WELCOME ADDRESS BY H.E. PROF. DR. RAHMAT MOHAMAD, SECRETARY-GENERAL, AALCO ON THE TOPIC "ALTERNATIVE DISPUTE RESOLUTION: ASIAN-AFRICAN PERSPECTIVES"

(at the ALSA National Conference, 2011, UiTM, Malaysia, on Sunday, 22 May 2011)

Good Morning Everybody,

Eminent Faculty Members,

Dear Students,

Distinguished Participants,

Ladies and Gentlemen,

At the outset, I would like to profoundly thank the Universiti Teknologi MARA for inviting me to deliver the welcome address before the learned fraternities and beloved students on one of the most contemporary topic of relevance to the Asian and African countries.

I would also like to congratulate the Malaysian Chapter of the Asian Law Students' Association (ALSA) for organizing this Conference in such a grand manner.

Before I dwell upon today's topic, let me just take this opportunity to share briefly about the Asian-African Legal Consultative Organization (AALCO) and its work programme, that aspires to realize the vision of our leaders for the Afro-

Asian solidarity, particularly in the sphere of the progressive development and codification of international law and its dissemination. AALCO's vision and mission has been to ensure that Afro-Asian values are integrated into the rapidly transforming international law, and the Eurocentric nature of international law is changed in to universal international law.

AALCO is a unique organization that serves the interest of the developing countries uniting two of the largest and most populous continents of the world in the legal field. The Organization since its inception in 1956 has been considering various areas of international law that are of common concern for the countries from the Asian-African region.

Let me now proceed to the topic and highlight some of the pertinent issues relating to ADR in the course of my presentation. Firstly, I would examine the evolution of ADR in Asian-African countries and how it has been portrayed considering their varied legal tradition and culture. Secondly, my address would review some of the major arbitration institutions in which Asian-African countries is part of and the significant mile stones; and finally, the challenges of ADR, especially to the international commercial arbitration in Asian-African countries.

Alternative Dispute Resolution (ADR) was conceived of as a dispute resolution mechanism outside the courts of law established by the Sovereign or the State. In this sense, it included arbitration, as also conciliation, mediation and all other forms of dispute resolution outside the courts of law, which would all fall within the ambit of ADR. However, with passage of time, the phrase "Arbitration and ADR" came in vogue, which implied that arbitration was distinct from other ADR forms. In arbitration, there is a final and binding award, whether the parties consent to it or not, but in other forms of ADR there would be no finality except with the consent of the parties.

Traditionally the indigenous justice system of Asian-African countries portrays restoration of peace and social harmony. Hence, all modes of dispute resolution – mediation, conciliation, arbitration and state court proceedings – are interrelated. It is the mission of mediators, arbitrators and judges to create the conditions of a fair settlement in lieu of a strict application of the law. Therefore, in the indigenous justice system, arbitration and mediation are not alternative dispute resolution (ADR) methods but were considered as an integral part of institutional justice.

In the past, ADR may not have been legally laid down in our societies, but solving problems by amicable means was generally the preferred option. Can such a system be applied in the modern Asian-African societies? Colonialism has certainly altered the picture in these regions, with variegated consequences. Moreover, matters have considerably changed in a globalized world in conjunction with the rise of new nation states, major industrialization and geographically dispersing families.

During the nineteenth and early twentieth centuries, the European colonizing powers' objective was to ensure that trade was regulated under laws acceptable to themselves and that, in terms of administration, their rules were applied. Customary law was largely ignored and marginalized. More specifically, they had no time or vested interest in making changes to the laws affecting local administration, personal status or minor criminal offences.

In the English colonies, customs recognized as law were usually admitted only at the local level and did not apply to all groups indiscriminately throughout the country. In short, customary law differed from one region to another. This remains the case today in the countries concerned.

The methods of traditional dispute resolution entrenched in the social fabric of the Asian-African heritage enabled the Colonial Courts, established by the colonial administrators, to recognize, validate and enforce settlement agreements through the courts. Settlement was effectuated thanks to the intervention of tribal chiefs, elders and heads of families and clans in each community.

With the rise of the modern nation-State, relying on formal law and a fully organized bureaucratic and rational judicial process, such non-litigious means of settling disputes were sidelined.

