ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

VERBATIM RECORD OF THE LEGAL EXPERTS MEETING ON THE LAW OF THE SEA

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I. VERBATIM RECORD OF THE INAUGURAL SESSION (DAY 1: 10.00-11.30 AM)

Master of Ceremony[1]: Good Morning. Welcome to all of you to this two-day Legal Experts Meeting on the Law of the Sea. In this Meeting, we have distinguished panelists, who are going to talk on different topics on challenges facinf the law of the sea and I am sure that you all would be enriched by the discussions that would take place here. Now, we begin with the inaugural session, and I would like to request His Excellencey Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO to please come and deliver the welcome speech.

1. Welcome address by H.E. Prof. Dr. Rahmat Mohamad, Secretary-General, AALCO

Her Excellency Madam Dr. Neeru Chadha, the President of the Fifty-Second Annual Session of AALCO and Joint Secretary, Legal and Treaties Division, Ministry of External Affairs, Government of India,

His Excellency Amb. Gudmundur Eiriksson, Ambassador of Iceland to India and former Judge of the International Tribunal for the Law of the Sea (ITLOS),

Hon'ble Mr. H. P. Rajan, Former Deputy Director, Division for Ocean Affairs and the Law of the Sea, United Nations; and Former Member of the Legal and Technical Commission, International Seabed Authority;

Excellencies, Distinguished delegates from Member States of AALCO, the Expert Panelists, Ladies and Gentlemen,

A Very Good Morning to you all.
It is of great honour and privilege have amongst us Her Excellency Madam Neeru Chadha, President of Fifty-Second Annual Session of AALCO and Joint Secretary, Legal & Treaties Division, Ministry of External Affairs, Government of India, who has kindly consented to inaugurate this Legal Experts Meeting. Despite her very busy work schedule and onerous responsibilities, we are privileged to have her valuable time and agreeing to address this august gathering. On behalf of the Member States of AALCO and my own behalf, I thank you Madam and we are confident that your address would set the tone for productive deliberations during the course of the meeting.

[1] Mrs. Anuradha Bakshi, Principal Legal Officer, Asian-African Legal Consultative Organization (AALCO).

I am extremely grateful for the support and guidance extended by Madam Neeru Chadha in her official capacity as the President of Fifty-Second Annual Session of AALCO towards steering the activities of the Organization. May I recall Madam's contribution in partnering with us as co-organizers during the meeting of Legal Experts to commemorate the 30th Anniversary of the historic 1982 United Nations Convention on the Law of the Sea held last year.

The presence of practitioners in the field of Law of the Sea is very instrumental in understanding the nuances and practical aspects of implementation of the United Nations Convention on the Law of the Sea (UNCLOS). With that, I invite and welcome His Excellency Amb. Gudmundur Eiriksson, Ambassador of Iceland to India who has served as former Judge to the International Tribunal for the Law of the Sea (ITLOS). I look forward for his address.

To deliver Special Address at this Legal Experts Meeting, I invite Hon'ble H. P. Rajan who has served as Former Deputy Director, Division for Ocean Affairs and the Law of the Sea, United Nations and also is a Former Member of the Legal and Technical Commission, International Seabed Authority. His expertise and professional experience, I am sure, would be enriching the deliberations.

I must admit that the response that I have received from the Member States by deputing their officials to participate at this Legal Experts Meeting has been very encouraging. I welcome other representatives from Intergovernmental Organizations, delegates, legal experts, academia and research scholars, some of whom have travelled long distances to be here today, is commendable and reaffirms our notion, that even after more than half a century AALCO's contribution towards the UINCLOS remains significant, despite new and upcoming challenges, that have to be dealt with by the international community.

I also take this opportunity to warmly welcome each one of the representatives of AALCO Member States and participants who are here with us today and I am confident that you all will greatly benefit from the proceedings of the day.

It needs to be recalled that the creation of AALCO in 1956 coincided with the general awareness of the importance of the changing nature of international law of the sea. Coastal states began to extend their maritime jurisdiction further and further into the oceans at the expense of the ever-receding high seas following President Truman's Proclamation of US jurisdiction over the submarine areas adjacent to the West-Coast, as well as the decision of the International Court of Justice in the Anglo-Norwegian Fisheries Case between United Kingdom and

Norway, which recognized the necessity and validity of Norwegian straight base lines and four miles limits of Norwegian territorial sea. In the meantime, Indonesia was poised in 1957 to claim its archipelagic seas. At the First Session of AALCO in New Delhi, Sri Lanka and India took the initiative to refer to AALCO the Question relating to the Regime of High Seas including questions relating to the rights to seabed and subsoil in open sea.

The real momentum on the issue came in August 1967, when Arvid Pardo, Ambassador of Malta to the United Nations proposed an agenda item on the law of the sea for consideration by the United Nations General Assembly. The rest as they say is history. AALCO under the dynamic leadership of Mr. B. Sen played a very important role in facilitating effective Asian-African participation in UNCLOS III. Pursuant to a reference by Indonesia in 1970, the item has continuously been on AALCO's agenda.

The product of a long-drawn process, which started in December 1973 and lasted until December 1982, the birth of the Convention on the Law of the Sea has been described as one of the most ambitious and original negotiating process ever undertaken within the United Nations. The topic law of the sea has come a long way from its traditional interpretation. In present day, various concerns have arisen involving environmental pollution, land based and atmospheric pollution, pollution from ships, dumping at sea, fishing rights, protection of marine environment including marine biodiversity, marine resources and protecting marine mammals, etc.,. Primary concerns of States are on those resources which are of transboundary nature like biodiversity beyond national borders. The management and governance of high seas areas, challenges the international community by warning the States that development of an effective regime for the protection of biodiversity in areas beyond national jurisdiction is seen to be circumscribing some of the traditional high seas freedoms. The challenges of protecting, conserving and ensuring sustainable management of marine biodiversity beyond national jurisdiction are thus enormous. Marine Protected Areas (MPAs) are seen to be an important marine ecosystem management tool for securing protection from threats to marine biological diversity.

In the recent past, many disputes have arisen between States which primarily based on jurisdiction over natural resources, maritime delimitation, maritime boundary and piracy at sea. The differing nature of cases depicts the involvement of diverse judicial bodies such as ITLOS, International Seabed Authority and ICJ. Special mention must be made of Fragmentation of international law which has paved way for various theoretical and practical issues such as overlapping environmental law issues, trade law issues and so on.

One of the major concerns of developing concerns of the developing countries is of marine scientific exploration and the non-compliance with the obligation of access and benefit-sharing of the marine resources. The concept of Scientific Exploration requires that all nations have the right to conduct scientific research in the oceans, provided that the research is 1) conducted exclusively for peaceful purposes; 2) conducted with acceptable scientific methods; 3) does not interfere with other legitimate uses of the sea; and 4) conducted with respect to the other terms of the UNCLOS treaty, including those pertaining to protection and preservation of the marine environment. Coastal nations have the exclusive right to regulate, authorize, and conduct scientific research in their territorial sea, which means that scientific research within the territorial sea can only be conducted with the expressed consent of the nation. However, it is more of access to genetic and marine resources that remain the concerns of developed countries whereas befit-sharing which is also an obligation is never given much serious thought by the developed countries. The rich biodiversity, including marine resources are mostly situated in developing countries and we witness more emphasis on access and knowledge sharing.

In the backdrop of growing importance to the law of the sea regime, and the challenges faced by the States, AALCO Member States have mandated the Secretariat to convene this two-day Legal Experts Meeting, which would comprehensively discuss certain key areas in the law of the sea regime, such as marine biodiversity, fragmentation of international law of the sea regime and its overlapping jurisdictional issues, and dispute settlement.

This Two-Day Legal Experts Meeting focusses on 5 key issues; namely, (i) Marine Biodiversity (ii) Fragmentation of International Law: Law of the Sea, which affects the environment and trade that is necessary to be addressed; (iii) Piracy Legislation, wherein we hope that something tangible would come up during this meeting; (iv) Regional Cooperation on Maritime Issues during which we expect to have some good examples of cooepration and have more inputs to foster better relations; and, (v) finally, Dispute Settlement: Afro-Asian Traditional Wisdom. I am sure the presentations and deliberations for these two days would be path-breaking. However, may I add a caveat that in view of some of the significant developments that have taken place within the ITLOS and ICJ last year, I would like to remind to all of you all that AALCO believes in discussing all matters within a spirit of consensus and thus we would like to refrain from focusing on any specific bilateral issues.

With these words, I now invite our Chief Guest Dr. Neeru Chadha, the President of AALCO to deliver her inaugural address and declare this meeting open. Thank you very much.

Master of Ceremony: Thank you Excellency for the welcome address and for flagging the issues which would be deliberated during these two days. Now, I request Madam Neeru Chadha, before her inaugural address to release the publications of AALCO. For this I request the Secretary-General to please come forward. The first is the Book on "Unilateral and Secondary Sanctions: An International Law Perspective". The second publication is the "AALCO Journal of Intenrational Law, volume 2, number 2 of the year 2013". Thank you. May I request you to kindly deliver your inaugural address.

2. Inaugural Address by Dr. Neeru Chadha, Joint Secretary & Legal Adviser, Ministry of External Affairs, Government of India; and President of the Fifty Second Annual Session of AALCO

Prof. Dr. Rahmat Mohamad, Secretary-General, AALCO;

Amb. Gudmundur Eiriksson, Ambassador of Iceland to India and former Judge of the International Tribunal for the Law of the Sea (ITLOS);

Mr. H. P. Rajan, Former Director, Division for Ocean Affairs and the Law of the Sea, United Nations, and Former Member of the Legal and Technical Commission, International Seabed Authority;

Deputy Secretary General of AALCO;

Excellencies, Distinguished Delegates, Ladies and Gentlemen;

Good Morning to you all.
At the outset, let me take this opportunity to thank the AALCO Secretariat for organizing this Legal Experts Workshop on the Law of the Sea. Convening this Workshop is timely as the issues related to Law of the Sea are gaining increasing prominence in international discourse.

In the year 2012, we at AALCO commemorated the 30th anniversary of the adoption of the United Nations Convention on the Law of the Sea (UNCLOS). For AALCO, it was a special occasion to celebrate its contributions to the conclusion of the Law of the Sea Convention. Since it adoption, forty Member

States of AALCO have become a Party to UNCLOS. This represents not only the wide acceptance but importance attached to the Convention in our region.

The 1982 Convention differentiates the competence to regulate ocean use by activity and distance from the coast, reflecting a balance that was struck between demands of coastal-states for control of natural-resources and maritime-states for freedom of navigation. The UNCLOS provides a comprehensive and dynamic framework for ocean governance. Three institutions created under the Convention namely, the International Tribunal for the Law of the Sea (ITLOS); the International Seabed Authority (ISBA); and the Commission on the Limits of the Continental Shelf are serving the international community in determination of their rights and obligations in various uses of the seas and oceans. It is supported by several global and regional organizations with the aim to specify rules and strengthen areas like shipping in International Maritime Organization, fisheries (Food and Agriculture Organization, regional commissions), and environmental protection (e.g. UN Environment Program, regional commissions).

However serious gaps in the global ocean governance still remain. The international community has consistently voiced concern that current ocean governance does not sufficiently address high seas issues. In response to these concerns, the UN General Assebly in 2004 established the UN Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. Since its inception the Adhoc working group has considered a variety of topics relating to the conservation of high seas biodiversity including marine genetic resources.

There is a marked divergence of opinion among States concerning the legal regime governing marine scientific research and "bioprospecting" for marine genetic resources: some consider that these activities are covered by the freedom of the seas, while others believe that genetic resources are the common heritage of mankind, analogous to mineral resources in Part XI of UNCLOS. Still others are of the view that all the issues can be addressed in a comprehensive implementing agreement to UNCLOS.

The UN General Assembly in its annual Resolution on the Law of the Sea adopted in December last year has requested the Ad Hoc Open-ended Informal Working Group, which has been considering this question, to start preparing recommendations so that the General Assembly can take a decision by 2015. Towards that end, Member States have been requested to submit their views on

"the scope, parameters and feasibility of an international instrument under the Convention" ("convention" refers to the UN Convention on the Law of the Sea). The information will be compiled into an informal working document before the working group meets and it will be updated before subsequent meetings. There are three meetings of the working group scheduled this year.

I believe AALCO can play a significant role in consolidating Asian-African views on this matter.

Distinguished delegates,
Safe navigation and smooth transportation of goods by seas are crucial to international trade and development. The acts of piracy and armed robbery at sea are a grave threat to maritime trade and the security of maritime shipping. Piracy endangers lives of seafarers, affects national security, territorial integrity and hampers economic development of nations. We appreciate the work of the Contact Group on Piracy off the Coast of Somalia (CGPCS) in containing piracy through international cooperation and coordination.

Piracy is a global menace which requires attention at the global, regional and national level. AALCO Members States are in the process of strengthening their legal mechanism, to tackle piracy. However, regional initiatives need to be strengthened and we believe that AALCO can contribute significantly in these efforts to enhance legal cooperation and capacity building amongst AALCO Member States.

Distinguished delegates,
We believe that the primary focus of AALCO could be on strengthening/developing regional legal perspectives and responses on issues related to sea. Capacity building is an area where AALCO can considerably contribute, particularly, in developing model national legislations and regional arrangements and training law makers, law enforcement agencies and judicial officers in various facets of the law of the sea.

Being a country with a vast coastline and numerous islands, India has a profound and continuing interest in the maritime and ocean affairs. We assure our full cooperation in the efforts of AALCO in strengthening international and regional legal regime on the law of the sea.

With these short words, I conclude and I wish all of you two days of fruitful deliberations. I Thank You.

Master of Ceremony: Thank you Madam for the inaugural address and for flagging certain issues which should be taken up by ALCO for further consideration. May I now request Amb. Gudmundur Eirikkson, Ambassador of Iceland to India and former Judge of the International Tribunal for the Law of the Sea (ITLOS), to deliver the keynote address.

3. Keynote Address by Amb. Gudmundur Eirikkson, Ambassador of Iceland to India and former Judge of the International Tribunal for the Law of the Sea (ITLOS)

Thank you and Good morning. May I take this opportunity to congratulate AALCO and the Secretary-General for hosting this Legal Experts Meeting on the Law of the Sea. On this occasion, I also once again pay tribute to AALCO for its contribution towards development of international law, and in particular, on its pioneering role in the formulation of new concepts in the law of the sea, including the exclusive economic zone (EEZ). Those who have attended the Fourth Biennial Conference of the Asian Society of International Law (AsianSIL), were treated to an exquise by Dr. Mohamad on contirbutions of Dr. B. Sen and Mr. Frank Njenga, former Secretaries-General of AALCO, with whom we worked together discussing on the key subject of Law of the Sea. I recall the annual presentations on the law of the sea at the Committee wherein the AALCC, as it was then known, giving us non-Western perspectives on the agenda items of the Committee. I also wish to express my gratitude to Prof. Mohamad, for his constant input intellectually to the legal fraternity in Delhi, of which this Meeting is yet another example.

It is a great pleasure to share the podium with Dr. Chadha, with whom we work very closely at the United Nations General Assembly. I also am pleased to see Mr. Rajan, with whom I worked at the United Nations and finally I am happy to meet Prof. Zhang Kening, a great colleague from my good old days. I am sure you all would find this as an emotional moment as I discuss on this area.

Infact, this year marks the 40th year of my joining, what we call the Law of the Sea mafia. Indeed, when I started working, my first job outside the law school was in the negotiations of the Law of the Sea Conference, which lead to the adoption of the Convention. Looking back to that era, I realize that I was one of the few members of the law of the sea mafia, who had experienced all three branches of the Law of the Sea, the Executive as an officer, the Diplomat as a member of the delegation attending the negotiations on UNCLOS; and as the Judge of the Tribunal.

In this meeting, I shall emphasise on a case recently decided by the International Tribunal on the Law of the Sea (ITLOS) on the *Delimitation of the Boundary between Bangladesh and Myanmar,* which is noteworthy for a number of reasons, including the proceedings of the case and the work which was conducted outside the records like those Second Committee etc. These records pose challenge for commentators and judges. For more details on the recourse of the preparatory meetings for further interpretation, one could refer to the preparatory works which is dealt under Article 31 and 32 of the Vienna Convention on Law of Treaties, 1969. The Conference decided to have preparatory works which would be a single negotiating text and combine the previous four 1958 conventions. The 1958 conventions did not have the preparatory texts and these negotiations had to be recorded for there were number of novel issues which seemed extremely political.

The importance of preparatory texts in the multilateral negotiations is highly significant, and all through these stages of preparatory works during the law of the sea negotiations, there have been very few records of identifying the traditional issues. There are two questions which are significant in relation to Bangladesh and Myanmar dispute. First, is the issue of fragmentation. There are complimentary issues between the ITLOS and the ICJ. I was always of the view that when there are more forums available for States to solve questions/disputes, including the judicial process, the better. Further, in the earlier days, many States like the third world States were reluctant towards the jurisdiction of the ICJ stating that they fell short of assisting them and the issues were never sorted out their way. However, nowadays, the ICJ and the ITLOS has many of the disputes and cases coming up from the third world.

The second issue is that the members of this Tribunal could be expected to share a similar background, including at the ILC, which would be beneficial to many large number of countries. Finally, it needs to be reaffirmed that we all expect to share a high regard of the role of international law in international affairs and this is not rhetoric. In the *Bay of Bengal* case[2], the Tribunal endorsed specifically the three stage methodology adopted by the ICJ in the case. Judge Nordic went a step further in dealing with this aspect in the judgment through a declaration. He stated that in order to state that there is fragmentation of international law and to prove that, I quote:

> "The possibility of decision by some tribunals, same law may be a sort of richness and not a contradiction, all Courts and Tribunals call to decide this an application of the Convention, should consider themselves as a part

[2] *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Judgment, I.C.J. Reports 2009, p. 61.

> of collective interpretative endeavour which must provide consistency and clearance each contributes its grain of wisdom and particular outlook."

The Court went on to add some of its perspectives in the "Methodology" on determining the nautical miles. Article 74 and 83 of the UNCLOS on delimitation of EEZ and Continental Shelf, were the articles to be agreed at the end of the Conference. There were equally large interest groups supporting the equidistance principle and the other supporting the relevant circumstances method principle. In *Bay of Bengal Judgment* Judge Rudiger Wolfrum, stated that -

> "Unlike for the delimitation of the territorial sea, the Third United Nations Conference on the Law of the Sea could not agree on a particular method of delimitation of the continental shelf and the exclusive economic zone. The Conference therefore left the task of the delimitation to the coastal States concerned and – if they could not agree – to judicial dispute settlement".

Judge Wolfrum basically says that the Conference could not agree on basic issues. In saying so, he was recalling the statements of various scholars. The ICJ since the adoption of the Convention has found difficulty in finding some basic principles of law in this regard. The Court came up with the methodology, first on adjustment of provisional equidistance line or equidistance methodology and the second stage, which is called 'relevant circumstances method'. The third was the disproportionality test, by which the equitableness of a decided delimitation can be checked. Incidentally, no issue arises under the test of disproportionality in the present case. The relevance of the coasts used does not come into play only for the calculation of the lengths of the Parties' coasts. It also defines the general framework of the dispute. The concavity of the *Bay of Bengal* is therefore a relevant circumstance liable to call for an adjustment of the provisional equidistance line.

In reverence of this captive audience, I would like to pose two questions, first, is Judge Wolfrum right in saying that the Conference has not accepted anything particularly. Secondly, whether the court is right in adopting the methodology by the ICJ and which was in pursuance to the deliberations at the Conference, my view is that, there is no proper documentation because there are few handful of amendments and discussions following the same. The provisional paragraph in the Article, mentions that pending an agreement, the coastal State was not entitled to extend its EEZ or the Continental Shelf beyond the agreed line. I subscribe by saying that in delimitation cases to divide equally meant that among the three principles or methods, one must choose for equidistance and in the

recent case before the ICJ between Peru and Chile, problem of proportionality could also be looked into.

I would like to make a brief point on the nature of the Conference, especially the views set out in the *Bay of Bengal* case, regarding the relevance of Court's natural prolongation in the maritime delimitation cases. Here, I come back to the ITLOS view on basic definition of continental shelf comprising the seabed throughout the natural prolongation. The Tribunal rightly considers that there is only one single continental shelf, which lies both within and beyond 200 nautical miles. Separate Opinion of Judge Chao is also very significant.

Thank you.

Master of Ceremony: Thank you His Excellency for the firsthand insight into the framing of some of the issues of UNCLSO. May I now invite Mr. H. P. Rajan to deliver the Special Address.

4. Special Address by H.P.Rajan, Former Deputy Director, Division for Ocean Affairs and the Law of the Sea (DOALOS), Office of Legal Affairs, United Nations; and Secretary of the Commission on the Limits of the Continental shelf on the Law of the Sea[3]

Thank you. Excellency Dr. Rahmat Mohamad, Secretary-General of the Asian-African Legal Consultative Organization, Madam Dr. Neeru Chadha, President of the Fifty-Second Annual session of AALCO, Ambassador Gudmundur Eiriksson, Ambassador of Iceland to India and former Judge of the International Tribunal for the Law of the Sea, Distinguished Participants,

It is a great honour and privilege for me to be invited to participate in this Workshop on the Law of the Sea, and for the opportunity to deliver a Special Address at the inaugural session today. This is a particularly nostalgic moment

[3] Former Deputy Director, Division for Ocean Affairs and the Law of the Sea (DOALOS), Office of Legal Affairs, United Nations, and Secretary of the Commission on the Limits of the Continental shelf. Former elected member of the Legal and Technical Commission of the International Seabed Authority. Prior to joining the United Nations served in the Government of India as Adviser in the then Department of Ocean Development. Starting the career as Legal Officer at the then Asian African Legal Consultative Committee, other assignments include, Legal Adviser to the Republic of Maldives, teaching and guiding research on the law of the sea as Assistant Professor of International Law at the School of International Studies, Jawaharlal Nehru University.

for me, as I had started my career in this Organization (at that time the Asian-African Legal Consultative Committee), forty years ago and began my work on the Law of the sea which I still continue! I am delighted to see some of my old friends again with whom I have interacted and worked together in different capacities. As I speak on the subject of the law of the sea, I wish to take this opportunity to share some of my personal views.

The Law of the Sea is a fascinating and complex subject. The seas afford immense opportunity for humankind. Uses of the seas are however, intrinsically linked with the concept of the security, sovereignty and sovereign rights of the coastal State. Maritime law is almost entirely developed reflecting the interests of States, depending on which States are the more active players at a given point of time.

Much of the Law of the Sea today is codified under the 1982 United Nations Convention on the Law of the Sea (Convention) and is widely accepted as the "Constitution for the Oceans". The Convention came into force on 16 November 1994, twelve months after the sixtieth instrument of ratification was deposited with the Secretary General of the United Nations. Indeed, this year marks twenty years of the coming into force of this Convention. Today there are 166 States parties to it including the European Union. Nearly one-fourth of the States Parties to the Convention are Member States of AALCO.

The most significant achievement of the Convention is that it brings precision to limits of national and international jurisdictions as well as clarity in the exercise of sovereignty, sovereign rights and jurisdiction by States. For the first time in the history of the Law of the Sea, developing countries stand to benefit from a legal framework concerning the oceans. This was evident from the fact that of the first 60 ratifications required for its coming into force, 59 States were developing countries.

Member States of the AALCO individually as well as through the AALCO have made extremely significant contributions in the codification of the law of the sea. Some of the relatively new concepts, in terms of history of the law of the sea, were evolved and refined in this forum. Indeed, Member States of AALCO have a continuing role to play in the development of future policies and law governing the oceans especially on matters that have emerged after the adoption of the Convention. Perhaps it is also time to revisit and review some of the provisions of the Convention and determine what exactly should be the focus in the coming years.

Under the existing framework of the law of the sea, the Convention has established three important institutions that govern the implementation of its crucial provisions. Two of these institutions, namely the International Seabed Authority and the International Tribunal for the Law of the Sea are autonomous bodies with their own headquarters, while the third, the Commission on the Limits of the Continental Shelf (CLCS) is a technical body of 21 individual experts in the field of geology, geophysics or hydrography, elected by the Meeting of States Parties to the Convention. The Commission has no headquarters. The meetings of the Commission are held in private at the United Nations headquarters in New York.

While the work of the International Tribunal for the Law of the Sea concerns with dispute settlement, (and you just heard Ambassador Erickson, former Judge of ITLOS on this subject), the work of the International Seabed Authority and the Commission on the Limits of the Continental Shelf relate to the exploration and exploitation of sea resources and thus has economic impacts, especially for developing countries.

The International Seabed Authority is the organ under the Convention that is concerned with the administration of the exploration and exploitation of the resources of the area beyond the limits of national jurisdiction, the "common heritage of mankind" under the Convention. While you will hear more on the work of this body from Professor Kening Zhang, I wish to draw your attention to some specific aspects.

It may be recalled that at the time the Convention was adopted more than 30 years ago, there was much expectation of huge economic benefits through exploration and exploitation of seabed resources. The Authority has already entered into contracts for exploration for polymetallic nodules, polymetallic sulphides, and cobalt-rich ferromanganese crusts in the deep seabed area.

Eleven of these contracts are for exploration of plymetallic nodules in the Clarion-Clipperton zone in the Pacific, while one contract is in the Central Indian Ocean. In addition one application for a contract in the Clarion-Clipperton Zone is pending with the Authority.

In respect of polymetallic sulphides, the Authority has entered into two contracts for exploration, one in the South West Indian Ridge and the other in the Mid Atlantic Ridge. In addition, two applications for contract are pending with the Authority.

The Authority has also entered into one contract for exploration for cobalt-rich crusts in the Western Pacific Ocean and one application for contract is pending with the Authority.

These contracts are initially for a period of 15 years and may be extended under certain conditions. While commercial exploitation still remains a distant future, there are two aspects in the work of the Authority that may be of immediate interest to Member States of AALCO.

The first relates to Article 82 of the Convention that provides for certain revenues to the Authority from coastal States for exploitation of mineral resources of the continental shelf beyond 200 nautical miles and for distribution of that revenue to developing countries under the common heritage of mankind principle. The second concerns the administration of the large amounts of application fees received from the contractors and the interest that is accrued on the surplus after deduction of the costs of processing of the applications. The Authority provides documentation and technical study on these matters. However, a careful and closer examination is required from the point of view of Member States of AALCO, and in my view the policy aspects need to be deliberated.

I will now briefly turn to the third body established under the Convention. Under the Convention, the term continental shelf refers to the area up to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, where the outer edge of the continental margin does not extend to that distance. Beyond the continental margin is the deep ocean floor with its oceanic ridges or the subsoil thereof.

Where a coastal State intends to establish the outer limits of its continental shelf beyond 200 nautical miles, the Convention provides certain criteria and complex formulae based on geological and geophysical parameters to determine the continental margin. The coastal State is required to submit all such information and data to the Commission on the Limits of the Continental Shelf for consideration. The Commission gives its recommendations to the submitting State based on data and information submitted to it by the coastal State, who may then establish the outer limits in accordance with those recommendations, or if not satisfied, make a new or revised submission for consideration. The outer limits of the continental shelf becomes final and binding only after the coastal State establishes its outer limits on the basis of the recommendations and deposits the charts and relevant information with the Secretary-General of the

United Nations. The seabed and ocean floor beyond the limits of continental shelf of coastal States comprise the international area.

It should be noted that the Commission facilitates the delineation of the outer limits of the continental shelf; it does not delimit, allocate or adjudicate. The Secretary of the Commission provides legal advice on procedural matters, and conduct of the Commission's meetings. I had the honour to serve as Secretary of the Commission for several years and witness the deliberations. The whole process of preparation of the submission and its examination by the Commission is an extremely complicated process. The meetings of the Commission and its subcommissions are held in private. There are no records of the deliberations that take place in the meetings of the subcommissions and their discussions with the delegations of coastal States.

The Commission has so far received 71 submissions. As of date 30 subcommissions have been established, and the Commission has so far provided 19 recommendations. Twenty nine submissions are pending consideration, of which 18 submissions are from Member States of AALCO. In view of the recent change in the working methods of the Commission, AALCO could consider some new initiatives that could be of interest to Member States for expeditious examination of their submissions including those which have been deferred for consideration by the Commission on account of disputes. It is needless to emphasise that delay in the examination of submissions will have many adverse effects.

The role of Asian and African States in formulating the policies of the institutions established under the Convention can be significant. From a representational point of view, 8 out of 21 Judges in the International Tribunal for the Law of the Sea are from Member States of AALCO. In the 36-Member Council of the International Seabed Authority, which is its executive organ, there are 6 Asian and 9 African States. Of these, 12 are Member States of AALCO, including one in the group of major importers, two amongst the 8 largest investors group, and one among the major exporters group. In any decision relating to substantive matters, a majority of these groups is also required.

Further, in the Legal and Technical Commission, 8 out of 25 experts and in the Finance Committee 5 out of 15 members are from Member States of AALCO.

In the Commission on the Limits of the Continental Shelf, of the 21 experts, 11 are from Member States of AALCO.

With such wide representation of Member States of AALCO in UNCLOS forums, a very significant influence can be exerted. The reason why I emphasise this is because the Convention contains a number of provisions in the so called "package deal", that is of particular benefit to developing countries. In practice however, these provisions have been either ignored or given an altogether different interpretation. While I explained in some detail the continental shelf issue, as that concerns simultaneous application of sovereign rights of coastal States and high Seas freedoms, such as laying of submarine cables and pipelines, there are other important issues that may require closer consideration at a later stage.

AALCO has in the past assisted Member States in drawing their attention to the implications of on-going deliberations and embarked upon new initiatives. One such initiative that I often recall is when the Single Negotiating Text (SNT) at the Third UN Conference on the Law of the Sea was revised. The Revised Single Negotiating Text in respect of Committee 1 matters (those dealing with the area beyond national jurisdictions) had substantially changed the SNT provisions by including subtle drafting changes. The Secretary-General, Mr. B.Sen took the initiative of a comprehensive examination of the provisions and convened a meeting of the Sub-Committee of the Whole of the then AALCC members. The discussions that took place in the Sub-Committee and that followed immediately at the Sixteenth Session of AALCC in Kuala Lumpur, completely altered the trend of the negotiations. In the Informal Composite Negotiating Text that followed, some of the crucial elements concerning developing countries were restored.

In my view, it may be of interest to review how far Member States of AALCO have actually benefited in the last twenty years, especially with such vast exclusive economic zone and continental shelf, and what steps could be taken with a consistent approach in the future, especially in the Meeting of States Parties to the Convention and in the negotiations that lead to the adoption of the General Assembly resolution Oceans and the Law of the Sea every year. Needless to emphasize, this would undoubtedly require careful and comprehensive Ocean Policy planning at national levels and vigilant implementation of the provisions of the Convention at the international level.

As I conclude, I take this opportunity to thank you all once again, and look forward to very interesting and fruitful discussions in this Workshop. Thank you.

Master of Ceremony: Thank you Mr. H. P. Rajan, for telling us what AALCO need to do in the area of law of the Sea. May I now invite Mr. Feng Qinghu, Deputy Secretary-General of AALCO to propose a vote of thanks.

5. Vote of Thanks by Mr. Feng Qinghu, Deputy Secertary-General of AALCO

His Excellency Prof. Dr. Rahmat Mohamad, Secretary General of AALCO;

Her Excellency Dr. Neeru Chadha, President of the Fifty-Second Annual Session of AALCO;

His Excellency Amb. Gudmundur Eiriksson, Ambassador of Iceland to India and former Judge of the ITLOS;

His Excellency Mr. H.P. Rajan, former Deputy Director of the Division of Ocean Affairs and the Law of the Sea, United Nations, and former Member of the Legal and Technical Commission, International Seabed Authority;

Distinguished Delegates, Ladies and Gentlemen;
It is my privilege to propose a vote of thanks on behalf of AALCO for the Inaugural Session of this Legal Experts Workshop on the Law of the Sea. I would like to express my sincere gratitude towards Dr. Neeru Chadha for her inaugural address as well as the exemplary example she has set as the President of the Fifty-Second Annual Session of AALCO.

