INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

STATEMENT BY

H.E. JUDGE SHUNJI YANAI

PRESIDENT OF THE
INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ON
AGENDA ITEM 75 (a), “OCEANS AND THE LAW OF THE SEA”

AT
THE PLENARY OF THE SIXTY-SEVENTH SESSION OF THE
UNITED NATIONS GENERAL ASSEMBLY

11 December 2012

Statement made by H.E. Judge Shunji Yanai, President of the International Tribunal for the Law of the Sea (ITLOS), on Agenda item 75 (a), "Oceans and the law of the sea", at the Plenary of the Sixty-seventh Session of the United Nations General Assembly,
New York, 11 December 2012

Mr President,
Ladies and Gentlemen,

1. It is a great honour for me to take the floor, on behalf of the International Tribunal for the Law of the Sea, at this Sixty-seventh Session of the General Assembly on the occasion of its examination of the Agenda item "*Oceans and the law of the sea*". I would like to take this opportunity to congratulate you on your election as President of the Sixty-seventh Session of the General Assembly and I wish you the greatest of success in performing your distinguished duties.

2. This year, 2012, marks the thirtieth anniversary of the opening for signature of the United Nations Convention on the Law of the Sea. I would like to welcome Ecuador and Swaziland, which ratified the Convention in September of this year, thereby bringing the total number of States Parties to 164, including the European Union. The ever-increasing number of States Parties is a manifestation of the positive momentum towards universal participation in this instrument, which plays a crucial role in maintaining peace and ensuring respect for the law in regard to matters involving the law of the sea.

3. The International Tribunal for the Law of the Sea is one of the key dispute settlement mechanism established by the Convention. It has been set up as a specialized court, universal in nature, to be called upon to deal with disputes of any kind concerning the sea or activity carried out at sea.

4. A dispute between States Parties to the Convention may be submitted to the Tribunal by means of unilateral application if the parties have made declarations under article 287 of the Convention in which they have chosen the Tribunal as a

forum for the settlement of disputes. As at 1 December 2012, declarations had been made by 47 States, 34 of which have chosen the Tribunal as a means for settlement.

5. The choice of procedure is of paramount importance. For example, if the disputing States Parties are not bound by declarations, the mandatory procedure is arbitration under Annex VII of the Convention, which can prove costly for those States. To be noted is that, where States have not made declarations under article 287 of the Convention, they may nevertheless agree to submit the dispute to the Tribunal by means of a special agreement concluded for the purpose. A special agreement may even be entered into after the dispute has been submitted to arbitration under Annex VII. To date, this has been done in four cases brought before the Tribunal.[1]

Jurisdiction and judicial activity of the Tribunal

Mr President,

6. The Tribunal has jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of the Convention which is submitted to it in accordance with that agreement (Statute of the Tribunal, article 21; Convention, article 288). In this connection, I note with satisfaction that the Tribunal is named as a forum for the settlement of disputes in a number of multilateral or bilateral conventions on such subjects as fisheries, protection and preservation of the marine environment, conservation of marine resources, underwater cultural heritage and removal of wrecks, among others.

7. In addition, the Tribunal enjoys advisory jurisdiction separate from that of the Seabed Disputes Chamber. Advisory proceedings are provided for in article 138 of the Rules of the Tribunal and can be an attractive option for States wishing to obtain an opinion on a point of law dividing them.

[1] *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea)*; *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)*; *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*; *The M/V "Virginia G" Case (Panama/Guinea-Bissau).*

8. Turning now from this overview of the main aspects of the Tribunal's jurisdiction, I would like to speak about its judicial work, and more specifically about the most recent cases to have come before it.

9. Twenty cases have been submitted to the International Tribunal for the Law of the Sea since its entry into operation in 1996. They have concerned a number of questions, such as the lawfulness of enforcement measures taken against foreign vessels in the exclusive economic zone, use of force at sea, prompt release of detained vessels and crews, protection of fishery resources and of the marine environment, delimitation of maritime areas, and the lawfulness of the boarding of vessels. Of these cases, 15 were settled by way of litigation, two were discontinued further to agreement between the parties[2] and three are in progress. On 14 November 2012, a request for the prescription of provisional measures was submitted to the Tribunal by Argentina in a dispute with Ghana concerning the detention by the Ghanaian authorities of the frigate *ARA Libertad*. Under article 290, paragraph 5, of the Convention, the Tribunal may prescribe provisional measures if it considers that *prima facie* the arbitral tribunal to be constituted in accordance with Annex VII has jurisdiction and that the urgency of the situation so requires.

