

STATEMENT BY

H.E. JUDGE TOMAS HEIDAR

PRESIDENT OF THE
INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ON

THE ANNUAL REPORT OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF
THE SEA FOR 2023

FOR

THE THIRTY-FOURTH MEETING OF STATES PARTIES TO THE
UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

10 June 2024

Mr President, distinguished delegates,

1. I am honoured to address the Meeting of States Parties to present to you the Annual Report of the International Tribunal for the Law of the Sea for 2023. On behalf of the Tribunal, I convey to you, Mr President, our congratulations on your election as President of the Meeting of States Parties and wish you every success in the completion of your mandate.

2. The Annual Report of the Tribunal gives an account of the Tribunal's activities for the period 1 January to 31 December 2023. I intend to draw your attention to the main aspects of the report and to furnish the Meeting with additional information on developments which have taken place this year.

3. As regards organizational matters, I wish to recall that on 14 June 2023 the Meeting of States Parties elected seven judges to the Tribunal for a term of nine years. I was re-elected and six judges were newly elected, namely: Ms Frida María Armas Pfirter of Argentina; Mr Hidehisa Horinouchi of Japan; Mr Thembile Elphus Joyini of South Africa; Mr Osman Keh Kamara of Sierra Leone; Mr Konrad Jan Marciniak of Poland; and Mr Zha Hyoung Rhee of the Republic of Korea. The new judges were sworn in on 2 October 2023 in Hamburg. Following these elections, the Tribunal now counts six female judges among its members.

4. On 30 September 2023, my predecessor, Judge Albert Hoffmann, completed his three-year term as President of the Tribunal. On 2 October 2023, I was elected President of the Tribunal for a three-year term. On the same day, Judge Neeru Chadha of India was elected Vice-President of the Tribunal. Judge David Attard of Malta was elected President of the Seabed Disputes Chamber on 4 October 2023.

5. I now turn to the judicial work of the Tribunal. As my predecessor reported to you at the last Meeting of States Parties, the Special Chamber in the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* delivered its Judgment on the merits on 28 April 2023. You can examine the key findings of this Judgment, which was adopted by unanimous vote, in the Annual Report of the Tribunal for 2023.

6. I would now like to address a very recent, major development at the Tribunal: the delivery on 21 May 2024 of its Advisory Opinion on the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*.

7. It bears recalling 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:

What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea [...], including under Part XII:

(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?

[and]

(b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

8. The request for an advisory opinion was filed with the Registry on 12 December 2022 and was entered into the List of cases as Case No. 31. In these proceedings, written statements from 31 States Parties and eight intergovernmental organizations were filed within the time-limit fixed by the President in his Order dated 15 February 2023. After the expiry of this time-limit, further written statements were received from three States Parties and one intergovernmental organization. These written statements were admitted and included in the case file. Pursuant to an Order of the President of the Tribunal dated 30 June 2023, a public hearing was held from 11 to 25 September 2023. I am pleased to inform you that delegations from 33 States Parties and four intergovernmental organizations made oral statements in these historic proceedings.

9. On 21 May 2024, the Tribunal delivered its unanimous Advisory Opinion. Over the course of the next few minutes, I will offer some insights into the Tribunal's core legal findings. However, before doing so, I wish to emphasize that the Tribunal found it appropriate, as a background to the Request, to provide an overview of the science and legal regime relating to climate change. Ample use was made 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". In a concluding paragraph, the Tribunal noted that "climate change represents an existential threat and raises human rights concerns."

10. The Tribunal subsequently proceeded to consider whether it had jurisdiction to give the advisory opinion requested by the Commission and, if so, whether there was any reason the Tribunal should, in the exercise of its discretion, decline to answer the Request. It is worth mentioning that when addressing these issues, the Tribunal relied on the jurisprudence it had developed in its 2015 Advisory Opinion on the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*.

11. With regard to jurisdiction, the Tribunal opined that the Agreement for the establishment of the Commission of Small Island States on Climate Change and International Law, which I will refer to as the "COSIS Agreement", "confers jurisdiction on the Tribunal" within the meaning of article 21 of the Statute, since it provides for authorization enabling the Commission to request advisory opinions from the Tribunal. Thus, article 21 of the Statute, together with the COSIS Agreement, was found to constitute the substantive legal basis of the Tribunal's jurisdiction in this case. Turning to the prerequisites to be satisfied in order to exercise advisory jurisdiction, which are contained in article 138, paragraphs 1 and 2, of the Rules, the Tribunal held that these had all been met. Further holding that the questions posed by the Commission constitute "matters which fall within the framework of the COSIS Agreement", as required by article 21 of the Statute, the Tribunal confirmed its jurisdiction to give the advisory opinion requested by the Commission.