I extend my sincere gratitude to H.E. Amb. Eiriksson for delivering the keynote address. Amb. Eiriksson whose presence at AALCO workshops and seminars is always greatly appreciated and useful, due to his extensive expertise both with the UNCLOS and the International Tribunal for the Law of the Sea.I would also like to sincerely thank Mr. HP Rajan for his informative and thought-provoking Special Address. Mr. Rajans extensive experience and wisdom is also a great asset to this workshop as he too is one of the foremost experts on the law of the sea.
On behalf of AALCO and myself, I would like to extend my thanks for our panelists and participants for gracing us with their presence as well as all those in attendance. We are also honoured by the presence of legal experts from eleven of our Member States who are in attendance for this event.

Lastly, I thank the Secretary General Prof. Dr. Rahmat Mohamad for the organization of this event as well as the Deputy Secretary Generals and Legal Staff of the Secretariat for their sincere efforts in organizing and planning this meeting. It is my earnest hope that this Legal Experts Meeting provides an informative and constructive forum for all participants and attendees.

We will meet here at 11:50 A.M. for the first Working Session. Thank you.

Master of Ceremony: Thank you Mr. Feng. Excellencies and Dear Participants, we will have a group photograph at the staircase outside this building. This will be followed by tea and I request you all to assemble at 11.50 for the next session. Thank you.

II. VERBATIM RECORD OF WORKING SESSION-I (12.00 – 1.30 PM):

"MARINE BIODIVERSITY"

Chairperson: Prof. Kening Zhang, Professor of Law, South China Sea Institute and Director of Centre for Oceans Policy and Law, Xiamen University, China

Chairperson: I think this would be a good start for cooperation with my university – Xiamen University and would like to express our view and confidence that from now on the cooperation between the Xiamen University and AALCO can be expected. I thank the organizers, and this is my first time in India. I would like to introduce the speakers Dr. Balakrishna Pisupati and Dr. Malathi Lakshmikumaran.

I have the pleasure to invite Dr. Balakrishna Pisupati, who is the former Chairman of the National Biodiversity Authority. Prior to that, he was the Head of Biodiversity, Land Law and Governance Programme at the United Nations Environment Programme (UNEP) in Nairobi, Kenya. He also served as the Programme Coordinator of the Biodiplomacy programme at United Nations University – Institute of Advanced Studies based in Yokohama, Japan and was the Head of the Regional Biodiversity Programme for Asia at IUCN-The World Conservation Union based in Colombo, Sri Lanka.

Dr. Pisupati has more than two decades of experience in dealing with issues of conservation, development, policy and law making and their implementation at local, national, regional and global levels and has authored about 80 peer-reviewed research articles and 34 books on various topics related to biodiversity and development. He is a Fellow of the Linnaean Society and Cambridge Commonwealth Trust, UK, Visitor at Minzu University in Beijing, China and is the Senior Visiting Fellow of United Nations University – Institute of Advanced Studies, Japan.

He has served as an advisor to several governments in the Asia, Pacific, Africa, Latin America and Europe on issues of conservation and development and supported establishment of biodiversity programmes in countries such as Philippines, Viet Nam, Sri Lanka and Nepal. He served as the lead author for the Global Environment Facility (GEF) in establishing the agrobiodiversity programme portfolio besides being a part of the Biodiversity Task Force under the China Council for International Cooperation on Environment and

Development (CCICED). He holds a Ph.D. in Genetics with specialization in plant biotechnology.

Topic: "Interest and Importance of Marine Biodiversity"

Dr. Balakrishna Pisupati, Former Chairman, National Biodiversity Authority (NBA), India: Thank you Prof. Kening Zhang, Professor, Xiamen University of China, Your Excellency Prof. Mohamad, Secretary-General of AALCO, Your Excellencies , Distinguished diplomats, dear participants, ladies and gentlmen;

Let me first thank AALCO for providing me and requesting me to be here today to speak about a very important as well as pertinent issue of managing the biological resources and the genetic diversity in marine areas. One of the aspects that caught my attention, while listening to previous speakers, was how the entire dimension of the law of the sea making process, mulitlateral processes, inter-linkages with other fields has undergone tremendous changes, and dealing with implementation processes have been taken up at regional and global level by policy makers and law makers as well.

For those of you who have been folowing the discussions on genetic resources and biodiversity, the issues concern not only in the exclusive economic zone but also in areas beyond national jurisdiction, which are at this point being discussed at the United Nations under Biodiversity Beyond National Jurisdiction (BBNJ). Apart from managing the diversity of resources, policy there have been few institutions at the level of policy making which have been looking into issues beyond peripheries. In recent years the question of the status of genetic resources of marine areas both within and beyond national jurisdiction has been a subjectof debate in the forums associated with the Convention on Biological Diversity, the International Seabed Authority, the United Nations Informal Consultative Process on the Law of the Sea, the annual debates Access and Benefit Sharing: Issues Related to Marine Genetic Resources of the United Nations General Assembly on Oceans and the Law of theSea, and more recently, in the deliberations of Ad Hoc Open-ended Informal Working Group to study issues relating to the conservationand sustainable use of marine biological diversity beyond areas of national jurisdiction. The UN Convention on Biological Diveristy, Law of the Sea Convention, UNBBNJ processes, and so on are few multialteral attempts to address this issue. However, looking at this issue from a holistic angle, there are issues like how do we understand diversity, governanace of biodiversity and so on, vis-à-vis how to economically be benefitted from the

potential of resources for the developement of the countries, especially for countries like India amidst various other institutions.

Distinguished Delegates, my attempt is to give an overview of where we are in terms of dealing with marine resources and biodiversity, and different policies and processes. Marine biodiveristy and marine resources contribute to large number of sectors like:

(i) Food security: UN Food and Agriculture Organization (FAO) has been working on this for very many years.

(ii) Climate Change Mitigation and Adaptation. We have got a large amount of interest emanating from the multialteral environemental agreements be it UNFCCC or other Conventions and Conferences; and

(iii) Economic and Health Security: This is another area. I will give few examples of how rich marine diversity is in terms of providing answers to our future health requirements and health needs alongside economic potential within marine biodiversity.

As a "Global Common Good", Marine Genetic Resources (MGR) is an asset with lot of resource base. MGR received lot of attention in the recent past, due to its commercial interest. Genetic resources in the world's oceans are of potential interest for commercial uses. The ratio of potentially useful natural compounds is higher in marine than terrestrial organisms. There is a higher probability of commercial success with marine-sourced material. There are numerous patents based on marine genetic resources and products on the market. Today, there are several discussions going on in terms of resource management and is directly related to the issue of intellectual property rights protection, privatizing knowledge product development and only handful of countries have been efficiently been able to manage these resources. There is an annual increase in the number of patents taken on these MGRs and its by-products. Further, commercial interest in marine organisms is resulting in patenting which is increasing at 12% per year.

Marine Resources: Most importantly, when we are talking of Marine Genetic Resources (MGR), we are talking of organisms within and beyond the coastal areas and areas beyond national jurisdiction. Many of the States which are endorsed with marine environment and resources, has not only to explore these resources, also require technology, investment and expertise to exlpore and utilise these resources and organisms for many years to understand the diversity and potential of these resources. This versus translating this knowledge into real use is also very challenging, both scientifically and financially, for many of these

MGR rich countries. This is why, most patents and products based on organisms which are from coastal areas or EEZs, are with handful of countries which are advanced. Further, it is often difficult to tell the exact geographical location where a specimen was collected. While a few patent documents contain exact coordinates, most have a more general description of collection location, such as the Mid-Ocean Ridge or the East Pacific Rise, which may or may not be beyond national jurisdiction. In addition, many patents are based on bacterial strains or specimens sourced from culture collections. This complicates the link between field research/collection and commercial use.

For India, we have had our share of exploring this diversity. This is just one example, that a particular enzyme from a marinefungus (*Aspergillus) for use in laundry* detergents was originally collected from depth of 5000m in the Central Indian Basin (EP20030772434 – Council of Scientific and Industrial Research, India). Fungus is sourced from a culture/ex situ collection.

In terms of MGR, various issues are interrelated, be it climate change, anthropological issues, marine pollution and so on and so forth. The assessment of MGR that has happened over last 40-50 years through the UNEP Regional Seas Programme and other Regional Seas Conventions, indicate that MGR is on alarming phase of decline - 14% of decline has been registered so far. When talking of MGR, one of the ways how they could be managed by countries is through the Convention on Biological Diversity (CBD), which is one of the Rio Conventions which was adopted in 1992 Earth Summit. This Convention, for a long time was dealing with management of MGR and very strong mandate from member States (consists of 193 State Parties). We already have the mandate called the Jakarta Mandate, which actually looked at developing certain packages to document the diversity, their use and management of diversity, and also deal with sharing benefits of using such diversity both within the coastal areas as well as neighbouring areas. One of the mechanisms on how decisions have been made is through establishing Marine Protected Areas (MPAs). So, MPA within CBD has gained lot of importance over the years and while talking of areas beyond national jurisdiction, CBD recognizes that the Countries must maintain the records of biodiversity available within the country including the EEZ, as the sovereign right over its natural resources. There are few issues pertaining to governance management, environment impact assessment, ownership issues and also in dealing with intellectual property rights of the areas beyond national jurisdiction.

A large amount of discussion that happens within the Conference of Parties, which is the governing body for the CBD, relates to this particular issue in terms

of what is the mandate that is given by the Convention to the Member States who are Parties to the Convention when it comes to putting in place policies, structures and monitoring and evaluating mechanisms to deal with biological resources in areas beyond national jurisdiction. That is why it has been a longstanding series of debates between the CBD on one hand, the UNCLOS on the other hand, and the UN discussions that have been happening with respect to the particular area of marine genetic resource management. That is why, as of now, we still do not have clarity on how to deal with these issues. We still have not reached the stage where we can say that we have a policy framework that we can use in terms of dealing with some of these issues in the years to come.That is where the technical and legal reviews that have happened in dealing with the linkages between such kinds of protection measures and conservation management actions that should happen, and the kinds of governance systems that should be put in place that will have legal sanctity, have gained importance and attention.

So, if you are looking at managing marine genetic resources, one of the fundamental criteria or issues that the CBD is spending a lot of effort in discussing is on Environmental Impact Assessment because of exploration, assessing resources and various activities that happen within the realm. This is why within the Convention we have got a special programme that has been happening for at least the past four or five years, which is called the 'Ecologically and Biologically Sensitive Areas' (EBSA). What kind of mechanisms should be put in place to deal with the impact assessment in areas where these resources are available, both within the EEZs and in the ABNJs. Today, a large amount of this discussion, had also started spilling over into the discussions within the UNCLOS and the UN, and not only in terms of looking at the policy measures, but also the government systems that should be guiding some of this policy-making.

For those of you that are familiar with some of these issues in terms of the status of this entire debate at a global level, it dates back quite a few decades now. In 1958 we had the four Conventions, and also in 1962 we had the first set of discussions dealing with resource management from a National Parks perspective. There, even though a lot of us working on these issues from a terrestrial viewpoint do not recognize there was a very specific discussion that happened even at that time dealing with coastal and marine resource management as such.

But having said that, one of the biggest challenges faced by us is in terms of how do we monitor these activities? One is, to know the diversity; two is, to manage

the diversity; and based on the management component, derive some benefits so that the benefits can be shared with other countries and stakeholder groups. That is why some of the data sets that have been compiled by various organizations like the FAO are very important for us because when we are talking of some of these measures from a legal, policy-centered, management approach; we already have had experience of dealing with these issues both from an unregulated legal perspective. And that's why some of these management issues are finding a place, not only within the context of the CBD but also the other policy platforms as well.

But having said that, when we look at the management issues and the emergence of these challenges over a large period of time, the science of the issues related to intellectual property rights, the policy linkages of linking that science and policy making with respect to MGRs have also had it's own evolution, which actually evolved in parallel with the entire set of discussions that happened in terms of resource management.

This actually shows some of the most important elements of science that have contributed to the debates and discussions. Where it is mostly proven that the hydrothermal vents are within the areas and ecosystems, they have been shown to be a potentially valuable and important source of information and knowledge when it comes to dealing with marine resources; and not only in terms of the science related to the organisms present within the vents, but also the potential use of many of these organisms is something which is receiving a lot of attention from both research and development and scientists as well. But if you are talking of these elements of knowledge in terms of understanding the science of it, linking it up with policy making within biodiversity resources is something which has had its own share of ups and downs. The CBD provided a particular platform to deal with the issues but many contracting parties have had certain reservations in dealing with these issues when it comes to managing resources beyond national jurisdiction, because they always felt that was within the mandate of the Convention.

That is why, years ago, when the Member States established an inter-governmental platform on biodiversity and ecosystem services, which is like NIPCC (Non-governmental International Panel on Climate Change). We now have formed to deal with biodiversity related issues, which is called Inter-government Panel on Biodiversity and Ecosystem Services (IPBES). We have had actual dates that have been given in the last meeting of the plenary that happened about 2 months ago, where a specific mandate has been given to the IPBES to actually look at the issues of the science part of understanding marine biodiversity. But, how does this science relate to the various policies that are

actually across different landscapes, whether it is related to UNCLOS or the CBD. And that is why the IPBES has been mandated to assess the contributing biodiversity and ecosystem services also in areas beyond national jurisdiction,which had received very little attention when it comes to some of these issues at the regional levels.This shows where the potential for the exploration of these marine organisms in terms of global assessments that were done. Also in terms of the diversity and the density of the essentially useful marine organisms or marine genetic resources, it has been found to be extremely important for scientific and commercial development across the world.

A couple of examples for those in terms of marine diversity uses in areas beyond national jurisdiction deal with *polymerase*, which many of you who have a scientific background would recognize as a very important enzyme.For any kind of biotechnical intervention, polymerase is an important enzyme. Today we have very little diversity of the polymerases that are available and today we have isolated and tested and started using polymerases from hyperthermophilic bacteria. But, we are looking at polymerase which has much larger ability to withstand temperature fluctuations. Thermophilic bacterium called *pyrolobus* is actually the subject matter of a patent taken in the US. There are also polysaccharides isolated from the bacterium *Vibrio diabolicus*, which is actually a French patent that is more in terms of pharmaceutical use.

So, the examples I gave you were just to give you an illustration of the kinds of diversity and opportunity existing in terms of dealing with marine biodiversity exploration. And today, krill, which is a very important species that occurs in marine areasis called “pink gold”. Almost 62% of marine records are based on various products derived from krill. Over 500 patents were filed just on krill products alone. So that is the kind of potential we are talking about for marine genetic resources that we have. Apart from krill we also have a large number of other organisms, starting from bacteria, sponges, fish and vertebrates and various other forms which live in marine areas which actually have a huge potential for countries to explore, both from understanding the science and potential of the organism and their biology, but also in terms of the commercial possibility of exploiting some of the biological processes of these organisms. This is being used not only in the pharmaceutical industry, but also in agriculture, aquaculture, cosmetics, bio-fuel production and so on. So the spread of the uses of some of these organisms is also very wide-ranging.

We also need, in terms of a policy-maker or somebody who is going to be investing in some of these, to know what the potential of some of these resources are in general terms. That is why in 2010 there was a global study called ‘The

Economics of Ecosystems and Biodiversity', which is called the TEEB study, where the contribution of marine diversity, both the coastal diversity as well as marine diversity, has been estimated to be enormous. The challenge before a lot of us is, how do we translate this potential into something real? We are talking about a $130,000 - $1.2 million per hectare as the worth of coral reefs. It is a very wonderful number in terms of looking at the potential of an economic contribution that this particular ecosystem can contribute. But, for those who actually want to trade that potential for something real beyond an assessment of economics alone? This means we need to look at implementing interventions that can contribute to translating this into something real. For example, the estimation is that $987 per hectare for providing nursery for off-shore fisheries of which a large amount including the coastal protection is being realized, but many times, the assessment at the level of countries does not have numbers available. We do have global numbers, but in terms of individual country-based assessments we still do not have much data.

To cite a few numbers in terms of nutrient cycling: the most important contribution of these organisms or ecosystems is in terms of dealing with climate change litigation. Today it is estimated that 93% of the Earth's carbon dioxide is stored within the oceans and 50% of the carbon dioxide in the atmosphere becomes sequestered in natural systems and is cycled into the seas and oceans. Today a large amount of research and policy-making is going into dealing with this component, which in scientific terms is known as 'blue carbon'-related work. As much as we want to do on the terrestrial carbon sequesterization and climate change, there is a large amount of interest relating to marine biodiversity based carbon sequesterization and adaptation as well.

The contribution of marine organisms, marine biodiversity, marine genetic resources and ecosystems is not only from a purely economic perspective, but it has both a social as well as environmental perspective as well. That is why a lot of interest has been shown in terms of how we now deal with it from a law and policy perspective. Of course mention was made about how different people interpret some of these processes differently depending on convenience, the stakeholder, the participants and the audience. Certainly this is true for marine genetic resource-based discussions that happen within the Convention and within the UN related components as well. For example, when we are talking about Article 77(4) and 68 of the Convention, it says that it includes the Continental Shelf and sedentary components, but the question that is being asked within the Convention process is whether we are talking about the same area or different areas. When we are talking about the entire marine realm as a 'global good', is it still possible for us to continue the debate within the Convention

process where national sovereignty, national rule-making, frameworks, and access and benefit sharing, is taking a much more important precedence over some of these issues. Common property: the entire debate is that anyone who is able to explore or invest in terms of taking intellectual property protection on these organisms is free to do so because investments have been made, science has developed and institutions are free to deal with them. Our question is, is it possible today in terms of the way we are dealing with intellectual property, in terms of sharing the benefits of taking privatized action both on the exploration and on the resources?

A lot of this debate is still continuing and that is why, when we talk of marine resources in the CBD, in spite of 20 years of its implementation, we still have a few issues which are unresolved. The first article or the objective of the convention itself is the conservation of biological diversity. So the understanding of marine genetic resources is within that objective. It is about sustainable use and sustainable management of those resources so the downstream use of the marine genetic resources is important. The fair and equitable benefit sharing; Dr. Malathi is going to talk about it. It is a point of debate as of right now. So how do we deal with access and benefit sharing for processes that are happening in areas beyond national jurisdiction? And the article also says: "Including by appropriate access to genetic resources and by appropriate transfer of relevant technologies". So, an important element that is being debated is that access as such is never an issue, but in these decision-making debates should also consider issues that emerge within the debates that happen in other processes, including the UNCLOS. Also, the Convention says that anything related to marine biodiversity should take into account "all the rights over those resources and rights to technologies and by appropriate funding." Of course the major question is, when we are talking of areas beyond national jurisdiction, who has rights over those resources? What is the governance mechanism that we need to put in place?

And that is why today a large number of processes and projects are looking at some of these components. For example, The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), Global Open Ocean and Deep Seabed (GOODS), Global Ocean Biodiversity Initiative (GOBI), Coral Triangle Initiative, Micronesia Challenge, Caribbean Challenge; all of these processes are looking at these issues. And within the UN system also, it is not only the CBD but also UNICPOLOS, the FAO, the IMO, the UN Working Group, and most importantly UNEP, which for a large amount of time was looking at these issues within the context of only a multilateral environmental agreement, has now in the past few years started a new program which is just beginning to take off, called the global commons program. This is looking at some of these issues in

terms of policy-making and rule-making when it comes to some of these elements.

So in this context, if you are looking at managing the biodiversity in ABNJs, certainly the question is asked how do we deal with this issue in the emerging debates with respect to governing global common resources? since a large number of activities are happening, a large amount of investment is going into exploration, but it's being done by a handful of countries and institutions. That is why a few options are being discussed.

One is a *status quo* option;if you had to do anything let these debates continue as they emerge and over a period of time we will get a little more clarity on some of these, either within the UNCLOS, or otherwise. But, it is also argued that genetic resources are covered by the CBD and not UNCLOS. So that is also an important element, when it comes to the discussions.

The second one is: let the International Seabed Authority deal with some of these issues, both by looking at the institutional mechanism as well as the mandate and discussions. And certainly if you are looking at some of these then it is important that we also consider issues related to environmental impact assessments, issues relating to ecologically and biological sensitive areas, looking at pollution control, looking at protecting the environment, and most importantly an oversight on what kind of IPR regimes are going to be emerging with some of these issues. Certainly for some this is actually a better option because, it is an entire process which is outside the CBD, because as I said the CBD only covers resources which are within national jurisdiction.

And, there is also a proposition to have a *sui generis* option. We already have a precedence of dealing with some of these kinds of resources under another process, which is called the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), which was negotiated within the FAO. What this particular international treaty does, is that it recognizes a set of agricultural crops, which are important for food security, and they have put together a list of about 64 crops which are crucial for food security across the globe. While accessing these resources, taking intellectual property over these resources, managing these resources, and sharing accrues because of resources are dealt within a multilateral system. It is not left to the individual countries to decide, but to the multilateral system where a specific benefit-sharing fund has also been established at the global level. So, any benefits that accrue because of accessing and using any of those 64 crop plants accrue to a global fund, and the global fund is operated through a governance mechanism.

Thus, there is another line of thinking that says that when we are dealing with governance or IPR or economic interests, can we make use of this option? And certainly, this kind of mechanism, because such a mechanism has already been established at a multilateral system, provides for benefit sharing. It also provides for opportunities to deal with conservation. It also provides opportunities for sustainable management. There is an increasing interest to explore this as one of the *sui generis* options in terms of better managing components of MGRs.

Of course within the CBD, MPAs are something which has been discussed for many years, certainly since 2003. But, for various reasons, the progress that has been made in terms of designating MPAs as special areas that need protection to deal with MGRs is really not taking off very well. The target that has been set in 2002 is to achieve 10% of the marine area as MPAs by 2012. But, so far in 2010 when we did an assessment we recognized that it was less than 1% that has been designated as MPAs and now this deadline has been extended till 2015 and 2020 with the hope that countries would now try and come up with policies and practices to deal with resource management by designating specific areas as MPAs within the Convention also.

The context and purpose of MPAs is not only to deal with resource management but also to come up with locally managed solutions with resource management. The Convention is almost 17-18 years old and so far in the process with the Convention we have hardly had any opportunity to focus on revisiting the mandate within the context of all the developments that have happened between 1993 to 1994. Of course there was an opportunity for us to do it in Hyderabad during the Conference of Parties to the Convention in 2012, but for various reasons unfortunately we did not use that opportunity to push this particular agenda as a very important agenda dealing with decision making in MGR management within the Convention.

The future options that we have are:

- Mainstreaming conservation and development action across different programs, platforms and activities and discussions that are happening;
- Apply principles of ecosystem based management at large scales because as of now we are looking at a more small scale approach to dealing with ecosystem management;
- Develop locally managed marine areas;
- Address issues of climate change;
- Negotiate synergistic policy development and implementation;
- Develop regional frameworks and policies; and,

- Develop partnerships with academia and private sector.

When one of my colleagues and I were writing a paper together on this issue of BBNJ (Biodiversity Beyond National Jurisdiction), we came up with this idea that we should 'mind the gap', 'find the gap' and 'fill the gap'. There are so many gaps that exist within the policy platforms that you need to find what you're going to fill first because you can't fill them all in one go. India currently holds the Chair for the Indian Ocean Rim Association (IORA) and has now shown a large amount of interest in dealing with resource management, especially natural resources. Also, India is the President of the Conference of Parties where it can also influence certain decision making with biological diversity.

Thank you very much.

Chairperson: Thank you very much Dr. Pisupati. I now invite the next speaker. Dr. Malathi Lakshmikumaran is the director and head of the New Delhi office of Lakshmikumaran and Sridharan. She has over 30 years of experience in the field of biochemistry and molecular biology with an expertise in plant genomics, DNA fingerprinting and genetic transformation. She has more than 100 publications to her credit.

She heads the life science group of the IP division of the law firm Lakshmi Kumaran & Sridharan. She is actively engaged with clients in advising them on patent strategy and portfolio, prosecutions, oppositions etc. She is mainly working on pharmaceutical, chemical and biotechnological patent applications. She advises clients on plant variety protection and registration. She is also actively involved in the area of Biodiversity and Traditional knowledge. Dr. Lakshmikumaran has also served as the Head of the Centre for Bioresource and Biotechnology Division in The Energy and Resource Institute (TERI) for a period of 17 years. She was also awarded the First National Women Bioscientist Award in March 2000 by the Department of Biotechnology.

Topic: "Access to Marine Genetic Resources and Benefit Sharing under the Biological Diversity Act, 2002"

Dr. Malathi Lakshmikumaran: My topic today is "Access to Marine Genetic Resources and Benefit Sharing under the Biological Diversity Act, 2002". First I would like to thank AALCO for giving me the opportunity to speak. For the past ten years I have been working on patent law and biodiversity. I was asked to

speak on access and benefit sharing in the context of the Biological Diversity Act. That is why my objective will be to help understand what Biological Diversity Act (BDA) in India. Dr. Pisupati has laid the groundwork for me to take on so I do not have to talk about certain issues, so I thank him for making it easy for me to go directly into the BDA, which has been in force since 2004.

I will also talk about access and benefit sharing so before we get into access and benefit sharing (ABS), what are the objectives of the BDA? *First,* it was to conserve biological diversity in relation to Access and Benefit Sharing. *Second,* equitable benefit sharing arising from utilization of Indian biological resources which also includes the marine genetic resources (MGR). Finally, the *third* objective was the creation of National Biodiversity Authority and State Biodiversity Boards.

The basic scheme under the BDA is how to have access to these resources, such as access to genetic resources, marine genetic resources, and terrestrial genetic resources. I will talk in the context of MGR. You need either prior approval from the Biodiversity Authority or you have to have a prior intimation. There is a difference between both and I will come back to that and explain why one has to get prior approval and/or prior intimation.

When you have access to genetic resources, the next step is activity. It could be research, bio-survey, commercial utilization and so on. There is really no regulation under the BDA, but you have many regulations for the transactions. Just as Dr. Balakrishnan Pisupati said, when you have access freely, but you want to transact, to have a patent on it or to transfer resources, you need prior approval. If you look at the important definition under the BDA; bio-resources cover the MGRs. It could be anything including, "plants, animals and microorganism or parts thereof, their genetic material and by-products (excluding value added products)".

Next you have activity which could be bio-survey or bio-utilization. The way that bio-survey and bio-utilization is defined is: "survey or collection of species, sub-species, genes, components and extracts of biological resource for any purpose and includes characterization, inventorisation and bioassay."

Commercial utilization: This includes the commercial utilization of the resource itself, or if extracts or compounds will be for commercial utilization. It means the uses of biological resources for commercial utilization such as drugs, industrial enzymes, fruit flavours, fragrance, cosmetics, emulsifiers, oleoresins, colours, extracts and genes used for improving crops and livestock through genetic

intervention, but does not include conventional breeding or traditional practices in use in any agriculture, horticulture, poultry, dairy farming, animal husbandry or bee keeping.

The other one is research. So you have had the access of bioresources, which also could mean MGRs, but what could you use it for? The activity could be for research. I've already talked about biosurvey and bioutilization, or it could be for commercial utilization. Research means for any "technological application that uses biological systems, living organisms or derivatives thereof to make or modify products or processes for any use."

As I said before, what is 'biological resources'? It means genes, components, extracts and so on, but it excludes value 'added products'. Value added products means products which may contain portions or extracts of plants and animals in unrecognizable and physically inseparable form. So, the actual value-added product is from the BDA. It's a certain framework. I won't say it's complete, but we definitely need more examples on what is a value added product.

Section 3 of the BDA is very important because here it differentiates between people of Indian origin and Indians. It says that "no person referred to in sub-section (2) shall, without approval of the National Biodiversity Authority, obtain any biological resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-survey and bio-utilization."So, if you are an Indian citizen working in an Indian institute, you don't need approval for access to genetic resources. Indian people have to have intimation. What about a person who is not a citizen of India? A citizen of India as per the Income Tax Act is "anyone who is a non-resident also needs to get prior approval from the Biodiversity Authority before they can access any genetic resources from India". That also means the Exclusive Economic Zone of India. A body corporate, association or organization not incorporated or registered in India or incorporated or registered in India under any law for the time being in force which has any non-Indian participation in its share capital or management, will also require prior authorization. So any Indian company, universities, institutes, government institutes, do not need prior approval for access to genetic resources. So therefore any Indian who is a non-resident Indian under the Income Tax Act, or any company which has any shareholding – it could be even one share –then you need prior approval to get access to genetic resources.

Prior approval is obtained under Section 3 of the BDA for access to Indian Biological resources. It may be for research, commercial utilization in the form of drugs and medicines or other products, or for bio-survey and bio-utilization. Therefore, we have to be very clear that before anybody uses the MGRs about

whether you need prior approval. Do you come under Section 7, which says that Indian companies which are wholly Indian, and Indian institutes, have only to give prior intimation to the State Biodiversity Authority?

As I said, Indian institutes, of which the example of CSIR (Council of Scientific and Industrial Research) was given, are doing a lot of work on MGR. They have a couple of institutes in Goa and also in Gujarat, which work on MGR and do file patents. They have access, but can they transact? Can they give this information or transfer this knowledge? Again you need to look at the BDA. Section 4 of the BDA states that, as an Indian one can have access to genetic resources, but cannot transfer the research results or the biological resources to anyone else. Organizations like CSIR, which have access to genetic resources, cannot transfer the research to a non-Indian body corporate, organization or company. If they are going to transfer the research results or the biological resources to a non-Indian company or institute, they need to get approval from the National Biodiversity Authority (NBA). It could be any results of research including data and findings. However, publications in journals are exempt. Section 20 of the BDA states that, prior approval from the NBA is required for the transfer of biological resources.

Section 6 states that prior approval from the NBA is required for obtaining intellectual property rights based on biological resources. Hence, CSIR file applications where there is no difference between an Indian and a non-Indian, any institute or person with patents for a biological resource, has to get approval from the NBA for grant of the patent. Here the reason was for ABS. They have access, but because of benefit sharing, anyone for a patent on any genetic resources obtained from India will require the approval from the NBA. However, plant variety protection is outside the purview of this subject.

As mentioned in the beginning, Section 7 of the BDA says non-Indian companies and institutes need prior approval, but all Indian companies, institutes, citizens or body corporates have to give prior intimation to the State Biodiversity Authority. So, if you are taking something from the coastal regions of Kerala, you need to inform the Kerala State Biodiversity Authority. If you're taking anything from the coastal regions of Andhra Pradesh, or anything like mineral resources, you need to give prior intimation. This is for all Indian citizens and also Indian companies. However, hakeems, and people who are working in fields of traditional knowledge are exempt from this Section. So this is the difference between prior approval and prior intimation.

So for all research activities, prior intimation to the State Biodiversity Authority is applicable for any Indian entity. CSIR, Delhi and Madras University, and

anybody working in any institute will actually have to inform the State Biodiversity Authority for any activities. All bio-survey and bio-utilization activities are not covered. It is basically bio-survey and bio-utilization for commercial purposes that are covered, but not other things like inventorization and so on.

Section 40 of the BDA states that the provisions of the BDA will not be applicable if the Government of India comes out with a list of species which exempts them from the BDA. We do have an official gazette notification of 26 Oct 2009 and a list of 190 plant species which has been referred to by their botanical name, and therefore under Section 40 this should be exempt from the BDA. There was a notification by Government of India more than three years ago where it was said that the list in the notification was only for trading purposes, but anyone doing research or commercial utilization will have to get prior approval. However, none of the MGRs were covered in this list and therefore we won't delve much into this.

So what is the implementation of the BDA? At the national level you have the National Biodiversity Authority; at the state level you have the State Biodiversity Boards, and at every local level you have to have Biodiversity Management Committees. Some of the State Biodiversity Boards are very active. Any non-Indian entity will have to go to the National Biodiversity Authority to get prior approval for access. The State Boards are for prior intimation.

What are the consequences of non-compliance? Approval by the NDA is required for use of biological resources in India, so any biological resources occurring in India, even if it came into India years before and people have been using it, if it is occurring in India and it was taken without approval, the punishment can be up to five years imprisonment or a fine of 10,00,000 rupees or both. Now when you have Indian companies which have to go to the State Board and intimate it about using biological resource for commercial utilization or bio-survey or bio-utilization, the punishment for non-intimation can extend up to three years imprisonment or a fine of 5, 00,000 rupees, or both.

