Remarks of Judge Tomas Heidar, President of the International Tribunal for the Law of the Sea at the Permanent Mission of Germany to the United Nations in New York
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The contributions of ITLOS to the clarification and development of the law of the sea: From the continental shelf to climate change

Excellencies, distinguished guests,

I wish to thank the Permanent Mission of Germany to the United Nations for organizing this annual event. As you all know, Germany is the host country of the International Tribunal for the Law of the Sea and I would like to express, on behalf of the Tribunal, our sincere thanks to the Government of Germany for its excellent performance in this regard. I am thankful for having this opportunity to speak to you all today. The topic I have chosen for my remarks concerns the contributions of ITLOS to the clarification and development of the law of the sea.

In discharging its principal function of settling disputes, an international court will inevitably apply the law to the facts at hand. In doing so, rules and principles are interpreted and, as a result, judicial decisions are rendered, offering invaluable guidance as to the proper understanding of international law. This certainly holds true for the adjudication of disputes concerning the interpretation and application of the United Nations Convention on the Law of the Sea. Bearing in mind that the Convention establishes an extensive set of rules governing the uses of the oceans and their resources, it stands to reason that there is quite some room for divergent interpretations of its provisions. While cooperation among States Parties, directly or through competent international organizations, assists in the harmonious implementation of the law of the sea, disagreements do still arise, prompting the need for peaceful means through which they can be resolved.

This bring us to one of the defining features of the Convention: its dispute settlement system. To say that the drafters paid great attention to this matter is anything but an exaggeration. It was their firm belief that effective dispute settlement was crucial to securing a balance between the intricate compromises reached in the Convention and to ensuring its coherent interpretation in practice. The outcome of

their efforts is plain to see in the many articles of the Convention which govern dispute resolution in remarkable detail.

Within the compulsory dispute settlement system, the Tribunal occupies a unique position as the sole permanent judicial organ created by the Convention. Having reached broad consensus for the establishment of a new adjudicatory body specialized in the law of the sea, the drafters of the Convention decided – wisely, in retrospect – to imbue the Tribunal with a distinct institutional design. In this regard, I wish to emphasize the geographically representative composition of the bench, increased access to the Tribunal, which in certain situations extends to entities other than States Parties, and an expedient procedural framework. Furthermore, the Tribunal enjoys special jurisdiction to deal with certain cases brought unilaterally by a State Party, irrespective of any choice of means under article 287 of the Convention. There are three such instances of special jurisdiction: provisional measures proceedings pending the constitution of an arbitral tribunal, prompt release proceedings, and proceedings instituted before the Seabed Disputes Chamber.

Since opening its doors over a quarter of a century ago, the Tribunal has been seized of thirty-three proceedings, two of which are pending. No other court or tribunal has handled more cases brought on the basis of recourse to the compulsory procedures stipulated in Part XV, section 2, of the Convention. This appears to be a trend which shows no signs of abating. If one reads through the various judgments, advisory opinions and orders on provisional measures rendered by the Tribunal, it becomes readily apparent that its jurisprudence has provided fertile ground for the clarification and development of the Convention.

A comprehensive survey of all the contributions made by the Tribunal to the law of the sea would go well beyond the speaking time that has been allotted to me. Therefore, I thought it would prove most fruitful to focus on our most recent case law, namely, the Special Chamber's Judgments in the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* and the Tribunal's recent Advisory Opinion on the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*.

I will start with the *Mauritius/Maldives* case, which was submitted to a special chamber of the Tribunal by special agreement concluded on 24 September 2019. In the Judgment of 28 January 2021 on the preliminary objections raised by the Maldives, the Special Chamber held that it had jurisdiction to adjudicate upon the dispute concerning the delimitation of the maritime boundary between the Parties in the Indian Ocean and that the claim submitted by Mauritius in this regard was admissible. In this context, the Special Chamber took into consideration determinations made by the International Court of Justice, or "ICJ", in its Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. Here I wish to note that the Special Chamber offered a valuable clarification on the distinction between the binding character and the authoritative nature of an advisory opinion of the ICJ. While recognizing that such an advisory opinion is not binding, the Special Chamber observed that "judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the 'principal judicial organ' of the United Nations with competence in matters of international law."[1]

