EIGHTH INTERNATIONAL CONFERENCE ON THE LAW OF THE SEA

Introductory Remarks by H.E. Judge Tomas Heidar, President of the International Tribunal for the Law of the Sea

20 November 2023

Excellencies, distinguished colleagues and guests,

It is an honour for me to welcome you to the 8th International Conference on the Law of the Sea, co-organized by the Ministry of Foreign Affairs of the Republic of Korea, the Korean Society of International Law and the International Tribunal for the Law of the Sea. It is a particular pleasure to join you for the first time in my capacity as President of the Tribunal. On behalf of the Tribunal, I wish to thank the Ministry of Foreign Affairs and the Korean Society of International Law for their initiative in organizing this event and congratulate them on bringing together this distinguished and diverse group of experts to discuss the important and timely topic of the BBNJ Agreement.

Since 2016, the International Conference on the Law of the Sea has provided a valuable opportunity for Members of the Tribunal to share insights on the work of the Tribunal and to benefit from new perspectives on current issues in the law of the sea. In light of the programme that has been put together, and the mix of participants from the diplomatic, judicial and academic fields, I am confident that this year will be no exception.

The focus this year on the BBNJ Agreement is a fitting culmination of the series “Law of the Sea for the Next Generation”. Over the last two years, the International Conference on the Law of the Sea has provided an opportunity both to look back and reflect on the adoption of the Convention and to examine how the Convention has been interpreted and applied by international courts and tribunals. Now is the time to look to the future, and to contemplate the challenges that lie ahead for the law of the sea.

Over the next two days, we will discuss in detail various aspects of the BBNJ Agreement. My intention is to offer some general remarks on the nature of the BBNJ Agreement as well as its relationship with the Tribunal.

The BBNJ Agreement is both a continuation of and an evolution of certain trends that emerged at the time of the drafting of the Convention.

As you are all well aware, the Convention was adopted as a package deal and succeeded in securing agreement on many essential rules constituting the modern law of the sea. The Convention is often described as a framework agreement, whose open-ended nature allows for the evolution of the law of the sea over time. It sets out certain general principles while leaving the details on the implementation of such principles for the subsequent consideration of the States Parties. There are traces of this approach also in the BBNJ Agreement. For example, in accordance with article 14 of the BBNJ Agreement, the Parties agree that monetary benefits from the utilization of marine genetic resources of areas beyond national jurisdiction and their digital sequence information shall be shared fairly and equitably, but it is left to the Conference of the Parties to decide on the modalities for the sharing of monetary benefits, taking into account the recommendations of the access and benefit sharing committee.

Thus, the BBNJ Agreement has, like the Convention, certain elements of a framework agreement. However, more fundamentally, it reflects a wider trend in international law, that of the turn towards the technical.

A driving force behind the adoption of the BBNJ Agreement was the desire to supplement the general principles set out in the Convention and to fill certain perceived “gaps” in the rules of the Convention applicable to areas beyond national jurisdiction. New scientific knowledge regarding both the value of marine genetic resources and the effectiveness of mechanisms such as area-based management tools and environmental impact assessments in ensuring the conservation and management of marine biodiversity provided particular impetus for the adoption of the Agreement. The BBNJ Agreement thus represents a move from the general to the specific, and is an attempt to develop a comprehensive global regime under the Convention with detailed rules on conservation and sustainable use, taking into account the existing overlapping mandates of other agreements, bodies and processes.

The Tribunal itself has its origins in this same turn to the technical, or the specialization of international law. While the International Court of Justice settles disputes of a legal nature that are submitted to it by States through the application of rules from any field of international law, the Tribunal is a more specialized legal body. The Tribunal has its origins in a proposal submitted by the United States during the drafting of the Convention in 1974. The US proposed the creation of a new permanent law of the sea tribunal on the grounds that special expertise was required. The note accompanying the proposal explained that "[t]he new Law of the Sea Convention will contain many technical provisions requiring judges with a special competence in the various fields covered by th[e] Convention". Article 2 of the Statute of the Tribunal provides that its Members are to be elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea. Incidentally, several Members of the Tribunal participated in the BBNJ process before commencing their current positions.

It is thus fitting that the BBNJ Agreement, as a specialized instrument regulating complex technical issues in the law of the sea, provides for the submission of disputes arising under the Agreement to the Tribunal. The core provision regarding dispute settlement under the BBNJ Agreement is article 60, which in principle makes Part XV of the Convention applicable to disputes concerning the interpretation or application of the Agreement, albeit with some variations. Article 60 distinguishes between States Parties and States not party to the Convention. For States Parties to the Convention, the dispute settlement system provided for in Part XV of the Convention applies directly. With regard to States that are not parties to the Convention, the Agreement provides that Part XV of the Convention "shall be deemed to be replicated for the purpose of the settlement of disputes involving a Party to th[e] Agreement that is not a Party to the Convention." The BBNJ Agreement further specifies that States not party to the Convention have the same choice of procedure for the settlement of disputes under the BBNJ Agreement as that provided for in article 287, paragraph 1, of the Convention.

Accordingly, both States Parties and States not party to the Convention may choose to submit any eventual disputes arising under the BBNJ Agreement to the Tribunal, a standing judicial body with expertise in the law of the sea.

The BBNJ Agreement also confers an advisory role on the Tribunal. Pursuant to article 47, paragraph 7, of the Agreement, the Conference of the Parties "may decide to request the International Tribunal for the Law of the Sea to give an advisory opinion on a legal question on the conformity with th[e] Agreement of a proposal before the Conference of the Parties on any matter within its competence."

In this context, I wish to highlight that article 22 of the Agreement provides that the Conference of the Parties shall take decisions on the establishment of area-based management tools, including marine protected areas, and related measures, on the basis of proposals submitted by Parties, either individually or collectively, as revised following consultations facilitated by the secretariat.

Article 23(5) of the Agreement sets out an opt-out clause in relation to such decisions and provides that a Party making an objection to a decision adopted under Part III of the Agreement on measures including area-based management tools shall provide to the secretariat the explanation of the grounds for its objection. One of the three permissible grounds for objection listed in the provision is that the decision is inconsistent with the Agreement or the rights and duties of the objecting Party in accordance with the Convention. Thus, if a Party considers that a decision of the Conference of the Parties to establish an area-based management tool is inconsistent with the Agreement, it may object to the decision with the effect that the decision shall not be binding on that Party.

I also wish to highlight in this regard that the structure of the Agreement reflects the fact that the inter-governmental conference was organized into four informal thematic working groups, namely on marine genetic resources, measures such as area-based management tools, environmental impact assessments, capacity-building and the transfer of marine technology, as well as a group on cross-cutting issues such as dispute settlement and institutional arrangements. The example I provided regarding proposals on the establishment of area-based management tools only pertains to one part of the Agreement, namely Part III. It is to be expected that proposals on other issues, relating to other parts of the Agreement, may also come before the Conference of the Parties, though it is difficult at this point, prior to the entry into force of the Agreement and the establishment of the COP, to anticipate their subject matter.

I hope that this brief consideration of the BBNJ Agreement and its relationship with the Tribunal will provide some useful context for our discussions at this conference on the content of the Agreement and its capacity to regulate marine biological diversity beyond national jurisdiction.

Excellencies, distinguished guests, it remains for me to reiterate the Tribunal's appreciation to the Ministry of Foreign Affairs and the Korean Society of International Law for co-organizing what I am sure will be a most stimulating and informative conference and to congratulate them on the excellent organization of the proceedings. I look forward to the interesting discussions ahead and thank you for your kind attention.