There are several legislations related to coastal and marine environmental protection. I've only touched on the Biological Diversity Act because I was asked to talk about access and benefit sharing. Under the BDA we do not have any guidelines on benefit sharing or how to come up with benefit sharing; whether it based on percentage or royalties or value. Now for green bio-resources you have been given a figure. For mangroves you've been given a figure, but how do you come up with benefit sharing. A value may be attached to it, but how does one come up with benefit sharing for MGR, or come up with patents. Today if you

look at algae and energy from algae from different resources which may produce oil and people can use it. Krill was talked about which produces very important oils which have omega-3 and omega-6 fatty acids which have very useful health properties for cardiovascular systems and so on; how do you assign value to it? We have not had clear guidelines from the NBA on how to assign the value or access or share benefits. We have one case study, where a plant was taken from Kerala and a patent was filed, and the royalties were given back to the traditional people from the hills of Kerala. I don't want to go too much into detail, because it's not an MGR, but I've already discussed access, but how does one come down to benefit sharing.

The first thing to consider in ABS is prior informed consent. The prior informed consent is being granted to a user, negotiating between a provider and a user to develop, along mutually agreed terms, to ensure that the benefits of the genetic resources are shared equitably. Prior informed consent is the permission granted by the competent national biodiversity authority of a provider country to a user prior to accessing the genetic resources, in line with an appropriate national legal and institutional framework. Dr. Pisupati did touch upon the treaty on plant genetic resources where you have an international mechanism. The reason these 64 crops are under the treaty is because they've gone over from every country to the other and you really do not know who owns those plant genetic resources. So then you put money into this fund and it is governed by this multilateral treaty. We do not have something like that for MGR.

When Dr. Pisupati talked about krill and algae, it's everywhere, but who owns it? Suppose I take it from the Indian Ocean and perform research and come up with a patent, who owns it? Therefore if you have taken it from the seas or territories of India you have to go to the NBA for access. Therefore, this prior informed consent is very important.

Now what are mutually agreed terms? An agreement reached between the providers of genetic resources and users on the conditions of access and use and the benefits to be shared between both parties. Here it will be anything you take from the seas of India within its EEZ. We're really not clear because of the way that the BDA has been written we really do not have much of a framework or any guidelines, so it is difficult to say.

So who is involved in access and benefit sharing? The providers of genetic resources: these are States that have sovereign rights over their natural resources, and the laws within the provider country determine rights over genetic resources at the national level, who has the authority to grant access to genetic resources and who should be involved in the negotiation of mutually agreed terms with

potential users. These are the ones who use genetic resources for research, commercial utilization, bio-survey and bio-utilization.

Who are the users of genetic resources? This is a diverse group, including botanical gardens, industry researchers such as pharmaceutical, agriculture and cosmetic industries, collectors and research institutes. They seek access for a wide range of purposes, from basic research to the development of new products. And who is the competent national authority? That is the Government, and in this cases the NBA. They are responsible for providing access to genetic resources and deciding all the benefit sharing.

So just to recap: You have Marine Genetic Resources, you have the Providers such as the Government of India, then you have people doing research who come out with a commercial or non-commercial product, then you have the benefits which arise from this, and then you have Users which could be research, universities or industries, which could be getting monetary or non-monetary benefit which will flow back to the providers of the MGRs or the Governments.

For equitable benefit sharing under the BDA, Section 2(g) talks about equitable benefit sharing which means sharing of benefits as determined by the National Biodiversity Authority under Section 21. Section 21 describes the manner of benefit sharing, the various categories of biological resources and the persons amongst whom such benefit is shared. The NBA can only give approval after establishing such equitable benefit sharing between the users of biological resources, the local bodies and the benefit claimers. Without having guidelines it is very difficult to talk about what actually sharing is, but the NBA has come up with certain MOU's or MTA's that can be signedbut we don't have perfect guidelines on how to actually come up with benefit sharing.

I won't talk much on the Convention on Biological Diversity (CBD) as it has already been talked about, or about the Nagoya Protocol and Access to Genetic Resources and fair and equitable sharing of benefits.

As Dr. Pisupati said, we know there is wealth and economists would give you a value for biodiversity. How does the NBA in India or other sovereign countries get the wealth from it or benefits from it. There are ample opportunities for science and business in the oceanic realm and there is an urgent need to effectively implement the existing convention or treaty or rules that regulate conservation of the marine resources within the national framework. The National Biodiversity Authority should frame guidelines to regulate the exploitation of Marine Genetic Resources. Coastal Biodiversity conservation must be a participatory process, with the support of Ministry of Environment and Forest, other governmental authorities including the general public.

With this I end my presentation.

Chairperson: Thank you very much once again to both the speakers for the enlightening presentations on this very important topic. We can have some questions now.

Delegate from Thailand: I have a question to Dr. Pisupati. When you mentioned the three options State Biodiviersity Authority, National Biodiversity Authority, and Biodiversity Management Committees, what could be the best forums to discuss this matter? And, more importantly, what would be the elements to be designed in the new Convention, is it some new languages or concepts? Thank you.

Dr. Pisupati: Thank you. It's again an important question. Certainly the reason why we have been discussing is because as Dr. Malathi mentioned them in her presentation, on ABS of the genetic resources available within the national jurisdiction, the convention gives the sovereign rights to countries that access these resources and requires two conditions. That's the legal language. But, when we are talking about marine resources, we are talking of areas beyond national jurisdiction, where there is larger interest in terms of commercial exploitation based on its commercial value. So, based on that, re-looking at the models already available with us, through a mulitalteral process like an international treaty is something which has been already discussed within the Convention on Biological Diveristy. Again, because of the mandate provided to certain international institutions, be it UNCLOS, CBD, etc, each one has to work within its mandate and deliver the results. That's why the UN has put the process in place which looks at the areas beyond national jurisdiction as well as speaks of access to such resources, and that would be the apporpriate forum rather than discussing at individual country level institutional mechanisms. As we know, the Nagoya Protocol has been agreed by 193 countries in 2010 but so far only 29 countries have only acceded to this Protocol. We need accession of another 21 countries in order for this Protocol to come into force.

But, when it comes to issues BBNJ, it is also very important that we look at some of the governance systems, public policy, legal practices which are beyond legal framework. Having said that, let me give out some important point with respect to the Indian BDA, which is peculiar in distinguishing between the applicants. However, the language of this Act, should be considered, which was drafted in 1994. And for those who follow India's trade and economic policies, at no point one could have imagined that India would have been an open economy subsequently. Further, these provisions were placed vis-à-vis investment and

trade issues were nearly twenty years old, which we thought had to be dealt very cautiously.

Dr. Luther Rangreji, Associate Professor, South Asian University: Thank you sir. I have a question for Dr. Pisupati. Dr. Malathi suggested that NBA should take efforts to make guidelines for access to MGR. During the Nagoya Protocol negotiations on ABS, this issue on BBNJ was discussed. At this forum, when there are many countries apart from India, who would be largely benefitted from the access to MGR in areas beyond national jurisdiction, what could be the key elements that they could incorporate at the regional level? One of the problems with Nagoya Protocol is people really do not know the benefits that stems out of the Protocol.

Dr. Pisupati: Thank you. When one speaks of Nagoya Protocol vis-à-vis Indan Biodiversity Act, what we discuss regarding MGR is that they are smaller sub-set of resources that are within the countries jurisdiction, especially coastal areas. In furtherance of which, countries are required to develop certain do and don'ts when it comes to access to MGR. Also, the Nagoya Protocol does not distinguish a particular genetic resource from an eco-perspective. So, within the context of looking at from national Biodiversity Act under the CBD – Nagoya Protocol, the following points are very important for countries to keep in mind: (i) it has to be comprehensive when it comes to a policy or legal framework. But it should not be short of flexibility in terms of implementation. So, Indian experience is that it has to be learning by doing approach. (ii) whether it is terrestrial bioresource or marine bioresource, there is no distinction with regard to access to these resources. However, the distinction comes to play, while deciding the nature of the benefits of these resources. The kind of benefit one expects from a company or the profits of the company which is producing these, from the nature of the profits made by a pharmaceutical company, and also from the R & D company. So, having a set of one size fit all approach for access and benefit sharing is not going to be beneficial because we will end up having much more institutional mechanism and timeline spent on understanding these issues would be very vast. As and when countries are looking at the access including for marine resources, they have to have a proper understanding of the economic potential of them or accrual benefits of them. There must be a sectoral approach as it is advantageous because each sector is differently pursued and have different benefits and access requirements. On BBNJ, we need to have a multilateral approach because it gives a model to emulate and deliberate upon the rights and duties of States in terms of access to MGR. But certainly one cannot emulate the model of Plant genetic resources Convention (specifically designed to deal with plant resources) to marine resources. This is because the Plant Variety Convention negotiated for

more than five years on various issues such as food security, including the issue of origin of crop that came from a particular country. So, we are looking at a small subset of resources which was able to be negotiated and even that too for ten years within the FAO. But when we are talking of areas beyond national jurisdiction on marine resources, we need to have a multilateral approach but we also need to have same level of flexibility and the same level of approach to deal with. Thus, there is a need to look at the approach taken at the multilateral level, at various platforms and forums such as the UNCLOS, CBD, ISBA, and then try to address the issues at national level with such model.

Dr. Neeru Chadha, President of AALCO: Thank you. I think you made a useful suggestion that there should be discussions at the national level before we go for discussions at regional level conference. I was little skeptical about the prospects at the national system, as we have the BDA but still we do not have the guidelines for ABS. But, when we go for negotiations at international level it is more than that. So, I think the task ahead is very difficult. Hence, it is important that all possible resources should join together and have a very focused position in international negotiations. At the UN level, the negotiations could be much better, but at other foras there might be other interests which come in the forefront. Each state would have to follow its own interest, so I think having a national position is very crucial.

Dr. Pisupati: Thank you. I do agree with the points you mentioned. But, with regard to ABS guidelines, now I am forced to respond to that. The reason for not having such a guideline even after 10 years of the Biodiversity Act, is that the Act has unfortunately another provision which says that the benefit sharing aspect should be discussed only on a case-by-case basis only.

Chairperson: Thank you very much panelists and participants for a great session. We have another half an hour for lunch. So, please be back by 2.15 PM.

III. VERBATIM RECORD OF WORKING SESSION II (2.30 – 4.30 PM)

"FRAGMENTATION OF INTERNATIONAL LAW: LAW OF THE SEA"

Chairperson: Amb. Gudmundur Eiriksson, Ambassador of Iceland to India and former Judge of the International Tribunal of the Law of the Sea (ITLOS)

Chairperson: Good afternoon. I welcome you all to this session on fragmentation of international law and the law of the sea. In this session, the first speaker is Prof. Kening Zhang, who will be speaking on the International Seabed Authority. Prof. Zhang is a legal counselor of the Department of Treaty and Law of the Ministry of Foreign Affairs, professor of the XMU South China Sea Institute and Director of the XMU Center for Ocean Law and South and East China Sea. He works as a part-time professor of the Law Schools of Peking University and Renmin University of China, cooperative faculty of the Research Center for Human Rights and Humanitarian Law of Peking University Law School and guest professor of Zhejiang University Guanghua Law School. Professor Zhang has also previously served in the UN International Seabed Authority as the Senior Legal Officer. Additionally he is a member of the Committee Against Torture (CAT) and is an editorial member of the Chinese Journal of International Law. With this short introduction, may I now invite Prof. Kening to make his presentation.

Topic: "The International Seabed Authority and its Recent Developments"

Prof. Kening Zhang, Professor of Law, South China Sea Institute and Director of Centre for Oceans Policy and Law, Xiamen University, China: Thank you Mr. Chair. Good Afternoon. I thank the AALCO Secretariat, the Secretary-General Prof. Mohamad for inviting me to this Meeting. I would be speaking on International Seabed Authority (ISA) and its Recent Developments. To begin with, I shall deal with the international seabed area and seabed mineral resources. The International Seabed Area consists of about 50% of the Oceans and 30% of the Earth. An "Area" as per Article 1 (1) of the UNCLOS means "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction". It outlines the areas of national jurisdiction as a twelve-nautical-

mile territorial sea; an exclusive economic zone of up to 200 nautical miles and a continental shelf. The international seabed area beyond national jurisdiction has been declared the Common Heritage of Mankind. The mineral resources of the Common Heritage are administered by the International Seabed Authority. The mineral resources of the Area includes Polymetallic *Nodules,* which is also known as seafloor mineral resources. The estimated quantity of deposit of this mineral resource in the Clarion-Clipperton Zone (CCZ), as per 2009 Production on Land is 62,000 mt, which is 34 billion metric tons of nodules, 2100 times land-based production, containing 7500 million metric tons of manganese, 340 million metric tons of nickel, 265 million metric tons of copper and 78 million metric tons of cobalt.

The other mineral resource of the Area is the *Cobalt-rich ferromanganese crusts*. Cobalt-rich iron-manganese (ferromanganese) form at the seafloor on the flanks and summits of seamounts, ridges, plateaux, and abyssal hills and contain sub-equal amounts of iron and manganese and are specially enriched in cobalt, manganese, lead, tellurium, bismuth, and platinum relative to their lithospheric and seawater concentrations. The estimated global reserves of deep-sea manganese nodules are in the order of 10 billion tonnes. Those of greatest economic interest contain on average about 30 per cent manganese, about 1.5 per cent nickel, 1.5 per cent copper and about 0.3 per cent cobalt.

Now, I move on to the substantive functions of the ISA. This intergovernmental body was established at the Jamaican Conference to organize and control all mineral-related activities in the ISA beyond the limits of national jurisdiction, an area underlying most of the world's oceans. Regarding the structure and functions of the ISA, the Secretariat of the ISA has its Headquarters in Kingston, Jamaica. The Secretary-General is elected for 4 years, and may be re-elected. There are 19 professional legal, technical, scientific and 16 general-service staff, it function as an Enterprise. The mandate to undertake substantive functions of the Authority is derived, particularly from Part XI of the 1982 UNCLOS Convention, and Annex III to the 1982 Convention, and the 1994 Agreement. Pending the approval of the first plan of work for exploitation, the Authority is mandated to concentrate on the 11 areas of work listed in paragraph 5 of section 1 of the annex to the 1994 Agreement.

The six major areas of work programmes of the authority during 2008-2010 and 2011-2013, are:

(1) supervise existing contracts for exploration;
(2) develop an appropriate regulatory framework for the future development of the mineral resources of the Area, including

standards for the protection and preservation of the marine environment during their development;

(3) monitor trends and developments relating to deep seabed mining activities, including world metal market conditions and metal prices, trends and prospects;

(4) collect Information and establish unique databases of scientific and technical information;

(5) to promote and encourage marine scientific research in the Area through, inter alia, an ongoing programme of technical workshops, to disseminate the results of such research and collaborate with contractors and the international scientific community; and

(6) to assess available data relating to prospecting and exploration for polymetallic nodules in the Clarion-Clipperton Zone.

One of the main functions as to supervising existing contracts for exploration saw the signing ceremonies of 8 Nodule Contracts between 2000 and 2005. There were applications by Nauru Ocean Resources Inc. & Tong Offshore Mining Limited for exploration for polymetallic nodules in the reserved area of the ISA in CCZ. On 5 July 2011 the team of Tonga Offshore Mining Ltd. made presentations before the Legal and Technical Commission on its application. On 14 July 2011 Hon. Minister of Commerce, Industry and Environment of Nauru addressed the Council of the ISA, appealing to the Council to give favourable consideration to NORI's application. NORI TOML applications were approved by the Council 19 July 2011.

On prospecting and exploration, in the c*ontracted and reserved areas in the Indian Ocean,* applications were received by COMRA and the Government of Russian Federation for approval of plans of work for exploration for polymetallic sulphides in the Area. With regard to this, on 5 July 2011 COMRA Scientists made presentations before the Legal and Technical Commission which considered and recommended to the Council for approval of COMRA's application. On 7 July 2011 the Government of Russian Federation made presentations before the Legal and Technical Commission which considered and recommended to the Council for approval of Russia's application. Further, a contract on exploration for polymetallic sulphides was concluded between the ISA and COMRA of China in Beijing, China in November 2011. There have been number of applicants before the Legal and Technical Commission (LTC), such as Republic of Korea (the Council Adopted the Cobalt Explorations in 2012), China (2013), Japan (JOGMEC and ISA Signed Cobalt Exploration Contract (27 January 2014, Tokyo), and so on. Sixteen contracts for exploration in the Area (13 for nodules, 2 for sulphides and 1 for cobalt-rich crusts as of 24 Feb

2014) for cobalt exploration has been signed. For Nodules around thirteen contracts were signed, such as Yuzhmorgeologiya (Russian Federation, 2001), Interoceanmetal Joint Organization (2001), Republic of Korea (2001), COMRA (China 2001), DORD (Japan 2001), IFREMER/AFERNOD (France, 2001), Government of India (2002), Federal Institute of Geosciences and Natural Resources (Germany 2006), Nauru Ocean Resources Inc. (2011), Tonga Offshore Mining Limited (2012), Marawa Research and Exploration Ltd. (Kiribati 2013), UK Seabed Resources Ltd. (2013), and G-Tec Sea Mineral Resources NV (Belgium 2013). For Sulphides there have been two contracts have been signed, namely, COMRA (China, 2011) and Ministry of Natural Resources and Environment (Russia, 2011). For Cobalt-rich Crusts only Japan Oil, Gas and Metal National Corporation (2014) has signed so far. Certain contracts were approved but were yet to be signed.

There exists legislation to regulate the deep sea mining regime in order to develop an appropriate regulatory framework for the future development of the mineral resources of the Area, including standards for the protection and preservation of the marine environment during their development. The existing regulatory deep seabed mining regime consists of *three Exploration Regulations,* such as,

1. Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (2000)
2. Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (2010)
3. Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area (2012)

These legislations are basically identical, but slightly different due to nature of resources. The term “Exploitation” means the recovery for commercial purposes and the extraction of minerals from the Area, including the construction and operation of mining, processing and transportation systems, for the production and marketing of metals (Reg. 1 (3) (a) of all the three Regulations). So far, there are no regulatory frameworks for exploitation of the resources of the Area. This makes commercial exploitation of these resources very difficult to contemplate. Pursuant to section 1, paragraph 15, of the annex to the 1994 Agreement, as read with articles 153 and 162(2) (o) (ii) of the Convention, the Council may undertake the elaboration of such rules, regulations and procedures as may be necessary to facilitate the approval of plans of work for exploration or exploitation for seabed minerals any time it deems that such rules are required for the conduct of activities in the Area, or whenever it determines that commercial exploitation is imminent, or at the request of a State whose national intends to apply for

approval of a plan of work for exploitation. Moreover, there could be seabed activities with potential environmental impacts due to various processes involved while conducting exploration such as picking-up, lifting, de-watering, onboard processing, transportation and metallurgical processing.

With regard to the "Implementation of article 82 of the 1982 UNCLOS", particularly paragraph 4, of the said article, one of the specific responsibilities of the Authority is to distribute to States parties to the Convention the payments or contributions in kind derived from exploitation of the non-living resources of the continental shelf extending beyond 200 nautical miles from the baselines of the territorial sea (the 'outer continental shelf')[4].

The ISA has been closely working with research institutes as well. On that note, in February 2009, the Authority collaborated with the Royal Institute of International Affairs (Chatham House), the United Kingdom, an independent policy research institution, in convening a seminar as a preliminary step in the exploration of issues associated with the implementation of article 82. As part of this work, the Authority commissioned two studies dealing with the legal and policy issues on the implementation of article 82, and the technical and resource issues on the outer continental shelf, respectively. The results of the two studies were published as Technical Study No. 4 and Technical Study No. 5. During the seminar, legal, economic, technical and policy experts from the International Tribunal for the Law of the Sea (ITLOS), the Organization of the Petroleum Exporting Countries (OPEC), the private sector and academia reviewed the studies and provided commentaries on specific aspects of the issues concerned.

Some practical issues relating to implementation of article 82 are:

- How the Authority should interact with producer States
- How it should devise a scheme for the distribution of potential payments and contributions in kind

[4] Article 82 of the 1982 UNCLOS:

- Under article 82 of the 1982 Convention, States or individual operators who exploit the non-living resources of the outer continental shelf are required to contribute a proportion of the revenues they generate from such exploitation for the benefit of the international community as a whole.
- Article 82, paragraph 4, gives the Authority responsibility for distributing these revenues on the basis of "equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them."

- In view of the long lead time needed for mineral development projects, it would be important to address these issues well before the commencement of commercial production from the outer continental shelf
- A study has been committed on the above issues.
- As a follow-up to the 2009 seminar and part of the work programme for the period 2011-2013, an expert group meeting was held in Beijing in 2012 involving representatives of members of the Authority, members of the LTC and other relevant experts, to consider and help to prepare draft recommendations to the Council and the Assembly on the implementation of article 82, paragraph 4, of the Convention.

At the level of capacity-building, two main ways in which the Authority promotes marine scientific research in the Area and build the capacity of developing countries in deep sea research and technology:

1. Training obligations of contractors: with the approval of new plans of work in the past three years it is anticipated that more than 20 training opportunities will become available in the next two years. During the 19th session the LTC also issued new recommendations for the guidance of contractors and sponsoring States relating to training programmes under plans of work.
2. Endowment Fund aims to promote and encourage the conduct of marine scientific research in the Area for the benefit of humankind as a whole, in particular by supporting the participation of qualified scientists and technical personnel from developing countries in marine scientific research programmes. So far a total of 56 scientists or government officials from 35 developing countries have been beneficiaries of financial support from the Endowment Fund.

The importance of environmental protection is also underlined by bringing awareness. The protection and preservation of the marine environment from the harmful effects of seabed activities in the Area has always been a matter of serious concern of the ISA. The ISA is under a legal obligation to adopt rules, regulations and procedures for this purpose and has been very active in the past years since 1998 when it had its first international workshop held in June 1998 in Sanya, Hainan Island, China.

The Recent Developments in this field is the LTC Recommendations, wherein since 2010, the ISA has issued over 10 documents in this respect by its organs. Such documents define the biological, chemical, geological and physical oceanographic information required to ensure the effective protection of the marine environment, the LTC during its 19th session in 2013 issued

recommendations, for the guidance of contractors for the assessment of the possible environmental impacts. These recommendations describe the procedures to be followed in the acquisition of baseline data, and the monitoring to be performed during and after any activities in the exploration area with potential to cause serious harm to the environment. They also provide guidance to future contractors in preparing plans of work. The recent developments in the also includes adoption of environmental management plan (EMP) for the Clarion-Clipperton Zone (CCZ) which is to be implemented over an initial three-year period, including the designation on a provisional basis of a network of areas of particular environmental interest covering 1.6 million square kilometres of seafloor in nine square shaped areas. Under the plan, no application for approval of a plan of work for exploration or exploitation would be granted in these nine areas of particular environmental interest for a period of 5 years or until further review by the LTC or the Council. This has to be applied in a flexible manner so that it may be improved with more data supplied by contractors and other interested bodies. It is hoped that the implementation of this plan will be reviewed in 2014, subject to availability of resources. Development of similar environmental management plans for other regions of interest for exploration such as Atlantic and Indian Oceans. To facilitate data standardization, the ISA has been making efforts to standardize the taxonomy of three classes of fauna: megafauna, macrofauna and meiofauna, all associated with the three mineral resources: polymetallic nodules, polymetallic sulphides, and cobalt-rich crusts. The first of a series of three workshops (megafauna, macrofauna and meiofauna) for each of the above three mineral resources for contractor scientists and expert taxonomists to develop a standardized taxonomy for megafauna associated with polymetallic nodules deposits was convened in Germany in 2013. The next workshop to address standardization of the taxonomy of macrofauna associated with the same mineral is expected to be held in 2014. The information and data that will be generated by these workshops will greatly contribute to the EMP for the CCZ and other polymetallic nodule-rich regions in the Area.

There exist a cooperation agreement between ISA and ITLOS. On the basis of a proposal initially submitted by Nauru (ISBA/16/C/6), recently a request was submitted by the ISA Council to the Seabed Disputes Chamber of the ITLOS under article 191 of the Convention on 3 questions:

1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?

2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2 (b), of the Convention?

3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

Questions relate to Nauru's intention to sponsor Nauru Offshore Resources Incorporated (NORI) in an application for exploration licence in the international seabed area (filed in 2008 and currently pending)[5]. The legal instruments instrumental was the Convention and 1994 Agreement requires every applicant to be sponsored by a State Party (evidenced by a certificate of sponsorship), it involved interpretation of following articles:

- Article 153(2)(b) - must be "*effective control*" by the sponsoring State,
- Article 139(1) - Sponsoring State is responsible to ensure that activities carried out in conformity with Convention and applicable regulations,
- Article 139(2) – Sponsoring State not liable if it has taken "*all necessary and appropriate measures to ensure effective compliance*", and
- Annex III, article 4(4) – Sponsoring State to adopt laws and regulations and administrative measures which are "*reasonably appropriate*" for securing compliance. This request paved way for hosting a seminar on the Advisory Opinion at the United Nations in New York on 7 April 2011.

There has been Reciprocating States legislation prior to the signing of the 1982 Convention. In response to the growing interests in the deep-sea minerals exploration and mining in recent years, some regions and States have taken legislative measures.[6] At regional level, a "Legal and Fiscal Framework for

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[5] During the proceedings, written statements were submitted by United Kingdom, Nauru, the Republic of Korea, Romania, the Netherlands, the Russian Federation, Mexico, Germany, China, Australia, Chile, the Philippines, International Seabed Authority, Interoceanmetal Joint Organization, the International Union for Conservation of Nature, the United Nations Environment Programme, Greenpeace International, and the World Wide Fund for Nature. Public hearings 14-17 September 2010, Hamburg. Oral statements made by International Seabed Authority, Germany, the Netherlands, Argentina, Chile, Fiji, Mexico, Nauru, the United Kingdom, the Russian Federation, the Intergovernmental Oceanographic Commission, and the International Union for Conservation of Nature.

[6] SPC-SOPAC EU-Funded Project: Deep Sea Minerals (DSM) in the Pacific Islands.

Sustainable Resource Management" (the Project), was adopted. It is to provide relevant assistance, support and advice to the Project's participating countries.[7] In 2012, the Secretariat of the Pacific Community developed the Regional Legislative and Regulatory Framework (RLRF). In 2013 Fiji promulgated the International Seabed Mineral Management Degree 2013; followed by Netherlands, Belgium, the UK, Japan and China. Thank you.

Chairperson: Thank you Prof. Kening. May I now invite the next speaker Dr. Luther Rangreji. Dr. Rangreji is on a deputation as Associate Professor to the Faculty of Legal Studies, South Asian University from the Legal and Treaties Division, Ministry of External Affairs, Government of India. He teaches international law, legal research methodology and laws of international organization. He has also worked as a Legal Officer at the Secretariat of the Asian-African Legal Consultative Organization (AALCO) New Delhi. Dr. Rangreji's areas of specialization include – law of the sea, international organization and international environmental law. He is a visiting faculty at the Indian Society of International Law, Indian Law Institute, New Delhi, WWF-Centre for Environmental Law, Symbiosis International University, Pune and others Law Schools and universities.

Topic: "Interface between Law of the Sea and Environmental Issues: Marine Environment"

Dr. Luther Rangreji, Associate Professor, Faculty of Legal Studies, South Asian University: Good afternoon everyone. Excellency Ambassador Eiriksson, Experts on the dais, Legal Experts of AALCO Member States, Officers of the External Affairs Division of the Ministry of External Affairs, Government of India, as well as the AALCO Secretariat, dear students, ladies and gentlemen, I have been given a rather surreal topic and I intend to flag four issues in this talk of mine. The first one being whether there is fragmentation at all when you speak about the law and environmental issues. The second issue is why UNCLOS which chronologically has come up much earlier than the post Rio agreements is supposed to be one of the earliest treaties dealing with environmental law in general and law of the sea in particular. The third issue is, what is the structure of Part XII of UNCLOS, which to my mind is an obligatory umbrella framework, an obligatory umbrella framework may sound oxymoron how it is obligatory and why is it then umbrella? But that is how the law of the sea structure of article XII

[7] Cook Islands, Federal States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu and Vanuatu.

is. Then I will also look at what is the foundational basis of Part XII which deals with number of issues dealing with sectoral sources dealing with marine pollution as well as how they build up a national, regional and global response. Lastly I will look at three cases that have come up before the ITLOS, particularly some environmental law issues, and try to establish that there is an interface between Law of the Sea, environmental issues and protection of the marine environment. However, this is not in the realm of fragmentation but complimentarity.

The first aspect of environmental law and the marine environment is that it is not a typical issue of fragmentation. It is not fragmentation for the simple reason that the topic is of interest today because keeping in mind Prof. Martii Koskennieni's report it typically deals with fragmentation of tribunals whereas we are dealing with the presence of *lex specialis* as opposed to a general regime, in that turn I would not say that this interface is an issue of fragmentation, the interface is largely of first in the chronology of getting in place a treaty on the protection of the environment in general more particularly protection of the marine environment. If you look at the history of the development of international environmental law, one of the earliest meetings was the UN Conference on Human Environment in 1972. When this Conference was on there were two major environmental issues which the world was grappling with, one was the creation of the UNEP, which was nearly in its final stage by 1972 and second one was the adoption of the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, except for these two elements which were largely source based issues, there was no high level directive or international meeting that set the agenda in the environment field. There was no Rio Declaration, Rio Plus, or even the Stockholm Declaration.

If we look at the Stockholm Declaration it dealt with three main issues which have been repeated in all the three conventions on environment: the first issue dealt with that efforts should be made to see that there is no pollution. Principle 7 says that the State shall take all possible steps to prevent the pollution of the sea by substances that are liable to create hazards to human health, harmful substances and marine life, to damage amenities or to interfere with other resources in the sea. This was the first principle that dealt with the seas. Then there are some principles in customary international law largely saying that you shall not harm the environment beyond your national jurisdiction and if you do that you shall be responsible for it. You also had principle 22 of the Stockholm Declaration which calls States to further rationalize national law regarding liability and compensation for victims of pollution and other damages. These three principles 7, 21 and 22 there was no directive really that set the agenda in the field of environmental law. By 1973 the Third Law of the Sea Conference was

already set in motion. It is not to deny that the 1958 Geneva Convention did speak of the protection of the Marine Environment but they largely were based on the protection of living resources as opposed to the protection of the environment *per se*. So this issue of fragmentation to my mind is not something that can be set in straight jackets that there was a treaty and now it is fragmented. So I do not agree that there is fragmentation in the area of the law of the sea with respect to the protection and preservation of marine environment is a false one and one needs to be very clear about this.

Another issue which also needs to have a closer look is, what is the structure in the law of the sea especially in UNCLOS 1982, which is different from any single international treaty. UNCLOS 1982 has been regarded as the Constitution of the Oceans; we also know that there are hardly areas of the ocean that have not been regulated by UNCLOS as such. Therefore I have listed four or five points which makes the understanding that any sort of fragmentation has taken place. What I believe is that in the first place there is a Constitutional Obligatory Umbrella framework which dealt with a large number of issues which did not immediately deal with the protection of the environment as such, or protection of the marine environment as such but they impacted upon the marine environment and these issues were not set out in Part XII *per se* they were set out in all the jurisdictional zones, they have been set out in dealing with ships, war ships, territorial waters, EEZ, they have also been set out in other activities regarding navigation and also the navigation regime, high seas issues. So these environmental boxes have been set up in many places not actually in any one section in Part XII.

In that sense of the term protection of the marine environment is not commonly understood as marine pollution, it has been a different aspect as compared to marine environment. If you see this has been dealt within Article 1 which deals with the definitional aspects and it very clearly says, "how is marine pollution of the environment defined", this means that this was the product of a Group of Experts on the Scientific Aspects of Marine Pollution, the Report that coined that definition states that:

> "Pollution means the introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) resulting in such deleterious effects as harm to living resources, hazards to human health, hindrance to marine activities including fishing, impairment of quality for use of sea water and reduction of amenities".