In the present times, the Asian-African States whether private or public have increasingly involved in commercial and investment arbitration disputes. The legal documents have become a necessity for transactions in business and otherwise. Today, disputes need to be resolved at another level within a deeply transformed society. By necessity, the State has undertaken to fill the gap by delivering a more official form of justice represented by courts and legal textbooks. Where does this leave us? Are there proper institutions encouraging and organizing ADR in Asian-African States? And what about the role of ADR in the future international business relations of the Asian-African States?. These are some of the issues which need to be adequately addressed.

In its course, Asian-African States have made initiatives to develop the practice of international arbitration and subject themselves to reputable international bodies. Some of them are active in these regions, which I would briefly touch upon now.

United Nations Commission on International Trade Law (UNCITRAL)

The **1985 UNCITRAL Model Law on International Commercial Arbitration** (revised in 2006) was designed primarily to encourage and assist States harmonise their arbitration procedure. It was formulated under the aegis of the United Nations and therefore contains input from a wide variety of countries. It is generally seen as an international standard for arbitral procedure and has formed the basis of many national arbitration laws. It covers the entire arbitral process and, crucially, seeks to limit court interference with it. It has been noted that the future of commercial arbitration in Asia and Africa greatly depends on the adoption of the Model Laws. Nearly 22 Member States of AALCO have enacted legislation based on the Model Law. Some countries like Malaysia (Arbitration Act 1952, as amended in 1980) and Indonesia (1999) promulgated their own laws without adopting the Model Law. These States have achieved varying degrees of success in attempting to modernise their arbitration practice and limit Court's intervention.

OHADA

The other Organization which is important to mention is the OHADA which literally means *Organisation pour l'Harmonisation du Droit des Affaires en Afrique* or the Organization for the Harmonization of Business Law in Africa. It is a supranational organization established by treaty signed on 17 October 1993 in Port Louis, Mauritius. It is composed of 16 sub-Saharan African member states. Its members are mostly Francophone countries with the exception of Guinea-Bissau and Equatorial Guinea. Membership is however, open to any member of the African Union. Its purpose is to promote regional integration and economic growth and to ensure a secure legal environment through the harmonization of business law among its member states. The basic instruments for harmonization of

national law by OHADA are the "Uniform Acts" adopted by the Council of Ministers that lay down common rules governing business. Once a Uniform Act comes into force, it overrides all incompatible national law in the member states. The OHADA Uniform Act on Arbitration entered into force in 1999. It authorizes the practice of ADR, lays out rules of procedure, provides for the enforcement of arbitral awards in Member States, and creates a key regional ADR centre: the Common Court for Justice and Arbitration (CCJA), in Abidjan, Cote d'Ivoire.

International Centre for Settlement of Investment Disputes (ICSID)

Where a foreign party has an investment claim against a government, like any other dispute, they may decide to resolve differences through arbitration. A notable mechanism for doing this is the International Centre for Settlement of Investment Disputes (ICSID). The Centre was established under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "Washington Convention"). It was created as a mechanism to resolve investment disputes within the structure of the World Bank although ICSID is an autonomous international institution. ICSID settles investment disputes between States and national's of other States that are parties to the Convention. To give rise to ICSID jurisdiction the dispute must arise directly out of an investment. An advantage of ICSID arbitration is that a disputing investor does not have to enter into an agreement with the government to submit their dispute to ICSID. The Centre's jurisdiction is often triggered by Bilateral Investment Treaties (BITs) entered into between the host state and the government of the foreign investor's State. The BITs set the terms and conditions for private investment by investor's of one State in the host State of the other. They usually have dispute settlement provisions which provides for ICSID jurisdiction. Today, BITs are commonly used to settle disputes with governments, however, it is noted that African States do not have many BITs in force when compared to Asian

region. According to a report by the UNCTAD (2008), Asia-Pacific countries have entered about 41 per cent of total BITs agreements whereas African region have entered 27 per cent of BITs agreements.

