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 76(a) “OCEANS AND THE LAW OF THE SEA”

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

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Statement by Judge S. Yanai, President of the International Tribunal of the Law of the Sea (ITLOS), on Agenda Item 76(a) "Oceans and the Law of the Sea", at the Sixty-sixth Session of the United Nations General Assembly

Mr President,
Excellencies,
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-sixth session of the General Assembly on the occasion of its examination of the agenda item "Oceans and the Law of the Sea". Mr President, I would also like to take this opportunity to congratulate you on your election as President of the General Assembly.

Mr President,

2. It is my sad duty to inform you of the death on 24 February 2011 of one of our colleagues, Judge Anatoly Lazarevich Kolodkin, who was a member of the Tribunal from 1996 to 2008. Judge Kolodkin devoted his career to the development of the law of the sea and maritime law. We shall always remember him and his invaluable contribution to the work of the Tribunal.

3. As is the custom, I shall report to the General Assembly on developments since the sixty-fifth session. I shall also take advantage of this occasion to address several points in connection with the Tribunal's recent activities. But before I do so, please allow me to welcome Thailand, which became a State Party to the Convention in 2011.

Composition of the Tribunal

4. The Tribunal was established by the United Nations Convention on the Law of the Sea of 10 December 1982 (the "Convention") as a specialized judicial body whose main responsibility is to deal with disputes concerning the interpretation or application of

the Convention provisions. As at 6 December 2011, 161 States, together with the European Union, are parties to the Convention. On the subject of the composition of the Tribunal, I shall note that on 15 June 2011 the twenty-first Meeting of States Parties to the Convention re-elected Judges Cot (France), Gao (China), Lucky (Trinidad and Tobago) and Ndiaye (Senegal). It also elected three new judges for a nine-year term of office: Mr David Attard (Malta), Ms Elsa Kelly (Argentina) and Mr Markiyan Z. Kulyk (Ukraine). They were sworn in on 1 October 2011. Judge Kelly is the first woman to serve as judge of the Tribunal.

5. On 30 September 2011, my immediate predecessor, Judge Jesus, completed his three-year term as President of the Tribunal. At a meeting on 1 October 2011 I was elected President of the Tribunal for three years. On the same day Judge Albert Hoffman was elected Vice-President of the Tribunal. Judge Golitsyn was elected President of the Seabed Disputes Chamber on 6 October 2011. As for the Registry, the Tribunal, on 22 March 2011, re-elected Mr Philippe Gautier Registrar of the Tribunal for five years.

Jurisdiction

6. As a judicial institution specializing in the law of the sea, the Tribunal is a key element of the dispute settlement system established by the Convention. Pursuant to article 287 of the Convention, a State may, by written declaration, choose the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal and a special arbitral tribunal as a means for settling disputes concerning the Convention. As at 6 December 2011, 45 States Parties have made declarations under article 287, and 33 of them have chosen the Tribunal as an appropriate forum.

7. The choice of procedure is of crucial importance. A State Party involved in a dispute not covered by a declaration in force is deemed to have accepted arbitration in accordance with Annex VII of the Convention. Let us note as well that, even when States have not made a declaration under article 287 of the Convention, they may still

entrust the Tribunal with a dispute initially submitted to arbitration in accordance with Annex VII. To date, this facility has been taken up in four cases referred to the Tribunal: *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)*; and *The M/V "Virginia G" Case (Panama/Guinea-Bissau).* The parties to the dispute stand to benefit in many ways from doing this, particularly in respect of costs and of dispute resolution by a standing specialized court.

Mr President,

8. The Tribunal's jurisdiction also extends to 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 the agreement (Statute of the Tribunal, article 21; Convention, article 288). In this connection, I shall note with satisfaction that a number of (multilateral or bilateral) conventions on, among other subjects, fisheries, protection and preservation of the marine environment, conservation of marine resources, underwater cultural heritage, and removal of wrecks refer to the Tribunal as the forum for the settlement of disputes. These clauses can prove quite useful in the event of dispute over the interpretation or application of the agreement in question by offering States a judicial means to arrive at a solution within a reasonable amount of time.

9. The Tribunal also enjoys advisory jurisdiction independent of that of the Seabed Disputes Chamber. The advisory proceedings are provided for in article 138 of the Rules of the Tribunal. I shall confine myself here to observing that advisory proceedings before the Tribunal may prove an attractive alternative for States seeking an opinion on a disputed point of law.

10. With your permission , Mr President, I would now like to say a few words about the activities of the Tribunal since the sixty-fifth session of the General Assembly.

