

LEAD DISCUSSANT'S REMARKS
INTERACTIVE DIALOGUE 7 OF THE UN OCEAN CONFERENCE 2022

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Thank you, Mr Moderator, distinguished Co-chairs.

As a public international lawyer, I will focus my remarks on the more lawyerly points raised by the panellists and the concept paper[, in particular in guiding questions (a), (b), (c), and (f)]. The broader point I want to make at the outset is that international law, as any instrument, can play many roles: it can be very helpful, providing rules, institutions, and background assumptions that guide conduct and policies of States and other actors, but will also occasionally fail to resolve all the issues, whether through vagueness of rules, which may well reflect genuine policy disagreements, or drafting complexity, which confuses more than it clarifies.

How can the implementation of international law, as reflected in the Convention, contribute to the scaling up of ocean action based on ocean science and innovation?

I take it as a given, as we heard, that the UN Legal Counsel, the Division for Ocean Affairs and the Law of the Sea (DOALOS), and the International Seabed Authority (ISA) play a key positive role in implementation of international law, as reflected in the Convention, and will focus on two further points.

First, international courts and tribunals play an important role in implementation of contested international law in changing circumstances. The general point I want to make is that the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and UNCLOS Annex VII arbitral tribunals have rendered important decisions since the last UN Ocean Conference, which have contributed by way of greater clarity and consistency to important legal issues, such as the methodology of delimitation of maritime zones, the delineation of competencies between the Commission on the Limits of the Continental Shelf and formalised dispute settlement bodies, obligations of States in disputed areas, the rules applicable in the EEZ, and jurisdiction on the high seas.¹ At a systemic level, the broadly concordant clarification of the legal and institutional assumptions within which the Convention is implemented must count as a move in a desirable direction. Scholarship may have similarly positive effect.

Secondly, the concept paper rightly notes the importance of marine scientific research [, for the promotion and conduct of which 'a comprehensive legal framework is set out in Part XIII of the United Nations Convention on the Law of the Sea ... , creating legal certainty and

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¹ *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (Judgment) 2017 ITLOS Reports 4; *The 'Enrica Lexie' Incident (Italy v India)*, PCA Case no 2015-28, Award, 21 May 2020 <<https://pcacases.com/web/sendAttach/16500>>; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* [2021] ICJ Rep <<https://www.icj-cij.org/public/files/case-related/161/161-20211012-JUD-01-00-EN.pdf>>; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* [2022] ICJ Rep <<https://www.icj-cij.org/public/files/case-related/155/155-20220421-JUD-01-00-EN.pdf>>.

facilitating its undertaking' ([19])). This is an important topic, on which, as we have heard, the encouragement and support of the International Seabed Authority, IOC-UNESCO, and DOALOS are crucial, and its complexity makes the capacity-raising debate particularly relevant. I would add that another helpful source of inspiration may be provided by the practice of individual States, for example the recently revised rules of the United States (from 2020)² and the United Kingdom (from March last year).³

How can United Nations system entities support Member States in harmonizing their legislative and policy strategies with the Convention and their obligations under other international instruments relating to the oceans to enhance ocean science and innovation?

I will now address the support that the UN system entities can provide to States in harmonising their strategies with the obligations under other international instruments, and consider in particular environmental law, where interaction between various instruments is presupposed in the statement of principle in Article 192 and more generally Part XII of UNCLOS and development of specific rules in other settings. Climate change puts the question in particularly sharp relief: to quote from ITLOS President Hoffmann's statement to the Meeting of the States Parties to UNCLOS from two weeks ago:

23. As we look to the future it is clear that the level of international attention being given to the protection of the environment, including the marine environment, is unprecedented and that the growing momentum around efforts to mitigate climate change is undeniable. The issue of sea-level rise and climate change has numerous implications for the law of the sea.

24. In this regard, there is the question of the effect of sea-level rise, on the baselines from which maritime zones are measured as well as on maritime delimitation agreements. There is also the question of the obligations of States under the Convention in relation to climate change mitigation. ...⁴

For these issues, UN system entities can be variously helpful, and in particular may provide the platform for States and other relevant actors to articulate their views and to contribute in a legally relevant manner to elaboration and harmonization of their obligations. For example, sea-level rise is a subject of great importance for many States, which the International Law Commission recognised by forming the Study Group on sea-level rise in relation to international law.⁵ The Study Group has published two issues paper: the First issues paper (on the law of the sea) was discussed by the Commission last year⁶ and the Second issues

² *Proclamation on revision to United States Marine Scientific Research Policy* (15 September 2020) <<https://www.govinfo.gov/content/pkg/DCPD-202000687/pdf/DCPD-202000687.pdf>>.

³ *UK FCDO's Marine Scientific Research (MSR) Guidance* (updated 15 March 2021) <<https://www.gov.uk/government/publications/marine-science-research-msr-guidance>>.

⁴ 'Statement by HE Judge Albert J Hoffmann, President of the International Tribunal for the Law of the Sea for 2021 for the Thirty-second Meeting of the States Parties to the United Nations Convention on the Law of the Sea' (13 June 2022) <https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/hoffmann/Statement_Hoffmann_32nd_MOSP_2022_EN.pdf>.

⁵ <https://legal.un.org/ilc/guide/8_9.shtml>.