AALCO Regional Arbitration Centres

AALCO's pioneering work related to alternative settlement of disputes started way back in 1970s. The unsatisfactory situation faced by the developing countries during that time prompted AALCO to realize the need to develop and improve the procedure for international commercial arbitration, the necessity of institutional support, develop necessary expertise and create environment conducive to conduct arbitration in the Asian and African regions.

Pursuant to that call, in 1978, AALCO established its first Regional Centre for Commercial Arbitration in Kuala Lumpur, Malaysia and subsequently Cairo, Nigeria, Tehran Arbitration Centre's were established. The fifth such Centre is in the process of establishment in Nairobi, Kenya. AALCO has also established its relationship with other international trade organizations such as UNCITRAL, UNCTAD and so on.

AALCO Regional Centres are to promote the wider use of the UNCITRAL arbitration rules and are to take such steps as to promote the wider application of the Rules. The Regional Centres thus aims to provide arbitration facilities of a widely acceptable international standard. The Centres deal with disputes of an international character, although domestic referrals may be made to the Centre such arbitration will be governed by the domestic arbitration law.

The use of the Centres and its facilities appear to enjoy growing popularity among the Member States as the disputes referred to the Arbitration centres are increasing sharply.

Awards made under the aegis of the AALCO Regional Arbitration Centres are benefited from the enforcement mechanism provided for under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). The host States of the Regional Centres are parties to the New York Convention and by its provisions awards are enforced against a disputing party in any other signatory State where its assets may be found.

Building a Better Infrastructure for ADR Services in Asian-African Countries

As in many other areas of the world, the trend shows that judicial systems in Asia and Africa are unable to handle the infinite number of cases brought before them, particularly pertaining to commercial disputes. In fact, sizeable caseloads leave many courts in these regions over-extended and under-budgeted.

Some investors are merely inconvenienced by the existence of slow, overburdened judicial systems in Asia and Africa. These financiers invest in the region, and when a dispute arises, they resort to alternative dispute resolution forums outside the region. Other investors are deterred outright from investing in the region because to the perceived lack of timely and affordable dispute resolution options located in the region. ADR is useful in resolving commercial disputes by providing quicker binding decisions through mediation or conciliation mechanisms. The availability of cost effective ADR mechanisms capable of resolving complex commercial disputes helps to strengthen the confidence of

commercial operators interested in the Asian-African region and therefore stimulates trade and investment both internationally and locally.

A common legal framework in these areas should be helpful to increase the use of ADR in the region. The creation of the Association of Asian and African Centres of Arbitration and Mediation could be a credible vehicle to support this purpose and attain the goal of establishing a real ADR network in these regions.

There is no doubt that ADR methods have already gained a steadfast foothold in many Asian-African jurisdictions and that the business community in these regions widely consider arbitration as an excellent method of resolving its commercial disputes. It is expected that this trend will continue in the decades ahead.

A comparative review of recent trends in arbitration legislation reform throughout Asia and Africa epitomize the positive effects and work of the UNCITRAL and other Organizations in promoting the harmonization of international arbitration law and the practice within Asia and Africa. However, as we can observe from the implementation of the New York Convention in Asia-Africa embracing international arbitration rules and principles and attempting to uniformly enforce them in very diverse socio-political and cultural surroundings present significant challenges. Clearly, much more work needs to be done.

Indeed, the Asian-African countries are now better equipped than before. However, there are many challenges and opportunities which Asian and African countries should address and explore. There is a need for the present arbitral setup to recognize and accommodate different cultural and legal traditions. The traditional advantages of arbitration such as cost effectiveness and simplicity of procedure seem to have become redundant. These problems and lack of

harmonization in arbitral law and practice have resulted in constant tension with national courts in the recognition and enforcement of foreign arbitral awards. At the same time, there is pressure on the developing countries to make their arbitral and other laws appropriate to attract investments.

The information and communication technology (ICT) has given a new meaning to international commercial transactions and business. E-commerce has now become an indispensable part of our daily commercial activities. The scope of ADR is widening day by day. Surmounting these challenges shall require continuous efforts and the exchange of experiences and views amongst industry players, arbitration practitioners, legal scholars and government officials.

With these observations, I once again thank the organizers for inviting me to deliver this address and I am certainly confident that the Conference will be a great success.

I thank you all.