Following the handing down of the Judgment on preliminary objections, the proceedings subsequently resumed. On 28 April 2023, the Special Chamber delivered its Judgment on the merits, which was adopted by unanimous vote. The Special Chamber was called upon to delimit the maritime boundary between Mauritius and the Maldives in the Indian Ocean with respect to the exclusive economic zone and the continental shelf. Before highlighting the contributions made by this Judgment, it seems fitting to point to the heightened role played by international courts and tribunals in this field. As stated by the Tribunal in the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, "[d]ecisions of international courts and tribunals, referred to in article 38 of the Statute of the ICJ, are also of particular

[1] *Delimitation of the maritime boundary in the Indian Ocean (Mauritius/Maldives), Preliminary Objections, Judgment, ITLOS Reports 2020-2021*, p. 17, at p. 77, para. 203.

importance in determining the content of the law applicable to maritime delimitation under articles 74 and 83 of the Convention."[2]

The Special Chamber commenced with the delimitation within 200 nautical miles. I wish to note two significant points in this respect. Firstly, the case is remarkable in that it concerned delimitation between two archipelagic States. Accordingly, the Special Chamber was presented with a rare opportunity to elucidate various features of the legal regime of archipelagic States, including archipelagic baselines and drying reefs. Another important point worth emphasizing is the treatment of low-tide elevations, *in casu* Blenheim Reef, as a relevant circumstance in the second stage of applying the equidistance/relevant circumstances method. This aspect of the Judgment may be deemed an innovation in the case law of maritime delimitation.

Having completed the delimitation within 200 nautical miles, the Special Chamber turned to the question of the delimitation of the continental shelf beyond 200 nautical miles. It should be mentioned that both Parties had made submissions to the Commission on the Limits of the Continental Shelf, or "the CLCS", with respect to the area at issue in this case, but the CLCS had not yet made recommendations to them.

The Special Chamber found that its jurisdiction included the delimitation not only of the continental shelf within 200 nautical miles but also of any portion of the continental shelf beyond that limit. However, having considered three different routes for natural prolongation to the foot of slope point on which Mauritius based its claim of entitlement to the continental shelf beyond 200 nautical miles, the Special Chamber considered that the first route was "impermissible on legal grounds under article 76 of the Convention" as it passed within the continental shelf of the Maldives within 200 nautical miles that was uncontested by Mauritus.[3] The Special Chamber further held that there was "significant uncertainty as to whether the second and third

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[2] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, at p. 56, para. 184.
[3] *Delimitation of the maritime boundary in the Indian Ocean (Mauritius/Maldives), Judgment of 28 April 2023*, paras. 444 and 449.

routes could form a basis for Mauritius' natural prolongation to the critical foot of slope point."[4]

The Special Chamber concluded that, given the significant uncertainty, it was not in a position to determine the entitlement of Mauritius to the continental shelf beyond 200 nautical miles in the Northern Chagos Archipelago Region. Consequently, in the circumstances of the case, the Special Chamber did not proceed to delimit the continental shelf beyond 200 nautical miles between Mauritius and the Maldives.

Following in the footsteps of the earlier case law of the Tribunal, namely, the *Bangladesh/Myanmar* case and the *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, the Special Chamber in the *Mauritius/Maldives* case added its own grain of salt to the legal clarification of the outer continental shelf. A major contribution is the meticulous manner in which the Special Chamber in the *Mauritius/Maldives* case applied the significant uncertainty standard originally developed by the Tribunal in the *Bangladesh/Myanmar* case. What transpires from the Judgment is that the Special Chamber engaged in a careful and lucid assessment not only of the legal arguments but also of the supporting evidence presented by the Parties.

In addition to applying the significant uncertainty standard, the Special Chamber explained the underlying rationale for its use. The Judgment clarified that this standard "serves to minimize the risk that the CLCS might later take a different position regarding entitlements in its recommendations from that taken by a court or tribunal in a judgment."[5] Moreover, the Judgment explained that caution was further warranted in the present case by the risk of prejudice to the interests of the international community in the international seabed area and the common heritage principle. In sum, the Special Chamber has provided a well-reasoned and prudent blueprint that other international courts and tribunals may wish to follow, in

[4] *Ibid.*, para. 449.
[5] *Ibid.*, para. 433.

appropriate circumstances, when dealing with the question of entitlement to the continental shelf beyond 200 nautical miles.