If we look at this definition, it deals with marine, although it says pollution of the marine environment, it deals with a large number of issues which impact the

environment, but it does not deal with pollution *per se*. It goes on to say much before any other treaty said that these are caused by the definition of anthropocentrism started only after our common future, this work of the Club of Rome on Sustainable development came up by the Brundtland Commission. This was a post 1990 phenomenon as opposed to ecocentricism which was there in 1972. So there is somewhere in between 1970 and 1982 where a decade before it was very clearly understood that these manmade activities had negatively impacted the marine environment. Therefore, the onus or the emphasis of the pollution of the marine environment has been placed on human beings. Today the climate change is human based; the science of climate change very clearly tells us this. However, there was recognition of this fact way back in 1982. This supports my thesis that did not protect the aegis of the protection of the marine environment but at the same time it was totally concerned with the marine environment not as a separate section but very closely and holistically having a single understanding. It was also connected to the issue of ocean resources which was clearly understood as a principle of ecology, as it is incorporated in the UNCLOS. Although you had separate maritime zones but oceans were regarded as a single ecological resource. Therefore, anyone who understands ecology would understand that if something is an ocean resource you also acknowledge that it is exhaustive finite, as oceans are not to be abused or use of rights by some should not lead to the abuse of rights of others.

The structure also has to go into more precise terms as mentioned under Article 192 and 193 which try to manage the essential debate that has being going on in Rio on Sustainable Development. Today we know that sustainable development means the right to development without jeopardizing the right of others to develop. Article 192 clearly balances the environmental rights with development. It says that there is an obligation to protect marine environment. In few places in the UNCLOS the word obligation is mentioned, and when it is said that the States are under the obligation, to my mind if you do not obey this obligation, then you have breached a particular international law for which you can attract rules of stability. If we look at Article 193, at one place this Article says protect the marine environment, immediately thereafter the rights of developing countries have very strongly been protected with respect to their permanent sovereignty over natural resources. Article 193 states that the sovereign right to exploit the natural resources pursuant to the environmental policies should be in accordance to their duty to protect and preserve the marine environment. It is my belief that this principle of sustainable development is an umbrella under which there are a large number of principles of polluter pay, precautionary principle, or principle of environmental impact assessment or for that matter principle of cooperation, notification and consultation. Although these are post Rio principles, many of

these were incorporated although with some difference in the Law of the Sea itself. Therefore, it is not as if the UNCLOS does not deal with these issues which are essential in international environmental law. It also has many other clauses such as unjustifiable interference in other's activities, such as rare and fragile ice covered areas, it prohibits introduction of new or alien species, many things that we learn in environmental law today. Therefore, these principles have been there for a long time though under different names, interdiction of alien species has been there for a long time for which we have the Nagoya Kuala Lumpur Protocol, dealing with the liability of genetically modified substances. Many of these principles which we know today have been there for long; one only has to search for them. Like the duty to notify for imminent or immediate damage, which is present in a number of treaties today, are parts of Law of the Sea as environmental law principles, although they are a part of general international law.

I also believe that the Law of the Sea has intrinsically obligated States to undertake three sets of obligations; it calls upon States to protect and obey international rules in a three tier phase : one is an obligation to protect and preserve and not to pollute; the second which is built upon the first is a duty to cooperate on global and regional basis, and develop acceptable standards, rules and practices, on the protection of the marine environment; lastly there is an obligation to implement and enforce at national levels what has been agreed either at the global or regional level. Therefore, one has a general obligation not to pollute, second is an obligation to have in place a regional and global rules, and third is an obligation to incorporate these regional and global rules, as far as it is possible, depending upon the city, at the national level. Here too many aspects that we understand of being principles of environmental law are there in the Law of the Sea and the UNEP, which have a programme "Concept of prevent, reduce and control pollution" which is very clearly receptive of the capacity of States to undertake international obligations. As opposed to the Europeans who in many of the conventions use the word eliminate pollution.

Hence, I am trying to build a case that fragmentation does happen but the UNCLOS is as it is, as it always has been. The principles have not been developed, in fact the Law of the Sea has been a codification effort of many principles that existed under general international law, and these were essentially principles of international law which are today recognized as principles of environmental law. The last issue is that there were three cases which came up before the ITLOS: (i) The Southern Blue fin Tuna case, (ii) the MOX Plant case, and (iii) the Land Reclamation case between Singapore and Malaysia, in all these three cases there has been an effort by the Judges of the Tribunal not to use terminology which

environmental lawyers use, but the effect is the same. In the Southern Blue fin Tuna case, the Tribunal while speaking about the conservation of the living resources as an element of prevention and preservation of marine environment did not use the word precautionary, but it did prefer to say that the parties should act with prudence and caution, as a logical consequence of the need to ensure effective caution. So here one is seeing that instead of saying that there is a principle of environmental law which is there in principle 15 of the Rio Declaration, which very clearly establishes what a precautionary approach means it's not a rule. It did not want to cite that particular thing. I am sure an ITLOS Judge would not want to cite general environmental treaties he would rather prefer the Law of the Sea Convention. While doing that using an environmental treaty, it largely goes to not show that you do not respect other environmental treaties but you believe in the strength of your own treaty or convention, that many aspects which environmentalists or an environmental lawyer says they are in the realm or something outside the Law of the Sea Convention, the Convention itself provides for the utilization of these rules.

To conclude, I would just make three or four main submissions, I believe that fragmentation is a term that we use for contemporary relevance and importance, but one would have to see very carefully whether fragmentation actually occurs in Law of the Sea. Umbrella legislation has deliberately been framed by the international community. Mr. Rajan, who has worked in the field, would know that it was not only a package deal but it was a huge risk to balance any of the demands of the developed as well as the developing countries. The compromise package very clearly mentions that some leeway has to be kept so that States to either have stronger laws, the very fact that we have the Framework Convention on the Law of the Sea was a deliberate attempt to leave the laws slightly loose or flexible so that stronger rules can develop at the international level. The best example of this is the London Dumping Convention, now the word dumping has been removed but very clearly it can be seen that seven issues have been left flexible so that States can have stronger laws.

The second issue that I want to mention is that instead of fragmentation, international lawyers are best known for confusing minds, the Law of the Sea Convention in many ways is a clear exposition of the hard realities of the time, in my view law should be that way. UNCLOS, to my mind, was a Convention which provided a great amount of complimentarity rather than what we understand as fragmentation. The last issue that I wish to state is that there may not be fragmentation of the law, I believe that the fragmentation of the institutions or for that matter even the Tribunals that have been working, I am not talking about the ITLOS, I am sure that it does compliment the work of other tribunals but

there may be outside the UN system a large number of bodies which deal with law , and there mandates may not be very clearly demarcated, for example the UNEP works on the Regional Seas Programme there have been many number of demands that you have a Headquarters somewhere in India or in Bangladesh or in any other country it has never been considered for reasons best known to the United Nations system. There are a number of other instruments or areas where you may not have so much of problems of marine pollution, the IMO I believe is doing its mandate, but there can be other organizations like the IOC which deals more with scientific activity. However I believe that the UNEP Regional Seas Programme is a programme, which has led to fragmentation in institutional mechanisms rather than actually in the law process. Thank you so much.

Chairperson: Thank you for this very comprehensive presentation. The next speaker is Mr. Taker Aoyama, who is the Counsel for International Legal Affairs in the International Legal Affairs Division, Japanese Ministry of Foreign Affairs. He is also the Director of the ICJ Whaling Case Division of the International Legal Affairs Bureau with the Ministry. He has earlier served as the official-in-charge of UNCLOS at the Treaty Bureau and was also in-charge of legal matters with the Japanese Embassy in Netherlands from 2003-2006. Now I will request Mr. Takero Aoyama, to make his presentation.

Topic: "Forum Shopping and Parallelism of Treaties (Southern Bluefin Tuna Case – Australia and New Zealand v. Japan)"

Mr. Takero Aoyama, Counsel for International Legal Affairs, Ministry of Foreign Affairs, Japan: Ladies and Gentlemen, today in my presentation, I would like to survey the "Southern Bluefin Tuna Case".[8] This is the case in which Japan became a party to international legal dispute for the first time in the post World War II history. I take up this case, because in the course of the proceedings the issue of "fragmentation of international law" became known taking the form of phenomenon such as forum shopping and overlapping of jurisdiction.

Relationship between UNCLOS and CCSBT

On 10 December 1982, the UNCLOS was adopted; and on 16 November 1994 it entered into force. Australia ratified UNCLOS on 5 October 1994, Japan on 20 June 1996 and New Zealand on 19 July 1996.

[8] The following Abbreviations were used during the presentation: (i) Southern Bluefin Tuna: SBT, (ii) Convention for the Conservation of Southern Bluefin Tuna: CCSBT, (iii) Australia and New Zealand: A/NZ, and (iv) Experimental Fishery Program: EFP.

On 10 May 1993, Japan, Australia and New Zealand adopted CCSBT. It entered into force 20 May 1994.

Now, I would like to look back over the background of the dispute briefly. Southern Bluefin Tuna ("SBT") are a highly migratory species listed in Annex I of UNCLOS and they can be found in the southern hemisphere, mainly in the Indian Ocean. Commercial fishing of SBT developed from the early 1950's. In 1980' Japan, Australia/New Zealand began informally to manage the catching of SBT. In 1989 they agreed to set a Total Allowable Catch ("TAC") at 11,750 metric tons; the national allocation for Japan was about 6,000, for Australia about 5,200 and for New Zealand about 400.

CCSBT was adopted in 1993. At the Commission for the Conservation of Southern Bluefin Tuna, established by CCSBT, Japan has argued that the TAC should be increased because the SBT stocks are recovering according to its own scientific advice. On the contrary, Australia/New Zealand has argued that the TAC should be held steady or even decreased because of the scientific uncertainty. Japan has proposed Experimental Fishing Program (EFP) repeatedly in order to address the scientific uncertainty of the SBT stocks, but A/NZ refused to consider Japan's proposals.

In February 1998, Japan announced at the session of the Commission that it would comply with its previous allocation for commercial catch but at the same time commence an EFP. In the 1998 fishery season, the EFP was implemented as a pilot program with an estimated catch of 1,400 metric tons. This triggered the dispute. The three States continued negotiations at the Commission as well as at the Working Group on the EFP, but they were not able to reach an agreement. Japan argued it is allowable to catch about 2,000 metric tons as EFP, while Australia insisted on 1,400 at the maximum. Eventually, on 1 June 1999, Japan commenced its three-year EFP unilaterally based on the Japan's stock assessment.

Procedural History

On 15 July 1999, A/NZ commenced the proceedings against Japan under Section 2 (Compulsory Procedures Entailing Binding Decisions), Part XV of UNCLOS. In accordance with Article 287, Para 1(c) and 5, the dispute was submitted to the Arbitral Tribunal constituted under Annex VII.

On 30 July 1999, A/NZ filed a request of provisional measures with ITLOS, pending the constitution of the Arbitral Tribunal.

On 27 August 1999, ITLOS issued an Order finding that, *prima facie*, the Arbitral Tribunal would have jurisdiction and prescribing certain provisional measures.

On 11 February 2000, Japan filed its memorial on its preliminary objection to jurisdiction.

On 4 August 2000, the Arbitral Tribunal concluded that it lacks jurisdiction to entertain the merit of the dispute and the Order of provisional measures shall cease to have effect.

Japan's Main Arguments

Argument 1

The center of the dispute was a disagreement between the A/NZ and Japan over the evaluation of scientific evidence concerning the current state and recovery prospects of SBT stocks and means by which the scientific uncertainty can best be reduced. As a matter of fact, the dispute was not about the application of UNCLOS, but was about the implementation of the CCSBT.

Here, the key question is; what is the dispute really about? What is the core or center of the dispute? Right up until June 1999, A/NZ continued to assert in their letters and notes verbales that this dispute is a dispute within the framework of the CCSBT. However, in June 1999, after Japan commenced the EFP, A/NZ sent notes to Japan stating their views that Japan's conduct of an EFP was in breach not only of CCSBT but also of UNCLOS. In effect A/NZ started the proceedings against Japan invoking the compulsory procedure under Section 2, Part XV of UNCLOS.

Now, I would like you to look at page 5, a sideway paper, entitled "Option of Courts or Tribunals and Procedures." As you can see, for the settlement of this SBT Case, we can find no less than seven choices of judicial procedures. The claimants have a wide range of options and an advantage over the defendant in selecting the proceedings which they calculate the best. Eventually, A/NZ took the Option 1 and succeeded in getting effectively an Order of the provisional measures by ITLOS. This is a typical forum shopping and an overlapping of jurisdictions, and this never happens in domestic judicial proceedings where integrated and hierarchical system is established.

Argument 2

UNCLOS is a *lex generalis* and CCSBT is a *lex specialis*. The *lex specialis* prevails over the *lex generalis*.

This relationship between UNCLOS and CCSBT based on the legal maxim is the vital feature of this case, but A/NZ disregarded it and asserted the conduct of Japan violates UNCLOS, in particular Article 64 and Article 116－119, in addition to the terms of CCSBT.

You can see at the last page a copy of the Articles of UNCLOS cited by A/NZ. These provisions lay down general obligations of the states concerned to cooperate in developing practical arrangements for the conservation and management of highly migratory species and high seas fisheries. Thus, this scheme of UNCLOS has the character of an umbrella agreement. The effectiveness of these articles depends upon the adoption and conclusion of further specific agreements by the states concerned.

There is no doubt that CCSBT gives substance to the articles of UNCLOS cited by A/NZ and functions as detailed implementing agreement. The CCSBT stands as *lex specialis* in relation to the *lex generalis*, UNCLOS.

This follows that if the *lex specialis* contains dispute settlement provisions, the *lex specialis* prevails over any dispute settlement provisions in the *lex generalis*. The *lex specialis* eclipses the *lex generalis*. Our observation was that the Statement of Claim of A/NZ attempts to reformulate the dispute in order to bring it within the dispute settlement procedures of Part XV, section 2, of UNCLOS.

Argument 3

Please, look at the page 6, where you can compare the Article 16 of CCSBT and the Article 281 of UNCLOS.

Even if the present dispute were not only about the disagreement on the implementation of CCSBT, but also were about UNCLOS, the dispute settlement provisions of UNCLOS does not permit the submission of the dispute to the Tribunal. UNCLOS Article 281 provides that the procedures in the Part XV apply only where no settlement has been reached by peaceful means of the Parties' choice and the agreement between the Parties does not exclude any further procedure. The peaceful means chosen by the Parties in this case are the provisions in the CCSBT Article 16 and this Article excludes the operation of Part XV of UNCLOS.

Japan's argument in this regard was a quite new theory, which could not be found in any textbook at that time.

It should be noted that there was a philosophical divergence of views regarding the dispute settlement procedure under UNCLOS in the context of this dispute. A/NZ thought that the compulsory dispute settlement procedure under UNCLOS

was a kind of higher procedure and ITLOS and the Arbitral Tribunal constituted by Annex VII could be regarded as so-called Supreme Court of the Sea. This understanding led to their argument that any dispute arising from any regional or special agreement could be submitted to the compulsory procedure under Part XV of UNCLOS. On the contrary, Japan asserted that in light of the drafting history and careful reading of the Articles concerned, the dispute settlement procedure of UNCLOS is a system which has utmost respects for the will of the Parties to a dispute, and that if there is an agreement among the Parties, they can opt out of the compulsory procedure of Part XV.

Argument 4

There are numerous treaties on matters that fall within the scope of UNCLOS, but which nevertheless have their own dispute settlement provisions which negate any intention that the disputes are subject to the dispute settlement provisions of Part XV of the UNCLOS.

During the proceedings, we found a number of Treaties, Conventions and Agreements having their own dispute settlement provisions. Some of them are identical with the Article 16 of CCSBT (such as Article XI of the Antarctic Treaty and Article XXV of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)). These are self-contained dispute settlement systems, intended to stand in place of the UNCLOS provisions. We listed up more than 80 examples of the self-contained dispute settlement provisions and submitted them to the Tribunal as Annex to our Memorial (Annex 47).

Main Points of the Award

Point 1

The tribunal does not accept the central contention of Japan that the *lex specilis* of CCSBT and its institutional expression have eclipsed any provisions of UNCLOS. The dispute between A/NZ and Japan over Japan's role in the management of SBT stocks and particularly its unilateral EFP, while centered in the CCSBT, also arises under the UNCLOS. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of dispute arising there under.

→ Japan's Argument 1 and 2

Point 2

The Tribunal accepts Article 16 of CCSBT as an agreement by the Parties to seek settlement of the dispute by peaceful means of their own choice as provided in

Article 281 of UNCLOS. The express obligation of Article 16 (2) of CCSBT to continue to seek resolution of the dispute by the listed means of Article 16 (1) imports that the intent of Article 16 is to exclude the application of any procedure of dispute resolution that is not accepted by all parties to the dispute.

→ Japan's Argument 3

Point 3

The Tribunal has taken into account the fact that a significant number of international agreements with maritime elements exclude unilateral reference of a dispute to compulsory procedures. To hold that disputes implicating obligations under both UNCLOS and an implementing treaty such as CCSBT must be brought within the reach of section 2 of Part XV of UNCLOS would be to deprive of substantial effect the dispute settlement provisions of those implementing agreements.

→ Japan's Argument 4

Based on the Point 3 and 4 I have mentioned, the Tribunal concluded that it lacks jurisdiction to entertain the merits of the dispute brought by A/NZ against Japan, so Japan won the case. But, what was striking for Japan was the reasoning of the Tribunal to give decision in favor of Japan; it denied Japan's Argument 1 and 2, that is, the essence of the dispute and the legal maxim "l*ex specialis* overrides *lex generalis*. The Tribunal decided in favor of Japan relying on some phrases of the very procedural provisions, the Article 281 of UNCLOS.

Lessons leart from the Case

1. *The proliferation of international judicial bodies and the forum shopping are reality as the fragmentation of international law goes on.*

2. *The Tribunal admitted the parallelism of treaties and the overlapping of jurisdictions, but it did not determine what the true nature of the dispute is and it did not indicate, consequently, which of the procedures is more appropriate to be taken for the settlement of the dispute.*

We have to be aware of having more strategic mind, when we face a dispute which cannot be resolved through negotiations and thus we seek the possibility of submitting the dispute to judicial procedure

3. *The legal order of the sea provides parties to a dispute with option of dispute settlement procedures and respects the parties' choice and agreement on the*

procedural matters.

The phenomenon such as forum shopping and overlapping of jurisdiction bears criticism, but observing this issue from different angle, we can notice that the legal order of the sea represented by UNCLOS has utmost respects for the will of parties to a dispute to choose and agree on procedure to resolve their dispute.

4. *As far as the conservation and management of straddling fish stocks and highly migratory fish stocks concern, the adoption and entry into force of UNIA has changed the picture.*

Lesson 4 is rather hindsight or sequel to the story; it should be noted that Agreement for the Implementation of UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNIA), which became effective in 2001, provides in its Article 30 that the provisions of Part XV of UNCLOS apply mutatis mutandis to any dispute concerning the interpretation or application of regional or global fishery agreements relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. The Japan's arguments that I explained earlier do not work anymore among the contracting Parties to the UNIA. Japan concluded the UNIA in 2006. Thank you.

IV. VERBATIM RECORD OF WORKING SESSION-III
DAY 2: 9.30 – 11.30 AM

"PIRACY LEGISLATION"

Chairperson: Dr. Neeru Chadha, President of AALCO and Joint Secretary, Legal and Treaties Division, MEA, Government of India

Chairperson: For today's session the topic is "Piracy Legislation" we have three speakers on the list, the first speaker is Ms. Zhen Lin. Ms. Lin is working as Assistant Professor, South China Sea Institute, Xiamen University, China. Her specialization is Law of the Sea and she did her Masters in International Maritime Law, she will be speaking on "Combating Piracy".

Topic: "Combating Piracy"

Ms. Zhen Lin, Assistant Professor, South China Sea Institute, Xiamen University, China: Thank you Madam Dr. Neeru Chadha. Good morning Excellencies and Ladies and Gentlemen, my topic for today's presentation is "An Analysis of the Chinese Criminal Legislation in the Context of the International Combat Against Piracy and Armed Robbery at Sea". Piracy and robbery at sea has become a more and more serious threat to the maritime security worldwide, particularly in the Red Sea in the Indian Ocean, waters of the Coast of Somalia, and the South China Sea. In most of the cases the activities of piracy are subjected to severe threats. From the year 2005 we observe the sharp increase in the number of cases taking place of the Coast of Somalia. The incidences in 2010 happening in the region were reduced due to the result of the joint efforts of navies worldwide, but the number of incidents largely increased in the year 2011. According to many the current situation is mostly due to the failure of the States to take the pirates to justice. It proves that the efforts by the international community to control the maritime area are a temporary solution and the implementation of the international treaties depends on the domestic legal system for its enforcement. Thus an effective legal system could be decisive in the combat against the piracy and armed robbery at sea.

China has actually played a very active role in the combat of piracy and armed robbery at sea at the international level. Until now the Chinese Government has deployed 16 Flotillas in the Gulf of Aden in the waters of the coast of Somalia. There is also a vital interest in insuring the security of most of the sea lanes and

the safety of navigation. So I will attempt to review the Chinese domestic legislation.

As I have done my PhD studies in France it is a tradition that we divide essays and presentations into two parts and so is my presentation in the first part I will briefly examine the substantive law of China and its domestic legislation in relation to piracy and armed robbery at sea. In the second part I will review the procedural issues especially the restriction of problems existing in domestic legislation.

In the first part I will start with the definition of piracy and armed robbery at sea provided by the international conventions. The most widely accepted definition of piracy is provided by Article 101 of UNCLOS. Though it is the most widely accepted definition provided, however, it does not mean that there is no definitive definition. Many scholars think that it is too restrictive, for example the first of all any act of piracy has to meet the high sea requirement, which means any single criminal act in the territorial water cannot be dealt with as piracy. Secondly, acts committed for political purpose will not be considered as piracy, like the maritime attacks. Thirdly, the two ship requirement which means an act of piracy or similar act committed by the crew or the passengers of the ship or aircraft, against persons aboard another ship, so at least two ships have to be involved. As this definition is restrictive the International Maritime Bureau has adopted a much more inclusive definition of piracy. It defines piracy "as any act on board any vessel with intent to commit theft or any other criminal activity with the use of force in furtherance of that act".

Another important convention in the domain of the Law of the Sea is the SUA Convention adopted in 1998. It is termed as Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) or Sua Act is a multilateral treaty by which states agree to prohibit and punish behaviour which may threaten the safety of maritime navigation. The SUA Convention prefers to enumerate a series of acts of safety of maritime navigation which may include the seizure of ships by force, acts of violence against persons, and the placing of devices on board a ship which may destroy or damage it. The Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (SUA PROT) was concluded at the same time as SUA. The Protocol came into force at the same time as SUA. SUA PROT is a supplementary convention to SUA.

In London on 14 October 2005, a second supplementary Protocol to SUA was concluded. The full name of the Protocol is the Protocol of 2005 to the

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and is often abbreviated as "SUA 2005". The 2005 Protocol adds provisions which criminalize the use of ships to transfer or discharge biological, chemical, or nuclear weapons. (However, the Protocol specifies that transporting nuclear materials is not an offence if it is transported to or from the territory or under the control of a state party to the Treaty on the Non-Proliferation of Nuclear Weapons.) It also prohibits ships from discharging oil, liquefied natural gas, radioactive materials, or other hazardous or noxious substances in quantities or concentrations that are likely to cause death or serious injury or damage. Finally, it prohibits the use of such weapons or substances against ships involved in maritime navigation. The 2005 Protocol came into force on 28 July 2010 and as of 2014 has been ratified by 29 states.

The SUA Convention and its Protocol constitute an important complementary mechanism to the UNCLOS and in my presentation the term of piracy used comes from Article 101 in UNCLOS, while armed robbery is used for describing similar acts taking place in the territorial waters. After this I will take a look at the criminal law of mainland China. The term of Piracy or Armed Robbery as you may know does not exist in the domestic law of China. Those illegal acts taking place in waters under the jurisdiction of the mainland China are punishable under the crimes against public security. In fact, during the judicial procedure the party is usually prosecuted and punished for the crimes of murder, robbery etc. The issue of Piracy in China was usually very closely related to the rampant smuggling in the coastal regions. So in this particular context of China the Court has inevitably led to the fight against piracy. After the affair of Pataranja in 1998 the Government has decided to launch a large campaign against maritime criminal activities. The efforts of mainland China have proven to be quite successful. From 1998 the police officers succeeded in criminal trials responsible for the incidents which have the main influence in China. The Tribunal had handed down severe sanctions on pirates, ranging from long term imprisonment to death penalty. Compared with legislations of some other countries the law of mainland China is quite harsh and could be really discouraging to the practice of piracy in its waters. All those efforts were welcomed by the international community and highly praised by the International Maritime Bureau. However, the fact that piracy and armed robbery have not been criminalized by the domestic law of mainland China nevertheless is a regretful shortcoming. Mainland China has ratified most of the important international treaties relating to piracy and armed robbery at sea. As the international conventions only provide for definitions of these crimes but do not provide concrete sanctions, they depend on the domestic legislation for their enforcement, it is treaty obligation for China to prosecute or extradite the alleged offenders committing those crimes.

However, if these crimes prescribed by the international treaties are not transformed in the domestic system of China, it will be difficult to prosecute an offender for committing this crime, because it is a basic principle that "if an act is not expressly defined by law as a criminal act it may not be convicted and sentenced".

Piracy and armed robbery may include elements like, murder, robbery etc. but as such those elements will not constitute piracy and armed robbery at sea. While the crime of piracy is subjected to universal jurisdiction other crimes are not of this nature. As Taiwan is made an integral part of China, we can also look at some of the provisions of Taiwan. Article 333 provides the detailed definition of piracy and armed robbery at sea. Similar to the definition provided by UNCLOS, Article 333 (1) requests that the crime should be committed by the crew or the passengers of the ship against another ship, or persons, or property, on board another ship. So the two ship requirement has to be met. However, the so called high seas requirement required by UNCLOS does not have to be satisfied. As a result in the Chinese Criminal Code a maritime terrorist attack might as well be included in the crime of piracy, to enlarge the application and scope of Article 333. The only difference between paragraph 1 and paragraph 2 is that of fulfilling the two ship requirement. It is often called by the scholars as the quasi piracy. Article 333 is included in Chapter 30 of the Criminal Code of Taiwan. This chapter mainly aims at criminal activities targeted at property rights. It is clear that piracy is not an offence solely directed at property, so it is more proper to put this article under the chapter relating to crimes against public security and public order. If mainland China is to criminalize the crime of piracy and armed robbery it may be more consistent with the mainstream system which puts the crime in chapter 2 of crimes related to security.

After having reviewed a substantive matter relating to the domestic legislation of China I will also take a look at the procedural matters, specially the jurisdiction of China's Courts over piracy and armed robbery at sea. Before that we will have a look at a very unique provision existing in China, which is jurisdictional conflict existing in mainland China. I will start with the famous case of 1990. The ship Eagle King flying the flag of Panama was involved in the smuggling of cigarettes in the Taiwan Strait. It was following the cargo of another ship in the Taiwan Strait, it was pursued by the Xiamen customs of mainland China. Incapable to escape the ship Eagle King turned to Taiwan Navy for help. They were pretending to be assaulted by pirates, the pursuit of the Xiamen customs was in direct connection with the Taiwanese Navy. The Taiwanese Navy took the ship Eagle King back. There were six customs officers from mainland China and they were taken to Taiwan. Mainland China mandated the authorities to return their

officials, the suspects and the ship with its cargo. After having investigated into the matter the authorities found that Eagle King was indeed a ship and the customs officials from mainland China were acting within their mandate. However, the Taiwanese side only agreed to return the officials they confiscated the cargo and the suspects were released, this was criticized by mainland China. Frankly speaking the Eagle King incident was not an incident of piracy, but the case freezes the problem in the jurisdictional limit of the Taiwan Strait, and the absence of the mechanism of cooperation as the root of this problem. Since the year 1987 criminals of each side got away with lack of conviction on the two sides to escape from punishment. In order to solve this problem the associations of the Red Cross on both sides authorized by their respective Governments signed an agreement for return of stowaways. By January 2009 altogether more than 38,000 people have been returned by one side to the other due to the associations of Red Cross. However, the contents of the agreement remain quite limited, as it is only applicable to the return of stowaways and suspects. Because of the non-governmental organizations which signed the agreements the traditional bodies of the two sides are not bound by the agreement. With the improvement after 2008 the cooperation between mainland China and Taiwan became possible, and they exchange information from the Taiwan side. With authorization of respective judicial organs, an agreement was signed joint contact to combat crimes and mutual legal assistance with the Taiwan Strait on 26 April 2009. It is often called "the 2009 Agreement".

According to the agreement the two sides across the Taiwan Strait agree to cooperate with each other in civil and criminal procedures, including the exchange of legal documents, mutual assistance in sanctions, mutual recognition of each other's judicial verdicts and the return of suspects. Crimes subject to the joint fight are usually serious crimes against public security and economic order. Article 4 (4) of this agreement stipulates that the high-jacking of ships or terrorist attacks are also subjected to the present agreement. Here we can see the agreement of the two sides to realize the importance of cooperation in piracy and armed robbery at sea. If there is an agreement between non-governmental organizations, that is also binding upon the judicial organs. However, there is still a lot to be done in the joint efforts of the two sides to combat piracy and armed robbery at sea.

Now I will talk about the situation of the Coast of Somalia that is universal jurisdiction in Chinese law in the context of combat piracy and armed robbery off the Coast of Somalia. Despite all the efforts by the international community to patrol this region it continues to be a dangerous area plagued by pirates. Efforts to try pirates are certainly an important area. The recent resolutions of the

Security Council all state that "all States were urged to adopt a legislation to facilitate prosecution of suspected pirates off the Coast of Somalia. And they also called upon States to criminalize piracy in their domestic laws. Until now China has not yet introduced any criminal procedure against Somali pirates. In fact according to the Chinese criminal law and Chinese Procedural law it is quite difficult to put on trial an alleged Somali pirate. The criminal law of China recognizes all types of jurisdiction, the territorial jurisdiction, personal jurisdiction and protective jurisdiction and the universal jurisdiction. A Chinese court establishes the territorial jurisdiction over the offences taking place in its territory. And the personal jurisdiction over the criminal offences committed by a Chinese citizen outside his country. A Chinese court may also have jurisdiction over a crime committed by an alien on the territory of China against a Chinese citizen, or against the State itself. A Chinese court cannot establish it's jurisdiction over the piracy and armed robbery at sea off the Coast of Somalia on the basis of the territorial jurisdiction, and personal jurisdiction. Only one victim is a Chinese citizen or a vessel flying the flag of China the Chinese court established the protective jurisdiction over the alleged offenders. The protective jurisdiction is established for the purpose of ensuring that the criminal acts committed by aliens outside the territory of China against a Chinese citizen and the State will be sanctioned. However, two conditions have to be met; firstly, the minimum punishment of sentence should be no less than 3 years of imprisonment according to the Chinese Criminal law and secondly, this offence should be criminalized in the State where it is committed. From this point of view the protective jurisdiction used with offences committed in the territory of another state instead of those taking place at the high sea or taking place outside the jurisdiction of any state like piracy in the sense of Article 101 of the UNCLOS. Apart from these three possibilities the Chinese court may also establish universal jurisdiction over piracy and armed robbery at sea. According to Article 9 of the Criminal Law of the People's Republic of China, this law shall be applicable to crimes which are stipulated in international treaties concluded or acceded to by the People's Republic of China and over which the People's Republic of China exercises criminal jurisdiction within the scope of obligations provided in this treaties.

