



**UMT- AALCO LEGAL EXPERT MEETING ON LAW OF THE SEA -
"MARINE BIODIVERSITY WITHIN AND BEYOND NATIONAL
JURISDICTION: LEGAL ISSUES AND CHALLENGES"**

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**KEYNOTE ADDRESS BY PROF. DR. RAHMAT MOHAMAD,
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**Excellencies, Distinguished Representatives of Member States of
AALCO, Ladies and Gentlemen.**

I. INTRODUCTION

At the outset I would like to thank the Universiti Malaysia Terengganu, the co-organizers of this meeting who upon a proposal presented by AALCO readily agreed to convene this two day Legal Experts Meeting on the Law of the Sea, here in Malaysia. Law of the Sea has been an important topic on the agenda of the Asian-African Legal Consultative Organization since 1956, thus it is very significant in the AALCO forum and very close to my heart. Very recently when the topic was deliberated upon in Beijing in April 2015 during the Fifty-Fourth Annual Session of AALCO, the Member States mandated the Secretariat to convene a meeting of Legal experts to thoroughly deliberate upon the topical issue of "Marine Biodiversity within and Beyond National Jurisdiction: Legal Issues and Challenges".

In this presentation, I will be first, briefly speaking about the evolution of the current law of the seas regime following which I will share a few of my thoughts on some of the themes of this conference. The first theme is current issues in South East Asia. The second theme is about the importance of the UNCLOS provisions on the preservation of marine

biodiversity, in which I will also be looking into how states can achieve this goal through domestic legislation.

Madam Chairperson, as we are all aware the history of seas is synonymous with the history of the world itself. Seas have generally performed two important functions-First as a medium of communication and secondly, as a vast pool of resources, both living and non-living. These two functions have spurred the development of legal rules in relation to the use of the seas.¹ The fundamental principle governing the law of the sea is that the 'land dominates the sea' so that the territorial land constitutes the starting point for the maritime rights of a coastal state.²

Indeed, the seas were at one time thought of as being subject to national sovereignty. Anyhow, the freedom of the high seas swiftly became a founding principle of international law. However, it was acceptable to appropriate a maritime belt around its coastline as territorial waters, or territorial sea as an extension of their territory. Much of the history of the law of the seas has revolved around the extent of the territorial sea and the precise location of the dividing line between it and the high seas. The original premise drew the width of the territory on the basis of the ability of coastal states to exercise control over it by military means from its shores. However, the present century has been witness to the exertion of continual pressure by states to enlarge the territorial belt and thereby subject more of the oceans to their exclusive jurisdiction.

This gradual shift in the law of the seas regime towards the enlargement of the territorial seas (the accepted maximum limit is now a width of 12 nautical miles as opposed to 3 nautical miles just forty years ago) along with the continued claim of jurisdiction over portions of what was regarded earlier as high seas has reflected a change in the attitude of states towards the seas. This shift may have been encouraged by the discovery of the presence of natural resources and seabed beyond the high seas. However, along with this trend to assert greater claims over the high seas has been the move towards the idea of a 'common heritage of mankind.' Hence, the development of the law of the seas has been in constant change in the twentieth century with the emergence of such differing principles.

This led to the recognition of a need to codify certain overarching principles that would regulate state behaviour with regard to the seas. A

¹ UN Convention on the Law of the Sea, 1982 (eds. M. Nordquist, et al.), The Hague, 6 vols, 1985-2003

² Malcolm Shaw, International Law (Cambridge, 6th ed, 2008) pp. 553; Qatar v Bahrain ICJ Reports 2001

series of conferences had been held, which led to the four 1958 Conventions on the Law of the Sea or UNCLOS I. UNCLOS I codified much of the existing custom into four conventions: The Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas and the Convention on the Continental Shelf. Despite the acceptance of these conventions by a sizable number of states, UNCLOS I failed to obtain consensus on the width of the territorial sea.

In 1960, another conference, UNCLOS II was convened but similarly failed to reach consensus on the territorial sea. In 1973, negotiations convened for UNCLOS III. More than 150 countries and several specialized agencies took part in these negotiations which lasted for nine years and resulted in what became the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which has since been regarded as a "constitution for the oceans" because of its comprehensive nature.

