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SIDE EVENT
On the Occasion of the 35th Meeting of States Parties to the United Nations Convention on the Law of the Sea

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Clarification of the Law of the Sea through Advisory Opinions

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

Excellencies, Distinguished Participants, Ladies and Gentlemen,

It is a pleasure to address you today at this event. Let me begin by expressing my gratitude to the Permanent Mission of Germany to the United Nations for hosting this annual event, and to the other core members of the Group of Friends of UNCLOS for their co-sponsorship. On behalf of the International Tribunal for the Law of the Sea, I also wish to convey our sincere appreciation to the Government of Germany for its steadfast support as the host country of the Tribunal.

We are gathering during the 35th Meeting of States Parties to the United Nations Convention on the Law of the Sea (the Convention), a fitting occasion to reflect on the continued importance of this landmark treaty. To this informed audience, it need hardly be said that the Convention, often referred to as the "constitution for the oceans", remains the foundation of the legal order for the seas and oceans.

At the same time, the breadth and complexity of the Convention inevitably give rise to legal questions. While not all of these questions lead to contentious

disputes, many may still call for authoritative interpretation in order to ensure clarity and consistency in the implementation of the Convention.

It is within this context that I would like to focus my remarks today on the important role that advisory opinions of the Tribunal play in clarifying the law of the sea and related international law. I will begin with a brief overview of advisory opinions and the Tribunal's advisory proceedings. I will then examine the three advisory opinions delivered by the Tribunal to date, and consider how each has contributed to the interpretation and application of specific provisions of the Convention. Finally, I will offer some thoughts on the continued relevance of advisory opinions as we navigate an evolving maritime landscape marked by new challenges.

Let us begin, then, with an overview of advisory opinions and the Tribunal's advisory proceedings.

As many of you are aware, unlike judgments in contentious cases, the primary purpose of advisory opinions is not to resolve concrete disputes between States Parties. Rather, they serve as a valuable procedural mechanism through which the Tribunal clarifies legal questions arising under the Convention or an international agreement related to the purposes of the Convention. In doing so, advisory opinions assist the requesting body and States Parties in carrying out their activities and contribute to the effective implementation of the Convention and related international agreements.[1]

One of the key distinctions of advisory proceedings is their broader inclusive nature. Thus, they allow the Tribunal to take into account facts and information from other and more sources than in contentious cases. They also allow wider participation. States Parties and intergovernmental organizations considered likely to be able to furnish relevant information are invited by the Tribunal to submit written statements, and they may also present their views during hearings. A recent example is the advisory proceedings on climate change, where the Tribunal received written statements from 34 States Parties and nine intergovernmental organizations. In addition, 33 States Parties and four intergovernmental organizations delivered oral

[1] *See Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, para. 30.

statements during the hearing. This high level of engagement reflects the broad interest and significance of the issues under consideration.

By their nature, advisory opinions are not binding, and the Tribunal has consistently affirmed that they do not carry binding force.[2] However, this does not diminish their value. As the United Nations Secretary-General has noted, advisory proceedings carry considerable weight and moral authority; they often serve as instruments of preventive diplomacy and contribute meaningfully to the clarification of the current state of international law.[3] The Tribunal has confirmed that an advisory opinion constitutes an authoritative statement of international law on the questions it addresses, and that the judicial determinations made in such opinions carry no less weight or authority than those in contentious cases.[4]

To appreciate the significance of advisory opinions, it is useful to examine the Tribunal's own record in this area. To date, the Tribunal has delivered three advisory opinions. These include the advisory opinion on the responsibilities and obligations of States with respect to activities in the Area, the advisory opinion requested by the Sub-Regional Fisheries Commission, and the most recent opinion, requested by the Commission of Small Island States on Climate Change and International Law. Each of these advisory opinions was issued in response to a specific set of legal questions posed by a competent body under the Convention or an international agreement related to the purposes of the Convention. Taken together, they demonstrate how the Tribunal's advisory function has contributed to greater legal clarity, particularly in the face of new and evolving challenges affecting the oceans.

Let me now turn to each of these opinions in greater detail. I should note, however, that given the breadth and depth of the issues they address, I do not intend

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[2] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, para. 76; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, 21 May 2024, para. 114.

[3] *Strengthening and coordinating United Nations rule of law activities*, Report of the Secretary-General, 20 August 2010, UN Doc. A/65/318, para. 25.