Thus, China exercises only universal jurisdiction over crimes prescribed by international treaties to which China is a party. Article 105 of the Law of the Sea Convention, Article 10 of the SUA Convention of 1988 and its Protocol adopted in the same year all reflect the duty to prosecute or extradite. China as a party to all these conventions bears a treaty duty to adjust its domestic law accordingly to establish its universal jurisdiction over the above mentioned offences. In general the opinion of the Chinese Government towards the consent of universal

jurisdiction is not very positive. For decades China showed hesitation to accept the idea of universal jurisdiction and has always been concerned about the views of its application. However, piracy is always considered by the Chinese Government to be one of the crimes to which the universal jurisdiction should apply. So at the cognitive level there has been no great obstacle to overcome and there exists a view among some Chinese scholars that Chinese courts should establish universal jurisdiction over piracy and armed robbery at sea. However, according to the present criminal law in order to establish universal jurisdiction there are several conditions to be satisfied. Firstly, such a crime must be prescribed by an international convention to which China is a party. Secondly, China must have a treaty obligation under international law to exercise jurisdiction on the crime, and thirdly such crime has to be criminalized by the domestic law. As piracy has not been criminalized by the domestic law of China a Chinese Judge may find it difficult to establish the jurisdiction of such an offence on the basis of Article 9. In reality the fact that piracy has not been criminalized by the Chinese law does not prevent the Chinese Judge from establishing its jurisdiction. In the case of "Cian Cha Chin" the Court effectively established its jurisdiction by invoking Article 9 of the criminal law and Article 3 of the SUA Convention. In this case the alleged offenders were Indonesians and the fact that the crime was committed in the waters of Malaysia and the victim was a ship flying the flag of Thailand a Chinese citizen was engaged in this, as a result the Chinese Court was unable to establish its jurisdiction on the basis of territorial jurisdiction, personnel jurisdiction or protective jurisdiction, instead as China had ratified the SUA Convention the Court established its jurisdiction invoking Article 10 of the Convention which demands States Parties to prosecute or extradite the alleged offenders from the territory of that country. The offenders were finally prosecuted for the unlawful activities against the safety of navigation, which are not criminalized by the domestic law of China. However, the judicial practice shows that Chinese Court will not probably establish its jurisdiction if the case is not least connected to China. In this case the offenders had been arrested in the territory of China and that is the minimum connection required. The Supreme Court of the People's Republic of China say clearly that to prosecute suspects in accordance with international treaties to which China is a party the jurisdiction is to be exercised by the intermediate court of the place where the suspect is apprehended. As a result it will be impossible to prosecute Somali pirates arrested on the high seas or in the waters in the jurisdiction of another state.

In conclusion, I believe that the domestic legal systems could play an important decisive role in the combat against piracy and armed robbery at sea. At the international level China a vital interest in ensuring the safety of navigation so it

is useful for China to adjust its domestic law to a few of its treaty obligations or these conventions to which she is a party. It will also be in her own interest to adjust its domestic law in this manner in both the substantive and procedural matters. Thank you very much.

Chairperson: Thank you Ms. Lin for highlighting the jurisdictional problems related to crimes related to piracy. I think it is due to the fact that very few countries have legislation under which they can definitely assume jurisdiction over pirates that the Somali piracy really benefited from it because I think there were very few countries having laws to convict the pirates. So the law of other countries could not assume jurisdiction despite the fact that piracy enjoys universal jurisdiction. However, there are very subtle differences between the crimes say piracy, armed robbery or under the SUA Convention a crime against the safety of navigation, so though substantively as Ms. Lin rightly pointed out you could assume jurisdiction for robbery or for murder but many countries cannot assume jurisdiction as they do not have legislation to assume jurisdiction over piracy or armed robbery at high seas and that is very specific definition.

Now I will give the floor to Dr. Gandhi. Dr. Gandhi served as a Legal Adviser to the Ministry of External Affairs, Government of India, he is my former colleague. During his stint in the Ministry he had as a Member Secretary to the High Level Committee of the Government of India to formulate legislation on Civil Liability for Nuclear Damage. He has also served as one of the Counsel for India in the Case concerning August 10 that is Pakistan versus India in the International Court of Justice at The Hague, he has also served in many other capacities to the Government of Mauritius to assess prospects to claim archipelago. He also represented India in the Sixth Committee of the United Nations from May 2002 to January 2006. He also served as a Member to the Seabed Authority of India from 2003 to 2006. Prof. Gandhi is currently a Professor and Executive Director for the Centre for International Legal Studies in the O P Jindal Global University. Dr. Gandhi would be speaking on Maritime Security Issues.

Topic: "Maritime Security Issues: Piracy"

Prof. Dr. M. Gandhi, Professor and Executive Director, Centre for International Legal Studies, Jindal Global Law School, India: Madam President and my previous speaker Ms. Lin and the other speakers who are going to speak after me, the topic today relates to Piracy. The SAU convention defines piracy and armed robbery at sea. Armed robbery at sea need not be committed at the high sea as is the case with piracy. The United Nations Convention on the

Law of the Sea ("UNCLOS") provides the universally-accepted definition of piracy under international law. This definition was drafted for the 1958 Convention on the High Seas, incorporated into the UNCLOS in 1982, and has remained largely unchanged. As referred by Ms. Lin Piratical these acts also fall under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention"), even though the Convention's main purpose is combating terrorism.

As far as India is concerned it does not have its own piracy legislation or piracy definition so far. A bill has been drafted and it is pending in the Parliament. However, piracy and other crimes took place in India and under the Indian Penal Code Provision and under the provisions of Indian Admiral Law. The only case that was decided here sometime back in Mumbai was "MV Alondra Rainbow" incident this is another case where the 1988 SUA Convention would have been applicable if all States concerned had been states parties at the time of the incident. The MV Alondra Rainbow was owned by Japanese and was flying a Panama flag. It was high jacked off the coast of Indonesia in the Malacca Strait. Acting on information provided by the Piracy Reporting Centre of the International Maritime Bureau (IBM), India interdicted, boarded and arrested pirates in its exclusive economic zone. The seizure by the Indian authorities of the ship in its exclusive economic zone was lawful under international law because the ship was a pirate ship or because the ship was stateless, as it was not registered in the State whose flag it was flying when it was intercepted. The pirates were charged and convicted in India for several offences under the Penal Code. If India had been party to the SUA Convention at the time of the incident, the pirates could have been charged under one of the offences set out in the SUA Convention. Also if Indonesia had been state party, it would have been under legal obligation to cooperate with India in connection with criminal proceedings against the pirates under the 1988 SUA Convention.

Therefore, by experience it was thought that it was not proper to have only Admirability Law and the Indian Penal Code there was requirement to go beyond. In the meantime we know that it is the piracy off the Coast of Somalia and this has brought very important changes not only to the definition of piracy but also when the trial takes place what are the impediments that are to be overcome. Piracy off the coast of East Africa is growing at an alarming rate, with 41 ships attacked in 2007,122 in 2008, and 102 as of mid-May 2009. The more high-profile captures include a Saudi supertanker full of oil and a Ukrainian freighter loaded with tanks and other weapons. An estimated 19 ships and more than 300 crew members are still being held by pirates who are awaiting ransom payments from ship owners or insurers. Such fees have been estimated to total more than $100 million in recent years, making piracy one of the most lucrative

industries and pirates one of the biggest employers in Somalia, a country with a per capita GDP of $600. Reported connections between the pirates and al Shabab - "The youth' a Taliban-style group of Islamist extremists.

More than 20 countries, including China, France, India, Russia, the United Kingdom, and the United States, have responded by sending naval forces to the waters off East Africa. But with an average of only 14 warships focused on combating piracy in the region at any one time, they have been unable to effectively police the more than one million square miles of ocean that is transited by over 33,000 cargo vessels every year.

From 1650-1850 Countries took a dozen or so steps to safeguard the seas during the pirate wars that stretched roughly from 1650 to 1850. These included changing public attitudes, hiring private pirate hunters, rooting out corruption, improving the administration of justice, offering pardons to pirates who voluntarily surrendered, increasing the number of naval ships dedicated to antipiracy duty, cooperating with other nations, convoying merchant ships, blockading and bombarding pirate ports, chasing pirates both at sea and on land, and, finally, occupying and dismantling pirate lairs.

However, the tone and tenor of international law has changed now and we cannot act like what had been done in the past. The United Nations has thoroughly discussed this topic and the United Nations Security Council adopted a number of Resolutions on this topic.[9] On November 18, 2013, the United Nations Security Council adopted Resolution 2125, renewing the call for international action to fight piracy off the Coast of Somalia. If we have a look at the financial aspect of Somali piracy we see that the 'Oceans beyond Piracy' project has calculated that piracy cost is between 7 and 12 billion US Dollars a year until 2009 and 4.9 to 8.3 billion in 2010 with the expectation to increase to 13-15 billion by 2015[10].

There have been direct costs for ransoms such as 176 million USD, insurance premiums up to 3.2 billion, re-routing of ships upto 2.4-3 billion, security equipment upto 2.5 billion, naval forces upto 2 billion, prosecutions upto 31 million, piracy deterrent organizations upto 19.5 million, and cost to regional economies such as trade, inflation and reduced foreign revenue of 1.25 billion.

Regarding piracy off the coast of Somalia, another report states that the cost for 2011 was between 6.6 and 6.9 billion USD (One Earth Future 2012: 1). This study

[9] The important ones being, 1814 (2008), 1816 (2008), 1838 (2008), 1844 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1918 (2010), 1950 (2010), 1976 (2011), 2015 (2011), 2020 (2011) and 2077 (2012).

[10] One Earth Future 2010: 25; Geopolicity 2011: IV.

also shows the negative impact that piracy in the Indian Ocean may have on countries like India and Kenya, and it detects worrying trends with regard to increasing seafarer deaths, increasing risk of piracy in West Africa, and increasing impact of piracy on oil trade (One Earth Foundation 2012: 31-38).

Various methods are being deployed to counter Somali Piracy, these include, Capture and release, Naval Escort, Kidnapping and abduction paying ransom, Trial in African region, Kenya, Seychelles etc, Entering MoU for the place of trial, Capacity building in places where piracy trials are conducted by UNODC and other States, Constructing prison houses and providing counsels.

In addition the CGPCS Working Group II has been Developing tool boxes, and creating templates for transfer of prisoners. The Contact Group convened November 10-15 for Counter Piracy Week in Djibouti. This first ever extended duration gathering of the CGPCS included meetings of all five working groups, a number of stand-alone thematic discussions, and the 15th Plenary. In all, the event drew 55 delegations totaling approximately 220 participants. Notably, the first ever plenary session in the Horn of Africa included active participation by the Federal Government of Somalia and a number of regional partners in the fight against piracy.

Participants agreed that, while significant progress has been made in the last two years, the underlying conditions that allowed piracy to flourish remain. Somalia will continue require significant capacity building assistance to ensure pirate gangs cannot return to peak. The 15th Plenary also marked the handover of the Contact Group chairmanship from the United States to the European Union, which will chair during 2014.

Now I will briefly spell out certain deficiencies in the Piracy definition - Requirement of 2 vessels. The commission of the crime in the High Sea, commission of armed robbery in territorial waters. Presumption of attempted piracy/commission of piracy. (long ladder, ropes, arms and food and ration for days), this is not provable by direct evidence, allowing crew of the ship to testify in the court wherever the trial is held. This then leads to human rights and extradition issues. (not beyond 24 hrs detention), seeking asylum and compensation by the acquitted piracy suspects and finding relocation possibilities with countries after the sentence is completed.

The most immediate legal concern associated with anti-piracy operations is jurisdictional questions that arise based on the location of pirate attacks and/or international naval interventions, the nationalities of crew members, and the countries of registry and/or ownership of any seized vessels.

Multiple governments may be able to assert legal jurisdiction depending on the specifics of the incident. Political will may be present in some countries, but many governments lack sufficient laws and judicial capacity to effectively prosecute suspected pirates. The disposition of property and insurance claims for vessels involved in piracy also raises complex legal questions. A developing legal issue concerns the prosecution of juveniles participating in acts of piracy. Recent reports suggest that some of the Somali pirates are teenage minors, and therefore could have a defense of infancy in certain jurisdictions that may assert jurisdiction over the offence.

Now we shall see what happens if there are similar facts but different decisions. While the definition of piracy has remained fairly consistent over the past 200-plus years, two recent US federal district court trial rulings may create uncertainty. Two strikingly similar cases involving alleged acts of piracy against U.S. Navy warships resulted in opposite outcomes with respect to two trial courts' interpretations of the offense of piracy under 18 U.S.C. § 1651.

Arguably, in light of international treaties addressing the act of piracy adopted by the United States since *Smith*, *Hasan* is the stronger of the two decisions.

In *United States v. Hasan* the United States Navy, after thwarting two separate alleged acts of piracy, transferred suspected pirates to Norfolk, VA, for criminal trials in the U.S. District Court for the Eastern District of Virginia on charges of piracy. One of the trials, *United States v. Hasan*, ended with the defendants found guilty on numerous charges, including piracy.

The other case, *United States v. Said*, is on appeal based on a court ruling dismissing the charge of piracy. A common issue between the two cases, and yet the greatest distinction, is how the two trial courts interpreted the definition of piracy under 18 U.S.C. § 1651.

In *United States v. Hasan*, the United States successfully prosecuted five Somalis for piracy, among other offenses. The case involved an attack on the USS *Nicholas*, a U.S. Navy frigate, on April 1, 2010, on the high seas between Somalia and the Seychelles. The government alleged that the defendants, utilizing a large seagoing vessel and two small assault boats, approached and attacked the USS *Nicholas*, mistakenly believing that it was a merchant ship, with a rocket-propelled grenade and AK-47 assault rifles. The USS *Nicholas* returned fire, gave chase, and apprehended the defendants.

An array of organizations of the shipping industry has come forward to support international efforts to fight piracy. These include the Baltic and International Maritime Council (BIMCO), IMB Piracy reporting Centre (IMB PRC),

International Association of Dry Cargo Ship-owners (INTERCARGO), International Chamber of Shipping (ICS), Oil Companies International Marine Forum (OCIMF), The Society of International Gas Tanker and Terminal Operators (SIGTTO), Maritime Piracy: Humanitarian Response Programme (MPHRP), Mission to Seafarers, Save our Seafarers, Seafarers Rights international (SRI) to name a few.

PMSCS and VPD's : Regulation of private armed security companies.(IMO circular guidelines), Use of force by them, Responsibility under law including respect to local law, conditions laid by coastal states that the arms need to be put inside the sealed strong room and VPD's and immunity available to the marines etc.

Turning to the question of the Legality of floating armouries, I will draw your attention to a case. On October 11, 2013 India detained the Sierra Leone-flagged S/V SEAMAN GUARD OHIO and later charged 33 men aboard for failing to produce papers authorizing the carriage of weapons in Indian waters. A U.S. maritime company, Advanfort, operates the ship with a crew that includes British, Estonian, Indian and Ukrainian nationals.

Now I will flag some of the pending issues before the CGPS are: Issues discussed (no conclusion or consensus sought or achieved), adequacy of existing legal framework (extant Conventions) for PCASP, legal complexity, how to adjudicate among competing jurisdictions, transport of arms across jurisdictions and responsibility for prosecution in cases of misconduct, injury, or death caused by armed security forces. Furthermore, Responsibility for PCASP – flag state, ship owner, and ship's master, responsibility for care/disposition of victims/remains. Code of conduct for PMSC/PCASP a la Montreux Convention; whether to develop/how to enforce? Lack of standard protocols for PCASP employment/operations. No consensus on/standards for use of lethal force by PCASP. The effect on countries whose laws prohibit use of PCASP. Advantages/disadvantages of VPDs (including lack of enough to serve). "Temporary arrangement" to accommodate transit of arms through Suez Canal is illegal and cannot stay in place indefinitely. Wide variation in coastal State laws regarding carriage and transport of arms into/through ports. Implications for voluntary notification of carriage of arms in/through EEZ/territorial seas. How states should react to the unmet need for physical security on the high seas that is currently being met by the emerging PMSC industry. Some points have been raised but not discussed, these include: Privately contracted armed escort vessels, and floating armories. Thank you.

Chairperson: Thank you Dr. Gandhi. The next speaker is Ms. Adina Kamaruddin. She is the Director of the Department of Maritime Affairs, Ministry of Foreign Affairs, Malaysia. She has been the member of the negotiating team for Maritime Delimitation and Continental Shelf and Exclusive Economic Zone. She also handles the case relating to the issues of Starits of Melacca and Maritime Security. She did her LL.M on Law of the Sea from the University of Wales, UK. She is currently awaiting the oral defence of her Ph.D. thesis. She has joined the Diplomatic Services in 1996 and has served in the bilateral political departments in South East Asia Division. She has also served in the Economic and Environment desk in the multilateral department as well as the training division. She has been a long-term delegate to the UN General Assembly and during the Malaysian Presidency of UN Security Council in 2000 and as well as delegate to the Negotiations of the State Parties Meeting on the Law of the Sea.

Topic: "Maritime Security Measures By Malaysia In Combating Piracy"

Ms. Adina Kamarudin, Director, Department of Maritime Affairs, Ministry of Foreign Affairs, Malaysia: Good Morning to you Madam Dr. Neeru Chadha, other Distinguished Panelists, Ladies and Gentlemen, at the outset I commend AALCO and its Secretary-General Prof. Dr. Rahmat Mohamad for the convening of this workshop. It shows the determination and commitment of AALCO to follow-through the mandate given last year at the thirtieth anniversary of UNCLOS which was jointly organized by AALCO and the Ministry of External Affairs, Government of India. I wish to also express my honour and privilege to Dr. Neeru Chaddha a very distinguished personality chairing the session today to have her as a legal luminary together with other distinguished Panelists.

My distinguished Panelists have zoomed in right to the problems, the jurisdictions and also the issue of piracy. I am just going to concentrate on measures that have been taken by Malaysia in combating piracy. This includes not just legal steps but also includes other cooperation mechanisms. Please allow Madame Chairperson just to touch on the keynote address and the special address given yesterday by both Ambassador Eiriksson and Mr. Rajan. Some of the issues that they touched resonate deeply about the work done in the maritime department of Malsysia itself. For example, he quoted the equidistance principle of maritime delimitation which is one of the key principles of UNCLOS and how it has developed into a two stage and three stage processes in the international jurisprudence. On this matter, Malaysia has its own complex maritime zones and we prefer to settle our issues peacefully with our neighbors by the application of

Article 279 and by bilateral discussions. He also commented on ITLOS and in this regard Malaysia would like to commend the presidency of Judge Shunji Yanai and the judgment of the ITLOS on the Myanmar and Bangladesh dispute which has been hailed as historic. Mr. Rajan spoke of continental shelf and the issue of delay and deferment as well as the Commission on the Limits of Continental Shelf (CLCS) is a technical body and it has no mandate to settle maritime delimitation issues.

Ladies and Gentlemen these are matters that are very much closer to the heart of Malaysia. I would like to concentrate on Article 76 of UNCLOS and Article 96 of it and Annex II of CLCS rules and Annex I components that reveal the elements of without prejudice to the question of delimitation which still have their cases deferred. We welcome the 30th and 31st Sessions Report where the CLCSS has outlined a number of procedures from three to seven weeks and twenty one week of the Commission which is waiting for its submission to be presented. Since my fellow Panelists have elaborated on the issue of piracy and the legal framework and the problems that plague them, I would just go directly to the measures that Malaysia has taken to address the issue of piracy.

In Malaysia, we have a complex maritime zone and semi-enclosed area just of the east coast and we have one in the South China Sea. As you can see I would first like to focus on Malacca. If you go back to the 3rd Century the fortunes of South East Asia mainly hinge around the smoothness of the Straits of Malacca. In fact archeological finding indicate that Malacca is one of the earliest regions. So Malacca has seen the rise and fall of major powers notable the shri Vijaya and the Sultanet of Malacca. Let me just focus on the strategic importance of the straits of Malacca and its location, shipping and maritime safety and its geographical location to ensure that large number of vessals go through safely. Annually 77, 000 Vessels go through this particular passage/. As a economy piracy would be connected to ensuring navigation and not just security. These are some of the efforts taken by Malaysia towards ensuring the safety of its maritime zone and maritime security issues which also include piracy.

We take particular interests on issues concerning maritime navigation, maritime security, piracy and armed robbery at sea. The security of the straits of Malacca is being enforced by Malaysia's Maritime Enforcement Agency together with the Royal Malaysian Navy and the Royal Malaysian Airforce and also the maritime Police. We have also enhanced the monetary capability of these bodies to enable to maintain effective surveillance of maritime activities in the straits. Besides we have installed the sea surveillance system, automatic identification system. Malaysia is not the only country using the straits of Malacca. So together with

Indonesia and Singapore we constantly undertake joint patrolling in the straits of Malacca. These three littoral states have launched coordinated patrols on these straits since 2004 and Thailand later on joined in 2008. With the Malacca Straits Sea Patrol and the other patrol and with the implementation of surveillance a cohesive arrangement for maritime security in the straits has been achieved. And we have also taken note of the high-risk area in 2004 and that will be subjected to continue Patrolling.

Let me just show you the IMB Piracy Report last year that can be compared it with the incidents of piracy that took place last year. Some of these acts are actually not acts of piracy and overall if we follow the recap, overall improving of piracy and of armed robbery have decreased. It was generally less violent than 2009 and 2012 and they have taken place in the East Coast of Malaysia. It has also taken the form of maritime security issues of hijacking and siphon of oil from vessels. Attention since 2008 was focused on piracy in the Gulf of Indian Ocean. Malaysia has been involved in the global effort to combat piracy of the coast of Somalia. This came about when three of our Ships were pirates of the coast of Somalia. Two of the Ships were released after negotiation by the owners and the Royal Malaysian Navy had this was the beginning of the Sep. 2008 sent five ships to the Gulf of Eden with the mission of providing escorts to our Malaysian Ships. The Royal Malaysian Navy has had its assistance requested by other Countries in merchant vessels either to join in a Convoy or the pirate attacks. Currently we still have two there. We went there following the UNSC 1816 on acts of piracy and armed robbery off the coast of Somalia. We have been continuously reviewing our strategies from time to time.

Other than the mechanisms that I have elaborated upon, Malaysia also has continued cooperation with other Countries in the area of maritime security and this includes USA, Japan, China and others. I just want to backtrack a little bit. Other than Malaysia there is also China, India, and Russia which also took the call for the help to address issue in the Gulf of Eden. India also joined the call by EU on this project. I would also like to touch upon the privately contracted military security. Many Shipping companies have engaged the help of these companies. And for Malaysia passing through the straits recognizes the fact that arms security persons should be authorized for ships flying in high-risk areas such as in the Gulf of Eden. Through the passage of straits of Malacca in the Malaysian maritime zone we are very conscious about that particularly on the issues of war ships. The idea of having uncontrolled number of personnel with weapons in the straits of Malacca actually goes against our security sentiments and practices in Malaysia and we deal with issues relating to mercenaries. We have strict laws regarding the use of weapons. However we acknowledge that

ships that are PCASC passing through the straits of Malacca is not a high-risk area any more and in some cases we have shown some flexibility and Malaysian authorities are working to make sure on this issue and looking at the legal and security issues for finalizing to regulate this matter.

I think both of my distinguished Panelists touch on domestic legislations and Malaysia has no piracy legislations as well. For the pirates of Somalia we tried them under Arms Act 1960 and previously they were charged under Section 3 of the firearms provisions of 1971 which carry a heavier penalty because on the charge of intending to cause death of Malaysian soldiers and was later reduced to Section 32 (1) of the Arms Act along with Section 34 of Penal Code. Since we are not having domestic legislation, we have begun drafting a maritime Security Bill in the last two years and are in the final process of being finalized. This will be an all-encompassing bill that covers many maritime security issues that would include not just piracy but also human trafficking, armed trafficking, robbery and this Bill possibly would be introduced in our Parliament this year. In the area of piracy it encompasses piracy and armed robbery at sea, receiving property through acts of piracy and robbery. For Malaysia other than piracy there are also maritime security issues which we have to deal with. Each Country has its own policy and ideas and some areas where there is a grey area that would possibly pose problem in terms of policy-making but that does not mean they need to wait for the problems to arise and then try to solve it.

When we speak about human rights these are legal and practical issues that we need to be concerned about, For example, on the use of force to capture pirates, government vessels may use reasonable degree of force when necessary as a last resort, do we look at the case of MV Saiga and how do we proceed if there is a hostage situation and Naval forces are really averse to taking risks. Another critical issue is the applicable international human rights law. The famous British case would appear to conform that European case law would appear to confirm that in a situation where Officers have taken control of vessel and arrested those on board it comes a place where exercise effective control and they are bound to confirm the protection available to the European Convention on Human Rights Protection for those in their custody. This along with the Convention against Torture, is significant because pirates also face justice. Pirates will be taken for prosecution the question of MOU that many countries have signed regarding the treatment of pirates.

Chairperson: I thank you a lot Ms. Kamarudin for giving us a comprehensive and illuminating lecture on how Malaysia is handling issues relating to piracy. Are there any Questions from the floor?

Delegate from Kenya: Thank you Chair for this wonderful discussion and Kenya has been in the forefront in the fight against piracy by virtue of having suffered piracy by being next to Somalia. Most of the ships that are hijacked along the Somali coasts are headed to us and hence we suffer politically and economically. In the fight against piracy out High Court almost brought to end this very important and the fight still goes on. But most importantly our Constitution that came into effect in 2010 now expressly makes reference to International Convention that Kenya is Party to. In fact our Courts have started taking seriously the incidents of piracy taking into account the laws of Kenya. Prof. Gandhi, we would be interested to know your take on the nexus between piracy, Somalia and its nexus with terrorism and the efforts needed to address these issues together.

Prof. Gandhi: Thank you so much and this is a very interesting question. The financial part of it is not very clear. What is happening is that States are not ready to divulge the data as to where the proceeds are going and how they are spent. However there is a clear nexus because it can be traced, where the funds come from and where it goes but there is no transparency. Internationally the question is being asked that why can not you share that, and there is going to be a problem and they say that we are very sure that this is sent for a specific purpose. Still things are not clear on this front. The second thing is about Al-Sabha and its connection and wherever you look there is rudimentary information on that except that they have attacked the prison and so on and so forth. So who is protection and where the protection comes from is not known. Another interesting issue that should be taken into consideration is the high-risk area and who declares this as a high-risk area. It is an economic issue when you declare that an area is a high-risk area the insurance goes up. The premium goes up. One needs to understand that all the Insurance companies are not Asian-African companies and they have their own headquarters. The point is when the money is siphoned from one end for different end altogether we do not have much transparency on it. This is about the economic front. On the legal side we have clarity. But on the economic front things are neither clear nor transparent in the sense that you can not find any written material or publicly available information. Thank you.

Chairperson: Thank you. Apart from the financial issues Dr Gandhi talked about the high-risk area and Ms. Kamarudin talked about private armed security guards on board. It is a problem of security for countries like India. So all these floating armories that provide arms to the private security guards, they created a lot of security risks. And countries like India were already suffering from

terrorism related matters. So two attacks on India have been carried out by terrorists who have taken the sea route. Many countries believe that for the security of the ships they should be allowed to have private armed guards. It is important that we tackle these very important issues facing countries like India. Thank you. Any other questions?

A Student: As Dr. Gandhi referred to Indian act was passed in 1976 and UNCLOS was adopted in 1982 and it came into force on 1994. Even the Supreme Court had said there is no contradiction between UNCLOS and our law. But there is a direct contradiction between UNCLOS and our Act. Article 33 says that beyond territorial sea you can not extend any laws. How do we resolve this issue?

Chairperson: I think you are posing a much larger question on the law of the sea which of course I can answer here. But our topic is piracy and we should restrict ourselves to piracy. Dr. Gandhi has already mentioned that the anti-piracy law has been pending before the Parliament. Apart from this we are not aware of any other bill dealing with this issue. Even if that is the case it would definitely come to us. As for us how India exercises its jurisdiction on various maritime zones, we can have it discussed on another day. We should confine ourselves to piracy at the moment.

Prof. Gandhi: There is no compulsion even under the present Law of the Sea Convention that you have to come with the piracy legislation. This understanding is well-maintained at all the GA discussions and as well as in the Security Council discussions. That is why they say that States are encouraged to pass such legislation. You cannot compel. Secondly it is within the prerogative of the government when you have an old legislation in tune with the treaty to which you are a Party whether you want to make legislation or not. Thirdly, we are making different legislations on law of the sea in a piecemeal way. You can see that in maritime zones Act, Fisheries and all these things. So whenever the legislation is needed we will do. Then the third question that you asked about the extension of jurisdiction whether that is permissible or not. Extension of jurisdiction is the prerogative of the sovereign. Perhaps you have to note one important thing that when the international law is silent about that, I am talking about general international law, international law authorizes the same. Tell me one country that follows the jurisdiction as laid down in UNCLOS? You cannot show any country. We are in a very nascent state of practice as far as 1982 Convention is concerned. So you will find more divergent practice than that of a unified one. Still in some other statements by USA as well as Japan that they do not want to go beyond three nautical miles as far as the territorial sea is concerned. I think I am clear to you. Thank you.

Chairperson: Are there any other questions from the floor?

S. Pandiaraj, Senior Legal Officer, AALCO: Sir you talked about the Indian anti-piracy bill that is pending before Parliament. I would be interested to know what are the rights that it confers on Indian enforcement authorities like Coast Guard and navy as regards capturing and prosecuting pirates?

Prof. Gandhi: I think the Bill is available either in the Lok Sabha or Rajya Sabha website. So one can read the provisions to find out the answer. It is an interesting question that you asked. The Bill simply replicates the mechanisms in SUA. Hence whatever the mechanism which we laid there the same mechanism is adopted.

A Student: This is a question regarding the *Bay of Bengal* and maritime security issue. Although there is no maritime piracy issue in this area there have been armed robbery issues. My question is this: is it possible for three countries (Bangladesh, Sri Lanka and India) to share non-sensitive information sharing center so that they could protect the rights of fishermen and ensure their natural resource protection.

Prof. Gandhi: I think that kind of a mechanism is already envisaged within the framerwork of IONS that white information they call this white information, of course you are not sharing any sensitive information, but white information and in that it can be plotted.

Chairperson: As you are aware cooperation on a bilateral or multilateral level is a prerogative of States. There are also moves to share information on a wider scale so if Bangladesh, Sri Lanka and India agree then there is nothing in law that stops them from sharing information.

A Student: Earlier the admiralty jurisdiction was vested with the High Courts. What is the position of this Bill on this issue?

Prof. Gandhi: Sea admiralty jurisdiction itself is transforming. Now they want to give all High Courts which are all located in Peninsula to have that. So they wanted to have that. It is in a transformation phase. Apart from that as I told you earlier there is already a mechanism in SUA which has been replicated. The central bill is a free-standing legislation and this has nothing to do with the admiralty. It is not by-passing whatever jurisdiction given under CrPC. It has nothing to do with your own regular criminal procedure or IPC. It devises its own

mechanisms like SUA. There is a possibility of multiple jurisdictions. And that jurisdiction which is best suited can apply.

A Student: My question can be answered by any of the Paneslists. What is your understanding or interpretation on the use of force by the private security company against suspected pirates on high seas and what is the international law on this issue.

Ms. Kamarudin: I do not know how to approach this issue. But I will try to answer this issue as simple as I can. In terms of use of force, you are saying use of force by private security guards. I am not sure of the case of France Vs UK where it appeared that when the pirates controlled the vessels a hostage situation ensues the use of force was actually done by the naval attack. Even then it was a matter of problem because UK and France each appeared to have killed one hostage while trying to rescue hostages. There is still a grey area as to how it would be interpreted.

Chairperson: I think on this the IMO has laid down some guidelines and they allow use of force in very limited circumstances and if I remember correctly it is only when the pirates are climbing the ship at that stage you can open fire. This is a gray area in the regulation of the private security guard.

Prof. Gandhi: The issue is evolving and even there is a general agreement that if that kind of responsibility is to be fixed, it can be fixed on flag State, ship owner. So the responsibility would be fixed not on a single person. The issue of the distribution of responsibility has not evolved so far. The regulation is IMO regulation and it is recommendatory in nature and hence not mandatory. If after following regulation something happens, the ship has to face. As far as the company is concerned the company, as well as the ship owner and master, they will have only the contractual engagement. So this is a tricky issue.

Prof. Mohamad, Secretary-General, AALCO: Last time when I went to IMO, London. I had fruitful discussions with their Officials on many of these issues. Though the IMO has done good work in relation to piracy the visibility has not been there. They have not been coordinating their work with various Ministries functioning in Countries. This is something that IMO needs to address quickly.

Chairperson: With this, I close this Working Session. Thank you, once again, the panelists for your presentations.

V. VERBATIM RECORD OF WORKING SESSION-IV
(12.00 – 01.30 PM)

"REGIONAL COOPERATION ON MARITIME ISSUES"

Chairperson: Prof. Kening Zhang, Professor of Law, South China Sea Institute and Director of Centre for Oceans Policy and Law, Xiamen University, China

Chairperson: I welcome all of you to a new Session on the 'Regional Cooperation on Maritime Issues'. Today we have three speakers on our panel. Our first Speaker is Dr. Mohd Hazmi Mohd Rusli who is an Associate Fellow at the Institute of Oceanography and Environment, Kuala Terrenganu, Malaysia. Let me invite him to deliver his lecture.

