

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-EIGHTH SESSION OF THE
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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-eighth session of the United Nations General Assembly, New York, 9 December 2013

Mr President

Ladies and gentlemen,

1. It is an honour and privilege for me, on behalf of the International Tribunal for the Law of the Sea, to address this sixty-eighth 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 offer to you my warmest congratulations on your election and wish you every success in the discharge of your responsibilities within this eminent body.

2. I take this opportunity to welcome Timor-Leste and Niger, which became parties to the Convention this year, thereby bringing the total number of States Parties to 166, including the European Union.

Mr President

Ladies and gentlemen,

3. One of the fundamental goals of the United Nations Convention on the Law of the Sea, as set out in its preamble, is to contribute “to the strengthening of peace, security, cooperation and friendly relations among all nations”. With this in mind, I would like to recall that one of the most important achievements of the Convention is the establishment of a comprehensive dispute settlement system. The principle of peaceful settlement of disputes, enshrined in Article 2, paragraph 3, of the Charter of the United Nations, is reflected in the Convention, in particular in article 279 thereof, which requires

States Parties to settle their disputes concerning the interpretation or application of the Convention by peaceful means.

4. In accordance with this principle, the drafters of the Convention created a comprehensive and largely obligatory dispute settlement system, which is put in place in Part XV of the Convention. This system comprises non-binding means (section 1) as well as compulsory procedures entailing binding decisions (section 2). This system forms an integral part of the Convention, which bars reservations or exceptions “unless expressly permitted” by articles of the Convention (article 309). Thus, by ratifying or acceding to the Convention, States express their consent to be bound by the dispute settlement procedures established therein.

5. At the same time, the Convention lays down limitations on and exceptions to the applicability of the compulsory procedures entailing binding decisions. Those limitations and exceptions are provided for in articles 297 and 298, respectively. In accordance with the well-established “principle of the *compétence de la compétence*”, it is the responsibility of the court or tribunal concerned to determine whether or not it has jurisdiction in a dispute relating to the interpretation and application of these provisions.

6. Part XV of the Convention offers States Parties the option of settling their disputes by means of their own choice (see article 280 of the Convention). Moreover, the Convention gives States Parties the possibility of choosing one or more of four means for the settlement of disputes concerning the interpretation or application of the Convention (see article 287 of the Convention). The International Tribunal for the Law of the Sea is an international judicial body created by the Convention and is one of four compulsory means available to States for settling disputes entailing binding decisions. The others are the International Court of Justice and two different arbitration mechanisms.

7. At this point, I would like to underline the importance of abiding by the compulsory procedures established in section 2 of Part XV of the Convention. It goes

without saying that a well-functioning dispute resolution system contributes to the sound implementation of the legal regime for the seas and oceans set out in the Convention. The Tribunal, through its jurisprudence, has fulfilled an important role in this regard. In addition, a necessary condition for the implementation of that system is the requirement in article 33 of the Statute that the Tribunal's decisions must be complied with by all the parties to the dispute.

8. After this introductory remark, I would now like to report to you on the judicial activity of the Tribunal. Since I last addressed the General Assembly, on 11 December 2012, the Tribunal has had a very busy time, having had to discharge judicial functions with respect to four cases. During this period the Tribunal delivered a judgment on the merits and two orders on requests for provisional measures. It also received a request for an advisory opinion under article 138 of its Rules. This evidences the increase in the Tribunal's judicial work.

9. On 14 November 2012, Argentina filed with the Tribunal a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention in a dispute concerning the detention by Ghana of the warship *ARA Libertad*. The Request for provisional measures was submitted to the Tribunal pending the constitution of an arbitral tribunal, further to the institution by Argentina on 30 October 2012 of arbitral proceedings under Annex VII to the Convention.

10. In its Request for provisional measures, Argentina asked the Tribunal to prescribe that Ghana enable the *ARA Libertad* to leave the port and the jurisdictional waters of Ghana and to be resupplied to that end. The hearing was held on 29 and 30 November 2012. On 15 December 2012, the Tribunal delivered its unanimous Order in the case. Regarding *prima facie* jurisdiction of the Annex VII arbitral tribunal, the Tribunal was of the view that a difference of opinions existed between the Parties as to the applicability of article 32 of the Convention concerning the immunity of warships and that this provision afforded a basis on which such jurisdiction might be founded (see paragraph 66 of the Order). In relation to the urgency of the situation, the Tribunal

considered *inter alia* that, “in accordance with general international law, a warship enjoys immunity” (see paragraph 95 of the Order) and that “any act which prevents by force a warship from discharging its mission and duties is a source of conflict that may endanger friendly relations among States” (see paragraph 97 of the Order), concluding from this that “the urgency of the situation requires the prescription by the Tribunal of provisional measures that will ensure full compliance with the applicable rules of international law, thus preserving the respective rights of the Parties” (see paragraph 100 of the Order). The Tribunal then adopted a provisional measure prescribing that Ghana “forthwith and unconditionally release the frigate ARA Libertad” and “ensure that the frigate ARA Libertad, its Commander and crew are able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana” (see paragraph 108 of the Order).

