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Keynote Speech by H.E. Judge Shunji Yanai
of the International Tribunal for the Law of the Sea

at the Second International Symposium on the Law of the Sea
hosted by the Ministry of Foreign Affairs of Japan

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(Introduction)

Excellencies, Ladies and Gentlemen,

A year ago, to my great honour, I was given the opportunity to deliver a keynote speech at the international symposium on the law of the sea hosted by the Ministry of Foreign Affairs, under the title: "The Rule of Law in the Seas of Asia: Navigational Chart for the peace and stability". Today my pleasure is doubled to be invited to do so again here, at this second symposium.

(1st and 2nd symposium: rule of law at sea)

70% of the Globe's surface is covered by seas and oceans. The rule of law over this area is a fundamental principle for international society; it is one of the key elements for the stability of inter-State relations, peaceful settlement of disputes, and promotion of the good international governance of the seas and oceans.

The last year's symposium took place against the backdrop of increasing interests in the law of the sea, in response to the situations in the seas of Asia in recent years. I recall that Prime Minister Abe advocated the "three principles of the rule of law at sea" in May, 2014, at the Shangri-La Dialogue. At last year's symposium, lively and constructive discussions were held among the eminent scholars and practitioners of international law from home and abroad. It was a fruitful meeting, where the participants reaffirmed the shared understanding of the importance of States' actions and settlement of disputes based upon the law of the sea, with UNCLOS at its core, for the peace and stability of the seas of Asia.

This year's symposium took up the theme of "International Law for the Resources

of the Sea". We don't need to point out how important the questions related to the development of the resources of the sea were throughout the negotiations of UNCLOS III. Today, 20 years after the entry into force of UNCLOS, the importance of marine mineral resources for the future of mankind is ever growing. We are witnessing an increasing number of submissions to the Commission on the Limits of the Continental Shelf (CLCS) of information on the limits of the continental shelf beyond 200 nautical miles from the territorial sea baselines. We also see in recent years many applications to the International Seabed Authority (ISA) for the exploration of mineral resources within the international area of deep seabed, named "the Area" under UNCLOS. Interest in the development of marine genetic resources and the necessity for the preservation of marine biological diversity within the areas beyond national jurisdiction is gathering the attention of the international community. This has resulted in the now on-going concrete talks toward the commencement of multilateral negotiations. To my understanding, therefore, today's symposium aims at strengthening the "rule of law at sea" from a different perspective.

I would like to briefly look into each of the three sub-themes of this symposium.

(Continental Shelf and the Area)

The regime of the continental shelf existed before UNCLOS, but it was substantially changed by it. The regime of the Area, the international deep seabed area, is an entirely new one, which was created by UNCLOS. Both of them are extraordinarily innovative regimes, but it can be said that the substance of the rules were supposed to be consolidated through future State practice and activities of international organizations. This is why UNCLOS established new organizations, namely CLCS and ISA, in order to implement these regimes. 30 years after the opening for signature of UNCLOS and 20 years after its entry into force, both of these legal regimes have developed remarkably through practice of these two organizations and States Parties.

With regard to the continental shelf, UNCLOS introduced a new regime of the continental shelf extended beyond 200 nautical miles from the territorial sea baselines. Since CLCS was established in 1996, 81 submissions were made by States and CLCS made 22 recommendations to date. The exploration and exploitation of the resources of the continental shelf beyond 200 nautical miles

may involve issues such as the following:

(1) Article 82 requires the coastal State to make payments or contributions with respect to the exploitation of non-living resources of the continental shelf beyond 200 nautical miles through ISA, which shall be distributed to States Parties to UNCLOS. How should such regime be implemented?

(2) The continental shelf beyond 200 NM are such zones where the coastal State exercises its sovereign rights over the shelf, while the superjacent waters are high seas, which are beyond national jurisdiction. How such specificity could affect the legal regime of the continental shelf or the exploitation of the resources there? and

(3) In case where the coastal State has received the recommendation from CLCS but not yet established the outer limit of the continental shelf beyond 200 NM, what would be the legal nature of such zones?

There seems to be no consensus on these issues within the international community.

With regard to the mineral resources in the Area, ISA has adopted regulations for prospecting and exploration for 3 different mineral resources, namely, polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts. To date, more than 20 contractors are engaged in exploration under contracts with ISA. Recently, ISA works on the regulations governing exploitation as a matter of priority. We are delighted to see that the progressive development of the relevant rules and guidelines has been made in order to enable the international community to exploit mineral resources in the Area, which is defined as a “common heritage of mankind” under UNCLOS. On the other hand, it would take much more time to adopt concrete regulations for the sharing of benefits from mineral resources of the Area among the States Parties, as foreseen in UNCLOS.

(Contributions made by ITLOS)

Here I would like to present some examples of contributions made by the International Tribunal for the Law of the Sea (ITLOS), another organization established under UNCLOS, in the development of these legal regimes for marine mineral resources. ITLOS, established in 1996, celebrates this year its twentieth

anniversary. In these 20 years, ITLOS has already dealt with and given answers to some important legal questions related to these legal regimes.

