

**VIII. SUMMARY RECORDS OF THIRD GENERAL
MEETING**

**SUMMARY RECORDS OF THE THIRD GENERAL MEETING
HELD ON TUESDAY, 22ND JUNE 2004 AT 2:30 PM**

The Vice-President Honorable Mr. Ambrose Patrick Dery in Chair.

A. Report on Matters relating to the work of the International Law Commission at its Fifty-fifth Session

1. **Amb. Dr. Ali Reza Deihim**, Deputy Secretary-General of AALCO introduced the item on the topic contained in the Document No. AALCO/43/BALI/2004/SD/S 1.
2. He welcomed Prof. Momtaz, who has been chosen by the Chairman as the Representative of the International Law Commission and Amb. Yamada and Prof. Chee, members of the ILC. He said that their presence and participation would be of valuable guidance for the deliberations, and reiterated that close ties this existed between these two legal bodies. He informed that AALCO and the ILC, held a joint meeting in conjunction with the meeting of the Legal Advisers of AALCO Member States in New York, on 30th October 2003.
3. Dr. Deihim informed that the fifty-fifth session of the ILC had on its agenda 7 topics. On the topic “Reservations to Treaties” the Commission had before it the eighth report of the Special Rapporteur dealing with withdrawal and modification of reservations and interpretative declarations. The Commission further referred five draft guidelines dealing with withdrawal and modification of reservations and interpretative declarations to the Drafting Committee and adopted 11 draft guidelines (with 3 model clauses) dealing with withdrawal and modification of reservations, which were described in the Secretariat document.
4. Guideline 2.5.3 dealing with periodic review of reservations was an addition to the existing corpus on law relating to reservations. Though this guideline does not mention any specific period for the review of reservations, it would certainly add new responsibility to parties to a treaty and would further help in preserving the integrity of a treaty. Guideline 2.5.7 dealing with effect of withdrawal of a reservation was an addition to the existing law of reservations as it had not been included in the Vienna Convention on the Law of Treaties 1969. This provision clarified a situation, which had been, till now, understood in an implied manner as reversing the legal effect of reservations.
5. Dr. Deihim further said that as regards the topic “Diplomatic Protection”, the Commission had before it the fourth report of the Special Rapporteur covering draft articles 17 to 22 on the diplomatic protection of corporations and shareholders and of other legal persons. The Commission decided to refer draft articles 17 to 22 to the Drafting Committee. After considering the report of the Drafting Committee the Commission adopted draft articles 8(10), 9(11) and 10(14) with commentaries thereto.
6. He said that the positive achievement on the topic during the last session was the adoption of exhaustion of local remedies rule, as it was a well-established principle of

customary international law. It was significant that the provision emphasized that the remedies to be exhausted must be in the form of right resulting in a binding decision rather than on the structure or form of the institution before which the matter was decided. The Commission rightly favored for the adoption of preponderance test, as approved by the International Court of Justice in *ELSI* and *Interhandel* cases, for the purpose of classification of claims. According to this test the injured individual was obliged to exhaust local remedies where the claim was preponderantly one that related to the injured individual as opposed to the State. The Commission made it clear that local remedies need to be exhausted both in the case of international claims as well as in the cases of request for a declaratory judgment

7. He informed that on the topic “Unilateral Acts of States”, the Commission had considered the sixth report of the Special Rapporteur, which focused on the unilateral act of recognition. The Commission also established an open-ended Working Group on Unilateral Acts of States. The Commission had before it the first report of the Special Rapporteur on the topic “International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law”. The Special Rapporteur made certain recommendations and submissions for the consideration of the Commission, which, if found accepted, could constitute a basis for drafting more precise formulations.

8. On the topic “Responsibility of International Organizations”, the Commission considered the first report of the Special Rapporteur dealing with the scope of the work and general principles concerning responsibility of international organizations. Following the consideration of the above report the Commission referred three draft articles to the Drafting Committee. The Commission further adopted articles 1 to 3 as recommended by the Drafting Committee together with commentaries.

9. He apprised that on the topic “Fragmentation of International Law” the Commission decided to establish an open-ended Study Group on the topic and appointed Mr. Martti Koskenniemi as Chairman, to replace Mr. Bruno Simma who was no longer in the Commission. The Study Group held four meetings focusing on various issues. On the topic “Shared Natural Resources”, the Commission considered the first report of the Special Rapporteur on the topic. In furtherance of its work on the topic the Commission also had an informal briefing by experts on groundwaters from the Food and Agricultural organization (FAO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

10. Finally, he drew the kind attention of the delegates to the information requested by the ILC on many of its agenda items. The feed back and information on State practice of AALCO Member States could be immensely helpful in enabling the Commission to take on board the views of different legal systems. He said that the Secretariat requested that delegations to submit specific comments and observations on the ongoing agenda items of the ILC so that they could be reflected in the statement of the Secretary-General of AALCO, when he attends the ILC session soon after the AALCO session.