Topic: "Oil Pollution from Shipping Activities in the Straits Malacca and its Legal Implications"

Dr. Mohd Hazmi Mohd Rusli, Associate Fellow, Institute of Oceanography and Environment, UMT, Malaysia: Thank you very much Mr. Chairperson for introducing me. This paper has been prepared jointly by me and my colleague but unfortunately she could not make it to this Workshop as she has to work in Malaysia. This paper is a mixure of both science and legal research. And I will try to make it as simple as possible. The title of my paper is "Oil Pollution from Shipping Activities in the Strait of Malacca and Its Legal Implications". This is the outline of my presentation. It will focus on the Straits of Malacca and Singapore Introduction and Important Maritime Crossroads, maritime accidents in the straits of Malacca, navigational hazards in the straits of Malacca and Singapore and the legal implications of it.

As we know the Malacca straits is located between the Malay Peninsula and Sumatra and why is this strait so important because approximately 30% of the world's oil shipment traverse through the straits of Malacca annually. May be this number has gone up recently. The Straits of Malacca are important for Far Eastern Economic Giants of China, South Korea and Japan. These countries also depend on them to transport their oil supply from the Middle East. This is the shortest route connecting the Middle East and the Far East and this can be seen by the map over here. Normally at the speed of 12.5 knots it will take about 21 days and 19 hours from Aden to Yokohama to reach its destination. But if they do

not use the starits of Malacca it will take an additional three days to reach the destination and the longer the journey the more the money that will be incurred. Let us see what happens if Malaysia and Indonesia choose to close navigation in the straits. If shipping activities are closed in this straits and surrounding the region, in this case the journey would mean an additional journey of more than 11, 000 nautical miles around Australian continent.

Unlike other body of water where Ships can apply freedom of navigation, innocent passage and others. In the Straits of Malacca even though it is located within the territorial sea of Malaysia, Indonesia and Singapore, navigational regime is unique. Let me explain why. Before the UNCLOS came into force States are allowed to claim up to 3 nautical miles of territorial sea. And this will leave high sea corridor where ships can apply freedom of navigation to traverse through the straits. When the UNCLOS came into force in 1994 Malaysia ratified in 1996 Article 3 allowed every state to extent up to 12 nautical miles and there is no more high seas corridor. So what happens, innocent passage is not preferable by the maritime states because sates can hamper the passage any time. However because of this there is a quid pro quo, maritime states agree to extent the territorial sea claim up to 12 nautical miles in straits and in return transit passage is to be used and it can not be impeded. This was in exchange for the 12 nautical mile territorial sea rule of the Law of the Sea Convention. This is used for international navigation including the in the straits of Malacca and Singapore.

Because the straits of Malacca is really very narrow and is busy with maritime traffic the risks of maritime accidents in this area is high. Due to its busy nature maritime accidents always occur and this causes destruction to the marine environment the most important of them all is oil spills, HNS spills, etc. Accidents happen every year and these are the list of accidents that have taken place in these years. The biggest maritime accident was in 1997 which resulted in 175, 000 litres of oil spillage getting into the sea. There have been other environmental problems as well that include: soil erosion in Mangrove areas; disruption of coral reef development; discharges of other contaminants like butlytin, marine debris, sewage, HNS substances, noise emission, and air pollution. The marine environment has suffered oil spilling damages and coupled with the navigational traffic that goes to these areas the marine environment of Tan Piai has suffered damage. So this is how Piai looks like and it is a Ramsar site that is important for wetland conservation. As a Malaysian I am proud to say that we have the Southern most tip of wetland is located in my Country. This area is now contaminated mainly by petrogenic pollutants and there are not many Industries in that Piai area. But this area is busy with navigational traffic and again this area is also contaminated by atmospheric pollution. There have been

attempts to remove petrogeneic substances in this area. Apart from heavy traffic, the waters of the straits are also so shallow and the water level changes with the change in tides. You can see waves in these areas. They show that the waters are somewhat shallow. Poor visibility has been a factor in this area. For example in 2009, hazy conditions reduced visibility to less than 50 meters in the Port of Dumai in Sumantra. In 1997 the crisis was worse since it forced Malaysia, Indonesia and Singapore to consider closing night shipping because of visibility falling below 0.5 nautical miles. With the presence of more than 60 small islands dotting across the straits of Singapore mariners find it difficult to navigate this straits. The straits of Malacca and Singapore are two of the busiest waterways in the world in terms of navigational traffic coming second only to the Dover strait in the English Channel. Now let me briefly mention about the navigational hazards in the straits of Malacca. There are approximately 11 identified wrecks along the straits of Malacca and Singapore. These wrecks may cause a bottleneck effect to traffic as some of them are located at the narrow bend of the TSS. In recent times, there are proposals to construct a bridge over the straits of Malacca connecting Teluk Gong in Malacca with Dumai in Indonesia. Imagine how the pillars of this bridge could be struck. This will create a difficult situation for the mariners to cross through this strait. If accidents happen, it will have terrific consequences for us.

Now let me move to the legal implications. First we have to understand that straits of Malacca and Singapore are straits used to conduct international navigation. Because of the application of transit passage this can unilaterally make laws to impinge ships from passing through. So what is the best way to do it. Article 43 of the UNCLOS encourages the littoral states and the user states to cooperate towards ensuring safety of navigation and protection of the marine environment of straits. Japan has been consistent in helping the littoral states since 1969 and more states are interested in sharing the burden in managing the straits. The creation of Cooperative Mechanism (CM) in 2007 has strengthened the cooperation between the littoral states and the users. The CM has established a Project Coordination Committee that has undertaken projects relating to removal of wrecks, replacement of aids to navigation damaged by the 2004 Tsunami, maintenance of the existing aids to navigation, enhancement of safety of navigation via te application of maritime technology, cooperation and capability-building to combat oil spills and hazardous substances, marine accident analysis in straits of Malacca and others. It has also established an 'Aids to Navigation Fund'. These measures assist considerable to ensure mariners could sail smoothly despite the presence of many navigational hazards along the straits. We have more support from China, UAE and South Korea as well.

In conclusion, the straits of Malacca and Singapore are navigationally difficult waterways as they are constricted, congested and possess many navigational hazards. As such the littoral states have with the assistance of other users worked towards ensuring the straits are served with the best aids to navigation facilities. With the predicted increase of shipping traffic and the proposed construction of the Strait of Malacca Bridge, the straits would be more difficult to be used for navigation in future. Therefore the littoral states should work more closely to develop measures to improve navigational safety in straits. With this view the on-going Cooperation Mechanism should be supported and enhanced to ensure the straits are always safe for international navigation.

Chairperson: Let me now invite the next speaker on the Panel. She is Dr. Wan Izatul Asma Wan Talaat working as Associate Professor at the Institute of Oceanography and Environment, Kuala Terrenganu, Malaysia. She has specially focused on environmental governance and is currently looking into the Southern part of the South China Sea. Let me invite Dr Wan to deliver her lecture.

Topic: "Oceanic Health & Sustainability throguh Scientific Explorati and its Legal Perspective"

Dr. Wan Izatul Asma Wan Talaat, Associate Professor at the Institute of Oceanography and Environment, Kuala Terrenganu, Malaysia: Thank you Prof. Zhang and I also thank Prof. Dr. Rahmat Mohamad for inviting me to deliver this lecture. And as mentioned previously by Prof. Zhang my current research focus is more on creating environmental governance through scientific explorations focusing on South China Sea. This paper is co-authored by Dr. Mohd Hazmi and I also have two marine scientists working with me. Dr. Hazmi talked about the straits of Malacca so I will be talking about the South China Sea. I think everybody is very familiar with what the South China Sea is but let me touch a little bit more on South China Sea. It is a semi-enclosed marine system and touches nine Countries, it has a unique configuration and one of the most productive seas in the world. And I am not talking about shipping alone but I am talking about the marine resources. One of the top 50 largest marine systems is the South China Sea and if it is combined it contributes to 95% of the world's fisheries resources. South China sea is very rich and it has been admitted to be having a high level of bio-diversity in the world and it harbors more than 1000 species of fishes and numerous hard-coral species. Because of the presence of very high bio-diversity, fisheries resources in the South China Sea has acquired national and international importance and serves as the major source of food for many.

Hence it is very important to protect the marine environment of the South China Sea. We have been taking steps to protect the marine environment of the South China Sea. Even though the modalities involve have many issues with the jurisdiction as to who shall have rights in the South China Sea. But what is more important for the scientists is on the marine environment because whether we like it or not who owns the South China Sea we all are going to lose the fisheries resources in this sea. Nonetheless despite the importance of the South China Sea surprisingly little research has been conducted in the Southern portion and most of the research has been conducted on the Northern part and analysis of the research conducted suggest that no concerted efforts have been taken to address the eco-system of this sea. I can say that there has been no major study conducted on the Southern part of the South China Sea. I am sure that most of you have not heard about my institute, this is what we at the Institute of Oceanography and Environment in UMT, have been doing research on and we are located in the East Coast of the Peninsulas Malaysia, so our University is facing the South China Sea and we have been accorded the status of National Special Institute for Marine Science and Oceanography and we look into marine environment in great detail. Our current focus is on sustainable resource management through the understanding and processes of the South China Sea. We are not dealing with the Northern part and the Chinese area and also Philippines. Much of the Southern half lies in Basin which is related to a water average of 200 meters and it has other resourses as well. So when we talk about marine environment in the Southern half of the South China Sea it is not just marine pollution for the ship activities it also includes pollution from the land-based pollutants and these very much impact the current state of the environment in the Southern part of the South China Sea. This region unfortunately has the highest coastal population growth in the world and most of them rely on these marine resources. The trans-disciplinary research is conducted here and we have three parts working on this. One is on the marine environmental processes and they do research on the bio-geo chemistry, second on ocean dynamics, and third, on ocean productivity and we also have people working on marine endangered species. I am heading the sustainable ocean governance this includes not just law but it includes governance, law and other management part.

Let me say something about what is a marine environmental process that is very important for the governance of the ocean which is the habitat of the marine resources. Oceanography contains vast informations on the state of the marine resources and because of these we need ships and luckily this information is to enable to study bio, geo chemical processes and ocean dynamic productivity. When I came to this Institute I could understand these aspects and after being

here for more than a year one can describe the importance of living organism and the sustainability of the ocean. The understanding of these issues is very important. When scientists go there they do research and publish. This is something of national concern and the government has recognized this and said the benefit of this research only goes to the scientists. This never goes to the nation and this is why governance is needed. And this is why others are also needed to try and conduct inter-disciplinary research in this area. As regards species we have currently more than 600 species of marine and it also harbors vulnerable and endangered species. The highest number on the top of the list is sea turtles and corals. These are part of IUCN list and this is what we are focusing and why corals are important because corals are where the fishes are. We also need to understand why we need to protect the corals, the dolphins etc. We are living on land, we do not need them. But there is a need to study the marine endangered species because marine animals are not as visible as the animals. We may say that they are not important, but it is important to study their population their habitat resources and others. They are good indicators of the marine environment. Because they are standing at the higher level so we need to know what happened to them. What happens to them could also affect our fishing resources and our food. These factors will inevitable reflect on how well we maintain our marine environment healthy and also find out the ways to protect our other resources.

Sustainable ocean governance requires more elaboration of international law and it is not just the law of the Convention, because we are taking about resources we also look at the Convention on Biological Diversity and we also look into the Convention on International Trade in Endangered Species (CITES) because very recently there were poaches of sea turtles found on Malaysian boats and which originated from Philippines and the poaches were caught and the culprits have been charged in Philippine Courts. The Conventions also have numerous provisions for the protection and preservation of marine environment. For example Article 192 of the UNCLOS sets out the general obligation of states to protect and preserve the marine environment and it includes a number of provisions which elaborate on this obligation. Particularly they have to take individually or jointly as appropriate all measures consistent with UNCLOS that are necessary to prevent, reduce and control pollution of the marine environment from any source using for this purpose the best practical means at their disposal and in accordance with their capabilities (Article 194). This includes not just the shipping and fishing activities but also the land-based pollution. This is very important because if you are looking into the logging activities you will know it affects domestic wastes, industrial wastes and everything goes into the sea. Hence the marine environment is going to affect our food unless you do not eat fish. So

this is a major programme that we have been doing and this is a trans-disciplinary programme that we have undertaken assessing the marine environmental health as part of the ocean governance. So these are three marine species that we are looking at, for they are the indications of the health of marine environment and a sustainable way of living for fisheries. So this is the Chart on how it works. We work together with the Marine Specialists Group and in the end we hope to come up with the governance for the species and habitat for the conservation of marine environment. For the governance group what we do is we hold meetings and we also use the data that we get from marine scientists to translate as something readable by the government. This could be put into policies and we dream big and we hope we will achieve the same. I must tell that this is something that has not been done in Malaysia. In the end what we would like to do is to be respected, to be used, to be renowned in this area of research regarding marine science and oceanography not just in Malaysia but also in the region.

In this photo, this is the East Coast of our Peninsula Malaya and we have another one that is in the Brunei Bay and the latter involves four dictions which is Brunei, territory that belongs to the Federal Government of Malaysia, we have Sabah that became part of Malaysia very late and which has its own competence to deal with some issues including environment, natural resources etc. These are our areas of research. The reason why Brunei Bay is important is that it has been identified as an area with plenty of marine resources particularly the sea turtles and marine mammals. It is also important because it is being threatened with the development projects and shipping activities which may threaten this and this includes the sea gross. These turtles come from China, Taiwan, and Vietnam. And researchers can identify which turtle belongs to which country. Brunei bay is quite international in that sense. Because of developments we have also built neutral refineries' being built in Sabha that poses a threat to marine environment. We also have coal plants being built in Sabha this also will pose a threat to environment. We have been trying to work out a transboundary marine-protected area. This is something in tune with UNCLOS that encourages creating marine protected areas. We have engaged the Brunei government and the Sabha governments. They can not do it alone since it requires the cooperation of all. This is possible because we are academics, we do not want to intrude into your territory but we would like to help you in protecting this marine environment. We have managed to convince 35 Women Agencies involved in the management of marine environment. In nutshell what we are doing is to translate the scientific date into something that is readable by lawyers and policy makers. I hope we would succeed in these efforts. With that I thank you all.

Chairperson: I thank you Dr. Wan Izatul for that comprehensive and enlightening presentation. The final speaker on our Panel today is Ms. Dyah Harini who is the Head of the Legal Sub-Division on Division on Directorate General of Capture Fisheries, Ministry of Marine Affairs and Fisheries, Indonesia. Now I invite Ms. Dyah to make her presentation.

Topic: "Indonesia and RFMOS:Challenges and Opportunities"

Ms. Dyah Harini, Head of the Legal Sub-Division on Division on Directorate General of Capture Fisheries, Ministry of Marine Affairs and Fisheries, Indonesia: Good afternoon Ladies and Gentlemen and I thank you Chair and I also thank Prof. Dr. Rahmat Mohamad to have given me this opportunity to speak on the measures that Indonesia has taken in the area of fisheries. Before I start my presentation I would like to introduce my Colleague from Indonesia who is sitting here and who deals with international cooperation and probably he should have some comments about the regional cooperation undertaken in the area of fisheries. Let me start with an introduction of my country. Indonesia has been an archipelagic state since 1957 and it has islands approximately amounting to 17, 504 and a territorial sea running until 284, 210.90 KM and it has its coastline running into 104, 000.00 KM. I have taken these statistics from a Report published by Ministry of Marine Affairs and Fisheries in 2011.

We start with why we need to cooperate in this area. I quote from the statement made by one of our Ministers. He said: "in the entire Indonesian Fishery Management Zone, the exploitation status of albacore, yellow fin, bigeye, and blue fin tuna is extremely alarming with the status of fully exploited and even over-exploited, and it's only the skipack tuna still being in the moderate status. The tuna sustainability is not a responsibility of one or two nations, but it's the entire world" This expresses the need for regional cooperation on fisheries. The legal basis of cooperation is also reflected in the UNCLOS. For example Article 63 (1) of UNCLOS says where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part. Similarly, UNCLOS Art 63 (2) provides that where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either

directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area. It is also provided that the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish an organization and participate in its work. (UNCLOS Art 64). So this part is an obligation for Indonesia to cooperate with other countries as regards the sustainability of the fisheries resources. In my view the implementation of these two paragraphs found in Article 63 are very important to sustain the fisheries resources. Based on this Indonesia has participated in many cooperative efforts and we normally extend our cooperation to all the regional mechanisms that exist in the area of fisheries management. Mention must also be made of the highly migratory species referred to in Article 64 of the UNCLOS and which are enlisted in Annex I to the Convention. To fulfil the obligations imposed by Article 64 on the Coastal States Indonesia had convened a Preparatory Conference of WCPFC in 2004. That means we actively cooperated with other states in this area.

As regards the national regulations that Indonesia has adopted in the area of fisheries management, mention may be made of the Law of the Republic of Indonesia No. 31 of 2004 on Fisheries, as amended by Law No. 45 of 2009. The Government actively participated within the membership of regional and international organization in terms of regional and international fisheries management cooperation (Art. 10 (2). There are a number of legal basis for taking action domestically. These include:

- Law of the Republic of Indonesia No. 17 of 1985 on Ratification of the United Nations Convention on the Law of the Sea
- Law of the Republic of Indonesia No. 31 of 2004 on Fisheries, as amended by Law No. 45 of 2009;
- Law of the Republic of Indonesia No. 21 of 2009 Concerning Ratification of Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (United Nations Implementing Agreement 1995);
- Presidential Regulation No. 9 of 2007 on Ratification of Agreement for the Establishment of the Indian Ocean Tuna Commission;
- Presidential Regulation No 109 of 2007 on Ratification of Convention for the Conservation of Southern Bluefin Tuna; and
- Presidential Regulation No 61 of 2013 on Ratification of Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.

We also need to understand that there are many Regional Fisheries management Organization functioning throughout the world. They include the Commission for the Conservation of Southern Bluefin Tuna (CCSBT); Western and Central Pacific Fisheries Commission (WCPFC); the Indian Ocean Tuna Commission (IOTC); the Western and Central Pacific Fisheries Commission (WCPFC); Inter-American Tropical Tuna Commission (IATTC); the International Commission for the Conservation of Atlantic Tunas (ICCAT); the Commission for the Conservation of Southern Bluefin Tuna (CCSBT). All these are inter-governmental organizations functioning in the area of conserving fisheries and other species.

The Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC Agreement) was adopted by the FAO Council at its Hundred and Fifth Session in Rome on 25 November 1993. The Agreement entered into force on the accession of the tenth Member on 27 March 1996. The IOTC (the Commission) is an intergovernmental organization established under Article XIV of the FAO Constitution. It has mandate to manage tuna and tuna-like species in the Indian Ocean and its adjacent seas. The objective of the Commission is to promote cooperation among its members with a view to ensuring, through appropriate management, the conservation and optimum utilization of stocks covered by the Agreement and encouraging sustainable development of fisheries based on such stocks

In the mid-1980s it became apparent that the Southern Bluefin Tuna (SBT) stock was at a level where management and conservation were required. The main nations fishing SBT at that time, Australia, Japan and New Zealand, began to apply strict quotas to their fishing fleets from 1985 as a management and conservation measure to enable the SBT stocks to rebuild. On 20 May 1994, the existing voluntary management arrangement between Australia, Japan and New Zealand was formalized when the Convention for the Conservation of Southern Bluefin Tuna (the CCSBT Convention), which has been signed by the three countries in May 1993, came into force. The CCSBT Convention created CCSBT headquartered in Canberra, Australia.

WCPFC was established by the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPF Convention) which entered into force on 19 June 2004. The period between the conclusion of the Convention and its entry into force was taken up by a series of Preparatory Conferences that laid the foundations for the Commission to commence its work. The WCPFC Convention seeks to address problems in the management of high seas fisheries resulting from unregulated fishing, over-capitalization, excessive fleet capacity, vessel re-flagging to escape controls,

insufficiently selective gear, unreliable databases and insufficient multilateral cooperation in respect to conservation and management of highly migratory fish stocks. Conservation and management measures (CMMs) of the Commission are legally binding and apply to all WCPFC members and the Convention Area.

There have been so many national regulations adopted in these areas. They include:

- Presidential Regulation No. 9 of 2007 on Ratification of Agreement for the Establishment of the Indian Ocean Tuna Commission;
- Presidential Regulation No 109 of 2007 on Ratification of Convention for the Conservation of Southern Bluefin Tuna; and
- Presidential Regulation No 61 of 2013 on Ratification of Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.
- Minister Regulation No. 30/2012 on Capture Fishery Business as amended by Minister Regulation No. 26/2013
- Minister Regulation No. 05/2007 on Vessel Monitoring System (adoption of IOTC Resolution 06/03; CMM-WCPFC 2007-02 dan in-line with the Resolution on Establishing the CCSBT VMS adopted at Annual Meeting 14-17 2008)
- Minister Regulation Nomor: 23 /2012 on Fishing Vessel Marking and Registration (in line with ITOC resolution 07/02 dan CMM-WCPFC 2004-03.

The issuance of fishing license on the Fisheries Management Area of the Republic of Indonesia based on Ministerial Decree No. 30/12 as amended by Ministerial Decree No. 26/13 on Capture Fisheries Business; Registration of Fishing Vessel on each RFMO; Fishing Vessel Marking (unique vessel identifier) based on Ministerial Decree No. 23 of 2013 on Registration and Fishing Vessels Marking and installation of 1,654 IOTC stickers to fishing vessels operating in the Indian Ocean. These are implementation of Resolution No. 07/02 concerning the Establishment of an IOTC Record of Vessels Authorized to operate in the IOTC area.

The Application of Catch Documentation Scheme includes: Application of IOTC Bigeye Tuna Statistical Document when exporting out the Tuna; VMS Installation. This measure should be endorsed in its application as it is not effectively implemented. Legal framework for this measure is Ministerial Regulation Number 5 of 2007; Application of Regional Observer Program for Transshipment at Sea from fishing vessel to fish carrier vessel since 2009;

Implementation of Observer Scheme aiming to collect fish catch data for fishing vessel above 24 LOA; Application of Fish Catch Quota; Indonesia has observed some quotas determined by CCSBT, IOTC and WCPFC; the Application of Fisheries Logbook based on Ministerial Decree Number 18 of 2010; the Arrangement of Fishing Gears and Fish Supporting Devices based on Ministerial Regulation Number 02 of 2011; the Application of Closed Season; WCPFC has closed 4 (four) high seas pocket in Pacific Ocean for Purse-seiner since 2010. It also needs to be underlined here that Indonesia has also hosted CCSBT Meetings, namely, the 16th Meeting of the Scientific Committee, incorporating the Extended Scientific Committee on July 19th-28th, 2011; the 6th Meeting of Compliance Committee on October, 6 – 8, 2011; and the 18th Annual Meeting of the Commission incorporating the extended Commission on October 10-13, 2011 in Bali.

There are number of opportunities existing for cooperation in this area. They include areas such as data and information; catch allocation; special treatment as developing country; decision making; comply with the obligation set in the UNCLOS 1982 and market. There are some challenges as well. They include: National v Regional regulations; Coordination among stake holders; Public awareness with obligations set by RFMOs; Vessel Monitoring System (VMS) and Fish catching production report.

This is an area that has a number of challenges and we need to give more and more assistance to various stakeholders as to how they can catch more and thereby increase the production. With this, I end my presentation and I thank for the opportunity.

Chairperson: Thank you very much Ms. Harini for giving us a very informative presentation and it is very interesting to see how much Indonesian has done in terms of protecting the marine fisheries resources. Time flies and almost 20 years age one was talking about Fisheries Stock Convention and next year 2015 the UN will mark its 20th anniversary which represents an opportunity to review the progress made thus for in this area. Well we are nearing lunch and are there any questions.

A Student, SAU: I have two questions. First, to Wan Talaat and second to Ms. Dyah Harini. First to Wan Talaat, from your presentation we got the idea that the marine environment situation of South China Sea is already at peril. But not much research has been done. My question is whether it is possible for nine of the countries to undertake comprehensive multilateral marine scientific research because doing so would affect the marine health as well as the food security of the

nine coastal States. My second question: your presentation is mainly based upon marine fisheries management. My question is about the person who catches the fish and the fisherman due to rough weather of the area. It may happen sometimes that those fisherman unintentionally cross the maritime border and step into neighbouring states' law enforcement agencies. So is it possible to implement the tracking of vessels and to use the fish cash log book to deal with such unwelcome circumstances?

Dr. Wan Izatul Asma Wan Talaat: Well, if you ask me I would say that it is possible but it will be very difficult. In fact there has been a project conducted by the UNEP which involves almost the nine countries of the littoral states that suggest that there should be some sort of regional environmental cooperation in managing the sea bed. The proposal has come not up formally that is why focus is kept on smaller areas which are Brunei as it is easier to do it with smaller capabilities not particularly in relation to South China Sea that is also part of transboundary area. But somehow when it comes to implementation it has been quite difficult though it is possible. I think I have answered your query

Legal Advisor, Ministry of Foreign Affairs, Turkey: I have a question to Dr. Mohd. The provision of maritime protection, provisions of UNCLOS excludes the state-owned ships used for purposes and we also know that state owned ships are a source of pollution in littoral states. I would like to get some insights about the Malaysian practice about how it has tackled this problem.

Dr. Mohd Hazmi Mohd. Rusli: Thank you for the question. The reason why I discussed more about commercial ships was that Straits of Malacca and Singapore is busy with particularly navigational traffic from commercial ships. I totally agree that the provisions of the Law of the Sea Convention they do not cover the ships under sovereign immunity. For example, a vessel passes the straits of Malacca, vessel of a foreign country, when they pass through the Straits; they do something that can particularly affect Malaysia. The practice what we do now is to lodge diplomatic protection and at the moment in the Declaration to the UNCLOS Malaysia has declared our EEZ here in the Northern portion. We have EEZ corridor from Sumantra to peninsula this is about 200 nautical miles in breath so there is an EEZ corridor. A ship passing through that area and if it conducts any military activity it will go against our Declaration that specifically says that no country can conduct military exercises in our EEZ. Anything that happens we will do it in a diplomatic way. I thank you.

A Student: I have one comment. Dr. Mohd Rusli mentioned that the protected numbers for vessals transiting through the straits of Malacca and Singapore is

141, 000 by 2020. I think so far the littoral states have done well to take care of the increasing number of vessels passing through the straits of Malacca and Singapore. I think that is the capacity of the straits of Malacca and Singapore particularly with the improvement of traffic.

Dr. Luther Rangreji, Associate Professor, SAU: I have a question to Dr. Hazmi. Malaysia is a Member and I am sure Indonesia is a party to the IMO Conventions on civil liability. There has been a move as far as I know that some of these countries, these littoral states, were not happy with the CLC and the funding for civil liability. There is a mechanism in place. It's good to have a precautionary fund where anybody who wanted to use the straits of Malacca something which apart from the insurers' fund, you also want to have not only the insurer but even the other people who wanted to use could do. Is this still in vogue? This is one question, and an additional question would be about the Ramsar Convention. Under the Ramsar Convention it is for the Ramsar state to do all the cleaning process. Do you do it on your own or you seek help from other littoral states?

Dr. Mohd Hazmi Mohd. Rusli: The question about the funding. Yes, we are a Party to CFC and I mentioned about the East Navigation Fund was established back in 2007 with a cooperative mechanism. Under cooperative mechanism there is a cooperation forum, project coordination committee that has undertaken a number of projects and the last one is the establishment of the Eastern Navigation Fund. This is a voluntary fund and it is up to any user state to contribute, but at the moment as far is this fund is concerned the contributions received is encouraging. But countries like China, South Korea, America, and Australia instead of proving money provide expertise. The second question related to the Ramsar site. We have done our part actually and as far as the cleaning process is concerned the state government and the Malaysian Government has been doing. I hope I have answered your question.

Chairperson: Are there any more questions? Since there are none, I request the distinguished participants to join us for the lunch.

VI. VERBATIM RECORD OF WORKING SESSION-V AND CONCLUDING SESSION (03.00 – 05.30 PM)

"DISPUTE SETTLEMENT: AFRO-ASIAN TRADITIONAL WISDOM"

Chairperson: Prof. Y. K. Tyagi, Professor and Dean, Faculty of Legal Studies, South Asian Univeristy, New Delhi

Chairperson: Good afternoon. With the kind permission of Secretary-General Rahmat Mohamad, we are going to start the post-lunch session. The theme of this session is 'Dispute Settlement'. I propose to organize this session by focusing on the following aspects.

First, I would take the liberty of offering you a few remarks as introduction, then I shall introduce the speakers of this afternoon, then present to you the structure of the session we are going to have, then finally we will have some discussions. Before I do that, I regret to inform you that one of the key speakers today, Prof. Patel from Gujarat is not able to attend the session for some reasons best known to him, but I am sure the presence of the other speakers and the presence of all of you here will help us have a fruitful session. Even if it is not a comprehensive session it is bound to be constructive. No doubt that the leadership, contribution and participation of the Secretary-General Rahmat Mohamad will serve the objective of developing certain ideals which we will take up for further exercise of the kind we have today.

When I speak today, I remember what we did last year in this very hall. In 2013, AALCO conducted an expert meeting on the law of the sea and invited a number of very distinguished people to speak on different aspects. I still remember a number of good presentations were made here, including discussions of high-quality and interventions from the floor. I still remember a presentation made by my esteemed senior Dr. H. P. Rajan, and one of the most conspicuous and constructive contributions of the last year for the formulation of an agenda for further research, engagement, and discussion relating to various aspects of the law of the sea. That determination was effectively implemented by the AALCO and I congratulate the Secretary-General and his team for being so effective in organizing another exercise within less than one year.

I did not have the privilege of listening to all the speakers who spoke since yesterday, but I got feedback that the discussion yesterday and before lunch had presentations of high quality. We will make the best use of the opportunity we have now. All of you have the strength of enriching your thoughts with the discussions we had yesterday and today, so I am sure most of us will be well placed to make best use of this discussion on dispute settlement.

We have with us a very bright and young expert on the law of the sea. The definition of 'young' is that if you start working on a topic today, you are very young. So all of us are young in a sense. Dr. Mohd. Hazmi bin Mohd. Rusli is the holder of an LLB degree from the International Islamic Univeristy Malaysia (IIUM). He is a non-practicing advocate and solicitor of the High Court of Malaya in Malaysia. Currently, he is undergoing his PhD research at the Australian National Centre for Ocean Resources and Security (ANCORS), University of Wollongong under the Malaysian government's scholarship. His areas of interest are Law of the Sea and issues on marine environmental law. He is currently Associate Fellow/Associate Professor at Institute of Oceanography and Environment, Universiti Malaysia Terengganu (UMT). He is very well qualified for today's talk on dispute settlement. I was trying find out what he is going to speak on, as I did not have the privilege of reading his paper and the title of his presentation is "Freedom of Seas in the Malay Archipelago: An unsung international custom."

The title reminded me of Late Prof. R.P. Anand's fascination for this topic. He used to start law of the sea with freedom of the seas and of course custom is another fascination of professor Anand. He used to tell us that customary democracies were developed in South-East Asia and that reminds me of his book *Origin and Development in the Law of the Sea*, where he documented, analyzed and beautifully presented the contribution of Asia in the development of law of the sea, particularly the freedom of the seas. And he used to say that although Grotius is considered the 'father of modern international law' the critical contribution of which he is considered the father, there is some dispute on that aspect. One of the critical contributions is freedom of the seas and Grotius learned freedom of the seas from Asia. That was Prof. Anand's thesis in his book which was a great contribution to scholarship in Asia and Africa.

When talking to Prof Mohd Hazmi bin Mohd Rusli I asked him what he would be talking about and he said the role of traditional wisdom in the settlement of disputes. I would like to know what the traditional wisdom is, how it is different from modern wisdom, and that's how we are going to structure this session today.

We can look at dispute settlement in many ways. I looked at it quite some time back and I imposed my writing on you, which is distributed. At your convenience you can reflect on it if you choose to. Although it is outdated, I wrote it within six months of the adoption of the Law of the Sea Convention so obviously I did not have the strength of state practice, but it has at least a reflect of some initial understanding of dispute settlement.