[4] *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Preliminary Objections, Judgment, 28 January 2021, paras. 202-203).

to examine every element of their contributions. Rather, I will focus on a few significant elements that illustrate their role in clarifying the law of the sea.

Let me begin with the first advisory opinion, delivered by the Seabed Disputes Chamber on 1 February 2011, at the request of the Council of the International Seabed Authority.

It may be recalled that, nine months earlier, on 6 May 2010, the Council submitted a request to the Chamber concerning the responsibilities and obligations of States Parties that sponsor activities in the Area, which is designated under the Convention as the common heritage of mankind.[5]

In its advisory opinion, the Chamber provided several important clarifications that have shaped our understanding of how sponsorship operates in the Area.

Among other important findings, the Chamber made a crucial clarification of the "responsibility to ensure" under article 139 of the Convention. This responsibility requires sponsoring States to ensure that their sponsored contractors comply with the Convention, the 1994 Implementing Agreement, and the terms of their contracts with the Authority.[6] The Chamber found that this is not an obligation to achieve a particular result. Rather, it is an obligation of due diligence: to deploy adequate means, to exercise the best possible efforts, and to do the utmost to secure compliance.[7] The Chamber emphasized that due diligence is a variable concept; it may evolve over time, especially in light of changing scientific knowledge, technological developments, and the risks involved in the activity concerned.[8]

In addition to the due diligence obligation, the Chamber identified a second category of obligations: direct obligations. These are binding on sponsoring States independently of the conduct of the contractor. Among them are the obligation to assist the Authority in the exercise of its functions, the obligation to adopt and

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[5] *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011.
[6] *Ibid.*, para. 108.
[7] *Ibid.*, para. 110.
[8] *Ibid.*, para. 117.

implement best environmental practices, the obligation to ensure access to recourse for compensation, and two obligations that the Chamber identified as potentially having, or already possessing, the status of customary international law: the obligation to apply a precautionary approach and the obligation to conduct environmental impact assessments.[9] According to the Chamber, fulfilling these direct obligations is required in its own right, although it also serves as a relevant factor in determining whether the State has met its due diligence obligation.[10]

The Chamber also addressed the issue of liability. It made clear that the liability of a sponsoring State does not arise from the conduct of the contractor, but rather from the State's own failure to fulfil its responsibilities. In other words, a sponsoring State can be held liable if it fails to comply with its own obligations and that failure results in damage.[11] There must be a causal link between the failure of the sponsoring State and the damage, and such a link cannot be presumed.[12]

The Chamber further clarified the relationship between the liability of the sponsoring State and that of the contractor. These two forms of liability exist in parallel. The sponsoring State is liable for failing to comply with its international obligations under the Convention and related instruments. The contractor, on the other hand, is liable under the terms of its contract and the undertakings it has made thereunder. The regime leaves no room for overlapping liability.[13]

However, the sponsoring State is absolved from liability if it has adopted laws, regulations, and administrative measures that are "reasonably appropriate" to ensure compliance by persons under its jurisdiction.[14] Regarding the protection of the marine environment, the Chamber made clear that national laws and regulations cannot be less stringent than those adopted by the Authority.[15]

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[9] *Ibid.*, para. 122.
[10] *Ibid.*, paras. 121 and 123.
[11] *Ibid.*, para. 172.
[12] *Ibid.*, para. 184.
[13] *Ibid.*, para. 201.
[14] *Ibid.*, para. 228.
[15] *Ibid.*, para. 232.

In this regard, it is worth noting that the Chamber affirmed that the Convention's provisions on responsibilities and liability apply equally to all sponsoring States, whether developing or developed. According to the Chamber, none of the general provisions of the Convention concerning the responsibilities or liability of a sponsoring State specifically provides for preferential treatment of developing countries.[16] While the Chamber acknowledged that differences in capabilities may influence how certain direct obligations, such as the application of the precautionary approach, are carried out, it emphasized that the regime must nonetheless be implemented effectively to ensure that developing States can participate in deep seabed mining on an equal footing with developed States.[17]

The impact of the advisory opinion, which was recognized by the Secretary-General of the International Seabed Authority and several members of the Council as a "milestone in the life of both the Authority and the law of the sea", was immediate and substantive.[18] At its seventeenth session in 2011, the Legal and Technical Commission of the Authority recommended revising the Regulations on Prospecting and Exploration for Polymetallic Nodules to strengthen environmental protection, enhance the application of the precautionary approach, and incorporate best environmental practices.[19] In 2013, the Assembly of the Authority approved amendments to those Regulations,[20] and the Legal and Technical Commission issued Recommendations for the guidance of contractors for the assessment of environmental impacts arising from exploration for marine minerals in the Area.[21]

Let me now turn to the second advisory opinion, which was the first rendered by the full Tribunal, in response to a request submitted by the Sub-Regional Fisheries Commission, or SRFC.

