NINTH INTERNATIONAL CONFERENCE ON THE LAW OF THE SEA

30 Years of UNCLOS: Then, Now, and the Future

Seoul, 19 November 2024

Keynote Address by H.E. Judge Tomas Heidar,
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Vice-Minister of Foreign Affairs, Insun Kang,
Professor Min Seo Kim,
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excellencies, distinguished colleagues and guests,

It is an honour for me to welcome you all to the 9th International Conference on the Law of the Sea, co-organized by the Ministry of Foreign Affairs of the Republic of Korea, the Korean Society of International Law and the International Tribunal for the Law of the Sea. On a personal note, it is a distinct pleasure to join you for the second time in my capacity as President of the Tribunal. At the outset, I would like to express my gratitude to the Ministry of Foreign Affairs and the Korean Society of International Law for their initiative in organizing this event and congratulate them on bringing together such a distinguished and diverse group of experts to celebrate the 30th anniversary of the entry into force of the United Nations Convention on the Law of the Sea.

The adoption of the Convention in 1982 is one of the greatest achievements in multilateral treaty-making in the history of the United Nations and up until the present day has contributed significantly to international peace and security. As the first and only comprehensive treaty on the law of the sea, the Convention combines both zonal and functional approaches, providing a jurisdictional regime prescribing the rights and obligations of States across different maritime zones, and enshrining a substantive legal framework for all uses of the oceans. Crucially, the Convention also establishes a compulsory mechanism for the settlement of disputes. As you may gather from the

conference programme, the organizers have been successful in selecting panel topics that cover all the core features of the Convention that I have just highlighted.

At the different commemorations of anniversaries of the Convention, such as ours today, it is repeatedly recognized that this instrument was negotiated with foresight and has withstood the test of time. However, it was emphasized already at the Third United Nations Conference on the Law of the Sea, which was convened to negotiate and adopt the Convention, that scientific and technological advances and changes could occur and new economic, political, juridical and environmental developments might take place, all of which could affect the subject matter of parts of the Convention. Accordingly, the Convention, like any other living instrument, must adapt to changing circumstances.

There are a number of ways in which such adaption may occur, including the possibility of formal amendment, the adoption of so-called “implementing agreements”, the incorporation of external rules via “rules of reference”, and the jurisprudence of international courts and tribunals. I have decided to focus my remarks on the latter category and establish a connection with the discussions that will ensue over the course of the next two days. To be more precise, I will endeavour to demonstrate how the case law of the Tribunal has made noteworthy contributions to every panel theme of the present conference.

Following the chronological order of the conference proceedings, I will start with the first panel, which centres on the territorial sea. As stipulated in article 2, paragraph 1, of the Convention, the sovereignty of a coastal State “extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.” Its breadth may not exceed 12 nautical miles, measured from baselines determined in accordance with the Convention. Where the territorial seas of two neighbouring State with opposite or adjacent coasts overlap, a delimitation line will need to be drawn. In this regard, article 15 of the Convention provides that “neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line”. It is therefore important to ascertain the existence and nature of such an agreement.

In 2012, the Tribunal delivered its ground-breaking Judgment in the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal*, which concerned, *inter alia*, the delimitation of the territorial sea. In its Judgment, the Tribunal clarified several key aspects with regard to what kind of instrument might constitute an "agreement" within the meaning of article 15 of the Convention. The Tribunal found that "the term 'agreement' refers to a legally binding agreement" and "what is important is not the form or designation of an instrument but its legal nature and content"[1]. After careful examination of the terms of agreed minutes of a meeting held between the Parties' representatives, the Tribunal held that the latter document did not constitute an agreement in the sense of article 15 of the Convention.