I propose to organize this session in the following way:

We can look at dispute settlement, what is the role of traditional wisdom in the settlement of disputes of the law of the sea. After his presentation I request HE Dr. Mohamad to share his thoughts about traditional wisdom and then we will have a discussion on that because in my view this is an unconventional approach to dispute settlement. After that presentation we would like to invite at least one presentation from one of the persons who are here to share his understanding of a few disputes which are now in the process of settlement. Then we will again have a discussion about formal means of settlement of disputes. At the end, with time permitting, I will take the liberty of sharing some thoughts which would probably sum up some of the points which will emerge out of the two main aspects of our discussion today.

Your Excellency, if I may have permission for this we can proceed by requesting our friend to make a presentation on the role of traditional wisdom in the settlement of law of the sea disputes.

Topic: "Freedom of the Seas in the Malay Archipelago: An unsung International Custom"

Dr. Mohd Hazmi Mohd Rusli: Good afternoon everyone. Thank you Mr. Chairperson and thank you Prof. Rahmat for inviting me to this prestigious meeting. It is an honour to be here and sometimes it feels good leave Malaysia when it is very hot in the country.

This paper is a joint effort between me and Prof. Rahmat in echoing what was said by Prof. Satyanandan in showing that in terms of the law of the sea, the wisdom actually came from us. It came from South-East Asia. So, this basically is a historical paper to show how the traditional kings in South-East Asia developed the concept of what we know as the freedom of seas and this has been admitted as one of the most important concept in the Constitution of the Seas at the

moment. This freedom of the seas has basically been made popular by Hugo Grotius, and many people regard him as the father of international law, but we should also take pride that Asians have also contributed to this.

Let me start by showing the historical thread of the civilization that has flourished in the Asian region. This is the outline of my presentation.

Introduction: The reason I chose the Malay Archipelago is because of its archipelagic nature. It is impossible for a person to travel from one place to another without using the seaways. Because of this, the freedom of the seas has always been used by the natives of the area and by the traders from China and Arabia and India and other parts of Asia. *Mare liberum* or freedom of the seas, traditional wisdom in dispute settlement, and whether its true that freedom of the seas in the Malay Archipelago is an unsung international custom.

In the current political arena, the Archipelago consists of a number of countries; Thailand, Malaysia, Singapore, Brunei, Indonesia, and the Philippines. Papua is not mentioned, but Papua was also part of the Malay Archipelago, popularly know by Malaysians and Indonesians as *Nusantara*. It has been the cradle of maritime civilization. As mentioned earlier, by Madam Adina this morning about the earliest kingdom that emerged in the Malay Archipelago in the 3rd Century called *Langkasuka*. So, this is actually true. I would like to confirm her assertion that the earliest kingdom registered in the Malay Archipelago was *Takua pa* or *Langkasuka*. There is a Thai movie called *Queens of Langkasuka* which is about a kingdom in southern Thailand. There were many conflicts at the time because of imperialist ambitions and the need of one country to withstand attack from another and there is no more *Langkasuka* now as it is a part of southern Thailand and northern Malaysia.

Langkasuka emerged sometime in the 3rd century AD as part of the Malay Archipelago. Arabia, China and India have been huge civilizations since the Mauryas, the Chinese and Indians went through the Malay Archipelago to get from one place to the other so the best way was to travel by sea and the Straits of Malacca is one of the most important seaways that connect these two parts of the world – India and China – as well as the Middle East. The other way is through the traditional land route through *Langkasuka*.

So this first regional kingdom that took control over the Northwestern part of *Nusantara*. After that there were other kingdoms which emerged, some of which as part of the territory of *Langkasuka* and the others as small territories. And after that the kingdom of Srivijaya became very eminent. It was the first Malay

empire to take control over both important maritime sea routes in South East Asia, the straits of Malacca and Sunda. This kingdom existed for more than six centuries and the territory sprawled all over Sumatra, the Malay Peninsula, Southern part of Thailand and just like Singapore in the modern day, Srivijaya participated extensively in the commerce involving camphor, cloves and other valuable commodities with merchants from different parts of Asia.

Srivijaya was a port that was frequented by many traders from all over Asia and Persia. During the time of Srivijaya's preeminence, *Sailendra* was an important ally to Srivijaya, because at that time, because in the past if people did not agree with methods they would go to war. There are many instances where these regional kingdoms perish because of war, and because they wanted to strengthen their foothold in the Malay Archipelago, Srivijaya and Sailendra became allies as a form of conflict resolution. Sailendra is reputed to be the dynasty that build magnificent architecture in Indonesia. I have visited monuments in Indonesia last year, but at the moment you cannot go there because of a volcano. The Borobodur temple, the largest Hindu-Buddhist temple was built in the time of the Srivijaya Empire.

As I said, in the past if you had imperialistic ambitions you'd go to war resulting in destruction. Across the *Bay of Bengal* the Chola Empire became very strong and beginning in the year 1025 King Rajendra Chola began punitive attacks on Srivijayan cities and sacked Tumasik and Palembang. So you can see that in the past, like what we are experiencing now, if you can't settle a dispute you become an ally or you go to war. So Rajendra Chola attacked these city-states in Palembang and as a result of the war, the Chola expedition was eventually unsuccessful resulting in the eclipse of both Srivijaya in the Malay region and the Cholas in the Indian Ocean. So most of the time war causes destruction.

After the war, the weakened Srivujaya disintegrated into smaller kingdoms and ceased to be a ruling entity in Nusantara by the second half of the 14th century. But then again, the Cholas did not get a strong foothold on Nusantara and as a result they went back and the next empire to take its leading role in the Nusantara region was Majapahit. This was a Javanese kingdom and the capital was in Trowulan. This replaced Srivajaya as the main port in South East Asia. It generated wealth through agricultural produce, rice production, and also through maritime trade that went through its archipelagic straits. We can see now that Indonesia has important archipelagic straits because it is important to ships to pass through these narrow straits. So Majapahit also became very strong because of its agricultural produce as well as the fact that it was a huge maritime empire. Replacing Srivijaya it became involved in the important trade of pepper, salt,

coconut oil, spices, ivory, all to be exchanged with the textiles from India and porcelain products from China.

The next would be Malacca. Why is Malacca so important? This is because Malacca was one of the first and strongest states ever established on the Malay Peninsula. After the fall of Majapahit, which was because of internal conflicts in the ruling family as well as the influence of Islam in Asia, in the 15th century, the central political power shifted from Java to the Malay Peninsula. Due to its strategic location it became one of the most important ports in this region. Malacca grew into a prosperous international port, but also a regional maritime empire. It engaged in a diplomatic and commercial relationship with other neighbouring states like China and India, and when it started to flourish Malacca received a lot of threats, particularly from Majapahit and Java in the south and Siam in the north.

So what Malacca did to end these disputes, it made itself a part of China, because at that time when there was one state to police that area, piracy became very rampant. These pirates had caused difficulties to Chinese merchants. So what the Malacca sultan did was it became an ally of the Chinese government at the time. In order to ensure that there was a proper relationship Chinese Ming dynasty would protect Malacca and at the same time Malacca would protect Chinese merchants from pirate attacks in the Straits of Malacca. So this is one of the earliest forms of dispute resolution and also one of the earliest forms of cooperation that took place in this part of the world.

Malacca prospered until 1511 as a crucial link in world trade. It was said that the population in the port of Malacca was over 100,000 people. Malacca's prominence in the region was short-lived with the arrival of the Portuguese in the region in the early 16th century.

After the arrival of the Portuguese the next kingdom to enter the limelight was the Aceh in present-day Indonesia and also Johor. Johor is still an existing sultanate in Malaysia until now. In order to oust the Portuguese from Malacca, Johor forged an alliance with the Dutch and the Portuguese were ousted from Malacca in 1641. So this is just to show that cooperation happened in the past as one of the ways to achieve dispute resolution and resolve disputes.

The other regional kingdoms to flourish after the fall of Malacca; Brunei is one of the oldest Malay sultanates in the world and it flourished and became one of the most important ports after the fall of Malacca. All the traders went there. There

were other sultanates to also emerge after the fall of Malacca; Palembang, Jakarta and Goa Putri.

There was no proper demarcation at the time of these traditional kingdoms. The first maritime demarcation in the Malay Archipelago only happened when the Dutch came in. So Malacca used to be under the Dutch after they ousted the Portuguese and Malacca belonged to the Dutch until the British got a strong foothold on Bengkulu in this area, so they decided to swap and the Johor Empire was situated in that sphere of influence. So after the swap, the British took Malacca and Bengkulu went to the Dutch, and this was the first ever demarcation of lines in the Malay Archipelago and this imaginary line until now divides Malaysia and Indonesia in the present day.

I just wanted to show that in the past, in the traditional kingdoms, there was no such thing as areas that belonged to countries, but it is just to show the sphere of influence. The Dutch and British came to this part of the world and divided the people of the same race into two different countries.

So now, let's go back to the concept of *mare liberum* in the Malay Archipelago. As I mentioned earlier these brief historical episodes have shown that the Malays have been practicing mare liberum together with the Arabs and most of the other merchants who came to the archipelago to trade. So this shows that we Asians have been practicing mare liberum long before Hugo Grotius advocated this in 1609. And as skillful seafarers, the Malays have in the past dominated the seas though the kingdoms of Srivijaya, Majapahit and Malacca. Particularly the Macassaris have traveled to Australia in the 17th century and the Malay seafarers from Srivijaya have gone as far as Madagascar in the 9th century AD. So this was the history in the past to show that they practiced mare liberum. And, Macassaris had discovered Australia before the Europeans.

During the colonial there were a number of oppositions by the local Malay kingdoms to the Dutch practice of monopoly. It's weird, Hugo Grotius mentioned about mare liberum but when they got to the Dutch in the present day Indonesia they said, "this land belongs to us" and then suddenly they wanted to advocate the concept of 'closed seas', or as we say *mare clausum*. So contradicted Hugo Grotius and when the Dutch colonized Indonesia they disallowed others to trade through the area. This is what we call a monopoly or *mare clausum*. This concept of monopoly had been opposed by the Sultan of Goa, who said that the order of the Dutch to seal the seas was a method unheard of by the Sultan. So this is quite weird as on one side they mention mare liberum and they got a strong foothold on the East Indies and then practiced mare clausum. So what I'm trying to say

that the real propagator of mare liberum was the Asians as they have never forbidden any countries from sailing in the region.

In 2008, in the *Pedra Branca* case, the ICJ in the first round of judgment pronounced that the Sultanate of Johor held the original title to Pedra Branca. This possession of the islands by the Sultanate of Johor was never challenged by the other powers in the region and these in all circumstances show that the concept of sovereignty had also been exercised by our local traditional kingdoms.

So let me give you some examples of traditional wisdom on dispute settlement in the past. Conflicts have always erupted in the past between regional kingdoms and until now Malaysia had conflicts with its neighbours in terms of maritime delimitation issues but, after 1945, war was not a way for us to resolve these disputes. So let us look at traditional wisdom.

Conflicts have always disrupted cordial relationships between kingdoms. These kingdoms have resulted in joint cooperation. Like the example I showed to you earlier, Malacca allied with the Ming Dynasty in 1411. The Ming Dynasty helped Malacca to improve its defence capabilities and at the same time Malacca protected Chinese traders from attacks in the Straits of Malacca. This is one of the examples of joint cooperation and dispute settlement because the Chinese were not really satisfied with the pirate attacks in the Straits of Malacca in the 15th century. So this is how they settled the dispute; through joint cooperation.

An alliance occurred between Srivajaya of Sumatra and Sailendra of Java in the 9th century through royal intermarriages. But then again, that was in the past when they had absolute monarchy and we do not have absolute monarchy anymore.

An alliance was also forged between the Johor and the Dutch to topple the Portuguese in Malacca. So this is also an example of an alliance to settle a dispute in the past.

Obviously, an alliance through joint cooperation is not uncommon in kingdoms in this part of the world to settle a dispute, and war will only take place if conflicts could not be effectively resolved, causing huge casualties. After 1945 and the end of the World War II, war has no longer been seen as one of the best ways to resolve a dispute because of the sorrow, pain, and economic destruction.

As a conclusion, mare liberum in the Malay Archipelago is an unsung international custom. History has shown that even though kingdoms in South

Asia kept changing, trading activities between these kingdoms and other Asian realms kept taking place. These Malay kingdoms were actively practicing the freedom of the seas, not only within but also with other kingdoms from China, India and Arabia. These kingdoms have mainly resorted to joint cooperation in resolving disputes with other regional kingdoms. Unfortunately for the Malays, their glorious past as empire builders and seafarers was never officially documented. For this reason, the state practice of mare liberum in the Malay Archipelago remained largely an unsung international custom and before I end my presentation I would just like to say that we Asians should be proud that from our heritage even though we didn't have our own Hugo Grotius, we actually put it into practice. They had Hugo Grotius, but when it came to the Dutch East Indies, the Dutch forbade other people to sail the seas. We should be proud of our heritage that we were seafarers in the past and empire builders and hopefully the law of the sea will develop as the Asian countries develop every day. I hope that this presentation will open a new perspective on the law of the sea; that it doesn't only belong to the First-World countries, but that the Constitution of the ocean belongs to everyone, including Asia and Africa.

With that I would like to end this presentation and thank you very much for your attention.

Chairperson: Thank you Dr. Hazmi. I reiterate the critical aspect of the presentation.

The evolution of the doctrine of the freedom of the seas itself was a reflection of absence of conflicts. If this freedom would not have been recognized, conflicts would have erupted and freedom means, philosophically, absence of conflicts. Conflicts arise when you have invasion, or you have de-recognition of freedom. It goes along with Grotius' philosophy about "why freedom of the seas?" He said the seas are frees because they are plenty and adjustable and unlimited. Why to fight with each other when everything is enormous.

And it reminds me of Karl Marx. When will you be really liberated? When you have abundance. When the means of production have reached a stage where you produce what you need. Everybody's needs are fulfilled. At that stage you need not fight with each other. When do you fight with each other? When you have limited resources. There is a scramble for resources. And since resources are limited everyone wants to posses those resources so conflict arises.

So the relationship between enormity of resources and desire on the part of the people concerned to allow everyone to have access to those resources. And of

course those resources at the time were understood differently from the way those resources are understood today. Poly-metallic nodules were not there at that time. If they were there then I'm sure the freedom of the seas would have been defined differently.

Now another point that was emphasized by Dr. Rusli in his beautiful presentation was about two aspects and practices that were adopted in Malacca and Malaya and the kingdoms of that time. Practices of joint cooperation as a means for settling disputes. When you have cooperation that implies a built-in mechanism for dispute resolution. If you don't have cooperation even minor differences may turn into conflicts.

But again we should be conscious of the fact that the scope of cooperation at that time was very small because oceanic activities were limited. The scope for joint cooperation today is enormous. There is hardly an area where cooperation is not needed. So, on the one hand we should feel happy that we have more scope for cooperation, and on the other hand we should feel disappointed that we are losing opportunities to institutionalize cooperation. But the wisdom is that if you cooperate you automatically reduces or minimize or resolve conflicts.

The other means that was deployed in the 16th century for resolution of disputes was forging alliances. It's not that alliances are not forged today. But whether those alliances create disputes or resolve disputes is a matter of debate and discussion. If you understand European history of modern times then you find that alliances are created to contain disputes, to deal with disputes rather than resolve disputes. That was the essence of the Cold War. They did not resolve much, but they contained each other. So those disputes were contained and they could erupt as soon as the containment began.

The aim of dispute settlement is not containment. It is only one aspect of dispute settlement. If you just contain dispute for some time, it is very good, but if you don't use that time for the settlement of disputes then containment may become a form of aggravated form of dispute. The cooling off period, if you don't use it for the resolution of dispute then there is no point in having that cooling off period. So alliances today, I'm not sure, are designed to resolve disputes. I am not sure of that. I cannot say with confidence because quite a few alliances are in the form of balance of power: containment and checks and balances. I am yet to study an alliance whose main objective is settlement of disputes.

But the essence of the presentation is, though limited and confined to a very restricted area, we have experiences of South East Asia of dealing with a situation

which might otherwise turn into an explosive situation. If there was no war, if there was no hostility at that time, it was not just a result of minimal oceanic activities. It was also the result of wisdom used by the people at that time. You don't need a big pretext to go to war. Sometimes you can go to war for no reason. You can be the enemy of each other for small things. We have a history of conflicts in this part of the world on small accounts. So I'm sure there were quite a few grounds at that time also but one must pay tribute to the people of that time that they did not allow those minor differences to prevail over their wisdom and they contained and somehow managed the dispute even when formal resolution did not come as it comes now, in the form of an ICJ report or arbitral award reports.

This is also a story of, what you said, I liked the title of the paper, 'An unsung international custom.' I can assure you that in this part of the world it is sung very well. Again, I would like to quote Prof. Anand. He used to sing it so beautifully that even after so many years we remember that song too well; the development of customary freedoms of the sea in this part of the world. He did not relate it to dispute settlement so I compliment you for this wonderful connection and I see the logic that freedoms develop when you have less disputes. Thank you very much for your beautiful presentation and I look forward to my esteemed Dr. Rahmat Mohamad to make his presentation so we will know more about that traditional wisdom.

Topic: "ASEAN and Dispute Settlement Practices"

Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO: Thank you Chair. I must admit at the outset that I have been called at the very last minute to replace the eminent professor Bimal Patel, I am sure he has his own idea on this matter. Mr Chairman I would like to further elaborate the interesting chapter to how later on the countries of South East Asia, known as ASEAN, would develop this wisdom again not creating any conflict between the nations when ASEAN started to emerge in 1967.

Well before 1967 when the nations of South East Asia were newly independent states and had their own priorities, they have to curb their own domestic conflicts. But, the wisdom of the founding members of ASEAN was that when they established ASEAN in 1967 they did not have a formal kind of treaty but a soft law declaration called the Bangkok Declaration. Because they do not have a treaty, they agreed among themselves that there should have a treaty and the

ASEAN Charter emerged in 2008 because the entity has a legal personality in international law.

Now what is the practice of these ASEAN countries in avoiding conflict? Again, regional cooperation, good neighbourliness, consultation and consensus are the five principles which have been the practice of ASEAN since its inception in 1967.

This is the accepted practice in that area and even if they have bilateral conflicts to the extent that they have to go to the ICJ – we have cases relating to maritime boundary issues, Malaysia had problems with Indonesia and Singapore, which was resolved through the ICJ – that shows that these countries are responsible countries; that they are avoiding conflict and resorting to peaceful means. So again they are particularly employing wisdom to avoid unfriendly manner or aggression. This despite the fact that many scholars criticize the informal regime of settlement as not being rule-based or consistent or predictable. The fact remains that these have actually made ASEAN a successful regional organization compared to other regional organizations.

In fact, at one time when Vietnam fell to the Communist regime it was thought that the whole region would collapse just like the domino theory that was propagated by the Americans. But it was not like that. In fact, for your information, next year in 2015 ASEAN is going to establish its ASEAN economic community and it is going to be a full-blown ASEAN community. So this is a success story.

An example of regional cooperation is between Malaysia and Thailand. They had regional cooperation where the exploitation of resources would be exploited together. And if you read the history of how the Gulf of Siam was going to be an area of conflict and it was narrated that the two ministers agreed and the decision was made on a roadside, and resolved the dispute without resorting to a formal means is exemplary. Friendship and leadership plays an important role.

Another critique from scholars is that ASEAN has as many as 400 meetings or more than that, but the fact that they have more than 400 meetings reflects that there is a lot of discussion and negotiation and consultation so that they will make a firm and favourable commitment finally. Mr. Chairman I am biased on this because my thesis is on ASEAN so obviously I would support the idea that this is one good example of trying to resolve disputes through wisdom even though this wisdom has been criticized by scholars as having no merit because they say it is not rule-based. But, I think that in many years to come this will continue to be the practice in ASEAN.

ASEAN also had a formal mechanism. They had a Treaty of Amity and Cooperation, 1967. They also established a protocol on dispute settlement in 1996. But these were never used. They would prefer to use the so-called ASEAN ways or informal ways of resolving disputes. So, this is one example that I think these disputes can be resolved with wisdom that has been practiced for hundreds of years and I think that this is a good example that we can avoid conflict so long as we practice good neighborliness and the wisdom of consultation and consensus. Thank you very much Mr. Chairman.

Chairperson: Thank you Excellency for bringing another exciting thought into the discourse of this afternoon.

When we study soft law we hardly study the contribution of South East Asia. I have not seen any article or contribution on soft law where this aspect has been appreciated. We generally look at human rights treaties and environmental agreements, but the dimension that you have brought in provokes a rethink of that understanding of soft law and again when we think of soft law it can be traced back to ASEAN and South East Asian practices where informal understandings and practices could be used more effectively than formal agreements and practices.

ASEAN is one of the exceptional organizations which was created not by a treaty, but by a declaration. If you study international organizations, to the best of my knowledge I do not know any international organization that has not been created through a treaty. In fact I tease my friends at Jawaharlal Nehru University who are professors of international organizations and tell them that every international organization is a child of a treaty to put them down and to emphasize the importance of international law. But here I find an exception that an organization was created and survived and flourished without having a charter or constitution or treaty-based foundation and the adoption of the ASEAN Charter in 2008 was probably not a big deal, because since the organization exists why not have a treaty also.

But the fact remains that it was not a legal formality. That was the basis of ASEAN, but again the wisdom on the part of the people and constituents of ASEAN. I have some difficulty with the term ‘alliances’ because when you talk of alliances you are reminded of military alliances, and when you talk of organizations you talk of more benign bodies which are governed by rule of law. When you talk of alliances you are not sure if they are governed by rule of law, but when you talk of organizations every organization is governed by rule of law,

because that organization is governed by its treaty or declaration or charter, in this case the Bangkok Declaration.

It reminds me of something even more interesting. When we were students we studied the legal significance of declarations and we had very standard formulations that declarations are generally non-binding while treaties are binding. Then we derived conclusions based on that understanding of the legal significance of all declarations and resolutions in general. Here we have an exception which is a declaration which is not only binding but was considered sacrosanct to the extent that nobody talked about deviating from it. That shows that the traditional positivist Euro-centric understanding of the legal significance of the term declaration or treaty and all that need to be revisited in the light of the experience of what we have witnessed in South East Asia and subsequently in the form of ASEAN as an organization.

I deeply appreciate this thought you have brought into the discussion. I am sure our friends here would like to have many questions so I open the floor for discussion and please announce your name, identify yourself and you are welcome to make a brief presentation. Both Dr. Rusli and Prof. Rahmat Mohamad will note down these comments and then at the end of the comments and questions they will respond. Let's have about 15 minutes of discussions on these two presentations.

Ms. Adina Kamarudin, Ministry of Foreign Affairs, Malaysia: Mr. Chairperson Prof. Tyagi, I don't have any questions. I would just like to make a short intervention with relation to the presentation by Dr. Hazmi, Prof. Rahmat and also your paper sir on the 'System of Dispute Settlement under the Law of the Sea Convention: An Overview'.

Mr. Chairman, your paper in 1985 is still very much relevant and it's rather prophetic I see in terms of predicting conflicts and disputes that would take place after the accession, ratification and coming into force of the UNCLOS. Sir, in international politics, states will go to the furthest extent it can to establish its claim, be it a territorial sovereignty claim or a maritime claim. But it takes a responsible state actor to come to the negotiating table and recognize that there are rights and duties in what they claim and to follow true the claim in the most responsible and positive way as part of the UN setup in being a responsible state actor.

In your paper you wrote about potential disputes in claims of national jurisdiction, disputes arising from the delimitation of boundaries, disputes

arising from activities in national zones. What is very much happening today especially in relation to the South East Asian part of the world; for example as mentioned by prof. Rahmat, Malaysia herself is no stranger to third-party adjudication. We went through the bilateral negotiation process with our neighbours, Indonesia and Singapore, and after exhausting all possible ways we went to third party adjudication looking for peaceful settlement of dispute. That is indeed the neighbourly way and the ASEAN way. You may call it wisdom or consensus, but it took place. And, it has been a way that we have followed true and we were looking for the right light at the end of the tunnel.

I went to court in the case of *Sipadan ligatan* and *Pedra Branca*. Those were territorial sovereignty issues but as we know, there is a 2-stage process to it. First, to settle the issue of territorial sovereignty and second, to settle the issue of maritime zone entitlement. In the second process as well, Malaysia and Indonesia have come together to delimit the area concerned. Malaysia and Indonesia have gone through the process of survey with Singapore and we are also coming out now with our committee on delimitation. That shows that there is a critical willingness for both parties to continue the dispute settlement process.

We also have a bilateral arrangement in the Straits of Malacca regarding problems between Malaysia and Indonesia regarding fishermen and we have recently come out with an MoU concerning the treatment of fishermen by maritime law-enforcement agencies of Malaysia and Indonesia. So, although Malaysia and Indonesia have bilateral reservations in the Straits of Malacca, both countries are united to oppose any international management of the Straits of Malacca.

So as mentioned on ASEAN's way, whatever was criticized about it, I do not believe that there is one way, and I believe sir, that wisdom comes in many forms and from perhaps many corners of the world. It is not entirely Euro-centric. Asia and Africa have wisdoms they are yet to discover in this matter and it is not just a process that was only developed in the 'age of enlightenment'.
Thank you.

Dr. Luther Rangreji, South Asian University: Thank you Chair, and thank you to the two speakers on a very enlightening talk on traditional wisdom of Asian and African states.

While complementing what you have done, I thought there is another angle we should look at as Asian-African states. The Chair spoke of Prof. Anand in a very early article in the international comparative law quarterly in 1966. He wrote on

how Asian –African countries' attitudes towards the ICJ have changed. SO while we agree that traditional wisdom is something which is a state attitude, in contemporary times where countries which came out of a colonial system and didn't trust western thrust international law they took time to agree to a third-party adjudication of their disputes.

Once they believed in this in the post-60's period, you see the flood of cases that came up in the ICJ. You had Libya and Bahrain and Tunisia and a number of cases involving Asian-African states who would have been happy to settle disputes by negotiation chose third party adjudication. I believe as a lawyer it is not a weakness of the system to go to third party adjudication. If you look at Art 33 of the UN Charter, all of these means of dispute settlement are peaceful and they are something which are not coercive and are invocable by states which have faith in the peaceful settlement of international disputes. I think the tribunals' contribution whether by separate or dissenting opinions and their contributions towards framing Afro Asian settlement is something that we must look very carefully at. I am sure the Chairperson would throw more light upon this. Thank you.

Prof. Rose Varghese: While I really appreciate the approach of the two speakers, I think it was quite a magnanimous approach to the problem. I am a little skeptical about practices of joint cooperation being a solution or a mode of settlement in the long run. When Grotius first spoke about the common heritage of mankind there was this kind of an attitude towards the wealth of the seas. As people explored the oceans we can see a number of disputes. Even in the territorial sea, there was initially a lot of customary practice. The customary practice went on until it was settled in the *Anglo-Norwegian Fisheries* case. And so also in the matter of the *North Sea Continental Shelf* case, the *Libya Continental Shelf* case, and the *Corfu Channel* case. These all had to ultimately be decided by a competent authority. The other is well said, but in the long run I agree with Prof. Tyagi, because in disputes if there are limited interests, conflicts will arise. Again, when there is enormity of resources conflicts will arise.

Now, when you go to UNCLOS III after 9 years of deliberation, since you spoke of archipelagos, I think there still needs to be some clarification and it's just that the bigger powers and superpowers would dominate in a system with a kind of settlement through joint cooperation. It would not be practical when there's a difference of leve of powers. It is just my observation and I am not very good at the subject because I did my thesis on law of the sea in 1985, that was just when the UNCLOS III was over and I have not updated my knowledge with the latest,

which is why I came for this conference. So, thank you for inviting me for this conference. Thank you sir.

A Student: In the maritime arbitration between Eritrea and Yemen in 1999, the arbitral tribunal cited the Quran or Islam to support the traditional fishing rights of the population living both in Eritrea and Yemen as an unrestricted right. So have you also considered the same in the Malaya region? Thank you.

Dr. Mohd Hazmi: Thank you Mr. Chairperson for allowing me to speak first. I appreciate the comments given particularly on the concept of joint cooperation. I agree with you and what Prof. Tyagi mentioned. In the past there was not as much conflict as there is now, but the gist of my presentation is just to say that all these concepts introduced in the law of the sea convention is not Euro-centric. So it is unfair to say that that they are the ones who have thought of all these things because we also have our own traditional wisdom. When we talk of joint cooperation, at the moment war is not one of the best ways that we can resort to because it will cause a lot of destruction. What Malaysia has done sometimes is to resort to the ICJ in our disputes, particularly with Singapore and Indonesia, but I think that at the moment the best is as Prof Rahmat said, because people in ASEAN are inherently friendly. So I think in terms of joint cooperation, even though it will take a longer time to resolve the disputes, it is the best way at the moment.

The comment is on the Quran. I am fascinated by your idea because the Malay Archipelago received Islam in the 15th century. So even in the Quran it says that we should explore the bounties of the world. Basically I have omitted that from my presentation, so if I am invited back I will put it in my presentation. But, the Quran has also played an important role in the development of civilization of the area. Thank you.

Secretary-General of AALCO: Thank you Chair. I would just like to respond to Dr. Rangreji. I wouldn't want to go into the merits of third-party adjudication. What we're trying to say here is why we don't explore the potential in international customary law. I think we are very much obsessed with the Euro-centric international law, particular the treaty law of the sea, but we are not looking at what we have in our region. I think one example that was given by a participant was why don't we look at the Quran as a source of international law. We have practice in ASEAN that could constitute international customary law by probably fulfilling the two important ingredients of CIL; state practice and opinion juris.

I think we have not really explored the full potential of this traditional wisdom and we say that this is part of CIL. As long as the evidence of state practice and the fact that there is a sense of legal obligation to follow, that could fall within CIL. I suppose UNCLOS is of course very important because it is the Constitution of the ocean, but the other aspect we are forgetting and that we have established in our region and which has been stated by our judges in the ICJ, that is actually an assurance that if you go on and explore it there could be an answer in trying to resolve a dispute. Thank you Chair.

Chairperson: Beautiful, brief and in-depth discussion. Just a few to summarise so that we move forward with a little more clarity.

There is hardly any doubt of the importance of traditional wisdom in the settlement of disputes. We grow not by destroying what we have learned but by developing more. So traditional wisdom remains the core. The experiences of traditional practices are incorporated into new formulations when a new formulation is negotiated or presented in treaty form. So what we call traditional wisdom is integrated into formulations we have today.

What comes out from the discussion here, and particularly highlighted by Dr. Rangreji and dean Rose Varghese, is that given the challenges of today, considering so many complexities, keeping in view many other considerations, it is best to learn from traditional wisdom and to modernize it. So, the idea is not to minimize the importance of traditional wisdom. The challenge is to use that traditional wisdom in such a manner that means, methodologies, mechanisms, institutions that we have today are utilized in much more effective way to settle disputes and preferably to avoid them. That is what the core discussion is.

So we have learned that in South East Asia. I admire my friend from Eritrea who is a scholar and thank you for bringing in the role of the Quran in the development of the freedom of the seas.

There is a critical difference in the way freedom of the seas was understood in Grotius' time and the way it is understood in modern times. The first of the freedom of seas in Grotius' time was on freedom of navigation. The focus of freedom of seas today as we understand it is related to resources. That is critical. So when you use the Quran as a reference for recognizing the freedom of fishing, I don't see the problem. So there is no conflict between South East Asian and Quranic understanding of the freedom of the seas. The only difference is that some freedoms were given primacy at that point of time and some other

freedoms were given primacy at some other point in time or in a different context.

And when you talk of freedom of seas today, you are not talking of freedom of fishing. That is not a core of the dispute. Nor even freedom of navigation. Now the disputes are about freedom of scientific research, for instance, and the freedom of construction of artificial islands and their status.

So, it is not that we have less freedom of the seas today. On the one hand, four freedoms have become six freedoms today. Four under traditional law, four under the Geneva conventions, and six today under the UNCLOS, and more. But the definition is limited. Each one of them is limited today. So the concept of the freedom of seas has evolved diluting the essence. I admire the role of the tribunal which highlighted the contribution of the Quran and Islamic law in the context of the freedom of the seas. I wish I knew it earlier.

