Statement by the President of the
International Tribunal for the Law of the Sea,
H.E. Judge Jin-Hyun Paik,
at the 30th Annual Informal Meeting of Legal Advisers in New York

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Is there a place for judicial dialogue between ITLOS and the ICJ?

Madam Chair,
Excellencies,
Ladies and Gentlemen,

Please allow me at the outset to express my thanks for the kind invitation to join this meeting of distinguished legal advisers. I am very grateful for the opportunity to exchange views with you on the work of the International Tribunal for the Law of the Sea (which I will refer to as ITLOS or the Tribunal) and the relationship between ITLOS and the International Court of Justice (the ICJ). I have been asked to address the question of whether there is a place for judicial dialogue between the ICJ and ITLOS. I am firmly of the belief that there is a place for such dialogue and that judicial dialogue between our two institutions can and does offer significant benefits not only to the two of them but to the international legal community as a whole.

In order to fully appreciate the place of judicial dialogue between ITLOS and the ICJ, I will first discuss the system created under the 1982 United Nations Convention on the Law of the Sea (or "the Convention") for the settlement of disputes. Having set out the benefits of judicial dialogue within this system, I will then consider the practical operation of such dialogue between the two institutions.

Allow me first to recall that the negotiation of the Convention was a long and complex process and many compromises were made by the States involved in order

to reach agreement on rules that would be acceptable to all parties. Given the deep divisions between groups of States on issues such as the extent of maritime zones, fisheries and freedom of navigation, the inclusion of a robust system of dispute settlement was considered essential for the effective operation of the Convention. Even so, the nature and shape of such system was not free of disagreements. In a remarkable spirit of cooperation, however, the drafters eventually agreed on compulsory dispute settlement procedures for disputes concerning the interpretation or application of the Convention.

This inclusion of compulsory dispute settlement procedures entailing binding decisions was one of the major achievements of the Convention. It involved significant compromise on behalf of several different groups of States, including the socialist group of States, who were opposed to any form of binding dispute settlement. In order to secure overall acceptance of a system in which States were obliged to refer disputes arising under the Convention for binding third party settlement, Section 2 of Part XV of the Convention allows States to choose between four different procedures for the settlement of disputes. States Parties to the Convention are free to choose between ITLOS, the ICJ, arbitration in accordance with Annex VII to the Convention, or special arbitration for four categories of disputes of a more technical nature under Annex VIII to the Convention. Thus, there are four different bodies with the potential to issue divergent interpretations of the Convention.

While the decisions of any dispute-settlement procedure under the Convention will only be binding on the parties to a particular dispute, the existence of inconsistent jurisprudence on the rules of the Convention is still clearly undesirable. This is true across all areas of law of the sea but it is particularly important for maritime delimitation. Since the question of boundaries reaches to the heart of State sovereignty, the development of consistent and predictable jurisprudence is of vital importance to ensure the confidence of States in the system created for the peaceful settlement of boundary disputes.

Within this context, the importance of judicial dialogue becomes evident. Professor Peters describes judicial dialogue as an informal procedure, which at its heart involves “courts’ mutual attentiveness to each other’s case-law and cross-

citations."[1] One can think of judicial dialogue as an informal communicative process of interaction and exchange between courts or tribunals. Such dialogue is a valuable means to ensure the consistent interpretation and application of the Convention.

Judicial dialogue between ITLOS and the ICJ, the two permanent judicial bodies within the Convention system, is of particular importance. For arbitral tribunals constituted under Annex VII to the Convention, judicial dialogue can be more difficult to establish, as such tribunals are constituted only to hear a particular dispute and have no pre-existing rules of procedure or institutional home. The same may be said of special arbitral tribunals established under Annex VIII to the Convention, though to date, no such tribunals have been established.

Judicial dialogue with the ICJ is also particularly important as the ICJ is not only one of four options available to States under the dispute-settlement system of the Convention, but is also engaged in applying the rules set out in the Convention outside of the Convention's dispute-settlement system.

The ICJ has several cases on its docket involving law of the sea issues in which the Convention is not the basis for the jurisdiction of the Court, but may nevertheless form part of the applicable law. In the *Somalia* v. *Kenya* maritime delimitation case, Somalia invoked declarations which Somalia and Kenya had made under Article 36, paragraph 2, of the Statute of the Court as the basis of the Court's jurisdiction. The Court held that an agreement to the Court's jurisdiction through such optional clause declarations applied "in lieu" of procedures provided for in Section 2 of Part XV of the Convention, in accordance with article 282 of the Convention. In the *Nicaragua* v. *Colombia* delimitation case concerning the delimitation of the continental shelf beyond 200 nautical miles, Colombia is not a State Party to the Convention, and the basis for the jurisdiction of the ICJ is the Pact of Bogotá.

During the drafting of the Convention, the idea emerged that ITLOS would have a role as a "guardian" of the Convention, and would seek to ensure the cohesiveness

[1] A Peters, "The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization" 15 *International Journal of Constitutional Law* 3 (2017) pp. 671-704 at p. 695.

of the system as whole. As part of this role, the Tribunal pays close attention to the jurisprudence of the ICJ relating to the law of the sea, and is deeply committed to cooperation with the ICJ so as to optimize the consistent interpretation and application of the Convention.