In the very same case, the Tribunal also had the opportunity to address the issue of the overlap between the territorial sea, on the one side, and exclusive economic zone and continental shelf, on the other. This occured in relation to an insular feature belonging to Bangladesh, namely St. Martin's Island. The Tribunal pointed out that "Bangladesh has the right to a 12 nm territorial sea around St. Martin's Island in the area where such territorial sea no longer overlaps with Myanmar's territorial sea". It was further explained that "[a] conclusion to the contrary would result in giving more weight to the sovereign rights and jurisdiction of Myanmar in its exclusive economic zone and continental shelf than to the sovereignty of Bangladesh over its territorial sea."[2]

Looking beyond the territorial sea, the Tribunal has dealt with various cases concerning the interpretation and application of the legal regime of the exclusive economic zone, or "the EEZ", which forms the focus of the second conference panel. The decisions rendered by the Tribunal have provided noteworthy clarifications on a range of matters, including the regulation of foreign-flagged vessels engaged in fishing and fishing-related activities in the EEZ. For instance, in 2014, the Tribunal delivered its Judgment in the *M/V "Virginia G" case*, the facts of which concerned bunkering in support of foreign-flagged vessels fishing in the EEZ of a coastal State. The Tribunal found that "[t]he use of the terms 'conserving' and 'managing' in article 56 of the

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[1] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 89.
[2] *Ibid.,* para. 169.

Convention indicates that the rights of coastal States [in its EEZ] go beyond conservation in its strict sense"[3] and "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 article 56 of the Convention read together with article 62, paragraph 4".[4] It added that this view was also confirmed by State practice which had developed after the adoption of the Convention.

While concluding that "the bunkering of foreign vessels engaged in fishing in the [EEZ] is an activity which may be regulated by the coastal State concerned",[5] the Tribunal clarified that the coastal State does not have such competence with regard to other bunkering activities, unless otherwise determined in accordance with the Convention. Through its Judgement, the Tribunal removed some uncertainty that had beset the questions of bunkering, thus offering legal certainty to States Parties and other interested actors.

Apart from classical contentious cases on the merits, the Tribunal also helps uphold the balance of rights and obligations laid out in the EEZ regime through its jurisprudence concerning prompt release of vessels and their crews. When a coastal State has taken enforcement measures, including arrest, in order to ensure compliance with the laws and regulations in the EEZ that it has adopted in conformity with the Convention, it is required to prompty release arrested vessels and their crews upon the posting of a reasonable bond or other security. Under article 292 of the Convention, where the flag State of a vessel alleges that the coastal State has not complied with its prompt release obligation, the question of release may be submitted to the Tribunal under the conditions specified in that provision. If the Tribunal finds that the detaining State was bound to comply with its prompt release obligation, it will determine whether the bond fixed by the detaining State was reasonable. If no bond has been fixed, the Tribunal will proceed to determine a reasonable bond.

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[3] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, para. 212.
[4] *Ibid.,* para. 217.
[5] *Ibid.,* para. 223.

In its first decade of judicial activity, ITLOS heard nine applications for prompt release, including its very first case, the *M/V "SAIGA*". However, interestingly, since 2007, only one such application has been brought to the Tribunal. This may be explained by the fact that the Tribunal has developed a comprehensive jurisprudence on various issues that may arise under article 292 of the Convention. For example, in the *"Camuoco" case*, the Tribunal listed some of the factors it considers when assessing the reasonableness of a bond. It has been argued by some that the case law of the Tribunal has served to prevent the occurrence of disputes in this field.

I now wish to turn to the legal regime of the continental shelf, on which we will hear more from the speakers of the third conference panel. In this regard, the Tribunal has made crucial contributions in the three maritime delimitation cases it has adjudicated: *Bangladesh/Myanmar*, *Ghana/Côte d'Ivoire,* and *Mauritius/Maldives*. The Tribunal clarified, in particular, questions concerning jurisdiction to delimit the continental shelf beyond 200 nm and the legal status of the so-called "grey area". I will illustrate the relevant legal findings with reference to the *Bangladesh/Myanmar* and *Mauritius/Maldives* cases.

The 2012 Judgment in the *Bangladesh/Myanmar case*, which I referred to earlier, constituted the first ever instance in which an international court delimited the maritime boundary between the parties' respective continental shelves beyond 200 nm. On this occasion, the Tribunal set out in detail the relationship between delimitation and delineation of the continental shelf beyond 200 nm. As the Tribunal pointed out, these are distinct processes, delimitation governed by article 83 and delineation by article 76 of the Convention. What they have in common, however, is the requirement of entitlement to a continental shelf beyond 200 nm. Without demonstrating such entitlement, there cannot be any delimitation or delineation of an outer continental shelf.

