ARF Seminar on Regional Confidence Building and the Law of the Sea
Tokyo, Japan
December 4, 2015
Co-chairs' Summary Report

Introduction

1. As endorsed at the 22nd ASEAN Regional Forum (ARF) Ministerial Meeting in Kuala Lumpur, Malaysia, the Government of Japan hosted the ARF Seminar on Regional Confidence Building and the Law of the Sea, in Tokyo, Japan on December 4, 2015. The seminar was co-chaired by Japan, Vietnam and India. The Program of this seminar is attached as Annex 1.

2. The seminar brought together 70 participants from 22 ARF participating countries and a region including almost all the ASEAN member states. The number of countries represented in the seminar underlined strong interests in the theme of the seminar. The List of Participants is attached as Annex 2.

3. Some of the prominent scholars and leading practitioners of the law of the sea participated in this seminar as speakers. These presenters explained how state practices and jurisprudence developed the international legal regime applicable to maritime areas pending delimitation as well as that for peaceful settlement of maritime disputes. The speakers and participants exchanged views on what role international law can play in regional confidence building and on how states can build their capacity for negotiations on maritime delimitation in the future. The List of Co-chairs and Speakers is attached as Annex 3.

Opening

4. At the beginning of the seminar, Mr. Yoshihiro Katayama, Director of Maritime Security Policy Division, Foreign Policy Bureau, Ministry of Foreign Affairs of Japan invited Mr. Hitoshi Kikawada, Parliamentary Vice-Minister for Foreign Affairs of Japan, for an opening remark. On behalf of the host country, Mr. Kikawada thanked co-chairs from Vietnam and India, welcomed the participants and emphasized the importance of the seminar. Citing the words of Japanese Prime Minister Shinzo Abe in his keynote address at the Shangri-La Dialogue in 2014, Mr. Kikawada stressed the importance of the three

principles of the rule of law at sea; (a) states should make and clarify their claims based on international law, (b) states should not use force or coercion in trying to drive their claims, and (c) states should seek to settle disputes by peaceful means. Mr. Kikawada expressed his hope that the participants would actively contribute to the enhancement of the rule of law.

5. In his opening remark as the ASEAN co-chair of the seminar, Mr. Le Quy Quynh, Director-General of Department of Maritime Affairs, Ministry of Foreign Affairs of Viet Nam, expressed his expectation of constructive discussion among the participants to make the seminar fruitful.

6. Dr. V.D. Sharma, Director and Head of Legal and Treaties Division, Ministry of External Affairs of India, made an opening remark as a co-chair. He highlighted the importance of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), especially its comprehensive jurisdiction for peaceful settlement of maritime disputes between coastal states.

7. After the opening remarks by co-chairs, Dr. Naoya Okuwaki, Professor of School of Law, Meiji University and Professor Emeritus of University of Tokyo delivered a keynote speech. In the introduction of his keynote address, Professor Okuwaki touched upon three recent events, namely the Arbitration between the Philippines and China, U.S. Freedom of Navigation Operation (FONOP) in the South China Sea and the Japan-China Summit Meeting in which Japanese Prime Minister Shinzo Abe and Chinese Premier Li Keqiang concurred, among other things, to aim to resume talks based on the "2008 Agreement" on the issue of resources development in the East China Sea. Dr. Okuwaki stressed the importance of careful management of these changes of the situation so that they can bring more beneficial relationships for all the states in the region. After that, Professor Okuwaki highlighted the necessity of cooperation in such areas as conservation and management of fishery resources, scientific research and protection and preservation of marine environment referring to Article 123 of UNCLOS which prescribed cooperation of states bordering enclosed or semi-enclosed seas. He then introduced Articles 74(3) and 84(3) of UNCLOS which stipulated delimitation of EEZ and continental shelf respectively, especially the importance of words “in a spirit of understanding and cooperation” in these provisions. Dr. Okuwaki found the value of provisional arrangements of practical nature as they could satisfy the need of local communities, build up confidence among the coastal states, and thereby lead those states to a final delimitation agreement which bring an equitable solution for them. In this context, he stressed the significance of the 2002

