

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



STATEMENT BY

H.E. JUDGE TOMAS HEIDAR

PRESIDENT OF THE

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ON

AGENDA ITEM 75(a) "OCEANS AND THE LAW OF THE SEA"

FOR

THE PLENARY OF THE SEVENTY-EIGHTH SESSION OF THE

UNITED NATIONS GENERAL ASSEMBLY

5 DECEMBER 2023

Mr President,
Distinguished delegates,

It is a great honour for me to take the floor, on behalf of the International Tribunal for the Law of the Sea, at this seventy-eighth session of the General Assembly on the occasion of its examination of the agenda item “Oceans and the law of the sea”. Mr President, I would also like to take this opportunity to extend to you my personal congratulations, and those of the Tribunal, on your election as President of the General Assembly.

Mr President,
Distinguished delegates,

In these brief remarks, I will report on the main organizational and judicial developments which have taken place since the last meeting of the General Assembly in December 2022. As regards organizational matters, I wish to inform you that on 14 June 2023 the Meeting of States Parties to the United Nations Convention on the Law of the Sea (hereinafter “the Convention”) 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. Let me highlight that, as a result of these elections, the Tribunal now counts six female judges among its members.

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.

Mr President,
Distinguished delegates,

I would now like to focus on the judicial work of the Tribunal, starting with the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*. As was previously reported, this case was submitted to a special chamber of the Tribunal by special agreement concluded on 24 September 2019. In a first phase of the case devoted to 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. The proceedings on the merits subsequently resumed. On 28 April 2023, the Special Chamber delivered its Judgment on the merits.

Allow me to summarize the main findings of this Judgment, which the Special Chamber adopted by unanimous vote, while also highlighting some of its contributions to the jurisprudence on maritime delimitation.

The Special Chamber first considered the delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles and found that the appropriate method to be applied in this respect was the equidistance/relevant circumstances method.¹ Under this method, the first step to be taken is the construction of a provisional equidistance line. In this regard, the key issue that divided the Parties was whether a maritime feature known as Blenheim Reef could be used as the location of base points.² The Special Chamber thus examined this issue in two respects, namely with regard to Blenheim Reef's status as a low-tide elevation (or low-tide elevations) and as a drying reef (or drying reefs).³

I may recall that article 13 of the Convention defines a low-tide elevation to be "a naturally formed area of land which is surrounded by and above water at low

¹ Judgment, para. 98.

² Judgment, para. 116.

³ Judgment, para. 119.

tide but submerged at high tide.” The Special Chamber did not consider that there was a general rule which requires that such a feature be disregarded in selecting base points for the purpose of delimitation.⁴ Rather, it held that “[t]he selection of base points on a low-tide elevation depends on whether it would be appropriate to do so by reference to the geographical circumstances of the given case.”⁵ At the same time, the Special Chamber noted that international courts and tribunals have rarely placed base points on a low-tide elevation for the construction of the provisional equidistance line,⁶ and that it “would be hesitant to place base points on Blenheim Reef unless there is a convincing reason to do so.”⁷ Having considered the impact Blenheim Reef would have on the provisional equidistance line in the case before it,⁸ the Special Chamber found that Blenheim Reef, as a low-tide elevation, was not a site for appropriate base points for the construction of the provisional equidistance line.⁹

With regard to the question whether Blenheim Reef could be a site for base points as a drying reef (or drying reefs), I may recall that such features are referred to in article 47, paragraph 1, of the Convention in the context of the drawing of archipelagic baselines by archipelagic States.¹⁰ The Special Chamber noted that Mauritius and the Maldives “are two of 22 States which have declared themselves archipelagic States in accordance with article 46 of the Convention”¹¹ and that, “[a]ccording to article 47, appropriate points for archipelagic baselines can be placed on outermost islands and drying reefs.”¹² However, the Special Chamber found that “there is nothing in article 47 which suggests that such points should also be base points for the construction of the provisional equidistance line”.¹³

The Special Chamber also observed that “there is no specific provision in the Convention which governs the delimitation of maritime zones between archipelagic

⁴ Judgment, para. 152.

⁵ Judgment, para. 152.

⁶ Judgment, para. 153.

⁷ Judgment, para. 153.

⁸ Judgment, para. 154.

⁹ Judgment, para. 155.

¹⁰ Judgment, para. 119.

¹¹ Judgment, para. 178.

¹² Judgment, para. 184.

¹³ Judgment, para. 184.

States” and that “[a]rticles 15, 74, and 83 of the Convention govern the delimitation of the territorial sea, the exclusive economic zone and the continental shelf between archipelagic States as between any other States with opposite or adjacent coasts.”¹⁴ In conclusion, the Special Chamber found no reason to “change its previous finding that no base points can be located on Blenheim Reef for the construction of the provisional equidistance line.”¹⁵

A further issue contested between the Parties concerned the question whether the distance requirements of article 47, paragraph 4, of the Convention applied in drawing Mauritius’ archipelagic baselines at Blenheim Reef.¹⁶ I may add that this provision imposes some restrictions on the possibility of drawing archipelagic baselines to and from low-tide elevations.