11. I am pleased to report that the Order of the Tribunal was complied with. The *ARA Libertad* was released as prescribed by the Tribunal and, on 19 December 2012, left the maritime areas under the jurisdiction of Ghana.

12. I will now turn to the *M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, which concerned the M/V “Louisa”, a vessel flying the flag of Saint Vincent and the Grenadines. The vessel was boarded, searched and detained by Spanish authorities on 1 February 2006. According to Spain, the vessel was detained and seized in connection with criminal proceedings and for carrying out “the crime of possession and depositing weapons of war ... together with the continued crime of damaging Spanish historical patrimony” (see paragraph 54 of the Judgment). Saint Vincent and the Grenadines maintained that the M/V “Louisa” was conducting surveys of the sea floor with a view to locating oil and gas deposits. Four persons were arrested and detained in Spain in connection with these criminal proceedings. The Spanish authorities also detained a second vessel, the “Gemini III”, which, according to Saint Vincent and the Grenadines, served as a tender for the M/V “Louisa”.

13. Proceedings in this case were instituted before the Tribunal on 24 November 2010. The Application filed by Saint Vincent and the Grenadines included a Request for the prescription of provisional measures under article 290, paragraph 1, of the Convention, in respect of which the Tribunal delivered an Order on 23 December 2010. The hearing on the merits took place from 4 to 12 October 2012 and the Judgment was delivered on 28 May 2013.

14. The Parties disagreed as to whether the Tribunal had jurisdiction to entertain the case. In this respect, the Tribunal was faced with a situation where the declarations made by the two States under article 287 of the Convention were not identical. The declaration of Spain had a wider scope than the declaration of Saint Vincent and the Grenadines. The Tribunal took the view that “in cases where States Parties have made declarations of differing scope under article 287 of the Convention, its jurisdiction exists only to the extent to which the substance of the declarations of the two parties to a dispute coincides”. The Tribunal then examined the declaration made by Saint Vincent and the Grenadines, which conferred jurisdiction on the Tribunal for the “settlement of disputes concerning the arrest or detention of its vessels”. The Tribunal considered that the use of the term “concerning” in the said declaration indicated that the declaration extended not only to articles expressly containing the word “arrest” or “detention” – an argument put forward by Spain – but to any provision of the Convention having a bearing on the arrest or detention of vessels. It concluded that the declaration of Saint Vincent and the Grenadines was meant to cover all claims connected with the arrest or detention of vessels flying the flag of Saint Vincent and the Grenadines. In relation to the “Gemini III”, the Tribunal concluded that it lacked jurisdiction, because this vessel was not flying the flag of Saint Vincent and the Grenadines.

15. The Tribunal turned then to the question of the existence of a dispute between the Parties concerning the interpretation or application of the Convention. In this regard, it noted that the case before it had two aspects: one involving the detention of the vessel and the persons connected therewith and the other concerning the treatment of these persons.

16. The first aspect related to the claim originally submitted by Saint Vincent and the Grenadines on the basis of articles 73, 87, 226, 227 and 303 of the Convention. After a careful examination of all provisions invoked, the Tribunal came to the conclusion that none of them could serve as a basis for the claims submitted in respect of the detention of the M/V “Louisa” and its crew. In particular, with regard to article 73 of the Convention, the Tribunal noted that the M/V “Louisa” was not detained for alleged breach of Spanish laws concerning living resources in the exclusive economic zone. The detention was made in the context of criminal proceedings relating to alleged violations of Spanish laws on “the protection of the underwater cultural heritage and the possession and handling of weapons of war in Spanish territory.” Concerning article 87 of the Convention dealing with the freedom of the high seas, the Tribunal, noting that the M/V “Louisa” was detained when it was docked in a Spanish port, concluded that article 87 could not be interpreted in such a way as to grant the M/V “Louisa” a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it.

