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INTERNATIONAL SYMPOSIUM ON THE LAW OF THE SEA

"The Rule of Law in the Seas of Asia:
Navigational Chart for the Peace and Stability"

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Keynote Speech by Judge Shunji YANAI
of
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I Introduction

Excellencies, Ladies and Gentlemen,

It is a great honour and pleasure for me to deliver a keynote speech at this symposium.

I think it is a very opportune moment to hold an international symposium focusing on the rule of law on the seas and oceans of Asia today for mainly two reasons.

First, it should be recalled that in 2012, the United Nations General Assembly commemorated the 30th anniversary of the opening for signature of the United Nations Convention on the Law of the Sea ("UNCLOS"), often referred to as "the Constitution of the Sea". Last year, the 20th anniversary of the entry into force of UNCLOS was celebrated. Throughout these years, the international community, including the Asia-Pacific region which covers vast maritime areas, has witnessed and experienced the application of UNCLOS to the realities of the seas and oceans. While States have acquired experience in interpreting and applying UNCLOS over the decades, they are now facing new challenges.

Second, in recent years, we have seen a gradual increase in the number of disputes among Asian States, especially maritime disputes, that were referred to dispute settlement procedures entailing binding decisions. It could be understood that Asian States, which were considered to be reluctant to use judicial or arbitral dispute settlement procedures, are slowly changing their attitude toward accepting third party adjudication for the settlement of disputes, thus contributing more actively to the development of international law.

Now, I would like to start from an overview of the role that UNCLOS has played to date in the establishment of "the rule of law on the seas and oceans."

II Role played by UNCLOS in "the rule of law on the seas and oceans"

UNCLOS consolidated the traditional principles of the law of the sea already established, such as the freedom of the high seas, the regime of territorial sea, the rules concerning the baseline for measuring the breadth of territorial sea and rules relating to piracy. By fixing the breadth of territorial sea up to a limit of 12 nautical miles ("nm"), UNCLOS put an end to the legal disorder which reigned before its adoption due to a lack of agreement on the breadth of territorial sea. It also shaped the regime of the 200nm exclusive economic zone ("EEZ") as a *sui generis* maritime zone from various concepts of new economic waters then claimed by States.

It also gave a new definition to the continental shelf up to a limit of 200nm and created a unique regime in which to establish its outer limit beyond 200nm. Also UNCLOS created an entirely new international maritime regime, that of the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction ("Area"). The Area and its resources are the common heritage of mankind. Furthermore, it established new regimes such as those for straits used for international navigation and archipelagic waters. For the interpretation and application of its complex provisions, including those concerning the above-mentioned new regimes, UNCLOS created new international institutions, namely the Commission on the Limits of the Continental Shelf ("CLCS"), the International Seabed Authority ("ISA") and the International Tribunal for the Law of the Sea ("ITLOS"). Together with the existing institutions such as the United Nations, the IMO and the ICJ, these newly created organizations contribute to the smooth and coherent implementation of UNCLOS.

Another important innovation materialized in UNCLOS was the creation of an unprecedented comprehensive and elaborate mechanism for the settlement of maritime disputes. When a dispute concerning the interpretation or application of UNCLOS is not resolved by agreement between the parties to the dispute, or by recourse to conciliation or other non-binding procedure, Part XV of UNCLOS aims to ensure that such a dispute be in principle resolved by a compulsory third-party dispute settlement procedure entailing binding decisions.

This mechanism is complex but highly flexible at the same time. States Parties to UNCLOS are free to choose one or more means among ITLOS, the International Court of Justice ("ICJ"), arbitration under Annex VII to UNCLOS ("Annex VII arbitral tribunal") or special arbitration under Annex VIII. If a State party to a dispute does not make a choice, or if the parties to the dispute have not chosen the same dispute settlement procedures, they are deemed to have accepted the jurisdiction of an Annex VII arbitral tribunal. This mechanism facilitates States Parties to have recourse to the compulsory procedures of their choice, and thus encourages the peaceful settlement of disputes over law of the sea matters.

III UNCLOS and new challenges

UNCLOS has stood the test of time for 30 years, and is now firmly established as a legal order. Nonetheless, we also have to answer the question of whether UNCLOS is capable to meet the new challenges of the next 30 years, and beyond.

It is a known fact that UNCLOS contains many ambiguous provisions as a result of compromises reached among States in order to reconcile their conflicting interests and differing views. Many provisions were thus left for future development through the implementation of UNCLOS.

One salient example of these provisions is the method by which the delimitations of the EEZ and the continental shelf are to be effected. The relevant articles of UNCLOS simply provide that the delimitation of the EEZ or the continental shelf between States with opposite or adjacent coasts, "shall be effected by agreement on the basis of international law […] in order to achieve an equitable solution." They only set a goal, without indicating the method to be applied in order to achieve it. Today, a so-called "three-stage approach" based on the "equidistance/relevant circumstances method" is widely used in many cases by international courts and tribunals including ITLOS, to effectuate equitable delimitation. This method has been taking shape mainly through the accumulation of jurisprudence of the ICJ. The "angle-bisector method" has also been devised and employed in cases where the "equidistance/relevant circumstances method" cannot be applied or is inappropriate due to such circumstances as the physical instability of the coastlines concerned.

Another example of provisions which need clarification is those provisions concerning exploration and exploitation of deep seabed resources. Here, it deserves special attention that the Seabed Disputes Chamber of ITLOS issued an advisory opinion in 2011 at the request of ISA, in order to clarify the nature and scope of the responsibilities and obligations of States sponsoring persons and entities engaged in activities in the Area. It is gratifying to note that this advisory opinion was welcomed by ISA, which also facilitated its work. As activities in the Area move from the present exploration phase to the exploiting phase in the near future, more requests for advisory opinion may come from ISA.

