Symposium: 30th Anniversary of the Entry into Force of the United Nations Convention on the Law of the Sea: The 'Constitution for the Oceans' in Light of Emerging Challenges

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UNCLOS as a Living Instrument

Remarks by H.E. Judge Tomas Heidar,

President of the International Tribunal for the Law of the Sea

Excellencies, distinguished guests, dear friends,

On behalf of the International Tribunal for the Law of the Sea, I would like to welcome you all to this Symposium held in celebration of the 30th anniversary of the entry into force of the United Nations Convention on the Law of the Sea. It is a pleasure to host such an auspicious event in our very own courtroom. I thank the organizers of the Symposium, the International Foundation for the Law of the Sea and the Korea Maritime Institute, for putting together an impressive line-up of panels and speakers.

In my brief remarks, I wish to offer some reflections on the overarching theme of the symposium, namely the Convention as the "Constitution for the Oceans" in light of emerging challenges. The adoption of the Convention in 1982 is one of the biggest achievements in the history of the United Nations and it has contributed enormously to international peace and security. As the first and only comprehensive treaty on the law of the sea, it provides a jurisdictional regime prescribing the rights and obligations of States in different maritime zones. It also contains a substantive legal framework for all uses of the oceans and a compulsory mechanism for settlement of disputes. The Convention has therefore rightly been referred to as "the Constitution for the Oceans".

The Convention's substantive regimes, which apply to various areas, such as fisheries, navigation, protection of the marine environment, and marine scientific research, are complemented by a number of specialized agreements and institutional arrangements at the global and regional level, some of which predate it. Together, the Convention and related agreements provide the legal framework for the oceans.

The Convention is a carefully balanced "package deal", in which the demands of some States or groups of States were taken into account in return for the inclusion of other provisions favouring other States or groups of States. Obviously, it is very important to preserve the integrity of the Convention by maintaining that "package deal" intact. This could be compromised by selective amendments.

At the different commemorations of anniversaries of the Convention, such as ours today, it is repeatedly recognized that it was negotiated with foresight and has stood the test of time. However, it was emphasized already at the Third United Nations Conference on the Law of the Sea, which was convened to negotiate and adopt the Convention, that scientific and technological advances and changes could occur and new economic, political, juridical and environmental developments might take place, all of which could affect the subject matter of parts of the Convention. Accordingly, its provisions should be adapted to such changes. Like any other living instrument, the Convention must adapt to changing circumstances. In the interest of time, I will only be able to touch upon some of the ways in which such adaption may occur, the first of which is the possibility of amendment.

The Convention provides a number of formal amendment procedures, which are either generally applicable or deal with a specific subject matter. These procedures, which are subject to stringent requirements, have never been used.

Other than formal amendment, there are various other means by which the Convention, and the law of the sea framework more generally, have been adapted to the challenges of new scientific knowledge and changing circumstances. At this juncture, we will turn to these other means, starting with the adoption of so-called "implementing agreements", which have *de facto* modified or amended the Convention or the law of the sea framework.

The first instrument in this category is the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, or Part XI Agreement in short. This instrument addressed several difficulties, which many industrialized countries had raised with respect to the seabed mining provisions contained in Part XI of the Convention, and thereby paved the way for universal participation in the Convention regime. While its title refers perhaps euphemistically to “implementation” of the provisions of Part XI, the Part XI Agreement goes well beyond implementation and effectively amends several provisions of the Convention.

The 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, or UN Fish Stocks Agreement, is the second implementing agreement. The UN Fish Stocks Agreement’s objective is to “ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention.” Although the UN Fish Stocks Agreement does not amend the Convention *per se*, it strengthens considerably the Convention framework for high seas fisheries and develops international law in this area significantly.

On 19 June 2023, an Intergovernmental Conference convened under the auspices of the United Nations adopted the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, or BBNJ Agreement, thus adding a third implementing agreement to the list. It addresses four main issues: marine genetic resources, including the fair and equitable sharing of benefits; measures such as area-based management tools, including marine protected areas; environmental impact assessments; and capacity-building and the transfer of marine technology. The BBNJ Agreement also addresses a number of “cross-cutting issues”, including the possibility for the Conference of the Parties to request the Tribunal to give an advisory opinion on a legal question on the conformity with the Agreement of a proposal before it on any matter within its competence.

Looking beyond implementing agreements, the Convention includes several other mechanisms through which its adaptation may take place. It provides, for example, for the obligation of States, acting through “competent international organizations”, to establish relevant international rules and standards, or to work through “appropriate international organizations”. In many cases, the rules and standards adopted by these organizations are incorporated by reference into the Convention regime, i.e., the “rule of reference”.

