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The Contributions of ITLOS to Clarification of the Law of the Sea: From Maritime Boundaries to Climate Change

Keynote Address by H.E. Judge Tomas Heidar,
President of the International Tribunal for the Law of the Sea

Your Excellency, President of Timor-Leste, Dr. José Ramos-Horta,
Your Excellency, Prime Minister of Timor-Leste, Kay Rala Xanana Gusmão,
Excellencies, Distinguished Participants, Ladies and Gentlemen,

It is a true privilege to join you at this Conference. I would like to begin by expressing my sincere gratitude to the Government of Timor-Leste, especially to the Land and Maritime Boundary Office, for hosting this important event and for the warm hospitality extended to all of us.

The International Tribunal for the Law of the Sea, as many of you know, is an independent judicial body entrusted with resolving disputes concerning the interpretation and application of the United Nations Convention on the Law of the Sea, as well as matters referred to it under other agreements that confer jurisdiction. While the Convention provides several mechanisms for the peaceful settlement of disputes, the Tribunal holds a unique position as the only permanent judicial institution created by the Convention itself.

This distinct status reflects the foresight and vision of the drafters of the Convention, who recognized that the complexity and breadth of the law of the sea warranted a dedicated, specialized forum for adjudication. In establishing the Tribunal, they designed an inclusive institution with a geographically representative

bench, an extended access in certain cases to entities beyond States Parties, and a procedural framework aimed at ensuring the efficient and timely resolution of disputes.

Notably, in certain matters, the Tribunal exercises compulsory jurisdiction regardless of a State Party's chosen means of dispute settlement under the Convention. These matters include applications for the prompt release of vessels and crews, requests for provisional measures pending the constitution of an arbitral tribunal, and proceedings brought before the Tribunal's Seabed Disputes Chamber.

Since its establishment nearly three decades ago, the Tribunal has been seized of thirty-three proceedings, including thirty contentious cases involving a wide array of legal issues under the law of the sea, some of which have directly concerned States in this region. Of these, two cases remain pending before the Tribunal.

In addition to its role in contentious adjudication, the Tribunal has also been called upon to deliver advisory opinions on law of the sea questions. To date, it has issued three such opinions: in 2011, at the request of the Council of the International Seabed Authority to the Seabed Disputes Chamber; in 2015, following a request from the Sub-Regional Fisheries Commission; and most recently, in 2024, in response to a request from the Commission of Small Island States on Climate Change and International Law.

No other international court or tribunal has handled more cases under the compulsory procedures of Part XV, section 2 of the Convention. Indeed, a review of the Tribunal's judgments, advisory opinions, and orders on provisional measures reveals that its jurisprudence has been a fertile ground for the clarification of the Convention.

Given the Conference's focus on maritime boundaries and the legal dimensions of climate change, I will concentrate my remarks today on the Tribunal's contributions in these two vital areas. Specifically, I will discuss two of our most recent cases that exemplify these themes: the *Dispute concerning delimitation of the*

maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) and the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*.

Let me start with the *Mauritius/Maldives* case, which was submitted to a Special Chamber of the Tribunal by a special agreement concluded between the Parties on 24 September 2019. This case marks an important contribution by the Tribunal to the jurisprudence on maritime delimitation, particularly with respect to archipelagic States, low-tide elevations and the complex issues surrounding the continental shelf beyond 200 nautical miles.

In a 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 reaching this decision, 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 highlight that the Special Chamber provided 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 delivery of the Judgment on preliminary objections, the proceedings resumed. On 28 April 2023, the Special Chamber rendered 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

[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.

the Maldives in the Indian Ocean with respect to the exclusive economic zone and the continental shelf.

The Special Chamber began by addressing the delimitation within 200 nautical miles. I wish to highlight two significant points in this respect.

Firstly, the case is remarkable because it involved the delimitation between two archipelagic States. This gave the Special Chamber a rare opportunity to elucidate various aspects of the legal regime governing archipelagic States, including issues relating to archipelagic baselines and drying reefs.