Declaration on the Conduct of Parties in the South China Sea and pointed out that there were several fundamental requirements for the states to promote this confidence building process. Dr. Okuwaki emphasized that the states should: (a) explain and clarify their position with common language of international law, especially referring to the UNCLOS; (b) release and share the information and data on basic facts based on the duty of cooperation on information under the UNCLOS (see ITLOS Mox Plant case); (c) refrain from taking tactics or strategy of ambiguity especially in unilateral actions; and (d) refrain from making excessive claims apparently in breach of the UNCLOS. In conclusion, Professor Okuwaki called for states to take their domestic measures taking into consideration of the benefits of the region and international community as a whole and to explain their conducts and clarify their legal position based on international law for the purpose of confidence-building and cooperation among states. He also pointed out that the role of international courts is not necessarily limited to final settlement of disputes since they may facilitate negotiations between the parties by requesting them to clarify their legal positions, to provide necessary information on basic facts and to avoid, through provisional measures, activities that might aggravate the dispute. Dr. Okuwaki concluded that cooperation between international courts and disputant parties would promote the process of confidence building and progressively establish the rule of law in the world. His presentation appears as Annex 4.

Session 1: International Legal Regime for Disputed Maritime Areas (Chaired by Japan)

8. In Session 1, Mr. Robert Harris, Assistant Legal Adviser for East Asia and Pacific Affairs, United States Department of State introduced the result of workshop that the Asia Foundation and the Centre for Strategic and International Studies (CSIS) in Indonesia co-hosted in Jakarta in August 2015. Mr. Harris gave the seminar participants an overview of relevant provisions of UNCLOS and “building blocks” for maritime boundary delimitations. He then explained legal principles developed in decisions by the Courts and Tribunals for determining an equitable solution. In this context, the application of “the three step method” in the Black Sea Case and Nicaragua v. Columbia Case was introduced as examined in the Jakarta workshop. Introducing the conclusions of workshop, Mr. Harris emphasized the importance for states to make reasonable claims grounded in international law. As another conclusion of the workshop, he also stressed the need of sustained and more institutionalized support to capacity building for governments to build up and maintain a team including junior officials with technical skills and legal knowledge for a successful delimitation negotiation which could be a decades-long generational work. His presentation appears as Annex 5.

9. In her presentation in Session 1, Dr. Mariko Kawano, Professor of Law, Waseda University emphasized the necessity to consider the effective way to settle as many disputes as possible and to ensure the most effective and stable utilization of marine resources in the disputed maritime areas in accordance with international law. In this context, Dr. Kawano examined the significance of the compulsory jurisdiction of international courts and tribunals under Part XV of UNCLOS as well as its limitations. Despite some limitations such as conditions for resorting to the compulsory jurisdiction under the UNCLOS and declaration in pursuance of Article 287, she argued, the enhancement of compulsory jurisdiction did not lose its significance. Professor Kawano referred to the Awards by the Arbitral Tribunals in the cases of Barbados v. Trinidad Tobago and the Philippine v. China which stated that "[T]he unilateral invocation of the arbitration procedures cannot by itself be regarded as an abuse of right contrary to Article 300 of UNCLOS, or an abuse of right contrary to general international law. Article 286 confers a unilateral right, and its exercise unilaterally and without discussion or agreement with the other Party is a straightforward exercise of the right conferred by the treaty,…" Dr. Kawano emphasized that the statement reflected the historical background of the enhancement of compulsory jurisdiction and fundamental purpose of the mechanism, and that the contracting parties of UNCLOS that enables the unilateral reference of a dispute are under an obligation to cooperate with the sound function of the compulsory jurisdiction provided by the convention. Professor Kawano also stressed the compulsory jurisdiction may contribute to the final settlement of a maritime dispute. In conclusion, she highlighted the importance of cooperation between the disputing parties both in the procedures for the final settlement of the dispute and in the provisional arrangements, and stated that regional mechanism may play a significant role to facilitate and encourage such cooperation. Her presentation appears as Annex 6.

10. In Q&A session, calls for capacity building to help states settle their maritime disputes in accordance with international law were echoed by other participants. In this context, Mr. Harris introduced U.S. initiative to hold the 2nd workshop in the late summer of 2016 in collaboration with the Diplomatic Academy of Vietnam to follow up this year's workshop in Jakarta. Other participants introduced some other initiatives by Centre for International Law (CIL) of National University of Singapore (NUS), Sasakawa Foundation, International Maritime Organization (IMO), Australia and the European Union (EU).