There are various circumstances in disputes regarding the delimitation of the outer continental shelf. In some cases, recommendations from the Commission on the Limits of the Continental Shelf, or "the CLCS", may be available, and even final and binding outer limits established by the relevant coastal States on the basis of such recommendations. In other cases, where recommendations are not available, the

relevant coastal States may be able to demonstrate entitlement to the outer continental shelf with different means, for example through submissions made to the CLCS.

In the *Bangladesh/Myanmar case*, both Parties had made submissions to the CLCS, but the Commission had not been in a position to consider the submissions due to a lack of consent by the two States. Referring to the concept of a single continental shelf, the Tribunal clarified that it had jurisdiction to delimit the continental shelf in its entirety, both within and beyond 200 nm. It also found that it was appropriate to exercise that jurisdiction in this case. Importantly, the Tribunal stated that it "would have been hesitant to proceed with the delimitation of the area beyond 200 [nm] had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question."[6] However, it noted the "unique situation" of the Bay of Bengal, as acknowledged in the course of the negotiations at the Third Law of the Sea Conference, and took note of "uncontested scientific evidence" that there is a continuous and substantial layer of sedimentary rocks extending beyond 200 nm.[7]

On 28 April last year, an ITLOS Special Chamber rendered a Judgment in the *Mauritius/Maldives case*. This was the first case regarding delimitation between two archipelagic States – one located in Africa, the other in Asia. The case concerned the delimitation of the EEZ and the continental shelf within 200 nm, and of the continental shelf beyond 200 nm, between the Chagos Archipelago and the Maldives.

As far as the delimitation of the outer continental shelf is concerned, both Parties had filed submissions with the CLCS but no recommendations had been made by the Commission. The Special Chamber stated that, to this extent, the situation was similar to that in the *Bangladesh/Myanmar case*. Accordingly, it decided to apply the standard of "significant uncertainty" when assessing the existence of a continental margin beyond 200 nm. The Chamber further explained the rationale for applying this standard: it "serves to minimize the risk that the CLCS might later take a different position regarding entitlements in its recommendations from that taken by a court or

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[6] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 443.
[7] *Ibid*., paras. 444-446.

tribunal in a judgment"[8] and affords "protection to the interests of the international community in the Area and the common heritage principle".[9]

What is different in the *Mauritius/Maldives case* is that while the entitlement of the Maldives to the continental shelf beyond 200 nm was uncontested between the Parties, they disagreed as to Mauritius' entitlement to the outer continental shelf. Mauritius set out three different routes for natural prolongation to a foot of slope point which it had identified as the basis of its claim. As the first route presented by Mauritius passed within the uncontested continental shelf of the Maldives within 200 nm, the Chamber considered that it was "impermissible on legal grounds under article 76 of the Convention".[10] The Chamber then found that there was "significant uncertainty as to whether the second and third routes could form a basis for Mauritius' natural prolongation".[11]

Therefore, the Special Chamber concluded that, given the significant uncertainty, it was not in a position to determine the entitlement of Mauritius to the outer continental shelf and, consequently, did not proceed with the delimitation of the continental shelf beyond 200 nm. Through its meticulous and well-reasoned application of the "significant uncertainty" standard, the Tribunal has not only made significant contributions towards the understanding of the outer continental shelf, but also strengthened the status of the Convention as a living instrument by offering a solution to the potential impasse in the implementation of the Convention.

The second important issue concerning the outer continental shelf that the Tribunal has clarified in its jurisprudence is the legal status of the so-called "grey area". In the *Bangladesh/Myanmar case*, the Tribunal stated that the delimitation of the continental shelf beyond 200 nm in this case "gives rise to an area of limited size located beyond 200 [nm] from the coast of Bangladesh but within 200 [nm] from the coast of Myanmar, yet on the Bangladesh side of the delimitation line."[12]

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[8] *Delimitation of the maritime boundary in the Indian Ocean (Mauritius/Maldives), Judgment of 28 April 2023*, para. 433.
[9] *Ibid.*, para. 452.
[10] *Ibid.*, paras. 444 and 449.
[11] *Ibid.*, para. 449.
[12] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, para. 463.