17. As regards the second aspect of the case, concerning the treatment of persons connected with the M/V “Louisa”, the Tribunal observed that this question was introduced by Saint Vincent and the Grenadines only after the closure of the written proceedings. It noted in this respect that the matter had been addressed during the hearing with reference to article 300 of the Convention, concerning good faith and abuse of right, and included, on that basis, in the final submissions of Saint Vincent and the Grenadines. The Tribunal then considered that reliance on article 300 of the Convention generated a new claim in comparison to the claims presented in the Application. In the view of the Tribunal, and in line with the jurisprudence of the International Court of Justice, it is a legal requirement that any new claim to be admitted must arise directly out of the application or be implicit in it. The Tribunal therefore considered that it could not allow a dispute brought before it by an application to be transformed in the course of proceedings into another dispute which is different in

character. For this reason, it was of the view that article 300 of the Convention could not serve as a basis for the claims submitted by Saint Vincent and the Grenadines.

18. The Tribunal concluded that no dispute concerning the interpretation or application of the Convention existed between the Parties at the time the Application was filed and, therefore, found, by 19 votes to 2, that it had no jurisdiction *ratione materiae* to entertain the case.

19. I will next address the “*Arctic Sunrise*” Case (*Kingdom of the Netherlands v. Russian Federation*), another urgent procedure, which was submitted recently to the Tribunal. The case relates to a dispute between the Netherlands and the Russian Federation concerning the arrest and detention of the vessel *Arctic Sunrise*, its crew and other persons on board by the authorities of the Russian Federation. According to the Netherlands, the vessel *Arctic Sunrise*, flying the flag of the Netherlands, was boarded on 19 September 2013 in the exclusive economic zone of the Russian Federation by Russian authorities who detained the vessel and the 30 persons on board. The vessel was subsequently towed to the port of Murmansk. On 4 October 2013, the Netherlands instituted arbitration proceedings, under Annex VII to the Convention, against the Russian Federation. After the expiry of the time-limit of two weeks, as provided for in article 290, paragraph 5, of the Convention, the Netherlands submitted a Request for provisional measures to the Tribunal on 21 October 2013.

20. In a note verbale dated 22 October 2013, the Embassy of the Russian Federation in Berlin informed the Tribunal that the Russian Federation did not intend to participate in the proceedings. In that note verbale, the Russian Federation invoked the declaration it had made upon ratifying the Convention on 26 February 1997, stating that it “does not accept procedures provided for in Section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes [...] concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction”.

21. During the hearing on 6 November 2013, the Netherlands requested the Tribunal to prescribe provisional measures to enable the *Arctic Sunrise* and the crew members of the vessel to leave the maritime areas under the jurisdiction of the Russian Federation. The Russian Federation was not represented at the hearing.

22. On 22 November 2013, the Tribunal adopted its Order on the Request for provisional measures. In relation to the declaration made by the Russian Federation with respect to law enforcement activities under article 298, paragraph 1, subparagraph (b), of the Convention, the Tribunal considered that this declaration “*prima facie* applies only to disputes excluded from the jurisdiction of a court or tribunal under article 297, paragraphs 2 and 3, of the Convention”, concerning marine scientific research and fisheries (see paragraph 45 of the Order).

23. Concerning the non-appearance of the Russian Federation, the Tribunal considered that the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings and does not preclude the Tribunal from prescribing provisional measures, provided that the parties have been given an opportunity of presenting their observations on the subject. The Tribunal noted that the Russian Federation had been given ample opportunity to present its observations but had declined to do so. It then considered that it had to identify and assess the respective rights of the Parties involved on the best available evidence.

24. In its Order, the Tribunal found that a difference of opinions existed as to the applicability of the provisions of the Convention in regard to the rights and obligations of a flag State and a coastal State, notably, its articles 56, 58, 60, 87 and 110, and that these provisions could be a basis on which the jurisdiction of the arbitral tribunal might be founded. The Tribunal therefore found that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute. The Tribunal also considered that, under the circumstances of the case, pursuant to article 290, paragraph 5, of the Convention, the urgency of the situation required the prescription by the Tribunal of provisional measures.

25. In its Order, by 19 votes to 2, the Tribunal prescribed that “the Russian Federation shall immediately release the vessel *Arctic Sunrise* and all persons who have been detained, upon the posting of a bond or other financial security by the Netherlands which shall be in the amount of 3,600,000 euros, to be posted with the Russian Federation in the form of a bank guarantee”. It also prescribed that upon the posting of this bond or other financial security “the Russian Federation shall ensure that the vessel *Arctic Sunrise* and all persons who have been detained are allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation” (see paragraph 105 of the Order). In addition, the Tribunal decided that the Parties should each submit an initial report not later than 2 December 2013 to the Tribunal. The Netherlands communicated its report to the Tribunal on that date.

