



45th Annual Conference on Oceans Law and Policy

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STATEMENT

by

H.E. Mr. Michael W. Lodge

Secretary-General of the International Seabed Authority

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I wish to thank and congratulate our hosts at the Maritime Institute of Malaysia for their great work in organizing this online event.

I also wish to thank the co-organizers, Professor James Kraska of the Stockton Center for International Law at the U.S. Naval War College, Dr. Jong-Deog Kim, President of the Korea Maritime Institute, and Dr. Cleopatra Doumbia-Henry, President of the World Maritime University, for their hard work in putting this year's conference programme together as well as for giving me the honour of making this closing keynote address.

Needless to say, I would much have preferred to be with you all in person. But perhaps the only good thing one can say about online events is that it opens the possibility for many experts to join the event who would otherwise not be able to travel. Certainly, this is well reflected in the rich and varied presentations that we have seen over the past two days.

The theme of this year's conference is UNCLOS at 40 and in my remarks today I propose to offer a few observations on lessons learned from our experience in implementing UNCLOS and some of the challenges for the future.

Of course, UNCLOS only entered into force in 1994, so as far as the institutions established under UNCLOS are concerned – ISA, ITLOS and the CLCS – we are only just over 25 years of age. Perhaps we could say that we have just passed our master's degrees and are ready to make our way in the world.

Before coming on to the points I wish to make, let me make a few comments about the video you saw at the beginning of this presentation. What you saw is the latest technology deployed to bring live video footage from the ocean floor, more than 3,000 metres deep. Today, this space is the frontier for cutting-edge marine science, technological innovation, and deep-sea exploration.

The prospects offered by this new frontier, which under UNCLOS is the common heritage of all humankind, are enormous. The research being undertaken over the last four decades and which has intensified in the last ten years, will enable us to better understand our planet and further develop a sustainable future. The rich mineral deposits found on the sea floor and the biodiversity associated with them also create exciting opportunities for sustainable development.

UNCLOS established the International Seabed Authority as the organization responsible for managing the vast area of ocean space that is the seabed beyond national jurisdiction and, in this context, the Authority represents a unique experiment in civilization.

Without the Authority, we could easily have seen rampant unrestrained exploitation of the deep seabed. Instead, we have the benefit of 40 years of carefully managed deep-sea exploration which has massively expanded our collective understanding and knowledge of the ocean at large.

So, what are the main lessons learned after 40 years?

The first is that ocean governance requires effective cooperation.

Anyone who has been involved in law of the sea discussions will know just how difficult it is to reach agreement on almost any aspect of the many issues covered by UNCLOS. It requires a level of persistence and patience that has few parallels in international relations.

Whilst UNCLOS stands as one of the towering achievements of the United Nations, we should remember that it took 12 years to negotiate, after a preparatory process that itself took five years, and on the back of two previous international conferences on the law of the sea – UNCLOS I and II.

Even after the adoption of UNCLOS in 1982, it took a further 12 years to build the necessary support to bring it into force, and then only after the adoption of not one, but two, implementation agreements.

It is important to bear in mind here that when we refer to UNCLOS, we must also consider the two implementing agreements of 1994 and 1995. These agreements must be read together with UNCLOS and interpreted as a single instrument. Each of them introduced important refinements to parts of UNCLOS that had not been sufficiently addressed in 1982 and part of our reflection on UNCLOS at 40 must include a reflection on the success of these two agreements.

As if that were not enough, it has taken 25 years to build the institutions established by UNCLOS. As someone who was intimately involved at the foundational stages, I can well remember how difficult it was to decide on the composition of the Council of ISA, elect the Finance Committee, decide on the budget, and adopt the rules of procedure for the different organs of ISA. I can also recall how anxious many people were in the early years about whether the Tribunal would receive any cases.

It is true that some issues are still pending, for example the problem of the composition of the Legal and Technical Commission remains a hot political issue, and there are still problems in the way the Commission for the Limits of the Continental Shelf functions, but overall, the story is one of success.

