this respect, including the conclusion of specific agreements or the establishment of appropriate cooperative arrangements.”[19]

Mr President,
Ladies and gentlemen,

20. The Tribunal’s contributions to the development of international law and the law of the sea are not limited to its judgments on the merits in contentious cases. As you are well aware, the Tribunal’s jurisdiction encompasses a number of other procedures, such as requests for the prescription of provisional measures, for the prompt release of vessels and crews, and for advisory opinions. In cases submitted under these procedures as well, the Tribunal has had occasion to make important pronouncements on a number of legal issues.

21. The Tribunal, when seized of a case on the merits, may prescribe provisional measures pending the final decision in the case.[20] The Tribunal may also be requested to prescribe provisional measures when a case on the merits is submitted to arbitration under Annex VII to the Convention. In these circumstances, the Tribunal may prescribe provisional measures pending the constitution of the arbitral

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[15] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012,* p. 4, at p. 114, para. 437.
[16] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012,* p. 4, at p. 113, para. 435.
[17] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012,* p. 4, at p. 119, para. 464.
[18] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012,* p. 4, at p. 121, para. 475.
[19] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012,* p. 4, at p. 121, para. 476.
[20] Article 290, paragraph 1, of the Convention.

tribunal if it considers that *prima facie* the arbitral tribunal would have jurisdiction and that the urgency of the situation so requires.[21]

22. The procedure for the prescription of provisional measures under the Convention has already been invoked in several cases before the Tribunal, the majority of which dealt with protecting the marine environment. In those cases, the Tribunal emphasized that States are under a "duty to cooperate"[22] and it declared this duty to be a "fundamental principle in the prevention of pollution of the marine environment under ... the Convention and in general international law".[23] Equally, the Tribunal consistently highlighted the obligation for States to act with "prudence and caution" in situations in which the protection of the marine environment is at stake,[24] which in fact is equivalent to acting by applying a precautionary approach.

23. Another procedure available before the Tribunal is that in what are referred to as prompt release proceedings. Pursuant to several provisions of the Convention, a State which has detained a ship flying the flag of another State for certain categories of offences – in respect of fishery or pollution offences – is obliged to release the vessel and/or its crew upon the posting of a reasonable bond or other financial security. Whenever it is alleged that the detaining State has not complied with these provisions, the flag State of the vessel or a person acting on its behalf is entitled under article 292 of the Convention to submit an application to the Tribunal for the release of the vessel and its crew.

24. Through its judgments in prompt release cases, the Tribunal has developed a coherent jurisprudence concerning the reasonableness of a bond or other financial security. In this regard it has elaborated a number of factors that are relevant for the assessment of whether a bond is reasonable or not, including "the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining

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[21] Article 290, paragraph 5, of the Convention.

[22] *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999,* p. 274, at p. 293, para. 48*; MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 95, at p. 110, para. 82*; Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003,* p. 10, at p. 25, para. 92*).*

[23] *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 95, at p. 110, para. 82*; Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003,* p. 10, at p. 25, para. 92*).*

[24] *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999,* p. 274, at p. 296, para. 77*; MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 95, at p. 110, para. 84*; Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003,* p. 10, at p. 26, para. 99*).*

State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form."[25]

25. According to article 292, paragraph 3, of the Convention, in prompt release proceedings the Tribunal may deal only with the question of the release of the vessel without prejudice to the merits of any case before the appropriate domestic forum. Based on this, the Tribunal in its jurisprudence has further clarified the relationship between prompt release proceedings and domestic proceedings. It has pointed out that "[a]rticle 292 provides for an independent remedy and not an appeal against a decision of a national court"[26] and that the Tribunal, in this respect, "is not an appellate forum against a decision of a national court".[27] At the same time, the Tribunal found that an applicant is not required to exhaust local remedies prior to submitting a request for prompt release under article 292.[28]

Mr President,
Ladies and gentlemen,

26. The Tribunal's jurisdiction is certainly not limited to contentious cases. As you are aware, the Tribunal can also exercise advisory functions, pursuant to article 21 of its Statute. Under this provision the Tribunal's jurisdiction comprises "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal". For a request for an advisory opinion to be validly submitted to the Tribunal, the procedural requisites stipulated in article 138 of its Rules need to be fulfilled. In addition, the Tribunal's Seabed Disputes Chamber can give advisory opinions. It can do so at the request of the Assembly or the Council of the International Seabed Authority "on legal questions arising within the scope of their activities"[29]. Also, at the request of the Assembly and provided that certain procedural requirements are met, it can give an advisory opinion "on the conformity with [the] Convention of a proposal before the Assembly on any matter".[30]

27. The Seabed Disputes Chamber delivered its first advisory opinion in 2011 in response to a request from the Council of the Authority. The opinion deals with "responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area".[31] The Chamber's findings in the opinion should

