International Conference

Resolving the Complex Challenges of Ocean Governance and Security for Secure and Sustainable Oceans in the Southeast Asian Region

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KEYNOTE ADDRESS

UNCLOS: The Foundation for a Rules-Based Order for Securing and Managing the Oceans

Robert Beckman

Center for International Law

National University of Singapore

History of UNCLOS

1. The impetus for the decision by the United Nations to negotiate a comprehensive legal regime to govern the oceans was a speech in November 1967 in the United Nations General Assembly by Ambassador Arvid Pardo of Malta. In his speech he called for the natural resources of the deep seabed to be declared the common heritage of mankind. In that same year the UN General Assembly established an Ad Hoc Committee to Study the Peaceful Uses of the Seabed and Ocean Floor beyond the Limits of National Jurisdiction.

2. In 1970 the UN General Assembly called for the Seabed Committee to act as a Preparatory Committee for a future conference on the law of the sea, and in late 1970 the Third UN Conference on the Law of the Sea was convened.

3. In addition to a new regime to govern the mineral resources of the deep seabed, several other highly contentious issues had to be addressed. First, how far would coastal States be permitted to extend their sovereignty over the waters and seabed adjacent to their coasts? At the first UN Conference on the Law of the Sea in the mid-1950s States had agreed on the rules governing the territorial sea, but they were unable to agree on the breadth of the territorial sea. The maritime powers insisted that the breadth be 3 nautical miles (nm) so that there would be a belt of high seas through most navigational choke points. Others, however, wanted a breadth of 6 or 12 nm, and some even proposed 200 nm. Second, there were calls by major archipelagic States like Indonesia and the Philippines to extend their sovereignty to the waters within their archipelago. Third, the regime governing fisheries that had been agreed to in 1958 had not been generally accepted, and many coastal states were calling for a new regime giving them exclusive rights to the fisheries resources up to 200 nm from their coasts. In addition, although there was agreement that coastal states had sovereign rights to explore and exploit natural resources on their continental shelf, it was necessary to more clearly define the outer limit of the continental shelf of coastal States.

4. Negotiations to address these issues and all other issues relating to uses of the oceans began in 1973 and continued for nine years. The ambitious goal was to establish a universally accepted legal regime governing all ocean uses that would withstand the test of time.

5. There were many reasons why the negotiations were successful, but in my view two were critically important. First, it was agreed at the outset that votes would not be taken on particular draft provisions, but that the States would work on the basis of consensus during the negotiations. Second, it was agreed that all of the issues would be addressed in a single document that would be negotiated as a "package deal". States would be required to accept or reject the entire package, and no reservations would be permitted. The package included not only the provisions giving States rights and jurisdiction, but also obligations to protect and preserve the marine environment and a system of compulsory dispute settlement. Therefore, States would not be able to accept some provisions and reject others. They would have to accept the entire package.

6. After nine years of negotiations, the Conference managed to reach a consensus on all of the issues except deep sea mining. However, in April, 1982, the Conference decided that all efforts to reach a consensus had been exhausted, and a decision was made to take a vote to adopt the whole of the package in the draft convention. The vote passed with a vote of 130 in favour, 4 against and 17 abstentions.

7. The final meetings of the Conference were held in Montego Bay, Jamaica in December, and the United Nations Convention on the Law of the Sea (UNCLOS) was adopted on 10 December 1982. The Convention was opened for signature on that same day, and 117 States signed the Convention to demonstrate their support. The United States refused to sign the Convention because the Reagan Administration, which came to power in 1980, was not happy with the provisions in Part XI on deep sea mining. Several Western industrialized countries supported the United States, and also refused to sign the Convention.

8. The 1982 Convention was a remarkable achievement. It reflected a consensus in the international community on a legal regime to govern the oceans on all issues except one – the regime governing the exploration and exploitation of deep sea resources in Part IX of the Convention.