The build-up to the Law of the Seas Conference between 1974 and 1982 involved dialogue among a range of states and international organisations and involved a variety of social, economic and strategic concerns. Many developing countries wished to develop the exclusive economic zone, by which coastal states would have extensive rights over a 200 mile zone beyond the territorial sea and establish international control over the deep sea bed. This was done with the motive of preventing technologically advanced states from exploiting resources freely without any constraint. The Western States, on the other hand wanted to uphold the principle of freedom of navigation in order to serve their economic interests by extracting resources and minerals from the deep sea bed.

It is in this context that AALCO's contribution to the law of the seas is worth taking note of. First, it acted as a consensus building forum among Asian African States on various key issues. Further, it enabled the Asian African States to engage with Latin American states and arrive at a consensus on multiple matters. Second, it used this consensus to act as a platform for expressing the views of the developed countries on the negotiating stage thus helping in developing of some of provisions which were accepted by the global community. These provisions include, in particular, the concept of the exclusive economic zone (EEZ), the archipelagic States as well as the regime for the straits used for international navigation.

This ultimately led to the emergence of an acceptable package that reconciled the views of the developed and developing states and moved towards a settlement of the question of the breadth of the territorial sea. The UNCLOS contains 320 Articles and 9 Annexes. It was adopted by 130 votes to 4 with 17 abstentions. It is an authoritative set of guidelines for all issues related to the oceans and should be used as a tool to resolve all disputes that may arise between states regarding the same.

II. CURRENT ISSUES IN THE SOUTH EAST ASIA

Madam Chairperson, with the emergence of several recent issues in the region of the South China Sea, including issues relating to delimitation of maritime boundaries, fisheries, sharing of resources etc. In this context all AALCO members are urged to amicably resolve these disputes according to the UNCLOS and other rules of international law.

III. UNCLOS AND MARINE BIOLOGICAL DIVERSITY

Madam Chairperson, despite the growing concerns regarding world biodiversity loss, until recently, little has been done to assess the biodiversity of – and losses of biodiversity within – the world’s oceans.³ There are two basic explanations for this knowledge gap. First, the oceans are difficult for humans to explore. As a result, marine systems have been relatively neglected because they are “out of sight, out of mind’ to most people, including most scientists.”⁴ Second, until recently humans tended to view the oceans as too vast for humans to affect much – what has been called the paradigm of inexhaustibility remain undiscovered and unexplored. Nevertheless, any nation or group of nations that cares about preserving biodiversity should view the preservation of marine biodiversity as a high priority – especially given that ocean health and human health are inextricably linked. Moreover: Marine ecosystems are major national capital assets. In addition to providing valuable goods, such as fisheries and minerals, they provide critical life support services, such as diluting, dispersing, and metabolizing the effluents of society, thus purifying waters for recreation.⁵ The value of a healthy ocean is difficult to overestimate. The oceans cover more than 71 percent of the Earth and, taking depth into account, contain more than 99 percent of the space

³ Peter M. Vitousek et al., “Human Domination of Earth’s Ecosystems”, 277 SCI. 494, 495 (July 25, 1997)

⁴ Tatiana Brailovskaya, Obstacles to Protecting Marine Biodiversity through Marine Wilderness Preservation: Examples from the New England Region, 12:6 CONSERVATION BIOLOGY 1236, 1238 (Dec. 1998)

⁵ Robin Kundis Craig, Protecting International Marine Biodiversity; International Treaties and National Systems of Marine Protected Areas (2004) 20 Journal of Land Use Vol 2; pp.337

available for life. The oceans' size thus already suggests their importance as biodiversity reservoirs, and marine systems are extraordinarily diverse in all aspects, from genetic to taxonomic to ecological.

Marine biodiversity beyond areas of national jurisdiction is considered of critical importance, owing to its shared, transboundary nature and its interconnectedness to coastal ecosystems. As global shipping intensifies and technological advances provide more opportunities to access the resources of the high seas and the deep seabed areas beyond national jurisdiction (ABNJ), the catalogue of threats to the marine environment and its biodiversity increase commensurately. Seaborne trade and passenger traffic is rapidly expanding and is expected to double over the next two decades. The risks to the marine environment and its biodiversity from intentional and accidental vessel source discharges including oil and other hazardous substances, noise and ship strikes on marine mammals are likely to be compounded with more prevalent high seas traffic.

