

Online briefing to CAHDI

65th meeting - Strasbourg, 28-29 September 2023

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Mr. Chair,
Members of the Committee of Legal Advisers on Public International Law,
Ladies and Gentlemen,

It is an honour and a pleasure for me to address the 65th meeting of the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI) in my capacity as Co-Chair of the Study Group on sea level rise in relation to international law of International Law Commission.

The following is a brief summary of the main points of the Additional Paper to the First Issues Paper co-authored by Bogdan and Aurescu and Nilufer Oral as the co-chairs of the ILC Study Group on sea level rise and the discussion that took place with all members of the Study group during the 74th session of the meeting of the Commission. This part will cover the issues addressed in Chapters III through XI of the Additional Paper. The topics covered in the Additional Paper had been proposed for additional study by the Study group that met during the 73rd session.

The context for most of the issues addressed concern their possible relevance for contributing to the understanding of the principle legal stability, certainty and predictability in relation to sea level rise impacts on maritime boundaries, especially in relation to the preservation of existing baselines, boundaries and entitlements.

THE IMMUTABILITY AND INTANGIBILITY OF BOUNDARIES

Chapter III of the Additional Paper relates to the existing definitions and functions of boundaries, and the principle of the immutability and intangibility of boundaries. It includes an examination of the relevant international case law relating to the principle.

The chapter also addresses the principle of *uti possidetis juris* and its possible applicability to existing maritime boundaries by examining its historical context and relevant international case law and doctrine.

In the Additional Paper, the Co-Chairs make clear that the intention in examining the principle of *uti possidetis juris* was not to assert that it should apply to maritime boundary delimitations within the context of sea-level rise, but rather as providing an example of the importance accorded under international law to ensuring the continuity of pre-existing boundaries in the interests of legal stability and the prevention of inter-state conflict, which was the underlying basis for *uti possidetis juris*.

In the Study Group, there was overall agreement on the principle of the intangibility and stability of boundaries. However, there were different views on the direct applicability of the principle *uti possidetis juris* to maritime boundaries, with members expressing reservations on this.

FUNDAMENTAL CHANGE OF CIRCUMSTANCES (REBUS SIC STANTIBUS)

The First Issues Paper had addressed the issue of fundamental change of circumstances (*rebus sic stantibus*) in relation to maritime boundary agreements and sea level rise. However, at the request of members of the Study Group from the 72nd session of the Commission, the Additional Paper engaged in a more detailed study. The Additional Paper examined the statements made by States during the meetings of the Sixth Committee and the submissions of States to the Commission.

During the meeting of the Study Group during the 74th session, Members of the Study Group generally expressed support for the Co-Chairs' preliminary observations that the principle of fundamental change of circumstances was not applicable to maritime boundaries because it raised the same need for legal stability and permanence as in the case of land boundaries and were thus subject to the exclusion foreseen in article 62, paragraph 2 (a), of the Vienna Convention on the Law of Treaties, which creates an express exception of « boundaries ». This was also the position of the First Issues Paper

The Co-Chairs, in their preliminary observations, noted that no State had expressed a view in favour of the application of the principle of fundamental changes of circumstances to maritime boundary agreements in face of sea level rise either in their statements at the Sixth Committee or written submissions to the Commission. Moreover, the Additional Paper also observed the scant State practice for termination of treaties based on article 62, paragraph 2 (a), of the Vienna Convention on the Law of Treaties. Likewise, the International Court of Justice has not applied the principle when requested by States, on the basis of concerns of ensuring stability under the Convention.

LAND DOMINATES THE SEA

The Additional Paper undertook the study on the principle that « land dominates the sea » not to reconsider the principle itself, but rather to examine whether it was an absolute rule and its applicability to cases where portions of land had become submerged. The Additional Paper highlighted the fact that it was a judicially established principle that was not codified in the 1958 Geneva Conventions or UNCLOS.

As an example of the flexible approach that can apply to some principles, the Additional Paper examined the principle of natural prolongation, which is a codified rule under UNCLOS. However, for practical reasons, it was been replaced by the International Court of Justice with the « distance rule » for the continental shelf up to 200 nm. The Additional Paper examined cases where the International Court of Justice did not apply the well-established and recognized principle of natural prolongation, for reasons of pragmatism and equity.

The Additional Paper proffered that a similar approach could be considered in regard to the application of the principle that “the land dominates the sea” in relation to sea-level rise and to possible equitable solutions such as the preservation of existing maritime boundaries. The Additional Paper also observed that the principle that the land dominates the sea would not apply in the case of the continental shelf under article 76 of UNCLOS in the case of sea level rise and possible resulting landward shift of the baseline in the case of an ambulatory baseline. The finality and permanency of the limits of the continental shelf under article 76, paragraphs 8 and 9, of the UNCLOS presents an example of the non-application of the principle that the land dominates the sea. The Additional Paper made the preliminary observation that this demonstrates a flexible application of the principle that “the land dominates the sea” under UNCLOS.

In the discussions of the Study Group during the 74th session, some member of the Study Group were of the view that the land dominates the sea was a legal maxim and not a rule of customary international law, and thus not an absolute rule and others were thought it was a rule of customary international law.