11. **Prof. Djamchid Momtaz**, Representative of the International Law Commission (ILC) stated that both ILC and AALCO were dealing with progressive development and codification of international law and said that the Commission was always happy in welcoming the Secretary-General of AALCO at the ILC annual sessions. He gave a brief report on the work of the ILC during its 56th session. The ILC has examined four items during the first part of the 56th session. They were: Diplomatic Protection; Shared Natural Resources; Responsibility of International Organizations; and International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law.¹

12. The **Delegate of the People's Republic of China** thanked the AALCO Secretariat and Prof. Momtaz, Representative of ILC, for their Report and briefing and Prof. Momtaz for his complete and detailed briefing on the first half of the 56th session of the ILC. She said that the People's Republic of China held same positions on the work of the ILC at its 55th session, as expressed in the speeches delivered by the Chinese Delegation at the Sixth Committee of the 58th Session of the UN General Assembly. She congratulated the Commission on the progress made and extended appreciation to the Special Rapporteurs of each topic for their remarkable work. She made some general comments on the topics covered during the first half of the 56th session of the ILC.

13. On the topic of Diplomatic Protection, the Delegate said that the draft articles reflect in essence the customary international law on diplomatic protection and were satisfactory on the whole. The Delegate wished that the complete commentaries on the draft articles could be finalized as early as possible, which would help to understand the draft articles. She hoped that the Commission would finish its second reading on the draft articles in 2006 in accordance with its quinquennium work programme.

14. On the topic of 'Responsibility of International Organizations', the Delegate said that they were looking forward to seeing the commentaries on the four new draft articles that were adopted by the Commission. She said that their rudimentary view on the topic was that the draft articles should be based as possible as it could, on the in-depth research of relevant practices of international organizations. Study on practices of only a few international organizations could not lead to any convincing general conclusion. At the same time, due attention should be paid to the relationship between responsibility of international organizations and responsibility of States. These two issues should be independent in international law, that is, the attribution of conduct to an international organization should not influence the attribution of conduct to a State and vice versa.

15. On the topic of 'Shared Natural Resources', the Delegate said that they acknowledged the importance of research on it and believe that using groundwater in a scientific and reasonable way is of significance to all States, their nationals and offspring. She appreciated the Special Rapporteur for his preciseness in working. The Delegate said that the general framework and draft articles were positive and constructive and informed that they were doing research on some specific issues involved.

¹As the statement was made in French, it shall be comprehensively dealt with in the Verbatim Record of Discussions of the Forty-Third Session.

16. On the topic of “International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law”, the Delegate said that the conclusions and principles drawn by the Special Rapporteur were very much conducive to further work on the topic. As to those principles, agreements have been reached among States as well as inside the Commission, they could serve as the basis for elaboration of the draft articles. As to those controversial issues, she said that they hope they might be solved by the Commission through further study in the near future.

17. **Prof. Chee, Member of the ILC** reported on two topics which were not covered by Prof. Momtaz earlier. These topics were, Unilateral Acts of States and Fragmentation of International Law. On the topic of Unilateral Acts of States, he said that it went through three stages of evolution as far as the content of the subject was concerned. First, it consisted of several topics, such as declaration, protest, recognition, waiver etc. but the Special Rapporteur had then changed the content of his subject from several single topics to one large topic, the recognition of States. But it was not received well by the Commission. The Special Rapporteur then changed his mind and went back to his original proposal, dealing with the individual topic doing away with the subject of recognition of State. The Commission did not have his draft report. The Special Rapporteur informed that a new draft would be delivered to the address of individual members during the recess. The Commission planned to take up the subject at the beginning of the second session this year. This was the reason for the slow progress of the work on the topic.

18. On the topic of Fragmentation of International Law, Prof. Chee said that the work had been slow on account of change of the Special Rapporteurship from Prof. Bruno Simma, who went to the International Court of Justice as a judge, to Professor Martti Koskenniemi. The present Special Rapporteur produced his first report with several research papers which would be debated at the second session of the ILC this year. He said that the Special Rapporteur aims to produce guidelines for the outcome of his work. He explained the reasons why the Commission has decided to work on the topic. Quoting the report of the ILC in this regard, he said that the rapid development of international law, the diversification of international legislation, the establishment and proliferation of international judicial bodies and operation of treaty monitoring mechanism and a significant impact created serious problems for the unity and coherence of international law. Consequently the resulting challenges to certain norms and legal framework, giving rise to divergent and incompatible interpretation of international law largely in order to take into account customary international law, warranted in-depth consideration and support was expressed for the Commission to address particularly aspects concerning the unity and coherence of international law in the consideration of the topic, shedding light on both the advantages and the disadvantages of having a plurality of judicial bodies. In that regard, it was noted that the Commission would assist international judges and practitioners in coping with consequences of proliferation.

19. The **Delegate of Republic of Indonesia** noted that his delegation was satisfied with the progress of the work of the ILC during its 55th session. The Delegate said that

they would confine their intervention to the topics of ‘Diplomatic Protection’, ‘Shared Natural Resources’ and ‘Fragmentation of International Law’.