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[16] *Ibid.*, para. 158.
[17] *Ibid.*, paras. 160, 161 and 163.
[18] ISBA, Seabed Council in first substantive meeting of seventeenth session discusses recent advisory opinion, Press release SB/17/5, 14 July 2011, p. 3.
[19] Summary report of the Chair of the Legal and Technical Commission on the work of the Commission at its seventeenth session, ISBA/17/C/13, 13 July 2011, para. 31.
[20] Decision of the Assembly of the International Seabed Authority regarding the amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISBA/19/A/9, 25 July 2013.
[21] Recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area, ISBA/19/LTC/8, 1 March 2013.

Submitted on 27 March 2013, this request addressed the issue of illegal, unreported and unregulated (IUU) fishing. The Tribunal delivered its advisory opinion on 2 April 2015.[22] In doing so, it made several important contributions to the law of the sea, particularly regarding the obligations and liability of flag States in relation to IUU fishing. It also addressed the liability of international organizations to which their member States have transferred competence over fisheries matters. And it elaborated on the rights and obligations of coastal States in managing shared and migratory fish stocks.

Let me highlight some of the key findings.

First, with regard to the obligations of the flag State, the Tribunal reaffirmed the primary responsibility of the coastal State for the conservation and management of living resources within its exclusive economic zone.[23] However, the Tribunal emphasized that "the primary responsibility of the coastal State in cases of IUU fishing conducted within its exclusive economic zone does not release other States from their obligations in this regard".[24]

The Tribunal noted that although the Convention does not explicitly address IUU fishing by foreign-flagged vessels in the exclusive economic zone of third-party States, it does contain several provisions that impose relevant obligations on flag States.[25] Based on its analysis, the Tribunal concluded that flag States are under the obligation to ensure that vessels flying their flag comply with the laws and regulations concerning conservation measures adopted by the coastal State, and that they are not involved in IUU fishing activities in the exclusive economic zones of other States.[26] To meet this responsibility, flag States must adopt and enforce appropriate measures, including those of control and enforcement, and effectively exercise jurisdiction over vessels flying their flag.[27]

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[22] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015.
[23] *Ibid.*, para. 104.
[24] *Ibid.*, para. 108.
[25] *Ibid.*, para. 110.
[26] *Ibid.*, paras. 123-124.
[27] *Ibid.*, paras. 127 and 134.

Significantly, the Tribunal drew upon the reasoning of the Seabed Disputes Chamber in its earlier advisory opinion. It confirmed that the obligation of the flag State is not one of result, but one of conduct; in other words, a due diligence obligation.[28]

Concerning the question of liability, the Tribunal again adopted an approach consistent with the earlier opinion of the Seabed Disputes Chamber. It held that the flag State's liability does not arise simply because a vessel flying its flag has violated the laws of a coastal State. The mere act of violation by a private vessel does not automatically engage the responsibility of the flag State.[29] Rather, liability arises only if the flag State fails to comply with its own due diligence obligations.[30] The Tribunal emphasized that the flag State is not liable if it can demonstrate that it has taken all necessary and appropriate measures to fulfil those obligations.[31]

The Tribunal was also asked to consider the responsibility of international organizations in cases where fisheries management powers have been transferred to such organizations by their member States. In this context, the Tribunal stated that the obligations of the flag State become the obligations of the international organization when such competence has been transferred.[32] If the organization fails to meet its due diligence obligations, it may be held liable for the violations.[33]

Turning to the obligations of coastal States, the Tribunal emphasized their duty to cooperate with competent international organizations to ensure, through proper conservation and management, that shared stocks in the exclusive economic zone are not endangered by over-exploitation, and to seek agreement on necessary measures to coordinate and ensure the conservation and development of such stocks or of associated species within the exclusive economic zones of two or more SRFC Member States.[34]

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[28] *Ibid.*, para. 129.
[29] *Ibid.*, para. 146.
[30] *Ibid.*, para. 146.
[31] *Ibid.*, para. 148.
[32] *Ibid.*, para. 172.
[33] *Ibid.*, para. 173.
[34] *Ibid.*, para. 207.