10. In the *M/V "Louisa" Case* between Saint Vincent and the Grenadines, on the one hand, and the Kingdom of Spain, on the other, the Tribunal delivered an Order on the request for provisional measures submitted by Saint Vincent and the Grenadines. The hearing on the merits was held from 4 to 10 October 2012 and the case is now under deliberation. In the *M/V "Virginia G" Case (Panama/Guinea-Bissau),* the written proceedings phase will soon close and the hearing is planned for 2013. The Respondent in this case submitted a counter-claim in its Counter-Memorial. Pursuant to article 98 of the Rules of the Tribunal, a counter-claim is admissible provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Tribunal. By Order of

[2] Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union), Order of 16 December 2009; The "Chaisiri Reefer 2" Case (Panama v. Yemen), Order of 13 July 2001.

2 November 2012, the Tribunal declared the counter-claim submitted by Guinea-Bissau to be admissible.

11. I shall not dwell on these cases, which remain to be decided on the merits, but I would like to describe to you the main legal issues considered in a Judgment delivered by the Tribunal on 14 March 2012 in its first maritime delimitation case.

Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)

12. In its Judgment of 14 March 2012, the Tribunal delimited the maritime boundary between the two States in the territorial sea and exclusive economic zone and on the continental shelf. One of the salient features of the case was that the Tribunal was asked to decide on the delimitation between the parties of the continental shelf at a distance beyond 200 nautical miles.

13. In respect of the delimitation of the territorial sea, the Tribunal found that there was no agreement within the meaning of article 15 of the Convention between the parties. Taking into account the circumstances of the case, the Tribunal also rejected Bangladesh's arguments as to the existence of a tacit or *de facto* agreement and its claim of estoppel. The Tribunal further stated that there was no historic title or any other special circumstance in the area to be delimited. It then undertook to delimit the territorial sea by drawing an equidistance line, in application of article 15 of the Convention. It turned to the question whether St. Martin's Island, which is under the sovereignty of Bangladesh and lies opposite Myanmar's mainland coast though "located almost as close to Bangladesh's mainland coast as to the coast of Myanmar" (Judgment, para. 149), constituted a special circumstance. In this connection it concluded that full effect should be given to St. Martin's Island.

14. Turning to the delimitation of the exclusive economic zone and continental shelf within 200 nautical miles, the Tribunal applied the equidistance/relevant circumstances method, following the three-stage approach developed in the most recent international jurisprudence on the subject, in particular the decision by the International Court of Justice in the case concerning *Maritime Delimitation in the*

Black Sea (Romania v. *Ukraine)* (*Judgment, I.C.J. Reports 2009,* paras. 115-122). This approach can be described in brief as follows. The court or tribunal begins by defining a delimitation method based strictly on geographic and geometric considerations. The equidistance method is given precedence, but it may be put aside if circumstances so dictate, for example on account of the coastal configuration or the impossibility of identifying reliable base points on the coasts. Thus, in keeping with this jurisprudence, the Tribunal began by constructing its own provisional equidistance line. It then determined that the cut-off effect produced by the concavity of Bangladesh's coast constituted a relevant circumstance. The Tribunal noted: "This problem has been recognized since the decision in the *North Sea cases*, in which the ICJ explained that 'it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity' (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, para. 89)". The Tribunal then decided to adjust the provisional equidistance line for this reason.

15. As for the effect to be given to St. Martin's Island, the Tribunal stated that "there is no general rule" on the effect to be given to an island in the delimitation of the maritime boundary in the exclusive economic zone and the continental shelf and added: "Each case is unique and requires specific treatment, the ultimate goal being to reach a solution that is equitable". In the case before it the Tribunal considered that giving effect to St. Martin's Island in the delimitation of the exclusive economic zone and continental shelf would block the seaward projection of Myanmar's coast. Accordingly, the Tribunal concluded that the island was not a relevant circumstance and gave it no effect in drawing the line delimiting the exclusive economic zone and the continental shelf.

16. The Tribunal considered the continental shelf beyond 200 nautical miles. It first found that it had jurisdiction to delimit the continental shelf in its entirety. It then considered whether in the circumstances of the case it should refrain from exercising that jurisdiction until each party had established the outer limits of the continental

shelf pursuant to article 76, paragraph 8, of the Convention, or at least until the Commission on the Limits of the Continental Shelf (CLCS) had made recommendations to each party. The Tribunal observed that a decision on its part not to exercise its jurisdiction over the dispute relating to the continental shelf beyond 200 nautical miles would not only fail to resolve a long-standing dispute but also would not be conducive to the efficient operation of the Convention. In the view of the Tribunal, it would be contrary to the object and purpose of the Convention not to resolve the existing impasse. Inaction by the Commission and the Tribunal, two organs created by the Convention to ensure the effective implementation of its provisions, would leave the parties in a position where they might be unable to benefit fully from their rights over the continental shelf. In the view of the Tribunal there is a clear distinction between the delimitation of the continental shelf under article 83 and the delineation of its outer limits under article 76. Under article 76, the Commission is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to delimitation of maritime boundaries. Just as the functions of the Commission are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts, so the exercise by international courts and tribunals of their jurisdiction regarding the delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the exercise by the Commission of its functions on matters related to the delineation of the outer limits of the continental shelf.