I have outlined the need for judicial dialogue between the Tribunal and the ICJ in the context of the system for dispute settlement under the Convention. I now wish to examine how, in practice, judicial dialogue and cooperation between the ICJ and ITLOS can and does work.

One important aspect of judicial dialogue is the reference in the decisions of a judicial body to decisions of other judicial bodies, sometimes referred to as cross-citation or cross-pollination. Cross-citation can have the effect of consolidating the meaning of certain terms or concepts.

We have seen that at the ICJ, an initial tendency to avoid citation to other courts and tribunals has given way to a new practice of increased reference to the decisions of other judicial bodies. The ICJ has referred to the jurisprudence of ITLOS on several occasions, for example in the *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) case and in its judgment on compensation in the *Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) case. Similarly, ITLOS has referred on numerous occasions to the jurisprudence of the ICJ, particularly in relation to procedural issues and questions of maritime delimitation. My predecessor Judge Wolfrum, addressing this meeting in 2007, noted that “the Tribunal, in its decisions, has not hesitated in referring, when appropriate, to the precedents set by that Court.” He considered that the practice of cross-citation demonstrated the constructive approach of the Tribunal to “maintaining consistency in international law and reinforcing the necessary coherence between general international law and the law of the sea.”

This does not mean that the Tribunal simply follows the approach adopted by the ICJ and *vice versa,* or that we will necessarily reach the same conclusions when faced with similar issues. Clearly, each case must be evaluated on its own facts, and the context and nuances of the situation and the particular arguments of parties must

be taken into account. But the work of one judicial body can provide a useful framework for discussion within another. An essential part of judicial dialogue is simply the awareness of how an issue has been dealt with by other courts. Judge Greenwood of the ICJ was a strong advocate for the role of judicial dialogue. In the compensation phase of the *Diallo* case, Judge Greenwood stated:

> As this is the first occasion on which the Court has had to assess damages since the Corfu Channel case […], it is entirely appropriate that the Court, recognizing that there is very little in its own jurisprudence on which it can draw, has made a thorough examination of the practice of other international courts and tribunals.[2]

In that case, the ICJ looked to the practice of ITLOS regarding the award of post-judgment interest. Judge Greenwood considered that "each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions."[3]

The Tribunal has, for its part, looked to the practice of the ICJ regarding several international legal issues. Let me first say a few words about the jurisprudential interaction between the two institutions in the area of international environmental law. Beginning with the *Corfu Channel* case in 1949, the ICJ has, on several occasions, considered the obligations of States in relation to activities within a State's territory that could cause transboundary harm. In its Advisory Opinion on the *Responsibilities and obligations of States with respect to activities in the Area*, the Seabed Disputes Chamber of the Tribunal had to consider the character and content of the obligations of States when entities under their sponsorship to carry out activities in the Area, that is, in the seabed and seafloor beyond areas of national jurisdiction. These were new legal questions that had not previously been considered by the ICJ. However, the Chamber was able to look to the work of the ICJ on issues of transboundary harm for guidance.

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[2] *Ahmadou Sadio Diallo (Republic Guinea v. Democratic Republic Congo) (compensation owed by the Democratic Republic of the Congo to the Republic of Guinea), Judgment*, *ICJ Reports 2012*, p. 324, Declaration of Judge Greenwood, para. 8.
[3] *Ibid*.

The Chamber referred to the Judgment of the ICJ in the *Pulp Mills on the River Uruguay* case regarding the link between "due diligence" and "obligations of conduct", the precautionary approach, and the requirement under general international law to undertake an environmental impact assessment or EIA. Building on the jurisprudence of the ICJ, the Chamber brought to light new dimensions of due diligence obligations, establishing a link between the obligation of due diligence and the precautionary approach and characterizing the precautionary approach as an integral part of the general obligation of due diligence of sponsoring States, applicable even outside the scope of the Regulations of the International Seabed Authority.[4]

In the *Pulp Mills* case, the ICJ had concluded that there is a requirement under general international law to undertake an EIA where there is a risk that a proposed industrial activity may have a significant adverse impact in a transboundary context. The Chamber considered that the Court's reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction, and the Court's references to "shared resources" may also apply to resources that are the common heritage of mankind.[5] The Chamber concluded that the obligation to conduct an EIA is both "a direct obligation under the Convention and a general obligation under customary international law".[6]

Subsequently, the ICJ, in its 2015 Judgment in *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v. Costa Rica*), linked the obligation to conduct an EIA to the obligation of due diligence, concluding that a State's due diligence obligation to prevent significant transboundary environmental harm included the obligation to ascertain whether there is a risk of significant transboundary harm which would trigger the requirement to carry out an EIA, before embarking on an activity having the potential adversely to affect the environment of another State.[7] While applying rules of international environmental law in different contexts, the ICJ

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[4] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 47, para.131.
[5] *Ibid.*, para. 148.
[6] *Ibid.*, para. 145.
[7] *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), ICJ Reports 2015*, para. 104.

and ITLOS have jointly contributed to the elaboration of the content of due diligence obligations.