12. As regards the issue of discretion, the Tribunal reiterated its earlier jurisprudence that “[i]t is well settled that a request for an advisory opinion should not in principle be refused except for ‘compelling reasons’”. Upon examination of possible objections, the Tribunal found it appropriate to render the advisory opinion requested by the Commission. The Tribunal then went on to state that it was mindful that “climate change is recognized internationally as a common concern of humankind” and was conscious of “the deleterious effects climate change has on the marine environment and the devastating consequences it has and will continue to have on small island States, considered to be among the most vulnerable to such impacts.”

13. The Tribunal turned its attention to the applicable law, which it found to cover “the Convention, the COSIS Agreement and other relevant rules of international law not incompatible with the Convention”. The focus of the Tribunal then shifted to the question of the interpretation of the Convention and the relationship between the Convention and other relevant rules of international law, referred to as “external rules”. It expressed the view that, “subject to article 293 of the Convention, the provisions of the Convention and external rules should, to the extent possible, be interpreted consistently.” Having regard to the extensive treaty regime addressing climate change, the Tribunal considered that “in the present case, relevant external rules may be found, in particular, in those agreements.” Such agreements include the United Nations Framework Convention on Climate Change, also known as “the UNFCCC”, the Kyoto Protocol, the Paris Agreement, Annex VI to MARPOL, Annex 16 to the Chicago Convention, and the Montreal Protocol, including the Kigali Amendment.

14. Before responding to the questions submitted by the Commission, the Tribunal examined the scope of the Request, concluding that it was requested to render an advisory opinion on “the specific obligations of States Parties under the Convention”. It further concluded that in order to identify these obligations and clarify their content, it would “have to interpret the Convention and, in doing so, also take into account external rules, as appropriate.” The Tribunal also considered the relationship between the questions and stated that the obligation addressed in the second question is broader in scope than the obligation addressed in the first

question. It explained that the obligation to protect and preserve the marine environment encompasses and goes beyond the obligation to prevent, reduce and control marine pollution.

15. I will now cast light on the Tribunal's responses to the questions in the Request. As the answers given by the Tribunal are rich in detail and span many provisions of the Convention, I can only offer a glimpse of what may be gleaned from carefully reading the Advisory Opinion in full.

16. The Tribunal observed that the first question posed to the Tribunal 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 greenhouse gas ("GHG") emissions into the atmosphere. 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.

17. 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. Following thorough examination, it 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, 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.

18. The Tribunal then proceeded to set out the specific obligations of States Parties to prevent, reduce and control pollution of the marine environment arising from climate change and ocean acidification. The Tribunal first considered the obligations under article 194 of the Convention and how they should be interpreted and applied in relation to marine pollution arising from anthropogenic GHG

emissions. It may be recalled that article 194 of the Convention is the primary provision in the marine pollution regime set out in Part XII and provides for obligations to prevent, reduce and control marine pollution applicable to any source.

19. Article 194, paragraph 1, of the Convention imposes upon States an obligation to take all necessary measures to prevent, reduce and control marine pollution from any source, regardless of the specific sources of such pollution. The Tribunal concluded that, under this provision, States “have the specific obligations to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions and to endeavour to harmonize their policies in this connection.” The Tribunal further concluded that such measures “should be determined objectively, taking into account, *inter alia*, the best available science and relevant international rules and standards contained in climate change treaties such as the UNFCCC and the Paris Agreement, in particular the global temperature goal of limiting the temperature increase to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve that goal.”

20. However, the Tribunal did 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, as the Convention and the Paris Agreement are separate agreements, with separate sets of obligations. According to the Tribunal, the Paris Agreement complements the Convention and does not supersede it. 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. In the Tribunal’s view, the Paris Agreement does not modify or limit the obligation under the Convention and is not *lex specialis* to the Convention.