20. Commenting on ‘Diplomatic Protection’, he said that legal aspects of diplomatic protection of legal persons, particularly corporations were quite complicated. The protection of corporation concerns not only individual rights of a corporation, but also economic interest of the State concerned. In this regard, he said that his delegation emphasized that there should be nationality links between the corporation and the State exercising diplomatic protection. His delegation supported the wording of paragraph 2 of article 17 of text draft articles on diplomatic protection provisionally adopted by the ILC. However, he said that Indonesia preferred to delete the second criterion in brackets. State of nationality of a corporation should be the State in which the corporation is incorporated. He said that his delegation was aware that the International Court of Justice had made reference to criterion of the place of the registered office and criterion of the place of incorporation. In this respect, his delegation maintained that the criterion of place of incorporation was growing dominance in other areas of law. Moreover, his delegation shared the view that the criterion of place of the registered office was superfluous because most of the registered corporations were located in the same place. Although Indonesia recognized the importance of maintaining balance between the interest of States and those of investors, it was quite cautious to include a reference to the State of nationality of the shareholders. Thus, his delegation supported the proposal that AALCO Member States would provide the ILC policy guidance on as to how to balance the interest between the protection of foreign investment and the prevention of multiple international litigations and undue intervention in domestic economic affairs by exercising diplomatic protection.

21. Speaking on ‘Shared Natural Resources’, the Delegate said that natural resources were the original patrimony of humanity and was the source of goods and services as well as of the space in which society developed and evolved. The utilization of natural resources should be considered to meet the need of the present and next generations. He said his Delegation wished to weigh its solid support to the work of the ILC to explore and formulate legal definition of ‘shared’ natural resources with a purpose to emphasize that natural resources should be in the benefit not only for the present but also the future generations. The management and the exploitation of such natural resources should be conducted in the most appropriate and sustainable way. The management and the exploitation of shared natural resources should be based on scientific calculation in order to prevent unwanted depletion of such resources. The Delegation urged the AALCO Member States to define their common understanding and position of shared natural resources in order to protect their interest. He said that his Delegation wished to remind the need of Member States to seriously deal with the formulation of this new concept in order to prevent it from being used by others as an entrance to lessen the sovereignty of a country where the shared natural resources were located. He said that his Delegation would recommend the AALCO Member States to explore the best formulation/mechanism for the exploration and the exploitation of shared natural resources, to avoid the depletion of such resources, in order to serve the interest of our

present generation as well as to preserve the legitimate benefit for the many generations to come.

22. On the topic on 'Fragmentation of International Law' the Delegate said that he would second the decision of the ILC to change the title of the topic to 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law'. He shared the agreement that the Commission should not deal with institutional proliferation. Instead, the emphasis to focus the study on the subject of fragmentation on the substantive perspectives was something, they should properly recommend. He said that his Delegation's view was that the Commission was quite correct when it addressed three different patterns of interpretation or conflict in dealing with the substantive aspects, namely, conflict between different understandings or interpretations of general law, conflict between general law and a special law claiming to exist as an exception to it, and conflict between two specialized fields of law. He said that the Commission's view that the Vienna Convention on the Law of Treaties would provide an appropriate framework for the study of fragmentation, which was endorsed by the United Nations General Assembly, was believed as an extraordinary guidance to lead the study on the right path as long as it contributes positive conclusion.

23. The **Delegate of the Republic of Korea**, while commenting on the topic of 'Responsibility of International Organizations' said that they appreciated the progress made by the ILC on this topic and suggested that any future work should fully take into account the institutional and legal diversity of various international organizations when adapting the articles on State responsibility to this topic. He said that his Delegation was of the view that the scope of this topic should be limited to intergovernmental organizations. In this regard, the term 'other entities' used in the draft article 2 required further clarification.

24. Speaking on the topic of 'Diplomatic Protection' he said that the ICJ judgment in the *Barcelona Traction* case of 1970 represented an accurate statement of customary international law on the diplomatic protection of corporations. He said that they could not deny that today's rules and practices governing foreign investment had been built upon the Court's decision in the case.

25. He said that his Delegation believed that that the State of incorporation is entitled to exercise diplomatic protection with respect to an injury to a corporation. However, his Delegation believed that there was no need for a 'genuine link' requirement or any such kind of requirement implying economic control in determining the nationality of a corporation. He said that they would like to see the genuine link as one of the factors that a State may consider in deciding whether to take up the claims of a corporation, in the light of the discretionary nature of the State's right of diplomatic protection.

26. He said that on the whole his Delegation was inclined to support the Commission's decision to include three exceptions to the principle that the State to exercise diplomatic protection was the State of incorporation. As the ICJ has envisaged, the State of nationality of shareholders should be entitled to exercise diplomatic

protection if the corporation has ceased to exist, or if the injury to the corporation was caused by the State of incorporation, or if the shareholders' own rights had been directly injured.

27. The Delegate said that his delegation appreciated the Commission's sincere efforts to facilitate its work on the topic of unilateral acts of States. His Delegation supported the recommendations made by the working group of the Commission with regard to the method of work. He welcomed the Commission's intention to focus its work on the unilateral acts *stricto sensu* and on the State practice in respect of unilateral acts.

28. He said that the Commission was at its initial stage of work with regard to the rest of the topics, such as the 'liability' part of the 'International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law', 'Shared Natural Resources' and 'Fragmentation of International Law'.