⁶ 'Sea-level rise in relation to international law: First issues paper by Bogdan Aurescu and Nilüfer Oral, Co-chairs of the Study Group on sea-level rise in relation to international law' (28 February 2020) UN Doc A/CN.4/740.

paper (on statehood and protection of persons) this year (co-authored by Portugal's very own Patrícia Galvão Teles),⁷ with the Commission's last year's report identifying key legal questions⁸ and prompting States (and groups of States) to contribute to the discussion both directly with the ILC and in the Sixth Committee.⁹ The same is likely to happen later this year. And States are seriously and publicly considering the possibility of requesting advisory opinions related to law of the sea and climate change from the ICJ (led by Vanuatu)¹⁰ and ITLOS (led by Antigua and Barbuda, Tuvalu, and Palau in the Commission of Small Island States on Climate Change and International Law).¹¹ Much will depend, of course, on the procedure and politics of framing and arguing the requests, but some will think at the very least the judicial bodies are *not* unfavourably disposed towards addressing these matters; to quote again from President Hoffmann:

28. ... I wish to assure you that the Tribunal also stands ready to assist States in whatever way possible in order to meet new challenges facing the law of the sea, whether by answering new legal questions or through the settlement of disputes arising under new instruments such as an eventual agreement on BBNJ.

The broader point, in reflecting on these developments, relates to the importance of coordination by States and other relevant actors within and beyond the UN system, so that efforts in relation to the ILC and international courts and tribunals as well as elsewhere (United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, General Assembly, Security Council, specialised institutions) are mutually reinforcing and supportive, rather than duplicating with or distracting from each other.

How can innovation, science and technology be better utilized to support the implementation of international instruments, including capacity development, knowledge exchange and the transfer of marine technology, and how can the technology sector be better engaged in multilateral policy processes?

I will conclude with two shorter observations [on guiding questions (b) and (f)].

The concept paper addresses the law and practice of transfer of marine technology [helpfully summarising the 'efforts ... made ... to elaborate the regulatory framework and develop practical guidance for ... the transfer of marine technology under the Convention and other instruments ... to assist in the implementation of Part XIV' ([34])]. The challenges regarding the topic are well known: some have described the provisions of Part XIV as no more than hortatory or even obsolete, because of the reservations of developed States.¹² It is perhaps unsurprising to find that issues implicating IP rights do not immediately lead to consensus in international relations, in law of the sea as in other fields of international law prominently

⁷ 'Sea-level rise in relation to international law: Second issues paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-chairs of the Study Group on sea-level rise in relation to international law' (19 April 2022) UN Doc A/CN.4/752.

⁸ *Report of the International Law Commission: Seventy-second session (26 April-4 June and 5 July-6 August 2021)* UN Doc A/76/10 Chapter IX.

⁹ <<https://www.un.org/en/ga/sixth/76/ilc.shtml>>.

¹⁰ <<https://www.blueoceanlaw.com/blog/pacific-firm-to-lead-global-legal-team-supporting-vanuatus-pursuit-of-advisory-opinion-on-climate-change-from-international-court-of-justice>>.

¹¹ <<https://commonwealthfoundation.com/wp-content/uploads/2021/12/Commission-of-Small-Island-States-on-Climate-Change-and-International-Law.pdf>>.

¹² R Churchill, V Lowe, and A Sander, *The Law of the Sea* (4th ed, Manchester University Press 2022) 817.

discussed in the last two weeks,¹³ which links back to my broader point that on some issues international law does not provide a ready answer but a range of substantive approaches as well as a procedural framework to further the dialogue. On the political side, perhaps introducing transfer of technology as a standing item in the Meeting of States Parties to UNCLOS could be helpful for taking stock of the mood. On the technical side, already functioning models may be found in other fields, for example the Climate Technology Centre and Network created by the Conference of Parties to the UN Framework Convention on Climate Change (UNFCCC),¹⁴ and there is hope that Part V of the Draft text on the BBNJ will resolve the tension on substance and character of rules to effectively complement UNCLOS.¹⁵

How can adherence to reporting obligations under various international instruments be improved by building synergies across different processes while mitigating reporting burdens on Governments?

The last point I want to make relates to reporting, where guiding question (f) flags ‘reporting fatigue’, familiar in many fields of international law. My somewhat contrarian question is whether there should be more reporting (of some sort), rather than less. At the moment, States have reporting obligations under several instruments that to various extents touch upon oceans issues. For example, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention), hosted by UNECE (of the Implementation Committee of which I have the pleasure of being a member), is a powerful instrument for sustainable management and protection of transboundary waters. It requires Parties to prevent, control and reduce transboundary impact and ensure protection of the environment influenced by transboundary waters, including the marine environment. Reporting on oceans may also be required under the UNFCCC and should feed into the Global Stocktake in 2023. Some will think that it would be helpful to also have reporting mechanisms that address oceans issues directly, rather than approach them solely from the perspective of other mechanisms and institutions. UNCLOS does not, of course, have a Conference of Parties but perhaps there is scope for either creatively developing the practice of the Meeting of States Parties in that direction or, more realistically, considering it under the auspices of the proposed Conference of Parties for the BBNJ.

That concludes my intervention.

¹³ ‘Ministerial Decision on the TRIPS Agreement’ (adopted on 17 June 2022) WT/MIN(22)/30 WT/L/1141.

¹⁴ <<https://unfccc.int/ttclear/support/technology-mechanism.html>>.

¹⁵ ‘Further revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction’ (30 May 2022) <https://www.un.org/bbnj/sites/www.un.org.bbnj/files/igc_5_-_further_revised_draft_text_final.pdf>.