Briefing to CAHDI by the Co-Chairs of the Study Group on "Sea-level rise in relation to international law" of the progress on the topic during the 2023 session of the ILC

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I thank you for the invitation to present to you, as Co-Chair of the Study Group on "Sea-level rise in relation to international law", the progress on this topic during the 2023 session of the International Law Commission. I have fond memories of the time when, as Legal Advisor of the Romanian MFA, I was taking part in the CAHDI meetings.

During this year session, the Study Group on "*Sea-level rise in relation to international law*" (and the ILC) focused again on law of the sea aspects related to sea-level rise.

The basis of the Study Group debate was the **Additional Paper to the First Issues Paper** of 2020, issued by the Commission on 20 April 2023. The Additional Paper was elaborated by Professor Nilufer Oral and I, as Co-Chairs of the Study Group for law of the sea aspects in connection with sea-level rise. A selected bibliography, prepared in consultation with members of the Study Group, was issued on 9 June 2023 as an addendum to the Additional Paper.

The Study Group, which at the current session comprised **32** members (that is, virtually, almost the whole membership of the ILC), held 12 meetings, from 26 April to 4 May and from 3 to 5 July 2023, while the Report of the Study Group was considered and adopted by the Commission on 3 August 2023 in the form included in Chapter VIII of the Annual Report.

The Additional Paper and the debate in the Study Group and in the Commission focused on a series of topics, which were selected based on the suggestions by members of the Study Group that were proposed during the 2021 debate on the First Issues Paper, but <u>especially</u> based on the main aspects highlighted by the Member States in their submissions to the Commission and in their statements presented in the Sixth Committee after the First Issues Paper was issued and following the debate on it in the Commission in 2021.

So, the ILC debate focused on **the following issues**: the meaning of "**legal stability**" in connection with the present topic, including the issue of ambulatory versus fixed baselines; the principle of **immutability and intangibility of boundaries**, including / or based on *uti possidetis juris*; the **fundamental change of circumstances** (*rebus sic stantibus*); the **effects of the potential situation whereby overlapping areas of the exclusive economic zones of opposite coastal States, delimited by bilateral agreement, no longer overlap**, and the issue of

objective regimes; effects of the **situation whereby an agreed land boundary terminus ends up being located out at sea**; and the **judgment of the ICJ in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*** (Costa Rica v. Nicaragua) case; the principle that "the **land dominates the sea**"; **historic waters, title and rights**; **equity**; **permanent sovereignty over natural resources**; **possible loss or gain** by third States; **nautical charts and their relationship to baselines, maritime boundaries and the safety of navigation**; and the **relevance of other sources of law**.

With your permission, I will briefly refer to the **outcome of the ILC debate regarding the chapters I elaborated in the Additional Paper**: chapter II on "**legal stability**", chapter V on the "**effects of the potential situation**…" and chapter XII on the **relevance of other sources of law**. For the other chapters of the Additional Paper and the related debate in the ILC, as well as regarding the future work on this topic, my colleague, friend, and Co-Chair, Professor Nilufer Oral, will make the presentation.

The debate regarding "**legal stability**" was perhaps **the most elaborate**, and for very good reasons.

Indeed, our debates in the ILC Study Group have reconfirmed that it is obvious that for all States affected by sea-level rise **the maritime zones** established under UNCLOS **are central** to their economies, to their food security, health and to their livelihoods. Therefore, **the concept of legal stability, security, certainty, and predictability in relation to maritime zones** is of paramount importance.

The **Additional Paper**, based on the submissions by Member States to the Commission and on the national statements in the Sixth Committee, showed that **this essential concept** is generally viewed by States as having a **very concrete** meaning and has been linked to the **preservation of maritime zones through the fixing of baselines** (and **outer limits of maritime zones** measured from those baselines).

Our debate of this year has **consolidated** the option meant to ensure this much needed security which **was already proposed by the Co-Chairs in the 2020 First Issues Paper**, and **endorsed by States** from various regions of the world, as evidenced by the submissions to the ILC and by the quite large number of statements presented in the Sixth Committee, but also by the collective regional and cross-regional declarations, such as the August 2021 "**Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise**" of the 18 Pacific

Islands Forum members and the September 2021 **Declaration of the 39 Heads of State and Government of the Alliance of Small Island States**.

This possible solution refers to the **interpretation** of UNCLOS that **there is no obligation under this treaty to keep baselines and outer limits of maritime zones under review**, nor to update charts or lists of geographical coordinates, once deposited with the UN Secretary-General, and that **such maritime zones and the rights and entitlements that flow from them shall continue to apply without reduction, notwithstanding any physical changes prompted by sea-level rise**.

In other words, **preserving (or fixing, or "freezing") the baselines and outer limits of maritime zones, which is crucial to the legal stability and security**, thus allowing for **safeguarding the rights of the affected States with respect to their maritime zones**.

Such possible option is **perfectly in line with the need to preserve the integrity of UNCLOS and the balance of rights and obligations included therein**. It is also in line with the mandate of the Study Group, which provides that **this ILC topic will not propose modifications to the existing international law, such as UNCLOS**.