I used this argument without illustrating a seminar at Cambridge. This was a core of my argument that when you talk of international law, you focus on the legal systems that adjust in parts of the world without realizing that there are so many legal systems that contribute in the form of state practice in modern terms.

I thank you all for this mini discussion, now we move over to the next round of our discussion. And we have one presentation by Mostafa, who is a research scholar at South Asian University. He has been taking an interest in the law of the sea for a long time. He comes from Bangladesh, but he really is truly cosmopolitan. He will make a presentation on Myanmar, Bangladesh maritime dispute.

Topic: "Method applied by ITLOS in Delimitation of Maritime Boundary between Bangladesh and Myanmar"

Md. Mostafa Hosain, Research Scholar, Faculty of Legal Studies, South Asian Univeristy: Thank you hon'ble Chair, learned panel and dear friends. The topic I am going to deal with very shortly is the delimitation dispute between Bangladesh and Myanmar.

The delimitation of maritime boundary between Bangladesh and Myanmar in the *Bay of Bengal* is the first dispute in which ITLOS delimited an area between. It is the first dispute where any dispute settlement body delimited beyond 200nm

continental shelf. Bangladesh and Myanmar are the juncture of South Asia and Southeast Asia. The *Bay of Bengal* is the maritime area between these two countries and is a source of the economy of both the country. The present dispute was brought by Bangladesh on 13th December 2009 before the ITLOS and both parties accepted the jurisdiction under Article 287 of UNCLOS. The yardstick provisions for delimitation under UNCLOS are Article 15, 74 and 83.

The first and foremost area of delimitation in any dispute is the territorial sea. Article 15 of UNCLOS provides the procedure to delimit such area. The Tribunal brought this Article into picture and followed prescriptions articulated in this Article. At first, the Tribunal looked at whether there is any agreement between the parties or not. Bangladesh put forward agreed minutes of 1974 and 2008 with Myanmar and claimed that the delimitation should be in accordance with these minutes. The tribunal found these minutes lack of considering as agreement. The reasons were that these minutes were not adopted by both parties in accordance with the required procedure of their respective constitution, were not registered as required for treaties to be submitted in accordance with Article 102 of the UN Charter and were not signed by the officials who can be regarded as representatives of the States for the purpose of signing international agreement as required by Article 7 of VCLT. Moreover, the Tribunal didn't find evidence of tacit or de facto agreement for delimitation. Although Bangladesh submitted that its fishermen and naval officers' practice constitute evidence of tacit or de facto agreement, the Tribunal rejected such contentions on the ground that opinion of persons interested in the outcome of the proceedings are not acceptable. The Tribunal then turned to Article 15 which requires to consider existence of historic title or other special circumstances before applying equidistance method. There was no question of historic title but with respect to special circumstance, Myanmar claimed to take into consideration the situation of St. Martin Island as special circumstance. The Tribunal rejected such argument on the ground that the consideration of taking special circumstance of island is based on the location of such island. In other words, the island must be in EEZ area. Therefore the delimitation of territorial sea was based on equidistance method.

With respect to delimit EEZ and Continental Shelf, the first challenge before the Tribunal was whether the delimitation of both the area should be by drawing a single line or different. Although the UNCLOS contains two different provisions for both area, the state practice of delimitation suggest that except Australia-Papua New Guinea Maritime Boundary of 1978 and Australia Indonesia Maritime Boundary of 1997, in most cases, delimitation was made by single line only. In delimiting this area, the Tribunal firstly looked into the purpose of delimitation that is to achieve equitable result. The Tribunal examined Equidistance/relevant

circumstance and angle bisector method. In prior one, the Tribunal referred both two-tier approach developed by ICJ in the case of Greenland and Jan Mayen and three-tier approach developed from Black Sea case. The Tribunal preferred to apply three tier approach to delimit the area of EEZ and Continental Shelf. This approach requires, as the first step to draw a provisional equidistance line and then to consider factors for the adjustment of such line and finally to verify that it didn't achieve inequitable result.

With respect to the delimitation of continental shelf beyond 200nm, the Tribunal viewed that since both the parties have recourse to the Tribunal, it is the obligation upon the tribunal to delimit such area. This is the first dispute where delimitation beyond 200nm continental shelf was conducted by a dispute settlement body. The Tribunal clarified that the function of the CLCS and Tribunal are different and hence no possibility of arising any difficulty due to the delimitation of such area. The tribunal further clarified that such delimitation will continue until it affects the rights of third States and the same method applied in EEZ and continental shelf within 200nm will continue to apply.

This judgment was a test for ITLOS to prove its competency and institutional capacity to be a complementary body of ICJ. It will certainly relieve the burden of ICJ. It further negated the apprehension of fragmentation by following three-tier approach of relevant circumstance method developed by the ICJ. Moreover, the Tribunal completed the whole proceedings by the shortest possible time which would perhaps be required more time for the ICJ as it is focused on diverse aspects of international law and same Judges have to do such. This Judgment perhaps may have a significant impact upon the India-Bangladesh maritime delimitation pending before Permanent Court of Arbitration due to the same geography and nature of the coast.

The critic put forward that the Tribunal ignored the practice of Bangladesh's fishermen and naval officers in delimiting territorial sea. In fact, Myanmar didn't make any objection on the practice of Bangladesh fishermen and naval officers. Secondly, with respect to grey area, the Tribunal haven't provide clear observation and left some issues upon the parties to decide. As a dispute settlement body, this attitude will be skeptical upon States to take ITLOS into consideration. Thirdly, over emphasis and preference of equidistance method over other method is a predetermined attitude of the Tribunal which possibly may lead to ignorance of special circumstance of a particular geography.

Thank you all for listening. We are keen to see how the Bangladesh and India delimitation case is going to be deliberated by the Permanent Court of Arbitration. Thank you.

Participant: Thank you for the presentation.

I have a question regarding the grey area issue. Although the parties did not request ITLOS to determine the maritime delimitation beyond 200nm, the tribunal did it. While describing how the grey area will be managed, the ITLOS gave the opinion that both parties will settle it. However if you focus on the political stability of these two parties of the dispute, it is not that optimistic in nature and after the pronunciation of the judgment, one party is claiming the maritime victory. But in maritime delimitation there is nothing called 'victory' and nothing called 'loss'. We have see one party saying it will extent their area and will embellish their name in the world map for settling disputes but nobody is saying whether settlement of this type of dispute will ensure the proper management of marine resources.

So my query is, whether ITLOS decision is a complete decision regarding maritime delimitation or whether it will rather create a new type of dispute in maritime delimitation. Thank you.

Md. Mostafa Hosain: Thank you sir. It is not that both countries have settled the dispute. Now due to this dispute, things will arise between the countries. The basic point is that first, taking into account the territorial sea and EEZ, etc. this is certainly a guiding factor, in the sense that the parties are clear about their own portion of the sea. But, with respect to the grey area, it is I think the political will of both of the parties whether they want to resolve in a peaceful manner through peaceful negotiation or I don't know in the future whether they will go to the ITLOS or some other tribunal because they are very interested to go to the west and settle the disputes in that manner so that the world will know that their name is on the cases in the tribunals.

Secondly, I remember when I went to Dhaka, I saw the placards and posters about how it was a great victory. People were thanking the Prime Minister for having the sea area. This I think is because of our ignorance about the settlement of disputes and things. Thank you.

Mr. H.P. Rajan: Thank you Prof. Tyagi for inviting me to take the floor. I thought I would refrain from taking it because the subject is not only very complex but it really also goes into various schools of thought.

Jurisprudentially if you see, it all depends on the school of thought you belong to and the way you like to interpret a particular provision of the Convention, or the methodology. In yesterday's presentation I took the liberty in my special address to say a few things and if you would read between the lines, there are a few things that I did embark upon.

First I said that the law of the sea, at least in the development of the law of the sea in particular, it is predominantly the States that develop the law of the sea, and at any given point of time it is the interests of those particular States that reflects the development of the law of the sea. This has been the case all through, whether it has been Hugo Grotius or whether we are talking about Continental Shelf delineations and the work of the CLCS.

Hugo Grotius also we touched upon quite a bit today and if you see my own thinking about Grotius' freedom of the sea doctrine, it actually emerged from a different perspective. Of course I won't go into the details. Basically, it was a question of trade with East India and the freedom of the seas book that he brought out was actually part of another book which was discovered 200 years later and that the *mare liberum* was actually in a manuscript which was discovered in the Martinus Nijhoff auction by one of the descendants of Grotius. It was discovered that this particular manuscript, De jure pradal, contained a chapter on the law of the sea. The freedom of the seas doctrine that he promulgated in 1609 was actually taken out of there, because he was actually asked to project the view that the freedom of the seas prevails, so that the track with India remains unaffected.

From the viewpoint of the State, its interests in development of law are predominant. Even in the Anglo-Norwegian Fisheries case, the straight baseline system was built in the way court applied it to heavily in developed courts or where there was a fringe of islands in the immediate vicinity. The first criteria was that it should be geographically, politically, and economically intrinsic feature. That was one of the criteria. The second criterion was the dependence of the local population on the sea for their daily livelihood.

Now if you jurisprudentially look at these kinds of phrases that the court has used, you know there are certain interests which have already been reflected there. A school of thought develops there. If you take social engineering for example, or if you belong to the school of thought of Roscoe Pound, you would like it, but if you try to apply the same principle and same jurisprudential analysis the positivist school of thought, you would find this to be a contradiction in

terms. So it all depends on how you would look at it from a school of thought. I'm not saying that any school of thought is correct or one prevails over the other. I mean all of them have a definite advantage – I do not want to go into the jurisprudence of all.

Let me come specifically to the ITLOS judgment. I agree that this particular judgment will be more controversial than it is thought. In the first place, there are certain basic fallacies involved here, if I may take the liberty of saying so. Let me try to say in a very simplistic manner. We are trying to delimit certain issues in anticipation of something. For example, especially in the case of the continental shelf, while states have a continental shelf, beyond 200nm and beyond the EEZ, it is not under any obligation to delineate it at all. It may say that its continental shelf extends up to 200 only. In the Convention, there was a prescription in Annex II which stipulated that states, within 10 years of the coming into force of that Convention for that State, would submit to the Commission on the Limits of the Continental Shelf (CLCS), the data and information regarding the continental shelf beyond 200 nautical miles, the data and the information would be verified by the Commission, and vet it whether the outer limits as proposed by the coastal state is in accordance with the data and information given to it.

However, this did not happen. The time limit for submission was first politically extended by the Meeting of States Parties to 13 May 2009, on the ground that the Scientific and Technical Guidelines prepared by the Commission were available only on 13 May 1999, and so the ten year limit for submission was construed from that date. The time limit for submission was again extended by the Meeting of States Parties, a second time, and this time in a much more flexible manner on the ground that some developing States did not have the technical know-how and technology to prepare the submission. States were just required to submit preliminary information of their intention to make a submission, the expected date of submission and the state of progress in the preparation of the submission.

The basis of the recommendations of the Commission also depends on its composition. The Commission is a body of 21 experts in the field of geology, geophysics or hydrography. It is not prescribed that these three fields of expertise will be represented equally in the Commission. So, depending on who the members are, the recommendations are likely to be eg: Geologists view the natural prolongation of the landmass quite differently from the geophysicists or hydrographers.

Besides, in the delineation of the outer edge of the continental margin, a cut off point of point prescribed is either 350nm from the baselines, or you can use the

2500m is both, plus 100nm. What happens in the second case? In the second case you are using the depth criteria and the jurisprudence of it comes from the Truman Proclamation and the 1958 Geneva Convention.

The way the whole thing has been developed is complex. What the Court has done here is in anticipation of the states submitting their submissions and in anticipation of whether or not the Commission has verified the technical data, they have assumed certain jurisdiction over it. Now, Continental Shelf rights are inherent rights of coastal states irrespective of whether they are delineated or not, and the continental shelf extends until the end of the continental margin, irrespective of whether it is 350 or 2500+100nm or whatever it is; the rights are inherent.

The only thing in law is that there has to be an outer limit prescribed. The outer limit is essential because beyond the outer limit begins the international area from where the International Seabed Authority would have jurisdiction over the resources. Even more than that, as I mentioned yesterday, that there are certain other benefits in the continental shelf other than resources alone.

Now if the State has not made a submission to the Commission – the Commission procedures have also been flexible enough to say the state can make partial submissions. The states can make joint submissions and so far the Commission has over 70 submissions before it and it will take decades for it to complete the consideration of these submissions. In the meantime more revised or new submissions can be expected. It was said that 32 states have continental shelf beyond 200nm. It has now come to something like 80 states.

I am sorry Prof. Tyagi, I am taking a little bit more time. The so-called 'biscuits' formula was a complex package where they included the 200 nm criteria, the depth criteria, they used also the distance criteria, everything put together and formulated Article 76, which for a legal interpretation is extremely difficult because the Commission on the Limits of the Continental Shelf does not have a lawyer in its composition. It's a specific technical body. What the geologists did, particularly, was to bring in elements of geology and geophysics in the determination of the term 'continental shelf' so that some of the western states can get the maximum.

For example, Iceland's continental shelf can extend upto the mid-Atlantic. The Australian continental shelf is something like 4.6 million square kilometers after the recommendation given by the Commission.

But, have they taken the next step on the basis of the recommendations? Did they delineate? Did they deposit the charts and coordinates? It's still pending. So therefore when does it become final and binding? Till then what happens? It is just a kind of notional area which is there, over which they already have inherent rights over. The only party which can at any point legally say that this is not your continental shelf is the International Seabed Authority. The International Seabed Authority also cannot on its own go and say that this area belongs to the "Area", unless and until some state makes anapplication to the International Seabed Authority for a contract in an area which is supposedly in the continental margin of one state which did not go to the CLCS, it becomes a very hypothetical situation.

The other important thing to bear in mind, which the court did not take into account, if they assumed that jurisdiction extends to determining the continental shelf is twofold: One, there is no appeal from the CLCS to the court; the court does not have jurisdiction over it. The CLCS only gives a recommendation and the Convention provides that if recommendations are accepted by the coastal state, it can go ahead and delineate the outer limits. If the coastal state does not accept the recommendations it has two options. It can make a revised submission or new submission altogether.

So, again it is a very expensive process. For example, when Russia made its first submission in 2001 and recommendations were given, on the LOMONOSOV ridge. If it is a ridge, geologically, then the outer limits are only 350 nm as prescribed under the Convention. If it is a submarine elevation in the continental shelf, then you can use the 2500 isobath criteria plus 100 nm, it goes up to the North Pole. I have simplified the issue that is involved. The amount of data that is given to the Commission is huge and that's why Russia preferred, although it strongly addressed letters to the Commission saying that it would not accept the recommendations, they preferred to go for revised submissions.

The volume of submission is something to be seen. The volume of submission was something like 1 ton from Argentina or India or Australia. And what do you do with those documents? Maps, charts, seismic data and all kinds of data are available. Some States consider those kinds of data as confidential and proprietary, as it belongs to the oil industry.

In a situation that takes years and years for the consideration to take place, where the members have changed, the people who prepared the data are gone, how will the discussions proceed? Because when it comes to a discussion of the submission with a delegation, the original delegation may not exist. Nor may the

same commission exist. A totally new interpretation may emerge. This again is a complex thing.

The other thing, under international law and the law of the sea the baselines follow the general configuration of the coast. You are using the baselines and certain other methods, and when you determine 350 nm or 200 nm EEZ, you are still using the same straight baselines etc.which initially was only for the purposes of territorial sea. So, what is inside the baseline are internal waters and they are large expanses of water. But more than that, the continental margin of the coastal state does not follow the general configuration of the coast at all. The natural prolongation under the sea of a coastal state is totally different from the configuration when you try to determine baselines. So, it is quite natural that the continental shelf of one state extends into another state and into the EEZ, but the latter may not have a continental shelf at all.

So this fallacy exists, but in law it is fine. Because the continental margin can extend into the EEZ of another, that is where the bilateral part of it comes. And, that is where the recommendations of the Commission are without prejudice to the delineation issue. I am particularly not able to understand why where there are certain disputes, and submissions have not been taken up for consideration on the ground that there are disputes. The disputes have nothing to do with the examination of technical and scientific data. On consideration of a submission, the scientific and technical people only come to the conclusion that the data that is submitted is correct, or they come to the conclusion that the data is not sufficient or it is an extrapolation and not the real scientific data.

So, my feeling is that if you go into the technical details of it and you start examining all the things in a much wider perspective, this is far more complex than simply saying following the recommendations from the CLCS, States can go for adjudication to the court. The Courts assumption of such jurisdiction certainly calls for a review.

Thank you very much for giving me the floor.

Chairperson: I would like to take this opportunity to offer a few observations. In fact, these observations are the result of the inspiration provided by these presentations here starting from Dr. Rusli, and culminating in the presentation of my esteemed friend Dr. Rajan.

In these two presentations, one initiating and one concluding, is a combination of traditional wisdom and modern challenges. Somehow things happen in such a

manner that you don't design them. Nature takes care of things and they become really extraordinary. It's a rare combination of what we had in mind; an understanding of the role of traditional wisdom in the settlement of disputes and also appreciating the role of modern law and the complexity of problems that we are faced with.

I propose to offer my comments by focusing on 4 aspects: one, to underline the importance of the peaceful settlement of disputes and put it in perspective of international law; second, just briefly to touch upon the evolution of the settlement of disputes in the context of law of the sea; third, to deal with the aspects of why we have too many disputes relating to the law of the sea and why it is important; and finally, a way forward, an adventurous form of academics engaging in a collation and building of ideas which could be of use.

When we talk of settlement of disputes we should recognize two critical aspects. One, when you read any treaty, convention or an agreement. Dispute settlement falls at the end of that treaty. When you get to the end, that's when you find dispute settlement provisions. It is for you to appreciate whether the things that appear at the beginning are more important, or whether the things that appear at the end are more important, but the fact is that it always falls at the end. The same thing happened with the UNCLOS also but, UNCLOS is more interesting. It does not fall at the end but in between. If you look at the structure of UNCLOS you will find provisions relating to dispute settlement in between but not only at the end. It has a message and the message is that dispute settlement, in the scheme of law of the sea, is probably more important than it is understood in the traditional sense. So this is a very important empirical understanding of UNCLOS as a text to understand the importance of dispute settlement as a phenomenon.

Now if you look at the basic structure of international law then things are different. If you start reading the Charter of the UN for instance, dispute settlement does not fall at the end. It starts right form the beginning of the UN Charter. Article 1 says to save succeeding generations from the scourge of war, and then the resolution through peaceful settlement of disputes in Article 2. In fact, peaceful settlement of disputes is a fundamental principle of international law, or a peremptory norm. No one can enter into an agreement to resolve disputes by non-peaceful means and claim validity of that treaty. A treaty in conflict with the peaceful settlement of disputes is legally unsustainable. So, peaceful settlement of disputes is a fundamental principle of international law, is a fundamental principle of international relations, it's a fundamental principle of common sense. If you don't resolve disputes by peaceful means that when will you do? You will waste your energy in hostilities and your time. You have less

time for development, less time for welfare and growth of the people and nation. So it is a principle of law and a good policy.

How do you differentiate a civilized society from an uncivilized society? Would you consider a society uncivilized if it doesn't settle its disputes by peaceful means? If its people are fighting each other to resolve disputes and things are being taken care of. That was a primitive time, and in primitive times people were not considered civilized. What was the critical departure of uncivilized society to civilized society? The critical departure was the recognition of the principle of peaceful settlement of disputes. A society minus peaceful settlement of disputes is an uncivilized society. That is the importance of peaceful settlement of disputes.

Now if this principle is so profound and fundamental in the scheme of governance and in the scheme of evolution of human civilization then it should be given commensurate importance in the scheme of the organization of international relations, rule of law, treaties, conventions, and whatnot. When you look at the structure of international law, you find that until the UN Charter was drafted the principle of peaceful settlement of disputes was not recognized as a fundamental principle of international law.

Even after the recognition of peaceful settlement of disputes as a principle, it did not reflect in the scheme of international law as it was developed through institutional arrangements. That's why you have optional jurisdictional clause in the statute and most treaties that you look at don't talk about compulsory settlement of dispute. Here is revolution in the form of the law of the sea convention. For the first time in the history of human kind, and I am not talking about regional arrangements, and I am not questioning the practice of settlement of disputes by peaceful means in traditional societies. I am talking about the way international law is understood in the modern sense. For the first time it was the UNCLOS which incorporated the concept of compulsory settlement of disputes. That's why it is revolutionary. No human rights treaty, no environment treaty, no trade treaty had this principle earlier in place.

Now imagine what you had in place in 1982 and you will appreciate what you have in the UNCLOS. Only the GATT in 1958 before UNCLOS had the optional protocol for the peaceful settlement of disputes which people have hardly heard of. How many of you have heard of the protocol adopted in 1958? So, it was for the first time in 1982 that the UNCLOS came with the idea of compulsory jurisdiction for the settlement of disputes by peaceful means.

Importance of the principle is recognized. This principle is elaborated and even fleshed out in real terms in the UNCLOS. Then comes the question that when you have UNCLOS in place and the ICJ in place for a long time which has dealt with about 27 cases – 20% of cases decided by the ICJ concern the law of the sea – and when you have a large number of arbitral tribunals and so many arrangements in place, how come the pattern of disputes is not getting. In fact, more disputes are going to come.

Now why are there so many disputes in Asia and Africa in spite of traditional wisdom? H.E. Rahmat Mohamad and Dr. Rusli have both emphasized the importance of traditional wisdom and I can assure you that each one of us claims that we have some form of traditional wisdom. When we have traditional wisdom then why do we have disputes? Why do we have a lesser degree of enthusiasm and intensity to resolve disputes? That's a critical question because availability of means per se is not going to solve the problem. Unless you understand the psyche of living disputes and unless you realize why people are ready to create disputes, you will not be ready to cope with the problem. It's like the way you deal with a crime. Crime cannot be dealt with by creating more law enforcement agencies. Crime needs to be dealt with by killing the criminal instinct. The same logic applies to disputes. If you cannot address the psyche of the people that tend to create disputes any mechanism to settle disputes will be overburdened and will not be able to cope with the amount of disputes that might arise.

I would like to draw a few tentative points here for your consideration.Why too many disputes, particularly in this part of the world. It is not that you don't have disputes in Latin America. It is not that you do not have disputes in Africa. But, the kinds of disputes you have in Asia are different. Please understand the gravity of the dispute you have in the South China Sea and East China Sea. These disputes are too serious. These disputes have repercussions and effects on balance of power,and the possibility of external intervention. These are not disputes where you are talking of maritime boundaries and 200 or 300 kilometers. Here is a dispute that presents a challenge that if the disputes are not addressed with traditional wisdom and also with more means than there is a danger of turning into maybe a whole bed of confrontation as a number of people are involved.

And who are involved? The country who is going to be *the* superpower in the next twenty years, and a number of people who are very emotionally surcharged. They carry a lot of pride in their culture. If there is a dispute between two states with some degree of equilibrium there is a lesser chance of hostilities because they know that there is no point in waging war because you are not going to win the

war. But when you have a dispute between a country which is considered superior in all possible terms, and the presence of that country is considered by some as a factor that it conveys a message. And that message is that disputes should be resolved not merely according to the whims of one party but also in terms of what you said about the importance of traditional wisdom and not merely in terms of the rule of law.

Please understand what is the rule of law under the UNCLOS for the delimitation of maritime boundaries, because it is very critical. Under the UNCLOS, an agreement is the rule of law. Two countries can delimit their boundaries with an agreement. And what is an agreement? When two parties negotiate with each other and when two parties have equilibrium and a reasonable degree of balance the agreement is likely to be fair and equitable. But when a bilateral agreement is negotiated between two entities with dis-equilibrium, then there is a danger of concluding an agreement, or expecting an agreement, which may not agree with the result of the rule of law we understand, but with the rule of law as it is understood in the game of power.

And this is a very important part of UNCLOS that every country is entitled to conclude a delimitation agreement. But it does not say according to what principle, just the freedom to conclude any agreement of your choice. There is no restriction in Article 74 and 83. If there is an unfair agreement you cannot challenge that agreement on the ground that it does not achieve equitable results.

So, the rule of law, as it is understood in the context of delimitation of boundaries is different from the way rule of law is understood in common parlance. Here is the importance of what you call 'traditional wisdom'. And what is traditional wisdom? Even if you are able to extract a favourable agreement, and it is possible for a country or entity or person with superior strength with better bargaining power and more skills and resources and more say in world order, the history of treaty is that when you extract an agreement which is outright more favourable to one party then that agreement has lesser chance of surviving. That's the history of treaties. I have done studies on termination of treaties and one conclusion that's drawn from the history of treaties is that if you want to see that a treaty is respected then make sure that you don't accept a favour which is not fair. Expect a favour which is fair. If a treaty does not incorporate fair favours then that treaty is unlikely to survive.

Now when I look at it in abstract terms, then I find that the rule of law that is understood in the UNCLOS in the context of delimitation of maritime boundaries is different from the term 'rule of law' understood in common parlance. I do not

have a formal categorical answer for it but I will fall back to traditional wisdom. There is consultation, consensus and you could add one thing more, which is a part of traditional wisdom; large-heartedness. There is no such thing as 'large-heartedness' written in international law. It is not a fundamental principle of international law. It is a principle of equity and common sense. But it is very critical for the survival of healthy relations and I would like to relate it to the dispute I just now mentioned and disputes that might arise in the future too.

The core of the settlement of disputes, whether it is in the South China Sea or East China Sea or the *Bay of Bengal* or others, is not through only traditional wisdom nor through only the means and mechanisms envisaged under treaties and conventions, because I have examples of failures of both. If traditional wisdom was the solution then these disputes would not have arisen. If these means of settlement was the solution then the *Temple of Preah Vihar* case would not have survived for so long. It was settled long back.When I was a student long back, then a teenager,I heard of the *Temple of Preah Vihar* case being settled by the ICJ, and when I am engaged with my students I am still hearing that the case is still going on. Where is the rule of law? Where are the four means of settlement of disputes?

The conclusion is that mere traditional wisdom cannot take care of what Dr. Rajan told us. Hydrographers were not involved at the time that traditional wisdom was developed. Geomorphologists and geophysicists and the 'biscuit formula' were not in existence at that time. To deal with the 'biscuit formula' you need a different wisdom. That wisdom should be understood in specific terms rather than abstract terms. And that wisdom is development in expertise in all those fields which are related to these disputes that are cropping up. What we do have is a lack of expertise. Please count the number of people with expertise in areas which, for instance, Dr. Rajan brought to our notice. Is there any person? I would not like to challenge anyone's expertise but I would say with some degree of certainty that most people have heard of biscuit but not of the 'biscuit formula'.

Now if you look at the implications, I never thought of the kinds of claims which would emerge which you (Dr. Rajan) are talking about. I had a full section on potential disputes but not of this kind, and even you did not know about this because when we used to discuss this we never discussed that such disputes will arise.

Now what is happening is something very interesting as shared by Dr. Rajan. You have claims, but you are not making those claims. You are postponing those claims. You are doing it because if you make those claims – and you can do it

through domestic law, all you have to do is issue a decree to claim a particular area as an area of jurisdiction. Of course, it will become a dispute when somebody challenges before the Commission or any other body. But, why they are not making claims is important, and here is again traditional wisdom.If certain countries are not making exaggerated claims the result is traditional wisdoms because countries know that by making exaggerated claims, they will create problems for themselves in different areas and different fronts. The better thing is to keep quiet and use it as some bargaining chip in due course in the future. The result is that as of now, a large number of potential disputes are contained and we do not know at what point in time they will emerge.

Now I would like to conclude by saying that, if history has conferred any lesson to us at least one lesson is that you cannot, with just traditional claims that "we were great in the 16thand 17thcentury".Nor can you feel comfortable that we have drafted conventions and formulated rules and established institutions and disputes can be taken care of by those institutions. What is needed is that, along with these institutional approaches for addressing disputes both real and potential, what is needed is constant engagement of academics and intellectuals to discuss various aspects of the law of the sea which will help us to understand the intricacies of the issues involved. If you don't understand the intricacies of the issues then how will you settle the disputes? What we have as of now is a false sense of security that if you refer a dispute to a tribunal the dispute will be resolved.And you feel that if a dispute cannot be resolved bilaterally then it can be resolved by a multilateral institution,and if you feel that if you can resolve this dispute now it will not emerge in a different form at a different point of time.

What is critical in this part of the world in particular is if the rest of the world must learn from Asia, Asia must learn from the rest of the world. The way disputes are addressed in Europe for instance – and there are plenty of disputes. We should salute their wisdom and that is modern wisdom and we should make use of that wisdom. So if South Asia offers traditional wisdom, Europe offers modern wisdom. We should understand how they have dealt with their disputes. There is a dispute between Germany and the Netherlands. There is a dispute between Iceland and the UK. There is a dispute between Norway and the UK. How did they resolve? Did they take as much time as we take in this part of the world? Or did they take quick steps and put in place some mechanism and what mechanism? If it is the East China Sea or the South China Sea and if traditional wisdom of that part of the world needs to be changed, then consultation and consensus. If that wisdom is so useful there how can it not be useful in South Asia? And if it useful in South Asia, what happened to consultation and consensus in this part of the world? You want the case to be decided by somebody

in Europe and you don't have wisdom to settle that dispute on this side of the world?

Here I would like to conclude with one slightly provocative proposition. And that proposition is: If I look at various maritime disputes in Asia I find a very challenging task and a possible solution written in that task too. We have one big power in that part of that world in the South China Sea, and another big power in this part of the world. Both countries are very rich in terms of civilization. Their contribution to the development of civilization is enormous – both China and India. Now I place one question; whether India, China, Japan and others would like to make more spectacular contributions to the development of human civilization by showing more large heartedness in the settlement of disputes.

Thank you very much.

Secretary-General of AALCO: Thank you Prof. Tyagi, Mr. Rajan, Dr. Rusli and the rest of the panel speakers and presenters.

I must say that in these two days of the workshop, in following the mandate that we have been given by the Member States in having another round of the law of the sea experts workshop, we managed to organize this. I am very encouraged that many of our Member States have given a very positive response in first providing the experts from their countries to make their presentations here, and second the participation from the diplomatic community here in Delhi, and also the academics. I think this shows that law of the sea is alive and it requires more attention. As has been deliberated over the last two days, there have been a lot of complex issues that need to be resolved perhaps, not by us but to highlight the complexities and challenges ahead of us by all sectors, be it Government bureaucrats, be it academics and even students for that matter.

Now as you can see for the past two days I deliberately invited young scholars apart from the bureaucrats and legal experts to make their presentations. Now I have this in mind that the future of the law of the sea is in the hands of these young scholars and bureaucrats. We have to lead and show them, as Prof. Tyagi and Mr. Rajan have shown us, the complexities of international law. I think this shows that it is a continuing and important and we must therefore consistently organize and deliberate on all these issues in the years to come. I think I will have to say that definitely this workshop is not going to stop here this year. We are going to have regular features on the law of the sea. Even if it's not in New Delhi perhaps some Member State will play host in organizing this Legal Experts Meeting.

Once again I must thank all of you – the paper presenters, eminent speakers and also participants – for making this workshop a success, and we hope to see you again next year. Those who are traveling back to their capital, I wish you a safe journey and I hope we will be in touch, and we hope that we have made some contribution to the Member States of AALCO.

Thank you very much.

VII. LIST OF PARTICIPANTS

AALCO LEGAL EXPERTS MEETING
ON THE
LAW OF THE SEA

24-25 February 2014
AALCO Headquarters, New Delhi

Speakers:

Dr. Neeru Chadha,
President of the Fifty-Second Annual Session of AALCO
Joint Secretary,
Legal and Treaties Division,
Ministry of External Affairs,
Government of India

Mr. H. P. Rajan,
Former Deputy Director,
Division for Ocean Affairs and the Law of the Sea, United Nations, and
Former Member of the Legal and Technical Commission,
International Seabed Authority

Amb. Gudmundur Eiriksson,
Ambassador of Iceland to India and
Former Judge of the International Tribunal for the Law of the Sea (ITLOS)

Prof. Y. K. Tyagi,
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