Although the advisory opinion focused specifically on the exclusive economic zones of SRFC Member States, the Tribunal's findings have broader relevance. In particular, the opinion provides important clarification on flag State obligations and liability in relation to IUU fishing, which are issues not directly addressed in the Convention. As a result, it offers valuable legal guidance to other States and institutions confronting the global challenge of IUU fishing.

Excellencies, Distinguished Participants, Ladies and Gentlemen,

I now turn to another significant development in the Tribunal's advisory jurisprudence: its most recent advisory opinion, delivered unanimously on 21 May 2024, in response to a request submitted on 12 December 2022 by the Commission of Small Island States on Climate Change and International Law.[35]

As I had the pleasure of presenting on this advisory opinion at this event last year, I will not repeat those remarks. Instead, I will highlight some of its substantive contributions to the clarification of the law of the sea in relation to climate change.

The first aspect of the advisory opinion that I wish to underscore is the Tribunal's clarification that anthropogenic GHG emissions into the atmosphere constitute "pollution of the marine environment" even though this term does not explicitly appear in the Convention. This finding is of great significance. It reinforces the Convention's status as the primary legal framework for addressing marine pollution, including that caused by GHG emissions. Since it cannot simply be presumed that States Parties' obligations under the Convention apply to climate change and ocean acidification, this determination lays the groundwork for the Tribunal's further findings on the specific obligations that arise in such cases.[36]

This brings me to the second important contribution of the advisory opinion: its detailed guidance on the obligations of States Parties to prevent, reduce, and control marine pollution resulting from anthropogenic GHG emissions.

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[35] *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.
[36] *Ibid.*, para. 158.

Specifically, the Tribunal found that article 194, paragraph 1, of the Convention imposes a specific obligation on States to take all necessary measures to address marine pollution resulting from anthropogenic GHG emissions.[37] These "necessary measures" should be understood broadly.[38] They include those designed to minimize, to the fullest possible extent, the release of toxic, harmful or noxious substances, especially those which are persistent.[39]

In determining what constitutes necessary measures, the Tribunal emphasized the crucial role of science.[40] However, it also made clear that full scientific certainty is not required. In situations where there is a lack of full scientific certainty, States must apply the precautionary approach.[41] This approach is "all the more necessary" in the context of climate change, given that the harm caused by GHG emissions may be serious and irreversible.[42]

To further interpret the scope of this obligation, the Tribunal considered relevant international instruments, notably the Paris Agreement.[43] The temperature goals and timelines for emission reduction articulated in the Agreement help inform the content of the measures expected under article 194, paragraph 1.[44] The Tribunal also noted, however, that the Paris Agreement allows each Party to determine its own contributions and does not prescribe binding reduction targets. It found that compliance with the Paris Agreement does not, in itself, fulfil a State's obligations under the Convention, which are legally binding.[45] The Tribunal stressed that the Paris Agreement is not *lex specialis* to the Convention; and even if elements of *lex specialis* were present, they must be applied in a way that does not undermine the object and purpose of the Convention.[46]

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[37] *Ibid.*, para. 197.
[38] *Ibid.*, para. 203.
[39] *Ibid.*, para. 205.
[40] *Ibid.*, para. 212.
[41] *Ibid.*, para. 213.
[42] *Ibid*.
[43] *Ibid.*, para. 214.
[44] *Ibid.*, para. 222.
[45] *Ibid.*, paras. 222-223.
[46] *Ibid.*, para. 224.

The Tribunal further clarified that the obligation under article 194, paragraph 1 is one of due diligence.[47] It noted that the best available science indicates that these emissions pose a high risk in terms of both foreseeability and severity of harm to the marine environment.[48] Accordingly, the standard of due diligence required of States in this context must be a stringent one.[49]

This standard also applies to the obligation under article 194, paragraph 2, which concerns transboundary pollution. Specifically, the Tribunal affirmed that article 194, paragraph 2, requires States to take all necessary measures to ensure that GHG emissions under their jurisdiction or control do not cause damage to other States or their environment, nor spread beyond areas where they exercise sovereign rights.[50] This obligation, too, is one of due diligence.[51]