9. The Convention provided that it would enter into force one year after ratification by the 60th State. In the early 1990s it appeared that UNCLOS would enter into force without ratification by any of the major industrialized countries, and that the objective of creating a universally accepted convention would not be achieved. The UN Secretary-General then convened a series of discussions to try to bridge the gap between the third world countries and the major industrialized countries on the deep sea mining provisions in Part XI. As a result, a consensus was reached to amend the deep sea mining provisions through an "Implementation Agreement" on Part XI. The Implementation Agreement was adopted in 1994, and this paved the way for a universally accepted agreement. UNCLOS then entered into force on 16 November 1994.

10. Even though the 1994 Implementation Agreement contained all the changes demanded by the United States on deep sea mining, the US Senate has failed to give the approval necessary under the US Constitution for the US to ratify the Convention. Nevertheless, the United States considers itself bound by most provisions in the Convention as customary international law, and in practice it follows the provisions in UNCLOS more closely than most States that are parties.

11. In the early 1990s it was recognized that the provisions on fisheries in UNCLOS were not sufficient to manage fisheries resources in sustainable manner. Consequently, in 1995, the United Nations adopted a second implementing agreement concerning the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

12. UNCLOS has become universally accepted. As of 23 August 2016, there are 168 parties, including the European Union. All of the coastal States in East Asia and Southeast Asia are parties except Cambodia and DPR Korea.

13. Discussions are currently under way at the United Nations to draft a new implementation agreement on the conservation and sustainable use of areas beyond national jurisdiction. However, it has been agreed that any new implementation agreement on this topic will need to respect, and be consistent with, UNCLOS and the two existing implementation agreements.

Key Provisions in UNCLOS

14. I will now highlight what I believe are the most important provisions in the "package deal" set out in UNCLOS.

15. First, UNCLOS resolved the difficult issue of how much ocean space is subject to the sovereignty of coastal States. Coastal States have sovereignty over the waters in their territorial sea, which extends to 12 nm from baselines along their coast.

16. In addition, a new legal regime was created for archipelagic States. UNCLOS provides that "archipelagic States" such as Indonesia and the Philippines can draw archipelagic baselines connecting the outermost parts of their outermost islands and reefs. The waters inside the baselines are archipelagic waters subject to the sovereignty of the archipelagic State, and the territorial sea and other maritime zones are measured from the archipelagic baselines.

17. At the same time, the sovereignty of coastal States in the territorial sea and archipelagic waters is limited in order to protect the interests of the maritime powers and user States. Carefully negotiated compromises ensure that foreign ships, including warships, have a right of innocent passage through the territorial sea. Also, UNCLOS contains two new regimes to ensure that all States have the rights of overflight and navigation through major chokepoints for international navigation. The two regimes are "transit passage" through straits used for international navigation and "archipelagic sea lanes passage" through archipelagic waters. These passage regimes include overflight as well as navigation, and they cannot be suspended. In addition, submarines may navigate submerged.

Maritime Zones Governing Natural Resources

18. The second major accomplishment of UNCLOS is that it resolved the issue of how to allocate the rights to explore and exploit the natural resources in and under the waters outside the 12 nm territorial sea. It did this by establishing a new maritime zone called the Exclusive Economic Zone (EEZ). The EEZ regime gives coastal States the sovereign right to explore and exploit all the fisheries resources out to 200 nautical miles (nm) from the baselines along its coasts, with a corresponding duty to conserve and manage its fisheries resources. The fisheries resources beyond the 200 nm EEZ continue to be governed by the high seas regime and by the 1995 Implementation Agreement.

19. UNCLOS also contains a new definition for the Continental Shelf which in effect provides that coastal States have the sovereign right to explore and exploit the natural resources of the seabed and subsoil off their coasts to a minimum of 200 nm, and in the case of broad-shelf States, to the outer edge of the continental margin, where the deep sea bed begins. This definition in effect allocates all of the oil and gas resources on the continental shelf to coastal States.