Session 2: Obligation of Self-restraint: Not to Hamper or Jeopardize the Reaching Final Agreement (Chaired by Vietnam)

11. In Session 2, Dr. V.D. Sharma, Director and Head of Legal & Treaties Division, Ministry of External Affairs, India gave a presentation to overview the regulatory framework of UNCLOS and the provisions of Articles 74 (3) and 83 (3), which stipulated obligations to negotiate in good faith on provisional arrangements and to make every effort not to jeopardize or hamper the reaching of final agreement. Dr. Sharma also reviewed observations and views presented by the Courts and Tribunals which clarified such obligations and made distinction between unilateral actions which may jeopardize or hamper reaching final agreement and other unilateral measures that may not do so. In conclusion, he stressed that parties of maritime disputes should refrain from taking unilateral action that may cause physical change to marine environment or risk of physical damage to the seabed or subsoil thereof. Dr. Sharma also emphasized that use of force is clearly not an option hence undesirable and unacceptable. His presentation appears as Annex 7.

12. Dr. Kentaro Nishimoto, Associate Professor of School of Law, Tohoku University gave a detailed analysis on the obligation of self-restraint under Articles 74 (3) and 83 (3) of UNCLOS. Studying functions of the obligation of self-restraint, Dr. Nishimoto pointed out that the obligation may be understood as linked to broader obligations: principle of good faith (Article 300); obligation to settle disputes by peaceful means and to refrain from the use or threat of force (UN Charter); and undertakings for preventing escalation of disputes that would affect peace and stability. Dr. Nishimoto then presented his studies on both material and geographical scope of the obligation. He explained what types or categories of activities are considered to jeopardize or hamper the reaching of final agreements referring to Aegean Sea Continental Shelf Case (ICJ, Interim Measures, 1976), Guyana v Suriname Arbitration Award (2007) and Ghana v Côte d'Ivoire (ITLOS, Provisional Measures, 2015). He explained that Guyana v Suriname Arbitration Award made a distinction between activities that lead to a permanent physical change, such as exploitation of oil and gas reserves, and those that do not, such as seismic exploration. Dr. Nishimoto then looked into geographic scope of the obligation and context-dependent character of the obligation. In conclusion, he emphasized that although some questions remain on the precise scope of the obligation of self-restraint, what is essential is for States to act in good faith, “in a spirit of understanding and cooperation” (Art. 74 (3) and 83 (3)) within the context of the maritime delimitation dispute. His presentation appears as Annex 8.

13. In Q&A session following the two presentations, a question was raised if a provisional arrangement of a practical nature such as joint development agreement could be a disincentive for states' moving into a final maritime delimitation agreement. In this context, various opinions were presented by the participants on the value of provisional arrangements.

Session 3: Obligation to Cooperate (Chaired by India)

14. In Session 3, Professor Xue Guifang, Chair Professor of KoGuan Law School, Shanghai Jiao Tong University, China, made a presentation on major threats to the marine environment and regional cooperation in semi-enclosed seas. Professor Xue first identified major threats to the marine environment and sources of pollution. She then emphasized the necessity of regional cooperation for the protection of the marine environment. Referring to Articles 123, 74 and 83 of the UNCLOS as well as Paragraph 6 of the 2002 Declaration on the Conduct of Parties in the South China Sea, Professor Xue stressed the duties of coastal states to cooperate in order to protect the marine environment in the South China Sea. She pointed out, however, that there is insufficient cooperation among the coastal states of South China Sea due to territorial disputes and disagreements over maritime boundaries. Professor Xue called for the coastal states of South China Sea to strictly perform their duties to cooperate for the protection of marine environment. Her presentation appears as Annex 9.

15. In her presentation in Session 3, Dr. Nguyen Thi Lan Anh spoke about the obligation to cooperate under the UNCLOS, especially Articles 74(3) and 83(3) as well as 123. She introduced state practices of cooperation such as joint development and fisheries agreements in overlapping maritime zones in Asia and identified common features in those arrangements. Dr. Nguyen found that the common features in joint development arrangements include: joint development zone identified by continental shelf claims of states; a mechanism for joint management; agreements for cost and benefit sharing; clarification of applicable law and jurisdiction; provisions on dispute settlement; and a non-prejudice clause. Those in fisheries agreement are: joint fishing zones formed from EEZ claims and/or taking into account of traditional fishing activities, joint management and conservation of fishing resources, clarification of applicable law and jurisdiction; and a non-prejudice clause. Dr. Nguyen also explained Article 123 of UNCLOS which stipulated cooperation of states bordering an enclosed or semi-enclosed sea, especially in such areas as management, conservation, exploration and exploitation of the living resources of the sea, protection and preservation of the marine environment and

scientific research. She then touched on some state practices of cooperation and suggested a model of cooperation which includes: promotion of dialogue, capacity building, development of rules and norms, and institutional building. Dr. Nguyen emphasized that what is most important for states is to cooperate flexibly with each other under the UNCLOS, and it would lead to a solution of sensitive issues such as the development of resources. Her presentation appears as Annex 10.