Activities of the Tribunal

Judicial activity

11. Two decisions have been delivered since my predecessor's last statement before this Assembly. On 23 December 2010 the Tribunal handed down its Order in the *M/V* "*Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain*). On 1 February 2011 the Seabed Disputes Chamber delivered its first advisory opinion, which concerns the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area.* During this period, the Tribunal has also pursued its examination of the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar).* In addition, the Tribunal has received a new case: *The M/V "Virginia G" Case (Panama/Guinea-Bissau).* I would like to set out for you the main legal issues raised in these various proceedings.

The *M/V* "*Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain*)

12. On 24 November 2010, Saint Vincent and the Grenadines instituted proceedings before the Tribunal against Spain in a dispute concerning the detention of the *M/V "Louisa".* The Application instituting the proceedings before the Tribunal included a request for the prescription of provisional measures submitted in accordance with article 290, paragraph 1, of the Convention.

13. The *M/V "Louisa"*, flying the flag of Saint Vincent and the Grenadines, was arrested by the Spanish authorities on 1 February 2006 and has been detained ever

since. The Applicant maintains that the vessel was conducting scientific research with a valid permit issued by the Respondent and that the detention is in breach of a number of provisions of the Convention. The Applicant's request for the prescription of provisional measures included a request that the Tribunal order the release of the vessel. In its statement in response Spain claimed that the *Louisa* had been detained on account of violations of the law on the protection of Spanish cultural heritage. The hearing held in the urgent proceedings in respect of provisional measures took place on 10 and 11 December 2010.

14. The Tribunal delivered its Order in the case on 23 December 2010. While finding that it had *prima facie* jurisdiction over the dispute, the Tribunal held that there was no real and imminent risk that irreparable prejudice might be caused to the rights of the parties in dispute before the Tribunal so as to warrant the prescription of the provisional measures. In addition, in respect of the Applicant's argument that leaving the ship docked in the port of El Puerto de Santa María would pose a definite threat to the environment, the Tribunal placed on record the assurances given by Spain that the port authorities were monitoring the situation and were capable of reacting against any threat to the marine environment. The case must now be judged on the merits. The written proceedings should be concluded in April 2012 and the hearing in the case should occur next year.

Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)

15. On 6 May 2010, the Council of the International Seabed Authority (the "Authority"), adopted Decision ISBA/16/C/13, by which, in accordance with article 191 of the Convention, it requested the Seabed Disputes Chamber of the Tribunal (the "Chamber") to render an advisory opinion on several questions regarding the responsibility of States Parties to the Convention which sponsor activities in the Area in accordance with the Convention and with the 1994 Agreement relating to the

Implementation of Part XI of the Convention. The request for advisory opinion was a consequence of the examination by the Authority's Legal and Technical Commission of applications for approval of a plan of work in the Area.

16. Fourteen States Parties to the Convention took part in the proceedings by submitting written statements or making oral statements at the hearing, which took place in Hamburg on 14, 15 and 16 September 2010. They were: Argentina, Australia, Chile, China, Federal Republic of Germany, Fiji, Mexico, Nauru, Netherlands, Philippines, Republic of Korea, Romania, Russian Federation and United Kingdom. Also participating in the proceedings were the Authority and the following four international organizations: Interoceanmetal Joint Organization, Intergovernmental Oceanographic Commission (IOC) of UNESCO, International Union for Conservation of Nature and Natural Resources and the United Nations Environment Programme (UNEP).

17. The Chamber delivered its advisory opinion on 1 February 2011, a little less than nine months after the request was submitted.

18. In its advisory opinion, the Chamber explained that States sponsoring activities in the Area are under two kinds of obligations. The first of these is the "obligation to ensure compliance by sponsored contractors with the terms of the contract and the obligations set out in the Convention and related instruments". This is an obligation of "due diligence", requiring the sponsoring State "to make best possible efforts to secure compliance by the sponsored contractors" and "to take measures within its legal system", namely, laws and regulations and administrative measures. Obligations of the second kind identified by the Chamber are "direct obligations with which sponsoring States must comply independently of their obligation to ensure a certain conduct on the part of the sponsored contractors". These include, among others, the obligation to assist the Authority, the obligation to apply a precautionary approach, and the obligation to apply the best environmental practices.

19. The liability of the sponsoring State arises from its failure to fulfil its obligations and that failure has resulted in damage. This requires that a causal link be established between the failure and the damage. Moreover, the sponsoring State is absolved from liability if it has taken “all necessary and appropriate measures to secure effective compliance” by the sponsored contractor with its obligations. This exemption from liability does not apply to the failure to carry out its direct obligations.