29. The **Delegate of Malaysia**, while commenting on the topic of 'Reservations to Treaties', welcomed the broad-based definition of 'objections' as proposed by the Special Rapporteur in his eighth report as it would alleviate any uncertainty on the divergent practices amongst States. She was of the view that a clear guide on the definition of what was an 'objection' was timely. She said that Malaysia favored guidelines which encouraged States to give reasons for objections to reservations, as this would encourage transparency and certainty in international relations.

30. With regard to 'Unilateral Acts of States' she said that Malaysia supported efforts to identify and elaborate guidelines on when unilateral acts of States create legal obligations in furthering legal security. States must know when the unilateral expression of their will would be taken to be legally binding commitments, as opposed to mere political statements. However, she said that Malaysia felt that formulation of legal rules should be deferred until materials on State practice could be analyzed. A further study on conduct of States leading to possible legal effects similar to unilateral acts should also be carried out with the possibility of being included in the guidelines.

31. On the topic of 'Shared Natural Resources', the Delegate said that Malaysia supported the approach of the Commission in collecting all pertinent information before embarking on the formulation of rules in this area. Malaysia also strongly supported the need to protect groundwaters from environmental pollution and other disruptive activities of humankind. Malaysia reiterated its commitments to share its experience and information concerning the topic. The delegate highlighted that there was an urgent need for preventive measures to combat contamination of groundwater resources.

32. The **Delegate of the Islamic Republic of Iran** expressed his delegation's sincere appreciation for the work of the International Law Commission and thanked the representative of the Commission, Prof. Djamchid Momtaz for his lucid and concise introductions to the recent work of the Commission. He made his comments on the topics of Diplomatic Protection, Reservations to Treaties and Shared Natural Resources in light

of ILC activities during its fifty-fifth session, without taking into account this year's ILC session.

33. On the topic of Diplomatic Protection, he recalled that in Paragraph 29 of the Report, the Commission welcomed comments of Governments on different questions, including the diplomatic protection of a ship's crew by the Flag State. He pointed out that his Government stated previously in the Sixth Committee that the crew should not be covered within the topic under the consideration. In his Delegation's view any reference to the judgment of the International Tribunal for the Law of the Sea, in M/V "Saiga" case, should be viewed in the context of the Law of the Sea Convention which was the basis of that judgment. Article 292 of the said Convention ensures the prompt release of the vessels and their crew. As a *lex specialis*, it does not, however, establish, expand or modify the rules embodied in the institution of the Diplomatic Protection.

34. Turning to Article 17 which deals with the State of Nationality of the Corporation, he said that his Delegation concurred with the Commission that the State in which the corporation was incorporated was entitled to exercise diplomatic protection. He said that his Delegation found this notion in conformity with the ICJ Judgment in the *Barcelona Traction Case*. However, to avoid any "State of Convenience" or "Tax haven State", they were in favor of inclusion of a reference to the existence of an effective or genuine link between the corporation and the State of nationality. The text in bracket in the paragraph 2 of Article 17 may properly serve this purpose. He said that because of this reason that they were in favor of removal of the brackets. He further said that they also noted with appreciation that the Working Group had agreed on looking for a new formulation for Article 17.

35. As for Article 18 which dealt with certain exception to the general rule enshrined in Article 17, his delegation believed that it did not reflect the existing customary international law. The Delegation believed that Paragraph 2 of this Article introduced an unbalanced exception to the rule set in the Article 17, in favor of the exception. This exception was highly controversial and had the potential to jeopardize the principle of equal treatment of national shareholders and those having the nationality of another State. He said that they also had some sympathy to the suggestion made by some members of the Commission to incorporate Article 19 into Article 18.

36. Concerning Article 21, he said that they noted the views expressed in the Commission on the purpose of the Draft Articles which was not to supersede or modify the existing regimes for the protection of investments. He said that they also observed that this regime was in consistence with thousands of Bilateral Investment Agreements that were concluded to protect foreign investments. They firmly believed that inclusion of this Article would serve the purpose of the Draft Articles and the existing legal regime of investments.

37. With regard to Article 22 which dealt with diplomatic protection of legal persons other than a corporation, he said that they wished to express their concern over the problems that might arise from the practical implementation of that Article. These legal

persons vary a great deal in their way of establishment and their functions. In a quite number of cases they were not recognized by the State in whose territory they perform their activities. Thus, application of a legal regime that was originally established for protection of corporations to different categories of legal persons would raise legal problems. He noted that the Special Rapporteur observed the lack of State practice in this area and proposed the Article as an analogy or as a matter of progressive development. He said that his delegation held the view that Article 22 was a far expression of *lex ferenda* and an abstract prediction rather than a simple analogy or a matter of progressive development.

38. On the topic of Reservations to Treaties, he said his Delegation followed with special interest the Commission's deliberations on the topic and was satisfied with the work of the Commission and commended the Special Rapporteur, for his eighth report which was considered by the Commission at its Fifty-fifth session.

39. He said that they learned from the Commission's report that a consensus had emerged that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions. He welcomed this consensus and assumed that the Commission's work on this topic would be based on this common understanding.

40. He also welcomed the intention of the Special Rapporteur to submit draft guidelines on the idea of "reservation dialogue" at the fifty-sixth session of the Commission. This would contribute to the integrity of treaties while maintaining basic principle of consent of States.