Technological progress in fishing also poses considerable threat to marine biodiversity. The deep sea fishing industry is now supported by a battery of technological innovations including global positioning systems, multi-beam sonar and stronger and more powerful cables and winches. Fishing nets and lines are composed of virtually indestructible synthetic material and may be laid over vast areas of ocean. Heavy bottom trawling gear has already caused substantial damage to vulnerable marine ecosystems (VMEs). Beyond these threats, new and emerging uses of ABNJ such as more intrusive marine scientific research, bio-prospecting, deep seabed mining and environmental modification activities to mitigate the effects of climate change have the potential to harm the highly interconnected and sensitive ecosystems of the open ocean and the deep seabed if not sustainably managed now and into the future.

UNCLOS does not define the term marine biodiversity. Convention on Biological Diversity defines it as variability among living organisms including terrestrial, marine and other aquatic ecosystems and complex ecological systems of which they are a part. There are diversity within species and diversity within ecosystems, as well as genetic diversity. The CBD also contains a specific reference to UNCLOS and provides that with respect to marine environment, it must be implemented consistently with the rights and obligations of States under UNCLOS.

It is believed that UNCLOS already contains environmental obligations and that a new legally binding implementing agreement could implement, strengthen, and elaborate on those obligations. The Convention contains obligations to protect and preserve rare or fragile ecosystems as well as habitats of depleted, threatened or endangered species or other forms of marine life, the duty to cooperate on a global or regional basis for the protection and preservation of the marine environment, the duty to undertake environmental impact assessments and publish or communicate reports of the results of such assessment to the competent international organizations.

UNCLOS contains several provisions for the protection and preservation of the marine environment, which obviously would include protection of the biological diversity. The provisions of UNCLOS differ with reference to the maritime zone, the water column or the seabed and subsoil, or with reference to the nature of the activity that is undertaken.

In the territorial sea and internal waters where the coastal State enjoys full sovereignty and its national laws on environmental issues apply.

In the exclusive economic zone and continental shelf, coastal States enjoy sovereign rights over the resources. In the exercise of such rights, coastal State may enact laws and regulations concerning the marine environment including, in respect of fisheries, optimum utilization in specific areas.

Environmental considerations and protection of microbes associated with the deep sea ecosystems assumes importance in the exploration of resources of the area beyond national jurisdictions, namely the Area. The Convention requires the International Seabed Authority to take the necessary measures in respect of activities in the Area to provide effective protection for the marine environment from activities that may have harmful effects, including interference with the ecological balance of the marine environment. Such measures are to be aimed at protecting and conserving the natural resources of the Area, as well as at preventing damage to the flora and fauna of the marine environment. Under the Convention, marine scientific research constitutes one of the freedoms of the high seas, and must be conducted in such a way as to preserve and protect the marine environment. Marine scientific research concerning the Area and its resources shall be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole. In addition, the Convention requires the International Seabed Authority to promote and

encourage the conduct of marine scientific research in the Area and to coordinate and disseminate the results of such research and analysis.

There is also a view that marine genetic resources beyond areas of national jurisdiction are the common heritage of mankind.

Although UNCLOS is not an environmental treaty, it frequently addresses environmental concerns. In addition to having an entire section dedicated to the protection and preservation of the marine environment (Part XII), the treaty also contains numerous references to environmental duties and obligations throughout its many articles. The scattered placement of all of the environmental references makes it difficult at times to put together a comprehensive understanding of the duties of member nations and the powers they are granted to enforce the various provisions. For example, Part XII of the UNCLOS is entitled 'Protection and Preservation of the Marine Environment' and includes both general and specific obligations of state parties to prevent, reduce and control pollution. Section 1 of Part XII of UNCLOS sets the tone for a number of the environmental provisions laid out in the treaty.

A COMPREHENSIVE TREATY ON BIODIVERSITY BEYOND NATIONAL JURISDICTION AND ITS INCORPORATION INTO DOMESTIC LEGISLATION

Madam Chairperson, Excellencies, Ladies and gentlemen, a substantial body of international law instruments has been developed since the adoption of the United Nations Convention on the Law of the Sea (UNCLOS) which complement and extend the UNCLOS framework for protection of the marine environment. Of most significance for the conservation of marine biodiversity, is the Convention on Biological Diversity (CBD) adopted in 1992. As mentioned above, the CBD introduced the concept of biodiversity defined in Article 2 of the Convention as “the variability among living organisms from all sources, including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part” and including “diversity within species, between species and of ecosystems.” This comprehensive approach added new dimensions to marine environmental protection which had previously focused on prevention reduction and control of marine pollution and the protection of single species. However, it is significant to point out that Article 5 of the CBD limits the obligations of Contracting Parties in relation to conservation and sustainable use of biodiversity in ABNJ to a duty to

cooperate directly or through competent international organizations. There is therefore no direct obligation on Contracting Parties to conserve or sustainably use the components of marine biodiversity in ABNJ.