ITLOS has demonstrated its capacity to act as a dispute settlement mechanism of first resort, with 27 contentious cases and two advisory opinions. ISA has developed a comprehensive set of legislation to regulate deep-sea exploration, including for resources that had not even been discovered when UNCLOS was adopted, and is well on the way to completing a comprehensive Mining Code covering all phases of activities in the Area.

These successes did not come easily and the fact that we can celebrate them today is testament to the hard work and commitment of successive generations of law of the sea experts. Sadly, many of the first generation from UNCLOS III are now retiring, and even more sadly, we have lost some key figures over the past two years, including both my predecessors as Secretary-General of ISA.

We owe them a huge debt of gratitude for their work and vision.

The second reflection is that this legal system remains highly vulnerable.

Although in many respects UNCLOS merely codified existing international law, it was revolutionary in some respects.

The regime for the deep seabed, which lies at the heart of the entire system of global ocean governance under UNCLOS, was completely new. The concept of the exclusive economic zone, which we now take for granted, represented an entirely new vision for resource management. And the 1993 Fish Stocks Agreement over-turned 300 years of international law by creating a regime for boarding and inspection of fishing vessels on the high seas.

All of this could easily have failed. However, today, this comprehensive governance system has the full and active support of 168 States parties. In the case of ISA, we also have the participation of 94 observers, including 32 civil society organizations.

It is critical that we do not take our achievements for granted.

It hardly needs to be said that right now the world is suffering from a deficit of international cooperation and a lack of confidence in multilateralism. Some multilateral institutions have proven too weak and fragmented for today's global challenges and risks. It is in this spirit that the Secretary-General of the United Nations, in the context of his vision for Our Common Agenda, focused on the need to strengthen global governance, abide by international law, and renew the social contract to achieve a more inclusive and networked multilateralism.

In the case of UNCLOS, there are also continuing and unresolved tensions. One such tension manifests itself in the persistent problem of excessive claims to maritime jurisdiction. Second, as I have discussed at length elsewhere, there is the problem of dealing with potential disputes over the delineation or delimitation of the continental shelf and the spillover consequences of those disputes, including the consequences for the Area. And third, despite our two implementing agreements, there remains unfinished business, for example in the case of regulating access to and benefit sharing from the use of marine genetic resources.

These tensions are not helped by the continued absence of the United States from the UNCLOS regime. This absence is particularly unfortunate considering the important contribution made by the United States to the implementation of the international fisheries regime under UNCLOS, including through the 1995 Fish Stocks Agreement.

I wish to express the hope that the US Senate will reconsider its position on the treaty as a whole. Recent public submissions by a significant number of retired military officers, as well as a member of the Energy and Natural Resources Committee by Senator Murkowski, including in relation to the importance of sourcing strategic minerals, give me some cause for optimism.

It would be much better for all of us if the United States were inside the regime rather than on the outside.

At the end of the day, it is incumbent on member States to protect the gains that have been made over the past 40 years. This includes placing their trust in the institutions that have been established under UNCLOS, as well as supporting them and fully participating in their work.

I include in this not only the UNCLOS institutions, but also the competent international organizations referred to in UNCLOS, such as the IMO and FAO, but also the regional fishery bodies. Collectively, these bodies have made commendable progress in reforming themselves and fully implementing the Fish Stocks Agreement and we should give them credit for this.

It is more important than ever that the work of these institutions is supported and not undermined.

The third reflection is that much more needs to be done to enable all nations to fully benefit from UNCLOS.

One of the primary objectives of UNCLOS, as expressed in its Preamble, is to “contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or landlocked”.

The extent to which this objective has been achieved is perhaps open to question, and some authors have rightly been critical of the watering-down of UNCLOS provisions on capacity building and transfer of marine technology.

Taking a more positive approach, I prefer to view the glass as half full and say that UNCLOS is yet to achieve its full potential.