Another important point worth emphasizing is the treatment of low-tide elevations, *in casu* Blenheim Reef, in maritime delimitation. A key issue in the first stage of the delimitation process was whether base points for the provisional equidistance line could be placed on a low-tide elevation such as Blenheim Reef. While the Special Chamber recognized that there is no general rule requiring the disregard of low-tide elevations when selecting base points for delimitation purposes, it emphasized that the use of such features must be determined by the specific geographic circumstances of each case.[2] Observing that international courts and tribunals have rarely relied on low-tide elevations in this context, the Special Chamber expressed hesitation to do so without a compelling justification.[3] Ultimately, it concluded that Blenheim Reef, as a low-tide elevation, was not a site for appropriate base points for the construction of the provisional equidistance line in this case.[4]

However, in the second stage of the delimitation process, where the focus shifts to assessing whether relevant circumstances warrant an adjustment to the provisional equidistance line, the Special Chamber found that completely disregarding Blenheim Reef would not lead to an equitable solution, given the presence of extensive areas of drying reefs as evidenced by the geodetic survey

[2] *Ibid.*, para. 152.
[3] *Ibid.*, para. 153.
[4] *Ibid.*, para. 155.

carried out by Mauritius.[5] Accordingly, the Special Chamber concluded that Blenheim Reef constituted a relevant circumstance justifying an adjustment to the provisional equidistance line and gave it half effect in the delimitation.[6]

The Special Chamber's treatment of Blenheim Reef reflects a balanced approach: declining to treat this low-tide elevation as a base point in the case, while nonetheless recognizing its geographical relevance within the broader maritime configuration and adjusting the delimitation line to ensure an equitable outcome.

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", regarding the area at issue in this case; however, the CLCS had not yet issued recommendations to either Party.

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. Accordingly, it proceeded to examine the Parties' claims to the continental shelf beyond 200 nautical miles.

Mauritius presented three possible routes of natural prolongation. The first route extended northward along the Chagos-Laccadive Ridge, which Mauritius described as a continuous geological formation.[7] The Special Chamber found this route "impermissible on legal grounds under article 76 of the Convention" as it passed through an area of the Maldives' continental shelf within 200 nautical miles that Mauritius did not contest.[8] The second and third routes sought to establish continuity across the Chagos Trough via the Gardiner Seamounts and an "elevated saddle" to the north.[9] The Special Chamber concluded that there was "significant

[5] *Ibid.*, para. 245.
[6] *Ibid.*, para. 247.
[7] *Ibid.*, para. 437.
[8] *Ibid.*, paras. 444 and 449.
[9] *Ibid.*, paras. 439 and 440.

uncertainty" as to whether these routes could form a basis for Mauritius' natural prolongation to the critical foot of slope point.[10]

In light of this significant uncertainty, the Special Chamber concluded that, 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.[11] 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.[12]

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 an important layer to the legal clarification of the outer continental shelf. A major contribution lies in 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 articulated 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."[13] 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.

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[10] *Ibid.*, paras. 448 and 449.
[11] *Ibid.*, para. 450.
[12] *Ibid.*, para. 451.
[13] *Ibid.*, para. 433.

In sum, the Special Chamber has offered a well-reasoned and prudent blueprint that other international courts and tribunals may wish to follow, in appropriate circumstances, when dealing with the question of entitlement to the continental shelf beyond 200 nautical miles.

Excellencies, Distinguished Participants, Ladies and Gentlemen,

Having reviewed the Special Chamber's Judgment in the *Mauritius/Maldives* case and its important contributions to the jurisprudence on maritime delimitation, I now turn to another major development: the Tribunal's most recent Advisory Opinion, delivered unanimously on 21 May 2024. This Advisory Opinion marks a milestone not only in the jurisprudence of the Tribunal but also in the broader effort to clarify the legal obligations of States Parties under the Convention in the context of climate change.

Before discussing the Tribunal's findings, let me recall that, on 12 December 2022, the Commission of Small Island States on Climate Change and International Law, or "COSIS", submitted a request to the Tribunal for an Advisory Opinion 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:
>
> (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:

(b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?[14]

The significance of this case is evident from the high level of participation in the proceedings before the Tribunal. Written statements from 34 States Parties and nine intergovernmental organizations were submitted as part of the case file. Furthermore, 33 States Parties and four intergovernmental organizations made oral statements during the proceedings. This broad participation reflects the widespread interest in clarifying the obligations of States Parties under the Convention in the context of climate change.

It is noteworthy that the Tribunal, before responding to the questions submitted by COSIS, engaged in a detailed examination of the precise scope of the request that it had received. I wish to highlight several observations made by the Tribunal in this respect. Firstly, the Tribunal was mindful that it was requested to render an advisory opinion on the specific obligations of States Parties under the Convention. In order to identify these obligations and clarify their content, it found that it would have to interpret the Convention and, in doing so, also take into account external rules, as appropriate.[15] Secondly, the request was found to be limited to primary obligations of States Parties. However, the Tribunal explained that, to the extent necessary to clarify the scope and nature of primary obligations, it might have to refer to responsibility and liability.[16] Thirdly, although the request mentions sea level rise in both questions, the Tribunal reached the conclusion that the relationship between sea level rise and existing maritime claims or entitlements was not included.[17] Fourthly, it found that the obligation to protect and preserve the marine environment, which is the focus of the second question, encompasses the obligation to prevent, reduce and control marine pollution, with which the first question is concerned.[18]

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[14] *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. 3.
[15] *Ibid.*, para. 142.
[16] *Ibid.*, para. 148.
[17] *Ibid.*, paras. 149-150.
[18] *Ibid.*, para. 152.