20. Although UNCLOS in effect allocated most the natural resources of the oceans to coastal States, the dream of Ambassador Pardo of Malta was not completely forgotten in the negotiations. UNCLOS provides that the seabed and subsoil beyond national jurisdiction (i.e., beyond the outer limit of the continental shelf of any State) and its mineral resources are the "common heritage of mankind". UNCLOS established a new institution – the International Seabed Authority - to manage the mineral resources of the deep seabed as the common heritage of mankind.

Preservation of Freedoms of the High Seas in the EEZ

21. The EEZ regime was a major compromise which balanced the interests of coastal States in the natural resources, and the interests of user States in preserving high seas freedoms in the areas outside the territorial sovereignty of coastal States. UNCLOS provides that in the 200 nm EEZ, the sovereign rights of coastal States are, as the name of the zone suggests, limited to

"economic matters". The jurisdiction of coastal States in the EEZ is limited to jurisdiction over economic matters, artificial islands, marine scientific research and the protection of the marine environment. In all other respects, the principles governing the high seas rules apply in the EEZ, including the rules on jurisdiction over ships on the high seas. UNCLOS provides that all States enjoy the traditional freedoms of the high seas in the EEZ of other States, including freedom of navigation, freedom of overflight, the freedom to lay submarine cables and pipelines, and all other internationally lawful uses of the sea related to these freedoms. It is generally agreed that this includes the right of States to conduct military activities in the EEZ of other States, provided they give "due regard" to the rights of the coastal State to explore and exploit the natural resources in its EEZ.

Dispute Settlement Regime in UNCLOS

22. A critical component of the "package deal" in UNCLOS is the dispute settlement regime set out in Part XV. The negotiators at the Third Conference anticipated that disputes would arise between States Parties on the interpretation and application of provisions in the Convention that set out carefully negotiated compromises. In fact, in order to reach a consensus on some sensitive issues the negotiators agreed to some provisions that were deliberately ambiguous. Therefore, the negotiators agreed that UNCLOS would not be successful in the long run unless it contained a compulsory system for resolving disputes between States Parties on the interpretation or application of its provisions.

23. UNCLOS contains the most elaborate and complex dispute settlement regime contained in any international treaty. The key element in the dispute settlement regime is that States Parties consent in advance to a system of compulsory procedures that will result in a legally binding decision by an international court or arbitral tribunal. The general rule in the UNCLOS dispute settlement regime is that if a dispute arises between two States parties on the interpretation or application of any provision of the Convention, and that dispute cannot be resolved by negotiation, either party to the dispute may unilaterally institute proceedings to have the dispute

resolved by an international court or arbitral tribunal. The consent of the other party to this procedure for a particular dispute is not required because they gave their consent to these procedures when they became a party to the Convention.

24. UNCLOS permits States Parties to "opt out" of the compulsory procedures entailing binding decisions for certain categories of disputes that are highly sensitive by making a formal declaration to the UN Secretary-General. States Parties may opt out the compulsory procedures for disputes on the interpretation or application of the provisions on maritime boundary delimitation, disputes involving historic bays or titles, and disputes concerning military activities. Several States have made declarations excluding these categories of disputes from the compulsory procedures on the settlement of disputes, including China, Korea and Thailand.

25. Several States in Asia have resorted to the compulsory dispute settlement procedures in UNCLOS. First, Malaysia instituted proceedings against Singapore in the dispute concerning Singapore's land reclamation activities in the Johor Strait. Second, Bangladesh instituted proceedings against both India and Myanmar with respect to long-standing disputes on the delimitation of maritime boundaries in the Bay of Bengal. Third, Japan instituted proceedings against Russia on the prompt release of its vessels in the "Hoshimaru" and "Tomimaru" cases. Fourth, the Philippines instituted proceedings in 2013 against China with regard to China's actions in the South China Sea. Most recently, Timor Leste invoked the procedures in UNCLOS against Australia in an attempt to bring their maritime boundary dispute to "compulsory non-binding conciliation" as provided in Article 298 of UNCLOS.