On that issue, the Special Chamber observed that it was “common ground between the Parties that every drying reef is a low-tide elevation” and that the Parties agreed that Blenheim Reef was a drying reef.¹⁷ It considered that there was “thus no question that Mauritius may draw straight archipelagic baselines joining the outermost points of outermost islands and drying reefs of the Chagos Archipelago, including Blenheim Reef.”¹⁸ Furthermore, in the Special Chamber’s view, “because a drying reef is a low-tide elevation, it is plain that article 47, paragraph 4, which applies to low-tide elevations, should apply when archipelagic baselines are drawn joining the outermost points of outermost islands and ‘drying reefs’.”¹⁹ The Special Chamber thus considered that “the requirements of article 47, paragraph 4, apply in drawing archipelagic baselines in accordance with article 47, paragraph 1, of the Convention.”²⁰

The Special Chamber then constructed a provisional equidistance line from the base points it had selected.²¹ Thereafter, it proceeded to determine whether any

¹⁴ Judgment, para. 189.

¹⁵ Judgment, para. 192.

¹⁶ Judgment, para. 220.

¹⁷ Judgment, para. 221.

¹⁸ Judgment, para. 221.

¹⁹ Judgment, para. 222.

²⁰ Judgment, para. 229.

²¹ Judgment, paras. 233-236.

relevant circumstances existed requiring an adjustment of the provisional equidistance line in order to achieve an equitable solution. In this respect, the Special Chamber found that Blenheim Reef constituted such a relevant circumstance and decided to give Blenheim Reef half effect and to adjust the provisional equidistance line accordingly.²²

Through its handling of the delimitation within 200 nautical miles, the Special Chamber has made several contributions to the jurisprudence of international courts and tribunals. I wish to note two significant points in this respect. Firstly, the case is remarkable in that it concerned delimitation between two archipelagic States. Accordingly, the Special Chamber was presented with a rare opportunity to elucidate various features of the legal regime of archipelagic States, including archipelagic baselines and drying reefs. Another important point worth emphasizing is the treatment of a low-tide elevation, *in casu* Blenheim Reef, as a relevant circumstance in the second stage of applying the equidistance/relevant circumstances method. This aspect of the Judgment may be deemed an innovation in the case law of maritime delimitation.

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 (hereinafter “the CLCS”) with respect to the area at issue in this case, but the CLCS had not yet made recommendations to them.²³

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.²⁴ However, having considered three different routes for natural prolongation to the foot of slope point on which Mauritius based its claim of entitlement to the continental shelf beyond 200 nautical miles, the Special Chamber considered that the first route was “impermissible on legal grounds under

²² Judgment, para. 247.

²³ Judgment, para. 430.

²⁴ Judgment, para. 343.

article 76 of the Convention”, and that there was “significant uncertainty as to whether the second and third routes could form a basis for Mauritius’ natural prolongation to the critical foot of slope point.”²⁵

The Special Chamber concluded that, given the significant uncertainty, 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.²⁶ 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.²⁷

This part of the Judgment contains several findings which are worthy of closer analysis. A major contribution is the meticulous manner in which the Special Chamber applied the significant uncertainty standard first developed by the Tribunal in the landmark *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 explained the underlying rationale for its use. The Judgment clarifies 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.”²⁸ Moreover, the Judgment explains 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.²⁹ In sum, the Special Chamber has provided 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.

²⁵ Judgment, para. 449.

²⁶ Judgment, para. 450.

²⁷ Judgment, para. 451.

²⁸ Judgment, para. 433.

²⁹ Judgment, para. 453.

I now turn to the second case on which I will report, *The M/T “Heroic Idun” (No. 2) Case (Marshall Islands/Equatorial Guinea)*. 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 dispute concerning the *M/T “Heroic Idun”* and her crew” between the two States. This case has been entered into the Tribunal’s List of cases as Case No. 32. By Orders of 19 May 2023 and 16 November 2023, the President of the Special Chamber fixed the time-limits for the filing of the Memorial and Counter-Memorial.

Significant developments have taken place in another case currently pending before the Tribunal, namely, the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*.

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 (the ‘UNCLOS’), 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?

The request for an advisory opinion was filed with the Registry on 12 December 2022 and entered into the List of cases as Case No. 31. On 16 December 2022, the President of the Tribunal issued an Order on the conduct of proceedings in the case and fixed 16 May 2023 as the time-limit within which States Parties to the Convention, the Commission and other intergovernmental organizations listed in the annex to the Order might present written statements on the questions submitted to the Tribunal for an advisory opinion. This time-limit was later extended to 16 June 2023. In addition, and upon their request, the President decided to consider the African Union, the International Seabed Authority and the Pacific Community as likely to be able to furnish information on the questions submitted to the Tribunal and therefore invited them to do so within the time-limit.