Mr President,

26. The Tribunal will also have a busy judicial agenda during 2014. The Tribunal is currently deliberating on the merits of the *M/V “Virginia G” Case (Panama/Guinea-Bissau)*. This case, which was submitted to the Tribunal on 4 July 2011, relates to the arrest on 21 August 2009 of an oil tanker, the M/V “Virginia G”, by the authorities of Guinea-Bissau in the exclusive economic zone of Guinea-Bissau; the vessel was arrested whilst carrying out refuelling activities. The M/V “Virginia G”, which was sailing under the flag of Panama, was released on 22 October 2010. Panama is seeking reparation for the damage suffered. The hearing in this case was held from 2 to 6 September 2013. I wish to inform you that the Tribunal intends to deliver its judgment in spring 2014.

27. Furthermore, I am glad to report to you that the Tribunal received a new case in early 2013. On 28 March 2013, the Sub-Regional Fisheries Commission, an organization whose membership comprises seven West African States, requested the Tribunal to render an Advisory Opinion under article 138 of the Rules of the Tribunal. By Order dated 24 May 2013, the Tribunal invited the States Parties to the Convention, the

Sub-Regional Fisheries Commission and a number of intergovernmental organizations identified by the Tribunal to submit written statements relating to the case by 29 November 2013. Statements were submitted by that date by 18 States Parties and 6 intergovernmental organizations. By a further Order dated 3 December 2013, the time-limit for presenting written statements has been extended to 19 December 2013. All statements will be available on the website of the Tribunal as from 23 December 2013.

Mr President,

Ladies and gentlemen,

28. In order to ensure the functioning of the system established under Part XV of the Convention, the President of the International Tribunal for the Law of the Sea has been assigned a role as appointing authority under article 3 of Annex VII of the Convention. This means that, whenever arbitral proceedings have been instituted under Annex VII and one of the parties to the dispute fails to appoint a member of the arbitral tribunal or the parties are unable to agree on the appointment of one or more members of the arbitral tribunal, the President of the Tribunal is required to make the appointment at the request of any party to the dispute and in consultation with the parties. I made such appointments in 2013 with respect to three cases: the arbitral proceedings instituted by Argentina against Ghana, those instituted by the Republic of the Philippines against the People's Republic of China, and those for the settlement of the maritime delimitation dispute between Bangladesh and India in the Bay of Bengal.

29. An efficient system for the peaceful settlement of disputes requires that complete information on the role of the Tribunal be provided to the Government officials who in their respective capitals are responsible for dealing with law of the sea matters. Likewise, it is important to transmit information and knowledge to the younger generation in order to ensure that lawyers and officials early in their careers are made aware of the tools available to States with a view to the peaceful settlement of international disputes. In this respect, I would like to draw attention to the capacity-

building programmes on the peaceful settlement of disputes under the Convention which are offered by the Tribunal. The Tribunal, in cooperation with the Government of Mexico, organized a workshop on *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 the Caribbean Region*. The workshop took place in Mexico City on 5 and 6 June 2013 and was attended by participants from 16 States. It was the ninth regional workshop held to date by the Tribunal. I take this opportunity to extend our sincere thanks to the Government of Mexico for the invaluable support it provided for the organization of this event.

30. A further aspect of the Tribunal's capacity-building activities is its Internship Programme, which annually gives twenty interns from around the world the opportunity to gain a deeper understanding of the work and functions of the Tribunal. Special trust funds have been established, with assistance from the Korea Maritime Institute and the China Institute of International Studies, to provide financial support to applicants from developing countries. Furthermore, a capacity-building and training programme on dispute settlement under the Convention, organized in cooperation with the Nippon Foundation, has been offered since 2007 for the benefit of young government officials and researchers. For the 2012-2013 session, eight participants from the following countries have received fellowships from the Nippon Foundation: Brazil, Comoros Islands, Haiti, Indonesia, Lebanon, Philippines, Tanzania and Tunisia. I would like to add that the seventh Summer Academy of the International Foundation for the Law of the Sea on "Uses and Protection of the Sea – Legal, Economic and Natural Science Perspectives" was held at the Tribunal from 21 July to 16 August 2013. Thirty-six participants, from 33 countries, attended lectures and workshops dealing with the law of the sea and maritime law. I would like to express my deep gratitude to the above mentioned institutions for their support.

31. Mr President, I would like to conclude by voicing my appreciation to you and the distinguished delegates for the opportunity given to me to address this meeting. I also would like to seize this opportunity to congratulate the new Legal Counsel, Mr De Serpa Soares, and the new director of DOALOS, Ms Goettsche-Wanli, on their recent

appointments. I am sure that, under their leadership, relations between the Tribunal and the United Nations Legal Office will be excellent, as they have been under their predecessors.

I thank you for your interest in the Tribunal and its work.