A grey area arises, in the delimitation of the continental shelf beyond 200 nm between States with adjacent coasts, whenever a delimitation line deviates from an equidistance line. In the *Bangladesh/Myanmar case*, a relatively small grey area was the consequence of the adjustment of the provisional equidistance line in favour of Bangladesh, which was required to achieve an equitable solution. The Tribunal explained that in the grey area in question, Bangladesh has continental shelf rights with respect to the seabed and subsoil and Myanmar EEZ rights with respect to the superjacent waters. Thus, there is an overlay of Bangladesh's continental shelf rights and Myanmar's EEZ rights in the grey area.

The Tribunal pointed out that "[t]here are many ways in which the Parties may ensure the discharge of their obligations in this respect, including the conclusion of specific agreements or the establishment of appropriate cooperative arrangements. It is for the Parties to determine the measures that they consider appropriate for this purpose."[13]

At present, allow me to shift from the zonal approach to the functional approach, and take up the topic of marine environmental protection, which will be addressed during the fourth conference panel. The Tribunal has dealt with a number of cases in which it was called upon to closely examine the rules of the Convention that deal with the protection and preservation of the marine environment, as found primarily in its Part XII. Different types of proceedings have been a source of relevant jurisprudence, including orders prescribing provisional measures, such as the *Southern Bluefin Tuna cases*, and advisory opinions, namely the 2011 *Area Advisory Opinion* of the Seabed Disputes Chamber, the 2015 *SRFC Advisory Opinion* and the 2024 *Climate Change Advisory Opinion*, both of which were handed down by the plenary Tribunal.

The Tribunal has interpreted and applied many of the obligations stemming from Part XII of the Convention, including the general duty to protect and preserve the marine environment, the duty to cooperate, the duty to apply the precautionary

[13] *Ibid*., para. 476.

approach and the duty to conduct environmental impact assessments, and has opined on the nature of different types of obligations, including due diligence.

In its jurisprudence, the Tribunal has given authoritative interpretations of what is meant by the term “marine environment” under the Convention. Although Part XII of the Convention focuses on marine pollution, it is clear from its section 1 that it was never intended to be limited to pollution and that it also encompasses protection of ecosystems and conservation of depleted and endangered fauna and flora. Reference may be made to the *Southern Bluefin Tuna cases*, which related to a fisheries dispute and provisions of the Convention concerning fishing. Nonetheless, the Tribunal expressly stated in its Order that “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.”[14] This finding was later confirmed in the *SRFC Advisory Opinion* and *Climate Change Advisory Opinion*.

This brings me to the latter advisory proceedings, which I will now explore in greater detail. In what has been referred to as “a landmark ruling”, the Tribunal concluded in the *Climate Change Advisory Opinion* of 21 May 2024 that anthropogenic GHG emissions into the atmosphere constitute “pollution of the marine environment” within the meaning of article 1(1)(4) of the Convention. I am sure that we will hear more on this historic case during the fourth conference panel, which will also consider the nexus between the law of the sea and climate change.

It bears reiterating that on 26 August 2022, the Commission of Small Island States on Climate Change and International Law, which I will refer to as “COSIS”, decided to request an advisory opinion from the Tribunal on two questions. The first question, which is centred on “pollution of the marine environment”, was formulated as follows:

> What are the specific obligations of State Parties to the [Convention], including under Part XII:

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[14] *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, para. 70.

(a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?

As you may well know, terms such as “climate change”, “greenhouse gas emissions”, and “ocean acidification” do not appear in the text of the Convention, since they were not necessarily in the minds of its drafters back in the 1970s and early 80s. Nevertheless, the Advisory Opinion makes clear that the absence of such terminology does not place these phenomena beyond the scope of the Convention.

