Conference on Ocean Law & Policy:
Peaceful Maritime Engagement in East Asia and the Pacific Region

Zoom Webinar (Virtual)

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KEYNOTE SPEECH
by
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Thank you for this opportunity to address this conference on peaceful maritime engagement in East Asia and the Pacific region.

I wish to congratulate Professor James Kraska and the Stockton Center for International Law for taking over the responsibility for organization of these annual conferences from the University of Virginia. The Virginia conference series started some 40 years ago, and the collected proceedings form an impressive record of the progressive development of the international law of the sea. I wish James and his team all the very best as they work to continue this legacy. I am very happy to see that Professor Myron Nordquist, as well as Judy Ellis, will continue their association with the conference programme.

I also wish to congratulate our host institution, the Japan Institute of International Affairs, for its support for this conference. I understand that it has been extremely challenging to organize it in the current circumstances and that we all would have wished to have been together in Tokyo for this event. The personal connections that are made in conferences such as this are invaluable and cannot be replicated over video. Nevertheless, I commend the institute for moving forward with the conference despite the formidable challenges.

Before I turn to the subject matter of my intervention, I wish to make one comment. Since 2019, in my capacity as Secretary-General of the Authority, I have been honoured to have been recognized as an International Gender Champion by the International Gender Champions Network, which is a network of global leaders committed to advancing gender equality. As part of my own commitment to that objective, I had signed the IGC Panel Parity Pledge to champion gender balance at events such as this.

I cannot help but reflect that none of today's keynote speakers are women, none of the moderators are women, and out of 24 speakers for the conference, only four are women. Indeed, three out of the seven

panels are exclusively male panels. This is not a good reflection of the diversity of the global community of law of the sea scholars and practitioners.

I do hope that the organizers can take this comment on board for future conferences. The Virginia conference is possibly the most prestigious law of the sea gathering in the world and it is important that it reflects who we are as a community.

The theme of the conference is peaceful maritime engagement in East Asia and the Pacific region.

I would like to use the opportunity of this keynote address to take a broader outlook and to reflect on the way in which Part XI of the Convention and the 1994 Agreement have ensured peace and order in the ocean beyond national jurisdiction, not just in East Asia and the Pacific, but around the world.

The history of the international law of the sea is one of a tension between exclusive jurisdiction of coastal States in areas close to the coastline and open access to natural resources in the parts of the ocean beyond national jurisdiction. In areas beyond national jurisdiction, each State had the right to use the sea and to exercise jurisdiction over ships flying its flag, and the duty to ensure that its freedoms were exercised with reasonable regard for the exercise of high seas freedoms by other States.

The evolution of the law, even up to the present day, is fundamentally associated with advances in the technological ability of States to control the sea at ever greater distances from the shore and to utilize the natural resources it contains.

In this sense, one of the great achievements of the Convention was to replace a plethora of conflicting and competing claims by coastal States with universally agreed limits on the territorial sea, the contiguous zone, and the exclusive economic zone, as well as clarity on the rights and duties of coastal States within those zones.

The Convention, and customary international law, also reflects a strong preference for carving up the natural resources of the sea into different regulatory domains controlled by coastal States and against international regulation of these resources by international agencies. We see this exemplified not only in the maxim that the 'land dominates the sea', but also in the way in which the Convention relegates the interests of the international community in the delineation of the continental shelf to a procedural afterthought.

The fact that common pool resources could be subject to over-exploitation and that international rules may be necessary to ensure proper conservation and management as well as equity over access to such resources was not lost on the participants in UNCLOS III. Both President Nixon's 1970 proposal for a UN Convention on the International Seabed Area and the draft Ocean Space Treaty proposed by Malta in 1971, recognized the need for international regulation of access to resources beyond national jurisdiction as well as distribution of the proceeds for the economic advancement of developing countries.

In the end, of course, these early proposals were substantially watered down. Partition of the ocean and its resources according to the national interests of States became the dominant approach. It was decided to limit the jurisdiction of the International Seabed Authority to the mineral resources located in the seabed beyond national jurisdiction and to give the Authority no role at all in the delineation of the spatial limits of its jurisdiction. Whilst there was some recognition of the legitimate interests of developing States in equitable redistribution of wealth, there were fundamental disagreements over the appropriate economic measures to be used to respond to these concerns.

It was only with the adoption of the Implementation Agreement of 1994 that it became possible to resolve these disagreements. That agreement marked a major step forward, not only in the way it addressed the substantive concerns of States while reiterating the core principles contained in the Convention, but also in the way in which it was so tightly woven together with the fabric of the Convention.

Any instrument of ratification or accession to the Convention following the adoption of the Agreement would also represent consent to be bound by the Agreement. Furthermore, no State was allowed to ratify the Agreement unless it had previously or at the same time acceded to the Convention. All States that were already party to the Convention prior to the adoption of the Agreement were considered to have established their consent to be bound by the Agreement unless they 'opted-out' within a period of 12 months.

These measures ensured prompt entry into force of the Agreement, but more importantly ensured that there would be a single regime formed by the Convention and the 1994 Agreement together. Accordingly, it denied any possibility of overlapping or conflicting regimes while preventing the development of a new regime that could potentially undermine the existing regime. Most importantly, these measures substantially reinforced the overall objective of peace and order in the ocean beyond national jurisdiction which is the centrepiece of the Convention.