Certainly, there is much more to be done in terms of fulfilling the obligations to provide capacity building to developing States Parties in relation to activities in the Area, marine scientific research, and the development and transfer of marine technology.

As we saw in the opening video, new developments in marine technology have the potential to transform our understanding and use of the ocean and its resources but have the potential also to exacerbate existing inequalities if we fail to fully implement UNCLOS provisions on capacity development and benefit-sharing.

The need to urgently address these issues is recognized in the ISA Strategic Plan for the period 2019-2023.

To better understand the specific needs of developing States, in particular LDCs, LLDCs and SIDS, in relation to capacity development, the ISA Secretariat convened an international workshop on capacity development, resources and needs assessment in Kingston, Jamaica, in February 2020, and also conducted a survey, in which Members were invited to identify their priority capacity-development needs relating to the role and mandate given to ISA under the Convention. One of the key outcomes of the survey was that, out of those States that were not currently sponsoring activities in the Area, 89 percent indicated that their country aspired to engage in activities in the Area in the future and wished to develop capacity to do so.

As a result, the Assembly adopted a decision on capacity development, in which it requested the Secretary-General to develop and implement a dedicated strategy for capacity development and explore options to mobilize additional resources to provide financial support for capacity development.

This is certainly positive progress in the right direction, and several other organizations have taken similar steps. But good intentions are not enough by themselves and what is essential now is to ensure that such programmes are supported and financed by those States that have the capacity to do so.

The fourth reflection is that we need to do a better job to link the law of the sea to the 2030 Agenda for Sustainable Development

The inclusion of SDG14 – conservation and sustainable use of the ocean and its resources – in Agenda 2030 was an important step in the right direction.

It is worth pointing out here that SDG14 places equal priority on conservation and sustainable use. Of course, we need to acknowledge that the pressures on the marine environment created because of our

dependence on the resources provided by the ocean are real. They also present a challenge for effective governance and management.

But we should also be pragmatic. Millions of people depend on sustainable use of ocean resources to support livelihoods and human development. There needs to be an appropriate balance between conservation and sustainable use. A significant concern in recent years is the call from some to apply the precautionary approach to support abstention and inaction. This radical approach is not what was intended. The precautionary approach was originally intended as a framework for action in the face of scientific uncertainty – not using an absence of evidence as a reason not to act. Too often we see that the default position has shifted to an interpretation that prohibits any activity from taking place in the face of uncertainty, which by definition always exists. Scientific advice is important, but science is about presenting a rigorous analysis of what we do and do not know. Scientists should expect to inform policy, not make it.

It is important also to bear in mind that the SDGs form a holistic package. They should not be viewed in isolation. The UNCLOS institutions as well as those organizations involved in implementing provisions of UNCLOS should be encouraged to align their mandates and activities with the SDGs to ensure that they are delivering for all countries. In this regard, an independent report issued a few months ago after extensive multistakeholder consultation determined that ISA makes a meaningful contribution to 12 of the 17 SDGs.

Concluding remarks

The 40th anniversary of UNCLOS is an opportunity to reflect on how much has been achieved so far as well as to look forward to shape future discussions on ocean governance and the sustainable development of the ocean and its resources.

We should acknowledge first and foremost that, after 40 years, UNCLOS remains the foundation for all human activity relating to the ocean and its resources and is the best guarantee for peace and good order in the ocean.

As far as the Area is concerned, we have also seen the progressive development of a sophisticated and balanced legal regime, open to equal participation by developed and developing States, anchored in the precautionary approach, transparency, and equity, and fully aligned with Agenda 2030. The resounding success of the legal regime for the Area offers a concrete example of some of the mechanisms that could be replicated in future to ensure sound and careful management of global public goods.

What is important now is to reinforce our collective action to ensure that this framework is respected and reinforced and that the institutions created for its implementation are respected and strengthened, and not undermined.
