DECLARATION OF JUDGE TREVES

1. I agree with the conclusions reached in the Judgment and with the reasons given. I would like, however, to make a brief general observation and offer some slightly more detailed considerations on jurisdiction.

2. This is the first time the Tribunal has decided a delimitation dispute on the merits. Delimitation of maritime areas is the law of the sea subject that most frequently has occupied international courts and tribunals. Under the Convention delimitation disputes fall within the scope of compulsory jurisdiction, save where States parties have made the optional declaration under article 298, paragraph 1. The Convention is indifferent as regards which adjudicating body exercises compulsory jurisdiction. Under article 287 such body may the Tribunal, the International Court of Justice or an arbitration tribunal constituted in accordance with annexes VII or VIII. Moreover, under article 282 procedures set out in general, regional or bilateral agreements providing that the dispute shall be submitted, at the request of a party, to a procedure that entails a binding decision are considered applicable in lieu of those set out in Part XV. To these various possible fora must be added the courts and tribunals to which the parties may submit their dispute by agreement. Consequently, a variety of international courts and tribunals may be called upon to adjudicate delimitation disputes on the basis of the jurisdictional and substantive provisions of the Convention. The framers of the Convention would seem not to have been concerned about the danger of fragmentation that decisions on the same body of law by different courts and tribunals might entail, a danger that some, but certainly not all, scholars and practitioners consider grave. In order to avert such danger and to prove that the possibility of decisions by different courts and tribunals on the same law may be a source of richness and not of contradiction, all courts and tribunals called to decide on the interpretation and application of the Convention, including its provisions on delimitation, should, in my view, consider themselves as parts of a collective interpretative endeavour, in which, while keeping in mind the need to ensure consistency and coherence, each

contributes its grain of wisdom and its particular outlook. The coexistence of a jurisprudence on delimitation of the International Court of Justice with awards of arbitration tribunals augurs well. Arbitration tribunals have participated, in an harmonious manner, in the development of the jurisprudence emerging from the judgments of the International Court of Justice. With the present judgment the Tribunal becomes an active participant in this collective interpretative endeavour. While it has adopted the methodology developed by the International Court of Justice and recent arbitral awards, the Tribunal has also contributed its own grain of wisdom and particular outlook. This contribution consists, in my view, especially in the manner in which the Tribunal has applied the notion of relevant circumstances and in its decision to delimit the continental shelf beyond 200 miles.

3. Coming now to my more specific observations, I shall begin by noting that the statements concerning jurisdiction set out in the judgment do not express clearly the view of the Tribunal in respect of the basis of its jurisdiction. Admittedly, it was not strictly necessary to be specific as there was no doubt that such jurisdiction existed. In my view it would, nonetheless, have been opportune to take a position in light of the persistent uncertainty of the jurisprudence of the Tribunal when confronted with the question of establishing its jurisdiction in cases in which an agreement of the parties was reached after submission to adjudication had been effected under the compulsory jurisdiction provisions of articles 286 and 287 of the Convention.

4. Submission to adjudication of the dispute concerning the delimitation of the maritime boundaries between Bangladesh and Myanmar was initiated by Bangladesh on 8 October 2009 when it instituted arbitral proceedings against Myanmar in reliance on the compulsory jurisdiction provisions of the Convention and the fact that, at that time, neither party had made a declaration choosing a procedure for the exercise of compulsory jurisdiction under article 287 of the Convention. On 4 November 2009 Myanmar made a declaration “in accordance with article 287, paragraph 1,” of the Convention, accepting the jurisdiction of the Tribunal for the settlement of the dispute with Bangladesh relating to the delimitation of the maritime boundary between the

two countries. On 12 December 2009 Bangladesh made an almost identical declaration. On 13 December 2009 Bangladesh stated in a letter from its Minister of Foreign Affairs to the Tribunal that: “Given Bangladesh’s and Myanmar’s mutual consent to the jurisdiction of ITLOS and in accordance with the provisions of UNCLOS Article 287(4), Bangladesh considers that your distinguished Tribunal is now the only forum for the resolution of the parties’ dispute”. The reference to the “mutual consent” of the Parties gives the impression that agreement and not compulsory jurisdiction is seen as the basis of jurisdiction, while the reference to article 287, paragraph 4, gives the opposite impression. Myanmar in its Counter-Memorial (paragraph 1.7) opts clearly for the view that the jurisdiction of the Tribunal is based “on a special agreement between Myanmar and Bangladesh under article 55 of the Rules of the Tribunal, which agreement is reflected in their respective declarations dated 4 November 2009 and 12 December 2009”.

5. The Tribunal leaves the question open. It reports having entered the case in the List of cases “[i]n view of the above-mentioned declarations, and the letter of the Minister of Foreign Affairs of Bangladesh dated 13 December 2009” (paragraph 5). In deciding on its jurisdiction, it refers to the acceptance of such jurisdiction by the declarations of the Parties under article 287, paragraph 1, of the Convention (paragraph 47) and to the fact that that “the Parties agree that the Tribunal has jurisdiction to adjudicate the dispute” (paragraph 49).

6. A certain degree of uncertainty as regards the view of the Tribunal as to the basis of its jurisdiction also emerges in earlier cases which were initiated by unilateral submission to an arbitral tribunal.

