

Remarks of Judge Tomas Heidar, President of the International Tribunal for the Law of the Sea at the 35th Anniversary Conference of the International Maritime Law Institute, Malta

Panel on the “International Efforts to Mitigate the Marine Environmental Crisis”

17 June 2024

Excellencies, distinguished guests,

I wish to congratulate the Director of the International Maritime Law Institute, Professor Norman Martínez, and his entire team for organizing this excellent anniversary conference. It is a great honour to speak at an institution that has done so much over the past 35 years to disseminate knowledge in international maritime law and train successive generations of experts in the field. I also wish to acknowledge Professor Martínez’s predecessor, my colleague Judge David Attard, who was at the helm of IMLI for so many of these 35 years.

With satisfaction I would also like to note that in recent years IMLI has continually expanded its research and teaching areas to include the law of the sea. In this regard, the “IMLI Course on Peaceful Settlement of Maritime Disputes and Delimitation of Maritime Boundaries” deserves special mention. As you may know, several of my distinguished colleagues and I have the pleasure of serving as lecturers in this course and I had the honour of opening this course last April. Participants are thus presented with a unique opportunity to learn directly from our judges about the jurisdiction, procedure and case law of the Tribunal. Such endeavours build bridges between our two institutions and help promote greater understanding of the legal order of the oceans.

The present panel is intended to cover “the international efforts to mitigate the marine environmental crisis”. While the protection and preservation of the marine environment have featured extensively in our jurisprudence, any effort on my part to

go through the relevant contributions made by the Tribunal would well exceed my speaking time. Therefore, I have chosen to focus on a recent and significant development at the Tribunal, namely, 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*. Rather than summarize the findings made by the Tribunal in response to the questions submitted by the Commission of Small Island States on Climate Change and International Law, which I will refer to as “the Commission”, I propose to shed light on the distinctive nature of the Advisory Opinion by drawing your attention to two 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.¹ In these 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”.² 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 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.”³

¹ *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.

² *Ibid.*, para. 51.

³ *Ibid.*, para. 208.

The second 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."⁴ 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.⁵

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 marine environment, was described as "reflect[ing] the need for consistency and mutual supportiveness between the applicable rules."⁶ 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."⁷ With respect to the method of interpretation reflected in article 31, paragraph 3(c), of the

⁴ Ibid., para. 130.

⁵ Ibid., para. 130.

⁶ Ibid., para. 133.

⁷ Ibid., para. 134.

VCLT, the Tribunal specified that the term “any relevant rules of international law” includes both relevant rules of treaty law and customary law.⁸

A point certainly worth emphasizing with respect to external rules is that the Tribunal was mindful to consider the international instruments adopted within the framework of the IMO that address matters related to climate change. Accordingly, you will find that the Advisory Opinion addresses the 2011 and 2021 amendments to Annex VI to MARPOL, which were made with a view to reducing greenhouse gas (GHG) emissions from ships through the inclusion of regulations concerning energy efficiency.⁹ The Tribunal also referred to the 2023 IMO Strategy on Reduction of GHG Emissions from Ships, which seeks to enhance the IMO’s contribution to global efforts by addressing GHG emissions from international shipping.¹⁰

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.¹¹

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

⁸ Ibid., para. 135.

⁹ Ibid., para. 79.

¹⁰ Ibid., para. 80.

¹¹ Ibid., para. 220.

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 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.¹²

Now that the dust has settled over these landmark proceedings, States Parties will have ample opportunity in the coming months to draw the appropriate conclusions from the Advisory Opinion. I hope that the Tribunal has succeeded in providing a comprehensive guide to the relevant specific obligations of States Parties under the Convention, thereby putting them in good stead to tackle the sizeable challenges posed by climate change. In arriving at this unanimous outcome, the Tribunal had to operate within a highly complex scientific context and was required to take into account a broad spectrum of other rules of international law that had a bearing on the Request before it, including those developed by the IMO. This achievement speaks volumes about the ability of the Tribunal to handle the intricate disputes and legal questions that may come its way in the years ahead.

I thank you for your kind attention.

¹² *Ibid.*, para. 223.