When viewed together, these normative features of the ABNJ legal and institutional framework represent a fundamentally disjunctive and fragmentary system for the conservation and sustainable use of marine biodiversity in ABNJ. The separate trajectory of international environmental law instruments such as the CBD has introduced a range of modern conservation norms which have yet to be properly incorporated in the law of the sea framework for protection and preservation of the marine environment.

Further, the responsibility for implementing international law obligations to conserve the marine biodiversity of ABNJ is dispersed among a variety of global and regional regimes with no overarching global instrument or institutional focal point to develop best practice standards or to adopt conservation measures for unregulated activities in ABNJ. There are multiple gaps in the geographic coverage of the relevant regulatory instruments and institutions, their incorporation of biodiversity conservation objectives, the effectiveness of their decision making structures and the systems in place to monitor and enforce compliance of biodiversity conservation measures in ABNJ. These deficiencies are compounded by a lack of coordination and cooperation between the global, regional and sectoral organizations which regulate human uses of ABNJ.

Excellencies, Ladies and Gentlemen, It is in this context that a number of global and regional initiatives have been taken over the last decade to address some of the gaps and disconnects in the legal and institutional framework for conservation and sustainable use of marine biodiversity in ABNJ. The political centre of gravity for these efforts has been the BBNJ Working Group established by the UNGA in 2004. The CBD has supported these discussions in the BBNJ Working Group with some technical and scientific initiatives related to environmental impact assessment (EIA) and the designation of ecologically and biologically significant areas (EBSAs) in the world's oceans including in ABNJ.

In the meetings of the Working Group (ninth and the last meeting was held in January 2015), Participating States have agreed on the need for improved implementation of global and regional agreements relevant to conservation and sustainable use of biodiversity in ABNJ including the UNCLOS and

the CBD. The integral role of sectoral and regional organizations in implementing such agreements has been recognized as has the need to improve the management of these bodies and to develop and strengthen mechanisms for their accountability. However, a lack of consensus among participating States on the legal status of marine genetic resources in ABNJ has been a contentious issue throughout the BBNJ meetings. In particular, there has been no consensus on rights of access to and the sharing of benefits derived from these resources.

The final meeting of the Working Group in January 2015 decided to develop an international legally binding instrument under the Convention on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. A preparatory committee will be established to make substantive recommendations to the General Assembly on the elements of a draft text of an international legally binding instrument under the Convention. It was decided that negotiations shall address the topics identified in the package agreed in 2011, namely the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular, together and as a whole, 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.

Excellencies, Ladies and Gentlemen, Given the growing threats and pressures on the marine environment of ABNJ and its biodiversity, it is time to specifically incorporate and reconcile the modern conservation norms and objectives of international marine environmental law with the law of the sea. The political process taking place in the Preparatory Group and the UNGA will ultimately determine the shape of any new instrument under the law of the sea and its long term contribution to conserving the biodiversity of the oceans beyond national jurisdiction. At this juncture, I would like to reiterate the commitment of AALCO to assist its Member States in their preparations for the negotiations for an implementing agreement to conserve biodiversity beyond areas of national jurisdiction.

Madam Chairperson, at this juncture, allow me to conclude by citing some broad parameters that states could bear in mind in the framing of a just biodiversity law. First, it needs to provide a mechanism for the assessment of the nation's biodiversity and biological resources. It should provide for (1) the identification of current impacts on domestic and transboundary

biodiversity and ecosystems, (2) the location drivers of biodiversity loss and (3) the evaluation of the possibilities for halting biodiversity loss. Further, there is a need for such legislation to establish clear goals in advance to inform and inspire the provisions of biodiversity laws and policies. The development of goals provides relevant guidance for the selection and drafting of instruments and mechanisms for inclusion in laws in accordance with a country's vision and priorities.

With these thoughts in mind, I sincerely hope that we can resolve some of the questions and build on some of the existing frameworks towards a comprehensive understanding of the Law of the Seas. Further, I also hope that this understanding leads to the creation of viable enforcement mechanisms that helps resolves some of the disputes regarding the UNCLOS. With that, I would like to close this address.

Thank You.