At present, allow me to take up the latest development at the Tribunal: the delivery on 21 May 2024 of its unanimous Advisory Opinion on the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*. It bears reiterating that on 26 August 2022, the Commission of Small Island States on Climate Change and International Law, which I will refer to as "the Commission", decided to request an advisory opinion from the Tribunal on two questions.

The first question was formulated as follows:

> What are the specific obligations of State Parties to the [Convention], including under Part XII:
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> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?

The second question was phrased as follows:

> What are the specific obligations of State Parties to the [Convention], including under Part XII:
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> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

You may recall that earlier this week I summarized the procedural history as well as the findings of the Tribunal in my address to the Meeting of States Parties to the Convention. Rather than recount these points once more, I propose to shed light

on the distinctive nature of the Advisory Opinion by drawing your attention to three points in particular.

The first notable aspect of the Advisory Opinion is the close attention paid to the science of climate change and its relationship with the ocean. Given that the phenomenon of climate change was central to the questions submitted by the Commission and necessarily involved scientific aspects, the Tribunal decided to devote an entire section of the Advisory Opinion to the scientific background of the case.[6] In those paragraphs, the Tribunal made ample use of the reports of the Intergovernmental Panel on Climate Change, commonly abbreviated to "the IPCC". Importantly, the Tribunal observed that most participants in the proceedings recognized these reports "as authoritative assessments of the scientific knowledge on climate change".[7] In addressing the most relevant reports, the Tribunal not only summarized their content but also explained methodological matters, such as their use of varying confidence levels, and how they are reviewed and subsequently endorsed by IPCC member countries. Moreover, it is worth mentioning that the notion of "the best available science" was taken into account in the legal analysis developed by the Tribunal in its replies to the two questions submitted by the Commission. On this topic, the Tribunal made an important connection between this notion and the IPCC by stating that "[w]ith regard to climate change and ocean acidification, the best available science is found in the works of the IPCC which reflect the scientific consensus."[8]

Secondly, the Advisory Opinion offers a powerful illustration of the Convention's continued relevance in the face of contemporary challenges to the law of the sea. The Convention, as a constitutional framework, is often praised for its comprehensive scope as well as the general and open-ended terms found in many of its provisions. These features allow for the Covention to govern new ocean-related issues that were not necessarily in the minds of its drafters back in the 1970s and early 80s. Climate change is an excellent case in point. Although terms such as

[6] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, para. 45.
[7] Ibid., para. 51.
[8] Ibid., para. 208.

"climate change", "greenhouse gas emissions", also known as "GHG emissions", and "ocean acidification" do not appear in the Convention, the Advisory Opinion makes clear that this does not place such phenomena beyond the scope of the Convention. Allow me to demonstrate this point by referring to the Tribunal's interpretation of the notion of "pollution of the marine environment" and its application to anthropogenic GHGs.

The Tribunal observed that the first question submitted to it by the Commission concerns the specific obligations of States Parties to the Convention to prevent, reduce and control marine pollution in relation to the deleterious effects that result or are likely to result from climate change and ocean acidification, which are caused by anthropogenic GHG emissions into the atmosphere.[9] Noting that the first question is formulated on the premise that these obligations necessarily apply to climate change and ocean acidification, the Tribunal stated that the validity of this premise could not be presumed and therefore needed to be examined.[10]

The Tribunal therefore considered whether anthropogenic GHG emissions meet the criteria of the definition of "pollution of the marine environment" in article 1, paragraph 1, subparagraph 4, of the Convention.[11] I will read out this provision:

> For the purposes of this Convention … "pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

Following thorough examination, the Tribunal found that anthropogenic GHGs are substances, that their emissions are produced "by man" and that, by introducing carbon dioxide and heat (energy) into the marine environment, they cause climate

[9] Ibid., para. 154.
[10] Ibid., para. 158.
[11] Ibid., para. 159.

change and ocean acidification resulting in “deleterious effects”.[12] On this basis, having determined that all three criteria of the definition were satisfied, the Tribunal concluded that anthropogenic GHG emissions into the atmosphere constitute “pollution of the marine environment” within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention.[13]