Another good example of judicial dialogue between the two institutions relates to the issue of the delimitation of the continental shelf beyond 200 nautical miles. In the *Bangladesh/Myanmar* case, the Tribunal was called upon to delimit the continental shelf beyond 200 nautical miles, in the absence of final recommendations from the Commission on the Limits of the Continental Shelf (or CLCS) on the outer limits of the parties' respective continental shelves. The Tribunal clarified that entitlement to a continental shelf "exists by the sole fact that the basis of entitlement, namely, sovereignty over the land territory, is present", and "does not require the establishment of outer limits." Applying an innovative approach, the Tribunal proceeded to delimit the parties' continental shelves, including the shelf beyond 200 nautical miles. This was the first time that an international judicial body had delimited the continental shelf beyond 200 nautical miles.

The ICJ then faced a similar, but not identical, question in the preliminary objections phase of the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast*.[8] It concluded that "since the delimitation of the continental shelf beyond 200 nautical miles can be undertaken independently of a recommendation from the CLCS, the latter is not a pre-requisite that needs to be satisfied by a State party to UNCLOS before it can ask the Court to settle a dispute with another State over such a delimitation."[9]

More recently in the *Ghana/Côte d'Ivoire* delimitation case, a Special Chamber of the Tribunal held that it could delimit the continental shelf beyond 200 nautical miles in the absence of CLCS recommendations regarding the outer limits of the continental shelf of Côte d'Ivoire. Each of the cases concern different geographic situations and each case was different in various ways. The essential point is not that an identical result is achieved in each case, but that through an appreciation and awareness of

[8] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment of 17 March 2016*, paras. 106-14.
[9] *Ibid*., para. 114.

each other's decisions, the Tribunal and the ICJ have contributed to the overall cohesiveness of the Convention, while still allowing room for innovative solutions to new legal questions.

While cross-citation is the most obvious manifestation of judicial dialogue between the two bodies, it is not the only one. Judicial dialogue can also take place on a personal level. Several visits and small group exchanges have been arranged between judges of the ICJ and ITLOS over the years. Next year, it is envisaged that ITLOS judges will visit the ICJ as a continuation of this endeavour. I should mention that this judicial dialogue in person has been focused on the issues of mutual interest and common concern. In addition, the ICJ and ITLOS also have much to learn from each other on institutional issues, for example in relation to the digitalisation of case management or of archives.

Alongside these bilateral meetings, judicial dialogue at ITLOS and the ICJ also takes place with a wider audience of international judges. For example, the Brandeis Institute for International Judges provides members of the international judiciary with the opportunity to meet and discuss critical issues concerning the theory and practice of international justice. And of course, I also hope to take advantage of the opportunity provided by this meeting to engage in judicial dialogue with Judge Tomka.

I have highlighted the potential risks arising from a system in which parties have a choice of four bodies for the settlement of disputes. Nevertheless, it is important that this risk is not overestimated. The issue of the fragmentation of international law has been the subject of considerable academic analysis. Much of the focus of this analysis has been on regime interaction, and the risk of divergent rulings on the same issue. However, as Judge Treves notes, the existence of judgments of different international courts relying on each other and contributing together to the development of international law is a more common occurrence than the issuance of divergent decisions.[10] This is clearly evident when one examines the jurisprudence of ITLOS

[10] T Treves, "Cross-fertilization between Different International Courts and Tribunals: The Mangouras Case" in H Hestermeyer et al (eds), *Coexistence Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, (Martinus Nijhoff Publishers, 2011), p. 1787.

and the ICJ. What is striking is not that the two bodies have different approaches to the interpretation of the Convention, but the way in which the decisions of both bodies are mutually reinforcing. Together, ITLOS and the ICJ contribute towards a cohesive framework of governance for the oceans. Indeed, this was precisely the calculation made by the drafters of the Convention. For them, the risk of divergent jurisprudence was considered to be low, and thus an acceptable risk to take in order to secure agreement on compulsory dispute settlement. Subsequent developments have proved them to be correct.

I hope I have convinced you that judicial dialogue between the Tribunal and the ICJ indeed has a place, and has already contributed to the consistent interpretation and application of the Convention, which has in turn increased predictability and enhanced the confidence of States in the virtue of the judicial settlement of international disputes.

Before closing, I want to underscore that ITLOS, as the only permanent court established by the Convention, has special responsibility to ensure that the legal system created by the Convention works effectively without increasing the risk of fragmentation. Its jurisprudence shows that the Tribunal has taken particular care to promote the uniformity and coherence of the Convention. In this regard, it has actively engaged in judicial dialogue with the ICJ and will continue to do so.

I would like to thank you again for inviting me to address this distinguished gathering and for giving me the opportunity not only to reflect on judicial dialogue and continuing cooperation and exchange between ITLOS and the ICJ, but to actively participate in such dialogue. I look forward to exchanging views with you on these issues and thank you all for your kind attention.