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At the outset, I would like to take this opportunity to extend my sincere appreciation for convening this important and meaningful webinar.

1. Situation in East Asia

It is no exaggeration to say that East Asia, which is one of the main themes in this webinar and where Japan is located, is among the “heavy users” of the United Nations Convention on the Law of the Sea (UNCLOS) in the whole world. Many issues related to the ocean in this area such as fisheries, maritime security, marine environment and marine traffic enliven media every day, and such situation has drastically increased the workload of the authorities, compared to when the UNCLOS went into effect in 1994. In case of Japan, which ratified this Convention in 1996, the body of experts on UNCLOS “Law of the Sea Division” in the International Legal Affairs Bureau in the Ministry of Foreign Affairs handles legal aspects of issues related to the ocean.

One of the fundamental reasons why the Ministry has established the specialized division on UNCLOS is that East Asia includes many non-delimited maritime boundaries between States and exercising of jurisdiction in such area requires a more careful management in conforming to the Convention. Globalization activated interconnection between States on the ocean, and the increased traffic of the ships and people need practical legal coordination of the jurisdiction between States. And non-delimited maritime boundaries make this coordination more complicated and sometimes more difficult.

As a matter of fact, Japan has not yet completed maritime delimitations with neighboring States without the exception of the agreement concluded on a part of continental shelf, while establishing provisional fisheries agreements with these States to

address practical problems relating to fishing activities in the EEZ in the transitional period.

2. Transitions after UNCLOS went into effect

It has been 27 years since the UNCLOS went into effect, and it is long enough to cause certain changes to the situation around the UNCLOS. Let us take a look one by one.

Article 88 of the UNCLOS stipulates that the high seas shall be reserved for peaceful purposes, which the previous Convention on the High Seas did not contain. In a traditional sense, areas beyond national jurisdiction such as the high seas were free and open to all States for navigation, fishing and other activities. However, there is an increasing need for ocean management to utilize and conserve the ocean and its resources under the necessary rules and frameworks for the common interest of the international community, while maintaining the principle of the freedom of the high seas.

The ongoing negotiations to develop a new implementing agreement under UNCLOS, known as the BBNJ Agreement, are a good example. The significance of conserving biological diversity has been widely recognized and is addressed in areas within national jurisdiction by the Convention on Biological Diversity. The new agreement aims to extend the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ). In 2018, Intergovernmental Conference (IGC) started the negotiations aiming to reach consensus on the challenging issues such as marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools including marine protected areas, environmental impact assessments and capacity-building and the transfer of marine technology. Japan is committed to contributing to the work of the IGC with the goal of creating a well-balanced international legally binding instrument on the conservation and sustainable use of BBNJ for the benefit of the international community.

Another example is deep-sea mining, which was once considered enormously challenging. Mining the seafloor several thousand meters below the ocean's surface has been emerging as feasible today due to the development and evolution of science and technologies. In pursuit of the exploitation of the mineral resources in "the Area", which is designated as "the common heritage of mankind" in UNCLOS, the International Seabed Authority has made significant achievements, such as adopting exploration

regulations for three mineral resources. The Authority has concluded as many as 31 exploration contracts since its establishment. As part of its effort, the Authority has been working on the development of the draft regulations for the exploitation of mineral resources in the Area over the last several years. Japan has constructively engaged in the work of the Authority to formulate reasonable regulations on mineral exploitation, properly striking a balance between exploitation and environmental considerations.

On top of these, there has been development of legal frameworks in respective fields. For instance in the field of fisheries, it is fresh in our mind that Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean was signed by 10 parties including Japan in 2018 for the conservation and sustainable use of fisheries resources on the high seas in the Arctic.

New legal regimes introduced by the UNCLOS such as the EEZ and the continental shelf increased the necessity to delimit maritime boundary between States. On the other hand, when it comes to how to delimit, UNCLOS remains to prescribe ambiguously that the delimitation shall be effected by agreement on the basis of international law in order to achieve “an equitable solution”.

In the early case laws in 1960’s, the continental shelf was regarded as an area which is physically extending the territory of the coastal States, and this concept of “natural prolongation” of its land territory was applied to the delimitation of the continental shelf between States with opposite or adjacent coasts, for example.

However, after the UNCLOS went into effect, the necessity of delimitation has increased not only of the continental shelf but also of the EEZ between States with opposite or adjacent coasts. In the recent case laws, the international tribunals pursue consistency in establishing maritime boundaries both for the continental shelf and the EEZ by means of the “three-stage approach”, which consists of constructing provisional median line, adjusting such provisional line by considering relevant circumstances, and conducting disproportionality test to ensure that the result does not cause unnecessary inequality. This transition from natural prolongation theory to three-stage approach is one of the remarkable changes which international community witnessed.

Furthermore, it is remarkable that the environmental situation around the world has drastically changed in the last 27 years, which possibly produce new legal issues on the law of the sea, such as recession of the baseline and submergence of the remote islands on the border area, caused by the sea-level rise.

3. Challenges accompanying the flag State principle

In addition to the transitions mentioned above, judicial practices during these 27 years revealed some challenges which accompanies the structure of the UNCLOS. Today, I would like to focus on one of them: the flag State principle.

UNCLOS prescribes that ships shall be subject to the exclusive jurisdiction of the flag State on the high seas. On the other hand, it stipulates that it is each State which shall fix the conditions for the grant of its nationality to ships. The differences between the States as to the condition of the tax or the operating cost of the ships create economic incentive for the ship operator and the flag States for the flag of convenience.

The assumption on which the flag State principle functions in order to maintain the maritime order on the high seas is that the flag States effectively administrate ships with their flag. However, the flag-of-convenience States sometimes lack the ability and will to administrate ships with their flag, and this is one the backgrounds behind the legal issues such as illegal fishing, marine pollution and violation of ship safety standards. It is new to our memory that the Panama-flagged bulk carrier ran aground on a coral reef in July 2020.

Furthermore, due to the flag State principle, coastal States cannot enforce jurisdiction on the ships on the high seas which engages in the illegal activities such as trafficking of drugs, without the consent of the flag State.

There seems to be no veritable panacea for those issues which accompany the flag State principle, and it is practically not easy to settle with them.

4. Conclusion

As I mentioned above, the situation around the international community and UNCLOS experienced changes and transitions in the last 27 years, and it also revealed that there are some challenges associated with the structure of UNCLOS. Nevertheless, it is clear that “Constitution for the oceans” plays an indispensable and essential role as the legal basis for the international maritime order. Japan continuously seeks to cooperate with the fellow States of the international community to address global issues on the ocean in order to maintain and enhance the rule of law on the seas and oceans.