Written statements from 31 States Parties and eight intergovernmental organizations were filed within the time-limit fixed by the President. After the expiry of this time-limit, further written statements were received from Rwanda, India, and the Food and Agriculture Organization of the United Nations. These written statements were admitted and included in the case file.

By Order of 30 June 2023, the President of the Tribunal fixed 11 September 2023 as the date for the opening of the hearing and invited those wishing to make oral statements to indicate their intention to do so not later than 4 August 2023. The public hearing was held from 11 to 25 September 2023. I am pleased to inform you that a large number of participants made oral statements in these historic proceedings. In total, delegations from 33 States Parties and four intergovernmental organizations participated in the hearing. The Tribunal is now deliberating on the case and will deliver its advisory opinion in due course.

Mr President,
Distinguished delegates,

As you are aware, the Tribunal is committed to the advancement of the peaceful settlement of disputes related to the law of the sea not only through its contentious jurisdiction but also by disseminating information and conducting

capacity-building programmes for current and future generations. Allow me to give you a brief overview of our recent activities in this field.

In June 2023, the Tribunal held another of its regional workshops on the settlement of disputes related to the law of the sea, this time in Nice, France. The event was the sixteenth in a series of workshops held in different regions of the world to provide national experts with practical information on the dispute-settlement procedures available before the Tribunal. Representatives of 10 States Parties attended the Nice workshop, which was organized in cooperation with the Institute for Peace and Development at Côte d'Azur University. I thank the Republic of Cyprus, France and the Korea Maritime Institute for their generous support.

I am pleased to report that two large events were held on the premises of the Tribunal in 2023. In July of this year, we hosted the second ITLOS Workshop for Legal Advisers. Over the course of six days, participants from 21 African States attended sessions dedicated to procedural and substantive issues, including the role of the Tribunal in settling law of the sea disputes, an overview of proceedings before the Tribunal, maritime delimitation and issues concerning the continental shelf, marine environment, fisheries and navigation. I wish to extend my gratitude to the Republic of Korea for sponsoring and assisting in the organization of this successful event. 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 taught by a distinguished faculty.

The Tribunal's programmes for recent graduates and early-career professionals remain as active as ever. We have hosted several interns in our internship programme in 2023. I may recall that a trust fund set up by the Tribunal is available to assist interns from developing countries, and several grants have been contributed to this fund over the years, most notably by the Korea Maritime Institute and the Ministry of Foreign Affairs of the People's Republic of China. I wish to express my deepest appreciation to them for their support. The Tribunal has also continued its capacity-building and training programme in international dispute settlement in the law of the sea, which has been organized annually since 2007 with

the financial support of the Nippon Foundation of Japan. I would like to take this opportunity to reiterate my sincere gratitude to the Nippon Foundation for its enduring commitment to the programme.

Mr President,
Distinguished delegates,

Before concluding my remarks, allow me to offer some brief reflections on the newly adopted Agreement under the Convention on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, also known as the “BBNJ Agreement”. This latest effort in multilateral treaty-making, which aspires to ensure the “effective implementation of the relevant provisions of the Convention”, demonstrates yet again that the Convention is fully capable of retaining its relevance in an era of changing circumstances. While I would not be able to do justice to the varied and important subject matters covered by the BBNJ Agreement, I find it fitting to make two observations concerning the role of the Tribunal within the dispute settlement system of the Agreement.

First, I would like to recall that the choice of forum provisions of the Convention also apply to the compulsory settlement of disputes under the new Agreement. Accordingly, the Tribunal remains one of the four compulsory procedures which Parties may select for the adjudication of their disputes. I am confident that the Tribunal, given its unique status as a specialized law of the sea adjudicatory body with an extensive track record in the area of marine environmental protection, is a highly attractive option for the sound and efficient resolution of BBNJ-related disputes.

Second, I wish to point out that the BBNJ Agreement greatly enhances the role of the Tribunal through its conferral of advisory jurisdiction. Pursuant to article 47, paragraph 7, of the Agreement, the Conference of the Parties may decide to request the Tribunal to give an advisory opinion on a legal question on the conformity with the Agreement of a proposal before the Conference of the Parties on any matter within its competence. It is quite apparent from the detailed provisions of the BBNJ Agreement that the Conference of the Parties is an important institution

entrusted with fleshing out and operationalizing a global legal regime for marine biodiversity. It stands to reason that such a formidable endeavour will bring with it significant legal queries. I have no doubt that advisory opinions rendered by the Tribunal could help ensure that the Conference of the Parties conducts its manifold activities effectively while keeping within the legal limits set by the BBNJ Agreement.

This brings me to the end of my address. I conclude by expressing my appreciation to the Secretary-General, the Legal Counsel and the Director of the Division for Ocean Affairs and the Law of the Sea for the unfailing cooperation and support they have always offered the Tribunal.

I thank you for your kind attention.