HISTORIC WATERS, TITLE AND RIGHTS

The Additional Paper examined the history of the development of the principle of **historic waters, title and rights**. It looked at State practice and decisions by international courts and tribunals, and the possible applicability in the context of sea-level rise for the purposes of preserving existing rights in maritime areas.

While the general view of the Study Group was that the principles of historic waters, title and rights had limited application to maritime delimitation, the Co-Chairs underlined that principle was relevant to the present study as it provided an example of the preservation of existing rights that has been exercised by a coastal State and tacitly recognized in maritime areas that would otherwise not be in accordance with international law.

EQUITY

The Additional Paper examined the place of equity in relation to sea level rise and maritime boundaries. It observed that equity was a broad concept of international law. The chapter first examined equity in general and its application in the specific context of the law of the sea and sea-level rise.

The Study Group had a very robust exchange of views on equity observing that equity was an important principle that was enshrined in various international conventions and instruments, including the United Nations Convention on the Law of the Sea. It was also recalled that those who stood to suffer the most from human-induced sea-level rise had contributed the least to the problem, and the preservation of baselines and maritime entitlements gave expression not only to the foundational principles of equity and legal stability, but also to notions of climate justice that were deeply rooted in human rights and general principles of international law. The link between the principle of equity and the principle of common but differentiated responsibilities was also mentioned by several members.

It was further noted that the latter principle, established in international law, was relevant to the obligations of all States to address climate change and its effects, including sea-level rise, and could prove useful in addressing the impact of sea-level rise through mitigation and adaptation measures, especially in developing States.

Furthermore, it was noted that legal stability and equity should be the guiding principles of the Study Group's work on sea level rise, given that equity was at the heart of the object and purpose of the UNCLOS itself. However, there was the view that care should be taken in applying the principle of equity as applied to maritime delimitation to the sea level rise context.

PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

This chapter explored the development and scope of the principle of permanent sovereignty over natural resources. It examined the principle in relevant international instruments and doctrine, and its application to marine resources. The Additional Paper provided the preliminary observation that the loss of marine natural resources, which was very important for the economic development of States, would be at risk as a result of the consequences of sea-level rise on maritime entitlements if maritime boundaries were to shift landward. Such loss of existing maritime entitlements would be contrary to the principle of the permanent sovereignty over natural resources. Whereas, the legal and practical solution of the preservation of existing maritime entitlements would be in accordance with this principle.

Members of the Study Group agreed that the permanent sovereignty over natural resources was a principle of customary international law. There were, however, different views. Some were of the view that the principle of permanent sovereignty over natural resources was relevant to the topic, including its link to the right of peoples to self-determination. The link between the principle of permanent sovereignty over natural resources and the presumption of continuity of statehood, as addressed in the subtopic of statehood, was also noted by members. However, some members questioned the preliminary observation of the Additional paper and relevance of the principle to marine resources in the context of sea level rise.

POSSIBLE LOSS OR GAIN BY THIRD STATES

The issue of the possible loss or gains by third party states in the case of changes in the baselines and maritime zone due to sea level rise had been studied in the First Issues Paper. It had provided the preliminary observation that: "Overall, third States stand to benefit from these changes, but at the expense of the coastal State. However, the issue was again examined at the request of the Study Group of the 73rd session. The Additional paper noted that no State had raised this question but was a request from members of the Study Group from the previous meeting of the Study Group in 2021.

The Additional paper examined in detail the changes to rights and obligations of the coastal State and third States should the baseline move landward due to sea level rise resulting in a landward shift of maritime zones. The same preliminary observation reached was that overall third States stood to gain at the considerable expense of the coastal State.

NAUTICAL CHARTS AND THEIR RELATIONSHIP TO BASELINES, MARITIME BOUNDARIES AND THE SAFETY OF NAVIGATION

The Additional Paper examined in detail the various functions of navigational charts under international law and to determine whether States had an obligation to update such charts periodically under the United Nations Convention on the Law of the Sea in relation to baselines.

The Additional Paper relied on information presented from States and international organizations, in particular the International Hydrographic Organization, the International Maritime Organization and the Division for Ocean Affairs and the Law of the Sea of the United Nations Office of Legal Affairs.

Our preliminary observations were as follows :

- (a) nautical charts are principally used for the purposes of the safety of navigation, and the depiction of baselines or maritime zones is a supplementary function;
- (b) there is no evidence of general practice among States of updating their baselines on their nautical charts for the purposes of the safety of navigation under the United Nations Convention on the Law of the Sea or international law;
- (c) there is no evidence of State practice in support of the view that an obligation exists under the Convention or other sources of international law to regularly revise charts for the purposes of updating baselines or maritime zones.

Members of the Study Group expressed agreement that there was no obligation for States under the United Nations Convention on the Law of the Sea to update nautical charts, once duly deposited with the Secretary-General, for the purposes of depicting basepoints, baselines or maritime boundaries.

Several members noted that there was also insufficient State practice to support the existence of such an obligation. It was also recalled that some States had difficulties in preparing charts as they did not have dedicated hydrographic agencies. It was further stressed that the need for legal stability should not have any effect on the question of updating navigational charts.

I take this opportunity to thank all of you for your interest in attending this special briefing for members of the Sixth Committee.