In February 2011, the Seabed Dispute Chamber of ITLOS issued an advisory opinion regarding the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area. ISA requested ITLOS to issue an opinion on these questions, which was the very first advisory case before ITLOS. ITLOS clarified the nature and scope of the responsibilities and obligations that such so-called sponsor States bear, and gave guidance as to the measures necessary or appropriate to be taken by those States.

More specifically, those States bear two categories of obligations: one is those obligations to secure the compliance by contractors of their own obligations under the contract or international law; and the other is those obligations of sponsor States themselves.

The obligations of the first category are the obligations of “due diligence”, and sponsoring States would not be responsible so long as they take “all measures necessary” to ensure the compliance by sponsored contractors of their own obligations. The direct obligations of the sponsoring State, on the other hand, include for example the obligation to assist ISA in the exercise of control over activities in the Area, the obligation to apply a precautionary approach, and the obligation to conduct environmental impact assessments. ISA welcomed the advisory opinion of the Chamber as providing for a useful guidance to the exploration activities of deep seabed resources.

The judgment of ITLOS rendered in 2012 in the case concerning the maritime delimitation between Bangladesh and Myanmar was the first case before an international court or tribunal in which the maritime delimitation of the continental shelf beyond 200 NM was decided. This judgment successfully brought to an end a dispute which was pending between these two States for 36 years. In this judgment, ITLOS gave clarifications to the meaning of “natural prolongation” under Article 76, paragraph 1, and how it interrelates with that of “continental margin”. It delimited the continental shelf up to, as well as beyond, 200 NM applying the so-called three-stage method: ITLOS first drew a provisional equidistance line between the coasts of the two States, adjusted it taking into consideration the relevant circumstances of the case, and then verified that the line thus adjusted did not lead to an inequitable result.

This judgment of ITLOS would be of some help for the international community in search for clearer understanding of the legal regime of the continental shelf beyond 200 NM. It is also important in this regard that ITLOS gave answer to some questions concerning the relations between the competence of CLCS and that of ITLOS. CLCS is entrusted with the task of examining the information submitted by coastal States and of making recommendations on the matters related to the establishment of the outer limits of their continental shelf beyond 200 NM. In this case, however, CLCS had decided to defer consideration of the submissions made by Bangladesh and Myanmar, respectively, because the dispute relating to the delimitation of continental shelf existed between them. By settling the delimitation dispute over the continental shelf both up to and beyond 200NM between these two States, ITLOS also removed the obstacle to the work of CLCS.

We need to follow with attention that the legal regimes for the resources of the sea are developed and deepened in a dynamic manner through the interpretation and implementation of UNCLOS, by activities or practice of States, international organizations and ITLOS.

(BBNJ)

Another option to develop and deepen legal regimes is through conclusion of a new legally binding instrument. This symposium covers the issue of conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ), which is now a topic of keen discussion both domestically and internationally. It was, however, not recognized at the time of drafting UNCLOS that biodiversity or genetic codes in the Area and high seas could be valuable resources. Thus there are no specific rules in UNCLOS on the preservation and sustainable use of such resources. Among a number of international organizations that took up this issue, the UN has addressed it since 2006 at the Ad Hoc Open-ended Informal Working Group that was established by the 2004 UNGA resolution. In this recent trend, the UNGA adopted a resolution in June 2015 by which it was decided to develop an international legally binding instrument on BBNJ. It was also decided that, for that purpose, a preparatory committee will be established in March 2016. Given these developments, it is indeed timely to invite experts from home and abroad to discuss BBNJ issues at this symposium.

At the forthcoming meeting, the Preparatory Committee will discuss such issues

as the relationship between the new rules for BBNJ and the principles of UNCLOS including the freedom of the high seas, as well as other existing frameworks regarding oceans and biodiversity. The negotiations also address issues such as the validity of marine protected areas or benefit sharing on marine genetic resources in the areas beyond national jurisdiction, environmental impact assessments, and capacity-building and the transfer of marine technology. Close attention should be paid to the development of the negotiations on both the format and contents of the instrument to be adopted.

(Concluding remarks)

The development of the resources of the seas and oceans is highly dependent upon the advancement of science and technology. It is necessary that international law for the resources of the seas and oceans enables us to accommodate various interests to be pursued, such as the advancement of science, the preservation of environment and the equity in benefit sharing.

As I presented in this address, UNCLOS not only provided for the rules but also laid down mechanisms to clarify and enrich these rules by interpretation and application. At this symposium, in the sessions of today and tomorrow, we would learn how such dynamism functions and what the newly emerging questions and problems are. We would also learn, to my great expectation, the key ideas to solve such questions and problems. I strongly hope that this symposium would contribute to the further promotion of “the rule of law at sea”.

Looking back to the time of the drafting of UNCLOS, the international law for the resources of the sea was one of the biggest issues for the scholars as well as practitioners of the international law. I wish that this symposium would turn the interests of younger researchers today toward the international law for the resources of the sea again.

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