16. In a Q&A session, the participants asked questions on how to build a concrete mechanism to implement a joint development agreement and what makes a joint development agreement successful. The participants generally shared the view that economic incentives, political leadership and reasonable claims under the UNCLOS were the keys to make such cooperation arrangements successful. Further studies were also suggested to find out what concrete language and elements were necessary to make these provisional arrangements successful.

Session 4: Role of International Law in Confidence Building (Chaired by Japan)

17. In Session 4, Ambassador Gilberto G.B. Asuque, Deputy Chief of Mission, Embassy of the Philippines in Tokyo who headed the Philippine Technical Working Group on Maritime Boundary Delimitation of the Department of Foreign Affairs, gave the seminar participants a chronological account of maritime delimitation talks between the Philippines and Indonesia including its background, negotiating principles, administrative structure and mechanism. At the initial meeting of their negotiations, the Philippines and Indonesia agreed on the guiding principles for their negotiation to achieve an equitable solution in accordance with the UNCLOS. In order to move forward the complex negotiation for maritime delimitation, the two sides developed a structure and mechanism to discuss legal and technical aspects. Even though both sides took hard-line positions at the early stage of negotiations, they later adjusted their positions under strong mandates from their political leaders to move forward the delimitation talks. What was noteworthy was the step the Philippines took to make their archipelagic baselines consistent with the UNCLOS. The enactment of a new baseline law by the Philippines enabled the once-suspended delimitation talks to resume. After a series of talks, the two sides reached a single delimitation line called the Provisional Exclusive Economic Zone Boundary Line (PEBL), which was, in effect, an application of the “three-step approach” in maritime delimitation enunciated in the ICJ case of Romania v. Ukraine (Maritime Delimitation in the Black Sea, 2009) and reiterated in the ITLOS case of Myanmar v. Bangladesh. It took twenty years for the two countries to reach the final

delimitation agreement which brought an equitable solution or win-win and “feels good” situation for both parties. From their experience of maritime boundary delimitation, Ambassador Asuque stressed the importance to establish principles governing future talks based on the principles of rule of law and peaceful settlement of disputes and to develop expertise on the issue in preparation for a generational challenge and to properly update domestic stakeholders such as congressmen and media which had the veto power. In conclusion, Ambassador Asuque emphasized the milestone agreement would open opportunities for closer cooperation in the preservation and protection of the rich marine environment in the area, increased trade and enhanced maritime security. His presentation appears as Annex 11.

18. In his presentation in Session 4, Captain J Ashley Roach, Senior Visiting Scholar and Global Associate, Centre for International Law and Associate, National University of Singapore, called on ARF participating states to bring their maritime claims into conformity with the Law of the Sea Convention (LOSC). He stressed that the upcoming arbitral merits decision in the Philippines-PRC case and also International Law Association (ILA) Baseline Committee Studies on State Practice would provide an opportunity for ARF countries to act together. Captain Roach pointed out that while the arbitral award will be binding only on the Philippines and China, its reasoning and results may affect almost all ARF nations as an important judicial precedent. In his view, the arbitral award may provide influential guidance on: criteria for applying LOSC Article 121 to islands and rocks; maritime zone entitlements of islands, rocks, low-tide elevations and submerged features; use of such features as base-points for straight baselines; and restrictions on navigation and overflight. Captain Roach suggested that the ARF may wish to undertake a region-wide analysis of implications of Arbitral Award and ILA studies and report on national compliance with provisions of the LOSC and their results could form basis for all ARF participating states to conform national laws and claims to international law. His presentation appears as Annex 12.

19. After the two presentations in Session 4, the delegation from the Philippines explained to the participants the recent developments of the arbitration between the Philippines and China. In response, the Chinese delegation reiterated its position in line with its position paper.

Closing

20. In closing, the co-chairs of the seminar expressed appreciation to the speakers and participants for their contributions to the discussions. Mr. Le Quy Quynh, the ASEAN co-chair from Viet Nam found that the seminar was successful, fruitful and well-organized and gave the participants deeper understanding on the UNCLOS, especially Articles 74(3) and 83(3). Reviewing some of the presentations and discussions in the seminar, Dr. V.D. Sharma, co-chair from India, highly valued contributions from both academic side and government side which made the seminar constructive and meaningful. As a co-chair and on behalf of the host country, Mr. Yoshihiro Katayama from Japan expressed gratitude to the co-chairs for their kind contributions, to the speakers for their expert opinions and sharing of valuable experiences, and to all the participants for constructive contribution to the discussions.

(END)