26. Cases have also been instituted against States in the Asian region. Australia and New Zealand instituted proceedings against Japan in the "Southern Bluefin Tuna" cases. In addition, Italy instituted proceedings against India in a case concerning the "Enrica Lexie" incident that is currently before the International Tribunal for the Law of the Sea (ITLOS).

27. It should be noted that the compulsory dispute settlement procedures in UNCLOS are only applicable to disputes on the interpretation or application

of provisions in UNCLOS. There are no provisions in UNCLOS on how to determine which State has the better claim to sovereignty over disputed offshore islands. Therefore, the dispute settlement regime in UNCLOS cannot be invoked to resolve the dispute about who has the better claim to sovereignty over the disputed islands in the South China Sea or East China Sea.

The Philippines v China Case

28. In recent months the spotlight has been put on the dispute settlement regime in UNCLOS because of the case instituted by the Philippines against China in 2013. China refused to participate in the case, but the arbitration proceeded in its absence as provided in UNCLOS. The decision of the Tribunal on the merits of the case was given on 12 July 2016.

29. The Philippines v China case highlights several points about the dispute settlement system in UNCLOS. But first let me correct one common misunderstanding about the case. The case was not heard the Permanent Court of Arbitration (PCA) in The Hague. Nor was it heard by the International Tribunal for the Law of the Sea (ITLOS) in Hamburg. It is not correct to refer to the case as a "PCA Arbitration". The case was heard by an Arbitral Tribunal established under Annex VII of UNCLOS. The Permanent Court of Arbitration at The Hague (which is not actually a Court) is simply providing secretariat services to the Annex VII Arbitral Tribunal at the Tribunal's request. Information about the case is found on the website of the PCA because it is providing secretariat services to the Tribunal.

30. I will now make a few points about the case. First, the Philippines invoked the procedures in UNCLOS to bring China to arbitration on several disputes concerning the interpretation or application of UNCLOS. China's consent to participate in this particular arbitration was not required. This is because China, like all other parties to UNCLOS, consented to the compulsory dispute settlement procedures in UNCLOS when it ratified the Convention. If China believed that the Tribunal lacked jurisdiction over some or all of the disputes raised by the Philippines, China had the right to challenge the jurisdiction of the Tribunal. However, it is clear under UNCLOS that the decision on whether

the Tribunal has jurisdiction in the case is made by the Tribunal, not by the State objecting to its jurisdiction. This is a common principle in international arbitration known as "competence de la competence".

31. Second, the Award of the Arbitral Tribunal is final and binding on the two parties to the dispute, the Philippines and China. However, there is no mechanism by which the Tribunal can enforce its decision. The dispute settlement system in UNCLOS, as in other international treaties, assumes that because States have agreed to the Convention and its dispute settlement provisions, they will comply in good faith with decisions of courts or tribunals rendered in accordance with the provisions in the Convention.

32. In its Award the Arbitral Tribunal gave rulings on several legal issues that are very significant for all parties to UNCLOS.

33. First, it confirmed that under UNCLOS a coastal State has sovereign rights to explore and exploit the natural resources in its EEZ, and that the sovereign rights of the coastal State in its EEZ are not compatible with "historic rights" claimed by other States. In other words, UNCLOS provides that the coastal State has sovereign rights to all the fisheries resources in their 200 nm EEZ, notwithstanding the fact that some of the areas in its EEZ may have been the historic fishing grounds of other States, and notwithstanding the fact that prior to UNCLOS entering into force, other States may have fished in those waters because they were governed by the principle of freedom of fishing on the high seas.