In this aspect, there are perhaps some important lessons to be considered in relation to future implementation agreements.

So how do we measure the success of the regime created by the Convention and the 1994 Agreement?

First, the mere fact that the Convention establishes a legal regime for the Area that limits access to resources and prevents unrestrained exploitation is itself a benefit to humanity and an important contribution to peaceful maritime engagement. Through the development and implementation of a set of rules and standards governing deep sea mining and related activities, including marine scientific research in the Area, it becomes possible to balance the need for resource extraction with the preservation of the marine environment.

Second, the regime has succeeded in its objective of preventing unilateral claims to deep seabed resources. Initially this was achieved by the pioneer investor regime under resolution II, which was subsequently grandfathered into the current regime by the 1994 Agreement. Since 1982, all claims to potential mine sites have been dealt with strictly in accordance with the provisions of resolution II, the 1994 Agreement and the regulations adopted by ISA. There have been no unilateral claims, even though some key States remain outside the regime created by the Convention and the 1994 Agreement.

It is clear that, whatever the political positions expressed in some countries, industry is not prepared to take the risk to operate outside the framework of the Convention. One of the decisive factors in this regard is the security of tenure that is guaranteed under the contract with ISA, which resolves one of the key problems for all open access regimes of a lack of enforceable property rights.

Third, is the fact that the regime forces States to act by consensus. One criticism of all international regimes is that they can only operate with the consent of all or most States, which makes them slow and inefficient. It is true that it takes a long time to build consensus, especially where there are many conflicting interests. This is certainly the case with respect to the rules for exploitation of seabed minerals, which have been under negotiation since 2015. On the other hand, the fact that States are forced to make all efforts to reach consensus makes the ultimate regime stronger and more broadly representative of the interests of all. It also promotes regulatory stability and predictability, which are important incentives for investment.

Of course, States will submit to an international regime only if they expect the gains from cooperation to be greater than the potential returns from unilateral action. This is why the Convention and the 1994 Agreement establish one of the most complex power-sharing arrangements in international law. The composition and decision-making rules in the Council ensure that decisions are made in a way that reflects a balance between the major interests in seabed mining.

Fourth, the fact that there is a single global regime covering more than 50 per cent of the global seafloor brings profound benefits on two important levels. It ensures a level playing field for industry, whether

funded by international capital, States or in the form of the Enterprise, but even more importantly, it ensures effective and comprehensive protection of the marine environment.

Under this single global regime, the default position is that the seabed is off limits to mining except where expressly permitted by ISA following a lengthy process of approval. Even at the exploration phase, the most stringent environmental regulations apply to ensure that the precautionary approach is applied, and that environmental data are collected and shared with the regulator. ISA is currently in the process of establishing the most comprehensive system for environmental impact assessment and subsequent regulation for any activity taking place beyond national jurisdiction. All environmental decisions are based on the best available science and a precautionary approach.

Fifth, the existence of a shared space for decision-making has proved to act as a catalyst for innovative action on many of the underlying concerns relating to equity that were at the core of the Maltese proposal in 1971.

In this regard, whilst the objectives of the original text of the Convention were hampered by the imposition of clumsy and divisive economic measures such as mandatory transfer of technology and subsidization of the Enterprise, there has always been a broad consensus around the application of general utilitarian ethics to the problem of equitable distribution of benefits. There is no disagreement with the general principle that poorer countries should receive transfers from richer countries, although there may be very strong disagreements as to the form those transfers should take.

One of the core objectives of the Part XI regime was to ensure equality of access to seabed mineral resources by both developed and developing States. The regime has been remarkably successful in meeting this objective. Today, out of 31 exploration contracts issued by ISA, eight are held by developing countries, including six small island developing States. I must mention here the important contribution that was made in this regard by the Seabed Disputes Chamber of ITLOS in its advisory opinion of 2011. By clarifying the law on the responsibilities and obligations of sponsoring States, the Chamber reinforced the provisions of the Convention and opened the door to full participation by the developing countries.

Many of the non-monetary benefits of the Part XI regime are specified in Article 150 of the Convention, including increased availability of minerals, rational management of the resources and expansion of opportunities for participation. However, there is no limit to the category of non-monetary benefits, and it is not possible to quantify all these benefits as they may change over time. They certainly include the protection of the marine environment, capacity-building, increased scientific knowledge of the marine environment and increased availability of marine technology.

The Part XI regime and the International Seabed Authority has always been a unique experiment in international relations. As the pressure to use ocean resources in a sustainable manner that benefits all of humanity increases, we can expect to see increased focus on the role and functions of ISA.

It is worth recalling the words of the current Secretary-General of the United Nations to the effect that the governance of critical global public goods, including peace and the natural environment, needs to be reinforced and reimagined. The starting point for this is respect for and compliance with international law.

I am convinced that the Part XI regime offers a convincing template for international governance of shared resources that will become increasingly important to the maintenance of peace and good order in the ocean. The regime has demonstrated that it is resilient, whilst also adaptable to changing political and economic circumstances. It has benefited from the support of the vast majority of the international community, and it deserves continued support as it seeks to fulfil its mandate of a fair and equitable distribution of the resources of the seabed beyond national jurisdiction for the benefit of all humanity.

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