41. He said that this issue draws him to the so-called doctrine of "super-maximum" effects. He said that there was no need to emphasize that reservations constitute basic elements of consent of States when approving or acceding to treaties. An objection with super maximum effect destroys this element for the sake of integrity of treaty. In his Delegation's view, he said, the Special Rapporteur's proposal for a new wording for draft guideline 2.6.1 could strike a balance between the consent of sovereign States and the integrity of treaties.

42. On the topic of shared natural resources, he recalled that the Commission, at its Fifty-fifth session considered the first report of the Special Rapporteur, on the topic. He welcomed the approach taken in the report, namely providing the background of the topic as well as a timetable for the future work.

43. On the question of applicability of principles contained in the 1997 Convention on the Law of Non-navigational Uses of International Watercourses to the topic under consideration, he said that they would like to add their voice with those members of the Commission who expressed their doubts. It was their view that the guiding principles for this topic should be the principles governing the Permanent Sovereignty of States over their natural resources enshrined in the General Assembly resolution 1803 (XVII) of 14 December 1962. He hoped that the distinguished Rapporteur would take this point into consideration in the course of preparing his reports.

44. The **Delegate of Sudan** expressed thanks to Prof. Mumtaz and other ILC Members for their presence in the session and said that the work of ILC and AALCO complement each other and the cooperation between the two bodies was exemplary. He said that the issue of diplomatic protection was of a special importance to AALCO which was comprised of developing nations as they have to augment the legal instruments by virtue of which they could extend their protection to their nationals abroad.

45. He further said that they seize this opportunity to seek the indulgence of Prof. Momtaz and other learned ILC Members to give clarification on the following issues:

46. Regarding article 8 (2) of the draft articles, the stipulation of a refugee being a habitual resident of the claimant state both at the time of the injury and at the date of the official presentation of the claim, makes it difficult for the refugee to seek benefit from the protection.

47. Regarding article 8 (3) if the injury takes place in a third State (for example while the refugee is in transit), what protection could he enjoy? Is article 8 (1) analogously applicable here?

48. On Fragmentation of International Law, a special attention had to be paid to the fact that developing countries found it more difficult to cope logistically and technically with the vast and diverse regime of international law. An arrangement was indispensable to address and redress this difficulty.

49. **Amb. Chusei Yamada**, in his personal capacity as ILC Member, said that the view of the ILC was to finalize the second reading of the topic of 'Diplomatic Protection' as soon as possible. First part of the Fifty-sixth session of ILC completed first reading and second session was going to complete commentaries. He requested Member States to send comments in this regard. He further appreciated favorable comments on his report on 'Shared Natural Resources' and informed that he was concentrating on groundwaters. He said he had the support of the hydrogeologists but getting State practice was difficult. He informed that they were asking UN General Assembly to ask States to send comments. Responding to Sudan's observations on diplomatic protection he said that the diplomatic protection was exercised by the State of Nationality and there was a requirement of continuous nationality. Injury caused by the home government of the refugee did not come under diplomatic protection.

50. The **Delegate of South Africa** while commenting the topic of Diplomatic Protection said that the right to exercise diplomatic protection being codified for States does not devolve or imply a duty upon the State to extend the said diplomatic protection to the national, corporation of flagship etc. The right to diplomatic protection was a right given to States and not to nationals or corporation or flag ship and it was up to the State concerned to decide, based upon its own political reasons which might include foreign policy consideration as to whether to extend diplomatic protection and also to decide the nature of the diplomatic protection it wished to extend.

51. **Prof. Momtaz** clarified that according to article 2 of the draft articles it was only the choice of the State and there was no obligation regarding the diplomatic protection.

52. **Prof. Chee** said that the diplomatic protection was a discretionary right.

B. The Law of the Sea

53. The **Deputy Secretary-General Mrs. Toshiko Shimizu** introduced the item "Law of the Sea" contained in the Secretariat Document AALCO/43/BALI/ 2004/S 2. She stated that the item had been consistently on the agenda of AALCO's annual sessions since 1970. The Government of the Republic of Indonesia had taken the initiative to introduce this topic in 1970. During the entire decade of 1970's, it was the single most important item. The AALCO can take reasonable pride in the fact that new concepts such as Exclusive Economic Zone, Archipelagic States, Rights of Land locked States originated and developed in the course of deliberations in the AALCO which later became part of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

54. Mrs. Shimizu said that post 1982, the AALCO's work programme was oriented towards assisting Member States in matters concerning their becoming parties to the Convention and other related matters. With the entry into force of the Convention in 1994, the process of establishment of institutions envisaged in the Convention began. The AALCO Secretariat prepared studies monitoring these developments. This practice had continued and the Secretariat documents for AALCO's annual session contain reports on the progress of work in the International Sea Bed Authority (ISA), the International Tribunal for Law of the Sea (ITLOS), the Commission on the Limits of the Continental Shelf (CLCS), the Meeting of the States Parties to the Convention and other related developments. In addition, the Secretariat Report also highlighted the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, ever since it was established by the United Nations General Assembly in 1999. The developments in these bodies demonstrated the strengthening of the implementation mechanisms established under the Convention and its Implementing Agreements.