7. The *M/V “SAIGA” Case* was submitted by Saint Vincent and the Grenadines to an annex VII arbitral tribunal, and later transferred to the Tribunal by an agreement concluded in 1998 with Guinea, the other party to

the case[1]. The Tribunal found that "the basis of its jurisdiction is the 1998 Agreement, which transferred the dispute to the Tribunal, together with articles 286, 287 and 288 of the Convention" (paragraph 43 of the Judgment). Was the basis of jurisdiction to be found in the compulsory jurisdiction articles 286, 287 and 288 to which the unilateral notification of Saint Vincent and the Grenadines for the establishment of an arbitral tribunal referred, or in the 1998 Agreement? In examining whether Guinea could raise objections to admissibility, the Tribunal seems to have opted for an interpretation of the 1988 Agreement ruling out the agreement as the basis of its jurisdiction. It stated that, in its view: "the object and purpose of the 1998 Agreement was to transfer to the Tribunal the same dispute that would have been the subject of the proceedings before the arbitral tribunal. Before the arbitral tribunal each party would have retained the general right to present its contentions. The Tribunal considers that the parties have the same rights in the present proceedings". Consequently, it concluded "that the 1998 Agreement does not preclude the raising of objections of admissibility by Guinea" (paragraph 51 of the Judgment).

8. In the *Swordfish* case[2] Chile initiated proceedings against the European Community (later European Union) by instituting arbitral proceedings under article 287, paragraph 3, of the Convention. Through an exchange of letters dated 18 and 19 December 2000, the parties agreed that the dispute "be not proceeded" in accordance with the arbitral procedure and that it would be submitted to a special chamber of the Tribunal. The agreement provided that the Chamber should decide on a list of issues "to the extent that they are subject to compulsory procedures entailing binding decisions under Part XV of the Convention". The agreement is similar to a *compromis* in that t submitted to the Special Chamber a list of issues to be decided (not all of which were identical with those Chile had submitted to the arbitral tribunal) and in that it specifies that the case "shall be deemed to have

[1] *M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998,* p. 14, and *Judgment of 1 July 1999, ITLOS Reports 1999,* p. 10.
[2] *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community), Order of 20 December 2000, ITLOS Reports 2000*, p. 148.

been instituted ... on the date on which the parties have notified the Tribunal of their request to submit" their dispute to a special chamber of the Tribunal. However, in stating that the jurisdiction of the chamber would not extend to matters which it would not have been possible to submit to the arbitral tribunal under article 287, it retains the fundamental characteristic of cases submitted to adjudication on the basis of the compulsory jurisdiction provisions of the Convention.

9. Further, a pending case, that of the *M/V "Virginia G"* between Panama and Guinea Bissau, was initiated by the institution of arbitral proceedings under article 287 and transferred by agreement to the Tribunal. The parties agreed that the proposal of Panama to transfer the case to the Tribunal and its acceptance by Guinea Bissau were sufficient to constitute a special agreement to submit the case to the Tribunal under article 55 of the Rules of the Tribunal (which deals with submission of a dispute to the Tribunal by notification of a special agreement).

10. Seen together with the other three cases mentioned, the present case shows that the compulsory jurisdiction provisions of the Convention are often necessary for a dispute concerning the interpretation or application of the Convention to be submitted to adjudication. These cases also show, however, that after unilateral submission to adjudication, and in light of the fact that there is no way to avoid adjudication, the common will of the parties may intervene in various ways to replace the adjudicating body initially called to exercise jurisdiction with another. The cases examined show that this may be done by agreements to transfer the case from one adjudicating body to another or to cancel the previously commenced proceedings and to institute new proceedings. Interpretation questions may remain open as to whether the agreements concluded for transferring jurisdiction from one adjudicating body to another amount to a new submission by special agreement or to a simple transfer of the case to the other adjudicating body without any change.

11. In the present case the Parties have used the declarations under article 287, paragraph 1, as a means to reach an agreement to establish the

jurisdiction of the Tribunal, replacing the jurisdiction of the arbitral tribunal established unilaterally by Bangladesh. Their declarations under article 287 accept the jurisdiction of the Tribunal not in general terms, as the drafters of the Convention presumably intended in light of the general language they used, but with respect to a single specific dispute[3]. The interpretative question that arises, and that the Tribunal has chosen not to address, is whether in so doing they concluded a special agreement (as Myanmar indicates in its Counter-Memorial quoted above) or whether the references to article 287 require that jurisdiction be considered as established unilaterally by Bangladesh's letter of 13 December 2009.

12. No issue has arisen in the present case that would make the determination of the basis of jurisdiction relevant for deciding a question submitted to the Tribunal. The remarks in the *M/V* "*SAIGA"* Judgment quoted in paragraph 7 above indicate, however, that such a determination may be important in certain cases, the most relevant of which seems to concern the applicability to the dispute of the limitations and exceptions to jurisdiction set out in articles 297 and 298 of the Convention. These limitations and exceptions undoubtedly apply to disputes submitted to adjudication under section 2 of Part XV of the Convention (namely, on the basis of the compulsory jurisdiction of the courts and tribunals mentioned therein) as they are included in section 3, entitled "Limitations and exceptions to applicability of section 2". They do not, however, apply to cases submitted by the agreement of the parties on the basis of section 1. This difference alone seems to warrant close attention by the Tribunal in future cases.

(signed)

Tullio Treves

[3] It is worth noting that in the *M/V "Louisa" Case* the Tribunal has recently had to consider a declaration made under article 287 limited to a very narrow category of disputes. The declaration by Saint Vincent and the Grenadines considered in that case chooses the Tribunal "as the means for the settlement of disputes concerning the arrest or detention of vessels": *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010,* p. 58.