17. Under the specific circumstances of the case, the Tribunal then considered questions such as: whether or not the parties had an entitlement to the continental shelf beyond 200 nautical miles, and the meaning of “natural prolongation” and its interrelation with that of “continental margin”. After doing so, the Tribunal concluded that the parties had overlapping entitlements to the continental shelf beyond 200 nautical miles and it proceeded to delimit that area, stating:

> [T]he delimitation method to be employed in the present case for the continental shelf beyond 200 nautical miles should not differ from that within 200 [nautical miles]. Accordingly, the equidistance/relevant circumstances method continues to apply for the delimitation of the continental shelf beyond 200 [nautical miles]. (Paragraph 455 of the Judgment).

18. Upon completing its examination, the Tribunal decided that the adjusted equidistance line would continue in the same direction beyond the 200-nautical-mile limit of Bangladesh until it reached the area where the rights of third States might be affected. It then applied the disproportionality test and came to the conclusion that the adjusted equidistance line did not lead to any significant disproportion in the allocation of maritime areas to the parties relative to the respective lengths of their coasts. It is to be observed that the delimitation of the continental shelf beyond 200 nautical miles creates a "grey area" resulting from the fact that the line of delimitation is not one based strictly on equidistance. It runs beyond the 200-nautical-mile limit off the coast of Bangladesh until it reaches a distance of 200 nautical miles from Myanmar's coast. Under these circumstances the Tribunal decided that "in the area beyond Bangladesh's exclusive economic zone that is within the limits of Myanmar's exclusive economic zone, the maritime boundary delimits the Parties' rights with respect to the seabed and subsoil of the continental shelf but does not otherwise limit Myanmar's rights with respect to the exclusive economic zone, notably those with respect to the superjacent waters". Each State must therefore exercise its rights and perform its duties with due regard to the rights and duties of the other. There are many ways in which the parties may ensure the discharge of their obligations in this respect, including, for example, by establishing cooperative arrangements.

19. It took slightly more than two years from the time the case was brought to the date the Judgment was delivered and that is remarkably fast for a complex delimitation case. The Judgment was well received by the two States, which can now exploit the natural resources of their maritime areas. Bangladesh congratulated the Tribunal on the successful conclusion of its first maritime delimitation case, stating that the fact that the Tribunal had delivered its Judgment within 28 months from the institution of proceedings was "a manifestation of unprecedented efficiency". It also expressed appreciation to the Tribunal for having dealt with the proceedings in a manner that was "transparent, just and equitable". Myanmar, for its part, stated that the Judgment in Case No. 16 was "fair, equitable and balanced to both States" and had resolved a dispute that had existed for over 36 years. It observed that the Judgment covered all aspects of the Convention and served as an "historic and major milestone in international law, particularly in [the United Nations Convention on the Law of the Sea]".

Mr President, I would now like to touch on two other points relating to the activity of the Tribunal.

The role of the President of the Tribunal as appointing authority under the Convention

20. The Tribunal's role in settling disputes relating to the law of the sea is not confined to its judicial function. Under Annex VII, article 3, of the Convention, if the parties to a dispute are unable to agree on the appointment of one or more arbitral tribunal members to be appointed by agreement, or on the appointment of the president of the arbitral tribunal, the President of the International Tribunal for the Law of the Sea makes the appointment at the request of a party to the dispute and in consultation with the parties. Support of this kind has been given through the appointment of arbitrators in two recent cases: the arbitral proceedings under Annex VII of the Convention for the settlement of the dispute over the delimitation of the maritime boundary between Bangladesh and India in the Bay of Bengal; and the arbitral proceedings under Annex VII of the Convention in the dispute between Mauritius and the United Kingdom concerning the marine protected area around the Chagos Archipelago.

Training activities

21. Mention should be made of the Tribunal's activity in providing training in the law of the sea. Every year, as one aspect of this activity, it welcomes some twenty interns from around the world, generally for three months at a time. Special trust funds were established to provide financial support to applicants from developing countries, with the assistance of the Korea Maritime Institute and the China Institute of International Studies. Along the same lines, reference is made to the capacity-building and training programme on dispute settlement under the Convention, which is supported by the Nippon Foundation. In the 2011-2012 session, seven programme participants from the following countries received fellowship from the Nippon Foundation: Angola, France, Jamaica, Panama, Senegal, Tonga and Viet Nam. The programme lasts nine months, during which the fellows attend seminars on the law

of the sea and maritime law and receive training in negotiation and delimitation. I would like to add that the International Foundation for the Law of the Sea held its sixth Summer Academy, on "*Uses and Protection of the Sea – Legal, Economic and Natural Science Perspectives*", at the Tribunal from 22 July to 8 August 2012. Thirty-five participants, from 32 countries, attended lectures and took part in workshops on the law of the sea and maritime law.

22. Mr President, this brings me to the end of my statement. On behalf of the International Tribunal for the Law of the Sea, I wish to thank you for your interest in the Tribunal and its work.