

“United Nations Convention on the Law of the Sea at 30”

International Conference
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Rule of Law over the Seas and Oceans

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It is a great honor and privilege for me to have been invited to participate as a speaker in the international conference on the theme “United Nations Convention on the Law of the Sea at 30” held at Yeosu in connection with the World Exposition “The Living Ocean and Coast”. On behalf of the International Tribunal for the Law of the Sea (“ITLOS”), I thank the United Nations, the Ministry of Foreign Affairs and Trade of the Republic of Korea and the Korea Maritime Institute for sponsoring this important and timely conference to celebrate the thirtieth anniversary of the opening for signature of the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”).

The role of the sea has never been as important as it is today in all fields of human activities including fishing, exploitation of mineral resources, transportation, energy production and environmental protection. It is therefore vital to maintain peace and order on the seas and to encourage the sustainable development of marine resources for the future of mankind. For the past thirty years UNCLOS, which is often referred to as the “Constitution of the Sea”, has been the mainstay in the efforts to achieve these objectives.

The 1958 Geneva Conventions on the Law of the Sea codified the customary international law of the sea to a certain extent and also established the regime of the continental shelf and the contiguous zone. States however were unable to agree on the breadth of the territorial sea under the Convention on the Territorial Sea of 1958 and at the Second United Nations Conference on the Law of the Sea in 1960. Given this lack of agreement on the breadth of the territorial sea, a number of coastal States claimed territorial seas extending to 6 nautical miles (“nm”), 12 nm or even more, while others maintained the traditional 3 nm limit. This gave rise to disputes, including, for instance, when a coastal State claiming a 12 nm territorial sea arrested, in waters between 3 and 12 nm off its coast, fishing vessels of a State maintaining the 3 nm territorial sea. The Convention on the Continental Shelf of 1958 left room for differing interpretations in respect of the outer limits of the shelf, which were determined by reference to the depth of 200 meters or, beyond that point, to the exploitability of the seabed resources. These provisions also engendered disputes among States concerning the extent of coastal States’ national jurisdiction over the continental shelf. The legal disorder of the sea was even aggravated by the unilateral establishment by major maritime States in the seventies of fishery zones or exclusive economic zones extending to 200 nm before conclusion of the Third United Nations Conference on the Law of the Sea.

UNCLOS put an end to the legal disorder reigning in respect of the sea. In addition to the existing maritime zones under national jurisdiction, UNCLOS established new regimes such as those for straits used for international navigation, archipelagic waters and the exclusive economic zone, and redefined the continental shelf within and beyond 200 nm. Further, it created an entirely new international maritime regime, that of the deep seabed Area beyond national jurisdiction, which is the common heritage of mankind. As these complex provisions may give rise to disputes between States Parties to it, UNCLOS set up an institutional framework for implementing its provisions. In addition to such existing institutions as the United Nations, the Specialized Agencies and the International Court of

Justice (“ICJ”), UNCLOS established the Commission on the Limits of the Continental Shelf (“Commission”), the International Seabed Authority (“Authority”) and ITLOS to ensure the proper interpretation and smooth implementation of its complex provisions. Although UNCLOS and its related documents contain hundreds of detailed provisions, it is fair to say that they still leave room for differing manners of interpretation and implementation. Thus, we must still look to the cumulative State practice, and the functions of the above-mentioned international institutions in order to clarify the meaning of these provisions and ensure their smooth implementation. In other words, cooperation among States Parties and the support of these institutions are indispensable for preventing disputes over law of the sea matters, peacefully settling any that nevertheless arise, and establishing the rule of law over the seas and oceans.

UNCLOS established an innovative, complex yet flexible system of dispute settlement to ensure the proper interpretation and efficient application of its provisions based on a delicate balancing of divergent interests of nations. Part XV of UNCLOS gives States the choice of one or more compulsory procedures leading to binding decisions; these procedural settings include ITLOS, ICJ and arbitration. ITLOS, a new judicial institution specialized in law of the sea matters, was established by UNCLOS as a key element of its dispute settlement system. When this system was introduced by UNCLOS, there were fears and criticism expressed that such a system would cause the fragmentation of jurisprudence on law of the sea matters. Those fears and criticism subsist. ITLOS, ICJ and arbitral tribunals have dealt with a significant number of disputes over law of the sea matters since UNCLOS entered into force, but it would appear that judges and arbitrators carefully study the judgments and arbitral awards handed down in similar cases by other courts or tribunals and the feared “fragmentation” has not occurred. In my view, the flexible dispute settlement system of UNCLOS facilitates the referral by States Parties of their disputes to the compulsory procedures leading to binding decisions of their choice, and thus encourages the peaceful settlement of disputes over law of the sea matters.