The third and final aspect of the Advisory Opinion that I wish to underscore is the Tribunal’s approach to the interpretation of the Convention and the relationship between the Convention and other relevant rules of international law, referred to as “external rules”. The Tribunal explicitly acknowledged the significance of coordination and harmonization between the Convention and external rules. Achieving this objective, in the view of the Tribunal, is important “to clarify, and to inform the meaning of, the provisions of the Convention and to ensure that the Convention serves as a living instrument.”[14] The relationship between the provisions of Part XII of the Convention, entitled “Protection and Preservation of the Marine Environment”, and external rules was found to be of particular relevance in this case.[15]

The Tribunal offered another useful clarification by clearly categorizing three distinct mechanisms through which a relationship between the provisions of Part XII of the Convention and external rules is formed. These mechanisms are the rules of reference contained in Part XII of the Convention, article 237 of the Convention and the method of interpretation, as reflected in article 31, paragraph 3(c), of the Vienna Convention on the Law of Treaties, or “the VCLT”, requiring that account be taken, together with the context, of any relevant rules of international law applicable in the relations between the parties.

The Tribunal also went beyond mere categorization by either expounding the rationale underlying these mechanisms or explaining their scope. Accordingly, article 237 of the Convention, which clarifies the relationship of Part XII of the Convention with other treaties relating to the protection and preservation of the

[12] Ibid., paras. 164, 165 and 178.
[13] Ibid., paras. 179 and 441(3)(a).
[14] Ibid., para. 130.
[15] Ibid., para. 130.

marine environment, was described as "reflect[ing] the need for consistency and mutual supportiveness between the applicable rules."[16] Furthermore, the Tribunal noted that the rules of reference contained in Part XII of the Convention and article 237 of the Convention "demonstrate the openness of Part XII to other treaty regimes."[17] With respect to the method of interpretation reflected in article 31, paragraph 3(c), of the VCLT, the Tribunal specified that the term "any relevant rules of international law" includes both relevant rules of treaty law and customary law.[18]

A primary example of how the relationship between the Convention and external rules operates in practice can be found in the Tribunal's assessment of the obligation to take necessary measures under article 194, paragraph 1, of the Convention. It was contended by some participants in the proceedings that the United Nations Framework Convention on Climate Change, or "the UNFCCC", and the Paris Agreement are *lex specialis* in respect of the obligations of States Parties under the more general provisions of the Convention. In the same vein, several participants took the view that, as concerns obligations regarding the effect of climate change, the Convention does not by itself impose more stringent commitments than those laid down in the UNFCCC and the Paris Agreement.[19]

The Tribunal reached different conclusions on these matters. In this regard, I find it fitting to quote from a noteworthy passage of the Advisory Opinion, which elucidates its reasoning in greater detail:

> The Tribunal does not consider that the obligation under article 194, paragraph 1, of the Convention would be satisfied simply by complying with the obligations and commitments under the Paris Agreement. The Convention and the Paris Agreement are separate agreements, with separate sets of obligations. While the Paris Agreement complements the Convention in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter. Article 194, paragraph 1, imposes upon States a legal obligation to take all necessary measures to

[16] Ibid., para. 133.
[17] Ibid., para. 134.
[18] Ibid., para. 135.
[19] Ibid., para. 220.

> prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions. If a State fails to comply with this obligation, international responsibility would be engaged for that State.[20]

I have now come to the end of my presentation. Building on a steady increase in its case law, with a clear uptick in recent times, the Tribunal has demonstrated its capacity and willingness to fulfil the mission entrusted to it by the States Parties to the Convention. In undertaking its task, the Tribunal has significantly contributed to the clarification and development of the law of the sea. As both the *Mauritius/Maldives* case and the Advisory Opinion given at the request of the Commission demonstrate, the Tribunal has not shied away from elucidating some of the more intricate legal issues under the Convention. It can indeed be stated that the Tribunal stands ready to take on the full spectrum of issues concerning the law of the sea, ranging from the continental shelf to climate change. The achievements of the Tribunal place it in good stead to carry on its mandate well into the twenty-first century as a leading forum for the peaceful settlement of ocean disputes.

[20] Ibid., para. 223.