That is why I am glad to note that one important outcome of this year' debate in the Study Group and ILC as a whole, based on the Additional Paper – as mentioned in the conclusions of Chapter VIII of the 2023 annual report – was **the proposal to prepare an interpretative declaration on the UNCLOS, which could serve as a basis for future negotiations between States parties**. (Even if differing views were expressed as to the applicability to sea-level rise of the concept of the legal stability of baselines under article 7, paragraph 2, of the UNCLOS and of the outer limits of the continental shelf under article 76, which had been raised in the First Issues Paper and by some States.)

Other various proposals were made, including **drafting a framework convention on issues related to sea-level rise that could be used as a basis for further negotiations within the UN system** (following the example of the *UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*). It was also suggested that the Study Group should contemplate **providing some practical guidance to States**, possibly through **a set of conclusions**. More generally, it was suggested that any outcome of the Commission's work on the topic **should guarantee the sovereign rights of States over their maritime spaces**.

So, I am glad that **this year debate in the Study Group** (and in the Commission in general) **broadly endorsed and supported the proposals I and my Co-Chair put forward in favour of fixed baselines**, **both in the First Issues Paper (especially in paragraph 104), and in the Additional Paper** – considering, inter alia, that the UNCLOS did not prohibit the option of fixed baselines, and that it was critical that the final outcome of the Commission's work on the topic should guarantee the sovereign rights that States were claiming over their maritime spaces.

Although it was emphasized that **the current practice** was insufficient to justify the existence of a regional or general rule of customary international law, **it was stressed that it could nonetheless be used to support a particular interpretation of the UNCLOS**. At the same time, as I stressed during the debates, it is not easy to evaluate State practice within the context of sea-level rise, such as the decision of certain States or groups of States not to update coordinates or charts deposited with the UN Secretary-General. That is because practice in those cases was in fact **inaction**, lacking the visibility usually relied upon to determine the content of such practice.

As to the debate related to **the aspects analyzed in chapter V on the "effects of the potential situation…"** of the Additional Paper, the views expressed were generally in accordance with the preliminary observations of the Co-Chairs. For instance, in line with the findings of the Additional Paper, members were doubtful as to the relevance and applicability of the supervening impossibility of performing a treaty, as enshrined in article 61 of the Vienna Convention on the Law of Treaties, to the sea-level rise context. It was also noted, as mentioned as well in the additional paper, that article 61 was not automatically applied, and that sea-level rise could not have an effect on the performance of a maritime delimitation treaty. Also, members expressed diverging views on the question whether legal regimes could be regarded "an object indispensable for the execution of the treaty", as referred to in article 61 of the VCLT. Given the lack of clarity in international law in that respect, it was proposed that the Study Group should not focus its work on the question of the applicability of article 61. With respect to cases in which an agreed land boundary terminus ended up being located out at sea, it was observed that two legal options existed: to recognize, as a legal fiction, that the land boundary remained; or to conclude that it had become a maritime boundary. With respect to the issue of objective regimes, it was noted that maritime delimitation agreements should not be considered as imposing any objective regime vis-à-vis third States. It was proposed that the issue be approached from the perspective of the legal effects of acquiescence. In line with the additional paper, the question of obsolescence, or desuetude, of treaties was seen as highly controversial and hardly helpful in the context of sea-level rise.

As to **other sources of law,** the conclusion of the debate, in line with that of the Additional Paper, was that their relevance to the topic was limited, although the fixed baselines solution would favour the proper implementation of some of the international instruments examined.

To conclude, I consider that this year session of the Commission was **very productive** for our topic, and **I hope that the concrete proposals and conclusions we formulated will be found useful** by the Member States. Indeed, since sea-level rise – as a direct negative effect of climate change – presents **mounting hazards for human and State security**, it has **obvious implications on security and stability** around the world, being **an existential threat** for many States. And – as I mentioned not only once – last time on the 14th of February when I acted as briefer for the Security Council on the progress of the topic, on behalf of the ILC – **it creates global problems**, affecting the international community as a whole. Therefore, it requires **global solutions**. **But these solutions must be practical, concrete**. After that meeting it was clear to me that we have to deliver.

In this regard, the UN International Law Commission **responded** to the appeals of the interested Member States and **promptly included** this topic on its agenda, and **now it is delivering concrete solutions**. Our capacity as a UN body to deliver concrete solutions for this matter of existential relevance for so many States is also positive – not just for the profile of our Commission, but also, in more general terms, for the UN capacity to respond to pressing concerns of its Member States. And this is against the background of a certain mistrust in the efficacy of multilateralism that we have faced in the past years.

So, I am looking forward to the debates in the Sixth Committee at the end of October!

[Next year, an additional paper to the Second Issues Paper will be presented by my colleagues, Patricia Galvao Teles and Juan Jose Ruda Santolaria, focusing on the protection of persons and statehood, as subtopics related to sea-level rise (including, for instance, issues such as self-determination and submerged territories), and in 2025 we will present together a substantive final report on the topic as a whole, with concrete proposals, thus consolidating the results of the work already undertaken since 2019.]

Thank you!