21. As for the nature of this obligation to take all necessary measures, the Tribunal found that it is one of due diligence. The standard of due diligence in this regard is stringent, “given the high risks of serious and irreversible harm to the marine environment from such emissions.” However, the Tribunal held that “the implementation of the obligation of due diligence may vary according to States’ capabilities and available resources.”

22. The obligation under article 194, paragraph 2, of the Convention in relation to anthropogenic GHG emissions was next to be considered by the Tribunal. This provision sets out the obligation of States in the situation of transboundary pollution. According to the Tribunal’s conclusion, under this provision, States Parties have the specific obligation to “take all measures necessary to ensure that anthropogenic GHG emissions under their jurisdiction or control do not cause damage to other States and their environment, and that pollution from such emissions under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights.” Here too, the Tribunal found that it is an obligation of due diligence. According to the Tribunal, the standard of due diligence under article 194, paragraph 2, can be even more stringent than that under article 194, paragraph 1, because of the nature of transboundary pollution.

23. The remainder of the Tribunal’s answer to the first question focused on the obligations with respect to the specific sources of pollution provided for in sections 5 and 6 of Part XII and other relevant obligations under sections 2, 3 and 4 of Part XII. In terms of specific sources of pollution, the Tribunal found that marine pollution from anthropogenic GHG emissions can be characterized as pollution from land-based sources, pollution from vessels or pollution from or through the atmosphere. It is also worth noting that the Tribunal addressed duties to adopt national legislation and establish international rules and standards as well as their enforcement. With respect to other relevant obligations under sections 2, 3 and 4 of Part XII, the Tribunal opined on the specific obligations incumbent on States Parties in the areas of global and regional cooperation, technical assistance, and monitoring and environmental assessment.

24. The Tribunal subsequently proceeded to formulate its answer to the second question, confining its observations to the specific obligations to protect and preserve the marine environment in relation to climate change impacts and ocean acidification that were not previously identified in its response to the first question.

25. In responding to the second question, the Tribunal offered detailed analysis of the obligation under article 192 of the Convention to protect and preserve the marine environment. It held that, under this provision, States Parties have the specific obligation to protect and preserve the marine environment from climate change impacts and ocean acidification and that “[w]here the marine environment has been degraded, this obligation may call for measures to restore marine habitats and ecosystems.” According to the Tribunal, article 192 requires States Parties “to anticipate risks relating to climate change impacts and ocean acidification, depending on the circumstances.” This obligation was found to be one of due diligence for which the standard is stringent.

26. Looking to other provisions of the Convention, the Tribunal confirmed that States Parties have a specific obligation under article 194, paragraph 5, “to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life from climate change impacts and ocean acidification.” Consideration was also given to the specific obligations of States Parties under articles 61 and 119 to take measures necessary to conserve “living marine resources threatened by climate change impacts and ocean acidification.” Moreover, the Tribunal held that the obligations to seek to agree under article 63, paragraph 1, and to cooperate under article 64, paragraph 1, require States Parties, *inter alia*, “to consult with one another in good faith with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks”. Finally, the Tribunal found that, under article 196, States Parties have the specific obligation to take appropriate measures “to prevent, reduce and control pollution from the introduction of non-indigenous species due to the effects of climate change and ocean acidification which may cause significant and harmful changes to the marine environment.”

27. 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. This achievement speaks volumes for the ability of the Tribunal to handle the intricate disputes and legal questions that may come its way in the years ahead.

Mr President,
Distinguished delegates,

28. The next judicial item on which I will now report is *The M/T “Heroic Idun” (No. 2) Case (Marshall Islands/Equatorial Guinea)*, which is on the docket and listed as Case No. 32. Following the institution by the Marshall Islands of arbitral proceedings under Annex VII to the Convention against Equatorial Guinea in the dispute concerning the M/T “Heroic Idun” and her crew, the President of the Tribunal held consultations with the Parties at the Tribunal in Hamburg on 18 April 2023 to discuss the composition of the arbitral tribunal. On that occasion, the Marshall Islands and Equatorial Guinea agreed to transfer the arbitral proceedings to a special chamber of the Tribunal to be constituted pursuant to article 15, paragraph 2, of the Statute of the Tribunal. By Order of 27 April 2023, a special chamber of the Tribunal composed of five members was formed to deal with the case.