The issues concerning the method of maritime delimitation; the implementation of exploration and exploitation of deep seabed resources, and the determination of the outer limits of continental shelf beyond 200nm, had been fully recognized and discussed among States at the Third UN Conference on the Law of the Sea. That is why UNCLOS III did not limit itself to lay down "static" rules but also decided to create ITLOS, ISA and CLCS. This institutional framework allows the smooth and coherent interpretation and application of UNCLOS as a whole. This framework also enables UNCLOS to make a "dynamic" response to the changing environment after its entry into force. The smooth functioning of

UNCLOS for the last 3 decades could be attributed to these institutions, and it would be the same case for future challenges.

On the other hand, the progress of human activities has brought a series of whole new problems. For example, bunkering, or fueling at sea, fishing vessels within the EEZ of other States is a practice which was developed after the adoption of UNCLOS. UNCLOS did not give clear guidance as to whether such activities fall within the scope of the freedom of the high seas, or that of the coastal State's jurisdiction within the EEZ. In its judgment rendered in 2014 in the *M/V "Virginia G"* case, ITLOS gave an answer to this question. ITLOS expressed the view that the regulation by a coastal State of bunkering of foreign vessels fishing in its own EEZ, is among those measures which the coastal State may take in its own EEZ to conserve and manage its living resources under UNCLOS. ITLOS also noted that this view is confirmed by State practice which has developed after the adoption of UNCLOS.

If questions of a fundamentally new nature arise and they can hardly be resolved by interpretation and application of the provisions in UNCLOS, a complement to the Convention with new guidelines or agreements is expected. For example, today, such development is called for concerning the conservation and sustainable use of marine bio-diversity in areas beyond national jurisdiction. The subject is under intensive discussion at the Ad Hoc Open-ended Informal Working Group established by the UN General Assembly.

However, third-party dispute settlement procedures under Part XV of UNCLOS are still under-utilized, although we have seen some improvements in recent years. This is one of the major challenges for the rule of law over the seas and oceans, with UNCLOS at its center. Here I would like to recall that the so-called "Manila Declaration on the Peaceful Settlement of International Disputes (the UN General Assembly Resolution A/RES/37/10(1982))" provides in its Annex II, paragraph 5, that "Recourse to judicial settlement of legal disputes should not be considered an unfriendly act between States."

Upon these considerations, I would like to encourage all the States parties to a dispute brought before a court or tribunal under UNCLOS to appear and exercise their procedural rights in full, not only to defend their own interests, but also to make a contribution toward the integrity and the development of the law of the sea.

IV States of Asia and dispute settlement procedure

It is often said that, in Asian cultures, an adversarial third-party dispute settlement procedure, such as a trial, is preferred to be avoided. Leaving aside the credibility of such an observation, the records of international judicial and arbitral dispute settlement seem to prove that the number of cases involving States of the South and East Asia regions has been relatively limited until

recently, in comparison to other regions.

However, since the entry into force of UNCLOS in 1994, we do see some signs of an increase. Among 21 contentious cases brought before ITLOS to this day, Asian States were applicants in 2 cases and respondents in another 2 cases. Furthermore, in another 2 cases, both parties were Asian States. One of them is the Case concerning *delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal.* It was an important case for the development of the rule of law at sea in the sense that ITLOS rendered its first judgment over maritime delimitation since its establishment. In addition, in this case, for the first time in history, an international tribunal decided upon the delimitation of the continental shelf beyond 200nm. With regard to the arbitration cases, among 12 cases, Asian States were the respondent in one case, and in 3 cases were both applicants and respondents. We should also note that, during this period, 4 cases were brought before the ICJ in which both parties were Asian State, and one in which Japan was the respondent, while the subject-matters of those cases were not limited to the law of the sea.

This trend indicates that Asian States have become important and active clients of third-party dispute settlement procedures especially in the field of the law of the sea, implying how important the rule of law at sea is for States in Asia. It is a welcome trend for the international community that the Asian States, which have been relatively “under-represented” in the field of international law, are taking a larger part in their contributions, and I hope that this will continue.

V Conclusion

As a keynote speech for this symposium, I have briefly given an overview of the role that UNCLOS has played and its importance, with my answers to the question of whether UNCLOS is able to stand the new challenges of the next 30 years and beyond, touching upon the attitude of Asian States vis-à-vis the judicial and arbitral procedures for the settlement of maritime disputes. To conclude my speech, I would like to send my message to the researchers in the audience, especially to the budding scholars who are looking at a voyage to academic exploration in the law of the sea.

I sincerely hope that young researchers and practitioners of international law from both Japan and other States will make important contributions to the advancement of the rule of law over the seas and oceans of Asia in the future, eagerly expanding the caliber of their input by taking advantage of opportunities including this symposium.

ITLOS provides young experts of the law of the sea with the opportunities of an internship program, the ITLOS-Nippon Foundation capacity-building and training program on dispute settlement, and a summer academy sponsored by the International Foundation for the Law of the Sea. Taking this opportunity, I

would like to express my gratitude to the organizations supporting these programs and hope that such capacity-building of young experts to be further deployed.

I would like to appeal to young researchers and practitioners of the law of the sea: please develop your interest in the law of the sea, have active and vigorous discussions, and be the cornerstone for peace and stability of the seas and oceans of Asia.

I thank you.