55. She mentioned about the possibility of AALCO entering into cooperation agreement with the ITLOS, which would help in preparing administrative arrangements with the Registry of the ITLOS, whereby:

- ITLOS and AALCO would extend invitation to each other's meetings where matters of mutual interest were to be examined; particularly the AALCO Secretariat would extend an invitation for its Annual Session to the ITLOS;
- Regular and free exchange of information, publications and reports of mutual interest; and
- Information concerning meetings, seminars and training courses organized by each institution

She hoped that the presence of the President or other Members of the Tribunal, would enhance the quality of the deliberations on the agenda item on the Law of the Sea.

56. Mrs. Shimizu mentioned that the AALCO Session was preceded by the Fifth Meeting of the Consultative Process from 7 to 11 June and fourteenth Meeting of the States Parties from 14 to 18 June 2004 at the UN Headquarters in New York. While the area of focus for the Consultative Process was “New sustainable uses of the oceans, including the conservation and management of the biological diversity of the seabed in areas beyond national jurisdiction”, the Meeting of Parties considered the Report of ITLOS and approved its Budget for 2005-06; and Information reported by the Secretary-General of International Seabed Authority and the Chairman of the Commission on the Limits of Continental Shelf.

57. In conclusion, she stressed that it was important to underline that a decade had passed since the entry into force of UNCLOS. It was increasingly evident that the adoption of the Convention was but the first step toward identifying and resolving ocean-related issues. New problems, such as over-exploitation of fisheries and destructive fishing practices, degradation in the marine environment and increase in ship-related accident and crimes have arisen. She believed that this was the time to reflect upon the achievements of the Convention, as well as also to explore the areas in which the Convention could be strengthened through amendments. In this regard, she referred to Article 312 of the Convention which stipulated that a State Party, after the expiry of a period of 10 years from the date of entry into force of the Convention, by written communication addressed to the Secretary-General of the United Nations, could propose specific amendments to this Convention, other than those relating to activities in the Area, and request the convening of a conference to consider such proposed amendments. In view of this, she suggested that any AALCO Member State wishing to suggest amendment to this Convention may raise such proposals so that these proposals could be as in the past thoroughly deliberated in a focused manner within the forum of AALCO and later on the Member States could place it in the United Nations.

58. The **Delegate of Malaysia** thanked the AALCO Secretariat for its excellent and informative Report, on the agenda item. He said that Malaysia viewed with concern the acts and incidents of armed robbery committed against ships and in particular, those perpetrated in the Straits of Malacca. The crimes at sea affect the safety and security of maritime navigation and he stressed that there was a need for individual countries to police their own waters to prevent and prosecute crimes at sea. In this regard, he spoke about the Malaysian initiative of establishing an agency called the Malaysian Maritime Enforcement Agency whose function would be to enforce law and order within the Malaysian Maritime Zone. The functions of the Agency would be to preserve peace and security, to prevent and suppress the commission of offences, to detect and arrest criminals and to perform maritime search and rescue operations.

59. Another important initiative of the Malaysian Government was its offer to become the host of the Information Sharing Centre (ISC) to be established under the proposed Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP), under which member countries agree to share information and to cooperate in enforcement actions and capacity building. Among the functions of the Centre would be to act as a focal point to obtain, analyse and disseminate

data on piracy and armed robbery incidents to the various governments and enforcement authorities.

60. The Delegate referred to the Order of the ITLOS in regard to Malaysia's request for prescription of provisional measures handed down on 8 October 2003, in the *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*. He informed the Meeting that Malaysia and Singapore were currently working very closely in the implementation of the study on the effects of Singapore's land reclamation in accordance with the requirements of the above-mentioned ITLOS Order.

61. He stated that the obligation of States laid down under Article 192 of the UNCLOS to protect and preserve the marine environment remained a key challenge. He informed the meeting about the Ecoregion Conservation Plan (ECP) for the Sulu-Sulawesi Marine Ecoregion (SSME) formulated jointly over the years by Malaysia, Indonesia and the Philippines. SSME was situated in an area of about 1 million sq. km comprising the waters of Malaysia, Philippines and Indonesia namely from the Sulu Sea in the north until the Sulawesi Sea in the south. It was bordered by the state of Sabah mainland, a chain of small islands in the Philippines, the Sulawesi Island, a chain of small islands of Sangihe-Talaud in Indonesia and the eastern coast of Kalimantan. It was one of the five priority conservation regions of the world known to the world community for its biological diversity. The SSME region was selected due to its ecological importance and the wealth of biodiversity of its marine life. It had also been identified as a highly productive and major fishing area in the ASEAN region. The main objective of the SSME programme was to assist Malaysia, Philippines and Indonesia in their activities to conserve the biological diversity of the fauna and flora (marine and non-marine) which were available in the SSME region. The three countries had formalized the cooperation in the SSME Programme in the form of a Memorandum of Understanding (MoU) which sought to put into place a more systematic and coherent cooperation with a higher degree of efficiency and effectiveness due to the matching of resources. It also proposed to constitute a Tri-National Committee to assist the three countries to monitor the national activities in the maritime waters of the respective countries to ensure its compliance with the ECP which inter alia had also identified specific eco conservation plans that could be undertaken at the local, national and regional levels.