The two most relevant international organizations in this respect are the International Maritime Organization (IMO) and the Food and Agricultural Organization of the United Nations (FAO), both specialized agencies of the United Nations predating the Convention. The IMO is the global standard-setting authority for the safety, security and environmental performance of international shipping and therefore addresses a wide variety of issues covered by the Convention, in particular those falling under Part VII (High Seas) and Part XII (Protection and Preservation of the Marine Environment). The IMO has adopted a number of agreements and “soft law” instruments, which complement the Convention and in many cases adapt the law of the sea framework to new circumstances.

The FAO is the competent international organization in the area of fisheries. It has adopted several agreements and soft law instruments in this field, which complement the fisheries provisions of the Convention, such as the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, the 1995 FAO Code of Conduct for Responsible Fisheries, the 2001 International Plan of Action on Illegal, Unreported and Unregulated Fishing, the 2008 International Guidelines for the Management of Deep-sea Fisheries in the High Seas and the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

The Convention provides in article 319 for the convening of Meetings of States Parties to the Convention and it created three international institutions, the International Seabed Authority, the Tribunal and the Commission on the Limits of the Continental Shelf. The Convention entrusts a regulatory role to these institutions in their respective areas.

Last, but not least, international courts and tribunals, including ITLOS, may clarify and develop the law of the sea framework. The main task of the Tribunal is of course to settle disputes concerning the interpretation or application of the Convention. In so doing, the Tribunal shall apply the Convention and other rules of international law not incompatible with it. Through its decisions in contentious cases, the Tribunal has had the chance to clarify and develop the law of the sea, which not only benefits the parties to the relevant dispute but the international community as a whole.

By way of example, the maritime delimitation jurisprudence of the Tribunal has made significant contributions towards our understanding of the outer continental shelf. In this regard, I wish to specially mention the Judgment of 28 April 2023 rendered by the Special Chamber in the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, which offers a meticulous and well-reasoned application of the "significant uncertainty" standard in relation to the question of entitlement to the continental shelf beyond 200 nautical miles.

In addition to contentious proceedings, the plenary Tribunal and its Seabed Disputes Chamber enjoy advisory jurisdiction. Advisory opinions serve to interpret and clarify the relevant provisions of the Convention, related agreements and other international law. Thus far, three advisory opinion have been handed down, all of which have contributed to the elucidation of the law of the sea. The 2011 Advisory Opinion of the Seabed Disputes Chamber on responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area clarified the relevant provisions of Part XI and related international law. The 2015 Advisory Opinion of the Tribunal on the request of the Sub-regional Fisheries Commission clarified and developed, *inter alia*, the due diligence obligation of the flag State to take appropriate measures in order to ensure that vessels flying its flag are not engaged in IUU fishing activities in the exclusive economic zones of other States.

The most recent Advisory Opinion, which was rendered by unanimous vote on 21 May 2024 pursuant to a request submitted by the Commission of Small Island States on Climate Change and International Law (COSIS), offers an excellent

illustration of how the Convention remains fit for purpose in light of changing circumstances.

In these proceedings, the Tribunal was presented with legal questions referring to, *inter alia*, “climate change”, “greenhouse gas emissions”, also known as “GHG emissions”, and “ocean acidification”. As you may well know, these terms do not appear in the text of the Convention. Nonetheless, the Advisory Opinion makes clear that the absence of such terminology does not place these phenomena beyond the scope of the Convention.

This observation holds particularly true if we consider the Tribunal’s interpretation of the notion of “pollution of the marine environment”, as found in article 1, paragraph 1, subparagraph 4, of the Convention and its application to anthropogenic GHGs. 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 change and ocean acidification resulting in “deleterious effects”. 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. Accordingly, the Advisory Opinion has brought climate change into the realm of the Convention. It demonstrates that new ocean-related issues that were not necessarily in the minds of the drafters of the Convention back in the 1970s and early 80s are nonetheless subject to the comprehensive legal order it has established.

The Advisory Opinion also shows how external rules interact with the Convention and enable the latter to remain up-to-date. As highlighted by the

Tribunal, “coordination and harmonization between the Convention and external rules are 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.”[1]

The Advisory Opinion also deals with the role played by generally accepted international rules and standards established through the competent international organization or general diplomatic conference. It is made clear by the Tribunal that the relevant rules of reference are integral for determining the specific obligations of States Parties under the Convention regarding the prevention, reduction and control of marine pollution from GHG emissions from several sources.

Excellencies, distinguished guests, I have now come to the end of my introductory remarks. All that remains for me is to reiterate the Tribunal’s appreciation to the International Foundation for the Law of the Sea and the Korea Maritime Institute for organizing what I am sure will be a most stimulating and informative set of discussions over the next two days. Thank you for your kind attention.

[1] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal), Advisory Opinion of 21 May 2024*, para. 130.