In relation to the duty to cooperate, the Tribunal found that the Convention imposes specific obligations on States Parties to cooperate in good faith to prevent, reduce, and control marine pollution from anthropogenic GHG emissions.[52] The Tribunal also affirmed the obligations of developed States to assist developing States through capacity-building, scientific and technical expertise, and technology transfer, either directly or via competent international organizations, and by granting them preferential access to funding, technical assistance, and relevant specialized services from international organizations.[53]

Finally, the Tribunal clarified that the obligation to protect and preserve the marine environment under article 192 extends to addressing the broader effects of climate change, including ocean warming and sea level rise, and ocean acidification. This obligation, like those under article 194, is one of due diligence and is subject to the same stringent standard, given the high risk of serious and potentially irreversible harm.[54]

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[47] *Ibid.*, para. 233.
[48] *Ibid.*, para. 241.
[49] *Ibid.*, para. 241.
[50] *Ibid.*, para. 250.
[51] *Ibid.*, para. 254.
[52] *Ibid.*, para. 321.
[53] *Ibid.*, para. 339.
[54] *Ibid.*, para. 400.

In short, this advisory opinion represents a significant advancement in clarifying the legal obligations of States Parties with respect to one of the most pressing global challenges of our time: climate change. It provides meaningful guidance on the interpretation of several key provisions, including the definition of "pollution of the marine environment" and the obligations to prevent, reduce, and control marine pollution, to address transboundary pollution, and to protect and preserve the marine environment. It also clarifies the duties of cooperation and assistance, particularly toward developing and vulnerable States, in the context of climate change. Moreover, it offers important clarification on the application of due diligence, the precautionary approach, and the relationship between the Convention and external rules. In doing so, it reinforces the Convention's continuing relevance and adaptability in responding to complex and evolving threats to the marine environment.

Excellencies, Distinguished Participants, Ladies and Gentlemen,

Over the years, the Tribunal's advisory opinions have played a vital role in addressing a range of pressing maritime issues. From the responsibilities of sponsoring States for activities in the Area, to the obligations of flag States in combating IUU fishing, and most recently, the obligations of States Parties to prevent marine pollution linked to climate change, the Tribunal has provided important authoritative clarifications rooted in the Convention.

As we look ahead, I would like to share a few reflections on the continuing relevance of advisory opinions in navigating the evolving legal challenges that lie before us in the field of the law of the sea.

The international community is currently paying close attention to developments in the field of deep-seabed mining. During the second part of its thirtieth session, from 7 to 18 July 2025, the Council of the International Seabed Authority will hold negotiations on the remaining sections of the Revised Consolidated Text of the Draft Exploitation Regulations. While I will not go into detail here, these developments may give rise to legal questions of considerable

importance for the Authority, for activities in the Area, and for the interpretation of the Convention. In this evolving context, I am confident that the Tribunal, acting through its Seabed Disputes Chamber, can continue to play an important role in providing authoritative guidance when called upon.

Another pressing issue is the impact of sea-level rise, one of the most visible and far-reaching consequences of climate change. According to the Intergovernmental Panel on Climate Change, the global mean sea level has already increased by 20 centimetres between 1901 and 2018. Between 2006 and 2018, the rate of rise accelerated to 3.7 millimetres per year. The implications are profound for coastal States and communities around the world.[55]

Sea-level rise gives rise to a host of complex legal questions under the Convention. These include issues relating to baselines, outer limits of maritime zones, the entitlements of maritime features, maritime boundaries, and the rights and obligations of States affected by these developments. In recent years, the international community has begun to engage with these challenges. The work of the International Law Commission, particularly through its Study Group on Sea-level Rise and International Law, has been central to this effort. Yet, as the Study Group itself has suggested in its final consolidated report, the complexity of these questions may well call for further clarification through advisory opinions issued by international courts and tribunals.[56]

As we confront these and other evolving developments, the importance of legal clarity cannot be overstated. Advisory opinions will continue to serve as a valuable tool for guiding States Parties and institutions in the implementation of the Convention, and in ensuring its continued relevance in responding to new and emerging maritime challenges.

I thank you for your kind attention.

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[55] Intergovernmental Panel on Climate Change, Climate Change 2023 Synthesis Report, p. 46.
[56] International Law Commission, Sea-level Rise in relation to International Law, Final Consolidated Report of the Co-Chairs of the Study Group on Sea-Level Rise in Relation to International Law, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria, A/CN.4/783, 3 February 2025, para. 502(i).