The Tribunal observed that the first question submitted by COSIS concerns the specific obligations of States Parties to the Convention to prevent, reduce and control marine pollution in relation to the deleterious effects that result or are likely to result from climate change and ocean acidification, which are caused by anthropogenic GHG emissions into the atmosphere.[15] Noting that this question is formulated on the premise that these obligations necessarily apply to climate change and ocean acidification, the Tribunal stated that the validity of this premise could not be presumed and therefore needed to be examined.[16]

The Tribunal therefore considered whether anthropogenic GHG emissions meet the criteria of the definition of “pollution of the marine environment” in article 1, paragraph 1, subparagraph 4, of the Convention.[17] I will read out the latter provision:

> For the purposes of this Convention … “pollution of the marine environment” means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life,

[15] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion of 21 May 2024*, para. 154.
[16] *Ibid*., para. 158.
[17] *Ibid*., para. 159.

hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

Following thorough examination, the Tribunal found that anthropogenic GHGs are substances, that their emissions are produced "by man" and that, by introducing carbon dioxide and heat (energy) into the marine environment, they cause climate change and ocean acidification resulting in "deleterious effects".[18] On this basis, having determined that all three criteria of the definition were satisfied, the Tribunal concluded that anthropogenic GHG emissions into the atmosphere constitute "pollution of the marine environment" within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention.[19] Accordingly, the Advisory Opinion has brought climate change into the realm of the Convention and confirmed the applicability of pollution-related provisions in the Convention with regard to GHG emissions.

The Advisory Opinion also shows how external rules, including those addressing climate change and environmental issues, interact with the Convention and enable the latter to remain up-to-date. As highlighted by the Tribunal, "coordination and harmonization between the Convention and external rules are important to clarify, and to inform the meaning of, the provisions of the Convention and to ensure that the Convention serves as a living instrument." [20]

At this juncture, I wish to turn my focus to the topic of our last panel, dispute settlement under the Convention, and share some thoughts on the jurisdiction of the Tribunal. As one of the means for the settlement of disputes under article 287 of the Convention, the Tribunal shares the compulsory jurisdiction to deal with disputes concerning the interpretation and application of the Convention with the International Court of Justice and arbitral tribunals constituted under Annex VII and Annex VIII to the Convention. In addition to this, the Tribunal also enjoys exclusive compulsory jurisdiction in relation to three categories of contentious proceedings: disputes concerning activities in the Area with respect to the Seabed Disputes Chamber, the

[18] *Ibid*., paras. 164, 165 and 178.
[19] *Ibid*., paras. 179 and 441(3)(a).
[20] *Ibid*., para. 130.

prescription of provisional measures pending the constitution of an arbitral tribunal, and applications for prompt release of vessels and crews. Moreover, both the Seabed Disputes Chamber and the full Tribunal enjoy advisory jurisdiction.

Having received 33 cases, of which two are currently on the docket, the Tribunal has consistently and conscientiously fulfilled its mandate and, in so doing, has strengthened the dispute settlement mechanism under the Convention. It is noteworthy that the Tribunal has received the largest volume of cases submitted pursuant to Part XV, section 2, of the Convention. This exceeds the number of Annex VII arbitral tribunals that have been constituted, which serve as the default forum under article 287 of the Convention. It may also be observed that parties have opted to transfer their disputes from Annex VII arbitration to the Tribunal in an increasing number of instances, including all three maritime delimitation cases that have come before the Tribunal or a Special Chamber as well as the ongoing *M/T "Heroic Idun" (No. 2) case*. This trend signals the trust that States Parties to the Convention place in the Tribunal.

A further sign of this confidence in the Tribunal can be found in the newly adopted Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, or “BBNJ Agreement”. Pursuant to article 47, paragraph 7, of the Agreement, the Conference of the Parties may decide to request the Tribunal to give an advisory opinion on a legal question on the conformity with the Agreement of a proposal before the Conference of the Parties on any matter within its competence. Thus, the Tribunal may be called upon to assist the Parties to the BBNJ Agreement with its effective implementation through the issuance of advisory opinions.

In my view, this development also shows States’ recognition of the significance of advisory opinions in tackling contemporary challenges, as demonstrated by the *Climate Change Advisory Opinion*. In light of the experience of that opinion, I believe that the Tribunal has shown that it plays a crucial role in ensuring that the Convention remains relevant as a living instrument and will continue to do so in the foreseeable future.

Excellencies, distinguished guests, I have now come to the end of my keynote address. On behalf of the Tribunal, I wish to reiterate our appreciation to the Ministry of Foreign Affairs and the Korean Society of International Law for co-organizing this most promising conference and their hospitality. I look forward to the interesting discussions ahead and thank you for your kind attention.