20. Lastly, the Chamber provided guidance as to the necessary and appropriate measures which a sponsoring State must take if it is to fulfil its responsibilities. The laws and regulations adopted, and the administrative measures taken, by the sponsoring State have two distinct functions: “to ensure compliance by the contractor with its obligations and to exempt the sponsoring State from liability”. Such laws and regulations and administrative measures “may include the establishment of enforcement mechanisms for active supervision of the activities of the sponsored contractor and for co-ordination between the activities of the sponsoring State and those of the Authority. [They] should be in force at all times that a contract with the Authority is in force… [and] should also cover the obligations of the contractor after the completion of the exploration phase”.

21. Last July the Secretary-General of the Authority welcomed the contribution made by the opinion to the Authority’s work. Indeed, the Legal and Technical Commission of the Authority at its seventeenth session recommended, *inter alia*, that the Nodules Regulations be revised in the light of the advisory opinion and suggested that the Authority should prepare model legislation to assist States in fulfilling their obligations as laid out in the opinion. Furthermore, the Secretary-General of the Authority has expressed the view that the opinion provides important clarification of some of the more difficult aspects of the Convention in respect of exploring and exploiting the seabed. “Several delegations [at the twenty-first Meeting of States Parties] viewed the delivery of the advisory opinion to the Authority as a landmark in the work of the Tribunal”.

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

22. This is the first maritime delimitation case to have come before the Tribunal. By a letter dated 13 December 2009, the Minister for Foreign Affairs of Bangladesh notified the President of the Tribunal of declarations made under article 287 of the Convention by Myanmar and Bangladesh on 4 November and 12 December 2009, respectively, whereby the two States accepted the jurisdiction of the Tribunal for the settlement of the dispute relating to their maritime boundary. By that same letter, the Minister for Foreign Affairs invited the Tribunal to exercise jurisdiction to settle the dispute. In the light of the parties' agreement, as evidenced by their declarations, and of the notification made by Bangladesh, the case was entered in the List of cases of the Tribunal as Case No.16 on 14 December 2009.

23. The case concerns the delimitation of the territorial sea, the exclusive economic zone and the continental shelf, including at a distance beyond 200 nautical miles. The hearing was held from 8 September to 24 September 2011. The case is now under deliberation and the decision is expected in March 2012, some two years after the case was submitted to the Tribunal; this is a reasonable duration for a maritime delimitation case.

The M/V "Virginia G" Case (Panama/Guinea-Bissau)

24. By a letter dated 4 July 2011, the Agent of Panama transmitted to the Tribunal the notification of a special agreement concluded by an exchange of notes, dated 29 June and 4 July 2011, between the Republic of Panama and the Republic of Guinea-Bissau to submit to the Tribunal a dispute regarding a damage claim for the arrest of the vessel *Virginia G*. According to the statement of claim submitted by Panama, the oil tanker *Virginia G* was carrying out refuelling operations for fishing vessels in the

exclusive economic zone of Guinea-Bissau when it was arrested on 21 August 2009 by Guinean authorities. Panama maintains that the vessel, though released on 22 October 2010, suffered significant damage during the 14 months of detention. Panama is seeking reparation for the injury suffered.

Training activity

Mr President,

25. An internship programme has been in place at the Tribunal since 1997. From 2004 to 2009 it received financial support from the Korea International Cooperation Agency (KOICA). Of the 223 interns, hailing from 73 countries, who participated in the programme until 2011, 84 from developing countries benefited from grants from the KOICA fund. In October 2009 the Tribunal established a trust fund aimed at providing financial assistance to programme participants from developing countries. Two contributions to the fund, in the amounts of €25,000 and €15,000, were made respectively in April 2010 and October 2011 by a company from the Republic of Korea and operating in Hamburg and by the Korea Maritime Institute (KMI).

26. Since 2007 the Tribunal, with support from the Nippon Foundation, has also maintained a capacity-building and training programme on dispute settlement under the Convention. Seven participants – from Argentina, Brazil, Greece, Mozambique, Oman, South Africa, and Togo – took part in the 2010/2011 programme, while this year's programme counts seven participants from: Angola, France, Jamaica, Panama, Senegal, Tonga and Vietnam. The nine-month Nippon Programme affords participants the opportunity to enhance their knowledge of the law of the sea, judicial procedures and the work of the various international organizations concerned with the seas and the law of the sea.

27. I have the added pleasure to inform you that the fifth International Foundation for the Law of the Sea Summer Academy was held at the Tribunal's premises from 24 July to 20 August 2011. Twenty-nine attendees, from 24 countries, took part in the academy.

Mr President,

28. Before concluding, I would like to take this opportunity to thank the Secretary-General, the Legal Counsel and especially the Director of the Division for Ocean Affairs and the Law of the Sea for their unfailing cooperation and the support they have always offered us.