Given the breadth, depth, and scope of the Advisory Opinion, I do not intend to address every aspect of it here. Rather, I wish to shed light on the distinctive nature of the Advisory Opinion by drawing your attention to three particular points.

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 COSIS and necessarily involved scientific aspects, the Tribunal decided to devote an entire section of the Advisory Opinion to the scientific background of the case.[19] In this section, the Tribunal made ample use of the reports of the Intergovernmental Panel on Climate Change, or "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".[20]

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 taking into account "the best available science" formed part of the legal analysis developed by the Tribunal in its replies to the two questions submitted by COSIS. On this topic, the Tribunal made an important connection between the latter 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."[21]

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 Convention 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 a prime example. Although terms such as "climate

[19] *Ibid.*, para. 45.
[20] *Ibid*., para. 51.
[21] *Ibid*., para. 208.

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 illustrate 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 COSIS 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.[22] 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.[23]

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.[24] As the Tribunal clarified, this definition does not provide a list of pollutants or forms of pollution of the marine environment. Instead, it sets out three criteria to determine what constitutes such pollution: (1) there must be a substance or energy; (2) this substance or energy must be introduced by humans, directly or indirectly, into the marine environment; and (3) such introduction must result or be likely to result in deleterious effects.[25] The Tribunal then applied these criteria to anthropogenic GHG emissions.

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".[26] 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

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[22] *Ibid.*, para. 154.
[23] *Ibid.*, para. 158.
[24] *Ibid.*, para. 159.
[25] *Ibid.*, para. 161.
[26] *Ibid.*, paras. 164, 165 and 178.

"pollution of the marine environment" within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention.[27]

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."[28] 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.[29]

In the present case, relevant external rules may be found, in particular, in the extensive treaty regime addressing climate change, including the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. An entire section of the Advisory Opinion was devoted to the climate change treaty regime as background of the case.

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: first, through rules of reference in certain provisions of the Convention that explicitly refer to external rules; second, through the openness and mutual supportiveness between Part XII of the Convention and other treaties on marine environmental protection, as outlined in article 237 of the Convention; and third, through article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires that account be taken, together with the context, of any relevant rules of international law applicable in the relations between the parties.[30]

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[27] *Ibid.*, paras. 179 and 441(3)(a).
[28] *Ibid.*, para. 130.
[29] *Ibid.*, para. 130.
[30] *Ibid.*, paras. 131-135.

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."[31] Furthermore, the Tribunal noted that the rules of reference contained in Part XII and article 237 of the Convention "demonstrate the openness of Part XII to other treaty regimes."[32] 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.[33]

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 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.[34]

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, paragraph 223, 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

[31] *Ibid*., para. 133.
[32] *Ibid*., para. 134.
[33] *Ibid*., para. 135.
[34] *Ibid*., para. 220.

> 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.[35]

Excellencies, Distinguished Participants, Ladies and Gentlemen,

I have now come to the end of my address. As we have seen, the Tribunal's jurisprudence continues to expand, demonstrating not only the Tribunal's readiness but also its resolve to fulfil the mandate entrusted to it under the Convention.

Through a growing body of case law, the Tribunal has made important contributions to the interpretation and application of the Convention. The *Mauritius/Maldives* Judgment and the recent Advisory Opinion at the request of COSIS show that the Tribunal is well-positioned to address the full spectrum of legal issues that may arise under the Convention, whether concerning maritime boundaries or the implications of climate change for the marine environment. In doing so, the Tribunal continues to offer States Parties a specialized forum for the peaceful settlement of ocean disputes and for seeking authoritative advisory opinions on law of the sea questions, thereby reinforcing the legal order for the seas and oceans established by the Convention.

Looking ahead, the Tribunal remains steadfast in its commitment to upholding the integrity of the Convention and its role as the legal framework within which all activities in the oceans and seas must be carried out. As new challenges emerge, the need for authoritative legal guidance will only grow. The Tribunal, grounded in nearly three decades of experience, is fully equipped to meet that need.

Let me conclude by once again expressing my sincere gratitude to the Government of Timor-Leste and the Land and Maritime Boundary Office for hosting this important Conference and for your warm and generous hospitality. I also thank all participants for your kind attention and for the opportunity to engage with you here.

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[35] *Ibid*., para. 223.

I wish the Conference a great success and hope that it will inspire continued progress in the peaceful settlement of maritime disputes.