62. In conclusion, he rendered his delegation's support to Secretariat initiative to seek proposal's for amendments to the Convention for in-depth and focused deliberations. He said that his country would seriously consider and comment on any amendments proposed.

63. The **Delegate of Republic of Indonesia** stated that it was her pleasure to address an issue which had always been of importance to the international community and had established true universality in the effort to achieve a "just and equitable international economic order" governing ocean space. That was the issue of the law of the sea. The UNCLOS 1982, which constituted a comprehensive "constitution for the oceans", sets out the legal framework within which all activities in the oceans and seas must be carried

out. The Convention also sets legal norms for achieving this goal through balancing the interest of the legitimate rights of coastal states to explore the natural resources within their maritime boundaries in a manner consistent with the need to preserve it for future generation while simultaneously ensuring the interest of the international community for having safe navigation given the fact that maritime area served as medium for international transportation.

64. As a landmark for progressive development of international law, the UNCLOS 1982 had established a comprehensive framework concerning the use of oceans and covers all marine areas, including the airspace above and the seabed and subsoil below. Various rules have been introduced in order to ensure the optimum use of portion of maritime areas by the coastal states under different maritime zones, such as that of territorial sea, contiguous zone, economic exclusive zone and continental shelf. Management for the exploration and exploitation of the seabed and subsoil beyond any national jurisdiction has been vested in an International Seabed Authority (ISA) as it was considered as “common heritage of mankind”.

65. The delegate stated that 16 November 2004 would mark the tenth anniversary of the entry into force of the UNCLOS. The State Parties to the UNCLOS 1982 have now reached 145 states and this was clearly an indication that universal acceptance on the Convention as both codification of laws as well as progressive development of international law regulating all aspects of the use of resources of the sea. It was worth mentioning that more than half of states that ratified the Convention (78 countries) were countries from the Asian and African region.

66. Within this context, she observed that her delegation would also like to mention that the AALCO had consistently considered matter relating to the law of the sea as an important agenda in their meeting since 1970's, particularly as a medium to forge common position in the deliberations for establishing a new legal regime for ocean affairs under the third United Nations Conference on Law of the Sea. The Asian-African countries' stance toward the adoption of several legal regimes for the utilization of the maritime area was crystal clear that the legal structure of the UNCLOS should accommodate the specific need of developing countries and other states that have particular characteristic, such as archipelagic states, land-locked and geographically disadvantage countries.

67. She said that a decade of coming into force of the Convention provided a good momentum for the international community especially the people of Asia and Africa to retrospect on:

- a. the developments since November 1994;
- b. the review of whether the legal regimes has so far benefited developing countries;
- c. and the new challenges in the governance of ocean affairs varying from technological advances that facilitate deeper exploration into the ocean to the issue of maritime security, particularly smuggling related to terrorism or other transnational crimes.

68. She also touched upon Article 312 of the Convention that provided that any state party to the Convention may, through written communication addressed to the Secretary-General of the United Nations, request the convening of a conference with a view to consider amendments to the Convention. The delegate suggested that the Member States may reflect on this issue of amendment as provided for by Articles 312, 313 and 314 of the Convention. Whether the last ten years of developments merit amendments to the Convention and whether new challenges and developments could be addressed through other means such as creating complementary legal instruments are matters that could be deliberated by AALCO.

69. She invited all the AALCO Members to consider and deliberate on how best to address the developments on the law of the sea as well as to evaluate whether the existing legal regime on the law of the sea has so far benefited developing countries. In light of this, her delegation believed that the AALCO was the most appropriate forum and should deliberate and study the matters for the benefit of all.

70. The **Delegate of Republic of Korea** thanked the Secretariat for the insightful report on the law of the sea. He stated that this year was a meaningful year as it marked the tenth year of the coming into effect of the UNLCOS. In addition, it was also the tenth anniversary of the ISA. He emphasized that the Republic of Korea as a major maritime state, actively participated in the efforts of the international society to establish an effective legal order in the seas and oceans. He reaffirmed the importance of the UNCLOS and the ISA in the development of law relating to the use of the sea.

71. The Delegate stated that his delegation was pleased to note that the UNCLOS was closer to attaining universality. He hoped that UNCLOS, presently with 145 States Parties would have as many States Parties as possible to promote the peaceful and sustainable use of the ocean. He said that his Government was of the view that cooperative development of oceans governance was instrumental in dealing with various issues rising from using the oceans, such as the preservation of living resources and the prevention of marine pollution. The international community should work together to harmonize the efforts and projects of each state and region to effectively respond to the oceans problems.

72. He stated that his delegation viewed that the concept of sustainable development should be the guiding principle in building international oceans governance. In this connection, his Government had keen interest in the discussions on the Global Marine Assessment (GMA) process and was fully aware of the importance of that endeavour to collect and evaluate information the marine environment on a global basis. He said that his delegation expected the GMA process to produce a working framework to make accurate assessments of the physical and chemical aspects of the marine environment. As regards the legal aspects of GMA, he said that his delegation noted that the purpose of the GMA process should be to implement important provisions of the UNCLOS, such as Article 200 on the nature and extent of pollution, Article 204 on monitoring of the risks or effects of pollution, and Article 206 on assessment of potential effects of activities.