Nineteen cases have been filed with ITLOS since it began operation in 1996. These include cases involving prompt release of fishing vessels and crews, provisional measures for preventing serious harm to the marine environment and cases on the merits. In the early years of ITLOS, most cases fell under the heading of urgent procedures, with nine prompt release cases and six provisional measures proceedings. Two of these provisional measures cases were related to cases on the merits which had been submitted to ITLOS, while four others involved measures prescribed pending the constitution of arbitral tribunals to which the cases on the merits concerned were being submitted. Among the nineteen cases, there are five cases on the merits including those on compensation for the damage sustained by arrested vessels and a case on the delimitation of a maritime boundary and one advisory opinion. Cases brought to ITLOS in recent years have been increasing not only in number but in variety. The most recent decisions which ITLOS has pronounced were the advisory opinion given by its Seabed Disputes Chamber (“Chamber”) on 1 February 2011 and the judgment on the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal delivered by ITLOS on 14 March 2012.

In 2010 the Council of the Authority requested the Chamber to render an advisory opinion on several questions regarding the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area in accordance with UNCLOS and the 1994 Agreement relating to the implementation of Part XI of UNCLOS. Fourteen States Parties to UNCLOS, the Authority and four other international organizations expressed their views by way of written and oral statements. The Chamber, after having examined these views, delivered its advisory opinion in a little less than nine months after the request had been submitted. In its opinion, the Chamber explained the nature and extent of the responsibilities and obligations of a sponsoring State and gave guidance as to the necessary and appropriate measures which a sponsoring State must take. The Chamber further recommended that the best available environmental protection measures and

precautionary approach be taken into account in the Authority's regulations on the exploration of seabed mineral resources. The Authority welcomed the advisory opinion and its Legal and Technical Committee recommended to the Authority to take follow-on actions in line with the opinion.

Now I would like to touch upon the "Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal". This case, which was submitted to ITLOS on 14 December 2009, is the first delimitation case to have come before it. By the judgment rendered on 14 March 2012, ITLOS delimited the territorial sea, the exclusive economic zone and the continental shelf within 200 nm, as well as the continental shelf beyond 200 nm, between Bangladesh and Myanmar. With regard to the continental shelf beyond 200 nm, it should be pointed out that the Commission has decided, in light of the dispute between Myanmar and Bangladesh over the continental shelf, to defer consideration of the two States' respective submissions on the limits of the continental shelf beyond 200 nm. If the Tribunal had declined to delimit the continental shelf beyond 200 nm, the resolution of the issue concerning the establishment of the outer limits of the continental shelf of these States might have remained in an impasse. ITLOS concluded: "[I]n order to fulfill its responsibilities under [...] the Convention in the present case, it has an obligation to adjudicate the dispute and to delimit the continental shelf between the Parties beyond 200 nm. Such delimitation is without prejudice to the establishment of the outer limits of the continental shelf in accordance with article 76, paragraph 8, of the Convention". This is the first judgment of an international court or tribunal delimiting the continental shelf beyond 200 nm. It is noteworthy that the decision in the case was delivered little more than two years after the proceedings were instituted, which is quite a short period for a complex delimitation case, and one on which Bangladesh and Myanmar had negotiated for more than 36 years without reaching agreement. It is gratifying to note that both Bangladesh and Myanmar welcomed the judgment as a fair, equitable and expeditious one.

As mentioned above, UNCLOS established the Commission, the Authority and ITLOS to ensure the smooth implementation of its complex provisions. These three institutions under UNCLOS have different functions. The Commission consists of 21 experts in the field of geology, geophysics or hydrography and is entrusted with the task of examining the information submitted by coastal States on the limits of their continental shelf beyond 200 nm and of making recommendations to the coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the continental shelf established by coastal States on the basis of these recommendations are final and binding. The Authority is another institution created by UNCLOS: it has the task of managing the activities of exploration for, and exploitation of the mineral resources of the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction which is defined as the “Area”. UNCLOS provides that “[t]he Area and its resources are the common heritage of mankind” and that “[a]ll rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part (XI) and the rules, regulations and procedures of the Authority. [...]”. ITLOS is the judicial institution established under UNCLOS and specializes in law of the sea matters.

Through their respective functions which are complementary to each other, these three institutions ensure the coherent and efficient implementation of the provisions of UNCLOS. In this connection, ITLOS, through its Chamber and the advisory opinion on the question, facilitated the work of the Authority by clarifying the meaning and extent of the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area. In the case concerning delimitation of the maritime boundary between Bangladesh and Myanmar, ITLOS removed the obstacle to the work of the Commission by delimiting the boundary of the continental shelf beyond 200 nm between the two countries. It is gratifying to note that through its judicial work in these two cases ITLOS was able to contribute to the proper interpretation and the

efficient implementation of provisions of UNCLOS at the very time when the thirtieth anniversary of the opening for signature of UNCLOS is being celebrated.

While cases before ITLOS have increased in number and become more diversified, its potential has yet to be fully realized. To cite just a few examples: ITLOS stands ready to deal efficiently with more delimitation cases and ITLOS and its Chamber can render additional useful advisory opinions in the future. The procedure for the prompt release of vessels can be used in cases of marine pollution as well as in those involving fishing vessels. Many are the further contributions ITLOS can make to strengthening the rule of law over the seas and oceans.