29. By Order of 19 May 2023, the President of the Special Chamber fixed the time-limits for the filing of the Memorial and Counter-Memorial. Further to a request of the Marshall Islands, and having sought the views of the parties, the President of the Special Chamber, by Order of 16 November 2023, extended the time-limits for the submission of the Memorial and the Counter-Memorial to 18 December 2023 and 15 July 2024, respectively.

30. The last judicial development to which I would like to draw your attention occurred only last week. On 3 June 2024, Luxembourg instituted proceedings before the Tribunal against Mexico in a dispute regarding the detention of the “Zheng He”, a vessel flying the flag of Luxembourg. I should note that both Luxembourg and Mexico have made declarations under article 287 of the Convention, recognizing the competence of the Tribunal as a means for the settlement of disputes concerning the interpretation or application of the Convention. The case has been entered in the Tribunal’s List of cases as Case No. 33. The Application instituting proceedings as well as a press release providing further information about this case have already been made available on our website.

31. In addition to reporting on judicial work, the Annual Report which is before you includes a review of organizational and administrative issues addressed by the Tribunal during two sessions held in 2023. The Registrar will address certain budgetary matters of the Tribunal in a separate statement.

32. The Tribunal is engaged in various capacity-building activities relating to its work with a view to increasing awareness of its role in the settlement of disputes. Allow me to provide you with an update on these activities.

33. The Tribunal regularly organizes regional workshops that enhance capacity building in the law of the sea. The sixteenth such regional workshop was held in 2023 in Nice, France, and was attended by representatives of 10 States Parties from the region. I wish to express my sincere appreciation to Cyprus, France and the Korea Maritime Institute for their generous support and to Côte d’Azur University for its excellent cooperation in organizing the workshop.

34. During the period 2023-2024, for the seventeenth time a nine-month capacity-building and training programme on dispute settlement under the Convention was conducted with the support of the Nippon Foundation. Fellows from Malawi, Mauritius, Mexico, Peru, the Solomon Islands and Türkiye took part in the programme. The candidates for the eighteenth edition of the programme – to start in July of this year – have already been selected. I wish to express the Tribunal’s deep

appreciation for the ongoing support given to this programme by the Nippon Foundation.

35. In addition, the Tribunal's internship programme offers training opportunities to students and recent graduates. In 2023, 14 persons from the same number of States served as interns at the Tribunal.

36. In order to provide financial assistance to participants from developing countries in the internship programme and in the Summer Academy, special trust funds have been established with the support of the Korea Maritime Institute, the China Institute of International Studies and the Government of China. I wish to express our sincere appreciation to these donors for their contributions to the trust funds.

37. Two large events were held on the premises of the Tribunal in 2023. In July of last year, we hosted the second ITLOS Workshop for Legal Advisers, during which participants from 21 African States attended sessions dedicated to procedural and substantive issues. I wish to thank the Republic of Korea for sponsoring and assisting in the organization of this successful event and I am pleased to confirm that a third workshop for legal advisers will be held in September, this time for States from Latin America and the Caribbean.

38. Furthermore, as per tradition, the International Foundation for the Law of the Sea organized its annual Summer Academy, offering the enrolled participants a wide array of courses on the law of the sea and maritime law. The next edition is due to take place in July and August of this year. The Foundation, in cooperation with the Korea Maritime Institute, is also organizing a symposium at the Tribunal, to be held on 21 and 22 September on the occasion of the thirtieth anniversary of the entry into force of the Convention.

39. Finally, I wish to note that in September 2021 the Tribunal established a Junior Professional Officer programme, enabling young professionals to serve in the Legal Office of the Tribunal's Registry or in other departments of the Registry, as necessary. On 1 December 2022, a memorandum of understanding between the

Tribunal and the Government of China concerning this programme was signed. On 7 February 2024, a memorandum of understanding between the Tribunal and the Ministry of Foreign Affairs of the Republic of Korea was signed. Recruitment for one post of Junior Professional Officer is currently being finalized.

Mr President,

Distinguished delegates,

40. This brings my presentation of the Annual Report of the Tribunal for 2023 to a close. As always, the Tribunal stands ready to assist States in whatever way possible in the fulfilment of its mandate under the Convention. It gives me great satisfaction to say that the Tribunal enjoys excellent cooperation with the United Nations and I convey our gratitude to the Secretary-General, the Legal Counsel and the Director of the Division for Ocean Affairs and the Law of the Sea and his staff for their support. I thank you all for your kind attention.