**2012 Yeosu International Conference**
**Commemorating the 30th Anniversary of the Opening for Signature of the United Nations Convention on the Law of the Sea**

**12 August 2012, Yeosu EXPO, Republic of Korea**

## Session I I
## Asia and UNCLOS: Progress, Practice and Problems

by
Tommy Koh (Singapore)
President of UNCLOS

I wish to begin by highlighting the progress which Asian States have made in ratifying or acceding to the Convention. Of the countries which belong to the Asian Group at the United Nations, only four, Cambodia, Iran, North Korea and Timor Leste, have not yet ratified the Convention. I am not sure why they have not done so. The overall picture in Asia is, therefore, a very positive one. The Convention enjoys the near universal support of Asian States. This is important because the Convention is the basic law governing maritime disputes between and among the countries in Asia.

Another development which I would highlight under "progress" is the settlement of disputes under the Convention. Indonesia and Malaysia referred their dispute over two islands, Sipadan and Ligitan, to the International Court of Justice (ICJ). Malaysia and Singapore referred their disputes over Pedra Branca, Middle Rocks and South Ledge, to the ICJ. Malaysia referred a dispute with Singapore to arbitration, under Annex VII of the Convention and, subsequently, applied to the International Tribunal for the Law of the Sea (ITLOS) for provisional measures.

Bangladesh and Myanmar referred their disputes over the delimitation of their territorial seas, exclusive economic zones and the continental shelf boundaries to ITLOS. Bangladesh and India have referred a similar dispute to arbitration under Annex VII of the

Convention. I observe that the countries of South Asia and Southeast Asia have a good track record of referring their disputes to arbitration and adjudication. In contrast, the countries of Northeast Asia have not shown a willingness to do the same. Is there a historical or cultural explanation for this regional difference?

Next, I wish to focus on some aspects of State practice in Asia which are troublesome and, arguably, not consistent with the Convention. First, I refer to baselines. I have come across cases in which States have drawn straight baselines when, according to my reading of the Convention, they are not entitled to do so. Second, I am disturbed by the actions of several coastal States to assert sovereignty in their exclusive economic zones when the Convention only confers on them sovereign rights to the living and non-living resources within the said zone. Coastal States do not have sovereignty to the waters within the exclusive economic zone. This distinction is legally significant and should not be blurred.

Third, there is also a tendency by some coastal States to assert rights to regulate activities in their exclusive economic zones which are highly contentious and, arguably, not authorised by the Convention. Restrictions imposed by some coastal States on the conduct of military activities in their exclusive economic zone are one such example. Fourth, the actions taken by two States, Australia and Papua New Guinea, with respect to the Torres Strait is a matter of concern. They have unilaterally imposed compulsory pilotage on all ships transiting the said Strait. I have argued at length elsewhere, that the unilateral imposition of compulsory pilotage on ships going through a strait used for international navigation is not consistent with the provisions of the Convention on the regime of transit passage. Fifth, another troublesome aspect of State practice in Asia is the tendency by States to make excessive maritime claims from insular features then what is provided for in the Convention.

I will now refer to some of the current problems in Asia relating to the law of the sea and UNCLOS. There is a long-standing but dormant dispute between Japan and Russia over the Kurile Islands, aka the Northern Territories. There is a dispute between Japan and the Republic of Korea over the Dokdo/Takeshima Islands. There is

also a dispute between Japan and China over the Senkaku/Diaoyu. Following the decision of the ICJ in the Sipadan and Ligitan case, Indonesia and Malaysia have not yet concluded their negotiations on their maritime boundaries in this sector. Similarly, Malaysia and Singapore have not yet concluded their negotiations on their maritime boundaries in the vicinity of Pedra Branca, Middle Rocks and South Ledge.

Perhaps the most serious and urgent of the maritime disputes are in the South China Sea. I would like to disaggregate the disputes in the following manner. First, there is a sovereignty dispute between China and Vietnam over the Paracel Islands. Second, there is a sovereignty dispute between China and Vietnam over the Spratly Islands. China and Vietnam are the only two countries which claim sovereignty to all the Paracel and Spratly Islands. Third, there is a dispute between China and the Philippines over the Spratly Islands and the Scarborough Shoal. The Philippines claims 53 of the features in the Spratly Islands.