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[25] *"Camouco" (Panama* v. *France), Prompt Release, Judgment, ITLOS Reports 2000,* p. 10, at p.31, para. 67.
[26] *"Camouco" (Panama* v. *France), Prompt Release, Judgment, ITLOS Reports 2000,* p. 10, at p. 29, para. 58.
[27] *"Monte Confurco" (Seychelles* v. *France), Prompt Release, Judgment, ITLOS Reports 2000,* p. 86, at p. 108, para. 72.
[28] *"Camouco" (Panama* v. *France), Prompt Release, Judgment, ITLOS Reports 2000,* p. 10, at p. 29, para. 57.
[29] Article 191 of the Convention.
[30] Article 159, paragraph 10, of the Convention.
[31] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011,* p. 10.

assist the Authority in the discharge of its tasks under the Convention with regard to deep seabed mining. At the same time, the advisory opinion provided the opportunity for the Chamber to explain in more detail the meaning of a number of key legal terms.

28. For instance, the Chamber clarified the notion of "obligation to ensure", defining it as "an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost" and "as an obligation 'of conduct' and not 'of result'".[32] Similarly, the Chamber clarified the content of an "obligation of due diligence". In this respect, it observed that "'due diligence' is a variable concept" which "may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity."[33]

29. The Chamber also addressed a long-debated international legal issue, the status of the precautionary approach. The Chamber observed that "the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration".[34] This observation led the Chamber to the view that "this has initiated a trend towards making this approach part of customary international law."[35]

30. Another request for an advisory opinion is now pending before the Tribunal. It concerns questions relating to illegal, unreported and unregulated fishing activities and was submitted in March 2013 by the Sub-Regional Fisheries Commission, an intergovernmental organization comprised of seven West African States. The issue of illegal, unreported and unregulated fishing is of great concern to the international community. Therefore, it is no surprise that the proceedings in this case have attracted considerable interest. A large number of States and intergovernmental organizations submitted statements to the Tribunal during the course of the written and oral proceedings. It is expected that the Tribunal will deliver its advisory opinion in the spring of 2015.

Mr President,
Ladies and gentlemen,

31. I have highlighted some of the contributions the Tribunal has made since its inception to the development and advancement of international law and the peaceful

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[32] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011,* p. 10, at p. 41, para. 110.
[33] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011,* p. 10, at p. 43, para. 117.
[34] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011,* p. 10, at p. 47, para. 135.
[35] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011,* p. 10, at p. 47, para. 135.

settlement of disputes through the exercise of its contentious and advisory functions. I wish to emphasize that the Tribunal is also firmly committed to advancing the idea of peaceful dispute settlement through other means, in particular by disseminating information and conducting capacity-building programmes.

32. The Tribunal therefore continues its series of regional workshops intended to provide national experts with practical information on the dispute settlement procedures available before the Tribunal. The tenth workshop in this series was held by the Tribunal in Nairobi in cooperation with the Government of Kenya and the Korea Maritime Institute in August 2014. The workshop, dedicated to the role of the International Tribunal for the Law of the Sea in the settlement of disputes relating to the law of the sea in Eastern and Southern Africa, welcomed participants from seven African States as well as representatives from the United Nations Environment Programme and the Southwest Indian Ocean Fisheries Commission. I would like to take this opportunity to extend my sincere thanks to the Government of Kenya and the Korea Maritime Institute for their support in organizing this event.

33. The Tribunal also runs capacity-building programmes on its premises in Hamburg. Each year, the Internship Programme provides interns with the opportunity to work at the Tribunal for three months and to gain deeper insight into the role and functioning of the Tribunal. Interns from developing States receive financial assistance from special trust funds established with generous support from the China Institute of International Studies and the Korea Maritime Institute. I wish to express my sincere gratitude to both institutes for this.

34. A second programme offered by the Tribunal is the capacity-building and training programme on dispute settlement under the Convention, which has been organized in cooperation with the Nippon Foundation since 2007. Again, I wish to extend my gratitude to the Nippon Foundation for their continued generosity. This annual nine-month programme is designed for young government officials and researchers. It provides them with an intensive and in-depth course in the law of the sea and dispute resolution. The seven participants in the 2014-2015 session hail from Albania, Cambodia, the Republic of Congo, Madagascar, Mexico, Ukraine and Vietnam. Each of them has received a fellowship from the Nippon Foundation.

35. Finally, the Tribunal also hosted the eighth Summer Academy of the International Foundation for the Law of the Sea on its premises from 27 July to 22 August 2014. A record number of 41 participants from 33 countries were welcomed.

Mr President,
Ladies and gentlemen,

36. Before concluding, I would like to take this opportunity to thank the Secretary-General, the Legal Counsel and the Division for Ocean Affairs and the Law of the Sea for their continued cooperation with the Tribunal.

I thank you for your attention.