34. Second, the Tribunal in this case was the first international court or tribunal to interpret and apply the language in Article 121(3) of UNCLOS, which provides that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." The Tribunal ruled that none of the disputed islands in the Spratlys, including the largest, Itu Aba or Taiping, are islands entitled to an EEZ and continental shelf of their own. The Tribunal held that all of the largest islands in the Spratlys are "rocks" entitled to no more than a 12 nm territorial sea. The result of this ruling is that there are no areas of overlapping EEZ claims between the coasts of the bordering States and the disputed islands. This greatly reduces the

significance of the disputed islands in the allocation of resources, as it means that most of the hydrocarbon and fisheries resources in the South China Sea are within the EEZ of the bordering coastal States.

35. The Tribunal set quite a high bar for an island to be entitled to an EEZ and continental shelf of its own. The Tribunal concluded that for an island to be entitled to an EEZ and continental shelf of its own, the island must, in its natural condition, be able to sustain either a stable community of people or economic activity that is not dependent on outside resources and is not purely extractive in nature. This criteria means that many small uninhabited islands in this region will only be entitled to a 12 nm territorial sea. This has implications for many parties to UNCLOS. If States Parties to UNCLOS respect the decision of an Annex VII Arbitral Tribunal as an authoritative interpretation of UNCLOS, they should review their own national practice and bring their own claims from small offshore islands into conformity with the decision of the Tribunal.

Conclusion on the Future of UNCLOS

36. In conclusion, allow me to say a few words on the future of UNCLOS. In my view, UNCLOS establishes a legal order for the oceans that has not only withstood the test of time, but is increasingly important. All States, whether or not they are parties to the Convention, have a vital stake in ensuring that activities in the oceans are governed by the legal rules set out in UNCLOS, and not by power. States Parties to UNCLOS have an additional interest in ensuring that the regime they established continues to be respected and followed.

37. The legal regime in UNCLOS ensures that all States, including the maritime powers, enjoy high seas freedoms in and above the waters of the South China Sea outside the territorial sea of any State, and that the sea lanes of communication through the South China Sea remain open to all States. At the same time, UNCLOS ensures that the sovereignty and jurisdiction of coastal States in their territorial sea and archipelagic waters is respected. It is the interests of all States that the careful balance of interests that is set out in UNCLOS is respected by all States. This is vital not only to trade and

development, but also to the national security of both coastal States and the maritime powers.

38. If UNCLOS is going to continue to govern relations between States in all uses of the oceans, States Parties must also recognize that the dispute settlement regime in Part XV is a vitally important component of the Convention. Disputes on the interpretation and application of the provisions of UNCLOS are certain to arise, and such disputes must be resolved by peaceful means. Almost all States believe that such disputes should be resolved through negotiations. However, this it is not always possible. Situations will arise where negotiations fail and one party to the dispute believes its only recourse is to invoke the compulsory procedures entailing binding decisions in Part XV of UNCLOS. This is the very reason why Part XV was made an integral part of the package deal.

39. In the long run UNCLOS will not achieve its objective of creating a rules-based order for the oceans unless all States Parties to UNCLOS fulfill their obligations under the Convention in good faith, including their obligations to resolve their disputes in accordance with the dispute settlement regime in Part XV, and their obligation to abide by the decisions of international courts and tribunals on the interpretation and application of the Convention. In my view it is also essential that all States Parties respect and follow decisions of courts and tribunals interpreting its provisions, even though the decisions are legally binding only on the parties to the case.

40. One final point. Renewed efforts must be made to encourage the United States to become a party to UNCLOS. The calls by the United States for all States to respect the rules-based order for the oceans that is set out in UNCLOS is undermined by the fact that the United States is not a party to UNCLOS. Many observers believe that it is hypocritical of the United States to call on other States to abide by the provisions of the Convention and comply with decisions of courts and tribunals on its interpretation, when the United States itself has not become a party and has not subjected itself to the dispute settlement procedures in Part XV of the Convention.