Fourth, there is a dispute between Malaysia and Vietnam, on the one hand, and China, on the other, over a joint submission by the two former countries to the UN Commission on the Limits of the Continental Shelf (2009), claiming that much of the continental shelf in the South China Sea lie within their respective exclusive economic zones and continental shelves.

Fifth, there is a dispute between China and Vietnam over fishing rights in the South China Sea. Sixth, there is a lack of clarity on the specific nature of China's claims and, especially, on the meaning of the Chinese map with the nine dashed lines. The map was submitted by China to the UN Commission on the Limits of the Continental Shelf, in 2009, together with a note rejecting the joint submission by Malaysia and Vietnam. Is China only claiming sovereignty to the rocks, islands and other maritime features enclosed by the lines, or is China also claiming to have rights to the waters enclosed by the lines? The lines enclose 80 per cent of the South China Sea. There is a state of policy incoherence in Beijing, with the Chinese Ministry of Foreign Affairs taking one position and other ministries and agencies, such as fisheries and petroleum, taking

different positions. The International Crisis Group has attributed this state of affairs to the fact that there are 11 ministerial-level authorities and five law enforcement agencies involved in the South China Sea.

It is not my intention to discuss each of these six issues. What I propose to do instead is to describe the state of play between ASEAN and China on the South China Sea. I will begin from the recent meetings of the ASEAN Foreign Ministers in Phnom Penh, under the chairmanship of Cambodia. For the first time in 45 years, the annual ASEAN Ministerial Meeting ended without adopting a joint communiqué. The reason for the failure was due to disagreement among ASEAN members on how to reflect the South China Sea in the joint communiqué. The Philippines wanted a reference to the Scarborough Shoal. Vietnam wanted a reference to respecting the exclusive economic zones and continental shelves of coastal States. The chairman, Cambodia, let the group down by advocating China's cause instead of focusing on its responsibility to forge a consensus. The failure of ASEAN to adopt a joint communiqué has seriously dented its credibility.

In order to control the damage, the Indonesian Foreign Minister, Marty Natalegawa, embarked on a shuttle diplomacy and succeeded in negotiating the text of a statement of ASEAN Foreign Ministers, on ASEAN's six principles on the South China Sea (Annex). The statement was issued on the 20th of July 2012.

Where do we go from here? The current situation is potentially dangerous. Nationalism is rising in China, the Philippines and Vietnam. This will constrain the freedom of action of their respective governments. This is also a sensitive year for China and the United States. China will witness a transition of leadership later this year. The United States will hold its Presidential elections in November. Neither country can afford to look weak in this period. Hence, we cannot expect any concessions from China. Nor can the United States allow its ally, the Philippines, to be intimidated by China. It would be desirable for Beijing and Washington to agree to de-escalate the tensions in the South China Sea. All claimant States should refrain from taking unilateral actions which are provocative and not in line with the Convention. It would also be in China's interest to agree to start

negotiations with ASEAN on the regional code of conduct in the South China Sea, as a gesture of its goodwill. After contributing to the setback in Phnom Penh, it is time for China to repair its relations with ASEAN and to reassure ASEAN that it is not China's policy to divide and weaken ASEAN.

. . . . .

[as at 27 Jul 12]

# *STATEMENT of ASEAN Foreign Ministers*
## *on ASEAN's Six-Point Principles on the South China Sea*

*ASEAN Foreign Ministers reiterate and reaffirm the commitment of ASEAN Member States to:*

1. *the full implementation of the Declaration on the Conduct of Parties in the South China Sea (2002);*
2. *the Guidelines for the Implementation of the Declaration on the Conduct of Parties in the South China Sea (2011);*
3. *the early conclusion of a Regional Code of Conduct in the South China Sea;*
4. *the full respect of the universally recognized principles of International Law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS);*
5. *the continued exercise of self-restraint and non-use of force by all parties; and*
6. *the peaceful resolution of disputes, in accordance with universally recognized principles of International Law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS).*

*The ASEAN Foreign Ministers resolve to intensify ASEAN consultations in the advancement of the above principles, consistent with the Treaty of Amity and Cooperation in Southeast Asia (1976) and the ASEAN Charter (2008).*

---