CHAPTER 2

Reflections on Peaceful Maritime Engagement in East Asia and the Pacific Region

Shunji Yanai

Professor Nordquist, Professor Kraska, Ambassador Sasae, distinguished panelists, and participants, ladies and gentlemen, it is a distinct honor and pleasure for me to give opening remarks at the Conference on Oceans Law and Policy 2021. When the conference was postponed last year due to the COVID-19, I was hoping that it could be held this year as an in-person event. Unfortunately, the pandemic has continued to linger. In the meantime, however, all of us have been accustomed to attend conferences via the Zoom webinar format. And I know that many are participating remotely in this year's conference from all over the world.

Almost four decades have elapsed since the adoption of the United Nations Convention on the Law of the Sea (the Convention). The Convention put an end to legal disorder reigning in respect of the seas and oceans under the 1958 Geneva Conventions. At the third United Nations Conference on the Law of the Sea (UNCLOS III), States finally agreed on the breadth of the territorial sea and established new regimes such as the 200-nautical miles Exclusive Economic Zone (EEZ), straits used for international navigation, and archipelagic waters. They also redefined the continental shelf within and beyond 200 nautical miles.

Further, the Convention created an entirely new international maritime regime, that of the deep seabed, defining that the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (the Area), and its resources are the common heritage of mankind. For these decades, the Convention, which is often referred to as the "Constitution of the Sea," has been the mainstay in the efforts to maintain peace and the rule of law on the seas and oceans, and to encourage the sustainable development of marine resources for future generations.

As the Convention comprises complex provisions such as laws concerning the continental shelf, which are difficult to implement or may give rise to disputes between State Parties to the Convention, it sets up an institutional framework for interpreting and implementing its provisions. In addition to such existing institutions as the United Nations, the specialized agencies,

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and the International Court of Justice (ICJ), the Convention established 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). This is to ensure the proper interpretation or the smooth implementation of these complex provisions. Cooperation among State Parties and the support of these institutions are indispensable for preventing disputes over law-of-the-sea matters, peacefully settling any disputes that nevertheless arise, and establishing the rule of law over the seas and oceans.

The drafters and negotiators of the Convention were wise to devise this institutional framework which facilitates the Convention to address various issues, including new challenges. This is in addition to setting out laws in the Convention to govern a wide range of law-of-the-sea matters. All three institutions created by the Convention have worked hard to implement or interpret its complex provisions that are not always clear, as the Convention is a product of compromise among many States with different interests and backgrounds. ISA has adopted regulations on the exploration for and exploitation of mineral resources in the Area and has drawn up many formal plans of work. CLCS has examined many submissions from coastal States, concerning the continental shelf beyond 200 nautical miles and made recommendations on matters related to the establishment of the outer limits of their continental shelf. ITLOS, for its part, has dealt with twenty-seven contentious cases, including three maritime delimitation cases and two advisory opinions in the twenty-five years since it started its operation.

In connection with maritime delimitation disputes, the important contribution by the ICJ should be underlined. As is well known, the Convention only provides that the delimitation of the EEZ and the continental shelf respectively shall be effected by agreement on the basis of international law in order to achieve an equitable solution. However, the Convention does not offer any criteria for the delimitation nor does it specify the method to be applied for achieving an equitable solution. The ICJ devised a three-stage method of delimitation, which has come to be known as the "equidistance/relevant circumstances method." ITLOS has applied this method in the past delimitation cases on the merits.

Although long and thorough negotiations were conducted on a wide range of maritime issues at UNCLOS III, new challenges have arisen through the law of the sea after the adoption of the Convention. These include some issues that States were not aware of or were not fully discussed. For example, States did not discuss at UNCLOS III, the question of the right of a flag State with respect to a container ship having multinational composition of its crew and multiplicity of interests that may be involved in the cargo on board a single ship. Also, in

shipping, bunkering by foreign tankers to foreign fishing vessels in the EEZ of a coastal State is a shipping business that developed after the adoption of the Convention. Regarding the right of a flag State with respect to a container ship, ITLOS ruled in the M/V "SAIGA" (No.2) Case that the flag State has the right to protect the vessel flying its flag irrespective of the nationalities of the persons involved in the shipping operations concerned. ITLOS stated in its judgment that the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. This has come to be known as a "ship-as-a-unit principle." With respect to bunkering in the EEZ, there is no explicit provision in the Convention as this is a business practice that developed only after the adoption of the Convention. However, in the M/V "Virginia G" Case, ITLOS ruled that the regulation by a coastal State of bunkering of foreign vessels fishing in its EEZ is among those measures which the coastal State may take in its EEZ to conserve and manage its living resources under the Convention.

The Convention codified the customary rules of international law regarding piracy on the high seas. However, different types of piracy and armed robbery occurred frequently in the EEZ and the territorial sea of certain countries in Asia and Africa after the adoption of the Convention. This is another challenge to the law of the Sea.

Further, the Convention covers only mineral resources in the area, and living resources on the deep seabed beyond national jurisdiction were not a subject of the negotiations at UNCLOS III. As we all know, active negotiations are being conducted in the United Nations with a view to adopting a new legal instrument on the biological diversity beyond national jurisdiction under the Convention. In addition, the impact of climate change on the law of the sea is another new challenge that was not aware of at UNCLOS III.

As mentioned above, the right of a flag State to protect the vessel flying its flag and bunkering in the EEZ are the issues that fall within the scope of the interpretation or application of the Convention even though it has no explicit provisions on these matters. On the other hand, other kinds of challenges have arisen and may arise in the future, which cannot be resolved only through the interpretation or application of the provisions of the Convention as they now stand. The Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ) is a typical case of this kind of challenges which is not covered by the Convention even implicitly, and therefore requires new international legislation.

It is gratifying to note that together with traditional issues, new challenges to the law of the sea are included in the agenda of the 2021 Conference on Oceans Law and Policy, such as the impact of climate change, including sea level rise and Arctic shipping, combat against maritime crimes, and the preservation

of the marine environment, including the hazard of plastic debris. I earnestly hope that panelists and participants will have fruitful discussion at this conference and come up with useful proposals.

I cannot close my remarks without expressing my serious concern about attempts in East Asia to change the maritime legal order in violation of international law, including, in particular, the law of the sea.