73. In conclusion, he said that his delegation believed that discussions on the law of the sea in AALCO sessions would allow Member States to play a greater role in promoting international oceans governance.

74. The **Delegate of Myanmar** stated that a significant rise in problems concerning illegal use of marine transport, serious effects of pollution on the marine environment, piracy problems, armed robbery at sea and illegal fishing activities was increasingly evident. The importance of protecting and preserving the world oceans and seas was apparent and the urgent protection of the marine environment was essential. She said that it was crucial to build the capacity of developing countries to fulfill their obligations under the UNCLOS. However, she mentioned that developing States encountered multiple problems such as financial constraints, lack of capacity, lack of technical expertise and equipment. In this regard, she welcomed the decision of the Fifty-eighth session of the UN General Assembly to establish Trust Fund for facilitating the preparation of submission to the CLCS for delimitation of continental shelf. She informed that her country was among the 14 countries listed by the UN and it required technical expertise and assistance, knowledge, skills and resources for the preparation and submission on the continental shelf as it was vital for the effective implementation of the Convention.

C. The International Criminal Court: Recent Developments

75. **Ambassador Dr. Ali Reza Dehim, Deputy Secretary-General** introduced the item “The International Criminal Court: Recent Developments” contained in the Secretariat Document AALCO/43/BALI/2004/S 10. He stated that the Organization had been following the developments relating to the establishment of the International Criminal Court since its 35th Session, held in Manila in 1996. From 1996, till the adoption of the Rome Statute of International Criminal Court, on 17 July 1998, at the United Nations Conference of Plenipotentiaries, the Organization closely followed the developments in the Preparatory Committee for the elaboration of the Rome Statute. After its adoption the Organization followed up the developments in the Preparatory Commission. The Statute entered into force on 1 July 2002 and since then the focus of the Secretariat Report had been the follow-up of various institutional developments, which took place in the Assembly of States Parties of the Rome Statute. In addition, these Reports also drew attention to other relevant developments pertaining to the ICC, such as the extension of UN peacekeeper’s immunity by the Security Council or the practice of the United States of America of entering into bilateral agreements with various countries granting immunity to US citizens from prosecution before international courts.

76. Referring to the present Secretariat Report, he said that it highlighted the developments at the Second Session of the Assembly of States Parties, held in New York from 8 to 12 September 2003. The meeting inter alia elected Mr. Serge Brammertz of Belgium as the Deputy Prosecutor of the Court. He gave his solemn undertaking on 3 November 2003 at the seat of the Court in The Hague. Another important development was the election of five prestigious individuals as members of the Board of Directors of the Victims Trust Fund. Among them, he said that it was a matter of pride to note that

two of these distinguished persons were from AALCO Member States, namely Jordan and South Africa.

77. Ambassador Deihim expressed his concern over the momentum of the work on elaborating definition on the crime of aggression in the Special Working Group and said that it was rather slow. Complexity of the issues, limited time for discussion, political factor etc., were hampering down the progress in this regard. It may be mentioned here that due to the lack of definition of crime of aggression in the Rome Statute, which really and correctly had refrained many States from joining the ICC. Therefore, it was imperative, in this context, to follow-up the work of the Special Working Group and for this purpose the desirability of convening a meeting of international criminal law and international humanitarian law experts from the Asian-African region to formulate an acceptable definition of crimes of aggression for atleast the AALCO Member States which could be then placed for the consideration of the Special Working Group.

78. He said that the real test for ICC's performance would come through the following two cases under consideration of the Prosecutor, namely, one the situation in the Ituri province of the Democratic Republic of Congo; and two, the referral by the President of Uganda Mr. Youveri Museveni, regarding the atrocities allegedly committed by the Lord's Resistance Army. Incidentally, the second case pertained to an AALCO Member State. In case, the Prosecutor would decide to prosecute, it was hoped that the ICC would make every effort to conduct the most fair, impartial, effective and efficient trial. This would ensure that the Court gained effective legitimacy and credibility.

79. He informed that as at 3rd May 2004, 94 countries were States Parties to the Rome Statute of the ICC. Out of them 24 were African countries, 11 were from Asia, 15 were from Eastern Europe, 18 were from Latin America and the Caribbean, and 26 were from Western Europe and other States. The Agreement on the Privileges and Immunities of the ICC had been ratified by 8 countries, while there were 52 signatories to the Agreement, as at 17th May 2004. In order to enter into force, the Agreement required 10 ratifications.

80. He suggested that it would be useful to exchange views on AALCO's role in the context of ICC. Among 47 AALCO Member States, only 14 were Parties to this Statute. He said that the AALCO fully confirmed that it were the Member Governments who were the best judges and it was their sovereign decision whether to join ICC or not, however, it would be desirable to know their concern about this very important legal body. Free and open exchange of views in this regard could perhaps help us to meet such concern. Furthermore, exchange of information would definitely contribute to a better understanding of Rome Statute and its importance in the process of achieving international criminal justice against perpetrators of serious crimes against humanity, war crimes, genocide and in future crime of aggression.

The Meeting was thereafter adjourned and the statements of the delegations deferred for consideration in the Fourth General Meeting.